Michaelmas Term
[2022] UKSC 29
On appeal from: [2020] EWCA Civ 926

JUDGMENT

The Soldiers, Sailors, Airmen and Families Association – Forces Help and another (Respondents) *v* Allgemeines Krankenhaus Viersen GmbH (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Kitchin
Lord Hughes

JUDGMENT GIVEN ON
2 November 2022

Heard on 29 and 30 March 2022

Appellant
Charles Dougherty KC
Benjamin Phelps
(Instructed by DAC Beachcroft LLP (Bristol))

Respondents
(The Soldiers, Sailors, Airmen and Families Association – Forces Help and Ministry of Defence)
Charles Hollander KC
(Instructed by The Government Legal Department)

LORD LLOYD-JONES (with whom Lord Reed, Lord Hodge, Lord Kitchin and Lord Hughes agree):

Introduction

1. This appeal raises an important question as to the effect of the Civil Liability (Contribution) Act 1978 ("the 1978 Act"), namely whether it has mandatory or overriding effect ("overriding effect") so that it applies to all contribution claims brought in England and Wales, or whether it applies only when domestic choice of law rules indicate that the contribution claim in question is governed by the law of England and Wales (hereinafter "English law").

2. On 14 June 2000 the claimant, Mr Harry Roberts, was born at a hospital in Viersen, North-Rhine Westphalia, Germany ("the hospital") operated by the third party, Allgemeines Krankenhaus Viersen GmbH. The claimant alleges that in the course of his birth he suffered an acute hypoxic brain injury as a result of negligence on the part of the attending midwife.

3. The claimant's father was stationed with UK armed forces in Germany. The hospital provided medical services to UK armed forces and their families. The attending midwife was employed by the first defendant, the Soldiers, Sailors and Airmen and Families Association – Forces Help ("SSAFA"). The claimant alleges that SSAFA and/or the second defendant, the Ministry of Defence (which has agreed to indemnify SSAFA for the purposes of the claim), are liable for the acts or omissions of the midwife. The defendants deny that they are liable to the claimant.

4. The defendants in turn brought a claim for contribution against the third party. The basis of the claim is that pursuant to the 1978 Act the third party is liable in respect of the same damage as the defendants. Whilst the first defendant admits that it employed the midwife, it denies it is liable for any failings on her part, alleging that she was working under the control and instruction of the third party. Furthermore, the defendants allege negligence on the part of the obstetricians employed by or working at the hospital for which the third party is said to be liable.

5. It is common ground on this appeal that the claimant's claim against the defendants is governed by German law and that any liability of the third party to the claimant is also governed by German law. The parties agree that, applying domestic choice of law rules, German law would apply to the contribution claim unless the 1978 Act has overriding effect. The parties further agree that, if the contribution claim is governed by German law, this would extend to the question of limitation by

virtue of section 1(1) of the Foreign Limitation Periods Act 1984 and that under German law the limitation period has expired. However, the defendants maintain that the 1978 Act has overriding effect with the result that limitation is governed by section 10 of the Limitation Act 1980 and the contribution claim is not time-barred.

6. Soole J and the Court of Appeal held that the 1978 Act does have overriding effect and applies irrespective of domestic choice of law rules.

Procedural background

7. The claimant's claim form against the defendants was issued on 31 December 2004. The defendants filed a defence to that claim and issued third party proceedings on 17 February 2016.

8. The third party challenged the jurisdiction. Dingemans J dismissed the third party's jurisdiction challenge by a judgment dated 3 November 2016 ([2016] EWHC 2744 (QB), [2017] PNLR 10).

9. The third party thereafter filed a defence dated 12 September 2017 denying negligence but also averring that the defendants' contribution claim was time barred under German law.

10. On 15 May 2018 Master Yoxall directed that the following preliminary issue be heard in the third party proceedings (as varied by a consent order dated 10 October 2018):

> "[T]he relevant question for the purposes of the trial of the preliminary issue is whether or not the 1978 Act has mandatory or overriding effect and applies automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules. If not, German law will apply to the Defendants' claims for contribution against the Part 20 Defendant and they will be time-barred".

11. Soole J heard the trial of the preliminary issue in March 2019. In a judgment dated 3 May 2019 ([2019] EWHC 1104 (QB), [2020] QB 310) he held that the 1978 Act does have overriding effect and applies to all claims for contribution in courts in

England and Wales regardless of the law applicable to the contribution claim under any anterior choice of law analysis.

12. The third party appealed, with the permission of the judge. The Court of Appeal heard the appeal in April 2020 and dismissed the third party's appeal by a judgment dated 17 July 2020 ([2020] EWCA Civ 926, [2021] QB 859).

13. In the main proceedings between the claimant and defendants, on 31 July 2018 Master Yoxall directed that a preliminary issue be heard as to the law applicable to the claimant's claim against the defendants, and whether that claim was time-barred. Foster J heard the preliminary issue in November 2019 and by a judgment dated 24 April 2020 ([2020] EWHC 994 (QB)) held that German law applied to the claimant's claim against the defendants, and that the claim was not time barred under German law.

14. On 15 December 2020 the claimant applied in the main proceedings to join the third party as a defendant. That application was dismissed by Master Yoxall by a judgment dated 8 October 2021.

15. The contribution proceedings against the third party are stayed by an order of Master Yoxall dated 8 October 2021. The main proceedings are to proceed to a trial on liability as a preliminary issue.

Legislation

16. The 1978 Act provides in relevant part:

> 1 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).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question

since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.

(6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.

2 Assessment of contribution.

(1) Subject to subsection (3) below, 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) Subject to subsection (3) below, 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.

(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to—

(a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;

(b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section *5* of the Fatal Accidents Act 1976; or

(c) any corresponding limit or reduction under the law of a country outside England and Wales;

the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced.

…

6 Interpretation

(1) 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). …

7 Savings

…

(3) The right to recover contribution in accordance with section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances; but nothing in this Act shall affect—

(a) any express or implied contractual or other right to indemnity; or

(b) any express contractual provision regulating or excluding contribution;

which would be enforceable apart from this Act (or render enforceable any agreement for indemnity or contribution which would not be enforceable apart from this Act).

17. The Foreign Limitation Periods Act 1984 provides in relevant part:

1 Application of foreign limitation law.

(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules

of private international law applicable by any such court) to be taken into account in the determination of any matter—

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings…; and

(b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

…

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.

18. The Limitation Act 1980 provides in relevant part:

10 Special time limit for claiming contribution

(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued. …

The judgment of Soole J at first instance

19. Soole J approached the issue on the basis of what he described as "the authoritative exposition of the relevant law" in *Cox v Ergo Versicherung AG* [2014] UKSC 22; [2014] AC 1379 (para 86). He rejected the submission that the 1978 Act expressly provided that it had overriding effect. However, a statutory intention of overriding effect could be implied and the presumption to the contrary rebutted. In his view, the express reference to private international law in sections 1(6) and 2(3)(c) supported this implication (paras 91-92). Parliament having chosen to identify specific circumstances in which choice of law rules are to apply and the extent of that application in a claim under the statute, the natural implication was that the availability of this statutory cause of action was not itself to be subject to choice of law rules (para 93). Furthermore, on its proper construction section 7(3) was consistent with this conclusion. In the context of the express references in section 1(6) and section 2(3)(c) to private international law, the natural meaning of the words "supersedes any right" was that "any right" included any right of contribution which would otherwise arise under foreign law (para 96). He considered that the implication of overriding effect could be justified on each of the two bases identified by Lord Sumption in *Cox* (at para 29): the purpose of the 1978 Act cannot effectually be achieved unless it has extraterritorial effect and the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to anyone resorting to an English court regardless of the law that would otherwise apply. In each case this was most obvious where the foreign law provided no right of contribution, but it applied equally where a foreign limitation provision would otherwise have defeated the claim (at para 102). He agreed with the observation of Chadwick J in *Arab Monetary Fund v Hashim (No 9)*, The Times, 11 October 1994, that it would be a serious defect in the law if contribution could not be obtained between tortfeasors who have been or could be found liable in the courts of England and Wales.

The judgments in the Court of Appeal

20. The Court of Appeal (David Richards, Irwin and Phillips LJJ) unanimously dismissed the appeal by the third party.

21. The lead judgment was given by Irwin LJ. First, with regard to the provisions of the 1978 Act he noted that the effect of section 1(6) was that provided the underlying liabilities of defendant and third party to the claimant could be established, so as to gain judgment in an English court whether or not any issue or issues were decided by foreign law, the threshold condition for a contribution claim was fulfilled. He asked rhetorically: if by its own terms the Act applies in relation to

the principal liability of the tortfeasors, even where the proper law of the tort is foreign law, then why should a consequential contribution claim where the proper law of the claim is foreign law fall outside the ambit of the 1978 Act? He gained no assistance from sections 1(3) or 2(3) but considered section 7(3), which provides for other rights of contribution to be superseded by the right to contribution under the 1978 Act, a powerful argument in the defendants' favour (paras 54-60). Secondly, with regard to the purpose of the 1978 Act, he considered that the principal purpose was the simplifying and standardising of contribution claims, whatever form of liability gave rise to the common liabilities to the person suffering damage. The 1978 Act was wholly directed to contribution claims and it would have been simplicity itself to provide that where the proper law of the contribution claim was a foreign law, then the statutory right did not arise. There was no such provision. While he accepted that there was no inherent defect in the German law on contribution, it was nevertheless logical, in a standardising and simplifying statute, that such considerations should be set aside once it is shown that primary liability can be established, if necessary, by reference to the relevant foreign law (paras 63-64). Thirdly, referring to the judgment in Lord Sumption in *Cox*, a matter considered further below, Irwin LJ considered that the policy to be construed from the 1978 Act, and in particular from section 7(3), would not be achieved "otherwise than through extraterritorial effect" (para 68).

22. Phillips LJ agreed with Irwin LJ. He considered it plainly implicit that the statutory right of contribution under section 1(1) arose regardless of the law which might otherwise have governed such rights between the parties. In his judgment, such implication arose not only because of the interplay between section 1(1) and 1(6), but also because the rights of contribution superseded by virtue of section 7(3) must be taken, in the context of provisions which fully recognise the likely relevance of private international, to include rights of contribution under the otherwise applicable foreign law. The creation of a statutory right of contribution as between persons notwithstanding that the liability of one or more of them arises under foreign law and the exclusion of other rights of contribution (save for express contractual rights) could and should be read together as giving rise to the plain implication that the 1978 Act has "extraterritorial effect" (para 74).

23. David Richards LJ concurred in the result, but for different reasons. Referring to the judgment of Lord Sumption in *Cox*, he did not consider that this was a case where the terms of the legislation could not effectually be applied, or its purpose effectually achieved, unless it had extraterritorial effect. Furthermore, this was not a case where the legislation gave effect to a policy so significant in English law that Parliament must have intended it to apply to anyone having resort to the English courts. As a result, it could not be said that the 1978 Act embodied any policy of such significance that it could by implication have "extraterritorial effect" (para 84). David

Richards LJ rejected the judge's suggestion that there would be a defect in English law if, where the underlying liability of defendant and third party to the claimant were governed by a foreign law, the contribution claims were also governed by that foreign law (at para 86). He considered that sections 2(3) and 7(3) were equivocal (paras 93-95). However, he considered that section 1(6) expressly contemplated the application of the 1978 Act to contribution proceedings even if both underlying liabilities to the claimant were subject to a foreign law. In this regard he rejected the submission that this would be so only if the contribution claim would, under private international law principles, be governed by English law, because the chances of a contribution claim in such circumstances being governed by English law "appear to be small to the point of invisibility" (at para 91). In his judgment, the conclusion was inescapable that the 1978 Act was intended to have "extraterritorial effect", in the sense that claims lie under it even though, applying the principles of private international law, they would be governed by foreign law (para 92).

Submissions of the parties

24. On behalf of the appellant third party, the hospital, Mr Charles Dougherty KC and Mr Benjamin Phelps submit as follows:

(1) There is nothing in the 1978 Act that expressly provides that it applies regardless of the law applicable to the contribution claim.

(2) There is nothing in the language of the 1978 Act from which overriding effect might be implied. Properly understood the provisions variously relied upon by Soole J and the Court of Appeal, sections 1(3), 1(6), 2(3)(c) and 7(3), do not provide support for the 1978 Act having any overriding effect. The provisions relied on are equally consistent with the 1978 Act only applying where the applicable law of the contribution claim is English law.

(3) The case against implying overriding effect into the 1978 Act is all the stronger when the presumption against "overriding/extraterritorial effect" is taken into account, as it should be.

(4) The terms of the 1978 Act can be effectively applied absent overriding effect. They simply apply to those contribution claims governed by English law.

(5) The purpose of the 1978 Act can be achieved without any overriding effect. The clear aim was to expand the statutory right of contribution in English law beyond joint tortfeasors. There is nothing in the 1978 Act to suggest that it was targeted at correcting perceived inadequacies in foreign laws of contribution.

(6) Insofar as any ambiguity remains, the relevant legislative history of the 1978 Act plainly indicates that there was no intention by the Law Commission, on whose report the 1978 Act was based, or the promoters of the Bill in Parliament, for the 1978 Act to have "overriding/extraterritorial effect".

25. On behalf of the respondent defendants, Mr Charles Hollander KC submits as follows:

(1) The 1978 Act provides for a general statutory right to contribution in proceedings before the English courts where English law provides no right otherwise to claim contribution other than under a variety of individual statutes.

(2) As the 1978 Act provides the necessary statutory basis for the claiming of contribution in actions in England and Wales and appears to do so comprehensively and with express reference to the impact of foreign law, it would be a matter of considerable surprise if it was subject to an unspoken proviso that the Act did not apply at all where the proper law of the right to contribution was not English law. There are no words in the statute to support such an important proviso, which would be all the more surprising given that the Act expressly mentions the role of private international law in the determining of contribution in proceedings before the courts of England and Wales. (See, at least, sections 1(6) and 2(3)(c).)

(3) The policy of the Act can therefore be regarded as recognising the justice of providing for a comprehensive right to contribution between parties where proceedings are brought before the courts of England and Wales, in circumstances where there is no general right without statutory provision and where previous statutory provision had been unsatisfactory.

(4) Every judge who has ever considered section 1(6) has taken the same view of the effect of the subsection when read in the context of the Act and in the light of section 1(1).

(5) The respondents' analysis is further supported by section 7(3) of the Act. The right to recover compensation in accordance with section 1(1) "supersedes any right" subject to a number of exceptions concerned with contractual rights to indemnity or contribution. "Any right" must include a right under foreign law.

(6) None of the other provisions of the Act is directly on point. However, the Act expressly takes account of the impact of private international law in sections 1(6) and 2(3)(c) and by implication in section 1(3).

(7) The observations of Lord Sumption in *Cox* are distinguishable on the ground that in that case there was nothing in the wording of the statute (the Fatal Accidents Act 1976) which supported a conclusion that the statute was intended to have overriding effect.

The correct starting point

26. In a situation where B and C are both liable to A in respect of the same damage, and where the liability of each of them to A is governed by German law, which law governs issues relating to contribution between B and C?

27. In agreement with Soole J, I consider that in addressing this issue the correct starting point is the identification of the appropriate law by the application of domestic choice of law rules. The domestic choice of law rules governing contribution in this case are prima facie the common law rules, by contrast with the provisions of Parliament and Council Regulation (EC) No 864/2007 ("Rome II") because Rome II applies only where the events giving rise to damage occurred after 11 January 2009. The identification of the appropriate law at common law involves a three stage process: (1) characterisation of the relevant issue; (2) selection of the rule of private international law which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue (*Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 391-392, per Staughton LJ; *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, para 26, per Mance LJ). It is necessary, however, to have regard to the possibility that legislation in the lex fori may have the effect of overriding the operation of the choice of law rules at common law.

28. In the present case it is common ground that the application of domestic choice of law rules at common law would lead to the conclusion that issues of

contribution between B and C are governed by German law. It is, however, instructive to consider how choice of law rules at common law might apply to a statutory right of contribution and, in particular, the position as it was understood immediately prior to the enactment of the 1978 Act. It is significant that there was no English authority prior to the enactment of the 1978 Act which addressed the proper law of a statutory claim for contribution under the Law Reform (Married Women and Tortfeasors) Act 1935 ("the 1935 Act").

29. It was at one time considered that contribution claims were immune from choice of law rules and were a matter for the lex fori. (See, for example, *American Surety Co of New York v Wrightson* (1910) 103 LT 663, 665 col 1, per Hamilton J, obiter, considering an equitable claim for contribution.) However, by the mid-twentieth century most common and civil law commentators alike regarded the proper law of a contribution claim as a substantive question to be settled by a choice of law analysis. (See *Yeo*, *Choice of Law for Equitable Doctrines* (OUP: Oxford, 2004), at p 129; K. Zweigert and K Müller-Gindullis, "Quasi-Contracts" in *International Encyclopaedia of Comparative Law* (1973), vol 3, ch 30, at para 18.)

30. Professor Glanville Williams considered that the law governing contribution between joint tortfeasors "is not one of procedure, governed by the *lex fori*, but is a substantive-law claim arising *e lege*" (*G Williams, Joint Torts and Contributory Negligence* (London: Stevens & Sons Ltd; 1st ed (1951), at p 135; footnote omitted). Professor Williams identified two possible approaches to the treatment of contribution claims under a choice of law analysis. First, since the right of contribution arises out of a tort, it may be held to be governed by the same law as the tort, namely the lex loci delicti. Secondly, since the right to contribution rests upon the notion of unjust enrichment, it may be held to be governed by the law of the place of enrichment. Professor Williams considered that the better view was that the place of enrichment was the country where the tortious liability arose. Either approach led back to the *lex loci delicti*. As a result, he concluded that the statutory right to contribution then available in English law under the 1935 Act "should apply to torts committed in England, while for torts committed in other jurisdictions the question of contribution should be regulated by the law of the place of commission of the tort" (para 39, at p 136). He considered it inconceivable that English statutory rights to contribution would be available in all proceedings before English courts. Professor Williams entered one qualification, however, to his view that the proper law of B's statutory claim against C will necessarily follow the law of A's tortious claim against B and it is of some importance to the present appeal.

> "What has been said is subject to one qualification. It may be that the parties are in some special relation to each other and that a claim for contribution arises out of that

> relation. In that case the claim for contribution may be governed by the law governing the relation – *e.g.*, where the parties are related as principal and agent, the proper law governing the contract of agency" (para 39, at p 136; footnote omitted).

Professor Williams here refers to Professor Ernst Rabel who offers a more expansive notion of when a special relationship between B and C will determine the proper law of B's contribution claim. Professor Rabel writes that in claims "of indemnity and contribution between the codebtors", "the internal recourse of one debtor against his faulty associate is governed, according to its source, by the law governing the employment contract, the bailment, the parental, or any other underlying relation" (*E Rabel*, *The Conflict of Laws: A Comparative Study*, Vol Two (Ann Arbor: Michigan, 1960), at p 275; footnote omitted).

31. The ninth edition of *Dicey & Morris on The Conflict of Laws* was published in 1973. The editors conceded that "[t]here does not appear to be any English authority on the question what law governs the right of one tortfeasor to claim contribution or indemnity from another" ((*Dicey & Morris on The Conflicts of Laws* (London: Stevens & Sons Ltd, 9th ed (1973), at p 967; footnote omitted). However, the commentary made clear that it is a matter of substantive law. According to Dicey a contribution claim "must surely be either quasi-contractual or *sui generis*". Dicey suggested that the correct choice of law rule is the "proper law of the obligation in accordance with Rule 176". Rule 176 was the rule for restitution or quasi-contract. It provided for the proper law of the obligation to restore the benefit of an enrichment obtained at another person's expense to be determined by the proper law of the contract, if the obligation arises in connection with a contract, and otherwise to be determined by the law of the country where the enrichment occurs (at p 924). The commentary to Rule 176 explained that the underlying rationale of those principles is "[i]n order to determine the law with which the obligation is most closely connected" and it suggested that Rule 176 should be applied flexibly where, for example, the obligation to make restitution is most closely connected to the place where the loss was sustained, rather than the place where the enrichment occurs. It is significant for present purposes that Dicey suggested, on the basis of the categorisation of a statutory claim for contribution as either quasi-contractual or sui generis, that:

> "In such a case the proper law of the obligation will prima facie be the lex loci delicti, unless perhaps the joint tortfeasors are both resident in another country and there is some special relationship between them, e.g. that of employer and employee or bailor and bailee, which is centred in that country" (at p 967).

32. Other common law commentators in the 1970s also tended to characterise statutory rights to contribution as restitutionary or quasi-contractual obligations which are governed by the proper law of the obligation (See, for example, *Cheshire & North, Private International Law*, 10th ed (1979), at p 282). Similarly, broadly speaking, the prevailing view among civil law jurists was also that contribution claims were restitutionary for conflict of law purposes (See E von Caemmerer, *Festschrift für Ernst Rabel* (1954), Vol 1, at p 388; K Zweigert and K Müller-Gindullis, "Quasi-Contracts" in *International Encyclopaedia of Comparative Law* (1973), vol 3, ch 30 , at para 31; and the discussion in T. W. Bennett, "Choice of Law rules in claims of unjust enrichment" (1990) 39 ICLQ 136-168, 159 et seq, especially at pp 162-163.)

33. I consider that the correct characterisation of a claim for contribution under the 1978 Act is that it is *sui generis* in character but that it is closely analogous to a restitutionary or quasi-contractual claim. One of the purposes of the 1978 Act was to expand the statutory right to contribution beyond liability in tort. It is, as a result, impossible to characterise all contribution claims under the 1978 Act as quasi-delictual. B's claim against C may arise in a variety of circumstances, many of which do not involve the commission of a tort. Furthermore, C has not committed a tort against B. Claims for contribution under the 1978 Act more closely resemble restitutionary or quasi-contractual claims. This view is supported by section 2(3) of the 1978 Act which limits the amount of contribution recoverable from C to the amount of damages for which B was or would have been liable to A where that liability was or would have been reduced by virtue of a statute or an agreement with A. In this way, the value of B's contribution claim against C may be reduced to reflect the true extent of C's enrichment. However, the analogy with restitutionary or quasi-contractual claims is not a perfect one. Thus, for example, the effect of section 2(3) may be that in certain circumstances C will remain liable to B notwithstanding that C's liability to A has ceased and therefore C has not obtained any benefit from B's liability to A. (See *K Takahashi, Claims for Contribution and Reimbursement in an International Context* (2000), p 10.) Nevertheless, the analogy with restitutionary or quasi-contractual claims is a useful one. By analogy with Rule 250 in the current edition of *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed (2022), (choice of law rules for obligations arising out of unjust enrichment) a strong case can be made out for a prima facie rule that the proper law of a contribution claim under the 1978 Act is the law with which B's claim against C is most closely connected. In the present case the parties are agreed that, in the absence of overriding effect of the 1978 Act, the contribution claim is governed by German law.

34. It is against this background that it is necessary to consider whether the 1978 Act was intended to have overriding effect or whether its provisions apply to contribution proceedings only when English law is applicable pursuant to choice of law rules. The current edition of *Dicey, Morris & Collins on the Conflict of Laws*, 16th

ed (2022), describes overriding statutes as "those which must be applied regardless of the normal rules of the conflict of laws, because the statute says so" and observes that "[o]verriding statutes are an exception to the general rule that statutes only apply if they form part of the applicable law" (para 1-054, at p 24). It provides examples from the fields of employment protection (Employment Rights Act 1996, section 204(1)), consumer protection (Unfair Contract Terms Act 1977, section 27(2)) and insurance law (*Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418).

> "Laws of this kind are referred to as "overriding mandatory rules" or lois de police or lois d'application immédiate. Where such legislation is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Thus in contract cases, United Kingdom legislation will be applied to affect a contract governed by foreign law if on its true construction the legislation is intended to override the general principle that legislation relating to contracts is presumed to apply only to contracts governed by the law of a part of the United Kingdom. Article 9(2) of the Rome I Regulation provides that nothing in the Regulation is to restrict the application of the overriding mandatory provisions of the law of the forum." (*Dicey, Morris & Collins, The Conflict of Laws*, 16th ed (2022), para 1-055, at p 25).

The question for consideration here is whether Parliament has cut across the normal rules of the conflict of laws and laid down special rules for the application of the 1978 Act. (See *Dicey, Morris & Collins, The Conflict of Laws*, 16th ed (2022), para 1-058, at p 26).

35. In this regard the courts below were greatly influenced by the observations of Lord Sumption in *Cox*. That case concerned a claim by the widow of a British Army officer who had been killed while cycling in Germany. After her husband's death the widow returned to live in England, entered into a new relationship and had two children with her new partner. She brought proceedings in England and Wales against the German insurer of the driver of the car which had killed her husband. It was accepted that German law governed the issue of liability, but the widow claimed that the quantification of damages recoverable from the defendant was governed entirely by English law and by the provisions of the Fatal Accidents Act 1976. The Supreme Court held that the Fatal Accidents Act had no application. It was common ground that the lex causae arrived at on ordinary principles of private international law was German law. The Supreme Court held that there was nothing in the language of the Fatal Accidents Act 1976 to suggest that its provisions were intended

to apply irrespective of the choice of law derived from ordinary principles of private international law. In that case no such intention could be implied. Lord Sumption discussed this matter under the heading "Extraterritorial application" and observed:

> "Implied extraterritorial effect is certainly possible, and there are a number of examples of it. But, in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extraterritorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply" (at para 29).

36. The question under consideration here is whether Parliament intended that legislation should be given overriding effect, regardless of the choice of law indicated by ordinary principles of private international law. There is to my mind a risk of confusion if this is referred to as "extra-territorial effect". The issue is not whether the 1978 Act applies outside the jurisdiction but whether it mandates the application of English law to issues which would otherwise be governed by a foreign law. (See C Riegels, "Choice of law in relation to contribution claims", [2022] 138 LQR 26, at p 27.) We are here concerned with which law should be applied in the resolution by courts in this jurisdiction of a civil dispute of which they are properly seised. This should be contrasted with a situation in which legislation seeks to regulate activities outside the jurisdiction of the United Kingdom, thereby intruding into or interfering with the internal affairs of a foreign State, a situation in which a strong interpretative presumption against extraterritorial effect would apply. In the present situation the issue is, rather, whether the public policy of the forum displaces the more modest presumption that statutes only apply if they form part of the applicable law. The present case is remote from cases such as *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2; [2022] AC 519 on which the appellant relies in its written case. It is, therefore, preferable to refer to and to address the current issue as one of overriding effect, as opposed to extra-territorial application.

<u>The provisions of the 1978 Act</u>

37. I turn to the ordinary and natural meaning of the provisions of the 1978 Act and the scheme of the legislation. Soole J and the members of the Court of Appeal relied variously on sections 1(6), 2(3)(c) and 7(3) in support of their conclusion that the 1978 Act had overriding effect.

38. Contrary to the views expressed by Irwin LJ (at paras 66-68) and David Richards LJ (at para 91), the 1978 Act does not provide expressly that it has overriding effect. There is no provision that the 1978 Act applies irrespective of the foreign law otherwise applicable to the contribution claim. The question is whether such an intention must be implied from the provisions of the statute.

Section 1(6)

39. Section 1(1) confers a right of contribution. It provides that, subject to the following provisions of section 1, 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. Section 1(6) provides that references in section 1 to a person's liability in respect of damage is a reference to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage. It then goes on to provide that it is immaterial whether any issue arising in any such action was or would be determined, in accordance with the rules of private international law, by reference to the law of a country outside England and Wales. Accordingly, in circumstances where B and C are liable to A in respect of the same damage suffered by A, B is given a right to recover contribution from C, provided that B's liability to A is one which has been or could be established against B in an action brought by A in England and Wales. It is immaterial that the liability of B to A or that of C to A is governed by a law other than that of England and Wales.

40. All three members of the Court of Appeal considered that the fact that section 1 could apply, even though the underlying claims of the claimant against the tortfeasors were subject to a foreign law, suggested that the 1978 Act must have been intended to apply irrespective of the choice of law which prima facie governed the contribution claim. (See Irwin LJ at paras 55, 64; Phillips LJ at para 74; David Richards LJ at paras 88-92.) To my mind, this is a non sequitur. The law governing the principal liability of the tortfeasors to the victim and that governing contribution between them are distinct matters. Section 1(6) is concerned with providing a definition of, or guidance about, what liabilities may be taken into account for the purposes of section 1 of the Act (*RA Lister & Co Ltd v EG Thomson (Shipping) Ltd (No 2) (The Benarty)* [1987] 1 WLR 1614, 1621H-1622A, per Hobhouse J; see also *Logan v Uttlesford District Council* (14 June 1984, unreported) per Sir John Donaldson MR; *Virgo Steamship Co SA v Skaarup Shipping Corpn (The Kapetan Georgis)* [1988] 1 Lloyd's Rep 352, 357-359, per Hirst J; *Fluor Australia Pty Ltd v ASC Engineering Pty Ltd* [2007] VCS 262, at para 56). Moreover, as Mr Dougherty points out in his written case, any system of contribution inevitably has to cater, expressly or impliedly, for what is to happen if one or more of the underlying liabilities is subject to a foreign law. That is all section 1(6) does. The approach adopted variously by the members of

the Court of Appeal ignores the preliminary choice of law question and the question whether the 1978 Act has any application at all.

41. It is, however, necessary to address a further point made by David Richards LJ in this regard. He observed (at para 91):

> "The effect of this provision [section 1(6)], in my judgment, is that a contribution claim lies under the 1978 Act (and is thus governed by English law) even though the liabilities to which it relates, that is the liabilities of B and C to A, may both be governed by foreign law. It thus expressly contemplates the situation in the present case, where any liability of SSAFA and of [the appellant] to the claimant will be governed by German law but a claim for contribution will nonetheless lie under the 1978 Act. It might be said that this will be so only if the contribution claim would, under private international law principles, be governed by English law. However, the chances of a contribution claim in such circumstances being governed by English law appear to be small to the point of invisibility."

42. If it were indeed the case that, where the underlying liabilities of B and C to A are governed by foreign law, the chances of domestic choice of law rules leading to the application of English law to contribution proceedings between B and C would be vanishingly small, this would be a powerful argument in support of the respondent's case that the 1978 Act is intended to have overriding effect. If there would be no cases in which English choice of law rules would indicate that English law applies where the underlying liabilities are governed by foreign law, the second part of section 1(6) would otherwise seem pointless. There would be no scope for the application of the statutory right of contribution in cases where underlying liabilities are governed by foreign law. It would only be by giving overriding effect to the statutory right of contribution that the second part of section 1(6) could have any effect.

43. However, I am not persuaded that David Richards LJ is correct in his premise. While it is undoubtedly correct that in many cases the contribution claim between B and C will be intimately connected to the underlying liabilities of B and C to A, with the result that they are governed by the same law, this will not invariably be the case. First, there will be situations in which B and C are in a special relationship which is governed by English law and where, as a result, the system of law with which a contribution claim would be most closely connected would be English law. In this

regard I note that in their discussion of the law governing a statutory right of contribution, referred to above at paras 30 and 31, Professor Glanville Williams and the editors of *Dicey & Morris on the Conflict of Laws* (9th ed) both considered that where B and C have a special relationship, the proper law of B's contribution claim against C may be the law governing that relationship. (See also the observations of Professor Rabel referred to at para 30 above.) As we have seen, Professor Williams gives the example of an agency relationship, while the editors of Dicey mention the relationships of employer/employee and bailor/bailee. What is particularly striking here is that there existed, at the time the 1978 Act was enacted, a distinguished body of opinion that the proper law of a contribution claim might be that governing a special relationship between B and C as opposed to that governing their liability to A. Although the examples of special relationships referred to above are likely often to be contractual in nature, they need not be so limited. Other examples might include the relationships between trustees of an English trust, directors of a company incorporated in England and Wales, partners in an English partnership or co-fiduciaries. (See, generally, C Mitchell, "The Civil Liability (Contribution) Act 1978" [1997] RLR 27, at pp 35-38.) Secondly, I would not be willing to rule out of consideration possible situations in which a preponderance of other factual features might point to English law as the law governing the contribution proceedings.

44. To my mind, the terms of section 1(6) cast no light on the prior question of whether the 1978 Act has any application at all. There is scope for the application of the second part of section 1(6) whether or not the 1978 Act is given overriding effect.

Section 2(3)(c)

45. Section 2(3)(c) provides that a person whose liability for damages would have been limited or reduced as a matter of applicable foreign law will not be required to contribute a sum greater than the amount of that person's liability so limited or reduced. Soole J considered (at paras 92, 93) that section 1(6) and section 2(3)(c) supported the implication that the statute was intended to have overriding effect. In his view, Parliament having chosen to identify specific circumstances in which choice of law rules are to apply (and the extent of that application) in a claim under the statute, the natural implication was that the availability of the statutory cause of action was not itself to be subject to choice of law rules. Similarly, in the Court of Appeal Phillips LJ considered (at paras 73, 74) that in the context of section 1(6) and section 2(3)(c) it was plainly implicit that the statutory right to contribution arises regardless of the law which might otherwise have governed such rights between the parties. However, section 2(3)(c) simply clarifies the position where there is a limit or reduction under a foreign applicable law. It is equally applicable on either construction of the 1978 Act and therefore provides no basis for any implication. I agree with Irwin LJ (at para 57) and David Richards LJ (at para 93) that section 2(3)(c)

is equivocal and provides no independent support for the overriding effect of the 1978 Act.

Section 7(3)

46. Section 7(3) provides that the right to recover contribution under section 1 "supersedes any right … to recover contribution … otherwise than under this Act in corresponding circumstances" subject to certain exceptions. In the Court of Appeal both Irwin LJ and Phillips LJ considered that this provision supported the implication of overriding effect. Irwin LJ considered (at paras 60, 67, 68) that the reference to "any right" must include rights of contribution existing under a foreign law. Phillips LJ considered (at para 74) that the rights of contribution superseded by virtue of section 7(3) must be taken, in the context of provisions which fully recognise the likely relevance of private international law, to include rights of contribution under the otherwise applicable foreign law. In his view, the creation of a statutory right of contribution as between persons notwithstanding that the liability of one or more of them arises under foreign law and the exclusion of other rights of contribution (save for express contractual rights) can and should be read together as giving rise to the plain implication that the 1978 Act has "extraterritorial" effect. David Richards LJ, however, considered (at para 95) that section 7(3) does not give rise to any such implication. In his view, if on analysis of the remaining features of the 1978 Act it were found that it did not have overreaching effect, section 7(3) could not produce a different conclusion because it is consistent with either conclusion.

47. The reference in section 7(3) to superseding "any right" is most obviously a reference to previous common law and equitable rights of contribution in English law which were replaced by the 1978 Act, such as contribution between trustees for a common liability for breach of trust or between company directors under a common liability for breach of an equitable duty owed to the company. (See C Mitchell, *The Law of Contribution and Reimbursement* (2003) para 4.25, at p 81.) (In this regard I also note that the promoter in the House of Commons of the Civil Liability (Contribution) Bill stated that the clause which became section 7(3) of the Act was to make "fresh provision on the relationship between the Bill and existing common law rights to contribution" (Mr Geoffrey Pattie MP, Standing Committee C, 14 June 1978, col 55.) More fundamentally, however, as Mr Dougherty puts it in his written case, section 7(3) cannot found an argument that the 1978 Act has overriding effect because, like section 1(6), it begs the question in issue. Whether or not the statute has overriding effect, section 7(3) makes sense. If it does have overriding effect, it makes sense in that it supersedes any rights of contribution in domestic law or otherwise under a foreign law. If it does not have overriding effect, it makes sense in that it supersedes any rights of contribution in domestic law. I agree with David Richards LJ that section 7(3) provides no assistance either way.

48. In my view, therefore, the provisions of the 1978 Act relied upon by the defendants are equivocal in this regard. They do not indicate that the statute is intended to have overriding effect nor is their efficacy dependent upon overriding effect. They are equally consistent with a statutory right of contribution arising only where conventional choice of law rules indicate English law as the law with which the contribution claim is most closely connected.

Legislative history

49. The 1978 Act has its origins in the Law Commission report, *Law of Contract*, *Report on Contribution* (Law Com No 79), which was published in March 1977 and which included as an Appendix a draft Bill. It is therefore appropriate to take account of the Law Commission report in order to identify the mischief to which it was directed (*Cooke v United Bristol Healthcare NHS Trust* [2003] EWCA Civ 1370; [2004] 1 WLR 251, para 54 per Carnwath LJ). It appears from the Law Commission report that the principal purposes of the legislation were, first, to extend the statutory right of contribution beyond the right conferred by the 1935 Act to persons who are jointly or severally liable in respect of the same damage and, secondly, to amend the law relating to successive legal proceedings brought against persons who are liable either jointly for the same debt or jointly and severally for the same damage. These stated purposes were capable of being achieved without giving the legislation overriding effect. The question of overriding effect is not addressed in the report and the references in section 1(6) and 2(3) of the 1978 Act to private international law did not form part of the Law Commission's draft Bill. As a result, nothing in the report or in the draft Bill casts any light on the present issue.

50. There were changes between the Law Commission's draft Bill and the legislation in its final form, but its purpose does not appear to have differed significantly from the intention of the Law Commission. The Explanatory Memorandum to the Bill when it was introduced into the House of Commons in December 1977 stated: "This Bill gives effect, with certain modifications, to the Law Commission's Report on Contribution (Law Com No 79)". Nothing in the statements by the promoter of the Bill in the House of Commons suggests that the Bill was intended to have overriding effect. Lord Scarman, in introducing the Bill in the House of Lords on 18 July 1978, made clear that the Bill had been drafted to give effect, with certain modifications, to the report and recommendations of the Law Commission in Report No 79. He stated that the differences from the Law Commission recommendations were minor, save in relation to the extension of the legislation to Northern Ireland.

51. Nothing in the admissible Parliamentary materials supports the view that the Bill was intended to have overriding effect.

Further Law Commission projects

52. It is convenient to refer at this point to a further matter. In the years following the enactment of the 1978 Act the Law Commission touched on the current issue in two other projects.

(1) Law Commission Working Paper No 75, *Classification of Limitation in Private International Law* (LCCP 75, 14 February 1980) expressly considered the extent to which the 1978 Act applies to contribution claims involving foreign elements and stated that the 1978 Act applies only insofar as English law is the relevant applicable law.

> "First, it should be borne in mind that the 1978 Act will only apply to those claims for contribution involving rules of private international law where the law governing the contribution claim (as opposed to [the Plaintiff's] right of action) is English law. There is no direct English authority on the law to govern a contribution claim but the better view would seem to be that it is a matter to be governed by the proper law of the obligation." (at para 76; footnote omitted)

(2) Similarly, Law Commission Working Paper No 87, Scottish Law Commission Consultative Memorandum No 62, *Private International Law, Choice of Law in Tort and Delict* (LCCP 87, 28 September 1984) states:

> "The Civil Liability (Contribution) Act 1978 contains no general choice of law rules and may be taken not to apply directly to all claims for contribution arising in a court in England and Wales or in Northern Ireland, but only to such of those claims as are governed by English or Northern Ireland law respectively." (at para 2.83)

A contrast is drawn (at para 2.84) with the position in Scotland where, it is said, it could be argued that section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 requires a Scottish court to apply the rules enunciated by that

section as part of the lex fori to all claims for contribution coming before it, whether or not the claim is itself governed by Scots law.

53. Both Working Papers Nos 75 and 87 therefore proceeded on the express basis that the 1978 Act applied only to the extent that English law was the applicable law. These are clear and principled statements of the approach of the Law Commission which has a great deal to commend it.

54. In Law Commission Report No 114, *Classification of Limitation in Private International Law* (Law Com No 114) the Law Commission returned to the subject of contribution between joint wrong-doers at paras 4.72 and 4.73. To my mind, there is nothing in this report which is inconsistent with the position taken by the Law Commission in Law Commission Working Paper No 75 at para 76, quoted at para 52(1) above. (To the extent that Chadwick J may have taken a different view in *Arab Monetary Fund*, I respectfully disagree.) The report simply concluded that no amendments to the 1978 Act would be necessary as a result of the proposed reclassification of statutes of limitation as substantive or the proposal that a foreign judgment on a limitation point should be regarded as having been given on the merits. More generally, the Commission agreed with the clear view of consultees that amendment of the 1978 Act was neither necessary nor desirable.

55. I note that Dr Peter North, as he then was, was a Law Commissioner at the date of publication of Law Commission Report No 79 on the law of contribution, Working Papers Nos 75 and 87 and Law Commission Report No 114. On behalf of the appellant, Mr Dougherty also draws attention to the fact that, prior to the decision of Chadwick J in *Arab Monetary Fund*, both of the leading practitioner texts on private international law supported the view that the 1978 Act did not have overriding effect (*Dicey & Morris, The Conflict of Laws*, 12th ed (1993), at pp 1533-1534; Cheshire & North, *Private International Law*, 10th ed (1979) at p 282).

Authorities

56. In support of his submission that the 1978 Act has overriding effect, Mr Hollander is able to rely on a line of authority in which overriding effect appears to have been assumed. This, he submits, supports the view that there was no point to take.

57. In *The Benarty* the claimants claimed damages for negligent damage to their cargo aboard the vessel Benarty, against the shipowners as first defendants and the Indonesian charterers of the vessel as second defendants. The Court of Appeal

stayed the action against the charterers. The shipowners subsequently claimed contribution from the charterers, under section 1 of the 1978 Act, in the event that the shipowners were held liable to the claimants. On an application by the charterers to strike out the contribution notice, Hobhouse J held that, notwithstanding the order for a stay, the action remained a pending or subsisting action and the charterers remained parties to that action. The charterers further submitted that section 1(6), in relation to the underlying liabilities, imposed a procedural as well as a substantive criterion. They argued that the words "could be established in an action brought against him in England and Wales" imposed a requirement that such proceedings could be brought in England and Wales even if such proceedings had not yet been brought. The charterers submitted that because the claim by the claimants against the charterers was stayed, the only jurisdiction in which liability [of the charterers to the claimants] could be established was Indonesia and not England and Wales. In rejecting this submission Hobhouse J considered that section 1(6) was concerned with providing a definition of or guidance about what underlying liabilities may be taken into account for the purposes of section 1. It was concerned with the character of the liability and not with any merely procedural considerations as to how it might be enforced. It was not concerned with such problems as whether or not a writ could have been served out of the jurisdiction of the court, such considerations being alien to the substantive scheme provided for by the Act. Hobhouse J then observed:

> "If the respondent to the contribution claim is, as here, a foreigner then before such a foreigner can be made the subject of a contribution claim the claimant must establish some procedural right recognisable under RSC, Ord 11, or other relevant provision, which entitled him, the claimant, to proceed against the respondent in this country. If he cannot establish such a procedural entitlement no question of liability under the Act of 1978 will arise; if he can then there is no need for any further inquiry and the provisions of the Act should be applied" (at p 1622 C-E).

Mr Hollander's point is that Hobhouse J did not consider it necessary to address as a preliminary question what law ought to govern the claim for contribution; he simply dealt with the matter on the basis that it raised a question of construction under the 1978 Act. Furthermore, as Chadwick J pointed out in *Arab Monetary Fund v Hashim (No 9)*, (considered further below) it is difficult to see how in *The Benarty* the question as to what law should govern the claim for contribution could have been answered in favour of English law on any ground other than that the claimants' action was proceeding in the English court.

58. *The Benarty* was followed by Hirst J in *The Kapetan Georgis*. This was another jurisdiction case. Hirst J held that the 1978 Act created a cause of action in its own right, the ambit of which was to be discerned from the terms of the Act itself. There was nothing in the Act to limit its scope to liabilities incurred in England and Wales. On the contrary, Hirst J considered that section 1(6) with its references to private international law, was a small pointer in favour of an international dimension (at pp 357R, 359L). Once again, the question of overriding effect was not raised. However, as Mr Hollander points out, referring to the observations of Chadwick J in *Arab Monetary Fund*, if Hirst J in *The Kapetan Georgis* had thought it necessary to address the preliminary question as to what law ought to govern the contribution claim, it is difficult to see how that question could have been answered in favour of English law.

59. In *Petroleo Brasiliero SA v Mellitus Shipping Inc, (The Baltic Flame)* [2001] EWCA Civ 418; [2001] 2 Lloyd's Rep 203 the defendant owners of The Baltic Flame, Mellitus, issued third party proceedings against Fortum and Saudi Aramco. Fortum sought permission to serve a claim for contribution pursuant to section 1 of the 1978 Act on Saudi Aramco out of the jurisdiction on the ground that Saudi Aramco was a necessary and proper party. The Court of Appeal upheld the decision of Longmore J to give leave to serve out of the jurisdiction. It was common ground that unless Fortum could maintain its contribution claim against Saudi Aramco in England and Wales, it could not be enforced or otherwise provided for, because the law of Saudi Arabia allowed no remedy of contribution in those circumstances. Potter LJ, with whom Sedley and Jonathan Parker LJJ agreed, observed:

> "The 1978 Act is strictly territorial in scope. However, it is unequivocal in its application to all proceedings brought in England, and there is nothing in the Act, or in particular in section 1(6), to limit the right of contribution to liabilities incurred in England and Wales…" (at para 36)

Mr Hollander is able to submit, on behalf of the respondents, that as in *The Benarty* and *The Kapetan Georgis*, there was no apparent connection with English law. If the law of Saudi Arabia applied to the question whether contribution could be claimed, the court would have been obliged to refuse leave to serve out of the jurisdiction because the claim for contribution would have been bound to fail.

60. Recognising that the issue of overriding effect was not argued in these cases, Mr Hollander is nevertheless able to submit that, if the appellants are correct in their submission, a number of most distinguished judges must have missed the point completely.

61. The issue was, however, directly addressed by Chadwick J in *Arab Monetary Fund v Hashim (No 9)*. The Arab Monetary Fund ("AMF") sought to recover damages against its former director-general, Dr Hashim who was alleged to have misused his powers and to have appropriated funds, some of which had found their way to the First National Bank of Chicago ("the Bank"). The AMF sought damages against the Bank on the ground that the Bank defendants had assisted Dr Hashim to misappropriate AMF money with knowledge of his breach of fiduciary duty. By a contribution notice the Bank sought contribution from Dr Hashim under the 1978 Act. It was submitted on behalf of Dr Hashim that the 1978 Act did not apply to all contribution claims brought in the English courts, but only to those claims governed, in accordance with English rules of private international law, by English law. Counsel for Dr Hashim argued that the substantive law governing contribution was, as a matter of private international law, the law of Switzerland and that, accordingly, the 1978 Act could have no application and the Bank's claim for contribution must fail.

62. Chadwick J addressed the point in the following way.

> "The premise which is, I think, implicit in Mr Ross-Munro's proposition – and, perhaps, also in the Law Commission Working Papers – is that the 1978 Act contains rules which are only applicable as part of the English domestic law; and does not itself contain private international law rules for the purpose of identifying the circumstances in which the English court is to apply the Act to cases involving foreign elements. In my view this is a false premise.
>
> The correct approach is not to ask whether, under some rule of English private international law which is to be found or ascertained independently of and without regard to the provisions of the Act itself, the contribution claim which has been made in the proceedings which are before the court is to be determined by reference to the Act: the correct approach is to ask whether under the rules of law applicable in an English court (which include the provisions of the Act itself) the contribution claim ought to succeed. In a case involving foreign elements that approach requires the court to decide whether, upon a true construction of the Act, the legislature intended to confer on the claimant (B) in the contribution proceedings which are before it a right of contribution against the respondent to those proceedings (C) which was to be recognised and enforced in England."

63. Chadwick J emphasised that, in deciding whether upon the true construction of the 1978 Act the legislature intended that B should have a statutory right of contribution against C, the court is not concerned with any obligation to contribute which might exist between B and C independently of the Act or with any relationship between B and C other than the relationship which gives rises to the statutory right. The court was concerned to establish whether B and C were each liable to A in respect of the same damage suffered by A. That question had to be determined in the light of sections 1(6) and 6(1) of the Act. Section 1(6) and other sections contemplated that the court may be required, by its own rules of private international law, to answer those questions by reference to some system of foreign law. If those questions were answered in the affirmative, then section 7(3) provided that the statutory right to contribution superseded any right, other than an express contractual right, which might arise or exist otherwise than under the Act. He continued:

> "It would be strange, therefore, if – before it came to construe the 1978 Act at all – the Court were required to answer a preliminary question which was unrelated to and inconsistent with the basis upon which the statutory right of contribution arises under English law. To ask whether a right of contribution arising out of any relationship between B and C other than their relationship as persons each of whom is liable to A in respect of the same damage ought to be determined by English domestic law would be to ignore the basis upon which the right arises under that law. To ask whether a right of contribution arising out of the relationship between B and C as persons who are each liable to A in respect of the same damage would be to ask the very question to which the 1978 Act provides the answer."

64. Chadwick J drew attention to *The Benarty* and *The Kapetan Georgis*, decisions which he considered inconsistent with the proposition that the 1978 Act applies only to contribution claims which are governed, in accordance with applicable rules of private international law, by English domestic law. In neither case had that preliminary question been asked. In those cases, Hobhouse J and Hirst J had proceeded on the basis that the answer to the questions before them was to be found in the 1978 Act itself.

65. Chadwick J addressed in some detail the observation of Professor Glanville Williams, in relation to the 1935 Act in his monograph on *Joint Torts and Contributory Negligence*, (to which reference has been made at para 30 above) that

it was inconceivable that English statutory rights to contribution would be available in all proceedings before English courts. Professor Williams stated (para 39, at p 135):

> "The Tortfeasors Act allows the recovery of contribution between parties 'liable' in respect of damage. Literally speaking, it is possible for parties to be 'liable' under a foreign system of law. This does not mean, however, that the Act is capable of being applied indiscriminately to liability for foreign torts. If three Ruritanians are involved in tort litigation in Ruritania, under whose law there is no right to contribution, it is inconceivable that merely by coming to England and suing here they could obtain the benefit of the Tortfeasors Act".

66. Chadwick J pointed out that while the 1935 Act contained no indication whether the liability of tortfeasors B and C to A under section 6(1)(c) was restricted to liability under English domestic law or extended to liability under some foreign system of law, sections 1(3), 1(6) and 2(3)(c) of the 1978 Act recognised that foreign law may determine or affect such liability. It did not follow that the 1978 Act was "capable of being applied indiscriminately" whenever two parties are liable for the same damage under foreign law. Although it was immaterial that, in deciding whether or not liability was established, the court may (in accordance with its own rules of private international law) apply foreign law, the "liability" was a liability which could be established in an English court. Accordingly (as the law then stood) liability under foreign law alone in respect of a tortious act committed abroad would not be sufficient. Liability under English law would need to be established in accordance with the test of double actionability recognised in *Boys v Chaplin* [1971] AC 356. However, if that test was satisfied, it was immaterial whether a right of contribution between the tortfeasors existed under any foreign law. That right, he considered, was conferred by section 1(1) of the 1978 Act and the English court must give effect to it. Chadwick J considered therefore that, properly understood, the 1978 Act does not give rise to the consequence which Professor Williams regarded as "inconceivable". B would not obtain the benefit of a statutory right of contribution "merely by coming to England and suing here". B would need to establish that both he and C were, or would have been, liable to A on the basis of the law applicable in an English court. B would also have to establish some basis upon which the English court could assume jurisdiction over C.

67. In this regard, Chadwick J made the following further observation:

> "… [I]f the English court assumed jurisdiction in the litigation in which Professor Glanville Williams' Ruritanians were involved and – after applying the relevant provisions of English and Ruritanian law in accordance with the principles explained in *Boys v Chaplin* … - reached the conclusion that two (say, B and C) were liable to the third (A) in respect of the same damage, it would, in my view not only be conceivable but correct in law for the Court to apportion the damages between B and C inter se. It would be remarkable if the Court could not do so. It would be a surprising defect in the law if the English court, having decided in an action to which A, B and C were party that B and C were each liable to A in respect of the same damage – suffered in, say, a collision between motor vehicles in Ruritania in which the three were involved – and having assessed that damage, were precluded by the absence of any law of contribution in Ruritania from deciding also how its judgment for that sum against each of B and C should be apportioned inter se. I am satisfied that, following the enactment of the 1978 Act, that defect is not a feature of English law."

68. To my mind Chadwick J's judgment is open to criticism on two principal grounds. First, much of the reasoning is, in itself, circular in that it assumes what it seeks to demonstrate. In asserting that the answer to the current issue is to be found in the provisions of the 1978 Act, it begs the question whether Parliament intended that the 1978 Act should have overriding effect and displace the common law choice of law rules which would normally apply in such a situation. Secondly, I respectfully doubt that if, in the example given, the absence of any law of contribution in Ruritania precluded any apportionment between B and C in English proceedings brought by A, that should be regarded as a defect of English law. This is a matter to which I will have to return.

69. In *Fluor Australia Pty Ltd v ASC Engineering Pty Ltd* [2007] VSC 262, Bongiorno J, in the Supreme Court of Victoria, considered a claim by Fluor against ASC for contribution under section 23B of the Wrongs Act 1958 (Vic) which included provisions materially identical to those in section 1(1) and 1(6) of the 1978 Act. Under section 23B contribution between wrongdoers was available whatever might be the basis of each of their liabilities to the person who had suffered damage. In this respect the Victoria statute was, in Australia, unique to Victoria; contribution statutes in other Australian jurisdictions confined rights to contribution between tortfeasors. Fluor's claim for contribution arose in respect of an underlying

contractual liability. ASC submitted that any contribution claim brought by Fluor must be determined by application of the law of Western Australia, the law with which the contribution claim had its closest connection, and that accordingly under the Western Australia statute Fluor had no case. ASC maintained that there was no nexus between the contribution claim and the State of Victoria; Fluor was engaged in blatant forum shopping, seeking a remedy which would be unavailable if the law appropriate to its claim was applied by the court or if its claim was brought in a more appropriate forum. Fluor responded by submitting that section 23B of the Victorian statute enacted a statutory choice of law rule by prescribing that Victorian law will always be applied to a claim for contribution brought in a Victorian court, regardless of the law the court might have to apply to determine questions concerning the underlying liability of the parties upon which the claim for contribution was based. Fluor maintained that the only prerequisite for an award of contribution under section 23B was that the underlying claim was able to be established in an action in Victoria.

70. Bongiorno J was referred to the relevant English authorities. He noted that Hobhouse J in *The Benarty* did not address the issue of which law should govern the contribution claim but seemed to assume the primacy of English law because it was the law of the forum. Similarly, he observed that in *Arab Monetary Fund v Hashim (No 9)* Chadwick J had held that, given the existence of the statutory cause of action, no question as to whether the claim should be determined according to English law or some foreign law needed to be answered. That was essentially the argument relied upon by Fluor.

71. Bongiorno J noted (at paras 50 and following) that none of the cases cited addressed the issue whether there was a logically anterior choice of law question to be determined. However, the unqualified application of the English cases in the context of the Australian legal system would mean that any Australian State or territory could legislate to provide remedies which would be available to any litigant who sued in the courts of the legislating polity regardless of whether the factual circumstances of the case or other governing factors had any geographical or other connection with the territory of that polity. In his view, Fluor's argument ignored the decision of the High Court of Australia in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36;203 CLR 503 which made it clear that the choice of law rules for Australia are provided by the common law adapted to the Australian Constitution and these rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated and whether it is litigated in federal or non-federal jurisdiction.

> "The acceptance of Fluor's argument … would mean that a remedy provided by the statute law of any state or territory

> in Australia would be available to any litigant in respect of any fact situation to which the remedy could be applied, wherever it occurred, by the simple process of commencing a proceeding in that jurisdiction. Absent some qualifying feature, not only would such a principle encourage forum shopping to the detriment of the whole Australian legal system, it would be antipathetic to the federal compact itself, with obvious consequences for state sovereignty and the integrity of individual state legal systems.
>
> Consistently with *Pfeiffer*, the unique Victorian remedy of contribution should be available to and in respect of wrongdoers, regardless of the juridical source of their wrongdoing, only in those cases to which, by the application of appropriate common law choice of law rules, Victorian law should be applied." (at paras 53, 54)

He concluded, therefore, that the function of the provision was merely facultative. It permitted a claim to be brought under Victorian law even where the underlying liability, in tort, breach of contract, breach of trust or otherwise, falls to be judicially determined according to the law of a jurisdiction outside Victoria. Significantly, he added:

> "It is not difficult to imagine a situation where choice of law rules which relate to a contribution claim (whatever they might be in a particular case) would dictate the application of Victorian law even where the wrongdoing of one or other or even both of the parties involved fell to be determined according to the law of another jurisdiction." (at para 56)

72. The decision in *Fluor* is, perhaps, of only indirect relevance to the present issue. The judge's perceptive reading of the English authorities resulted in the application of a principle which relates specifically to the Australian constitutional context. Nevertheless, it may be considered a case in which the public policy of the forum required that a statutory provision should not be given overriding effect but should apply only where choice of law rules at common law indicated its application.

Academic commentary

73. The weight of academic commentary on the issue strongly favours the appellant's case. In particular, I consider the criticisms of *Arab Monetary Fund* to be compelling.

74. Reference has been made above to the fact that prior to the decision of Chadwick J in *Arab Monetary Fund*, both of the leading practitioner texts on private international law supported the view that the 1978 Act did not have overriding effect (*Dicey & Morris on the Conflict of Laws*, 12th ed (1993) at pp 1533-1534; *Cheshire & North, Private International Law*, 10th ed (1979) at p 282).

75. In his chapter on The Choice of Law Rules of Restitutionary Obligations in *Restitution and the Conflict of Laws* (1995), ed F Rose, at pp 209-210, Professor Robert Stevens casts doubt on the decision in *Arab Monetary Fund*.

> "If liability can be established in an English court against two or more persons in respect of the same damage, the Act applies regardless of the rules of private international law. Application of the *lex fori* simplifies the position but seems unprincipled. If by the law(s) of the obligations no contribution action would be possible, why should the *lex fori* determine the issue in a different way?"

76. Professor Adrian Briggs is also critical of the decision in *Arab Monetary Fund*: ("The International Dimension to Claims for Contribution: *Arab Monetary Fund v Hashim"*, [1995] LMCLQ 437; see also *Briggs, The Conflict of Laws* 1st ed (2002), pp 198-199). He explains that Chadwick J held, in effect, that as long as the court had jurisdiction *in personam* over C, the Act permitted and required it to order contribution from C according to the scheme of the Act. It was irrelevant that the relationship between B and C was not otherwise connected with English law or that under some potentially applicable law a claim for contribution would have been resolved differently. Professor Briggs accepts that there is an immediate attraction to the result reached by Chadwick J: if the court has jurisdiction over C (the more so when the claim for contribution is brought in the very proceedings brought by A against B) the convenience of settling all issues once and for all is plain. However, he points out that it did not follow that, just because the court has and will exercise jurisdiction to order contribution, it should apply its domestic law to the issue without regard to choice of law.

77. Professor Briggs draws an analogy with contributory negligence under the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act "). The wording of the two statutes is strikingly similar and neither gives any indication that it is to apply notwithstanding, or that it is not to apply in the face of, international elements in the claim. Yet, he makes the point that in the case of a tort committed in Ruritania, an English court would almost certainly not apply the 1945 Act to the exclusion of a different rule in the law of Ruritania.

78. Professor Briggs draws the following conclusions (at pp 441-442; footnotes omitted).

> "First, a court should be willing to accept jurisdiction over contribution claims when it has jurisdiction over the claim of [A] against [B]: one single determination binding on all will be a solution much preferable to the anarchy of separated parts of a single story being litigated in separate courts. … But second, this pragmatic encouragement to take a wider-than-usual view of jurisdiction should lead to a greater-than-usual sensitivity to issues of choice of law: this is, after all, the very foundation of private international law. The blanket application of English law to the substance of the contribution claim is inappropriate, at least in cases where the claim, when seen in simple isolation, would not otherwise have belonged within the jurisdiction of the English court or to English law. In other words, the relationship created or arising between [B] and [C] should be treated as self-contained, and the law appropriate to it selected to govern the claim. … [F]or present purposes there is much to recommend the view that a contribution claim should be governed by the law with which it has its closest and most real connection, and that in the absence of clear and compelling words in the 1978 Act, the operation of the Act should be limited to cases where the law with the closest and most real connection to the contribution claim is English law."

79. Similarly, Dr Charles Mitchell writing in the Restitution Law Review in 1997 ("The Civil Liability (Contribution) Act 1978" [1997] RLR 27) criticises the decision in *Arab Monetary Fund*. Having explained the law as it stood on the basis of *Arab Monetary Fund*, he concludes (at p 52):

> "This understanding of the effect of section 1(6) has the merit of simplicity, but it may be questioned whether the wording of the section clearly indicates that Parliament intended the 1978 Act to apply without regard to the choice of law rules which would otherwise come into play." (See also Riegels, above, at 36.)

Conclusion

80. The ordinary and natural meaning of the provisions of the 1978 Act and the scheme of the legislation provide little assistance on the issue as to whether it is intended to have overriding effect. The Act contains no express provision that it applies regardless of the law otherwise applicable to the contribution claim. Furthermore, the provisions are neutral as to whether overriding effect is to be implied. They are equally consistent with the 1978 Act applying only where the applicable law of the contribution claim is English law. They cast no light on the prior question whether the 1978 Act has any application at all. Furthermore, I have been able to find no assistance on this point in the legislative history of the Act.

81. Nevertheless, I am persuaded that the 1978 Act was not intended to have overriding effect so as to displace conventional choice of law rules. In coming to this conclusion, I am influenced in particular by two considerations.

82. First, as explained above (at paras 41 ff), I am unable to accept the view of David Richards LJ in the Court of Appeal in the present case that where the underlying liabilities of B and C to A are governed by foreign law, the chances of domestic choice of law rules leading to the application of English law to contribution proceedings between B and C would be small to the point of invisibility. If that view were correct, it would be a powerful indication that the 1978 Act was intended to have overriding effect. Otherwise, section 1(6) would be pointless. However, it seems clear to me that there will be many situations in which a contribution claim will be governed by English law, notwithstanding the fact that the underlying liabilities are governed by a foreign law. In particular this will be so in cases where there exists a special relationship between B and C. As a result, this cannot be a justification for displacing conventional choice of law rules. If the 1978 Act is not given overriding effect, there will nevertheless be many situations in which choice of law rules at common law will lead to the conclusion that English law governs the contribution claim.

83. Secondly, I can see no good reason why Parliament should have intended to give overriding effect to the 1978 Act. Why should Parliament have intended to

confer a statutory right of contribution whenever the party from whom contribution is sought can be brought before a court in this jurisdiction, and regardless of the law with which the contribution claim has its closest connection? One possible answer was provided by Chadwick J in *Arab Monetary Fund* where he considered that Parliament intended to remedy a failure of foreign law to provide for contribution claims. (See the example he gives of the Ruritanians involved in a road accident in Ruritania who are parties to proceedings in this jurisdiction, cited at para 67, above.) Chadwick J considered that it would be a surprising defect in English law if the absence of any law of contribution in Ruritania precluded the English court from ordering contribution between Ruritanian defendants. However, I respectfully disagree that this should be regarded as a defect in English law. I can see no sound reason why the UK Parliament should be legislating in order to remedy perceived deficiencies in foreign laws in the manner suggested and there is nothing in the legislation to suggest that that was the objective. Furthermore, in the example given, it would seem contrary to principle for the court to apply English law if the contribution claim were most closely connected to the foreign law. That would be particularly so if the foreign law conferred more generous rights of contribution than were available under the 1978 Act. (In this regard see, generally, *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 WLR 1397.) Furthermore, this would be inconsistent with giving effect to the reasonable and legitimate expectations of the parties which is a fundamental objective of the conflict of laws (*Dicey, Morris & Collins, The Conflict of Laws*, 16th ed (2022), para 1-006; Briggs, above, at p 442, quoted at para 78 above).

84. For these reasons, I would allow the appeal and I would answer the preliminary issue directed by Master Yoxall as follows:

> "The Civil Liability (Contribution) Act 1978 does not have overriding or mandatory effect. It does not apply automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules. Accordingly, in the present case, German law applies to the Defendants' claims for contribution against the Part 20 Defendant and those claims will be time-barred."