MEMORANDUM TO THE ATTORNEY GENERAL ON EMPLOYEE'S LIABILITY FOLLOWING THE RECENT ENACTMENT OF THE WORKERS COMPENSATION ACT 1987

I. BACKGROUND

On the 9th April 1984, the NSW Law Reform Commission received a reference on Employees' Liability. It arose from the interpretation given to the Employees Liability (Indemnification of Employer) Act 1982 by the NSW Supreme Court in Fairfield Council v McGrath [1984] 2 NSWLR 247. This decision limited the operation of the Act and allowed employers to recover contribution from negligent employees, pursuant to s5 of the Law Reform (Miscellaneous Provisions) Act 1946. The Commission's draft report was at an advanced stage when the High Court of Australia overturned the NSW decision and substantial rewriting of the draft report was required. The Commission decided at that stage that its report should be completed despite the High Court decision because a number of questions in relation to the 1982 Act remained unresolved by the decision. These were as follows:

1. Sections 64/64A Indemnity and Contribution Provisions: The operation of the 1982 Act needed to be extended to protect employees from the effects of ss64 and 64A of the Workers Compensation Act 1926 under which they could be made liable to contribute to, or indemnify their employer in a common law action.

2. Clarification of 1982 Act: This was necessary to avoid further confusion in the interpretation of the Act and to entrench the High Court decision in McGrath's case in legislation.

3. Rights of 3rd Parties: The right of an injured party to sue a negligent employee directly was not affected by the High Court decision.

4. Action For Loss of Servant: Questions remained as to the continued relevance of the action per quod servitium amisit.

II. EFFECT OF THE WORKERS COMPENSATION ACT 1987 ON THIS REFERENCE

At the end of September 1986 the New South Wales Government published two papers proposing substantial changes to both the Workers' Compensation and Traffic Accident Compensation systems. These resulted in the passage of the new Workers Compensation and Transport Accidents Compensation Acts of 1987, both of which came into operation on 1 July 1987. The new Workers Compensation Act deals extensively with the concerns of the Employee's Liability reference and supersedes either directly or indirectly, most of the questions raised above and the recommendations in paragraphs 4.4-4.35 of the Commission's report. Sections 149-151 of Part 5 abolish common law actions where compensation is available under the workers' compensation legislation. This Part also contains a redrafted and combined version of ss64 and 64A of the 1926 Act.

In summary the impact of the 1987 Act on the Commission's terms of reference is:

1. Sections 64/64A Indemnity and Contribution Provisions: These provisions have been redrafted to relieve both employers or employees from any duty to indemnify or make a contribution towards another's loss.

2. Clarification of 1982 Act: The complete reworking of the workers' compensation legislation, and the abolition of the right to sue, have superseded the 1982 Act with regard to injuries caused by a fellow employee. The problems identified by the Commission at paras 1.11 and 4.4 of the draft report have been overcome.

3. Rights of 3rd Party: This problem is not addressed specifically by the 1987 Act, and it is given only limited attention in relation to Transport Accidents in the "Transcover" Scheme. Therefore the possibility of an employee being liable in this way remains. Our comments and recommendations on the matter appear at paras 4.26-4.35.

4. Action For Loss of Servant: This topic is not addressed by the 1987 Act. The Commission's comments and recommendation appear in the draft report at paras 4.25.

III. RECOMMENDATIONS

As the two issues left outstanding are relatively minor, the Commission has decided to conclude this reference by way of Memorandum, supported by our draft report. We make the following recommendations:

1. Rights of a third party: The Commission recommends that this matter be dealt with as outlined in paragraphs 4.26-4.35. Draft legislation to achieve this is attached as Appendix I.

2. The Commission recommends that the action per quod servitium amisit be abolished, as discussed at paragraph 4.25. Draft legislation to this effect is attached as Appendix II.

NEW SOUTH WALES LAW REFORM COMMISSION

COMMUNITY LAW REFORM PROGRAM

DRAFT REPORT

EMPLOYEES' LIABILITY

MAY 1988

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Terms of Reference

On 9 April 1984, the then Attorney General of New South Wales, the late Honourable DP Landa LLB MP made the following reference to the Commission:

> Pursuant to s10 of the Law Reform Commission Act, 1967, I refer the following matters to the Law Reform Commission for inquiry and report to me.
>
> (1) (a) whether contribution or indemnity by an employee to an employer in respect of the liability of the employer, pursuant to common law, the Workers' Compensation Act, 1926 or otherwise, for loss or damage suffered by a third person as a result of the act or omission of the employee, should be limited or denied.
>
> (b) the circumstances, if any, in which an employer should be liable to indemnify an employee in respect of liability incurred by the employee for loss or damage suffered by a third party.
>
> (2) Any related matter.
>
> In making its Report the Commission should pay particular attention to the provisions of the Employee's Liability (Indemnification of Employer) Act, 1982.

Participants

Commissioners

For the purpose of this reference a Division was created by the Chairman, in accordance with s12A of the Law Reform Commission Act 1967. The Division when first constituted on 21 March 1985 comprised the following members of the Commission:

Mr Keith Mason QC
Professor Colin Phegan
Miss Deidre O'Connor

The Division was reconstituted on 22 October 1986 to comprise:

Ms Helen Gamble
Mr Keith Mason QC
Professor Colin Phegan
Mr H D Sperling QC
The Honourable Mr Justice J R T Wood

Ms Mason left the Division on 5 February 1987 upon being appointed Solicitor General of New South Wales.

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Chapter 1

COMMUNITY LAW REFORM PROGRAM AND THIS REFERENCE

I. INTRODUCTION

1.1 This is the [*] report of the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter included the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act, 1967.

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Reports of 1982 and 1983.

II. THE LAW GOVERNING EMPLOYEES' LIABILITY

1.2 The present law in New South Wales governing the liability of employees for loss or damage suffered by a co-employee or other person as a result of the negligent act or omission of the employee, is described in detail in Chapter 2. In summary, a negligent employee may be liable:

* directly at common law to a co-employee or third person for loss or damage suffered by that person; or

* indirectly to his or her employer, who because of the negligence of the employee, is liable to pay compensation at common law, or by way of workers compensation, to another employee or third person.

1.3 In the past, the employer's right to recover from the employee was based on at least three different grounds. The employer could:

* obtain an indemnity from the employee in accordance with the rule in Lister v Romford Ice and Cold Storage Co Ltd[1];

* recover contribution from the negligent employee pursuant to s5 of the Law Reform (Miscellaneous Provisions) Act, 1946;

* seek an indemnity under ss64 and 64A of the Workers' Compensation Act, 1926.

1.4 So long as these means of indemnification are available to employers, the law is inconsistent with the policy that employers, rather than employees, should bear the consequences of the carelessness of other workers in the course of their employment. Employees are thus exposed to the risk of catastrophic financial loss because they generally do not have the means available to employers to spread the loss either through insurance or by increasing costs.

III. BACKGROUND TO REFERENCE

1.5 In June and July 1983, the Commission gave preliminary consideration to the subject of employees' liability as part of its research on its reference relating to accident compensation. The Commission was concerned about the effect of judicial interpretation of the Employee's Liability (Indemnification of Employer) Act 1982. This Act was passed in order to abolish the rule in Lister v Romford Ice, under which a negligent employee was liable in contract to indemnify his or her employer for the consequences of the employee's negligence.

1.6 The intended effect of the legislation had been frustrated when employers were allowed to recover contribution (which could amount to an indemnity) from negligent employees under the Law Reform (Miscellaneous Provisions) Act 1946.[2] It was held by the New South Wales Supreme Court that the 1982 Act did not prevent such claims by an employer.[3]

1.7 When moving that the Bill for the 1982 Act be read for the second time in the Legislative Council on 17 March 1982, the late Hon D P Landa QC, then Minister for Energy and subsequently Attorney General, stated that it was generally accepted that occasional lapses of care by members of the workforce were part of the employer's business risk, a concept which the Minister described as "enterprise liability". On 28 July 1983, the Commission wrote to Mr Landa, by then the Attorney General, suggesting that the interpretation of the Act was inconsistent with the concept of enterprise liability as described in the second reading speech. The Commission suggested that if the Attorney General considered it appropriate, a report on the law relating to employees' liability could be delivered either in the course of the accident compensation reference or under the Community Law Reform Program.

1.8 By letter dated 9 April 1984, the Attorney General made the following reference to the Commission, under the Community Law Reform Program.

> Pursuant to s10 of the Law Reform Commission Act, 1967, I refer the following matters to the Law Reform Commission for inquiry and report to me.

(1) (a) whether contribution or indemnity by an employee to an employer in respect of the liability of the employer, pursuant to common law, the Workers' Compensation Act 1926 or otherwise, for loss or damage suffered by a third person as a result of the act or omission of the employee, should be limited or denied.

(b) the circumstances, if any, in which an employer should be liable to indemnify an employee in respect of liability incurred by the employee for loss or damage suffered by a third party.

(2) Any related matter.

In making its Report the Commission should pay particular attention to the provisions of the Employee's Liability (Indemnification of Employer) Act 1982.

IV. SUBSEQUENT INTERPRETATION OF THE 1982 ACT AND THE REMAINDER OF THE REFERENCE

1.9 In May 1985, when a draft of this Report was at an advanced stage, the High Court delivered its decision in McGrath v Fairfield Municipal Council.[4] The High Court reversed the decision of the New South Wales Court of Appeal which had interpreted the 1982 Act in a manner that permitted the circumvention of the Act by means of a claim for contribution under s5(1)(c) of the 1946 Act (para 1.6). According to the High Court, the 1982 Act

> ... sprang from a deeply rooted and general concern with the substance of the problem as it was thought to exist under the law as expounded in Lister v Romford Ice, namely, the perceived injustice in the employer's entitlement to recoupment whether under s5(1)(c) or under the contract from an employee whose fault resulted in the employer becoming liable to the plaintiff. That perceived injustice arose from the conviction that the employer should shoulder the responsibility for damages for which be becomes liable in consequence of the "fault" of his employee occurring as an incident of the latter's employment when in most instances the employer

> insures himself against that liability. Plainly enough this was the mischief which the Act sought to remedy ...[5]

1.10 As the decision addressed the Commission's chief concern directly (para 1.7) consideration was given to whether further work on the reference could be justified. The Commission came to the conclusion that it should proceed to a report. The uncertainty caused by the language of the 1982 Act warranted a review of the Act notwithstanding the High Court decision. Furthermore, other matters covered by the reference remained to be considered, in particular,

* rights of contribution and indemnity under the Workers' Compensation Act 1926;
* liability of the employer to indemnify the employee.

1.11 As the High Court decision diminishes the importance of the earlier Supreme Court judgments interpreting the 1982 Act, this Report will deal with them only briefly and will concentrate on those matters which were not at issue in McGrath v Fairfield Municipal Council.

Footnotes

1. [1957] AC 555.
2. The Commission has since received a reference to review that legislation.
3. Fairfield Municipal Council v McGrath [1984] 2 NSWLR 247.
4. (1985) 59 ALR 18; 59 ALJR 655 (Mason, Wilson, Brennan, Deane and Dawson JJ).
5. Id at 20.

Chapter 2

THE PRESENT LAW IN NEW SOUTH WALES

I. INTRODUCTION

2.1 In the first part of this Chapter we examine the various ways in which an employee may become liable either directly or indirectly for an act or omission. Direct liability occurs where the employee is personally liable to a co-employee or other person who sustains injury or damage as a result of the employee's act or omission. Indirect liability describes those cases in which the injured person obtains compensation from the employer because the employer is responsible for the actions of the employee. The employee may then be liable to the employer for the whole or part of the amount which the employer has had to pay because of the employee's negligence. The final part of the Chapter describes the law of insurance as it relates to employees' liability.

II. HOW EMPLOYEES MAY BE LIABLE

A. Direct Liability

2.2 A person who sustains injury or damage as the result of the act or omission of an employee may sue the employee for damages. Most frequently the claim will be based on the negligence of the employee but other conduct may give rise to an action other than in negligence, eg assault and battery for an intentionally inflicted injury. The employee is treated no differently from any other defendant in corresponding circumstances nor does it matter whether the plaintiff is a

co-employee or some other person.[1] The liability of the employee is not affected by the existence of a contract of employment[2] nor by the fact that the employer may be jointly or severally liable with the employee.[3]

2.3 It is not possible for the employee to escape liability on the grounds that he or she was acting solely on behalf of the employer or obeying the employer's orders.[4] In Miller v Hawker[5] it was held that a surveyor of a Highway Board could not plead in his defence that he was obeying the orders of the Board even though he was required by statute to obey the Board's orders.[6]

2.4 If injury is sustained by a co-employee who has received workers' compensation, the negligent employee is unable to plead those payments as a defence in diminution of the co-employee's claim. This is in contrast to the situation of an employer who is sued for damages by an injured employee who has already received workers' compensation. The employer can plead those payments as a defence in such an action to the extent of the amount of those payments.[7]

2.5 In some special circumstances, a person may be liable not only for physical injury to person or property but also for loss of a financial kind caused to one person as a result of injury to another. An example of liability of this kind arises where a person injures an employee and the employer suffers loss, such as the cost of a replacement for the injured

employee. In such a case, the employer has a right to sue the negligent person to recover damages for the loss of services of the injured employee. This action for loss of services is known as the action per quod servitium amisit.[8] In England the action has been restricted to domestic or menial employment,[9] but no such limit has been imposed in Australia.[10] For our purposes, the question is whether an employer can bring such an action against an employee who negligently injures a co-employee with the result that the injured employee's services are lost to the employer. Although we know of no decision precisely on the point, in principle the action would be available against the negligent employee.

B. Indirect Liability/Indemnity and Contribution

2.6 This section examines the ways in which an employee may be liable to make good damages or other compensation which the employer has been liable to pay to some third person as a result of the act or omission of the employee in the course of employment. The liability is vicarious, that is, the employer is liable because the act of the employee is attributed to the employer and not because the employer has been guilty of any negligent or other wrongful act or omission.[11]

2.7 Prior to the introduction of the Employee's Liability (Indemnification of Employer) Act 1982, the employer could seek to recover from the negligent employee the compensation which the employer was vicariously liable to pay on any of the three

grounds described in para 1.3. Each of these grounds and their current status in the law of New South Wales will now be discussed.

1. Lister v Romford Ice and Cold Storage Co Ltd

2.8 In this case, decided in 1957,[12] the appellant was employed by the respondent employer as a lorry driver. In the course of his duties, the employee accidentally struck down his father (who was assisting him) while reversing the lorry. The father claimed damages against the employer on the basis that the employer was responsible for the negligent driving of the employee. The father's claim succeeded and the employer then sought contribution or, in the alternative, an indemnity, from the son for breach of an implied term in the contract of employment that the son would exercise reasonable care in the driving of the lorry. The trial judge awarded the employer 100 per cent contribution and the decision was upheld by the Court of Appeal. The employee's appeal to the House of Lords was dismissed on the ground that an employer who is vicariously liable for the negligent act or omission of an employee is entitled to an indemnity from the employee for breach of contractual duty of care.

2.9 The majority of their Lordships held that it was an implied term of a contract of employment that an employee would perform his or her duties with proper care and that breach of this duty by the employee founded an action for damages for breach of contract.[13] The reason for this conclusion was expressed by Viscount Simonds as follows:

> The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community.[14]

2.10 The decision has been the subject of much criticism. Lord Denning referred to it an "unfortunate"[15] and Professor Fleming states that the decision is "absolutely intolerable in the industrial context".[16] Writing shortly after the judgment was handed down, Professor Glanville Williams stated that the "consequences of this decision are likely to be far-reaching, and they hold possibilities of great hardship for employees".[17] Professor Atiyah observes that:

> It is obvious that the whole foundation of vicarious liability as it operates today would be seriously affected if employers made a regular practice of suing their servants for indemnities when they had been rendered vicariously liable.[18]

2.11 Lister v Romford Ice has been followed in Australia, albeit with reluctance. For example, Fox J, in the course of giving an employer full indemnity from an employee in Marrapodi v Smith-Roberts[19] stated:

> It seems to me that the law which I have found it my duty to apply on this aspect of the case is in an unsatisfactory state. The result at which the course of judicial decision has arrived is, I fear, at variance with the understanding and reasonable expectations of employers and employees alike. Like other employees engaged in industrial activities, Smith-Roberts expected that his employer was insured against claims by third parties, such as the claim on which the plaintiff in the present case has succeeded. The expectation of the employee and of the employer in such cases is that the insurance company will pay any damages awarded. It is not, I believe, in the contemplation of the parties to the employment contract that the insurer will, in the name of the employer, claim for its own benefit, an indemnity or even a contribution from the employee. True it is that, in the present case, it was the employee alone, who was at fault. But, in general, it is no longer the case that persons guilty of negligence expect or are expected to bear personally a resultant liability to pay damages.[20]

2.12 In Morris v Ford Motor Co Ltd[21] the English Court of Appeal refused to apply Lister v Romford Ice indirectly to permit recovery against a negligent employee by a person liable to indemnify the employer. The plaintiff Morris was employed by a firm of contract cleaners. While working for his employer at a Ford car factory, he was injured as a result of the negligence of Roberts, one of Ford's employees. The plaintiff sued Ford which brought third party proceedings against the plaintiff's employer. In those proceedings Ford claimed an indemnity under the cleaning contract between Ford and the plaintiff's employer. The latter joined Roberts as a fourth party claiming a right as indemnifiers to subrogation of Ford's rights against Roberts. The majority of the Court of Appeal held that there was no such right to subrogation based on Lister v Romford Ice.

2.13 It was the rule in Lister v Romford Ice which the Employee's Liability (Indemnification of Employer) Act 1982, was designed to abolish. The Act, which commenced operation on 29 March 1982, consists of the following two sections:

Short title

1. This Act may be cited as the "Employee's Liability (Indemnification of Employer) Act 1982".

Partial abrogation of right to indemnity

2. (1) In this section -

"damage" includes loss of life and personal injury;

"fault", in relation to an employee, means negligence, or other act or omission, of the employee (not being negligence, or other act or omission, that is serious and wilful misconduct) as a result of which his employer is, as employer and not otherwise, liable in damages in tort.

(2) This section has effect notwithstanding any other Act, any law or the provisions of any express or implied contract or agreement entered into before or after the commencement of this Act.

(3) Where -

(a) a person suffers damage as a result of the fault of an employee; and

(b) but for this Act, the employee would be liable to indemnify the employer against whom proceedings for damages may be taken as a result of the fault against any liability of the employer arising out of those proceedings,

the employee is not so liable, whether the cause of action against the employer arose before, or arises after, the commencement of this Act.

2.14 It is clear from the language of s2(3) that, at the very least, the effect of the Act is to do away with the employer's contractual right to indemnity established in Lister v Romford Ice. In the second reading speeches in both the Legislative Assembly[22] and Legislative Council, [23] the rule in Lister v Romford Ice was expressly referred to as the mischief which the Act was intended to remove. Since the Act came into force, there has been no suggestion that it has not effectively removed the contractual right to indemnity. However the word "indemnity", if construed narrowly and literally, was not wide enough to cover other means by which the effect of a contractual indemnity could be achieved.

2. Law Reform (Miscellaneous Provisions) Act 1946, s5

2.15 The second avenue open to an employer who wished to recover from an employee compensation paid to another person for injury or damage caused by the employee's act or omission was found in s5 of the Law Reform (Miscellaneous Provisions) Act 1946, which provides:

> 5 (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -
>
> (a) ...
>
> (b) ...
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

> (2) In any proceedings for contribution under this section 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; and the court shall have power 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.

2.16 The section has been the subject of much criticism both because its wording has presented difficulties of interpretation[24] and on the ground that its restriction to tortfeasors (that is persons liable in tort) arbitrarily excludes those liable in any other way, for example in contract.[25] These criticisms have generated a separate reference to this Commission under which the Commission is reviewing the law governing contribution between persons liable for the same damage in general and the operation of this section in particular. For the purposes of this Report it is necessary only to describe the effect of the section, in its present form, on contribution and indemnity between employer and employee.

2.17 Where an employee has injured[26] another person in the course of employment and the employer is vicariously liable, the employer and employee are described in such circumstances as "joint tortfeasors". They may also be "several concurrent tortfeasors"[27] where their own independent acts have combined to cause the injury.[28] Whether as joint or several concurrent tortfeasors, employer and employee are tortfeasors for the

purposes of s5 of the 1946 Act, and under s5(2) contribution between the tortfeasors will be determined according to what is "just and equitable" having regard to the extent of each tortfeasor's responsibility for the injury.

2.18 Where the employer is independently responsible for the injury, there is no right against the employee for contribution to the extent of that responsiblity.[29] In other words, the employer's right to contribution only exists, if at all, with regard to the vicarious liability of the employer for acts of the employee committed in the course of employment. What is "just and equitable" under s5(2) will therefore be limited by how much of the injury can be reasonably attributed to the employer's personal responsibility and how much to the personal responsibility of the employee for which the employer is vicariously liable.

2.19 To the extent that the employer was vicariously liable for the acts of the employee, prior to the 1982 Act, there was authority of the effect that the employer was entitled to contribution of 100 per cent in a claim against the employee.[30] In Northern Assurance Co Ltd v Coal Mines Insurance Pty Ltd[31] Hope J, while acknowledging this line of authority, expressed reservations about it "particularly where the relevant liability is one against which the employer is by law required to be insured".[32] Such reservations are consistent with the dissatisfaction with the rule in Lister v Romford Ice which prompted the 1982 Act. But for some time

after it came into force, the 1982 Act was held to have no effect on the employer's right to contribution under the 1946 Act.[33]

2.20 In the interpretation of the 1982 Act, most judges in the Supreme Court focused attention on the word "indemnify" in s2(3)(b) of the Act. The absence of any reference to "contribution", even if such contribution could amount to 100 per cent, was said to indicate that the Act was intended only to deprive the employer of the contractual right to indemnity permitted by Lister v Romford Ice but to leave untouched the employer's right to contribution under the 1946 Act.[34] The view was taken that if the 1982 Act had been intended to affect contribution rights under the 1946 Act, that would have been done expressly.[35] This view was reinforced by reference to the second reading speech of the then Attorney General, Mr Frank Walker QC when introducing the Bill into the Legislative Assembly:

> The proposal will abolish the rule of law that an employer has a contractual right to be indemnified by an employee for any damages he has had to pay as a result of the negligence of the employee.[36]

2.21 Although this view prevailed in the short term, misgivings were expressed soon after the 1982 Act came into force. Master Sharpe in Waters v Dedini[37] held that the 1982 Act did deprive the employer of the right to contribution from the employee under the 1946 Act. In a later case,[38] Master Allen, was prepared to entertain arguments restricting the 1982

Act to the employer's contractual right to indemnity, but conceded that if such arguments prevailed, "the Act would be deprived almost wholly of practical significance".[39] Mahoney JA in his dissent in Sinclair v Graham[40] was of the same opinion:

> I find it difficult to see why the Legislature should be seen as intending to bar the employer's recovery on the contractual basis but not on the tortfeasor basis. The 1982 Act was, I think, clearly directed to the protection of the employee. To remove only the employee's liability to the employer on the contractual basis would leave him liable to the employer on the tortfeasor basis. To do this would appear to give the employee no significant protection.[41]

2.22 In McGrath v The Council of the Municipality of Fairfield[42] the High Court of Australia adopted the minority view and reversed the decision of the New South Wales Court of Appeal. In the passage quoted earlier (para 1.9) the High Court referred to the "perceived injustice" in the employer's right to recover an indemnity or its equivalent from the employee whether under contract or under s5(1)(c) of the 1946 Act. Their Honours therefore read the 1982 Act as having abolished both means of indemnification. They distinguished the employer's personal responsibility,[43] from liability arising simply by reason of the relationship of employer and employee, to which the 1982 Act was directed:

> ... the effect of the Act is to transfer the whole of the ultimate burden of a judgment to the employer: he was never entitled to claim any contribution from his employee under s5(1)(c) of the NSW Law Reform Act (ie the 1946 Act) in respect of his (the employer's) personal responsibility for the damage and now, by force of the Act, he can claim nothing in respect of the employee's negligence for which he, the

> employer, is vicariously liable. To the extent to which the Act deprives the employer of a right to indemnity or contribution from the employee, it operates as a partial repeal of s5(1)(c) of the NSW Law Reform Act.[44]

2.23 As a result of the High Court decision, it is now clearly established that the 1982 Act effectively deprives the employer of the right to indemnity against the employee whether based on contract or a claim for contribution under the 1946 Act and it is highly unlikely that the right to indemnity could survive on any other ground not explicitly addressed by the High Court. For example, in view of the reasoning of the High Court in McGrath's case, there is little, if any, room left for an argument that the employer could still have a right to indemnity based on an action in negligence for breach of a duty of care by the employee. Even before the 1982 Act, the existence of such a right of action was doubtful. In Lister v Romford Ice counsel for the employer sought to rely on it as an alternative ground but the House of Lords declined to address the issue having decided that the employer was entitled to succeed on the contract ground.[45] Only Viscount Simonds made oblique reference to its existence "for centuries".[46]

2.24 The 1982 Act has therefore been relieved of the narrow construction which gave rise to this reference (paras 1.5-1.18). As a result of the High Court decision in McGrath's case the Commission was obliged to carefully reconsider the future of the reference. Our decision to proceed with this Report was prompted largely by two matters within the terms of

reference not addressed, either expressly or by implication, in the 1982 Act and therefore unaffected by McGrath's case. The first of them involves another example of indirect liability, as that term is used in this Report, and is a product of the Workers' Compensation Act, 1926.

3. Workers' Compensation Act 1926, s64A

2.25 Where an employer becomes liable to pay compensation to an employee under the Workers' Compensation Act, by reason of an injury resulting from the negligence of another employee, a statutory entitlement to recover that compensation from the negligent employee may exist. Such a right depends on ss64 and 64A of the Act. Section 64(1) provides:

> (1) Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof -
>
> (a) the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to retain both damages and compensation.
>
> If the worker recovers firstly compensation and secondly such damages he shall be liable to repay to his employer out of such damages the amount of compensation which the employer has paid in respect of the worker's injury under this Act, and the worker shall not be entitled to any further compensation.
>
> If the worker firstly recovers such damages he shall not be entitled to recover compensation under this Act;
>
> (b) if the worker has recovered compensation under this Act, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid;

(c) where any payment is made under the indemnity and, at the time of the payment, the worker has not obtained judgment for damages against the person paying under the indemnity, the payment shall, to the extent of its amount, be a defence to proceedings by the worker against that person for damages;

2.26 In Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd,[47] the High Court of Australia held that an employer's right to an indemnity under s64(1)(b) was available only to an employer whose sole liability to the injured worker was the statutory liability to pay workers' compensation. Section 64(1)(b) did not allow an employer whose own negligence had contributed to the injury, to recover workers' compensation payments.[48] In its interpretation of s64(1)(b) the High Court had to consider the opening paragraph of the subsection which applies to both paragraphs (1)(a) and (1)(b), and had to choose between different constructions of the phrase "some person other than the employer". The question was whether that phrase was intended to be read as referring only to cases in which the "other person" was liable to the exclusion of the employer or also to cases in which that person was liable as well as the employer. The High Court preferred the former construction, following the judgment of Buckley LJ in the English Court of Appeal decision in Cory & Son Ltd v Franch, Fenwick & Co Ltd.[49]

2.27 The decision in Murray-More's case was considered by the New South Wales Court of Appeal in D'Angolo v Rio Pioneer Gravel Co Pty Ltd.[50] Although not necessary to the decision

in that case,[51] Reynolds JA referred to a problem created by the "preferred interpretation" of s64 when considered in conjuction with s63. Under s63 payment made by way of compensation under the Act is, to the amount of such payment, a defence in an action against the employer for damages independently of the Act. But, according to the "preferred interpretation", the obligation on the employee to repay under s64(1)(a) does not apply if both the employer and the third party are liable to pay damages at common law. It followed that an employee, having received workers' compensation in such a case, could sue the third party for the full amount of the damages and retain the workers' compensation. This result, according to Reynolds JA, was "destructive of one aspect of the legislative scheme" and demanded "the urgent intervention of the legislature".[52]

2.28 Legislative intervention was forthcoming in s64A of the Workers' Compensation Act 1926 which commenced operation on 29 August 1980. The section provides

> (2) Where, in respect of an injury to which this section applies, a worker is entitled to recover damages independently of this Act both from his employer and from another person and
>
> (a) he recovers damages against the other person but does not seek to recover damages from, or does not proceed to judgment against, the employer; or
>
> (b) judgment in an action by the worker for damages is given against both the employer and a person other than the employer but the worker refuses to accept satisfaction of the judgment against the employer,
>
> s64 applies to the case as if the worker had not been entitled to recover the damages from the employer, except that -

(c) where the compensation paid by the employer exceeds the amount of the contribution that could be recovered from him as a concurrent tortfeasor - the indemnity referred to in s64(1)(b) is for the amount of the excess only;

(d) when the compensation paid by the employer is equal to the amount of that contribution - s64(1)(b) does not apply; and

(e) where the compensation paid by the employer is less than the amount of the contribution that, but for this paragraph, could be recovered from him as a concurrent tortfeasor, s64(1)(b) does not apply and the employer has, to the extent of the amount of the compensation so paid, a defence to an action for such a contribution.

2.29 The section does overcome the problem identified by Reynolds JA in D'Angola v Rio Pioneer Gravel Co Pty Ltd, but, in doing so, it extends one avenue of recovery by an employer against a negligent employee. The right of recovery conferred by s64(1)(b), as extended by s64A, is available against any person, other than the employer, who is legally liable to the injured employee. Such other person may be a co-employee of the injured party. Prior to the enactment of s64A, no such right would have existed against the employee because s64(1)(b) had been interpreted as applying only where the employer was not liable for damages either personally or vicariously.[53] But with the extension introduced by s64A, no such limitation applies and the employer would now seem to have a right of recovery against the negligent co-employee.

2.30 The operation of s64A in this regard would appear to be unaffected by the 1982 Act. In Waters v Dedini[54] an application was made to strike out a cross-claim in which an indemnity was claimed from an allegedly negligent employee in respect of workers' compensation payments made to a co-employee. However, the question whether the right to such an indemnity was affected by the 1982 Act was not addressed directly. Because no arguments were advanced as to why the 1982 Act did not relieve an employee of liability based on ss64 and 64A of the Workers' Compensation Act, the cross-claim was struck out.[55] The argument which could have been advanced, and we suggest successfully, is found in the language of the 1982 Act which refers only to proceedings for damages against the employer for which the employee may be liable to provide an indemnity. The expression "proceedings for damages" does not include statutory compensation paid pursuant to the Workers' Compensation Act and therefore the terms of the 1982 Act are not wide enough to deny the employer a right to be indemnified for workers' compensation payments.

2.31 Two situations have now been identified in which the ultimate burden of workers' compensation may fall on the co-employee whose negligence caused the injury:

* where the negligent co-employee cannot plead workers' compensation payments made by the employer by way of defence in an action by the injured employee against the co-employee for damages (para 2.4). The injured employee is required to repay workers' compensation to the employer if such damages are recovered from the co-employee (Workers' Compensation Act 1926, s64(1)(a).

* the situation resulting from the combined effect of ss64 and 64A of the Workers' Compensation Act which exposes the negligent co-employee to an action under s64(1)(b) for recovery of workers' compensation payments made by the employer (para 2.29).

While both situations are mutually consistent, the question to be considered is whether either can be justified when measured against the broader purposes of workers' compensation legislation and the general policy of shifting the burden of course of employment accidents from employee to employer (para 1.4).

III. THE EMPLOYEE'S RIGHTS AGAINST THE EMPLOYER

2.32 The second matter within the terms of reference which still requires attention (para 2.24) is the question whether the employee should have a right of indemnity against the employer where the employee is solely responsible for the injury. As the law now stands, in the absence of an express term to the contrary in the contract of employment, the employee has no right to an indemnity from the employer for liability resulting from the acts or omissions of the employee in the course of employment for which the employer would be vicariously liable. Even if the employer has undertaken to indemnify the employee, such an undertaking may not be enforceable against the employer if the employee knew or ought to have known of the tortious nature of the conduct.[56] Generally, the employee is not entitled to the benefit of any insurance taken out by the employer in the absence of express words in the policy to that effect.[57] This rule applies to compulsory insurance such as that required to be taken out by

an employer under workers' compensation legislation.[58] If however, the injury is the result of a motor vehicle accident caused by the employee's negligent driving of a vehicle owned by the employer, the employee is covered by compulsory third party insurance.[59]

2.33 Prior to the 1982 Act, a right to contribution against the employer was not available to the extent of the employee's own responsibility for the injury. Because of the employer's right to indemnity by virtue of the rule in Lister v Romford Ice,[60] the employee against whom such a right to indemnity existed had no right to contribution if sued by the injured party. Under s5(1)(c) of the 1946 Act, a person was not entitled to recover contribution "from any other person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought". Although this part of s5(1)(c) has been rendered irrelevant for present purposes by the 1982 Act, which has abolished the employer's right to indemnity, this change in the law has not created a right to contribution or indemnity against the employer who is vicariously liable.[61]

2.34 The changes brought about by the 1982 Act have also left intact the rules applied to contribution between employer and employee where both are independently responsible for the injury.[62] If, in such circumstances, the employee is sued by the injured party, the employee is entitled to recover from the

employer, by way of contribution, that amount considered just and equitable having regard to the extent of the employer's independent responsibility for the injury.[63]

IV. INSURANCE

2.35 In most circumstances in which a person sustains injury or damage as the result of the negligent act or omission of an employee, questions of insurance arise. Where a co-employee is the injured person, the employer's liability, both for workers' compensation and damages at common law, is covered by insurance which the employer is under a statutory obligation to obtain in accordance with s18(1) of the Workers' Compensation Act 1926.[64] If the injury or damage is sustained in a motor vehicle accident, in which the employee was driving the employer's vehicle, both the employer as owner of the vehicle and the employee as driver are covered by compulsory third party motor vehicle insurance.[65] In some cases, an employee may have voluntarily insured against liability. It is possible, therefore, that in a given case liability for loss or damage may be covered by more than one insurer. Such a possibility raises questions of contribution between insurers, a matter to which we return below (paras 2.42-2.44). But before taking up that matter, it is necessary to discuss two other aspects of insurance namely subrogation and assignment.

A. Subrogation

2.36 Subrogation has been defined as:

> the right of an insurer to enforce for his own benefit any right or remedies which his insured possesses against third parties.[66]

The right accrues only when payment has been made under the policy of insurance (although this requirement may be varied by an express contractual provision between the insurer and the insured) and is limited to the amount paid under the policy.[67]

2.37 Where an employer has been held vicariously liable for the act or omission of an employee, the employer's insurer may, having paid the whole or part of the claim against the employer in satisfaction of obligations under the policy of insurance with the employer, sue the employee in the employer's name for the amount paid under the policy to the extent of the employer's right of indemnity or contribution against the employee. This is what happened in Lister v Romford Ice. In that case, it appears that the proceedings were commenced without the approval of the employer.[68] Such approval is not required by law. In fact the employer cannot refuse the use of his or her name in such an action.[69] Thus the ultimate burden of paying damages may be at the whim of the insurer, at least in those limited situations where the employer still has a right of indemnity against the employee.

2.38 To the extent that the Employee's Liability (Indemnification of Employer) Act 1928, effectively prevents an action by the employer for indemnity against a negligent employee the prospect of subrogation becomes irrelevant. However, in other circumstances, for example where a right to indemnity may arise under s64A of the Workers' Compensation Act (paras 2.25-2.31) the employer's rights would still be subrogated to those of the insurer.

2.39 The Australian Law Reform Commission gave consideration to the doctrine of subrogation in its report on Insurance Contracts, and concluded, with respect to an insurer's right against employees, that "the exercise, in this context, of an insurer's rights of subrogation is inconsistent with sound practice in the field of industrial relations".[70] The Commission recommended that the question should be settled by national legislation.[71] The Insurance Contracts Act 1984 (Cth) is based on the recommendations of the Commission. Section 66 of the Act provides as follows:

> Where -
>
> (a) the rights of an insured under a contract of general insurance in respect of a loss are exercisable against a person who is his employee; and
>
> (b) the conduct of the employee that gave rise to the loss occurred in the course of or arose out of the employment and was not serious or wilful misconduct,
>
> the insurer does not have the right to be subrogated to the rights of the insured against the employee.

The Insurance Contracts Act 1984 (Cth) came into operation on 1 January 1986. Thus, an insurer will no longer be entitled to be subrogated to the right of the employer against the employee, even in those cases where such a right still existed at common law.

B. Assignment

2.40 Apart from the doctrine of subrogation, an insured may assign his or her rights against a third party wrongdoer to the insurer by a legal assignment.

> While, where the insurer exercises his right of subrogation, he cannot sue the third party in his own name, but only in the name of the assured, in the case of a legal assignment, where he has indemnified the assured under the policy, he may sue the third party in his own name to enforce the right of action.[72]

Although there appears to be no case precisely in point which applies the principle of legal assignment to an employer-employee relationship, it may be that an insured employer can assign rights against a negligent employee to the insurer. The insurer may then bring proceedings against the negligent employee with the result that the burden of financing the damages paid to the plaintiff by the insurer ultimately falls on the employee, as with subrogation.

2.41 In England, it has been held that an insured may assign his or her rights against a third party wrongdoer to the insurer relying on s126 of the Law of Property Act 1925 (Eng).[73] The equivalent provision in New South Wales is s12 of the Conveyancing Act 1919, which permits legal assignment of debts and choses in action.[74] Policies of insurance are "legal things [choses]",[75] and assignment is possible because

> the enforcement of a bare right to sue is not involved, but rather the prosecution of a cause of action, legitimately supported by the interest of the underwriter or insurer in recouping himself to the extent of the amount of the loss incurred by way of payment under the policy.[76]

It would therefore seem that, provided the requirements of s12 of the Conveyancing Act are satisfied, an insured employer may assign his or her rights against an employee to the insurer. As with subrogation, the employer can only assign those rights

which the employer could enforce against the employee. For present purposes, this would be restricted to the right of indemnity under s64A of the Workers' Compensation Act.

C. Contribution between Insurers

2.42 The doctrine of contribution between insurers has evolved to meet the situation where an insured is covered by two (or more) insurers against the risk which gives rise to the claim. In such a case, for example where the insured has both workers' compensation and motor vehicle policies, the insured may recover from either or both insurers provided that the insured recovers no more than the actual loss. Both insurers will be liable for the loss and entitled to contribution from each other on equitable principles.[77] The Law Reform (Miscellaneous Provisions) Act 1946 has no application to contribution between insurers since it applies only to "tortfeasors".[78]

2.43 The equitable principles will apply where an employee is injured in the course of employment as a result of the negligent use of a vehicle owned by the employer and insured under the Motor Vehicles (Third Party Insurance) Act 1942. In such a case the employee may claim from the employer both workers' compensation and common law damages. Where the employer is a self-insurer under the Workers' Compensation Act 1926,[79] the employer is entitled to recover the full amount of common law liability from the motor vehicle third party insurer under the Motor Vehicles Third Party Insurance Act,

1942[80] (now always the Government Insurance Office which is the named defendant under s14).[81] Where the employer is not a self-insurer both the workers' compensation insurer and the motor vehicle third party insurer must make contribution.[82] Workers' Compensation payments, which are usually made in advance, are regarded as part satisfaction of common law liability for the purpose of determining contribution between insurers.[83]

2.44 Similar principles apply where the employee is injured in an accident which casts liability on both the employer and a stranger, who as owner or driver of a motor vehicle is covered by third party motor vehicle insurance. The employer will be a self-insurer or covered by workers' compensation insurance and, if the employer's vehicle is involved, the Government Insurance Office, as the motor vehicle third party insurer, will be liable to indemnify the self insured employer or to contribute if a workers' compensation insurer is involved (para 2.43). As a consequence of subrogation, the workers' compensation insurer would in turn be entitled to rely on s5 of the Law Reform (Miscellaneous Provisions) Act 1946, in order to recover contribution from the Government Insurance Office as third party insurer of the stranger's vehicle.

Footnotes

1. See eg Lees v Dunkerley Brothers [1911] AC 5.
2. Sands v Child (1694) 3 Lev 351; 83 ER 725.
3. Para 2.6.
4. Perkins v Smith (1752) Sayer 40; 96 ER 796. See also Cullen v Thomson (1862) 6 LT 870.

5. (1875) LR 10 Ex 92.

6. Atiyah refers to this case as an "extreme illustration" of the principle that "obedience to superior orders is not in itself a defence to an action in tort": P S Atiyah, Vicarious Liability in the Law of Torts (1967) at 398.

7. Workers' Compensation Act 1926 s63(5).

8. J G Fleming The Law of Torts (6th ed 1983) at 65.

9. Inland Revenue Commissioners v Hambrook [1956] 2 QB 641.

10. Commissioner for Railways (NSW) v Scott (1959) 102 CLR 392.

11. See H H Glass, M H McHugh and F M Douglas The Liability of Employers in Damages for Personal Injury (2nd ed 1979) Ch 6; also Atiyah, note 6 above, generally, and Fleming note 8 above Ch 18.

12. [1957] AC 555.

13. Id at 573 per Viscount Simonds; at 580 per Lord Morton; at 592 per Lord Tucker; at 598 per Lord Somerwell.

14. Id at 579.

15. Morris v Ford Motor Co Ltd [1973] 1 QB 792 at 801.

16. Note 8 at 239.

17. G Williams, "Vicarious Liability and the Masters Indemnity" (1957) 20 Modern Law Review 220 at 220.

18. Atiyah note 6 above at 239.

19. 6 June 1968, Supreme Court of the Australian Capital Territory, Fox J.

20. Quoted in editorial note, "An Anomalous Indemnity" (1970) 44 Australian Law Journal 3 at 4.

21. Note 15 above.

22. New South Wales Parliamentary Debates, Legislative Assembly, 10 February 1982 at 1704-1704 (Hon F J Walker QC Attorney General).

23. Id Legislative Council 17 March 1982 at 2691 (Hon D P Landa QC).

24. It has been described by the High Court as "a piece of law reform which seems itself to call somewhat urgently for reform": Bitumen and Oil Refineries (Australia) Ltd v

Commissioner for Government Transport (1955) 92 CLR 200 at 211 per Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ.

25. Fleming note 8 above at 234.

26. The word "damage" in s5 includes personal injury.

27. This terminology is adopted and explained by Professor Glanville Williams in Joint Torts and Contributory Negligence (1951) at 6-9.

28. For example, where the employer supplies a defective vehicle to an employee which combined with the employee's negligent driving causes a motor vehicle accident.

29. McGrath v Fairfield Municipal Council (1985) 59 ALR 18 at 23 per Mason, Wilson, Brennan, Deane and Dawson JJ.

30. Semtex Ltd v Gladstone [1954] 2 All ER 206; Harvey v R G O'Dell Ltd [1958] 2QB 78.

31. [1970] 2NSWR 223.

32. Id at 228.

33. Civic v Glastonbury Steel Fabrications Pty Ltd (Unreported) 24 February 1983, Supreme Court of New South Wales, Yeldham J; Fairfield Municipal Council v McGrath [1984] 2 NSWLR 247; Sinclair v Graham [1984] 2 NSWLR 253.

34. Ibid.

35. [1984] 2 NSWLR 247 at 250-251 per Glass JA.

36. Quoted ibid.

37. (Unreported) 17 September 1982 Supreme Court of New South Wales.

38. Petrovic v Dowler (Unreported) 24 March 1983 Supreme Court of New South Wales.

39. Id transcript of judgment at 5.

40. Note 33 above.

41. [1984] 2 NSWLR 253 at 256.

42. (1985) 59 ALR 18; 59 ALJR 655.

43. Discussed in para 2.18 above.

44. (1985) 59 ALR 18 at 23.

45. [1957] AC 555 at 585-586, where Lord Morton referred to it as an "interesting point which may some day fall for decision by this House".

46. Id at 579.

47. (1975) 132 CLR 336.

48. Some confusion arises from the fact that two of the judges in Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd (1975) 132 CLR 336 stated that s64(1)(b) precluded an employer whose own negligence contributed to the injury from seeking an indemnity: Barwick CJ, at 341; Gibbs J at 351. Such a statement might suggest that an employer who is only vicariously liable is able to seek an indemnity. However, the prevailing view is that an employer who is liable in any sense apart from the statutory liability to pay workers' compensation, cannot seek an indemnity. See Cory & Son Ltd v France, Fenwick & Co Ltd [1911] 1 KB 114 at 136 per Kennedy LJ; Foster v A T Brime & Sons Pty Ltd [1972] WAR 157.

49. [1911] 1 KB 114 at 125.

50. [1979] 1 NSWLR 495.

51. In that case the injured employee sought to enforce judgment against a person other than the employer. Since judgment against the employer had already been satisfied in full, the employee was held to have exhausted his rights.

52. [1979] 1 NSWLR 495 at 499.

53. See note 48 above.

54. Note 37 above.

55. Id transcript of judgment at 3.

56. Shackell v Rosier (1836) 2 Bing NC 634; 132 ER 245; W H Smith & Son v Clinton & Harris (1908) 25 TLR 34.

57. Lister v Romford Ice [1957] AC 555.

58. Workers' Compensation Act 1926 s18 See para 2.35 below.

59. Motor Vehicles (Third Party Insurance) Act 1942 s10.

60. Paras 2.8-2.9 above.

61. McGrath v Fairfield Municipal Council note 41 above at 23-24.

62. Para 2.18 above.

63. Law Reform, (Miscellaneous Provisions) Act 1946 s5(2) reproduced in para 2.17 above.

64. The employer may be a "self-insurer": Workers' Compensation Act 1926 s18(1A).

65. Motor Vehicles (Third Party Insurance) Act 1942. Since 1 July 1984 actions arising out of injuries sustained in motor vehicle accidents are brought against the Government Insurance Office as insurer: Motor Vehicles (Third Party Insurance) Act 1942 s14 inserted by Motor Vehicles (Third Party Insurance) Amendment Act 1984.

66. M G Britts Third Party Insurance in Australia (1973) at 144.

67. R Colinvaux The Law of Insurance (4th ed 1979) at 136-139.

68. [1957] AC 555 at 600 per Lord Somerwell.

69. See Colinvaux note 67 above at 140.

70. Australian Law Reform Commission Insurance Contracts (Report No 20 1982) para 306.

71. Ibid.

72. Colinvaux note 67 above at 140.

73. Compania Colombiana de Sequros v Pacific Steam Navigation [1965] 1 QB 101; see also King v Victoria Insurance Co Ltd [1896] AC 250.

74. This section provides:

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the

same, or he may, if he thinks fit, pay the same into court under and in conformity with the provisions of the Acts for the relief of trustees.

75. Colinvaux note 67 above at 166.

76. J G Starke, Assignments of Choses in Action in Australia (1972) para 87. The author states that this is a "narrow exception" to the principle that a bare right of litigation is not assignable.

77. Albion Insurance Co Ltd v Government Insurance Office of New South Wales (1969) 121 CLR 342.

78. Commercial and General Insurance Co Ltd v Government Insurance Office of New South Wales (1973) 129 CLR 374 at 380 per Menzies, Walsh and Mason JJ.

79. Section 18(1A).

80. Australian Iron & Steel Pty Ltd v Government Insurance Office of New South Wales [1977] 2 NSWLR 446.

81. See note 65 above.

82. Commercial and General Insurance Co Ltd v Government Insurance Office of New South Wales note 78 above.

83. Australian Iron & Steel Pty Ltd v Government Insurance Office of New South Wales [1978] 2 NSWLR 446.

Chapter 3

REFORMS OUTSIDE NEW SOUTH WALES

I. INTRODUCTION

3.1 The unsatisfactory state of the law relating to employees' liability, particularly as a result of the decision in Lister v Romford Ice,[1] has led to reforms in England and other Australian jurisdictions. In New South Wales, the Employees' Liability (Indemnification of Employer) Act 1982, as interpreted by the High Court,[2] has abolished the rule in Lister v Romford Ice but the extent of reforms in other jurisdictions is still relevant to the question whether change should be taken beyond that effected by the 1982 Act. To provide a broader perspective, there is also brief discussion of the law governing employees' liability in a number of European countries.

II. TASMANIA

3.2 In Tasmania, an employer is required by statute to take out and maintain insurance which, amongst other things indemnifies each employee in respect of liability incurred by the employee for:

> ... personal injury by accident, or disease, suffered by any worker that arises out of, and in the course of, the employment of that worker with him. (Workers' Compensation Act 1927 (Tas) s34(1)(b)).

The effect of this provision is that where an employee negligently injures another employee in an accident which arises in the course of employment the negligent employee will

be indemnified by the insurance which the employer is required to effect. The provision was inserted in the Workers' Compensation Act 1927 (Tas) in 1973.[3]

3.3 The main shortcoming of this statutory provision is that the negligent employee is assured of protection only where personal injury is caused to another worker. Where the injured person is a stranger, there is no statutory requirement that the employee be indemnified in respect of the liability. A further problem is that although there is not specific provision in the Act for a judgment against a negligent employee in favour of the insurer who has indemnified the employee, a trial judge has been known to make an order to this effect.[4] If this was a regular practice, it would effectively destroy any protection that a negligent employee would appear to have under the legislation.

III. SOUTH AUSTRALIA

3.4 In 1972, the South Australian Parliament amended the Wrongs Act 1936 with the introduction of a section which provides as follows:

> 27c (1) Notwithstanding any Act or law, or the provisions express or implied of any contract or agreement, where an employee commits a tort for which his employer is vicariously liable -
>
> (a) the employee shall not be liable to indemnify the employer in respect of the vicarious liability incurred by the employer; and
>
> (b) unless the employer is otherwise entitled to indemnity in respect of his liability, the employer shall be liable to indemnify the employee in respect of liability incurred by the employee in respect of the tort.

> (2) Where an employer is proceeded against for the tort of his employee, and the employee is entitled pursuant to a policy of insurance or contract of indemnity to be indemnified in respect of liability that he may incur in respect of that tort, the employer shall be subrogated to the rights of the employee under that policy or contract in respect of the liability incurred by him (the employer), arising from the commission of the tort.
>
> (3) Where a person commits serious and wilful misconduct in the course of his employment and that misconduct constitutes a tort, the provisions of this section shall not apply in respect of that tort.[5]

3.5 In the course of the second reading speech, the Attorney General, the Hon L J King, outlined the reason for introducing the section.

> Its purpose is to abrogate a rule under which an employer who is vicariously liable for the tort of his employee can claim indemnity from the employee in respect of that liability. This indemnity may be claimed on the basis of an express or implied term in the contract of employment or pursuant to the provisions of the Wrongs Act for contribution between tortfeasors. A prudent employer can always protect himself by insurance where there is any real likelihood of liability arising by reason of the acts or omissions of those engaged in his employment. There can be no justification for continuing this right of indemnity which is of such dubious value to an employer that it is rarely enforced but which may in isolated cases cause considerable hardship to an employee.[6]

3.6 It appears that s27c has not been the subject of judicial interpretation in any reported judgment of the Supreme Court of South Australia. This may be the direct result of the section's having effectively deterred employers from seeking recovery from employees. Despite this lack of judicial

interpretation there is a significant difference between it and the Employee's Liability (Indemnification of Employer) Act 1982, which is obvious from its terms.

3.7 Unlike the New South Wales Act, the South Australian legislation provides that the employer is liable to indemify the employee in respect of liability incurred by the employee. This liability to indemnify, which is the reverse of Lister v Romford Ice, does not arise if the employee is otherwise entitled to indemnity. This proviso means that where the employee has effected insurance in respect of the liability, the employee must seek indemnity from the insurer and not the employer. Moreover, where proceedings are brought against the employer by the injured person, and the employee is entitled to be indemnified by a contract of insurance, the employer is to be subrogated to the rights of the employee under the policy of insurance.[7] This right is not affected by the Insurance Contracts Act 1984 (Cth) (para 2.39), which applies only to insurers who attempt to be subrogated to the rights of the employer against the employee.

IV. NORTHERN TERRITORY

3.8 In 1980, the Northern Territory Law Review Committee published a report concerning the rule in Lister v Romford Ice.[8] Although the report does not discuss the various ways in which an employee may be liable to an employer for the consequences of the employee's tortious act or omission, the final recommendation is expressed in broad terms:

> ... in the whole of the circumstances, a workman should not be in the position whereby damages paid by his employer can be recovered against him.[9]

3.9 The Law Reform (Miscellaneous Provisions) Act 1984 (NT), implementing the recommendation of the Committee, was passed by Parliament on 7 June 1984 and received Royal Assent on 12 July 1984. The Act is in terms almost identical to s27c of the Wrongs Act 1936 (SA). Apart from differences of terminology, the Northern Territory legislation also contains a transitional provision to the effect that the Act applies:

> to all torts whether committed before or after the commencement of this Act but nothing in this Act requires an employer to repay an amount of money to his employee or former employee which was paid before, in relation to a tort committed before, the commencement of this Act.[10]

3.10 During the second reading speech, the Attorney-General, the Hon J M Robertson did not specifically mention the rule in Lister v Romford Ice but referred generally to the liability of an employee to reimburse the employer.

> The need for this present amendment arises because there are some doubts about an employee's position when he commits a wrongful act. The common law seems to provide that, if the employer required it, the employee would have to reimburse him - or, more likely, the employer's insurer - for any damages paid to the victim. This is clearly an inequitable situation and has been criticised by judges and other legal authorities. Very few employees could afford to pay back large damages sums and, in fact, most employers would have taken out insurance in the reasonable belief that it would cover their employees' tortious acts.[11]

The Act received the full support of the Opposition, on the basis that it was aimed at removing an anomaly in the law, rather than providing any sudden and extreme disruption to the law.

V. ENGLAND

3.11 Following the decision in Lister v Romford Ice, the Minister of Labour appointed an inter-departmental committee to study the implications of the case.[12] The committee did not recommend legislative intervention to reverse the decision but stated that it was preferable for insurers to agree not to exploit their legal rights against negligent employees. Members of the British Insurance Association subsequently entered into a "gentleman's agreement" in the following terms:

> Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of the death of or injury to a fellow-employee unless the weight of evidence clearly indicates (i) collusion or (ii) wilful misconduct on the part of the employee against whom a claim is made.[13]

3.12 The agreement only applies to insurers. Employers are therefore still free to bring proceedings against employees for breach of an implied term in the contract of employment to exercise reasonable care. Secondly, the agreement only prevents legal proceedings being commenced by the insurer when death or injury occurs to a fellow-employee of the negligent employee. Consequently, where an employee injures a person who is not a fellow-employee, the insurer is not prevented by the agreement from bringing proceedings against the employee. One

commentator has doubted "whether on general grounds, this rather peculiar method of law reform should be encouraged".[14] A more direct and effective way of dealing with subrogation is that contemplated in the Insurance Contracts Act 1984 (Cth) (para 2.39).

VI. OTHER EUROPEAN COUNTRIES

3.13 In the Federal Republic of Germany, the courts have limited the liability of employees by the development of what is termed "employee's right of immunity". The rule is flexible and may operate in a variety of circumstances.

> A court may hold that the employer, after having indemnified the victim, will be barred from recovering from the employee or will be awarded only a part of his costs. The employee after having paid the third party may claim full or partial indemnity from his employer. The employee may also ask the employer to relieve him wholly or in part from any claims that may be raised against him by the injured person.[15]

The rule does not apply if the conduct of the employee was grossly negligent, if the injured person was a co-employee, or if the employee's liability was covered by insurance.

3.14 Austria has codified what is essentially the West German court practice in the Law on the Liability of Employees of 23 April 1965. Where the injured person brings an action for damages against the employee who has committed what is termed an "excusable mistake", the employee may claim complete reimbursement from the employer of any damages the employee has had to pay. Where the action is brought against the employer no reimbursement from the employee may be claimed in cases of "excusable mistake".[16]

3.15 Under both Norwegian and Swedish legislation, liability of the employee has become the exception rather than the rule. Only in cases of intentional acts or gross negligence will the employee be liable. The employee may rely on the rule in an action by either the employer or the injured party.[17]

Footnotes

1. [1957] AC 555.

2. In McGrath v Fairfield Municipal Council (1985) 59 ALR 18; 59 ALJR 655.

3. Workers' Compensation (Alternative Remedies) Act 1973 (Tas).

4. CCH Australian Workers' Compensation Guide para 53-440.

5. Statutes Amendment (Miscellaneous Provisions) Act 1972, s17.

6. South Australian Parliamentary Debates, 8 March 1972 at 3705.

7. Section 27c(1)(b).

8. Northern Territory Law Review Committee, Report Relating to Abolition of the Rule in Lister v Romford Ice and Cold Storage Co Ltd (4th report 1980).

9. Id at 7.

10. Law Reform (Miscellaneous Provisions) Amendment Act 1984 (NT) s3.

11. Northern Territory Parliamentary Debates, 29 February 1984 at 90.

12. G Gardiner "Lister v Romford Ice and Cold Storage Co Ltd - Report of the Inter-Departmental Committee" (1959) 22 Modern Law Review 652.

13. Quoted in Morris v Ford Motor Co Ltd [1973] QB 792 at 799 per Lord Denning MR.

14. Gardiner note 12 at 656.

15. G Eorsi "Private and Governmental Liability for the Torts of Employees and Organs" in International Encyclopedia of Comparative Law XI Torts (1983) paras 4-116.

16. Ibid.

17. Id para 118.

Chapter 4

RECOMMENDATIONS FOR REFORM

I. INTRODUCTION

4.1 Since the Commission sought this reference in July 1983, the problems arising in relation to employee's liability in tort and in contract have been resolved either through the original amending legislation or, more recently, through the revised interpretation of such statutes. As outlined in Chapter 2, however, anomalies remain. The law as it stands is uneven, and offers no consistent approach. A negligent employee may be protected from indemnifying his employer under the contract of employment, or as a joint tortfeasor,[1] but will still be liable for such an indemnity under s64A of the Workers' Compensation Act 1926, in relation to statutory workers' compensation payments made to an injured co-employee. The recommendations set out in this Chapter, seek to overcome these anomalies to make the law consistent with the intentions of earlier legislative amendments.

4.2 In this regard, the arguments put forward in the second reading speech on the 1982 Act on 17 March 1982 are still appropriate. In line with the trend in workers' compensation legislation, employees and employers generally assume that an employee will be automatically covered for any negligent acts (or omissions) committed in the course of employment by insurance taken out by the employer. Any loophole allowing an insurance company to avoid liability and "off load" the

obligation to pay to an employee should be removed. Clearly in the past, the option of seeking an indemnity of this sort (whether in tort, contract or via s64A) was rarely resorted to by employer or insurer. This alone is no good reason to reject reform. Even if it is rarely enforced, the right may in isolated cases cause considerable hardship[2] to individual employees.

4.3 While most of the recommendations of this Report are directed at finally removing the indirect liability of an employee to the employer, consideration of a slightly more extensive revision of rights is also raised. On the surface, the abolition, or at least severe limitation, of the liability owed by an employee directly to the injured party appears no more than a simple extension of the policy of enterprise liability, consistent with the reasons set out in 4.2. Careful consideration, however, must be given to the effect of such abolition on the rights of the injured party.

II. RECOMMENDATIONS

4.4 The Commission recommends that the Employee's Liability (Indemnification of Employer) Act 1982 be redrafted and its provisions replaced with sections of wider application and clearer intent. This redraft would basically attempt to achieve four results:

(1) to be structured in such a way as to avoid, so far as possible, any further misinterpretation of the legislation, or any unwitting alteration or exclusion by later amendments to related Acts.

(ii) to entrench in legislation the interpretation given to the 1982 Act by the High Court in McGrath's case.

(iii) to extend the ambit of that Act in order to provide employees with protection from indemnifying their employers in relation to payments made pursuant to the Workers' Compensation Act 1926.

(iv) to limit the right of the injured party to sue a negligent employee directly.

4.5 The draft provision recommended is:

Clause 1 (1) Notwithstanding any Act or law, or the provisions express or implied of any contract or agreement, where an employee commits a tort whether personally, vicariously or otherwise

(a) the employee shall not be liable to indemnify the employer in respect of the liability incurred by the employer; and

(b) the employee shall not be liable to pay contribution to the employer as a joint tortfeasor under the provisions of s5 of the Law Reform Miscellaneous Provisions Act 1946; and

(c) unless the employee is otherwise entitled to indemnity in respect of his or her liability, the employer shall be liable to indemnify the employee in respect of liability incurred by the employee in respect of the tort.

(2) Where an employer is proceeded against for the tort of his or her employee, and the employee is entitled pursuant to a policy of insurance or contract of indemnity to be indemnified in respect of liability that he or she may incur in respect of that tort, the employer shall be subrogated to the rights of the employee under that policy or contract in respect of the liability incurred by him or her (the employer), arising from the commission of the tort.

Draft legislation prepared by Mr D Colagiuri of the Office of Parliamentary Counsel is attached in Appendix A. This provision represents the Commission's suggested first draft from which that legislation was developed. The clause is

largely based on a combination of s27C of the Wrongs Act 1936 (SA) and s22A of the Law Reform (Miscellaneous Provisions) Act (NT). Changes have been made to clarify some aspects of the original provision and to reinforce areas relevant to New South Wales. While this is the major recommendation of the Commission, there will be a number of changes required to various related Acts in order to fully accommodate the proposed amendments. These revisions will be discussed separately, as the issues arise.

4.6 Before examining the clause further it should be noted that sub-clause (3) limits the ambit of its operation so that:

> (3) Where a person commits serious and wilful misconduct in the course of his or her employment and that misconduct constitutes a tort, the provisions of this section shall not apply in respect of that tort.

This accords with provisions in the existing 1982 Act and will protect employers from liability for the excessive or extraordinary actions of employees.

4.7 While the 1982 Act, the Law Reform (Miscellaneous Provisions) Act 1946 and the Workers' Compensation Act 1926, all deal with the apportionment of liability, the basic aim of each Act varies widely. The 1982 Act was introduced primarily to protect employees from owing their employer an indemnity in contract, the Law Reform (Miscellaneous Provisions) Act 1946, to provide for fair contribution between tortfeasors of any sort, and the Workers' Compensation Act, to regulate no-fault statutory payments made to workers injured in the course of employment.

4.8 Both Public Transport Commission of NSW v J Murray-More (NSW) Pty Ltd[3] and Civic v Glastonbury Steel Fabrications Pty Ltd[4] demonstrate that restrictive interpretations have been given to these Acts. They also reveal the general reluctance of the courts to increase or shift the burden of liability to another party without a clear expression of statutory intent.[5] Minor amendments to each of the existing Acts would not resolve many of these difficulties. Retention and extension of the 1982 Act will however, create a single, clear and comprehensive coverage of employees liability. The rest of this Chapter considers some of the implications of the new provisions, along with the effect they will have on the current situation.

III. RIGHTS OF EMPLOYERS AGAINST EMPLOYEES

4.9 There are, as has been noted several times, three ways in which an employer may indirectly recover damages from an employee through an indemnity in relation to the negligent acts of that employee.

A. Lister v Romford Ice and Cold Storage Co Ltd

4.10 This indemnity, based on the contract of employment was abolished by the 1982 Act. Clause 1(1)(a) of the proposed provision (set out at 4.5) has the same effect, so that employers will continue to be denied the use of the indemnity.

B. Contribution under the Law Reform (Miscellaneous Provisions) Act 1946, s5

4.11 Contribution by employees under this section was also abolished by the interpretation of the 1982 Act adopted by the High Court in McGrath's case.[6] It is however, the opinion of the Commission that this question should also be made clear on the face of the new comprehensive legislation. Clause 1(1)(a) is clearly wide enough (in the light of McGrath's case) to include contribution claims. However, to overcome any residual problems which may arise in this respect, Clause 1(1)(b) has been added, stating:

> The employee shall not be liable to pay contribution to the employer as a joint tortfeasor under the provisions of s5 of the Law Reform Miscellaneous Provisions Act 1946.

This clause specifically addresses the question of contribution claims between employer and employee, the result being that an employer will be barred from relying on s5 of the Law Reform (Miscellaneous Provisions) Act 1946, without affecting any claim an employee may have under that section.

C. Workers' Compensation Act 1926, s64A

4.12 The right given to an employer via ss64(1)(b) and 64A of the Workers' Compensation Act 1926, to recover compensation payments made under the Act from an employee, has already been discussed in Chapter 2.[7] Waters v Dedini[8] failed to resolve the question of whether the 1982 Act applied to such a claim. The indemnity in that case was denied (and, therefore, the Act applied) only because no arguments were advanced by the opposing party as to why the 1982 Act should be excluded.

4.13 It is unlikely that as it stands the Employee's Liability (Indemnification of Employer) Act 1982 could be applied to protect employees from the effects of s64A of the Workers' Compensation Act. Section 2(3)(b) specifically limits the operation of the 1982 Act to circumstances where "proceedings for damages may be taken". Similarly, in the definitions given in s2(1)

> "fault", in relation to an employee, means negligence, or other act or omission, of the employee (not being negligence, or other act or omission, that is serious and wilful misconduct) as a result of which his employer is, as employer and not otherwise, liable in damages in tort (emphasis added).

This final phrase could clearly be interpreted in conjunction with s2(3)(a) to exclude liability which does not arise from fault, but by statutory compulsion.

4.14 Of course, in any situation where the employee is a tortfeasor and so liable to indemnify an employer via s64(1)(b) and s64A, the employer will also, through the workings of vicarious liability, be liable for "damages in tort". Thus, it could be contended that the 1982 Act would apply. This argument however misconstrues the nature of the Act, and the basis of the courts' interpretations of these statutes. The 1982 Act is only directed at damages which arise out of that vicarious liability; it will not and cannot extend to a liability that arises in the employer from another source, even if that other liability arises at the same time and out of the same circumstances. Because s64A of the Workers' Compensation Act 1926 concerns itself with the statutory liability of the

employer, the existing provisions of the 1982 Act, relating as they do to vicarious liability and damages in tort, will not suffice.

4.15 The conclusion to be drawn then, is that despite the decision in Waters v Dedini[9] employers - and more importantly, their workers' compensation insurers - are technically capable of returning the burden of workers' compensation payments to their employees. This result is not only inconsistent with the trend of industrial law over the last century, but also inconsistent with the basic aims of the Act itself.

4.16 The clause set out in para 4.5 is intended to overcome these difficulties in two ways. First, by avoiding reference to the "end result" of the liability (ie "damages in tort" etc) and relying instead on a simple reference to liability. For example, subclause (1)(a) states:

> the employee shall not be liable to indemnify the employer in respect of the liability incurred by the employer.

Second, subclause (1) is expressed in the widest possible terms as it applies:

> ... where an employee commits a tort for which his employer is liable; whether personally, vicariously or otherwise

This clearly directs that the Act should include any statutory liability incurred by the employer.

4.17 Another problem in relation to the Workers' Compensation Act is its failure to allow workers' compensation payments made by the employer to be pleaded in defence when an employee is sued directly by an injured co-employee. This defence is available to an employer, under the Workers' Compensation Act:

> 63(5) Where any payment by way of compensation under this Act has been made the payment shall, to the extent of its amount, be a defence to proceedings against the employer independently of this Act in respect of the injury.

As the proposed revised provisions for the 1982 Act do not deal directly with this contingency, any amendments would, if necessary be required to be made to the Workers' Compensation Act itself.

4.18 Generally, as subclause (1)(c) of the proposed reforms indemnifies an employee against being sued directly, (see 4.25 and following) there seems no necessity for a defence to be available in such an action. The subclause states:

> unless the employee is otherwise entitled to indemnity in respect of his or her liability, the employer shall be liable to indemnify the employee in respect of liability incurred by the employee in respect of the tort.

The indemnity set out in this clause shifts the burden of the entire common law claim back to the employer. This is, in turn, complemented by the existing provisions of s64(1)(a) which state:

> the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to retain both damages and compensation.

> If the worker recovers firstly compensation and secondly such damages he shall be liable to repay to his employer out of such damages the amount of compensation which the employer has paid in respect of the worker's injury under this Act, and the worker shall not be entitled to any further compensation.
>
> If the worker firstly recovers such damages he shall not be entitled to recover compensation under this Act.

Thus the injured employee to required to reimburse the employer for the amount of the statutory payments out of the damages awarded him by the court. There is no possibility of the injured worker being able to enjoy the benefit of both statutory payments and common law damages, while the negligent employee is automatically covered by clause 1(1)(c).

4.19 There are, however, two matters in relation to this defence which require some attention. An employer could attempt to rely on a wide interpretation of s63(5) of the Act, to the effect that the proceedings launched by an employee are "proceedings" subject to the operation of s63(5). Such a construction of this section would exempt the employer from indemnifying a negligent employee for so much of the claim as amounts to the statutory payment. This would severely restrict subclause (1)(c) and leave the negligent employee still liable for at least a percentage of the damages award.

4.20 It is, however, unlikely that this wide interpretation would be accepted by the courts. Section 63(5) is directed not only at "proceedings" but "proceedings in respect of the injury". To allow this defence to subclause (1)(c), would in

effect extend s63(5) to include "proceedings for an indemnity in relation to proceedings in respect of an injury"; clearly both an unsatisfactory and artificial result. In any event, this debate becomes academic, for under the opening terms of clause 1 the employer would be denied the right to rely on s63(5), as the provision specifically states it will operate

> Notwithstanding any Act or law, or the provisions express or implied of any contract or agreement.

4.21 A second argument for providing a negligent employee with a defence in these situations, relates to the complexity of the procedural steps involved. Subclause (1)(c) as it stands, does not restrict the right of an injured worker to obtain damages or collect workers' compensation payments. It is only the first step in a lengthy procedure, whereby the injured worker, on conclusion of a successful action against the co-employee, is required (via s64(1)(a)) to reimburse the employer; who in turn would be required (via the indemnity) to reimburse the negligent employee for the entire amount of damages, including that percentage returned to the employer under 64(1)(A). It could be argued that introducing a defence for the defendant employee would at least by-pass this circular process.

4.22 To rely on this reasoning, however is to confuse the purpose of the defence and its relationship with the rest of the Workers' Compensation Act 1926, for in allowing the s63(5) defence to an employee, problems are automatically created with the distribution of liability. The defence was originally

provided for the employer; ie a party liable for both statutory payments and common law damages. Section 63(5) created an automatic adjustment to stop an injured employee from unfairly gaining excessive damages. Similarly s64(1)(a) was aimed at providing the same adjustment where a third party was liable. Again, the intention of the section was to ensure an injured party was not "double paid". If a defence is introduced for the negligent employee this balance would be upset, to the inevitable disadvantage of the injured worker. The amount of statutory payments would automatically be deducted from any damages award against a co-employee, yet at the same time s64(1)(a) will stand, and continue to require the injured employee to pay back an equal amount to the employer.

4.23 This could be corrected by amendments to s64(1)(a) to exclude litigation between employees from the ambit of the section. However, in view of the minor gains to be made from such amendments, and the complications likely to ensue,[10] it is wiser to avoid granting a negligent employee a right to this defence, and to rely instead on the effect of sub-clause (1)(c).

D. Per quod servitium amisit

4.24 One final aspect of an employee's liability to his employer remains: the possibility of a direct action by the employer based on the old common law cause of action[11] of per quod servitium amisit. While all but abolished in the UK;[12] it has been applied in Australia in at least two cases,[13] with the widest possible reach, applying whenever the

relationship of master and servant exists. The action is limited in that it will only be available to recover money paid as wages while the injured worker was unable to provide service.[14] While there is no direct authority to confirm it, there is no reason why an action per quod servitium amisit should not be available against an employee.

4.25 The Commission therefore recommends that in addition to the amendments to the 1982 Act already set out, another clause be added:

> Clause 2. No employee shall be liable in tort under the laws of New South Wales to any other person on the ground only of having deprived that other person of the services of that other persons servant.[15]

In addition though beyond the terms of reference of this report, the Commission recommends that the action per quod servitium amisit be abolished altogether.

IV. RIGHTS OF THIRD PARTY AGAINST A NEGLIGENT EMPLOYEE

4.26 A person injured by a negligent employee has the right - like any other plaintiff - to sue that negligent party directly. This right exists separately from any other rights which may accrue from the operation of vicarious liability, or statute. The negligent employee will not be treated as a 'special case' because the incident arises in the course of employment. The employer is under no obligation to indemnify or contribute to the damages unless personally liable; and then only under the usual contribution provisions of s5 Law Reform (Miscellaneous Provisions) Act 1946.

4.27 To continue to allow the fact of employment to be treated as an irrelevancy very obviously runs counter to the norms of 'enterprise liability' which have guided much of the modern legislation in this area. At the same time, any extension of the existing protections and immunities available to an employee ought to be approached with caution. It is not the automatic process which might be expected, as Glanville Williams noted.

> ... a statute should be passed to disallow an action by the master for indemnity against the servant, where the servant has been guilty only of inadvertent negligence. It may be expected that many persons would approve this proposal, while jibbing at the logical corollary - that the servant who is sued should be given a right of indemnity against the master.[16]

4.28 So far, this Report has only addressed matters affecting rights between employee, employer and insurer, and the best way to distribute the burden of liability between them. The major impetus for reform goes beyond the precarious position in which employees are currently placed to address the issue of whether insurers should be permitted to off-load their responsibilities in the ways suggested. When the discussion is extended to cover the rights of the injured third party, new factors come into the calculation. Any moves to restrict the liability of negligent employees could be seen as narrowing the options available to the injured party, and it is of primary importance that whatever the injustices between the employee and the employer, they should not be resolved at the expense of the injured third party.

4.29 There are two options available to protect an employee from direct action by an injured 3rd party. They are

(a) to abolish the right to sue; providing an employee with a complete immunity; or

(b) to provide the employee with an indemnity from the employer where action is taken.

4.30 Initially, the better option appears to be to abolish the employee's liability altogether[17] in cases where the employer would be vicariously liable for the employee's acts. This would directly protect negligent employees and avoid the more circuitous route of indemnification by the employer. Such a provision would also satisfy the policy of enterprise liability. But, as was stressed above, the rights most involved here are those of the injured third party. When that person's position is examined the pitfalls in this approach become apparent.

4.31 The creation of a complete immunity for an employee, envisaged by the abolition of the injured party's right to sue, ignores situations where an employer may be insolvent or uninsured. If this proposal were adopted in such circumstances an injured party would be denied a remedy. This would be particularly unjust if the liability arises out of a motor vehicle accident when the employee is covered by compulsory third party insurance for the straight abolition of liability would relieve the compulsory third party insurer of its statutory burden and possibly require the employer to take out extra insurance to cover the liability.

4.32 For these reasons the Commission does not recommend abolition of the right to sue the negligent employee. However, we do recommend inclusion of a provision in the form of subclause 1(1)(c) [set out in para 4.5 above]. This offers protection to the employee, who is not otherwise indemnified against the loss. That employee is given a right to indemnity from the employer. Clause 1(1)(c) reads as follows

> ... unless the employee is otherwise entitled to indemnity in respect of his liability, the employer shall be liable to indemnify the employee in respect of liability incurred by the employee in respect of the tort.[18]

4.33 The introduction of this indemnity will not, of course, solve all the situations that can arise in relation to employees' liability. It will only alleviate the situation. The difficulties noted above in relation to an employee's immunity will continue to arise where an employer does not have proper extra insurance. No system can deal with all imperfections. Whether an indemnity or immunity is created, the loss will fall somewhere. What is attempted here is the best possible balance between the rights of the injured third party and the interests of the employee. This means limiting the liability of the negligent employee as much as possible, while retaining a wide choice for the plaintiff; including the opportunity of calling on the resources of the insured employee.

4.34 It was argued above that introducing an absolute immunity for a negligent employee ought to be avoided as it would deny an injured person access to this resource, and force

that party to bear the loss. Generally, it is true, a prudent employer will have complete insurance to cover an indemnity. However, when neither defendant is insured it is necessary to fall back to the primary basis of enterprise liability, and require the party who is most able to bear the burden, to bear it. This is an end best served by the use of an indemnity clause such as is set out by subclause 1(1)(c).

V. INSURANCE

4.35 The issues raised in relation to insurance and employees' liability have already been noted at paragraphs 2.35 et seq. It is the intention of the Commission that the present rules of contribution between insurers be retained. To this end, the terms of the proposed reforms set out in clause 1(1)(c) only grant an employee indemnity from the employer

> ... unless the employee is otherwise entitled to indemnity in respect of his liability.

This is intended, as are the reforms in South Australia and the Northern Territory, to maintain the status quo.

VI. CONCLUSION

4.36 This Report is a product and reflection of the many reforms over the last hundred years in the areas of industrial law and workers' compensation. It cannot be said that it is conclusive on such issues, but it does attempt to provide a single, comprehensive guideline to one aspect of that law - namely the liability of employees. In this respect it is based on other reforms in other jurisdictions, but it seeks to go

beyond the sectional approaches taken there, in setting out a wide coverage of both the problems of this liability and the methods by which these difficulties may be resolved.

Footnotes

1. Although the Law Reform (Miscellaneous Provisions) Act 1946, s5(1) is directed at contribution between tortfeasors, the peculiar circumstances created in cases of vicarious liability will mean that when the employer has no personal liability, the contribution he/she can seek from the negligent employee will, for all practical purposes amount to an indemnity.

2. South Australian Parliamentary Debates 8 March 1972 at 3705 Hon L J King, Attorney General.

3. (1975) 132 CLR 336.

4. (Unreported) 24th February 1983, Supreme Court of NSW Yeldham J; where Yeldham J stated he was not prepared to give a wider interpretation unless there were clear words to that effect.

5. McGrath v Fairfield Municipal Council [1984] 2 NSWLR 247; the interpretation given by the High Court ((1985) 59 ALR 18; 59 ALJR 655) was in this respect an exception to the other cases in this area.

6. (1985) 59 ALR 18 at 23.

7. Ante; 2.25 and following

8. (Unreported) 17 September 1982 Supreme Court of New South Wales.

9. Which could be argued to have been reinforced by the High Court decision in McGrath's case (see note 5).

10. For example, the difficulties which arose in amending s46(1)(b) reflected in s46A.

11. Although this action did in part arise from the Statute of Labourers of 1351 (23 Ed III) see G H Jones 'Per Quod Servitium Amisit' (1958) 74 LQR 39.

12. IRC v Hambrook [1956] 2 QB 641; also see Law Commission (GB), Report on Personal Injury Litigation - Assessment of Damages (Law Com No 56, 1973) paras 144-50.

13. Commissioner of Railways v Scott (1959) 102 CLR 392; Sydney County Council v Bosnich [1968] 3 NSWR 725.

14. Id, Bosnich at 726 per Sugerman AP.

15. This is based on the provision recommended by the English Law Commission, see note 12 at 122; Clause 12(c).

16. Glanville Williams 'Vicarious Liability and the Masters Indemnity' (1957) 20 Mod LR 437 at 446.

17. This would of course, not apply to any liability for 'serious and willful misconduct' see ante, para 4.6.

18. This is based on s27c(3) Wrongs Act (SA).

Appendix A

DRAFT LEGISLATION

EMPLOYEES LIABILITY BILL 1988

NEW SOUTH WALES

[STATE ARMS]

TABLE OF PROVISIONS

1. Short title
2. Liability of employee where employer also liable
3. Employer subrogated to rights of employee under insurance policy
4. Act to prevail
5. Act binds Crown
6. Causes of action to which Act applies
7. Repeal of Act No. 3, 1982

EMPLOYEES LIABILITY BILL 1988

NEW SOUTH WALES

[STATE ARMS]

A BILL FOR

An Act to make provision with respect to the liability of employees; and to repeal the Employee's Liability (Indemnification of Employer) Act 1982.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Employees Liability Act 1988.

Liability of employee where employer also liable

2. (1) If an employee commits a tort for which his or her employer is also liable---

(a) the employee is not liable to indemnify, or to pay any contribution to, the employer in respect of the liability incurred by the employer; and

(b) the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability).

(2) Contribution under this section includes contribution as joint tortfeasor or otherwise.

(3) This section does not apply to a tort committed by an employee if the conduct constituting the tort---

(a) was serious and wilful misconduct; or

(b) did not occur in the course of, and did not arise out of, the employment of the employee.

Employer subrogated to rights of employee under insurance policy

3. (1) If---

(a) an employer is proceeded against for the tort of his or her employee; and

(b) the employee is entitled under a policy of insurance to be indemnified in respect of liability that the employee may incur in respect of that tort,

the employer shall be subrogated to the rights of the employee under that policy in respect of the liability incurred by the employer arising from the commission of the tort.

(2) In this section, "insurance" includes indemnity.

Act to prevail

4. This Act has effect notwithstanding---

(a) any other Act or law; or

(b) the provisions (express or implied) of any contract or agreement entered into before or after the commencement of this Act.

Act binds Crown

5. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Causes of action to which Act applies

6. This Act applies whether the cause of action concerned arose before, or arises after, the commencement of this Act.

Repeal of Act No. 3, 1982

7. The Employee's Liability (Indemnification of Employer) Act 1982 is repealed.

LAW REFORM (MISCELLANEOUS PROVISIONS) BILL 1988

NEW SOUTH WALES

[STATE ARMS]

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LAW REFORM (MISCELLANEOUS PROVISIONS) BILL 1988

NEW SOUTH WALES

[STATE ARMS]

A BILL FOR

An Act to abolish liability in tort for depriving a person of the services of any servant of the person.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Law Reform (Miscellaneous Provisions) Act 1988.

Abolition of remedy for loss of services of servant (per quod servitium amisit)

2. A person is not liable in tort to another person merely because the person has deprived that other person of the services of any servant of that other person.

Act to prevail

3. This Act has effect notwithstanding---

(a) any other Act or law; or

(b) the provisions (express or implied) of any contract or agreement entered into before or after the commencement of this Act.

Application of Act

4. This Act applies whether the conduct that has deprived a person of the services of a servant occurred before, or occurs after, the commencement of this Act.