INTRODUCTION

This chapter concerns three dilemmas arising in cases of multiple defendants, in circumstances where, say, D1, D2, and D3 are each liable in tort to C:

1. whether D1, D2, and D3 are jointly liable, severally liable, or proportionately liable, for the damages for which they are liable to C;
2. whether (and, if so, when) D1, D2, and D3 can look to each other for contribution, for any payments which they have made to C – a question governed by ss 1 and 2 of the Civil Liability (Contribution) Act 1978 (‘the 1978 Act’); and
3. whether (and, if so, when) C may sue D2 and D3 for successive actions, after either obtaining a judgment against D1, or after entering into a settlement agreement (or compromise) with D1.

Each of these conundrums will be considered in turn.

SUING MULTIPLE DEFENDANTS: JOINT, SEVERAL AND PROPORTIONATE LIABILITY

Key concepts

This section concerns the specific question of whether C must proceed against all defendants, in order to recover the totality of his damages; or whether C is entitled to proceed against just one culpable D to recover the totality of his damages, leaving that defendant to sort out with his co-defendants any appropriate claims for contribution among the defendants.

The question may have significant ramifications – if all defendants (and/or their insurers), other than D1, are unlocatable, uninsured, or insolvent, then C may be very gravely disadvantaged if he cannot recover the full 100% of his damages from D1 but, rather, is limited to only a percentage recovery from D1. Hence, the question reduces to the practical outcome of who bears the detriment of, say, D2’s insolvency – C, or D2’s co-defendants?

The answer turns upon whether the multiple defendants acted as joint tortfeasors, as several concurrent tortfeasors, or as independent tortfeasors; and whether the injury suffered by C was a ‘divisible’ or an ‘indivisible’ injury. It is important to be as precise as possible about the terminology by which to describe different types of liability, where multiple Ds are in play.

This description will be used throughout the chapter to denote multiple defendants.
## Divisible versus indivisible injury

The distinction between an indivisible and a divisible injury can be difficult to draw. In *Barker v Corus (UK) plc*, Lord Walker remarked that whether an injury is divisible or indivisible is a question of fact, and not of law; and that there may be debatable borderline cases.

As a rule of thumb, ‘[w]here there are causes [from D1 and D2] concurrent in time, the likelihood is that a resulting injury will be indivisible; but where causes are sequential in time, it is not likely that an injury will be truly indivisible, especially if the injury is a disease which can get worse with cumulative exposure’ (per May LJ in *Environmental Agency v Ellis*). The table below provides some examples of ‘divisible’ and ‘indivisible’ injuries.

### Key terminology concerning litigation against multiple defendants

<table>
<thead>
<tr>
<th>The term</th>
<th>What it means/covers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Several liability</td>
<td>applies where each of D1, D2 and D3 is liable for the whole (100%) of C’s damage. In practice, this means that C is entitled to proceed against any one of D1, D2 or D3 individually for the whole of his damage (against whom is entirely C’s choice); or C is entitled to sue each of D1, D2 and D3, and each of those Ds will be liable for 100% of C’s damage (albeit that C can only recover his damages once)</td>
</tr>
<tr>
<td>Joint liability</td>
<td>applies where D1 is able to seek contribution from his co-defendants D2 and D3, so that each defendant is proportionately liable to C for the extent to which their individual wrongdoing contributed to C’s injury. There are two scenarios where D1 will be jointly liable with D2 and D3, i.e., where they are all several concurrent tortfeasors; or where they are joint tortfeasors (see below)</td>
</tr>
<tr>
<td>Joint and several liability</td>
<td>applies where each of D1, D2 and D3 is liable to C for the full amount of C’s damage; and where each can also seek a contribution from his co-Ds, by which to reduce the extent of his monetary liability to C</td>
</tr>
<tr>
<td>Proportionate liability</td>
<td>applies in the absence of joint and several liability; and means that D1 is liable to C for X% of the damage suffered by C; D2 is liable to C for Y% of the damage suffered by C; and D3 is liable for Z% of the damage suffered by C. There is no joint liability, permitting D1 to seek contribution from D2 and D3 in these circumstances</td>
</tr>
<tr>
<td>An indivisible injury</td>
<td>occurs where D1, D2 and D3’s acts or omissions have caused one injury to C – i.e., some indivisible damage, whereby specific parts of the damage cannot be attributed to D1 and other specific parts of the damage to D2 and D3</td>
</tr>
<tr>
<td>A divisible injury</td>
<td>occurs where there is a rational basis for distinguishing between parts of the damage caused by two different tortfeasors (e.g., where it is dose-related, or time-related)</td>
</tr>
<tr>
<td>Concurrent tortfeasors</td>
<td>occurs when D1 and D2 each commit wrongful acts or omissions, independently, which cause a single indivisible injury to C (per Laws LJ in <em>Rahman v Arearose Ltd</em>)</td>
</tr>
</tbody>
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Suing multiple defendants: joint, several and proportionate liability

There are three types of multiple defendants: joint tortfeasors; several concurrent tortfeasors; and independent tortfeasors.

EXAMPLES OF TYPES OF INJURIES

Indivisible injuries:

- if a pedestrian, C, is injured by a collision between two cars whose drivers were both driving negligently, and the extent of C’s injuries are so severe that it is impossible to say which car/driver caused which part of C’s injury, then C has suffered an indivisible injury (per Lord Scott in Barker v Corus (UK) plc,\(^a\), citing the example of Fitzgerald v Lane\(^b\);
- if D1, D2 and D3, acting separately and not in concert, hit C, one after another, and as a result of the assaults, C suffers injury and shock and is unable to work for a month; and if each assault was a cause of the shock, and it is impossible to rule out any of the assaults as being the cause, C has suffered an indivisible injury (per Devlin LJ in Dingle v Ass Newspapers Ltd\(^c\));
- mesothelioma is an indivisible injury (per Lord Walker in Barker v Corus\(^d\)). It may be caused by a single fibre, and therefore, it cannot be proven which employer who exposed C to asbestos caused the condition (per Dowdall v William Kenyon & Sons Ltd\(^e\)).

Divisible injuries:

- if C was hit by two men, acting separately and not in concert, and one broke his right arm and the other broke his left arm, those are divisible injuries (to adapt Devlin LJ’s example in Dingle\(^f\));
- where employer #1 operates machinery very loudly, and causes partial deafness to employee C, and then employer #2 also negligently exposes C to loud machinery, and exacerbates that progressive industrial disease, then the injury (deafness) is divisible (per Hackney LBC v Sivanandan,\(^g\) and Thompson v Smiths Shiprepairers (North Shields) Ltd\(^h\)). In the latter case, C had been engaged in the ship repair industry where they had been exposed to excessive noise over extended periods of their employment, resulting in their loss of hearing;
- diseases which are dose-related are divisible, and where they get progressively worse with cumulative exposure – including asbestosis, silicosis, vibration white finger, and industrial deafness (per Lord Phillips in Sienkiewicz v Greif (UK) Ltd\(^i\)).

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\(^a\) [2006] UKHL 20, [2006] 2 AC 572, [60].

\(^b\) [1989] AC 328 (HL).

\(^c\) [1961] 2 QB 162 (CA) 189.

\(^d\) [2006] 2 AC 572 (HL) [112].

\(^e\) [2014] EWHC 2822 (QB) [13].

\(^f\) ibid, 194.

\(^g\) [2011] UKEAT 0075_10_2705 (27 May 2011) [16(3)].

\(^h\) [1984] QB 405.

\(^i\) [2011] 2 AC 299 (SC) [14].

These concepts are necessary to understand, to then identify how C should proceed against multiple defendants, in order to recover 100% of his damages.

SMD.1
**Joint tortfeasors**

The general position

Joint tortfeasors are ‘joint tortfeasors’ if they share a common design to commit a tort, which causes an indivisible injury to C. Where D1, D2 and D3 have acted as joint tortfeasors, thereby causing indivisible damage to C, they are jointly and severally liable for C’s damage.

Joint tortfeasors must ‘intend, procure and share a common design’ to commit a tort (per Chadwick LJ in *MCA Records Inc v Charly Records Ltd*) – or, put another way: ‘the two were concerned in a joint act done in pursuance of a common purpose’ (per Mustill LJ in *Unilever plc v Gillette (UK) Ltd*). D1, D2 and D3 do not have to have any sort of formal, enforceable agreement between them to commit the common purpose; but there does need to be a ‘meeting of minds’ to carry on the enterprise for their joint benefit (per *Investors Compensation Scheme v West Bromwich Building Socy*).

Typically, their acting in concert gives rise to indivisible damage on C’s part. (Indeed, it is difficult to conceive of a scenario in which D1, D2 and D3 could act as joint tortfeasors, and cause C divisible injuries.)

As joint tortfeasors, D1 and D2 are ‘jointly and severally liable for the whole damage’ (per Lord Scott in *Barker v Corus (UK) plc*) – ‘jointly’, because they have a right of contribution from each other so as to reduce their payout to the extent for which the court adjudges them to be responsible; and ‘severally’, because they are each fully liable to C for the damage caused by their joint act. In other words, C can sue any of D1, D2 and D3, to recover his full damage; and D1 can sue D2 or D3 to recover some contribution. Liability as joint tortfeasors does not give rise to any principle that D1 is proportionately liable for X% of C’s damage, and D2 is responsible for Y% damage, such that C must proceed against both defendants to have any hope of recovering all of his damage – that was confirmed, e.g., in *Hackney LBC v Sivanandan*.

The policy justification for ‘joint and several’ liability is this: given that D1 and D2 acted in concert, then the law justifies the whole liability which each potentially bears to C (subject to any right to contribution between them under the 1978 Act) in this way: ‘if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm’ (per *Barker v Corus (UK) plc*).

**Examples**

Some leading examples of joint tortfeasors are as follows:

- employers–employees: employers are jointly liable with their wrongdoing employee to compensate C, where employer and employee have participated in the same act that damaged C (per Scrutton LJ in *The Koursk*). Separately, employers may be vicariously liable for the torts committed by their employees (discussed in Chapter 18);
In *Bungay v Saini (Rev 1)*,\(^{12}\) the statutory tort of discrimination was proven because of common acts of unlawful discrimination towards employee C by both employer and wrongful employee. They were joint tortfeasors.

- principal–agent: a principal is a joint tortfeasor with his agent for the torts of his agent (per Scrutton LJ in *The Koursk*\(^{13}\));
- company director–company: a company director will not be treated as liable with his company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company (by voting at board meetings) – but if the director steps outside the bounds of proper corporate governance of his company, ‘then he steps out from behind that shield and is potentially in the firing line himself’, as being jointly liable with the company (per *Ultraframe (UK) Ltd v Fielding*\(^{14}\) – although not proven there).

In *MCA Records Inc v Charly Records Ltd (No 5)*,\(^{15}\) a company director was liable, as joint tortfeasor with his company, in the field of breach of copyright, where that director acted with the company – so that he ‘intends, procures and shares a common design’ that the infringement should take place.

- a person who prompts another to commit a tort, and that person who then commits the tort, are joint tortfeasors too (per Akenhead J in *Phaestos Ltd v Ho*\(^{16}\));
- those who act with common purpose – a wide category which can encompass a number of disparate scenarios, and is oft-sourced to *Brooke v Bool*\(^{17}\) (see, e.g., the *Oxford Dictionary of Law*\(^{18}\)). However, it typically applies where D has assisted the principal tortfeasor to commit a tort against C.

In *Brooke v Bool*,\(^{19}\) a lodger and his elderly landlord (both defendants) sought to investigate the source of a gas leak which was the landlord’s responsibility to fix. As the landlord was too old to carry out a particular task, his lodger did it instead – but when the lodger lit a naked flame (at his landlord’s request), an explosion ensued, causing C damage. Held: both lodger and landlord were liable in negligence, as joint tortfeasors engaged in a common venture. In *Crooks v Newdigate Properties Ltd (formerly UPUK Ltd)*,\(^{20}\) UPUK agreed to pay a ‘finders’ fee’ to Mr Crooks, C, for properties found by C. UPUK acquired an option to purchase a property, and assigned it to another company, NBT. C alleged that, by assigning the option, UPUK acted in breach of contract and with a view to defeating his entitlement to the ‘finders’ fee’. C sued UPUK and NBT and various individuals for various economic torts (interference with another’s contractual relations; conspiracy to injure by unlawful means). Held: this was a claim against all Ds as joint tortfeasors, because ‘the allegedly wrongful acts are in furtherance of a common design’.

In *Unilever v Gillette*,\(^{21}\) Mustill LJ noted that *Brooke v Bool* ‘has engendered curiously little in the way of subsequent reported authority, but no doubt has been cast in the intervening 60 years on the proposition that participation in a common venture may cause someone to become directly liable as a tortfeasor, together with the person who actually did the damage’. The category was considered by the Supreme Court recently, however, in *Sea Shepherd UK v Fish & Fish Ltd*,\(^{22}\) in which Lord Toulson remarked that the proof of joint tortfeasors arising

\(^{12}\) [2011] UKEAT 0331_10_2709.  \(^{13}\) [1924] P 140 (CA)155.  \(^{14}\) [2005] EWHC 1638(4) (Ch) [1849].  
\(^{15}\) [2002] FSR 26 (CA) [32].  \(^{16}\) [2012] EWHC 668 (TCC) [36].  \(^{17}\) [1928] 2 KB 578, 585–86.  
from a common purpose requires two elements: (1) D must have acted in a substantial (non-trivial) way which furthered the commission of the tort by the principal tortfeasor (the conduct element); and (2) D must have done so in pursuance of a common design to do, or secure the doing of, the acts which constituted the tort (the common design element).

In *Sea Shepherd v Fish & Fish Ltd*, Fish & Fish, C, ran a fish farm off Malta, and was transporting a catch of tuna in fish cages when its vessels were attacked by the *Steve Irwin*, a vessel operated by the environmentalist protection group, Sea Shepherd. The cages were broken into and the fish released. Steven Watson commanded the *Steve Irwin* that day, but was not subject to the jurisdiction of the UK (being a US citizen), and hence, C's claim in tort would fail, unless Sea Shepherd UK, D, (an English company) assisted Mr Watson to commit a tort against C's property. C alleged that D was party to a common design with Mr Watson to carry out operations and violent interventions of the sort which occurred here. **Held:** D was not a joint tortfeasor. It did not control the vessel; did not recruit any volunteers or crew for the campaign (other than two volunteers to source and supply a pump); did not arrange a mailshot about Mr Watson's operations; and did not actively solicit contributions (and any facilitating of sterling-based transactions was *de minimis* assistance only). D's contributions to that day's events were of such minimal importance, and played no effective part in the commission of the tort, so that it could not be a joint tortfeasor, as the conduct element was not met.

**Several concurrent tortfeasors**

**The general position**

Multiple defendants are 'several concurrent tortfeasors' if they act independently in a tortious manner, and their wrongful acts or omissions cause an indivisible injury to C. Where D1, D2 and D3 are concurrent tortfeasors, thereby causing indivisible damage to C, then the legal consequences are precisely as described for joint tortfeasors – D1, D2 and D3 are jointly and severally liable for C's damage.

Several concurrent tortfeasors act independently in a wrongful manner, causing indivisible injury to C (per Laws LJ in *Rahman v Arearose Ltd*) – or, put another way, D1, D2 and D3 are tortfeasors who separately contribute to the same damage suffered by C (per Lord Devlin in *Dingle v Associated Newspapers Ltd*). There is no common purpose or common design among any of them, and hence, there is no question of their being *joint* tortfeasors.

Each of D1, D2 and D3 are jointly and severally liable for C's damage. The reasons are precisely as explained for 'joint tortfeasors' – if D1 has caused C's damage in a way which is indivisible, then he cannot be heard to complain that his liability to C should be fixed at something less than 100% of C's damage, merely because D2 caused the same harm. Hence, it follows that any insolvency on, say, D2's part will be irrelevant to C (he can proceed solely against D1 for the full amount of his damage), but it will be detrimental to D1, who will not be able to recover anything from D2 under the 1978 Act. In *Rahman v Arearose Ltd*, Laws LJ remarked that justification of several liability for concurrent tortfeasors, so that each was liable to compensate C for the whole of C's damage, was 'not hard to find. In any such case, [C] cannot prove that either tortfeasor singly caused the damage, or caused any particular part or portion of the

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23 [2001] QB 351 (CA) [17].  
25 [2001] QB 351 (CA) [18].
Suing multiple defendants: joint, several and proportionate liability

damage. Accordingly his claim would fall to be dismissed, for want of proof of causation. But that would be the plainest injustice; hence the rule'.

Of course, where several liability occurs, then C can pursue D1 only, and how liability is ultimately apportioned among D1, D2, and D3, under the 1978 Act, 'is no concern of the victim' (per Lord Scott in Barker v Corus (UK) Ltd).

Examples
The two negligent car drivers in Lord Scott’s example in Barker v Corus (UK) plc, and the four men who assaulted C in Devlin LJ’s example in Dingle v Associated Newspapers Ltd, were several concurrent tortfeasors. Where an employee C is exposed to asbestos or other toxic agent at successive places of employment by successive employers, D1, D2 and D3, and C suffers from some asbestos-related or other illness (the source of which is medically impossible to trace to any particular employer), then those employers are several concurrent tortfeasors.

The Barker v Corus exception
Wherever several concurrent tortfeasors D1, D2, D3, etc, are found liable in negligence on the basis of the Fairchild exceptional theorem of causation, then liability will be proportionate, and not (as would usually apply) joint and several (per the ‘Barker v Corus exception’). That exception, however, was reversed by s 3 of the Compensation Act 2006, to re-establish joint and several liability in a narrow scenario, i.e., in respect of employers D1, D2 and D3, who have wrongfully exposed employee C to asbestos, and where C has developed mesothelioma by reason of that exposure.

Suppose that D1, D2, D3, etc, are liable in negligence to C as several tortfeasors, on the basis of the Fairchild exception (per Fairchild v Glenhaven Funeral Service Ltd, discussed in Chapter 8, and described briefly below). It will be recalled that the Fairchild exception applies where C has been wrongfully exposed to an agent (in Fairchild, to asbestos dust) by more than one tortfeasor D1, D2 and D3. C cannot prove which tortfeasor was responsible for C’s damage (in Fairchild, more than one employer exposed Mr Fairchild to asbestos fibre/s); but each of D1, D2 and D3 materially increased the risk of C’s sustaining damage (i.e., contracting mesothelioma). The exception requires proof of five pre-requisites (previously discussed in Chapter 8).

In fact, asbestos-related diseases may be divided into the malignant and the non-malignant. Mesothelioma and lung cancer are malignant, and may result from a single exposure to asbestos. These are indivisible injuries. Non-malignant conditions, such as asbestosis and pleural thickening, are the result of a cumulative exposure to asbestos, and are treated as divisible injuries. It will be recalled that Fairchild concerned the indivisible injury of mesothelioma. Where employee C develops mesothelioma, and has been exposed to asbestos by employers D1, D2 and D3, on different occasions and over different periods of time, C faces the difficulty that, with the present state of scientific knowledge, it is impossible for C to establish which of those employers is responsible for the particular exposure which caused his mesothelioma. Rather than allow C’s claim to fail, because C could not prove causation against any particular employer, C was entitled to claim damages against all or any of the employers who exposed him to asbestos, and therefore materially increased the risk of contracting the disease.

The exception. Until Barker v Corus (UK) Ltd in 2006, it was presumed that the orthodox principle of joint and several liability for several concurrent tortfeasors who caused indivisible injuries would apply to D1, D2, and D3 under the Fairchild exception – although Fairchild had not directly answered the question. Thus, it was presumed that employee C could obtain judgment for the full amount of his damages against any of the employers (say, D1), who would then be entitled to claim contribution from the other employers (D2, D3).

In Barker v Corus, the House of Lords had to determine what basis of liability – joint and several, or proportionate – would apply to D1, D2 and D3 under the Fairchild exception. A majority (Lords Hoffmann, Scott, Walker, and Baroness Hale, Lord Rodger dissenting) held that those several concurrent tortfeasors were proportionately liable to C, only to the extent that their act or omission materially increased C’s risk of suffering mesothelioma. In BAI (Run Off) Ltd v Durham (Employers’ Liability Ins ‘Trigger’ Litig), Lord Clarke stated the effect of Barker succinctly in these terms: ‘where there are two or more employers who have exposed the claimant to the risk of mesothelioma, they are not jointly and severally liable to the claimant for the whole of the consequences of the disease but only severally liable for an aliquot part.’ It means that C cannot recover 100% of his damages from any one of D1, D2 or D3; and there will not be any contribution claims among those employers either.

In Barker v Corus (UK) plc, Mr Barker (whose estate was C) died of mesothelioma. He had been exposed to asbestos dust on three occasions in his working life – for six months when working for Corus, D1; for six weeks when working for another employer, D2 (now insolvent); and for three short periods over 7 years, when working for himself as a self-employed plasterer (when he failed to take reasonable precautions for his own safety). At trial, C's damages were reduced by 20% to reflect Mr Barker’s contributory negligence. Other conjoined appeals involved employees who had been exposed to asbestos dust by a series of employers, many of whom had since been held insolvent. The question was whether the solvent employers (D1, D2, D3, etc) were to be held jointly and severally liable (as Cs argued); or whether each employer should only be liable for that proportion of the damages which represented his contribution to the risk that C would contract mesothelioma (as D1, D2, D3, etc, argued). Held (4:1): proportionate liability prevailed.

The basis for working out the basis of apportionment among D1, D2, and D3 (said Lord Hoffmann) may depend upon, say: the time during which D1, D2 and D3 respectively expose C to the agent, as a fraction of the total exposure suffered by C (this methodology was adopted in Barker itself, as the ‘most practical method of apportionment’); the quantity or the intensity of exposure to the asbestos; or the adverse quality of what C was exposed to (i.e., of the three types of asbestos – brown (amosite), blue (crocidolite) and white (chrysotile) – brown is by far the most serious). Lord Hoffmann ‘hoped that the parties, their insurers and advisers will devise practical and economical criteria for dealing with [the issue of apportionment]’ under the Barker v Corus exception.

The disparate reasoning. Lord Rodger dissented in Barker, and considered that joint and several liability should be retained, for D1, D2 and D3 who are liable under the Fairchild exception. His Lordship’s viewpoint has been since called, judicially, a ‘powerful’ and ‘forceful’
dissent. Ultimately, his view was also adopted by Parliament, by virtue of s 3 of the Compensation Act 2006 (discussed below). His view was also judicially preferred in Scotland, on the question of apportionment (given that Barker v Corus (UK) plc was an English appeal, the majority verdict was not binding on Scottish courts\(^\text{34}\)).

The contrasting reasoning of the majority, and the dissenter Lord Rodger, is noted in the Table below.

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**BARKER v CORUS: THE DISPARATE REASONING**

<table>
<thead>
<tr>
<th>The majority’s justifications for why proportionate liability should be (exceptionally) implemented:</th>
<th>Lord Rodger’s justifications for why joint and several liability should be (ordinarily) retained:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• the <em>Fairchild</em> theorem renders D liable in negligence, on the basis that D materially increased the risk that C would suffer damage and may have caused that damage, but D cannot be proved to have done so on the balance of probabilities. That is a potentially unfair result to D. As a <em>quid pro quo</em>, it was fair to impose proportionate liability on D, rather than D being potentially severally liable for the whole of C’s damage. Proportionate liability fairly reflected the fact that there may be a ‘relatively small chance’ that D actually caused C’s injury;</td>
<td>• where not all of D1, D2 and D3 can be located or are solvent and operating – both very real possibilities, given the very long latency of mesothelioma – that means that only a proportion of his damages would be recoverable by C, under proportionate liability. That would mean that the risk of D2’s insolvency was for C to bear, which was unfair. Under joint and several liability, the risk of insolvency of D2 was D1’s to bear, as D1 could then not claim contribution under the 1978 Act. That was a fairer result;</td>
</tr>
<tr>
<td>• for reasons of logic: the damage which D caused C was that of creating a risk or chance of C’s contracting mesothelioma. It did not strictly matter that the disease itself was indivisible damage, because the damage was the risk – and risk was ‘infinitely divisible, and different people could be separately responsible to a greater or lesser degree for the chance of an event happening’. Hence, proportionate liability was justifiable and logical;</td>
<td>• proportionate liability would ‘maximise the inconsistencies in the law, by turning the <em>Fairchild</em> exception into an enclave’ that was different from other areas of negligently-caused personal injury. For a wife whose husband died of mesothelioma, she may only receive 30% of the estate’s damages from D1 (the other D2 and D3 being insolvent); whereas if her husband is killed in a factory accident caused by several tortfeasors and where the only solvent D is, say, 5% to blame, she may recover the whole of the damages from D;</td>
</tr>
<tr>
<td>• proportionate liability dealt best with the problem of non-negligent exposures (e.g., via contributory negligence, or natural causes). D1, D2 and D3 were only liable in proportion to their own contribution to C’s overall exposure to the risk of harm.</td>
<td>• if liability is joint and several, then it provides a severely-ill C with the opportunity to recover 100% of his damages (even if that leaves some Ds hard-done-by);</td>
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<tr>
<td></td>
<td>• if ‘the lifeline’ of proportionate liability should be ‘thrown to wrongdoers and their insurers, at the expense of [Cs]’, then that was for Parliament, not the courts, to decide.</td>
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</table>

\(^{34}\) *ibid.*, [148]–[149].
The inter-relationship between *Fairchild’s* exception, and the allocation of responsibility against multiple defendants who are held to be liable under that exception, has obviously caused a real division of legal opinion. Indeed, some judges have lamented the complexity and rationale of the cases – note, e.g., the comment of Jay J, in *Heneghan v Manchester Dry Docks Ltd*, that *Barker* was an ‘unappealing companion’ to the ‘mire of *Fairchild*’.35

Of course, the majority decision in *Barker v Corus* was ‘defendant-friendly’, because any Ds not before the court meant that the payouts to C were substantially reduced – and, without joint and several liability applying, there was a very real risk that C would recover substantially little, if his period of employment with the only solvent D was fairly brief. However, as judicially noted, ‘[t]he rejoicing with which the insurance industry must have greeted this result was short lived, as Parliament intervened’ (per *Sienkiewicz v Greif (UK) Ltd*36), and remarkably swiftly too.

The statutory overrule, for mesothelioma cases. The preamble of the Compensation Act 2006 provides that its objects include, ‘to make provision about damages for mesothelioma’. The relevant provisions apply when each of the s 3(1) criteria are met (set out below). The statute does not purport to change the *Fairchild* exception, but only deals with the basis upon which the ‘responsible persons’ bear monetary liability – and that is to re-establish joint and several liability among D1, D2 and D3, where that exception applies.


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**s 3(1)** This section applies where:

(a) a person (‘the responsible person’) has negligently or in breach of statutory duty caused or permitted another person (‘the victim’) to be exposed to asbestos,

(b) the victim has contracted mesothelioma as a result of exposure to asbestos,

(c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

Section 3(1)(b) restricts the operation of the statute greatly – it does not cover other asbestos-related illnesses, apart from mesothelioma. When s 3(1)(d) states that D must be liable in tort, ‘by reason of having materially increased a risk, or for any other reason’, it has been said, judicially, that s 3 contemplates joint and several liability, not only for Cs who have to establish causation via *Fairchild*, but also for Cs who may be able to prove causation against D1, D2 and D3 on but-for balance of probabilities – ‘should medical science ever overcome “the rock of uncertainty”’ (per Cooke J in *Intl Energy Group Ltd v Zurich Ins plc UK*37).

Section 3(2) then overturns *Barker v Corus*, by establishing that the ‘responsible person’ shall be ‘jointly and severally liable with any other responsible person’. It means that C can proceed against D1 alone for 100% of his damages. In *BAI (Run Off) Ltd v Durham (Employers’ Liab Ins*
‘Trigger’ Litig), Lord Mance stated the effect of s 3 succinctly: ‘when a victim contracts mesothelioma, each [employer] who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating a “material increase in risk” of the victim contracting the disease will be held to be jointly and severally liable in respect of the disease.’

Section 3(3) then provides that each responsible person can recover contribution from other responsible persons (under the 1978 Act), and permits a finding of contributory negligence against the mesothelioma-affected employee too. It means that, if D1 has paid out 100% of C’s damages, D1 can look to D2 and D3 for contribution (provided that they are solvent).

When it comes to assessing the proportion of responsibility which should be allocated to D1, D2 and D3, then s 3(4) notes that the court ‘shall have regard to the relative lengths of the periods of exposure for which each was responsible’, but that the allocation could be agreed by D1, D2 and D3 among themselves, or on some other basis that is ‘more appropriate in the circumstances of a particular case’.

In summary, Barker v Corus (UK) plc was a favourable decision for employers’ insurers. The 2006 Act, when taken together with the Fairchild exception, dramatically shifted the balance of power in favour of the mesothelioma-suffering C. The statute was ‘flatly contrary to the interests of the employer’s liability insurers’ (per AXA General Ins Ltd v Lord Advocate). Indeed, it ‘has draconian consequences for an employer who has been responsible for only a small proportion of the overall exposure of [C] to asbestos dust, or his insurers, but ... Parliament has willed it so’ (per Lord Phillips in Sienkiewicz v Greif (UK) Ltd). The upshot of these numerous judicial and statutory developments is summarised in the Table:

<table>
<thead>
<tr>
<th>ALLOCATING DAMAGES PER BARKER v CORUS, AND s 3 OF THE COMPENSATION ACT 2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>If C was negligently exposed by more than one D to asbestos and contracts mesothelioma ...</td>
</tr>
<tr>
<td>If C was negligently exposed by more than one D to some other agent that leads to some illness ...</td>
</tr>
</tbody>
</table>

**Independent tortfeasors**

**Definition**

§MD.5 Where C suffers divisible damage (i.e., distinct and separate aspects of C’s injury or illness), by reason of the separate acts or omissions of D1 and D2, then D1 and D2 are independent (not concurrent) tortfeasors. Independent tortfeasors are liable to C only for that part of the damage which is attributable to each of them. In other words, D1 and D2 are each proportionately liable, i.e., liable only for the identifiable extent of the injury or illness which he caused C.


Multiple defendants

In *Rahman v Arearose Ltd*, independent tortfeasors were described as existing where ‘on the evidence, the respective torts committed by the defendants were the causes of distinct aspects of [C's] overall [damage], and it is positively established that neither caused the whole of it.’

Given that proportionate liability applies to independent tortfeasors, any insolvency on, say, D2’s part will be detrimental to C, because C will not be able to recover that portion of his damages from D1. Note that the Civil Liability (Contribution) Act 1978 has no application at all, because there is no question of each of D1 and D2 being jointly and severally liable. D1 cannot recover contribution from D2, or vice versa. Any case involving independent tortfeasors cannot be ‘driven into the regime of the 1978 Act to which, in principle, it does not belong’ (per Laws LJ in *Rahman*).

Independent tortfeasors also have the consequence that C ‘will have to proceed against each tortfeasor for the part of his loss caused by him’ (per President Underhill in *Hackney LBC v Sivanandan*).

Example
Suppose that successive employers, D1 and D2, operate their machinery very loudly and cause progressive partial deafness to employee C, and the progressive deafness can be shown to have had stages of severity, attributable to each successive employer (a previously-mentioned example of a divisible injury). D1 and D2 are independent tortfeasors. They will each be liable only for the extent of their contribution to C’s injuries.

THE RIGHT TO CONTRIBUTION AMONG MULTIPLE DEFENDANTS

For joint tortfeasors or several concurrent tortfeasors, D1, D2 and D3, whose acts or omissions have caused C an indivisible injury, they are jointly and severally liable. Hence, the common law rule is that each tortfeasor is liable for the whole of C’s damage. However, as between themselves, D1 may seek contribution from D2 and D3, in order to apportion the damages which each is liable to pay to C. That aspect of the Civil Liability (Contribution) Act 1978 is considered in this section.

Where D1, D2 and D3 are not concurrent tortfeasors, then the 1978 Act has absolutely no application. It cannot – because, in the case of independent tortfeasors (i.e., those whose torts cause distinct aspects of C’s overall injury), there is no joint and several liability to which the Act can apply (per *Rahman v Arearose Ltd*).

The relevant statutory provisions

Where D1, D2 and D3 are jointly and severally liable for C’s damage, then it is potentially unjust that D1 may find himself responsible to C for the whole of C’s damage. To redress that concern, s 1 of the Civil Liability (Contribution) Act 1978 provides that D1, who is liable in respect of damage to C, has the right to claim ‘contribution’ from D2 and D3.

The primary provision permitting contribution among D1, D2 and D3, is contained in s 1(1):

303 The right to contribution among multiple defendants

Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

The court’s assessment of *inter partes* contribution among Ds must be in accordance with the criteria contained in s 2(1) of that Act, *viz*, that the amount of contribution must be what is found by the court to be ‘just and equitable, having regard to the extent of that person’s responsibility for the damage in question’. (This aspect of the contribution analysis is discussed later in the chapter.)

Under the 1978 Act, where C is wishing to sue joint tortfeasors or several concurrent tortfeasors – both of whom are jointly and severally liable – then C has a number of options.

### A right to contribution

$$\text{C} \quad \text{D1} \quad \text{Contribution} \quad \text{D2}$$

These were described by the Court of Appeal in *Heaton v AXA Equity and Law Life Ass Socy plc*:45

- C could sue D1 and D2, in the same action, and obtain judgment against both of them. D1 and D2 can then claim contribution between themselves,46 pursuant to ss 1 and 2 of the 1978 Act. The court will apportion the damages between them (without affecting C’s rights to recover in full from either);
- C could sue D1, and either obtain judgment against, or settle with, him alone. D1, against whom the judgment or settlement has been obtained, then can claim contribution from D2, pursuant to ss 1 and 2, by a third party procedure (i.e., joining D2 as a third party);
- if C has obtained a judgment against D1 alone, which is unsatisfied in whole or in part, C can then sue D2 in a subsequent action. C’s claim against D2 is not barred by any judgment which C has obtained against D1 – that successive action is permitted by s 3 of the 1978 Act (discussed later in the chapter).

To reiterate, the exercise of contribution assessment under s 2 determines the liability of joint or several concurrent tortfeasors *as between themselves*, but has no impact on the liability of D1 or D2 to C – C can recover in full against whichever defendant he chooses. Thereafter, that defendant sued has the burden of recovering any contribution from his co-defendants. Hence, if C chooses to sue D1 alone for the full amount of his damages, and if D2 is insolvent and incapable of meeting any order for contribution which a court may make, then that is D1’s risk and concern, and not C’s.

45 [2001] Ch 173 (CA) [44].
46 The party seeking contribution, D1, is referred to as the claimant, in proceedings instituted against D2 (e.g., *Mouchel Ltd v Van Oord (UK) Ltd* [2011] EWHC 72 (TCC) [144], [152]–[153]).

Those claiming contribution

D1 is entitled to claim contribution from his joint, or several concurrent, tortfeasors, D2 and D3, where D1 has either been found liable to C by a court, or where D1’s liability could be established in an action brought against him (per s 1(6)). If D1 elects to pay C the full amount of C’s damage, such that D1 is not liable to C any longer, D1 may still recover contribution (per s 1(2) – the fact that he ceases to be liable to C does not affect his right to contribution from his co-tortfeasors).

Of course, the vast majority of civil suits settle. Under s 1(4), D1 may seek to recover a contribution from D2 and D3, even where D1 has settled his claim with C. He may do so, ‘without regard to whether or not he himself is, or ever was, liable in respect of the damage’. However, in order to claim such a contribution from his co-defendants, D1 must show that the settlement reached with C was a reasonable and bona fide one (per Demco Investment & Commercial SA v Interamerican Life Ass (Intl) Ltd47). D1 will be unable to recover a contribution from his co-tortfeasors, where there had been collusion between C and D1 by inflating the amount payable (per BRB (Residuary) Ltd v Connex South Eastern Ltd48).

Background to the 1978 Act

The history of the right to contribution in ss 1(1) and 2 of the 1978 Act has been somewhat convoluted (as explained, per Royal Brompton Hosp NHS Trust v Hammond,49 in the Table below).

### History of right to contribution

- the common law was unsympathetic to the notion of contribution among defendants (unless they had agreed to that contribution among themselves). Over centuries, it recognised some scenarios in which D1, liable to C, would be entitled to claim a contribution from D2 and D3, who were subject with D1 to that obligation (e.g., for common maritime adventures, co-sureties, co-trustees, co-contractors, partners, co-insurers, co-mortgagors, co-directors and co-owners), for reasons of fairness and justice;
- however, ‘the advent of the motor car … highlighted a situation in which D1, if called upon to discharge a liability to C, could not seek any contribution from others also subject to the same liability to C’ at common law. In The Koursk (1924),50 even joint tortfeasors could not claim contribution amongst themselves. In Rahman v Arearose Ltd, Laws LJ noted that D1, against whom judgment was obtained and who was liable for C’s damages, ‘had no cause of action against his fellow concurrent tortfeasor [D2] to recover any part of what he had to pay under the judgment; so that [D2], if for whatever reason he was not sued by [C], might escape scot free’;51
- so, in 1934, the Law Revision Committee52 said that the problem at common law ‘should be altered as speedily as possible’, and that both joint and several concurrent tortfeasors would ‘be given a right of contribution inter se’, where D1, D2 and D3 each contribute to the same damage suffered by C, but one pays more than his share;
- in 1935, those recommendations were enacted in s 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935. However, these reforms were somewhat limited (e.g., they did not

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47 [2012] EWHC 2053 (Comm) [55].  
48 [2008] EWHC 1172 (QB) [12].  
50 [1924] P 140 (CA).  
51 [2001] QB 351 (CA) [18].  
52 Third Interim Report (Cmd 4637, Jul 1934).
Some general features
Courts have often been called upon to judicially interpret what certain words in the 1978 Act mean – prompting one judge to say that ‘the court has to try and steer a path between the Scylla of a broad brush approach and the Charybdis of an over-analytical approach’ to Parliament’s intention (per *Luke v Kingsley Smith & Co*).

A two-year limitation period applies, for any claim for contribution which D1 makes against D2. According to s 10(3)(a) of the Limitation Act 1980, D1 must make a claim for contribution under the 1978 Act within a period of two years from the date on which D1, as the person seeking contribution, is ‘held liable in respect of that damage by a judgment given in any civil proceedings’.

§MD.7 A claim for contribution made by D1 against D2 and D3, under the 1978 Act, requires three points to be answered affirmatively:

i. C suffered some damage;

ii. D1 was liable to C in respect of that damage; and

iii. D2 was also liable to C in respect of that damage, or some of it.

These requirements arise from a combined reading of ss 1(1) and 1(6). In *Royal Brompton Hosp NHS Trust v Hammond*, the House of Lords (especially Lords Bingham and Steyn) reiterated that there is a distinction between ‘damage’ and ‘damages’ in the context of the 1978 Act – D1 and D2 must be liable to C for the same damage, i.e., the same ‘harm’ or ‘loss’. Only then will D1 have a right to contribution from D2 under the 1978 Act. In none of the following did D1 and D2 cause C the same damage, and nor was there any ‘overlapping element’ to that damage that could have triggered a right to contribution:

In *Royal Brompton*, Royal Brompton, C, developer of a hospital site, sued its contractor, D1, for failing to deliver the hospital building by the completion date. That claim settled. C also claimed damages from the architect, D2, alleging that it negligently issued extension-of-time certificates (which relieved D1 from paying for the delay in completion). D2 (architect) then sought contribution from D1 (contractor), but was unable to, because D1 and D2 were not liable for the same damage. The damage caused by D1 was the delay and late delivery of the building, whereas the damage caused by D2 was the impairment of C’s liability to proceed against D1 because D2 negligently evaluated D1’s entitlement to an extension of time. It was not legitimate to extend the meaning of the phrase, ‘the same damage’, beyond its natural and ordinary meaning (per Lord Steyn). In *Wallace v Litwiniuk*, a Canadian case which received explicit endorsement in the House of Lords in

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53 EWLC (Rep No 79). 54 [2003] EWHC 1559 (QB) [38] (Davis J).
56 (2001), 92 Alta LR (3rd) 249.
Royal Brompton\textsuperscript{57} (and later in the High Court in Luke v Kingsley Smith & Co\textsuperscript{58}), C suffered damage in a car accident, due to D1’s negligent driving. C’s solicitors, D2, thereafter allowed her claim to become time-barred, due to the expiry of the statute of limitations. Again, the damage suffered by C at the hands of D1 was not the ‘same damage’ as that damage which she suffered at the hands of D2. In Thames Water Utilities Ltd v Digginwell Plant & Construction Ltd,\textsuperscript{59} a water main in Lisson Grove, London, belonging to Thames Water, D1, burst and flooded Cs’ adjacent properties, when it was damaged by Digginwell, D2, whilst D2 was excavating a trench and laying cables. About four months earlier, another contractor doing excavation work in Lisson Grove had hit the same main, causing serious flooding. After that incident, D1 knew that the location of the main shown on their plans was incorrect, and that it was a lot shallower than thought, but this was not explained to D2. Cs settled their claim in negligence with D1. D1 then sought contribution from D2, re the sums which it had paid to the flooding victims, C, but had no right to do so, because D1 and D2 were not liable for ‘the same damage’. The damage caused by D1 was failing to investigate and show on its maps the correct location and depth of the main. D2’s negligence was actually hitting the main.

What matters is that D1 is liable to C in respect of some damage which corresponds to the damage for which D2 is liable to C.

The principles governing ‘just and equitable’ apportionment

Discretion vested in the court

There is a wide discretion vested in the court to decide whether to order contribution among D1, D2 and D 3, and, if so, the extent of the apportionment among them. The 1978 Act, s 2(1), requires the contribution to be assessed in an ‘amount … as may be found by the court to be just and equitable, having regard to the extent of that person’s responsibility for the damage in question’.

\textsuperscript{57} [2002] UKHL 14, [2002] 1 WLR 1397, [29]. \hspace{1cm} \textsuperscript{58} [2003] EWHC 1559, [2007] Lloyd’s Rep PN 29 (QB) [33]–[34].

\textsuperscript{59} [2002] EWHC 1171 (TCC) [71]. \hspace{1cm} \textsuperscript{60} [1997] 1 WLR 426 (CA) 445.

\textsuperscript{61} [1949] 2 KB 291 (CA) 326.

In making the apportionment assessment between D1 and D2 under s 2(1) of the Civil Liability (Contribution) Act 1978, a court must take into account both of the following: (1) the relative blameworthiness of D1 and D2, \textit{and} (2) the causative relevance of their respective acts and omissions. It is open to a court to attribute the apportionment of responsibility 100% to one D, and nothing to the other.

The twin pillars of both degree of fault (i.e., D1 and D2’s relative culpability), and their causative relevance (i.e., the extent to which D1 and D2 caused the damage – given that each must have met the causal threshold to be liable to C at all) are relevant to the question of apportionment between D1 and D2. \textit{Both} elements are included in the ‘just and equitable’ phrase used in s 2(1).

There has been plenty of support for these twin pillars. For example, in Downs v Chappell: ‘[t]he extent of a person’s responsibility involves both the degree of his fault and the degree to which it contributed to the damage in question. It is just and equitable to take into account both the seriousness of the respective parties’ faults and their causative relevance.’\textsuperscript{60} In 1959, Denning LJ remarked, in Davies v Swan Motor Co (Swansea),\textsuperscript{61} that the court’s discretion as to
what was ‘just and equitable’ ‘involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness’. In Re-Source America Intl Ltd v Platt Site Services Ltd, Tuckey LJ said that causative relevance was likely to be the ‘most important factor in the assessment of relative responsibility which the court has to make’.62

On appropriate facts, it may be ‘just and equitable’ that D1 should make a full 100% contribution in respect of D1 and D2’s liability to C. Such a result, however, is not common, given the comparative degree of fault and contribution which the law requires (it was unsuccessful, e.g., in Woodland v Essex CC,63 as between the relevant local authority and the lifeguard on duty at the pool when Annie Woodland was injured – a case considered under the subject of the non-delegable duty of care in ‘Employers’ liability’, an online chapter64).

When assessing a ‘just and equitable’ apportionment, a greater apportionment may be warranted on the part of D1 than imposed on D2, in the following circumstances:

• where D1’s tort was a positive act of commission (which is treated more seriously in the apportionment assessment), whereas D2’s was an omission to act (and thus, less serious). To use a metaphor, a perpetrator (‘the poacher’) will usually bear more apportionment than a supervisor (‘the gamekeeper’):

In McKenzie v Potts,65 builder D1 was in breach of statutory duty for using improper building materials, and his liability was apportioned at 60% under the 1978 Act. Architect D2 was also found liable for breach of statutory duty for failing to properly supervise the work, and his apportionment was assessed at 40%. Each of them was culpable for breaches that were ‘as causative of the problem as the other’, but D1 was more blameworthy – his breach ‘was one of commission rather than one of omission’, whereas D2 had omitted to supervise.

• where, in a case of professional negligence towards C, D1 had greater seniority, experience or knowledge in relation to the transaction than D2 had:

In Hickman v Lapthorn,66 Mr Hickman, C, claimed damages against his solicitors, D1, and his counsel, D2, for their alleged negligence in connection with the settlement of his action against another driver (and the Motor Insurers Bureau), relating to a car accident in which C suffered severe head injuries. Held: D2, in his role as barrister, had the conduct of the case, and so had the leading role in valuing the claim and in giving legal advice, plus he had greater seniority and experience. On the other hand, D1, the solicitor, had greater knowledge of the case. The correct apportionment of responsibility in these circumstances was 2/3rds to D1, and 1/3rd to D2.

• where D1 has made a profit out of his wrongful conduct, whereas D2 did not:

In Dubai Aluminium Co Ltd v Salaam,67 a greater contribution was ordered against the wrongdoing partner of the law firm who made a profit from the fraud perpetrated on C than against the innocent co-partners.

• where D1 behaved poorly after the tortious incident (e.g., so as to try to blame D2 for it, and to conduct its defence so that D2 was wholly culpable):

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62 [2004] EWCA Civ 665, [51].  
63 [2015] EWHC 820 (QB). Also called Woodland v Maxwell.  
64 Earlier: [2013] UKSC 66.  
66 [2005] EWHC 2714, [60].  
Multiple defendants

In *Re-source America Intl Ltd v Platt Site Services and Barkin Construction Ltd*, a welding contractor, D2, undertook ‘hot work’ which led to a fire at C’s premises and which caused the loss of C’s goods. The contractor had been engaged by Barkin, D1. **Held:** D2 was 0% liable for the loss, because D1’s representative had negligently instigated and directed the work. Also, D1’s representative had deliberately decided to leave the site immediately after the fire started to avoid criticism, and had also blamed D2 for the mishap. The court was entitled to take these factors into account, as indicative of the seriousness of D1’s fault, since it was D1 who was responsible for supervising the welding work. Reference was also made to how D1 conducted its defence – something that occurred subsequently to the fire, and in no way could be said to have contributed to it. Yet, it was still properly relevant to the apportionment under s 2(1) of the 1978 Act.

- where C’s damage would not have happened at all, but for D1’s actions:

  In *Shah v Gale*, on 9 March 2002, Mr Shah was murdered by several people, when his front door was knocked in at his house at Hounslow. Several people were sent to prison as a result of the attack. Ms Gale was acquitted. However, the Shah family (his estate, C) was unhappy with the outcome of the criminal trial, and sued Ms Gale, D1, and others, D2, in battery. D1 had admitted that she had (mistakenly) pointed out C’s home as the home of a man, Xhafer Ismaili, against whom the murderers had a grievance (of which she was well aware). **Held:** D1 bore a substantial responsibility for C’s battery and death, as a joint tortfeasor of the battery inflicted on C. She was 80% liable. Had she not pointed out C’s house, the attack would not have occurred; but she did not go to the house herself. Hence, 80% apportionment was appropriate.

- where there are a number of separate, but interlinked, causes for C’s damage, and D1 contributed to more of the causes than D2 did:

  In *Crowley (t/a Crowley Civil Engineers) v Rushmoor BC*, C’s house partially collapsed due to the withdrawal of support to the flank wall foundations. There were six separate but inter-linked causes of the damage. Rushmoor, D1, were responsible for five operative causes of the damage, whereas Crowley, D2, was jointly and equally responsible for only the last two of these causes. Each of the causes contributed equally to the damage. Therefore, D1 was solely responsible for 3–4 of these five equal causes. On this basis, it would be both just and equitable to apportion contribution for the damage by allocating 80% to D1 and 20% to D2.

- where D1’s wrongdoing caused C far greater levels of personal injury and inconvenience than D2’s had done (but where both D1 and D2’s acts or omissions had some causative effect):

  In *Webb v Barclays Bank plc*, Mrs Webb, C, contracted polio when 2 years old, which left her with a limp. While employed at Barclays Bank, D2, C stumbled and tripped over a protruding stone, and hyper-extended her polio-affected left knee. She was left with a grossly unstable knee. After lengthy treatment, her surgeon, D1, suggested an above-the-knee amputation (which advice was negligently given), and the operation was proceeded with. **Held:** both D1 and D2 were causally responsible for the one indivisible injury, the amputation, and its consequences. Re the question of contribution between D1 and D2, in relation to that ‘same damage’, D2’s negligence had been first-in-time and injured a vulnerable C, but it was D1’s negligence which was ‘much more responsible for the amputation and all that went with it’. D2’s apportionment was 25%, and D1’s was 75%.

The right to contribution among multiple defendants

**Hawley v Luminar Leisure Ltd**, a bouncer, Mr Warren, D1, stabbed a club patron, Mr Hawley, C, severely injuring him. D2 was the agency employer of D1, and D1 had been supplied by D2 to the owners of a nightclub to provide security for patrons at that nightclub where the stabbing occurred. **Held:** D1’s responsibility was apportioned at 100%, and D2’s fault was ‘negligible’. D2 bore some direct liability in negligence, for failing to make proper enquiries when it first employed D1, but that was ‘far removed from the incident itself’. D2’s only role was to organise their rosters and arrange for doormen to report for duty at the club; it was only if the nightclub operators took exception to the behaviour of any particular doorman that D2 was responsible for replacing him, but for the 2-year period that D1 had worked at the club, nothing had occurred to alert D2 to any proclivity D1 may have to unprovoked violence. D2 could have done nothing on that fateful night to control D1’s violent behaviour, and it was D1’s behaviour that night which caused C’s’ terrible injuries. As between D1 and D2, the blame lay fairly and squarely at D1’s door. As between those defendants, D2’s negligence had negligible causative effect.

Under s 2(1) of the 1978 Act, the court may properly take account of factors other than the causative factors leading to C’s damage, such as the relative ‘blameworthiness’ of D1 and D2, when assessing what (if any) contribution should be ordered under the 1978 Act. As remarked in **Re-source America Intl Ltd v Barkin Construction Ltd**, ‘the court’s assessment has to be just and equitable, and this must enable the court to take account of other factors as well as those which are strictly causative.’ However, the role of non-causative factors must be lesser than causative matters. This was noted by Arden LJ in **Brian Warwicker Partnership v Hok Intl Ltd** – just because Parliament provided, in s 2(1), that a court shall have regard to one matter (‘the extent of that person’s responsibility for the damage in question’), it did not mean that the court could not have regard to other matters; but that ‘if non-causative material is brought into account, there is only a limited role it can play. It must be given less weight than the material showing [D1’s] responsibility for the act in question.’ Nevertheless, as the facts of **Re-source America** (discussed above) showed, the court properly took into account D1’s conduct after the events (in trying to ‘pin the blame’ on D2 for the fire, and for leaving the site early), and whilst that conduct could have had no causative potency, it was nevertheless relevant.

Where D1 is vicariously liable for the wrongdoings of D2, the fact that D1 is strictly liable is **not** a relevant matter to be taken into account, to apportion contribution between D1 and D2 under Civil Liability (Contribution) Act 1978.

Despite the lack of fault of an employer which is vicariously liable for the wrongful act of his employee, that employer may still be apportioned with responsibility under the 1978 Act. The ‘innocence’ of the vicariously liable D is not a defence against any allocation, for the purposes of determining contribution proceedings between that D and another wrongdoer.

For example, in **Dubai Aluminium Co Ltd v Salaam**, the House of Lords attributed some proportion of liability against the law firm partnership (innocent, and vicariously liable for the
wrongdoing of a dishonest law partner), for the purpose of assessing contributions under the 1978 Act.

§MD.10 D1 cannot properly claim a contribution from D2, his several concurrent tortfeasor, which is a sum greater than the sum that D1 has paid out to C as compensation.

This proposition has judicial support. In *AB v British Coal Corp*, it was said that, ‘instinctively’, D1 ought not to be able to recover from D2 an amount greater than what he has paid out to C. It is also supported by the wording of s 2(1) itself. When determining the contribution to which D1 was entitled, ‘the extent of that person’s responsibility for the damage in question’ means that it would be neither just nor equitable to require contribution which exceeded what D1 had, himself, paid to C.

The role of the appellate court

§MD.11 Appellate courts are very reluctant to amend the levels of contribution assessed by a trial judge under ss 1 and 2 of the 1978 Act.

Provided that a trial judge applies the correct tests of relative blameworthiness and causation, and provided that the award was within an acceptable range, it will not be overturned on appeal. An apportionment assessment ‘made by a trial judge will only be altered on appeal if it is clearly wrong’ (per *Re-source America*), and will not be altered if it was ‘within a range which is not obviously wrong’, even if it is not the apportionment which the appellate court would have ordered (per *Carillion JM Ltd v Phi Group Ltd*).

In *McKenzie v Potts*, the apportionment of 40% against the architects was appealed against, but unsuccessfully. The trial judge applied the correct tests of causation and blameworthiness, and even though other judges ‘may have taken a more sympathetic view of the degree of culpability on the part of the architects’ (some other courts had adjudged architects’ liability at no more than 20%), the Court of Appeal would not interfere.

The relationship between contributory negligence and contribution

§MD.12 If C sues D1 and D2 as several concurrent tortfeasors, but contributory negligence is established against C, then the court must decide, pursuant to s 1(1) of the Law Reform (Contributory Negligence) Act 1945, to what extent it is just and equitable to reduce the damages which would otherwise be recoverable by C, having regard to his ‘share in the responsibility for the damage’. That is the first stage. Thereafter, as a second stage, the court must determine the contribution as between D1 and D2.

In *Fitzgerald v Lane*, the House of Lords outlined the two stages of assessment:

Step #1: was C guilty of contributory negligence and, if so, to what extent should the recoverable damages be reduced? These are issues which concern C, on one side of the table, and the defendants jointly on the other side;

Step #2: what is the contribution between the defendants *inter se*, to be assessed having regard to the extent of their responsibility for the damage recovered by C?

In other words, ‘apportionment of liability in a case of contributory negligence between C and the defendants must be kept separate from apportionment of contribution between the defendants *inter se’; and any assessment of contribution as between D1 and D2 has regard to the extent of their responsibility for the damage recovered by C, ‘an issue which affects only the defendants *inter se*, and in no way involves [C]’. These two stages are not to be ‘telescoped’. It is impermissible to consider all three negligent parties – C, D1 and D2 – at the one time, and to allocate the proportion of fault in the one exercise.

Hence, suppose that C, D1 and D2 were all equally negligent for bringing about C’s damage. That cannot be assessed, in the one exercise, as each of them being liable for 33% of C’s damage.

In *Fitzgerald v Lane*, Mr Fitzgerald, C, 22, a trainee real estate agent, was rushing to an appointment to show a client a flat, and crossed the Esher High St in Surrey to where his car was parked. C crossed the road at a pelican crossing about 50 m away from C’s office, when the traffic lights were green to the road traffic and red against the pedestrians. He passed in front of a stationary car, and then into the path of D1’s car. He was thrown up onto D1’s bonnet, crashed into the windscreen, and was then thrown forward and struck by D2’s car being driven in the opposite direction. As a result, C suffered partial tetraplegia and other serious injuries. **Held (trial):** ‘It is impossible to say that one of the parties is more or less to blame than the other ... the responsibility should be borne equally by all three’, i.e., 33% each. **Held (HL):** C was 50% contributorily negligent. If each of the parties was equally at fault, then as a first step, C, on one side of the table, and D1 and D2 collectively, on the other side, were responsible 50–50 for C’s damage. Hence, C should recover 50% of his damages only. As a second step, D1 and D2 were liable for 25% each of the damages payable to C, given that the contribution between D1 and D2, on their side of the table, is to be assessed equally. D1 and D2 were not liable for 33% each.

**SUING MULTIPLE DEFENDANTS IN SUCCESSIVE ACTIONS**

**Judgment obtained against D1, with successive action against D2**

This section is concerned with C’s capacity to obtain judgment against D1 – and, thereafter, to proceed, or continue to proceed, against D2 and D3, against whom C did not obtain judgment or with whom C did not settle. The relevant provisions governing this issue are ss 3 and 4 of the 1978 Act.

**SMD.13** If C sues D1, and obtains a judgment against D1 for £X, which is unsatisfied in whole or in part, then C can sue joint or several concurrent tortfeasors D2 and D3, to recover the rest of the unpaid damages in a subsequent action, pursuant to s 3 of the 1978 Act.

Suppose that C has sued joint or several concurrent tortfeasors (recalling that such tortfeasors have to be jointly and severally liable):
C’s claim against D2 is not barred by any judgment which C has obtained against D1 – that successive action is explicitly permitted by s 3. However, it must be emphasised that s 3 has, in fact, a very limited application. These were explained by Lord Bingham in *Heaton v AXA Equity and Law Life Ass Socy*.\(^2\) It can only apply where C has obtained a court-issued *judgment*, and not to *settlement* agreements reached between C and D1. The common law governs what happens when C settles with D1 (discussed below).

Also, it cannot apply if C’s judgment against D1 is fully satisfied, for two reasons (per Lord Bingham in *Heaton*). First, C’s claim will be extinguished if C recovers the full amount of the judgment from D1, because C will have suffered no remaining loss uncompensated, upon which to found a claim in tort against D2. C will be unable to sue D2 for the same cause of action, as a concurrent tortfeasor liable in respect of the same damage, because C will be unable to allege or prove any such damage. Secondly, any claim by C against D2 will ‘amount to a collateral attack on the judgment already given’, which will constitute an abuse of process.

Of course, D1 who has paid the judgment sum to C may apply to the court to recover a contribution from D2 under ss 1 and 2 of the 1978 Act, as a party liable with him for the same damage suffered by C (as discussed in the preceding section).

### Some background to the statutory provisions

The enactment of s 3 was pivotal in changing the common law, as the English Law Commission discussed in the report which was the prelude to the enactment of the 1978 Act:\(^3\)

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\(^3\) Summarised from *Law of Contract: Contribution* (1977) (Rep 79, 1977) [34].

\(^4\) (1844) 13 M & W 494, 153 ER 206 (Ct Exch) 209–10.

\(^5\) [1999] L8TR 578 (CA) 594.
In fact, it is not partly- or wholly-unsatisfied judgments which give rise, in the main, to successive actions. Rather, it is the scenario of an ‘inadequate’ settlement reached between C and D1, and a successive action against D2 to try to make up the shorfall, which has generated far more legal angst and discussion. It had been candidly admitted, judicially, that, in comparison with the judgment scenario, ‘[m]ore difficult questions arise where [C] sues [D1] alone, compromises the action for a sum ... “in full and final settlement and satisfaction”; and then sues [D2]’ (per Heaton’s Court of Appeal\(^87\)). A number of dilemmas have arisen, as to how the common law should operate, where C settled with D1, and thereafter wishes to recover further damages by proceeding against D2, etc. Section 3 of the 1978 Act has no application to that scenario.

The problem of subsequent action/s after a settlement between C and D1

The battle-lines typically drawn in these cases are thus: C alleges that his settlement with D1 does not preclude him from pursuing joint or several tortfeasor D2 to recover the balance of his damages; whereas D2 contends that the settlement which C entered into with D1 discharged all claims which C might otherwise have had against D2.

Lord Bingham explained in *Heaton*\(^{88}\) that, if the settlement sum which D1 pays C is ‘agreed or taken to represent the full value of [C’s] claim against D1’ in negligence, then C has recovered the full amount of his damage, and has no further basis upon which to sue D2 (at least, for that same cause of action). C may wish to sue D2 for another cause of action, such as for breach of contract – but even then, C will recover against D2 nominal damages at most.

However, as Lord Bingham pointed out, frequently C will settle his claim against D1 for something considerably less than ‘full value’ of the claim. The amount recovered may be discounted because C was concerned about the risk of losing at trial; or knew that D1 carried only limited insurance and hence, anything recovered from D1 was better than nothing; or C was old or sick and wanted to exit the litigation; or because a measure of contributory negligence may have been found against C; or C may want to obtain some payment from D1 in order to finance expensive litigation against other parties; or for ‘any other hazard of litigation’.

### Settlements and contribution

#### §MD.14

The general rule at common law is that, according to the doctrine of ‘release by settlement’, any release from liability of a joint or several tortfeasor D1 granted by C, by means of a settlement agreement between C and D1, also released co-tortfeasors D2 and D3. Releasing one releases all. Hence, if C settles with D1, and then seeks to proceed against D2 and D3, he will be precluded from doing so. However, the general rule is subject to exceptions, in order to soften the effect of the doctrine on C, i.e., D2 is not released if the settlement agreement contains a reservation of C’s rights against D2.

The law governing the ability to bring successive actions after C settles with D1 has moved relatively quickly over recent years.

Given the onerous effects of the common law doctrine of release by settlement, various judicially-created exceptions have been raised to it, to allow C to pursue D2, even where settlement with D1 had been reached. As Steyn LJ noted in 1975 in *Watts v Aldington*, ‘in the best common law tradition, [judges] devise[d] ways of escaping the rigours of its application.’\(^{89}\) In *Bryanston Finance Ltd v de Vries* too, Lord Diplock noted that, notwithstanding the common law rule, ‘courts nowadays are reluctant to construe an agreement with [D1] as a release, rather than a covenant not to sue him, unless it is plain that the agreement was intended by [C] to operate also as a release of [D2, D3, etc] from their liability’.\(^{90}\) Furthermore, although s 3 of the 1978 Act makes no explicit reference to settlements reached between C and D1, it nevertheless cannot be totally ignored, and must influence the law regarding successive actions after settlement (per Steyn LJ in *Watts*: ‘the changes which have been effected by statute require one to scrutinise more carefully any argument that an accord or compromise with one joint tortfeasor ... is to be treated as the release of all’\(^{91}\)).

\(^{89}\) [1999] L&TR 578 (CA) 594.  
\(^{90}\) [1975] QB 703 (CA) 730–34.  
\(^{91}\) [1999] L&TR 578 (CA) 594.
As an exception to the general rule, the intention of C to reserve the right to pursue D2 can be either expressly made or impliedly found. However, in Watts, Steyn LJ was highly critical of the common law rule, and exceptions cast to it, remarking that, ‘plainly the law is not in a satisfactory state’, that sophisticated lawyers may well avoid the application of the general rule and so permit C to pursue D2 and D3, but that, otherwise, ‘the rule is undoubtedly a trap for the unwary’, and that it is a ‘point is of considerable importance since it potentially affects a large number of transactions.’

In Heaton, Lord Bingham, and earlier, the Court of Appeal noted that a settlement agreement between C and D1 will not affect C’s rights to proceed against D2, unless either (a) C agrees to forgo or waive rights which he would otherwise enjoy against D2; or (b) the settlement agreement ‘in full and final settlement’ is enforceable by D2 as a ‘third party’ to the settlement agreement. Whether the amount accepted by C in settlement of his claim against D1 does fix the ‘full’ measure of C’s loss depends upon a proper construction of the settlement agreement. When C settles his claim with D1, C may expressly reserve his right to sue D2 for part of his claim, which will ‘fortify the inference that [C] is not treating the sum recovered from [D1] as representing the full measure of his loss’. However, even if C does not make the reservation by express words, it may be implied. In any event, the court will look to the settlement terms, to see whether the intention was to settle C’s claim in its entirety, or only to settle a part of the claim. If C does intend to reserve his rights to proceed against D2, etc, C ‘must make it clear that that is what he is doing’ (per the trial judge in Heaton).

Notably, where C proceeds against D2, and is legally permitted to do so, then D2 may try to obtain contribution from D1 under ss 1 and 2 of the 1978 Act, which he is entitled to do. It will be no defence to that contribution claim for D1 to assert that he is no longer liable to C by virtue of the settlement – pursuant to s 1(3) of the 1978 Act. Of course, it would be inconsistent with the supposed ‘final’ settlement which C has made with D1 for C to pursue D2, which will ultimately expose D1 to the risk that he will have to make a further payment – indirectly, as a result of a contribution claim brought against him by D2 – in respect of the same damage. Nevertheless, that possibility exists. If D1, in settling C’s claim, does wish to protect himself against any claim against him by D2 claiming contribution under s 1 of the 1978 Act, then D1 may seek to achieve that protection via one of two means: (a) by obtaining an enforceable undertaking by C not to pursue any claim against D2 relating to the subject matter of the settlement, or (b) by obtaining an indemnity from C against any liability to which D1 may become subject via any contribution proceedings brought against D1 by one of his co-defendants.

Dealing with a couple of specific dilemmas arising from successive suits, after a settlement has been reached between C and D1:

8MD.15 Where C accepts payment from D1 in ‘full and final settlement’ of C’s claim, and where D2 and D3 are several concurrent tortfeasors with D1, then notwithstanding the wording adopted in the settlement agreement, C may be permitted to proceed against D2 and D3 in respect of the same damage suffered by C. It will depend on the proper construction of the ‘full and final settlement’ clause, and on all the circumstances surrounding the settlement.
**JAMESON v CENTRAL ELECTRICITY GENERATING BOARD**

<table>
<thead>
<tr>
<th>the settlement</th>
<th>the cause of action</th>
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<tbody>
<tr>
<td>C (Mr Jameson) v D1 (Babcock)</td>
<td>a claim for negligence and breach of statutory duty – C contracted lung cancer (malignant mesothelioma) from exposure to asbestos dust whilst employed by Babcock, D1. Very shortly before his death, C and D1 settled the claim for £80,000, ‘in full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claims in the statement of claim’. The sum was paid just after his death. His full claim was worth £130,000, but the discounted settlement sum reflected the uncertainty of litigation.</td>
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<tr>
<td>.... and the successive action:</td>
<td>the cause of action:</td>
</tr>
<tr>
<td>C (Mrs Jameson, bringing an FAA action) v D2 (CEGB, in whose premises Mr Jameson had worked during some of the time when he had been exposed to asbestos dust during his employment by D1).</td>
<td>a claim for Mrs Jameson’s loss of dependency</td>
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</table>

**Problem**: if the second claim was maintainable, D2 would be potentially liable to the widow for a substantial sum, and could look to D1 for contribution under the 1978 Act, and D1 would be potentially liable to contribute without any requirement that credit should be given for the amount that it had already paid to Mr Jameson.

**Held**: Mrs Jameson could not proceed with the action against D2. She could only maintain her claim against D2 if Mr Jameson, had he lived, would have been able to do so. But Mr Jameson could not have – because by accepting £80,000 from D1 ‘in full and final settlement’ of his claim, he had extinguished it:

- proof of damage is essential in establishing a claim in negligence and in breach of statutory duty – so that, once C’s damages claim has been fully satisfied, then no further action can be brought by C;
- that is a claim by C against D1 for unliquidated damages;
- a sum accepted in settlement of a claim may fix the full measure of C’s loss – that will depend upon a proper construction of the compromise agreement;
- in this case, the sum accepted from D1 in settlement was to be taken as representing the full measure of C’s loss: it followed that C’s claim in negligence was extinguished; he had no claim which could be pursued against D2; and neither did his widow.

However, the effect of *Jameson* has been somewhat ‘watered down’ since. In *Heaton v AXA Equity and Law Ass Socy plc*,66 Lord Bingham noted that the proposition in *Jameson* – that a sum accepted in settlement of C’s claim may also fix the full measure of C’s loss, depending upon a proper construction of the settlement agreement – ‘may perhaps have been stated a little too absolutely in *Jameson*, but ... I do not think it can be challenged. There was clearly

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 room for more than one view, ... whether the sum accepted in settlement by [C] was to be taken as representing the full measure of his loss, but if it did the conclusion followed: C could not have proved damage, an essential ingredient, in his action against D2, and that was fatal to the widow’s FAA claim against [D2]. In any event, Lord Bingham clarified that Jameson certainly did not lay down a rule of law that, once C accepted and received a settlement sum from D1 ‘in full and final settlement’ of his claims against D1 in tort, C is thereafter precluded from pursuing, against D2, any claim which formed part of his claim against D1.97

Subsequent cases have acknowledged that Jameson has been, at least, qualified by Heaton – note, e.g., the statement by Akenhead J in Phaestos Ltd v Ho that ‘whatever [Jameson] decided, the House of Lords explained it in the Heaton decision’.98 It can be a very perplexing issue, as to whether or not the settlement agreement is to be interpreted as meaning that C has received full satisfaction for its loss from D1, thereby precluding any further action – it seems that ‘hairs may be split’, when it comes to construing the settlement agreement. For example, in Gladman Commercial Properties v Fisher Hargreaves Proctor99 the settlement agreement stated that the sum paid was ‘in satisfaction of’ that claim – it did not state that it was in full satisfaction of that claim; it did refer to ‘full and final settlement’, ‘but that is not the same thing’ (said the court). In that case, C had not received full satisfaction for its loss from D1.

What, though, if the settlement agreement does not contain a ‘full and final settlement’ clause of the type in Jameson? In that event, and where any release under the settlement agreement is said to be only in respect of claims against D1, and not against anyone else, then a successive action against D2 is likely to be permitted.

**CAPE & DALGLIESH (A FIRM) v FITZGERALD**

<table>
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<tr>
<th>the original settlement ...</th>
<th>.... and the successive action:</th>
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<tbody>
<tr>
<td>C (IMP) v D1 (Mr Fitzgerald, their managing director)</td>
<td>C (IMP) v D2 (Cape &amp; Dalgiesh, its auditors)</td>
</tr>
<tr>
<td>the cause of action:</td>
<td>the cause of action:</td>
</tr>
<tr>
<td>a claim for breach of fiduciary breach – IMP Properties employed Mr Fitzgerald as managing director, until he was dismissed for serious breaches of fiduciary duty. He negotiated a settlement with IMP, by transferring some shares to IMP’s holding company</td>
<td>IMP sued Cape &amp; Dalgiesh, its auditors, for negligence, for the balance of the damage suffered by IMP</td>
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</tbody>
</table>

**Problem**: the damage caused to IMP by Mr Fitzgerald’s frauds was assessed at over £700,000. The value of the shares transferred by D1 (Mr Fitzgerald) was only £430,000. Cape & Dalgiesh, D2, sought contribution (amounting to a complete indemnity) from Mr Fitzgerald. The question arose as to the legal effect of IMP’s settlement with Mr Fitzgerald.

**Held**: IMP’s receipt of D1’s shares was not intended to be in full satisfaction of all of IMP’s claims. As between C and D1, ‘no further claims could be brought’ (specific clauses of their settlement agreement made that plain), but given the matters mentioned above, and ‘whatever view is taken of the developing legal principles in the light of the recent authorities’, C was not precluded from advancing claims against other contract breakers in respect of the same losses (quoting from the CA,97 and affirmed by the HL).98

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§MD.16 Where C obtains a settlement against D1 in part satisfaction of his claim, then whatever is recovered from D1 must be credited, so as to reduce the amount recoverable from D2. C cannot recover, in the aggregate, more than the amount of his loss.

The reason for this is that, once C has fully recouped his loss, then ‘any further proceedings would lack a subject matter’ (per Lord Nicholls in Tang Man Sit v Capacious Investments Ltd, and cited by Lord Hope in Jameson v CEGB).

In Watts v Aldington, Lord Aldington obtained judgment for damages of £1.5M for defamation against Mr Watts and Count Tolstoy. An agreement was entered into, by which Lord Aldington accepted £10,000 in full and final settlement of the claim against Mr Watts. The agreement impliedly reserved Lord Aldington’s rights in respect of the judgment against Count Tolstoy. It was accepted that Lord Aldington would have to give credit for the sum of £10,000 received from Mr Watts.

The principle has been oft-illustrated since, e.g., in Jameson, where double recovery was impermissible, given the full satisfaction which Mr Jameson had achieved in action #1 against D1, Babcock.

§MD.17 Where C is suing D2 for a loss different from that which D1 was sued for (i.e., where C’s settlement agreement with D1 is not in respect of the ‘same damage’ for which C is suing D2), then whether the subsequent action may be brought depends upon the scope of the original judgment/settlement.

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**JOHN v PRICE WATERHOUSE**

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<th>the original settlement:</th>
<th>.... and the successive action:</th>
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<tbody>
<tr>
<td>C (Elton John) v D1 (John Reid, Elton John’s former manager) and D2 (JREL, John Reid’s company)</td>
<td>C (Elton John) v D3 (Price Waterhouse) and D4 (an individual)</td>
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</tbody>
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<tr>
<th>the cause of action:</th>
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<tbody>
<tr>
<td>a claim for a debt (i.e., a liquidated amount); and the settlement agreement referred to payment to C of ‘compensation for all Elton John financial claims’</td>
<td>a claim for professional negligence/negligence (i.e., for unliquidated damages)</td>
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</tbody>
</table>

**Problem:** C reached a settlement with JREL and John Reid in May 1998. D3 and D4 argued that this settlement not only discharged all claims against JREL and John Reid but also discharged any claims which C might otherwise have had against D3 and D4.

**Held:** the settlement agreement would not prevent C maintaining the claims brought in the action against D3 and D4. The settlement agreement only dealt with ‘financial claims against JREL and John Reid’, and nothing more.

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100 [1996] AC 514 (PC, Hong Kong) 522.  
102 [2000] 1 AC 455 (HL) 472.