



Neutral Citation Number [2019] EWHC 1104 (QB) Case No: HQ04X04213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2019

Before :

MR JUSTICE SOOLE

Between :

MASTER HARRY ROBERTS (a child and protected party by his mother and litigation friend Mrs Lauren Roberts) **Claimant**

- and-

(1) **THE SOLDIERS, SAILORS, AIRMEN AND FAMILIES ASSOCIATION – FORCES HELP** **Defendants/ Part20 Claimants**
(2) **THE MINISTRY OF DEFENCE**

-and-

ALLGEMEINES KRANKENHAUS VIERSEN GMBH **Part20 Defendant**

Mr Charles Hollander QC (instructed by **Government Legal Services**) for the Part 20 Claimants

Mr Charles Dougherty QC (instructed by **DAC Beachcroft**) for the Part 20 Defendant

Hearing dates: 25-27 March 2019

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Mr Justice Soole :**

1. This trial of a preliminary issue concerns the pure question of law as to whether the Civil Liability (Contribution) Act 1978 (the 1978 Act) has mandatory/ overriding effect and applies automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules. The only case in which this point has been determined is at first instance (Arab Monetary Fund v. Hashim (No.9) The Times 10 October 1994) (Hashim) where Chadwick J, as he then was, answered in the affirmative. The Part 20 Defendants (the Hospital) submit that this conclusion was wrong, both at the time and in the light of the Supreme Court decision in Cox v. Ergo Versicherung AG [2014] UKSC 22; [2014] AC 1379 (Cox) and should not be followed.
2. The relevant rule on precedent has been restated by the Supreme Court as : *‘So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so’* : Willers v. Joyce (No.2) [2016] UKSC 44 at [9]; [2018] AC 843.
3. The background to this issue can be shortly stated. The Claimant was born at the Hospital in Viersen, North-Rhine Westphalia, Germany on 14 June 2000. The Hospital provided medical services to UK Armed Forces stationed in Germany, with whom the Claimant’s father was serving, and their families. His claim is that he sustained an acute profound hypoxic brain injury as a result of negligence in the course of his delivery by a British midwife supplied by the First Defendant charity (SSAFA). On his behalf it is alleged that SSAFA and/or the Second Defendant (MOD) are vicariously liable for her acts or omissions.
4. SSAFA/MOD deny liability. In addition they have issued a Part 20 claim against the Hospital, seeking contribution pursuant to the 1978 Act¹ in the event that they are found liable. They contend that the Hospital is vicariously liable to the Claimant for the midwife and/or that the Hospital and its staff were otherwise negligent in the management of his delivery. This is denied.
5. As a preliminary objection, the Hospital contends that the application of the 1978 Act is subject to choice of law rules, whose effect is to apply German law to a claim for contribution. By the combined effect of the German law of limitation and s.1 Foreign Limitation Periods Act 1984 the contribution claim is time-barred; and therefore must fail.
6. SSAFA/MOD accept that, if choice of law rules prevail, the relevant law is German and the claim time-barred. However they contend that the 1978 Act has overriding effect. Since the limitation period under the 1978 Act expires 2 years from the date of judgment award or settlement (s.10 Limitation Act 1980), the claim can proceed.
7. As recorded in a Consent Order dated 10 October 2018 the preliminary issue is agreed as :

¹ Reply to Third Party Defence para.4

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‘whether or not the 1978 Act has mandatory or overriding effect and applies automatically to all proceedings for contribution brought in England and Wales, without reference to any choice of law rules. If not, German law will apply to the Defendants’ claims for contribution against the Part 20 Defendant and they will be time barred.’

8. As a preliminary point it should be noted that, subject to any effect of the 1978 Act, the choice of law rules for contribution in this claim are derived from the common law. The Rome II Regulation on non-contractual obligations (EC 864/2007), and in particular Article 20 concerning ‘Multiple Liability’, is not engaged. This is because Rome II only applies where the ‘events giving rise to damage’ occurred after 11 January 2009². In this case the alleged negligence and consequential injury were in June 2000. Furthermore Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act) has no application, as that is concerned with the choice of law in tort. Whatever its correct classification³, the claim for contribution is not a claim in tort.

9. **The 1978 Act : material provisions**

‘1. Entitlement to contribution

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

(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

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

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

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

² Articles 31, 32.

³ The parties agree that it should be classified as a restitutionary claim.

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

2 Assessment of contribution

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

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

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

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

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

6 Interpretation

(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)

...

7 Savings

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

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

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

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

Hashim

10. The Arab Monetary Fund (the Fund) sued its former Director-General Dr Hashim for alleged breaches of fiduciary duty; and also sued a bank and its affiliates (FNBC) for dishonest assistance. Before settling with the Fund, FNBC commenced contribution proceedings against Dr Hashim pursuant to the 1978 Act. Dr Hashim contended that

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the proper law of any claim for contribution was that of Switzerland, alternatively Guernsey; that the 1978 Act applied only to claims governed, in accordance with the rules of private international law, by English domestic law; and that accordingly the contribution claim must fail. It is necessary to consider the judgment in some detail. For the purpose of the Hospital's submissions, this includes a focus on its structure. The judgment identified the person who suffered the damage as A; the person claiming contribution as B; the person against whom contribution is claimed as C.

11. The judgment first set out the relevant provisions of the 1978 Act. From these Chadwick J identified five questions which '*prima facie...will or may arise*' in any proceedings under the Act by B against C. The list did not include any question as to whether the 1978 Act was itself subject to choice of law rules.
12. Chadwick J then recorded the submission on behalf of Dr Hashim that there was a 'preliminary question' in contribution proceedings with a foreign element, namely whether the contribution claim was governed by English law. He then considered passages in two Law Commission Working Papers.
13. Law Commission Working Paper No.75 (1980), 'Classification of limitation in private international law', considered the extent to which the 1978 Act applied to contribution claims involving foreign elements (paras.75-78). Its discussion began '*First, it should be borne in mind that the 1978 Act will only apply to those claims for contribution involving rules of private international law where the law governing the contribution claim (as opposed to P's⁴ right of action) is English law. There is no direct English authority on the law to govern a contribution claim but the better view would seem to be that it is a matter to be governed by the proper law of the obligation.*' (para.76).
14. The footnote to that statement referred to Dicey and Morris, Conflict of Laws, 9th ed. (1973), p.967 and Cheshire and North Private International Law, 10th ed. (1979), p.282. In the 12th edition of Dicey and Morris, current at the time of Chadwick J's decision in Hashim, the comparable passage stated : '*There does not appear to be any English authority on the question what law governs the right of one tortfeasor to claim contribution or indemnity from another. If the right to contribution is statutory, as it is in English domestic law, it is submitted that an English court would characterise it as quasi-contractual and not as delictual...In such a case the proper law of the obligation will prima facie be the lex loci delicti...*' (pp.1533-1534)⁵. Cheshire and North was to the same effect. The point was restated in the Law Commission Working Paper No.87 (1984) 'Private International Law Choice of Law in Tort and Delict', para.2.83, footnote 197.
15. Chadwick J did not comment on the textbook references, but observed that in each case the Law Commission had cited no authority for its proposition.
16. He then referred to a decision of the Supreme Court of South Australia⁶ relied on by Dr Hashim; and stated that this also did not support the proposition that there was a preliminary question on choice of law. Mr Dougherty does not rely on that authority.

⁴ i.e. the person who suffered the damage (A).

⁵ The 9th edition (1973) was in the same terms, save to state that this was contrary to the submission in the previous edition.

⁶ Plozza v. South Australian Insurance Company Limited [1963] SASR 122.

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The judge then referred to two English decisions at first instance in which the scope of the 1978 Act had been considered in relation to claims involving foreign elements: The Benarty [1987] 1 WLR 1614 (Hobhouse J, as he then was); The Kapetan Georgis [1988] 1 Lloyd's Rep 352 (Hirst J, as he then was). He stated that these also appeared to be inconsistent with the proposition.

17. The next section was headed '*The correct approach*'. This included :

'The premise, which is, I think, implicit in Mr Ross-Munro's proposition - and, perhaps, also in the Law Commission Working Papers - is that the 1978 Act contains rules which are only applicable as part of English domestic law; and does not itself contain private international law rules for the purpose of identifying the circumstances in which the English Court is to apply the Act to cases involving foreign elements. In my view this is a false premise.'

The correct approach is not to ask whether, under some rule of English private international law which is to be found or ascertained independently of and without regard to the provisions of the Act itself, the contribution claim which has been made in the proceedings which are before the Court is to be determined by reference to the Act: the correct approach is to ask whether under the rules of law applicable in an English court (which include the provisions of the Act itself) the contribution claim ought to succeed. In a case involving foreign elements that approach requires the Court to decide whether, upon a true construction of the Act, the legislature intended to confer on the claimant (B) in the contribution proceedings which are before it a right of contribution against the respondent to those proceedings (C) which was to be recognised and enforced in England.

It is, I think, important to keep in mind that the right of contribution created and conferred by the 1978 Act is not based upon the breach of any existing obligation owed by C to B...'

He continued : 'In deciding whether, upon a true construction of the 1978 Act, the legislature intended that B... should have a statutory right of contribution against C, the Court is not concerned with any obligation to contribute which might exist between C and B independently of the Act; or with any relationship between C and B other than the relationship which gives rise to the statutory right - that is to say, that each is, or would have been, liable to A in respect of the same damage.'

18. He continued that in contribution proceedings under the 1978 Act - '*including contribution proceedings involving foreign elements*' – the respective liability of B to A and C to A were to be determined by the first two questions which he had identified, i.e. (i) is B liable in respect of any damage suffered by A and (ii) is C a person liable in respect of the same damage? For this purpose the existence of liability was to be determined in the light of s.1(6) and 6(1) of the Act.
19. He continued : '*Section 1(6), and other sections, contemplate that the Court may be required (by its own rules of private international law) to answer those questions by reference to some system of foreign law. If those questions are answered in the affirmative, then s.7(3) of the Act provides that the statutory right to contribution supersedes any right (other than an express contractual right) which might arise or exist otherwise than under the Act.*

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It would be strange, therefore, if – before it came to construe the 1978 Act at all – the Court were required to answer a preliminary question which was unrelated to and inconsistent with the basis upon which the statutory right of contribution arises under English law. To ask whether a right of contribution arising out of any relationship between B and C other than their relationship as persons each of whom is liable to A in respect of the same damage ought to be determined by English domestic law would be to ignore the basis upon which the right arises under that law. To ask whether a right of contribution arising out of the relationship between B and C as persons who are each liable to A in respect of the same damage would be to ask the very question to which the 1978 Act provides the answer.’ (p.7).

20. Chadwick J then returned to the decisions in The Benarty and The Kapetan Georgis. The essential facts of these multi-party shipping cases are conveniently summarised at p.7 of the judgment. He observed that the Court in neither case asked itself the suggested preliminary question, i.e. whether the contribution claim made by B against C was governed by English law. On the facts of each case, it would have been difficult to see how the question could have been answered in favour of English law; and yet in each case the judge had concluded that the 1978 Act created a cause of action in its own right and whose ambit was to be determined from the terms of the Act itself.
21. Turning to academic texts, Chadwick J was referred to Glanville Williams, *Joint Torts and Contributory Negligence* (1951). In his discussion of s.6(1)(c)⁷ of the predecessor Law Reform (Married Women and Tortfeasors) Act 1935 (the 1935 Act), Professor Glanville Williams observed *‘The Tortfeasors Act allows recovery of contribution between parties ‘liable’ in respect of damage. Literally speaking, it is possible for parties to be liable under a foreign system of law. That this does not mean, however, that the Act is capable of being applied indiscriminately to liability for foreign torts. If three Ruritarians are involved in tort litigation in Ruritania, under whose law there is no right to contribution, it is inconceivable that merely by coming to England and suing here they could obtain the benefit of the Tortfeasors Act.’* : para.39 ‘Contribution under the Conflict of Laws’.
22. Chadwick J noted that the 1935 Act contained no indication whether ‘liable’ in s.6(1)(c) was restricted to liability under English domestic law or extended to liability under some foreign system of law. He contrasted the provisions in the 1978 Act which recognised that foreign law may determine or affect liability, citing ss.1(3), 1(6) and 2(3)(c). He focused in particular on s.1(6), observing that *‘Although it is immaterial that, in deciding whether or not liability is established, the Court may (in accordance with its own rules of private international law) apply foreign law, the ‘liability’ is a liability which could be established in an English court... But if that test is satisfied, then it is immaterial whether a right of contribution between the tortfeasors exists under any foreign law. That right is conferred by s.1(1) of the 1978 Act and the English court must give effect to it.’* (p.9).
23. Turning to Professor Glanville Williams’ Ruritanian example, he stated that, if the English court assumed jurisdiction in the litigation and concluded (having regard as

⁷ *‘Where damage is suffered by any person as a result of a tort (whether a crime or not) - ... (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...’.*

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necessary to the relevant provisions of English and Ruritanian tort law⁸) that each of B and C were liable to A for the same damage, ‘...it would, in my view, not only be conceivable but correct in law for the Court to apportion the damages between B and C inter se.’ (p.9).

24. In support of this analysis, he cited Hobhouse J in The Benarty : ‘If the respondent to the contribution claim is (as here) a foreigner, then before such foreigner can be made the subject of a contribution claim the claimant must establish some procedural right recognisable under R.S.C. O.11, or other relevant provision, which entitles him, the claimant, to proceed against the respondent in this country. If he cannot establish such a procedural entitlement no question of liability under the 1978 Act will arise : if he can then there is no need for any further enquiry and the provisions of the 1978 Act should be applied.’ : p.1622C-E.
25. Chadwick J added that ‘It would be a surprising defect in the law if the English court, having decided in an action to which A, B and C were party that B and C were each liable to A in respect of the same damage...were precluded by the absence of any law of contribution in Ruritania from deciding also how its judgment for that sum against each of B and C should be apportioned inter se. I am satisfied that, following the enactment of the 1978 Act, that defect is not a feature of English law.’
26. Thus he held that ‘There is no preliminary question as to proper law the answer to which determines, independently of the 1978 Act, whether the Act applies.’ Furthermore, where the 1978 Act applies, ‘the statutory right conferred by s.1(1) supersedes any other right to recover contribution, including any right under foreign law.’ (p.13). This was a reference back to s.7(3) of the 1978 Act; see also p.7.
27. In these circumstances it was unnecessary to decide what the position would be if, upon its true construction, the 1978 Act did not apply : ‘In that case it might well be that a contribution claimant could rely on a right of contribution conferred by a foreign law; and that, on that basis, the English court would recognise a right of contribution arising under the law of the place with which the circumstances giving rise to the contribution claim have the most real connection...’ (p.13).

Hospital submissions

28. Mr Charles Dougherty QC started with the principles which govern the question of whether an English statute has overriding effect or ‘extraterritorial application’, i.e. so as to be applicable irrespective of ordinary rules of private international law. For this purpose he relied in particular on the judgment of Lord Sumption in Cox.
29. In that case the issue was whether the relevant provisions of the Fatal Accidents Act 1976 (FAA), concerning the measure of damages, should be applied notwithstanding the ordinary rules of private international law. This was argued on two bases. First, that as a matter of construction the Act had extraterritorial effect. Secondly, that its provisions represented mandatory rules of English law which applied irrespective of the ordinary rules of private international law. Lord Sumption considered that in the circumstances of the case both submissions raised the same issue : [26].

⁸ At this time there was the requirement of double actionability; cf. its removal by the Private International Law (Miscellaneous Provisions) Act 1995.

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30. Lord Sumption's starting point was that whether an English statute applies extraterritorially depends on its construction. However there is '*...a presumption against extraterritorial application which is more or less strong depending on the subject matter.*': [27].
31. As to what is meant by the extraterritorial application of an English statute, Lord Sumption distinguished two questions which were sometimes confused, viz. (i) what is the proper law of the relevant liability and (ii) whether the proper law is displaced by some mandatory rule of the forum. If the answer to the first question is English law, no question of extraterritorial application arises [28]. In Cox, the answer was German law and accordingly the focus was on the second question.
32. In Cox the form of that question was identified by s.14(3)(a)(i) of the 1995 Act: '*Nothing in this Part...authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim insofar as to do so...would conflict with principles of public policy...*'. However Lord Sumption made clear that this had its counterpart in the common law [28].
33. The expression 'mandatory rule' was commonly employed to describe what the Law Commissions of England and Scotland had called '*rules of...domestic law...regarded as so important that as a matter of construction or policy that they must apply in any action before a court of the forum, even where the issues are in principle governed by a foreign law selected by a foreign choice of law rule*' [34] : Law Commission and Scottish Law Commission Working Paper No 87 (1984), paragraph 4.5.
34. The question of whether an English statute has extraterritorial application, i.e. in this sense of imposing such a mandatory rule, depended on construction of the statute: Cox at [27]. The statute may impose the rule expressly or by implication. As to the latter: '*Implied extraterritorial effect is certainly possible, and there are a number of examples of it. But, in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extraterritorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to any one resorting to an English court regardless of the law that would otherwise apply.*': [29].
35. In Cox the Supreme Court held that the FAA contained no express mandatory rule : '*There is nothing in the language of the [FAA] to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law.*' [29]. Furthermore, it provided no basis to imply such a rule in the particular context of the rules of German law on the measure of damages. Those rules '*...are based on a perfectly orthodox principle which is by no means unjust and is accepted in principle by English common law in every other context than statutory liability for fatal accidents.*' [34]. By contrast, a foreign law rule might be so offensive to English legal policy that effect would not be given to it in an English court. Lord Sumption gave the hypothetical example of a rule that women or ethnic minorities should have half the damages awardable to white males similarly placed : [34].

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36. Lord Sumption also observed that the whole purpose of FAA s.1 was to correct an anomaly in the English law of tort, which was unlikely to be exhibited in foreign law [33].
37. Subsequent examples of cases where the Court has found the relevant statutory provision to have no overriding effect are Syred v. Powszechny Zakład Ubezpieczeń (PZU) SA [2016] 1 WLR 3211 (Social Security (Recovery of Benefits) Act 1997) and Deutsche Bahn AG v. Mastercard Incorporated [2016] CAT 14 (Competition Act 1998); cf. Bilta (UK) Ltd v. Nazir (No.2) [2015] UKSC 23 [2016] AC 1 (Insolvency Act 1986 has overriding effect).
38. Before turning to the impact of Cox, Mr Dougherty's central criticism of Hashim is that its reasoning starts and finishes with an analysis of the 1978 Act; and thereby fails (i) to engage with the necessary preliminary questions derived from the conflict of laws, i.e. characterisation of the contribution claim and application of the relevant conflict rule to that characterisation; and then (ii) to consider whether the 1978 Act has overriding or mandatory effect, so as to displace that rule. In consequence the analysis was circular, assuming what it had to prove, i.e. that the 1978 Act governed the FNBC's contribution claim.
39. This was demonstrated by the structure and terms of the judgment. Having started with a recitation of the provisions of the 1978 Act, Chadwick J identified the five questions which those provisions raised '*prima facie...in any proceedings in an English court*' (p.4). The section headed '*The correct approach*' amounted to an assertion that the answer was to be found in the terms of the statute; hence its concluding sentence: '*To ask whether a right of contribution arising out of the relationship between B and C as persons who are each liable to A in respect of the same damage would be to ask the very question to which the 1978 Act provides the answer.*' (p.7).
40. As to the judge's identification of a '*false premise*' in the contrary argument (p.6), this did not amount to a conclusion that the statute on its proper construction overrode the choice of law rule which would otherwise apply.
41. The section on 'The academic texts' likewise did not engage with the problem. The answer to Professor Glanville Williams' Ruritanian example simply asserted that it would be a '*surprising defect*' in the law if there could be no contribution between B and C, having each been found liable to A; and again concluded that the terms of the 1978 Act provided the answer that there was no such defect.
42. As to the concluding section of the judgment (p.13), this made clear that its reasoning was on the basis that there was no preliminary question to be considered. Mr Dougherty submitted that the decision in Hashim was thus wrong, even without recourse to the subsequent decision in Cox.
43. Turning to Cox, there was nothing in the 1978 Act which could demonstrate that its provisions overrode the effect of the ordinary principles of private international law. There was no express provision to that effect. As to implication, there was no basis to conclude that the case fell within either of the two categories identified by Lord Sumption at [29].

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44. Thus s.1(1), the main operative provision, was silent on the point. The only references to private international law were in ss.1(6) and 2(3)(c). The former simply made clear that, if the Act was in play, the rules of private international law applied in the determination of the liability of B to A or of C to A. As to s.2(3)(c), this simply provided that, in the event that the Court had reached the stage of the assessment of contribution, the choice of law rules potentially applied to the extent that applicable foreign law imposed a limit or reduction of a type akin to those identified in subsections (a) and (b).
45. Thus the references to foreign law in ss.1(6) and 2(3)(c) provided no support for the proposition that the statute overrode the choice of law rules which would otherwise obtain. That was a preliminary question on which the statute was silent. The necessary implication was that the statute did not have overriding effect.
46. As to s.7(3), its effect was that, if the 1978 Act otherwise applied, then it would supersede the assortment of rights of contribution which existed before the 1978 Act and its predecessor the 1935 Act; subject to the identified exceptions. It provided no support for the argument of overriding effect. Indeed, its exception for express contractual provision which excluded contribution was another pointer to the contrary.
47. The 1978 Act merely provided a statutory basis for contribution, where English law applied, which would not be available at common law. This was comparable to the FAA and the Law Reform (Contributory Negligence) Act 1945 (the 1945 Act) which likewise corrected anomalies in the common law, but which did not have overriding effect.
48. Thus there was no reason to conclude that the 1978 Act fell within Lord Sumption's first category of legislation which could not be effectually applied unless it had overriding effect. Nor was there any compelling policy argument within his second category. There was no such policy in respect of claims in tort. Prior to the 1935 Act there was no general right of contribution between tortfeasors; and the further extension only occurred in the 1978 Act. Thus there was no fundamental principle that the 1978 Act should apply to all contribution claims, regardless of the applicable law.
49. Mr Dougherty then contrasted statutes which dealt expressly with the preliminary question. Thus the Unfair Contract Terms Act 1977 provided by s.27, under the heading 'Choice of law clauses' : '*(2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both) [two circumstances then identified]*'; see also the Third Parties (Rights against Insurers) Act 2010 s.18, under the headings 'Application of Act' and 'Cases with a foreign element'.
50. The conclusion that the application of the 1978 Act was itself subject to choice of law rules was supported by the Law Commission report which led to its enactment and its subsequent Working Papers. The report (No.79) by its Commissioners⁹ contained, like the appended draft Bill, no reference to private international law. The implication

⁹ The Hon. Mr Justice Cooke, Mr Stephen Edell, Mr Derek Hodgson, QC; Mr Norman Marsh, QC; Dr. Peter North.

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was that there was no intention to alter the primary position that the choice of law rules were applicable. The subsequent Law Commission Working Papers (No.75, para.76; No.87, para.2.83) provided express support, citing the leading textbooks on private international law.

51. As to academic discussion, in The Conflict of Laws (OUP 2002), Professor Adrian Briggs considered the decision in Hashim and observed '*As a matter of statutory construction this is questionable, for there is no particular reason – either deduced from the wording of the Act or from the policy involved - to consider that Parliament intended English contribution rules to be applied to each and every respondent brought before the English courts, any more than it intended English rules on contributory negligence to be applied with equally indiscriminate effect. The correct analysis ought to be that such a claim is restitutionary, and that choice of law is well within the framework of that for restitutionary claims.*' (p.199); see also his article on the decision in [1995] LMCLQ 437. The decision had been similarly questioned by Professor Charles Mitchell in [1997] Restitution L Rev 27, 51-52.
52. The English decisions referred to by Chadwick J and subsequent observations of the Court of Appeal (The Baltic Flame [2001] 2 Lloyd's Rep 203) provided no assistance.
53. In The Benarty the jurisdiction of the English court in respect of the subject matter had already been established. The application was to strike out the contribution notice in circumstances where the contribution proceedings had been stayed. This depended on interpretation of s.1(6), and in particular its words '*any such liability which has been or could be established*'. It did not engage with the preliminary question, which was not argued. Mr Dougherty emphasised that in many cases that question may be irrelevant, in particular where (unlike the present case) a contribution claim is not time-barred under the applicable foreign law.
54. Equally, in The Kapetan Georgis, the application was to set aside a previous order for service of the contribution notice out of the jurisdiction. The claim was both in tort and for contribution under the 1978 Act. It was held that the party seeking contribution had a good arguable case in tort; and therefore the observations of Hirst J on the 1978 Act were obiter. In any event, as in The Benarty, the argument proceeded on the basis that the 1978 Act would apply if the Court assumed jurisdiction. On that issue Hirst J followed the observations of Hobhouse J in The Benarty.
55. The observations of the Court of Appeal in The Baltic Flame took the point no further. In that case the application was by a Saudi company (Saudi Aramco) to set aside an order granting time charterers (Fortum) permission to serve out of the jurisdiction a contribution claim under the 1978 Act. Under Saudi law there was no right of contribution. The issue was forum conveniens and the exercise of the Court's discretion. In upholding the decision below to dismiss the application, the Court of Appeal did so on the basis that the judge (Longmore J, as he then was) had properly balanced the various factors relevant to the exercise of his discretion. Thus there was no argument on the preliminary question; on the contrary, Saudi Aramco conceded that there was a good arguable case under the 1978 Act. He surmised that this concession reflected the fact that the contract of carriage was subject to English law [40]. Thus in citing The Benarty and The Kapetan Georgis and describing the 1978 Act as '*...unequivocal in its application to all proceedings brought in England...*' [36] Potter LJ was advancing no broad proposition that the statute had overriding effect.

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56. Conversely, the Hospital's case was supported by the decision of the Supreme Court of Victoria in Fluor Australia Proprietary Limited v. ASC Engineering Proprietary Limited [2007] VSC 262 (Bongiorno J). That concerned a statutory provision of that State (Wrongs Act 1958 as amended, s.23B) which was in materially the same terms as s.1 of the 1978 Act. In all other Australian states the statutory provisions for contribution only permitted contribution between tortfeasors. Fluor sought contribution by reference to ASCE's liability in contract. In disputing the application of the Victorian statute, ASCE contended that the contribution claim had no nexus to that state, pointing in particular to the contractual choice of law clause which nominated the law of Western Australia as its governing law. It described the claim as '*blatant forum shopping*'.
57. Fluor submitted that the statute enacted the statutory choice of law rule which prescribed that Victorian law must always be applied to a claim for contribution brought in a Victorian court; and thus overrode the common law choice of law rules.
58. The Court accepted that the claim had no factual connection to Victoria. Having considered the English decisions in The 'Kapetan Georgis' and Hashim it stated that the effect of Fluor's arguments would be to allow any claimant for contribution to resort to a Victorian court '*... to obtain the benefit of considerably wider rights to contribution which are available under Victorian law than those which would be available elsewhere, including in the jurisdiction in which all the factual elements of the cause of action for contribution may have occurred and even in circumstances where the parties have, themselves, stipulated the law which they wish to govern their rights inter se. No connection with Victoria would need to be established.*'. : para.51.
59. The Court applied the principle in the majority judgment of the High Court of Australia in John Pfeiffer Pty Ltd v. Rogerson (2003) CLR 503 that the choice of law rules for Australia are governed by the common law adapted to the Australian constitution. Although Pfeiffer concerned tort liability, its principle was wide enough to extend to the statutory provisions for contribution. Thus : '*It could not be suggested that contribution concerns only procedural rights so as to give primacy to the law of the forum. The principle in Pfeiffer is as much applicable to such a claim as to a claim in tort. This is so whether a claim to contribution can be characterised as restitutionary or defined by reference to the character of the underlying liabilities upon which it is based or can be described in some other way*' : [52]. Furthermore '*Consistently with Pfeiffer, the unique Victorian remedy of contribution should be available to and in respect of wrongdoers, regardless of the juridical source of their wrongdoing, only in those cases to which, by the application of appropriate common law choice of law rules, Victorian law should be applied.*' [54].
60. In rejecting Fluor's argument, the Court described the function of s.23B(6) - which equates to s.1(6) of the 1978 Act - as '*...merely facultative. It permits a claim to be brought under Victorian law even where the underlying liability, in tort, breach of contract, breach of trust or otherwise, falls to be judicially determined according to the law (written or unwritten) of a jurisdiction outside of Victoria. It is not difficult to imagine a situation where choice of law rules which relates to a contribution claim (whatever they might be in a particular case) would dictate the application of Victorian law even where the wrongdoing of one or other or even both of the parties involved fell to be determined according to the law of another jurisdiction. Were the facts of this case to be geographically rearranged it may well be that the appropriate*

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rules of private international law would dictate that Victorian law should be applied. As the facts stand however no possibly applicable common law rules of private international law would have that effect.’ [56].

61. The Court also rejected Fluor’s submission that s.24(2A) – which is in similar terms to s.2(3) of the 1978 Act - supported its argument on the primacy of the statute. Thus : *‘This section merely ensures that the determination by a Victorian court concerned with a contribution claim of an underlying liability according to the law of a jurisdiction other than Victoria which recognises apportionment of damages for contributory negligence would take contributory negligence into account in determining contribution. For example, where an underlying liability of one of the parties was a liability in tort according to the law of a foreign jurisdiction which recognise the apportionment of damages for contributory negligence in tort, a Victorian court determining contribution would have to take contributory negligence into account when determining the existence and extent of the underlying liability upon which the claim for contribution would depend. Once s.23B(6) is seen as a facultative provision enabling foreign law to be applied to determine underlying liability where Victorian law is the appropriate law to be applied to the claim for contribution, no difficulty is encountered by applying s.24(2A) according to its terms.’* [57].
62. Whilst accepting that this decision had to be understood in the context of the Australian federal system and the associated particular concerns of forum-shopping, the Court’s construction was entirely in keeping with the argument against the overriding effect of the 1978 Act.

SSAFA/MOD submissions

63. Mr Charles Hollander QC began with the provisions of the 1978 Act. These demonstrated that the draftsman had in mind claims for contribution which had a foreign element and in consequence the interaction of the statute with private international law; and made specific provision where it was necessary to do so.
64. As to s.1(6), it restricted the effect of private international law because it required only that the liability has been or could be ‘established’. This meant a liability which could be established in England and Wales, notwithstanding an express obligation not to bring the claim in this jurisdiction. Thus in The Benarty, C argued that the words ‘could be established’ denoted an entitlement to bring such proceedings; and that there was no such entitlement in circumstances where the proceedings had been stayed because of the exclusive jurisdiction clause in the bills of lading. Hobhouse J rejected that argument, holding that s.1(6) *‘...is concerned with the character of the liability and not with any merely procedural considerations as to how it might be enforced’* : pp.1621F-1622B. The Kapetan Georgis was to the same effect : pp.358-359.
65. Section 1(6) had the restriction that it only applied where B was able to bring C before the court under the rules for service out of the jurisdiction or where C submitted to the jurisdiction. However once C was before the court, on whatever basis, the 1978 Act applied. If not before the court, the question did not arise: The Benarty at p.1622C-E.

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66. As to s.1(3), its effect was to disregard a foreign (or domestic) limitation provision which barred the remedy as between A and B and/or between A and C. In this way it expressly overrode the rules of private international law. It cannot have been the statutory intention that the application of the Act could be defeated by a foreign limitation provision which barred the remedy as between B and C.
67. As to s.2(3)(c), this made specific provision for the effect of private international law in the context of the assessment of contribution. The effect of s.7(3) was to supersede other rights of contribution, including those arising under foreign law; and subject to the identified exceptions.
68. In this way the 1978 Act provided its own very clear code as to when it did and did not apply choice of law rules, specifying the circumstances in which these were to be taken into account. These did not include any preliminary question.
69. As to Hashim, Chadwick J had correctly found that there was no preliminary question and that the answer was to be found in the language of the 1978 Act. This did not involve circularity but depended on construction of its provisions. In doing so, he correctly focused on the provisions of the statute which provided for the potential application of foreign law : see pp.6-7.
70. Chadwick J rightly concluded that the previous English decisions were inconsistent with the proposition advanced on behalf of Dr Hashim. Whilst acknowledging that the present issue had not been raised directly in The Benarty or The Kapetan Georgis, it was unthinkable that it would not have occurred to the eminent practitioners and judges in those cases if it were at all arguable.
71. The judge had likewise correctly recognised the element of public policy which compelled the conclusion that the language of the 1978 Act was decisive. It would indeed be a defect in the law if foreign tortfeasors before the English court were unable to obtain contribution from each other. Mr Hollander emphasised the particular injustice if e.g. one had substantially greater responsibility for A's damage than the other.
72. Whilst acknowledging that the supposed preliminary question was also not argued in The Baltic Flame, the observations of the Court of Appeal were again consistent with the conclusion that the 1978 Act was determinative. It was irrelevant that the contract to which Saudi Aramco was party was subject to English law. There was no legal relationship between the parties to the contribution claim (Fortum and Saudi Aramco). Fortum's contribution claim depended on the 1978 Act; and Saudi law gave no right of contribution. The Court had rejected Saudi Aramco's submission that the combination of the 1978 Act and the rules for service out of the jurisdiction should not be used to confound the expectation of the parties as to the forum in which their disputes were to be resolved : [11(6)].
73. In his judgment Potter LJ endorsed the statement in The Benarty that s.1(6) was concerned with the character of the liability and not with any procedural considerations as to how it might be enforced : [34]. In the following paragraph he acknowledged that Saudi Arabia was an '*available forum*' in the sense that there was no physical or administrative barrier to taking proceedings there, but it was common ground that there would be no point in doing so when contribution was not available

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in that jurisdiction [35]. He rejected Saudi Aramco's submission in broad terms which included that *'The draftsman of the 1978 Act and the Supreme Court Rules Committee may be taken to have had in mind that the combined effect of the 1978 Act and O.11, r.1(1)(c) would be to permit joinder of a foreign party who would not be liable if sued directly in his own country.'* [36]

74. The public policy in favour of the application of the 1978 Act regardless of the foreign elements in the claim before the Court was further emphasised by Potter LJ's adaptation of old authority¹⁰ to support the contention that the right to contribution was based on the general principles of justice : [39]. If there were the preliminary question for which the Hospital contended, it would have been a complete answer to the attempt to join Saudi Aramco. If so, it would not have been overlooked by the distinguished practitioners and judges in that case.
75. As to the Supreme Court of Victoria in Fluor, its review of the English decisions, including Hassim, wrongly stated that *'none of them had addressed the issue as to whether there is a logically anterior choice of law question to be determined'* [50]. That issue had been expressly addressed by Chadwick J. Furthermore the reasoning in Fluor did not deal with the issue of service out of the jurisdiction. Its focus was on the constitutional problem in a federal system and the associated analysis by the High Court of Australia in Pfeiffer.
76. Turning to Cox, its context was the Fatal Accidents Act 1976 which, unlike the 1978 Act, contained no references to private international law. In those circumstances the Court's decision was unsurprising.
77. Mr Hollander pointed to Lord Sumption's judgment where he stated that *'The first question is what is the proper law of the relevant liability. The answer will usually depend on the extent of any connection between the facts giving rise to liability and England or English law. If the proper law of the liability is English law, no question of extraterritorial application arises'* [28]. The 'relevant liability' was the right to contribution; and that was derived from the 1978 Act. It was thus wrong to refer to the issue as one of extraterritoriality. The Act simply applied where contribution was sought from a party before the English court. It was therefore unnecessary to consider whether the 1978 Act on its proper construction had overriding effect and the principles in Cox at [29].
78. If it were necessary to do so, there was in the 1978 Act (unlike the FAA) an express indication of overriding effect. That was apparent from its provisions which made express reference to private international law; and which in turn *'...suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law.'* : Cox at [29].
79. Alternatively, if it were necessary to establish implied extraterritorial effect, the 1978 Act satisfied both of the categories identified by Lord Sumption. The statute could not be effectually applied if, e.g., the foreign law gave no right of contribution. As to policy, the defect would be apparent. It was for these reasons that the point had been treated as obvious by every judge who had considered the 1978 Act and its intent and policy.

¹⁰ Dering v. Earl of Winchelsea (1787) 1 Cox Eq. Cas. 318

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80. The academic texts and articles provided no assistance. At best they reflected observations as to how the law ought to be.

Analysis and conclusion

81. Whilst the preliminary issue is confined to the question of whether the 1978 Act has mandatory/overriding effect, I think it necessary to start with the approach of the common law to any dispute on choice of law in a claim with a foreign element. As authority cited in Cox makes clear, the first question in such a dispute is the characterisation (or classification) of the claim or issue in question. Such classification should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system; and should be taken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum : Cox per Lord Mance at [46] citing Macmillan Inc v. Bishopsgate Investment Trust plc (No.3) [1996] 1 WLR 387 per Auld LJ at 407C; and Raiffeisen Zentralbank Osterreich AG v. Five Star Trading LLC [2001] QB 825 per Mance LJ at [25-27].
82. Following classification, the second and third questions require selection of the rule of conflict of laws which lays down a connecting factor for that claim or issue; and then identification of the system of law which is tied by that connecting factor to that claim or issue : Raiffeisen at [26].
83. Having determined the choice of law in accordance with these rules, there may be a further question as to whether that result is displaced by a mandatory rule of the forum. However, as Lord Sumption observed '*This is not a choice of law principle at all, but turns on the overriding rules of policy of the forum*' [28]. That this is so is inherent in the very concept of a 'mandatory rule' which applies '*irrespective of ordinary rules of private international law*' [34]; and thus in the terms of the present preliminary issue.
84. For this reason I do not accept that this preliminary issue can be approached on the basis that it involves no question of extraterritoriality and is to be answered on the simple basis that the 1978 Act applies where any claim for contribution is sought from a party who has been brought before the Court or otherwise submitted to the jurisdiction. To approach the question in that way would indeed involve circularity – and be at odds with the terms of the preliminary issue.
85. Thus I do not accept Mr Hollander's submission that Lord Sumption's first question '*what is the proper law of the relevant liability*' [29] can be answered as (i) the 'relevant liability' to contribute is provided by the 1978 Act; therefore (ii) the proper law is English law; therefore (iii) no question of extraterritoriality arises. Identification of the proper law of the relevant liability, i.e. the claim for contribution, starts with classification and the two further stages. The effect of the parties' agreement is that this produces the answer 'German law'. The next stage is to consider whether that choice of law, reached in accordance with the ordinary principles of private international law, has been displaced by the 1978 Act.

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86. All that said, I do not accept Mr Dougherty's contention that Chadwick J's reasoning in Hashim involved circularity. For this purpose it is important to note that the judge had evidently not received an argument from FNBC in the express formulation that the 1978 Act was a mandatory rule with overriding effect; nor of course the authoritative exposition of the relevant law in Cox.
87. True it is that Chadwick J began with the 1978 Act and identified the five 'prima facie' questions which it raised; rejected the submission that there was a preliminary question in contribution proceedings involving foreign elements; and concluded that the statute provided the answer : pp.2-4 and 7.
88. However his judgment also :
- (a) rejected, as a *'false premise'*, the proposition that the 1978 Act *'does not itself contain private international law rules for the purpose of identifying the circumstances in which the English Court is to apply the Act to cases involving foreign elements'* : p.6. In other words he concluded that the statute, on its proper construction, did contain such rules;
- (b) acknowledged that if the 1978 Act did not apply, the Court might otherwise recognise a right of contribution arising under the law of the place with which the circumstances giving rise to the contribution claim had the most real connection: p.13;
- (c) identified policy reasons which buttressed his construction of the statute, i.e. the defect in the law, demonstrated by the Ruritanian example, which would otherwise arise : p.9.
89. Thus whilst Chadwick J did not approach the question by sequential consideration of (i) classification and (ii) statutory construction, the effect of his decision was that, properly construed, the 1978 Act overrode any choice of law rule which would otherwise apply. This is particularly apparent from his closing observations (p.13) when he considered the position which would have arisen if the 1978 Act did not apply. Furthermore his focus on construction anticipates Lord Sumption's statement that *'Whether an English statute applies extraterritorially depends on its construction [27]*.
90. All that said, I accept that the question of construction has to be reviewed in the light of the principles identified in Cox.
91. I do not accept Mr Hollander's submission that the 1978 Act expressly provides that it has overriding effect. His argument stretches the language of Lord Sumption [29] and in substance depends on an implication to be derived from the express statutory provisions concerning choice of law. The question is whether a statutory intention of overriding effect can be implied; and in particular having regard to the two bases identified by Lord Sumption at [29].
92. In my judgment it is implicit from the provisions of the 1978 Act that the statute does have overriding effect; and that the presumption to the contrary is accordingly rebutted.

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93. I consider that the express references in the 1978 Act to private international law (ss.1(6), 2(3)(c)) support this implication. Parliament having chosen to identify specific circumstances in which choice of law rules are to apply (and the extent of that application) in a claim under the statute, the natural implication is that the availability of this statutory cause of action was not itself to be subject to choice of law rules.
94. I do not accept that the FAA or the 1945 Act provide any useful comparison, when these are distinguished by the absence from their provisions of any reference to private international law. The same applies to the suggested comparison with the general domestic law of tort. Nor do I see any significance in the fact that all these statutes made significant changes to the common law.
95. Although this was not cited in argument, I note that when Cox was before the Court of Appeal ([2012] EWCA Civ 854), Leading Counsel for the Claimant supported his contention that the FAA had overriding effect with the argument that this was consistent with the approach to the 1978 Act in Hashim : see at [20]. In rejecting the argument in respect of the FAA, Etherton LJ observed that s.1(6) of the 1978 Act was '*A good contrast with the present case...*' [60].
96. On its proper construction, s.7(3) is consistent with this conclusion. In the context of the express references in s.1(6) and s.2(3)(c) to private international law, I consider that the natural meaning of '*supersedes any right*' is that '*any right*' includes any right of contribution which would otherwise arise under foreign law : see also Hashim at pp.7 and 13. I do not accept that the exception in s.7(3) for contractual provision which excludes a contribution claim is a pointer the other way.
97. A further pointer is provided by the combined effect of ss.1(3) and 1(6). Where the statute makes express provision (in a case where the Act applies) to disregard foreign law of limitation which bars the remedy, it would be inherently anomalous for it to provide otherwise for the purpose of deciding whether the Act does apply. The implication must be that this was not the statutory intention.
98. Whilst the position could have been put beyond doubt by express provision of the types seen in the Unfair Contract Terms Act 1977 and the Third Parties (Rights against Insurers) Act 2010, I am not persuaded that its absence in the 1978 Act provides any support to the case against implication.
99. As to Fluor, I respectfully consider that this decision is to be understood in the very different setting of a federal constitution and the Court's evident concern at the potential implications for forum shopping within the Commonwealth of Australia.
100. As to the Law Commission Report (No.79), its silence on the point provides no assistance either way; in particular when its draft Bill did not include any references to foreign law : cf. ss.1(6) and 2(3)(c). As to the Working Papers, the identified statements are focussed on the first question of characterisation and do not consider the question of overriding effect and the issue of statutory construction which that entails; cf. the reference to overriding effect in Working Paper No.87, para.4.5, cited in Cox at [34]. The cited textbook references were likewise concerned with the issue of characterisation. The current (15th, 2012) edition of Dicey & Morris takes the matter no further. Hashim is reported without adverse comment, albeit questioning whether the position would be the same under Rome II : 36-108.

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101. As to the academic articles, their principal source of doubt is drawn from the comparison with the 1945 Act, and then in tentative terms. For the reasons already given, I respectfully consider that there is a real distinction between the two statutes. Unlike the 1945 Act, the 1978 Act does make express provision for private international law; and this includes express provision for the application of foreign law which has corresponding limits or reductions to those in the 1945 Act : s.2(3)(c).
102. I also conclude that the implication of overriding effect is justified on each of the two bases identified by Lord Sumption in Cox at [29]. The purpose of the 1978 Act cannot effectually be achieved unless it has extraterritorial effect; and the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to anyone resorting to an English court regardless of the law that would otherwise apply. In each case, this is most obvious where the foreign law provides no right of contribution; but it applies equally where a foreign limitation provision would otherwise defeat the claim.
103. In Hashim Chadwick J observed that it would be a serious defect in the law if contribution could not be obtained between the tortfeasors who have been or could be found liable in the courts of England and Wales. I agree.
104. As to the other English decisions, the present issue was not argued. In each case the question was jurisdictional, in the sense of whether the proposed contributing party should be brought before the Court. It is not fruitful to consider the particular facts and circumstances of those cases. However, the judicial observations therein display a persistent theme that the statutory intention is to provide a right of contribution which is available, according to its terms, in respect of all claims before the courts of England and Wales. These observations are consistent with the proposition that the 1978 Act has overriding effect; and provide comfort to that conclusion.
105. For all these reasons I am not persuaded that Hashim was wrongly decided, whether considered before or after the decision in Cox; and conclude that the answer to the preliminary issue is that the 1978 Act does have mandatory/overriding effect.