[1999–00 Gib LR 392]

GILBERT v. ATTORNEY-GENERAL, S.O.S. 24 LIMITED, and ASSICURAZIONI GENERALI S.P.A.

SUPREME COURT (Pizzarello, A.J.): February 2nd, 2000

Limitation of Actions—tort actions—third party proceedings—if no judgment against it, defendant may claim contribution from third party within two years of date when defendant sued, assuming third party would then have been liable (i.e. within limitation period for action by plaintiff against third party)

The plaintiff brought an action for damages for personal injuries sustained on the defendant's premises in the course of his employment with a third party.

The plaintiff issued proceedings against the defendant in January 1998 in respect of injuries sustained at work in March 1996. The defendant entered a defence but did not seek contribution from the third party in respect of potential liability until November 1999, after the statutory limitation period for proceedings by the plaintiff against that party had

expired. Under s.5(1) of the Contract and Tort Ordinance, the defendant was entitled to recover a contribution from the third party if the third party was someone who "is or would if sued have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise." Under s.8(1) of the Limitation Ordinance, no action could be brought by the defendant to recover contribution from the third party after the expiry of two years from the date on which the right to do so accrued to the defendant. Section s.8(2) specified how that date was to be calculated in respect of tortfeasors against whom judgment had been given or who had admitted liability, but not otherwise.

The third party's insurer challenged the grant of leave to the defendant to issue third party proceedings against it. It submitted that the proceedings were statute-barred under s.8, since the phrase "would if sued have been liable" referred to liability under a notional action against it by the plaintiff at the time when the defendant claimed a contribution from the third party, and the limitation period for such an action had by November 1999 expired.

The defendant submitted in reply that the phrase meant "if sued by the plaintiff at the time when the plaintiff sued the defendant," which in this case had been January 1998, and within the plaintiff's limitation period.

Held, dismissing the third party's objection:

(1) The defendant, as the tortfeasor claiming contribution, had properly issued third party proceedings within two years of the date when it had been sued by the plaintiff. The phrase "would if sued have been liable," in s.5 of the Contract and Tort Ordinance presupposed liability under a hypothetical action by the plaintiff against the third party before the expiry of the limitation period for such an action. After that time the third party would not be so liable. The third party would, if sued when the defendant had been sued in 1998, within three years of the injuries complained of, have been liable in tort if the plaintiff proved its case (paras. 13–15).

(2) The situation would have been different if judgment had already been entered against the defendant. Section s.8(2) would have permitted it to claim contribution at any time within two years from that judgment, regardless of whether that judgment took place after the expiry of the limitation period for the plaintiff's action (paras. 8–9).

Cases cited:

(1) *Harvey* v. *R.G. O'Dell Ltd.*, [1958] 2 Q.B. 78; [1958] 1 All E.R. 657, *dicta* of McNair, J. applied.

(2) *Stott* v. *West Yorks. Road Car Co. Ltd.*, [1971] 2 Q.B. 651; [1971] 3 All E.R. 534, applied.

(3) *Wimpey (George) & Co. Ltd.* v. *British Overseas Airways Corp.*, [1955] A.C. 169; [1954] 3 All E.R. 661, considered.

Legislation construed:
Contract and Tort Ordinance (1984 Edition), s.5(1)(*c*): The relevant terms of this paragraph are set out at para. 3.
s.8(1): The relevant terms of this sub-section are set out at para. 4.
(2): The relevant terms of this sub-section are set out at para. 4.

P. Peralta for the plaintiff;
C. Pitto, Crown Counsel, for the defendant;
S.R. Bossino for the third party;
S.P. Triay for the intervener.

1 **PIZZARELLO, A.J.:** In this case the plaintiff claims against the defendant damages for injuries alleged in the pleadings to have been sustained on March 28th, 1996 during the course of his employment at the defendant's premises. The plaintiff issued a writ on January 28th, 1998. The plaintiff was employed by S.O.S. 24 Ltd., which had been engaged by the defendant. The defendant entered his defence on June 1st, 1998, denying negligence and putting the plaintiff to proof that the injuries alleged were sustained when the alleged accident took place. The defendant did not immediately take steps to seek contribution from S.O.S. 24 Ltd., as it was thought to have no assets. However, it subsequently came to the notice of the defendant that S.O.S. 24 Ltd. was in receipt of funds. The defendant issued third party proceedings on November 4th, 1999 after having applied for and obtained leave on October 21st, 1999.

2 The question is: Is the defendant's claim for contribution against the third party good? As alleged tortfeasors, both the defendant and the third party are equally liable to the plaintiff, provided of course that (a) they have a duty of care; (b) negligence is made out; and (c) damage is sustained. The plaintiff sued the defendant in time. Any claim by the plaintiff against the third party, S.O.S. 24 Ltd., is now statute-barred and was so at the date the third party notice was issued, which is the date that proceedings by the defendant against the third party began.

3 At common law there was no right to contribution between joint tortfeasors, but the position was altered by the Contract and Tort Ordinance, which enacted in Gibraltar similar provisions to those in the Law Reform (Married Women and Tortfeasors) Act 1935. Section 5 of the Ordinance is similar to s.6 of the Act. The relevant part of s.5 is s.5(1):

> "(*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in

respect of the liability in respect of which the contribution is sought."

4 The claim by the defendant against the third party is under that provision and that right is not circumscribed by any consideration of limitation. That is contained in s.8 of the Limitation Ordinance:

> "(1) Where under section 5 of the Contract and Tort Ordinance a tortfeasor (in this section referred to as 'the first tortfeasor') becomes entitled to a right to recover contribution in respect of any damage from another tortfeasor, no action to recover contribution by virtue of that right shall (subject to subsection (3) of this section) be brought after the end of the period of two years from the date on which that right accrued to the first tortfeasor.
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> (2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to a tortfeasor (in this subsection referred to as 'the relevant date') shall be ascertained as follows, that is to say—
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> (*a*) if the tortfeasor is held liable in respect of that damage by a judgment given in any civil proceedings, or an award made on any arbitration, the relevant date shall be the date on which the judgment is given, or the date of the award, as the case may be;
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> (*b*) if, in any case not falling within paragraph (a) the tortfeasor admits liability in favour of one or more persons in respect of that damage, the relevant date shall be the earliest date on which the amount to be paid by him in discharge of that liability is agreed by or on behalf of the tortfeasor and that person, or each of those persons, as the case may be,
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> and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the tortfeasor."

5 All counsel are agreed that s.8 of the Limitation Ordinance rides on the back of s.5 of the Contract and Tort Ordinance. Section 8 states that no action to recover contribution by virtue of that right in s.5 shall be brought after the end of the period of two years from the date on which that right accrued to the first tortfeasor. The point is: What is the date on which that right accrued to the first tortfeasor (*i.e.*, the defendant)? Because it is from that point in time that the two years run. Clearly, the cause of action of the tortfeasors *inter se* and that between the plaintiff and the tortfeasors is different. The Ordinance gives the defendant/claimant a new cause of action and, to repeat, the defendant commenced proceedings on his cause of action against the third party on November 4th, 1999.

6 For the purpose of s.8 of the Limitation Ordinance, the relevant date on which the right accrues to the claimant tortfeasor is ascertained in sub-s. (2). Section 8(2)(*a*) might, and does, approximate to the situation when the tortfeasor is held liable to judgment, and reflects the first limb of s.5(1)(*c*), *i.e.* "may recover contribution from any other tortfeasor who is liable in respect of the same damage" (the word "tortfeasor" in s.8(2)(*a*) referring, in my view, to the first or other claimant tortfeasor, in keeping with the definition in s.8(1)). Section 8(2)(*b*) refers to any case not falling within (*a*) but does not reflect the second limb of s.5(1)(*c*), so the date on which that right accrued in relation to the second limb of s.5(1)(*c*) must be gleaned from the Contract and Tort Ordinance.

7 So what is the answer which lies in the expression in s.5 "who would if sued have been liable in respect of the same damage"? The question is: Does S.O.S. 24 Ltd. come within this expression? The matter was considered in *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corp.* (3), which considered all the authorities up to that date. 37 *Halsbury's Laws of England*, 3rd ed., para. 247, at 138 neatly sums it up:

> "The foregoing statutory right to recover contribution contemplates two classes of persons from whom a contribution can be claimed:— (1) persons who have been held liable; and (2) persons who would have been held liable if sued . . ."

and there is a reference to footnote (m). Note (m) (*ibid*.) reads:

> "*George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn*., [1955] A. C. 169, H. L. at pp. 178, 179; [1954] 3 All E. R. 661, at p. 664, *per* Viscount SIMONDS, and at pp. 191, 192, and pp. 673, 674, respectively, *per* Lord TUCKER. The time which the law postulates as that at which the person or persons must have been taken to have been notionally sued remains doubtful. In *George Wimpey & Co., Ltd*. v. *British Overseas Airways Corpn*., *supra*, there was a division of opinion on this point; see *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn*., *supra*, at pp. 189, 190, and p. 672, respectively, *per* Lord REID ('if sued' means 'if sued when the tortfeasor claiming contribution was sued' or 'if sued . . . when the . . . tortfeasor claims contribution'), at p. 179, and pp. 664, 665, respectively, *per* Viscount SIMONDS (acceptance of Lord REID'S conclusion), at pp. 183, 184 and p. 668, respectively, *per* Lord PORTER, and at p. 196, and p. 676, respectively, *per* Lord KEITH (the words 'if sued' have no particular temporal connotation); and see *Merlihan* v. *A. C. Pope, Ltd*., *Pagnello (Third Party)*, [1946] 1 K. B. 166; [1945] 2 All E. R. 449 ('if sued' does not mean 'if sued in time'), overruled by *Littlewood* v. *George Wimpey & Co., Ltd. and British Overseas Airways Corpn. (Third Party)*, [1953] 2 Q. B. 501, C. A.; [1953] 2 All E. R. 915; on appeal *sub nom. George Wimpey &*

> *Co., Ltd.* v. *British Overseas Airways Corpn., supra*. See also *Harvey* v. *R. G. O'Dell Ltd.*, [1958] 2 Q. B. 78, at pp. 109, 110; [1958] 1 All E. R. 657, at pp. 669, 670 ('if sued' means 'if sued at any time'); *Morgan* v. *Ashmore, Banson, Pease & Co., Ltd.*, [1953] 1 All E. R. 328."

8 *Stott* v. *West Yorks. Road Car Co. Ltd.* (2) is authority to show that "liable" in the first part of s.5(1)(*c*), namely, "any tortfeasor liable in respect of that damage," means "responsible in law" and does not mean "held liable in an action." "Liable" in the second part, namely, "any other tortfeasor who is or would if sued have been liable," means "liable in judgment." "If sued," in that expression, means "sued by the plaintiff," and it seems to me that in respect of a person who has been held liable (to judgment) the cause of action starts then, and the two years start from the date of judgment which founds the claim for a contribution, for that is when the cause of action commences.

9 In *Harvey* v. *R.G. O'Dell Ltd.* (1), McNair, J. said ([1958] 1 All E.R. at 669):

> ". . . [I]t is . . . clear that the cause of action for contribution under the Act of 1935 did not arise until judgment in this action. I think that this conclusion is implicit, though not as a matter of decision, in the speeches in the House of Lords in *Wimpey* v. *British Overseas Airways Corpn. . . .*"

and, for my part, I agree with that. Now, while it is hoped that all actions will be dealt with expeditiously, that does not always happen and it could be that the plaintiff's action that leads to judgment against a tortfeasor may not come to an end before the limitation period expires in respect of a joint or other tortfeasor who is not sued, and if the action takes time to come to judgment still a defendant may bring proceedings up to two years later and this might be years later, giving rise to the complaint that it is unreasonable and unjust to be exposed to a suit many years after becoming protected against the original injured party. In these circumstances, the argument advanced by the intervener that relief under s.5 can only commence while an action against the third party by a plaintiff lies does not seem to me to be a strong consideration.

10 The matter, as I have said, was touched upon in *Wimpey* (3). I am fairly confident that one can conclude, from their Lordships' speeches, that there were two favoured alternative options, namely: (a) "if sued" is held to mean "if sued by the plaintiff at the time when action was being taken [by the defendant] against the other tortfeasor," *i.e.* when the tortfeasor claims contribution from the other; and (b) "if sued" is held to mean "if sued by the plaintiff when the tortfeasor claiming contribution was sued." "If sued" does not mean "sued in time." It seems to me that

Lord Reid preferred option (a), and he closed his speech as follows ([1954] 3 All E.R. at 672–673):

> "I think that it is clear that the draftsman of s. 6 failed to notice that cases like the present might occur and failed to make any express provision for them. This is, therefore, an example of the not uncommon situation where language not calculated to deal with an unforeseen case must, nevertheless, be so interpreted as to apply to it. In such cases it is, I think, right to hold that, if the arguments are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law. If the appellants are right [they argued for "if sued when the tortfeasor claiming contribution was sued"] the effect of s. 21 of the Limitation Act, 1939, would be considerably modified but that is not so if the respondents are right."

11 It is to be noted that in the House of Lords their Lordships were grappling with a situation where different limitation periods governed the plaintiff's claim against the defendant and the defendant/third party, whereas in the instant case the limitation period governing the plaintiff's claim against the defendant and the third party is the same. Section 21 of the Limitation Act 1939 has no equivalent in Gibraltar.

12 Both options reserved by their Lordships in the *Wimpey* case were left in the air and I have to make up my mind. I am conscious that I have to deal with the matter in a hypothetical manner. But I think it important to look at what Lord Reid said (*ibid*., at 671–672):

> "Next I would consider the mischief against which sub-s. (1) (c) is directed. Before 1935, if separate torts by two different tortfeasors contributed to cause the same damage, the plaintiff could, and, I think, commonly did, sue and get judgment against both tortfeasors in the same action. He could then proceed to recover the damages from whichever one he chose and the tortfeasor who had been made to pay had no right to require the other to contribute. Plainly that was thought by Parliament to be unjust and that case is undoubtedly covered by the first alternative in sub-s. (1) (c)—
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> > 'any tortfeasor liable . . . may recover contribution from any other tortfeasor who is . . . liable in respect of the same damage . . .'
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> But a plaintiff might, and sometimes did, choose to sue only one when he might have sued and succeeded against both, and the second alternative—
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> > 'any tortfeasor liable . . . may recover contribution from any other tortfeasor who . . . would if sued have been, liable in respect of the same damage . . .'

is, I think, designed to cover that case. The second tortfeasor is put in no worse position than he would have been in if the plaintiff had taken the ordinary course of suing both."

13 The expression in s.5 "who . . . would if sued have been liable," in my view, underlines that whatever date is chosen, at the very least it presupposes a hypothetical action against the third party to commence before the expiry of the limitation period between the plaintiff and the third party. This is because if it is after the expiry of the limitation period, the third party cannot be a tortfeasor who would, if sued, be liable for the same damage, for the self-evident reason that it is statute-barred and therefore cannot proceed to liability arising from a judgment. The situation is quite different from that where the tortfeasor has been held liable in judgment. Here the court is in an hypothetical situation. Section 5(1)(*c*) is dealing with the case of tortfeasors not sued in fact.

14 But ought not the interpretation given to s.5(1)(*c*) to be one which more closely approximates to the situation in the other? If I am right in agreeing with McNair, J. (see para. 9 above), and the instant case goes to judgment, that would found a cause of action by the defendant against the third party which it can progress immediately. There is no limitation in the Contract and Tort Ordinance and s.8 of the Limitation Ordinance states what it is. It is my opinion that I should not choose the preferred option (as I see it) of Lord Reid, because he left the matter open and his choice was affected by the consideration of s.21 of the Limitation Act, which has no equivalent in Gibraltar, and so the effect of the general law in Gibraltar is not affected.

15 In my judgment, "if sued" means "if sued at the time when the tortfeasor claiming contribution (namely, the defendant) was sued." Since the writ had been issued on January 28th, 1998 and the defendant had issued proceedings against S.O.S. 24 Ltd. on November 4th, 1999, S.O.S. 24 Ltd. was, on November 4th, 1999, a tortfeasor who would, if sued, have been liable. It is also, in my view, more logical to make this the relevant point in time because this should be the time when a defendant should take action against any other tortfeasor from which it may have a right to contribution. In my judgment, the defendant becomes entitled to recover contribution from the third party.

16 I am grateful for counsel's arguments. They have enabled me to tread a path through what I have found a very complex and difficult matter. The summons for directions is adjourned to a date to be fixed.

Ruling accordingly.