Elizabeth Ann Jameson & Alan William Wyatt (Executors of the estate of David Allen Jameson) v CEGB & Babcock Energy Ltd [1997] EWCA Civ 1008

Court of Appeal before Nourse LJ, Auld LJ, Sir Patrick Russell. 13th February, 1997

JUDGMENT : LORD JUSTICE AULD:

1. There are two appeals before the Court against a judgment of Sir Haydn Tudor Evans, sitting as a Judge of the Queen's Bench Division, given on 31st March 1995. The first is by the Defendant, the Central Electricity Generating Board ("the CEGB"), against a number of rulings made on preliminary issues in favour of the Plaintiffs, the Executors of the Estate of David Allen Jameson, deceased, in their claim against the CEGB for damages for loss of dependency under the Fatal Accidents Act 1976. The second is by the Third Party, Babcock Energy Limited ("Babcock Energy"), against those rulings in the main action and also against the ruling that, in the event of the Plaintiffs succeeding in their claim against the CEGB, the CEGB was entitled to maintain proceedings against it for a contribution under the Civil Liability (Contribution) Act 1978.

2. The issue in the first appeal is whether a *"full and final"* settlement by a plaintiff with a tortfeasor of a personal injury action bars a dependency claim after his death against a concurrent tortfeasor. The issue in the second appeal is whether, if it does not, the latter tortfeasor can seek a contribution from the tortfeasor who settled with the deceased.

3. Mr Jameson died on 24th April 1988 at the age of 50 from malignant mesothelioma. Shortly before his death he agreed to accept £80,000 in "full and final settlement and satisfaction" from his former employer, Babcock Energy, of his claim in proceedings against it for negligently and in breach of statutory duty causing that disease by exposing him to asbestos. The sum of £80,000 was significantly less than the full liability value of his claim, reflecting both parties' appreciation of the uncertainty of the outcome of the litigation if it had proceeded.

4. Mr Jameson's claim against Babcock Energy was that the harmful exposure had occurred at various premises at which it had employed him, including those of the CEGB at which Babcock Energy was undertaking work. The fatal disease may have been caused solely by Babcock Energy's negligence or breach of statutory duty as employer, or solely by the negligence and breach of statutory duty of the CEGB as occupier, or by the respective negligence and breach of statutory duty of both of them. Assuming liability by both, it is accepted by the parties that they are to be regarded as several or concurrent, not joint, tortfeasors.

5. After Mr. Jameson's death his executors issued proceedings against the CEGB under the 1976 Act in respect of the same exposure to asbestos dust as for part of the claim in the settled action against Babcock Energy, alleging similar, but not identical, negligence and breach of statutory duty. The executors also claimed on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934, but later abandoned that claim because it was extinguished by the receipt of the settlement sum of £80,000.

6. The executors of Mr. Jameson's estate cannot claim under the 1976 Act against Babcock Energy as well as the CEGB because, by Section 1 of the Act, such a claim would only lie if, but for Mr. Jameson's death, he would have been entitled to maintain an action and recover damages against Babcock Energy. He would not have been so entitled since his settlement with it in his lifetime was an accord and satisfaction which discharged it from further liability to him.

7. The CEGB denied any culpable responsibility for Mr Jameson's fatal illness, but maintained that, in any event, it could not be liable because Mr Jameson's settlement with Babcock Energy had satisfied his claim and had thus discharged any claim that it might have had against the CEGB as a concurrent tortfeasor.

8. The CEGB joined Babcock Energy as a third party to the claim. Babcock Energy resisted that claim, similarly maintaining that its settlement with Mr Jameson barred the claim against the CEGB as a concurrent tortfeasor. It also maintained that, in any event, a claim under the 1976 Act in such circumstances is not within the provisions of the 1978 Act or that, if it is, the contract between it and the CEGB had expressly excluded liability for contribution.

9. The relevant facts in a little more detail were as follows. Mr Jameson was exposed to asbestos for relatively short periods in the 1950's while working for Babcock Energy at the CEGB's and other premises. His last contact with the substance was at the end of 1958, shortly before leaving Babcock Energy's employment. The disease of malignant mesothelioma was first diagnosed nearly thirty years later, in 1987, when he was

50. The nature of the disease is such that by the time it is manifest it has already severely curtailed expectation of life, and death normally follows within two years. In 1987, shortly after Mr. Jameson's discovery of his fatal illness, he issued proceedings against Babcock Energy, against whom his advisers considered he had a stronger claim than against the CEGB. He alleged breaches of the Factories Act 1937 and of the Building (Safety, Health and Welfare) Regulations 1948 and negligence at common law. Babcock Energy denied liability.

10. In early 1988 Mr. Jameson successfully applied to the Court for an order that the issue of liability should be tried first. He knew that he had not long to live and that any damages he might recover by way of judgment in his lifetime would be less than those that might be recovered for Mrs. Jameson, his sole dependant, under the 1976 Act after his death. He decided, therefore, that it would be to her advantage for him to obtain judgment on liability before he died, leaving her to reconstitute the action and introduce her dependency claim under that Act after his death.

11. However, on 30th March 1988, shortly before the date fixed for trial of the issue of liability, Babcock Energy paid £75,000 into court. Then, on 19th April 1988, five days before Mr. Jameson's death, his solicitor, on his behalf, agreed with Babcock Energy's advisers to settle the action for £80,000 with costs, a sum of damages which included some provision for future loss of income. The view of both parties' advisers was that the claim, including that for future loss of income, was worth about £130,000 if it were to succeed on liability, a valuation which the Judge said was reasonable. However, they both clearly took the view that there were weaknesses in the claim. These were mainly on the issue of liability, stemming from the shortness of time during which Mr. Jameson had been exposed to asbestos and uncertainty as to whether it had been sufficiently widely known in the 1950's that inhalation of small quantities of asbestos dust could cause injury to health. The Judge, therefore, found that the settlement sum was significantly less than the full liability value of the claim, reflecting as it did, both parties assessment of the hazards of litigation.

12. On 29th April 1988, five days after Mr Jameson's death, the action was stayed, save for the purpose of enforcement, in the form of a Tomlin Order. The Order provided, so far as material:

"1. That the Defendant do pay to the Plaintiff the sum of £80,000 ... in full and final settlement and satisfaction of all causes of action in respect of which the Plaintiff claims in the Statement of Claim.

...

4. That upon payment by the Defendants of the balance of damages and agreed costs the Defendants be discharged from any further liability in respect of the Plaintiff's claim in this action.

5. That the record be withdrawn."

13. There was no provision in the original settlement agreement or in the order barring a claim against the CEGB or any other party, and no basis that I can see for implying one. Whilst Mr. Jameson's advisers appear to have considered at the time the possibility of such a claim, the Judge, having heard evidence from his solicitor on the matter, rejected the suggestion made on behalf of the CEGB that such consideration was in any way improper so as to bar future proceedings against the CEGB.

14. In the present proceedings, by agreement between the parties the Judge considered a number of questions of law, leaving for later determination, if necessary, consideration of the issue of liability on the facts. The questions of law in the main action were:

1. the effect of Mr. Jameson's settlement with Babcock Energy on his executors' entitlement to make a dependency claim against the CEGB; and
2. whether, in any event, it would be an abuse of process to allow such a claim to proceed; and
3. what, if any, value there is in the dependency claim.

15. I turn to the first of the questions, which, more precisely, is whether release by judgment or settlement of one tortfeasor discharges a concurrent tortfeasor. It requires careful consideration of the separate defences of accord and satisfaction and of satisfaction.

Accord and Satisfaction

16. The Judge, in a characteristically thorough and well constructed judgment, held that settlement by one concurrent tortfeasor only releases another concurrent tortfeasor if it amounts to actual satisfaction, i.e. payment, of the full value of the claim. Accordingly, he held that Mr. Jameson's settlement with Babcock

Energy for a figure clearly less than his claimed whole loss did not release CEGB from any liability that it might have to Mr. Jameson. He held that the recital in the settlement that it was "in full and final settlement and satisfaction" of the action did not prevent the court from considering whether the settlement figure did represent the full value of the claim and that, in any event, it referred only to the action against Babcock Energy not to any potential action against the CEGB or anyone else. After a thorough review of English, Scottish and North American authorities, he summarised his ruling at page 42 of his judgment in the following way:

" No English case has been cited in which it has been held that payment to a claimant by one concurrent tortfeasor by way of an accord and satisfaction is satisfaction of the claimant's action against another concurrent tortfeasor. On the contrary, the strong indications from Clark v. Urquhart, Bryanston Finance Ltd. v. de Vries, and from the two Townsend cases, especially No. 2, are that a plaintiff can go on against another joint tortfeasor or a party having a concurrent liability but that he must bring into account what he has already received and his success or failure in such a second action will depend on how the balance is struck between what he has received in the first and what he obtains in the subsequent action. In so far as the ratio of the Scottish case or any of the American cases or any observation in them conflict with that principle, I decline to follow them."

17. Accordingly, he held that Mr. Jameson had vested in him at the moment of death a cause of action which, if he had survived, he could have maintained against the CEGB, and which thus entitled his executors to make a dependency claim against it on behalf of his widow under the 1976 Act. He also held that, even if the settlement sum of £80,000 were taken as the full value of Mr. Jameson's claim if he had lived, it could not have amounted to satisfaction so as to extinguish his claim before death because it was not paid in full until after it.

18. Mr. Jameson's settlement with Babcock Energy, whether regarded as an accord and satisfaction or simply as a covenant not to sue, barred his widow from claiming against it under Section 1 of the 1976 Act. By the settlement he had divested himself of his cause of action against it on which her entitlement to sue it depended under that provision. See **Read v. The Great Eastern Railway Company** [1868] LR 3 QB 55; and **Pickett v. British Rail Engineering Ltd**. [1980] AC 137, HL, per Lord Salmon at 152E-G. The question is whether the settlement also barred his executors from making a 1976 Act claim against the CEGB.

19. Assuming liability by both Babcock Energy and the CEGB to Mr Jameson for his fatal disease, the parties have rightly agreed for the purpose of this part of the proceedings that they were not joint tortfeasors because the acts of negligence and breach of statutory duty alleged against each of them were not all the same. They were concurrent tortfeasors, that is to say several tortfeasors who have caused the same damage. The importance of the distinction is that whilst it is well established by authority that settlement with one tortfeasor may, as an accord and satisfaction, bar a claim by him as against a joint tortfeasor, the position as to concurrent tortfeasors is said to be less clear.

20. Mr. Ian McLaren, QC, on behalf of the CEGB, and Mr. William Woodward, QC, on behalf of Babcock Energy, submitted that where a plaintiff, who has causes of action against concurrent tortfeasors, agrees to accept a sum "in full and final settlement and satisfaction" from one of them, the agreement discharges the others, unless it expressly or impliedly recognises that the settlement is only in partial satisfaction of the tort. They submitted that it is the agreement, the accord, that discharges the obligation and that the only materiality of satisfaction, whether there are joint or concurrent tortfeasors, is that it makes the accord operative. They relied on a passage from the judgment of Scrutton LJ in **British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers Ltd**. [1933] 2 KB 616, CA at 643-4, not a joint or concurrent tortfeasor case, in which he stated, that, contrary to early law on the matter, consideration in accord and satisfaction could be executory, consisting of an exchange of obligations in the agreement itself.

21. They submitted, therefore, that the Judge was wrong to consider whether the settlement figure of £80,000 was full satisfaction on full liability basis. Mr. McLaren suggested that all the cases of partial satisfaction by one tortfeasor where the court has permitted an action against another tortfeasor are not examples of the inapplicability of the defence of accord and satisfaction to concurrent tortfeasors but of an express or implied reservation by the plaintiff in his acceptance of partial satisfaction of his right to proceed against another in respect of the same matter.

22. Mr. Ronald Walker, QC, on behalf of Mr. Jameson's executors, replied that, whilst Mr. McLaren's and Mr. Woodward's submissions might be correct as to the treatment of satisfaction in a defence of accord and satisfaction, they had no relevance to this case because:
    1. the defence of accord and satisfaction, as distinct from the quite separate defence of satisfaction, is available only to joint, not concurrent, tortfeasors, and, in any event
    2. the settlement with Babcock Energy was not an accord and satisfaction, but merely a covenant not to sue it, and, for that reason, would not have barred a claim against the CEGB even if the latter were a joint tortfeasor.

23. There is no reported English authority in which it has been held that an accord and satisfaction, as distinct from full satisfaction of a claim, given by one tortfeasor discharges a concurrent tortfeasor. There is much support for Mr. Walker's contrary submission in the approach of the House of Lords and of this Court in a number of decisions to which I shall refer and in the views of leading academic writers on the subject. That approach is also of a piece with the statutory inroads made on the former common law bar to successive proceedings against those jointly liable, originally by Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 and now, more widely drawn, in the 1978 Act. Putting aside the added complications of a dependency claim under the Fatal Accidents Legislation, the trend, it seems to me, is to inhibit further litigation against joint or concurrent tortfeasors only to the extent necessary to prevent greater recovery than the damage suffered.

24. I take as a starting point the assertion of the editors of the 17th edition of ***Clerk & Lindsell***, at para. 4-55, that accord and satisfaction does not release several, as distinct from joint, tortfeasors: *" The only remaining consequence of the distinction between joint tortfeasors and several tortfeasors causing the same damage is that release of one joint tortfeasor whether under seal or by way of accord and satisfaction, releases all others, and this is not the case with several tortfeasors."*

25. Glanville Williams, in his 1951 study, "***Joint Torts And Contributory Negligence***", was of the same view. At page 46, citing a Manitoban authority of first instance, **Negrich (Negrych) v. Werner** [1937] 1 WWR 190 (Man), he said that the rule as to release by accord and satisfaction "*does not apply to concurrent tortfeasors, except of course to the extent that actual satisfaction discharges*". In Negrich Taylor J held that settlement by a plaintiff of her claim against the owner and driver of one of two vehicles in a road traffic accident in which her husband was killed did not preclude her from proceeding with an action against the owner and driver of the other vehicle since the pairs of defendants were not joint tortfeasors.

26. As I have said, the rule that accord and satisfaction, as distinct from a covenant not to sue, operates as a release for joint tortfeasors, is well established. The oft-stated rationale of the rule is that the cause of action against them is "*one and indivisible*". See, for example, **Duck v. Mayeu** [1892] 2 QB 511, CA, per A.L.Smith LJ at 513; **Apley Estates Co. Ltd. v. de Bernales** [1947] Ch 217, CA, per Morton LJ at 220-221; Gardiner v. Moore [1979] 1 QB 55. It may be executed or it may be executory where there is a settlement agreement replacing and extinguishing the right of action. See ***Chitty on Contracts***, 27th ed. Vol. 1, para. 22-014; **Morris v. Baron [**1918] AC 1, HL, per Lord Finlay, LC, at 13 and Lord Atkinson at 35; and **British Russian Gazette v. Associated Newspapers** [1933] 2 KB 616, CA, per Scrutton LJ at 643-5.

27. In either case the effect of the settlement will, in any event, depend on whether it amounts to a release of all joint tortfeasors as distinct from a covenant not to sue, or, as Neill LJ has described it, *"a release with a reservation"*. See **Bryanston v. De Vries**, per Lord Diplock at 732B, and **Watts v. Aldington**, CA (15th December 1993), per Neill LJ at page 25 of the transcript. Thus, in **Gardiner v. Moore** [1979] 1 QB 55, Thesiger J held that an agreement to "*discharge*" a claim against two joint tortfeasors was not a release but a covenant not to sue because of an implied preservation of the cause of action against a third joint tortfeasor.

28. Because of the hardship that the rule can cause, the inclination of the Courts has been to confine it narrowly. See **Apley Estates Co. Ltd. v. de Bernales**, per Morton LJ at 221. This inclination has received a boost from the replacement of Section 6(1)(a) of the 1935 Act with Section 3 of the 1978 Act extending the scope for successive actions against tortfeasors to *"any other person ... jointly liable ... in respect of the same debt or damage"*. The following words of Steyn LJ in **Watts v. Aldington**, at 31-33, with which I respectfully agree, suggest that now is not the time to extend to concurrent tortfeasors a rule as to joint tortfeasors which is in retreat:

" These appeals illustrate the absurdity of the rule that the release of one of two joint and several tortfeasors operates as a release of the other. In Victorian times judges of great distinction reasoned that in a case involving joint and several liability of joint tortfeasors there is only a single cause of action, and accordingly a release of one of two joint tortfeasors extinguishes that single cause of action, or as it was usually put, releases the other joint tortfeasors. The rule has been relaxed by statute. The fact that joint tortfeasors can be sued successively heavily compromised the perceived rule of logic. But the old rule apparently still survives. In truth there is no inexorable march of logic. In a less formalistic age it is now clear that the question whether the release of a joint tortfeasor should operate to release the other tortfeasor is a policy issue. Either solution is logically defensible. But good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for contribution against the released tortfeasor must be faced. As far as the unreleased tortfeasor is concerned the settlement between the plaintiff and the released tortfeasor is res inter alios acta . If this solution is not perfect, it at least has the merit of promoting more sensible results than any other solution. See Glanville Williams, Joint Obligations, 1949, 137-138.

The absurd consequences of applying the rule of logic invariably led judges, in the best common law tradition, to devise ways of escaping the rigours of its application. The first was the invention of the distinction between an agreement operating as a release of one joint tortfeasor from liability (which resulted in the discharge of the other joint tortfeasor from liability) and an agreement not sue one joint tortfeasor (which did not involve a discharge of the other). The second technique was the creation of the rule that, even if the agreement operates as a release of one joint tortfeasor, nevertheless the other tortfeasor was not released if the agreement contained a reservation of the plaintiff's rights against the other tortfeasor. In combination these two subsidiary rules, generously interpreted, have ensured that in the majority of cases satisfactory solutions are achieved. But plainly the law is not in a satisfactory state. It is true that a claimant, who engages sophisticated lawyers, can by suitably drafted contractual stipulations avoid the application of the primary rule. But the rule is undoubtedly a trap for the unwary. And for those who are aware of the problem it is a potential disincentive to entering into bona fide and reasonable compromises. The rule requires re-examination, notably in the light of the suspect logic on which it was founded and, in any event, on the basis that the rationale of the rule disappeared once the "one cause of action" theory was undermined by the statute which authorized successive actions against joint tortfeasors. The point is of considerable importance since it potentially affects a large number of transactions. But it seems to me that binding authority compels me to approach the problem in the traditional way."

29. There is no such binding authority compelling that approach in the case of concurrent tortfeasors, to whom Steyn LJ's remarks apply a fortiori. In my view, the principle to be extracted from the authorities to which I have referred is that accord without full satisfaction reached with one tortfeasor does not release a concurrent tortfeasor. That is because the latter is a defendant or a potential defendant to a separate action.

30. Logically, and in the normal expectation of the settling plaintiff, the release of one, unless and to the extent that it amounts to satisfaction of the full value of his several claims, should not be expected to release the others. See, for example, **Townsend v. Stone Toms & Partners (No. 1) [**1981] 1 WLR 1153, CA, where the Court held, in overlapping claims by a building owner against a builder for defective work and against an architect for defective supervision, that the building owner's acceptance of a payment into court by the builder did not operate to stay proceedings against the architect by virtue of RSC Order 22 rule 3(4). That rule operated, on a plaintiff's acceptance of a defendant's payment into court, to stay all further proceedings against *"any other defendant sued jointly or in the alternative"* with the defendant whose payment he had accepted. Though the plaintiff's claims against the builder and the architect overlapped as to much of the alleged defective work, he had a different cause of action against each of them. Eveleigh LJ, with whom Watkins LJ and Sir David Cairns agreed, held, at 1160, that the words in the rule "sued jointly" meant sued "in respect of joint liability" and, therefore, did not apply to a case, such as that, where there are separate causes of action against two or more defendants albeit in relation to the same subject matter. He concluded his judgment, at 1161F, with the following observation, which I respectfully regard as being a sound principle whatever the procedural context*: " ... where there are two separate causes of action, satisfaction of the one should not be a bar to proceedings in the other."*

31. It seems to me that such a clear approach is likely to be at least as conducive to the proper settlement of actions as the one for which Mr. McLaren and Mr. Woodward have contended. Mr. Woodward argued that a plaintiff and settling defendant have the reassurance of finality if they know that their agreement

prevents all further litigation between the plaintiff and others arising out of the same matter. That would be true, if finality were the only object of settlement and if one looks at it solely through the eyes of the settling defendant and other potential defendants. Whilst finality is clearly of importance to defendants, a plaintiff who has potential claims against two or more tortfeasors is less likely to settle with one if he knows that in so doing, whatever the level of recovery achieved in that settlement, he may lose his right of recovery against all the others unless he clearly reserves it. In any event, where there are separate, concurrent, claims, why should a reservation as between a plaintiff and one settling tortfeasor affect the plaintiff's right to proceed with his separate claim against the other tortfeasor? Neither logic nor policy requires it, as Steyn LJ's remarks about settlement in joint tortfeasor cases make clear. The only justification in law suggested by Mr. McLaren - somewhat theoretical, in my view - is that the settling tortfeasor may have, as part of the settlement, negotiated and be willing to pursue a contractual entitlement to enforce the reservation on behalf of other tortfeasors.

Satisfaction

32. The defence of satisfaction, in the sense of full satisfaction of a wrong or liability, is different from that of accord and satisfaction. First, it must be full satisfaction and second it must be given, executed. Its basis is the simple one that a claimant should not receive more than is necessary to compensate him for the wrong or wrongs done to him or in respect of the liability or liabilities owed to him. Where accord and satisfaction cannot be relied upon, as where a claimant settles with only one of two concurrent tortfeasors, the tortfeasor facing a claim will nevertheless have a defence if the plaintiff's settlement with the other has fully compensated him for the separate wrongs done to him. A further question raised in this appeal is whether the use of such words as "in full and final satisfaction" in a negotiated settlement for a sum less than the formulated claim impresses the settlement sum when paid with the quality of full satisfaction for this purpose.

33. Mr. McLaren and Mr. Woodward submitted that a settlement with one tortfeasor expressed to be in full and final settlement and satisfaction should be regarded as full satisfaction so as to bar an action against a concurrent tortfeasor unless the claimant as part of the settlement reserved the right to proceed against any other concurrent tortfeasor. Mr. Woodward added that most settlement figures are less than the potential full value of claims, but that they should nevertheless be regarded as "full satisfaction" if that is what the parties have agreed.

34. Mr. Walker submitted that the defence of satisfaction, as distinct from that of accord and satisfaction, is only available where the claimant has been fully compensated in accordance with his claims for the wrongs done to him or in respect of the liabilities owed to him. He maintained that the fact that in settling with one tortfeasor a claimant is content to characterise the agreed sum as *"full satisfaction"* of the claim against him does not render it so for the purpose of claims against others.

35. The authorities cited by Mr. McLaren and Mr. Woodward in support of their submission that the answer is to be found in the words of the parties in the settlement agreement are meagre.

36. The first was **Apley Estates Co. Ltd. v. De Bernales**, which concerned joint, not concurrent, tortfeasors and where the defence under consideration was accord and satisfaction, not satisfaction.

37. The second was a Scottish case, **Carrigan v. Duncan** [1971] SLT(Sh. Ct) 33, which, in my view, on close examination, does not support the submission. It was a case of acceptance by a pursuer of a tender from one tortfeasor apparently in full satisfaction of his claim for all loss arising out of the matter, but which his solicitor in a subsequent action against a concurrent tortfeasor claimed to have been in partial settlement of his loss. The Sheriff's Court upheld the decision of the Sheriff Substitute dismissing his claim, holding that his previously undeclared and unevidenced intention of accepting the tender in partial satisfaction of his loss could not override what on an objective assessment of the matter appeared to have been an acceptance of payment in full satisfaction of his loss. Putting aside the possible differences of Scottish law, the circumstances of the case do not suggest to me a contrary approach to that of the English courts. There was no evidence before the court that the tender sum accepted by the pursuer was not the full amount of his loss, and the court felt bound to proceed on the basis that it was. The English authorities, to which I shall briefly refer, indicate that if, as a question of fact a plaintiff has secured full recovery, he cannot recover any

more. In the case before us, as I have said, the Judge found as a fact that Mr. Jameson had not secured by his settlement with Babcock Energy full recovery of his loss.

38. Mr. McLaren also cited some North American authorities in support of his submission that, as between concurrent tortfeasors, an agreement with one expressed to be in full satisfaction, whether or not it was, released the other. On examination, they do not support Mr. McLaren's argument or, where they appear to do so, are not persuasive. In **Lovejoy v. Murray** (1865), the Supreme Court of the United States held that a partially satisfied judgment against a trespasser did not bar recovery of the balance from a joint trespasser because the partially satisfied judgment was clearly not full satisfaction. In **Black v. Martin** (1930) (Montana) 292P 577, the Supreme Court of Montana held that settlement with two joint tortfeasors for a sum less than full satisfaction did not bar an action for the balance against a concurrent tortfeasor. In **Lisoski v. Anderson** (1941) 112 P(2d) 1055, the Supreme Court of Montana held that release of a tortfeasor discharged a joint tortfeasor. In **Latham v. Des Moines** (1942) 6 NW 2d 853, the Supreme Court of Iowa declared that the tortfeasors were not joint but appears to have barred the second claim on the basis that the two causes of action were indivisible and that the two tortfeasors were responsible for the same wrong.

39. Such guidance as can be found in English authorities on the point indicate that satisfaction is a practical and objective defence, not dependent on agreement or accord, though often the result of it, by which a defendant says simply that the plaintiff has already been fully compensated for the wrong or wrongs for which he claims damage. As I have said, unlike accord and satisfaction, it can only be executed. It is available where the plaintiff has received the full value of his claim, whether by judgment or acceptance of money in court or by settlement. Its basis is simply that a plaintiff should not recover more than his true loss. Thus, unlike accord and satisfaction in the case of joint tortfeasors, it does not apply to a negotiated settlement figure which is less than that full value of that claim. For the same reason Mr. McLaren's reliance on the immateriality of the adequacy of consideration in contract as applied to a settlement agreement expressed to be in full satisfaction is misconceived.

40. This is how Glanville Williams, citing from very early authorities, put it at page 33 of his 1951 study:
" Satisfaction by any concurrent tortfeasor discharges the others. Satisfaction means payment of damages, whether after judgment or by way of accord and satisfaction or the rendering of an agreed substitution therefor. If the payment is of damages, it must be of the full damages agreed by the plaintiff or adjudged by the court as the damages due to him; otherwise it will only be a satisfaction pro tanto."

41. The Court may give effect to the defence of satisfaction in different ways.

    1. where the plaintiff has obtained full recovery, by declining to give him judgment because he can no longer prove an essential part of the cause of action, an entitlement to damages - see **Bird v. Randall** (1762) 96 E.R. 210 and 218; **Clark v. Urquhart** [1930] AC 28, HL, per Lord Sumner at 38, 50, 54 and 57, Lord Atkin at 63 and 66 and Lord Tomlin at 76; **United Australia Ltd. v. Barclays Bank Ltd**. [1941] AC 1, PC, per Viscount Simon LC at 21; and **Bryanston v. De Vries** [1975] 1 QB 703, CA, per Lord Denning MR at 722A-724D, Lord Diplock at 729H-734D and Lawton LJ at 740B; or

    2. where there has only been partial recovery, by confining any subsequent judgment to the unrecovered amount of the plaintiff's loss from the overlapping claims - see **Townsend v. Stone Toms (No. 1)** [1981] 1 WLR 1153, CA, per Eveleigh LJ at 1160F, and (No. 2) (1984) 27 BLR 26, CA, per Oliver, Purchas and Waller LJ at 38-39, 51 and 56 respectively; see also **The Koursk** [1924] P. 140, CA; or -

    3. where there has been full or partial recovery, by giving judgment for an amount but denying him his right to execution of it or confining execution to the unrecovered amount - see, for example, **Dering v. Uris** [1964] 2 QB 669; and **Wah Tat Bank Ltd. v. Chan Cheng Kum** [1975] AC 507, PC; see also **Townsend v. Stone Toms (no. 1),** per Eveleigh LJ at 1160E-F and Sir David Cairns at 1162A-C.

42. Mr. McLaren has subjected **Bryanston v. De Vries** to detailed analysis, distinguishing it on its facts, including the fact that it was joint tortfeasor case, correctly observing that it did not deal with the precise issue before this Court and drawing attention to the differences between the judgments of Lord Denning, Lord Diplock and Lawton LJ. He conducted much the same exercise with the two Townsend cases, emphasising, in particular, that, though there were concurrent claims in that dispute, it did not follow that when the facts came to be established there would be concurrent tortfeasors, and that though the allegation

was that they had caused some overlapping damage, it was not alleged that they were responsible for precisely the same damage.

43. In my view, none of the distinctions that Mr. McLaren made of **Bryanston Finance Ltd. v. de Vries** is material. Although it was a joint tortfeasor case, it was not concerned with an accord and satisfaction, but with a consent judgment against one of the joint tortfeasors. The plaintiff was, therefore, entitled, by Section 6 of the 1935 Act to proceed against the other tortfeasor. The relevant question for the Court of Appeal was how it should treat the subsequent claim against the second tortfeasor, having regard to the finding of the trial judge that the judgment sum against the first joint tortfeasor, if paid, more than compensated him for the wrong. Lord Denning MR and Lawton LJ regarded it as a bar to further recovery; Lord Diplock regarded it as a defence if pleaded. The Court's conclusion on the main issue that a claimant should not recover more than his true damage is as applicable to concurrent as to joint tortfeasors and as to judgments as to settlements whatever form the latter take. See per Lord Denning MR at 723A-D.

44. As to the **Townsend** cases, Mr. McLaren's submissions similarly do not meet the main thrust of the judgments, which was against over-recovery of damages, in this instance against concurrent tortfeasors or potentially concurrent tortfeasors. It seems to me that Oliver LJ pointed the way in the following passage from his judgment in Townsend (No. 2), at 38, in which, though talking of concurrent claims, he clearly had in mind principles governing valid claims against concurrent tortfeasors:

" The treatment of moneys taken out in satisfaction of claims against one defendant whilst the action proceeds against another, and where there is no precise coincidence of claims is a question which, curiously enough, appears to be uncovered by any reported authority. The plaintiffs' submissions in this case, however, appear to me to be misconceived and to be based on the fallacious proposition that a unsatisfied judgment is to be treated for purposes of account in the same or another action on the same footing as a satisfied judgment. This, in my judgment, is palpably wrong.

The starting point, and one on which there is a good deal of clear authority, is that where a plaintiff with concurrent claims against two persons has actually recovered part or all of his loss from another, that recovery goes in diminution of the damages which will be awarded against the defendant.

A plaintiff can never, as I understand the law, merely because his claim may lie against more than one person, recover more than the total sum due."

See also his application of that approach at 51.

45. Returning to this case, I can see no basis in law or in commonsense why an agreement expressed to be in *"in full and final settlement and satisfaction"* between a claimant and one tortfeasor should be regarded as full satisfaction in respect of any claims that he may have against a concurrent tortfeasor who was not a party to it. These are separate causes of action, not a single and indivisible action as is the case with joint tortfeasors. Nor am I impressed by the argument of Mr. Woodward that, in a case of concurrent tortfeasors, it is undesirable and difficult for a court to attempt to determine the value of a claim on the basis of full liability regardless of the settlement figure. Such argument may apply to joint tortfeasors, but not to concurrent tortfeasors where satisfaction is not a reflection of an agreement but of whether the claim, good or bad, made against the second tortfeasor has in fact been satisfied. Where there is a question about that, in personal injury cases or otherwise, the task for the court is the same as that performed daily by civil courts throughout the country.

46. As I have said, the Judge found that the settlement figure of £80,000 did not represent the full value of Mr. Jameson's claim against Babcock Energy on a full liability basis. In my view and for the reasons I have given, he was not bound to equate full satisfaction with a figure acceptable to both parties representing their respective assessment of the risks of the litigation. And, on the material before him, it was a finding he was entitled to make.

47. Accordingly, as Babcock Energy and the CEGB are agreed for the purpose of this preliminary issue to be concurrent tortfeasors and as Mr Jameson's settlement sum was only partial satisfaction of the full value of his claim, his receipt of that sum could not bar his executors from proceeding with their claim.

48. Mr. Walker has advanced a further reason, which he described as *"subsidiary"* and *"somewhat artificial"*, why the settlement payment of £80,000 cannot provide a defence of satisfaction to the CEGB.

49. It is that, even if the £80,000 were regarded as capable of being full satisfaction, it was not executed, because Mr. Jameson did not receive it all before he died. The final £5,000 making up the total sum was not paid until 29th April 1988, after his death.

50. **Bryanston Finance Ltd. v. De Vries** and the other authorities to which I have referred indicate the importance of actual receipt of full satisfaction before it can be relied upon as a defence. The entitlement of Mr. Jameson to proceed against the CEGB and, hence, that of his executors under the 1976 Act turn on his entitlement at the moment of death. See **British Electric Railway Company Ltd. v. Gentile** [1914] AC 1034, PC, per Lord Dunedin, giving the judgment of their Lordships, at 1041. At that time, he had not received the sum which, on the CEGB's and Babcock Energy's case, case amounted to full satisfaction. Mr. Walker submitted, therefore, that he was still entitled for that reason to maintain an action against the CEGB at the moment of death, thus founding his executors' present action against the CEGB.

51. In reply, Mr. McLaren relied on the fact that the Judge, by his order of 31st March 1995 giving effect to his judgment on the preliminary issues, has ordered that Mr. Jameson's executors *"cannot now maintain any action against"* Babcock Energy, the only basis for which could be a finding that there had been an executory accord and satisfaction of Mr. Jameson's claim at the time of his death. Mr. McLaren's reliance on that order to support a defence of satisfaction is misconceived. Babcock Energy as a matter of contract was entitled to rely on the executory settlement agreement as an accord and satisfaction; the CEGB as a concurrent tortfeasor cannot rely on it on the quite separate defence of satisfaction.

52. Mr. McLaren submitted that, in any event, the date of payment is irrelevant since the settlement agreement was made and the case was effectively *"finished"* on 19th April 1988, at which time £75,000 was already in court. That submission, it seems to me is simply another way of putting the same misconceived argument, namely that accord and satisfaction, as distinct from satisfaction, bars a claim against a concurrent tortfeasor.

53. I would not care to determine the case against the CEGB on a point such as this, and in the light of my conclusion on the main issue as to satisfaction, do not need to do so. However, it cannot be dismissed as an artificial or technical point. Unless Mr. Jameson received full satisfaction - for the purpose of this alternative argument of Mr. Walker, the agreed settlement figure - before his death so as to deprive him of any further right of action against the CEGB, the statutory right of his executors to make a dependency claim on behalf of his widow vested on his death. Subsequent payment of the balance of the agreed sum could not, it seems to me, take away that entitlement.

Abuse of process/Construction of Section 1 of the Fatal Accidents Act 1976

54. As to abuse of process, the Judge held that it would not have been an abuse for Mr. Jameson to have proceeded against the CEGB had he lived; such an action would not have been, and the present action was not, a collateral attack on the settlement or akin to a collateral attack on a final judgment; he had found that the law permitted it and he referred by way of example to **The Koursk** and Sections 3 and 4 of the 1978 Act, which provide for successive actions against persons jointly liable for the same damage. He rejected the suggestion that Mr. Jameson's advisers in negotiating the settlement had in mind further recovery against Babcock Energy by proceedings against the CEGB in which they contemplated Babcock Energy would be brought in as a third party. As to the possible "windfall" to Mr Jameson's widow in recovering both the £80,000 through his estate and, thanks to Section 4 of the 1976 Act, full dependency damages in the region of £142,000, as claimed, he referred to similar windfalls upheld by the courts.

55. A dependency claim under the Fatal Accidents Acts has always depended upon the entitlement of the deceased at the moment of death to sue and recover damages for the wrongful act causing his death. Section 1(1) of the 1976 Act provides:
"If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

56. Section 4 of the Act provides that in assessing, inter alia, dependency damages, benefit to dependants from the deceased's estate shall be disregarded. More precisely, it provides:

"In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded."

57. Mr McLaren made two alternative submissions.

58. The first, which he described as a matter of statutory construction of Section 1 of the 1976 Act, only arises if, contrary to my view, the settlement sum of £80,000 would have been regarded as full satisfaction, as distinct from accord and satisfaction of the claim against Babcock Energy, but was only prevented from being so because the final £5,000 was not paid before Mr. Jameson's death. Mr. McLaren argued that at the time of death Mr. Jameson would have lost his right of action against the CEGB because, by reason of the payment five days later, he would not in practice have been able "to maintain an action and recover damages in respect thereof" as required by Section 1.

59. Mr. McLaren's submission on this point results from a misreading of Section 1(1). It enables the bringing of an action on behalf of dependants if the wrong, but for the deceased's death, would have "entitled" him "to maintain an action and recover damages". The test is the deceased's "entitlement" just before death to achieve that end if he had lived, not whether he could have achieved it given the fact that he died when he did or that his claim would thereafter have been struck out as an abuse of process as a result of the payment five days later. In any event, as, in my view, the settlement figure of £80,000 did not amount to full satisfaction of Mr. Jameson's claim, it was not capable, whenever paid, of releasing the CEGB as a concurrent tortfeasor.

60. Mr. McLaren's second submission, which Mr. Woodward supported, was that it would have been an abuse of process to allow Mr. Jameson's widow to make a dependency claim against the CEGB, he having entered unreservedly into a full and final settlement with Babcock Energy for a sum which included a significant amount for future loss of earnings that she received as part of his estate. (Such loss could not have been recovered in a claim by his estate for *"the lost years"* after his death, and it will be remembered that the 1934 Act claim was abandoned at the trial.) Mr. McLaren added that it was a further abuse of process if, as Babcock Energy maintained, the CEGB could not recover contribution from it. He submitted that that abuse taints this "derivative" action on behalf of Mr Jameson's widow and offends the general canon that there should be finality in litigation.

61. Whilst the categories of cases that may be struck out as an abuse of process are not closed, examples are rare and usually fall into one of two classes, namely: invoking the judicial process for some collateral purpose - see e.g. **Hunter v. Chief Constable of West Midlands Police** [1982] AC 529, HL, per Lord Diplock at 536; **Ashmore v. British Coal Corporation** [1990] 2 QB 338 - and stultifying the process of the court - see e.g. **Headford v. Bristol and District Health Authority,** The Times 30th November 1994.

62. The Judge, at pages 58-59 of his judgment, rejected the argument of Mr. McLaren that there was evidence indicating that the action was tainted by reason of a secret or planned "procedural device" under which Mr. and Mrs. Jameson agreed that he would not proceed with one of his causes of action so as to enable her to take advantage of the windfall of part of his damages by virtue of Section 4 of the 1976 Act. Even if the Judge had found that there had been some such arrangement, it is, in my view, open to question whether it would have rendered the present action an abuse.

63. I cannot see how, if Mr. Jameson had lived, it would have been an abuse of process for him to have sued the CEGB for the balance of his claimed loss after settling as he did with Babcock Energy. He was not bound to sue all alleged tortfeasors in one action or to settle his claim as against all of them. See ***Clerk & Lindsell***, op. cit, para. 4-55, pp. 147-8 and e.g. **The Koursk** and **United Australia Ltd. v. Barclays Bank Ltd.,** per Lord Porter at 50. See also the 1935 Act, section 6 and the 1978 Act, sections 3 and 4, expressly providing for successive actions. If, as the Judge found, his settlement did not amount to full satisfaction of his claim against all those responsible for his condition, I can see no reason in law or as a matter of policy why he should not, if he had lived, proceed against a concurrent tortfeasor for the balance.

64. As to the present claim, Mrs. Jameson has a statutory right, as her deceased husband's dependant, to damages for her loss of dependency against those who caused it. She is also entitled, by Section 4 of the 1976 Act, to ask the court to disregard any sums received "from his estate or otherwise as a result of his death", including the sum of £80,000 from his settlement agreement with Babcock Energy. It cannot

normally be an abuse of process to enforce an express statutory entitlement. See e.g. **Pidduck v. Eastern Scottish Omnibuses Ltd**. [1990] 1 WLR 993, CA, and also **Gammell v. Wilson** [1982] AC 27, HL and other "lost years" damages cases until the scope for such claims was removed by Section 4(2) of the Administration of Justice Act 1982, substituting Section 1(2)(a)(ii) of the Law Reform (Miscellaneous Provisions) Act 1934.

65. Mr. McLaren suggested nevertheless that it was an abuse of process for Mrs Jameson to seek and obtain double recovery of at least some of her husband's lost future earnings already included in the £80,000 settlement. He said that the 1976 Act was not intended to assist those who had already recovered damages which could provide for dependency, as the 1982 Act still permits a living plaintiff to do.

66. Mr. McLaren, in making that suggestion, relied heavily on a passage from the speech of Lord Salmon in **Pickett v. British Rail Engineering Ltd**. [1980] AC 136, HL, at 152D-153D, a *"lost years"* claim by a plaintiff continued after his death by his widow as administratrix, not a dependency claim under the 1976 Act. Lord Salmon clearly considered the function of that Act and its predecessors to provide for a fatally injured man's dependants where the interval between the fatal injury and death was so short that the injured man could not make similar provision by proceeding to judgment in a claim for his "lost years" before death. He seems to have regarded the *"lost years"* entitlement of a dying man and the dependency entitlement of his family after his death as alternative ways to the same end, the alternative chosen depending on the timing. This is how he put it at 153A-D of his speech:

67. " When the Fatal Accidents Acts 1846 to 1908 were passed, it is, in my view, difficult to believe that it could have occurred to Parliament that the common law could possibly be as stated many years later, by the Court of Appeal in Oliver v. Ashman ... [holding that there was no entitlement to claim for "the lost years"]. The clear intention of Parliament in passing those Acts appears to have been to deal with the all too frequent cases in which, as a result of someone else's negligence, a man suffered injuries which incapacitated him from earning and caused his death before he could obtain any damages from the tortfeasor to compensate him for the loss of the money he would have earned but for the tort. The policy of the Acts was, in my opinion, clearly to put that man's dependants, as far as possible, in the same financial position as they would have been in if the bread-winner had lived long enough to obtain judgment against the tortfeasor. In my opinion, Parliament correctly assumed that had the deceased lived, he would have recovered judgment for a lump sum by way of damages as compensation for the money he would have earned but for the tortfeasor's negligence; and that these damages would have included the money which the deceased would have earned during 'the lost years'. Otherwise, Parliament would, surely, have made it plain that no judgment in favour of the deceased or settlement of his claim could bar a claim by his dependants under the Fatal Accidents Acts; I certainly do not think that Parliament would have used the language which it did use in section 1 of those Acts."

68. Lord Salmon was not, of course, concerned in that case with the precise nature of entitlement under the Fatal Accidents Acts or with a dependency claim after death against a concurrent tortfeasor. The principle of law that he described at 152G as *"probably correct"* is that as a matter of construction of Section 1 of the 1976 Act and its predecessors, if a dying man settles with or obtains judgment against a tortfeasor his dependants have no claim against that tortfeasor because he has none at death and his death does not create a fresh cause of action. See e.g. **Read v. The Great Eastern Railway Co**. [1868] LR 3 QB 555; **Williams v. Mersey Docks and Harbour Board** [1905] 1 KB 804, CA; Murray v. Shuter [1972] 1 Lloyds Rep. 6, CA. However, as I have said, that principle does not apply where a dying man has a claim against another, concurrent, tortfeasor which he has not settled and against whom he has not obtained judgment, because there, if he had lived, he would have been entitled to maintain an action against that tortfeasor.

69. As to the effect on Mr. Jameson's notional claim if he had lived, or on his widow's dependency claim, of the possible injustice to Babcock Energy in now being subjected to a third party claim despite its *"full and final"* settlement with Mr. Jameson, it seems to me that the possibility or probability of that at the time of settlement could not *"taint"* either claim. Mr. Jameson's only agreement was with Babcock Energy; it was nothing to do with him whether, in any subsequent claim by him or by his widow under the 1976 Act against the CEGB, it might seek a contribution from Babcock Energy; and it was nothing to do with the CEGB, finding itself a defendant to a dependency claim, that Mr. Jameson had settled his claim against

Babcock Energy *"in full and final satisfaction"*. This appears to have been the approach of Steyn LJ in the passage that I have cited from his judgment in **Watts v. Aldington**, at 31, in which he suggests that release of a tortfeasor should not release a joint tortfeasor, putting him in the same position as a concurrent tortfeasors in this respect. For convenience I repeat that part of the passage:

" ... But good sense, fairness and respect for the reasonable expectation of contracting parties suggest that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for contribution against the released tortfeasor must be faced. As far as the unreleased tortfeasor is concerned the settlement between the plaintiff and the released tortfeasor is res inter alios acta. If this solution is not perfect, it at least has the merit of promoting more sensible results than any other solution ..."

70. Accordingly, my view is that there is no basis, evidential or otherwise, for regarding Mrs. Jameson's dependency claim, which she is legally entitled to make against the CEGB, as tainted by her husband's settlement with Babcock Energy so as to render the present action an abuse of process.

Damages

71. The issue as to damages arises only if, as I would hold, Mr. Jameson's cause of action before death has not been satisfied and the present claim is not an abuse of process. It is whether Mrs. Jameson can establish that her loss of dependency has resulted from her husband's death.

72. The Judge rejected the CEGB's and Babcock Energy's argument that at the time of Mr. Jameson's death there was no dependency because by then he had no actual or potential earning capacity. He held that the effect of the Fatal Accidents Legislation from its inception was to require a tortfeasor whose tort had caused loss of earning capacity and death, whether or not simultaneously, to compensate the deceased's dependants for that loss. He also declined to accept the argument advanced on behalf of Babcock Energy that he should set against any dependency the fact that had Mr. Jameson lived he would have required costly full-time nursing and would not have been able to do any work about the house.

73. I set out the relevant provisions of the 1976 Act, for convenience repeating Sections 1(1) and 4, highlighting parts of the provisions particularly relevant to this issue, and observing that Section 1 is essentially the same as it was in the 1846 Act:

"1(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

Section 1(2) provides, subject to immaterial exceptions, that
"every such action shall be for the benefit of the dependants of ... the deceased ...".

Section 3(1) identifies in broad terms the damages recoverable:

"In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively."

Section 3(3) excludes consideration in the assessment of damages of the prospect of a widow's re-marriage:
"In an action under this Act where there fall to be assessed damages payable to a widow in respect of the death of her husband there shall not be taken into account the re-marriage of the widow or her prospects of re-marriage."

And Section 4 provides that in assessing damages certain benefits shall be disregarded:
"In assessing damages in respect of a person's death in an action under this Act benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded."

74. Mr. McLaren and Mr. Woodward submitted that Mrs. Jameson's loss of dependency, including the claimed allowance for the work that he did around the house, did not result from her husband's death, as required by those provisions, because he had already lost all future earning and *"d.i.y."* capacity before it occurred. They maintained that the Act does not provide compensation for loss of dependency caused by the wrong or the injury that it caused during the deceased's lifetime, but only for that resulting from the death, and they drew attention to the highlighted words in Sections 3(1), 3(3) and 4. They placed particular

reliance on the words of Lord Dunedin in the British Columbia Electric Railway case, at 1041, albeit that they were couched in terms of actionability rather than recovery of loss of dependency:

"... the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, [have] maintained, i.e. successfully maintained, his action, then the action under the Act does not arise."

75. The consequence of their submission, if correct, would be to deprive dependants of any recovery under the Act whenever the injury causing permanent loss of earning capacity does not also instantaneously cause death. It would also mean that possibly hundreds of thousands of judgments and settlements in the 150 years of the Fatal Accidents Legislation have erroneously provided for the dependants of those who did not die instantaneously from another's wrong, including those who died only after a lingering fatal illness.

76. Mr. McLaren and Mr. Woodward suggested that such an outcome would not produce an injustice in this case because Mr. Jameson had already recovered a substantial amount of damage for his injury which would enure for the benefit of Mrs. Jameson as part of his estate, thus merely preventing double recovery. That line of reasoning led Mr McLaren to soften the surprising consequence of the argument. He acknowledged that the clear policy of the 1976 Act and its predecessors was to provide for dependants whenever their provider died after suffering a fatal injury or disease. However, he suggested that the policy conflicted with the plain meaning of its words, particularly those that I have highlighted in Sections 3(1), 3(3) and 4. To overcome that dilemma he suggested that where the deceased has not obtained judgment or settled his claim before death courts should apply the absurdity test to the literal meaning of the Act and the policy should prevail, but where he has done either the courts should give the provisions the literal and natural meaning for which he and Mr. Woodward contended. They maintained, therefore, that Mrs. Jameson cannot establish any dependency and that her only effective claim is for bereavement damages.

77. Mr. McLaren sought, as part of this submission, to close a possible loophole in it based on any additional loss of dependency that Mrs. Jameson might be able to establish from her husband's entitlement before death to recover against the CEGB the balance of his claim for future loss. He said that as Mr. Jameson had settled his claim against Babcock Energy in full and final settlement, he would have been unlikely to have made any claim against the CEGB if he had lived. He would have had to give credit for the substantial settlement sum £80,000, much of it going to future loss (not having the benefit of Section 4 of the 1976 Act given to a deceased's dependants); any claim by him against the CEGB would, as Mr. Walker has conceded, have been weaker than that against Babcock Energy; and he would have been at risk as to costs under Section 4 of the 1978 Act in bringing successive actions in respect of the same damage. Mr. McLaren submitted that, in practice, Mr. Jameson had no further claim at the time of death upon which he could have maintained an action and have recovered damages against the CEGB and that, therefore, Mrs. Jameson had no basis for a claim for loss of dependency under Section 1(1) of the 1976 Act.

78. Mr. Woodward argued additionally, though he did not press it as strongly as he had done to the Judge, that if Mr. Jameson had not died any claim that he might have had for future loss of earning capacity would have been of no benefit to his widow because it would have been substantially or entirely consumed in providing full-time care for him.

79. It is said that the cause of action under the 1976 Act and its predecessors is a new cause of action arising only at death, distinct, both as to cause and the nature of recoverable damages, from that of the deceased if he had lived. See e.g. **Pym v. Great Northern Railway Co**. (1863) Ex. Ch.396; **British Columbia Electric Railway Co. Ltd. v. Gentile** [1914] AC 1084, PC, per Lord Dunedin at 1039-040; and **Davies v. Powell Duffryn Associated Collieries Ltd.** [1942] AC 601, HL, per Lord Wright at 611 and 617 and Lord Porter at 623. Damages for dependency are not what a deceased would have recovered by way of his own action. They are what his dependants have lost by reason of his death, based conventionally on what he would have earned but for his death.

80. Whether one calls a dependency claim new or derivative, or both, the scheme of Section 1 of the 1976 Act is plain. It vests in dependants a right to claim for loss of dependency resulting from a wrongful act causing injury and death in respect of which a deceased could have claimed for his injury if he had lived. Putting

aside for a moment any question of full or partial recovery of future loss of earnings during life by settlement or judgment, in every case where death is caused by a wrongful act the deceased has suffered injury depriving him of his earning capacity before or by his death. Up to the moment of death he has an entitlement to claim for damages for the injury and its disabling consequence caused by that wrongful act. It is that entitlement which, by Section 1(1) of the Act, is the basis for the dependants' entitlement provided by Section 1(2) and assessed in accordance with Section 3(1) for the quite separate "injury" of loss of dependency "resulting from the death". The two forms of injury though distinct, are successive results of the same wrongful act.

81. Accordingly, in my judgment, even without resort to the notion of absurdity in the case of settlement or judgment before death, the meaning and effect of the 1976 Act are plain. It entitles a deceased's dependants to claim for loss of dependency after death where his injury and death were caused by a wrongful act, whether or not there was an interval between injury and death and whether or not the injury had disabled him from working before death. As Mr. McLaren's qualified submission on the matter acknowledged, any other interpretation of the statute would be absurd. It would frustrate the clear purpose of the Fatal Accidents Legislation since its introduction in 1846 and contradict the effect given to it by the courts in the 150 years of its existence. When Parliament continued in the 1976 Act substantially the same formula for entitlement as that in the 1846 Act it must have intended that it should continue to have that effect.

82. Mr. Woodward's additional and alternative submission is also contrary to the clear meaning of the Act and absurd, namely that there is no dependency entitlement because, if Mr. Jameson had lived, all his loss of earnings would have been absorbed in maintaining him and he could have done no work about the house. It wrongly equates Mr. Jameson's cause of action before death for damages for the disabling effects of asbestosis with that of Mrs. Jameson after his death, namely for loss of her dependency resulting from death. The scheme of Section 1(1) of the 1976 Act in establishing an entitlement to a dependency claim is to enable a deceased's dependants to recover their loss resulting from the wrongful act causing his injury and death, not to assume that the deceased has not died and that his loss continues after death.

Indemnities

83. The CEGB maintains that if it fails in its other arguments, it is entitled, by virtue of Section 1 of the Civil Liability (Contribution) Act 1978, to a contribution from Babcock Energy notwithstanding the latter's settlement with Mr. Jameson, because their potential respective liabilities were ***"in respect of the same damage".*** Babcock Energy's case is that it is not liable to contribute because its potential liability is not "in respect of the same damage" and that, in any event, it has contractually excluded such liability.

"In respect of the same damage"

84. The Judge found that Mr. Jameson developed the fatal mesothelioma after the 1978 Act came into force and that, therefore, the question of contribution was governed by that Act and not the Law Reform (Married Women and Tortfeasors) Act 1935, Section 6 of which the 1978 Act replaced and extended to include contribution for damage caused by any wrong whether or not tortious. He held that the CEGB was entitled to seek contribution from Babcock Energy in the third party proceedings, and Babcock Energy now appeals that decision.

85. The 1978 Act, provides in Section 1(1) that:
"... 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)."

By Section 1(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; ..."

By Section 2(1) -
".... in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage in question."

By Section 6(1), which clearly had liability under the Fatal Accidents Legislation in mind, a person is liable in respect of any damage for the purpose of the 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)."

By Section 6(2)-
"References in this Act to an action brought by or on behalf of the person who suffered any damage include references to an action brought for the benefit of his estate or dependants."

And by Section 6(3) -
"In this Act "dependants" has the same meaning as in the Fatal Accidents Act 1976."

86. The first issue is whether the damage for which the CEGB may be liable in the present action is "the same damage" for which Babcock Energy may be liable. By Section 1(3) of the Act a person may be liable to contribute *"notwithstanding that he has ceased to be liable in respect of the damage ..."* unless by limitation or prescription extinguishing the claim. Thus Section 6(1) must be interpreted as if it read *"... is or has been at any time entitled to recover compensation ..."*. See **Lister & Co. Ltd. v. Thompson (Shipping) Ltd**. [1987] 1 WLR 1614, per Hobhouse J at 1621B and 1623B-C. Similarly, in Section 1(6), as qualified by Section 6(2), a person's *"liability in respect of any damage"* means a liability which has been or could have been or could be established in an action against him *"by or on behalf of the person who suffered the damage"*, including an action brought for the benefit of a deceased's estate or his dependants. See, for example, **Logan v. Uttlesford District Council, CA** (unreported) 14th June 1984, per Sir John Donaldson MR, in which this Court upheld the right of a defendant in a road traffic case to seek contribution from another with whom the plaintiff had settled his claim in respect of the same accident without resort to litigation.

87. Mr. McLaren submitted that the relevant damage in this context is the alleged wrong that caused injury and death to Mr. Jameson, not the damages that he could have recovered for his injury. He said that the only wrong/damage was to Mr. Jameson, not to Mrs. Jameson, and that the action on her behalf is a derivative one "in respect of the same damage", namely in respect of the damage suffered by him. He added that the fact that Babcock Energy ceased to be liable to Mr. Jameson for that wrong/damage on the settlement is irrelevant on the question of contribution because Sections 1(3), 1(6) and 6(1) create an entitlement to contribution in respect of a liability which could have been established at any time. He relied upon the following passage from the judgment of Sir John Donaldson MR in **Logan v. Uttlesford District Council,** explaining the code of the 1978 Act and in particular its provision in Section 1(2) for a defendant who was but is no longer liable to a plaintiff to recover a contribution from a third party, and in Section 1(3) for a defendant to recover contribution against a third party who was, but is no longer, liable to the plaintiff:
"Subsection (3) looks at the problem from the point of view of [the third party] against whom the [defendant] has made a claim for contribution in circumstances in which [the third party] is outside the general rule, because he has ceased to be liable to [the plaintiff]. It provides that he will nevertheless be liable to contribute if he was at one time liable to [the plaintiff], unless he ceases to be liable to [the plaintiff] by virtue of the expiry of a period of limitation or prescription which extinguished the right on which [the plaintiff's] claim was based as contrasted with merely barring [the plaintiff's] remedy."

88. Mr. Woodward submitted that Babcock Energy is not liable under the 1978 Act to contribute to any damages that the CEGB may be ordered to pay for her benefit under the 1976 Act. Put at its simplest his argument was that, as Mrs. Jameson is and always was unable to maintain an action against Babcock Energy in respect of her husband's death, the CEGB is unable to obtain a contribution from Babcock Energy in respect of his death because there is no common "damage" for the purpose of Section 1(1) of the 1978 Act. The premise of his argument was that the injury or damage in an action under the 1976 Act is not that suffered by the deceased before he died but only that suffered by his dependants on and as a result of his death. He relied on a number of authorities under the Fatal Accidents Legislation, to some of which I have referred, indicating that a dependency claim is a new cause of action arising only on death. Thus, he reasoned that Mrs. Jameson's only claim for damage is that arising after her husband's death and in respect of his death; she could never have had such a claim against Babcock Energy before his death and his

settlement with Babcock Energy has deprived her of a claim after his death in respect of it. Accordingly, he submitted, Babcock Energy is not and never was putatively liable in respect of the same damage as that claimed against the CEGB, namely death and loss of dependency.

89. In my judgment, Mr. McLaren has interpreted the 1978 Act correctly. Mr Woodward's argument confuses *"damage*" as it is used in the 1978 Act with "damages" in its normal sense of compensation.

90. To demonstrate this, it is important to bear in mind the scheme of the 1976 Act (see Sections 1(1) and (2), 2(4) and 3(1) and 4), which, as I have said, the draftsman of the 1978 Act clearly had in mind. It is to provide "damages" to the dependants of a deceased for *"any wrongful act, neglect or default"* that caused his death. In the 1978 Act the word *"damage"* is not defined, but, in my view, its meaning is plain in the various contexts in which it appears. It is the wrong causing injury and/or death; it does not mean death and it does not mean loss of dependency resulting from death. It thus corresponds to the 1976 Act formula *"any wrongful act, neglect or default"*. The scheme of the 1978 Act, as I put it in **Friends' Provident v. Hillier Parker** [1996] 2 WLR 123, CA, at 135H, is to provide for contribution in respect of *"compensation*" for *"damage"*. See also **Birse Construction Ltd. v. Haiste Ltd**. [1996] 1 WLR 675, particularly per Roch LJ at 682C-F.

91. Thus, Section 2(1) directs the Court when assessing the amount of any contribution to have regard to his responsibility for *"the damage in question"*. As Mr. McLaren observed, apportionment of responsibility "for the damage in question" only makes sense if it means apportionment of responsibility for the wrong causing injury and death and not the statutory remedy of dependency damages provided by the 1976 Act. See also Sections 1(6) and 6(2), which I have set out above.

92. Any other interpretation would result in a narrowing of the provision for contribution as originally provided in Section 6 of the 1935 Act, which is clearly not what was intended by 1978 Act. See e.g. **Lampitt v. Poole Borough Council** [1991] 2 QB 545, per Lord Donaldson at 555.

Contractual exclusion of right to contribution

93. Babcock Energy maintains in the alternative that it has contractually excluded any liability to contribute and relies on Section 7(3)(b) of the 1978 Act, which provides that -

"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 circumstance, 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 ..."

94. The contract between Babcock Energy and the CEGB included a form of general conditions recommended by a number of professional engineers' bodies. Condition 21(iv) of those conditions provided for Babcock Energy to indemnify the CEGB, in certain specified circumstances, against claims in respect of damage or injury occurring during the contract works caused by Babcock Energy's negligence, but made no provision for contribution. Condition 21(vi) provided:

"The Contractor [Babcock Energy] shall not be liable to the Purchaser [the CEGB] for -

...

(b) except as provided in these Conditions, any claim made against the Purchaser [the CEGB]."

Mr. Woodward submitted that that provision expressly excluded contribution as provided by Section 7(3)(b). Mr. McLaren, on the other hand, contended that it excludes only the right to an indemnity falling outside the circumstances specified in Condition 21(iv), not the statutory right to a contribution.

95. Section 7(3)(b) protects any provision regulating or excluding contribution *"which would be enforceable apart from this Act"*. At common law there was, in general, no right of contribution between tortfeasors outside contract. See Law Commission Report on Contribution, paragraphs 13-17. The 1935 Act made no provision for statutory contribution in contract, only in respect of tortfeasors liable in respect of the same damage. However, the 1978 Act, in Section 6(1), introduced a statutory right of contribution, based, inter alia, on contractual liability. It thus became necessary also to include in the 1978 Act a provision protecting

contractual provision for, or exclusion of, a right to contribution. Hence Section 7(3) provides that the statutory right to a contribution in Section 1 supersedes all but such express contractual provision.

96. Here, condition 21(iv) provides only for an indemnity and then in carefully specified circumstances. There is no express contractual provision for a contribution. The use of the general words *"any claim"* in that context does not seem to me to amount to *"an express contractual provision excluding contribution"*. There is, therefore, no candidate for exclusion under condition 21(vi), that is, a contribution *"which would be enforceable apart from [the] Act"*. In addition, the condition excluding liability - *"except as provided in these Conditions, any claim made against the Purchaser"* - seems to me to be primarily intended to restrict to the specified circumstances the right of indemnity or other claim expressly provided for in the contract.

97. In my judgment, as a matter of construction of the contract and of Section 7(3)(b) of the 1978 Act, the contract did not expressly exclude the CEGB's statutory right of contribution under the 1935 Act and now the 1978 Act. I am reassured in that construction by the inherent implausibility, as Mr. McLaren described it, of the parties having intended that the CEGB's right of recovery against Babcock Energy should be a full indemnity or nothing.

Exercise of discretion

98. A further and alternative ground of appeal by Babcock Energy in the third party proceedings was that the Judge should have exercised his discretion under Section 2(2) of the 1978 Act so as to exempt Babcock Energy from liability to make a contribution.

99. As Mr. McLaren submitted, it would have been inappropriate for the Judge to have attempted to exercise such a discretion in determining these preliminary points of law. He had yet to hear evidence on and make findings of fact which would bear on the exercise of such discretion.

100. Accordingly, I would dismiss both appeals and confirm the Judge's orders.

SIR PATRICK RUSSELL: I agree

LORD JUSTICE NOURSE: I also agree

Order: defendant's and third party's appeal against the plaintiffs dismissed with costs; third party's appeal against the defendant dismissed with costs; leave to appeal to the House of Lords refused.

MR. I. McLAREN QC (instructed by Messrs. Dibb Lupton Broomhead, Birmingham) appeared on behalf of the Appellant Defendant.
MR. W.C. WOODWARD QC (instructed by Messrs. Hextall, Erskine & Co., London E1) appeared on behalf of the Appellant Third Party.
MR. R. WALKER QC (instructed by Messrs. Payne Marsh Stillwell, Southampton) appeared on behalf of the Respondent Plaintiffs.