C.A. 370/63

MUSAH BASSET and CALEDONIAN INSURANCE CO. LTD.

v.

HAPOL COMPULSORY INSURANCE LTD.

The Supreme Court sitting as a Court of Civil Appeal
[March 15, 1964]
Before Olshan P., Agranat D.P. and Berinson J.

Insurance - traffic accident - liability to third parties - right of contribution among insurers - Civil Wrongs Ordinance, 1944, sec. 64(1)(c) - Motor Vehicles Insurance Ordinance (Third-Party Risks), 1947, sec. 10(1) and (2)(a).

The first appellant was involved in a traffic accident, for which he was partly responsible. as a result of which a number of persons were injured. The respondent, the insurer of the other vehicle, settled the claims of some of the injured in negotiations outside court, after having invited the appellants to join in the negotiations. The latter refused to do so nor did they make any contribution to the payments made by the respondent who sued for contribution. The appellant denied liability and applied for the action to be dismissed *in limine* for no cause of action.

Held. The right of contribution lies in Equity or quasi-contract and not in contract, since it would not be just for a party to be relieved from a financial burden and thus be enriched at the expense of another. The right is available whenever two people are liable *in solidum* and not necessarily jointly or jointly and severally. When two people are liable in respect of the same matter, the presumption, in the absence of evidence to the contrary, is that each must bear half of the liability, and if one pays more the other is unlawfully enriched at his expense. The underlying principle is flexible and therefore applicable to all kinds of different situations, irrespective of whether judgment has been obtained regarding liability of the person from whom contribution is claimed, provided it is to be anticipated that if action had been taken against him he would have been rendered liable.

Israel cases referred to:

(1) C.A. 479/60 - *Natan Apelstein and others v. Juliet and Zwi Aharoni* (1961) 15 P.D. 682.
(2) *C.A.* 203/54 - *Zion Shalti v. Moshe Canterowitz and others* (1955) 9 P.D. 559.
(3) *C.A.* 294/53 - *David Caspi v. Moshe Yaakov* (1955) 9 P.D. 1858.
(4) *C:A.* 33/54 - *Commercial Union v. Abraham Sher and others* (1954) 8 P.D. 427.
(5) *C.A.* 255/56 - *Rolf Karman v. "HaSneh" Israeli Insurance Co. Ltd.* (1956) 10 P.D. 1912.
(6) *C.A.* Tel Aviv-Jaffa, 176/59 - *Meir Greitzer v. "Bohan" Insurance Co. Ltd.* (1960) 23 P.M. 212.
(7) *C.F.* Jerusalem, 22/53 - *Shlomo Zaddok v. Eliezer Ben Pinhas Schweitzer and others* (1958) 16 P.M. 129.

English cases referred to:

(8) *George Wimpey and Co. Ltd. v. British Overseas Airways Corporation* (1954) 3 *All E.R.* 661; (1955) A.C. 169.
(9) *Edward Deering v. Earl of Winchelsea, John Roes, and The Accorney-General* 126 *E.R.* 1276 (1787).
(10) *Samuel Stirling and others v. Robert Forrester 4 E.R.* 712 (1821).
(11) *Whitham v. Bullock* (1939) 2 K.B. 81: (1939) 2 *All E.R.* 310.
(12) *Merryweather v. Nixan* 101 E.R. 1337 (1799).
(13) *Palmer v. Wick and Pulteneytown Steam Shipping Company, Ltd.*(1894) 2 A.C. 318.
(14) *Adamson v. Jarvis* 130 E.R. 693 (1827).
(15) *The Englishman and The Australia* (1895) P. 212.
(16) *The Koursk* (1924) P. 140.
(17) *Romford Ice and Cold Storage Co., Ltd. v. Liscer* (1955) 3 *All E.R.* 460: (1957) 1 *All E.R.* 125.

L. *Weinberg* and *R.A. Gipter* for the appellants.
D. *Friedman* for the respondents.

AGRANAT D.P.: In this appeal an interesting question falls to be considered: in the event of a collision between two vehicles due to the negligence of both the drivers, a third person is injured who thereafter settles with the insurer of one of the drivers and receives

from it a sum of money for damages, is that insurer entitled to resort to the second tortfeasor and his insurer for part of the sum which it paid to the injured person?

This question was raised in an action brought by the respondent against the appellants in the Tel Aviv-Jaffa District Court, based principally on the following facts:

(a) In the evening of 6 July 1961, the first appellant was driving a lorry on the Hadera-Netanya road and because of a puncture in it, he stopped and parked the lorry at the side of the road but with its wheels projecting on to the road and without leaving enough light in the lorry, including the rear, to warn persons travelling along the road of its presence.

(b) Some time afterwards, a bus driven from the direction of Hadera by one Ya'acov Mokhof, collided with the lorry so parked without enough light, and as a result, a number of passengers in the bus were injured, one of them dying from his injuries.

(c) At the time of the accident the second appellant was the insurer of the lorry in accordance with the Motor Vehicles Insurance Ordinance (Third-Party Risks), 1947 (hereinafter called "the 1947 Ordinance"), while the respondent was the insurer of the bus as aforesaid.

(d) Following the accident, negotiations took place outside court between the respondent and some of the injured over their claims for damages, and a compromise was reached, according to which the respondent paid them a total sum of IL 25,010 in settlement.

(e) The appellants were also invited to join the negotiations but they refused to do so and did not share in the payment of damages which the injured received.

(f) In the above-mentioned action the appellants were requested to share in the said payment up to half and therefore to reimburse the respondent the sum IL 12,505.

The appellants filed a Statement of Defence wherein they denied their obligation to share in the sum paid by the respondent in accordance with the settlement and then applied to the District Court to strike out the action in *limine* for lack of cause of action. In a reasoned judgment of 12 July 1963, the learned judge dismissed the application. This appeal is brought against that judgment.

In support of the appeal, the appellants' counsel repeated the two main arguments, on which he had relied before the judge. (a) There is no dispute between the parties: (b) the respondent is not entitled to claim contribution from the second appellant (the lorry's insurer) in the given amount, without the obligation to make good the damage of the persons injured in the accident having been imposed on the latter in accordance with section 10 of the 1947 Ordinance. For such an obligation to arise, he went on to argue, prior conditions must be fulfilled, one that judgment was given in favour of the injured against the first appellant (the lorry driver), and the other that the first appellant received advance notice of the proceedings in which the judgment was given. The respondent does not argue here that these conditions or either of them was fulfilled before the payment was made; it was also impossible for them to be fulfilled after the payment, because when the settlement between the injured and the respondent was reached and the latter paid them monies to discharge their claims, they got full satisfaction. The second appellant therefore does not have to indemnify the respondent in respect of these monies.

In my opinion there is no foundation for these arguments. To explain that, I proceed on the three following assumptions.

(1) In the Statement of Claim the respondent pleaded that "the accident was totally or mainly caused through the negligence... of the first defendant" (the lorry driver). In view of this plea, it was *perhaps* possible to think that when the respondent paid the injured persons' claims in accordance with the settlement, it acted as a volunteer and therefore has no cause of action against the appellants. But I do not wish to lay down any hard and fast rule on this point because appellants' counsel in his summation made no submission in this vein. On the other hand, respondent's counsel in his summation attributes negligence also to the bus driver for the accident in saying "that the share the respondent claims from the appellants is in accordance with the proportion *between its insured's negligence* and the first appellant's negligence". Not only that, but the respondent also set his claim at half the sum paid by it to those injured in the accident. Accordingly, I find that it is necessary to deal with this appeal on the assumption that the cause of the damage should be attributed to the negligence of each of the two drivers.

(2) Attention must be paid to the fact that owing to the aforementioned settlement the two conditions set out in section 10 of the Ordinance and mentioned above were also not fulfilled as regards the respondent. But I am of the opinion that this matter cannot prejudice the respondent's cause of action, because the fact that it paid the said monies to the injured persons in accordance with the settlement must be regarded as an admission on its part of its liability to discharge their claims, within section 10 above; that is to say, the payment together with the admission it implies takes the place of the fulfilment of those conditions. (See by analogy, the example in paragraph 14(b) in the judgment of Sussman J. in *Apelstein* v. *Aharoni* (1) at p.696*: see* also the remarks of Lords Simonds and Reid in *George Wimpey & Co*. v. *B.O.A.C.* (8) at pp.664 and 672; and further G. Williams*, Joint Torts and Contributory Negligence,* paragraph 31, p. 97; Fleming, *Law of Lores,* 2nd edition, pp. 694-695). It will be noted that no argument by the appellants was heard against this assumption either.

(3) According to the first above assumption in connection to the facts pleaded in the Statement of Claim, it follows that the two drivers cannot be regarded as joint tortfeasors, but only as tortfeasors who contributed to the occurrence of the same tortious result by negligent actions which were separate from and independent of one another (concurrent tortfeasors). Yet it is clear - and that is my third assumption – that by the respondent (the insurer of the bus driver) settling the claims of the injured, also the lorry driver (the first appellant) is freed from all liability towards them for the damage they incurred (G. Williams, *op. cit.,* paragraph 9, p. 34; *Shalci* v. *Canterowitz* (2) at p. 560). And the insurer of the lorry driver (the second appellant) as well is *ipso facto* freed from all liability towards them for the same damage. Appellants' counsel concurred in this view and indeed this concurrence is closely related to his argument that since the claims were discharged by the respondent in accordance with the settlement, no proceedings would be instituted by the injured for damages from the appellants because "a settlement with one joint tortfeasor releases the second", although in using the expression "joint tortfeasor", counsel was imprecise in his language, as explained above.

In the light of these assumptions let me give the reason for my opinion that the arguments of appellants' counsel rest on shaky foundations. To do so, I must first deal with the meaning of the right of contribution.

(a) As is known, the source of this right lies in the rule of Equity that equity is equality, and accordingly, if two people have to fulfil the same financial claim of a third person and it is discharged by one of them, so that the other is wholly or partially freed from this burden, the former is entitled to resort to him and exercise the right of contribution at a rate considered by the court to be just in the circumstances of the case. The reason for this rule is that in such a case it would not be just that one debtor freed from financial burden should be enriched at the expense of the debtor who brought about this result. The right of contribution is therefore based on the principle of justice - literally - and not on the existence of any contractual relations whatsoever, though a contract can negate it completely or limit it (see *Halsbury-Simonds, Laws of England,* Vol. 14, paragraph 934, pp. 492-493). What emerges from this is that the fact that the liability which rested on the two was a liability *in solidum* - and not necessarily joint, or joint and. several is sufficient to attach to the payer the right of contribution. Even as early as 1787 it was decided in *Deering* v. *Earl of Winchelsea* (9) that one guarantor who paid a debt could resort to another guarantor, even though between them there was no relationship and the two guarantees were created under separate documents; and the court affirmed the rule in 1921 in *Stirling* v. *Forrester* (10). In the first of these cases Lord Eyre said (at p. 1277)

> "the bottom of contribution is a fixed principle of justice, and is not founded in contract. Contract indeed may qualify it".

And then (at p. 1278)

> "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same and different instruments? In every one of those cases sureties have a common interest and a common burthern. They are bound as effectually quoad contribution, as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally."

In the second case Lord Redesdale said (at p. 719):

> "The principle of *Deering v. Lord Winchelsea* proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal... . The duty of contribution extends to all persons who are within the equitable obligation."

In the modern period the principle of contribution was formulated by Clauson J. in *Whitham* v. *Bullock* (11) in the following words:

> "In equity the principle must be regarded as covering cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with the benefit to the defendant even though there is no common liability to be sued."

In view of the rationale of the contribution principle - that it is only intended to prevent unlawful enrichment - leading jurists are of the opinion that one must relate it today to "quasi-contract" (see Woodward, *The Law of Quasi Contract,* pp. 391, 409: G. Williams, *op. cit.,* paragraph 30, p. 95). According to this approach the application of the principle in local law was thus explained by Cheshin D.P. in *Caspi* v. Yaakov (3) at p. 1863:

> "The duty of the remainder of the debtors to share in the payment made by one debtor is 'quasi-contractual' in nature and is intended only to prevent unlawful enrichment. Where two are liable for one debt, the presumption is - if there is no proof to the contrary - that each must pay a half. If follows that if the one pays more than his share, the other is unlawfully enriched at his expense, and the extent of the enrichment is measured by what the first was forced to pay in excess of his share... . The emphasis is therefore on the *unlawful* enrichment at the expense of his friend, that is to say, on the unfair and unjust basis of enrichment."

(See also B. Cohen J. in *Greirzer* v. *Bohan* (6) at p. 216.)

These observations instruct us that the principle with which we are dealing - whether part of the rules of Equity or whether it must today be related to "quasicontract" - is of a wide and flexible character and therefore applicable to different and changing factual situations. as attested by the many examples of its practical application cited by respondent's counsel in his summation. Additional evidence in this regard can be found in an article published in Yale Law Review (Vol. 45. p. 153]:

> "Analysis shows that contribution... is a flexible doctrine applicable in many situations where it is desirable to prevent unjust enrichment."

The result of the above is that despite the absence of any issue between the parties by virtue of contract or enacted law, no logical reason seems to exist to prevent the application of the principle to the present case. On the one hand, the persons injured were entitled to claim from each of the parties the payment of damages, and on the other discharge of these claims by the respondent released the appellants therefrom and justice therefore demands that they participate in the said payment at the appropriate rate, so that they are not enriched at the expense of the respondent.

(b) Appellant's counsel submits: when the local legislator provided - in section 64(1)(c) of the Civil Wrongs Ordinance, 1944 - an arrangement according to which a tortfeasor who settles a claim for damages of the injured party is given the right of contribution from a joint tortfeasor, it did not direct that the tortfeasor's *insurer* should have an identical right when it was he who settled the claim. Furthermore, when the legislator provided in section 10 of the 1947 Ordinance that the injured person is entitled to recover damages directly from the *insurer* of the driver who caused the accident, again it did not provide that the same insurer should, after making good the damage, have the remedy of contribution from the other tortfeasor and his insurer. The conclusion is that the legislator's silence on this matter in the above two provisions means that it did not intend the above right to accrue to the insurer/payer, whether in respect of the other tortfeasor/driver or his insurer.

This argument does not recommend itself to me. But in order to withstand it, I must further review the development of the English law in relation to the principle of

contribution, to the same extent that it concerns the question of its application to tortfeasors amongst themselves.

(1) Considering the breadth and nature of the principle, it seems that the English judges would have had no difficulty - even before provision of the statutory arrangement mentioned in section 6(1) of the Law Reform (... Tortfeasors) Act, 1935, which is parallel to that in section 64(1)(c) of the local Ordinance - in recognising the right of the tortfeasor who paid the injured party his damages to have recourse to his joint tortfeasor. The Common law did not, however, at first proceed in this logical and direct manner. On the contrary, when the question arose - and that was in 1799 in *Merryweather* v. *Nixan* (12), Lord Kenyon laid down the rule that no right to contribution exists as between tortfeasors themselves and that, it seems, for the reason that a tortious act is regarded as an illegal act and therefore the court will not assist a plaintiff when his cause of action is based on such conduct: *ex turpi causa non oritur actio.* (As to this explanation of the rule, see G. Williams, *op. cit.,* paragraph 26, p. 80.)

(2) Not many years passed, however, and it became apparent that the rule could lead to an unjust result because the injured party could get satisfaction by claiming against only one of the tortfeasors at his choice and with settlement of the claim by the latter, the other tortfeasor would be freed from liability towards the injured party without having to restore anything to the payer in respect of his share in the injury (dicta of Lord Herschell and Lord Watson in *Palmer v. Wick,* etc. Co. (13) at pp. 318, 324, 326, 327, and Lord Porter in *Wimpey* (8) at p. 666). It was therefore sought to ameliorate the rule so that contribution is not denied a tortfeasor who was compelled to pay - and paid - the damages of an injured party for a civil wrong committed in good faith and without moral fault. That was the factual situation dealt with in 1827 in *Adamson* v. *Jarvis* (14). There, the plaintiff sold on behalf of the defendant and according to his instructions the property of another person, in the *bona fide* belief - having so heard from the defendant - that the property belonged to the latter. After the true owner had sued and recovered damages from him, the seller presented a claim against his principal for return of the amount and his claim was accepted. In his judgment Best C.J. said:

> "From the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixan* and from reason and sound policy, the rule that wrong-doers

> cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

(3) It had not yet been clarified whether this rule was intended to limit the applicability of the "prohibitive" rule, laid down in *Merryweather* (12) to an intentional conscious tortfeasor or whether the rule still operated to deny this remedy also from a tortfeasor who had merely acted negligently. This question was dealt with by the House of Lords in *Palmer* (13), but was not finally settled because judgment was given in accordance with Scottish law which never recognised the above-mentioned rule at all. Lord Herschell, however, had some harsh things to say about the rule (at 324) although he agreed that it was still in force in the English law:

> "It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me founded on any principle of justice or equity, or even public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application in England."

Furthermore, after pointing out - with approval and as evidence to the "softening" tendency evident in the precedents - the decision of Best C.J. in *Adamson* (14], he added:

> "If the view thus expressed... be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration."

In view of the fact that *Palmer* (13) was decided according to Scottish law, the words last cited were, it must be understood, not necessary for the merits of the case and were not binding (see the observations of the other Lords who sat in judgment, and especially those of Lord Halsbury at pp. 333-334; but compare G. Williams, *op. cit.,* p. 83). Indeed, in later cases it was decided that in cases of negligence, a tortfeasor could not turn to his negligent co-actor for contribution whether the two were joint or concurrent tortfeasors (see *The Englishman and The Australia* (15) and *The Koursk* (16)).

(4) That was the juridical situation in the matter on the eve of the enactment of the Act of 1935 which came to close the breach and provided for the remedy of contribution as between tortfeasors themselves. In explaining the object of this law, Lord Porter said in Wimpey (8) (at p. 666):

> "Before the passing of the Act it was left to the claimant to choose his victim. The person sued, whether he was a joint or a separate tortfeasor, if he was implicated as being partly responsible for the accident, had to abide by that choice... . The object of the Act was to cure this evil and to enable those on whom the burden had been placed to recover a just proportion from those who shared the blame."

(5) In his book, written in 1951, Williams expressed the view (p. 84) that since the above-mentioned Act, the rule laid down in *Merryweather* (12) has become obsolete, and in any case it certainly is not in force as regards negligent tortfeasors (p. 87). And then, after some years, the question arose whether the same rule still constitutes an obstacle to a claim for contribution by one joint tortfeasor against the other, not based on the 1935 Act but on another cause of action (breach of contract). I refer to the case of *Romford Ice Co.* v. *Lister* (17). According to the facts, one of the plaintiff's employees was injured when a car driven by his son, the defendant, struck him. The son also was the plaintiff's employee, being employed as a driver for many years. Because the accident occurred in the course of fulfilling this function and was caused by negligent driving, the plaintiff was liable - on the ground of vicarious liability for the driver's negligence - to pay damages to the injured party and were so paid by the plaintiff's insurance company.

Afterwards, the insurer, in the name of the plaintiff, claimed - on the basis of the right of subrogation under the insurance policy - indemnity from the defendant (the driver). The latter pleaded *(inter alia)* that his employer (the plaintiff) is to be regarded in law, by reason of its vicarious liability for his negligence, as a joint tortfeasor and is therefore to be denied contribution by virtue of the Common law rule, since its claim was based on the ground that the defendant had been in breach of his contractual obligation to fulfil his duty of driving with competency and reasonable care (and not on the 1935 Act).

This argument was not accepted for the reason that no moral fault lay on the plaintiff for the negligent act of its employee, in respect of which it was liable to pay damages to the injured party, and it was to be considered as a joint tortfeasor only in a narrow technical sense; therefore the "ameliorating" rule, laid down by Best C.J. in *Adamson* (14) was applicable. This is what Romer J. had to say (at 478):

> "The general principle, which the defendant invokes, is certainly supported by venerable authority (see e.g. *Merryweacher v. Nixan),* but it is not a rule of universal application... . Although the plaintiffs were liable in damages to the defendant's father for the accident which befell him, they themselves were morally blameless in the matter and their liability to the father arose solely from the fact that they were answerable for the negligence of the defendant himself. In these circumstances, it would ... be a flaw in our law, and against natural justice, to permit the defendant to rely on his own wrongful act as a defence to proceedings for breach of contract... . The current of ... authority ... on the point is distinctly the other way."

And after citing Best C.J., he held:

> "The plaintiff's action in the present case, based on breach of contract, is not defeated by the suggested principle that there can be no contribution between joint tortfeasors."

The judgment was upheld in the House of Lords on other grounds, but these observations of Romer J. were approved by Lord Simonds (at p. 135).

(c) On the basis of this survey it is to be concluded that once a person injured in a road accident is given the statutory right to levy damages from the insurer of the negligent driver, there is no need for the legislator to provide a special arrangement whereby the insurer, after having paid the damages adjudged against it, is able to claim contribution from the driver who was a partner to the injury, because the "prohibitive" rule of the Common law cannot - after being limited and "softened" as aforesaid - frustrate such a claim. The insurer which made good the damage of the injured person was not itself guilty

of any illegal or immoral behaviour whatsoever with regard to the injury caused by the insured; as was emphasised by the writer of the above-mentioned Note (Yale L.R., Vol. 45, p. 154):

> "The reasoning invoked to deny contribution between co-tortfeasors can have no application to their indemnitors, whose interests are opposed to the commission of torts, and who come into court with clean hands."

I think that this should have been the law even had the statutory arrangement in section 64(1)(c) of the 1944 Ordinance not negated the validity of the rule forbidding the grant of the said remedy to one tortfeasor against his associate, since the position of the insurer who has made good the damage of a person injured in a road accident is no less strong than the employer in *Lister* (17), especially as in order to recover the monies it has paid it has no need of subrogation of the rights of the insured as against the other wrongdoer:

> "Contribution does not depend on subrogation" (ibid., p. 152, note 25).

A fortiori the remedy should not be denied such an insurer when the juridical situation today - both in England and in Israel - is that the above-mentioned rule lacks validity. This view finds support in the words of the writer of an article in the Harvard Law Review (Vol. 50, p. 989):

> "Where this rule has been abrogated by judicial decision, the insurer of one wrongdoer has obtained contribution from a joint wrongdoer and his insurer.... It is difficult to understand why a statute abolishing these disabilities *inter se* of joint wrongdoers should not have at least as great an effect as a judicial decision abolishing them."

The conclusion is that in the absence of a contract to the contrary, no reason exists - whether grounded in law or in the public policy - to justify denying the insurer the remedy of enforcing contribution against the party implicated in the injury along with the insured,

after it has made good the damage caused by the negligent driving of the insured. Therefore, the argument of absence of issue falls away on its two parts.

(d) It will be recalled that the second main argument of appellants' counsel is that as long as the two conditions mentioned in section 10(1) and (2)(a) of the 1947 Ordinance have not been fulfilled - the giving of a judgment which charges the first appellant to pay damages to the injured persons and receipt of the statutory notice by the second appellant - its obligation to settle their claims does not and cannot arise in the future, because after the injured persons have received satisfaction it is impossible for the above conditions ever to be fulfilled; the respondent therefore does not have the right to sue the appellant for contribution. This argument also I cannot accept.

(1) In my view when dealing in a case for contribution with the question of the defendant's liability to fulfil the third party's monetary claim, the fact that payment in the meantime by the plaintiff might release the defendant from that liability should be ignored. These two things - the defendant's liability towards the third party and his discharge therefrom because of the plaintiff's payment - constitute *separate* elements of the ground for contribution and the question whether one of them exists is not dependent on the answer to the question whether the other element exists. If that were not so, the reason for this remedy is emptied of its content and value. Surely just because the plaintiff's payment releases the defendant from his monetary liability towards the third party, he is rightly required to make contribution in order not to be enriched at the expense of the plaintiff; and how can it be said therefore that the very payment sets at naught the latter's right to contribution. Hence also there is no value in the argument of the frustration of the possible future fulfilment of the two statutory conditions by the second appellant, which were stressed by counsel as preconditions of its said liability.

(2) If, in order to decide whether ground exists for the second appellant's liability toward the injured, we must ignore the fact of the said payment, then it is essential that we examine it according to the following test: just prior to the payment or the day when the present claim for contribution was made (I see no need to decide which is determinative between the two), did the appellant anticipate the liability to pay damages to the injured persons for the injury caused to them by the insured? This test should be applied today in the light of the rule in *Commercial Union* v. *Sher* (4), that by virtue of section 10 of the

1947 Ordinance an injured party is entitled to claim that its damage be made good directly by the insurer, provided that the insured is joined as a party to the claim (at p. 435); see also *Karman* v. *"HaSneh"* (5) at pp. 1914-1915. The meaning of this rule is that in the present case the test must be applied so that, had the injured presented their claims for damages against the two appellants the court would have found the second appellant liable to pay. To my mind it is clear our assumption must be that in this hypothetical case the court would not, in answering the said question, have considered the two above conditions of law. There are two reasons for this which go together.

First, where an injured person sues the insurer and the insured together for damages under the above-mentioned rule there is no practical worth to the question whether or not the two conditions were fulfilled. That is manifest as to the requirement of notice mentioned in section 10(2)(a) of the Ordinance, the object of which is to enable the insurer to defend when the injured person sues the insured alone; where the two are sued together, the insurer knows, through the summons to court, of the claim brought against the insured and can defend itself against it; that is to say, the summons is like the statutory notice which therefore becomes superfluous (see *Zaddok* v. *Schweitzer* (7) at p. 140). As for the second condition - the requirement of a judgment, under section 10(1) of the Ordinance - here also it is clear that from a practical point of view the questions which may engage the court - according to the patties' pleadings - in such a case are merely on the one hand the driver's responsibility for the accident and on the other hand the insurer's liability by virtue of the insurance policy; such as, for example, (1) was the accident caused as a result of the driver's negligence; (2) what is the extent of the injury and the amount of the damages to be determined in respect thereof; (3) does an insurance policy exist within the meaning of the Ordinance, which covers the case? As was stated by Judge Harpazi in *Greiczer* v. "*Bohan*" (6) at p. 215:

> "By virtue of the Insurance Ordinance as interpreted, the claims against the insurer and insured are therefore submitted together and once the claim is proven, including the fact that the event is covered by the insurance policy, the plaintiff is entitled to judgment making the insured and the insurer liable in *solidum*. Under this liability the plaintiff is entitled to execute the judgment directly against the insurer, without taking any action against the insured at all."

Even if we have to say that from the formal, precise point of view, the insured's liability precedes that of the insurer, though they are defendants in one trial, nothing attaches to that because the question to be answered from the point of view of the claim for contribution, is only of a mere practical-legal character: whether in the hypothetical case of the injured person suing the insurer (together with the insured), the insured would expect to be liable for the damages in respect of which contribution is claimed? To this matter I shall return.

(3) The second reason for my view in this matter is that the two statutory conditions must be regarded as merely procedural, and therefore not to be taken into account in respect of a claim for contribution. This character of the statutory notice condition is self evident. The same is true of the condition of a judgment against the insured, witness the fact that the principal reason which influenced Olshan P. - and he was one of the two majority judges who gave section 10(1) the interpretation that there must be an issue between the injured and the insurer - is that

> "The provision of obtaining judgment against the insured is only intended to direct that in order to find the *insurer* liable, proof in the form of a judgment against the insured is required, and no other proof will suffice" *(Commercial Union* (4), at p. 435).

If that is the purpose of the said condition, it is merely of a procedural nature, a point which also emerges from Salmond *(Jurisprudence,* 11th ed. pp. 503,506), that the presentation of evidence - and also the giving of judgment - belongs to the procedural branch of the law. If that is the case, I find that the approach taken by Sussman J. in *Apelstein* (1) at p. 697, applies equally here: when, in a case for contribution brought under section 64(1)(c) of the Civil Wrongs Ordinance, against a tortfeasor who has not yet been found liable towards the injured party, a question of the liability of the defendant as regards the injured party comes up for consideration, the answer must be sought in substantive and not procedural law. Therefore, he held that the fact that the defendant in that case was the husband of the injured woman would not defeat the claim, since the prohibition provided in section 9 of the Ordinance (regarding evidence by spouses) is of a mere procedural nature and has no effect on the husband's liability under substantive law to compensate the

wife for the damage caused to her. It is true that this rule was laid down for the need of interpreting the words "if he were sued" which are mentioned in section 64(1)(c), but it includes, in my opinion, a general test which belongs to the principle of contribution and effectuates it, and is in any event applicable to the present matter. For this reason, it is again necessary to ignore the two statutory conditions, owing to their procedural character.

(4) In his separate judgment in *Commercial Union* v. *Sher* (4) Berinson J. - who also supported the interpretation that an issue between the tortfeasor and the insurer must exist - relied on reasoning different from that of Olshan P. He said (at p. 431):

> "I think we have to distinguish between the insurer's *liability to* pay the injured person and the injured person's *right to sue* the insurer. Section 10(1) in principle grants to those physically injured by a car ... a right to compensation from the insurer. Because of that, we do not see any substantial difference between the injured person joining such insurer as a party to his original claim against the insured and a defendant joining a third party where he argues that he is entitled to indemnity from the third party. In both instances the liability to compensation does not exist when the joinder is made but only arises if and when a judgment is given in favour of the plaintiff."

From this reasoning appellants' counsel inferred that as long as judgment is not given against the insured - even where the insurer is joined as a defendant - he is under no liability to compensate the injured person and obviously no right to contribution as above arises. In my opinion, the last conclusion rests on an error. The problem which occupied Berinson J. and to which his above reasoning relates was whether *at the time action was commenced* in that case there was an issue between the injured plaintiff and the insurer. The affirmative answer he gave to this question had regard only to the then legal situation and was based on the fact that at that time the injured had the "right of action" against the insurer even though the "liability to pay" had not yet arisen and depended on judgment afterwards being against the insured. On the other hand, when, in a case for contribution against an insurer who has not yet been made liable to pay compensation to the injured, the question of such liability arises, a different approach must be taken in the sense that the answer to this question will be determined by the *result* in which the hypothetical case of

the injured person against the insurer and the insured would *conclude.* In other words, the question that must be answered here is whether there fell on the defendant - if the plaintiff did not settle the demand for compensation- *the risk and the expectation* that he himself would be liable to pay the injured party. It is clear that the approach which is behind this *practical* - legal test, does not contradict the reasoning of Berinson J. because it lies within the purpose for which the remedy of contribution is aimed at, to avoid unjust enrichment at the expense of the plaintiff, as aforesaid.

(5) Having regard to the above "expectation" test, I find also that there is no value in the argument of appellants' counsel, that the conditions for giving the statutory notice and obtaining judgment against the insured have not yet lost their practical importance in a case where an injured person exercises his right to sue the tortfeasor and his insurer for damages in separate actions because in an action against the second the question whether these conditions or either of them was fulfilled might still arise. My answer is that this is not the case before us, and we are therefore entitled, in applying the said test, to take into account the possibility that here the injured persons might have filed one claim for damages against the two appellants; and also to pose to ourselves the question whether, in the light of this assumption, the second appellant would have expected to have liability imposed on it. Secondly, the assumption about splitting the process against the insurer and the insured cannot change my conclusion, because the question that must always be answered in a *case for contribution* is whether the anticipated *result of* two such hypothetical actions is that the insurer would be liable for making good the damage: and it has already been emphasised that the answer to this question does not depend on the two said conditions but only on the substantive law.

In my opinion therefore the learned judge was correct in deciding to reject the appellants' application. I must add that having also reached this conclusion for reasons which to me seemed based on pure law, I find it equally desirable from the point of view of the purpose of enabling insurance companies to settle with injured people outside court.

On the basis of the foregoing, the appeal should be dismissed and the appellants made liable to pay the respondent the costs of the appeal in the inclusive amount of IL 500.

OLSHAN P.: I concur.

BERINSON J.: I concur.

Appeal dismissed.

Judgment given March 15, 1964.