ATTORNEY-GENERAL'S DEPARTMENT

SYMPOSIUM ON STATUTORY INTERPRETATION, SATURDAY 5 FEBRUARY 1983

COMMENTS ON THE PAPER BY MR. GRAHAM HARRIS, M.P. ON USE OF EXTRINSIC AIDS IN STATUTORY INTERPRETATION: PARLIAMENTARY VIEWPOINT

The Hon. Mr. Justice M.D. Kirby, C.M.G.
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THE RIGOURS OF BREVITY

Was it Oscar Wilde who apologised for writing a long letter on the ground that he did not have time to write a short one? As if in proof of the need for access to extraneous material, in elaboration, clarification and rumination on my succinct oral comment, I am forced to append a written memorandum which I hope the more adventurous of you will trouble to read for the light it will shed on my abbreviated remarks. A comment of eight minutes on Mr. Harris' paper and on this fascinating topic is bound to be as obscure as a Commonwealth statute. It faces the same problems. It must be brief. It must fondly assume a great deal of background knowledge. It must tread that narrow path between a broad sweep of social policy and pernickety attention to detail where it matters. Furthermore like most Parliamentary Bills, this commentary was prepared in haste, amidst many competing tasks; yet not without some years of consideration of the subject matter. For the subject matter is one of the central questions for law reform in common law countries.

In the English legal tradition, as Lord Wilberforce has pointed out, the judges have traditionally seen themselves as defenders of the individual against oppression, particularly by the state. This role has led naturally to the development of rules of statutory interpretation which have, in turn encouraged legislation of great detail and complexity. Ministers and those who advise them, are determined to leave as little room as possible for judicial frustration of their policy aims. Thus, they have produced a style of legislative expression which results in statutes of great length and complexity - bewildering to the layman and not easygoing for the trained lawyer either. When I was in Zimbabwe last week, at a conference including lawyers from many Commonwealth countries, a major complaint about our common system was the complexity of the statute book. I was asked for solutions. I included amongst my suggestions the use of computerised legal information retrieval (to overcome the physical problem of access) and new approaches to statutory interpretation (to encourage and permit a simpler mode of legislative drafting).

I recounted to this audience in Zimbabwe the theory on the topic I had read some years ago in an English law journal. Here it was suggested that the traditional role of the judiciary in narrowly construing legislation and in blinkering its search for the statutory intent by excluding all manner of documents which a layman would assume to be relevant was outmoded. That these judicial techniques were simply another case of rules developed for an earlier time, lingering on to control our time. According to this view, the approach to statutory interpretation that was appropriate in the days of the overweening Royal Executive and unrepresentative Parliament were no longer apt for the days of the responsible Executive answerable to an elected and representative legislature. As I propounded this theory, and looked around at the faces of my audience in Harare, Zimbabwe, I saw from their response to this theory that some, at least, considered the role of the judicial guardians had not yet outlived its usefulness. Mind you, most were lawyers, brought in the traditional wisdom of the common law.

If reformers listened to the people - including quite intelligent people in responsible positions who do not happen to be lawyers - the chief complaints they would hear about the law would certainly include its inaccessibility and, when found, its obscurity even incomprehensibility to the ordinary people bound by its rules and deemed to know its content. Because many things in the law are not and never will be simple, legislation always will be complex. But we can do better. It is no chance thing that the legislation of Europe, even when it suffers from translation into English, is frequently expressed in a much simpler, more straightforward style, using everyday languange and disdaining the detail that so marks the statutes of the Commonwealth of Nations. The professional judiciary outside the Commonwealth of Nations has a different concept of its role. Furthermore, it can and does look at a very wide range of travaux preparatories in aid of construction. The result is a willingness of government to confine legislation to simpler and more general expressions, safe in the knowledge that when in doubt those whose duty it is to interpret the legislation will look beyond it to any relevant supporting material.

For two years I had this dichotomy of approach brought home to me as I chaired a committee of the Organisation for Economic Co-operation and Development (OECD) developing Guidelines on privacy law. For the United Kingdom, Australia, Canada, Ireland and New Zealand it was vital to lavish attention on the Guidelines themselves. No great concern was expressed about the explanatory memorandum prepared to accompany the Guidelines. For the European nations and Japan equal concern was attached to every sentence of the explanatory memorandum. For in their tradition, this document would have much the same weight and importance as the Guideline rules. The United States representative was somewhere between the two traditions. He contented himself with lavishing attention on everything!

Traditions so fundamental to a legal system die hard. But I suspect that the price to be paid for a simpler statute book, in a time of burgeoning legislation, is a new approach to statutory interpretation which frees the judges from the shackles which some, at least, have felt in the past. So long as Ministers and those who advise them feel that judges will adopt a narrow approach to statutory interpretation - indifferent to the policy intent or even - dare I say it? - sometimes enjoying a perverse intellectual pleasure in frustrating it - they will bend their labours to frustrating the frustrators. If we want a simpler legal system - and who does not? - the starting point must be found in a new approach to statutory interpretation.

THE COMMON LAW IN FLUX

In its inimitable way, the common law, as a continuing process of law reform - is already feeling its way to change.

* Mr. Justice Stephen had resort to legislative history but found the experience unrewarding.[1]
* Mr. Justice Mason thought it proper to seek access to a Minister's statement, at least in some cases, as evidence of the 'mischief'.[2]
* The Federal Court, encouraged by this authority, decided more recently that the Hansard reports of the second reading speeches of the relevant Ministers and the explanatory memorandum were admissible as evidence of part of the mischief designed to be remedied by the statute under consideration.[3]
* Even in circumstances of a trial, judges are now openly looking for the legislative intent by examining the Hansard to ascertain what the Minister said was his intention in proposing amendment to the statute law.[4]

Developments in England and doubtless elsewhere within the Commonwealth of Nations reflect the fluid situation we are now in. We are seeing in operation a major common law development even modifying 'a series of rulings unbroken for a hundred years...that recourse to reports of proceedings in either House of Parliament...is not permissable as an aid to construction'.[5]

A danger of legislative intervention at this stage, unless it be ample permissive and very carefully framed, is that it may (in Australia at least) inhibit more radical developments in the hands of the judges. It is now generally acknowledged that two great changes that have come upon the judicial role in recent decades include the growth of the judge's function as interpreter of legislation and the growth of his function in exercising

statutory discretions.[6] For each of these functions, the extent to which judges can look beyond the statute to relevant background material is clearly critical for the future effective performance of the judicial branch of government. Mr. Justice Mason has already emboldened the Federal Court to go beyond the statute to documents accompanying an Act of Parliament one of which, at least in form, is a speech in the Chamber of Parliament.

A law reformer constantly asks for an identification of the principle by which this or that reform is suggested. Once it is conceded that the practical and policy reasons that stand as a barrier to access outside the statute are to be removed, it is difficult to hold the line. In seeking to hold the line by legislation which confines access to explanatory memoranda or other documents specifically authorised by Parliament, we may impede what appears to be a worldwide movement of the common law to open the field of reference. Not only does this possibility raise questions of policy and principle. It may also, as Dr. Griffith has hinted darkly, raise a constitutional question. To what extent is it competent for the Parliament, at least in the Australian constitutional setting, to tell the Federal courts precisely the material they will, or will not, use in the discharge of their judicial functions? A like question is raised for the Law Reform Commission in its enquiry into reform of the law of standing: to what extent may the Parliament instruct the Federal courts whom they will hear in disposing of 'matters' brought before them?

THE LAW REFORM COMMISSION'S ROLE

You can imagine what a delight, and what a surprise it is for me to come to a symposium in Canberra and to find that everybody loves a law reformer. Lord Wilberforce, Mr. Griffith and Mr. Harris all agree that, whatever else happens, law reform reports will find a place in the scheme of things when access is permitted to a wider range of extrinsic aids. We cannot fly under false colours. Lord Wilberforce in his paper says that law reform reports, 'being politically uncontroversial, tend to be accepted in full'.[7] Would that this were so in Australia. It has been the feature of references to the Australian Law Reform Commission (and increasingly to State Commissions) that they are on controversial topics of significant social policy. Hardly ever are reports accepted in full. Always, there are significant amendments. An illustration is the Criminal Investigation Bill arising out of the second report of the Commission. The first [Ellicott] Bill of 1977 contained significant variations from the Commission's draft, particularly because it accepted a minority dissenting view expressed on a critical matter by Mr. F.G. Brennan, Q.C. (as he then was). Then the 1981 [Durack] Bill contained so many variations from the 1977 measure that a special comparative memorandum was prepared to illustrate the changes made - many of them arising out of a report of a interdepartmental committee. Now, I understand, further amendments are proposed,

arising out of police and public comments on the 1981 Bill. Indeed, I have heard whispers that no fewer than 57 amendments will be suggested. Perhaps criminal investigation is a special case. But the other tasks assigned to the Australian Law Reform Commission have been scarcely less controversial. The prospect of our reports emerging unscathed from the torturous path of consideration, re-consideration, deliberation, decision and enactment is remote. This factor must be taken into account in contemplating the use of Law Reform Commission reports in aid of legislation based, broadly, on them.

The Commission was an early entrant into the field now under consideration. Even in its second year of operation, in a report on breathalizer laws for the Australian Capital Territory[8], the Commission made a special recommendation that access should be had to that report in aid of the interpretation of the statute. The general issue was reserved. The particular problems that had arisen in interpretation of breathalizer laws, were cited as justification for this special recommendation. It arose out of the proposal of the Renton report that Parliament, if it saw fit, could declare that specified material outside an Act should be admissible for the purpose of interpreting it. The language proposed in the draft statute attached to the Commission's report was in permissive terms:

> '50. In construing this Ordinance and the regulations, a Court may have regard to the report of the Law Reform Commission on Alcohol Drugs and Driving tabled in the House of Representative on 1976'.

One member of the Commission, Mr. Brennan, had reservations about the proposal particularly because of the criminal nature of the statute in question. However, the recommendation went forward in its limited form. When the legislation implementing the report proposal was finally proposed, it followed the Commission's draft in all material respects. However, the interpretation clause was deleted. The history of the Ordinance, since it was made, has been one of many contentious legal disputes concerning its language. Whether the judges would have been assisted if they had been authorised to have access to the report, is not certain. The first modest effort of the Law Reform Commission in this field had come to nothing.

After this setback, there were wistful references to the subject from time to time in the Commission's bulletin Reform, mostly concerning the unsuccessful efforts to secure legislative reforms in Britain.[9] Mention was made of the amendment of the Commonwealth Acts Interpretation Act 1901 by the insertion of Section 15AA in 1981 and the introduction of an equivalent provision in the Victorian Acts Interpretation Act 1958, in December 1982.[10] However, emboldened by the new initiatives of the

Attorney-General, the Commission in its most recent report on Insurance Contracts returned to the subject of interpretation and the use of its reports. The report on Insurance Contracts was tabled in Parliament in December 1982. It provides the first national review of the law of insurance contracts in Australia. It proposes a Commonwealth Act in a sphere that has traditionally been left to the common law and State legislation. It proposes a Federal statute drawn against the background of centuries of developed insurance law. It suggests many novel reforms. Conscious of the innovations and of the need to understand the necessarily brief language of the reforming statute against the background of insurance law, the Commission adopted two strategies:

* First, it annexed with the draft Insurance Contracts Bill a detailed explanatory memorandum, commenting on each clause of the Bill: offering cross-references to the respective paragraphs of the report, stating the purposes of the clause and offering illustrations and examples of the operation proposed for the clause.
* As well, the Commission proposed in clause 3 in the draft Bill attached that the report should be used in aid of the interpretation of the legislation, once enacted:

> It is the intention of the Parliament that this Act and the regulations are to give effect to the recommendations made in the report of the Law Reform Commission entitled 'Insurance Contracts' and laid before each House of the Parliament under the Law Reform Commission Act 1973 and accordingly, in the interpretation of this Act regard may be had to that report, including the draft legislation set out in that report'.

The report has been referred to the Treasury and to other relevant officers for comment. By way of illustration of the way in which the draft explanatory memorandum offers assistance to the reader of the Act, I attach to this note, samples of clauses and the memorandum commentary.

Most recently, doubtless with an eye on the interest of the Attorney-General in this topic, the Commission received a Reference on a new subject matter containing a specific request for the preparation of an explanatory memorandum that might be used in support of any legislation based on its recommendations. At the end of November 1982 the Commission received a reference on Admiralty jurisdiction. Included in the reference was the request:

> (v) To formulate a draft explanatory memorandum that could be used as an aid to the interpretation of any Bill for an Act to give effect to the recommendations by the Commission pursuant to these Terms of Reference.

This symposium will provide practical assistance to the cause of law reform if it identifies the most appropriate form and content of such an explanatory memorandum. Is it appropriate to incorporate by reference the relevant paragraphs of the law reform report? Is it appropriate to offer cross-reference to other relevant statutes and earlier reform efforts? Is it apposite to include examples and illustrations of the intended operation of the legislation? What other material should be included in an explanatory memorandum to maximise its usefulness, if this is to become the vehicle for reform.

Mr. Harris rightly points in his paper to the Parliamentary responsibility for the content of such material if courts are required to have special regard to it. In a sense, if judges are to be permitted a freer hand, to roam widely amongst background material they consider relevant, there is less responsibility on the Parliament to change its standing orders and modify its procedures than if special documents are identified having a quasi legislative status. Once a special function is assigned, Parliament, as it seems to me, must assume special responsibility for the content. It must adopt procedures to ensure consistency and compatibility between the statute and the supporting document. It must adopt procedures no less rigorous in respect of the special document than in respect of the statute. It must take steps to ensure its public availability. It must provide for the inevitable inconsistencies that will arise, if only because of the occasional disorder that can attend the legislative passage of a measure through Parliament. That disorder alone makes all the talk of a 'Parliamentary intent' of legislation - as if it were the same as the intent of a natural person, unrealistic: another fiction of the law with which we must continue to live for a while.

CONCLUSION

The subject of this sumposium is of universal concern in countries that trace their laws and tradition of legislative drafting to England. Only last week, it was a lively topic of discussion in Zimbabwe. They saw the future of simpler legislation in the education and training of the next generation of legislative draftsmen. I told them that the real price of simpler drafting was a new rule of statutory interpretation. Whether the special role of the judiciary in protecting the individual from erosion of liberties, either by the Executive Government or the Parliament, is any less needed in Australia than Zimbabwe and today than in earlier times, is a matter for political judgment. A more ample interpretation of legislation, encouraged by access to extrinsic material, may lead to simpler legislation. But it may also, on occasion, lead to the erosion of freedoms sometimes protected by the pernickety approach.

Once the practical reasons for blinkering the courts and confining their attention to the statutory language alone is abandoned, it is hard to draw the line of principle. If access is allowed to ministerial statements, explanatory memoranda or law reform reports, it is difficult in principle, to stem the tide that will lead on to the use of all relevant extrinsic material. True it is, ample discretions will be needed by the judges to call a halt to an enthusiastic search that has gone too far. Clearly the commo' law itself is in a state of flux, more so in Australia perhaps than elsewhere. Legislative reform should seek to supplement and not to atrophy the innovative processes of judicial reform. Statutory interpretation will become (if it is not already) the major professional task of the judiciary. The judges must be aided and not impeded unduly in developing the skills and techniques necessary to perform this function well.

The Parliamentary role should be one of cautious encouragement to the developments that are already occurring in the courts. There are constitutional questions. To what extent can Parliament tell the Federal courts the materials to which they should or should not have access? Is this an invalid intrusion in the judicial domain? If explanatory memoranda are adopted, will a failure to pass a memorandum, though the statute is passed, constitute a failure to pass a 'proposed law' within section 57 of the Constitution?[11] Doubtless there are others.

Within Parliament, if particular extrinsic aids are to be given a special status, procedures must be developed to consider those aids, for they may affect the rights and duties of citizens and hence are the political responsibility of the elected representatives of the people.

The pace of change is likely to be quickened by the developments of international law and the technology of travel and communications which now throw together the lawyers and law makers of the common law and civil law tradition. Lawyers of Europe find our blinkered and bridled approach incomprehensible and, when comprehended, unacceptable. As the Council of Europe, the OECD, the Commonwealth of Nations and the United Nations bring together people of different legal traditions, we, in our system, will come under increasing pressure from the other legal systems of the world to modify our traditions. In the context of the Treaty of Rome, Lord Denning, as usual, has given the battle cry:

> In interpreting the Treaty of Rome (which is part of our law), we must certainly adopt the new approach. Just as in Rome, you should do as Rome does. So in the European community, you should do as the European court does.[8]

This symposium comes at a critical time in the development of a most important area of the law. The Attorney-General and his department are to be congratulated for arranging it. Mr. Harris is to be commended for his thoughtful paper. It is my hope that the Law Reform Commission will have a part to play in these exciting and beneficial developments.

FOOTNOTES

1. Duggan v. Mirror Newspapers (1978) 142 CLR 583.
2. Federal Commission for Taxation v. Whitfords Beech Pty. Limited (1982) 39 ALR 521, 533-4 (Mason J.).
3. TCN Channel 9 Pty. Limited and ors v. Australian Mutual Providence Society (1982) 42 ALR 496.
4. R. v. Murray [1982] 1 NSWLR 740 (Cross J.).
5. Hadmor Productions Limited and ors v. Hamilton and ors [1982] 1 All ER 1042.
6. Sir Roger Ormrod, 'Judges and the Process of Judging', address to the Holdsworth Club, 7 March 1982, noted [1982] Reform 138.
7. Lord Wilberforce, 'Use of Extrinsic Aids in Statutory Interpretation: A Judicial Viewpoint', paper for the Symposium, 10.
8. The Law Reform Commission, Alcohol Drugs and Driving (ALRC 4, 1076) 138.
9. See e.g. [1980] Reform 47; [1981] Reform 83.
10. See [1983] Reform 8.
11. This point was made to the writer by Mr. J.Q. Ewens, C.M.G., C.B.E., former First Parliamentary Counsel and former Commissioner of the Australian Law Reform Commission.
12. James Buchanan and Co. Ltd. v. Babco [1977] 2 WLR 107, 112.

PART V — THE CONTRACT

Division 1 — Standard Cover

Interpretation

35. In this Division —

"minimum amount", in relation to a claim, means the amount declared by the regulations to be the minimum amount in relation to a class of claims in which that claim is included;

"prescribed contract" means a contract of insurance that is included in a class of contracts of insurance declared by the regulations to be a class of contracts in relation to which this Division applies;

"prescribed event", in relation to a prescribed contract, means an event that is declared by the regulations to be a prescribed event in relation to that contract.

Notification of certain provisions

36. (1) Where —

(a) a claim is made under a prescribed contract; and
(b) the event the happening of which gave rise to the claim is a prescribed event in relation to the contract,

the insurer may not refuse to pay an amount equal to the minimum amount in relation to the claim by reason only that the effect of the contract, but for this sub-section, would be that the event the happening of which gave rise to the claim was an event in respect of which —

(c) the amount of the insurance cover provided by the contract was less than the minimum amount; or
(d) insurance cover was not provided by the contract.

(2) Sub-section (1) does not have effect where the insurer proves that, before the contract was entered into, he clearly informed the insured in writing or the insured knew, or a person in the circumstances of the insured could reasonably be expected to have known —

(a) where the effect of the contract, but for sub-section (1), would be that the liability of the insurer in respect of a claim arising upon the happening of the event would be less than the minimum amount — what the extent of the insurer's liability under the contract in respect of such a claim would be; or
(b) where the effect of the contract, but for sub-section (1), would be that the insurer would be under no liability in respect of such a claim — that the contract would not provide insurance cover in respect of the happening of that event.

(3) Regulations made for the purposes of this section take effect at the expiration of 28 days after the date on which they are notified in the *Gazette*.

(4) Where regulations made for the purposes of this section are amended after the date on which a particular contract of insurance is entered into, the amendments shall be disregarded in relation to the application of sub-section (1) to that contract.

Interpretation of regulations

37. If a question arises whether a risk is a prescribed risk, the relevant provisions of the regulations shall be construed as though they were provisions of a contract put forward by the insurer.

Clause 35: Interpretation

1. This clause defines terms used in Div. 1.
2. Standard cover works in the following way:
   - regulations declare that contracts included in specified classes of contracts are 'prescribed contracts'.
   - in respect of such contracts, regulations declare that certain events are 'prescribed events'.
   - in respect of such events, regulations declare a 'minimum amount' which must be paid by the insurer unless:
     - .. it specifically tells the insured that it will be liable for a lesser amount, or
     - .. the insured knew, or a reasonable person in the insured's circumstances would have known, that the insurer would only be liable for a lesser amount.

   Clause 36 sets out the actual mechanism for standard cover.

Clause 36: Notification of certain provisions

1. See Report, para. 43, 45, 69–70.
2. The purpose of standard cover is primarily to ensure that exclusions and limitations which an insured might not expect are brought to his notice at the time he takes out the insurance cover.
3. Sub-cl. (1) makes the insurer liable, to the extent set out in regulations, in respect of the happening of the events specified in the regulations. The draft regulations in Appendix B cover six areas:
   - motor vehicle insurance;
   - householder's (contents) insurance;
   - houseowner's (building) insurance;
   - personal sickness and accident insurance;
   - consumer credit insurance;
   - travel insurance.
4. Sub-cl. (2) provides that an insurer can vary the effect of the regulations by drawing the variations specifically to the attention of the insured when the insurance is effected. In order to avoid needless notifications to the insured, the sub-clause also provides that, if the insured actually knew, or if a person in the circumstances of the insured (that is, considering his age, mental condition, education, etc.) could reasonably be expected to have known, of the derogation from standard cover, the derogation applies. For example, many insurance proposal forms required the insured to select the type of cover that he desires, e.g., by having the insured tick the appropriate box and nominate appropriate sums insured. Where the insured has done this, it will not be necessary to bring these matters to his attention to gain the benefit of sub-cl. (2).
5. Sub-cl. (3) and (4) deal with technical matters relating to the regulations:
   - regulations normally come into effect on the day which they are notified in the *Commonwealth Gazette* (Acts Interpretation Act 1901, s. 48(1)(b)). A further period of 28 days is prescribed before the regulations actually take effect.
   - the making of regulations, and the amending of regulations, is not to have effect on contracts that were in effect immediately before the regulations were made or amended.

Clause 37: Interpretation of regulations

1. See Report, para. 71.
2. The *contra proferentem* rule requires the terms of an insurance contract to be strictly construed against the party who offered the terms of the contract. This is always the insurer. The regulations setting out prescribed risks, prescribed claims, etc., are not, strictly speaking, part of the contract, but the *contra proferentem* rule should still apply.

Insurer may not refuse to pay claims in certain circumstances

54. (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which sub-section (2) applies, the insurer may not refuse to pay the claim by reason only of that act but his liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that—

(a) no part of the loss that gave rise to the claim was caused by the act — the insurer may not refuse to pay the claim by reason only of the act; or

(b) some part of the loss that gave rise to the claim was not caused by the act — the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(4) Where—

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person to do the act,

the insurer may not refuse to pay the claim by reason only of the act.

(5) A reference in this section to an act includes a reference to—

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

Clause 54: Insurer may not refuse to pay claims in certain circumstances

1. See Report, para. 228–230, 241–242.
2. cf. Insurance Law Reform Act 1977 (N.Z.), s. 11, Consumer Credit Act 1981 (N.S.W.), s. 138, Credit Act 1981 (Vic.), s. 138.
3. Where the effect of a contract is to impose an obligation on the insured, the insurer may not refuse to pay a claim because of a breach of the obligation unless:
   - the breach caused the insurer prejudice (sub-cl. (1)); and
   - the insured could not reasonably have complied with the obligation (sub-cl. (4)).

   Even then, the insurer may only reduce the claim by the amount of prejudice it has actually suffered. Where the breach of obligation of a type that is likely to cause or contribute to a loss, then the prejudice suffered by the insurer is to be measured by reference to the extent to which the breach actually caused or contributed to the loss in question (sub-cl. (2)). In this case, it is for the insured to prove that his breach was not the only cause of the loss (sub-cl. (3)).
4. A contract may impose an obligation on the insured in a number of ways:
   - by imposing an obligation directly (e.g., 'the insured is under an obligation to keep the motor vehicle in a roadworthy condition');
   - by a continuing warranty (e.g., 'the insured warrants he will keep the motor vehicle in a roadworthy condition');
   - by an exclusion from cover (e.g., 'this cover does not apply while the motor vehicle is unroadworthy');
   - by defining the risk (e.g., 'this contract provides cover for the motor vehicle while it is roadworthy').

   The clause operates in the same way however the obligation is created.
5. *Examples*:
   (1) A motor vehicle policy contains a term by which the insured warrants that the vehicle will be maintained in a roadworthy condition. As a result of a brake failure, the vehicle, while being driven by the insured, collides with another vehicle. The driver of the other vehicle was 50% to blame for the accident. The insured's conduct in allowing the vehicle to become unroadworthy could reasonably be supposed to cause or contribute to a loss, hence sub-cl. (2) applies. The insured is able to prove that he was, at most, 50% to blame for the accident. Hence the insurer is entitled to deduct only 50% of the claim (sub-cl. (3)).
   (2) If the vehicle was damaged while parked, the insured could recover the full amount of his loss (sub-cl. (1)).
   (3) A's motor vehicle policy contains a term which excludes the insurer's liability if the driver of the vehicle is unlicensed. While driving the car, A is involved in an accident. He was unlicensed at the time, having forgotten to renew his licence, which expired 2 weeks previously. A's conduct could not reasonably be supposed to be of a type which could contribute to an accident, so sub-cl. (1) only applies. Since the insurer could not have been prejudiced by A's driving the car without a licence, it is liable for the full amount of the claim.

PART X — MISCELLANEOUS

Contribution between insurers

77. (1) This section applies where 2 or more insurers are liable under separate contracts of general insurance (being contracts of indemnity) to the same insured in respect of the same loss, but does not apply where —

(a) all the insurers who are liable under such contracts of insurance in respect of the loss so agree; or

(b) the amount of the loss exceeds the total of the amounts of the liabilities of the insurers in respect of the loss.

(2) Subject to this section, each of the insurers may recover contribution from each of the other insurers in such an amount that each insurer will have paid (whether under the contract or by way of contribution) an amount equal to the amount attributable to him.

(3) The amount that, for the purposes of sub-section (2), is to be attributable to an insurer is whichever is the lesser of the following amounts:

(a) the amount of the liability of the insurer in respect of the loss;

(b) an amount such that —

(i) the total of the amounts attributable to all the insurers in respect of the loss equals the amount of the loss; and

(ii) each insurer to whom is attributable an amount that is less than the amount of his liability in respect of the loss has attributed to him an amount that is equal to the amount that is attributable to each other such insurer.

(4) For the purposes of this section, the liability of an insurer under a contract of insurance in respect of a loss shall be ascertained as though he were the only insurer.

(5) An insurer may not recover contribution under this section until the liability of each insurer under his contract of insurance has been finally determined and the total amount of the loss has been paid to the insured.

(6) Where there are 2 or more persons who are insurers under one contract of insurance, they shall, for the purposes of this section, be treated as 1 insurer.

(7) For the purposes of ascertaining the amount that is to be attributable to an insurer under sub-section (3), there shall be taken into account the liability, in respect of the loss, of an insurer (in this section referred to as "the State insurer") under a contract entered into in the course of State insurance not extending beyond the limits of the State concerned but sub-section (3) does not —

(a) entitle the State insurer to recover contribution; or

(b) render the State insurer liable to pay contribution.

Clause 77: Contribution between insurers

1. See Report, para. 296–7.
2. This clause regulates the method of calculating contribution between insurers. It does not apply where all the insurers concerned agree on some other basis of contribution. It is a 'back-stop' clause only, providing a rule for determining contribution in the absence of agreement.
3. The contribution is to be *calculated* on the assumption that State insurers are bound to pay and entitled to receive contribution equally with non-State insurers. However, since the draft Bill does not extend to State insurance, sub-cl. (7) specifically excludes State insurers from benefiting from or being liable under this clause.
4. The clause does not operate until no more claims are possible against any of the insurers concerned: see sub-cl. (5).
5. Special provision is made for multiple insurers, e.g., Lloyds Underwriters (who are each individual insurers as to specified portions of the risk) (sub-cl. (6)).
6. *Examples*:

   Assume that there are three insurers, A, B and C, each of which is liable, in respect of a loss, for the following amounts (taking into account excess, average and the like):

   A: $500
   B: $1000
   C: $2000

   Example (1): The amount of the loss is $450.

   Ascertain the amount attributable to each insurer (sub-cl. (3)). To do this, divide the amount of the loss by the number of insurers [$450/3 = $150].
   This is less than the lowest of the insurer's liabilities, A's, so each insurer will have attributed to him the same amount, $150 (para. (3)(b)). [$150 (A) + 150 (B) + 150 (C) = 450.]
   Each insurer who paid an amount under his policy in respect of the loss can then recover contribution so that, at the end of the day, each insurer will have paid $150 (sub-cl. (2)).

   Example (2): The amount of the loss is $1,500.

   Ascertain the amount attributable to each insurer (sub-cl. (3)). To do this, divide the amount of the loss by the number of insurers [$1,500/3 = $500].
   This is equal to the lowest of the insurer's liabilities, A's, so each insurer will have attributed to him the same amount, $500 (para. (3)(b)). [$500 (A) + 500 (B) + 500 (C) = 1,500.]
   Each insurer who paid an amount under his policy in respect of the loss can then recover contribution so that, at the end of the day, each insurer will have paid $500 (sub-cl. (2)).

   Example (3): The amount of the loss is $3000.

   Ascertain the amount attributable to each insurer (sub-cl. (3)). To do this, divide the amount of the loss by the number of insurers [$3000/3 = $1000].
   This exceeds the lowest of the insurer's liabilities (A's liability is $500). So:

	A	*B*	*C*	*Total*
As to 3 times A's liability:	500	500	500	1500
Remainder of loss is $1500. This exceeds the balance of B's liability (i.e. $1000 - 500 = 500). Two insurers are left: as to 2 times B's remaining liability:	—	500	500	1000
Remainder of loss is $500. As to this:	—	—	500	500
Amounts attributable:	500	1000	1500	3000

   Each insurer who paid an amount under his policy in respect of the loss can then recover contribution so that, at the end of the day, A will have paid $500, B $1000 and C only $1500.