# ISSUE ESTOPPEL, CONTRIBUTION AND CONTRIBUTORY NEGLIGENCE

## *NOALL* v. *MIDDLETON*[1]
## *RANDOLPH* v. *TUCK AND OTHERS*[2]
## *MAXFIELD* v. *LLEWELLYN*[3]

The accidents which give rise to actions for negligence frequently are of such a character as to give rise to more than one cause of action in, or against, more than one person. Counsel must then decide whether to seek to dispose of all questions at issue at one stroke, or whether separate litigation of diverse claims will serve the interests of particular clients better. The present note reviews three recent decisions which have a bearing on this problem, either because they help to determine to what extent one piece of negligence litigation may foreclose issues being tried in another, or because, as in *Maxfield* v. *Llewellyn*,[4] an indication is given how damages awarded may be affected by having all, or alternatively only some, of the possible defendants before the court. The former of these questions, that of "issue estoppel", has been closely implicated in its application to many negligence cases with a broad question of theory, namely, whether contributory negligence connotes merely failure to care for one's own safety, or whether the conception is broad enough to include also a breach of a duty of care owed to the defendant. In *Noall* v. *Middleton*,[5] Sholl, J. has upheld the prior Australian view on this matter,[6] in opposition to an English current of authority,[7] by holding that the latter question should be answered in the affirmative. Recently, too, some other aspects of issue estoppel in relation to negligence cases have been canvassed by Lawton, J. in *Randolph* v. *Tuck*.[8]

### *1. Contribution and the Absent Tortfeasor*

In *Maxfield* v. *Llewellyn*[9] the Court had to decide whether in apportioning damages between liable defendants, attention should be paid to the possible liability of a party not before the Court, it being argued that by s.6(2) of the English Statute[10] the amount of contribution recoverable was to be "such as may be found by the court to be just and equitable" and that this meant that damages could not be apportioned unless all parties possibly responsible were before the Court.

The widow of a deceased pillion passenger sought damages from the owner and driver of a post office van which had been parked near a bend on a country roadway and from the owner and driver of a cattle truck which had moved on to its incorrect side of the carriageway in order to pass the

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[1] (1961) V.R. 285.
[2] (1962) 1 Q.B. 175.
[3] (1961) 1 W.L.R. 1119.
[4] *Ibid.*
[5] (1961) V.R. 285.
[6] See *Jackson* v. *Goldsmith* (1950) 81 C.L.R. 446.
[7] For a valuable article discussing this line of authority and working out its implications for the present context see Harry Street, "Estoppel and the Law of Negligence" (1957) 73 *L.Q.R.* 358.
[8] (1962) 1 Q.B. 175.
[9] (1961) 1 W.L.R. 1119.
[10] Law Reform (Married Women and Tortfeasors) Act, 1935 (25 and 26 Geo. 5, c. 30) s.6(2) which corresponds with s.5(1)(2) of the Law Reform (Miscellaneous Provisions) Act of New South Wales, Act No. 33 of 1946. This section provides that "In any proceedings for contribution under this section 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 the extent of that person's responsibility for the damage; . . ."

van and in so doing had collided with the motor cycle upon which the deceased was travelling. Evidence was adduced that the driver of the cycle may also have been negligent in travelling at an excessive speed but he was not joined as a party by the plaintiff or by the defendants in their simultaneous actions for contribution and indemnity. The trial judge, Stable, J., found that the negligence of the truck driver alone of the defendants, was the sole cause of the accident and accordingly entered a verdict for the plaintiff against him and the truck owner who appealed on the ground that, *inter alia*, the van driver had also been negligent in so parking his vehicle and that the damages awarded should have been apportioned between the respective defendants.

Ormerod, L.J. (with whom Upjohn, L.J. and Davies, L.J. concurred), after stating that in his opinion those in charge of the post office van had been negligent, went on to deal with their counsel's submission that even if they were partially responsible, no apportionment of damages could be made unless all persons possibly responsible were before the Court, or at least, that the responsibility of such persons not before the Court had to be included in the computation of the degree of responsibility of the van owner and driver, for the Act directs that such contribution shall be recoverable as is found just and equitable having regard to the extent of that person's responsibility for the damage.[11] His Lordship stated that this could not possibly have such a meaning for if it did, the section would be most anomalous. He pointed out that no one for the deceased cycle driver had had the opportunity of putting evidence before the Court or of dealing with evidence and submissions given, and he went on to say:

> It appears to me that the court must have regard to a person's responsibility for the damage having regard to the parties who are before the court, whose share of the damage can be taken into account and who have had the opportunity of putting arguments for and against their share of blame and generally of being heard in the action.[12]

Upjohn, L.J. agreed, pointing out that if this interpretation were not correct, the section would be unworkable for several reasons. Firstly, assuming three parties were in fact each one third liable for the damage suffered by the plaintiff who sued only two of them, each defendant could only recover in contribution from the other one-third of the verdict and it would be a matter of whim for the plaintiff as to which one would have to pay the balance. Secondly, he thought it contrary to the notion of justice for the liability of a person to be assessed before that person had had the benefit of appearing before the court.[13] His Lordship also noted that the practice of assessing relative responsibility only between the parties before the court appeared the correct one when s.6(2) is considered in conjunction with s.6(1)[14] which provides that any defendant having been found liable is at liberty to bring separate proceedings for contribution against any person (here the deceased cycle driver) who would if sued have been liable to recover from him such contribution as is "just and equitable having regard to the extent of that person's responsibility for the damage".[15]

This unanimous decision of the Court of Appeal has made this section workable and has left liable defendants with adequate actions against any responsible party not joined as a party, whereas the proposed construction of it would have, apart from making the determination of relative responsibility impossible in cases where all potential defendants were not sued, resulted in

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[11] (1961) 1 W.L.R. 1119, 1121.
[12] *Id.* at 1122.
[13] *Id.* at 1123.
[14] This section corresponds with s.5(1)(c) of the Law Reform (Miscellaneous Provisions) Act of New South Wales, Act No. 33 of 1946.
[15] *Ibid.*

many difficulties. From the viewpoint of everyday practice it would seem that, for his own convenience, a defendant should join as a party to the original proceedings or in his coincidental action for contribution all persons upon whom he feels rests some responsibility for the plaintiff's damage. The plaintiff in most cases is, of course, not concerned with the apportionment of his verdict amongst the various defendants for he is entitled to recover all of his verdict from any one of them and if there is no contributory negligence on his part it often matters not to him whether he sues only one negligent party or joins all of the tortfeasors. However, if there is a possibility of a finding of contributory negligence and the matter arises in a jurisdiction where such negligence merely reduces the damage, it may matter a great deal to the plaintiff. Assuming that the judgment in *Maxfield* v. *Llewellyn*[16] is sound on its widest ratio in that in no case is the responsibility of parties not before the court to be considered, the plaintiff should join as defendants all potential tortfeasors. If, for example, the plaintiff A sues B, C and D who are all partly to blame for his misfortune and it is found that all four persons are in fact equally responsible, then under apportionment legislation the plaintiff would recover seventy-five per cent. of his verdict. If, however, he had only sued B, then on the analogy of the decision under consideration, as the court cannot consider the responsibility of C and D, A and B would be found equally to blame and A would recover only one half of his damages. Admittedly, it is dangerous to draw such analogies from the application of one statutory provision and apply them in considering another such provision but one is given courage to do this after perusing the general form of apportionment legislation. For example, s.26(1) of the Victorian Wrongs Act[17] provides that "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

This, then, surely must mean that the Court in assessing the plaintiff's relative responsibility and diminishing his award accordingly, can only have regard to the comparative blameworthiness of the tortfeasors before the Court and must ignore the negligence of persons not sued by the plaintiff, thus finding the plaintiff and defendant in the hypothetical example above equally liable and awarding the plaintiff only one half of his verdict.

### 2. *Issue Estoppel and Contributory Negligence*

In the two remaining cases under review, the primary legal issue before the court was the precise meaning and application of the doctrine of estoppel by record, as it is termed in England, or issue estoppel, by which phrase it is more commonly referred to here in Australia, a doctrine designed to prevent one jury or judge from having to decide a particular issue when this particular issue has already been the subject of binding decision. Because of modern legislation regarding contributory negligence and contribution between tortfeasors it has become vital for many potential plaintiffs to consider the effect on their action of prior litigation arising out of the same happening by which they suffered damage, and it could well have been that this ancient legal principle might have had an extremely stultifying effect on many such actions had the judiciary, generally speaking, not been so eager and able, often by means of rather academic and artificial distinctions between the separate

[16] (1961) 1 W.L.R. 1119.
[17] Act No. 6420 of 1958.

duty owed by the defendant to one plaintiff as compared with another,[18] to perform its historic function of ensuring that as many injured parties as possible might possess the right to seek redress unprejudiced by complicating factors.

The present-day limitations on the extent of issue estoppel simpliciter formed the ratio of the decision of the English High Court in *Randolph* v. *Tuck and Others*.[19] The Plaintiff, Randolph, a passenger in a motor vehicle driven by Tuck, sued Tuck, Norfolk Animal Products Limited (the owner of a second vehicle involved in the accident) and its driver, one Steele. However, before this action was commenced, the first defendant, Tuck, who had also been injured, had sued the other two defendants in the County Court. His action had failed, the Judge finding that Tuck had been wholly responsible for his own injury. But in the case presently under discussion the trial Judge, Lawton, J., found as a fact that Tuck was equally liable with the other defendants for Randolph's injuries. Co-incidental third party proceedings were brought by the defendants against each other for contribution and indemnity and the second and third defendants claimed to be entitled to an indemnity by Tuck on two grounds, firstly that they were persons "entitled to be indemnified" under the relevant statute[20] and secondly that by reason of the County Court judgment, Tuck must be deemed to have admitted his sole responsibility for the plaintiff's loss and so should be estopped from denying same and from alleging that the other defendants were liable.[21] Lawton, J., after holding that he was entitled to admit in evidence the record of the prior proceedings,[22] went on to state[23] that, in claiming they were "entitled to be indemnified" by reason of the County Court decision, the second and third defendants were seeking to base a cause of action upon estoppel by record, and at common law no action can be based on any form of estoppel.[24]

As to the second plea that the earlier decision should be considered as determining what contribution was "just and equitable", the learned Judge stated that its relevance depended upon there being in this case "put in issue and decided the precise question, the precise fact which was in issue"[25] in the County Court proceedings. Lawton, J. continued:[26]

> In the action before me the question in issue for decision was whether the damage suffered by the plaintiff had been caused by any breach of duty owed to her by the defendants Tuck and Steele or either of them. The nature and extent of their duty to her may have been similar to the nature and extent of their duty to each other [the issue in the County Court Case], but if I understand *Bourhill* v. *Young*,[27] they were separate and distinct duties, not two aspects of a general duty, which as motorists, they owed to all road users and which the County Court Judge had decided had not been broken by Steele. The issue whether these defendants, or either of them, were in breach of their respective duties to the plaintiff was never before the County Court. The fact that issues in two actions are

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[18] It is contended that this distinction is never artificial in assessing the damages payable to one plaintiff as distinct from another (as in *Bourhill* v. *Young* (1943) A.C. 92 and *Paris* v. *Stepney Borough Council* (1954) A.C. 367) but that it is often so in distinguishing the duties of care owed by the defendant to each of the plaintiffs.

[19] (1962) 1 Q.B. 175.

[20] S.6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act, 1935.

[21] (1962) 1 Q.B. 175 at 178.

[22] This point was decided in *Marginson* v. *Blackburn Borough Council* (1939) 2 K.B. 426 (per Slesser, L.J. at 437).

[23] (1962) 1 Q.B. 175 at 184.

[24] See *Low* v. *Bouverie* (1891) 3 Q.B. 82 at 105 per Bowen, L.J.

[25] See Lush, J. in *Ord* v. *Ord* (1923) 2 K.B. 432 at 440.

[26] (1962) 1 Q.B. 175 at 184-5.

[27] (1943) A.C. 92.

similar does not raise an estoppel.[28]

In deciding that no estoppel arose in these circumstances which would prevent Tuck from recovering contribution, Lawton, J. had cause to consider the controversial decision of the Court of Appeal in *Marginson* v. *Blackburn Borough Council*.[29] The facts of this case, decided before the advent of apportionment on the ground of contributory negligence, were that a car owned by Marginson and driven by his wife collided with a bus which then damaged some shop windows. The shop owner sued both Marginson, whose wife had been killed, and the corporation owning the bus. Both defendants denied liability and commenced contribution proceedings against each other. However, the bus owner, in its third party notice to Marginson, also claimed damages from him for the damage done to the bus in the collision. The trial Judge found both defendants equally liable and in dealing with the corporation's claim against Marginson he said: "There I think I am entitled not to award any damages. I find they were both to blame for the damage to the bus".[30] Marginson then sued the corporation for damages for personal injuries and for the loss of his wife. (No estoppel was alleged in respect of the latter count for the issue there was the responsibilities and duties owed by the wife and the bus driver to each other which had not previously been the subject of the decision.) It was found that Marginson's action for personal injuries was estopped. The reason for the subsequent difficulty in interpreting and applying the decision in *Marginson's Case* is that Slesser, L.J. did not enlarge on his statement[31] as to why, in the light of the previous proceedings, Marginson's action was estopped; but surely in retrospect the reason must have been that it had already been decided that Marginson was guilty of a breach of duty towards the bus driver in being "to blame for the damage to the bus" and that this breach, in the form of contributory negligence, would be sufficient to bar his subsequent claim. But at any rate, Lawton, J. in *Randolph* v. *Tuck* was satisfied that the estoppel in question in *Marginson's Case* did not arise out of any findings of breach of duty to the shop owners and that therefore the case was not an authority dealing with the question before him.

Lawton, J. finally considered and rejected (properly, as it is clearly in the face of stronger authority to the contrary) the broader perspective of the application of estoppel propounded by McNair, J. in *Bell* v. *Holmes*[32] where he stated that, though the legal issues (duties owed by one party to two persons) were technically different, the issues of fact and the evidence to support them were sufficiently similar to enable the plea of estoppel to succeed.

In summary, this English decision appears to have conduced to Anglo-Australian uniformity by following the lead of our own High Court in holding that subsequent proceedings are affected by an issue estoppel only if the issues of duty and liability which arise in the subsequent case are identical with the issues determined in the prior suit, identical not only in the minds of the jury but strictly in law. But even when this general principle has been settled, its application to the simple situations involving only two parties is not a matter of automatic ease unless the question of the nature of contributory negligence is settled. Suppose A sues B for injury he has suffered and is awarded a verdict and B later sues A for injury he suffered in the same accident. In the second action B will be estopped in a jurisdiction where contributory negligence is a complete bar, if a finding that he broke his duty to A is a finding

[28] See *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council* (1926) A.C. 94, and *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (1939) A.C. 1.

[29] (1939) 2 K.B. 426.

[30] *Id.* at 436.

[31] *Id.* at 438.

[32] (1956) 1 W.L.R. 1359.

of contributory negligence. However, if contributory negligence connotes only a failure to take care of one's self, then there is no estoppel. Even in jurisdictions where contributory negligence serves to reduce damages, the same question of the nature of contributory negligence has had to be canvassed, as the case which now falls for discussion shows.

*Noall* v. *Middleton*[33] arose out of a collision between a car in which Mr. Noall was driving Mrs. Noall and one in which Mr. Bunt was driving Mrs. Bunt. Mr. Noall and Mrs. Bunt were killed. Mrs. Noall took proceedings against Bunt, seeking damages on two counts, for her personal injuries and for the death of her husband. Subsequently Bunt sued Noall's estate, also on two counts, seeking damages for his injuries and for the death of his wife. The latter action was tried first when a verdict was entered for Bunt, the jury making the specific finding of no contributory negligence on the part of Bunt.[34] Before Mrs. Noall's action could be heard Bunt died and so her action proceeded against his estate.

It was not alleged that Mrs. Noall's suit for personal injuries was estopped, for the issue relevant to such a suit, namely the duties of care owed to her by Bunt, had never been the subject of prior proceedings. But it was claimed by the defendant that she was estopped from bringing her statutory action arising out of her husband's death, for it is a condition precedent to such an action that the deceased, had he been alive, would have had a cause of action and therefore the question of her husband's duty to Bunt and Bunt's duty to him were in issue and exactly these duties had been the subject of the jury finding in the earlier trial of Bunt's action. The primary question for the Court, therefore, was whether the previous finding of "negligence on the part of the deceased (Noall) and no contributory negligence on the part of Bunt" estopped Mrs. Noall's subsequent action under the Wrongs Act[35] arising out of her husband's death, with the consequent side issue as to the meaning of "no contributory negligence", for it was obviously vital for the defendant to prove in order to estop her claim, that this was a denial not only of a failure in Bunt to ensure his own safety but also a breach of his duty to Noall.

It was first argued for Mrs. Noall that for the plea of issue estoppel to succeed the prior decision relied upon must have been given before the writ issued in the present action, a notion supported by Halsbury[36] and earlier case law. On the considerable weight of more recent decisions,[37] however, His Honour was constrained to find that even if the prior decision was given after the subject writ had been issued, an estoppel might still exist.[38] It was then argued that even if the deceased would have been estopped, as Mrs. Noall brought her statutory claim not as his personal representative she was not a "privy" of his and so a finding of no breach of a duty to him could not affect her action. But as Sholl, J. correctly stated,[39] this was really only begging the issue, for in order for her action to succeed, she had to prove that her husband, had he survived, would himself have been able to sue. On the real problem, then, as to whether Noall's action itself would have been estopped, the defendant claimed firstly that in a normal motor vehicle accident the duty of each driver to take reasonable care for his own safety is so closely linked with his duty

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[33] (1961) V.R. 285.
[34] *Ibid.*
[35] Act No. 6420 of 1958.
[36] 15 Halsbury 3 Ed. 211: "It seems that a judgment cannot take effect as a Res Judicata or an estoppel unless it was given before the proceedings in which it was relied upon were commenced."
[37] *Re Defries* (1883) 48 L.T. 703; *Bell* v. *Holmes* (1956) 3 All E.R. 449 (McNair, J. at 453 *et seq.*); *Isaacs* v. *Ocean Accident & Guarantee Corporation Ltd.* (1957) 58 S.R. 69 (Owen, J. at 84).
[38] (1961) V.R. 285 at 288.
[39] *Ibid.*

to other persons on the highway, that the jury could not and would not distinguish them, and so a finding of "no contributory negligence" must *ipso facto* negative a breach of both duties. Sholl, J. was content in rejecting this point to follow authority, including his earlier decision in *Edwards* v. *Joyce*.[40]

The defendant's second and more weighty point was that contributory negligence and its statutory definition, "partly of his own fault",[41] involves both a breach of self-care and of care towards the defendant and so the verdict previously given necessarily negatived any fault of either kind, and did not merely relate to self-care, lack of which of itself could not, of course, estop the subject action. Existing authorities on this point were at variance: in a strong *obiter dictum* the Privy Council had said in *Nance* v. *British Columbia Electric Railway Co. Limited*[42] that contributory negligence consisted only of a breach of the duty of self-care and this had been the opinion of McTiernan, J. (in dissent) in *Jackson* v. *Goldsmith*,[43] who stated:

> . . . the finding that the respondent was not guilty of contributory negligence is consistent with the hypothesis that the respondent did not drive his motor car carelessly as to commit a breach of his duty to take due care for his own safety. The finding does not necessarily conclude the question whether the respondent drove so carelessly as to commit a breach of his duty to take due and reasonable care for the plaintiff's safety.[44]

But the majority in *Jackson* v. *Goldsmith*, typified by the attitude of Latham, C.J.,[45] had held that contributory negligence can be constituted by either "(1) carelessness with respect to his own safety; or (2) a breach of the duty which he owed to Jackson to take care".[46]

Sholl, J. felt that although *Jackson* v. *Goldsmith* had preceded *Nance's Case*, he should find that contributory negligence involved both elements and that a specific finding negativing its existence must necessarily negative both elements of it.[47] In so finding he relied also upon *Marginson's Case*,[48] which on analysis could only mean that contributory negligence can result from a breach of either a duty owed to one's self or a duty owed to the defendant. His Honour properly pointed out that had the finding in the earlier action by Bunt been that the plaintiff was guilty of contributory negligence, this could not have estopped any defence which Bunt might have made in a subsequent action against him, for he could have been guilty of either type of contributory negligence, and not necessarily both.[49]

It must be hoped that this Victorian Supreme Court decision will be generally followed because it leads to a sane approach being adopted to both the problem of contributory negligence itself and to the question of estoppel, as it will succeed in barring only those actions in which the defendant has previously been found free from blame. In this regard it is essential that the jury be properly instructed as to the precise nature of contributory negligence so that its finding will be a deliberate one. A number of problems still exist in the application of apportionment legislation and to lawyers with practical minds, it would seem that they should be remedied by appropriate legislation, but at least one of them, the application of issue estoppel, has been solved, subject to confirmation by superior courts. If the latter principle in its present

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[40] (1955) V.L.R. 216.
[41] S.26(1) Wrongs Act, 1958 (Victoria).
[42] (1951) A.C. 601.
[43] (1950) 81 C.L.R. 446.
[44] *Id.* at 458.
[45] *Id.* at 455.
[46] *Ibid.*
[47] (1961) V.R. 285 at 293.
[48] (1939) 2 K.B. 426.
[49] (1961) V.R. 285 at 295.

form contains any maxim for the profession at large, it must be that speed is to be the watchword in having a plaintiff's action heard if further litigation is likely to result from the same occurrence, for it is only by defeating the other party in the race to litigate that the plaintiff can ensure the trial of his own action unmolested by any previous suits.[50]

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## WHEN IS A MOTOR-CAR NOT A MOTOR-CAR?

### *NEWBERRY* v. *SIMMONDS*[1]

### *SMART* v. *ALLAN*[2]

The average car owner in England must feel a little confused as to when he is required to have a licence for his car under the United Kingdom Vehicles (Excise) Act, 1949. S.15(1) of that Act provides:

> If any person uses on a public road any mechanically propelled vehicle for which a licence under this Act is not in force . . . he shall be liable to a penalty.

But just what constitutes a mechanically propelled vehicle? Charles Simmonds claimed his Ford did not fit this description during the time it was unlicensed since at that time its engine was missing, stolen by "persons unknown". This contention, although upheld by the justices at first instance, was nonetheless rejected by a Divisional Court of the Queen's Bench division whose members had no difficulty in deciding that a motor-car without an engine could in certain circumstances be a "mechanically propelled vehicle". On the other hand William Smart, who left an unlicensed Rover by the road-side, had his conviction quashed; Mr. Smart's Rover had been bought for scrap and another Divisional Court held that where, as here, there was no reasonable prospect of a motor-car ever being made mobile again, the stage had been reached when the car had ceased to be a "mechanically propelled vehicle".

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[50] It should be noted in passing that in *Isaacs* v. *The Ocean Accident & Guarantee Corporation Ltd. and Winslett* (1958 S.R. 63) it was held by Street, C.J. and Roper, C.J. in Eq. (Owen, J. dissenting) that where an action is brought by A against B and this action is settled by consent, the filed terms containing one clause to the effect that the consent verdict is to be given without admission of liability on the part of B, a later action brought by B against A is not estopped by reason of the earlier verdict in A's favour. It was also held that if B's case, when sued by A, is conducted by his authorised insurer and other requirements of s.18 of the Motor Vehicles (Third Party Insurance) Act, 1942-51 are met, s.18(3) would operate to prevent such a verdict against B from prejudicing him in any other claim or proceedings arising out of the same occurrence. Section 18 of this Act empowers the authorised insurer who issued a third party policy—

(a) to undertake the settlement of any claim against any person in respect of a liability against which he is insured under the third party policy;
(b) to take over the conduct, on behalf of the insured, of any proceedings taken to enforce any such claim or for the settlement of any question arising with reference thereto; and
(c) to defend or conduct such proceedings in the name and on behalf of the insured.

Subs. 3 of s.18 provides—

> Nothing said or done by or on behalf of the authorised insurer in connection with the settlement of any such claim or the defence or conduct of any such proceedings shall be regarded as an admission of liability in respect of or shall in any way prejudice any other claim, action or proceedings arising out of the same occurrence.

[1] (1961) 2 W.L.R. 675.
[2] (1962) 3 W.L.R. 1326.