THE RIGHT OF A PARTNER TO BRING AN ACTION AGAINST A CO-PARTNER WITH PARTICULAR REGARD TO ACTIONS IN NEGLIGENCE

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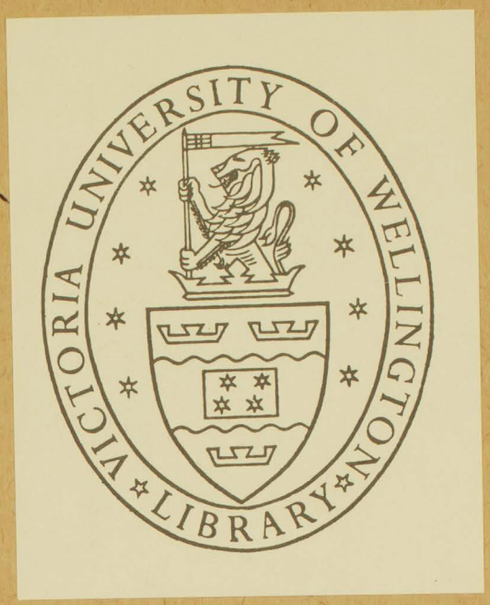

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I N D E X

INTRODUCTION

This paper attempts to set out the law relating to the duty of skill and care owed by one partner to his fellow partners and particularly whether he can resist a claim by his fellow partners that he must bear the total brunt of any loss caused by reason of his negligence[1]. Unlike many aspects of the law, the problem lies not so much in reconciling a mass of judicial comment in various courts and jurisdictions and discerning some underlying principle, as in finding any authoritative statement on the point at all. As Beven[2] has commented in something of an understatement:-

> The principles governing the determination of the amount of negligence importing liability between partners are not very copiously illustrated by decided cases in English law.

In what is an apparent non sequitur he asserts that we must therefore be guided by the rules of the civil law. Civil law rules will undoubtedly be of interest, but before considering them some observations are necessary on why Common law and Equity did not come to grips with the issue and why too, the Partnership Act 1908[3] is largely silent. In this context it is also interesting to note the comparative lack of hesitancy on the part of the Courts when asked to determine the liabilities attaching to directors of deeds of settlement type companies which were emerging as a

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(1) The word "negligence" is used in this paper as a loose but convenient term covering careless or reckless conduct even in the discussion on whether or not there is a duty of care, which is of course fundamental and prior to the determination of whether there is "negligence" as known to the Common lawyer.

(2) Beven on Negligence 4th ed vol 2 p.1409.

(3) Hereinafter "the Act". Reference to sections are to sections of the Act unless stated otherwise. The Partnership Act 1890 (UK) is referred to as "the U.K. Act".

competitor to or replacement for the partnership as a vehicle for commercial activity in the late nineteenth century.

There is need to state the law as it is as definitively as possible and attempt to determine whether it is adequate for commercial reality. There are already some indications that special rules or variations might be possible in specific situations such as motor vehicle accidents in which the negligent driving of one partner injures a fellow partner while both are going about the partnership business and it is interesting to note the possible effects of Hedley Byrne[4] on actions between partners particularly in professional partnerships.

THE PROBLEM

Since neither Common law nor Equity came to grips with the issue and the Partnership Act merely flirted with it there is some justification for asking whether there is any real problem at all. The answer must surely be that there is, since there are many situations where partners, or their insurers, may wish to make one of their number solely responsible for a liability, loss, or debt incurred by the firm on the grounds that his conduct or misconduct alone brought about the loss.

It must be remembered now and throughout the discussion that the situation being considered is the relationship between the partners once the firm has met the liabilities to third parties or outsiders.

(4) Hedley Byrne & Co Ltd v Heller and Partners Ltd [1964] A.C.465

There can be no doubt that the firm's assets and those of each and every partner are available to any non-partner who successfully claims against the firm in respect of wrongful acts or omissions by any partner acting in the course of the firm's business[5]. The particular point is, having met this liability to non-partners or outsiders can any partner or group of partners turn to one of their number and require him to make good the loss suffered by them personally or by the firm as a whole (such as loss of goodwill), on the grounds that their partner owed them a duty to exercise a certain care or skill, that he failed to do so, and that they suffered damage or loss as a direct result[6]? If these elements can be found to properly apply, then other issues such as the appropriate standard of care and the assumption of risks which a partner must make when throwing in his lot with others in an unincorporated business association must also be considered.

WHY IS THE LAW SO SILENT?

The answer probably lies in history. Actions in negligence did not occur frequently until the latter half of the nineteenth century and even then the limits and precise nature of the action were not defined with any great particularity or certainty. At that time Common law and Equity were quite distinct, and the fusion of the two in the Judicature Acts of 1873 was followed closely by statutes concerning the law of partnerships and relations between partners. Sir Frederick Pollock drafted a Bill

(5) S15
(6) The first four elements of the negligence action as summarised by Fleming in the 4th ed. of his Law of Torts p.104-5.

to consolidate and amend the law of partnership in 1879 and submitted it to Parliament in 1880. Ten years later after many deletions, additions and several re-submissions to Parliament it became the English Act of 1890. New Zealand followed quickly in early 1891 and in 1908 the Act was stated to be a consolidation of the 1891 Act and certain provisions of the Mercantile Law Act of 1880[7]. The length of delay and difficulties of reform are indicative of the importance of partnerships in the late nineteenth century business affairs and can be compared with the similar problems facing those who are attempting to reform the law of incorporated associations today[8]. Furthermore, the Act did not assert, even in 1908, to be an exclusive code regulating partnerships since it declared that the rules of equity and common law were to continue in force except where inconsistent with the express provisions of the Act[9]. It is to these rules that we must now turn.

Throughout this paper it is assumed that the partnership is not evidenced by written or oral agreement or conduct of the parties, or if it is then it is silent as regards the matters considered in this paper. This is essential, for it is quite clear that partners may contract between themselves on whatever basis they wish and indeed may specify maximum amounts for which each partner shall be liable to his fellow partners. In the case of sleeping partners or mere capital contributors it would not be unusual for such a partner to deny liability for all acts done by the active

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(7) S1(2) and First Schedule.
(8) As clearly illustrated by the Special Committee to Review the Companies Act (Macarthur Report) which was commissioned in May 1968 but did not make its final report until March 1973.
(9) S3

partners so far as contributions and indemnities between the partners are concerned, and in other cases to provide for a sum by way of liquidated damages on breach of the agreement[10], though of course he cannot avoid his liabilities as a member of the firm and as a partner individually to outsiders who have a claim against the firm [11].

(10) Lindley on Partnership 13 ed. 461.

(11) S15. Part II of the Act which deals with the position of special partners and special partnerships is disregarded here and in the rest of the paper.

THE POSITION AT COMMON LAW PRIOR TO THE JUDICATURE ACTS

Prior to the Judicature Acts there was no simple way in which a firm could sue or be sued by any of its members, since the firm had no legal existence. This had important effects; in particular neither the firm nor even an individual member of it could bring an action to recover money payable to the firm by a member, and until specifically changed by statute(12) it was not even possible for a partner or firm to bring a criminal prosecution against a partner who stole the firm's property.

The above stated rule arose because in an action involving the firm on one side and a partner on the other, that partner would be both a plaintiff and a defendant(13). These procedural difficulties have been removed by the rules of court(14), but these rules are mere procedural aids and cannot affect the rights of the parties or create fresh causes of action(15). They cannot constitute the firm as a separate legal entity.

Thus, a partnership agreement which stipulated that a partner whose acts or omissions resulted in a successful claim against the firm by a third party must make good the loss to the firm would seem to be unenforceable in court by the firm, notwithstanding that section 27 clearly envisages variations to the general requirement

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(12) Larceny Act 1868, 31 & 32 Vict. c116.

(13) The full extent of this rule can be seen in Bosanquet v Wray (1815) 6 Taunt 598; 126ER 1167 where it was held that one firm could not sue another in respect of matters which arose while they had a common partner.

(14) Supreme Court R. 77
The rules are optional and a plaintiff may choose to name either the firm or the partners as defendant.

(15) Meyer & Co. v Faber (No 2) [1923] 2 Ch 421.

of equality between the partners in the bearing of losses sustained by the firm.

However, the relationship between partners, as distinct from the relationship between the firm and its members or some of them, is based firmly in contract. Furthermore, as the Privy Council has hastened to point out, the contract between partners is a continuing relationship(16). As such, the contractual rights and obligations will ennure at least until the dissolution of the partnership and there is nothing to prevent an action by one party to a partnership contract against another to enforce a provision of that contract which may vary the prima facie rules laid down in section 27.

Before the Judicature Acts, it was very difficult to bring an action at common law against a co-partner, particularly if dissolution of the partnership itself was not being sought. Some actions were permitted while others were not, and it would appear that the distinction lay in whether the court could dispose of the matter without having to resort to the remedy of account. Account was only available as a remedy on dissolution of the partnership. Thus partner A could not sue to recover a payment made as a loan to cover B's contribution of capital since that was merely a loan to the firm of which A himself was a member(17), but he could sue B if he loaned the money to B for B to contribute to the partnership capital(18), even though they were partners. It was seemingly even possible to sue a defaulting partner who had

(16) Sennanayake v Cheng [1966] AC 63,83.
(17) Perring v Hone 4 Bing 28.
(18) Elgie v Webster 5 M+W 119.

not contributed his share of capital, even though he had an interest in what he had undertaken to contribute[19]. The distinction between that situation and the case of Perring v Hone[20] is difficult to determine, but it seems that Hesketh's Case may not support any general rule since the very brief judgment of Lord Ellenborough C J asserts that vis a vis third parties there was a partnership but between the two persons concerned there was a mere debtor and creditor or speculative investment situation.

(19) Hesketh v Blanchard 4 East 144. This case gave rise to much controversy when decided in 1803.
(20) supra n6.

THE POSITION AT EQUITY PRIOR TO THE JUDICATURE ACTS

Although equity is frequently regarded by many as the caulking which was capable of stopping leaks in the Common law ship, it is reasonably clear that equity courts were not over-exerting themselves to ensure that the ship was watertight.

The Courts of Chancery would permit a partner to bring an action against a fellow partner, but were decidedly reluctant to do so unless dissolution and account were also sought. The most common situations where there would have been suits at equity were in actions for specific performance, for an account[21] for an injunction, and in actions for fraud where some remedy other than the recovery of damages was sought. However, the general rules by which equity was guided meant that not all those who sought a remedy in equity were able to have their grievances satisfied. Those guiding precepts were[22] --

(1) Not to interfere except with a view to dissolution of the partnership.

(2) Not to interfere in matters of internal regulation.

(3) Not to interfere at the request of persons who had been guilty of laches.

Since they remain as principles today although equity and the Common law have been merged for over a century they deserve further brief mention.

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(21) This remedy was apparently available at both Common law and equity.

(22) Lindley on Partnership 13th ed. p.493

(1) The rule that equity will not interfere except with a view to dissolution has weakened over the years and it seems that where a specific wrong has occurred or dispute has arisen the courts will intervene if satisfied that justice can be done by so doing. The rule is undoubtedly linked to other equitable principles such as "Equity will not act in vain" and the refusal of equity to enforce demands for specific performance of contracts (including partnerships) for personal services.

(2) The rule not to interfere in matters of internal regulation is one which applies not only to partnerships, but also to other unincorporated associations and of course to disputes between members of companies. This rule is always subject to the general principle that he who acts harshly, oppressively, or without regard for the rules of natural justice should not be able to escape equity's sight by throwing up technicalities as blindfolds.

(3) The doctrine of laches which presupposes both undue lapse of time and some change of circumstances which render it unjust to give relief to the plaintiff or unduly prejudice the defendant is a doctrine of general application in any court exercising equitable jurisdiction and does not deserve special attention here except to record that it does apply to the partnership situation and particularly in cases where there is an

> agreement between persons to become partners and one does all the work. If ultimately a profit is produced those who have stood idly by over a long period may not be permitted to attempt to prove the existence of a partnership on the grounds that if there had been no profit nothing would have been heard from them. The doctrine is strongest in partnerships involving speculation; e.g. in land development(23), mining(24) or salvage(25).

Moreover, until 1852 the issue of whether or not a partnership in fact existed could only be tested at Common law, not in the Court of Chancery.

One aspect in which equity did offer a considerable advantage over the Common law was in the right which existed in equity for recovery of a debt owed by a partner to the firm and the ability of one firm to bring an action against another where they shared a common partner.

The first situation is illustrated by Piercy v Fynney(26) where two brothers were in partnership and one of them brought an action as plaintiff against the other, and a third party joined as defendants. The defendant partner had allowed his co-defendant who was a debtor of the partnership to set off a debt owed by the defendant partner to him against the debt he (the third party)

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(23) Cowell v Watts 2 H+Tw 224; 47 ER 1665
(24) Prendergast v Turton 13 LJ Ch 238
(25) Blundon v Storm (1969) 7 D.L.R. (3d) 418
(26) (1871) 12 Eq69

owed the firm and the plaintiff was granted a remedy.

The second situation, which is to be contrasted with that at Common law as illustrated in Bossanquet v Wray[27] is found in Waters v Towers[28] where the action was between two unrelated partnerships, but the measure of damages was the loss of profit suffered by one partnership of which two of its three members were the only members of another partnership with which the three member partnership dealt. Alderson B would not accept a defence raised by the defendant that the two plaintiff partnerships could not have an enforceable debt or recoverable loss between them on the grounds that their community of partners would prohibit either from ever bringing an action against the other.

Equity developed further than Common law and along slightly different lines in relation to the remedy of account. Whereas at Common law account was a remedy only available on dissolution, equity relaxed this view and allowed account in respect of a specific issue without requiring a general account. This can be regarded as an erosion of the once firm view that account was available only on dissolution[29] and that equity would not interfere in partnership affairs except with a view to dissolution. Thus in Prole v Masterman[30] an action between co-promoters of a company was permitted without the need to take a general account. The plaintiff was one of a managing committee which had been sued by some of their partners for fraudulent mismanagement. The suit

(27) discussed infra p.6 n13
(28) (1859) 8 Ex 401; 155 ER 401.
(29) See Forman v Homfray (1813) 2 V&B 329; 35 ER 344 where a motion for account without a prayer for dissolution was refused on that very ground.
(30) (1885)21 Beau 61; 52 ER 781

had been settled and the present plaintiff, having paid more than his share of the settlement, sought contribution from his fellow defendants. Sir John Romilly M.R. ruled that the contribution could be awarded even though there remained a number of disputes outstanding between the partners.

It is now appropriate to consider the state of the law since the Judicature Acts and the rules of court to clarify the circumstances under which a firm may bring an action against some of its members or members may bring an action against each other before considering specifically the present state of the law relating to negligence actions between partners.

THE PRESENT POSITION

In this case the present position can only be assessed by having regard to the past; in particular the law as it stood prior to the Judicature Acts. Although the rules of Court appear to make it easier for a partnership to sue or be sued and perhaps easier for partners to sue each other, it will be seen that these rules are procedural only and do not create rights or remedies where none existed before.

Firstly, the Partnership Act of 1908 must be considered. Section 9 provides that an act relating to the business of the firm and done in the firm name or some other manner which shows an intention to bind the firm is binding on the firm and all the partners. However, there is no provision enabling a partner to recover from a co-partner any losses suffered by such an act on the latter's part.

Section 12 provides that every partner is liable jointly for debts and obligations incurred by the firm while he is a partner, but is silent on the question of whether, having met those debts and obligations, a partner may call upon one of his fellows to indemnify him or pay more than an equal share on the grounds that he was responsible for the loss.

Section 13 deals with the wrongful acts or omissions of a partner, but only where loss or injury is caused to any person who is not a partner in the firm. Thus, when section 15 provides that every partner is liable jointly with his co-partners and also severally for everything for which the firm becomes liable under section 13 it does not help clarify the issue of the rights of the partners inter se once the obligations to outsiders have been satisfied or if there is a wrong committed and the only ones to suffer are the partners themselves.

Turning to the prima facie rules as to the interests and duties of partners contained in section 27 does not provide any obvious assistance for they merely require the firm to indemnify a partner for payments made and liabilities incurred in the ordinary and proper conduct of the firm's business or necessarily done to preserve the firm's business or property(31).

As noted earlier in the paper section 3 preserves the rules of equity and Common law insofar as they are not inconsistent with the Act. Since the Act is seemingly silent on the particular

(31) S27(b)(i) and (ii) which are considered more closely later.

issues under consideration it would appear that Lindley[32] is correct in summarising the position as follows:-

1. An action for damages may be maintained by one partner against another in all those cases in which an action might have been maintained before the Judicature Acts; provided the action would not have been restrained by a court of equity.

2. Any action which would have been so restrained cannot be supported.

3. An action may be maintained by one partner against another for any money demand which before the Judicature Acts could have been made the subject of a suit for an account.

Returning to the rules of Court[33] these merely facilitate the bringing of existing actions by the removal of procedural difficulties and do not create new rights of action where none existed before. This was clearly stated in the case of Meyer and Co v Faber (No2)[34] where the Court of Appeal held that the equivalent of R77 could not be used by a State appointed controller[35] to bring an action against one of the partners to recover monies retained by him. The defendant partner resisted the claim on the grounds that the court rules only existed to make it easier for the firm to sue and be sued and could not be used to create new law to the effect that the firm (as opposed to individual partners) could not sue one of its members. The reason was the old Common law bar mentioned earlier, namely that since the firm is no more nor less than the sum total of its members, so as soon as it commences an action

(32) Lindley on Partnership 13th ed 568.
(33) Specifically R77 Code of Civil Procedure
(34) [1923] 2 Ch421
(35) The Board of Trade had taken over the handling of the partnership during World War I due to the fact that some members were German nationals.

against one of its members that member is both plaintiff and defendant. Lord Sterndale M R agreed and said at page 435:-

> The rules do not in any way as it seems to me alter the substantive law as it existed before or alter the rights which in law and in equity partners have one against the other; all they do is to provide that the procedure which is laid down in the order shall apply to actions between partners and that the firm name may be used for those actions..... and I do not think the firm could, in circumstances like the present, demand that the money in the hands of the partner should be handed over to the firm, that is, to the individuals consitutting the firm other than the partner, because the action is brought in the firm name.

Warrington L J referred[36] to the well settled law of partnership that:-

> A partner cannot be a creditor of or a debtor to his firm, or sue his firm or be sued by it, inasmuch as the English law does not recognise the existence of a firm as distinct from the members of it;

This decision is cited frequently in many of the texts on partnership law and the codes of civil procedure, but its significance must be kept in perspective. It is indeed a decision of the English Court of Appeal in which there are clear statements of interpretation of the effect of the rules. However, these statements only relate to the right of the firm, or someone authorised to use its name, to bring an action against a member of it. There is nothing in any of the judgments which in any way affects the rights, if any, of one partner to sue another.

Moreover, the statements cited above may have to be treated as obiter dicta, or at least with due caution and regard to the peculiar facts of the case. The Master of the Rolls went to

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(36) ibid p.439

considerable lengths[37] to explain his view that the defendant could be brought to account by having the enemy partners' interests vested in a custodian (presumably the unsuccessful Board of Trade controller) who could then have the partnership accounts taken and the defendant partner made to account to the other partners. In the present case the action had been commenced in the firm name and the controller was later joined as co-plaintiff.

Warrington L J was certainly of the opinion that a firm could not sue one of its members, but he followed the remarks cited above with the comment[38] --

> Moreoever I take it, in such a case, the name of the firm would be a compendious expression for "the partners other than the defendant"; and, as I have said, the present action, whatever else it is, is not an action by them.

Younger L J reached the same conclusion as his bretheren solely on consideration of the position of the controller and his enabling and empowering statute. He asserted[39] that his decision on those grounds enabled him to dispense with having to consider whether a claim could be made by an action in the name of the firm. He was of the opinion that the only remedy available was an account of the partnership dealings and he speculated --

> I can conceive that in view of /R77/ a claim to such a balance may be made in the firm name, but I do not so decide.

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(37) ibid p.439
(38) ibid p.441
(39) ibid p.450

There is a further complicating factor in that the partnership had been dissolved and the defendant partner had acted with Home Office approval in calling in the assets of the firm and discharging its liabilities. The controller was seeking an account of profits made since the outbreak of war and during which time the defendant was, quite properly "liquidating" the partnership business and making authorised drawings. Although he held sums of money due to his co-partners there might have been some difficulty in holding that the drawings which he made in accordance with the partnership agreement over a period of years could constitute assets of the business subject to account if his co-partners ever won recognition of status from the Court. So far as the claim for account of the profits was concerned the quantum could not be accepted without full accounting from all partners, since the defendant might have genuine claims for expenses or counter-claims. It also seems likely that since the business was being or had been "liquidated" by or under a specific statute, the defendant may have been using his former partners' assets or capital to carry on or finance a business which may not necessarily have been the partnership business.

THE CIVIL LAW

This paper does not assert to be in any way authoritative on matters of Civil law and the principal sources consulted are, indeed, Common law commentators and judges. There is a statement of the Civil law in Beven on Negligence which has been referred to earlier[40] and some comment to the effect that this is not entirely accurate[41], but it is not within the scope of this paper to become embroiled in this dispute any more than is strictly necessary.

According to Beven, a partner must show only the same diligence and attention to partnership affairs as he does to his own. He asserts, relying entirely on the Civil law[42] --

> Partners, accordingly, are "not always obliged to use that middle kind of diligence which prudent men employ in their own affairs"; they are secure if they act in the partnership affairs as they would do in their own; so that if a partner fell into error in management from want of a larger share of prudence and skill than he was truly master of, he is not liable for the consequences; for the partners are themselves to blame in not making choice of an associate of greater abilities and can recover only for the consequences of gross faults.

As will be seen later the notion that partners who choose to associate with persons who are not of the abilities expected should bear the resulting losses themselves because they chose to so associate (perhaps a variation on contributory negligence?) has found some favour in the United States, but

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(40) supra p.1.

(41) Mair v Wood [1948] S.C.83 and Huston v Burns (1955) Tas S.R.3. Both these cases are considered in some detail, as to facts and reasoning later and are referred to here merely in regard to the Civil law.

(42) Beven on Negligence 4th Ed p.1410.

has received scant attention elsewhere. Beven continued --

> It follows that partners are not responsible for damna fatalia - accidents, as, for example robbery or fire, but they are liable for thefts, as any other bailees would be. Where a partner is engaged in partnership business, and is thereby exposed to loss, he is entitled to recoupment from the partnership funds; and the opinion of Julian was generally accepted, that, if a partner sustained injury in defending the partnership goods, the partnership should pay the doctor's bill.

Few would argue that the view of Julian expressed above is incorrect in policy, or in law, in view of section 27(b) of the Act, but it must be noted that indemnification for payments and liabilities incurred in the preservation of partnership property is quite a different matter from an award of compensation for the personal injury or other damage suffered by one partner at the hands of another.

This point was taken by Lord Keith in Mair v Wood where, after referring to the passage cited above and section 27(b) he said[43] --

> This right to reimbursement is plainly measured by a different standard from that applicable to damages for negligence. ..... [reference to Erskine]..... By this I think he means, not any personal or physical loss or expense unrelated to the affairs of the partnership, but any loss or expense incurred on behalf of, or in the interests of the partnership. This is borne out by the terms of section 24[27] of the Partnership Act which confines the indemnity to payments made and liabilities incurred by a partner.

(43) (1948)S.C.83, 92-3.

Pothier, in a passage cited by Lord Keith in Mair v Wood[44] discusses the dispute as to whether a partner should be indemnified for losses suffered and concludes that the Civil law would allow a partner who was wounded by slaves whom he was taking to market to be indemnified for the cost of treatment.

> The reason is that the risk incurred by that partner of being maltreated was a risk inseparable from their convoy, which he only incurred for the affairs of the partnership and from which he ought consequently to be indemnified by the partnership. For the same reason the same Julian decides that if a partner in a journey which he makes for the affairs of the partnership has been attacked by robbers who have robbed him and wounded his servants the partnership ought to indemnify him for what he has lost and the expense which he has incurred for the cure of his servants.

Firstly, it is interesting to note that the particular point of what should be the rights of the partner if he himself suffers some permanent loss, such as an arm or leg, is not mentioned, though it is discussed later in this paper.

Secondly, at this stage it can be briefly noted that the Common law has not gone quite as far as the Civil law, if correctly stated by Pothier. The items mentioned would be covered by section 27(b)(i) and (ii) for the damage done to the slaves. However, personal items stolen from a partner while carrying on the partnership business would not constitute a "payment made" or "personal liability incurred" within the meaning of section 27(b). It would seem that "losses suffered" have been deliberately omitted from section 27(b).

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(44) (1948)S.C. 83, 92

THE NEGLIGENCE ACTION

It is not altogether surprising that actions between partners based on the "negligence" of one of them should be few and far between.

Tortious actions in negligence developed from actions on the case and by the time of the Judicature Acts were still very much in an embryonic state in many respects.

While it is not surprising that the Partnership Act, which had its beginnings in the last quarter of the nineteenth century, should be silent on the question of tortious liability between partners, the reason why developments in the rules of Common law and Equity since that time have been minimal deserves some comment since those rules are made available by Section 3 of the Act to fill any lacunae that may exist.

It is probable that the reason why negligence actions between partners have not been more frequent this century lies in the development of the limited liability company contemporaneously with the development of the negligence action though quite independent of it. The development of the company as a corporate entity with the many benefits including limited liability meant that the emphasis shifted away from partnerships as the principal vehicle for commercial activity. In particular, limited liability appealed to those who were combining their capital with that of strangers to promote business ventures.

It is interesting to note that most of the nineteenth century cases considered have involved reasonably substantial business operations, in particular mining, and textile trading; both activities which today would almost invariably be carried on by limited liability companies. With the demise of the partnership to the smaller and more intimate family and professional type business operations it is reasonable to assume that the incentive to sue a fellow partner would diminish on two grounds. Firstly, the size of the operation and the asset backing of whose who continued through choice to operate as a company, and, secondly, the greater likelihood of personal ties of family or friendship between partners.

Against this must be weighed the rise[45] in influence of the insurance industry.The effect of insurance on this aspect of the law i difficult to determine because of the strict observance of the rule that the existence of insurance interests should not be made known in any court action. It is reasonable to assume, however, that the interests of different companies might encourage or even compel partners who would not contemplate bringing an action against the personal estate of their partner to bring actions in the knowledge that what was actually involved was a dispute between large organisations and neither of the named parties actually stood to lose from the bringing of the action. This might well have been the case in Huston v Burns[46], a case which will be considered in detail later.

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(45) and in New Zealand since 1 April 1974 the decline

(46) (1955) Tas S.R.3

This potential influence should not be over-emphasised because of two factors. The first is the tendency of insurance companies to settle claims on a knock-for-knock or swings and roundabouts basis and state involvement in motor vehicle accident insurance in many jurisdictions. The second is the fact that many partnerships involve professional activities such as law, medicine and accountancy and such professions are often found to have mutual socities or special arrangements to cover cases of professional negligence so that inter-insurance company disputes are less likely to arise.

There have, however, been some cases involving the relationship between partners once liabilities, if any, to outsiders have been met and in attempting to determine what the rules of law are or ought to be it is necessary to consider them in some detail.

"GROSS" NEGLIGENCE

In considering these cases particular attention is being paid to the nature or extent of any duty owed by a partner to his fellow partners. It will readily be seen that the Courts have been prepared to assume that a partner owes his fellow partners a duty of care, but there is some doubt as to the extent of the duty. References to "culpable" or "gross" negligence abound, although these terms are more confusing than helpful. If the enquiry is as to whether or not negligence is culpable is it open to a Court to find that there is a duty owed, breach of that duty and damages resulting from that breach, but no liability on the grounds that the negligence was "not culpable"?

Use of these terms seems to be no more than a confusion of the first or second element of the successful tort action, with the whole concept of negligence. Negligence which is "non-culpable" ought more properly be regarded as an act or omission done by one who owed a duty, but who did not breach that duty. In other words either the duty was not strong enough to have been breached or the act or omission was not severe enough to support a claim that there had been a breach of the duty owed.

The concept of so called "gross" negligence must be given some attention here because it has found favour in some of the cases discussed later, but the view maintained throughout this paper is that gross negligence is totally unjustified as a test for distinguishing between acts for which a partner is or is not to be liable.

The concept itself had its judicial origins in the law of bailment and the distinctions between gratuitous bailees and bailees for reward. The principal authority is Coggs v Bernard[47] a case decided in 1703 and which, remarkably, is reported no fewer than seven times (with varying degrees of accuracy) in the English Reports. In that case Holt C J attempted to distinguish six different types of bailment. Even then the decision was much debated and criticised and in the succeeding 250 years the concept of "gross negligence" which he expounded has variously been acclaimed and attacked.

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(47) 92 ER 107

Gresson J in Helson v McKenzies Ltd[48] made some general comments on the term "gross negligence" with which I would respectfully agree.

> Personally I think the word "gross" should be discarded altogether.... With respect, I do not think there can or should be put to a jury two issues - namely, as to negligence and gross negligence.

His Honour then cited the following passage by Atkin J (as he then was) in Newman v Bourne and Hollingsworth[49] --

> Varying circumstances in which a man might be placed might import a duty to take varying degrees of care, and omission to take the degree of care appropriate to the circumstances was negligence. Whether it was called gross or not was immaterial; negligence to be negligence at all must be a breach of duty and unless there was a breach of duty to take the proper degree of care there was no negligence.

Although the concept of gross negligence has found statutory favour in some Canadian and United States jurisdictions in relation to the liability of a driver to gratuitous passengers it has not won wide judicial acceptance[50] and the economic and social considerations[51] applicable to motor vehicle accident situations hardly seem to be justification for extending the doctrine with its invidious and illogical effects throughout the law of negligence.

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(48) [1950] NZLR 873, 924
(49) (1915) 31 TLR 209, 210
(50) see the reservations expressed by Dixon J in Insurance Commissioners v Joyce (1948) 77 CLR 39 at p55.
(51) notably hardship on generous drivers, collusion and rising compulsory insurance premiums - see Fleming on Torts 4th Ed p399.

With regard to the nature of the duty the proper choice seems to be between --

(1) An objective test of the skill and care which prudent and diligent men apply to their business affairs;

(2) A subjective test under which the duty is no more than to deal with the partnership property assets and business in the same manner as he is accustomed to use in dealing with his own affairs.

With these issues in mind the relevant cases can be analysed, but before doing so the prospect of liability under two other heads, agency and vicarious liability, will be briefly discussed. It is not proposed to fully develop arguments under either head, but merely to highlight some of the difficulties and shortcomings.

LIABILITY BASED ON AGENCY

There are a number of problems in attempting to base the liabilities of partners to each other on the law of agency.

While partners are declared in section 8 to be agents of the firm that section seems to properly apply only to the relationship of the partner and the firm to outsiders. Its effect is to make each partner an agent of the firm and give him the power to bind the firm, with the consequent rights and liabilities for the firm that flow from this. However, as between themselves it would seem that section 8 would have no application and the proper view

is that as between themselves, partners are principals[52].

This view appears to be soundly based, since section 8, while limited to relations with third parties, declares each partner to be an agent of the firm and of the other partners. Since he too is a member of the firm this would mean that he is his own agent if that relationship is to be treated as existing between the partners so far as their rights inter se are concerned.

Even more difficulty is caused by the fact that the standard of care required of an agent is not the same in all situations[53]. To assert that the rights of partners inter se are to be decided on the rules of agency would not advance the discussion far since the particular type and facet of agency would vary from case to case and even perhaps within the same partnership depending on the particular acts, omissions or dealings at issue.

(52) Lord Keith in Mair v Wood (1948) S.C. 83,90

(53) see e.g. Coggs v Bernard 92 ER 107 (though this primarily concerned bailees) and the general texts concerning the law of agency.

LIABILITY BASED ON VICARIOUS LIABILITY

A claim that one partner should alone bear a loss resulting from his negligent actions based on vicarious liability (or denial of such liability) would be based on the claim that he is in the same position as the employee in Lister v Romford Ice and Cold Storage Co.(54). This decision by a majority of the House of Lords has been the subject of considerable criticism and some judicial limitation(55), but such matters need not be delved into here for it is clear that a partner cannot be regarded as an employee of the firm. If he were an employee he would be in the impossible situation of being his own employer(56).

This, of course, does nothing to detract from the general principle when dealing with claims by outsiders the firm can become vicariously liable for the acts of its members, but this paper is concernedwith the position as between the partners once any such liability has been met. The same applies to the brief earlier comments on agency, for one partner can clearly make another liable on that basis, as is illustrated by Hamlyn v Houston & Co(56A) but this paper is concerned with the actions permissable between partners once the liability to outsiders has been met; e.g. in the above case whether the sleeping partner could, having met the firm's liability to Hamlyn attempt to recover the full amount from Houston.

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(54) [1957] AC 555
(55) see e.g. Harvey v O'Dell [1958] 2 QB
(56) Ellis v Joseph Ellis & Co [1905] 1.K.B. 324. In this case a partner was held not to be entitled to Workers' Compensation on these grounds.
(56A) [1903] 1 KB 81.

CASES INVOLVING NEGLIGENCE CLAIMS BETWEEN PARTNERS

Bury v Allen (1845) 1 Coll 589: 63 ER 556 :

It is submitted that this case is sometimes cited as authority for a much broader proposition than it in fact supports. Dr Allen took the plaintiff into partnership to operate "an establishment for the cure and treatment of insane persons". The plaintiff was to pay a substantial premium and the usual requirements as to proper books of accounts were assented to. Relations between the partners became strained because of alleged breaches by both parties; the plaintiff claimed the defendant had received large amounts of money which he had not paid to the firm's bankers. The defendant admitted this, but claimed that he was justified because the plaintiff had not paid in his instalments of capital. The defendant in turn claimed justification for his actions in the fact that delays and disputes as to valuation of the assets had delayed execution of the agreement embodying his obligation. There was also a dispute over the non-residence of the plaintiff in the firm's premises as required in the agreement and the adequacy of the accommodation provided.

The plaintiff sought dissolution, account, an injunction and appointment of a Receiver. To complicate matters further the defendant was declared a bankrupt between the commencement of the action and the hearing, and died during argument of the case.

The Vice-Chancellor, in discussing whether the plaintiff's demand for return of the portion of premium paid was a demand for unliquidated damages[57] observed that it was settled law that a

(57) an issue he did not eventually resolve

partner could claim unliquidated damages by way of compensation, but only in equity, and continued[58] --

> Suppose the case of an act of fraud or culpable negligence or wilful default by a partner during the partnership to the damage of its property or interests in breach of his duty to the partnership; whether at law compellable or not compellable he is certainly in equity compellable to compensate or indemnify the partnership in this respect.

The issue before the Court was the effect of bankruptcy on claims for damages or losses occasioned before the bankruptcy, but not capable of ascertainment until afterwards. The issue was eventually avoided. However, Lindley[59], under the heading "losses attributable to one partner's misconduct or negligence" cites the passage quoted above as authority for the proposition that before the Partnership Act a partner who was guilty of a breach of his duty to the firm must bear any resulting loss alone.

It must be noted, that the above passage was an isolated and qualified statement on an issue which was not resolved on those grounds. There was no discussion of the nature or extent of the duty owed, nor indeed of the nature of a negligence action between partners, which is hardly surprising in view of the fact that the issue before the Vice-Chancellor was the effect of bankruptcy on a claim for what were probably unliquidated damages arising from specified breaches of a written partnership agreement.

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(58) 63 ER 563
(59) 13th Ed p.450

Lindley[60] in discussing the rights and duties of partners under section 27 cites the passage from Bury v Allen as authority for the broad proposition that --

> ....a partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him.

Since Knight-Bruce V.C. had, (for the purposes of dissolution) found misconduct on the part of the defendant and plaintiff, though in varying degrees, it is difficult to agree with the reliance on the passage cited as authority for such a broad proposition[61].

It is submitted that the Vice-Chancellor was doing no more than giving a few examples of cases where a claim for unliquidated damages might be allowed only in Equity even though unliquidated damages were more usually associated with actions at Common law.

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(60) 13th Ed p.390

(61) In fairness, it should be noted that Thomas v Atherton 10 ChD 185 (discussed later p.34) is also relied upon

Cragg v Ford 1 Y+CCC 280 62 ER 889 :

Lindley cites this case, together with Re Protestant Assurance Assn, Ex p. Letts and Steer[62] as authority for the proposition that a loss resulting more from the conduct of one partner than another must be borne equally by all if the partner acting had done so in good faith, with a view to benefitting the firm, and without culpable negligence.

Ford's Case involved a claim against a managing partner that on the dissolution of the partnership he did not dispose of its goods as quickly as he might have and that a loss resulted. The claim was rejected on the grounds that the partners had equal rights and powers and in allowing the defendant to arrange the sale the plaintiff could not burden him with all the loss. At any time he was entitled to step in and conduct the sale himself. Knight-Bruce V.C. observed that had there been fraud, or obstruction of the plaintiff in an attempt to sell then he very possibly would have held the defendant liable for all the loss, but no such issues could arise because the defendant had acted honestly. Since his acts were honest and the plaintiff had equal opportunities to act the Vice-Chancellor was not prepared to consider the wisdom or otherwise of the defendant's actions. There is nowhere in the very brief judgment nor in the submissions by counsel, any mention of culpable negligence or negligence in any form.

In passing, it can be noted that situations of fraud and obstruction of management rights are now covered by sections 44 and 27(e)

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(62) 13th Ed 404-5
(63) 26 L J Ch 455

respectively of the Act.

The other case cited by Lindley in support of his view only supports his proposition in a negative sense. In holding as he did in Re Protestant Assurance Assn. Ex p. Letts and Steer[64] that where one partner is misled by a third party and he thereby misleads his co-partner so that both are equally misled the former partner is not solely liable for losses suffered as a result. Kindersley V C provides no authority for the proposition that culpable negligence would affect the situation. There was no examination of the circumstances under which the partner was misled so as to determine whether his reliance only on the word of the third party could be considered negligent, whether culpable or otherwise.

We may now turn to cases where mention has in fact been made of "gross" or "culpable" negligence. In Thomas v Atherton[65] the Court of Appeal said, without citing any authority in support[66] -

> Prima facie, damages given against one partner for a partnership act are to be paid like any other debt, but with this exception, that if the damages were occasioned by the personal misconduct or culpable negligence of one partner he alone must bear the consequences.

In that case a managing partner was refused contribution from his fellow partners for his acts which the Court considered to be culpably careless or culpably reckless. He had continued to work a mine after receiving notice that he had overstepped the

(64) 26 LJ Ch 455
(65) (1878) 10 ChD 185
(66) ibid p.199

boundary. The Court accepted that the managing partner had acted honestly throughout in believing that the issue was merely one of title as between the partnership's lessor and the land owner so that ultimately the lessor would have to indemnify the partnership. The partnership stood to gain very little from the continuation of the trespass and the Court seemingly weighed this against the risks of liability should his view be wrong.

As mentioned before the statement by the Court that culpable negligence barred a partner from obtaining contribution for a partnership act was made without reliance on any authority.

In the report of counsel's submissions the proposition was supported by a reference to Lindley and Bury v Allen which, as discussed earlier, is dubious authority for such a proposition.

The only other case put in support was Campbell v Campbell[67]. Lindley[68] also cites the case as an example of the consequences of the rule he draws from Bury v Allen. The facts of the case were that the partnership operated a brewery and in doing so breached certain exise laws. A verdict by consent was entered for £3,000. One partner who was described as "absent and ignorant" sought contribution from his fellow partners who had actively committed the breaches for his share of the £3,000 settlement all partners had consented to. The jury gave a verdict that the active partners were liable to the sleeping partner. However, much was made by the House of Lords of the

(67) (1840) 7 Cl+F 166 7 ER 1030
(68) 13th Ed p.450

fact that the defending partners never raised the issue of whether the arrangement between the partners was such that as a matter of law contribution could not be awarded.

One of the defending (i.e. active and guilty) partners then appealed for a new trial and when that was refused appealed again unsuccessfully on the ground that the verdict was not sustainable at law. He then appealed to the House of Lords and for the first time raised the argument that the transaction was not one in which as a matter of law there could be contribution. The Lord Chancellor noted(69)--

> The case here is not that the parties having been jointly guilty of the offence a joint liability is endeavoured to be raised out of those transactions; but it is that, the partnership having agreed among themselves to pay a certain sum to relieve themselves from that liability, upon that contract between themselves, one party seeks for contribution and indemnity against the others. It is unnecessary to go into that question....

The reason why it was not necessary to go into the question was because of the interpretation and reconciliation of the jury verdict and judgment on the verdict which seemed inconsistent. The jury had found the defendant parties "liable" and the Lord Chancellor held that this left it open to the Court to decide whether that meant joint or several liability. The Lord Chancellor inferred that the Court must have found the partners to be severally as well as jointly liable. The appellant was one of the defending partners who had agreed to the arrangement to settle the excise liability and the Lord Chancellor held that his

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(69) 7 ER 1038

liability was not confined to a joint liability with the others but was several also, and as such it was consistent for the Court to have declared him liable to contribute to the sleeping partner's share of the overall liability.

Thus, it can be seen that the issues in the case were primarily procedural and the crucial issue as to the nature of the arrangement between the partnership and the revenue and the partners inter se never actually received consideration by any Court. The House of Lords seemingly did no more than dismiss the appeal on the grounds that the jury and Court had been consistent. That earlier appeal rights (to the Court of Session) had been exercised without raising the grounds now raised was the misfortune of the appellant, and certainly did not win him any sympathy from the House.

The above discussion clearly shows that Campbell v Campbell cannot be cited as authority for the proposition laid down in Thomas v Atherton that personal misconduct or gross negligence by a partner means he must bear the firm's loss alone.

On the other hand, there is clear authority for the proposition that the firm must bear the losses caused by the negligence of a partner.

In Blyth v Fladgate[70] a solicitor acted negligently in checking or failing to check on the securities available for the investment

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(70) 1891 1 Ch 337

of funds he knew to be trust funds and his co-partners were also liable. The case arose just before the Partnership Act, but the result would be the same today under either section 8[71] or section 13.

The discussion of the cases thus far has shown that it is far from clear that there could be an action between partners in which partners could make one of their number solely liable for acts done by him on the grounds that he was guilty of negligence or even "gross" or "culpable" negligence. Bury v Allen, Cragg v Ford and Ex p. Letts and Steer do not support such a proposition. In Thomas v Atherton, the Court of Appeal placed "personal misconduct" (whatever that may mean) and "culpable negligence" on the same footing in asserting an exception to the rule that damages awarded against a partner for a partnership act were merely a debt to be paid like any other partnership debt. The Court cited no authority for the exception. Counsel's submissions referred only to Bury v Allen, Lindley and Campbell v Campbell, none of which are authority to support the exception.

In the circumstances reference might well be made to Halsbury in the hopes of finding some authority on the subject, but that hope would be in vain. Halsbury states in the context of section 27(b)(i) that there is no indemnity for --

> ....losses due to his own fraud or culpable negligence in the conduct of the partnership affairs.

(71) The partners in the firm were treated as each other's agents.

The only cases cited in support are Thomas v Atherton, Bury v Allen and Roberton v Southgate[72]. The latter is an often cited case, but is of no relevance to a discussion of tortious liability since it concerned allegations of fraudulent misrepresentation and the problems of procedure caused by the bankruptcy of a partner occupies most of the judgment.

Somewhat surprisingly there is one very old case which has been overlooked by text writers and judges alike. In 1785[73] Lord Mansfield gave judgement in a case where two persons had been appointed joint agents to dispose of a prize ship. The defendant conducted all of the business involved and in the course of so doing was deceived by the fraud of other persons into making payments to them. The plaintiff was seeking his full share of the profits, without deduction of a share of the monies wrongly paid and lost. The judgment of Lord Mansfield may be cited in full.

> The defendant has been guilty of negligence, and as between him and the plaintiff the latter is not liable. It is of great consequence to the public that the rule should be strictly preserved. With regard to third persons, the plaintiff and defendant are both liable.

The parties were described as joint agents rather than partners, but it would appear that they would have been carrying on a business in common with a view to profit. The plaintiff was apparently a sleeping partner.

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(72) (1848) 6 Hare 536
(73) M'Ilreath v Margetson 99 ER 880

The judgment, though brief, is interesting, particularly the observation that it was a matter of great consequence to the public. The cases arose long before notions of corporate entity and limited liability and all business operations large and small were conducted in the partnership or joint undertaking form. In none of the other and more recent cases discussed has the public effect or significance of the issue rated a mention.

There are, however, some more recent cases in which the tortious liability of one partner to his fellow partners for acts done in the course of the conduct of the business was in issue. These are Mair v Wood(74) and Huston v Burns(75).

The facts in Mair v Wood were that one of five members of a fishing partnership was injured by the admitted negligence of one of his co-partners in not replacing a shaft cover. The plaintiff originally brought an action against his fellow partners but was allowed to amend the action at the hearing so as to join himself as a defendant also, the aim being to constitute any award a partnership debt and recover four-fifths of the award from his partners. This would presumably be to his advantage if some partners were more solvent than others.

The first point to be noted is that in Scotland, notwithstanding a Partnership Act common to ours in many respects, the firm has a separate legal existence and is in fact referred to as

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(74) (1948) S.C. 83
(75) (1955) Tas L.R. 3

a company. This is a feature unique to Scots law and as such has become well known. However, the consequences are rarely spelled out so clearly as they are in the judgment of the Lord President, Lord Cooper[76] with which Lords Carmont and Russell concurred.

One of the principal consequences of the doctrine is that the firm may be a debtor or creditor of any of its partners. Partners cannot be sued for a debt unless it has first been proved against the firm. Partners are in substance, guarantors of the firm's obligations, each being entitled to recover any of the firm's debts they have met personally on a pro-rata basis from his fellow partners. Because there is only a secondary liability on the partners, there is no conflict with the doctrine or concept of confusio. Confusio is the extinguishing of a debt by the merger of debtor and creditor which may occur in many ways; for example, if the creditor inherits the estate of the debtor and vice versa. At the secondary stage the doctrine of confusio would operate so that the injured partner would only be able to recover a total of four fifths of any damages awarded to him, and this would be so even if one partner had sufficient funds to meet the judgment in full. So it would seem that a partner could raise the doctrine of confusio as a defence.

However, the action in his case failed because the plaintiff could not establish as a matter of principle that there could be any liability on a firm for damage negligently caused by one member to another.

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(76) 1948 S.C. at 86-7

Lord Cooper had this to day[77] --

> Both in Scotland and in England a firm has long been recognised as liable for wrongs committed by its partners in relation to the firm's business, this being another of the positive exceptions to the rule that culpa tenet suos auctores.

However, he continued --

> But all the examples of this rule are cases in which the party damnified by the wrong has been a third party, and I know of no formulation of the rule which would admit of a like liability where the party damnified was himself a partner of the delinquent.

The learned President noted that when the rule relating to liability of the firm for wrongs was laid down in section 13 it was limited to loss or injury caused to persons who were not partners in the firm.

However, the next observation is one which does not appear as startling today as it did to the Lord President in 1948. His Lordship noted that had the crew members been fellow employees of the owner there could have been no claim and he found it a little odd to suggest that the fact of partnership should validate it. Furthermore, he found it startling to suggest that if one member of a professional or business firm was negligently run down by a fellow partner driving on the firm's business the partnership itself should be liable .

With respect, the observations are not as odd nor startling as Lord Cooper suggests, particularly since the discrediting of the concept of common employment on which his assertion relies.

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(77) ibid 87-88

Less than 20 years later a judge[78] observed of section 13 --

> This provision in the statute was clearly neccessary for several reasons. One appreciates that a partner might be driving the motor car of the partnership on partnership business negligently and that it is desirable in those circumstances that not only he but his partnersshould be liable to the same extent as the driving partner himself.

Lord Keith delivered a separate though not dissenting judgment. In the course of so doing he considered the law of agency in relation to partnerships and noted that while partners were agents of the firm when dealing with outsiders they were to be regarded as principals as between themselves.

The doctrine of common employment was regarded by Lord Keith as applying only to the master-servant relationship and could not constitute a defence in this case if an action were possible (which, he agreed, it was not).

His Lordship did, however, consider that there are certain breaches of duty by a partner which do allow fellow partners to bring an action against him. He described these as breaches of duties owed to the partnership and the claims as claims for the loss caused to the partnership or the partners' interests as partners. He rejected the contention that any such wrong should give rise to a claim agianst the partnership as an "impossible situation" and one which would invert the rights of the parties. Of the case before him he said[79] --

> Unless possibly where some loss was sustained thereby by the partnership I consider that any such claim is a purely personal claim by the injured party against the negligent party.

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(78) Winn J In Meekins v Henson [1964] 1 QB 472,477

(79) The only authorities cited to support this are various text writers and Campbell v Campbell discussed earlier pp 35-38

Although Mair v Wood has not been the subject of judicial consideration in New Zealand it was relied upon extensively in the Australian case of Huston v Burns[80]. The plaintiff (A) was injured while travelling as a passenger of his co-partner (B) in a vehicle owned by the third partner (C) and commonly used in the partnership business. There was no dispute that the accident occured in the course of the partnership business of mining and delivering timber. A, B and C were the only partners. A sued C as owner of the vehicle and B as his agent and as driver for B's negligence in driving. The defendants raised the following defences:

(a) denial of negligence

(b) inevitable accident

(c) volenti non fit injuria

(d) contributory negligence

(e) no duty of care to plaintiff

(f) that the parties were in partnership and the accident occurred in the course of partnership business.

Crisp J found negligence proven and when asked to distinguish between the degree of negligence for civil cases and gross or culpable negligence said to be necessary before criminal punishment was possible found the negligence was of the civil standard only. In so doing specifically expressed his disapproval of attempts to set various standards of negligence. He found that there was no inevitable accident, and overruled the pleas of volenti, and contributory negligence and the plea that there was no duty of care. The issue of agency was a question of statutory agency allegedly created by the Traffic Act 1925.

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(80) (1955) Tas S.R. 3

Like Lord Keith, Crisp J considered the statements in Beven on Negligence and noted the doubts as to whether the statement of the civil law was accurate on the question of "gross", "ordinary" and "slight" negligence.

After considering Mair v Wood in some detail Crisp J cited the passage by Lord Keith relating to the duty of care owed by a partner to another being lower than that required in dealings with third parties[81] and continued[82] --

> But I would suggest that a study of the cases makes it clear that such principles were equitable and applicable only in equitable proceedings where the contractual relation of partnership was the essential element going both to jurisdiction and the substance of the suit. I have found no case in which such principles have been applied in actions at law between partners where the partnership relationship was purely incidental and not of the gist of the action, whether the cause of action be tort or otherwise....

In the case before him Crisp J held that Mair v Wood was not an authority which advanced the defendants' case. He found the partner B (the driver) liable in negligence as a tortfeasor regardless of the fact of partnership since the fact that the plaintiff and defendants were partners was entirely incidental to the action. The second defendant, partner (C) was absolved from liability in his capacity as owner of the vehicle and it follows from what has been said that he could not have been held liable in his capacity as a partner.

There were no procedural difficulties in this case because A sued B directly as driver of the vehicle and C (the only other partner) as the alleged statutory agent of the driver pursuant to the Traffic Act.

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(81) (1948) S.C. 83,90
(82) (1955) Tas S.R. 3, 11

SECTION 27(b) AND PERSONAL INJURY

In Mair v Wood[83] Lord Keith gave an illustration of the law as he understood it by reference to a shipwreck. If a partner incurred personal expenses in saving the partnership goods he would be entitled to be reimbursed by the partnership. This would presumably be because of the statutory provision in section 27(b)(ii) of the Partnership Act. The right to an indemnity would extend to medical expenses necessarily incurred. In referring specifically to medical expenses I assume Lord Keith is making oblique reference to the Civil law he had considered earlier[84]. However, Lord Keith then observed that if the partner were to lose a leg there was no principle on which the partnership would be liable to compensate him for that loss, because[85] --

> It is a loss incurred while engaged in the partnership affairs but it is a personal loss compensation for which would have no relation at all to the purposes or objects of the partnership. Illness or incapacity, apart from permanent incapacity, to carry out the partnership contract does not bring about a dissolution of the partnership nor prevent a partner sharing in its profits. Nor have I ever heard it suggested that a partner is thereby entitled to compensation. If illness or accident gives no right to indemnity from the partnership still less can it give a partner such a right where brought about by the negligence of a fellow-partner. In such a case the injured partner has a Common law remedy against the wrongdoer personally. He has none in my opinion against the partnership.

The authority relied on for this was a passage in Story on Agency, para. 341, dealing with the remedies of an agent against his principal:

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(83) 4th Ed p.1409
(84) discussed in this paper at p.19
(85) ibid p.93.

> But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate and naturally flow from the execution of the agency. If, therefore, the losses or damages are casual accidental oblique or remote the principal is not liable therefor. In short, the agengy must be the cause and not merely the occasion of the losses or damages to found a just claim for reimbursement.

Lord Keith accepted that the injury was caused by the negligence of a fellow partner while both were engaged in the business of the partnership. However, the partnership relationship was merely the occasion of the loss and not the cause, and the action on grounds of reimbursement failed also.

Crisp J (85A) at pages 13-15 discussed the view put forward by Lord Keith and the support given by Lord Cooper in his remarks that it would be startling if all members of a professional partnership were to be liable in the event of one running down another while driving on the firm's business.

In the event Crisp J did not have to formally follow this view though he undoubtedly approved it.

There is much to commend this approach. Firstly, section 27(b) only entitles a partner to reimbursement in respect of payments made and personal liabilities incurred by him. A partner who is injured by the negligence of a fellow-partner can hardly describe his injury as a "payment made" or a "liability incurred" by him.

However, in the event of his being successful in an action against

(85A) Huston v Burns (1955) Tas SR 3

the negligent partner personally might not that partner then turn to the partnership (or firm) of which both he and the plaintiff are members and claim an indemnity in respect of the payment made or liability incurred by him?

In that case the objection would surely be raised that a negligent act could not have been done[86] "in the ordinary and proper conduct of the business of the firm", but this is an argument of doubtful validity.

In their comments on section 27(b)(i) or its equivalent the text writers usually exclude only "gross" negligence from the right to an indemnity. As has been noted earlier the concept of "gross" negligence finds little favour with the courts today. Thus, it seems possible that while a partner might not be able to make his fellow partners directly liable for damage or injury caused to him by one of their number, all may be required to contribute if the partner found personally liable subsequently calls upon the firm to indemnify him. One effect would be that the plaintiff would also have to contribute in his capacity as a member of the firm. No doubt there would be a dispute as to whether the negligent acts could be within the "ordinary and proper" conduct of the firm's business, but this would be an issue to be decided in each particular case on the facts. However, in Mair v Wood it would seem to have been in the ordinary and probably in the proper conduct of the business of the firm for the skipper to lift the floor covering to clear the boat's propellor. Indeed this was probably the only way it could be done. Assuming that the boat was part of the

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(86) S27(b)(i)

partnership property then the other limb of section 27(b) might also be invoked since the unfouling of the propellor of a fishing boat at sea would surely be an act necessarily done for the preservation of the property of the firm and raising the floor-boards to do so would be an act "in or about" this.

If this be the case then Mair may have succeeded against Dr Wood for four-fifths of his claim if he had sued the skipper and won and the skipper had then called on the firm, including the plaintiff and Dr Wood (who was the only one of substance) to indemnify him.

Section 13 is of course not relevant and indeed constitutes an implied authority to the contrary in that it refers only to the firm's liability for wrongs caused to non-members of the firm.

The answer to the particular example may be that the facts disclose no negligence at all, that there is no liability on the skipper and consequently no call for indemnity by the firm, since the Court of Session merely assumed negligence had been proved for the purposes of argument. It may be that the negligence lay in the omission to replace the covers after repairs had been completed and that omission was not in the ordinary and proper conduct of the firm's business, nor necessarily done for the preservation of the firm's business.

The Mair v Wood type situation is, of course, unlikely ever to be tested in New Zealand in view of section 5 of the Accident Compensation Act 1972. However, it is not at all difficult to frame an

example where these objections could not be raised, particularly for property damage where a partner makes premises, vehicles or other property available for use by the partnership, but retains ownership of them and they are damaged by the acts of a fellow-partner in the ordinary and proper conduct of the firm's business, or even acting out of necessity to protect or preserve the business of the firm, or property of the firm which may be in the premises or vehicle.

A further objection might be raised that the liability incurred by the negligent partner is not incurred in a way to make the firm liable to indemnify him by virtue of parts (i) or (ii) of section 27(b), but is incurred only when he is proven to have been negligent. This argument appears doubtful and could be countered in cases where a settlement had been agreed upon, because the settlement could properly be regarded as necessary to preserve the firm's business.

THE POSITION IN THE UNITED STATES

Despite the objections to the concept of "gross" negligence mentioned earlier it has found favour in some Canadian and United States jurisdictions. Crane and Bromberg on Partnership at p.395 made the following statement amply supported by authority --

> Although a partner owes a duty of faithful services to the best of his ability he is not held to possess the degree of knowledge and skill of a paid agent. In the absence of special agreement, no partner guarantees his own capacity. He is not liable to his partnership for the whole burden of losses caused by errors of judgment and failure to use ordinary skill and care in the supervision and transaction of business.

Most of the authorities cited for the above propositions make reference to the fact that a partner is not liable unless he is guilty of "fraud, bad faith, or culpable negligence". In one,(87) reliance is placed on Lindley for the following --

> He can only be held liable for the loss, if any, upon proof that he has been culpably negligent. even if a loss sustained by a firm is imparted to the conduct of one partner more than to that of another. Still, if the former acted bona fide with a view to the benefit of the firm and without culpable negligence, the loss must be equally borne by all.

The statment of the law in this form is open to the many objections raised earlier, but it may not be as far removed from the English Common Law as might first appear. When Higgins(88) states, (citing only Beven on Negligence 4th ed. para. 1409 as authority) that(89) --

> Where, however, a partner suffers damage caused by his co-partner's negligence it does not necessarily follow that he will have a right of action against his co-partner. Clearly, if a partner causes loss to the firm merely because of

(87) Knipe v Livingston 209 Pa 49 57 A 1130 (1904)
(88) Higgins & Fletcher, The Law of Partnership 3 ed
(89) ibid p273-4

> his lack of skill and experience he is not answerable to his co-partners by reason of that fact alone

he may be doing no more than stating that such actions do not constitute a breach of the duty owed by the partner because that duty is so light. In other words it is only conduct which is so culpable or gross as to amount to what some choose to call "gross" negligence that can be regarded as a breach of that duty. This point is developed further in the next and final section.

SUMMARY

Duty of Care

It is frequently stated that there is a duty of care owed by each partner to his fellow partners. In some situations this has found statutory expression and in others it is best described as a corollary of the general duty of uberrima fides or utmost good faith that must exist between partners.

Standard of the Duty

The concept of gross negligence is one which, in the writer's opinion, should not be applied in this area. The concept itself is of doubtful utility, and the cases such as Bury v Allen, Cragg v Ford, and Thomas v Atherton, either do not support the proposition asserted by some text writers, or, to the extent that they do (only Atherton's Case) are themselves lacking authority in support[90].

It is submitted that the proper view is that the standard of duty of care required of a partner is subjective so that it takes a "gross" act to constitute a breach of the duty. The standard required appears to be no more than that the partner must, in relation to the partnership affairs, exhibit only the same degree of skill and care which he exercises in his own affairs, and act in good faith, (or not act in bad faith) in what he believes to be the best interests of the partnership.

(90) supra p.38

Remedy Where the Duty is Breached

The procedural difficulties involved in actions between partners and the effect of Meyer's Case have been discussed at some length in this paper[91], as have the observations made in Mair v Wood[92]. While a partner may have considerable procedural difficulties in bringing an action against the firm of which he is a member, and likewise the firm will have considerable difficulty in bringing an action against one of its own number, it does not appear that a partner who suffers a personalloss at the hands of a fellow partner would encounter immediate procedural difficulties in bringing an action, though whether or not he would succeed is another matter. There is no rule preventing actions between partners, merely a procedural anachronism which prevents the use of the firm name in that situation.

It is clear from Huston v Burns[93] that a partner may sue another for matters merely incidental to the partnership relationship.

Where the matter does relate to partnership affairs or they are "the gist of the action" such as professional negligence causing loss to the members of the firm due to the operations of sections 13 and 15, a partner who chooses to bring an action against one of his fellow partners would not appear to breach the rules which would prohibit a person being both plaintiff and defendant in the same action. The plaintiff is, of course, likely to be met with the defence where the act complained of was one which the firm,

(91) supra p. 15 et seq
(92) supra pp 20, 40-45
(93) supra p. 44 et seq

including the plaintiff, ought to indemnify the defendant, under section 27(b), or that the loss is a firm loss and as such ought to be borne equally by all the members - section 27(a).

Examples

It may be helpful to clarify the situation by use of some examples. Where partner A (of the partnership consisting of A, B, and C) is driving truck X belonging to the partnership, his negligent driving causes him to collide with truck Y which is also owned by the firm, and car Z which is the personal property of his partner B --

(i) B has an action against A personally for the damage caused to car Z - (Huston v Burns)[94]. A then seeks an indemnity under section 27(b). Is his negligent conduct in the ordinary and proper conduct of the business of the firm? Lindley suggests that anything short of gross negligence is entitled to indemnity. Although the use of the concept of gross negligence as a dividing line has been shown to have many faults, this does not detract from the general principle. Cases such as Ex.p.Letts and Steer[95] and Cragg v Ford[96] are illustrative of the principle that an indemnity may be claimed in cases where conduct is perhaps reprehensible but falls short of being a breach of the duty owed by one partner to antoher. Thus, partner A will be personally liable to B for the full amount but entitled to

(94) supra p.44
(95) supra p.34
(96) supra p.33

claim an indemnity from C and the plaintiff B of one-third in each case. The indemnity payments by the firm then become losses of the firm and if they result in a net loss for the year then this would have to be borne equally between the partners - section 27(a).

(ii) The insurance company which insured ABC Company's property wishes to sue A for the damage he has caused to vehicles X and Y. It cannot do so in the name of ABC Co. (Meyer's Case) because that would have the effect of making A both plaintiff and defendant.

B and C then attempt to recover from A the damage caused to vehicles X and Y. They can succeed as individuals who have suffered a loss - the loss in each case being one-third of the value of the damage to the firm's property in which they have an interest. A would then call on them for an indemnity of the full amount of the damages awarded. Since he has not breached the duty of care owed between partners the indemnity would be available and the net effect would be that the partners would again share the loss equally. Thus, for B and C it would be a very hollow victory.

(iii) If A is driving his own car on matters totally unconnected with the firm's business and negligently collides with a vehicle which happens to be owned by his firm his firm may not sue him for the damage caused to the vehicle. However, following the suggestion of

the Master of the Rolls in Meyer's Case[97] the co-partners could sue in their own names and recover proportionate shares of the damages. Section 27(a) may have a very peculiar application in this situation. If the damages amount to say $3,000, B and C would each be able to recover $1,000, but since the property was the firm's property they would have to pay those damages over to the firm. Assuming the other affairs of the partnership resulted in a nil balance at the end of the year, the firm would then be in a $1,000 loss situation. Such a loss would then have to be contributed to equally by the partners pursuant to section 27(a). Thus, A is liable for a further $333 on top of the $2,000 already paid. Both B and C must contribute a further $333 in addition to the monies they have recovered from A and paid over to the firm account.

These examples can be carried over to the field of professional negligence. If a partner is not in breach of the duty to act as he would in his own affairs, then seemingly he is entitled to the indemnity. It is difficult to reconcile "ordinary and proper conduct" with the concept of negligence but the correct way to view conduct which is not so "gross" as to constitute a breach of the duty, is that it is not negligent at all. That partner is apparently assumed to run the risks of the behaviour of his co-partners so long as these fall short of the breach of the standard duty of care. Lord Keith noted in Mair v Wood[98]

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(97) supra pp 17-18
(98) supra p.20

that --

> This right to reimbursement [under s27] is plainly measured by a different standard from that applicable to damages for negligence.

But, it may be possible to combine the two in the sense that conduct in the performance of the affairs of the partnership is considered to be ordinary and proper conduct of those affairs so long as it is carried out by the partner with the same degree of diligence and care as he applies to his own affairs. In other words, the subjective test applies to the meaning of "ordinary and proper"also. Thus, where a firm has very lax accounting procedures and the partners run their own affairs in the same loose fashion, it may be in the ordinary and proper conduct of the business of the firm to run up losses merely by failing to collect debts owing. In another case this may be a breach of the duty owed by the responsible partner to the firm and consitute conduct which is not "ordinary and proper".

In relation to section 27(b) it must always be remembered that it covers only payments made and personal liabilities incurred and does not extend to "losses suffered".

CONCLUSION

In brief, the conclusion reached in this paper is that a partner cannot be forced to bear alone any loss resulting from his actions so long as he has acted in good faith in what he believes to be the best interests of the firm and with the same degree of diligence and care that he would exhibit in his own affairs. As long as his conduct is within this subjectively defined area, his co-partners by joining in business with him must be treated as accepting risks up to that point. They are prima facie entitled to participate in the management of the firm's business themselves[(99)] and entitled to access to the partnership books[(100)].

However, no partner has free rein to do as he wishes and yet saddle the partnership with the consequences. If his conduct is such that it falls below the standard set by the members of the firm having regard to their personal and partnership activities and abilities, then he may be held personally liable for the consequences.

The distinction is between the inefficient unqualified partner who makes a mess of every set of accounts he handles including those of the partnership because of his personal lack of ability, and the generally efficient partner (perhaps an accountant) who neglects to keep the same partnership books in a proper fashion. The first need not bear alone the whole of any loss resulting from his conduct, but the second is liable to his fellow partners. The duty owed by each is the same, but in the second case the standard is higher and thus perhaps more easily breached.

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(99) S27(e)
(100) S27(i)

This difference cannot be taken too far, because the accountant member of the partnership must still be judged on a subjective basis and cannot automatically be held liable merely because he has not performed up to some objective standard set by his profession.

Probably the only way the first partner could be held liable would be if he had represented or held himself out to the other members of the partnership as having greater skills than he in fact possessed. If this constituted conduct entitling a party to rescind the agreement on the grounds of misrepresentation then he may be forced to indemnify that party against <u>all</u> the debts and liabilities of the firm(101). It is not the purpose of this paper to analyse the law as to when misrepresentation entitles an innocent party to recission, but it should be noted that the latter is far from being an automatic consequence of the former.

(101) S44(c)

REFORM OF PROCEDURAL DIFFICULTIES

The discussion of the procedural difficulties has shown that there is nothing to prevent partners as individuals bringing an action against a fellow-partner or partners irrespective of whether the action directly involves partnership activities or matters in which the fact that they happen to be partners is merely incidental.

However, it is not possible for a firm to bring an action against one of its partners. This seems to be an unnecessary procedural limitation even though it does flow logically from the Common law and statutory denial of the existence of the firm as a separate legal entity.

There may be certain circumstances in which a partner may not be able to sue; e.g. if he has died or is out of the jurisdiction, or has been specifically barred as a hostile alien, as in Meyer's Case. Since where partnership property is involved each partner can only sue in respect of his share in that property a wrongdoer may be able to escape full liability for his wrongdoings.

The rules of Court permit actions by and against either firms or members of them and all that is needed is an alteration to the rules to enable the firm to sue some of its own members without being prohibited on the grounds that such member or members would be both plaintiffs and defendants. Implicit in this is a recognition of different status, but this need not mean that the partnership must for anything other than procedural purposes be treated as a separate legal entity. There would be no need to

disturb the rules relating to the substantive liabilities and rights of partners.

Since 1960 trustees have been able to sue themselves in a different capacity[102], and while not for a moment wishing to suggest that the law relating to trustees powers to sue and be sued are of direct relevance, it is suggested that section 33A might be adopted into the Partnership Act with appropriate amendment to read --

> Notwithstanding any rule of law or practice to the contrary a firm may sue and be sued by one or more of its members.
>
> Provided that in every such case the parties shall obtain the directions of the Court in which the proceedings are taken as to the manner in which the opposing interests are to be represented.

This would not unduly disrupt established concepts and would still mean that a partner who was on the opposite side to his firm would himself be liable to contribute his share as a member if he were successful against the firm; while if the firm succeeded in an action against him his liability would be reduced by the extent of his interest in the firm.

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(102) S33A Trustee Act 1956

rx CO COCHRANE, D.J. The right of a partner to bring an action against a co-partner...