

the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

In order to take the case out of the rule laid down . . . it is necessary to find the conscious act of another volition, which I understand to be a deliberate and intentional wrongful act, something which quite exceeds and goes beyond mere negligence on the part of that other. The last case referred to clearly indicates that this principle applies even where a high standard of obligation is created by reason of the dangerous nature of the substance under the defendant's control which either brings the case within the rule of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, or necessitates such a degree of care as to amount almost to an insuring of safety. . . .

[Reference to *Sullivan v. Creed*, [1904] 2 I.R. 317.]

For these reasons, I think the plaintiff is entitled to recover against both defendants.

I have much difficulty in considering the rights of both defendants as between themselves. Where two defendants are held liable because each has been guilty of an act of negligence which is a proximate cause of the injury, can there be any right on the part of either to claim indemnity against the other?

The case, as I have already indicated, is not one falling within the principle of *Merryweather v. Nixan* (1799), 8 T.R. 186, for there the tort was joint; but I think the principle is of wider application; for what that case really determines is, that the fact of a recovery against two defendants for a tort for which they are both responsible does not of itself create a right to contribution or indemnity, even if the plaintiff elects to obtain payment solely from one. This law has been modified so as to permit contribution or indemnity if, apart from the fact of the plaintiff's recovery and the payment by one, there can be found any ground upon which to base either contribution or indemnity, so long as the contract, express or implied, upon which the right is based, is not itself unlawful or in contravention of public policy. See *The Englishman and The Australia*, [1895] P. 212; *Dugdale v. Lovering* (1875), L.R. 10 C.P. 196; *Toplis v. Granes* (1839), 5 Bing. N.C. 636; *Betts v. Gibbins* (1834), 2 A. & E. 57; *Corporation of Sheffield v. Barclay*, [1903] 1 K.B. 1.

I am, therefore, unable to give either contribution or indemnity as between the defendants. I would, however, suggest that the plaintiff would be doing nothing more than what is