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Franks, Contribution and Indemnity Among Tortfeasors

CONTRIBUTION AND INDEMNITY AMONG TORTFEASORS¹

I. INTRODUCTION

A. CONTRIBUTION—INDEMNITY; DEFINED, DISTINGUISHED

The remedies used to achieve the allocation of the loss between two or more persons jointly liable for harm caused to a third person are denominated "contribution" and "indemnity." Contribution is the payment by each tortfeasor of his *proportionate share* of the plaintiff's damage to another joint tortfeasor who has paid more than his proportionate share. For example, if *A* and *B* were joint tortfeasors and *A* were held liable to plaintiff *C* for \$1,000, *A* would have a right to contribution from *B* in the amount of \$500.² Indemnity is the payment of *all* of plaintiff's damages by one tortfeasor to another tortfeasor who had previously paid the plaintiff for his damages.³ In the example used above, if *A* were held liable to *C* for \$1,000, *A* could secure a judgment for the entire \$1,000 amount from *B*. Contribution apportions the loss among those jointly responsible; indemnity shifts the entire loss to the tortfeasor primarily responsible.⁴

B. "JOINT TORTFEASORS"—INADEQUACY OF TERMS

The principals in cases involving non-contractual⁵ contribution and indemnity are generally referred to as "joint tortfeasors." The term used in this connection is an unfortunate choice, because it lacks precision. It connotes ideas that are unjustified, sometimes inaccurate, and generally misleading. The word "joint" implies concert of action,⁶ but rarely is contribution or indemnity permitted where there has been

¹See generally, PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 47, 48 (3d ed. 1964) [hereinafter cited as PROSSER]; 1 HARPER AND JAMES, THE LAW OF TORTS, § 10.2 (1956) [hereinafter cited as HARPER & JAMES].

²The ratable share is the more common measure of contribution, however, a few jurisdictions permit an apportionment of the amount relative to the tortfeasors' comparative negligence. The more common approach is stated in 18 C.J.S. *Contribution* § 1 (1939); ". . . ratable or proportional reimbursement is sought . . . in contribution." For the less common approach, see *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962), discussed *infra* at note 49.

³Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 151, (1947) [hereinafter cited as Hodges].

⁴Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV. 59, 60 (1965) [hereinafter cited as Sherk]. But as will be seen, the language employed in these definitions is deceptively simple, and the application of the principles of contribution and indemnity is fraught with problems.

⁵Those obligations of contribution and indemnity grounded in contract are not within the scope of this paper. For Montana's statutes on the consensual or contractual obligations, see R.C.M.1947, GENERAL INDEX, under "contribution" and "indemnity."

⁶HARPER & JAMES at 692. Strictly speaking "joint tortfeasor" should only be applied to a party who acts in concert with one or more other tortfeasors, making it proper to treat the conduct of each as the conduct of the others as well.

concert of action.⁷ The word "tortfeasor" means wrongdoer, but frequently the party granted one of the two remedies is neither guilty of a moral or social wrong,⁸ nor is he a doer, having committed no act.⁹ So as the term "joint tortfeasor" is used herein, unless otherwise qualified by context, it should be read only to denote one who is in law jointly and severally liable with one or more others to a third person.¹⁰

II. CONTRIBUTION¹¹

A. BACKGROUND OF GENERAL RULE¹²

Historically, the courts of the United States and those of England, have had little sympathy with the plight of wrongdoers in the adjustment of their affairs.¹³ Prosser¹⁴ cites the *Highwayman's*¹⁵ case as illustrative of the early courts' attitude toward a plaintiff who sought contribution based upon what was his own deliberate wrong. In that case, one highwayman sued another for an accounting of their plunder. The court dismissed the suit with costs to be borne by the defendant; the plaintiff's solicitors were fined fifty pounds each for contempt, and both the plaintiff and the defendant were hanged. "In short, contribution was not allowed."

The rule denying contribution apparently had its genesis in an English case, *Merryweather v. Nixon*,¹⁶ decided in 1799. In that case two

⁷If indeed there are examples of a party's establishing a right to contribution or indemnity when he has acted in concert with the defendant, thereby injuring a third person, such examples are rare. The more common situation involves the party who is liable though not negligent, or if he is negligent, his negligence has *concurred* with that of another to injure a third person. See, note 10 *infra*.

⁸Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORN. L. Q. 552n.1 (1936) [hereinafter cited as Bohlen].

⁹*Id.* Bohlen goes on to say that liability is often imposed where the conduct which subjects him to liability is not his own, nor done at his direction.

¹⁰Perhaps the overbreadth of the present terminology can be made more intelligible by noting Sherk's classifications of tortfeasors who are jointly and severally liable. They fall into four general categories: (1) Those who act in concert and thereby harm a third person; (2) those who each violate a common duty to a third person and thereby harm him; (3) those whose negligence concurs to cause injury to a third party; and (4) those who are held vicariously liable, or whose liability is imposed by law as the result of another's negligence. Sherk at 62. At the common law where there was no right of contribution or indemnity under classes 1. and 2., and usually not under class 3. Under class 4, however, indemnity was generally allowed. There is a genuine need for terminology purged of the many inapplicable connotations of "joint tortfeasor." At the risk of being presumptuous, it is suggested that "collective liablors" might serve to fill the need. Because the phrase does not appear to have current usage elsewhere in the law, by definition the inapplicable connotations of "joint tortfeasor" might easily be proscribed.

¹¹See generally, Bohlen, *supra* note 8; Hodges, *supra* note 3; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932) [hereinafter cited as Leflar].

¹²See generally, Leflar; Annot., 88 A.L.R.2d 1355-57 (1963).

¹³Hodges at 150.

¹⁴PROSSER at 273-74 n.38.

¹⁵Everet v. Williams, Ex. 1725, 9 L. Q. REV. 197 (1893).

¹⁶8 Term R. 186, 101 Eng. Rep. 1337 (K.B. 1799).

tortfeasors had committed an intentional tort. One of them satisfied a judgment in favor of the injured third party, and then sued for contribution from his co-tortfeasor. In rendering judgment, Lord Kenyon non-suited the plaintiff, saying in effect that no contribution could by law be claimed as between joint wrongdoers on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant.¹⁷ Since this decision “. . . it has been an established principle of the common law that, as between joint tortfeasors, there is no right of contribution. . . .”¹⁸

B. BASES¹⁹ OF THE GENERAL RULE—CRITICISM²⁰ THEREOF

The public policy considerations supportive of the general rule are four in number:²¹ 1. tort law is a punitive force for discouraging anti-social conduct, and a denial of contribution serves to deter the commission of wrongful acts; 2. the principle from equity appertains that a plaintiff seeking redress for losses based upon his own fault is barred; 3. the law has no scales to determine the relative guilt of the parties; and 4. contribution is impractical in terms of judicial expenditures of time and expense. In rebuttal to the first policy consideration, it is argued that for the rule to be a deterrent, the would-be tortfeasor must: 1. have knowledge that the conduct he is about to engage in is wrongful; 2. he must recognize the likelihood of injury resulting from a concurrence of negligence from a co-tortfeasor; and 3. he must know of the rule denying contribution. Hence the deterrent force is only theoretical, not practical.²² Furthermore where a would-be tortfeasor knew of the no-contribution rule, he might actually be encouraged to tortiously act in that he would recognize a possibility of escaping all liability. This “sporting chance” mentality is common to wrongdoers as a class, and

¹⁷*Id.*

¹⁸Annot., 60 A.L.R.2d 1366, 1368 (1958). The general rule is stated in *Fidelity & Casualty Co. of New York v. Chapman*, 167 Or. 661, 120 P.2d 223, 225 (1941): In the absence of statute the general rule is that there can be no contribution which rests on compulsory payment, between or among joint tortfeasors, it being against “public policy” for courts to determine the degree of culpability between wrongdoers, and the law, under such circumstances, leaves the parties where it finds them. Put more succinctly: “Apart from statute, the general rule, based on considerations of public policy, is that there can be no contribution between tortfeasors.” 18 C.J.S. *Contribution* § 11a (1939). The RESTATEMENT OF RESTITUTION § 102 (1936), also supports the general rule, with the following language: “Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other.”

¹⁹See generally, James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941) [hereinafter cited as James].

²⁰See generally, Bohlen; Leflar; Hodges; and Gregory, *Contribution Among Joint Tortfeasors*, 54 HARV. L. REV. 1170 (1941) [hereinafter cited as Gregory].

²¹Bohlen at 557; Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COL. L. REV. 123, 124 (1965) [hereinafter cited as *Rule in Federal Courts*].

²²Bohlen at 558.

hence, some might be more willing rather than less willing to engage in wrongful activity.²³ And even if one assumes the deterrent value of the general rule, one argument postulates that the theory of tort law itself has given way from one of deterrence to one of compensation, and as tort becomes emancipated from the penal or fault character, contribution should be extended.²⁴

The second policy reason advanced in support of the majority rule is that a wrongdoer is, and should be, denied access to a legal forum for redress of a legal wrong. This argument is not based upon a legal principle of any consistency.²⁵ There are many cases in which negligent plaintiffs are allowed to recover.²⁶ The third reason advanced for the rule, namely, that the law has no scales to determine relative guilt, has been refuted by experience.²⁷ And the fourth reason given for the rule, that the courts have no time to adjust the equities among wrongdoers, is attacked as being more of an epithet than a reason. This "reason" merely states a dislike for a certain type of litigation, but it does not indicate satisfactorily why such causes are not deserving of a decision. The argument that the courts are overburdened is not thought to be of sufficient weight to bar meritorious causes from adjudication.²⁸

In addition to the policy considerations, proponents of the general rule have advanced strong practical arguments in support of their position. Included in their arguments are the following:²⁹ 1. because contribution makes the litigation more complex, it makes settlement less feasible; 2. with the defendant having a right to implead, plaintiff is deprived of control over the litigation, and defendant is empowered to hale into court co-tortfeasors whose presence is highly prejudicial to plaintiff's cause; and 3. a socially undesirable allocation of loss is often achieved where an insured tortfeasor is allowed to seek contribution from one who is uninsured, and who is unable to distribute the loss.

Those favoring contribution view the practical arguments somewhat differently from those favoring the general rule. Courts have said that rather than impede settlements, a departure from the common law rule

²³Leflar at 133-34.

²⁴HARPER & JAMES at 717.

²⁵Bohlen at 559. *Hobbs v. Hurley*, 117 Me. 449, 104 A. 815 (1918), the court said the rule denying a founding of a cause of action on "one's own wrongdoing" had no application to negligence cases.

²⁶*E.g.*; those cases in which the plaintiff properly invokes the doctrine of last clear chance, and in those cases notwithstanding his own negligence, the plaintiff is permitted recovery.

²⁷Bohlen at 559.

²⁸Leflar at 134.

²⁹HARPER & JAMES at 717. *See also* James at 57.

would actually facilitate compromise.³⁰ The argument that a disadvantage would accrue to the plaintiff in the litigation as a result of a right of contribution has been met with the contention that if such disadvantage exists, it is offset by the assistance plaintiff would receive from the tortfeasors who, coming into court by impleader, would be moved to demonstrate the liability of their fellow wrongdoers.³¹ And finally, it is argued that as allocation of the burden of loss is now the function of tort liability, distribution of the loss in a manner least detrimental to society can be better achieved through contribution than through its denial.³²

Those favoring contribution further assert that the common law rule, which gives the plaintiff an arbitrary power to exempt chosen tortfeasors from suit, encourages collusion. Were contribution allowed, this corrupting possibility would be eliminated.³³ Even in the absence of collusion, it is unjust that an injured person by his whim can force the entire loss upon one of two or more tortfeasors who is unintentionally responsible. The choice is the more unjust when it is determined by the tortfeasors' comparative solvency rather than their comparative culpability.³⁴ Permitting contribution would eliminate the unjust enrichment of the non-paying co-tortfeasors, who though equally liable, go scot free.

C. EXCEPTIONS TO THE GENERAL RULE

Although the common law rule is subject to much criticism and to many exceptions,³⁵ the courts have been nearly unanimous in their continued denial of the right to contribution among intentional tortfeasors.³⁶ Only where the tortfeasors have acted willfully or intentionally are the commentators, too, generally in favor of the common law rule.³⁷

³⁰*McKenna v. Austin*, 77 App.D.C. 228, 134 F.2d 659, 148 A.L.R. 1253 (1943). See also, *Bielski*, *supra* note 2, which discounts the idea that settlements are discouraged by the minority rule permitting contribution.

³¹*Rule in Federal Courts* at 125.

³²*Bohlen* at 554; *Gregory* at 1188; *Bielski*, *supra* note 2.

³³*Rule in Federal Courts* at 125.

³⁴*Bohlen* at 552.

³⁵*Leflar* at 130 says, ". . . it has been argued that the exceptions are so numerous that there can no longer be said to be any general rule denying contribution"

³⁶*See, E.g., Rusch v. Korth*, 2 Wis.2d 321, 86 N.W.2d 464 (1957). Wisconsin is a leading minority jurisdiction, having adopted the right to contribution in certain circumstances in *Ellis v. Chicago & N.W.R. Co.*, 167 Wis. 392, 167 N.W. 1048 (1918). It also has determined that the measure of the sum contributed will be apportioned with regard to the comparative culpabilities of the tortfeasors. *Bielski v. Schulze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962). Yet Wisconsin applies the general rule to tortfeasors whose wrongful conduct was willful or intentional; and it also denies the right of contribution to one grossly negligent, as illustrated by *Rusch v. Korth*, *supra*.

³⁷Even the RESTATEMENT OF RESTITUTION (1936), which supports the general rule—see note 18 *supra*—is less than enthusiastic about the general rule. In Comment a to §102, it is noted that the rule denying contribution between negligent tortfeasors is ". . . explainable only on historical grounds."

The general displeasure with a blanket application of the rule has resulted in numerous exceptions which can be generically classified into four groups.³⁸ The first group includes active non-negligent tortfeasors who have no wrongful intent. Within this group are tortfeasors who intentionally and non-negligently do an act that turns out to be tortious, though they did the act in good faith thinking it legal. An example would be an attachment by two or more creditors levied upon property which turned out to belong to someone other than the joint debtor. The attaching creditors are subject to a tort action for wrongful levy of attachment, and contribution between them is generally permitted.³⁹ The second class of exceptions might be labeled "technical tortfeasors." A technical wrongdoer is generally allowed to recover from an actual wrongdoer. An example of a technical tortfeasor is the principal who has been held liable for the tort of his agent, the liability deriving from the principle of *respondeat superior*.⁴⁰ The third exception is comprised of tortfeasors who are merely negligent as opposed to those who are grossly negligent or who act with wrongful intent.⁴¹ And finally, the fourth class of exceptions to the common law rule denying contribution is created by statutory enactment.⁴² Approximately half the states permit contribution among joint tortfeasors by statutory enactment.⁴³

³⁸See 18 C.J.S. *Contribution* § 11b (1939).

³⁹Leflar at 140.

⁴⁰Although this situation is a proper one for compensation to the party only technically liable, it is more appropriate to allow indemnification rather than merely contribution. See, e.g., *Popejoy v. Hannon*, 37 C.2d 159, 231 P.2d 484 (1951).

⁴¹See, e.g., *Huggins v. Graves*, 210 F. Supp. 98 (D.C.E.D. Tenn. 1962). The court held that the right of contribution existed under Tennessee law as between negligent joint tortfeasors in the absence of willful or wanton negligence on the part of the party seeking contribution. Or see *Blunt v. Brown*, 225 F. Supp. 326 (D.C.S.D. Iowa 1963), which recognized the rule in Iowa allowing contribution between negligent tortfeasors whose negligence concurred to injure a third party.

⁴²The New York statute permitting contribution among joint tortfeasors is cited as an example: N.Y. C.P.L.R. § 1401 (McKinney) (Supp. 1969-70). "Action by one joint tort-feasor against another: Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action, or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action."

See also the California statutory law permitting contribution, and the rules therefor, CAL. CIV. PRO. §§ 875-80 (West) (Supp. 1968-69).

⁴³See HARPER & JAMES at 719, for a collection of jurisdictions. Several of those states allowing contribution have adopted the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT 9 U.L.A. (1939). Sherk at 50, lists eight jurisdictions as having adopted the ACT. For a discussion of the ACT, see Annot., 34 A.L.R.2d 1107 (1954).

D. CONSIDERATION OF PROBLEMS ATTENDANT TO THE MINORITY RULE

Where contribution is permitted, three obvious considerations arise. "What are the conditions prerequisite to the right," "what are the defenses to it," and "what is the measure of recovery"?

It has been said generally that prerequisite to the right of contribution,⁴⁴ 1. both parties must be judged negligent wrongdoers; 2. they must have a common legal liability⁴⁵ because of such negligence; and 3. one party must have borne a disproportionate share of the common burden. As a further proviso to the first element, generally, the negligence can only be technical or ordinary; it cannot be gross.⁴⁶

Where one resists suit for contribution, he may make use of defenses common to other actions in tort law; for example, the running of the statute of limitations. In addition there are defenses deriving from the relationship of one of the joint tortfeasors with the injured person. Defenses of this category bar suit for contribution by one tortfeasor against another by reason of status. A status defense is illustrated by the following example: Tortfeasor *A* seeks to obtain contribution from co-tortfeasor *B* for a judgment *A* has paid to the injured party *C*. But because *B* is *C*'s father, the intrafamily immunity doctrine bars *C* from bringing suit against *B*, and although *B* was a joint tortfeasor he has no liability to *C*. Since there must be a common liability to the injured party for the right of contribution to exist between them, *B* can plead this "status" defense and defeat *A*'s suit for contribution.⁴⁷

The measure of contribution presents another problem. Generally, the damages are shared equally among the tortfeasors rather than apportioned among them based on their comparative negligence.⁴⁸ But

⁴⁴See *Wirtzinger v. Jacobs*, 33 Wis.2d 703, 148 N.W.2d 86 (1967), which lists the elements noted in the text. With regard to the first element, that of negligence, it is generally held that the negligence must concur to cause the injury, but that the acts are not simultaneous but rather successive, does not mean that contribution is improper. *Cokas v. Perkins*, 252 F. Supp. 563 (1966).

⁴⁵This element has been criticized. See *HARPER & JAMES* at 718. "If the purpose of contribution is to make wrongdoers share the financial burden of their wrong, then the primary element of contribution should be the participation of the wrongdoers in acts or omissions which are considered tortious and which result in injury to a third person. The fact that one of the tortfeasors has a personal defense if he were to be sued by the injured party would seem to be irrelevant."

⁴⁶See, e.g., *Blunt v. Brown*, *supra* note 41; and *Huggins v. Graves*, *supra* note 41.

⁴⁷For a discussion of personal defenses unrelated to status, see *Annot.*, 60 A.L.R.2d 1366, 1368-88 (1958). For a discussion of "status" defenses, see *generally*, *id.* at 1384-86; for a more detailed treatment see *Annot.*, 19 A.L.R.2d 1003 (1951). Another example of a status defense is that of an employer of an injured workman protected by the Workmen's Compensation Acts, see *generally* *Annot.*, 53 A.L.R.2d 977 (1957); another status defense is that enjoyed by the driver of an automobile protected from suit by the injured passenger by a Guest Statute. Note the criticism of these defenses, *supra* note 45.

this approach has led to manifest injustices,⁴⁹ and it has been correctly noted that thus limiting the measure of contribution violates the very rationale upon which courts award contribution.⁵⁰ Hence, several states have enacted statutes permitting contribution relative to the degrees of comparative negligence.⁵¹ And at least one court,⁵² though bound by express statutory language⁵³ calling for pro rata shares, has balanced the equities rather than simply having counted heads to determine what was a pro rata share. In that case,⁵⁴ though there were four defendants involved, by balancing the equities the court determined there were two pro rata shares. One share was to be divided among three of the defendants, and the other share was to be borne by the fourth defendant.

Many other questions arise with regard to contribution, and although their extended discussion is beyond the scope of this paper, a few of the questions and some general answers thereto are as follows. Of what effect is the release by the plaintiff of one tortfeasor? Generally such a release will not automatically release the other tortfeasors, nor will the release by plaintiff of one tortfeasor relieve him of liability for contribution to another tortfeasor.⁵⁵ How does a settlement between the

⁴⁹In the case of *Bielski v. Schulze*, *supra* note 2, the jury found that the tortfeasor seeking contribution was guilty of 95% of the casual negligence, and the tortfeasor claimed against was guilty of only 5% of the casual negligence. Yet under the rule of pro rata or equal contribution, the trial court was constrained to award contribution of 50% of the total liability. The Wisconsin Supreme Court reduced the award to 5% of the total liability, to correspond to the degree of negligence.

⁵⁰Furnish, *Distributing Tort Liability: Contribution and Indemnity In Iowa*, IOWA L. REV. 31, 49 (1966) [hereinafter cited as *Furnish*].

⁵¹*Furnish* at 49n.71, lists Hawaii, Arkansas, Delaware, and South Dakota as adopting § 2(4) of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT 9 U.L.A. (1939), which section provides for an apportionment based on comparative negligence. Wisconsin has also adopted the comparative apportionment approach. See *Bielski*, *supra* note 49.

⁵²*Bundy v. City of New York*, 261 N.Y.S.2d 221, 23 A.D.2d 392 (1965). Three defendants were involved in the excavation of a street. A fourth defendant, a bus company, negligently discharged a passenger from one of their buses in front of the excavation, resulting in the passenger's injury. The court held that a recovery against the four defendants should be divided into two equal shares; the one share to be borne by the bus company which put the plaintiff in danger, and the other share to be divided equally among the three defendants who created the hazard. Two circumstances having combined to cause the injury, the court determined there were two pro rata shares.

⁵³The statute was N.Y. C.P.L.R. § 1401. The text of the statute is reprinted *supra* at note 42.

⁵⁴*Bundy v. City of New York*, *supra* note 52.

⁵⁵This answer, though certainly not the only one possible, is suggested by the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT 9 U.L.A. § 4 (1939), which provides that a release of one tortfeasor does not automatically release the other tortfeasors. No release of the others is affected unless the release specifically provides for the release of the others. But the release of one tortfeasor, although not releasing the other tortfeasors, will benefit them by reducing the claim against them in the amount of the consideration paid for the release, or in the amount or proportion by which the release provides that the total claim shall be reduced, whichever is larger. Nor of course, does the release by the plaintiff of one tortfeasor relieve his liability for contribution to another tortfeasor. See § 5.

For a discussion of problems that arise in relation to releases and covenants in third party practice, see Allaben, *Releases and Covenants Under Third Party Practice*, 44

plaintiff and one or more tortfeasors affect the right of contribution among the tortfeasors? The general rule is that a good faith settlement will not terminate the right to contribution.⁵⁶ Of what effect is the death of a joint tortfeasor? The death of one joint tortfeasor has been held not to deprive another tortfeasor of the right of contribution against the deceased joint tortfeasor's estate.⁵⁷ Of what effect is an assignment of a right to contribution? It seems manifest that a recognized right to contribution will not be lost merely through an assignment of that right.⁵⁸ What are the rights of contribution as between one joint tortfeasor's insurer and another joint tortfeasor or his insurer? The insurance company paying the judgment or settlement is probably subrogated to the rights of the insured.⁵⁹ What is the right of a joint tortfeasor to implead another joint tortfeasor not made a party by the plaintiff? The better rule allows impleader.⁶⁰ And finally, if an accident occurs in a state in which contribution is permitted, but suit is brought in a state disallowing contribution, can contribution be had? An affirmative conclusion has been reached in a federal district court.⁶¹

III. INDEMNITY

A. GENERAL RULE⁶²

It is a good deal easier to list the cases in which indemnity has or has not been allowed than it is to make sense out of them. It is well nigh impossible to work all of the indemnity cases into a consistent whole, and the language which the courts have employed in explaining their indemnity decisions is bewildering, to say the least.⁶³

But notwithstanding the confusion, it is generally true that indemnity is usually denied where the tortfeasors' negligence concurred⁶⁴ to cause

⁵⁶See Annot., 8 A.L.R.2d 196 (1949). See also Annot., 60 A.L.R.2d 1366, 1383-84 (1958).

⁵⁷See, e.g., *De Brue v. Frank*, 213 Wis. 280, 251 N.W. 494 (1933).

⁵⁸Annot., 60 A.L.R.2d 1366, 1389 (1958).

⁵⁹See *State Farm Mut. Auto. Ins. Co. v. Continental Casualty Co.*, 264 Wis. 493, 59 N.W.2d 425 (1953).

⁶⁰See generally, Annot., 78 A.L.R. 590 (1932), supplemented in Annot., 132 A.L.R. 1424 (1941). See also Annot., 11 A.L.R.2d 228 (1950).

⁶¹*Geborek v. Briggs Transp. Co.*, 139 F. Supp. 7 (D.C.N.D. Ill. 1956). This was an action in federal court in Illinois for an injury occurring in Wisconsin. The court held that contribution was permissible where Wisconsin permitted it; this decision was notwithstanding the fact that contribution was not permitted under Illinois law.

⁶²See generally PROSSER § 48. For a very accurate, comprehensive, and readable treatment of the subject, see Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, (1952) [hereinafter cited as Davis].

⁶³Davis at 536.

⁶⁴Some courts regard indemnity as an exception to the rule denying contribution among concurrently negligent tortfeasors; in rationalizing the "exception" the courts have resorted to complicated and ambiguous formulae. One test has been to allow indemnity to a tortfeasor guilty of only "passive" negligence from a tortfeasor guilty of "active" negligence. This terminology has led parties seeking indemnity to portray their negligence as "passive" to come within the exception, and the courts have at times yielded to temptation and strained the meaning of the words to award indemnity. Sherk at 63. See note 73, *infra*.

For an examination of the right of a tortfeasor guilty of only ordinary negligence to be indemnified by one guilty of intentional wrongdoing, wanton misconduct, or gross negligence, see *Jacobs v. General Acc. F. & L. Assur. Corp.*, 14 Wis.2d 1, 109 N.W.2d 482, 38 W.2d 332 (1963) [hereinafter cited as *Jacobs*]. Indemnity was denied. *Contra*,

injury to a third party, but it is usually granted where the tortfeasor who paid a judgment was liable vicariously or by imposition of law.⁶⁵

B. CIRCUMSTANCES IN WHICH INDEMNITY IS ALLOWED

Following is one⁶⁶ of the more viable and at the same time intelligible schemes, classifying the cases in which indemnity has been permitted.⁶⁷ Where imputed negligence is the basis of the indemnitee's liability to a third party, the courts frequently have permitted the indemnitee to recover. A common example involves a principal and an agent, where the actionable conduct of the agent is imputed to the principal as the basis for a tort judgment against him. The courts typically would say that the indemnitee has been held liable without fault, and generally, they would permit an indemnity action by the principal against the agent.⁶⁸ The misrepresentation class of cases is another in which parties are often granted indemnity. For example, if an agent is held liable in tort for acts he performed in good faith, having been induced to act through misrepresentations made by his principal, the agent is commonly characterized by the courts as only secondarily liable while the principal is denoted as primarily liable,⁶⁹ and generally, the agent is allowed indemnification from his principal.⁷⁰ The third and last class of cases in which indemnity is allowed is based upon the indemnitee's breach of a legal duty to discover and remedy the negligence of another. For example, the vendor whose negligence is based on his failure to inspect and discover a defect in an article manufactured

Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. CO. J. 630, 631 (1960). Prosser also thinks one merely negligent should be permitted to obtain indemnity from another who has been guilty of intentionally wrongful or reckless conduct. PROSSER at 281.

⁶⁵Sherk at 62.

⁶⁶For other schemes of classification, see PROSSER at 279-81; Davis at 519-30; and Leflar at 147-57.

⁶⁷The scheme of classification is that of Furnish at 45-48. For citations, see *id.* Furnish lists in addition a fourth class, "comparative culpability." But its use is primarily as a hedge against some unforeseen case not covered by the three listed classifications. *Id.* at 47, 48.

⁶⁸See, e.g., Hamm v. Thompson, 143 Colo. 298, 353 P.2d 75 (1960). See also William F. Larrick Inc. v. Burt Chevrolet Inc., 147 Colo. 133, 362 P.2d 1030 (1961), which makes it clear that by virtue of the agency relationship alone, indemnity is not granted. In that case the principal was found not to have been negligent solely by imputation, but was rather actively negligent himself. Indemnity was disallowed. For a rather interesting twist to a normal indemnity situation involving an employer and employee, see Kowaleski v. Kowaleski, 227 Or. 45, 361 P.2d 64 (1960), which said that the employer did not have a right of indemnity against the employee for whose negligence the employer was liable under the doctrine of *respondent superior*, but the employer had a right to recover from the employee based on the employee's duty to render faithful service.

⁶⁹For a decision cast in terms of primary-secondary liability, see State Ins. Fund v. Taron, 333 P.2d 508 (Wyo. 1958).

⁷⁰Though the agency relationship has been used in the first two textual examples, the principles are not limited to the agency relationship. Furnish at 46. See, e.g., Kennedy v. Colt, 216 Or. 647, 339 P.2d 450 (1959).

by the indemnitor, may be granted indemnity from the manufacturer when a third person is injured because of the defect, and for which injuries the vendor has been held liable.⁷¹ The courts might speak of the manufacturer's negligence as active, and the vendor's negligence as passive.⁷²

The test to determine whether indemnity should be allowed is said by the majority to be based on a great difference in the gravity of fault between the tortfeasors.⁷³ Others suggest the proper test is based on the duties of the tortfeasors to one another,⁷⁴ and yet another test is framed in terms of the disproportionate duties owed by the tortfeasors to the injured person.⁷⁵ But none of these tests is without ambiguity, and in the final analysis, the right to indemnity will be recognized in those cases where public opinion considers that in justice the responsibility should rest upon one rather than upon the other.⁷⁶

IV. MONTANA LAW

Montana has no relevant statute,⁷⁷ and only four cases⁷⁸ have dealt

⁷¹See, e.g., *Jennings v. U. S.*, 374 F.2d 983 (4th Cir. 1967).

⁷²See, e.g., *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, 294 F. Supp. 704 (D.C.M.D. Tenn. 1968).

⁷³The "fault principle" has been met with criticism, with the active-passive test receiving the brunt. See, e.g., *Leflar* at 156; *Keeton, Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader*, 28 *FORD L. REV.* 782, 787 (1960). *Davis* at 542, recounts an example of the strange statements sometimes made when a court relies on the active-passive test: A Tennessee court held a garage owner 'actively' negligent in having dim lights in his garage, and a person who drove into a ladder in the garage was 'passively' negligent. *Cohen v. Noel*, 165 *Tenn.* 600, 56 *S.W.2d* 744 (1933).

⁷⁴*Hodges* at 162. *Hodges* explains the test as follows: "When there are two tortfeasors, either or both of whom are liable to an injured third party, but one of whom has breached a duty which he owed both to his co-tortfeasor and to the injured third person, then the tortfeasor who, to his co-tortfeasor is blameless, should be allowed indemnity."

Hodges concludes that under this test the party seeking indemnity should be treated as any other plaintiff in a tort action, and that the usual tort rules should be applied to determine liability. In all cases where indemnity is to be allowed, the indemnitee must be blameless as to the other tortfeasor except where the doctrine of last clear chance is applied. In that situation, the indemnitee, though negligent with respect to his co-tortfeasor, might be allowed recovery where it could be shown the indemnitor later discovered the peril but failed to act reasonably. *Id.* at 163.

⁷⁵*Davis* at 546. The test is briefly explained this way: the tortfeasors will each owe a duty to the injured party; where duties owed are roughly equal, the case may be a more proper one for contribution; where the duties are disproportionate and the difference is important enough to warrant a complete shifting of loss, indemnity should be allowed. *Id.* at 546-47.

⁷⁶*PROSSER* at 281.

⁷⁷Montana has no statute permitting generally the right to contribution or indemnity among joint tortfeasors. Montana has, however, a few statutes prescribing a right to reimbursement in given situations. E.g., *R.C.M.1947* § 91-3027 dealing with contribution among legatees; also *R.C.M.1947* § 6-322 prescribing a right to contribution among sureties. For other statutes on "contribution" and "indemnity" (including those remedies based on contract), see those topics in the *GENERAL INDEX, R.C.M.1947*.

⁷⁸*Great Northern Ry. Co. v. U. S.*, 187 F. Supp. 690 (D.C.D. Mont. 1960) [hereinafter cited as *Great Northern*]; *Variety Inc. v. Hustad Corp.*, 145 *Mont.* 358, 400 P.2d 408 (1965) [hereinafter cited as *Variety*]; *Crosby v. Billings Deaconess Hospital*, 149 *Mont.* 314, 426 P.2d 217 (1967) [hereinafter cited as *Crosby*]; and *Panasuk v. Seaton*, 72 *F. Supp.* 279 (D.C.P. Mont. 1968) [hereinafter cited as *Panasuk*].

with the problem. One of these cases dealt with the subject in terms of evidence and pleading;⁷⁹ another denied indemnity where the principal wrongdoer was the one seeking the remedy;⁸⁰ and the two other cases were tried in federal district court where the judge was faced with the impossible task of applying Montana law . . . when there was no relevant Montana law to apply.⁸¹ The net result is that there is almost no binding precedent in Montana. The one exception is the decision in *Variety Inc. v. Hustad Corp.*⁸² In that case the Montana Supreme Court held that indemnity will not be granted where the would-be indemnitee is, as between himself and the would-be indemnitor, the principal wrongdoer. This decision certainly squares with good sense, natural justice, and the general rule.⁸³

Though the Montana cases provide little precedent, they⁸⁴ provide fertile ground for argument and the genesis of problems to be later tested. For example, in the earliest of the suits which was a suit for *indemnity*, Judge Jameson of the district court wrote:

In the absence of any Montana cases in point, I assume that the Montana Court would follow the common law rule that joint tortfeasors are not entitled to contribution from each other.⁸⁵

Commenting on this language, the Montana Supreme Court said:

As Judge Jameson . . . pointed out, the general principle of law is well-settled that one of several wrongdoers cannot recover against another wrongdoer although he may have been compelled to pay all the damages for the wrong done.⁸⁶

⁷⁹Crosby. In that case, a patient in defendant hospital was burned by a television switch that the hospital was leasing from Mid-West Leasing Company. In a suit by the patient against the hospital, the hospital filed a complaint against Mid-West for indemnity in the event that it might be required to pay plaintiff's damages. Summary judgment was granted for Mid-West. The hospital appealed. The Montana Supreme Court held that the hospital's complaint seeking indemnity raised questions of fact, and therefore the summary judgment below had been improper.

⁸⁰Variety. In that case, a shopping center promoter and second lessee were sued by plaintiff (first lessee) for breach of plaintiff's lease provisions. The shopping center promoter asserted a claim of indemnity against the second lessee. The court held that the restrictive terms of plaintiff's lease were breached by the promoter and not by the second lessee, and therefore the case was not a proper one for allowing the promoter indemnity.

⁸¹Great Northern; Panasuk. The Great Northern case antedated any consideration given the subject by the Montana Supreme Court. In that case, a plaintiff had made a good faith settlement with a third party, who had been injured by a mail sack thrown from plaintiff's train by an agent of the defendant. The court expressly found the plaintiff was not negligent, and therefore awarded a judgment in its favor for indemnification from the defendant, whose agent had been negligent. The Panasuk case was a suit by a passenger in an automobile which collided with a truck-trailer against the driver and the owner of the truck-trailer. The driver and the owner filed a third party complaint for indemnity against the driver of the automobile. The court denied indemnity.

⁸²*Supra* note 78.

⁸³The author knows of no case that on similar principles, was decided *contra*.

⁸⁴Great Northern; Variety; and Panasuk. *Crosby* is eliminated from further discussion because of its nature; it has little relevance to subsequent discussion.

⁸⁵Great Northern at 693.

⁸⁶*Variety* at 412-14.

By this statement did the Montana court mean to import Montana's acceptance of the common law rule denying contribution, or did the court merely acknowledge the existence of the rule? Certainly the court has not expressly adopted the rule denying contribution among tortfeasors.⁸⁷

Another question posed by the case of *Great Northern Ry. Co. v. U.S.*⁸⁸ is, whether that case stands for the proposition that in certain circumstances a *negligent* tortfeasor might be permitted the right to indemnity? The court expressly held that the indemnitee in that case was not negligent, but the limits of the holding are made somewhat ambiguous because the court favorably cited language implying an affirmative answer to the question just posed. A sample of such language follows:

Where the parties are not in *pari delicto*, and an injury results from the act of one party whose negligence is the primary, active and proximate cause of the injury, and another party who is not negligent or whose negligence is remote, passive and secondary, is nevertheless exposed to liability by the acts of the first party, the first party may be liable to the second party for the full amount of damages incurred by such acts.⁸⁹ [Emphasis supplied by author.]

And of course a corollary is, even if the district court has decided that in some circumstances a negligent tortfeasor may be indemnified, would the Montana Supreme Court so hold? A question similar in principle is raised by the district court's holding that the indemnitee was not precluded from his right to indemnity by his voluntary settlement with the injured party.⁹⁰ Some jurisdictions hold that such a settlement is a bar to a suit for contribution or indemnity.⁹¹ Would the Montana Supreme Court follow the federal district court's lead?

V. CONCLUSION

There is neither unanimity of opinion or law as to whether contribution or indemnity should be permitted as remedies, and if permitted, there is disharmony as to their bases, limits, and applications. But it may be concluded that the common law rule denies contribution among joint tortfeasors. The rule has been much eroded, however, by judicially created exceptions, and over half the states have abrogated the rule by statutory enactment. In those jurisdictions permitting contribution, the party granted the remedy is usually a joint tortfeasor who has been held liable even though he was not negligent, or who was only technically negligent, or who was guilty of mere ordinary negligence.

⁸⁷Panasuk at 981.

⁸⁸*Supra* note 78.

⁸⁹*Great Northern* at 693.

⁹⁰*Id.* at 697.

⁹¹For a thorough discussion of the problem, see Annot., 8 A.L.R.2d 196 (1949); and

Indemnity is allowed in certain circumstances in every jurisdiction. Commonly it is allowed where the indemnitee's negligence is imputed, or where he has been induced to act based on misrepresentations, or where he has breached a duty to discover and remedy another's negligence. Clearly many courts have permitted indemnity where the more appropriate remedy would have been contribution. This overextension of indemnity has resulted from a reaction to the rule denying contribution.

Montana is not bound by precedent, and contribution should be permitted among joint tortfeasors. The remedy might be permitted by judicial decision,⁹² but more preferred would be a legislative enactment to that end. The measure of contribution should be apportioned relative to the comparative fault of the tortfeasors. Providing for apportionment will universally achieve equitable results, whereas the pro rata shares method very often results in unconscionable holdings. Indemnity, too, should be allowed, limited to the indemnitee who is liable without fault, or who is negligent only technically or by imposition of law.

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⁹²Prosser lists nine jurisdictions that by judicial decision have allowed contribution; District of Columbia, Iowa, Louisiana, Maine, Minnesota, Nevada, Pennsylvania,