Montana Law Review

Volume 29
Issue 2 *Spring 1968*

Article 8

1-1-1968

Joint Tortfeasors: Contribution and Indemnity between Concurrently Negligent Defendants Denied (Panasuk v. Seaton, 25 St. Rptr. 16 (D. Mont. 1968).

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local law and the rules pertaning to professional practice, a mutual agency relationship . . . exists between the members of a professional service organization . . . ."[54] Colorado law provides that such a relationship does not exist during a period when the professional corporation maintained professional liability insurance which the group in the instant case did.[55]

The importance of the instant case lies in its first method of neutralizing the 1965 regulations — ruling them an invalid exercise of the legislative function. The difference between legislation and legitimate interpretation in many instances is one of degree, and consequently it is sometimes hard to make the distinction. But here the applicable Treasury regulations seem clearly to have passed beyond the field of interpretation.

Already the instant case has received approval from the Ohio District Court which ruled the regulations concerning professional associations invalid both on the grounds that they ignored the corporate charter of the organization and that they were not consistent with either judicial precedent or sound tax policy.[56]

Before the Second World War the medical and legal professions were usually organized in small partnerships. But as the population began to flow towards the urban centers and the need for specialization grew, professional men realized the need for group practice and organized in corporate-like structures including business trusts and common law associations.[57] In *Pelton*[58] the government recognized this change in organization and taxed such groups as corporations. If these groups decided to offset the loss resulting from corporate taxation by establishing pension and profit-sharing plans and if eventually the states adapted their corporate codes to accommodate these groups, the federal government should respect these decisions.

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JOINT TORTFEASORS: CONTRIBUTION AND INDEMNITY BETWEEN CONCURRENTLY NEGLIGENT DEFENDANTS DENIED.—Plaintiff was injured in a collision between an automobile in which he was a passenger and a truck driven by defendant. Defendant sought to implead the driver of the automobile alleging he was grossly negligent and should be liable to defendant for any judgment plaintiff recovered. *Held,* defendant had

[54]Treas. Reg. § 301.7701-2(h)(4)(1965).
[55]Rule 265 I(G), Colo. R. of Civ. Proc.
[56]O'Neil v. United States, 68-1 USTC (1968).
[57]Ray, *The "New Look" For Professional Corporations and Associations,* 51 A.B.A.J. 882 (1965).
[58]Pelton v. Commissioner, *supra* note 14.

no right of contribution or indemnity against the third party defendant, even if he was grossly negligent and defendant was only ordinarly negligent. *Panasuk v. Seaton,* 25 St. Rptr. 16 (D. Mont. 1968).

In contemporary tort law tortfeasors are jointly and severally liable in four general situations:[1] (1) where two or more persons act in concert and thereby harm the plaintiff,[2] (2) where two or more persons each violate a common duty to the plaintiff and thereby harm him,[3] (3) where the plaintiff is simultaneously injured by two persons who are not acting in concert[4] and (4) where a legal relationship produces vicarious liability.[5] The distribution of losses between tortfeasors jointly and severally liable is regulated by the principles of contribution and indemnity. Contribution is the right of one who has discharged a common liability to recover a pro rata portion of the judgment from his joint tortfeasor.[6] Indemnity is the right of one who has satisfied the judgment to recover the entire amount from his fellow joint tortfeasor.[7]

The orthodox common law rule prohibits contribution between joint tortfeasors.[8] Orthodox indemnity doctrine permits indemnity only in cases of vicarious liability.[9] Montana adheres to the orthodox rules in both respects[10] and therefore, under the doctrine of *Erie R. R. Co. v. Tompkins,*[11] the Federal District Court in the instant case was obliged to rule at it did.[12]

Apparently,[13] the rule prohibiting contribution between joint tort-

[1]See generally, PROSSER, LAW OF TORTS 258-264 (3d ed. 1964) (hereinafter cited as PROSSER).

[2]RESTATEMENT OF TORTS § 876 (1939).

[3]*Id.* § 878.

[4]*Id.* § 879.

[5]RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

[6]Parten v. First Nat'l. Bank and Trust Co., 204 Minn. 200, 283 N.W. 408, 412 (1938).

[7]U. S. Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 A. 660, 664 (1925).

[8]PROSSER 273.

[9]Sherk, *Common Law Indemnity Among Joint Tortfeasors,* 7 ARIZ. L. REV. 59, 64 (1965).

[10]The Montana Supreme Court has stated, "One of several wrongdoers cannot shift any part of his liability to a fellow wrongdoer although he has paid the entire judgment." Variety Inc. v. Hustad Corp., 145 Mont. 358, 368, 400 P.2d 408, 414 (1965). The Montana Supreme Court ruled indemnity was available to a lessee as against a lessor upon proper proof of facts. A small boy, who was a patient at a hospital, was burned by a faulty electrical switch on a television set the hospital leased. The boy recovered judgment from the hospital. The hospital sued the lessor of the television equipment and recovered. Crosby v. Billings Deaconess Hospital, 426 P.2d 217 (Mont. 1967).

[11]Erie R.R. Co. v. Tompkins, 304 U. S. 64 (1938).

[12]*See generally,* Comment, *Toward a Workable Rule of Contribution In The Federal Courts,* 65 COLUM. L. REV. 123 (1965).

[13]The Highwayman's Case, Evert v. Williams (1725), 9 L. Q. REV. 197 (1893) suggests the principles underlying *Merryweather v. Nixon* (1799). One highwayman sued another to account for their plunder. The bill was dismissed. Counsel for both parties were reprimanded for bringing contempt on the court. One party was subsequently executed and the other deported to a penal colony.

feasors was first enunciated in *Merryweather v. Nixon*.[14] A judgment had been rendered against two joint tortfeasors in a conversion action and execution had been levied against one of them. He was nonsuited in an action for contribution. At that time, tortfeasors could be joined only if they acted in concert,[15] which meant they had to have acted intentionally. That is, the two tortfeasors must have previously joined in planning to commit a tort against a third party. Such conduct is morally at fault in the classical sense in that a near criminal element of intentional conduct is involved. Thus, the moral fault of each must have been salient.

There were two possible bases for the decision in *Merryweather v. Nixon*, and each was dependent upon the intentional moral-fault principle. The first basis was that when two wrongdoers were equally at fault, the law would not aid one of them to the detriment of the other.[16] The second was the theory that the risk of entire liability would deter individuals from combining to commit intentional torts.[17] Clearly the no-contribution rule was intended to discourage the morally reprehensible conduct found in such torts. Earlier English and American decisions applied the rule in this limited type of case.[18]

The advent of liberal joinder rules changed the meaning of "joint tortfeasor."[19] Two individuals could now be joined if their simultaneous but independent negligence injured the plaintiff.[20] The original bases for the no-contribution rule became inapplicable in many situations. An individual whose negligence occurs contemporaneously with that of another is clearly not as morally at fault in the classical sense as one who engages in intentional conduct. Nevertheless, the courts continued to apply the rule.[21] The result was a tortfeasor might escape liability even though his negligence contributed to the plaintiff's damages.

A plethora of exceptions developed due to dissatisfaction with this result. Contribution has been allowed for court costs[22] and counsel fees[23]

[14]101 Eng. Rep. 1337 (1799). See Reath, *Contribution Between Persons Jointly Charged with Negligence—Merryweather v. Nixon*, 12 HARV. L. REV. 176 (1898).

[15]PROSSER 260.

[16]*Id.* at 273.

[17]Comment, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 124 (1965).

[18]SALMOND, LAW OF TORTS 86 (6th ed. 1942); Baily v. Bussing, 28 Conn. 455 (1859); Armstrong County v. Clarion County, 66 Pa. 218 (1870); Reath, *Contribu,tion Between Persons Jointly Charged with Negligence—Merryweather v. Nixon*, 12 HARV. L. REV. 176, 180 (1898).

[19]PROSSER 261.

[20]Union Stock Yards v. Chicago B. & Q. Ry. Co., 196 U.S. 217 (1905); Fidelity & Cas. Co. of N.Y. v. Chapman, 167 Ore. 661, 120 P.2d 223 (1941); Cain v. Quannah Light and Ice Co., 131 Okla. 27, 267 P. 641 (1928).

[21]*See* Comment, *Toward A Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123 (1965); Comment, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L. J. 964 (1958).

[22]Fakes v. Price, 18 Okla. 413, 89 P. 1123 (1907).

[23]Licht v. Klipp, 213 Iowa 1071, 240 N.W. 722 (1932).

incurred in defense of a tort action. One court distinguished between passive and active negligence and stated as dicta that contribution or indemnity might be available to the passively negligent tortfeasor.[24] Another court allowed contribution between two joint tortfeasors engaged in a joint undertaking and liable only by legal inference or intendment.[25] One court ruled the no-contribution rule was not applicable where the acts of the joint tortfeasor were not intentionally or morally at fault and appeared to implicitly state indemnity would be available in such a situation.[26] Some states denied contribution between tortfeasors but allowed it between their subrogees.[27]

Classically, indemnity is appropriate only when liability is predicated upon a legal relationship between the tortfeasors and the indemnitee is not at fault.[28] However, the movement to create exceptions to the no-contribution rule found expression in an effort to broaden application of the indemnity rule.[29] Today the indemnity concept has been expanded to include some cases involving concurrently negligent tortfeasors.[30]

It has thus become a difficult undertaking to determine when indemnity applies.[31] The courts frequently state that if the parties are not equally at fault, and if one party's negligence is the primary, active and proximate cause, whereas the other's negligence is only secondary, passive and remote, then a right of indemnity exists in favor of the latter.[32] A more generalized statement is that the " . . . duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other."[33]

The leading case in this area is *United Air Lines Inc. v. Weiner*.[34] United's plane was involved in a mid-air collision over Nevada with an Air Force jet trainer. An Air Force student pilot had been engaged in an instrument descent with a hood enshrouding the canopy over his cockpit. The trial court found four specific acts of negligence by United Air Lines and thirteen by the United States.[35] The Ninth Circuit Court of Appeals ruled the parties were not in *pari delicto* and that the dis-

[24]Central of Ga. Ry. Co. v. Swift & Co., 23 Ga. App. 346, 98 S.E. 256 (1919).
[25]Hobbs v. Hurley, 117 Me. 449, 104 A. 815 (1918).
[26]American Tel. & Tel. v. Leoegue, 30 Ill. App. 2d 120, 173 N.E.2d 737 (1961).
[27]Gale Lumber Co. v. Bush, 227 Mass. 203, 116 N.E. 480 (1917).
[28]Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. OF PA. L. REV. 130, 147 (1932). *Crosby v. Billings Deaconess Hospital, supra* note 11.
[29]Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV. 59, 64 (1965).
[30]*Id.*
[31]PROSSER 278; Sherk, *supra* note 30, at 64.
[32]Great Northern Ry. Co. v. United States, 187 F.Supp. 690, 693 (D. Mont. 1960). Variety Inc. v. Hustad Corp., 145 Mont. 358, 368, 400 P.2d 408, 414 (1965).
[33]PROSSER 281.
[34]335 F.2d 379 (9th Cir. 1964).
[35]Weiner v. United Air Lines, 216 F.Supp. 701, 706 (S. D. Cal. 1962).

parity in the character of the fault was such as to warrant indemnity in favor of United Air Lines.[36]

Indemnity has been sought in a number of recent cases involving concurrent negligence in motor vehicle collisions. The overwhelming majority of decisions have denied indemnity.[37] However, only one of the cases concerned a party who was grossly negligent and another who was only ordinarily negligent, which was alleged to be the situation in the instant case.[38] In that case, indemnity was denied because the court felt a policy of allowing indemnity would inhibit out-of-court settlements, protract litigation and place an unfair burden on injured parties. This position was adopted in the instant case.[39]

Dissatisfaction with the doctrine of indemnity and the no-contribution rule has provoked a controversy involving conflicting policies.[40] Those favoring contribution among joint tortfeasors argue that fundamentally, tort liability should relate to moral fault.[41] Moral fault is here used in the more modern sense of social responsibility. The intentional element is absent but in the judgment of society the conduct of the given defendant resulted in the damage. Adherents of this rationale maintain that individuals should not be allowed to create risks and injure individuals, and then eschew the responsibilities.[42]

Proponents of the common law rule advance essentially two arguments. Since accidents are said to involve a complex of personal and environmental factors unrelated to moral fault, they argue losses should be distributed over society as a whole.[43] Contribution, they assert, might allow an effective loss distributor such as an insurance company to shift part of the loss to a party incapable of distributing it throughout society.[44] For example, an insurance company might be held jointly liable with an individual defendant. The insurance company would satisfy the judgment and then seek and obtain contribution of a pro rata share from the individual defendant. The individual defendant

[36]United Airline Inc. v. Weiner, 335 F.2d 379, 402 (9th Cir. 1964).

[37]Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 141 F.Supp. 833 (N. D. Cal. 1956); Warner v. Capital Transit Co., 162 F. Supp. 253 (D.D.C. 1958); Roth v. Greyhound Corp., 149 F. Supp. 454 (E.D. Pa. 1957); *See* annot., 88 A.L.R.2d 1355 (1963); Comment, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L. J. 964, 983 (1958).

[38]Jacobs v. Gen. Acci. Fire & Life Assur. Corp., 14 Wis. 2d 1, 109 N.W.2d 462 (1961). *See* annot, 88 A.L.R.2d 1355 (1963).

[39]*Instant case* at 24.

[40]James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941); Gregory, *Rejoinder*, 54 HARV. L. REV. 1184 (1941).

[41]HOLMES, THE COMMON LAW 117-129 (Belknap Press Ed. 1963); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941).

[42]Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170, 1171 (1941).

[43]James,*Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

[44]*Id.*

would have no means of passing the loss on to society. The desirable end of distribution of loss would be controverted to the extent of the pro rata share. Proponents of the no-contribution rule also argue that contribution would inhibit rapid and adequate compensation of plaintiffs, since the number of parties involved in settlement negotiations would necessarily increase as would the complexity of problems, and time-consuming litigation would be more likely.[45] Furthermore, a tortfeasor might be reluctant to settle because he might later be liable for contribution if the plaintiff sued the other tortfeasor and recovered.[46]

A majority of jurisdictions now allow contribution. Seven jurisdictions have negated the common law rule by judicial decision[47] and twenty-two have abolished the rule by statute.[48] A minority of twenty-two still retain the common law no-contribution rule.[49] The statutes which provide for contribution have been drawn so as to resolve or mitigate many of the objections against it. Generally, the statutes provide for a pro-rata division of losses among joint tortfeasors. This articulates the fault principle of tort law.[50] Some jurisdictions attempt to protect the plaintiff's position by allowing contributions only among tortfeasors joined by the plaintiff.[51] The problem of liability after settlement was originally governed by the rule that a joint tortfeasor who settled was still liable for contribution if the plaintiff sued the other

[45]*Id.*

[46]James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941). The original Uniform Act provided the joint tortfeasor who settled with the plaintiff might still be liable for contribution if the plaintiff sued the other joint tortfeasor and recovered judgment. There was much dissatisfaction with this rule. Therefore the present Uniform Act provides the joint tortfeasor who settles is discharged from liability for contribution. REVISED UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 4 (1955). This rule has the merit of allowing a joint tortfeasor to settle and close his files on the matter without having to concern himself with future contribution litigation. See generally, PROSSER, 273.

[47]Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Bedell v. Reagen, 159 Me. 292, 192 A.2d 24 (1963); Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); Huggins v. Graves, 210 F. Supp. 98 (E.D. Tenn. 1962); Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

[48]ARK. STAT. ANN. §§ 34-1001 to 1009 (1962); DEL. CODE ANN. tit. 10, § 6301-08 (1953); HAWAII REV. LAWS §§ 246-10 to 16 (1955); S.D. CODE §§ 33.04A01-33.04A10 (1960); CAL. CIV. PROC. § 875-880 (West 1961); GA. CODE ANN. §§ 105-2011 to 2012 (1956); MISS. CODE ANN. § 335.5 (1957); N. Y. CIV. PRAC. § 1401; W. VA. CODE ANN. § 5481-82 (1961); KY. REV. STAT. § 412.030 (1962); LA. REV. STAT. ANN. § 2103-05 (Supp. 1967); MD. ANN. CODE art. 50, § 16-24 (1964); MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (Supp. 1967); MICH. STAT. ANN. § 27A.2925 (1962); MO. STAT. ANN. § 537.060 (1953); N. J. REV. STAT. § 2A: 53A-1 to 5 (1952); N. M. STAT. ANN. §§ 24-1-11 to 18 (1954); N. D. CENT. CODE §§ 32-38-01 to 04 (1960); PA. STAT. ANN., tit. 12, § 2082-89 (Supp. 1967); R. I. GEN. LAWS ANN. §§ 10-6-1 to 11 (1957); TEX. REV. CIV. STAT. ANN. art. 2212 (1964); VA. CODE ANN. § 8-627 (1957).

[49]Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Montana, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, South Carolina, Utah, Vermont, Washington, Wyoming.

[50]PROSSER 278.

[51]CAL. CIV. PROC. § 875-880 (West 1961); GA. CODE ANN. §§ 105-2011 to 2012 (1956); MISS. CODE ANN. § 335.5 (1957); N. Y. CIV. PRAC. § 1501; W. VA. CODE ANN. § 5481-82 (1961).

joint tortfeasor and recovered.[52] There was much dissatisfaction with this particular rule.[53] Therefore, the present Uniform Act provides that a tortfeasor who settles out of court is discharged from any liability for contribution.[54]

There is a need for reforming the system of loss distribution between joint tortfeasors as it is effected by the common law no-contribution rule and the doctrine of indemnity. It seems undesirable to attempt resolution of the problem by enlarging the operation of indemnity. This would only create a labyrinth of exceptions and inhibit development of a workable definition of the rights and duties of the parties. Furthermore, extending indemnity to cases involving concurrently negligent tortfeasors would allow one of them to shift the entire loss to the other due to a slight discrepancy in fault. This would contravene the fault principle of tort law and would be inequitable. Likewise, it would not further loss distribution, and a plaintiff's efforts to obtain a remedy would be complicated and protracted by the presence of a third party.

The solution seems to be complete abrogation of the no-contribution rule. The majority of judicial and legislative opinions support this view.[55] The opponents argue that it is desirable to distribute losses throughout society and that contribution restricts this process. If contribution restricts loss distribution, then insurance companies would seemingly be forced to bear fewer loss claims. Therefore insurance companies should favor passage of contribution legislation. Yet as several authorities have noted insurance companies are among the most vigorous opponents of legislation allowing contribution.[56] As noted, the opponents of contribution also urge that allowing contribution unjustly disadvantages the plaintiff, but contribution statutes can be drawn to defeat or mitigate this objection.

Even if we assume the validity of the foregoing objections the argument for contribution should still prevail. Tort law should relate to the ethical mores of the community.[57] A tortfeasor should be responsible for the damage he causes. This is the norm our society presently approves. A judicial redefinition of the bases of tort liability in terms of socialized loss distribution would be contrary to the established social norm. Only the legislature should provide for such a fundamental change, and until the legislature acts, tort law should give a rational and accurate definition of the rights and duties of parties based upon the fault principle. The rule against contribution allows a joint tort-

[52]PROSSER 278.
[53]*Id.*
[54]REVISED UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 4 (1955).
[55]*Supra* notes 47 and 48.
[56]PROSSER 275; Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170, 1177 (1941).
[57]HOLMES, THE COMMON LAW 117-129 (Belknap Press Ed. 1963).

feasor's liability to be determined at the whim of a plaintiff.[58] This is irrational, inequitable and not in accord with the mores of the community.

DOUGLAS M. GREENWOOD

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—SOLITARY CONFINEMENT—The prisoner was incarcerated in the California Correctional Training Center at Soledad. He was placed in solitary confinement for 12 days. The cell, approximately 6' x 8', was filthy and unheated; it had no interior lights, no facilities for personal hygiene, and no furnishings except a toilet which flushed from the outside of the cell. For eight days the prisoner was kept naked, for the other four days he was given a rough pair of overalls to wear. He was denied adequate medical treatment prior to, during, and after his confinement. The prisoner brought this action for an injunction against such punishment and for monetary relief. *Held,* confinement in a cell maintained in the foregoing condition falls within the Eighth Amendment prescription against cruel and unusual punishment. Permanent injunctive relief was granted but the claim for monetary relief was denied. *Jordan v. Fitzharris,* 257 F.Supp. 674 (N.D. Cal. 1966).

The Eighth Amendment to the United States Constitution prohibits any punishment which is cruel and unusual.[1] The scope of the Eighth Amendment has expanded greatly since its adoption and today prohibits punishments which were acceptable in former times. If the instant case had arisen twenty years ago, it is likely that no relief would have been granted because then society would not have considered such punishment cruel and ususual.[2] But in 1966 standards of justice had changed and the repulsive conditions attending the solitary confinement were found intolerable to society and the punishment was held to be cruel and unusual.

The prohibition against cruel and unusual punishments, which originally appeared in England in the Laws of Edward the Confessor, can be traced to the Magna Carta and to the English Bill of Rights.[3] The Eighth Amendment, as originally adopted, was intended to be much broader than the rule in England. For example, punishments allowed in England under the Bill of Rights included dragging to the place of execution,

[58]PROSSER 275.

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[1]"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. CONST. amend. VIII.

[2]Compare the extreme facts in Louisana *ex rel* Francis v. Resweber, 329 U. S. 459 (1947) discused in text at note 14, *infra.*

[3]34 MINN. L. REV. 134, 135 (1950); Weems v. United States, 217 U. S. 349, 371 (1910).