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## TORT CONTRIBUTION PRACTICE IN NEW YORK

CHARLES O. GREGORY

### (a) *Reflections on Civil Practice Act Section 211-a and Litigation Thereunder*

The New York legislature in section 211-a of the Civil Practice Act has created tort contribution only between tort-feasors against whom the injured plaintiff has secured a joint money judgment.<sup>1</sup> This statute requiring joint judgment liability as the necessary common obligation is unfortunate, not only because it fails to conform to customary notions of contribution generally, but also because it makes contribution available only at the whim of the injured plaintiff.<sup>2</sup>

The common-law policy against contribution between tort-feasors has been concerned only with denying the remedy to wrongdoers altogether and not with changing the nature of the substantive law of contribution.<sup>3</sup> Hence when the reluctance to grant tort contribution

<sup>1</sup>"Action by one joint tort-feasor against another. Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice."

<sup>2</sup>See Crouch, J., in *Haines v. Bero E. C. Corp.*, 230 App. Div. 332, 335, 243 N. Y. Supp. 657, 661 (4th Dept. 1930), where he said: "It was not intended, we think, that the opportunity of a defendant to utilize that right should depend solely upon the will of a plaintiff; . . ." See also the REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE (1934, N. Y.) 268: "The result is that the very substantial right of contribution is made to depend upon the whim of the plaintiff." See also Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action* (1933), 47 HARV. L. REV. 209, 228; (1928) 13 Cornell Law Quarterly 640; (1931) 16 *id.* 246, 400 and 598.

<sup>3</sup>The nature of the common-law prejudice against tort contribution and of the movement against it is ably set forth in the following accounts: Reath, *Contribution between Persons Jointly Charged for Negligence—Merryweather v. Nixan* (1898) 12 HARV. L. REV. 176; Leflar, *Contribution and Indemnity between Tort-feasors* (1932) 81 U. OF PA. L. REV. 130; Notes (1911) 11 COL. L. REV. 665; (1931) 45 HARV. L. REV. 349.

disappears there is every reason to believe it should be introduced, if at all, on exactly the same basis as any other kind of contribution. Although joint judgment liability is sufficient common obligation to support contribution generally, it is not considered essential to the recovery of contribution except in a few of the jurisdictions now permitting tort contribution.<sup>4</sup>

The rules of contribution in general are exemplified in actions between cosureties. When a creditor executes a several judgment against one of two cosureties, the latter may maintain a separate action against his cosurety for contribution. The common obligation which the claimant must show he has discharged for the benefit of himself and his cosurety is their joint and several liability to the creditor upon the principal's default. This is susceptible of proof in the claimant's action and sufficiently establishes the necessary common obligation without requiring the claimant to prove a joint judgment against himself and his cosurety. Indeed the unfairness of such a requirement is obvious, and a serious proposal to substitute it as the common obligation necessary to contract contribution would be very unpopular.

Now concerning the recovery of contribution, the common liability of two joint tort-feasors to suffer joint and/or several judgments to the injured party is exactly analogous to the common liability of two cosureties to assume the defaulting principal's obligation jointly and/or severally. In fact most jurisdictions in which tort contribution is now available do not require joint judgment liability as the necessary common obligation, but permit recovery of contribution to one of two joint tort-feasors against whom a several judgment has been executed.<sup>5</sup> In such an action the claimant for tort contribution is unable, it is true, to show any common liability as formal as that represented by the joint and several contract of cosureties. Nevertheless, if he can show that his fellow tort-feasor was also negligent toward the injured party under such circumstances that the latter might have obtained a joint and/or several judgment against the tort-feasors or either of them, the court recognizes a common liability sufficient to support the claim for contribution.

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<sup>4</sup>MD. ANN. CODE (Bagby, Supp. 1929) art. 50, § 12A; MO. REV. STAT. (1929) § 3268; N. M. STAT. ANN. (Courtright, 1929) §§ 76-100; N. Y. C. P. A. (1920) § 211-a; TEX. STAT. (Vernon, 1928) art. 2212; W. VA. CODE ANN. (Michie, 1932) § 5482.

<sup>5</sup>A list of the states which permit tort contribution either by decision of court or under a statute may be found in (1931) 45 HARV. L. REV. 349 and 369. See also Ont. Stat., 20 Geo. v. c. 27, § 3 (1930); Kan. Rev. Stat. Ann. (1923) c. 60, § 3437 as interpreted in *Ft. Scott v. Kansas City Ft. S. & M. R. Co.*, 66 Kan. 610, 72 Pac. 238 (1903).

A glance at the litigation arising under section 211-a shows that requiring joint judgment liability as the necessary common obligation places the control of contribution entirely in the injured plaintiff's hands. Unless it is his pleasure to secure a final and executable joint judgment, the burden of loss remains where the injured plaintiff chooses to leave it. That contribution, a remedy obviously for the benefit of defendants and of no interest whatsoever to the injured plaintiff, should be left in this status is absurd.

The litigation under New York's tort contribution statute indicates that the average joint tort-feasor, whether singly sued or appearing as one of two codefendants jointly sued, is anxious to secure the benefits of the statute by making certain that if he is held liable at all it will be as a party to a joint judgment against himself and his fellow joint tort-feasor. But the Court of Appeals has doomed to failure all attempts of a tort-feasor to secure the statutory benefits except claims against a fellow joint judgment debtor. A glance at a few of the outstanding decisions will show the vital issues of this general problem in sharp relief.

When the injured plaintiff sues both joint tort-feasors as codefendants the likelihood is that he will secure only a several judgment against one of them with which he will be satisfied. In such an event the luckless judgment debtor cannot secure contribution under the statute. To avoid this the apprehensive claimant attempts to file a cross-claim for contribution against his codefendant so that he may help to prosecute the plaintiff's case against the latter and be in a position to appeal from his codefendant's favorable judgment in case the plaintiff, content with his several judgment against the claimant, is unwilling to do so. In *Price v. Ryan*<sup>6</sup> the Court of Appeals condemned such a cross-claim, declaring that the claimant had failed to state a cause of action for tort contribution under the statute, and insisting that his claim could be filed and litigated only when a joint judgment had already been procured by the injured plaintiff against both tort-feasors.

Taking the court at its word in a subsequent case where the injured plaintiff had secured a joint judgment against two joint tort-feasors, which was reversed as to one and affirmed as to the other by the Appellate Division, the less fortunate codefendant appealed to the Court of Appeals on his cross-claim for contribution from his codefendant's favorable judgment, asking for a reversal thereof or for a new trial on the cross-claim in order to effect a joint judgment in plaintiff's favor as a foundation for his claim for contribution under

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<sup>6</sup>255 N. Y. 16, 173 N. E. 907 (1931).

the statute. The Court of Appeals denied this appeal,<sup>7</sup> asserting that in spite of the joint judgment at the trial the claimant was still in no position to litigate his claim since the tort contribution statute also stipulated that the claimant must not only be a party to a joint judgment but must also have discharged more than his proportionate share thereof before he states a cause of action. The court might have added, of course, that the cross-claim on which the appeal was founded had been filed before the joint judgment existed.

If these decisions are sound, as they undoubtedly are under the statute, one of two or more codefendants jointly sued may never file a litigable cross-claim for tort contribution under any circumstances. The best reason for these decisions, not expressed by the court in either of its opinions, seems to be the otherwise terrible inconvenience to the plaintiff, since recognition of such a claim would entail keeping his action open and delaying execution of his several judgment against the claimant until he procures a final joint judgment which he does not need and may not want. Furthermore, if a new trial were necessary to effect judgment liability against the defendant from whom contribution is sought, the result could not be a joint judgment in favor of the plaintiff but would be two probably inconsistent several judgments, unless the plaintiff were forced to release his existing several judgment against the claimant and to try both defendants anew, an intolerable step which no court would sanction. In any event since the claimant's object is to procure the joint judgment in plaintiff's favor at all costs, and since he cannot do this unless the plaintiff is compelled to delay execution of his several judgment against the claimant until the latter has conducted an appeal and/or a new trial, it is hardly conceivable that a court realizing such inconvenience should ever permit a claim for tort contribution to be filed in and as part of the injured plaintiff's action under a statute such as New York's.<sup>8</sup>

Many cases arising under the New York statute involved the attempt of a singly sued tort-feasor to add under section 193 (2) of the Civil Practice Act his alleged fellow joint tort-feasor as a party defendant to the injured plaintiff's action for the purpose of effecting joint judgment liability and of thus establishing a basis for tort contribution. In one of the most outstanding of these cases the Fourth Department of the Appellate Division permitted a sued defendant to add an alleged joint tort-feasor for the purpose of securing con-

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<sup>7</sup>Ward v. Iroquois Gas Corp., 258 N. Y. 214, 170 N. E. 317 (1932).

<sup>8</sup>This argument of convenience is set forth more thoroughly in Gregory, *op. cit.* *supra* note 2, at 213-219.

tribution.<sup>9</sup> The court observed that such joinder is allowed to a singly sued defendant without inconvenience to the original plaintiff for the purpose of securing contract contribution, even though a separate action is available therefor. Hence, it continued, it is all the more reasonable to permit such joinder for the purpose of securing tort contribution, for otherwise the claimant will never be able to secure it at all, joint judgment liability being a statutory condition precedent to such relief. Although the court pointed out that the immediate objective of the joinder was a joint judgment in the plaintiff's favor against both defendants, it apparently failed to appreciate that the absence of any need for a joint judgment in securing contract contribution and its necessity for tort contribution are the very factors which make the existing practice for securing the former in the creditor's action convenient and the attempted practice for securing the latter in the injured plaintiff's action not only highly inconvenient but impossible.

The Court of Appeals<sup>10</sup> overruled this decision on the ground that the third party statute, section 193 (2), specifically provides for the joinder only when the claimant invoking it can show that if he is liable the third party whom he seeks to add "is or will be liable . . . wholly or in part" over to him. But, as the court points out, the claimant cannot show this until a joint judgment exists in favor of the plaintiff against himself and the third party, in accordance with the terms of the tort contribution statute; and since it is primarily to bring about this joint judgment that the claimant invokes the joinder statute in the first instance, he is in the anomalous position of using this statute to bring about the very condition precedent which he must show exists before he is entitled to invoke it in the first place. Although this argument is decisive, the considerations of convenience presented in a previous paragraph clinch the court's position.

The discussion so far emphasizes the limited application of the tort contribution statute and should reveal how completely the benefits of that statute lie within the exclusive control of the injured plaintiff. It is probably apparent to the most casual reader that the only feature of section 211-a responsible for these defects in New York's system of loss distribution is the requirement of joint judgment liability as the common obligation necessary to securing contribution under the statute.

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<sup>9</sup>Haines v. Bero E. C. Corp., 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dept. 1930). Noted in (1931) 16 CORNELL LAW QUARTERLY 246; and see other notes on § 211a, *id.* at 400, 598.

<sup>10</sup>Fox v. Western N. Y. Motor Lines, Inc., 257 N. Y. 305, 178 N. E. 289 (1931), (1932) 17 CORNELL LAW QUARTERLY 693.

(b) *The Wisconsin Practice—A Comparison*

Under its decision<sup>11</sup> creating contribution between negligent tort-feasors and with the aid of an advanced system of procedure, the Wisconsin court has developed an extremely efficient practice for the recovery of tort contribution, which may serve as a model in jurisdictions contemplating the development of a tort contribution practice. In that state a negligent tort-feasor may recover contribution under a variety of circumstances, since joint judgment liability is not the required common obligation on which the claim for contribution must rest. Thus if the injured plaintiff recovers and executes a several judgment against a singly sued joint tort-feasor, the defendant may recover contribution in a separate action against his fellow tort-feasor. In this separate action the claimant cannot prove his defendant's liability to the injured plaintiff in the strict sense of having to pay damages. But he does not have to prove a common liability of this sort. He establishes a good claim for contribution by merely proving that his defendant's negligence concurring with his own brought about the harm to the injured plaintiff under circumstances which would have entitled such party to a joint and/or several judgment against the claimant and his defendant, or either alone.

In his separate action the claimant tries his defendant, usually with a jury and employing the same witnesses and evidence used against himself by the original plaintiff, with the sole object of proving such defendant to have been with himself concurrently negligent toward the original plaintiff. This is the only real issue involved since the damages will be for that amount in excess of his share of the judgment debt which the claimant discharged. The original injured plaintiff, of course, is not in the least interested in this separate action. Presumably his judgment against the claimant and consequently his claims against both tort-feasors have been completely satisfied.

In Wisconsin as elsewhere the claimant's best cause of action for tort contribution is, of course, proof of his discharge of a joint judgment in the original plaintiff's favor and against himself and his fellow joint tort-feasor. Indeed the claimant may file a motion for contribution in the original plaintiff's action after discharging more than his share of the joint judgment and recover against his codefendant for such excess.<sup>12</sup> But if he prefers to bring a separate action he may do so, alleging and proving as his entire cause of action the joint judgment and his discharge of more than his share. A separate suit under such circumstances would of course be ill-advised. But

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<sup>11</sup>*Ellis v. Chicago & N. W. Ry.*, 167 Wis. 392, 167 N. W. 1048 (1918).

<sup>12</sup>*Haines v. Duffy*, 206 Wis. 193, 240 N. W. 152 (1931).

it is noteworthy that in such a separate action the claimant does not have to re-try his defendant's negligence to the plaintiff, the joint judgment being accepted as proof of the common obligation.<sup>13</sup> On the other hand, when the original plaintiff sues the tort-feasors jointly and secures only a several judgment, the claimant paying this judgment is not bound in his separate action by his fellow tort-feasor's favorable judgment in the original action because, as the court says, this latter judgment is not *res judicata* on the claimant.<sup>14</sup> In the separate action based on the joint judgment, however, the court, while admitting that such judgment is not *res judicata* between the parties to the separate action, insists that no such question is involved but simply treats the joint judgment as in fact the best possible evidence of a common liability.

Wisconsin's tort contribution practice is most interesting, however, where this issue is raised in the injured plaintiff's action. This may be done where the plaintiff has voluntarily joined both tort-feasors as codefendants or where he has sued only one who adds the other under an appropriate statute, the claimant in either case pleading his demand by cross-claim. Naturally defendants against whom such claims have been filed have contended that the claimant could not state a cause of action for contribution in anticipation of the existence, much less the discharge, of his own liability and that, even if he could, no judgment could be rendered on such a claim in the event of his success. But the Wisconsin court denied<sup>15</sup> these contentions on the strength of a statute<sup>16</sup> intended to facilitate the cleaning up in one action of incidental claims related to the same subject matter or fact transaction giving rise to the original action. The pertinent section of this statute provides, in brief, that "a defendant who shows . . . that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may . . . apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action." The court decided that this section, obviously designed to facilitate the recovery of indemnity, was also intended to cover contribution, "since the whole must include an amount less than the whole."<sup>17</sup> Hence, it reasoned,

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<sup>13</sup>*Bakula v. Schwab*, 167 Wis. 546, 168 N. W. 378 (1918); *Wait v. Pierce*, 191 Wis. 202 and 225, 210 N. W. 410 and 822 (1926).

<sup>14</sup>*Ibid.* See also *Grant v. Asmuth*, 195 Wis. 458, 218 N. W. 834 (1928); *Michel v. McKenna*, 199 Wis. 608, 227 N. W. 396 (1929).

<sup>15</sup>*Wait v. Pierce*, *supra* note 13.

<sup>16</sup>Wis. STAT. (1931) § 260. 19(3) and (4).

<sup>17</sup>*Wait v. Pierce*, *supra* note 13, at 230.

the statute impliedly changed the substantive law concerning the nature of a cause of action for contribution in all claims filed under this statute, whether between codefendants or a singly sued defendant and a third party. As for the judgment to be given to the successful cross-claimant, the court implied authority from this same statute to grant what it called a "contingent" judgment which would be made final and executable on motion only after the claimant proves his discharge of the original plaintiff's judgment against himself.<sup>18</sup>

When the injured plaintiff voluntarily sues both tort-feasors as codefendants in Wisconsin, they may file mutual cross-claims for tort contribution which they may prosecute against each other at the same time the plaintiff tries them, and all issues are submitted to the jury at the same time since they are substantially identical, requiring the same witnesses and evidence and relating to the same objective: negligence *vel non* toward the original plaintiff.<sup>19</sup> The fundamental difference, however, between this practice as it exists in Wisconsin and as it was attempted in New York lies in the nature of the immediate objective of the cross-litigation. In the New York cases we saw that this objective was a joint judgment in the injured plaintiff's favor. In Wisconsin, however, the claimant's objective is simply to prove, whether the injured plaintiff does so or not, that his codefendant was negligent toward the plaintiff. He may on his pleadings against the plaintiff strive to deny his own liability and at the same time on his cross-pleadings seek to establish his codefendant's liability. When the codefendants file mutual cross-claims of this sort each attempts to escape liability but to insure a recovery of contribution if he fails to escape.

If the injured plaintiff recovers against one defendant, the other receiving a favorable judgment, the former defendant, now the sole claimant for contribution, may appeal from the adverse judgment on the plaintiff's claim and from that on his own cross-claim. But the object of the latter appeal is not to bring about a joint judgment. If the claimant loses the first appeal but wins the second the plaintiff executes his final judgment against him and withdraws from the action satisfied, leaving the claimant to continue the action against his codefendant, probably by new trial.<sup>20</sup> The claimant's object in this new trial is simply to prove his codefendant's negligence toward the original plaintiff and thus to establish the common obligation necessary to recover contribution.

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<sup>18</sup>Wait v. Pierce, *supra* note 13, at 231-2.

<sup>19</sup>Wait v. Pierce, *supra* note 13, at 225 *et seq.*

<sup>20</sup>Scharine v. Huebsch, 203 Wis. 261, 234 N. W. 358 (1931). This decision marked the complete development of Wisconsin's tort contribution practice.

In passing it may be of interest to note the nature of the judgment which the Wisconsin court invented to cover the situation in the previous paragraph where the plaintiff withdrew from the action to execute his several judgment against the claimant, leaving the latter to continue the action. Although no such judgment had ever been given at common law and the legislature had not expressly provided for it, the court declared that the success of the practice under discussion depended upon employing it and hence inferred authority to do so from the above-mentioned statute creating this practice. The novelty of this invention which the court named the "split" judgment lies in the possibility of rendering two entirely separate money judgments at two different times in the same action at law.<sup>21</sup>

When the injured plaintiff sues only one of two joint tort-feasors, the defendant may add the other as a third party defendant under the statute already mentioned. The plaintiff may then amend to include the third party as a codefendant in which case the action proceeds exactly as if the plaintiff had sued them as codefendants originally.<sup>22</sup> But if the plaintiff does not amend, the defendant alone can file a cross-claim for contribution, such a step being unnecessary for the third party since the plaintiff cannot take judgment against him.<sup>23</sup> The sued defendant prosecutes the third party on his cross-claim exactly as the plaintiff in turn prosecutes him, using the same witnesses and testimony, the object of such cross-litigation being merely to prove the third party's negligence toward the plaintiff. Both claims are tried at the same time and all issues are submitted simultaneously to the same jury. All rights of appeal which are available to any plaintiff or defendant exist also between the parties to the cross-litigation. But such appeals, if any, need interfere in no way with the plaintiff's action against the defendant. The plaintiff may withdraw and execute his several judgment as soon as he normally might do so, leaving his defendant to continue the action, if necessary, against the third party until final judgment is reached on the cross-claim for contribution.<sup>24</sup>

This account of Wisconsin's tort contribution practice may seem complicated, but the practice itself is not. It is simply the logical development of the procedural ideal of litigating in one action all related claims arising out of the same fact transaction, and most of its details are procedural incidents necessary to the achievement of this

<sup>21</sup>*Ibid.*

<sup>22</sup>Wait v. Pierce, *supra* note 13.

<sup>23</sup>Mitchell v. Raymond, 181 Wis. 591, 195 N. W. 855 (1923); Wait v. Pierce, *supra* note 13; Scharine v. Huebsch, *supra* note 20.

<sup>24</sup>Scharine v. Huebsch, *supra* note 20.

ideal. New York fosters the same ideal with respect to other aspects of substantive law such as contract contribution and indemnity of any sort. The novelty of the Wisconsin practice lies only in its application to tort contribution.

(c) *The Future of Tort Contribution Practice in New York*

The New York Commission on the Administration of Justice has recently proposed to displace section 211-a of the Civil Practice Act by a new and extremely comprehensive statute.<sup>25</sup> The present writer is naturally pleased that the Commission in this proposed legislation substantially adopts his suggestions and model statute appearing in a recent article.<sup>26</sup> This model statute, however, was intended to serve as a point of departure for legislatures desiring a tort contribution practice similar to that in Wisconsin but lacking the procedural facilities of that state.<sup>27</sup> Hence it is surprising that it or anything similar to it should be thought appropriate in New York, a state in which all the procedural developments necessary to such a practice are available. Nevertheless the Commission's suggested statute is an able statement of a tort contribution practice similar to that in Wisconsin and merits a detailed consideration not only for appreciation of its excellence but also to discover why the legislature failed to adopt it.<sup>28</sup>

The Commission creates tort contribution in the first section of the proposed statute.<sup>29</sup> Here it deals by mere implication with the most fundamental aspect of the problem as it now exists in New York, by omitting the stipulation in section 211-a of joint judgment liability as the required common obligation necessary to the recovery of contribution. A matter of this importance, however, deserves express treatment and the Commission could settle it beyond doubt by including a clause to the effect that the required common obligation need not be joint judgment liability.

Furthermore in this section the Commission apparently proposes to have contribution between willful as well as between negligent tort-

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<sup>25</sup>REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE (N. Y., 1934) 265 *et seq.*

<sup>26</sup>Gregory, *op. cit. supra* note 2, at 243, n. 122.

<sup>27</sup>Thus the writer's model statute is to be introduced as a bill before the present session of the Massachusetts legislature.

<sup>28</sup>The Commission's proposed statute passed the New York Senate but died in the Rules Committee of the Assembly.

<sup>29</sup>"There shall be a right of contribution between or among joint tort-feasors, in all cases where two or more persons are responsible for a tort, whether the tort was the result of concerted or unconcerted action by the tort-feasors, and whether such action was successive or concurrent in time."

feasors. No other jurisdiction has so completely abandoned the common-law prejudice against tort contribution;<sup>30</sup> but this feature could hardly have deterred the legislature from adopting the statute since section 211-a is similar in this respect.

The second section<sup>31</sup> of the proposed statute would permit the cross-litigation of the issue of contribution between codefendants in the injured plaintiff's own action; and if all of the alleged joint tortfeasors were not joined at such plaintiff's instance, those sued might add any such others as third parties for the purpose of cross-claiming against them.<sup>32</sup> Against such third party defendants the injured plain-

<sup>30</sup>See Leflar, *op. cit. supra* note 3, at 139 and 145. On the latter page he suggests legislation which he apparently believes would permit contribution between all joint tort-feasors, regardless of the nature of their liability, as to which see his footnote 66 on p. 145.

<sup>31</sup>"Contribution between tort-feasors may be enforced by counterclaim or cross complaint in an action brought by the injured person. If any person alleged to be liable jointly for the tort is not made a party to the action he may in the discretion of the Court be joined as a party defendant upon the application of any defendant.

"The plaintiff may thereupon serve an amended complaint against all the defendants, or the plaintiff may proceed without amendment, in which event the plaintiff shall be permitted to recover judgment against the person so joined, as if the appropriate allegations in the original defendant's pleading against such person were included in the complaint.

"Such tort-feasors claiming contribution against each other shall be treated as adverse parties in the action with the right to appeal against each other, and all other procedural rights allowed by law to adverse parties in actions except that no controversy between the tort-feasors subsequent to the rendition of the verdict or decision shall be permitted to delay the entry of judgment to which the injured person is entitled or the enforcement of the same, unless the court otherwise directs.

"Where two or more joint tort-feasors are parties defendant to an action brought by the person injured, a motion for nonsuit as to any defendant against whom contribution is claimed, shall not be granted, except with the consent of all the defendants, until the completion of the whole case. The defendants shall be called upon to offer evidence in the order in which they are named in the complaint or in the order in which they are subsequently joined as parties defendant, unless otherwise directed by the court.

"In the event that an action against joint tort-feasors terminates in a judgment against two or more defendants who claimed contribution from each other, any defendant who has paid more than his pro rata share of the judgment shall be entitled to recover the proper share of the excess from the other defendant or defendants by separate action or by motion in the original action."

<sup>32</sup>The third section of the Commission's proposed statute would permit the recovery of tort contribution by separate action. This section reads as follows: "In the event that only one or less than all of the joint tort-feasors are joined in the original action or if for any other reason the claim to contribution is not adjudicated in said action any tort-feasor who has paid more than his pro rata share of the damages for the tort may enforce his claim for contribution from the other joint tort-feasors in a separate action therefor."

tiff would have the option of amending his complaint and prosecuting them as codefendants although he might take judgment against them without so amending if they were found "liable" to him on the cross-claim filed by any of the originally sued defendants. This latter feature<sup>33</sup> would no doubt be desirable as a kind of exonatory remedy if the injured plaintiff would take the trouble to execute equally against all of the defendants; but it is probably objectionable as part of the proposed statute since it is a feature not already available in similar types of litigation involving cross-claims for contract contribution.

The third paragraph of the second proposed section would make the defendants claiming contribution against each other adverse parties for the purpose of appealing from judgments on cross-claims against each other and would secure to them "all other procedural rights allowed by law to adverse parties in actions," expressly stipulating, however, that no controversy between the tort-feasors shall delay the entry and enforcement of any judgment to which the injured plaintiff might have been entitled, unless the court otherwise directs. The provisions of this paragraph, of course, are sound but are already covered, either expressly or by implication, in sections 193 (2) and 264 of the Civil Practice Act as will be shown below.

The next paragraph of this section would protect the defendant tort-feasors from having their claims against other codefendants or third party defendants weakened by the injured plaintiff's dismissing his action against such latter parties. This feature is hardly necessary, however, since sections 193 (2) and 264 of the Civil Practice Act provide by implication that a cross-claimant for contribution would have as much right as the original plaintiff to prosecute the defendant against whom he claims. The final provisions in this section dealing with the order of the defendants' testimony and permitting a claimant for contribution to secure final judgment on motion against a fellow joint judgment debtor are no doubt commendable but do not seem vitally essential.

The fourth section<sup>34</sup> of the proposed statute which deals with the manner of apportioning contribution seems entirely unnecessary

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<sup>33</sup>This feature is most unusual and has appeared only in PA. STAT. ANN. (Purdon, 1931) tit. 12, § 141, as amended by Pa. Acts (1931) No. 236, p. 663. It is discussed in Gregory, *op. cit. supra* note 2, at 230.

<sup>34</sup>"In determining the amount of the share of each defendant for the purpose of contribution, the damages for which all of the joint tort-feasors are responsible shall be divided by the number of tort-feasors, provided, however, that if one or more of the tort-feasors did not participate personally in the commission of the tort, but is liable for the tort only by reason of his legal relation to one or more

since it merely approximates a statement of the rules ordinarily governing apportionment of responsibility for contribution generally. Inasmuch as these provisions resemble the common law their adoption by statute is unnecessary, and inasmuch as they differ from the common law, if at all, their adoption would introduce an unfortunate distinction between tort and contract contribution.

The fifth section<sup>35</sup> of the proposed statute seems at first glance merely unnecessary; but reflection shows that its adoption would be extremely unwise. In the first place it would crystallize an established common-law rule which, if left to the courts, may be gradually abolished. For example, if one of two negligent persons is the plaintiff's spouse or parent the plaintiff may not take judgment in tort against him in New York.<sup>36</sup> From a decision of a lower court under section 211-a it is clear that the other negligent person may therefore not secure contribution from such relative of the plaintiff,<sup>37</sup> a result which seems quite unfortunate although it is inevitable under the presently accepted notions of contribution requiring a common obligation or liability to the injured plaintiff. But this section would also deny the claim for contribution by one tort-feasor against another when the plaintiff had covenanted not to sue the latter, a result contrary to decisions involving this point and in effect permitting the injured

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of the other tort-feasors, the persons bearing such relation to each other shall for the purposes of contribution be considered as a single tort-feasor.

"If any of the persons liable for contribution is insolvent and if his share is not recoverable from any insurance carrier or other person, or if any of the persons liable for contribution is out of the jurisdiction at the time when the right of contribution is sought to be enforced and cannot be reached by the process of the courts of this state, he shall be excluded in the computation of the amount to be contributed by each of the other tort-feasors, but the tort-feasors who pay the damage for the tort shall be entitled to enforce their claim for contribution from the said person in any insolvency proceedings, or in a subsequent action or in separate actions brought by each of the persons making such payment for their proper portion of the share which the other tort-feasor should have paid.

"No tort-feasor shall be required to pay by way of contribution to any other tort-feasor more than his pro rata share as determined in accordance with this Statute, but the right of the person injured by the tort to recover the whole amount of his claim from any one of the persons liable therefor shall not in any way be affected or impaired by this Statute."

<sup>35</sup>"There shall be no right of contribution against a person responsible in part for the commission of a tort if by reason of the relationship between the said person and the person injured by the tort, or if for any other reason, no action at law would be maintainable by the latter against him."

<sup>36</sup>For example, see *Ackerson v. Kibler*, 138 Misc. 695, 246 N. Y. Supp. 580 (1931).

<sup>37</sup>*Ibid.* This is well-settled elsewhere. For a discussion with citation of cases see Gregory, *op. cit. supra* note 2, at 241-242.

plaintiff to dispose of a right created by the legislature for each defendant tort-feasor's benefit.<sup>38</sup> This second objection could be eliminated by striking from the proposed section the words "...or if for any other reason..."; but the section would still seem inadvisable.

The next section<sup>39</sup> is, of course, quite unnecessary, since it is unlikely that any court will permit the contribution statute to interfere with any defendant's right to recover indemnity under a statute or at common law.

The following section of the proposed statute dealing with the release by the injured plaintiff of any one of the tort-feasors responsible for his injury may be desirable.<sup>40</sup> It seems to change the common law governing the incidents of a release granted by an injured person to one of several joint tort-feasors; but as long as this change in no way interferes with the benefits guaranteed to the other tort-feasors by the contribution statute it seems unobjectionable. It certainly does not add to the rights of any of the tort-feasors, except perhaps to those of the party released, since at common law all would be automatically released by implication. Even the party released would probably be in no better position for it seems likely that the mere creation of contribution between tort-feasors would entitle him to contribution to the amount he expended in discharging the entire

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<sup>38</sup>La Lone v. Carlin, 139 Misc. 553, 247 N. Y. 665 (1931).

<sup>39</sup>"This statute shall not impair the right of any tort-feasor to recover indemnity from another under the existing rules of law."

<sup>40</sup>"A release given by an injured person to one of several joint tort-feasors shall relieve the person released from any liability for contribution on account of the claim or cause of action released.

"The effect of such a release with respect to the liability of the other tort-feasors shall be as follows:

"If the release contains an express statement that the consideration paid therefor is intended to constitute full satisfaction of the claim of the injured person, the injured person shall have no further claim against the other joint tort-feasors. However, in such case the tort-feasor obtaining the release shall be entitled to enforce contribution from the other tort-feasors to the extent to which he shall have paid more than his pro rata share of the damages for which the joint tort-feasors were responsible, but in the absence of such a statement the tort-feasor making the voluntary payment and obtaining the release shall not be entitled to enforce contribution.

"If the release does not contain the said statement, the injured person shall be entitled to enforce his claim against the other tort-feasors, but his claim against them shall be reduced by the amount which they would have been entitled to obtain from the person released by way of contribution if the release had not been given, or by the amount actually paid to the injured person in consideration for the said release, whichever amount is the greater."

As to this proposed section see La Lone v. Carlin, *supra* note 38; and Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N. Y. Supp. 746 (1931).

obligation. The matter covered in this section, however, really has little to do with tort contribution as such and would seem more appropriate in a statute dealing with joint and several obligations generally.

The last section<sup>41</sup> of the proposed act seems unnecessary since the courts will hardly be misled by the substitution, after the injured person's decease, of his next of kin or personal representatives. And that part of this section dealing with the type of injuries with respect to which contribution will be granted might better appear in the first section as definitional of the rights of contribution created.

In this wholesale criticism of the proposed statute the writer is not trying to belittle the Commission's efforts but is attempting to discover why the legislature refused to adopt their proposals. Perhaps the legislature felt that the proposed act was too long and included too much unnecessary detail. Certainly it would be justified in refusing to adopt the Commission's suggested statute, even though it otherwise approved this type of practice, in view of existing procedural devices on which a practice of this sort might be established.

Wisconsin's flawless practice is composed of a common-law declaration of contribution between tort-feasors,<sup>42</sup> a statute permitting cross-litigation between defendants,<sup>43</sup> and a third party joinder statute,<sup>44</sup> welded together by a court determined to achieve the procedural ideal expressed in these two statutes of cleaning up as far as possible in one action all related claims arising out of the same subject matter or fact transaction. Since the New York legislature entertains this same procedural ideal and has provided more complete and detailed rules of procedure and practice with which to realize it,<sup>45</sup> a simple statute creating tort contribution without the requirement of joint judgment liability as the necessary common obligation is alone sufficient to institute a practice similar to that in Wisconsin.

Thus section 264 of the Civil Practice Act parallels the Wisconsin

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<sup>41</sup>"The phrase 'injured person' and the phrase 'person injured by the tort' shall include any person who suffers a personal injury or any injury to any tangible or intangible property or any interest therein, by reason of the commission of any tort, and shall also include the personal representatives of such persons and shall also include any person who may be entitled to recover damages from the tort-feasors by reason of the commission of a tort affecting the person or property, or causing the death, of another."

<sup>42</sup>*Ellis v. Chicago & N. W. Ry.*, *supra* note 11.

<sup>43</sup>WIS. STAT. (1931) § 263. 15(1) and (2).

<sup>44</sup>WIS. STAT. (1931) § 260. 19(3) and (4).

<sup>45</sup>N. Y. C. P. A. (1920) §§ 193(2) and (4) and 264.

statute permitting cross-litigation between defendants,<sup>46</sup> and section 193 (2) of the Civil Practice Act is broader than the Wisconsin third party statute.<sup>47</sup> Indeed the latter New York statute alone is sufficient

<sup>46</sup>WIS. STAT. (1931) § 263. 15. "Cross Complaint. (1) A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action. Such relief may be demanded in the answer, which must be served upon the party against whom the same is asked or upon such person not a party, upon his being brought in, or may be by a cross complaint served in like manner or by petition in intervention under section 260.19, or by answer, served in like manner, when new parties are brought in under sections 260.19 and 260.20.

"(2) In all cases the court or the judge thereof may make such orders for the service of the pleadings, the bringing in of new parties, the proceedings in the cause, the trial of the issues and the determination of the rights of the parties as shall be just. The party against whom such relief is demanded may demur to the answer or cross complaint, as provided in section 263.17, or may answer, serving such demurrer or answer on the defendant claiming such relief, as well as upon the plaintiff, or he may object thereto at the trial for insufficiency. If he shall serve no answer or demurrer and make no such objection he shall be deemed to have denied the allegations relied on for such relief. Unless such an answer, petition or cross complaint be so served such affirmative relief shall not be adjudged."

N. Y. C. P. A. (1920) § 264. "Controversy between defendants. Where the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant who requires such a determination must demand it in his answer, and at least twenty days before the trial must serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants so to be affected who have not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the court otherwise directs."

<sup>47</sup>WIS. STAT. (1931) § 260.19. "(3) A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order.

"(4) This section shall be liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there be two controversies, provided the contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability or serious hardship."

N. Y. C. P. A. (1920) § 193. "(2) Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the court, on application of such party, may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading alleging the claim

to support a tort contribution practice similar to that in Wisconsin, whether the cross-litigation arose between a sued defendant and an added third party or between originally sued codefendants. For if a court would permit such litigation between a defendant and an added third party it would naturally have to permit it between jointly sued codefendants as well. Moreover since sections 264 and 193 (2) of the Civil Practice Act already sanction this practice for the cross-litigation of claims for contract contribution<sup>48</sup> they would automatically sanction it for the recovery of tort contribution after it is by statute placed on a par with contract contribution.

These two sections of the Civil Practice Act impliedly constitute the parties to cross-litigation of this sort adverse parties for the purpose of prosecution and appeals and impliedly authorize the courts to permit the injured plaintiff to withdraw from the action at any time and execute any judgment he may have received against any of the parties defendant, leaving the defendants to continue the action for the purpose of litigating contribution issues of interest to themselves alone. These two sections expressly provide for the type of judgments necessary to achieve the practice in question, that is, what the Wisconsin court terms the "contingent" and "split" judgments.<sup>49</sup>

But if express provision for the type of judgments necessary in such cross-litigation in the injured plaintiff's action were not available, the New York courts could as surely be trusted to infer authority for them from the general provisions of section 264 and 193 (2) of the Civil Practice Act as the Wisconsin court did from its corresponding procedural statutes. After all these New York sections cannot function unless the court can grant the contingent judgment on the cross-claim for contribution, since a final money judgment cannot be entered on such a cross-claim until the injured plaintiff has executed his judgment. Nor can the practice called for in these sections be achieved without the split judgment, since such practice would be futile unless the injured plaintiff could withdraw and execute whatever judgment he may have recovered, leaving the cross-

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of such party against such person be served upon such person and that such person plead thereto, so that the claim of such moving party against such person may be determined in such action, which shall thereupon proceed against such person as a defendant therein to such judgment as may be proper.

"(4) The controversy between the defendants shall not delay a judgment to which the plaintiff is entitled, unless the court otherwise directs."

<sup>48</sup>See Crouch, J., in *Haines v. Bero E. C. Corp.*, *supra* note 1, at 334.

<sup>49</sup>See N. Y. C. P. A. (1920) § 193(2) and (4), clauses referring to type of judgment, and see concluding clause of § 264. See note (1932) 17 CORNELL LAW QUARTERLY 693.

litigants to continue a controversy in which he is no longer interested.

But the Commission's proposed statute seems unwise for other reasons. It seems tactically inept since it resurrects before the legislature procedural issues which have already received a satisfactory disposition and for which the present personnel of the legislature might not wish to be thought responsible. Moreover, the proposed statute seems to betray distrust on the Commission's part that the courts will develop the desired practice from the available sections of the Civil Practice Act. It seems much wiser to leave this development to the courts and to minimize the possibilities of confusion through judicial interpretation presented by the introduction of more detailed procedural rules in a state that already has plenty with which to contend. After all, the New York courts are committed to an interpretation of the present procedural statutes which is favorable to the practice under discussion.<sup>50</sup>

The writer's thesis is, in short, that if tort contribution is put on the same basis as contract contribution in New York, litigation of the issue of tort contribution in the injured plaintiff's action will

<sup>50</sup>Although there seems to be no square decision in which § 193 (2) of the C. P. A. was employed in securing contract contribution, it has been employed for recovery of indemnity, and the Appellate Courts of New York have clearly stated that its purpose was also to enable the recovery of contribution in the original plaintiff's action. *Municipal S. R. E. Co., Inc. v. D. B. & M. Holding Corp.*, 257 N. Y. 423, 178 N. E. 745 (1931); *Fox v. Western N. Y. M. L. Inc.*, 257 N. Y. 305, 178 N. E. 289 (1931); *Stern v. Ide & Co., Inc.*, 212 App. Div. 714, 209 N. Y. Supp. 473 (1st Dept. 1925); *Haines v. Bero E. C. Corp.*, 230 App. Div. 332 at 334, 243 N. Y. Supp. 657 (4th Dept. 1930); *Merrett v. Rhodes*, 232 App. Div. 422, 252 N. Y. Supp. 114 (2d Dept. 1931).

Indeed the fact that most of the judges on the Appellate Division regarded its use to enable the recovery of tort contribution as not only proper but essential indicates the procedural purpose of this section. See *Crouch, J. in Haines v. Bero E. C. Corp.*, *supra*; and see *Davis v. Hauk & Schmidt Inc.*, 232 App. Div. 556, 250 N. Y. Supp. 537 (1st Dept. 1931). Other cases are cited in annotated editions of the Civil Practice Act. In fact the Court of Appeals recognized this but felt that because of the wording of the tort contribution statute which put the substantive right of recovering tort contribution on such a different basis from the recovery of contract contribution, the use of § 193 (2) as a means of recovering tort contribution was improper. But the court fairly implied that it took this stand only because of the unusual requirement in the tort contribution statute of joint judgment liability as a condition precedent to recovery of the particular kind of contribution in question. *Price v. Ryan*, 255 N. Y. 16, 173 N. E. 907 (1930); *Fox v. Western N. Y. L. M. Inc.*, *supra*.

§ 264 of the C. P. A. authorizing cross-litigation between defendants is probably unnecessary to this practice. There is apparently no case decided thereunder involving the recovery of contribution, but a glance at this section and the sparse annotations thereunder will indicate its applicability to the practice in question.

inevitably follow. Hence he suggests as an adequate substitute for section 211-a of the Civil Practice Act a very brief statute creating tort contribution without the required common obligation of joint judgment liability and including whatever additional measures the Commission deems absolutely necessary. As a mere suggestion of what the writer has in mind he deferentially proposes the following paragraph, not claiming it to be better than the Commission's proposed statute, but merely believing it to be more the sort of statute the legislature is likely to enact:

Tort contribution shall be allowed between tort-feasors causing damage to the person or property of another through such joint, concurrent or successive inadvertence or negligence as would render all of such tort-feasors commonly liable to suffer a joint and/ or several adverse judgment for the entire damage at the injured plaintiff's option. The common obligation or liability necessary to maintain an action or claim for tort contribution need not be joint judgment liability.