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Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Againsnt Action by the Injured Party

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NOTES

CONTRIBUTION AMONG JOINT TORTFEASORS WHEN ONE TORTFEASOR ENJOYS A SPECIAL DEFENSE AGAINST ACTION BY THE INJURED PARTY

Both in theory and by historical development the doctrine of contribution is an equitable one.[1] The common law denied any right to contribution among joint tortfeasors, holding that each was fully liable to the plaintiff for all the harm caused.[2] A man whose injury resulted from the acts of two equally culpable offenders could—by chance, whim, or design—recover full damages from either, leaving the other free from any legal obligation to his joint tortfeasor or to the victim. But as the number of tort actions based on negligence increased so as to greatly outnumber suits concerning intentional torts, which involve a greater element of moral turpitude, this doctrine was reexamined.[3] The inequality of allowing the full burden of loss, for which two or more persons are equally responsible, to be borne by one alone has led more than half of the American jurisdictions, by statute or judicial decision, to allow contribution among joint tortfeasors.[4]

Special Defenses in Contribution Suits

A tortfeasor may escape liability to the injured plaintiff if he enjoys a special defense. For example, he may be the plaintiff's spouse and thus have the defense of interspousal immunity, or the plaintiff may have been contributorily negligent, or the action may be barred by the statute of limitations.[5] In such cases, the joint tortfeasor who does not enjoy such a defense remains liable to an action by the plaintiff even though he is no more culpable than the tortfeasor with the special defense. The issue then is raised whether such a defense should also bar a suit for contribution against the tortfeasor who enjoys immunity to suit by the plaintiff. The overwhelming majority of jurisdictions has held that no right to contribution can exist without common liability to the plaintiff.[6] There must be

[1] Panichella v. Pennsylvania R.R., 167 F. Supp. 345, 351-52 (W.D. Pa. 1958); Bulkeley v. House, 62 Conn. 459, 467-68, 26 Atl. 352, 353 (1893); Anstine v. Pennsylvania R.R., 352 Pa. 547, 549, 43 A.2d 109, 110 (1945); Mong v. Hershberger, 200 Pa. Super. 68, 71, 186 A.2d 427, 429 (1962); 13 Am. Jur. "Contribution" § 4 (1938). See also Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co., 338 Mo. 692, 702, 93 S.W.2d 19, 22 (1935).

[2] Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799); see Leflar, "Contribution and Indemnity Between Tortfeasors," 81 U. Pa. L. Rev. 130 (1932).

[3] Best v. Yerkes, 247 Iowa 800, 810, 77 N.W.2d 23, 29 (1956); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 403-10, 167 N.W. 1048, 1051-54 (1918).

[4] See Note, 68 Yale L.J. 964, 981-82 (1959).

[5] See notes 8-44 infra and accompanying text (interspousal immunity); notes 47-51 infra and accompanying text (contributory negligence); notes 56-60 infra and accompanying text (statute of limitations).

[6] E.g., Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950) (interspousal immunity). Bond v. Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951) (indemnity action denied because of charitable immunity). Oahu Ry. & Land Co. v. United States, 73 F. Supp. 707 (D.C. Hawaii 1947) (governmental immunity). Lutz v. Boltz, 48 Del. 197, 100 A.2d 647 (Super. Ct. 1953) (guest statute). Saxby v. Cadigen, 266 Wis. 391, 63 N.W.2d 820 (1954) (assumption of risk). Kennedy v. Pennsylvania R.R., 282 F.2d 705 (3d Cir. 1960); Panichella v. Pennsylvania R.R., 167 F. Supp. 345 (W.D. Pa. 1958); Mutual Auto. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 268 Wis. 6, 66 N.W.2d 697 (1954) (contributory negligence). Iowa Power &

an enforceable right of action by the injured party against each of the tortfeasors.[7]

Policies necessarily conflict whenever contribution is sought from a defendant who is immune to direct action by the injured party, and anomalous results often follow. If contribution is allowed, the injured plaintiff will recover one-half his damages from a defendant against whom he could not have recovered at all had that defendant been the only one at fault. On the other hand, if contribution is denied, the first defendant must bear the entire burden of the loss despite the policy which led to the adoption of the rule of contribution.

Interspousal Immunity

A policy conflict most commonly arises in cases where the injured party is the spouse of one of the negligent tortfeasors. Four years ago, only Pennsylvania allowed contribution when one offender enjoyed the defense of interspousal immunity.[8] But that state has since been joined by Maine,[9] Louisiana,[10] and Rhode Island[11] in a growing dissent to the absolute requirement of common liability as a prerequisite to contribution.

Pennsylvania: The Original Dissenter. Pennsylvania passed its first contribution statute in 1939[12] and thereby expanded the holding of a 1928 case, which had allowed contribution among joint tortfeasors for unintentional torts,[13] to include all torts. Subsequently, the leading case of *Fisher v. Diehl*[14] allowed joining of the husband as a second defendant in an action brought by his wife. The wife was a passenger in a car driven by her husband and was injured in an accident in which both her husband and the other driver were negligent. The court held, under the 1939 statute, that the husband could be joined as defendant, provided that any judgment against him could not be enforced by his wife. That judgment was to be available only to the first defendant for purposes of contribution and, upon payment of the primary judgment, the first defendant was entitled to utilize it to enforce contribution from the husband.

The husband claimed that this holding was contrary to the Pennsylvania policy of the legal unity of husband and wife, which emphasizes the need to

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Light Co. v. Abild Constr. Co., 144 N.W.2d 303, 306-11 (Iowa 1966); Congressional Country Club, Inc. v. Baltimore & O.R.R., 194 Md. 533, 71 A.2d 696 (1950) (workmen's compensation). McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950) (statute of limitations); see Restatement, Restitution § 86 (1937).

7 The Uniform Contribution Among Tortfeasors Act provides that "where two or more persons become jointly or severally liable in tort . . . there is a right of contribution among them." Uniform Contribution Among Tortfeasors Act § 1(a), 1955 Revised Act, 9 Unif. Laws. Ann. (Supp. 1965, at 125). The Commissioners' Note comments:

> The language used has been adequate to exclude cases where the person from whom contribution is sought was not liable to the injured person. Thus where the potential contributor is the spouse of the injured person. . . . Or where the injured person assumed the risk of the potential contributor's negligence [sic].

9 U.L.A. (Supp. 1965, at 126).

8 Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945).

9 Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963).

10 Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965).

11 Zarrella v. Miller, 217 A.2d 673 (R.I. 1966).

12 "Contribution shall be enforceable among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary." Pa. Stat. Ann. tit. 12, § 2081 (1951).

13 Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928).

14 156 Pa. Super. 476, 40 A.2d 912 (1945).

preserve domestic peace and felicity. The court found, however, that the action was not one of wife against husband, since any judgment in favor of the wife could not be enforced against the husband. The court noted that:

> The legal unity of husband and wife and the preservation of domestic peace and felicity between them are desirable things to maintain . . . where they do not inflict injustice upon outsiders and deprive them of their legal rights.
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> . . . . To hold otherwise would permit a husband to profit by his own wrongful or negligent act at the sole expense of the third party.[15]

In 1951 Pennsylvania adopted the Uniform Contribution Among Tortfeasors Act[16] and repealed its 1939 statute. Though there was some speculation that this statutory change overruled Pennsylvania's minority position,[17] all doubt was removed in 1955 when *Fisher v. Diehl* was reaffirmed by the case of *Puller v. Puller*,[18] which emphasized the equities involved.[19]

The Growing Dissent. Though there had been no ruling on the precise question by the state courts of Maine, that state appeared to stand with the majority until 1963. In 1959 a federal court, in two actions[20] involving facts almost identical to those in *Fisher*, had denied contribution and held that to enforce contribution in Maine, common liability by the joint tortfeasors to the injured spouse was required.[21] But in *Bedell v. Reagan*[22] Maine joined Pennsylvania and allowed contribution in another automobile collision case involving interspousal immunity, despite the fact that under Maine law neither spouse could maintain an action against the other. The court held that "the instant case is not a single action but is obviously and in truth two separate causes of action procedurally combined . . . ."[23] The wife was not considered to be a party to the contribution action.

Despite the legal device employed, the *Bedell* court's holding rested primarily upon the equities involved. The court concluded that " '*the element of common*

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15 Id. at 484, 40 A.2d at 917.

16 Pa. Stat. Ann. tit. 12, §§ 2082-89 (Supp. 1966).

17 In 1952, a federal court, in Zutt v. Blatt, 13 F.R.D. 3 (E.D. Pa. 1952), attempted to apply Pennsylvania law in the same factual situation, and granted a motion by the defendant to sever an action by a husband and wife against him on the ground that if both defendants were found jointly liable for the wife's injuries, contribution could not be had from the husband under the uniform act. At least one authority commented that this case indicated that the statutory change overruled Fisher v. Diehl. See Prosser, Torts § 47, at 277 n.73 (3d ed. 1964).

18 380 Pa. 219, 110 A.2d 175 (1955).

19 The court observed that:

> Whatever may be the law in the majority of other jurisdictions, . . . it is established in our own State that a tortfeasor has a right of contribution against a joint tortfeasor even though the judgment creditor be the latter's spouse, parent, or minor child; in other words, a tortfeasor may recover such contribution even though, for some reason, the plaintiff who has obtained a judgment against both of them is precluded from enforcing liability thereunder against the joint tortfeasor . . . . The theory is that as between the two tortfeasors the contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.

Puller v. Puller, id. at 221, 110 A.2d at 177. [Citations omitted.]

20 Reed v. Stone, Jeppsen v. Jaeger, 176 F. Supp. 463 (S.D. Me. 1959).

21 The court cited Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815 (1918). Maine has no contribution statute and the doctrine as applied there is entirely court-made law.

22 159 Me. 292, 192 A.2d 24 (1963).

23 Id. at 294, 192 A.2d at 25.

liability of both tortfeasors to the injured person' has been suffered to become a fetish,"[24] and that equity should prevent the application of a legal principle which results in unconscionable and unjustified hardship. It felt that any marital discord engendered by a contribution suit would be slight and more tolerable than a denial of contribution.[25]

Louisiana joined Pennsylvania and Maine in 1965 when it decided *Smith v. Southern Farm Bureau Cas. Ins. Co.*,[26] which also involved interspousal immunity as a defense to an action arising from an automobile collision wherein both drivers were negligent. In so doing, the Louisiana court became the first to overrule a prior state decision on the question.[27]

Louisiana classifies joint tortfeasors as "solidary" codebtors in its Civil Code,[28] and amended the Code in 1960 "to provide a substantive law base for the enforcement of contribution among joint tortfeasors through the third party demand."[29] A husband's immunity from suit by his wife is also provided for by statute,[30] but the court in *Smith* held that the immunity was merely a procedural bar to the wife's right to sue the husband, and not a removal of a substantive cause of action against the husband for negligently injuring his wife. Therefore contribution could be enforced against the husband based on this existing cause of action.[31] The court expressed concern about the indirect, adverse effect upon the marital relationship which might result, but held that such a consideration was not a basis for extending the application of interspousal immunity.[32]

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[24] Id. at 298, 192 A.2d at 27.

[25] "It is of the very proper object of equity to prevent application of a universal legal principal in an eventuality where unconscionable and unjustifiable hardship must otherwise ensue." Ibid.

> [A]n assertion by a husband against his wife of a third-party plaintiff's defenses to the wife's action would be reliably calculated to engender marital discord but not to any insuperable degree. Such a regrettable evil must be regarded, however, as more tolerable than a denial of contribution to the third-party plaintiff in cases such as the one at bar.

Id. at 299-300, 192 A.2d at 28.

[26] 247 La. 695, 174 So. 2d 122 (1965).

[27] Johnson v. Housing Authority, 163 So. 2d 569 (La. App. 1964).

[28] La. Civ. Code Ann. art. 2103 (West 1952). A solidary obligation exists when one of several obligors is separately bound to perform the whole of the obligation. La. Civ. Code Ann. art. 2082 (West 1952).

[29] Explanatory Note—Henry G. McMahon, La. Civ. Code Ann. art. 2103 (West Supp. 1965, at 73), amending La. Civ. Code Ann. art. 2103 (West 1952).

[30] La. Rev. Stat. Ann. § 9:291 (1965).

[31] In so deciding, the Louisiana court ignored language in Article 2091 of the Civil Code which might have been construed to require common liability to the plaintiff for contribution as required in the majority jurisdictions:

> There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor.

La. Civ. Code Ann. art. 2091 (West 1952).

[32] The general tenor of Article 2315, creating a cause of action in favor of injured parties against those by whose fault the injury happened, makes that article universal in its operation unless a specific exception is established by law. In view of this fundamental premise, and in the absence of an appropriate exception, it follows that a substantive cause of action would come into being in favor of an injured wife against a negligent husband. The immunity created by LSA-R.S. 9:291 is not an exception to the creation of this substantive cause of action; it is merely a procedural bar to the wife's right to sue the husband personally.

Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 703, 174 So. 2d 122, 125 (1965).

> The indirect, adverse effect upon the marital relationship which might result . . . [concerns us but is not] a basis for extending the application of LSA-R.S. 9:291 beyond

Rhode Island Joins the "Minority." A collision between an automobile driven by the agent of Esther Zarrella and one driven by Jacob Miller caused injury to Mr. Miller's wife, a passenger in his car. Both drivers were negligent. Mrs. Miller brought suit against Mrs. Zarrella to recover for her injuries and a settlement was reached. In a subsequent action, *Zarrella v. Miller*,[33] the defendant in the first action sought contribution from Mr. Miller under Rhode Island's contribution statute.[34] Mr. Miller raised the defense of interspousal immunity, claiming that, since he was immune from a direct action by his wife to recover for her injuries, he was not "liable in tort" as required by Rhode Island's statute.[35] The court rejected this argument and allowed contribution, ruling that "liable in tort" referred to culpability. "Liable," it said, referred "to the existence of a cause of action rather than the right to enforce the same and . . . under our law the immunity of one spouse from suit by the other is merely procedural."[36] But the court went further:

> The considerations of public policy upon which the doctrine of interspousal immunity is predicated do not apply to actions for contribution under the act since such actions do not contemplate an action by a wife against her husband. The reason of the rule against interspousal suits does not apply to actions under the instant act.[37]

Until Rhode Island's decision in *Zarrella*, no state which had adopted the Uniform Contribution Among Tortfeasors Act[38] had held contrary to the majority rule, except Pennsylvania, which had a state policy favoring contribution even before it passed the Uniform Act.[39]

Evaluation of the Minority Decisions. Denying contribution from plaintiff's negligent spouse places an unfair share of the burden of loss on the third-party tortfeasor by allowing the defense of interspousal immunity to be raised against a person other than a spouse. Such a result is contrary to the trend toward limiting that defense,[40] and it ignores the fact that the primary policy sought to be implemented by the defense, the preservation of domestic harmony, is not violated by permitting contribution. The financial burden imposed on the family, by cutting in half its award from the third-party tortfeasor, is justly imposed because the family unit was as negligent as the third party. Under the common

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its clear import—the incapacity of the wife to sue her husband for damages being purely procedural and definitely limited to a suit between spouses.

Id. at 706-07, 174 So. 2d at 126.

[33] 217 A.2d 673 (R.I. 1966).

[34] R.I. Gen. Laws Ann. §§ 10-6-1 to 10-6-11 (1956).

[35] R.I. Gen. Laws Ann. § 10-6-2 (1956), which defines joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury to person . . . ."

[36] Zarrella v. Miller, 217 A.2d 673, 675 (R.I. 1966).

[37] Ibid.

[38] See note 7 supra.

[39] See text accompanying notes 12-19 supra. The section of the act on uniformity of construction provides: "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it." Uniform Contribution Among Tortfeasors Act § 9. Both Pennsylvania (Pa. Stat. Ann. tit. 12, § 2088 (Supp. 1965)) and Rhode Island (R.I. Gen. Laws Ann. § 10-6-10 (1956), substituting the word "chapter" for "Act") adopted this section. It is generally held that the Commissioners' notes, while not binding with respect to interpretation, are highly persuasive and should be adopted unless clearly erroneous or contrary to the settled policy of the state. E.g., Shultz v. Young, 205 Ark. 533, 538, 169 S.W.2d 648, 651 (1943).

[40] See Prosser, Torts § 116 (3d ed. 1964).

law, the negligence of one spouse would have been imputed to the other and would have acted as a total bar to recovery.[41]

But there are defenses which should be maintained in contribution actions as well as in direct actions. The minority jurisdictions which have allowed contribution despite the defense of interspousal immunity have gone too far if their decisions allow contribution without regard to the defense involved. Each defense must be individually considered.

Pennsylvania and Louisiana have already made distinctions or contrary rulings with respect to workmen's compensation,[42] and Pennsylvania decisions in related areas indicate that different policy considerations should govern each defense pleaded.[43] Pennsylvania and Maine have emphasized equity, and an equitable doctrine is by its very nature more flexible than a rule of law. Louisiana and Rhode Island have emphasized the difference between substantive and procedural bars. Louisiana decisions indicate that the nature of the individual defense will govern. In contrast, Rhode Island's emphasis on the *mere existence of a cause of action* as sufficient to make a defendant liable under its contribution statute may well lead to unfortunate results.[44]

Other Special Defenses

Most other defenses involve policies which would be directly violated if the defenses were not recognized to prevent contribution. Thus, where charitable immunity is still recognized, it should be upheld as a defense to a contribution suit, since allowing contribution would violate the primary policy behind the immunity—preservation of the charitable trust fund.[45] Similarly, governmental immunity should be upheld when allowance of contribution claims would violate the policy against the dissipation of public funds which underlies the immunity.[46]

Contributory Negligence. It is generally held that the defense of contributory negligence is a defendant's substantive right, and in order to abolish it a statute must declare the abolition in express terms, not merely set forth grounds of

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41 E.g., McFadden v. Santa Ana, O. & T. Ry., 87 Cal. 464, 25 Pac. 681 (1891).

42 See notes 66-70 infra and accompanying text.

43 See Union Paving Co. v. Thomas, 9 F.R.D. 612 (E.D. Pa. 1949), where the court said that in Pennsylvania contribution is allowable except when it would be inequitable. Pennsylvania courts have also held, in ignoring the defense of interspousal immunity, that "when the policy behind a rule no longer exists, the rule should disappear." Kaczorowski v. Kalkosinski, 321 Pa. 438, 444, 184 Atl. 663, 665 (1936).

44 The original Uniform Contribution Among Tortfeasors Act of 1939 is in effect in both Pennsylvania and Rhode Island. Construing this statute, which defines joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury" (Uniform Act § 1, Pa. Stat. Ann. tit. 12, § 2082 (Supp. 1965), R.I. Gen. Laws Ann. § 10-6-2 (1956)) and which provides that "the right of contribution exists among joint tortfeasors" (Uniform Act § 2(1), Pa. Stat. Ann. tit. 12, § 2083(1) (Supp. 1965), R.I. Gen. Laws Ann. § 10-6-3 (1956)), the majority jurisdictions hold that the requisite liability is not present if a tortfeasor has a valid defense against an action by the injured party, Pennsylvania holds that the particular defense involved determines whether or not there is liability, and Rhode Island holds that the required liability is present whenever the injured party has a cause of action against a tortfeasor, even if it cannot be enforced because of a defense enjoyed by the tortfeasor. The 1955 revised Uniform Act (see note 7 supra) was intended to reconcile the variations among the states. Among the changes made was the elimination of the term "joint tortfeasors." However, neither Rhode Island nor Pennsylvania has adopted the revised act.

45 Cf. Bond v. Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).

46 Cf. Oahu Ry. & Land Co. v. United States, 73 F. Supp. 707 (D.C. Hawaii 1947).

liability which appear to exclude contributory negligence as a defense.[47] In the case of workmen's compensation statutes and the Federal Employers' Liability Act, contributory negligence is expressly excluded as a defense for the employer.[48] If injury to an employee is caused by the employer and a third party as joint tortfeasors, and the employee is contributorily negligent, the third party has a defense but the employer remains liable. The employer should not be able to obtain contribution from the third party and thereby deprive him of his defense, since the reasons for allowing the defense have not been undermined.[49] The employee's contributory negligence bars him from recovering ordinary tort damages. The amount he can recover from his employer under a workmen's compensation law is limited by statute.[50]

A plaintiff may also be contributorily negligent toward one defendant but not the other.[51] In this case there is less reason for denying contribution than there is when the joint tortfeasors are subject to different tests for liability and different measures of damages because of a workmen's compensation statute. Contributory negligence is a bar to recovery by a plaintiff because his actions make him as culpable as the defendant. As between the joint tortfeasors, there is no difference in culpability even though the plaintiff was contributorily negligent toward only one of them. As plaintiff will recover damages from one tortfeasor regardless of whether contribution is allowed, the reason for the defense is gone and contribution should be allowed. Whether contribution is allowed, however, depends on whether the contribution statute is construed to have eliminated contributory negligence by the plaintiff as a defense in this situation. It is unlikely that this will ever happen, since courts are extremely reluctant to eliminate any defense and the defense of contributory negligence is considered to be a defendant's substantive right.

Assumption of Risk. When a plaintiff expressly "assumes the risk"[52] of a defendant's actions, or such assumption of risk is clearly implied, the plaintiff cannot recover.[53] But the duty of other defendants in this situation is in no way altered, and they should be fully liable for their torts. The defendant who has breached no duty, even though he would be a joint tortfeasor had there been no assumption of risk, should not be forced to share in this liability.[54]

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47 See, e.g., Lowe v. Southern R.R., 85 S.C. 363, 367-68, 67 S.E. 460, 462 (1910); Du Rocher v. Teutonia Motor Car Co., 188 Wis. 208, 205 N.W. 921 (1925).

48 Under the Federal Employers' Liability Act, contributory negligence only mitigates damages. 35 Stat. 66 (1908), 45 U.S.C. § 53 (1964).

49 See Kennedy v. Pennsylvania R.R., 282 F.2d 705 (3d Cir. 1960); Panichella v. Pennsylvania R.R., 167 F. Supp. 345 (W.D. Pa. 1958); Mutual Auto Ins. Co. v. State Farm Mut. Auto. Ins. Co., 268 Wis. 6, 66 N.W.2d 697 (1954).

50 This limitation of liability is also protected. See notes 63-70 infra and accompanying text.

51 For example, *P* buys a rope from *D2* for rigging a scaffold and *D2* negligently gives him a defective rope. *P* discovers the defect and therefore buys another rope from *D1* which, unknown to *P*, is also defective. *D1* is negligent in supplying the second rope. *P* then raises the scaffold using both ropes; both break, *P* falls and is injured. Had either *D1* or *D2* not negligently supplied a defective rope, the injury would not have happened. Clearly *D1* is liable to *P*. But *P* knew of the defect in the rope supplied by *D2* and depending on that rope is contributory negligence by *P*.

52 See, e.g., Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959); Restatement (Second), Torts §§ 496A-496G (1965).

53 Meistrich v. Casino Arena Attractions, Inc., supra note 52, at 49, 155 A.2d at 93.

54 If plaintiff is playing in a football game and is injured as a result of being tackled by an opposing player who pushed plaintiff onto a rake negligently left on the field by school

When the intent to assume risk is not so clearly manifested, assumption of risk is very similar to contributory negligence, the test of plaintiff's conduct being the reasonably prudent man.[55] In this situation, assumption of risk should be upheld against contribution when contributory negligence would be upheld against it.

Statutes of Limitation. If the injured plaintiff brings a successful suit against one of the joint tortfeasors before the statute of limitations has run, an action for contribution can generally be maintained by that tortfeasor, even though the statute would bar an action by the original plaintiff against the other tortfeasor.[56] The statute of limitations applicable to the contribution action does not begin to run until the first defendant satisfies the judgment against him, since this is when the cause of action for contribution arises. This view is reinforced by the theory that a contribution suit is basically quasi-contractual, the payment of the judgment by the first defendant establishing the quasi-contractual obligation.[57]

Statutes of limitation are enacted to allow repose, so that after a certain time a matter can be considered settled without perpetual concern that it may be revived and disrupt future events.[58] These statutes also ensure that a party will not be forced to litigate an issue long after evidence concerning it has been destroyed and witnesses to it have disappeared or have forgotten what transpired.[59] The procedure above does extend the statutory period beyond its normal limit, but a definite period after which an action cannot be brought is still maintained. At the same time, the defendant is ensured of having fair and adequate time in which to bring his action for contribution.

However, the fact that the statute runs from the date of payment of the judgment rather than from the date the judgment was obtained may work substantial injustice upon the contribution defendant if there is a long delay between the date the judgment is obtained and the date it is paid. A delay of many years is possible if the first defendant is insolvent or successfully evades payment and the plaintiff continually renews the judgment until it is satisfied. If the negligence of the contribution defendant has already been determined, the loss of evidence and reliable witnesses is not a factor. But such long delay is a burden on that defendant and, if the first defendant is responsible for the delay, laches or some similar doctrine should bar his recovery of contribution, especially as contribution in itself is an equitable doctrine.[60]

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employees, the school district should certainly not be allowed contribution from the player who made the tackle. Plaintiff did not assume the risk of the school district's negligence and its liability is unaffected. But plaintiff, by participating in the football game, did remove the duty of ordinary care owed him by his opponents, and they should not be liable for injury resulting from the ordinary dangers of the game.

[55] See Meistrich v. Casino Arena Attractions, Inc., supra note 52, at 51, 155 A.2d at 94. But see 38 Am. Jur. "Negligence" § 172 (1941).

[56] McKay v. Citizens Rapid Transit Co., 190 Va. 851, 857-58, 59 S.E.2d 121, 123-24 (1950). See also Restatement, Restitution § 86, illustration 3 (1937).

[57] Builders Supply Co. v. McCabe, 366 Pa. 322, 336, 77 A.2d 368, 375 (1951). See also McKay v. Citizens Rapid Transit Co., supra note 56, at 858-59, 59 S.E.2d at 124, holding that the three year statute of limitations for implied promises rather than the one year statute for torts should apply.

[58] See Campbell v. Haverhill, 155 U.S. 610, 617 (1895).

[59] Id. at 616-17; Exploration Co. v. United States, 247 U.S. 435, 448 (1918).

[60] See cases cited in note 1 supra.

The hardship on the second defendant is especially great if he is unaware that he may be subject to a suit for contribution long after the judgment against the first defendant is obtained. But having the limitations period for a contribution action run from the date of the original judgment, rather than from the date the judgment is paid, would work injustice on an insolvent first defendant who is unable to satisfy the judgment before the statute has run. The interests of both sides might best be protected if the statute were to begin running when the judgment against the first defendant is obtained, with the first defendant being allowed to toll the statute until after payment by notifying the second defendant of his intent to seek contribution when he has satisfied the judgment. The second defendant would then be alerted to the fact that he might have to defend against a contribution action. If he were to show that continued delay would be an inordinate burden on him, the second defendant could be permitted to settle the matter by means of a declaratory judgment action.

Automobile Guest Statutes. Guest statutes have been adopted by more than half the states,[61] and are designed to relieve the driver of the consequences of ordinary negligence to his guest. Thus a guest involved in a two-car collision in which both drivers were merely negligent would have no enforceable cause of action against his host driver, but he could bring a successful action against the other driver. That driver would want to obtain contribution from the host.

Guest statutes are usually based upon a theory of assumption of risk by the guest or upon a desire to protect insurance companies from collusive claims.[62] When the primary policy behind the statute is one of assumption of risk, the statute should be treated as was the defense of assumption of risk. But when the primary policy is the prevention of collusive claims, the defense should not be permitted in a contribution suit. This is because the claim of the guest has already been established and the only issue which remains is the equitable distribution of the burden of that claim.

Workmen's Compensation Laws. When workmen's compensation laws are raised as a defense to a contribution suit, there are again two strong equitable or policy considerations. The employer whose liability to his employee is absolute, but limited in amount, should not be subjected to unlimited liability for his common-law torts merely because a third party is also liable to the employee. A rule allowing contribution would also allow an injured employee to recover indirectly from his employer for injuries concerning which the employer was not directly liable under the workmen's compensation law. On the other hand, the third party should not be forced to bear the entire burden of the loss merely because the other tortfeasor chanced to be the plaintiff's employer; such a situation forces the third party to subsidize the workmen's compensation system.

The majority of courts in this situation follows the same path taken with other immunities and denies contribution, reasoning that there is an absence of common liability, the employer's liability being imposed and limited by the act rather than by the rules of negligence.[63] This seems more just than allowing unlimited

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61 See Note, 3 Wyo. L.J. 225 n.2 (1949).

62 See Prosser, Torts § 34, at 190 (3d ed. 1964).

63 A few jurisdictions have gone beyond holding merely that joint liability is required and have given lengthy consideration to the problems involved. See Iowa Power & Light Co. v. Abild Constr. Co., 144 N.W.2d 303, 306-11 (Iowa 1966), where the court decided that any change in the rule ought to be dealt with legislatively but noted the strong arguments

liability, as in an ordinary tort suit. The reasons for disallowing interspousal suits, for example, do not appear to be as strong a basis for denying contribution as the creation of an exclusive statutory remedy under a workmen's compensation act, which substitutes liability without fault for common-law negligence[64] and is clearly substantive rather than procedural in nature.[65]

Pennsylvania seems to have found a better rule than absolute denial of contribution. Since the 1940 case of *Maio v. Fahs*,[66] Pennsylvania has allowed contribution to a joint tortfeasor to the extent of the employer's liability under the act.[67] The formula employed by *Maio* combines the statutory limitation of liability with the equitable policy that joint tortfeasors share their liability to the plaintiff.[68]

No other state has followed Pennsylvania's limited formula and allowed contribution to overcome the defense of statutory immunity from ordinary tort liability where an employer is liable under workmen's compensation.[69] Of the three other states standing with Pennsylvania in allowing contribution despite the defense of interspousal immunity—Maine, Rhode Island, and Louisiana—only Louisiana has ruled on the question of workmen's compensation as a defense. That state, standing this time with the majority, has denied contribution.[70]

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for allowing contribution when one defendant enjoys a special defense against the injured party. See also Justice Becker's opinion concurring in the result but dissenting on the question considered here. Id. at 317.

[64] See Iowa Power & Light Co. v. Abild Constr. Co., supra note 63, at 306-11.

[65] Ibid.

[66] 339 Pa. 180, 14 A.2d 105 (1940).

[67] Id. at 187-92, 14 A.2d at 109-11.

[68] In Brown v. Dickey, 397 Pa. 454, 461-62, 155 A.2d 836, 840 (1959), the plaintiff claimed that Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955), which upheld the ruling in Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945), overruled Maio and that full contribution should be allowed (see text accompanying notes 12-19 supra). Despite the broad, theoretical basis for the Puller decision, it was held that Puller was distinguishable from Maio. The court said that Puller decided that the public policy aimed at preserving domestic tranquillity was overcome by that enforcing the joint tortfeasor's statutory and equitable right to contribution, whereas the applicable statute had eliminated any cause of action for trespass where workmen's compensations procedures had been substituted. In the latter case there was no common liability based in tort because the employer was simply not liable in tort; he retains only the statutory liability.

[69] Illinois denies contribution between joint tortfeasors under the common law, except when one is the primary tortfeasor and the other bears only a passive relationship to the cause of injury. In such a case contribution is allowed as an adjustment between defendants, independent and separate of the original tort claim and based on principles of equity, not tort law. It has been held that the Workmen's Compensation Act in Illinois does not abolish rights of a party to contribution or indemnity from another tortfeasor whose relations to the injured person were governed by the act. Boston v. Old Orchard Business Dist., Inc., 26 Ill. App. 2d 324, 168 N.E.2d 52 (1960).

In admiralty contribution is allowed despite workmen's compensation; see, e.g., The Tampico, 45 F. Supp. 174 (W.D.N.Y. 1942).

[70] Palmer v. Willemet-Stouse Elec. Co., 183 So. 2d 373 (La. App. 1966), cert. denied, 184 So. 2d 736 (La. 1966). The Louisiana Court of Appeals previously had upheld the defense of no liability under the workmen's compensation law and denied contribution in Sanderson v. Binnings Constr. Co., 172 So. 2d 721 (La. App. 1965). But just eleven days later the Supreme Court of Louisiana handed down its decision in Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965), allowing contribution despite interspousal immunity and casting doubt on the Sanderson ruling. See text accompanying notes 26-32 supra. A federal court rejected the precise argument that Smith overruled Sanderson in Yale & Towne Mfg. Co. v. J. Ray McDermott Co., 347 F.2d 371 (5th Cir. 1965).

The Effect of Liability Insurance

The role which liability insurance should play in tort law is widely debated, and it presents particular problems in contribution suits. Primarily, the question is one of whether the presence of such insurance should alter traditional concepts of tort liability based on fault and whether consideration should be given to the ability to pay and redistribute the loss.[71] Unquestionably, "contribution allows defendants who are strategically placed to distribute the loss over society to cast it back instead on to the shoulders of individuals who cannot distribute it at all."[72]

The questions presented by the presence of liability insurance are additionally complicated when one of the joint tortfeasors enjoys a special defense against direct action by the injured party. Insurance may undermine the policy behind the defense—as when a charitable trust fund is not diminished because of insurance protection.[73] Against this stands the proposition that liability insurance is not supposed to create liability but only to recompense it when it already exists.[74]

The presence of insurance may mean that family harmony is not endangered by an interspousal tort suit, but the danger of a collusive law suit between the spouses seeking recovery on their insurance provides a further reason for barring interspousal suits. In *Puller v. Puller*,[75] contribution was allowed despite interfamily immunity. Mr. Puller carried liability insurance, but the policy provided that "this policy does not apply . . . to the insured or any member of the family of the insured residing in the same household as the insured."[76] The court held that the insurance company was not liable to pay the contribution award because such liability would make the policy applicable in contradiction of its express terms.

The reason for such clauses limiting liability insurance coverage is the obvious danger of collusion between closely related parties who will both stand to benefit from recovery on an insurance policy. Insurance companies have also sought to combat such collusion by including in their policies cooperation clauses requiring the reasonable aid of the insured in the conduct of suits concerning the policy.[77] States have sought to prevent collusion by statutes specifically limiting the parties who are covered by an insurance policy when there is liability,[78] and by eliminat-

[71] See the exchange between Fleming James, Jr. and Charles O. Gregory in: 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).

[72] James, "Contribution Among Joint Tortfeasors: A Pragmatic Criticism," 54 Harv. L. Rev. 1156, 1169 (1941).

[73] In Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1947), it was held that protection of a charity's trust fund by insurance destroyed its immunity to suit.

[74] See, e.g., Villaret v. Villaret, 169 F.2d 677, 678 (D.C. Cir. 1948).

[75] 380 Pa. 219, 110 A.2d 175 (1955).

[76] Id. at 222, 110 A.2d at 177.

[77] See State Auto. Mut. Ins. Co. v. York, 104 F.2d 730 (4th Cir. 1939). But see Rozell v. Rozell, 281 N.Y. 106, 113, 22 N.E.2d 254, 257 (1939); Signs v. Signs, 156 Ohio St. 566, 576-77, 103 N.E.2d 743, 748 (1952).

[78] E.g., New York in 1937 simultaneously amended § 57 of the Domestic Relations Law so as to permit husband and wife to sue each other for torts causing personal injury (N.Y. Dom. Rel. Law § 57, repealed Sept. 27, 1964; subject matter now covered by N.Y. Gen.

ing liability altogether when the danger of collusive lawsuits is too great (the primary example being the institution of automobile guest statutes). But permitting contribution can upset the balance of such a scheme.

When contribution is allowed despite a special defense which a tortfeasor has against direct action by the injured party, the contribution defendant may be subjected to liability for injury to a party who, because of the danger of collusion in a suit by the injured party against the policy holder, is excluded from coverage under the insurance policy. But the reasons for protecting the insurance company are not as strong in a contribution action as they are in a direct action. Though there is obvious hardship in denying protection to a member of the tortfeasor's family or to his guest, the state has determined that the danger of a collusive lawsuit against the insurance company is of overriding importance. This is not so in a contribution suit. The persons between whom collusion is feared—e.g., husband and wife, driver and guest—are not direct antagonists, and recovery by the injured party in a direct action against the third party must be assured before the third party has any claim for contribution. Here insurance protection should not be denied to the policy holder. While policy coverage may not extend to the immediate family or some other specifically included class, there seems to be no reason why it should not extend to include liability as an equitable duty to a party not so excluded—the joint tortfeasor.

CONCLUSION

The majority view that there can be no contribution among joint tortfeasors unless there is common liability to the plaintiff should be abandoned, but some alternative limitation to indiscriminate allowance of contribution must be imposed. The determinative factor should be the particular defense involved. When one tortfeasor has a defense against the plaintiff, he should be allowed to raise it against his co-tortfeasor to bar contribution only when the policy reasons underlying the defense to a suit by the plaintiff apply equally well to an action for contribution. Though uncertainty in the law might result from this approach before a state rules on the status of a particular defense, this is not of major concern. The torts which involve contribution do not normally involve premeditated action, and, in any event, the presence of a defense should never serve as a motivation for wrongdoing.

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Obligations Law § 3-313 (McKinney 1964)), and added a provision to § 167(3) of the Insurance Law which excludes death or injury to spouse and damage to the spouse's property from coverage under any policy or contract unless the policy or contract specifically provides otherwise (N.Y. Ins. Law § 167(3) (McKinney 1966)).

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