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CONTRIBUTION BETWEEN TORTFEASORS

ELLIS BERGER*

It is proposed in this paper to trace the development of the law on the subject of the right of contribution between joint tortfeasors. The question has assumed increased importance since the activities and relations of persons engaged in industry has taken on a most complex nature. The writer will confine himself to the discussion of the rules governing contribution and will, therefore, not take up those cases which have to do with the right of indemnity that may or may not exist where the relation between the litigants is that of principal and agent or master and servant and where as between the tortfeasors, one is primarily responsible for the wrong and ought to bear the consequences. It has long been a familiar maxim that there can be no contribution among wrongdoers. This doctrine, that one joint tortfeasor who pays or is compelled to pay all the damages, cannot obtain contribution from those who are equally guilty as himself, or even more guilty than he, had its origin in the case of *Merryweather v. Nixon*.¹ This is a necessary consequence of the principle embodied in the maxim *ex turpi causa non oritur actio*.² An analysis of this case, however, will disclose that one S had previously brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a will, in which was included a count in trover for the machinery, had recovered judgment and had collected the whole amount thereof from the present plaintiff, who thereupon brought this action for contribution. Lord Kenyon held that the plaintiff was properly non-suited, merely remarking that "he had never before heard of such an action having been brought where the former recovery was for a tort." Lord Kenyon further said "this decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose

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¹ 8 T. L. R. 186 (1799).

² Street's *Foundation of Legal Liability*, vol. 1, P. 490, and Harper on Torts, Section 333.

of asserting a right." It is therefore necessary in any intelligent discussion of the doctrine of no contribution between joint tortfeasors to keep in mind that the doctrine enunciated by the court in *Merryweather v. Nixon*³ had reference to a case where there was an intentional wrong done to the plaintiff by the joint defendants. Best, C. J., in *Adamson v. Jarvis*⁴ says "From the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixon*, and from reason, justice and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." In the case of *Palmer v. Wick & Sulteneytown Steam Shipping Co.*⁵ one Palmer, a stevedore, was engaged in discharging pig iron from the shipping company's vessel when one of his workmen was killed by the fall of a defective block, part of the ship's tackle. A joint judgment against Palmer and the company was paid in full by the latter, which then brought this action for contribution. Held, the defendant Palmer was liable in this action for contribution, and the court, through Lord Herschell quotes Best, C. J., in *Adamson v. Jarvis*.⁶ Thus we see that the House of Lords permits contribution between negligent tortfeasors at least in negligence cases arising in Scotland.⁷

The common law is well settled that there can be no contribution between tortfeasors who knew and intended the tortious consequences of their misconduct.⁸ It has never been suggested that this rule should be changed to allow contribution between the intentional wrongdoers. Green, J., in the case of *Thuratt v. Jones*⁹ said, "The reason why the law refuses its aid to enforce contribution amongst wrongdoers, that they may be intimidated

³ *Supra* note 1.

⁴ 4 Bing. 66 (1827).

⁵ 1894 A. C. 318.

⁶ *Supra* note 4.

⁷ See R. A. Seplar, "Contribution and Indemnity Between Tort Feasors," (1933) 81 Pa. L. Rev.

⁸ *Merryweather v. Nixon*, *supra* note 1, *Weld-Blundell v. Stephens* 1920 A. C. 956; *Rucker v. Allendorph*, 102 Kan. 771; *Alexander v. Alexander*, 154 Ky. 324; *Peck v. Ellis*, 2 Johns. Ch. 131 (N. Y. 1816), 2 Sumner (U. S.) 238 (*Arnold v. Clifford*); *Miller v. Fenton*, 11 Paige (N. Y.) 18, 3 Head. 121 (Tenn.); *Atkins v. Johnson*, 43 Vt. 78; *Davis v. Gilham*, 44 Ohio St. 69, *Boyer v. Bolender*, 129 Pa. 324. For additional cases, see T. W. Reath "Contribution Between Persons." 12 Harv. L. R. 176. Also see for more cases, Woodward "Quasi Contracts," P. 402 n. 3; Harper on Torts, Section 333.

⁹ 1 Randolph 328 (Va. 1823).

from committing the wrong, by the danger of each being made responsible for all the consequences; a reason which does not apply to torts or injuries arising from mistakes or accidents or involuntary omissions in the discharge of official duties." In an action for contribution by one joint wrongdoer against another, the test of recovery is said to be whether the plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful.¹⁰ In *Bailey v. Bussing*,¹¹ the owner of a coach, after being charged for the negligence of the driver, sued him for contribution, and it was held he could recover, Ellsworth, J., said: "The reason assigned in the books for denying contribution among trespassers is that no right of action can be based on a violation of law; that is, where the act is known to be such, or is apparently of that character. A guilty trespasser, it is said, cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or, as the case may be, a contribution—as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right; an assistant rendering aid to a sheriff in the execution of process; or common carrier, to whom is committed, and who innocently carry away, property which has been stolen from the owner. The form of action, then, is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied. Indeed, we think this maxim too much broken in upon this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like."

It should further be borne in mind that what is unhappily generally regarded as the general rule of no contribution be-

¹⁰ *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253.

¹¹ 28 Conn. 455 (1859), Reath "Contribution Between Persons," 12 Harv. L. R. 186.

tween joint tortfeasors as announced in *Merryweather v. Nixon* is really an exception rather than a rule. The general rule of law is that, "Where two or more persons are jointly or jointly and severally bound to pay a sum of money and one or more of them are compelled to pay the whole or more than his or their share, those paying may recover from those not paying the aliquot proportion which they ought to pay."¹² It is submitted therefore, that it would be more proper to state that there can as a general rule be contribution among wrongdoers excepting those cases in which the wrongdoers are morally guilty. It would unquestionably lead to less confusion so to state the general rule.

Thus far we have observed how the rule of no contribution between joint tortfeasor had its origin in a case in which there were intentional wrongdoers; it is further noted that the common law is well settled in all jurisdictions that there can be no contribution between intentional or wilful tortfeasors; and that such a rule is a most salutary one cannot be controverted. The writer, in discussing the question whether contribution should be enforced between wrongdoers whose liability arose out of mere negligence, will endeavor to show that the reason for the rule of no contribution between intentional joint tortfeasors is absent when the application of the doctrine is sought to be made in respect to non-intentional or negligent wrongdoers.

There is a line of cases which permit contribution between the joint tortfeasors who are legally responsible for the wrong not because they actually participated in the commission but because of their relation to the actual wrongdoer, that is where the element of vicarious responsibility is present.¹⁴ (The variations of this type of case will be discussed later.) Contribution is also allowed "when the parties authorized or actually participated in such an infringement of another's legal rights as constitute a tort, but they acted in good faith and are not chargeable with knowledge that their action was wrongful."¹⁵

¹² 7 *Americ. Eng. Enc. of Law* (2d Ed.) 326, Woodward "Quasi Contracts" (1913), P. 401.

¹³ "Quasi Contracts" (1913), P. 403.

¹⁴ *Wooley v. Batte*, 1826, 2 *Cas. P.* 417, *Bailey v. Bussing*, 28 *Conn.* 455; *Ankeny v. Moffett*, 37 *Minn.* 109; *Horbach v. Elder*, 18 *Pa. St.* 33; *Hobbs v. Hurley* 117 *Me.* 449.

¹⁵ *Vandever v. Pollak*, 1893, 97 *Ala.* 467 (levy on goods); *Farwell v. Becker*, 129 *Ill.* 261 21 *N. E.* 792 (1889) (Attachment of goods); *Jacobs v. Pollard*, 10 *Cush. (Mass.)* 287 (seizure of cattle by plaintiff and

While it is not the purpose of the writer to discuss at length those cases in which indemnity is allowed, it may be well to mention here that even in those jurisdictions which do not permit contribution between tortfeasors—joint and negligent—the courts will allow indemnity whenever one has paid the damages which ought to have been paid by another upon whom rested the basic or primary responsibility, but which damages have been paid by that other because of some rule of law which holds either of them or both to the person injured.¹⁶ In the case of *Lowell v. Boston L. R. R.*¹⁷ the court says, "Our law however, does not in every case disallow an action by one wrongdoer against another to recover damages incurred in consequence of their joint offense. * * * If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude all parties are deemed equally guilty and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." In the light of these cases and those which arise by reason of the various legal relations, such as master and servant, principal and agent, common carriers, joint contractors and partners, the doctrine of "no contribution" does not apply. It is apparent that there is justification for Ellsworth, J.'s, statement in *Bailey v. Bussing*,¹⁸ "we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the case of master and servant, principal and agent, partners, carriers and the like."

What then is the law in regard to contribution between joint tortfeasors whose liability arose out of mere negligence? The

sale by defendant); *Smith v. Ayrault*, 1888, 71 Mich. 475 (infringement of patent); *Schappel v. First Nat. Bank*, 80 Neb. 708 (attachment); *Acheson v. Miller*, 1853, 20 Mo. St. 203 (levy on goods).

¹⁶ *Lowell v. Boston L. RR* 23 Pick. (Mass.) 32; *Gray v. Boston Light Co.*, 114 Mass. 149; *Washington Gaslight Co. v. Do C*, 161 U. S. 316; *Cincinnati R. Co. La. R. Co.*, 97 Ky. 128; *Austin, etc., Ry. Co. v. Faust*, 133 S. W. (Tex.) 449; *Portland v. Citizens Tel. Co.*, 206 Mich. 632; *Oceanic Co. v. Compania Transatlantica*, 134 N. Y. 461.

¹⁷ *Supra* note 16.

¹⁸ *Supra* note 11.

courts are not in accord in the answer they give to this question. The heavy weight of authority is today in favor of the doctrine that denies any right to contribution.¹⁹ Some of the states whose common law rule denied contribution have abrogated in whole or in part such doctrine, by the enactment of statutes.²⁰ The unfortunate feature of most of these statutes is that they are burdened with unnecessary limitations and significant defects which render them impotent to effect what must have been the design of the legislators in passing them, viz., to abrogate, in toto, the common law rule in their respective jurisdiction, that there can be no contribution among joint wrongdoers whose liability arose through negligence. Most of these statutes permit contribution only between tortfeasors against whom joint judgment has been rendered. A statute providing simply that "there shall be contribution among tortfeasors" eliminates this difficulty.²¹ Others fail to provide a method whereby a defendant may interplead his fellow wrongdoer when he is within reach of process.²² Thus, in construing the New York statute, the Court said in *Fox v. Western, etc., Lines*,²³ "Section 211-a has in no way modified or extended Section 193²⁴ subdivision 2, of the Civil Practice Act, or the limitations placed upon it by the courts. The practice under the latter section is the same

¹⁹ *Union Stock Yards Co. v. Chicago etc. R. Co.*, 196 U. S. 217 (1905); *Atlantic etc. R. Co. v. Southern, etc., Co.*, 107 Fed. 874; *Forsythe v. Los Angeles R. Co.*, 149 Cal. 569; *Gregg v. Page Belting Co.*, 69 N. H. 247; *Andrews v. Murray*, 33 Barb. (N. Y.) 354; *Galveston, etc., R. Co. v. Mass.*, 94 Tex. 255; *Walton v. Miller*, 109 Va. 210; *Tacoma v. Bonnell*, 65 Wash. 505; *Doles v. Seaboard, etc., R. Co.*, 16 N. C. 318; *Wise v. Berger*, Ill. Cent. Ry. Co. v. *Bridge Co.*, 171 Ky. 444; *Cain v. Quannale Light, Ice Co.*, 131 Okl. 25; *Gulf S. I. R. R. Co. v. Gulf Ref. Co.*, 260 Fed. 262; *Central of Ga. Ry. Co. v. Swift Co.*, 23 Ga. App. 346; *Larkin v. Terminal Warehouse Co.*, 146 N. Y. Supp. 380; *Spalding v. Adm. of Oakes*, 42 Vt. 20; *Public Service Ry. v. Mattenci*, 105 N. J. L. 114; *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582. See Harper, *Law of Tort*, Section 333.

²⁰ Georgia, Kentucky, Maryland, Michigan, Missouri, New Mexico, New York, North Carolina, Texas, Virginia, West Virginia.

²¹ Such statutes are in force in Ky. Stat. (Carroll, 1930) 484a; Va. Code Ann. (Michie 1930), i. 5779.

²² See 45 Harv. L. R. 369 at 373.

²³ 257 N. Y. 305, 173 N. E. 289.

²⁴ "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."

now as it has been since 1923. Sec. 211-a sought to remedy one glaring defect in the law. Where a judgment had been recovered against two joint tortfeasors, the payment by one relieved the other of all liability, either to the plaintiff or to the paying defendant. This was changed by requiring the joint defendant to pay his share of the judgment. This is the only change that has been made. A plaintiff may now sue as many defendants as he pleases whom he thinks may be liable in negligence for his damages. The legislature has not given this same choice to the defendants to bring in other parties, whom they think should be liable either in place of or jointly with those whom the plaintiff has selected. If Section 193 is to be extended, it must be by the act of the Legislature and not by the fiat of the courts."²⁵ The North Carolina Act²⁶ meets these difficulties by giving a defendant an election either to sue his joint tortfeasors separately or to implead them in the initial cause.

The doctrine that there may be contribution between unintentional joint tortfeasors has been adopted as the common law rule only in three states—Wisconsin,²⁷ Pennsylvania²⁸ and Minnesota.²⁹

It is interesting that an exhaustive search has revealed but three cases³⁰ in which there were vehicles owned and operated respectively by A and B which collided by reason of their concurrent negligence, and the rule that there may be contribution between negligent joint tortfeasors has been applied. It has been suggested³¹ that the leading case on this subject in Pennsylvania, *Goldman v. Mitchell-Fletcher Co.*,³² permits contribution because of the technical nature of the liability of the wrongdoers, and not because of the character of the wrong committed.

²⁵ See 9 N. Y. L. Q 354.

²⁶ N. C. Pub. Laws (1929), c. 68, 1 Amend. N. C. Com. Stat. (1919), 618 N. C. Code Am. (Michie 1931), S. 618.

²⁷ *Ellis v. Chicago, N. W. R. Co.*, 167 Wis. 392; *Mitchell v. Raymond*, 181 Wis. 591; *Sattler v. Neiderkom*, 190 Wis. 464; *Wait v. Pierce*, 191 Wis. 202; *Rober v. Lowell*, 200 Wis. 420; *Hainer v. Duffy*, 206 Wis. 193.

²⁸ *Armstrong County v. Clarion Co.*, 66 Pa. 218; *Goldman v. Mitchell-Fletcher Co.*, 292 Pa. 354.

²⁹ *Underwriters at Lloyds, etc., v. Smith*, 166 Minn. 388 (1926); *Duly M. N. Ry. Co. v. McCarthy*, 183 Minn. 414.

³⁰ *Mitchell v. Raymond*, 181 Wis. 591; *Sattler v. Neiderkom*, 190 Wis. 464; *Underwriters, etc., v. Smith*, 166 Minn. 388.

³¹ 34 Dick. L. R. 123 at 128.

³² *Supra* note 28.

In that case one Gertrude Goldman, a minor, through her mother, S. Goldman, and the latter in her own right, sued to recover for injuries sustained by the former while a passenger on a trolley owned and operated by one of the two joint defendants, the Phila. Rapid Transit Co., which collided with a wagon and team of horses owned by and under the control of an employee of the other defendant, Mitchell-Fletcher Co. Verdicts were rendered and judgments entered for both plaintiffs and against both defendants. The American Surety Co., surety for Mitchell-Fletcher Co., paid the judgments to the plaintiffs and was subsequently permitted by order of the trial court to intervene to assert its right to subrogation and to mark the judgments to its use. The court to avoid further litigation passed on the question of the right to contribution (the only question really involved was the right of the Surety Co. to be subrogated to the judgments). The court held that the rule that there can be no contribution between joint tortfeasors applied only where there has been an intentional wrong or violation of law, or where the wrongdoer knows or is presumed to know that the act was unlawful. It expressly held that the rule does not apply to torts which are the result of mere negligence. It is argued that the case of *Goldman v. Mitchell-Fletcher Co.* may take its place among those which permit contribution because the parties are legally responsible for a wrong, not because they authorized or actually participated in its commission, but because of their relation to the actual wrongdoer. But the court, after a most exhaustive review of the English and American authorities, states in no uncertain terms that the rule of no contribution between joint tortfeasors has no application to torts which are the result of mere negligence. It seems clear, therefore, that the Pennsylvania Supreme Court will not hesitate to hold that contribution may be permitted between negligent joint tortfeasors where the liability of the defendants is not by implication of law but because of active participation, and where, as in *Mitchell v. Raymond*,³³ contribution must rest on the theory that no wilful tort was committed. The whole idea in denying contribution between intentional or wilful tortfeasors is primitive in outlook—it is to impose a penalty upon those who deliberately flout the very law through whose medium they now seek relief, and so that, perhaps, too, future wrongdoers may be intimidated from committing the wrong.³⁴

³³ *Supra* note 30.

³⁴ *Supra* note 9.

A study of the cases in which the liability of the negligent joint tortfeasors grows out of the rule respondent superior discloses that contribution is generally permitted where the liability of the parties arises out of the misconduct of their joint employee.³⁵ On the other hand, contribution is not allowed in many cases in which there are wholly unconnected principals, but they are rendered jointly liable for injuries occasioned by the concurrent but not concerted acts of their respective agents.³⁶ It would seem that there is no distinction between these two types of 'respondeat superior' cases and the same results should be reached in both classes. The reason for denying contribution between intentional wrongdoers is equally absent here as in the former type of case. In *Public Service Rwy. Co. v. Mattencci*,³⁷ on facts precisely analogous to *Goldman v. Mitchell-Fletcher Co.* contribution was denied, the court saying, "Whenever the damage is the product of the contributory misfeasances the action will lie against each of the wrongdoers or against both, and neither one can claim contribution from the other so as to dispense the loss equally among themselves, the reason being that the law will not undertake to adjust the burden of misconduct." The writer has found no jurisdiction which permits contribution where a joint servant has committed the tort and denies it where two independent employees of respective principals concurrently commit the tort.

There remains to discuss the nature of the tortfeasor's right to contribution. In so far as the right of a tortfeasor to indemnify or contribution has been recognized, it is enforced both in equity and at law. Where the wrong consists of a mere unintentional neglect of duty, it cannot properly be said that there is an implication of a promise of contribution. "The obligation may well be rested upon quasi-contractual principles, for insofar as one tortfeasor pays what is equity and good conscience another tortfeasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is un-

³⁵ *Wooley v. Batte*, 2 C. P. 417 (1826); *Farney v. Hauser*, 109 *Man.* 75 (1921); *Hobbs v. Husky*, 117 *Me.* 449; *Ankenny v. Moffett*, 37 *Minn.* 109, *Horback's Adm. v. Elder*, 18 *Pa.* 33 (1851); Also see, *Woodward* "Quasi Contracts," P. 403 (1913).

³⁶ *Union Stock Yards etc. v. Chicago B. Q. R. R.* 196 *N. S.* 217 (1905); *Central of Ga. Ry. Co. v. Macon Ry. Co.*, 9 *Ga. App.* 628; *Illinois C. RR Co. v. Louisville Bridge Co.*, 171 *Ky.* 445; *Detroit Ry. Co. v. Boomer*, 194 *Mich.* 52; *Public Service Ry. Co. v. Mattenci*, 105 *N. J. L.* 114. See *Leflar*, "Contribution and Indemnity Between Tort Feasors," 81 *Pa. L. R.* 143.

³⁷ 105 *N. J. L.* 114 (1928).

just.”³⁸ “The doctrine of contribution is not founded on contract but comes from the application of principles of equity to the condition in which the parties are found in consequence of some of them, as between themselves, having done more than their share in the performance of a common obligation.”³⁹

An exhaustive search of the Indiana Reports revealed to the writer that the question of the right to contribution between joint tortfeasors has arisen in the appellate courts in only two cases. In *The American Express Co. v. Patterson*⁴⁰ where an action was brought against an express company and another to recover damages for arrest and imprisonment, it was held that the fact that the verdict is silent as to one of the defendants is no cause for a venire de novo—the court saying “* * * but, whether the judgment be joint or several, there is no right of contribution which can be enforced as between the defendants.” In *Smith v. Graves*⁴¹ there was a suit by one Graves against Smith, Bowser and Kocher to recover damages for alleged malicious prosecution. The jury found for the plaintiff against the defendants Smith and Bowser and was silent as to the third. It was held that in view of the nature of their liability, none of the defendants affected by the verdict can complain that it was not also against their codefendant and that the rule in actions on contract, that a verdict against part of the defendants without a finding either for or against the other is a nullity, does not apply. The court says, “The liability of the appellants as tortfeasors is several and the suit may be maintained against all, or one, or any number of them. There is no right of contribution that can be enforced as between such defendants or persons liable for the same tort.”

Thus, we see that in the two cases in which the right to contribution has been passed on, the courts have in neither case attempted to distinguish between a delict proper or a quasi-delict, i. e. whether contribution might be permissible if the tortfeasors involved are negligent and be refused where the tort is an intentional one. Perhaps it can be said that the right to contribution between joint negligent wrongdoers is open in Indiana, and that if the question is squarely presented the court may formulate a rule allowing contribution under such circumstances.

³⁸ Woodward, *Quasi Contracts*, 409.

³⁹ 13 C. J. 821.

⁴⁰ 73 Ind. 437 (1881).

⁴¹ 59 Ind. App. 55 (1914).

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