

Uniform Contribution Among Tortfeasors Act

Often cited with the deference accorded a "general rule" is the proposition that there can be no contribution among tortfeasors.¹ *Merryweather v. Nixan*² is said to be the case which first embodied this doctrine. From an examination of that case it becomes apparent that the enunciation of so broad a rule, if such a rule was enunciated, was by way of dictum only, for the case itself is concerned with the tortious acts of two wilful wrongdoers.³ "The reason [of the rule in *Merryweather v. Nixan*] alleged is the technical one that any such claim must be based on an implied contract between wrongdoers and . . . is necessarily illegal and void as being made in contemplation of the commission of an illegal act."⁴ It has been suggested⁵ that the purported rule of the *Merryweather* case is a misstatement and that Lord Kenyon actually declared an exception, that of wilful wrongdoers, to the general proposition 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 her share those paying may recover from those not paying the aliquot proportion which they ought to pay."⁶ Correctly stated or otherwise, *Merryweather v. Nixan* is considered the leading case on the issue of contribution among tortfeasors.

One exception to the rule of the *Merryweather* case was recognized to the effect that a party induced by another to commit an act ostensibly legal but, in fact, tortious had a right to *indemnity* from his co-tortfeasor.⁷ But the English law on *contribution* among tortfeasors remained unchanged from the *Merryweather* case until the English Law Reform in 1935.⁸

The early Virginia case of *Thweatt v. Jones*⁹ held that the rule

¹ *Union Stockyards v. Chicago B. & Q. Ry.*, 196 U.S. 217 (1905); *Maryland Cas. Co. v. Gough*, 146 Ohio St. 305, 65 N.E. 2d 858 (1946); *Ash v. Mortensen*, 24 Cal. 2d 654, 150 P. 2d 876 (1944); RESTATEMENT, RESTITUTION § 85 c. (1938); RESTATEMENT, TORTS § 875 (1938).

² 8 T. R. 186 (K. B. 1799).

³ SALMOND, *THE LAW OF TORTS* 103 (7th ed. 1928); Reath, *Contribution Between Persons Jointly Charged for Negligence*, 12 HARV. L. REV. 176 (1898); Quarles, *Contribution Between Joint Wrongdoers*, 1 MARQ. L. REV. 141 (1917).

⁴ SALMOND, *op. cit. supra* note 3, at 103.

⁵ Reath, *supra* note 3; Quarles, *supra* note 3.

⁶ 7 AM. & ENG. ENCYC. OF LAW 326 (2d ed. 1902).

⁷ *Betts v. Gibbins*, 2 A. & E. 57 (K. B. 1834).

⁸ England Law Reform (Married Women and Tortfeasors) Act, 25 & 26 GEORGE V, c. 30 § 6 (1935).

⁹ 1 Rand. 328 (Va. 1823).

of *Merryweather v. Nixan* did not apply to the commission of a negligent tort, or quasi delict, and precipitated the still extant struggle to relieve the negligent joint tortfeasor from the incubus of total and final liability. Without the aid of statute, some states have permitted contribution among joint tortfeasors when the tort is a quasi delict,¹⁰ but many others—the federal court system, before the *Erie Ry. v. Tompkins*¹¹ decision was included here—clung to the “general rule.”¹²

In most fields of law where joint obligations are recognized, e.g., contracts,¹³ suretyship,¹⁴ and admiralty,¹⁵ the equitable doctrine of contribution among joint obligors is the rule.

Several states have by legislation attempted to repeal this anomalous doctrine and grant the right of contribution to certain classes of tortfeasors. In none of these states has the wilful tortfeasor been given the right to contribution. In some of the states the right to contribution arises only after the rendition of a *joint* judgment against the tortfeasors.¹⁶ In others a several judgment may be used as the basis of a subsequent suit against a co-tortfeasor.¹⁷ In Michigan, there is a right of contribution only among co-tortfeasors who commit the tort of libel.¹⁸ Such joint tort statutes are usually implemented by a third party practice act, either already a part of that state's procedural law or expressly passed in conjunction with the joint tortfeasor act.¹⁹ The joint tort procedure of Wisconsin, a sort of hybrid resulting from a cross between common law and statute, is frequently singled out for approval.²⁰

¹⁰ *Underwriter v. Smith*, 166 Minn. 388, 208 N. W. 13 (1926); *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253 (1895); *Vandiver v. Pollak*, 79 Ala. 467, 12 So. 473 (1893); *Farwell v. Becker*, 129 Ill. 261, 21 N. E. 729 (1889); *Nickerson v. Wheeler*, 118 Mass. 295 (1875); note following *Spaulding v. Oakes*, 42 Vt. 343, 348 (1864).

¹¹ 304 U. S. 64 (1937).

¹² *Union Stockyards v. Chicago B. & Q. Ry.*, 196 U.S. 224 (1905); *Gulf & S. I. R.R. v. Gulf Refining Co.*, 260 Fed. 262 (S.D. Miss. 1919); *Central of Ga. Ry. v. Swift & Co.*, 23 Ga. App. 346, 98 S.E. 256 (1918); *Detroit Ry. v. Boomer*, 194 Mich. 52, 160 N. W. 542 (1916); *Louisville v. Louisville Ry.*, 156 Ky. 141, 160 S. W. 771 (1913); *Forsythe v. Los Angeles Ry.*, 149 Cal. 569, 87 Pac. 24 (1906).

¹³ RESTATEMENT, CONTRACTS § 119 (1932).

¹⁴ ARANT, SURETYSHIP 333 (1931).

¹⁵ ROBINSON, ADMIRALTY 90 (1939).

¹⁶ MO. REV. STAT. ANN. § 3658 (1942); TEX. REV. CIV. STAT. art. 2212 (Cum. Supp. 1948); N. Y. CIV. PRAC. ACT § 211 (a) (1939).

¹⁷ PA. STAT. ANN. tit. 12, § 2081 (Supp. 1948); N. C. GEN. STAT. ANN. § 240 (1944).

¹⁸ MICH. STAT. ANN. § 1401 (Henderson 1938).

¹⁹ MO. REV. STAT. ANN. § 847.20 (Cum. Supp. 1948); N. Y. CIV. PRAC. ACT §§ 193 (2), (4) (1939); N. C. GEN. STAT. ANN. § 240 (1944).

²⁰ *Ellis v. Chicago & N. W. Ry.*, 167 Wis. 392, 167 N. W. 1048 (1918); WIS. STAT. §§ 263.15 (1), (2) (1947); WIS. STAT. §§ 260.19 (3), (4) (1947).

Under present Ohio law, there is no right of contribution among any tortfeasors.²¹ The doctrine of contribution among negligent co-tortfeasors which was given express sanction in 1845 in the case of *Acheson v. Miller*²² has today evidently vanished without ever being expressly repudiated.

This seeming atavism is explained by Professor Prosser as having resulted from the confusion, by the Ohio courts, of the concepts of joint tort in its original sense and joint tort as used in permissive joinder under the code reform.²³

Such being the condition of the law on this subject, it is not surprising that the Commissioners on Uniform State Laws should draft a uniform act in an effort at rectification. The Uniform Contribution Among Tortfeasors Act was submitted in 1939, and has been adopted, to date, by five states²⁴ and the Territory of Hawaii.²⁵

The Act begins by defining joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." The purpose of the last clause of the definition is to disapprove the policy of making a joint and several judgment a necessary prerequisite to the recovery of contribution, as is explicit in the joint tortfeasor acts of some states.²⁶ "The common obligation contemplated by this act is the common liability of the tortfeasor to suffer adverse judgment at the instance of the injured person, whether or not the injured person elects to impose it."²⁷ It will be seen that the wilful tortfeasor fits into the above definition and purposefully so.²⁸ Presumably, this inclusion of the wilful tortfeasor within the definition coupled with the statement of Section 2 (1) that "the right of contribution exists among joint tortfeasors" gives to the wilful tortfeasor all the benefits which inure under the Act. However, should the derelictions of a tortfeasor in a particular case prove too shocking, the drafters of the Act suggest that the court could in its discretion refuse to allow such tortfeasor to participate under the Act.²⁹ The case of the wilful tort-

²¹ *Maryland Cas. Co. v. Gough*, 146 Ohio St. 305, 65 N.E. 2d 858 (1946).

²² 2 Ohio St. 203, 59 Am. Dec. 663 (1855), *overruling Acheson v. Miller*, 18 Ohio 5 (1849).

²³ PROSSER, TORTS 1093 (1941).

²⁴ ARK. DIG. STAT. § 611 (Cum Supp. 1944); MD. ANN. CODE GEN. LAWS art. 50, § § 21-30 (Supp. 1947); N. M. STAT. ANN. § § 21.118-125 (1941); R. I. GEN. LAWS c. 940 (1940); S. D. Sess. Laws c. 167 (1945).

²⁵ HAWAII REV. LAWS § § 10487-10493 (1945).

²⁶ See note 16 *supra*.

²⁷ 9 UNIFORM LAWS ANN. 161, § 1 Comm'rs' Notes (1942).

²⁸ *Id.* at 162, § 2 Comm'rs' Notes, (1).

²⁹ *Shultz v. Young*, 205 Ark. 533, 169 S. W. 2d 648 (1943); Gregory, *Contribution Among Tortfeasors, a Uniform Practice*, [1938] WIS. L. REV. 365.

feasor could be administered more expeditiously in this manner than by, say, inserting a clause excluding from the Act the culpable actors in torts involving moral turpitude; the term "moral turpitude" and similar general terms are ones almost impossible of definition.

A suit for contribution would not be in order "... until he [the tortfeasor] has by payment discharged the common liability or has paid more than his pro rata share thereof."³⁰

Section 2 (3) entitles a tortfeasor who has entered into a settlement with the injured party to contribution, but only if by virtue of that settlement his co-tortfeasor also was released. For example, the purchaser of a personal covenant not to sue shall not be entitled to contribution.³¹

Section 2 (4) which deals with the doctrine of proportional fault, is inclosed within brackets to indicate that its adoption is optional and that its omission will not undermine the purport of the Act.³² Subsection (4) provides that when disproportional degrees of fault are among the issues in the suit for contribution, the court may submit that issue to the jury, but only when the issue is properly brought into litigation³³ and the court finds that from the evidence there is indication of such disproportion.

Sections 4 and 5 treat the problem of releases. Section 4 considers the effect of releases on the injured person's claim and changes the common law of most forums,³⁴ in that releases, absent contrary specific provisions, do not discharge the other co-tortfeasors. They merely reduce the total joint obligation by the amount paid for each release or by a stated proportion (not less than the consideration paid for each release) contained in the release. For instance X, one of three co-tortfeasors, may enter into a contract of release with A, who suffered damages to the extent of \$3000 and, disregarding any doctrine of proportional fault, X for a consideration of \$1000 may induce A to release 50% of his total claim against X, Y and Z, the co-tortfeasors. But using same example, X may not effectuate a contract for his release with A, paying a consideration of \$1000 and stating in the release that it has reduced the total claim by only 25%. In no event need the remaining co-tortfeasors pay A more than \$2000. The release is treated under this Act much the same as the covenant not to sue.³⁵

³⁰ 9 UNIFORM LAWS ANN. 162, § 2 (2) (1942).

³¹ *Id.* Comm'rs' Notes (3).

³² Maryland does not include § 2 (4), MD. ANN. CODE GEN. LAWS art. 50, § § 21-30 (Supp. 1947).

³³ 9 UNIFORM LAWS ANN. 164, § 7 (5) (1942).

³⁴ RESTATEMENT, TORTS § 885 (1939).

³⁵ *Ibid.*

Section 5 considers the effect of releases on the right of contribution. The released tortfeasor is still liable to his co-tortfeasor for contribution unless the release provides that the remaining co-tortfeasors are relieved from the released tortfeasor's *pro rata* share of liability. This negatives the possibility that the remaining co-tortfeasors might be prejudiced by collusion between the injured party and the released tortfeasor. Thus A, the injured party, cannot by executing a release to X, the co-tortfeasor, for a nominal consideration prevent X from being liable for contribution to his co-tortfeasors, Y and Z, unless he includes in the release the provision that Y and Z are to be liable only for two-thirds of A's original claim. The doctrine of proportional liability is disregarded in the last example, also.

A third party practice act is contained in Section 7 which is virtually identical to the original Rule 14, Federal Rules of Civil Procedure, now amended.³⁶ This section is bracketed, designating optional adoption, but the state not having a third party practice act of its own would do well to adopt Section 7. Contained therein is the procedural machinery designed to insure the efficacy of the Act. Using Section 7, the tortfeasor who is to be amerced can, by filing a bill of impleader, bring into the same action his co-tortfeasor, who will be liable to him for contribution, and have that issue settled in the same action.

No significant body of litigation has yet arisen on interpretation of the various sections and subsections of the Act. It is to be hoped that the state courts called upon to construe the provisions will preserve their original context, stated so succinctly in the language of the provisions themselves and in the very helpful annotations by the Committee of Commissioners on Uniform State Laws. The Act is an intelligent attempt to reconcile the joint tortfeasor with his counterparts, the joint obligors in other fields of law. "Tortfeasor" does mean wrongdoer. But "tortfeasor" is not a preclusionary term for describing one who commits wrongs upon others. Is the equity of the inadvertent, or even wilful, tortfeasor necessarily less than that of the wilful breacher of contract? If not, and it seems obviously not, the joint tortfeasor is getting unjustifiably harsh treatment in most of our courts of justice. Further, this harsh treatment can be directly traced to its source, a case decided in 1799 by the Court of the King's Bench in England which, as dictum, either incorrectly stated a proposition of law or correctly stated a proposition which was later garbled.

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³⁶ FEDERAL RULES OF CIVIL PROCEDURE (West Rev. ed. 1947).