Washington and Lee Law Review

Volume 16 | Issue 1 Article 13

Spring 3-1-1959

Contribution: Limitation On The Liability Of One Tortfeasor

CONTRIBUTION: LIMITATION ON THE LIABILITY OF ONE TORTFEASOR*

A train and a truck are involved in a collision in which a brakeman on the train is killed. The railroad settles for $42,500 an action brought against it under the Federal Employers' Liability Act by the administrator for the brakeman. The railroad then sues the truck owner, whose liability for the wrongful death is based on a state wrongful death statute under which the maximum recovery is limited to $17,500. Is the railroad entitled to recover and, if so, what is to be the amount of the recovery?

This was the knotty problem presented in *Northern Pac. Ry. v. Zontelli Bros., Inc.*[1] The decedent's administratrix decided to sue the railway under the Federal Employers' Liability Act. In due course Zontelli Brothers was made a third party defendant by order of the court. The railway settled with the widow of the brakeman for $42,500 and instituted an action for contribution against Zontelli Brothers. The jury in this last action found that the railway and the truck company were both negligent and rendered a verdict for $21,500 in favor of the railway. The maximum recovery which the administratix could have obtained under the Minnesota Wrongful Death Act if she had sued Zontelli directly was $17,500.[2]

The underlying premise on which contribution among joint tortfeasors is based is the compensation of one who has discharged a debt for which several are liable.[3] This compensation may be explained either on a quasi-contractual obligation on the part of each

*Ed. Note: The following case comment discusses the decision of the district court in Northern Pac. Ry. v. Zontelli Bros., Inc., 161 F. Supp. 769 (D. Minn. 1958). After this comment was written, the Court of Appeals for the Eighth Circuit affirmed the decision in Zontelli Bros., Inc. v. Northern Pac. Ry., 45 A.B.A.J. 287 (8th Cir. Jan. 26, 1959). In affirming the decision of the district court, the court of appeals reformed the judgment below by holding that the maximum contribution available from Zontelli Brothers was $17,500, the limitation placed by the wrongful death act of Minnesota on Zontelli's liability.

[1]161 F. Supp. 769 (D. Minn. 1958).

[2]37 Minn. Stat. Ann. § 573.02 which reads: "Subdivision 1 .... The recovery in such action in such an amount as the jury deems fair and just in reference to the pecuniary loss resulting from such death, shall not exceed $17,500 and shall be for the exclusive benefit of the surviving spouse and next of kin proportionate to the pecuniary loss severally suffered by the death." The limit on recovery has since been raised to $25,000. Laws of Minn. 1957, ch. 712, § 573.02.

[3]Parten v. First Nat. Bank & Trust Co., 204 Minn. 200, 283 N.W. 408, 412 (1938); Brown v. Hargraves, 198 Va. 748, 96 S.E.2d 788, 791 (1957); Wait v. Pierce, 191 Wis. 202, 226, 210 N.W. 822, 823 (1926).

to help bear the common burden,[4] or on an equitable principle of equality in sharing the common burden and preventing unjust enrichment after another tortfeasor has paid the entire debt.[5]

At common law there was no right to contribution among joint tortfeasors. The law left the parties where it found them on the theory that one should not be permitted to bring an action based on one's own wrong.[6] However, because of vigorous denunciation of this common law principle by writers, many jurisdictions, either by statute or judicial decision, now permit contribution among joint tortfeasors.[7]

In order for a right of contribution to exist there must have been common liability from joint tortfeasors to the original plaintiff.[8]

> "Contribution of any sort presupposes a common burden or incubus resting upon all members of a group, more than his share of which one of such members has discharged for the benefit of all. It is an equitable device to redistribute the common burden rateably and in a fashion different from that employed by the person to whom each one of the group is usually answerable severally for the entire amount. In cases of contract contribution it is ordinarily quite easy to determine the amount of the common obligation .... But this is not true of the common obligation in tort contribution."[9]

It is generally held that the mere existence of concurring negligence by joint tortfeasors is not the test which must be applied.[10] Common liability does not mean that contribution between concurrent tort-

---

[4]Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368 (1951); Proff v. Maley, 14 Wash. 2d 287, 128 P.2d 330 (1942).

[5]Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 102 A.2d 587, 593, 595 (1954).

[6]Warner v. Capital Transit Co., 162 F. Supp. 253, 255 (1958); Prosser, Torts 246-49 (2d ed. 1955).

[7]Prosser, Torts 248-49 (2d ed. 1955); Gregory, Contribution Among Tortfeasors; A Uniform Practice, 1938 Wis. L. Rev. 365; Note, 32 Colum. L. Rev. 94 (1932); Note, 45 Harv. L. Rev. 349 (1931).

[8]Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942); Chapman v. Lamar-Rankin Drug Co., 13 S.E.2d 734 (Ga. App. 1941); Zutter v. O'Connell, 200 Wis. 60, 229 N.W. 74 (1930); See also: Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945). When the Pennsylvania court points out that although a wife may not sue her husband for personal injuries, this does not prevent one who is jointly liable with a husband for injuries suffered by the wife from obtaining contribution from the husband. Pennsylvania follows the theory that as between 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.

[9]Gregory, Contribution Among Tortfeasors: A Uniform Practice, 1938 Wis. L. Rev. 365, 369.

[10]Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 131 & n.9 (1932).

feasors can be enforced only if both are judgment debtors of the plaintiff.[11] However, when the liability is joint and several, though the acts of the negligent parties were independent and concurrent, there is common liability[12] unless the tortfeasor from whom contribution is sought could not have been sued because of a marital, filial, or other family relationship, or unless there was an assumption of the risk by the plaintiff as far as this defendant was concerned.[13] In either of the latter cases there would be no liability, common or otherwise.

The Supreme Court of North Carolina held in *Wilson v. Massagee*,[14] a 1944 decision, that there was no common liability to support contribution where the liability of one of the joint tortfeasors was based on a state wrongful death act and the other tortfeasor's liability arose under the Federal Employers' Liability Act. Wilson, an employee of the Southern Railway Company, was killed when a truck owned by the Sinclair Refining Company and driven by Massagee collided with a Southern train. Mrs. Wilson sued Massagee and Sinclair Refining under the North Carolina Wrongful Death Act. By motion defendant Massagee sought to join Southern Railway as a third party defendant on the theory that Massagee would be entitled to contribution from Southern Railway if it were shown during the course of the trial that Massagee and the railway both were liable to the plaintiff. Southern Railway appeared specially, moving the court to strike the order joining it as a party defendant and to dismiss the action as to it. The court granted the railway's motion on the ground that since the action against the truck driver [Massagee] was based on the North Carolina Wrongful Death Act, whereas the action against Southern Railway was based on the Federal Employers' Liability Act, there was no common liability among the alleged joint tortfeasors so as to support contribution.

---

[11]Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 220 (D.C. Cir. 1942). There are, however, eight states (New York, Delaware, Michigan, Mississippi, Missouri, North Carolina, Texas and West Virginia) which have statutes applying only to contribution between defendants against whom there is a joint judgment. Smith and Prosser, Cases and Materials on Torts 463 (2d ed. 1957). See Uniform Contribution Among Tortfeasors Act § 1(a): "Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort ... for the same wrongful death; there is a right of contribution among them even though judgment has not been recovered against all or any of them."

[12]George's Radio, Inc. v. Capital Transit Co., supra note 11; Piratensky v. Wallach, 162 Misc. 749, 295 N.Y. Supp. 581 (N.Y. City Ct. 1935).

[13]Yellow Cab Co. v. Dreslin, supra note 10; Annot., 19 A.L.R.2d 1003 (1951). See note 8 supra.

[14]224 N.C. 705, 32 S.E.2d 335 (1944).

As between two states, it is generally held that a judgment for damages for the wrongful death of a person is a bar to an action under a statute of another jurisdiction or in another state to recover for the same death where the *real party in interest* is the same, even though the *nominal parties* are different.[15] Under this view, therefore, one joint tortfeasor would be entitled to contribution from another joint tortfeasor, since payments by the first tortfeasor would relieve the second from his liability. On analogy this result would seem to follow as between one state and the Federal Employers' Liability Act.

In the *Wilson* case, the North Carolina court held that there was no common liability to support contribution since the beneficiary under the Wrongful Death Act[16] was not the same as the beneficiary under the Federal Employers' Liability Act. But the principal case is to be distinguished from *Wilson* on this point: the surviving wife is beneficiary under both the Federal Employers' Liability Act and the Minnesota Wrongful Death Act.[17] Payment by one joint tortfeasor under one of these acts would relieve the other joint tortfeasor of his liability under the other act. Hence, there seems to be common liability in the principal case so as to support contribution, the Minnesota court having specifically found the railway and Zontelli to be jointly and severally liable to the surviving widow.[18]

Since Minnesota is one of six states to adopt contribution without

---

[15]Chicago, R.I. & Pac. Ry. v. Schendel, 270 U.S. 611 (1926); Teixeira v. Goodyear Tire & Rubber Co., 261 F.2d 153 (1st Cir. 1958); McCarron v. New York Cent. R.R., 239 Mass. 64, 131 N.E. 478 (1921); See Luce v. New York, Chicago and St. L.R.R., 242 N.Y. 518, 152 N.E. 409 (1926).

[16]N.C. Gen. Stat. § 28-173 (1950); See also N.C. Gen. Stat. § 28-149 (1950), which provides "the surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided: 1. If a married man die intestate leaving one child and a wife, the estate shall be equally distributed between the child and wife; ... 2. If there is more than one child, the widow shall share equally with all the children and be entitled to a child's part; ... 3. If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate ...."

[17]Federal Employers' Liability Act, § 1, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1952): "[E]very common carrier by railroad while engaging in commerce between any of the several states or territories ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee ...." 37 Minn. Stat. Ann. § 573.02 states: "The recovery in such action ... shall be for the exclusive benefit of the surviving spouse and next of kin proportionate to the pecuniary loss severally suffered by the death."

[18]161 F. Supp. at 771, 772.

a statute,[19] the court in the principal case held that the wrongful death act will not be construed as defeating the common law right to contribution, and thus the railroad was permitted to receive one-half its settlement from Zontelli through contribution. It is submitted, however, that the recovery limitation imposed by the Minnesota Wrongful Death Act could be enforced without defeating the supposed common law right of contribution. Contribution "hinges on the doctrine that general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors, without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled."[20]

What should be the aliquot portion which Zontelli ought to pay or bear in the principal case? In suretyship, contribution is proportionate to the interest held or the liability undertaken.[21] Applying the suretyship theory to the case in comment, Zontelli's liability should be limited to $17,500 since that is the maximum for which he would have been liable under the Minnesota Wrongful Death Act; the railway's liability should be limited to $42,500, which is the total amount of the debt due. The railway and Zontelli would therefore be "sureties" to the extent of $60,000 on a $42,500 debt. Zontelli, in view of the obligation undertaken under the death act, would be liable to the railway for $12,395.83 under this suretyship theory.[22]

Basing contribution on an equitable principle of equality aimed at preventing unjust enrichment, Zontelli could not have been enriched more than the amount for which he could have been liable

---

[19]The only states to adopt contribution without a statute are Pennsylvania, Louisiana, Iowa, Minnesota, Tennessee, and Wisconsin. Smith and Prosser, Cases and Materials on Torts 461 (2d ed. 1957).

[20]George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 221 (D.C. Cir. 1942).

[21]Southern Surety Co. v. Commercial Cas. Ins., 31 F.2d 817 (3d Cir. 1929), cert. denied, 280 U.S. 577 (1929); United States Fid. and Guar. Co. v. Naylor, 237 Fed. 314 (8th Cir. 1916); Restatement, Restitution § 86 (1937).

[22]

limit on Zontelli's liability for wrongful death / total limit on liability of Zontelli and the railroad	times	debt due as a result of the settlement	equals	amount owed by Zontelli

In figures, this formula produces the amount of the settlement [$42,500] which is attributable to Zontelli:

17,500 / (17,500) plus (42,500)	times	$42,500	equals	$12,395.83

to deceased's representative before the railway paid the debt.[23] Under the Minnesota Wrongful Death Act, Zontelli's total liability would be limited to $17,500 if he were a sole tortfeasor. However, where there are two joint tortfeasors and the death results from their concurring negligence, the remedy of contribution is available.[24] A paying defendant whose liability is fixed by the wrongful death act would be entitled to one-half of the amount paid in settlement.[25] In the case in comment that amount would be limited to $8,750.

Since the court found that Zontelli was relieved of an obligation to the administratrix, he was unjustly enriched to that extent. Aside from considerations of contribution, his unjust enrichment must be limited to $17,500 since that is the maximum amount he would have been liable for had he been sued directly. The only explanation for the result of the court in the principal case seems to be an application of a comparative negligence doctrine.[26] The court is treating the action as a tort suit rather than as an action for contribution. Since the jury found that the railway and Zontelli were equally negligent,

---

[23]"Contribution is an equitable principle of equality in the sharing of a common burden arising out of contract or status, to enforce restitution and prevent unjust enrichment, that at common law does not extend to persons in equal or mutual fault. Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 102 A.2d 587, 593 (1954). See also Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236 (1937). Mr. Justice Brandeis speaking for the court said: "The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover, a plaintiff must prove that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations."

[24]The basic theory upon which contribution is permitted is that the party from whom contribution is sought must have been relieved of a debt or obligation and accordingly should be required to reimburse the person who paid, thereby relieving him from such debt or obligation. Merrimac Mining Co. v. Gross, 216 Minn. 244, 12 N.W.2d 506 (1943). See also American Automobile Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953).

[25]If an action had been brought under the Minnesota Wrongful Death Act against Zontelli arising out of the death of plaintiff's intestate, and Zontelli had sought contribution from the railroad, the railroad's maximum liability would have been $8,750. See Wold v. Grozalsky, 277 N.Y. 364, 14 N.E.2d 437 (1938) for apportionment of contribution in certain cases.

[26]"Under the new English Statute, the Canadian Statutes and the Maritime Conventions Act, however, contribution is apportioned among the tortfeasors in accordance with their respective degrees of fault.... This feature is in keeping with an analogous trend in Anglo-American law to qualify the harshness of the defense of contributory negligence by merely cutting down a negligent plaintiff's recovery of damages in accordance with his respective degrees of fault." Gregory, Contribution Among Tortfeasors: A Uniform Pfactice, 1938 Wis. L. Rev. 365, 372, 373. The court in the principal case found the truck company and the railroad equally negligent so the recovery by the plaintiff was borne equally by each of them.