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The Rule Against Contribution And Its Status In Nebraska

It is the purpose of this article to present two distinct phases of the law of contribution between joint tortfeasors. The first section includes a brief summary of the background for the "no contribution" rule along with a discussion of a recent case which relaxes the stringent requirements for recovery. The second section deals exclusively with the Nebraska law on this issue and endeavors to determine Nebraska's exact position as to the allowance of contribution between negligent joint tortfeasors.

I. THE RULE IN GENERAL

The starting point for any discussion of the law of contribution is the famous English case of *Merryweather v. Nixan*,¹ holding that an *intentional* tortfeasor compelled to pay the full amount of the victim's damages cannot subsequently force his fellow intentional wrongdoers to pay their *pro rata* shares. The case rests solely and simply on the notion that a court should leave such culpable persons where it finds them. The "no contribution between joint tortfeasors" rule has, in England,² never been extended to negligent tortfeasors and for a time it appeared as though American law would similarly refuse to extend it.³ Later, however, after jointers became commonplace, American courts lost sight of the true basis for the rule and held that no contribution would lie notwithstanding that the joint tortfeasors were merely negligent. This is the law in most of the states today.

¹ 8 Term. Rep. 186 (1799). Although the *Merryweather* case is commonly cited for the formation of the rule against contribution this decision was preceded by *Battersey's case*, *Winch's Rep.* 48, by *Common Pleas* (1623). See *Reath, Contribution Between Persons*, 12 *Harv. L. Rev.* 176 (1898) for a discussion of this case. The famous *Highwayman's case*, *Everet v. Williams, Ex.* (1725) was also prior to the *Merryweather* holding. In the *Everet* case two thieves appeared before the court for a division of their plunder. The court held the plaintiff's attorney in contempt, fined one attorney, deported the other and had both the Plaintiff and the Defendant beheaded. See 9 *L.Q. Rev.* 197 (1893).

² See Lord Herschell's opinion in *Palmer v. Wick & Pultneytown Steam Shipping Co.*, 1894 *A.C.* 318. Contribution is now provided by statute in England. *Salmond, Law of Torts*, 8th Ed. (1934).

³ *Horbach's Adm'rs v. Elder*, 6 *Harriss* 33, 18 *Pa.* 33 (1851) and *Nickerson v. Wheeler*, 118 *Mass.* 295 (1875).

Courts in this country have seldom sought to justify the "no contribution" rule as applied to negligent joint tortfeasors. The only condition adverted to in these cases, other than prior authority, is that the very harshness of the rule serves as an added deterrent to wrongdoing. Conveniently overlooked is the fact that joint tortfeasors, against whom contribution is denied, are permitted to escape the consequences of their wrongdoing.

Contribution arose in equity and is based on the theory of equality of burden and the doctrine of unjust enrichment.⁴ The social considerations for allowing recovery in these cases seem to heavily outweigh those arguments in opposition. The failure to allow contribution will undoubtedly promote fraud and collusion. A possible agreement between the suing plaintiff and one of the tortfeasors is not impossible to foresee. The "no contribution" rule is unjust in its treatment of the defendant. He is not totally at fault for the injured party's damages and yet is forced to pay the full amount of such damages. The whim of the plaintiff is the controlling factor in these cases. Should we allow such private arbitration rather than submit to the more practical and equitable judicial arbitration? The refusal to allow contribution is also inconsistent with reality and the modern theory of indemnity, where the passive tortfeasor is allowed complete relief.

Negligent tortfeasors in these cases are much like the passive tortfeasor in the indemnity case in that his liability is discharged by large insurance companies or under the doctrine of *respondet superior*. The courts should allow these insurers to adjust the loss distribution accordingly.

The rule barring contribution between negligent tortfeasors is being steadily rejected in this country. In 1939 the first Uniform Contribution Among Tortfeasors Act was submitted for adoption.⁵ The first state to adopt the Uniform Act was Rhode Island in 1940⁶ and subsequently seven other jurisdictions have called for its acceptance.⁷ Legislative repeal or modification of the "no contribu-

⁴ Arnold, *Suretyship and Guaranty*, at 270 (1927), "Equality of burden as well as of the benefits is the basis for its recognition."

⁵ 9 Uniform Laws Ann. 230 (1957).

⁶ Gen Laws of R.I. (1956), §§ 10-6-1 to 10-6-11.

⁷ Arkansas: Ark. Stat., §§ 34-001 to 34-009, in 1941.

Delaware: Del. Code Ann., Tit. 10, § 6308, in 1949.

Hawaii: Rev. Laws Hawaii (1955), c.246, §§ 10 to 16, in 1941.

Maryland: Ann. Code of Md. (1957), Art. 50, §§ 16 to 24, in 1941.

New Mexico: New Mex. Ann. Stat. (1953), Art. 24, §§ 1-11 to 1-24, in 1941.

Pennsylvania: Purdon's Penna Stat., Tit. 12, §§ 2082 to 2089, in 1951.

South Dakota: S. Dak. Code (Supp. 1952), c. 33.04A, in 1945.

tion" rule has taken place in many other states⁸ although the courts of a slight majority still refuse to allow contribution.⁹ As the rule appears to be well settled in these jurisdictions it is up to the various legislatures to provide for *pro rata* loss distribution between joint tortfeasors.

In those states allowing contribution, either by statute or at common law, three distinct prerequisites emerge before recovery

⁸ The following states allow contribution in some form by statute.

Georgia: Ga. Code Ann., Tit. 105, §§ 2011 to 2012 (1935).

Kansas: Gen. Stat. of Kansas, c. 60, § 3437 (1949).

Kentucky: Kent. Rev. Stat., c. 412.030 (1956).

Louisiana: Civil Code of La., Art. 2103-2104 (1952).

Michigan: Mich. Stat. Ann., vol. 22, §§ 27.1683 (1) and (4) (1954).

Minnesota: Minn. Stat. Ann., §548.19 (1948).

Mississippi: Miss. Code Ann., § 335.5 (1956).

Missouri: Vernon's Ann. Mo. Stat., §537.060 (1953).

Montana: Rev. Codes of Mont., §59-511 (1947) and see *Beedle v. Carolan*, 115 M. 587, 590, 148 P.2d 559. Although the statute does not expressly cover the joint tortfeasor situation, the court implies that it may be interpreted to include such a problem.

New Jersey: N.J.S.A. 2A: 53A-3 (1952).

New York: Consol. Law of N.Y. Ann., Bk. 12, §§ 231-240 (1928).

North Carolina: Gen. Stat. N.C., §1-240 (1955).

Texas: Vernon's Tex. Stat. Ann., Art. 2212 (1941).

Virginia: Code of Va., §8-627 (1950).

West Virginia: W. Va. Code Ann., §5482 (1955).

Wisconsin: Wis. Stat. Ann., c. 113.01 (1955).

Puerto Rico has also enacted a statute allowing contribution between joint tortfeasors. Laws of Puerto Rico, Tit. 32, §1149 (1955).

⁹ The following are cases in some of those states that refuse to allow contribution in the absence of a statute to the contrary:

Arizona: *United States v. State of Arizona*, 214 F.2d 389 (9th Cir. 1954).

Connecticut: *Friend v. Middle Atl. Transp. Co.*, 153 F.2d 778 (2nd Cir. 1946).

Iowa: *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950).

Oklahoma: *Peak Drilling Co. v. Halliburton Oil Well Cementing Co.*, 215 F.2d 368 (10th Cir. 1956).

Tennessee: *Fontenot v. Roach*, 120 F.Supp. 788 (E.D. Tenn. 1954), contribution not allowed except in cases where one tortfeasor is active and one is passive. This appears to be indemnity.

Illinois: *Aldridge v. Morris*, 337 Ill. App. 369, 86 N.E.2d 143 (1949) and see *Gulf M. & O.R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E.2d 783 (1951), for exceptions to the general rule.

Virginia: *American Emp. Ins. Co. v. Maryland Cas. Col.* 218 F.2d (4th Cir. 1954). In Virginia contribution is allowed only if the tortfeasor is guilty of negligence and there is no moral turpitude involved. See Virginia statute cited in note 8.

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

Oregon: *Jackman v. Jones*, 198 Ore. 564, 258 P.2d 133 (1953).

Utah: *Hardman v. Mathews*, 1 Ut.2d 110, 262 P.2d 748 (1953).

will be allowed. The first of these is that there must be a discharge of the obligation to the injured party.¹⁰ The Uniform Contribution Among Tortfeasors Act requires a discharge:

A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.¹¹

The second requirement, which is recognized in a few states, is that the injured party must acquire a judgment against both tortfeasors before one can sue for contribution.¹² The effect of this requirement is to bar contribution in most cases. Some courts have expressly rejected the joint judgment requirement¹³ and it should be noted that it could operate to throw the discretion back onto the injured party as in the case where contribution is not allowed at all.

The third and most important prerequisite to the allowance of contribution in these cases is that there must be a common burden. By common burden it is meant that both tortfeasors must have contributed to the injury and that they must both be jointly liable to the injured party.¹⁴ A tortfeasor's recovery of contribution from a joint tortfeasor presupposes a common liability of the tortfeasors to the injured party.¹⁵ Contribution has been denied for a failure to meet the common burden requirement where the tortfeasor from whom recovery was sought had a personal defense due to: the defendant being the plaintiff's father,¹⁶ the plaintiff's assumption of the risk of the defendant's negligence,¹⁷ the defendant having paid workmen's compensation to the plaintiff,¹⁸ the injured party failing to give the required notice and hence, the statute of limitations

¹⁰ *American Auto Ins. Co. v. Molling*, 238 Minn. 74, 57 N.W.2d 847 (1953), *Western Cas. Co. v. Milwaukee Gen. Constr. Co.*, 213 Wis. 302, 251 N.W. 491 (1933), *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926) and *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949).

¹¹ 9 Uniform Laws Ann. 230 (1957), § 2 (2).

¹² *Murtagh v. Phillips Wase Oil Pick-Up and Road Oiling Service Inc.* 17 F.R.D. 495 (E.D. Mich. 1955); *Franklin v. United States*, 124 F. Supp. 953 (N.D. W. Vir. 1954) and *Linkenhoger v. Owens*, 181 F.2d 97 (5th Cir. 1950).

¹³ *Yellow Cab Co. of D.C. v. Dreslin*, 181 F.2d 626 (D.C. Cir. 1950).

¹⁴ *Supra* note 13, and *Jackson Co. v. Norfolk*, 197 Va. 62, 87 S.E.2d 781 (1955).

¹⁵ *LoBue v. United States*, 188 F.2d 800 (2nd Cir. 1951).

¹⁶ *Zutter v. O'Connell*, 200 Wis. 601, 229 N.W. 74 (1930).

¹⁷ *Shrofe v. Rural Mut. Cas. Ins. Co.*, 258 Wis. 128, 45 N.W.2d 76 (1950).

¹⁸ *Buggs v. Wolff*, 201 Wis. 533, 230 N.W. 621 (1930) and *Wis. Power and Light Co. v. Dean*, 275 Wis. 236, 81 N.W.2d 486 (1957).

running,¹⁹ and finally where the United States had not yet consented to be sued as a tortfeasor and thus contribution could not be allowed as there was no common liability.²⁰ Although most of the decisions as to the prerequisites for allowing contribution arise under various statutes giving a right of contribution between joint tortfeasors, those states that recognize the right at common law also base the allowance on a common burden.²¹ Decisions under statutes are numerous and in accord. In *Guerriero v. U-Drive-It Co.*,²² the court stated:

. . . there must be liability in tort before the statute can become operative . . . the element of common liability of both tortfeasors to the injured person, essential to the right of contribution, is lacking. . . .

The New Jersey court refused to allow contribution because of the lack of common liability and its opinion serves as a model of the many other decisions on the subject.

The stringent requirement of a common burden has been recently relaxed in favor of the innocent party who mistakenly makes a settlement, thinking himself to be liable, and thereafter sues the true tortfeasor for contribution. In the recent case of *Rusch v. Korth*,²³ the plaintiff was injured while riding in an automobile driven by one Heimerl when it collided with another car driven by Korth. Plaintiff sued Korth who alleged that the accident was caused by Heimerl's negligence and also demanded contribution in case plaintiff should recover against her. On the day of the trial

¹⁹ *Palmer v. Autois Mut. Ins. Co.*, 234 Wis. 287, 291 N.W. 364 (1940). This case, although once representing the law as the Statute of Limitations, has since been overruled by *Ainsworth v. Berg*, 253 Wis. 438, 34 N.W.2d 790, 35 N.W.2d 911 (1949). The majority rules concerning these defenses are expressed in 19 A.L.R.2d 1003.

²⁰ *Oahu Ry. and Land Co. v. United States*, 73 F.Supp. 707 (Hawaii 1947), citing *Baltimore Transit Co. v. Maryland*, 183 Md. 674, 39 A.2d 858, 156 A.L.R. 460 (1944).

²¹ *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926). Wisconsin now allows contribution by statute. See *Snohomish County v. Great Northern Ry. Co.*, 130 F.2d 996 (9th Cir. 1942), where contribution is allowed if the act is not immoral, providing a common burden exists. See *Yellow Cab Co. of D.C. v. Dreslin*, supra, note 13.

²² 22 N.J. Super. 588, 92 A.2d 140 (1952) in interpreting N.J.S.A. 2A:53A-1-5. See *Walker v. Kroger Grocery and Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934); *American Auto Ins. Co. v. Molling*, supra, note 10; *Connecticut Indem. Co. v. Prunty*, 263 Wis. 27, 56 N.W.2d 540 (1953); and *Jackson Co. v. Norfolk*, supra, note 14.

²³ 2 Wis.2d 321, 86 N.W.2d 464 (1957).

Korth settled with the plaintiff, who executed full and complete releases. At the trial Korth sought to show that Heimerl was casually negligent and further objected to evidence showing that she was negligent. The jury found that Heimerl was negligent and that Korth was not. Korth then requested the court to find her casually negligent so as to entitle her to contribution as a joint tortfeasor. The motion was denied and Korth appealed to the Wisconsin Supreme Court. *Held*: Judgment reversed with directions to enter judgment for contribution, notwithstanding the absence of negligence on the part of Korth.

Thus the accepted requirement of resting the right to contribution between joint tortfeasors on a showing of common liability has been modified in Wisconsin.²⁴ The court stated that their decision accords with the equitable basis for allowing contribution and was in agreement with the sound policy of encouraging settlements. The majority opinion mentions several earlier Wisconsin cases that appear to be based on reasoning inconsistent to the present holding but restricts those cases to their own facts.²⁵ One of the cases referred to is *Papenfus v. Shell Oil Co.*²⁶ Here it was held that a payment made to the injured party by the insurance carrier of an impleaded defendant, later found to be free of negligence, was a voluntary contribution. The amount could not be deducted from the judgment in favor of the injured party against the true tortfeasor. The theory underlying these decisions appears to be contrary although they can be distinguished in that the innocent party is suing for contribution in the *Korth* case and the real tortfeasor is suing for a deduction in the *Papenfus* case. This distinction appears to be unsound and in the *Papenfus* case the court is unrealistic in calling the payment a voluntary contribution. The distinguished Professor Warren A. Seavey, in delivering the third of the Roscoe Pound Lectures at the University of Nebraska College of Law, submitted this contention and also stated that the desirability of allowing contribution in these cases is almost beyond argument.²⁷

The first question to come before the court in the *Korth* case was whether Korth was a mere volunteer and therefore not en-

²⁴ *Michel v. McKenna*, 199 Wis. 608, 227 N.W. 396 (1929), and *Zutter v. O'Connell*, supra, note 16. These cases were not specifically overruled but the reasoning behind them seems contrary to the present decision.

²⁵ See *Rusch v. Korth*, supra, note 23 at page 32.

²⁶ 254 Wis. 233, 35 N.W.2d 920 (1949).

²⁷ *Cogitations on Torts*, pp. 53-55, Third Roscoe Pound Lecture, University of Nebraska College of Law, March 23-25, 1953.

titled to recovery.²⁸ A volunteer is one who does or undertakes to do that which he is not legally or morally bound to do.²⁹ The court rejected this argument and held that she was not a volunteer as she had a real interest to protect in payment of the settlement. This reasoning is based on those cases which have held that one is not a mere volunteer if there is a bona fide claim of interest, but it must be shown that the party had, or supposed he had, some interest to be protected.³⁰ An analogy can also be drawn to those cases where payment of the debt of another, by reason of a mistake of fact, has been held not to bar recovery under the volunteer doctrine.³¹ These decisions are based on the theory that the court will, in good conscience, not allow the real debtor to take advantage of the mistake of the plaintiff.

The second question to arise in the *Korth* case was that of common liability. The logical reasoning in this case, with reference to the existing rules concerning contribution, would seem to be that *Korth* was free of negligence and such a complete defense would bar any common liability and hence, recovery of contribution. The court discussed at length the equitable basis of contribution and cited the earlier case of *Ainsworth v. Berg*,³² where it permitted contribution between the wrongdoers notwithstanding that one had a complete defense to an action by the injured plaintiff. This decision formed the foundation for the *Korth* opinion and the two cases stand as an exception to the general requirement of a common burden. They are based on the principle that contribution is an equitable remedy and equity should be served in its execution.

An example of the harshness of a failure to note this exception occurred in Charlotte, North Carolina, where a pedestrian was injured by falling on a sidewalk. He subsequently obtained a judgment from the city, who then sought to recover from the abutting property owners, under the Contribution Between Joint Tortfeasors Act. The Supreme Court of North Carolina held that the city had not alleged any negligence on their part and therefore was not a

²⁸ Holding that a volunteer may not recover are: *Gosnell v. Garner*, 198 Ark. 989, 132 S.W.2d 187, 189 (1939) and *In Re Bell*, 344 Pa. 223, 25 A.2d 344, 350 (1942).

²⁹ *White v. Great Northern Ry. Co.*, 142 Minn. 50, 170 N.W. 849 (1919).

³⁰ *Boney v. Central Mut. Ins. Co. of Chicago*, 213 N.C. 563, 197 S.E. 122 (1938), quoting from *Journal Publishing Co. v. Barber*, 165 N.C. 478, 81 S.E. 694, 697 (1914).

³¹ *Detroit Bldg. & Loan Ass'n v. Oram*, 200 Mich. 485, 167 N.W. 50 (1918) and *Lee v. Newell*, 96 Neb. 209, 147 N.W. 684 (1914).

³² 253 Wis. 438, 34 N.W.2d 790, 35 N.W.2d 911 (1949).

joint tortfeasor under the statute.³³ Contribution was refused due to the absence of a common burden. The problem in this case seems identical to that in *Rusch v. Korth*,³⁴ with the courts of the two states reaching opposite conclusions.

As the courts of the several jurisdictions seem reluctant to overrule those cases that require a common burden, another possibility might be suggested. Although it has not been referred to in these cases, the doctrine of equitable subrogation may be invoked. The party seeking recovery in this instance is not a volunteer and the obligation was paid for the purpose of protecting some real or supposed interest of his own. The use of this doctrine is highly favored by the courts and might prove to be a method whereby the requirement of common liability in contribution cases could be preserved.³⁵

The possibility of the decision in *Rusch v. Korth*³⁶ becoming a new trend seems highly unlikely, but as the theory of contribution between joint tortfeasors was founded in equity the strict rules applied in some cases seem to be without justification.

II. CONTRIBUTION IN NEBRASKA

Nebraska has no statute authorizing contribution and the cases discussing the problem are controversial. It has been submitted that the Supreme Court of Nebraska would allow contribution as between negligent tortfeasors on the basis of past decisions.³⁷ The Nebraska Supreme Court has recognized the negligent tortfeasor exception to the "no contribution" rule along with the general requirements for recovery. Whether they have in fact allowed contribution in these cases is questionable,³⁸ but the "no contribution" rule has never been upheld in Nebraska.

The first case involving contribution between joint tortfeasors

³³ *Charlotte v. Cole*, 223 N.C. 106, 25 S.E.2d 407 (1943) interpreting N.C. Code Ann., § 618 (1939).

³⁴ *Supra*, note 23.

³⁵ See 50 Am. Jur., p. 693, § 15. An excellent note in 22 N.C. L. Rev. 167, suggests equitable subrogation as a possibility in these cases.

³⁶ *Supra*, note 23.

³⁷ *George's Radio Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942) citing *First Nat. Bank v. Avery Planter Co.*, 69 Neb. 329, 95 N.W. 622, 625, 111 Am. St. Rep. 541 (1903).

³⁸ Compare the statement of Groner, C.J. in *George's Radio Inc. v. Capital Transit Co.*, *supra*, note 37, with the opinion of Delehant J. in *Andromidas v. Theisen Bros.*, 94 F. Supp. 150 (D. Neb. 1950).

that arose in Nebraska was *Johnson v. Torpy*.³⁹ A saloon-keeper sold intoxicating liquors to the deceased husband which caused, or contributed to, his death. The wife of the deceased sued the saloon-keeper, under a then effective statute permitting recovery, and acquired a judgment. The saloon-keeper now sues another saloon-keeper, who also sold liquor to the deceased, for contribution. The lower court allowed recovery and there was an appeal. The Supreme Court reversed on the ground that the plaintiff tortfeasor was presumed to have known that his act was wrongful and he therefore stood in the position of an intentional tortfeasor. It should be noticed that in this case the presumption of knowledge and intent was put upon the plaintiff because of his *violation of the statute* and also because he *knew* the deceased to be a habitual drunkard. Where the plaintiff is put in the position of an intentional tortfeasor, contribution has not been allowed.⁴⁰ Although recovery was not allowed in *Johnson v. Torpy*, the court expressly recognized the right of contribution between negligent tortfeasors. In referring to the test for recovery in these cases the court stated:

In determining whether the right of contribution exists in favor of one wrong-doer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy.⁴¹

This appears to be a forceful argument for the suggestion that the Nebraska Supreme Court would, if the facts warranted such a finding, allow recovery between negligent joint tortfeasors.

In *Sharp v. Call*,⁴² the court was faced with a request for contribution by a trustee of an insolvent corporation who had wrongfully distributed corporate assets and was required to account to the creditors for the amount of such distribution. The court found the plaintiff must be presumed to have known it was a wrongful act. In disposing of the case on the basis of presumed knowledge and therefore barring negligence, the court made the following statement:

If the action . . . is tortious, and the plaintiff must be presumed to have known that it was a wrong-doing, then it would seem that there can be no recovery in this case. On the other hand,

³⁹ 35 Neb. 604, 53 N.W. 575 (1892).

⁴⁰ Prosser on Torts, 2nd Ed., p. 249.

⁴¹ *Johnson v. Torpy*, supra, note 39, at p. 606. This case was later affirmed in another opinion by the Nebraska Supreme Court in *Torpy v. Johnson*, 43 Neb. 882, 62 N.W. 253 (1895).

⁴² 69 Neb. 72, 95 N.W. 16, 96 N.W. 1004 (1903).

if the action was taken in good faith, and with defendants participation, and plaintiff need not be pressured to have known it was wrong, there would be a right to contribution.⁴³

By using the words "good faith" the court would seem to imply that a tortfeasor who was merely negligent might recover contribution from his fellow tortfeasor. Sedgwick J., in dissent, felt that the plaintiff had acted in good faith and should be allowed to recover. He apparently felt that the plaintiff "has at all times taken such action as an honorable and intelligent business man would ordinarily be expected to take . . .", and that he would therefore be merely negligent and should not be presumed to have known that his actions were wrongful.⁴⁴ Thus it again appears that Nebraska judges have demonstrated a preference for the allowance of contribution between joint tortfeasors where their acts were of a negligent character.

In a later case, *First National Bank v. Avery Planter Co.*,⁴⁵ attaching creditors joined with the sheriff in resisting an action brought by a party whose goods were seized under a wrongful attachment order. By joining in this defense they were found to have become joint tortfeasors. The Supreme Court, *in allowing contribution*, made the following statement:

The general rule that contribution among tortfeasors will not be enforced, does not apply where, as in this case, the parties acted in good faith without any intention of committing a trespass.⁴⁶

The court made mention of the fact that the right to contribution results from natural equity and that its enforcement is an application of the principle, that one should be compelled to do that, which, in equity and good conscience, he ought to do; and in conclusion stated:

We conclude, therefore, that the defendant is entitled to contribution for the amount paid by it in discharge of the judgment, and the reasonable expense incurred in defense of the action. . . .⁴⁷

Additional litigation under this factual situation arose in *Schappel v. First National Bank*.⁴⁸ The court affirmed the judgment of the district court which followed the ruling in the *Avery*

⁴³ *Sharp v. Call*, supra, note 42, at pp. 75, 76.

⁴⁴ *Sharp v. Call*, supra, note 42, at p. 77.

⁴⁵ 69 Neb. 329, 95 N.W. 622 (1903).

⁴⁶ *First Nat. Bank v. Avery Planter Co.*, supra, note 45, at p. 337 citing *Johnson v. Torpy*, supra, note 39.

⁴⁷ *First Nat. Bank v. Avery Planter Co.*, supra, note 45, at p. 338.

⁴⁸ 80 Neb. 708, 115 N.W. 317 (1908).

Planter case.⁴⁹ Duffie, C., writing the majority opinion expressed doubt as to whether the evidence warranted a finding that the other parties joined the bank in resisting the action brought against the sheriff. He pointed out that such a finding could be the only basis on which the bank had all, if not more than all, it was entitled to receive.

Although it appears that the establishment of joint liability may have been in doubt in the *Avery Planter* and *Schappel* cases, the fact remains that contribution was allowed in the *Avery* decision and it was allowed on the basis of the wrongdoers acting in good faith and as joint tortfeasors.

In these cases the courts mention the term "good faith." In an effort to defeat the contention that Nebraska has recognized the right of recovery as between negligent tortfeasors it could be suggested that the failure to mention negligence demonstrates an intent to limit that recognition only to cases where the wrongdoer acted in good faith. This distinction has not been made in any of the Nebraska opinions and as a negligent tortfeasor must necessarily be acting in good faith, the cases should not be distinguished in this manner. Good faith and negligence, as stated here, are used in the same context.

The opposite view as to Nebraska's status on this issue is expressed in an excellent opinion written by Judge Delehant in *Andromidas v. Theisen Bros.*⁵⁰ After a careful examination of the Nebraska authorities in point the learned judge suggested that the Nebraska Supreme Court has not, in any of its opinions, sustained the right of contribution between joint tortfeasors. In deciding the issue, Judge Delehant made this statement:

Measured by the test proposed in *Johnson v. Torpy*, supra, this court thinks that the negligent user of the state's public highways—or any other party guilty of actual and actionable negligence—should 'be presumed to have known that the act for which he has been compelled to respond was wrongful.' It is elemental that persons are presumed to contemplate and intend the natural and probable consequences of their own acts.⁵¹

The judge has placed all negligent tortfeasors in the position of intentional actors and thereby destroyed their right of contribution. It is not disputed that contribution will not be allowed to intentional tortfeasors. In concluding that Nebraska had never allowed contribution in these cases and in an effort to overcome the ruling in

⁴⁹ *Supra*, note 45.

⁵⁰ 94 F. Supp. 150 (D. Neb. 1950).

⁵¹ *Supra*, note 87, at p. 156.

First National Bank v. Avery Planter Co.,⁵² Judge Delehant quoted the commissioner in *Schappel v. First National Bank*,⁵³ who had also written the opinion in the *Avery Planter* case, and concludes that the commissioner "damned with faint praise,"⁵⁴ his former action in awarding the bank contribution. It remains that, despite the doubt expressed by the commissioner, contribution was allowed.

Does the interpretation suggested in the *Andromidas* case evince that every negligent tortfeasor should, in all cases for the purpose of deciding contribution, "be presumed to have known that the act for which he has been compelled to respond was wrongful," and therefore be refused contribution? If this be the situation how could contribution ever be allowed? What becomes of the negligent tortfeasor and would we be forced to revert to the old and outmoded rule denying contribution in all cases where joint tortfeasors are involved?

Although Nebraska has never passed a statute allowing contribution between joint tortfeasors there have been two efforts at getting such a proposal enacted. In 1953, Ralph Svoboda, a member of the Legislature from Omaha, proposed LB 472.⁵⁵ The bill was very much like the Uniform Act.⁵⁶ Along with Senator Svoboda, Professor H. H. Foster of the University of Nebraska appeared as a proponent of LB 472. They pointed to the outmoded concept behind the common law refusal to allow contribution, the economy of time that would be achieved in allowing one suit to settle the responsibilities of all parties, and finally, the possibility of putting a stop to connivance and collusion between parties trying to settle their own law suits.

Again in 1955 Senator Svoboda presented a similar proposal to the Legislature in the form of LB 487,⁵⁷ which would allow contribution between joint tortfeasors. He advised that the Nebraska State Bar Association recommended adoption and also that the bill had the approval of Dean James Doyle of the Creighton Law School. Dean David Dow, who was at that time Dean of the Nebraska College of Law, spoke in favor of the bill. No one appeared in opposition to LB 487 but the proposal was again refused passage.

⁵² *Supra*, note 45.

⁵³ *Supra*, note 48.

⁵⁴ *Andromidas v. Theisen Bros.*, *supra*, note 50, at p. 155.

⁵⁵ See Judiciary Committee Minutes of 1953, on file in the office of the Clerk of the Nebraska Legislature.

⁵⁶ 9 Uniform Laws Ann. 230 (1957).

⁵⁷ See Judiciary Committee Minutes of 1955, Book #2.

III. CONCLUSION

It appears that the principles behind the proposition allowing contribution between negligent tortfeasors are sound and slowly becoming accepted in this country. It is the duty of the various Legislatures to recognize the need for a statute of this type. The courts are slow to overturn such a deeply rooted doctrine and as the concept behind the "no contribution" rule is no longer justified, it is up to the Legislature to correct the situation.

Nebraska's exact position as regards contribution between joint tortfeasors is unsettled. The cases decided on this question are susceptible of various interpretations. Until the Supreme Court clearly decides the issue, or the Legislature settles the problem, Nebraska's position will have to remain one of individual interpretation. However, it is suggested that on the basis of past decisions Nebraska should be put in that group of states that has recognized and allowed contribution between joint tortfeasors where they were acting in good faith and not as intentional wrongdoers. If such a position is not tenable it is further suggested that Nebraska should, even in the absence of a legislative enactment, adopt the more equitable principle and allow contribution between negligent tortfeasors.

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