Volume 34 | Issue 2

1-1-1930

# Contribution Between Wrongdoers

Fred S. Reese

CONTRIBUTION BETWEEN WRONGDOERS—It has long been a familiar maxim that as between joint tort-feasors contribution will not be enforced. A recent Pennsylvania case, *Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, (1928),* presents a phase of this question upon which the courts in the various jurisdictions are not in accord.

Gertrude Goldman, a minor, through her mother, Sarah 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 Philadelphia 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. Both defendants appealed from the judgments, the American Surety Co. becoming security for Mitchell-Fletcher Co. on its appeal bond. Upon affirmance of the judgments,[1] the Surety Co. paid them 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. From this order, the Transit Co. appealed, contending that the result of the action of the trial court would be to bring about contribution between it and its joint tort-feasor.

The Supreme Court said that the only question really involved was the right of the Surety Co. to be subrogated in the judgments, but that to avoid further litigation, if possible, the Court would pass on the question of the right to contribution, which would become involved, should the Surety Co. attempt to use the judgments to collect, not only from its principal, but also from the Transit Co.

The Court held that, under the facts of the case,[2] contribution between joint tort-feasors was not improper. After a careful and exhaustive review of the English and American authorities, the Court concluded that the general rule that there can be no contribution between joint tort-feasors applies 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. Further, it was held that the general rule does not apply to torts which are the result of mere negligence.

---

[1]288 Pa. 102 (1927).

[2]The court said, page 366, "There may be cases in which such outcome should not be sanctioned; they will be disposed of in the future when they are brought before us for determination."

Upon the last proposition, as will be pointed out *infra,* the several courts are not in accord.

The general maxim, *supra,* that there can be no contribution between wrongdoers, had its origin in an English case, *Merryweather v. Nixan.*[3] But as has well been said,[4] "Indeed this maxim is too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it."

Modern decisions have limited the doctrine, that there can be no contribution, to cases where the wrongdoers have committed an intentional violation of the law or have done acts which they knew or ought to have known were wrongful.[5] To apply the general rule "we must look for personal participation, personal culpability, personal knowledge,"[6] or, as otherwise stated, "if there was knowledge that the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable", then there can be no contribution.[7] Actual participation in the wrong is not *per se* sufficient to deny contribution. It must also appear that there was knowledge of the wrong or that such knowledge could be presumed.[8] It must appear that there was concert of action in the commission of the wrong[9] and that the parties were in *pari delicto.*[10]

Accordingly, it has been held that there can be no contribution between wrongdoers who join together in the commission of an act involving moral turpitude,[11] or in the commission of the following torts: libel,[12] fraud,[13] tres-

[3]8 Term R. 186 (1799). The later English cases, limiting the general rule, are discussed in the principal case, page 360.

[4]Bailey v. Bussing, 28 Conn. 455 (1859).

[5]Street's Foundations of Legal Liability, vol. 1, page 490; 13 C. J. 830; Woodward on Quasi-Contracts, page 402, and cases there cited; and see cases cited infra; also collection of authorities in principal case.

[6]Bailey v. Bussing, supra, note 4.

[7]Cooley on Torts, vol. 1, 3rd ed., p. 259.

[8]13 C. J. 830.

[9]In the principal case, there was no concert of action.

[10]Mayberry v. Northern Pac. Ry. Co., 100 Minn. 79 (1907).

[11]Chicago Rys. Co. v. Conway, 219 Ill. App. 220 (1920); Horrabin v. Des Moines, 198 Iowa 549 (1924).

[12]Arnold v. Clifford, Fed. Cases, No. 555 (1835); Atkins v. Johnson, 43 Vt. 78 (1870).

[13]Bartle v. Nutt, 29 U. S. 184 (1830); Goldsborough v. Dorst, 9 Ill. App. 205 (1881); Tomerlin v. Krause, 278 S. W. (Texas) 501 (1926); Boyer v. Bolender, 129 Pa. 324 (1889).

pass,[14] conversion,[15] nuisance[16] and sale of liquor in violation of statute.[17]

The leading case in Pennsylvania falling under the general rule is *Boyer v. Bolender*,[18] in which one of several directors of an insurance company had paid off a judgment recovered against them jointly for the fraudulent misappropriation of the funds of the company to their own use. It was held he could not enforce contribution from the others, because he had participated in the fraud and knew or must be presumed to have known that he was doing an unlawful act.

In those cases where the general rule applies the reason the law refuses contribution, "is that the wrongdoers may be intimidated 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."[19]

But there are many cases in which contribution has been enforced between wrongdoers held jointly responsible for a tort to a third person. A concise summary of such cases is found in the following words, "In cases of quasi-torts only, not involving any moral turpitude or any personal fault, or where the acts are not obviously unlawful, or the parties are not presumed to have known they were doing any wrong, or where their liability is by implication of law merely, then contribution will be enforced."[20] Again, if there is "only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong,"[21] or, "where the parties are acting under the supposition of the entire innocence and propriety of the act and the tort is merely one by construction, or inference of law,"[22] there can be contribution.

---

[14]Percy v. Clary, 32 Md. 245 (1870); Avery v. Halsey, 31 Mass. 174 (1833); Sutton v. Morris, 102 Ky. 611 (1898).

[15]Rhen v. White, 40 Tenn. 121 (1859); Davis v. Gelhans, 44 Ohio 69 (1886); Sharp v. Coll, 69 Neb. 72 (1903).

[16]Brown v. Southern Ry. Co., 111 S. C. 140 (1918).

[17]Wanack v. Michels, 215 Ill. 87 (1905); Johnson v. Torpy, 35 Neb. 604 (1892).

[18]Supra, note 13.

[19]Thweatt's Admr. v. Jones, 1 Randolph (Va.) 328. The reason is one of public policy. Woodward on Quasi-Contracts, page 406; 12 Harv. L. R. 176.

[20]13 C. J. 829, and cases there cited.

[21]Bailey v. Bussing, supra, note 4.

[22]Story on Partnership, page 220.

The following excellent statement of the principles governing cases enforcing contribution has been made by an eminent writer,[23] "As between parties who 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, * * * * contribution is enforced.[24] The same is true when, although the parties authorized or actually participated in such an infringement of another's legal right as constitutes a tort, they acted in good faith and are not chargeable with knowledge that their action was wrongful."[25]

We now reach the question upon which the several courts are not in accord, *viz,* will contribution be enforced between wrongdoers whose liability arose out of mere negligence? Some jurisdictions permit contribution,[26] apparently on the theory, that while the wrongdoers may have participated in the concurrent negligence, the tort is negative in character and is not a wrong committed intentionally or with knowledge of its wrongfulness, elements essential to the application of the general rule denying contribution. On the other hand, many jurisdictions

---

[23]Woodward on Quasi-Contracts, page 403.

[24]E. g., where the wrongdoers were liable not because of their own tort, but because of the tort of their common servant, Horbach's Admr. v. Elder, 18 Pa. 33 (1851); Hobbs v. Hurley, 117 Me. 449 (1918); or because of the joint tort of their respective servants, Armstrong County v. Clarion County, 66 Pa. 218 (1870), where a traveler was injured as a result of negligence in joint maintenance of a bridge; also the principal case, Goldman v. Mitchell-Fletcher Co., 292 Pa. 354 (1928); and on similar facts, Ellis v. Chicago, etc., Ry. Co., 167 Wisc. 392 (1918); contra, semble, Norfolk S. R. Co. v. Beskin, 140 Va. 744 (1924); Public Service Ry. Co. v. Mattencci, 143 Atl. (N. J.) 221 (1928).

[25]Vandiver v. Pollak, 97 Ala. 467 (1893); Farwell v. Becker, 129 Ill. 261 (1889); Jacobs v. Pollard, 10 Cush. (Mass.) 287 (1852); Smith v. Ayrault, 71 Mich. 475 (1888); First Nat. Bank v. Avery Planter Co., 69 Neb. 329 (1903); Schappel v. First Nat. Bank, 80 Neb. 708 (1908); Acheson v. Miller, 2 Ohio 203 (1853).

[26]Ankeny v. Moffett, 37 Minn. 109 (1887); Mayberry v. Northern Pac. Ry. Co., 100 Minn. 79 (1907); Lloyds v. Smith, 166 Minn. 388 (1926); Hobbs v. Hurley, 117 Me. 449 (1918); Mitchell v. Raymond, 181 Wisc. 591 (1923); Ellis v. Chicago, etc., Ry. Co., 167 Wisc. 392 (1918), facts similar to principal case; Nickerson v. Wheeler, 118 Mass. 295 (1875); Armstrong County v. Clarion County, 66 Pa. 218 (1870); see also principal case, page 364, and cases there cited.

refuse contribution between mere negligent wrongdoers,[27] apparently because both are in *pari delicto* and their conduct, though negative, is morally, as well as legally, culpable.

But many of the cases enforcing contribution where the wrong was mere negligence fall in that class of cases, described above by Prof. Woodward, where the wrongdoers are held liable, not because they authorized or actually participated in the negligent conduct, but because of their relation to the actual wrongdoer. For instance, in *Hobbs v. Hurley*,[28] A and B borrowed an automobile and their chauffeur (their common servant) negligently injured a third person. It was held that A, who paid the damages, could enforce contribution from B. Again, automobiles, owned by A and B and driven by their respective employees, X and Y, collide by reason of the concurrent negligence of the latter and a third person is injured. Contribution has been enforced.[29] But in both these cases, A and B are held liable, not because of their own participation in the wrong, but because of their relation to the person or persons who actually committed the tort. The liability of A and B in each case is free from personal fault and is merely by implication of law. In such cases then, contribution should be enforced on those principles which, as outlined hereinabove, justify a departure from the general rule. Such cases should not be authority for the statement that there can be contribution where the wrong is mere negligence.

The facts of the principal case, *Goldman v. Mitchell-Fletcher Co.*, are like those in the latter of the above illustrations.[30] The case, therefore, should be authority

[27]Union Stock Yards Co. v. Chicago, etc., R. Co., 196 U. S. 217 (1905); Atlanta, etc., R. Co. v. Southern, etc., Co., 107 Fed. 874 (1901); Forsythe v. Los Angeles R. Co., 149 Cal. 569 (1906); Gregg v. Page Belting Co., 69 N. H. 247 (1897); Andrews v. Murray, 33 Barb. (N. Y.) 354 (1861); Galveston, etc., R. Co. v. Nass, 94 Tex. 255 (1900); Walton v. Miller, 109 Va. 210 (1909); Tacoma v. Bonnell, 65 Wash. 505 (1911); Doles v. Seaboard, etc., R. Co., 160 N. C. 318; Wise v. Berger, 103 Conn. 29 (1925); Ill. Cent. Ry. Co. v. Bridge Co., 171 Ky. 445 (1916); Cain v. Quannah Light & Ice Co., 131 Okl. 25 (1928); Norfolk, etc., Co. v. Beskin, 140 Va. 744 (1924), same facts as principal case; Public Service Ry. Co. v. Mattencci, 143 Atl. (N. J.) 221 (1928), semble.

[28]Supra, note 26.

[29]See cases cited in Note 30, infra.

[30]Ellis v. Chicago, etc., Ry. Co., supra, note 26; indeed, most

for the principle that there can be contribution between wrongdoers who are liable by implication of law and free from personal fault and is not a strong authority for the rule that there can be contribution where the wrong is mere negligence. It is submitted that in the principal case and others with similar facts, contribution is permitted because of the technical nature of the liability of the wrongdoers, and not because of the character of the wrong committed. This contention is strengthened by the Court's statement[31] in the principal case that "the responsibility of the defendants grows out of the rule *respondeat superior,*" and again by the court's admonition[32] that the decision in the case rests upon its particular facts.

But if two vehicles, owned and operated respectively by A and B, collide by reason of their concurrent negligence, and contribution for the resulting injuries to a third person is enforced, then the liability is not by implication of law, but because of active participation, and contribution is permitted because of the nature of the wrong, i. e., a wrong not intentionally done.[33]

There is another class of cases where one wrongdoer may recover indemnity, i. e., may recover from another wrongdoer the entire amount which he has been compelled to pay the injured victim of the tort. This is to be distinguished from contribution, which, when allowed, permits the recovery of merely a proportionate share of the liability. It has been said that the rules governing contribution between wrongdoers apply, *mutatis mutandis,* to cases of indemnity.[34]

Thus, whether an agent who has committed a tort under the direction of his principal may recover indemnity from the principal depends upon the moral responsibility of the agent. Suppose the agent, at the direction of his principal, innocently makes a false statement of fact, the falsity of which is known to the principal, and is com-

---

of the cases cited in note 26, supra, have such facts. But, see contra, on similar facts, Norfolk, etc., Ry. Co. v. Beskin, and Public Service Ry. Co. v. Mattencci, supra, note 27.

[31]P. 359.

[32]P. 365.

[33]For a case which, upon these facts, enforced contribution, see Mitchell v. Raymond, supra, note 26. No similar case was discovered in a careful search of the authorities.

[34]Woodward on Quasi-Contracts, p. 406.

pelled to pay damages to the injured person. It will be noted that there is only one wrongdoer who consciously or intentionally commits a tort. The agent is made liable largely because of the conscious wrong of another. The agent is not in equal fault and should be fully indemnified by the one morally culpable. Where contribution was denied, as seen *supra,* both wrongdoers were in *pari delicto* and were both conscious participants. Where contribution was permitted, neither was intentionally a wrongdoer and should bear the liability proportionately.

Accordingly, if an agent commited a tort under the direction of his principal and knew or ought to have known that his act was wrongful, he will not be allowed indemnity,[35] nor would he be allowed contribution.[36] But if he acted in good faith and without any intention of violating another's rights, he may shift the consequences to his principal, where as between the two it should justly fall, and he may recover indemnity.[37]

Again, while one has actually authorized the commission of a tort by his agent or servant is obviously entitled neither to indemnity nor contribution one who has not authorized a wrongful act, but is held liable to the person injured merely because of his relationship to the agent or servant who committed it, will be allowed to seek indemnity.[38]

Indemnity is frequently sought where the relation of master and servant or principal and agent does not exist, but where, nevertheless, as between the tort-feasors, one is primarily responsible for the wrong and ought to bear the consequences. The principle, allowing indemntiy in such cases, has been stated thus: "As between two negligent parties, if the negligence of one was merely passive or was such as only to produce the occasion, and the other negligent party was the active perpetrator of the wrong, the

---

[35]Nelson v. Cork, 17 Ill. 443 (1856); Sutton v. Morris, 102 Ky. 611 (1898); Coventry v. Barton, 17 Johns. (N. Y.) 142 (1819); Culmer v. Wilson, 13 Utah 129 (1896).

[36]See cases cited in notes 5-10, supra.

[37]Betts v. Gibbons, 2 Ad. & E. (Eng.) 57 (1834); Moore v. Appleton, 26 Ala. 633 (1855); Gower v. Emory, 18 Me. 79 (1841); Hoggan v. Cahoon, 26 Utah 444 (1903).

[38]Betcher v. McChesney, 255 Pa. 394, 398 (1917); Bradley v. Rosenthal, 154 Cal. 420 (1908); Georgia, etc., R. Co. v. Jossey, 105 Ga. 271 (1898); Grand Trunk Ry. Co. v. Latham, 63 Me. 177 (1874); Costa v. Yochim, 104 La. 170 (1900); Lane v. Fenn, 65 Misc. (N. Y.) 336 (1909); 39 C. J. 1313.

former may recover over against the latter."[39] Or, in other words, "One who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter * * * * and the right to indemnity does not depend upon the fact that the defendant owed the plaintiff (seeking indemnity) a special or particular duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and, if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."[40]

Accordingly, where a sidewalk is negligently maintained, both the property owner and the municipality are legally responsible to the person injured, but the primary duty rests upon the property owner. If the municipality is compelled to pay damages, it may recover the amount so paid from the property owner.[41] A property owner who has been compelled to pay damages for a defect in the sidewalk, can recover indemnity from a gas company whose negligence caused the defect.[42] Similarly, a landlord who has been held liable for a defect in the premises, may seek indemnity from the tenant upon whom the primary duty rested.[43]

Attention is called to a recent Pennsylvania statute,[44] the provisions of which are useful to defendants in tort actions, who may later be able to seek contribution or indemnity from some other wrongdoer. The Act permits a defendant to have joined, as additional defendants, persons whom he alleges are liable over to him or jointly or severally liable with him. The Act has recently been construed and held constitutional, and procedure for its proper use suggested by the Supreme Court.[45]

---

[39]Austin, Etc., Ry. Co. v. Faust, 133 S. W. (Tex.) 449, 453 (1911); Portland v. Citizens Tel. Co., 206 Mich. 632 (1919).

[40]Oceanic Co. v. Compania Transalantica, 134 N. Y. 461 (1892).

[41]Phila. v. Reading Co., 295 Pa. 183 (1929); Pittsburgh v. Reed, 74 Pa. Super. 444 (1920); and many cases cited in 31 C. J. 456.

[42]Orth v. Consumers Gas Co., 280 Pa. 118 (1924); accord, on nearly similar facts, Phila. Co. v. Traction Co., 165 Pa. 456 (1895); Reymer v. Consolidated Ice Co., 67 Pa. Super. 468 (1917).

[43]Hanley v. Ryan, 87 Pa. Super. 6 (1926); San Antonio v. Smith, 94 Tex. 266 (1900).

[44]Act of April 10, 1929, P. L. 479.

[45]Vinnacombe v. Phila., 297 Pa. 564 (1929). The court said the Act does not affect the plaintiffs in such suits. Where there are

Finally, if one wrongdoer is entitled either to contribution or to indemnity, his proper remedy is an action of assumpsit on the theory that the duty of the other wrongdoer is quasi-contractual.[46] If contribution is sought from several persons, equity has jurisdiction on the ground of prevention of multiplicity of suits.[47]

Fred S. Reese

---

ARSON AS AFFECTED BY THE ACT OF APRIL 25, 1929, P. L. 767—The act of April 25th, 1929,[1] is entitled, in part, "An act to define arson": the first section of the act declares that any person who does certain things "shall be guilty of the felony of arson"; the sixth section of the act repeals section one hundred and thirty-seven of the act of March 31st, 1860,[2] by which arson was previously defined.

The act makes important changes in the law of arson. These changes may be exposited by considering: (1) The nature of the thing affected; (2) The ownership of the thing affected; (3) The act done to the thing affected; (4) The mental attitude of the actor.

Arson at common law was defined as the malicious and wilful (or voluntary) burning of the house of another.[3] The term "house" was interpreted as meaning dwelling house, and included buildings located within what was then known as the "curtilage."[4]

The act of March 31st, 1860, provided that the burning of any of the following three classes of buildings should constitute arson: (1) Any factory, mill, or dwelling

---

two or more wrongdoers, as to whether plaintiff may sue them jointly or must sue them separately, as to effect of judgment against one, and similar questions, see Hill v. American Stores Co., 80 Pa. Super. 338 (1923); Betcher v. McChesney, 255 Pa. 394 (1917).

[46]Phila. v. Reading Co., 295 Pa. 183 (1929). Assumpsit was successfully used, without objection, in Armstrong County v. Clarion County, 66 Pa. 218 (1870); and in Horbach's Admr. v. Elder, 18 Pa. 33 (1851).

[47]Steigerwalt v. Smeych et al., 9 Pa. Super. 363 (1899). In Boyer v. Bolender, 129 Pa. 324 (1889), one wrongdoer sued in equity to recover contribution from nine other wrongdoers.

---

[1]P. L. 767.

[2]P. L. 382.

[3]5 C. J. 539; Trickett's Crim. L. p. 164.

[4]5 C. J. 547.