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Contribution Among Tortfeasors

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LEGISLATION

CONTRIBUTION AMONG TORTFEASORS

A statute enacted by the recent Pennsylvania General Assembly provides as follows: "Contribution shall be enforcible among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary."[1] Given a literal interpretation, this act completely abandons the last vestiges of the common law rule that there can be no contribution among tortfeasors. The rule was first laid down in the English case of *Merryweather v. Nixan*,[2] but a considerable number of exceptions to the general rule are always stated,[3] and it has been argued that the exceptions are so numerous that there can no longer be said to be any general rule.[4]

It is not the purpose of this note to inquire into the nature of these exceptions, for the topic has been given frequent treatment by courts and writers of legal treatises.[5] In Pennsylvania, the leading case is that of *Goldman et al. v. Mitchell-Fletcher Co.*,[6] where, after an exhaustive review of the cases, the court concludes that the general rule that there can be no contribution among tortfeasors applies only where there has been an intentional violation of the law, or where the wrongdoer knows or is presumed to know that the act was unlawful. Further, it is suggested that the general rule does not apply to torts which are the result of mere negligence. It is with this latter contention that the courts in various jurisdictions have not been in accord. However, in view of the recent legislation now in force in Pennsylvania,[7] it would seem that any doubts on the matter are now resolved in favor of allowing contribution in such cases.[8] Assuming, for the present, that Pennsylvania courts have accepted all the recognized exceptions to the general rule of no contribution, the fact remains that prior to the act above quoted, contribution among intentional tortfeasors was never allowed.[9] Therefore, if the statute is given its full legal portent, a considerable breach with the

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[1]PA. LAWS 1939, No. 376, approved June 24, 1939.

[2]8 T. R. 186 (1799).

[3]See 13 C. J. 829, 830; BURDICK, TORTS (4th Ed.) 260; WOODWARD, QUASI-CONTRACTS (1913) p. 401.

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

[5]Generally, 13 C. J. 829; Leflar, *Contribution and Indemnity Between Tort Feasors* (1932) 81 U. OF PA. LAW REV. 130; *Contribution Between Wrongdoers* (1930) 34 DICK. L. REV. 123; RESTATEMENT, RESTITUTION (1936) §§81-102.

[6]292 Pa. 354, 141 Atl. 231 (1928).

[7]Note 1, *supra*.

[8]See *Contribution Between Wrongdoers* (1930) 34 DICK. L. REV. 123; also, Parker v. Rodgers, 125 Pa. Super. 48, 189 Atl. 693 (1937).

[9]Goldman *et al.* v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928); Armstrong Co. v. Clarion Co., 66 Pa. 218 (1870); Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127 (1889).

past occurs, in that as among intentional tortfeasors contribution may now be allowed.

Several reasons are generally given as to why contribution should not be permitted as between two or more persons who intentionally commit a tort, or a crime which, at the same time, amounts to a tort. The first of these may best be explained by the maxims *Ex turpi causa, non oritur actio* and *In pari delicto, potior est conditio defendentis.* With these, and the doctrine of contributory negligence, and clean hands in equity, courts have frequently reiterated their determination not to aid a wrongdoer in his suit against another wrongdoer. Logically, of course, one tortfeasor, be he negligently or intentionally such, who has satisfied a judgment in full rendered against him and others, should have a claim to contribution under the general quasi-contractual principle that "One who, in the discharge of his own legal obligation, has done that which, as between himself and another rested in equity and good conscience upon the other is entitled to restitution of the benefit thereby conferred."[10] Thus a refusal of contribution to intentional tortfeasors, and allowance of it between those, for example, whose liability arose by virtue of negligence or implication of law must be rested on some other grounds. This has been done by proclaiming that, in spite of their distaste for aiding tainted litigants, courts should, as a matter of public policy, refuse contribution. Thus it is argued that past misconduct will thereby be punished, and, in the case of a prospective wrongdoer, he will be deterred from wrongdoing when he knows that if judgment is taken against him and his allies, and he is forced to satisfy the entire amount, he can have no prospect of recovering from the latter a proportionate share of the amount he has paid.[11] It is hard to see how this reason would have any logic at all where mere negligent tortfeasance is involved, or where liability arises by implication of law, since in these cases there is no premeditated intent which the shadow of "no contribution" is likely to deter. Moreover, even as regards intentional tortfeasors, the validity of the argument is counterbalanced by the phenomenon that one prospective evildoer may be tempted to try his hand at some wrongful act, knowing that if suit is brought against him and his co-tortfeasors, and the judgment is satisfied by the latter, such latter cannot claim contribution from him, and he may go unpunished, financially speaking, for the damage he has caused.[12] This, it seems, was the conclusion reached by the House of Lords in *Palmer v. Wick*

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[10] WOODWARD, QUASI-CONTRACTS (1913) 396.

[11] "This rule is founded on public policy and intended to check the disposition to combine in committing wrongs by declaring that each individual concerned is liable to bear the whole loss or damage which may be occasioned." Pierson v. Thomson, 1 Edw. Ch. 212 (N. Y. 1831); Avery v. Kansas City Bank, 221 Mo. 71, 119 S. W. 1106 (1909).

[12] "It is true that the effect of the rule is to permit the injured party to single out one wrongdoer for punishment and entirely relieve the other." Owensboro City R.R. Co. v. Louisville, 165 Ky. 683, 178 S. W. 1043 (1915).

and Pulteneytown Steam Shipping Co.,[13] where the House refused to extend the rule of no contribution to Scotland. It was there said, Lord Herschell speaking: "On principle, I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free. I am bound to say that it (the rule of no contribution) does not appear to me to be founded on any principle of justice or equity, or even of public policy."

The statute as enacted by the Pennsylvania legislature merely states that contribution shall be enforcible among tortfeasors, provided of course they are all of the same class. By this it would seem that intentional tortfeasors were meant to be included. Though a statute derogating, as does this, from the common law, has heretofore been strictly construed to comply with the prior law, that rule of construction no longer prevails, and liberal construction is now the order of the day.[14] It is submitted that the statute, if interpreted to allow contribution among all joint or several tortfeasors, should have the salutary effect of (1) clarifying the confusion created by the cases and (2) conforming this exception to the general quasi-contractual principle already noted.

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[13][1894] A. C. 318.
[14]Act of 1937, P. L. 1019, Art. IV, Sec. 58, 46 PURD. STATS. (Pa.) 558.