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Contribution Between Joint Tort-Feasors in Wisconsin

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CONTRIBUTION BETWEEN JOINT TORT-FEASORS IN WISCONSIN

I. INTRODUCTION

A definition of contribution which adequately encompasses the various ramifications of the doctrine is difficult to arrive at; a definition general enough to prove workable is found in a Connecticut decision wherein it is defined as:

> . . . the payment made by each, or by any, of several having a common interest of liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others.[1]

In other words, it is:

> . . . the right of one who has discharged a common liability or burden, to recover of another also liable the aliquot portion which he ought to pay or bear.[2]

In November of 1957 the Wisconsin Supreme Court handed down a decision[3] which undermined the very cornerstone of the foundation upon which our traditional rule of contribution rested. The rationale of this decision affords an excellent springboard into a survey-like re-evaluation of the present Wisconsin position in the area of contribution. Before entering upon an analytical consideration of this decision, it would be advantageous to trace the historical development of the law of contribution and thereafter to review the various Wisconsin decisions on which the decision in the style case could have been founded.

II. ENGLISH HISTORICAL BACKGROUND

Since 1799, when *Merryweather v. Nixon*[4] was decided, it has been an established principle of the common law that as between joint tort-feasors, there is no right of contribution. Prior to the case in question one Starkey had brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill; Starkey also included in his action a count in trover. Starkey prevailed and levied for the entire judgment on the present plaintiff, who thereupon brought an action against his co-defendant in the Starkey case for "contribution of a moiety" based upon an implied assumpsit. The plaintiff was non-suited and appealed. In the rather meager report of the case, Chief Justice Lord Kenyon concluded that no contribution could by law be claimed as between joint-wrongdoers, and that this action upon an "implied assumpsit" could not be maintained on the mere ground that the plaintiff had alone paid the money

[1] Fidelity & Casualty Ins. Co. of New York v. Sears, Roebuck, & Co., 124 Conn. 227, 199 Atl. 93, 94, 119 A.L.R. 565 (1938).
[2] Porten et al. v. First Nat. Bank & Trust Co. et al., 204 Minn. 200, 283 N.W. 408, 412, 120 A.L.R. 962 (1938).
[3] Rusch v. Korth, 2 Wis. 2d 321, 86 N.W. 2d 464 (1957).
[4] 8 Term. Rep. 186 (1799).

which had been recovered against him and the other defendant.[5] The underlying principle upon which this decision rested was unquestionably *"in pari delicto potior est conditio."*[6] The harshness of this decision was somewhat tempered in 1827, when in distinguishing it, Chief Justice Best pointed out:

> . . . and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.[7]

In 1936 the *Merryweather* rule was further modified so as to apply only:

> . . . where both parties are actually employed in the commission of a tort. It does not apply in cases like the present, where plaintiff was made a tort-feasor merely by inference of law, being rendered liable for the act of his servant, although he was not present and had no control over the servant at the time.[8]

Just before the turn of the century, the true attitude of England's highest court toward their leading case on the doctrine of contribution is mirrored in the statement of Lord Hirschell:

> It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even public policy which justifies its extension to the jurisprudence of other countries.[9]

However, as late as 1934 in *Hillen v. I.C.I. (Alkali) Ltd.*[10] the court by way of *obiter dicta,* since the case dealt with indemnification and not contribution, reiterated that there is no contribution between joint tort-feasors, citing with approval the modification of the *Adamson* case.[11] Bound as the courts are by the rule of *stare decisis,* it took an act of Parliament[12] to allow contribution between negligent joint tort-feasors in England.

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[5] *Cf.* Everet v. Williams Ex 1725, 9 L. Q. REV. 197 (1893) wherein one highwayman brought suit against his associate for an account of their plunder. The bill was dismissed because both parties were *participes criminis;* the barrister who signed the bill was made to pay the costs, the solicitor was fined 50£, and the plaintiff and defendant were both hanged.

[6] Where the fault is mutual, the law will leave the case as it finds it.

[7] Adamson v. Jarvis, 4 Bing. 66, 13 Eng. C. L. Reps. 403, 405 (1827).

[8] Pearson v. Skelton, 1 M. & W. 504 (1836).

[9] Palmer v. Wick and Pulteneytown Steam Shipping Company, Limited, (1894) App. Case 318, 324.

[10] 1 K.B. 455 (1934).

[11] See *supra* note 7.

[12] Law Reform Act (1935) 25 & 26 Geo. V, c. 30, §6(1)(3) which provides that a tort-feasor may recover contribution from any other tort-feasor who is, or would if sued, have been liable in respect to the same damages whether as a joint tort-feasor or otherwise.

III. ADOPTION AND DEVELOPMENT OF CONTRIBUTION IN WISCONSIN

The first reported case allowing contribution between negligent tort-feasors in Wisconsin is *Ellis v. Chicago & N.W. Ry. Co. et al.*[13] Two parties sustained personal injuries when a train and a street car collided in the city of Neenah. Suit was instituted against the defendant railroad company who in turn interpleaded the traction company, and cross-complained for contribution. The primary resolution of the case at both the trial and appellate levels turned on whether the plaintiff was in fact the real party in interest. However, the Supreme Court, by way of *obiter dicta,* did make clear their position on the contribution question lest it be raised by the defendants on a subsequent appeal. Justice Kerwin capably entered into a scholarly dissertation of the contemporary views on the doctrine of contribution. After having reviewed the decisions supporting the English view and the majority American view on the one hand and the minority American view on the other, he adopted the rule,

> . . . that where an element of moral turpitude is not involved and there is no willful or conscious wrong between the parties against whom a judgment in a tort action is recovered, there may be contribution between the tort-feasors.[14]

Thus, the general rule that there can be no contribution between joint wrong-doers, was modified so as to grant relief when the wrongdoer's conduct was non-intentional.

Justice Rosenberry, one year after the Ellis decision, pointed up the principles underlying the right to contribution in the case of *Frankfort General Ins. Co. v. Milw. Ry. & Light Co.,*[15] where, with complimentary approach, he quoted from 13 *Corp. Jur.* 821:

> The doctrine of contribution rests on the principle that, when parties stand in *aequali jure,* the law requires equality, which is equity, and one of them shall not be obliged to bear a common burden in case of the other. It is founded on principles of equity and natural justice, and does not arise from contract.

IV. AN ANALYSIS OF THE ESSENTIAL ELEMENTS

From these underlying principles it is apparent that there are three requisite essential elements that have to be present before the equitable relief of contribution is available; namely———

1. *Parties in aequali jure,*[16] having
2. *A common obligation,* with one party
3. *Bearing on unequal proportion of the common burden,*[17]

[13] 167 Wis. 392, 167 N.W. 1048 (1918).
[14] *Id.* 167 N.W. at 1053.
[15] 169 Wis. 533, 173 N.W. 307 (1919).
[16] "In equal right."
[17] Standard Accident Ins. Co. v. Runquist, 209 Wis. 97, 244 N.W. 757 (1932); Western Casualty & Surety Co. v. Milwaukee General Const. Co., 213 Wis. 302, 251 N.W. 491 (1933); Ainsworth v. Berg, 253 Wis. 438, 34 N.W. 2d 790, 35 N.W. 2d 911 (1948); Mutual Automobile Ins. Co. v. State Farm Mutual Automobile Ins. Co., 268 Wis. 6, 66 N.W. 2d 697 (1954).

Although it is essential that all three of these elements be present before the right of contribution will obtain, it does not necessarily follow that the court has treated them with equal emphasis. The stress has varied according to the facts of the case. However, it would be of particular benefit to consider these Wisconsin decisions in light of an artificial categorization of them based upon the emphasis with which the court treats each of the particular elements.

Paradoxical as it appears, for the parties to be in *aequali jure,* they must be in equal wrong; that is to say they must be joint non-intentional or negligent wrong-doers. This principle may best be illustrated by a negative example. In *Fisher v. Milwaukee Electric Ry. & Light Co.,*[18] the plaintiff sustained injuries when she was allegedly thrown from one of the defendant company's cars. It was the contention of the company that the damages incurred by the plaintiff were partially due to the negligent treatment afforded her by one Dr. Rumph; the physician by order of the court was made a party defendant and the company cross-complained against him for contribution. Dr. Rumph's demurrer to the cross omplaint was sustained by the circuit court. Justice Rosenberry, with typical lucidity, stated:

> It appears that the liability of the defendant Rumph, if any there be, is due to his want of care and skill as a surgeon, while the liability against the light company is due, if any there be, to its failure to exercise ordinary care. They are not in any sense of the term joint tort-feasors. The liability of the defendant Rumph to the light company does not arise by reason of his liability for contribution in the event of a recovery against the light company. He is a liability over, and arises in favor of the light company by reason of the fact that the light company is compelled to pay damages which are primarily due to the alleged negligence of the defendant Rumph, and for which the plaintiff might have maintained an action against the defendant Rumph. The light company being compelled to pay these damages is subrogated to the plainti'ffs rights against Rumph, as she may not twice recover compensation for the same injury.[19]

Since it is from the joint wrongful conduct that the common obligation springs it is difficult to find decisions that are illustrative of a clear-cut distinction between these two elements. For example in *Grant v. Asmuth,*[20] Conrad and Loa Asmuth were injured when involved in a collision with an automobile operated by the defendant Grant. Both brought suit against Grant but only Mrs. Asmuth recovered, her husband's action having been dismissed because of his own contributory negligence. The defendant totally satisfied Mrs.

[18] 173 Wis. 57, 180 N.W. 269 (1920).
[19] *Id.* at 270-271; also *cf.* Greene v. Waters, 260 Wis. 40, 49 N.W. 2d 919 (1951), with Heims v. Hanke, 5 Wis. 2d 465, 93 N.W. 2d 455 (1958).
[20] 195 Wis. 458, 218 N.W. 834 (1928).

Asmuth's judgment, and then by an independent suit sought reimbursement from her husband by way of contribution. Justice Eschweiler, writing for a unanimous court, emphatically determined that Conrad Asmuth although properly found guilty of contributory negligence had not had his day in court upon the trial of the issue of his actionable negligence with respect to his wife, nor had the issue of her contributory negligence with respect to him been resolved. The court held:

> . . . until it has been properly determined by judgment to that effect that Conrad Asmuth is also responsible to Loa Asmuth for her injuries arising out of this collision, the plaintiff, Grant, cannot compel contribution from Conrad Asmuth as a joint tort-feasor.[21]

A conscious awareness of this subtle blending between the first two of the elements of contribution will be most advantageous upon the subsequent analysis of the second element, namely, the requisite of common obligation or liability. The digests are replete with decisions that place special emphasis on this element, but there is the omnipresent articulate weaving into these decisions of the element of joint wrong-doing. For example in *Michel v. McKenna et al.*,[22] the plaintiff was injured while riding as a guest in an automobile driven by her husband; the injuries resulted from a collision with the car driven by one McKenna. Prior to the institution of the personal injury suit, McKenna brought an action in civil court to recover the value of his property damage. The jury by their finding absolved him of any contributory negligence, and he recovered the total amount of his claim. Mrs. Michel thereafter started a personal injury suit against McKenna and her husband with McKenna cross-complaining for contribution. Upon the trial the jury found only McKenna guilty of causal negligence, awarded a verdict in favor of the plaintiff, with the court dismissing McKenna's claim for contribution. The Supreme Court affirmed the ruling of the trial court and held that the liberal rule of pleading did not change fundamental law, stating:

> . . . that there is no right of contribution in the absence of finding that both defendants are jointly liable.[23]

Since both the verdict in the civil court as well as the one then before the appellate court negatived joint liability, the right to contribution was properly denied.

The efficacy of the requirement of common liability is most graphically illustrated by those cases wherein contribution is denied because of its absence. In the frequently cited case of *Zutter v. O'Connell*,[24] the plaintiff was injured in a two car collision while

[21] *Id.* at 835; *Cf.* Connecticut Indemnity Co. v. Pruntz, 263 Wis. 27, 56 N.W. 2d 516 (1953).
[22] 199 Wis. 608, 227 N.W. 396 (1929).
[23] *Id.* at 399.
[24] 200 Wis. 601, 229 N.W. 74 (1930).

riding as a passenger in a car owned and operated by his father. Suit was brought by the son exclusively against the driver of the other vehicle, who in turn interpleaded the plaintiff's father for the purpose of obtaining contribution. The jury found both the plaintiff's father and the defendant O'Connell guilty of causal negligence. The Supreme Court affirmed the ruling of the trial court dismissing the cross complaint for contribution. The decision was founded on the doctrine of *Wick v. Wick*[25] which precluded a child from recovering against the parent. Since the plaintiff could not recover from his father there was lacking the requisite common liability necessary to entitle the defendant O'Connell to contribution. After reaching this conclusion, Justice Owens went on to illustrate a singularly characteristic difference between the element of common liability and that of joint wrongdoers.

> Although the verdict established the fact that the accident was the result of concurring neglience of both Thomas O'Connell and Phillip Zutter, the right of contribution does not spring from concurring negligence. A common liability is the first essential for contribution.
>
> . . . In the absence of common liability there can be no contribution. Although the negligence of Phillip Zutter concurred to produce the injuries suffered by Donald Zutter, his son, it gave rise to no liability on the part of Phillip Zutter. Thomas O'Connell, therefore, if and when he paid the judgment, discharged no part of Phillip Zutter's liability, which must be a basis of a right to contribution from Phillip Zutter.[26]

It is clear then that although the common liability flows almost universally from the concurring negligence of the joint wrongdoers, the former is not inexorably united with the latter.

Assumption of risk is an area of law fertile with decisions in which contribution is barred by the absence of common liability. A style case in this area is *Walker et al. v. Kroger Grocery & Baking Co. et al.*[27] Walker and his two passengers brought suit to recover for personal injuries sustained by them when the car operated by Walker crashed into the rear end of the defendant's truck which had been parked on the highway in the fog. The defendant company sought contribution from Walker by way of a cross complaint. The jury found both the defendant and Walker causally negligent and contribution was granted. On appeal the court determined that Walker's guests assumed the risk of his negligence as a matter of law, under the then existing weather conditions. Justice Fritz wrote:

> . . . even if the negligence on the part of Walker concurred with the negligence of the defendants in causing injury to his guests, Iselin and Bashaw, if the latter were not entitled as a

[25] 192 Wis. 260, 212 N.W. 787 (1927).
[26] See *supra* note 24, at 76-77.
[27] 214 Wis. 519, 252 N.W. 721 (1934).

> matter of law, to recover from Walker, as their host for such negligence on his part, then there exists no common liability because of which the defendants are entitled to contribution from Walker.[28]

Since the guests assumed the risk of Walker's negligence he was not liable to them for their injuries, and therefore,

> . . . there existed no such common liability as was the first essential for contribution.[29]

Another instance where the joint negligence of two wrongdoers may concur, and still not result in a common liability is under the Workmen's Compensation Act. If for example, as in the case of *Britt v. Buggs et al.*,[30] an employee is injured in the course of his employment through the concurring negligence of his employer and a third party, and he is compensated under the Workmen's Compensation Act, the third party is not entitled to contribution from the employer when the employee brings an action against such third party. To enter into an exhaustive survey of the ramifications of contribution under the Workmen's Compensation Act is certainly not within the purview of this article and would only serve to raise issues tangential to the central problem of contribution.

Still another instance where one is precluded from obtaining contribution though there be the concurring wrongful conduct of joint tort-feasors is where one of the wrongdoers is guilty of gross negligence. The rationale underlying a denial of contribution in such a case is pointed out in *Ayala v. Farmers Mutual Auto Ins. Co.*[31]

> The right of contribution in Wisconsin is based on principles of equity and arises from common liability . . . gross negligence is so much more tortious than ordinary negligence that equity does not require that one guilty of the former should be afforded any right of contribution.[32]

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[28] *Id.* at 725.

[29] *Id.* at 725. *Cf.* Kauth v. Landsverk et al., 224 Wis. 554, 271 N.W. 841 (1937) (Assumption of risk-inexperience of host-driver); School et al. v. Milwaukee Automobile Ins. Co., 234 Wis. 332, 291 N.W. 311 (1940) (Assumption of risk—skill and judgment of driver); Shrofe et al. v. Rural Mutual Cas. Ins. Co. et al., 258 Wis. 128, 45 N.W. 2d 76 (1950) (Assumption of risk—weather conditions); London & Lancashire Indemnity Co. v. Phoenix Indemnity Co. 263 Wis. 171, 56 N.W. 2d 777 (1953) (Assumption of risk—skill and judgment); Saxley et al. v. Cadigan et al., 266 Wis. 391, 63 N.W. 2d 820 (1954) (Assumption of risk—skill and judgment); Purnir v. Mann et al., 249 Wis. 469, 25 N.W. 2d 83 (1946) (Assumption of risk—skill and judgment of host); Sandley v. Pilsner, 269 Wis. 90, 68 N.W. 2d 808 (1955) (Assumption of risk is affirmative defense and must be pleaded. Here not pleaded, and therefore common liability existed); Forecki et al. v. Kohlberg et al., 237 Wis. 67, 295 N.W. 7 (1940) (No assumption of risk because no opportunity to object).

[30] 201 Wis. 533, 230 N.W. 621 (1930). (Employee injured while riding as a passenger in a truck driven by his employer when the truck collided with another car.)

[31] 272 Wis. 629, 76 N.W. 2d 563 (1956).

[32] *Id.* at 571; *Cf.* Wedel v. Klein, 229 Wis. 419, 282 N.W. 602 (1938); Twist v. Aetna Casualty & Surety Co., 275 Wis. 174, 81 N.W. 2d 523 (1957) (Traveling

In regressing for a moment it is apparent upon analysis that not only is the element of common liability lacking, but, perhaps more importantly, that there is absent the element of joint *negligent* tort-feasors. The Wisconsin court has refused to extend the doctrine of contribution beyond the realm of those cases dealing with joint *negligent* conduct. Quite obviously, if the court was not disposed to include in the purview of the doctrine a grossly negligent tort-feasor on the ground that such negligence differs in kind from ordinary negligence, then certainly the doctrine will not be extended to joint intentional tort-feasors.

The third element requisite for a recovery under the doctrine of contribution is that the party seeking it has born an unequal portion of the common burden. It, however, is not necessary that there be an actual payment of an unequal portion of the common burden before the right to contribution arises.

> The right is an incident which follows the principal event; that is, the concurring negligent act, and draws its life therefrom. When the concurring negligent acts give rise to the injured a cause of action against the joint tort-feasors, the incidental right of a joint tort-feasor to compel contribution is created.[33]

Justice Fairchild went on by way of clarification to point out:

> Once in being, although contingent, subordinate, or inchoate, it has an existence in contemplation of law until it is no longer needed as a recourse to which the joint tort-feasor may look for relief from an unequitable burden placed upon him by reason of the refusal of another to perform such other's duty by paying his honest share of the common obligation, unless sooner waived or given up by its owner.[34]

One bears an unequal burden of the common obligation if he is made to pay more than his aliquot portion of such obligation. The case of *Homerding v. Pospychalla et al.*[35] offers an excellent illustration not only of the third element of contribution, but also of the effect of the Wisconsin Comparative Negligence Statute[36] on the overall doctrine of contribution. There the plaintiff, Lucille Homerding, was injured in a two car collision while riding in an automobile operated by her husband. While negotiating a left turn, the Homerding car was struck from the rear by an automobile operated by one Popsychalla. The

50-55 M.P.H. in a 25 M.P.H. zone, and colliding with the rear end of an angle-parked police car is not gross negligence.)

[33] De Brue et al. v. Frank et al., 213 Wis. 280, 251 N.W. 494, 496 (1933).

[34] *Id.* at 496.

[35] 228 Wis. 606, 280 N.W. 409 (1938).

[36] "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering." WIS. STAT. §331.045 (1957).

plaintiff brought suit against the driver of the striking vehicle, who in turn impleaded the plaintiff's husband, and cross-complained for contribution. Mr. Homerding then answered by denial, and counterclaimed for the damages sustained by him as the result of Pospychalla's negligence. The jury found both Pospychalla and Homerding causally negligent, apportioning 90% of the negligence to the former, and 10% to the latter. The trial court changed the verdict and absolved Homerding of all causal negligence. On appeal the verdict of the jury was re-instated; the court went on to point out:

> Upon those answers [special verdict] Pospychalla and his insurer are entitled to judgment on their cross-complaint against Theodore Homerding for thte recovery of contribution from him for half of such amount as they pay to the plaintiff, in satisfaction of his judgment . . .[37]

After having resolved the contribution issue in favor of Pospychalla thus entitling him to be reimbursed by Homerding for one-half of the judgment in spite of the 90%-10% apportionment of negligence, the court further determined that:

> . . . his [Homerding] recovery upon his counterclaim must be reduced to ninety per cent of his damages, as assessed by the jury, and that recovery the appellants are entitled to have used as an offset against his liability for contribution herein.[38]

Shortly after the *Homerding Decision*[39] the Wisconsin Supreme Court in *Wedel v. Klein et al.*[40] was called upon to alleviate the apparent harshness of the *Homerding* rule and to incorporate into the doctrine of contribution the rule of comparative negligence. It was contended that contribution between tort-feasors should be based upon a comparison of the degrees of their fault, expressed in percentages, rather than on an aliquot apportionment. Thus, for example, in the Homerding case, if such were the rule, the damages would be apportioned between the defendants on a 90-10 basis rather than on a 50-50 basis. The court acknowledged the contentions and discussions in support of them as "very interesting," but found them:

> . . . not sufficiently convincing to move us at this time to reconsider and abolish our rule with respect . . . to contribution between tort-feasors.[41]

V. Evaluation of Rusch v. Korth

After having considered the elements essential to a cause of action in contribution, and the traditional rules of law which govern and give life to these principles, it is appropriate to turn to the case which stimulated this study and evaluate it in light of these traditional rules. In

[37] See *supra* note 35, at 411.
[38] *Id.*
[39] See *supra* note 35.
[40] 229 Wis. 419, 282 N.W. 606 (1938).
[41] *Id.* at 609.

Rusch v. Korth,[42] the plaintiff, Rusch, sustained injuries while riding as a guest in the automobile of one Heimerl when it collided with a car driven by the defendant, Mrs. Korth. The particulars of the collision are unreported. Plaintiff brought his action against Mrs. Korth and her insurance carrier. The defendants answered by denial and interpleaded Heimerl, along with his insurer, cross-complaining against them for contribution. On the day of the trial and with the knowledge of Heimerl, Mrs. Korth's insurer settled with the plaintiff for $1,109.00. It had previously been stipulated between the respective defendant insurance companies that the amount was a fair compensation for the injuries sustained by the plaintiff. At that point, Heimerl moved for leave to amend his cross-complaint in order to aver that Korth was estopped by reason of the settlement from denying her own negligence. With tragic irony, the motion was denied, the contribution issue was tried, and the jury absolved Korth of all causal negligence. The finding that Heimerl was 100% causally negligent totally negatived the element of common liability and lended to the settlement the nature of a mere gratuity. Korth was then confronted with the paradoxical duty of requesting the trial court to change certain of the questions of the special verdict so as to find him causally negligent, that there might be a common liability between the joint tort-feasors. The trial court denied Korth's motion and dismissed the cross-complaint for contribution. Justice Wingert who was called upon to write for the majority manifested at the inception of his opinion his acute awareness of the traditional elements of contribution when he wrote:

> It has been stated in many cases, as an accepted principle, that the right to contribution rests on a common liability. On the basis of that proposition it has been said on occasion that only when both of those persons whose conduct contributed to the accident have been found negligent can the one have the right of contribution against the other.[43]

However, the majority was of the opinion that the quoted principles were too broad to apply to the facts that had given rise to the question then before the court. Shifting to a consideration of the equities of the case because "contribution between joint tort-feasors is in origin an equitable principle,"[44] the court determined that the equities weighed heavily in favor of the innocent settler. The conscience of the court dictated that:

> If a wrongdoer who has paid a claim may recover half the payment from another, who ought in fairness to pay part of it, surely one who is found not to have been guilty of any wrong

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[42] 2 Wis. 2d 321, 86 N.W. 2d 464 (1957).
[43] *Id.* at 467.
[44] *Id.*

> should not be denied a like recovery from one who ought in equity and fairness to pay the whole claim.[45]

Thus the court for the first time since the adoption of the doctrine of contribution granted the relief it affords despite the conspicuous absence of common liability and joint wrong-doing. The court admittedly realized that its decision ran *contra* to certain of their prior decisions, citing three[46] of them, and acknowledged that they were not over-looked in reaching the style decision; the court stated that it was unwilling to extend the rationale of these decisions "to the very different case now before us."[47] The last of these cited opinions, *Mutual Automobile Ins. Co. v. State Farm Mutual,*[48] illustrates the extreme to which the court extended itself in granting relief. This case made patent the necessity for the one seeking relief by way of contribution to prove his own causal negligence. There, one Delia Mantin, a pedestrian, was injured in an accident involving automobiles driven by the respective insureds of the insurance companies involved in the suit. Mrs. Mantin had instituted suit against both companies, but before trial, negotiated a settlement with the plaintiff company. Upon the defendant company's refusal to contribute suit was brought. Both drivers were found causally negligent, and contribution was granted. The case was reversed on appeal because no consideration had been given to the negligence of Mrs. Mantin. At the very outset a unanimous court made patent the necessity for the one seeking relief by way of contribution to prove his own negligence when it wrote:

> In bringing this action it was plaintiff's burden to show, first, that its own driver was causally negligent and that such negligence was greater than any negligence of the injured party.[49]

The force of this requisite is bolstered by several decisions antecedent to the one cited in the *Rusch* opinion. In *Western Casualty & Surety Co. v. Milwaukee General Construction Co. et al.*[50] it was stated with unequivocal emphasis:

> The burden is upon the paying tort-feasor to establish his own negligence and the negligence of the other tort-feasor as the concurring causes of the injuries.[51]

The same rule is enunciated with comparable emphasis in *London Lancashire Indemnity Co. v. Phoenix Indemnity Co.*[52]

[45] *Id.* at 468.
[46] Michel v. McKenna, 199 Wis. 608, 227 N.W. 396 (1929) (common liability); Papenfus v. Shell Oil Co., Inc. et al., 254 Wis. 233, 35 N.W. 2d 920 (1949) (settlement a gratuity); Mutual Automobile Ins. Co. of the Town of Herman v. State Farm Mutual Automobile Ins. Co., 268 Wis. 6, 66 N.W. 2d 697 (1954) (burden of proof).
[47] See *supra* note 42, at 469.
[48] 268 Wis. 6, 66 N.W. 2d 697 (1954).
[49] *Id.* at 699.
[50] 213 Wis. 302, 251 N.W. 491 (1933).
[51] *Id.* at 493.
[52] 263 Wis. 171, 56 N.W. 2d 777 (1953).

> Plaintiff had the rather unusual burden of establishing that its assured was guilty of actionable causal negligence. Unless both Miss Bloom, and McDermott were so found neither can recover from the other upon the theory of contribution.[53]

The court admittedly did not over-look these decisions, but instead disregarded them without in fact over-ruling them. The same approach was adopted in dispensing with the requirement of common liability. The court voluntarily restricted the scope of their consideration to the unique facts then before it, and resolved the issue by relying on the broadest of equitable principles.

The rationale on which the decision hinges is subject to alternative criticism. Granted that contribution is founded upon principles of equity and natural justice, as the court suggests citing *Waite v. Pierce*,[54] it is nevertheless a common law right.[55] If the court is to base each contribution decision on equitable considerations pertinent to the facts then before it, then certainly all pertinent and well-known equitable maxims should be applied. If this be not so, the law of contribution will unquestionably be reduced to utter chaos.[56] In *Rusch v. Korth*[57] the court seemed moved by its equitable conscience to the aforementioned conclusion that:

> If a wrongdoer who has paid a claim may recover half the payment from another who ought in fairness to pay part of it, surely one who is found not to have been guilty of any wrong should not be denied a like recovery from one who ought in equity and fairness to pay the whole claim.[58]

Certainly the rule of "equity and fairness" as determined by the conscience of the court is not the only rule to be applied. What of the equitable maxim—

> Equity will not aid a volunteer.[59]

An alternative, or perhaps more accurately, an ancilliary criticism of the court's approach to an otherwise satisfactory conclusion, is the total disregard that was given to the facts of the alleged joint negligence. If the court was sympathetically inclined toward the cause of the appellants in light of their unique plight, why not make a comprehensive and detailed investigation into the facts that ultimately gave rise to this dilemma? It is admitted in both briefs that the appellant

[53] *Id.* at 780.
[54] 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926).
[55] State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W. 2d 425 (1953).
[56] *Cf.* In re Koch's Estate, 148 Wis. 548, 134 N.W. 663, 666 (1912). "The individual chancellor cannot, as an original proposition, do in each case what he may think will fit the facts from the standpoint of justice in the abstract. He cannot merely seize upon his ideal in the moral sense and vitalize it by a decree. That would make contribution depend on arbitration in the habiliments of judicial administration."
[57] See *supra* note 42.
[58] *Id.* at 468.
[59] 30 C.J.S. (1959 Supp.), §89.

Korth was on the wrong side of the center line when the impact occurred; the only controversy relative to this fact is whether such act of negligence was causal. In spite of the fact that Wis. Stats. §85.15(1)(4)[60] necessitates the conclusion that such conduct constitutes negligence as a matter of law, the jury found that Mrs. Korth was not negligent with respect to her position on the highway, and further resolved unnecessarily, that her position on the highway did not causally effect the collision. Such a finding was unquestionably contrary to the evidence as Justice Broadfoot suggested in his very succinct concurring opinion.

> In my opinion the record requires a finding that Mrs. Korth was negligent as a matter of law, and that her insurer is entitled to contribution.[61]

In terms suggesting sound judicial caution he went on:

> The majority has determined the case upon an issue not raised in the briefs nor argued before us. Before we change what has been the accepted rule in contribution cases I feel that we should determine the question after research and argument by attorneys in this or some other case.[62]

Thus the way was open and patent for the court to reach the desired result without over-turning with one sweep, those principles which have been corner-stones of the doctrine of contribution in Wisconsin since its inception.

VI. Efficacy of Rusch v. Korth

The impact that this decision will have on the future law of contribution is a question fertile with material for speculation. Perhaps as the concurring opinion suggests it changes the accepted rule of common liability in contribution cases. Perhaps, in view of the majority's refusal to over-rule in *"ipsis verbis"* those decisions that are cited and ignored, the old rule has not been modified and the *Rusch* decision is going to stand as an anomaly in the law of contribution. Perhaps, the decision will be rigidly restricted in interpretation to its precise and singular facts. Speculation may and undoubtedly has run far afield, but the real efficacy of the decision will not be determined until the court is ultimately called upon to resolve an appeal in keeping with *Rusch v. Korth*.[63]

James G. Doyle

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[60] Section changed in 1957 to §346.05(1)(3), and §346.13(2) respectively.
[61] See *supra* note 42, at 469.
[62] *Id.*
[63] 2 Wis. 2d 321, 86 N.W. 2d 464 (1957). [Since the formal preparation of this article, the Wisconsin Supreme Court has delivered its opinion in the case of Bauman v. Gilbertson, 7 Wis. 2d 467, 470 (1959), in which the Court said of the Rusch decision: "The latter case in reality should not be classed as a contribution case but rather as one grounded on the principles of subrogation. Kennedy-Ingalls Corp. v. Meissner (1958), 5 Wis. 2d 100, 106, 92 N.W. 2d 247." Ed.]