Marquette Law Review

Volume 26
Issue 3 *April 1942*

Article 4

Should There Be a Comparison of Negligence Among Joint Tortfeasors for Contribution Purposes?

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NOTES

SHOULD THERE BE A COMPARISON OF NEGLIGENCE AMONG JOINT TORTFEASORS FOR CONTRIBUTION PURPOSES?

The doctrine of contribution found its origin in the courts of equity. It arose not upon any contract principle, but on principles of right and justice, the courts feeling that damages should be apportioned equally where two or more persons were liable on the same obligation, as, for example, in the case of co-sureties.[1] The doctrine was originally applied only in contract cases, and for a long time its application was confined to such cases, the courts refusing to extend it to tort actions involving joint wrongdoers. This was because of the policy of the law at that time not to adjust equities between wrongdoers, nor to permit anyone to base an action on his own wrongdoing. The theory was that the court would leave a party who sought relief in such a case in the position in which it found him.[2] Gradually this rule has been relaxed, however, so that a number of states now allow contribution where the tortfeasor seeking it has been only negligent, or has been guilty of no fraud or wilful wrong. This is a comparatively late doctrine, having been introduced in Wisconsin in 1918.[3]

Having contribution among joint tortfeasors, the question immediately presents itself: For what amount of the plaintiff's total damages will each contributing defendant be liable? The universal rule in the United States is that the damages will be apportioned equally among the defendants. This follows from the common law idea that it is impossible to determine the degree of fault attributable to each person where two or more are negligent. Thus, under the common law, if a plaintiff is guilty of the slightest want of ordinary care he cannot recover, although the defendant may have been guilty of a far greater want of such care. It follows naturally from this rule that where two or more persons are to be held liable in a negligence action the law will not attempt to determine the degree of fault attributable to each, but will apportion the plaintiff's damages among them equally.

The Comparative Negligence Act,[4] passed in 1931, has so far changed the common law rule in Wisconsin that a plaintiff may now recover although he is guilty of contributory negligence, provided that his negligence is less than that of the person against whom recovery is sought. While the act itself is silent on the matter, the Wisconsin

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[1] Estate of Koch, 148 Wis. 548, 134 N.W. 663 (1912).
[2] 18 C.J.S., Contribution, Sec. 11.
[3] Ellis v. C. & N. W. R. Co., 167 Wis. 392, 167 N.W. 1048 (1918).
[4] Wis. Stat. (1941) Sec. 331.045.

Supreme Court has held that this section does not authorize a comparison of negligence between joint tortfeasors in contribution cases. Thus, in *Walker v. Kroger Grocery and Baking Co.*,[5] the court said: " . . . there is no provision (in the statute) which effects any change in the common law rule that all tortfeasors who are liable at all, are liable to the injured person for the entire amount now recoverable by him." This position was affirmed by the Supreme Court as late as 1938.[6] It thus appears clear that if there is to be any change in the present rule, it will have to come by legislative action, and not by judicial construction of existing statutes.

The beneficial effects of such a law to the more negligent defendant can easily be shown by example. For purposes of illustration we shall use only automobile accident cases, since they are the ones which most frequently arise. In a late Wisconsin case[7] the injured guest (G) sued the third party (T) for damages. T interpleaded G's host (H) for contribution, and H counterclaimed against T for his own damages. The jury found T guilty of 90% of the total causal negligence and H guilty of 10% of the total. H, under the Comparative Negligence Law, was allowed to recover 90% of the damages he suffered, diminished by the amount of contribution he would have to pay toward G's damages. Assume that G's damages are $1,000, and that H's damages are $500. H may collect 90% of his $500 damages, or $450. But that recovery is first diminished by the amount of contribution he must pay to G's damages. Under the present rule he must pay 50%, or $500. Hence his total recovery in the case will be $450 less $500, or nothing. Now, if the damages to G were apportioned between the defendants according to the percentage of negligence attributable to each, H's recoverable damages would be reduced by only 10% of G's claim, $100. Thus his total recovery in such a case would be $450 less $100, or $350. In another Wisconsin case[8] G's wife, as executrix, sued H and T for the wrongful death of G. H cross-complained against T for contribution. The jury found H guilty of 87½% of the total causal negligence and T guilty of 12½% of the total. It is obvious that a law would be of great aid to T, which would compel him to contribute only 12½% of the damages, rather than 50%, as he must do under present law.

The question arises as to what effect such a law would have on the joint and several liability that now exists between joint tortfeasors. In other words, would such a law change the present rule that "any one of two or more joint tortfeasors, or one of two or more joint wrong-

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[5] Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, 92 A.L.R. 680 (1934).
[6] Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).
[7] Homerding v. Popsychalla, 228 Wis. 606, 280 N.W. 409 (1938).
[8] Van Gilder v. Gugel, 220 Wis. 612, 265 N.W. 706, 105 A.L.R. 824 (1936).

doers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence"?[9] For example, suppose that in a negligence action the plaintiff is found 10% negligent; defendant A is found 25% negligent; defendant B is found 58% negligent; and defendant C is found 7% negligent. The negligence of defendant C is less than that of the plaintiff, and hence there is no liability on his part. What, then, of the other two defendants? Under the present rule they are jointly and severally liable for the entire amount, and the plaintiff is entitled to collect 90% of his damages from either of them, or half of that amount from each. But under a law apportioning damages in accordance with the negligence of the defendants, defendant A would be liable for only 25% of the total, and defendant B for 58%. What is to become of the other 7% of damage? Is it to be apportioned between A and B according to their respective degrees of fault? Such a result would be highly impractical, and well-nigh impossible. Or is it to drop out of the picture entirely, thus giving the plaintiff a maximum recovery of 83% of his damages, instead of the 90% to which he is now entitled? Or, suppose the plaintiff is found 20% negligent, defendant A is found 20% negligent, defendant B 20% negligent, and defendant C is found 40% negligent. The negligence of the plaintiff being as great as that of defendants A and B, he cannot recover from them. Under the present rule he can, theoretically, at least, recover 80% of his damages from C, the one defendant who is liable to him, even though C's active guilt was only 40% of the total. But what would be the result under a law making each joint tortfeasor liable only for the amount of negligence attributable to him? If he were held only to that amount, the plaintiff's total recovery in this assumed case would be but 40% of his damages, or half of the amount to which he is entitled under existing law. This would unquestionably work a hardship on the plaintiff. On the other hand, however, if, through some manner of reasoning, it was decided that joint and several liability for the entire amount continued to exist in such a case, it would seem to openly defy the law which said that a defendant should be liable only in proportion to the amount of his negligence. The case of *Van Gilder* v. *Gugel,*[10] was complicated by the fact that the host, who, it will be remembered was found 87½% negligent, had, during the course of the trial, obtained a covenant not to sue from the plaintiff, for $3,500. Plaintiff's total damages were found to be $7,500. Thus, under present law, the third party, guilty of only 12½% of the total negligence, had to pay $4,000 of the plaintiff's damages. What effect would a comparative negligence

[9] Kingston v. C. & N. W. R. Co., 191 Wis. 610, 211 N.W. 913 (1926).
[10] See note 8, *supra.*

act between joint tortfeasors have on such a situation? Or would it have any effect where there was such a covenant?

Other examples can be cited. Assume that in an ordinary three party action the injured guest sues the third party, who interpleads the host for contribution. The guest is found to be free from negligence, the third party is found to be 75% negligent, and the host 25% negligent. However, the third party turns out to be judgment proof. What will the result be? The third party has no defense against the plaintiff, but is simply unable to pay. Will the host be compelled to pay the entire damage, as he is under present law, or will the plaintiff have to be content with a satisfaction of only one quarter of his claim? Other problems will arise where one of the defendants has a defense against the plaintiff, such as assumption of the risk, or joint enterprise, and so on, but they will not be dealt with here.[11] However, all these problems are almost certain to arise if such a proposed law were to be put into effect, and they are deserving, it seems, of serious consideration.

England has a contribution statute under which the courts have apportioned contribution according to the degree of negligence of the parties involved.[12] The statute reads as follows: "In any proceeding for contribution under this section the amount of contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage. . . . "

This statute has been applied by the courts with seemingly little trouble. Thus, in the case of *Daniel* v. *Rickett, Cockerell and Co. and Raymond,*[13] a truckdriver in the employ of the defendant company, while delivering coke at the home of the defendant Raymond, and on the instructions of Raymond's servant, raised an iron plate in the pavement in front of Raymond's home in order to gain access to the coal cellar beneath. The defendants failed to fence or otherwise guard the hole in the pavement or to warn the plaintiff of the danger, whereby she fell into the hole and suffered serious injury. The court held that the company, in failing to take the necessary precautions to safeguard the users of the pavement, had been guilty of causal negligence, and that Raymond, through his agent, had directed the driver to raise the plate and to do the very thing which had created the danger in the highway; that both were negligent, and that the company's responsibility was nine-tenths and Raymond's one-tenth. In the case of *Croston* v.

[11] For a thorough discussion of this phase of the problem see Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party,* 1940 WIS. L. REV. 467.

[12] Law Reform (Married Women and Tortfeasors) Act (1935) 25 & 26 Geo. V, c. 30, Sec. 6.

[13] 2 K.B. 322, 159 L.T. 311 (1938).

Vaughan[14] plaintiff was riding in an automobile which was fifth in a long line of cars. For some reason the line was stopped. The third car stopped suddenly, the driver, defendant Buckley, giving no signal of her intention to do so. The fourth car, in attempting to stop, ran lightly into the third car. Defendant Vaughan, however, the driver of the car in which plaintiff was riding, was unable to stop, and ran into the fourth car violently, throwing plaintiff through the windshield. The court simply held that both defendants were liable, and under the statute apportioned Vaughan's liability at one-third of the total, and Buckley's at two-thirds, and directed each to pay his share of the damages.

There has recently been proposed a statute which covers the problem more in detail than the present English law.[15] The pertinent provisions of the statute are as follows:

> "In any action founded upon the negligence or gross negligence of two or more persons there shall be a right of contribution; provided that no contribution shall be recoverable from a person who, if he had paid the damages, would be entitled to be indemnified by the person seeking contribution. This section shall not affect the joint and several liability of such persons to a person suffering loss or damage.
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> "The right to contribution shall not be defeated by the inability of the injured party to recover damages from one of the tortfeasors.
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> "In any action for contribution, or in trying the issue of contribution arising in any action in tort for damages, the jury shall apportion the damages among the tortfeasors in proportion to the amount of damage for which the negligence of each was responsible. No apportionment of punitive damages assessed against a particular person shall be made.
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> "If the court shall be convinced that the evidence does not so preponderate that reasonable men could apportion the damages according to the respective degrees of responsibility of each, it shall direct a verdict of equal responsibility."

The proposal seems to the writer to have obvious merit. Under the suggested statute, however, the right to contribution cannot be defeated even though the injured party cannot recover from one of the tortfeasors. Such a doctrine would be more harsh on a tortfeasor with a defense than would be the present law. Suppose A is injured by the joint negligence of B, C and D. The jury finds that A was 10% negligent, that B was 25% negligent, that C was 15% negligent and that D was 50% negligent. Suppose, too, that the jury finds that as to D, A assumed the risk. Under present law, of course, D has a complete defense,[16] and B and C are jointly and severally liable for

[14] 1 K.B. 540, 158 L.T. 221 (1938).
[15] See Burke: *Contribution—Joint Tortfeasors—A Proposed Act*, 1938 Wis. L. Rev. 580.
[16] See Scory v. La Fave, 215 Wis. 21, 254 N.W. 643 (1934).

90% of the plaintiff's total damage. Under the proposed law A cannot recover from D, but B and C, after paying A's damage, may sue D for contribution, presumably for a sum in proportion to the amount of his negligence. But under such a rule what becomes of the defense of assumption of risk? Is it not, for all practical purposes, abrogated? If B and C may sue D for contribution after having paid A's damages, they may join him as a party defendant in the principal action, under the Wisconsin interpleader statute.[17]

It would seem more just to work the problem out along these lines: Let there be no recovery against any tortfeasor with a defense against the plaintiff; and let the plaintiff recover only from those defendants who are actually liable, and only to the extent that the negligence of each contributed to the injury. Again using our example, where the plaintiff A is 10% negligent, the defendants B, C and D are 25%, 15% and 50% negligent, respectively, and there is assumption of risk as to D: let there be no recovery from and no right of contribution against, D. A could not recover from D in a direct action against him; how, then, can B and C sue him for contribution? The basis on which contribution is allowed is a common liability between the contributing parties.[18] But here there is no common liability, since D is not liable to A. Let assumption of the risk, then, be a complete defense as it is under present law. If fault is to be apportioned among defendants and each held liable only in proportion to the amount of his negligence, the rule should be carried to its logical conclusion, so that each defendant would be held liable only for the amount of his negligence, and no more. The final result, under our assumed case, would be that A could recover 40% of his total damages. The 50% imputable to D, who has a complete defense, and the 10% attributable to A's own negligence, would not be recoverable. This 40% would be divided among the remaining tortfeasors, B and C, in proportion to the negligence of each, B paying 25% and C, 15%. Or, putting it into figures, assuming A's total damages to be $10,000, A could recover $4,000, $2,500 from B, and $1,500 from C.

A statute imposing final liability upon joint tortfeasors only in proportion to the percentage of the total negligence which the jury finds is caused by their acts seems a logical and just sequel to the comparison of negligence between plaintiff and defendants. An increasing number of tort cases today involve contribution, often with the result that a party who is guilty of a very small percentage of the total negligence is forced to pay a large percentage of the damages. This is entirely opposed to one of the basic tenets of negligence law, namely, that liability is imposed according to fault. WILLIAM C. ANTOINE.

[17] WIS. STAT. (1941) Sec. 260.19.
[18] See Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822, 48 A.L.R. 276 (1926).