Land & Water Law Review

Volume 9 | Issue 2 Article 11

1974

Wyoming Contribution among Joint Tortfeasors

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COMMENTS

WYOMING CONTRIBUTION AMONG JOINT TORTFEASORS

In 1973 this state joined a majority of jurisdictions in recognizing by statute the right of contribution among joint tortfeasors.[1] The Wyoming Act was patterned after, and in all important respects is identical to, a 1971 Idaho statute.[2]

1. WYO. STAT. ANN. § 1-7.3 to 1-7.6 (Supp. 1973). The Wyoming Act is printed in full below.

> § 1-7.3. Contribution among joint tort-feasors. — (a) The right of contribution exists among joint tort-feasors, but a joint tort-feasor 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.
>
> (b) A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another join tort-feasor whose liability to the injured person is not extinguished by the settlement.
>
> (c) When there is such a disproportion of fault among joint tort-feasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tort-feasors shall be considered in determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.
>
> (d) As used in section 1-7.3 through 1-7.6 of the statutes, "joint tort-feasor" means one of two or more person jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.
>
> § 1-7.4. *Same; certain matters not affected* — (a) Nothing in this oct (§§ 1-7.3 to 1-7.6) affects:
>
> (i) The common law liability of the several joint tort-feasors to have recovered and payment made from them individually by the injured person for the whole injury. However, the recovery of a judgment by the injured person against one joint tort-feasor does not discharge the other joint tort-feasors;
>
> (ii) Any right of indemnity under existing law.
>
> § 1-7.5. *Same; effect of release of one tort-feasor; discharge.* — A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if such amount or proportion is greater than the consideration paid.
>
> § 1-7.6. *Same; release of one tort-feasor; contribution.* — (a) A release of one tort-feasor by the injured person relieves that tort-feasor from liability to make contribution to a joint tort-feasor only if:
>
> (i) That release is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued; and
>
> (ii) The release provides for a reduction to the extent of the pro rata share of the released tort-feasor of the injured person's damages recoverable against all the other tort-feasors; and
>
> (iii) The issue of proportionate fault is litigated between joint tort-feasors in the same action.

2. IDAHO CODE §§ 6-803 to 6-806 (Supp. 1973).

Presumably the Wyoming Legislature was influenced in its choice of legislation by the adoption in both states of identical comparative negligence statutes,[3] and by the growing recognition that the right of contribution among tortfeasors is a desirable, if not necessary, corollary of comparative negligence legislation.[4]

The Wyoming and Idaho contribution statutes are both resurrections of an old 1939 uniform state law[5] which, according to many commentators, has been a conspicuous failure since its inception.[6] It has, for example, long since been abandoned by its draftsmen in favor of a completely revised uniform act.[7] It has been amended and changed beyond recognition in states that adopted it many years ago,[8] and entirely ignored by others that have since considered or enacted similar legislation.[9] Through the experience of other juris-

3. WYO. STAT. § 1-7.2 (Supp. 1973); IDAHO CODE § 6-801 (Supp. 1973).

4. Laugensen, *Colorado Comparative Negligence*, 48 DEN. L. J. 469, 479 (1972); Heft & Heft, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A. J. 127, 130 (1969); Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597, 607 (1973). With no right of contribution, the defendant whom plaintiff chooses to proceed against must bear the entire loss, irrespective of his relative percentage of fault. This offends the basic concept of comparative negligence, that each party shall bear the burden of the loss proportionate to his percentage of negligence.

5. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939) (act withdrawn 1955), 9 U.L.A. 233 (1957).

6. One lawyer's disenchantment with the New Jersey statute, inspired by the 1939 Uniform Act has been stated in Orlando, *The Operation of the "Joint Tortfeasors Contribution Law" in New Jersey*, 22 INS. L. J. 480, 482 (1955).
> In its operation, the act has bewildered judges and litigants, it has spawned prolific litigation and controversies, and has created paradox and absurdity . . . It has produced a plethora of legal literature, and has even posed among its supporters, the question whether the fight to bring about its passage, was worth the effort.

7. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955), 9 U.L.A. 127 (Supp. 1967).
> The Uniform Contribution Among Tortfeasors Act of 1939 has been adopted in the eight jurisdictions of Arkansas (1941), Delaware (1949), Hawaii (1941), Maryland (1941), New Mexico (1947), Pennsylvania (1951), Rhode Island (1950), and South Dakota (1945). Most of these states have made important changes in the Act which have defeated the whole idea of uniformity; and in anything like its original form it is now in effect only in Arkansas, Hawaii, and South Dakota. For this reason, and because of unfavorable reports as to the progress and operation of the Act, the Commissioners withdrew it for further study and revision.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note (1955), 9 U.L.A. 126 (Supp. 1967).

8. Delaware, Maryland, New Mexico, Pennsylvania, and Rhode Island have all made significant changes in the original 1939 Uniform Act.

9. Until Idaho and Wyoming's recent adoption of the 1939 Act, no state had seriously considered passing it since it was adopted by Pennsylvania over two decades ago. In the interim other states have passed contribution legislation (Massachusetts, North Dakota, Alaska, and Tennessee). All have opted for the 1955 Uniform Act.

dictions it has proved inadequate for the needs of an effective and modern reparations system.[10] It is, by the testimony of some, an outdated and unworkable remnant of an early experiment in the unification of state contribution laws.

The 1939 Uniform Act clearly does not carry into the Wyoming statutes an impressive array of credentials. It in fact contains several proven defects which must be remedied before the act will operate as an effective piece of legislation. Both the need to be aware of these shortcomings and the need for a general understanding of the new contribution statute in Wyoming prompted the writing of this article.

I. THE NATURE OF CONTRIBUTION

At common law,[11] and in Wyoming before the passage of this act,[12] there could be no contribution among tortfeasors. If the plaintiff was injured by the joint and several tort of two or more defendants, he could place the loss, as "lord of his action," where and how he saw fit.[13] There it stayed on the theory that it was contrary to the policies and maxims of the law to allow actions to adjust equities between wrongdoers[14] or to allow actions to be founded on one's own wrongdoing.[15] If the parties were in *pari delicto* when the tort was committed, the law left them as it found them.

There is an obvious lack of justice, as Prosser has fluently explained,[16] in a rule which allows the entire burden of a loss, for which two defendants are equally and unintentionally responsible, to be shouldered onto one alone according to the accident of a successful levy of execution or the existence of liability insurance, while the other goes scot free. In recognition of the general fact that most joint and several tort liability results from inadvertenty caused damage, the rule

10. Comment, *Adjusting Losses Among Joint Tortfeasors In Vehicular Collision Cases*, 68 YALE L. J. 964 (1959).
11. *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799) has long been cited for the common law rule holding that there can be no contribution among wrongdoers.
12. Convoy v. Dana, 359 P.2d 885 (Wyo. 1961).
13. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note (1939), 9 U.L.A. 231 (1957).
14. Slater v. Ianni Const. Co., 268 Mich. 492, 256 N.W. 495 (1934).
15. Manovitz v. Kanov, 107 N.J. Law. 523, 154 A. 326, 328 (1931).
16. PROSSER, TORTS § 50 at 307 (4th ed. 1971).

against spreading a common burden among tortfeasors has been abrogated in a majority of jurisdictions, either by decisional law or, as in Wyoming, by statute.[17] Now, under the act adopted in Wyoming, once a joint tortfeasor has discharged by payment the common liability of all other tortfeasors liable to the plaintiff, or has paid more than his pro rata share thereof, his right to contribution accrues,[18] and each defendant originally liable to the plaintiff must account to the paying tortfeasor for a proportionate share of damages.

II. ELEMENTS OF THE RIGHT TO CONTRIBUTION

Under the Wyoming Act there are three prerequisite elements to a tortfeasor's right of contribution: (1) there must be two or more joint tortfeasors; (2) they must have a common liability to an injured party as a result of their negligence; and (3) one such party must have discharged an unequal proportion of the common burden. Each of these elements, and their concomitant problems, will be discussed below.

A. Two or More Joint Tortfeasors

1. *Joint judgment not required for contribution*

Both the Wyoming statute[19] and the Uniform Act of 1939[20] define a joint tortfeasor as one of two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. The phrase "whether or not judgment has been recovered" was deliberately included by the draftsmen of the Uniform Act to indicate that joint and sev-

17. Well over one-half of the states permit some form of contribution, either by statute or by judicial decision. Eight states (Michigan, Mississippi, Missouri, New York, North Carolina, Texas, West Virginia and Delaware) have statutes which limit contribution to joint judgment tortfeasors. Six states (Georgia, Kentucky, Louisiana, New Jersey, Virginia, and Wisconsin) have broad contribution statutes which define the right of contribution and leave most questions to the courts. Minnesota, Maine and the District of Columbia recognize the right of contribution without a statute. Eight jurisdictions have adopted the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT of 1939, exclusive of Idaho and Wyoming, and four others have adopted the revised Uniform Act of 1955. *Supra*, note 7.
18. WYO. STAT. § 1-7.3 (Supp. 1973).
19. WYO. STAT. § 1-7.3(d) (Supp. 1973).
20. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1939), 9 U.L.A. 233 (1957).

eral judgment liability is not a necessary prerequisite to the recovery of contribution from another tortfeasor.[21] Hence, if the plaintiff is injured by the negligence of A and B, and he recovers a judgment in a suit in which only A is named, contribution may still be recovered by A against B, either by A joining him as a third party defendant,[22] or by bringing a separate suit.[23] Whereas other jurisdictions allow an action for contribution only from a wrongdoer joined by the plaintiff,[24] the Wyoming act makes all wrongdoers subject to the paying tortfeasor's right of contribution, even though they were not made parties to the suit in which judgment was rendered. Indeed, in some situations it is not necessary that a judgment be rendered. If an injured person brings a personal injury actions against two defendants, for example, and settles in full with one, extinguishes all liabiity against both, the defendant who is not a party to the settlement is still a joint tortfeasor within the meaning of the Wyoming act, and the other has a right of contribution against him, even though a judgment was never obtained in the original action.[25]

2. *Scope of contribution determined by joint and several liability*

It is clear, both from the Wyoming act[26] and from cases that have interpreted identical provisions in other states,[27] that the scope of the new contribution statute is to be determined by joint and several liability and not by joint or concurrent negligence. Consequently, it becomes imperative to determine when joint and several liability may be imposed by the plaintiff upon two or more tortfeasors to further establish whether the right to contribution can arise between them.

21. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Note (1939), 9 U.L.A. 233 (1957).
22. WYO. R. CIV. P. 14(a).
23. WYO. STAT. § 1-7.3(a) (Supp. 1973).
24. *Supra*, note 17.
25. By negative implication, WYO. STAT. § 1-7.3(b) (Supp. 1973) provides that a joint tortfeasor who enters into a settlement with the injured person is still entitled to recover contribution from any tortfeasor whose liability he has extinguished by payment. This is the construction given an identical provision by the Pennsylvania courts. *See* Mong v. Hershberger, 200 Pa. Super. 68, 186 A.2d 427 (1963).
26. WYO. STAT. § 1-7.3(d) (Supp. 1973).
27. *E.g.*, Burmeister v. Youngstrom, 81 S.D. 578, 139 N.W.2d 226 (1965).

Recent cases indicate that a black letter rule defining joint and several liability may read something as follows: two or more tortfeasors may be held jointly and severally liable, though the acts and omissions complained of are not joint, nor do the causes concur so as to create a single force or condition, if the injury is indivisible in the sense that evidence from which to make a division among tortfeasors is unavailable.[28] A determining factor, then, in a finding of joint and several liability is whether the damage caused is reasonably divisible among those who caused it. In a leading case, for example, two salt water carrying pipes, owned by two separate companies, broke at approximately the same time, pouring salt water into the plaintiff's lake, killing his fish and causing other damage.[29] Obviously, each of the tortfeasors caused only a proportionate amount of harm. Nonetheless, each was held jointly and severally liable for the entire damage. In the words of the court:

> Where the tortious acts of two or more wrongdoers join to produce an indivisibe injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.[30]

In *Maddux v. Donaldson*[31] a similar result obtained where plaintiff's automobile was involved in a head-on collision with the first defendant, and some thirty seconds later plaintiff's car was struck from the rear by the second defendant. Here the test was phrased in this manner:

> [W]here the trier or triers of facts find they cannot ascertain the amount of damages each wrongdoer has inflicted, then such trier or triers are authorized to assess the plaintiff's damages against any one or all of such wrongdoers on grounds that the latter have—

28. Comment, *Recent Developments in Joint and Several Tort Liability*, 14 BAYLOR L. REV. 421, 423 (1962).
29. Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).
30. *Id.* at 734.
31. 362 Mich. 425, 108 N.W.2d 33 (1961).

in law—participated in the infliction of "a single indivisible injury."[32]

The Wyoming Supreme Court has apparently adopted a similar construction of joint and several liability. In *Phelps v. Woodward Constr.*,[33] for example, the court quoted with approval the finding of joint and several liability in a hypothetical situation where if the presence of gas in a cellar is due to the negigence of a gas company, and an explosion results from the negligent striking of a match by a stranger, the party injured may recover against either the gas company or the stranger, or against both, at his election.[34]

A joint tortfeasor, as thus defined by the Wyoming act, is an exceedingly broad term and goes beyond the traditional meaning of the word.[35] It literally embraces successive wrongdoers liable for the same harm, even though one may also be liable for additional damage.[36] Other cases go even further. When it is known that only one of several defendants caused the injury, but it is not known which one, some jurisdictions hold that the plaintiff may nonetheless hold any of the defendants jointly and severally liable.[37] Another case holds that plaintiff, to establish joint and several liability, need only show the fact of injury while in the presence of several defendants.[38]

32. *Id.* at 46 (concurring opinion).
33. 66 Wyo. 33, 204 P.2d 179 (1949). *See also* Parkinson v. California Co., 255 F.2d 265, 270 (10th Cir. 1958); Chandler v. Dugan, 70 Wyo. 439, 251 P.2d 580 (1952).
34. 66 Wyo. 33, 204 P.2d 179, 180 (1949).
35. Many jurisdictions still require some concerted action in pursuance of a common design as a prerequisite to joint and several liability. See PROSSER, TORTS, § 46 at 291 (4th ed. 1971).
36. Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892 (1961).
37. In *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), the court held that two hunters were jointly and severally liable despite the finding that the shot which wounded the plaintiff could have come from the gun of either of them. In holding that the burden of proof in such case shifts to defendants, the court said: "They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can." *Id.* at 4.
38. In *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1945), the court held that plaintiff, who awoke following an appendectomy with a pain in his arm and shoulder, could sue jointly the doctor who diagnosed his case and aided in the operation, the surgeon, the hospital administrator, an anesthetist, and two nurses, though he could not show which one, if any, had caused the injury complained of. Though the question of an indivisible injury (and thus joint and several liability) was not discussed, it was implicit in the holding, since if it cannot be shown which of the defendants was negligent, it cannot be shown how the damage should be apportioned between them.

3. *Intentional tortfeasors may be included under Wyoming Act*

The Wyoming act does not necessarily restrict its operation to joint tortfeasors who are merely negligent or who in any way inadvertently harm others.[39] It is clearly open to the interpretation that would include those responsible jointly and severally for wilful, wanton, or intentional misconduct. Such a construction has in fact been applied in several jurisdictions with identical provisions,[40] including the dictum of the only case that has yet interpreted the new Idaho statute.[41] Other cases, construing comparable legislation, adhere to a rule that expressly prohibits the right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death of the plaintiff.[42] In accord with this rule is the 1955 Uniform Contribution Among Joint Tortfeasors Act.[43]

The disagreement centers on policy. Those who would deny contribution to an intentional tortfeasor do so first on the premise that such a denial acts as a penalty for the commission of the wrong, and as a deterrent against the future commission of like wrongs.[44] It was said in an early case, for example, that the reason in law for refusing to enforce contribution between wrongdoers is that "they may be intimidated from committing the wrong by the danger of each being made responsible for all the consequences,"[45] a reason which does not usually apply to injuries arising from mistakes or

39. Both the Wyoming statute and the 1939 Uniform Act are lamentably silent on the contribution rights of an intentional tortfeasor. The Wyoming Act provides only that the right of contribution shall exist among "two or more persons jointly or severally liable in tort for the same injury to person or property . . . ." WYO. STAT. § 1-7.3(d) (Supp. 1973).
40. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 110 A.2d 24 (1954) (fraud); Maryland Lumber Co. v. White, 205 Md. 180, 107 A.2d 73 (1954) (conversion); Shultz v. Young, 205 Ark. 533, 169 S.W.2d 648 (1943) (battery).
41. Holve v. Draper, 505 P.2d 1265 (Idaho 1973).
42. Cage v. New York Central Railroad Co., 276 F. Supp. 778 (W.D. Pa. 1967), *aff'd* 386 F.2d 998 (3rd. Cir. 1967) (per curiam); Hardware Mut. Casualty Co. v. Danberry, 234 Minn. 391, 48 N.W.2d 567 (1951); Rusch v. Korth, 2 Wis.2d 321, 86 N.W.2d 464 (1957); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945).
43. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) (1955), 9 U.L.A. 127 (Supp. 1967).
44. Woodward, QUASI CONTRACT 406 (1913). *See also* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PENN. L. REV. 130 (1932). For a collection of common law cases *see* Annot., 60 A.L.R.2d 1366 (1958).
45. Thweatt's Administrator v. Jones, 1 Rand. 328, 332 (Va. Ct. of App. 1823).

accidents. Secondly, it is thought by some that contribution ought to be denied to one who has committed an intentional tort on the assumption that courts have no time to adjust disputes between wrongdoers,[46] and should not, as a matter of principle, seek to dignify the commission of an intentional tort by allowing one tortfeasor to shift part of his burden onto another.

Those who would allow contribution among intentional tortfeasors point out, and quite forcefully so, that the asserted punitive effect on the tortfeasor who is forced to pay is offset by the complete freedom from liability allowed to the remaining wrongdoers, such that the sporting chance of going scot free may induce, rather than deter, the commission of wrongs.[47] "[T]here is," according to one commentator, "absolutely no factual proof that the rule operates effectively as punishment and discouragement to wrongdoers, or that the law's attitude of dignified aloofness serves any good purpose whatever, whether the would-be litigant be a double-dyed villain, or only an ordinary imprudent man."[48] Also, the rule denying contribution has a corrupting influence by encouraging an intentional wrongdoer to bribe the plaintiff to obtain satisfaction from others.[49]

4. *Master and servant are considered joint tortfeasors*

The question of whether master and servant are joint tortfeasors within the meaning of the 1939 Uniform Act arises mostly in release of liability cases. Typically, a master, because of his vicarious liability for his servant's misconduct, will execute a release of liability with the injured person, who subsequently brings suit against the negligent servant. The servant then seeks to assert his master's release as a defense under the common law rule that a release of one

46. Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956). *See also* Leflar, *Contribution and Indemnity Betewen Tortfeasors*, 81 U. PENN. L. REV. 130, 133 (1932)); Comment, *Contribution Between Joint Tortfeasors: A Legislative Proposal*, 24 CAL. L. REV. 546, 548 (1936).

47. Laflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PENN. L. REV. 130, 133 (1932); Comment, *Contribution Between Joint Tortfeasors: A Legislative Proposal*, 24 CAL. L. REV. 546, 548 (1936).

48. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PENN. L. REV. 130, 139 (1932).

49. *Id.* at 134.

tortfeasor releases all.[50] By holding that master and servant are joint tortfeasors, however, cases that have interpreted the 1939 act have eliminated this defense, because under the 1939 act if one joint tortfeasor is released, other tortfeasors remain liable to the plaintiff unless the release specifically provides otherwise.[51] Hence, in *Mazer v. Lipschutz*[52] the release of a hospital offered no protection to a surgeon where the surgeon's negligence in administering the wrong blood to his patient resulted in the patient's death. The court reasoned that both the surgeon and the hospital were jointly and severally liable for the death of the patient.[53] As joint tortfeasors, the release given to the hospital did not discharge the surgeon from liability. The Idaho case of *Holve v. Draper*[54] arrived at an identical result, though in that instance it was the servant, and not the master, that executed the release.[55]

There are instances where a master, by virtue of his status as a joint tortfeasor, may seek contribution from a negligent third party.[56] But the right of a master to recover contribution from a third party tortfeasor should not be confused with his right to indemnity against a negligent servant when the master is held vicariously liable for his servant's misconduct.[57] The master may only seek contribution from a party against whom he has no right of indemnity.

50. *See* text accompanying notes 121 to 128.

51. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1939), 9 U.L.A. 242 (1957).

52. 327 F.2d 42 (3rd. Cir. 1963).

53. *Id.*

54. 505 P.2d 1265 (Idaho 1973).

55. *See also* Kertz v. National Paving and Contracting Co., 214 Md. 479, 136 A.2d 229 (1957); Comment, *Master and Servant: Are They Joint Tortfeasors?*, 10 WASHBURN L. J. 478 (1971).

56. Anytime a master discharges more than his pro rata share of damages under the doctrine of *respondeat superior*, he has a right of contribution against any third party whose negligence was also a proximate cause of the harm.

57. PROSSER, TORTS § 51 at 310 (4th ed. 1971).

> There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it onto the shoulders of another who should bear it instead. The two are often confused and there are many decisions in which indemnity has been allowed under the name of contribution.

Neither the 1939 Uniform Act nor the Wyoming statute impairs any rights of indemnity under existing law. WYO. STAT. § 1-7.4(a)(ii) (Supp. 1973); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 6 (1939), 9 U.L.A. 246 (1957).

If, for example, the combined negligence of a servant and a third party tortfeasor injures the plaintiff, and the master discharges the judgment under the doctrine of *respondeat superior,* he has an absolute right to be indemnified for the loss by his servant. In the event his servant is not able to satisfy the entire burden, the master has a right of contribution against the third party equivalent to that party's relative degree of fault. Rather than incurring a part of the common burden, as in typical contribution suit, the master is able to shift the entire loss back onto the parties responsible for the actual harm.

B. Common Liability to an Injured Party

In addition to the requirement that there be two or more joint tortfeasors, most courts also require, as a second prerequisite to the right of contribution, some common liability among tortfeasors to the injured party. This generally involves the question of whether a tortfeasor who enjoys a special defense against the plaintiff can assert the same defense against a tortfeasor who has discharged the judgment in a subsequent contribution action.[58] A typical example occurs where a tortfeasor seeks to recover contribution from a negligent husband, where the fault of both the third party tortfeasor and the husband combine to injure his plaintiff-wife. A majority of courts in this situation, and in others where one of the tortfeasors enjoys some special defense, have held there must be some common or original liability to the plaintiff,[59] usually on the basis that the right of contribution is granted as between tortfeasors only if they are jointly or severally liable in tort for the same injury.[60] If there never was any such liability, as where a party from whom contribution is sought has the defense of family immunity, an automobile guest statute, the statute of limitations, or workmen's compensation, then he is not liable to a third party tortfeasor for contribution.

58. Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party,* 52 CORNELL L. Q. 407 (1967).

59. *Id.* at 407-08. *See also* PROSSER, TORTS § 50 at 309 (4th ed. 1971).

60. Rodgers v. Galindo, 68 N.M. 215, 360 P2d 400 (1961).

In spite of this general rule, a significant number of jurisdictions have held that a rule denying contribution from a party who enjoys a special defense should not be applied indiscriminately.[61] The right of contribution should be barred, by this view, only when the policy reasons underlying the defense to a suit by the plaintiff apply equally well to an action for contribution.[62] In either event policies will necessarily conflict. If contribution is allowed from a defendant who is immune to direct action by the injured party, the injured plaintiff will recover one-half his damages from a defendant against whom he could not have recovered at all had that defendant been singularly at fault. If contribution is denied, on the other hand, the first defendant must bear the entire burden of the loss despite the policy which led to the adoption of the role of contribution.[63]

1. *Family immunity*

In line with the minority view expressed above several recent cases have held that in a family immunity suit, where the negligence of one family member combines with the negligence of a third party to injure a second family member, the defense of family immunity cannot be invoked to preclude the contribution rights of the third party tortfeasor.[64] The primary policy sought to be implemented by the defense, the preservation of domestic harmony, is not violated by permitting contribution from the tortfeasor who asserts it.[65]

61. Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961); Zaccori v. United States, 130 F. Supp. 50 (D.C. Md. 1955); Burmeister v. Youngstrom, 81 S.D. 578, 139 N.W.2d 226 (1965); Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965); Downing v. Dillard, 55 N.M. 267, 232 P.2d 140 (1951); Bertone v. Turco Products, 252 F.2d 726 (3rd. Cir. 1958).

62. Zarrella v. Miller, 100 R.I. 545, 217 A.2d 673, 675 (1966).

63. Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L. Q. 407, 408 (1967).

64. Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945); Puller v. Puller, 380 Pa. 219, 110 A.2d 175 (1955); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Smith v. Southern Farm Bureau Casualty Ins. Co., 247 La. 695, 174 So.2d 122 (1965); and Zarella v. Miller, 100 R.I. 545, 217 A.2d 673, 675 (1966).

65. Zarella v. Miller, 100 R.I. 545, 217 A.2d 673, 675 (1966).
> The considerations of public policy upon which the doctrine of interspousal immunity is predicated do not apply to actions for contribution under the act since such actions do not contemplate an action by a wife against her husband. The reason of the rule against interspousal suits does not apply to actions under the instant act.

A contribution suit under these circumstances does not pit the husband against the wife in a court of law with one trying to establish the other's negligence. Rather, the dispute is between negligent parties themselves, and how they are to distribute the liability they have jointly and severally incurred. The defense of family immunity should have no application where the controversy is between the third party tortfeasor and the negligent spouse, because the right of the third party to shift part of his loss onto another does not affect the domestic tranquility of husband and wife. It simply reduces the damages already awarded to one spouse by the negligence of the other.

Other courts have not been willing to subvert the plain meaning of "liable in tort,"[66] which according to the draftsment of the 1939 act refers to an enforceable cause of action by the injured party against the tortfeasor from whom contribution is sought, and which must exist before contribution will be allowed.[67] In the comments to the 1939 act the draftsmen state:

> The common obligation contemplated by this Act is the common liability of the tortfeasors to suffer adverse judgment at the instance of the injured person, whether or not the injured person elects to impose it.[68]

If the husband is immune to a direct action by his wife, he cannot "suffer adverse judgment at the instance of the injured person." He is therefore, by the traditional view, not a joint tortfeasor within the meaning of the 1939 act, and cannot subsequently be made to account for a proportionate share of damages.[69]

66. Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400, 402 (1961).
> [I]n order for us to arrive at a conclusion favorable to appellant it would be necessary for us either to reverse ourselves on the doctrine of marital immunity . . . or to alter our interpretation of our Uniform Contribution Among Tortfeasors Act to allow contribution if joint tortious conduct was present rather than to predicate it upon joint or several liability as plainly required by the language of the statute . . . This we decline to do.

67. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 1 Commissioners' Note (1939), 9 U.L.A. 233 (1957).
68. *Id.*
69. Tamashiro v. De Gama, 51 Ha. 74, 450 P.2d 998 (1969); Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961); Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363 (D.C. R.I. 1967).

Of course, in those jurisdictions that have abrogated the doctrine of family immunity, one family member is liable in tort to another, and he thereby becomes subject to the contribution rights of another third party tortfeasor. The doctrine still lingers in Wyoming, although there is reason to believe that, should the issue arise in a timely fashion, it will be discarded entirely.[70]

2. *Guest statutes*

Another example of a special defense often invoked to defeat the contribution rights of a joint tortfeasor is the automobile guest statute.[71] This ordinarily entails a situation where the host's passenger recovers a judgment from a negligent third party, who then seeks contribution from the negligent host. Almost without exception the courts have held that a host driver not directly liable to a guest may effectively raise the guest statute as a defense to an action for contribution by a third party tortfeasor.[72]

Again, it is questionable whether the denial of contribution in this instance furthers the policies behind the guest statute,[73] which generally have included the discouragement of collusive claims between host and passenger and the supposed injustice that results where a gratuitous passenger is allowed to sue his host for simple negligence.[74] If the primary purpose is the prevention of collusive claims, the defense of the guest statute should not be permitted in a contribution

70. *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943), established the interspousal immunity doctrine in Wyoming. One justice was of the opinion that a wife has no right to sue her husband in tort. Another thought that she had no right to do so in absence of liability insurance, and the third justice dissented on the ground that such action is maintainable irrespective of liability insurance. With the trend toward limiting the doctrine of interspousal immunity, PROSSER, TORTS § 122 at 864 (4th ed. 1971), and the widespread prevalence of liability insurance, the court may well be persuaded to abolish the doctrine if the issue were to arise today. See also Oldman v. Bartshe, 480 P.2d 99 (1971), where the court indicated there may be certain circumstances involving wilful and wanton disregard for the well being of a child that a suit by the child against either of the parents would be in order.

71. *See* Annot., 26 A.L.R. 3d 1283 (1969).

72. Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965); Mumford v. Robinson, 231 A.2d 477 (Del. 1967); Burmeister v. Youngstrom, 81 S.D. 578, 139 N.W.2d 226 (1965); and Lutz v. Boltz, 48 Del. Sup. 197, 100 A.2d 647 (1953).

73. Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L. Q. 407, 415 (1967).

74. PROSSER, TORTS § 34 at 187 (4th ed. 1971).

suit because the claim of the guest has already been established, and the only remaining issue is an equitable distribution of the claim according to the parties' relative degrees of fault.[75] In other words, if a judgment has already been rendered against a third party tortfeasor in favor of the passenger, there is no reason for him to enter into a collusive agreement with the host when the judgment recovery has been safely tucked away in the passenger's pocketbook.

It has been said that the second policy behind the guest statute, that of preventing a mere guest from recovering against his host for simple negligence, again fails in an action for contribution, because a contribution suit does not contemplate an action by a guest against his host based on ordinary negligence.[76] That is, an action for contribution can hardly prevent litigation between a passenger and his host when its only purpose is to permit a tortfeasor to seek an equal distribution of the liability.

It may, on the other hand, be said in broader terms that the policy of the guest statute is to prevent any kind of liability from being imposed on the host, whether by his passenger via a direct suit or by a third party tortfeasor in a contribution suit. Considered in this light, the underlying policy of the guest statute is obviously violated by permitting a suit in contribution, because a third party is allowed to impose a liability on the host indirectly even though he remains immune from any action by his passenger.

3. *Workmen's compensation*

There are instances where a party should be able to raise a special defense to preclude the assertion of another tortfeasor's contribution rights. One is where an employee brings suit both against his employer and a third party tortfeasor, the former's liability being premised on workmen's compensation.[77] The third party, after discharging the judg-

75. Shonka v. Campbell, 160 Iowa 1178, 152 N.W.2d 242, 246 (1967) (dissenting opinion).

76. *Id.*

77. Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L. Q. 407, 415 (1967).

ment, then seeks contribution from the employer. In this situation it is generally held that the employer, whose liability to the employee is absolute, but limited in amount, should not be subjected to unlimited liability for his common law torts merely because a third party is also liable to the employee.[78]

The most familiar approach in arriving at this result is that taken by the New Mexico courts, who have held the employer to be immune from contribution by a simple construction of that state's workmen's compensation statute. It provides:

> Any employer who has elected to and has complied with the provisions of the act . . . shall not be subject to any other liability whatsoever for the death or personal injury to any employee . . . .[79]
>
> . . . .
>
> [T]he right to the compensation provided for in this act [is] in lieu of any other liability whatsoever, to any and all persons, whomsoever, for any personal injury . . . .[80]

It was held in *Beal v. Southern Union Gas Co.*[81] that if the words of exclusion in the statute above were construed to require contribution to a third person for the injuries covered by the act, such a construction would render the words of exclusion meaningless, and would further violate the purpose of the act to grant immunity to the employer in exchange for his absolute, though limited, liability to secure compensation to his employee. Wyoming's workmen's compensation statute contains language that could easily be construed the same way.[82]

78. C & L Rural Electric Cooperative Corp. v. Kincaid, 221 Ark. 450, 256 S.W.2d 337 (1953); Congressional Country Club Inc. v. Baltimore & O. R. Co., 194 Md. 533, 71 A.2d 696 (1950); Hill Lines, Inc. v. Pittsburgh Plate Glass Co., 222 F.2d 854 (10th Cir. 1955).
79. N.M. STAT. ANN. § 59-10-5 (1953).
80. N.M. STAT. ANN. § 59-10-6 (1953)
81. 62 N.M. 38, 304 P.2d 566 (1956). *See also* Hill Lines, Inc. v. Pittsburgh Plate Glass Co., 222 F.2d 854 (10th Cir. 1955).
82. WYO. STAT. § 27-50 (1957).
> The right of each employee to compensation from such funds (in the state treasury) shall be in lieu of and shall take the place of any and all rights of action against any employer contributing, as required by law to such fund in favor of any such person or persons by reason of any such injury or death.

Perhaps a more just approach has been taken by the state of Pennsylvania. Since the 1940 decision of *Maio v. Fahs*,[83] Pennsylvania has allowed contribution, but only to the extent of the employer's liability under the workmen's compensation statute. The formula employed by *Maio* combines the statutory limitations of workmen's compensation liability with the equitable policy of contribution that requires a pro rata distribution of the loss. Thus, if the employer's liability is limited by statute at $10,000, assuming equal degrees of negligence, the employer's maximum liability in contribution is $5,000, regardless of the total damages paid by the other tortfeasor.

4. *Statute of Limitations*

Another issue frequently raised under the requirement of common liability occurs where the injured plaintiff brings a successful suit against one of the joint tortfeasors before the statute of limitations has run, but the statute has run as to the other tortfeasor so as to bar an action against him by the same plaintiff.[84] The question arises as to whether the statute also bars the contribution claim of the paying tortfeasor. The response of the courts has generally been to allow contribution by the first tortfeasor on the ground that the statute of limitations applicable to the contribution action does not begin to run until the first defendant satisfies the judgment against him.[85]

Because the statute runs from the date of payment of the judgment rather than from the date the judgment was obtained, there may be a substantial injustice to the defendant still liable for contribution. In Wyoming, for example, which has a four year statute of limitations for most personal injury actions,[86] if the time necessary to bring the first suit to judgment (up to four years) is added to the time the paying tortfeasor has to bring his contribution suit (another

83. 339 Pa. 180, 14 A.2d 105 (1940).
84. Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L. Q. 407, 414 (1967).
85. Cooper v. Philadelphia Dairy Products Co., 34 N.J. Sup. 301, 112 A.2d 308 (1955); Keleket X-ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960); and Ainsworth v. Berg, 253 Wis. 438, 34 N.W.2d 790 (1948).
86. WYO. STAT. § 1-18 (1957).

four years), the contribution defendant may find himself answering the contribution claims of another tortfeasor for an accident that occurred eight years ago. This type of extension defeats the whole purpose behind the statute of limitations and unduly extends the liability of any tortfeasor still potentially liable for contribution.

There is no way to avoid some extension of the time within which the second tortfeasor may be sued, unless contribution is to be limited to joint judgments. It seems clear, however, that a four year period, as provided by Wyoming, is far too lengthy a time in which to permit an action for contribution. The extension of time should be as short as possible, though not so short as to restrict the right of contribution to those who can raise the money to pay off the judgment immediately.[87] Some compromise must be made between a reasonable time to pay the judgment by the paying tortfeasor and the unduly extended liability for contribution to those tortfeasors who must later share the burden of the loss.[88] The 1955 Uniform Act,[89] in contrast to the silence of the 1939 act,[90] has provided for a one-year statute, so that if there is a judgment for the injury against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final.

5. *Other defenses*

The 1939 Uniform Act and the Wyoming statute are again silent on the problem of whether a liability insurer who has discharged all or more than a pro rata share of an insured tortfeasor's liability, thereby discharging in full its obligation as an insurer, may be subrogated to the insured's right of contribution. At least one case has held that the right of

87. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) Commissioners' Note (1955), 9 U.L.A. 131 (Supp. 1967).
88. *Id.*
89. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) (1955), 9 U.L.A. 130 (Supp. 1967).
90. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) Commissioners' Note, 9 U.L.A. 131 (Supp. 1967).
> One of the chief criticisms of the (1939) Act, which has even led to efforts to repeal it in some of the states where it has been adopted, has been that this unduly extends the liability of the second tortfeasor.

contribution is a personal right not to be exercised by an insurer, because an insurer is not a joint tortfeasor within the meaning of the 1939 act and hence is not entitled to the benefit of contribution.[91]

The argument against subrogation is that the insurer has been paid full consideration for carrying the risk of liability, and contribution is a windfall as to him. But the practical effect of denying contribution to an insurer, according to the draftsmen of the 1955 Uniform Act, is an inevitable increase in insurance rates.[92] Thus, the 1955 act provides that a liability insurer, who has by payment discharged in full its obligation as an insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability.[93] In reality it is doubtful whether there would be any demonstrable rise in insurance rates, because a large insurance company would lose as much from the contribution claims of other companies subrogated to their insured's contribution rights as it would save from not having to pay similar claims. Moreover, by subrogating insurance companies to ther insured's right of contribution there is a needless re-distribution of tort losses that already have been evenly distributed by the widespread prevalence of liability insurance.

Two cases have considered the question of whether a defendant held strictly liable in tort has any contribution rights against a tortfeasor whose liability was grounded in simple negligence.[94] Both were federal courts, both were based on a "prediction" of applicable Pennsylvania law and both arrived at different results. In the first,[95] defendant manufacturer was held strictly liable for injuries received when the suction cup of a toy arrow came off, exposing the shaft of the arrow, and blinding the plaintiff child in one

91. Lumbermen's Mutual Casualty Co. v. U.S. Fidelity and Guaranty Co., 211 N.C. 13, 188 S.E. 643 (1936).
92. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(e) Commissioners' Note (1955), 9 U.L.A. 129 (Supp. 1967).
93. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(e) (1955), 9 U.L.A. 127 (Supp. 1967).
94. Fenton v. McCrory Corp., 47 F.R.D. 260 (W.D. Pa. 1969); Walters v. Hiab Hydraulics, Inc., 356 F. Supp. 1000 (M.D. Pa. 1973).
95. Fenton v. McCrory Corp., 47 F.R.D. 260 (W.D. Pa. 1969).

eye. Claiming a right of contribution, defendant manufacturer joined the child's playmate, who fired the arrow, as a third-party defendant. The court denied contribution on the grounds that where liability is imposed on two different bases there is no common liability to the plaintiff.[96] This result has been severely criticized because, even though two different theories of recovery were involved, both the manufacturer and the playmate would have been jointly and severally liable in tort for the same injury to the plaintiff.[97]

The second and most recent case to consider the problem, *Walters v. Hiab Hydraulics Inc.*,[98] allowed contribution by a manufacturer held strictly liable in tort by holding that the policy reasons underlying Section 402A of the Restatement of Torts do not apply in an action for contribution. Section 402A, said the court, was adopted in order to afford greater protection to a consumer injured by a defective product by imposing strict liability on the manufacturer, and not to deprive a manufacturer from seeking contribution from a third party whose negligence was a proximate cause of the injury.[99]

There is, finally, very little authority on the contribution rights of a tortfeasor who has been assessed punitive damages. At least one case has squarely held that he may seek contribution only as to those damages assessed by virtue of his negligence.[100] A different result would defeat the policy behind imposing punitive damages by allowing a tortfeasor to spread among others a sum he alone, by virtue of his reprehensible conduct, has been ordered to pay.

C. Unequal Proportion of the Common Burden

The third prerequisite to the right of contribution is the assumption of an unequal proportion of the common burden by one of the joint tortfeasors. A right of contribution

96. *Id.* at 262.
97. Note, *The Effect of Strict Liability Upon Contribution*, 22 SYRACUSE L. REV. 749 (1971).
98. 356 F. Supp. 1000 (M.D. Pa. 1973).
99. *Id.* at 1003.
100. State v. Cook, 400 S.W.2d 39 (Mo. 1966). *See also* Comment, *Exemplary Damages and Joint Tortfeasors*, 18 WASH. & LEE L. REV. 270 (1961).

accrues either when a joint tortfeasor has discharged by payment the common liability of all tortfeasors originally liable to the plaintiff or where he has paid more than his pro rata share thereof.[101] Where one of three joint tortfeasors has fully satisfied a several judgment of $12,000, for example, he may recover by contribution $4000 from each of the two remaining tortfeasors. Similarly, where he has paid a judgment of $6000 in one action and the plaintiff later brings another action against two other tortfeasors,[102] collecting $3000 from each, the first tortfeasor is entitled to contribution of $1000 from both of the tortfeasors joined in the second action. In either event, each tortfeasor is liable to the others for an equal share of the judgment.

1. *Apportioning relative degrees of fault*

Ordinarily no inquiry is made into the respective degrees of fault of the tortfeasors as among themselves. Under the Wyoming statute,[103] however, and by optional provision of the 1939 Uniform Act,[104] relative degrees of fault are to be considered in determining pro rata shares of liability whenever there is such a disproportion of fault among the joint tortfeasors as to render inequitable an equal distribution of the common liability between them. This is shown below.

Action: Suit by D1 to recover contribution from D2 and D3

Judgment: $12,000, satisfied by D1

D1	70% negligent
D2	20% negligent
D3	10% negligent

Result: D1 is responsible for $8400 of the damage by virtue of his 70% negligence. He may thus recover $2400 from D2 and $1200 from D3.

101. WYO. STAT. § 1-7.3(a) (Supp. 1973).

102. The plaintiff is not precluded from bringing a separate action against the other tortfeasors. "(T)he recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors." WYO. STAT. § 1-7.5(a)(i) (Supp. 1973); UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 3 (1939), 9 U.L.A. 241 (1957).

103. WYO. STAT. § 1-7.3(c) (Supp. 1973).

104. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) (1939), 9 U.L.A. 235 (1957). Four states have adopted this optional provision: South Dakota, Arkansas, Delaware, and Hawaii.

According to the draftsmen of the 1939 Uniform Act, the inclusion of this provision was meant to rectify the injustice that results when a tortfeasor whose fault was patently greater than that of another tortfeasor can nevertheless shift onto him one-half of the common burden.[105] In the example above, if the rule that the common burden of the liability is to be distributed equally among tortfeasors were to prevail, D1, who was responsible for 70% of the damage, would be able to shift two-thirds of the total damage onto two other joint tortfeasors whose combined negligence consisted of but 30% of the total.

The degrees of fault among various tortfeasors are not apportioned as a matter of course. According to the draftsmen of the 1939 act, only if the evidence at trial reveals a disproportion of fault between two or more tortfeasors should the court, by means of a special verdict,[106] instruct the jury to fix their relative degrees of fault.[107] It is a jury function, in other words, to determine the relative degree of fault attributable to each tortfeasor only if the court first determines from the evidence that there is a disproportion of fault.[108] If the court believes that an apportionment of fault is inappropriate in a particular case, none will be made.

2. *Apportioning fault under the doctrine of comparative negligence*

If the negligence of the plaintiff is at issue, the doctrine of comparative negligence is invoked and the negligence of both parties to the action is compared.[109] If the negligence of the plaintiff is equal to or greater than that of the defendant, recovery is denied. Otherwise the plaintiff may recover a sum reduced by his own proportion of negligence.[110]

105. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) Commissioners' Note (1939), 9 U.L.A. 237 (1957).

106. WYO. R. CIV. P. 49(a). Note that if the fault of the parties is compared under the doctrine of comparative negligence, the special verdict procedure is provided for in WYO. STAT. § 1-7.2(b)(i) (Supp. 1973).

107. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) Commissioners' Note (1939), 9 U.L.A. 237 (1957).

108. Little v. Miles, 213 Ark. 725, 212 S.W.2d 935 (1948); Mitchell v. Branch, 45 Ha. 128, 363 P.2d 969 (1961).

109. WYO. STAT. § 1-7.2(a) (Supp. 1973).

110. *Id.*

Serious problems arise when multiple defendants are joined. In that case the plaintiff's negligence, if any, is compared with the negligent conduct of each defendant, and recovery is then allowed against any defendant whose negligence exceeds that of the plaintiff.[111] An example follows:

Action: Suit by P against D1, D2, and D3

Damages: $12,000 to P

P	20% negligent
D1	30% negligent
D2	20% negligent
D3	30% negligent

Result: D1 and D3 are jointly and severally liable for $9600. D2 is dismissed because the negligence of P equals his own.

Whenever the negligence of one of the defendants is equaled or exceeded by that of the plaintiff, the question of who is to bear the burden of the dismissed defendant's negligence (D2 above) in a contribution action will inevitably arise.[112] There are no less than five different methods of treating the problem.

First of all, under the requirement of common liability,[113] it may be said that since the dismissed defendant is not originally liable to the plaintiff, he is not a joint tortfeasor and cannot be made to account for a proportionate share of the damages in a contribution action. If that be the case, whoever ultimately satisfies the judgment must bear a disproportionate cost, because his contribution rights are restricted against those who were originally liable to the plaintiff. This is illustrated below:

Action: Suit by D1 for contribution against D2 and D3

Judgment: $9600, satisfied by D1 (reduced from $12,000 by P's 20% negligence)

111. Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597 (1973).

112. The same problem generally arises when one of the tortfeasors is judgment proof, immune, or simply cannot be found.

113. *See* text accompanying notes 58 to 63.

P	20% negligent
D1	30% negligent
D2	20% negligent
D3	30% negligent

Result: Since D2 has been dismissed altogether, D1, who has discharged the judgment, has as his only remedy in a contribution action the right to recover 30% of the damages from D3, or $2880.

D1's contribution rights are restricted to his $2880 recovery from D3. In effect then, D1, who is only 30% negligent, pays for 70% of the judgment ($9600 — $2880 = $6720, which is 70% of $9600) simply because he was chosen by the plaintiff, on the basis of his joint and several liability, to satisfy the plaintiff's loss.

A second method is a variation of the first, and would require that the 80% base of negligence among defendants above (the combined negligence of all three defendants is only 80% because of the 20% negligence of plaintiff) be transposed into a 100% base of negligence. This may in fact be required by the language of the 1939 Uniform Act itself,[114] on the ground that any negligence of the plaintiff is irrelevant in a contribution action among joint tortfeasors, where the only issue is how a common burden is to be equitably distributed among those who caused it. This would result in the following changes in the example above.

Action: Suit by D1 for contribution against D2 and D3

Judgment: $9600, satisfied by D1

P	ignored
D1	37½% negligent
D2	25% negligent
D3	37½% negligent

114. "(T)he relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves. . . " WYO. STAT. § 1-7.4(c) (Supp. 1973), 9 U.L.A. 237 (1957). This language suggests that in a contribution action any negligence of the plaintiff is to be ignored. If so, then the relative percentages of negligence as among tortfeasors may change significantly. For example, if the plaintiff's negligence was 30%, both D1 and D2 were 35% negligent, and D1 discharged a $1000 judgment, he could recover only 35% or $350 from D2. If plaintiff's negligence were ignored, on the other hand, both D1 and D2 would, for the purposes of contribution, be 50% negligent, and D1 could recover $500 from D2.

Result: D1 recovers $3600 from D3 (37½% of $9600).

Here D1's recovery has been increased against D3 from $2880 to $3600 because the base of the the three defendants' negligence has been changed from 80% to 100%. Under either of these first two alternatives, D1 bears the negligence of D2, who has been dismissed, although in the second example he recovers more because of the change in the negligence base.

A third method would require all defendants originally liable to the plaintiff to share proportionately the burden of D2's negligence. This could be done either with an 80% or 100% negligence base in the example above, with the following result:

Action: Suit by D1 for contribution against D2 and D3

Judgment: $9600, satisfied by D1

P	ignored
D1	37½% negligent
D2	25% negligent
D3	37½% negligent

Result: D1 recovers $4800 from D3. Both D1 and D3 by virtue of their equal negligence share the $9600 burden equally.

Still a fourth method would require that the total damages be distributed among defendants originally liable to the plaintiff before they are reduced by the plaintiff's degree of negligence. This is a way of circumventing the important role played by the negligence of P by allowing an action in contribution based on total damage caused, just as if P were not originally negligent.

Action: Suit by D1 for contribution against D2 and D3

Judgment: $9600, satisfied by D1. Actual damare $12,000.

P	20% negligent
D1	30% negligent
D2	20% negligent
D3	30% negligent

Result: D1 recovers $3600 from D3 (30% of $12,000).

Note that D1's recovery from D3 is the same as his recovery in the second method above, but only coincidentally so because of the figures used. With this method, the greater the plaintiff's negligence the more D1 will be able to recover from D3 in a contribution action.

The fifth and final method of distributing D2's negligence, and clearly the most equitable one, is to require him to account for his causal negligence to other tortfeasors. Here the 100% negligence base must be used again (otherwise the total damages apportioned among the three defendants make up only 80% of the plaintiff's judgment). D1 and D3 would then be responsible for $3600 of the damages, and D2, even though dismissed fom the original action, must contribute the remaining $2400 by virtue of having caused 20% of the damage.

Research has failed to disclose a case that has ruled on the precise question presented by these examples, largely because there are few comparative negligence jurisdictions that have adopted the 1939 Uniform Contribution Among Joint Tortfeasors Act.[115] When the issue is raised, however, it will probably be resolved on the basis of whether a common liability to the plaintiff is required as a prerequisite to the right of contribution. The best result would be the fifth method described above, which requires D2 to contribute 20% of the damages, even though he was dismissed from the action, for the reason that the contribution rights of one tortfeasor against others should not be made to depend on the plaintiff's relative degree of negligence. The policy behind the doctrine of comparative negligence, that of ameliorating the harsh consequences of the "all or nothing" rule of contributory negligence, is not furthered by denying contribu-

115. Among the eight states that have adopted the 1939 Uniform Act, only Arkansas, Hawaii, Rhode Island, and South Dakota have adopted comparative negligence legislation. Hawaii and Rhode Island have only recently done so. Arkansas follows a rule of comparison that precludes this question from ever arising in that state, Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962), and it is also doubtful if the issue could arise in South Dakota, which adheres to a "slight-gross negligence" version of comparative negligence. *See* Comment, *Comparative Negligence In Wyoming*, 8 LAND & WATER L. REV. 597, 598 (1973).

tion against a defendant whose negligence is less than that of the plaintiff, simply because, by virtue of his lesser negligence, that defendant was not originally liable to the plaintiff.

If some original or common liability is held to be a prerequisite to the contribution rights of a paying tortfeasor, thereby eliminating the fifth method, the third example above becomes preferable over the other methods, because it at least distributes the burden of a dismissed defendant's negligence evenly as among those tortfeasors originally liable to the plaintiff. The other methods require that the defendant who discharges the judgment to bear a disproportionate amount of the judgment claimed by the plaintiff, simply because he has no way of recouping that part of the loss caused by a dismissed defendant.

3. *Effect of pro rata reduction clause*

The discussion above leaves little doubt but that the relative degree of fault doctrine is more equitable in its distribution of liability among joint tortfeasors. It justly provides that each tortfeasor is to bear the burden of the loss in proportion to his percentage of fault. Yet this concept, otherwise known as "comparative contribution,"[116] was rejected by the draftsmen of the 1955 Uniform Act as an undesirable appendage,[117] and has similarly been repudiated in several of the states that have adopted the 1939 act.[118] A major reason for its disfavor is that, when combined with the pro rata reduction requirement of the 1939 Uniform Act,[119] the relative

116. Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962); Packard v. Whitten, 274 A.2d 169 (Me. 1971).

117. "In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered . . . ." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1955), 9 U.L.A. 129 (Supp. 1967). Not only has the 1955 Act eliminated the principle of relative degrees of fault, but it has also dropped the controversial pro rata reduction clause. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) (1955), 9 U.L.A. 132 (Supp. 1967).

118. Four of the states adopting the 1939 Act have omitted this optional section: Maryland, New Mexico, Pennsylvania, and Rhode Island.

119. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939), 9 U.L.A. 245 (1957).

> A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of

fault provision stands as a serious obstacle to pre-trial settlement of tort claims against joint tortfeasors. This subject, which many consider to be the most objectionable feature of the entire 1939 Uniform Act, will be given a comprehensive treatment in the section below discussing the pro rata reduction clause.[120]

III. RELEASES—SETTLEMENTS

A. Effect of Release on Injured Person's Claim

1. *Releases and covenants not to sue*

The adoption of the 1939 Uniform Act destroys the common law rule in Wyoming that a release of one of two or more tortfeasors automatically releases the others.[121] This rule was premised on the theory that the plaintiff is entitled to but one satisfaction of his claim,[122] and that his execution of an unqualified release implies that he has received it.[123] Only when the release expressly reserved the right to pursue other tortfeasors was the plaintiff entitled to hold more than one tortfeasor liable for his injuries.[124] In that event the instrument was technically not a release but a covenent not to sue.[125]

The distinction has now been rendered meaningless. The new Wyoming act provides that a release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides.[126] Ostensibly this provision was intended by the draftsmen of the 1939 Uniform Act to rectify the problem faced by an injured person seeking settlement with one tortfeasor, but fearful of forfeiting his cause of action

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the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.

Identical language is found in the Wyoming Act. WYO. STAT. § 1-7.6(a)(i)(ii) (Supp. 1973).

120. *See* text accompanying notes 153 to 161.
121. Day v. Smith, 46 Wyo. 515, 30 P.2d 786 (1934); Natrona Power Co. v. Clark, 31 Wyo. 284, 225 P. 586 (1924); and Casper National Bank v. Jones, 79 Wyo. 38, 329 P.2d 1077 (1958).
122. Natrona Power Co. v. Clark, 31 Wyo. 284, 225 P. 586, 588 (1924).
123. *Id.*
124. Casper National Bank v. Jones, 79 Wyo. 38, 329 P.2d 1077, 1081 (1958).
125. *Id.*
126. WYO. STAT. § 1-7.5 (Supp. 1973); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1939), 9 U.L.A. 242 (1957).

against the non-settling defendants.[127] But as the draftsmen themselves point out,[128] although this provision changes the technical rule as to the effect of a release in states such as Wyoming, it makes no practical difference, since any plaintiff wishing to hold other joint tortfeasors would insist on a covenant not to sue instead of a release.

2. *Reduction of claims against other tortfeasors*

Although a release does not discharge other tortfeasors, it will, under the Wyoming Act, reduce the claim against the other tortfeasors, either (1) in the amount of the consideration paid for the release, or (2) in any amount or proportion by which the release provides that the total claim should be reduced, if greater than the consideration paid.[129] If the release provides for a pro rata reduction clause,[130] for example, the claim against another tortfeasor, assuming equal negligence, is automatically halved. This is illustrated below:

Action:	Suit by P against D2, after P executes a release with D1 for $5000
Damages:	$25,000 to P
Result:	P recovers only $12,500 from D2

Had there been no pro rata reduction clause in the example above, plaintiff's claim would have been reduced by the consideration paid for the release ($5000), so that plaintiff's total recovery against D2 would have been $20,000.

A release pursuant to this, section 4 of the 1939 Uniform Act, also gives the settling tortfeasor the right to credit in a contribution proceeding against him the amount by which the injured person's claim is reduced by the settlement,[131] as long as there is no pro rata reduction clause contained in

127. Comment, *Contribution Among Tortfeasors in Nevada*, 23 HASTINGS L. J. 1612, 1614 (1972).

128. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, Commissioners' Note (1939), 9 U.L.A. 242-43 (1957).

129. WYO. STAT. § 1-7.5 (Supp. 1973); UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 4 (1939), 9 U.L.A. 242 (1957).

130. *See* text accompanying notes 153 to 161.

131. UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 4 Commissioners' Note (1939), 9 U.L.A. 242-243 (1957).

the release.[132] Thus, in the example above, where P recovers $20,000 from D2, D1 need only contribute $7500. The total liability of both D1 and D2 is $25,000, and since D1 has already satisfied $5000 of his $12,500 share of the burden by settling with P, his payment of $7500 to D2 distributed the common liability evenly among both.

Several cases have been concerned with the method by which the settlement figure should be taken into account in fixing the plaintiff's damages. One view, adopted by the Arkansas courts,[133] is that the jury should be informed of the release and the settlement, since they need be aware of all circumstances involving damages, including the value placed on them by the parties making the settlement, to arrive at a just verdict. It is then assumed that the settlement of liability with one of the tortfeasors will be reflected in the jury's verdict against the other, and that defendant cannot then request the court to reduce his verdict again.[134] The other view, and cearly the better one,[135] is that a jury should not be informed of a settlement with a third party defendant in the first instance, since that fact would only tend to mislead them in their deliberations, and could be construed incorrectly as an admission of liability on the part of the settling party. For these reasons, the court in *Brooks v. Daley*[136] concluded that allowing a jury to apply a prior payment in reduction of the verdict against a joint tortfeasor who had settled with the plaintiff is far less satisfactory than having the court make the necessary reduction after trial. This view seems to be in accordance with the rule adopted in Wyoming.[137]

132. Under the Wyoming Act, if the release contains a pro rata reduction clause, *inter alia*, a release of one tortfeasor by the injured person relieves that tortfeasor from liability to make contribution. WYO. STAT. § 1-7.6 (Supp. 1973); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939), 9 U.L.A. 245 (1957).

133. Giem v. Williams, 215 Ark. 705, 222 S.W.2d 800 (1949).

134. *Id.* at 804.

135. Comment, *An Analysis of the Pennsylvania Uniform Contribution Among Tortfeasors Act of 1951*, 13 U. PITT. L. REV. 390, 394-95 (1952).

136. 242 Md. 185, 218 A.2d 184 (1966).

137. Carpenter & Carpenter v. Kingham, 56 Wyo. 314, 109 P.2d 463 (1941), *modified and rehearing denied*, 56 Wyo. 314, 110 P.2d 824 (1941). "A compromise entered into with third persons is not admissible in evidence except under exceptional circumstances." *Id.* at 472.

3. *Settlements that exceed the non-settling tortfeasor's pro rata share*

The provision discussed above, section 4 of the 1939 Uniform Act, is not a particularly controversial one. Indeed, it is one of the few provisions carried over to the 1955 Uniform Act intact.[138] The major difficulty with it, and one that points more than anything else to the poor draftsmanship of the 1939 act, concerned a situation where a settling tortfeasor settles with the plaintiff for a sum in excess of his pro rata share of damages, which is ultimately determined by the jury in the plaintiff's action against the second tortfeasor. The question then arises whether the non-settling tortfeasor can reduce his liability by whatever the settling tortfeasor paid in excess of his pro rata share of damages. The cases hold,[139] though not without dissent,[140] that the plain language of section 4 commands such a result. Hence, the non-settling tortfeasor is allowed to assert, either as a partial or complete defense,[141] any sum in which a settling tortfeasor pays the plaintiff in excess of one-half of the jury's eventual verdict (assuming both tortfeasors are equally negligent). The following example illustrates this point.

Action:	Suit by P against D2, after P settles with D1 for $5000
Damages:	$8000 to P
Result:	D2 is liable for $3000 rather than his ordinary $4000 pro rata share, because $5000 of the common liability has already been extinguished by settlement.

The conflict in this example is between giving the plaintiff a windfall of $1000 by holding the non-settling tortfeasor strictly liable for his pro rata share of damages, or reducing his liability by allowing him to subtract from his pro rata share of the liability the amount by which the settling tort-

138. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(a) (1955), 9 U.L.A. 132 (Supp. 1967).
139. Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730 (1956); Weinstein v. Stryker, 267 F. Supp. 34 (E.D. Pa. 1967); and Raughley v. Delaware Coach Co., 47 Del. 343, 91 A.2d 245 (1952).
140. Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730, 734 (1956).
141. Raughley v. Delaware Coach Co., 47 Del. 343, 91 A.2d 245 (1952).

feasor's payment exceeds his pro rata share of damages.[142] The latter result, as stated above, is the majority view, in spite of its criticism that it discourages pre-trial settlement.[143]

There is still one remaining issue. In the example above the settling tortfeasor has discharged $5000 of an $8000 judgment. Since he is a joint tortfeasor within the meaning of the 1939 Uniform Act,[144] he shares a common liability with D2,[145] and he has by payment discharged more than his pro rata share of the damages,[146] section 2(2) of the 1939 act (identical to the Wyoming provision[147]) grants him a right of contribution against D2 for $1000 which, if paid, would distribute the $8000 burden evenly between both. But the following provision of the 1939 act just as clearly denies the settling tortfeasor in this example the same right of contribution, because the settlement he executed did not extinguish the common liability of all other tortfeasors. Section 2(3) of the 1939 Uniform Act provides:

> A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.[148]

142. These two alternatives are even more vividly illustrated in *Weinstein v. Stryker*, 267 F. Supp. 34 (E.D. Pa. 1967), where the court held that since a plaintiff motorist had already received from one of the joint tortfeasors a sum of $5000 in return for execution of a joint tortfeasor's release, the non-settling tortfeasor was entitled to have the judgment against him of $1650 marked satisfied, and in *Raughley v. Delaware Coach Co.*, 47 Del. 343, 91 A.2d 245 (1952), where the court held that a release of a bus company and its driver for $20,000 would be a complete defense to a railroad company if the jury found that the passenger was not entitled to a sum greater than $20,000.

143. Justice Musmanno has remarked in his dissenting opinion in *Daugherty v. Hershberger*, 386 Pa. 367, 126 A.2d 730, 735 (1956).

> In the future when two tortfeasors are involved, each tortfeasor will prefer not to settle because there is always the possibility that if his joint tortfeasor pays more than one-half of the eventual jury's verdict, the non-settling tortfeasor will be relieved of paying a portion or all of his one-half liability.

144. WYO. STAT. § 1-7.3(d) (Supp. 1973); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1939), 9 U.L.A. 233 (1957).

145. WYO. STAT. § 1-7.3(a) (Supp. 1973); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(2) (1939), 9 U.L.A. 235 (1957).

146. *Id.*

147. WYO. STAT. § 1-7.3(b) (Supp. 1973).

148. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(3) (1939), 9 U.L.A. 235 (1957). This provision was intended to apply in a situation where the settling tortfeasor has purchased only his immunity from suit, taking a release from the injured person, so that the other tortfeasors are still

With one provision granting the right to contribution, and another taking it away, the tendency of the courts in this situation not too surprisingly has been to ignore the quoted provision above and allow the settling tortfeasor to recover his $1000 in contribution from the non-settling tortfeasor.[149]

B. Effect of Release on Non-Settling Tortfeasor's Right of Contribution

1. *Elements of settling tortfeasor's immunity from subsequent contribution claims*

Of major pecuniary importance to the settling tortfeasor is the question of whether his release from liability protects him from the contribution claims of other tortfeasors, in the event he settles for a sum less than his pro rata share of damages as eventually determined by a jury. Section 5 of the 1939 Uniform Act relieves the settling tortfeasor from subsequent contribution claims, provided he meets two requirements: (1) he must have executed his release before another tortfeasor discharges a disproportionate share of the common liability; (2) he must insist on a release that provides for a reduction of the plaintiff's damages to the extent of his pro rata share of liability.[150] The Wyoming act adds a third requirement, that the issue of proportionate fault be litigated between joint tortfeasors in the original action.[151]

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liable to the injured person. In such a case there is no reason to permit contribution since the settling tortfeasor has removed no common burden of more than one tortfeasor. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(3) Commissioners' Note (1939), 9 U.L.A. 236 (1957).

149. Mong v. Hershberger, 200 Pa. Super. 68, 186 A.2d 427, 429 (1963).
Section 2 and section 4 recognize the right to contribution when one pays more than his share; and although the third provision of section 2, when given a strict interpretation might lead to the conclusion that in cases of settlement, unless there is a complete extinguishment of the claims against the other tortfeasor, the right of contribution does not exist. We do not believe the Legislature intended such a strict meaning.
. . . .
Therefore, we have no difficulty in concluding that the releases secured by Mong satisified the third provision of Section 2 as to all the claims, regardless of whether they were completely or only partially extinguished. . . .

150. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939), 9 U.L.A. 245 (1957); WYO. STAT. § 1-7.6(a)(i)(ii) (Supp. 1973).

151. WYO. STAT. § 1-7.6(a)(iii) (Supp. 1973).

a. Release must be executed before judgment has been discharged

The first requirement, that a tortfeasor must execute his release before another tortfeasor pays more than his pro rata share of damages, is self-explanatory. A different rule would provide no incentive for settlement, and would allow a malingering tortfeasor to stand by while his co-wrongdoers discharge all or part of the common burden, with the assurance that he would later be immune from a non-settling tortfeasor's right of contribution. Absent this provision, the ground for settlement would be fertile for collusion and favoritism between the setting tortfeasor and the plaintiff.[152]

b. Release must contain a pro rata reduction clause

Before a release under the new contribution statute will relieve him from liability for contribution to other joint tortfeasors, the settling tortfeasor must, among other things, insist that it contain a pro rata reduction clause.[153] The effect of the clause is to reduce any verdict against non-settling tortfeasors by the settling tortfeasor's pro rata share, regardless of whether the consideration received for the release is the equivalent of that share. If D1 and D2 are equally at fault and cause $100,000 damage to P, and P settles with D1 for $10,000, the liability of D2 would only be $50,000. The settlement with D1 automatically reduces the amount of damages by D1's pro rata share of $50,000.

When combined with the doctrine of relative degrees of fault, as discussed above, the pro rata reduction clause has the effect of making pre-trial settlement of tort claims difficult for either party. The reason is that before the plaintiff undertakes a settlement by executing a release with a pro rata reduction clause, he will of necessity be faced with a speculative inquiry into the relative degrees of fault of both tortfeasors. He may, for example, settle with D1

152. UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 5 Commissioners' Note (1939), 9 U.L.A. 245 (1957).

153. This provision was included in the 1939 Uniform Act so that an injured person, acting in collusion with or out of sympathy for one of the tortfeasors, cannot relieve him from the obligation to contribute to the other tortfeasors by releasing him. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 Commissioners' Note (1939), 9 U.L.A. 245 (1957).

for $10,000 on the assumption that D1 caused only 10% of the damage. In that event, if the damages to P were $100,000, he could still recover 90% of that sum from D2, because P's recovery is reduced only by D1's pro rata share of damages, which if he were 10% at fault would be $10,000. But suppose that P underestimates the relative degree of D1's fault and at D2's trial a jury finds that D1 and D2 were equally to blame. Then P can recover $50,000 only from D2, because, as seen above, the settlement with D1 automatically reduces the amount of damages by D1's pro rata share of $50,000. The plaintiff, by bargaining away his right to the other $50,000 by executing a release with D1 for only $10,000, loses $40,000 by miscalculating D1's negligence.

Should the plaintiff overestimate the degree of the settling tortfeasor's negligence, on the other hand, so that, rather than being found 10% negligent, he is not found negligent at all or only nominally so, it doesn't follow that plaintiff then becomes entitled to a full judgment from D2, now 100% at fault, in addition to the $10,000 he hes received in settlement from D1. A plaintiff will not be allowed to recover more by executing a release than he would have been able to without it. He can do no better in this instance than recover the unsatisfied portion of his damages from a nonsettling tortfeasor.[154]

The effect of the pro rata reduction clause on the plaintiff's willingness to settle may thus be a profound one.[155] It is quite understandable that a plaintiff would be hesitant to execute a settlement with a pro rata reduction clause if he knows that the reduction of his damages will depend not on his estimation of the settling tortfeasor's negligence, but rather on a later determination of his relative degree of fault by a jury. If he underestimates the fault of the settling tortfeasor, he may well recover less by having settled than if he had permitted the case against both defendants to proceed to trial. It is not likely either that a plaintiff will persuade

154. PROSSER, TORTS § 48 at 299-300 (4th ed. 1971); Comment, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, 24 MAINE L. REV. 243, 257 (1972); and Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730, 737 (1956).

155. Comment, *Contribution Among Tortfeasors in Nevada*, 23 HASTINGS L. J. 1612, 1625-27 (1972).

a settling tortfeasor to execute a release without a pro rata reduction clause, because without it, the settling tortfeasor is liable for future contribution claims from tortfeasors brought to judgment to the same extent as if he had never made the settlement. The inevitable but unfortunate result under these two provisions of the new contribution statute will be fewer settlements in multiple defendant cases.[156]

The likelihood that neither party will settle the claim involved under the pro rata reduction clause and relative degree of fault provision was a major factor in the decision of the Commissioners on Uniform State Laws to withdraw the 1939 act for complete revision.[157] A reconsideration of the pro rata reduction clause led the draftsmen of the 1955 act to conclude that it had accomplished nothing in preventing collusion,[158] which was its original purpose,[159] and they proceeded to abolish it, on the assumption that "(i)t seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit."[160] Accordingly, the 1955 act went the whole length, and now provides that a good faith release discharges the tortfeasor outright from all liability for contribution.[161]

156. Whether this justifies a return to the common law rule of equal contribution has been questioned in *Gomes v. Brodhurst,* 394 F.2d 465, 468-69 (3rd Cir. 1967).

157. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b), Commissioners' Note (1939), 9 U.L.A. 133 (Supp. 1967).
> Some reports go so far as to say that the 1939 Act has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say they can no longer settle cases with one tortfeasor. Such reports have reached other states, and have been responsible for a considerable part of the opposition to the 1939 Act. The New York Law Revision Commission has introduced a number of bills for contribution acts, and this objection has been the chief factor in defeating them.

158. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) Commissioners' Note (1955); 9 U.L.A. 132 (Supp. 1967).
> Reports from the state where the Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three- party cases two parties join hands against the third, and this occurs even when the case goes to trial against both defendants. "Gentlemen's agreements" are still made among lawyers, and the formal release is not at all essential to them. If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so.

159. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 Commissioners' Note (1939); 9 U.L.A. 245 (1957).

160. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) Commissioners' Note (1955), 9 U.L.A. 133 (Supp. 1967).

161. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) (1955), 9 U.L.A. 132 (Supp. 1967).

c. Proportionate fault must be litigated in same action

The third requirement, found only in the Idaho[162] and Wyoming[163] statutes, appears to be misplaced. It requires the tortfeasors to litigate the issue of proportionate fault in the original action as a prerequisite to the settling tortfeasor's claim of immunity from subsequent contribution actions.

In the first place, the settling tortfeasor has no interest whatever in litigating his proportionate degree of fault. Having been released from all liability it matters little to him if he is later found to be responsible for all or only part of the damage. Neither does the non-settling tortfeasor have an interest in the settling tortfeasor's degree of fault, except insofar as it increases or decreases his own share of the burden, becaue he cannot change the terms of the release. The non-settling tortfeasor, moreover, has been protected from excessive liability by claiming full benefit of the pro rata reduction clause contained in the settling tortfeasor's release, which reduces his liability by the settling tortfeasor's pro rata share of damages. To say now that the non-settling tortfeasor may have a right of contribution against the tortfeasor who settled, simply because the issue of proportionate fault was not litigated in the same action, is surely not what the Wyoming Legislature had in mind when it passed the statute, and certainly is not what the draftsmen of the 1939 act intended.[164]

In the second place, the requirement that proportionate fault be litigated in the original action is mooted by practical consideration. When one tortfeasor has settled his liability, and another is brought to trial, the issue of proportionate fault must always be litigated before the non-settling tortfeasor's share of damages can be computed. As a practical matter, without some assignment of fault, there is no way of knowing what the non-settling tortfeasor's liability is. If P's damages are $10,000, for example, and he executes a release for $1000 with D1 containing a pro rata reduction

162. IDAHO CODE § 6-806 (Supp. 1973).
163. WYO. STAT. § 1-7.6(a)(iii) (Supp. 1973).
164. There is nothing in the entire 1939 Uniform Act that suggests that the settling tortfeasor's immunity from future contribution claims should be so restricted.

clause, D2's damages are impossible to calculate without reference to his degree of fault. If D2 is only responsible for 10% of the damages, his liability will be reduced by 90%. If, on the other hand, his relative degree of fault is 50%, he incurs a liability of $5000. His direct pecuniary interest in litigating degrees of fault insures that D2 will always raise the issue, for without an assignment of proportionate fault D2 will remain severally liable for the entire judgment.

The real purpose of this provision, according to the 1939 Uniform Act, is to prevent a multiplicity of lawsuits. The comparable provision in the Uniform Act is not found in section 5, as it is in the Wyoming statute, but in an optional third party practice section, which provides:

> As among joint tortfeasors against whom a judgment has been entered in a single action, the provisions (of the relative degree of fault section) apply only if the issue of proportionate fault is litigated between them by cross-complaint in that action.[165]

The draftsmen of the 1939 act intended this provision "to compel litigation of the issue of apportionment during the trial of the other issues concerning contribution."[166] The purpose, therefore, is not to destroy a settling tortfeasor's immunity against subsequent contribution claims, but simply to facilitate judicial economy by preventing the parties from re-opening the issue of proportionate fault at some later time.

2. *Joinder rights of non-settling tortfeasors*

An important issue raised by the 1939 act is the right of the non-settling tortfeasor to join the settling tortfeasor as a third party defendant. It is discussed here because it is raised most often under the section 5 pro rata reduction clause, though conceivably it could arise where a release was executed without such a clause.[167] The case of *Davis v.*

165. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 7 (1939), 9 U.L.A. 247 (1957).

166. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 7 Commissioners' Note (1939), 9 U.L.A. 249 (1957).

167. Assuming that a tortfeasor would execute a release without insisting on a pro rata reduction clause, the non-settling tortfeasor may well want to join the settling tortfeasor to have his damages reduced by the consideration the settling tortfeasor paid for the release. This he could do by proving that the settling tortfeasor was a joint tortfeasor, and originally liable to the plaintiff.

Miller[168] is dispositive of the question and there appears to be no authority to the contrary.[169] In *Davis* the court held that before a pro rata reduction of the plaintiff's damages could be requested by the non-settling defendant pursuant to the settling tortfeasor's release, the settling tortfeasor must be shown to be a joint tortfeasor, which requires his joinder. In other words, if the settling defendant is not a joint tortfeasor, the release given him by the plaintiff cannot inure to the non-settling tortfeasor's benefit. In *Davis* the rationale was as follows:

> Therefore, although (the non-settling tortfeasor) cannot recover contribution from the additional defendant, he does have an extremely valable right in retaining her in the case, because, if the jury should find her to be a joint tortfeasor, his liability to plaintiffs would be cut in half. Her continuance in the case is therefore necessary, even though no recovery can be had against her either by plaintiffs or by defendant, in order to determine the amount of damages that defendant may be obliged to pay plaintiffs in the light of the situation created by their releases of the additional defendant's liability.[170]

It has been suggested that this result places an onerous burden on non-settling defendants, since the non-settling tortfeasor becomes subject to the plaintiff's entire claim for damages in the event he fails to prove that the released defendant was a joint tortfeasor, even though the plaintiff considered him as such when the release was executed with the first tortfeasor.[171]

CONCLUSION

The objectives of this article were, first of all, to acquaint the practitioner with the operation of the new contribution statute and secondly to pinpoint with some precision its defects and weaknesses. Each is summarized below.

168. 385 Pa. 348, 123 A.2d 422 (1956).
169. One of the rare cases that has considered the problem is *Swigert v. Welk*, 213 Md. 613, 133 A.2d 428 (1957), which arrived at the same conclusion as the *Davis* court.
170. Davis v. Miller, 385 Pa. 348, 123 A.2d 422, 424 (1956).
171. Comment, *Contribution Among Tortfeasors in Nevada*, 23 HASTINGS L. J. 1612, 1628 (1972).

A. Operation of the Wyoming Act

The right of contribution may be exercised by any tortfeasor jointly or severally liable to the injured party who discharges all or more than his pro rata share of the liability, even though the tortfeasor against whom contribution is sought has never been brought to judgment. The scope of the Wyoming act is not necessarily restricted to those who are guilty of simple negligence, but the right of contribution may not be asserted by one who also has an absolute right to be indemnified for his loss.

A tortfeasor who is immune to a direct action by the plaintiff, generally speaking, may assert the same defense in a later contribution action, under the requirement that contribution rights apply only to those who have some original or common liability to the plaintiff. Other courts have held that a special defense against the plaintiff does not preclude the later assertion of contribution rights as long as the policy underlying the special defense is not violated by permitting an action for contribution. Particuarly is this so where the special defense is family immunity.

If the court determines from the evidence that there is such a disproportion of fault among tortfeasors as to make an equal distribution of liability inequitable, it may instruct the jury, by means of a special verdict, to apportion by percentage the relative degree of fault of each tortfeasor. Where the negligence of the plaintiff is also at issue, the doctrine of comparative negligence is invoked, and the plaintiff can recover a joint and several judgment from any defendant whose negligence is not equaled or exceeded by his own. Special problems may arise where a defendant is dismissed because his negligence does not exceed that of the plaintiff. The question then becomes one of who is to bear the burden of the dismissed defendant's negligence in a contribution action.

The adoption of contribution among joint tortfeasors destroys the traditional distinction between releases and covenants not to sue in Wyoming and provides that a release executed by the plaintiff does not discharge other tortfeas-

ors from liability unless the release so provides. The tortfeasor who discharges the judgment, however, is entitled to reduce his liability by either the amount of consideration paid for the release or in any amount by which the release provides that the total claim shall be reduced, as long as such amount is greater than the consideration paid for the release. A release under the new contribution statute also relieves the settling tortfeasor from liability to make contribution to another tortfeasor, as long as it is given before that tortfeasor's contribution rights have accrued, and as long as it contains a clause that reduces the plaintiff's verdict by the pro rata share of the settling tortfeasor's liability, as later determined by a jury.

B. Suggested Revisions

Experience in other jurisdictions that have adopted the 1939 Uniform Contribution Among Tortfeasors Act has exposed several defects and weaknesses in the Act that need be cured before it will operate smoothly and effectively.

First, the most serious defect in the Wyoming act is its unfavorable impact on the settlement of tort claims. By requiring that a release contain a pro rata reduction clause as a prerequisite to a settling tortfeasor's immunity from subsequent contribution claims, the 1939 act, while intending to prevent fraud and collusion, has actually forced a plaintiff amenable to settlement to speculate as to the eventual assignment of fault by a jury, since the plaintiff's verdict will be reduced pursuant to the cause, not by his estimation of the settling tortfeasor's degree of fault, but by that of a jury in a later action. To provide a more favorable climate for settlement of tort claims, and one unhindered by the operative principles of contribution, the Wyoming act should be amended to provide that a release of one tortfeasor discharges him absolutely from all subsequent contribution claims of other tortfeasors, especially in light of evidence that the pro rata reduction clause has done little to prevent fraud and collusion, which was its original and only purpose. The deletion of the pro rata reduction clause would have no effect on the doctrine of relative degrees of fault.

Secondly, the provision that forbids a tortfeasor who settles his liability from seeking contribution because he hasn't extinguished the common liability of all others who may be liable to the plaintiff[172] should be amended to allow contribution when it turns out in a later jury finding that the settling tortfeasor discharged by settlement more than his pro rata share of the burden. There is no reason why a settling tortfeasor should be treated differently than one brought to trial, if both have in fact discharged more than their proportionate share of the damages.

Third, the provision that requires, as a prerequisite to a settling tortfeasor's immunity from subsequent contribution claims, the issue of proportionate fault to be litigated in the original action brought by the plaintiff should be deleted entirely from that section, where it clearly doesn't belong, and indeed where it makes no sense.[173] The principle embodied by this provision is a sound one, insofar as it requires the defendants to litigate in one action the issue of proportionate fault before a tortfeasor whose negligence is less than that of his co-tortfeasors may be heard to complain. But it does not serve this purpose as an element to a settling tortfeasor's contribution immunity, and should be made the topic of another section.

Fourth, there should be some limitation on the length of time within which a tortfeasor has to bring a contribution action. In Wyoming the general four-year statute of limitations for personal injury actions, if applied to contributive actions, is much too long a time in which to subject a tortfeasor to a potential contribution suit, especially if it is tacked on to the same four year limitation within which the plaintiff had to bring the action in the first instance. The time within which a tortfeasor has to seek contribution, for this reason, should be established for contributive actions.

Fifth, the legislature should declare its policy on the question of whether a special defense may be asserted by a tortfeasor in a subsequent contribution action. Whenever a

172. WYO. STAT. § 1-7.3(b) (Supp. 1973); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(3) (1939), 9 U.L.A. 235 (1957).
173. WYO. STAT. § 1-7.6(a)(iii) (Supp. 1973).

party immune to a direct action by the plaintiff seeks to assert the same immunity against a tortfeasor seeking contribution, the policy of contribution will necessarily conflict with the policy of immunity arising from the specal defense. Declaring the prominence of policy over the other would be a great aid to the courts in resolving these questions as they arise.

Finally, the legislature should define more precisely the scope of the new contribution statute, especially as regards its application to intentional torts, and a policy on the subrogation rights of insurance companies in a contribution action should likewise be declared, based on a determination of the right of contribution on insurance rates and loss distribution.

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