

# Michigan Law Review

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Volume 56 | Issue 5

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1958

## Contribution - Joint Liability - Claimant Not a Volunteer But Not Subject to a Common Liability

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### Recommended Citation

Melvyn I. Mozinski, *Contribution - Joint Liability - Claimant Not a Volunteer But Not Subject to a Common Liability*, 56 MICH. L. REV. 809 (1958).

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CONTRIBUTION—JOINT LIABILITY—CLAIMANT NOT A VOLUNTEER BUT NOT SUBJECT TO A COMMON LIABILITY—A passenger was injured while riding in an automobile driven by *D* when it collided with a car driven by *C*. In the passenger's action for damages against *C*, *C* cross-complained against *D*. On the day of trial *C* settled with the passenger with the knowledge and approval of *D*. In the ensuing suit for contribution both *C* and *D* denied negligence; the jury found that *D* was negligent and that *C* was in no way at fault. Since there was no common liability shown, *C*'s claim for contribution was dismissed. *C* moved to have the court find him negligent as a matter of law, but the motion was denied. On appeal, *held*, reversed. While contribution is a right generally limited to persons under a mutual obligation, it is appropriately applied to one not under a common liability but who had not acted officiously in discharging another's obligation.<sup>1</sup> *Rusch v. Korth*, (Wis. 1957) 86 N.W. (2d) 464.

In the classical conception, contribution is regarded as an inchoate equity, arising out of the relationship of joint obligors, which ripens into a cause of action when one party expends more than his ratable share of a common burden.<sup>2</sup> Most frequently contribution is sought between sureties on a common obligation, but it has found expression in a myriad of analogous situations.<sup>3</sup> In cases of joint-tort liability, absent statutory sanc-

<sup>1</sup> Two justices concurred on the ground that *C* was entitled to his motion to be found negligent as a matter of law.

<sup>2</sup> *Wayland v. Tucker*, 4 Gratt. (45 Va.) 267 (1848); *Western Casualty & S. Co. v. Milwaukee G. C. Co.*, 213 Wis. 302, 251 N.W. 491 (1933).

<sup>3</sup> E.g., *In re Real Estate of Cochran*, 31 Del. Ch. 545, 66 A. (2d) 497 (1949), for taxes on commonly owned property; *Awtry v. Hilman*, 193 Misc. 693, 85 N.Y.S. (2d) 146 (1948), for partnership obligations; *Lex v. Selway Steel Corp.*, 203 Iowa 792, 206 N.W. 586 (1925), for statutory debt of corporate shareholders.

tion,<sup>4</sup> American courts,<sup>5</sup> on the principle which refuses relief to a wrongdoer, deny contribution between tort-feasors regardless of the character of their acts.<sup>6</sup> This generalization has been the subject of innumerable exceptions<sup>7</sup> and it is thought that as jurisprudence becomes emancipated from the notion that liability in tort is largely penal in character, the principle of contribution may be extended rather than restricted.<sup>8</sup> In a few jurisdictions, including Wisconsin, contribution among unintentional tort-feasors has been allowed without the aid of statute.<sup>9</sup>

In the principal case the claimant, having fully paid the claim, compromised in recognition of a possible adverse judgment, was granted contribution although ultimately found not to have been under a common liability. Deviation from traditional limitations was justified on the reasoning that if a joint wrongdoer is entitled to contribution, surely one who is absolved of liability should be entitled to like relief from one who ought in fairness to pay the whole claim.<sup>10</sup> To determine whether common liability is fundamental to contribution, it is necessary to inquire into the two theories underlying the doctrine. The popular analysis is founded upon the early English maxims "equality is equity" and "equity delighteth in equality."<sup>11</sup> Jurisprudence based upon such succinct axioms inevitably furnishes an imperfect guide for decision. Yet, since joint liability is an inherent element in the necessary "equality," under this analysis contribu-

<sup>4</sup> See Uniform Contribution Among Tortfeasors Act, 9 U.L.A. 233 (1957). For a collection of state statutes abrogating in whole or in part the common law rule against contribution, see 1 HARPER AND JAMES, *THE LAW OF TORTS* 719 (1956). In *City of Charlotte v. Cole*, 223 N.C. 106, 25 S.E. (2d) 407 (1943), noted in 22 N.C. L. REV. 167 (1944), the city, after paying damages to an injured pedestrian, brought suit for contribution under the state's Joint Tort-feasors Liability statute, N.C. Gen. Stat. (1953) §1-240. *Held*, since the stake that caused the injury was not on its property the city was free from fault. The city's mistaken belief that it was liable is insufficient to invoke the statute which requires a common liability.

<sup>5</sup> In England the rule was abolished by the Law Reform Act, 25-26 Geo. 5, c. 30, §6(1)(c) (1935).

<sup>6</sup> E.g., *Adams v. White Bus Line*, 184 Cal. 710, 195 P. 389 (1921); *Detroit Ry. Co. v. Boomer*, 194 Mich. 52, 160 N.W. 542 (1916). *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799), is generally credited with originating the rule, but since it involved intentional tort-feasors it does not support the broad proposition for which it is so frequently cited in American cases.

<sup>7</sup> 45 HARV. L. REV. 349 (1931).

<sup>8</sup> 1 HARPER AND JAMES, *THE LAW OF TORTS* 717 (1956).

<sup>9</sup> *Underwriters at Lloyds v. Smith*, 166 Minn. 388, 208 N.W. 13 (1926); *Davis v. Broad St. Garage*, 191 Tenn. 320, 232 S.W. (2d) 355 (1950); *Ellis v. Chicago and N. W. R. Co.*, 167 Wis. 392, 167 N.W. 1048 (1918).

<sup>10</sup> Principal case at 468.

<sup>11</sup> *Deering v. The Earl of Winchelsea*, 2 Bos. & Pul. 270, 126 Eng. Rep. 1276 (1787); *Stirling v. Forrester*, 3 Blyth. 575, 4 Eng. Rep. 712 (1821). See "The Law of Contribution," 8 AM. L. REC. (n.s.) 449 to 450 (1869): "Contribution . . . in the Roman Law . . . existed in but a crude and imperfect form. . . . The English courts of equity in adopting this remedy . . . modified and enlarged it, basing it, not upon the narrow ground of subrogation, but upon the broadest principles of natural equity. . . ."

tion in the principal case should have been denied. A more satisfactory approach is to analyze contribution as a tangent of the law of restitution. The term "unjust-enrichment" seldom appears in the cases, yet it is obvious that the shape which the law of contribution has taken can be explained in terms of restitution.<sup>12</sup> Clearly, where a non-volunteer discharges the liability of another, the latter is unjustly enriched and should make restitution. Under this analysis, the element of common liability is of diminished importance, merely providing conclusive proof that the claimant has not acted officiously.<sup>13</sup> Accordingly, where a party absolved of liability seeks contribution, but proves by other evidence that he was not a volunteer, there is no reason to deny recovery. While identical results will generally be reached under either theory of contribution, the difference in theory is saliently illustrated in cases where the party from whom contribution is sought has a defense good against the party paid by the claimant. In these cases there is no unanimity of decision.<sup>14</sup> Under the unjust-enrichment analysis, contribution must be denied upon the ground that benefit has not been conferred upon the party from whom contribution is sought. The fact that this person has a defense would seem irrelevant where ideas of basic fairness require that wrongdoers share the financial burden of their wrong. As an original consideration, the principal case accomplishes, at best, only partial relief under facts where the claimant ought to be fully reimbursed. Through either restitution<sup>15</sup> or subrogation,<sup>16</sup> both equitable remedies broad enough to include almost every instance where a non-volunteer pays a debt for which another is liable, there could be a complete adjustment between the parties with the ultimate burden falling upon the party who is at fault.<sup>17</sup> While on the facts of the principal case it

<sup>12</sup> ". . . as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim, '*Qui sentit commodum, sentire debet et onus*'" (He who receives the advantage ought also to suffer the burden). 1 STORY, EQUITY JURISPRUDENCE 505 (1886); RESTITUTION RESTATEMENT §81 (1937).

<sup>13</sup> For a discussion of who is a volunteer, see Hope, "Officiousness," 15 CORN. L. Q. 25 (1929); 5 POMEROY, EQUITY JURISPRUDENCE, 2d ed., 5195 (1919).

<sup>14</sup> See Zutter v. O'Connell, 200 Wis. 601, 229 N.W. 74 (1930), where contribution was denied on the ground that defendant was the injured party's father and a child could not sue his parent. *Accord*, Kennedy v. Camp, 14 N.J. 390, 102 A. (2d) 595 (1954), involving a husband and his spouse. But see Fisher v. Diehl, 156 Pa. Super. 476, 40 A. (2d) 912 (1945), where defendant was the injured person's husband and contribution was allowed although the wife could not sue her husband directly. In Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E. (2d) 736 (1943), contribution was allowed although the statute of limitations barred an action against this wrongdoer.

<sup>15</sup> RESTITUTION RESTATEMENT §71(2) (1937): "A person who has paid the debt of another in response to the threat of civil proceedings by a third person . . . is entitled to restitution from the other if the payor acted to avoid trouble and expense."

<sup>16</sup> New York Casualty Co. v. Sinclair Refining Co., (10th Cir. 1939) 108 F. (2d) 65; Yonack v. Interstate Securities Co., (5th Cir. 1954) 217 F. (2d) 649. See also McCLINTOCK, EQUITY, 2d ed., 210 (1948); 22 N.C. L. REV. 167 (1944).

<sup>17</sup> See Avey v. American Surety Co. of New York, 146 Misc. 224, 260 N.Y.S. 828

would have been paradoxical to deny the claimant partial reimbursement on the grounds that he was rightfully entitled to full compensation, the decision should be strictly limited to its anomalous factual background. The court's cavalier treatment of existing remedial limitations should be discouraged where more complete and appropriate remedies are available.

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(1930), where a tax collector misappropriated funds, but the town accused plaintiff of the theft. After indictment, and also threat of civil suit, plaintiff satisfied the deficiency. *Held*, plaintiff was entitled to be subrogated to the rights of the town on a bond, to which defendant was surety, given the town for the faithful discharge of the collector's duties.