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CONTRIBUTION AND INDEMNITY AMONG TORTFEASORS IN MINNESOTA

Contribution and indemnity may be defined as principles which permit one who is liable to another to shift a part or the whole of his liability to a third person. Because many aspects of the law of contribution and indemnity are identical, it is possible to treat much of these subjects jointly; but fundamentally contribution and indemnity have different bases.[1] Although it developed in Law rather than Equity, contribution has been said to have been founded on the maxim that "equity is equality";[2] and thus the party who seeks to recover contribution endeavors to shift a part, rather than the whole, of his liability to another. When indemnity is recovered, however, the entire burden of liability is shifted. The party who can recover indemnity is usually one whose liability to the original plaintiff was merely nominal as compared with the liability of the party from whom indemnity is sought. There appear to be several different theories which seek to explain why indemnity among tortfeasors is allowed.[3]

Contribution

There was no clear decision at common law on the general right of the unintentional joint tortfeasor to recover contribution. The leading case of *Merryweather v. Nixan*[4] denied contribution in a situation in which the joint tort appears to have been intentional. A number of the early American cases appeared to accept the idea that there might be contribution among unintentional tortfeasors.[5] These decisions generally fall within two classes: 1. where the original defendant was held liable on the basis of respondent superior,[6] and 2. when a wrongful attachment was made at the direction of judgment creditors.[7] Eventually, however, most American courts followed *Merryweather v. Nixan* and denied contribution whether

1. *See* Fidelity & Cas. Co. v. Northwestern Tel. Co., 140 Minn. 229, 167 N. W. 800 (1918), where the court confused the two.
2. *See* Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 310, 50 N. W. 2d 689, 693 (1951); see 2 Pomeroy, Equity Jurisprudence § 411 (5th ed., Symons, 1941).
3. See p. 468 *infra*.
4. 8 T. R. 186, 101 Eng. Rep. 1337 (K.B. 1779). The tort in this case was conversion. See Prosser, Torts 1112 (1941).
5. See Prosser, Torts 1113 (1941).
6. *E.g.*, Farney v. Hauser, 109 Kan. 75, 198 Pac. 178 (1921) (partnership—tortious acts of manager); Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815 (1918); Horbach's Adm'rs v. Elder, 18 Pa. 33 (1851).
7. Vandiver & Co. v. Pollak, 97 Ala. 467, 12 So. 473 (1893); Farwell v. Becker, 129 Ill. 261, 21 N. E. 792 (1889).

the original tort was intentional or negligent.[8] Only Minnesota[9] and five jurisdictions[10] have in recent times permitted contribution among unintentional tortfeasors. Elsewhere in the United States, the right to recover contribution, if allowed, is statutory.[11]

The only Minnesota statute[12] dealing with contribution is procedural rather than substantive.[13] The first Minnesota case to deal with contribution among tortfeasors was *Ankeny v. Moffett*[14] decided in 1887. Factually the case could fall within the supposed respondent superior exception[15] to the common law rule against contribution among tortfeasors, but the Minnesota Supreme Court in reaching the recision did not appear to consider the case as such; it stated that the rule against contribution applied only where the person seeking it was guilty of an intentional wrong or might be presumed to have knowingly done an illegal act. The *Ankeny* case

8. *E.g.*, Union Stock Yards Co. v. Chicago, B. & Q. R. R., 196 U. S. 217 (1905); Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389 (1921); Portland v. Citizens Tel. Co., 206 Mich. 632, 173 N. W. 382 (1919); Public Service Ry. v. Matteucci, 105 N. J. L. 114, 143 Atl. 221 (1928); Royal Indem. Co. v. Becker, 122 Ohio St. 582, 173 N. E. 194 (1930). This wholesale denial of contribution has met with the approval of only one recent commentator. See Fleming, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941). Fleming expresses opposition to contribution because it hinders settlements and may result in a less effective social distribution of accident loss. This article influenced the dissent of Edgerton, J., in George's Radio, Inc. v. Capital Transit Co., 126 F. 2d 219 (D.C. Cir. 1942).

9. *E.g.*, Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 236 N. W. 766 (1931).

10. District of Columbia: George's Radio, Inc. v. Capital Transit Co., 126 F. 2d 219 (D.C. Cir. 1942); Louisiana: Quatray v. Wicker, 178 La. 289, 151 So. 208 (1931) (civil law solidary liability); Pennsylvania: Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928); Tennessee: Davis v. Broad St. Garage, 191 Tenn. 320, 232 S. W. 2d 355 (1950); Wisconsin: Ellis v. Chicago & N. W. Ry., 167 Wis. 392, 167 N. W. 1048 (1918).

11. Ark. Stat. § 34-1001 *et seq.* (1947), as amended, Ark. Stat. § 34-1002 (Supp. 1951); Del. Laws 1949, c. 151; Ga. Code Ann. § 105-2012 (1935); Hawaii Rev. Laws §§ 10487-10493 (1945); Ky. Rev. Stat. § 412.030 (1948); Md. Ann. Code Gen. Laws art. 50, §§ 20-29 (1951); Mich. Comp. Laws §§ 691.561-691-564 (1948); Mo. Rev. Stat. § 537.060 (1949); N. M. Stat. Ann. §§ 21-118 *et seq.* (Supp. 1951); N. Y. Civ. Prac. Act § 211-a; N. C. Gen. Stat. § 1-240 (1943); Pa. Stat. Ann. tit. 12, §§2082-2089 (Supp. 1951); R. I. Acts & Resolves 1940, c. 940; S. D. Laws 1945, c, 167; Tex. Stat., Rev. Civ. art. 2212 (1950); Va. Code § 8-627 (1950); W. Va. Code Ann. § 5482 (1949). Georgia, Michigan, Missouri, New York, Texas, and West Virginia have joint judgment statutes rather than statutes based on common liability. The most recent attempt to regularize and expand contribution is the Uniform Contribution Among Tortfeasors Act, 9 U. L. A. 156 (1951), which has been adopted by Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island, and South Dakota.

12. Minn. Stat. § 548.19 (1949).

13. Kemerer v. State Farm Mut. Ins. Co., 201 Minn. 239, 276 N. W. 228 (1937). *But cf.* Fort Scott v. Kansas City, Ft. S. & M. R. R., 66 Kan. 610, 72 Pac. 238 (1903), where a similar statute was held to create a substantive right of contribution between tortfeasors.

14. 37 Minn. 109, 33 N. W. 320 (1887).

15. See note 6 *supra*, and text thereto.

has been followed or approved by the court since the date that it was decided.[16]

Recovery of contribution in Minnesota is dependent on two conditions. First, there must be common legal liability on the part of the tortfeasors toward the injured person.[17] Common liability has been said by the Minnesota court to come into existence "immediately after the acts of the tortfeasors which give rise to the cause of action against them."[18] Apparently common liability has been conceived as being liability which is enforcible against each tortfeasor individually at some time after the tortious occurence; but common legal liability is inadequate as one of the necessary conditions precedent to the recovery of contribution in view of its basic rationale that "equity is equality." Instances are not uncommon when one of the tortfeasors has at the time of the tort a personal defense against the injured person which negates the possibility of personal legal liability and thus makes common liability a logical impossibility. If the purpose of contribution is to make the wrongdoers share in the financial burden of their wrong, then the primary element of contribution should be the participation of the wrongdoers in acts or omissions which are commonly considered tortious and which result in the injury of a third person. Since the element of common liability is usually present when contribution is sought, it is possible that the courts have inadvertently considered it as one of the the necessary elements of contribution without realizing that it is an inadequate basis for achieving the basic aim of contribution.[19]

The second condition on which the recovery of contribution depends is the payment of a disproportionate share of the liability.[20] It is settled in Minnesota that payment pursuant to a judgment is not a condition precedent to obtaining contribution.[21] The pay-

16. *E.g.*, Duluth, M. & N. Ry. v. McMarthy, 183 Minn. 414, 236 N. W. 766 (1931); Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N. W. 13 (1926).

17. American Automobile Ins. Co. v. Molling, Minn. Sup. Ct., April 2, 1953; *see* Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 309, 50 N. W. 2d 689, 693 (1951); American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 123, 5 N. W. 2d 397, 399 (1942).

18. Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 309, 50 N. W. 2d 689, 693 (1951).

19. The Uniform Act, however, has adopted the common liability requirement. 9 U. L. A. Uniform Contribution Among Tortfeasors Act § 1 (1951).

20. Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 236 N. W. 766 (1931); *cf.* Canosia v. Grand Lake, 80 Minn. 357, 83 N. W. 346 (1900); *see* American Motorist Ins. Co. v. Vigen, 213 Minn. 120, 123, 5. N. W. 2d 397, 399 (1942).

21. Duluth, M. & N. Ry. v. McCarthy, *supra* note 20; *accord,* Wabasha

ment must be compulsory only in that the party who makes it has a legal obligation to do so.[22] Thus, one who settles the claim may thereafter litigate the issues of liability with those from whom the contribution is sought. Contingent claims for contribution or indemnity may also be litigated at present before judgment is rendered in the main action.[23]

Intentional torts. Since *Merryweather v. Nixon* the courts have quite uniformly denied contribution to intentional tortfeasors.[24] The Minnesota Supreme Court has extended this principle much further than have most courts. In *Ankeny v. Moffett,*[25] Justice Mitchell stated that the rule against contribution was applicable when it was presumed that the tortfeasor knew he was doing an "illegal" act. The full import of this statement was not shown until the court decided *Fidelity & Casualty Co. v. Christenson,*[26] in which it was held that the violation of a traffic statute prevented recovery of contribution. The court reasoned that since the act was illegal and volitional it was intentional within the area defined by Justice Mitchell where there could be no recovery of contribution. The decision was approved and followed in the similar case of *Kemerer v. State Farm Mutual Auto Insurance Co.*[27]

v. Southworth, 54 Minn. 79, 55 N. W. 818 (1893) (indemnity); Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698 (1883) (indemnity).

22. Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320 (1887).

23. In Minnesota there is no summary means for the recovery of contribution and indemnity among tortfeasors. Kemerer v. State Farm Mut. Ins. Co., 201 Minn. 239, 276 N. W. 228 (1937). Prior to the adoption of the Minnesota Rules of Civil Procedure in 1952, there was not express provision in the Minnesota statutes relating to cross-claims. However, there were provisions in Minn. Stat. § 548-02 (1949) providing that ". . . when justice so requires [the judgment] shall determine the ultimate rights of the parties on each side as between themselves."

Before its amendment in 1947, Minn. Stat. § 540.16, relating to impleader, was inadequate for the purpose of bringing in additional defendants who might be liable for contribution or indemnity. The amended impleader statute was held to be broad enough to permit the defendant in a tort action to implead a party from whom contribution might be recovered. Gustafson v. Johnson, 235 Minn. 358, 51 N. W. 2d 108 (1952), 36 Minn. L. Rev. 543. The court in the *Gustafson* case also held that the remedy of garnishment was available if personal service could not be obtained on the party from whom contribution was sought.

Minn. R. Civ. P. 13.07 now provides for cross-claims among co-defendants, which should considerably expedite litigation relating to contribution and indemnity; Rule 14.01 provides for impleader of third party defendants; and Rule 24.01 allows one to intervene as a matter of right in the action against the joint tortfeasor. Coupled with the broad separation powers of Rule 42.02, these three rules now give Minnesota an effective mechanism for litigating the issues of contribution and indemnity.

24. *See, e.g.,* Warren v. Westrup, 44 Minn. 237, 239, 46 N. W. 347, 348 (1890); Prosser, Torts 1113, 1117 (1941).

25. 37 Minn. 109, 33 N. W. 320 (1887).

26. 183 Minn. 182, 236 N. W. 618 (1931).

27. 211 Minn. 249, 300 N. W. 793 (1941).

The *Christenson* and *Kemerer* decisions are not in accord with the modern view that contribution should be liberally allowed even where the joint tort is intentional.[28] Furthermore, the statutes involved in the two decisions are legislative codifications of standards of due care for highway traffic. Their violation involves negligence in the ordinary tort suit, but the Minnesota court has given their violation the same effect as is accorded to deliberate wrongs. According to this view the person who is at greater fault may escape from all liability simply because the other tortfeasors violated a minor statute.

It seems possible that the court may modify the rule of the *Christenson case.* In the recent case of *Hardware Mutual Casualty Co. v. Danberry,*[29] it was contended that the trial court erred in not instructing the jury on the effect of a willful and intentional violation of a "right of way" statute in an intersection accident case. The court reversed on other grounds but stated that in the earlier cases there had been a greater showing of intentional violation,[30] and to find intentional and willful negligence in the case before it would preclude the recovery of contribution in nearly all intersection accidents.[31]

. *Damages.* Contribution in Minnesota results in damages being shared equally among the tortfeasors rather than being apportioned on the basis of their comparative negligence.[32] In Great Britain damages in the main action[33] and contribution among tortfeasors[34] are apportioned on the basis of comparative negligence. Although Wisconsin apportions damages in the main action, the statute[35] providing for this has been held not to apply to actions for contribution.[36] The Uniform Act contains a provision for appor-

28. See, *e.g.,* 9 U. L. A. Uniform Contribution Among Tortfeasors Act, 157, 158 (1951).

29. 234 Minn. 391, 48 N. W. 2d 567 (1951).

30. In the *Christenson* case the statutory violation consisted of knowingly leaving a truck parked at night without any light burning, while in the *Kremerer* case it was found that the plaintiff violated the "right of way" statute, Minn. Stat. § 169.20 (1949), by driving into an intersection although aware of the approach of the defendant's car. In the *Danberry* case, *supra* note 29, the driver's vision was blocked by obstruction as he entered the intersection.

31. *Id.* at 397, 48 N. W. 2d at 570.

32. *Cf.* Gugisberg v. Eckert, 101 Minn. 116, 111 N. W. 945 (1907).

33. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, § 1.

34. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, § 1(3); Law Reform (Married Women & Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, § 6.

35. Wis. Stat. § 331.045 (1951).

36. Brown v. Haertel, 210 Wis. 354, 246 N. W. 691 (1933); see Note, 26 Marq. L. Rev. 151 (1942).

tioning contribution on the basis of comparative negligence,[37] but this provision is explicitly optional and has been omitted by four states that have adopted the Act.[38]

INDEMNITY

While denying contribution among those jointly liable in tort, *Merryweather v. Nixan* expressly excluded from the scope of the decision those cases in which one person was employed by another to do acts which were not unlawful in themselves; and in *Adamson v. Jarvis*[39] the right to recover indemnity in such a situation was upheld.

In each case in which indemnity is allowed there is an element of fault which attaches to both indemnitor and indemnitee. As was pointed out in the discussion of contribution, the vital element which the courts should consider is the wrongful nature of the acts or omissions rather than the legal liability toward the injured person of the one from whom contribution is sought. This same consideration should apply with equal force to indemnity actions, since here again common liability is thought necessary.[40] The more perplexing problem, however, is that of finding a satisfactory rationale to explain why in a given case the recovery of indemnity, which shifts the entire burden of liability, rather than contribution, which shifts only a part of the liability, is permitted.

The answer to this problem lies in the nature of the wrongful conduct of the parties to the action for indemnity. The courts have used a large number of stock phrases to explain the different character of the acts or omissions of the wrongdoers and to justify the award of indemnity.[41] One writer has said that indemnity should be awarded when one of the tortfeasors has breached duties owed to the other tortfeasor and the injured person.[42] However, the existence of duties between the tortfeasors, especially in some situations where recovery of indemnity is permitted,[43] is very tenuous. Another proposed rationale is that indemnity is permitted where disproportionate duties are found to exist on the part of the tort-

37. 9 U. L. A. Uniform Contribution Among Tortfeasors Act § 2(4) (1951).

38. Maryland, New Mexico, Pennsylvania, and Rhode Island.

39. 4 Bing. 66, 130 Eng. Rep. 693 (C.P. 1827).

40. *See* Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 418, 236 N. W. 766, 768 (1931).

41. See Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517, 543 (1952).

42. See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 Tex. L. Rev. 150, 162 (1947).

43. What duty but the most general can be said to be owed by a common laborer to his employer? See Davis, *supra* note 41, at 546.

feasors toward the injured person.[44] However, in one common situation in which indemnity is usually allowed, that in which the indemnitee commits a trespass at the direction of the indemnitor, it is possible to argue that the indemnitee who was the immediate wrongdoer had a greater duty toward the injured person than the indemnitor. It is possible that indemnity exists solely because so many courts refuse to allow contribution;[45] and that may explain why no one rationale is broad enough to include within its scope all of the more common situations in which indemnity is permitted.

The Minnesota Supreme Court has used such standard terms as "passive" and "active"[46] and "primary" and "secondary"[47] to differentiate the negligence of the parties in an action for indemnity, but the Minnesota decisions do not evidence the development of any general theory about indemnity. There are, however, several situations where indemnity is usually permitted, and the Minnesota cases tend to fall within these situations.

Vicarious liability. One of the most frequently encountered situations where indemnity is permitted is that in which the indemnitee's original liability was based on some variation of the doctrine of respondeat superior.[48] Within this category also are those cases in which municipalities held liable for injuries caused by defects in public streets have been able to shift their liability to the persons responsible for these conditions.[49] In cases where there was originally an agency relationship of some sort between the parties, the indemnity has been based upon the breach of duty to exercise due care or act with propriety on the part of the indemnitor;[50] but in the municipality cases, where there is no agency or fiduciary relationship between the defendant and the city, the courts have awarded indemnity on the ground that the defendant was the origi-

44. *Id.* at 546-553.

45. See Bohlen, *Contribution and Indemnity Between Tortfeasors,* 21 Cornell L. Q. 552, 568 (1936).

46. See Fidelity & Cas. Co. v. Minneapolis Brewing Co., 214 Minn. 436, 440, 8 N. W. 2d 471, 473 (1943).

47. See *id.* Fidelity & Cas. Co. v. Northwestern Tel. Co., 140 Minn. 229, 231, 167 N. W. 800, 801 (1918).

48. *E.g.,* Grand Trunk Ry. v. Latham, 63 Me. 177 (1874); Hill v. Murphy, 212 Mass 1, 98 N. E. 781 (1912); Northern Pacific Ry. v. Minnesota Transfer Ry., 219 Minn. 8, 16 N. W. 2d 894 (1944); Produce Trading Co. v. Norfolk Southern R. R., 178 N. C. 175, 100 S. E. 316 (1919).

49. See, *e.g.,* Topeka v. Central Sash & Door Co., 97 Kan. 49, 154 Pac. 232 (1916); Lowell v. Boston & L. R. R., 23 Pick. 24, 34 Am. Dec. 33 (Mass. 1839); Hart v. Noret, 191 Mich. 427, 158 N. W. 17 (1916); Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818 (1893); Seattle v. Puget Sound Improvement Co., 47 Wash. 22, 91 Pac. 255 (1907).

50. See, *e.g.,* Georgia S. & F. Ry. v. Jossey, 105 Ga. 271, 31 S. E. 179 (1898); Grand Trunk Ry. v. Latham, 63 Me. 177 (1874); Hill v. Murphy, 212 Mass. 1, 98 N. E. 781 (1912).

nal source of the wrong.[51] The line of reasoning in these two situations is not inconsistent, since in the agency cases the agent is almost invariably the original wrongdoer; but where confronted with an agency relationship the courts find duties created by the relationship upon which to easily base liability.

Torts committed by direction of another person. Generally, indemnity may be recovered by an employee or independent contractor who is held liable to a third person for doing a tortious act which is not manifestly wrong at the direction of his employer or principal.[52] The courts usually explain the award of indemnity by saying that the plaintiff has justifiably relied on the principal's right to have the acts performed as he directs or by implying a promise on the part of the principal to make indemnity.[53] The former reason seems to be closer to the realities of the situation, and the latter is merely a legal fiction. Although the issue has not been squarely raised in Minnesota,[54] it has been indicated that indemnity will be allowed in this situation.[55]

Failure on the part of the indemnitee to discover the negligence of another. Indemnity is also permitted in those situations in which the indemnitee's liability stems from neglect to discover a dangerous condition caused by the negligent act or omission of the indemnitor.[56] The courts in this type of case reason that the primary or *actual* wrong was done by the defendant, who caused the condition to arise.[57] A Minnesota case illustrative of this result is *Fidelity & Casualty Co. v. Northwestern Telephone Exchange Co.*,[58] in which the plaintiff was originally liable to an injured employee because of its failure to discover that the defendant indemnitor had negligently

51. See, *e.g.*, Topeka v. Central Sash & Door Co., 97 Kan. 49, 154 Pac. 232 (1916); Hart v. Noret, 191 Mich. 427, 158 N. W. 17 (1916); Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818 (1893).

52. See, *e.g.*, Howe v. Buffalo, N. Y. & E. R. R., 37 N. Y. 297 (1867); Hoggan v. Cahoon, 26 Utah 444, 73 Pac. 512 (1903); Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Rep. 693 (C.P. 1827).

53. See, *e.g.*, Howe v. Buffalo, N. Y. & E. R. R., *supra* note 52; Hoggan v. Cahoon, *supra* note 52; Aberdeen Construction Co. v. City of Aberdeen, 84 Wash. 429, 147 Pac. 2 (1915).

54. *Cf.* Guirney v. St. P., M. & M. Ry., 43 Minn. 496, 46 N. W. 78, (1890).

55. *See* Henderson v. Eckern, 115 Minn. 410, 413, 132 N. W. 715, 716 (1911).

56. *E.g.*, Southwestern Bell Tel. Co. v. East Texas Pub. Serv. Co., 48 F. 2d 23 (5th Cir. 1931); Standard Oil Co. v. Robins Dry Dock Co., 32 F. 2d 182 (2d Cir. 1931); Standard Oil Co. v. Robins Dry Dock Co., 32 Co., 140 Ga. 309, 78 S. E. 931 (1913); Pullman Co. v. Cincinnati, N. O. & T. P. R. R., 147 Ky. 498, 144 S. W. 385 (1912).

57. See, *e.g.*, Southwestern Bell Tel. Co. v. East Texas Pub. Serv. Co., *supra* note 56; Standard Oil Co. v. Robins Dry Dock Co., *supra* note 56; Pullman Co. v. Cincinnati, N. O. & T. P. R. R., *supra* note 56.

58. 140 Minn. 229, 167 N. W. 800 (1918).

attached a wire to a utility pole which the employer and the indemnitor shared in common. The court found that the primary duty of securing the wire was the indemnitor's, and that neglect of this duty was the primary cause of the accident.

Negligently performed delegated duties. When the indemnitor fails to perform duties undertaken by contract but ordinarily performed by the indemnitee, the indemnitee held liable in tort by reason of this neglect may recover indemnity.[59] The failure to perform duties which have been specifically undertaken justifies the recovery of indemnity. In one Minnesota case a lessee recovered indemnity from his lessor whose failure to perform a covenant to repair an elevator on the leased premises resulted in injury to one of the lessee's employees.[60] The early case of *Minneapolis Mill Co. v. Wheeler,*[61] involving the failure of a grantee to maintain a bridge erected over the grantor's canal—which resulted in the liability of the grantor—probably falls within this category.

Effect of Prior Judgment as Res Judicata

Prior to 1943 Minnesota did not depart from the majority rule that judgment for the plaintiff is not res judicata between co-defendants.[62] Thus a judgment against *all* defendants in the original action would not decide their individual rights to contribution or indemnity.[63] Even when the original action results in a judgment against one co-defendant and in favor of another it is commonly held that the original judgment does not prevent the losing defendant from seeking contribution.[64] In Minnesota before 1943 this view was accepted, but in doing so, in one case the court noted that the plaintiff in the contribution action by paying his judgment had not discharged a common liability.[65] In 1943 the court again was faced with the situation in which an unsuccessful co-defendant

59. Georgia Power Co. v. Banning Cotton Mills, 42 Ga. App. 671, 157 S. E. 525 (1931); *see* Boston & M. R. R. v. Brackett, 71 N. H. 494, 497, 53 Atl. 304, 306 (1902).

60. Olson v. Schultz, 67 Minn. 494, 70 N. W. 779 (1897).

61. 31 Minn. 121, 16 N. W. 698 (1883).

62. See, *e.g.*, Kemerer v. State Farm Mut. Ins. Co., 201 Minn. 239, 276 N. W. 228 (1937); Pioneer Sav. & Loan Co. v. Bartsch, 51 Minn. 474, 53 N. W. 764 (1892); Note, 27 Minn. L. Rev. 519, 528 (1943).

63. Kemerer v. State Farm Mut. Ins. Co., 201 Minn. 239, 276 N. W. 228 (1937).

64. *E.g.*, Fidelity & Cas. Co. v. Federal Express, Inc., 99 F. 2d 681 (6th Cir. 1938); Pullman Co. v. Cincinnati, N. O. & T. P. R. R., 147 Ky. 498, 144 S. W. 385 (1912); Central Banking & Security Co. v. United States Fidelity & Guaranty Co., 73 W. Va. 197, 80 S. E. 121 (1913). But see 1 Freeman, Laws of Judgments § 425 (5th ed. 1925).

65. *See* Hardware Mut. Cas. Co. v. Anderson, 191 Minn. 158, 162, 253 N. W. 374, 376 (1934).

sought contribution from the prevailing defendant; and it was held, in *American Motorists Insurance Co. v. Vigen*,[66] that since the issue of common liability was decided in the original action there could be no contribution. The rule of the decision was shortly thereafter applied in an action for indemnity.[67]

The *Vigen* case appears to be unsound, for it allows the very important substantive rights of contribution and indemnity to be decided in an action in which the persons concerned did not, at the time, have adequate means or opportunity[68] to litigate the issues among themselves. Minnesota has recently reaffirmed its adherence to the general rule that judgment for the original plaintiff is not res judicata among defendants,[69] limiting the doctrine of the *Vigen* case to actions for indemnity and contribution.[70] The future of the *Vigen* rule seems doubtful,[71] but it is probably merely of academic interest since it is now possible for the diligent tortfeasor to litigate the issue of contribution and indemnity contemporaneously with the main action by means of intervention, impleader or the crossclaim.[72]

The Problem of Individual Defenses

One of the persistent problems of contribution and indemnity is the effect of the fact that the person from whom recovery is sought had a personal defense against the injured person when the tort occurred. Since the individual defense negates the possibility of legal liability of that tortfeasor to the injured person, it may preclude the recovery of either contribution or indemnity. Previously, it was pointed out that the critical element in the recovery of contribution and indemnity should be a course of conduct on the part of the person from whom recovery is sought rather than possible legal liability toward the injured person. The validity of this theory can be seen by appraising the effect of the individual defense on the recovery of contribution and indemnity. To date the Minnesota Supreme Court has considered only two of these defenses,[73] but it is perhaps only a matter of time before most of them will arise.

66. 213 Minn. 120, 5 N. W. 2d 397 (1942).
67. Fidelity & Cas. Co. v. Minneapolis Brewing Co., 214 Minn. 436, 8 N. W. 2d 471 (1943).
68. See Note, 27 Minn. L. Rev. 519, 521 (1943).
69. Bunge v. Yager, 52 N. W. 2d 446 (Minn. 1952), 36 Minn. L. Rev. 983.
70. *Id.* at 450.
71. See 36 Minn. L. Rev. 983, 984 n. 5 (1952).
72. Minn. R. Civ. P. 24.01, 14.01, 13.07; see Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 593, 611, 627 (1952).
73. American Automobile Ins. Co. v. Molling, Minn. Sup. Ct., April 2, 1953) (family relationship); Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 50 N. W. 2d 689 (1951) (covenant not to sue).

Assumption of risk. If there is assumption of risk on the part of the original plaintiff toward the negligence of one of the tortfeasors, then the courts which require the presence of common legal liability of the party from whom contribution or indemnity is sought could well deny recovery of either. An analogous situation arises under the so-called guest statutes, which may cut off the passenger's right to recover from a negligent driver but do not prevent recovery from the driver of another car.[74] Thus, courts have refused contribution to the driver of the other car if the passenger is unable to recover from the driver of the car he was riding in.[75]

Family relationships. In Minnesota, neither a spouse[76] nor an unemancipated minor[77] may sue the other spouse or parent in tort. Since the domestic relationship creates an immunity, it was held in *American Automobile Insurance Co. v. Molling*[78] that the common legal liability which Minnesota requires in order to recover contribution is lacking where marital immunity exists between the injured person and one of the wrongdoers. In jurisdictions which have the common liability rule in contribution, the weight of authority supports the holding of the Minnesota court where a family relationship exists.[79] This result may be logically sound, but apparently it does not take into consideration that the tranquility of the home, which is one of the principal reasons for domestic immunities in tort,[80] is not much endangered by a suit in which the persons within the relationship are not opposing parties.

Statute of limitations. When the statute of limitations has run in favor of one tortfeasor against the injured person, the courts which have considered the problem are uniformly of the opinion that this does not destroy the possibility of contribution.[81] Common

74. See 4 Blashfield, Cyclopedia of Automobile Law and Practice § 2313 (1946), for a discussion of the guest statutes.

75. Kauth v. Landsverk, 224 Wis. 554, 271 N. W. 841 (1937); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N. W. 721 (1934); Patterson v. Tomlinson, 118 S. W. 2d 645 (Tex. Civ. App. 1938).

76. *E.g.*, Patenaude v. Patenaude, 195 Minn. 523, 263 N. W. 546 (1935) (pre-coverture tort); Drake v. Drake, 145 Minn. 388, 177 N. W. 624 (1920) (tort committed after separation); Strom v. Strom, 98 Minn. 427, 107, N. W. 1047 (1906) (tort committed during marriage; action brought after divorce).

77. *E.g.*, Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931), 16 Minn. L. Rev. 323 (1932); Miller v. Pelzer, 159 Minn. 375, 199 N. W. 97 (1924) (alternative holding), 9 Minn. L. Rev. 76.

78. Minn. Sup. Ct., April 2, 1953.

79. Yellow Cab Co. v. Dreslin, 181 F. 2d 626 (D.C. Cir. 1950); Norfolk Southern R. R. v. Gretakis, 162 Va. 597, 174 S. E. 841 (1934); Zutter v. O'Connell, 200 Wis. 601, 229 N. W. 74 (1930). *Contra:* Fisher v. Diehl, 156 Pa. Super. 476, 40 A. 2d 912 (1944).

80. Prosser, Torts 903, 906 (1941).

81. Adam v. Vacquier, 48 F. Supp. 275 (W.D. Pa. 1942), *aff'd per*

legal liability is present since liability comes into existence at the instant the tort is committed; thereafter, the right to recover contribution remains inchoate until one of the tortfeasors discharges a disproportionate share of the financial liability.[82] Although the Minnesota court has never had to consider this defense, it has expressed a somewhat similar view in discussing contribution,[83] and it is probable that the defense would not be held to bar the recovery of either contribution or indemnity.

Covenants not to sue. The execution of a covenant not to sue by the injured person in favor of one of the tortfeasors might create an individual defense which would appear to be effective in an action to recover contribution or indemnity.[84] Yet, as was true with the defense of the statute of limitations, this defense arises after the conduct which creates legal liability. Thus, the reasoning which permitted the recovery of contribution despite the running of the statute should permit either contribution or indenmity to be recovered despite the existence of the covenant.

The Minnesota Supreme Court has considered this problem in *Employers Mutual Casualty Co. v. Chicago, St. Paul, M. & O. Ry.*,[85] where one tortfeasor paid the plaintiff six thousand dollars as consideration for a dismissal and a covenant not to sue. The other tortfeasor then settled with the plaintiff for five thousand dollars and sought contribution from the first tortfeasor. The court refused contribution, but in doing so stated that the execution of the covenant not to sue did not destroy the common liability necessary to support an action for contribution.[86] The court further stated that "payment, to the extent that it is compensation, will be a *pro tanto* reduction of . . . eventual liability for contribution."[87]

Exclusive liability in workmen's compensation. Workmen's compensation acts all provide that the employer's exclusive liability shall

curiam, 139 F. 2d 347 (3d Cir. 1943) (alternative holding); Godfrey v. Tidewater Co., 223 N. C. 647, 27 S. E. 2d 736 (1943); Ainsworth v. Berg, 253 Wis. 438, 34 N. W. 2d 790 (1948); Battle v. Laurel Line Taxicab Co., 52 Pa. D. & C. 534 (1945).

82. Ainsworth v. Berg, 253 Wis. 438, 34 N. W. 2d 790 (1948).

83. *See* Gustafson v. Johnson, 235 Minn. 358, 364, 51 N. W. 2d 108, 112 (1952).

84. The covenant not to sue should not be confused with the release. A release given to one joint tortfeasor may release all other joint tortfeasors from liability and foreclose the injured person from bringing action against the others. O vovenant not to sue does not preclude suit by the injured person against the other tortfeasors. See Prosser, Torts 1107-1111 (1941). The Uniform Act gives the release the same effect as the covenant not to sue. See 9 U. L. A. Uniform Contribution Among Tortfeasors Act § 4 (1951).

85. 235 Minn. 304, 50 N. W. 2d 689 (1951).

86. *Id.* at 310, 50 N. W. 2d at 693.

87. *Id.* at 313-314, 50 N. W. 2d at 695.

be for compensation under the terms of the act,[88] and these provisions give rise to another individual defense. Both contribution[89] and indemnity[90] have been denied on the ground that a third person seeking either recovery is within the "any other person" phrase of the provision providing for exclusive liability. Contribution has also been denied on the theory there is no common liability in tort.[91] There are, however, a number of decisions which would permit the recovery of both contribution and indemnity despite the provisions of the acts.[92] This is allowed on the theory that the compensation acts were intended only to change the right of recovery between the employee and his employer.

It is undecided in Minnesota whether this provision precludes recovery of contribution and indemnity from an employer. There is dicta in one case that the statute was not intended to alter the right to recover contribution among joint tortfeasors;[93] and with reference to the rights of an employee against a third party, the court has pointed out that the statute changed only the rights of the employee and the employer *inter se*.[94] Thus there seems to be a possibility that the Minnesota act would not be held to afford a defense against either contribution or indemnity.

88. Riesenfeld and Maxwell, Modern Social Legislation 395 (1950). *E.g.*, Minn. Stat. § 176.04 (1949): "The liability of an employer . . . shall be exclusive and in place of any liability to such employee . . . or any other person entitled to recover damages at common law or otherwise on account of such injury or death, . . ."

89. *E.g.*, American Mut. Ins. Co. v. Matthews, 182 F. 2d 322 (2d Cir. 1950); Coates v. Potomac Elec. Power Co., 95 F. Supp. 779 (D. D.C. 1951); Liberty Mut. Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D. D.C. 1950); Standard Wholesale Phosphate & Acid Works v. Rukert Terminal Corp., 193 Md. 20, 65 A. 2d 304 (1944); Britt v. Buggs, 201 Wis. 533, 230 N. W. 621 (1930) (alternative holding).

90. Standard Wholesale Phosphate & Acid Works v. Rukert Terminal Corp., *supra* note 89.

91. *E.g.*, American Mut. Ins. Co. v. Matthews, 182 F. 2d 322 (2d Cir. 1950); Coates v. Potamac Elec. Power Co., 95 F. Supp. 779 (D. D.C. 1951); Clark v. Chicago, M. St. P. & P. R. R., 214 Wis. 295, 252 N. W. 685 (1934).

92. American Dist. Tel. Co. v. Kittleson, 179 F. 2d 946 (8th Cir. 1950); Rederii v. Jarka Corp., 26 F. Supp. 304 (D. Me. 1939), *appeal dismissed*, 110 F. 2d 234 (1st Cir. 1940); Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 175, 15 N. E. 2d 567 (1938).

93. Thornton Bros. Co. v. Reese, 188 Minn. 5, 9-10, 246 N. W. 527, 529 (1933), 17 Minn. L. Rev. 829.

94. Gleason v. Geary, 214 Minn. 499, 8 N. W. 2d 808 (1943), 27 Minn. L. Rev. 585.