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INDEMNITY AND CONTRIBUTION BETWEEN STRICTLY LIABLE AND NEGLIGENT DEFENDENTS IN MAJOR AIRCRAFT LITIGATION

D. DUDLEY OLDHAM*
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I. INTRODUCTION

In the early days of the Common Law, English courts began fashioning the concept of indemnity. Since that time courts and litigants have been struggling with the problem of allocating damages between defendants. The development of the concepts of indemnity and contribution in the United States has been on an ad hoc basis resulting in a lack of conformity from jurisdiction to jurisdiction. During the past decade developments in the law of strict liability have been superimposed on rapidly changing indemnity and contribution concepts, resulting in confusion for courts and litigants faced with the application of these principles in multi-jurisdiction aircraft litigation.

This paper will trace the background and development of the concepts of indemnity and contribution and provide an overview of the current law in selected jurisdictions in the United States. It is hoped that this approach will facilitate an understanding of the current law as well as aid litigants in predicting potential changes through future legislation and court decisions.

II. DEVELOPMENT OF THE CONCEPTS OF INDEMNITY AND CONTRIBUTION

As early as 1799 the courts began struggling with the problem of allocating the damages recovered by a plaintiff in a lawsuit be-

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between one or more individuals who were somehow associated with or responsible for the injury sustained by the plaintiff.\(^1\) Initially, the courts recognized the right of one individual who was legally responsible to the plaintiff for the plaintiff's damages, but who was not guilty of any fault or wrongful conduct, to recoup his entire loss from the individual whose fault or wrongful conduct gave rise to the injuries sustained by the plaintiff.\(^2\) This right, characterized as the right of indemnity by the courts, has also been recognized by the various jurisdictions in the United States which have adopted the common law.\(^3\) Over the years the courts have defined, developed, and modified their own rules governing the right of indemnity and have established a number of tests to be applied to different fact situations for the purpose of determining whether the right of indemnity exists. Examples of the tests established by the courts include the active-passive test,\(^4\) the primary-secondary test,\(^5\) and the duty versus no-duty test.\(^6\) The courts' definitions of each individual test have been vague and the application of each test has been illogical and inconsistent.\(^7\)

At the time these rules were developing to allow indemnity, the courts did not attempt to allocate the loss if both of the parties associated with or responsible for the plaintiff's injury were guilty of some degree of fault or wrongdoing.\(^8\) The courts allowed the

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2. Id.
5. For example, a vicariously liable owner of an aircraft has been held to be entitled to indemnity from the pilot who caused the harm. See Note, Torts—Joint Enterprise Doctrine—A Flying School/Aircraft Owner is Engaged in a Joint Enterprise with its Student Pilots and Is Vicariously Liable for the Student's Negligent Acts, 41 J. Air L. & Com. 511 (1975).
6. South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 947 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).
plaintiff to choose the party against whom he desired to recover and did not allow that defendant to receive any reimbursement from the other wrongdoer, reasoning that it was not the duty of the courts to come to the aid of a wrongdoer. Because of the harshness of this rule, many jurisdictions in the United States have, either statutorily or by judicial determination, relaxed the rule against reimbursement to permit a recovery by one wrongdoer or tort-feasor from another for a portion of the common liability, at least among negligent tort-feasors, so long as the party seeking partial recoupment has not been guilty of conduct characterized as an intentional wrong. This right was characterized as the right of contribution and continues to be recognized by many of the jurisdictions within the United States today.

There is a glaring disparity among the various jurisdictions within the United States as to the scope and application of this doctrine, since each jurisdiction formulated its own rules of contribution. For example, the question of contribution arises primarily among joint tort-feasors, but confusion surrounds the definition of a joint tort-feasor, especially when strict product liability allegations are injected into a case. Some jurisdictions define joint tort-feasors as "two or more persons jointly or severally liable in tort for the same injury to persons or property." Those persons "jointly or severally liable in tort" have been divided into three categories: persons who knowingly join in the performance of a tortious act; persons who fail to perform a common duty to the plaintiff; and persons whose separate and independent acts concur to produce the plaintiff's injury. Contribution arises almost exclusively in situations within the third category.

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9 See Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932).
10 Thirty-five states have divorced themselves from the common law antipathy to contribution among tort-feasors. See Allen, Joint Tortfeasors—A Case for Unlimited Contribution, 43 Miss. L.J. 50, 55 (1972).
14 Huyett, supra note 3, at 126.
15 Id. at 127.
Additional confusion surrounds the proper method of allocating the damages among the various defendants. Some jurisdictions have allowed contribution according to the relative degree of fault by such tort-feasor. Other jurisdictions have refused to analyze the degree of fault and have allocated the loss on a straight pro rata basis, strictly according to the number of joint tort-feasors.

Further disparity has developed in the procedural routes which a joint tort-feasor can choose to enforce his right of contribution. Three such routes exist: join the tort-feasor as a third-party defendant in the original action; institute a post-judgment action for contribution; or institute a post-settlement action for contribution. Because of this procedural disparity, and the opportunities for collusion inherent in permitting a party to seek recovery against any one or more of the tort-feasors as he may choose, the National Conference of Commissioners on Uniform State Laws, in 1939, drafted the Uniform Contribution Among Tort-feasors Act. This Act provided for the right of contribution among joint tort-feasors and, in an optional section, authorized consideration of relative degrees of fault among such persons in determining each one's share of common liability.

In 1955 a revised Act was drafted by the Commission containing a number of significant changes—the most important being that in determining pro rata shares of common liability, relative


18 Huyett, supra note 3, at 128.

19 Uniform Contribution Among Tortfeasors Act (1939).
degrees of fault should not be considered. Most states adopting either version of the Act have opted to avoid attempting to allocate the loss according to the relative degree of fault in favor of distributing the loss according to the number of parties sharing in the common liability.

While the various jurisdictions within the United States were developing rules of contribution and indemnity on an ad hoc basis, some jurisdictions began undergoing a metamorphosis of substantive tort law, struggling with new concepts of strict product liability and comparative negligence. These substantive law developments further compounded and complicated the problems of allocating the loss between two or more persons responsible for or associated with injuries sustained by a plaintiff.

Today at least thirty-one states apply the principle of strict liability to the law of products liability. Conflict between strict liability and some of the long established concepts of tort law has accompanied the adoption of this principle. Negligence, which the concept of strict liability was designed to replace in the field of products liability, is indicative of such conflicts. Contribution among tort-feasors is a corollary of negligence and, like negligence, its underlying policies and rationale clash with those underlying strict liability. This conflict is clearly illustrated when considering whether a right of contribution exists between a tort-feasor strictly liable and a tort-feasor negligently liable.

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20 Uniform Contribution Among Tortfeasors Act (revised 1955).
22 Compare Texas, which has adopted both comparative negligence (Tex. Rev. Civ. Stat. Ann. art. 2212a, §§ 1, 2 (Vernon 1973)) and Restatement (Second) of Torts § 402A (1965) but has not extended comparative negligence to products liability [see Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref’d n.r.e.)] with Wisconsin, which has adopted comparative negligence (judicially in Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962)) and Restatement (Second) of Torts § 402A (1965) and has applied comparative negligence to products liability [Bielski v. Schulze].
24 While the list is by no means exhaustive, compare jurisdictions allowing contribution in a strict liability case to jurisdictions which do not:
Historically, negligence predominated as the method of establishing liability for victims of accidents caused by defective products. For an individual to be held liable in tort, aside from a determination that his actions actually caused the injury, a finding of fault in his conduct was necessary. Strict liability in tort, on the other hand, asserts responsibility for conduct which is neither intentional nor negligent; the responsibility is based on the condition of the product. Unlike negligence, in which the injured plaintiff as a prerequisite to recovery must sue the seller who caused the defect, in strict liability the injured person may sue anyone within the chain of distribution of the product.

In the products liability field there have been far more actions for indemnity than for contribution. Most of the actions for indemnity have arisen between members of the chain of distribution of a defective product. The cases usually involve the owner or distributor, held liable for an injury as a matter of law (such as strict liability) or in contract (such as warranty), proceeding against the previous seller or manufacturer who was primarily responsible for the defect in the product which caused the injury.

The adoption of comparative negligence principles in some jurisdictions has further compounded the already difficult problems of

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25 James, Products Liability, 34 Texas L. REV. 192, 227 (1956).
29 See FRUMER and FRIEDMAN, PRODUCTS LIABILITY, Indemnity § 1.03[111] (1971).
applying the concept of contribution between defendants. Some jurisdictions had the foresight to anticipate problems of contribution and indemnity and addressed these problems within their statutes. For example, the comparative negligence statute in Texas sets out specific guidelines for apportioning the loss according to the relative degree of causal negligence.\(^{31}\) What the statute does not do is address the problem of contribution in cases involving both allegations of negligence and strict liability.\(^{32}\) Other jurisdictions have not attempted to address the problem of contribution and indemnity at all.

The final and most significant complicating factor in the application of contribution and indemnity concepts has been conflicts of law problems. Up until early 1960 the conflicts problems were only moderately difficult. Prior to the 1960's the states' conflicts laws uniformly applied a *lex loci delicti* test; therefore, the substantive law of the state where the accident occurred was applied. Two things happened to complicate the picture. First, the courts began on rare occasions to hold that public policy required the application of the state's own substantive law rather than the law of the state where the accident occurred.\(^{33}\) Second, states began applying a "significant contacts" test to determine which state's substantive law should be applied.\(^{34}\) Thus, in a major accident involving multiple plaintiffs, various federal courts could make independent determinations, based upon different criteria, of the law applicable to the case.

It is therefore apparent that the complexities of predicting rules of contribution and indemnity in cases involving allegations of strict liability, negligence, and comparative negligence are of tremendous proportions.

### III. Current Status of the Law in Selected Jurisdictions

Currently, various jurisdictions within the United States are struggling with the question of whether contribution is available


\(^{32}\) Id.


Sixteen states have statutes providing for contribution without any recovery of judgment: ARK. STAT. ANN. §§ 34-1001 to 34-1009 (1947 & Supp. 1959); HAW. REV. STAT. §§ 663-11 to 663-17 (1968); KY. REV. STAT. § 412.030 (1959); MD. ANN. CODE art. 50, §§ 16-24 (1957); MASS. GEN. LAWS. ANN. ch. 231, §§ 1-4 (West 1974); N.J. STAT. ANN. §§ 2A:53A-1 to 2A:53A-5 (1952); N.M. STAT. ANN. §§ 24-1-11 to 18 (1953); N.C. GEN. STAT. § 1B-1 to 1B-7 (1969); N.D. CENT. CODE §§ 32-38-01 to -04 (1960); OHIO REV. STAT. §§ 18-440 to 18-460 (1971); PA. STAT. ANN. tit. 12, §§ 2082-2089 (Supp. 1960); R.I. GEN LAWS §§ 10-6-1 to 11 (1956 & Supp. 1960); S.D. COMPIL. LAWS ANN. §§ 33.04A01-.04A10 (Supp. 1960); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon 1973); UTAH CODE ANN. §§ 78-27-39 to 78-27-43 (Supp. 1975); VA. CODE § 8-627 (1957); WIS. STAT. ANN. §§ 113.01-1 to 113-10 (1957).


Comparing jurisdictions on whether contribution is allowed in a products liability action, see note 24 supra.
volved; whether common liability exists; and whether one or more of the tort-feasors has settled with the plaintiff and been released from further liability.

Originally, the "type" tort-feasor concept was applied in the context of the willful or wanton tort-feasor, to deny such tort-feasors the right of contribution. At common law the courts refused to allow contribution in this context, reasoning that the courts would not come to the aid of a wrongdoer. Today, although the overwhelming majority of jurisdictions which have addressed this question deny contribution to intentional or willful tort-feasors, there has been some effort to abandon this concept. Some jurisdictions have attempted to utilize the "type" tort-feasor concept in actions where a strictly liable tort-feasor seeks contribution from a negligently liable tort-feasor. In 1969 a federal district court sitting in the Western District of Pennsylvania used such reasoning in denying a claim for contribution between a party strictly liable and a party negligently liable. That court reasoned that there is no right to contribution "between those whose liability is imposed under different grounds." Thereafter, in 1973, another federal district court sitting in Pennsylvania held that a right of contribution between one strictly liable and one negligently liable does exist. In doing so, the court distinguished strict liability from willful and wanton liability,

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Id. at 262.

pointing out that the reason contribution is unavailable to a willful and wanton wrongdoer is that the courts should not aid one whose acts imply moral turpitude. There is no implication of moral turpitude, the court noted, on the part of one strictly liable. One party, seeking to avoid contribution, argued that to hold that no right of contribution exists in this type of situation would be in keeping with the intent of the Restatement (Second) of Torts § 402A, that the manufacturer of products must bear the entire loss even though there is negligence on the part of others in bringing about such loss. The court rejected this reasoning, stating that the policy reasons given for the adoption of § 402A are for the protection of the injured consumer and not for the protection of an uninjured third party whose negligence contributed to the plaintiff's injury.

Similarly, the Court of Appeals of Washington, in Northwestern Mutual Insurance Co. v. Stromme, allowed contribution between a negligently liable tort-feasor and a strictly liable tort-feasor, discounting the policies underlying § 402A and reasoning in terms of fault. In Chamberlain v. Carborundum Co., a federal district court sitting in Pennsylvania allowed contribution between a strictly liable tort-feasor and a negligently liable tort-feasor, reasoning that contribution is intended to relieve tort-feasors of injustice among themselves and to achieve sharing of common responsibility according to natural justice and equity. Thereafter, the same federal district court held that a strictly liable manufacturer was not entitled to contribution from a negligent user tort-feasor. The court's rationale was that contribution is available only to joint tort-feasors who are "in pari delicto" (of equal fault), and that to be in pari delicto the joint tort-feasor must first be "in aequali juri" (of equal status or right). The court reasoned that the underlying

40 Id.
41 Id.
42 Id. at 1001.
43 Id. at 1003.
45 479 P.2d at 556.
46 485 F.2d 31 (3d Cir. 1973).
48 Id.
social principles of strict liability require that the seller (strictly liable manufacturer) and the protected user (negligent tort-feasor) not be treated as in aequali juri.\textsuperscript{49}

At least two other jurisdictions have arrived at the opposite result—the right of contribution does not exist between a strictly liable defendant and a negligently liable defendant.\textsuperscript{50} In this regard, an Illinois court refused to allow a strictly liable defendant to shift a portion of the loss to a negligently liable defendant under the guise of contribution because the underlying purpose of strict liability law is to place the risk of loss on the manufacturer of a defective product.\textsuperscript{51} In doing so, the court judicially ignored the indemnitee's fault, stating that there is "a strong public policy that insists upon the distribution of the economic burden in the most socially desirable manner, even to the extent of ignoring the indemnitee's fault."\textsuperscript{52}

In slight contrast, one Texas court refused to allow a strictly liable defendant to recover contribution from a negligently liable defendant, reasoning that the negligently liable defendant owed "no duty" to the strictly liable defendant.\textsuperscript{53} This decision, however, has been modified by a very recent decision which allowed contribution by a strictly liable defendant against a negligently liable defendant.\textsuperscript{54}

In most states, before the right of contribution may be asserted, there must be a common legal liability on the part of the tort-feasors toward the injured person.\textsuperscript{55} For common liability to exist, the

\textsuperscript{49} Id. at 1319.
\textsuperscript{52} Id. at 358, 254 N.E.2d at 588.
\textsuperscript{53} Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).
\textsuperscript{54} General Motors Corp. v. Simmons, 545 S.W.2d 502 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).
\textsuperscript{55} See cases listed at 19 A.L.R.2d 1003 (1951). For a more detailed discussion see Note, Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party, 52 CORNELL L.Q. 407 (1967). In a minority of jurisdictions, there is no need for common liability, and the Uniform Act is construed accordingly. See Huyett, supra note 3, at 132.
plaintiff must have a cause of action against each tort-feasor from whom contribution is sought. At the time of the tort, if one of the tort-feasors has a personal defense, such as immunity, against the injured party, common liability is impossible. The joint tort-feasor who does not enjoy such a defense, even though he is no more culpable than a tort-feasor with a special defense, must pay the plaintiff's entire loss.

Workmen's compensation law presents an example of a special defense. These laws have been interpreted by the overwhelming majority of states as precluding the establishment of the common liability requirement. When an employee's injury is caused by a third party outside of the employment relationship, the employee is permitted to pursue an action at common law against the third party. The difficulty arises when the employee's injury is a result of the joint wrongdoing of the employer and the third party, and, after the employee brings an action against the third party, the third party seeks to join the employer to enforce his right of contribution. For example, in Kantlehner v. United States, the plaintiff, a flight engineer for Pan American, sued the government for negligence. The government attempted to implead Pan American for contribution and indemnity. Pan American pleaded that payment of workmen's compensation constituted a complete defense to the third-party claim against the employer for contribution. The judge agreed and dismissed the impleader action, reasoning that


58 In the case of common-law joint tortfeasors, the overwhelming weight of authority holds to the view that where the concurring negligence of the party from whom contribution is sought gives the injured party no cause of action against him, the claimant cannot recover contribution, even though such concurring negligence was a proximate cause of the injury. Panichella v. Pennsylvania R.R., 167 F. Supp. 345, 351 (W.D. Pa. 1958).


59 Id. at 129.
the parties were "in pari delicto" so that indemnity was not available.\textsuperscript{60}

In contrast, the New York courts have held that a negligent third party might bring in the employer for purposes of indemnity, although it was conceded that there was no tort liability to the employee.\textsuperscript{61}

A similar split in authority currently exists concerning the limitation provisions in the Federal Employers Liability Act.\textsuperscript{62} In \textit{Weyerhaeuser Steamship Co. v. United States},\textsuperscript{63} a privately owned ship collided with an Army dredge injuring a civilian employee of the United States. The Court held, notwithstanding the exclusive remedy clause, that the United States was still liable in contribution for one-half of the total liabilities incurred by the owner of the privately owned ship due to the government employee's injuries.\textsuperscript{64}

Three weeks later the Supreme Court,\textsuperscript{65} following \textit{Weyerhaeuser} in a non-admiralty suit, vacated a Third Circuit decision which had held that the exclusive remedy clause precluded contribution from the United States for liabilities incurred because of injuries to government employees and remanded the case for further consideration in light of \textit{Weyerhaeuser}.\textsuperscript{66}

Similarly, the Fourth Circuit has allowed indemnity or contribution.\textsuperscript{67} A plurality of the court of appeals, however, has conclud-

\textsuperscript{60} Id.


\textsuperscript{62} 5 U.S.C. § 8116(c) (1970). The Act states:

\hspace{1cm} (c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

\textsuperscript{63} 372 U.S. 597 (1963).

\textsuperscript{64} Id. at 600.

\textsuperscript{65} Treadwell Constr. Co. v. United States, 372 U.S. 772 (1963) (per curiam).

\textsuperscript{66} Id.

ed that a third-party claim for contribution or indemnity against the United States does not lie, either because of the language of the exclusive remedy provision or because of the extinguishment of the United States' underlying tort liability to its employees. 

The effect the limitations afforded airlines under the Warsaw Convention and Montreal Agreement would have on a claim for contribution against an airline has apparently never been litigated. Ostensibly, the jurisdictions allowing contributions against an employer, despite the limitations of the Workmen's Compensation Statute, would disregard the limitations of the Convention, whereas the jurisdictions which honor the limitations of the Workmen's Compensation Statute would also honor the limitations of the Convention.

Further, the limits of liability afforded an airline under the Warsaw Convention, Article 25, are removed if the carrier or an agent or servant of the carrier is guilty of willful misconduct. As previously discussed, there is a decisive split between the various jurisdictions within the United States concerning whether a party guilty of willful misconduct would be entitled to contribution. Thus, a claim for contribution in an action involving a finding of willful misconduct on the part of the airline would ostensibly be dependent upon the state's law which the court chose to apply.

Jurisdictions in the United States also disagree concerning the effect of settlements, releases, and covenants not to sue with regard to the right of contribution and indemnity and the rights of a non-settling tort-feasor to an offset or credit against the amount of any judgment entered by the court. For example, in Kohr v. Allegheny

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72 See cases cited note 36 supra.

73 Effect of settlement by a tort-feasor: the question generally depends upon whether the particular jurisdiction limits contribution to those against whom judgment have been rendered, which fix both liability and amount. Such jurisdictions include: Cal. Civ. Proc. §§ 875-80 (West Cum. Supp. 1975-1976) (see
Code §§ 55-7-11a-12-13 (1977); Baltimore & O.R.R. v. Saunders, 159 F.2d 481
(4th Cir. 1947).

Where there are no such provisions, it is generally held that one who settles
without judgment may recover contribution. See Zontelli v. Northern Pacific R.R.,
263 F.2d 194 (8th Cir. 1959); Traveler's Ins. Co. v. United States, 283 F. Supp.
14 (S.D. Tex. 1968); Sleek v. Butler Bros., 53 Ill. App. 2d 7, 202 N.E.2d 64
(1964); Hawkeye-Security Ins. Co. v. Louie Constr. Co., 251 Iowa 27, 99 N.W.2d
421 (1959); O'Keefe v. Baltimore Transit Co., 201 Md. 345, 94 A.2d 26 (1953);
Young v. Steinberg, 53 N.J. 252, 250 A.2d 13 (1969); Swartz v. Sunderland,
403 Pa. 222, 169 A.2d 289 (1961). Massachusetts allows a separate action for
contributions regardless of whether judgment has been entered, if the party seek-

ing contribution paid more than his pro rata share of the common liability. See
who have paid a claim in full may have a cause of action for contribution if the
compromise was made in good faith. See McKenna v. Austin, 134 F.2d 659 (D.C.
Cir. 1943); Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964); Reynolds
Zurich Gen. Acc. Life Ins. Co., 271 S.W.2d 909 (Ky. 1954); Samuelson v. Chi-
cago, R.I. & Pac. R., 287 Minn. 264, 178 N.W.2d 620 (1970); Farmers Mut.
However, he is not entitled to recover contribution from another joint tort-feasor
whose liability to the injured person is not extinguished
by the settlement. See
United States v. Reilly, 385 F.2d 225 (10th Cir. 1967); Allbright Bros. Con-
tractors v. Hull-Dobbs Co., 209 F.2d 103 (6th Cir. 1953); Lacewell v. Griffin,
214 Ark. 909, 219 S.W.2d 227 (1949).

Effect of release or covenant not to sue contained in the settlement: The
common-law rule that the release of one joint tort-feasor releases all is still re-
tained in a few jurisdictions. See Price v. Baker, 143 Colo. 264, 352 P.2d 90
(1959); McCloskey v. Porter, 161 Mont. 307, 506 P.2d 845 (1973); Bland v.
Warwickshire Corp., 160 Va. 131, 168 S.E. 443 (1933); Haney v. Cheatam, 8
Wash. 2d 310, 111 P.2d 1003 (1941) [but see Richardson v. Pacific Power &
Light Co., 11 Wash. 2d 288, 118 P.2d 985 (1941)]. Most jurisdictions have modi-
"fied or abrogated the common-law rule by legislation or judicial decision. See
§§ 15-8-11 to 15-8-22 (1969); see also McKenna v. Austin, 134 F.2d 659 (D.C.
Cir. 1943). Where a defendant settles with plaintiff and receives a release or a
covenant not to sue, the usual holding is that the defendant is not released from
contribution. See Hodges v. United States Fid. & Guar. Co., 91 A.2d 473 (D.C.
Ct. App. 1952); Hawkeye-Security Ins. Co. v. Lowe Constr. Co., 251 Iowa 27,
99 N.W.2d 421 (1959); Leitner v. Hawkins, 311 Ky. 300, 223 S.W.2d 988
(1949); Skaja v. Andrews Hotel Co., 281 Minn. 417, 161 N.W.2d 657 (1968);
Michelucci v. Bennett, 73 Misc. 2d 621, 341 N.Y.S.2d 837 (Sup. Ct. 1973);
Compare Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300
(1900) with Bacik v. Weaver, 173 Ohio St. 214, 180 N.E.2d 820 (1962); State
Farm Mut. Auto Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d
423 (1953). The more modern view is that the effect of a release is a question

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two of the original defendants settled with the plaintiffs and then sued the other defendants for indemnity and contribution. The court allowed the action for contribution and indemnity, reasoning that settlements should be encouraged and to deny a settling tort-feasor the right to claim contribution or indemnity would discourage settlement. Similarly, a New York court allowed a settling tort-feasor to seek contribution or indemnity from a third party provided the settling tort-feasor could prove the settlement was reasonable. If the settling tort-feasor was not guilty of negligence, however, this settlement would be considered a volunteer payment and the settling tort-feasor would not be entitled to contribution or indemnity. New York courts also allow a non-settling defendant to bring a settling defendant back into the action on a claim for contribution or indemnity. In doing so, the courts reason that to deny a non-settling tort-feasor the right to seek contribution from a settling tort-feasor would result in "a disproportionate shifting of liability to the non-settling tort-feasor regardless of his actual degree of blame." In contrast, California courts have reached the opposite conclusion, reasoning that to allow contribution would tend to discourage settlement.

Recently, both the New York and Texas legislatures have of the intent of the parties and of whether full compensation has been received; extrinsic evidence is admissible to show actual intent of the parties. See McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); St. Paul Mercury Indem. Co. v. United States, 201 F.2d 57 (10th Cir. 1952); Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954); Derby v. Prewitt, 12 N.Y.2d 100, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962); Restifo v. McDonald, 425 Pa. 5, 230 A.2d 299 (1967). See also Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953); Ash v. Mortensen, 24 Cal. 2d 634, 150 P.2d 876 (1955); Wheat v. Canter, 79 N.H. 150, 106 A. 602 (1919); contra, Norton v. Benjamin, 200 A.2d 248 (Me. 1966); Farrar v. Wolfe, 357 P.2d 1005 (Okla. 1960).

Id. at 402.


TEX. REV. CIV. STAT. ANN. art. 2212(a) (Vernon 1973). The statute provides:
passed new statutes to ensure that the nonsettling tort-feasor would not be burdened with more than his equitable share because another tort-feasor had chosen to settle.

Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

Section 2. (a) In this section:
(1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.
(2) "Defendant" includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

(f) If the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

(h) This section prevails over Article 2212, Revised Civil Statutes of Texas, 1925, and all other laws to the extent of any conflict. Acts 1973, 63rd Leg., p. 41, ch. 28, §§ 1, 2, eff. Sept. 1, 1973.
After the court makes the initial determination that contribution or indemnity is available, it must still determine how to allocate the common liability. At least two jurisdictions seem to be in agreement that the previously separate concepts of indemnity and contribution have been merged and the allocation is simply on the basis of fault. Under this system, the fact finder is given the obligation of allocating the common liability. For example, in *Walsh v. Ford Motor Co.*, both the manufacturer and dealer of a carburetor were found to be negligent in failing to inspect and test the carburetor. The judge decided that the relative fault was seventy-five per cent for the manufacturer (fifty per cent for negligent manufacture and twenty-five per cent for negligent failure to inspect and test) and twenty-five per cent for the dealer. In *Coons v. Washington Mirror Works, Inc.*, one defendant was liable on the theory of negligence and a second defendant was liable on the theory of breach of warranty. The judge decided to allocate fifty per cent of the losses to each defendant.

In the jurisdictions which have adopted comparative negligence principles, either by statute or judicial decision, decisive splits exist concerning whether comparative negligence concepts apply to the doctrine of contribution, and whether they apply to the doctrine of

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83 The three basic methods are contribution, indemnity, and subrogation. *E.g.*, indemnity: *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); subrogation: *Horton v. Continental Cas. Co.*, 72 Ga. App. 594, 34 S.E.2d 605 (1945). Contribution is generally granted either on relative degrees of fault, *see* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) or on a pro rata basis, *see* Safeway Stores, Inc. v. Nest-Kart, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1976). Jurisdictions may recognize both contribution and comparative negligence, *see* note 16 supra. Jurisdictions recognizing comparative negligence may follow one of four different varieties: (1) "pure," *see*, *e.g.*, N.Y. CIV. PRAC. LAW art. 14-A, § 1411 (McKinney 1975); (2) "not as great as" type (49% system), *see*, *e.g.*, ARK. STAT. ANN. § 27-1765 (1955); (3) "not greater than" type (50% system), *see*, *e.g.*, TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon 1973); (4) "slight v. gross" system, *see*, *e.g.*, S.D. COMPiled LAWS ANN. § 20-9-2 (1967).


85 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct., Trial Term 1972).

86 *Id.* at 113.


88 *Id.* at 658.

of contribution between the strictly liable and negligently liable tort-feasors. In Texas, for example, the comparative negligence statute expressly states that contribution will be based upon the relative degree of causal negligence of each joint tort-feasor, but the Texas courts have not applied this statute to an action involving strict liability.

In California, the right to contribution is defined statutorily. Contribution on a pro rata basis is allowed when judgment has been rendered jointly against two or more defendants in a tort action and one tort-feasor has either paid more than his pro rata share or discharged the joint judgment. Recent decisions by the California Court of Appeals indicate that contribution will continue to be on a pro rata basis despite a landmark decision by the California Supreme Court which judicially abolished the rule of contributory negligence and replaced it with a doctrine of “pure” comparative negligence.

In slight contrast, the Alaska Supreme Court recognized pure comparative negligence as a defense in a strict liability action. Although the case involved an action between a negligent plaintiff and a strictly liable defendant, the court's reasoning could easily be molded to control the rights of a strictly liable defendant seeking contribution from a negligently liable defendant. The court reasoned that pure comparative negligence could provide a predicate of fairness in products liability cases in which the plaintiff and defendant contribute to the injury. The defendant would be strictly

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90 See note 89 supra.
92 Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref’d n.r.e.).
96 Id. at 808, 532 P.2d at 1230, 119 Cal. Rptr. at 862.
liable due to the existence of a defective condition in the product, but the award of damages could be reduced in proportion to the plaintiff's contribution to his injury. The court further stated that the defense of comparative negligence was not limited to those cases in which the plaintiff used the product with knowledge of the defective condition, but also to those cases where the plaintiff misused the product. In a dissenting opinion, Judge Burke criticized the court's decision as a step backward because it ignored the fundamental policy considerations that gave rise to the doctrine of strict liability in products liability cases.

Similarly, comparative negligence concepts were applied to a products liability action by an Idaho court in Sun Valley Airlines, Inc. v. Avco-Lycoming Corp. In that case, an airline and relatives of persons killed in a crash of one of the airline’s planes brought actions against the manufacturer, claiming that the crash was caused by a defect in the plane. The jury attributed ninety per cent of the cause of the crash to the airline and ten per cent to the plane manufacturer. The court held that the Idaho comparative causation law applied to this products liability action, reasoning that a violation of a duty owed, whether it be labeled negligence or strict liability, is blameworthy or culpable conduct and can be apportioned by the fact finder. The court felt that strict liability was like negligence per se and was capable of causal comparison,

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98 Id. at 45, 46.
99 Id. at 46.
100 Id. at 47.
1 Burke stated:

As articulated in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 901 (1962), "The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Clearly, this underlying policy will be given little effect if a plaintiff is to be held responsible for his own injuries, to the extent that those injuries are caused by his own ordinary negligence, when he is not aware of the defect and the dangers associated with that defect. Accordingly, I would hold that a plaintiff's own negligence is relevant only in those cases where he is aware of a specific defect and voluntarily proceeds to encounter a known danger.

102 Id. at 598.
103 Id. at 601.
104 Id. at 602.
and found this rationale was supported by case law as well as the writing of commentators. Further, although there was no question of contribution involved, the court concluded that comparative causation could easily facilitate the law of contribution. Similarly, the Wisconsin courts have applied their comparative negligence statute to products liability actions, stating that comparative fault replaces the defense of abnormal use or misuse. The Wisconsin Supreme Court has held that the comparative negligence statute applies to the allocation of common liability between joint tort-feasors in a products liability action, stating that indemnity was no longer available after the adoption of the comparative negligence statute, since the purpose of the comparative negligence statute was to eliminate the "all or none" concept.

There are decisive differences among the various jurisdictions of the United States concerning the use of the comparative negligence doctrine, the application of comparative negligence in products liability cases, and the application of comparative negligence to

105 Id. at 603.
106 Id. at 604.
107 E.g., Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 211 N.W.2d 810 (1973); City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
110 Presently, thirty states, either by statute or by judicial decision, have adopted comparative negligence—by judicial decision: Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); and Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).
110 Five states have comparative negligence statutes which appear to apply to tort liability in general: Ark. Stat. Ann. §§ 27-1763 to 27-1765 (1975); Me.
Various jurisdictions have also adopted different types of comparative negligence. Eight states have “pure” comparative negligence, that is, even if the plaintiff was ninety per cent at fault, he can still recover ten per cent of his damages. Ten have adopted the “not as great as” type, that is, if the plaintiff is forty-nine per cent at fault he may recover, but he cannot recover if he is at least fifty per cent at fault. Eleven states have adopted a “not greater than” type of comparative negligence, that is, if the plaintiff


California, which judicially adopted comparative negligence (see note 109 supra), appears to apply it as well to products liability action. Cf. Safeway Stores, Inc. v. Nest-Kart, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1976).


111 See note 16 supra.
112See notes 113, 114, 115 infra.
114Examples of the “not as great as” type (sometimes called the 49% system): ARK. STAT. ANN. §§ 27-1763 to 27-1765 (Supp. 1975); GA. CODE ANN. §§ 94-703 (1972); IDAHO CODE §§ 6-801 to 6-806 (Supp. 1976); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. tit. 14, § 156 (Supp. 1976); MINN. STAT. ANN. § 604.01 (West Supp. 1976); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, §§ 11-12 (1973); OR. REV. STAT. § 18.470 (1975); UTAH CODE ANN. §§ 78-27-37 (1977); and WYO. STAT. § 1-7.2 (Supp. 1975).
is fifty per cent at fault, he may recover, but he cannot recover if he is fifty-one per cent at fault. Because of this substantial difference among the various jurisdictions, a Uniform Comparative Fault Act has been drafted by the commissioners for the Uniform State Law Commission under the guidance of Professor John Wade. The commissioners have chosen to recommend the adoption of "pure" comparative negligence. In the latest draft of the Uniform Comparative Fault Act, comparative negligence supplants last clear chance, implied assumption of risk, and similar common-law and statutory provisions regarding contributory fault and applies

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Footnotes:


116 The Act provides:

SECTION 1. In a tort action for damages on the basis of negligence, recklessness or strict liability, including statutory actions unless otherwise expressed or construed, contributory fault of the plaintiff, or, in a derivative action the person injured or killed, whether previously constituting a defense or not, does not necessarily bar recovery, but the damages are diminished in proportion to the amount of fault attributable to the plaintiff, the injured person or the decedent.

SECTION 2. In a tort action involving contributory fault, the court shall instruct the jury to give answers to special interrogatories [render special verdicts], or make findings itself if there is no jury, which indicates:

1. The amount of damages which would have been recoverable if there had been no contributory fault,
2. The percentage of the contributory fault for each plaintiff as compared with the total fault of all of the parties to the action, and
3. The percentage of the fault of each defendant as compared with the total fault of all of the parties to the action.

SECTION 3. This act does not change common law principles of joint and several liability of joint tortfeasors. Contribution rights among multiple defendants are determined in accordance with the percentage of fault of each defendant, as found by the trier of fact. The court enters judgments on the basis of these principles and the findings made under Section 2.

SECTION 4. To the extent that liability insurance is available to pay a judgment entered under this act the principle of set-off is not applied.

SECTION 5. This act applies to all injuries incurred after the act takes effect.


117 Id.
whether or not contributory fault previously constituted a defense.¹¹⁸

During the same period of time that the different state courts were struggling with the problems of developing rules of contribution and indemnity, strict products liability, and comparative negligence, the federal courts began to fashion a body of federal common law of contribution. In Kohr v. Allegheny Airlines, Inc.,¹¹⁹ the Seventh Circuit held that the allocation of contribution would be on a comparative negligence basis. Kohr arose out of a midair collision between a commercial aircraft owned by Allegheny Airlines and a small private aircraft. Wrongful death actions or property damage suits were initiated in various federal district courts against Allegheny, the Federal Aviation Agency under the Federal Tort Claims Act, the estate of Carey (the student pilot of the small aircraft), and the Forth Corporation (owner of the small aircraft and instructor of Carey) as joint tort-feasors. Allegheny and the United States filed cross-claims and third-party complaints against the other defendants. Allegheny and the United States settled the claims of all the plaintiffs. The district court dismissed claims by Allegheny and the United States against the other defendants on the ground that no right to indemnity or contribution existed under Indiana law.¹²⁰ The Seventh Circuit, however, reversed and held that a federal law of contribution or indemnity should control and should be applied on a comparative negligence basis.¹²¹ On the same day the Supreme Court denied certiorari in Kohr, it decided an admiralty case involving the same issue.¹²² The Supreme Court replaced the admiralty rule of dividing damages on a pro rata basis with a rule requiring liability for maritime collision damages to be allocated among the parties according to their degree of fault, a holding very similar to that of the Seventh Circuit in Kohr. The Supreme Court therein indicated that contribution in admiralty and in certain aviation collision contexts was to be based upon proportionate fault and not upon such arcane rationales as the "active-passive" test or the "divided damages" test.

¹¹⁸ *Id.* at 117.
¹²⁰ *Id.* at 402.
¹²¹ *Id.* at 405.
The soundness of the decision to create a federal common law has been sharply challenged. The criticism has been tempered, though, by a recognition of the strong federal interest in aviation and by a recognition of the difficult problems facing courts and litigants absent a federal rule. The Seventh Circuit in *Kohr* was faced with a tempting opportunity. The alternatives open to the court were to deny contribution from a joint tort-feasor to Allegheny and the United States, or to radically change the complexion of aircrash litigation and achieve an equitable apportionment of loss among the parties. While violative of states' rights to promulgate substantive tort law, and unsupported by the Rules of Decision Act, the decision has focused attention, once again, on the desirability of a uniform torts law for aviation litigation.

**IV. Conclusion**

The present state of the law is unacceptable. In most jurisdictions within the United States, the law is unsettled, and the handling of major aviation litigation necessarily requires an attempt to forecast the forum court's ruling concerning choice of law principles, as well as a prediction of the applicable substantive law concepts of strict liability, comparative negligence, and contribution, without any concrete guidelines. This is because the forerunning jurisdictions which have had an opportunity to address these problems have changed the substantive rules of law concerning products liability, comparative negligence, conflicts of law, and contribution and indemnity on an ad hoc, piecemeal basis. There is no satisfactory method to determine the law applicable to each case in order to facilitate a prediction of the legal ramifications of one's conduct. For this reason, a number of commentators have begun espousing the need for the adoption of uniform rules.

One solution would be for Congress to adopt a substantive body of law governing aviation litigation. The state courts do not have sufficient jurisdiction to adopt uniform laws on a national basis, and any attempt by the federal courts would unnecessarily encounter several problems. First, the courts attempting to fashion the law of the case would be faced with having to analyze the effect of the law on the rights of the parties before the court. Second, the courts do not have the time or resources to make the necessary
analysis of the policy decisions underpinning such a uniform rule of law. Third, the various circuit courts within the United States might arrive at different conclusions as to what the law should be, leading to forum shopping and its associated inequities. Finally, the courts’ decisions would be subject to appeal, thereby further prolonging the enactment of a uniform law and leaving litigants in the uncomfortable position of not knowing what the law is or will be. Congress has the power to enact such legislation under the Commerce Clause, but seems to be in no mood to act. The last serious attempt to enact a bill giving federal courts the exclusive jurisdiction over major aviation litigation and providing a substantive body of law to govern major aviation litigation was the introduction of a bill by Senator Joseph Tydings in 1969. Overall support for the bill was lacking, and the bill never left the Judiciary Committee following Senator Tydings’ unsuccessful bid for reelection.

Although the Uniform Comparative Fault Act is currently being considered by Congress, the Act does not address some of the problems set out and discussed in this paper and the Act leaves a large amount of discretion to the states to determine whether they wish to adopt the Act. Unfortunately, no easy solution appears to be in sight.

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123 S. RES. 961, 91st CONG., 1ST SESS., 115 CONG. REC. 3111, 20,253 (1969).