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Contribution in Missouri-Procedure and Defenses under the New Rule

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COMMENTS

CONTRIBUTION IN MISSOURI—PROCEDURE AND DEFENSES UNDER THE NEW RULE

I. INTRODUCTION

Contribution is a means of equitably apportioning the liability arising from a particular tort among those wrongdoers responsible for the tort's occurrence.[1] In the past in Missouri, when a tortfeasor compensated the

1. Panichella v. Pennsylvania R.R., 167 F. Supp. 345, 351-52 (W.D. Pa. 1958); Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 688 (Minn. 1977); Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co., 338 Mo. 692, 693, 93 S.W.2d 19, 23 (En Banc 1934); Mong v. Hershberger, 200 Pa. Super. Ct. 68, 71, 186 A.2d 427, 429 (1962); 18 AM. JUR. 2d *Contribution* § 1 (1975).

plaintiff for his loss, the tortfeasor's right to obtain contribution from others responsible for the loss was limited to the situation where there was a judgment entered against *joint* tortfeasors.[2] In a sweeping opinion, the Missouri Supreme Court in *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*[3] removed this obstacle confronting a defendant who sought to have others share in paying for a loss for which they were also responsible. The court created a contribution system based on relative fault, in effect a system of comparative negligence between joint tortfeasors.

This comment will examine the parameters of the new Missouri rule on contribution and its effect on non-contractual indemnity. The new rule is a major step in establishing a realistic and equitable means of distributing loss. However, the application of the rule is fraught with problems and unanswered questions. The focus of this comment will be to discern the substantive and procedural implications of the rule. Since the new rule has no effect on the injured party's rights as they existed prior to the decision, emphasis will be on the problems confronting the tortfeasor who seeks contribution and the problems confronting the tortfeasor from whom contribution is sought. In order to more fully understand and appreciate the new rule, it will be helpful to briefly survey the common law origins of the rule, its acceptance and application in the United States, and the development of the rule in Missouri.

II. DEVELOPMENT

Contribution and indemnity developed from equitable principles of unjust enrichment and restitution.[4] At common law there were few exceptions to the right of a defendant to seek contribution or indemnity from another who was partly or wholly responsible for the plaintiff's injury. In the case of contribution it was thought that a person who discharged a common liability was entitled to recover from another who was also liable on that part of the liability for which he was responsible.[5] On the other

2. RSMo § 537.060 (1978). *See* Crouch v. Tourtelot, 350 S.W.2d 799 (Mo. En Banc 1961).

3. 566 S.W.2d 466 (Mo. En Banc 1978).

4. Comment, *Products Liability—Non-Contractual Indemnity—The Effect of the Active-Passive Negligence Theory in Missouri,* 41 MO. L. REV. 382, 383 (1976).

5. The right of contribution grows out of the relation of the parties to the obligation or from the nature of the relation between them and out of what they do. It is almost universally agreed that the doctrine of contribution is founded not upon contract but upon principles of equity and natural justice, which require that persons under a common burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligors. It is equally true, therefore, that the doctrine of contribution is founded upon morality, since no one ought to profit by another man's

hand, indemnity allows a tortfeasor to recover reimbursement from another for the entire amount of the loss.[6]

The principal exception to the common law rule allowing contribution was that there was no contribution among wilful tortfeasors.[7] Initially, courts in the United States applied the rule only to intentional conduct;[8] however, due to misinterpretation of the common law rule,[9] the bar on contribution soon became expanded to include within its scope mere negligent acts.[10] Negligent joint tortfeasors became subject to the same harsh common law rule denying contribution which was originally intended to include only intentional torfeasors.

Many courts, including Missouri, expanded the concept of implied indemnity in an attempt to circumvent the harsh rule denying contribution among joint tortfeasors.[11] If a tortfeasor could show that his negligence

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loss where he himself has incurred a like responsibility.
18 AM. JUR. 2d *Contribution* § 4 (1965). *See also* W. PROSSER, THE LAW OF TORTS 310 (4th ed. 1971); Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130 (1932).

6. The right to indemnity typically arises from contract, either expressed or implied. W. PROSSER, *supra* note 5, at 310. Indemnity allows a party to recover reimbursement from another for the entire amount of the loss rather than sharing the loss as is done with contribution. Originally, indemnity could be obtained only when the liability of the prospective indemnitee arose as a matter of law, either through express agreement or, more commonly, vicarious liability. Thus a master who is held liable for the torts of his servant can seek indemnity from the servant because as between them the master is without fault. Comment, *Contribution Among Tortfeasors—The Need for Clarification,* 8 J. MAR. J. PRAC. & PROC. 75, 79 (1974).

7. Pearson v. Skelton, 150 Eng. Rep. 533 (1836); Betts v. Gibbins, 111 Eng. Rep. 22 (1834); Adamson v. Jarvis, 130 Eng. Rep. 603 (1827); Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799).

8. *See* cases collected in W. PROSSER, *supra* note 5, at 306 nn.45 & 46.

9. Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan,* 12 HARV. L. REV. 176, 177 (1898). *See also* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d at 469.

10. *See* cases collected in W. PROSSER, *supra* note 5, at 306 n.47. It has been asserted that the reason courts in the United States began applying the rule to negligent tortfeasors is adoption of procedural codes which allowed the convenient combination of many parties and issues in one trial but which failed to recognize that at common law "the rules of law regarding 'joint' tortfeasors did not necessarily apply to tortfeasors who could now be 'joined' procedurally in the same action." Comment, *Contribution Among Tortfeasors—The Need for Clarification,* 8 J. MAR. J. PRAC. & PROC. 75, 78 (1974).

11. It has been observed "that the doctrine of indemnity evolved in the unnatural surroundings of an inflexible rule against contribution and consequently was overextended as a device for reallocation of loss." Comment, *Toward a Workable Rule of Contribution in the Federal Courts,* 65 COLUM. L. REV. 123, 126 (1965). "Despite the early common law 'rule,' we do permit indemnity to some extent between non-contractual concurrent tortfeasors in Missouri." Missouri Pac. R.R. v. Whitehead & Kales, Co., 566 S.W.2d at 469. *See also* Comment, *Products Liability—Non-Contractual Indemnity—The Effect of the Active-Passive Negligence Theory in Missouri,* 41 MO. L. REV. 382, 384 (1976).

was of a different character than that of his fellow tortfeasor, he could obtain indemnity from the other for the entire amount of the loss.[12] Thus, a tortfeasor whose negligence was said to be passive could recover from the tortfeasor whose negligence was active.[13] Likewise, one who was secondarily liable to the injured party would be entitled to indemnity from one primarily liable.[14] These labels proved to be little more than artificial distinctions made necessary by an inflexible rule against contribution.[15] They allowed a court to rationalize its decision in a particular case but often proved to be inadequate precedent for subsequent decisions. It seems that many cases simply involved a judicial choice of the lesser of two evils: either imposing the whole loss on a tortfeasor who was unable to obtain contribution, or allowing him to shift the entire burden to another who was deemed to be more at fault.[16] The "all or nothing" approach of the indemnity exception was rationalized on the ground that the truly culpable party should not be allowed to escape liability while the technically culpable party was forced to pay the plaintiff's entire loss.[17]

The impetus for expanding the concept of indemnity through artificial conceptual distinctions has been lessened due to recent legislative and judicial pronouncements which have virtually eradicated the no contribution rule. Over forty jurisdictions now allow contribution between joint tortfeasors to some extent; the majority of these jurisdictions have some statutory basis for their rule.[18] Many of the statutes are based on the

12. Implied indemnification is dependent on the character of the negligence whereas contribution depends on the difference in the degrees of negligence between the tortfeasors. Missouri Pac. R.R. v. Whitehead & Kales, Co., 566 S.W.2d at 472. *See also* Crouch v. Tourtelot, 350 S.W.2d 799, 805 (Mo. En Banc 1961); State *ex rel.* Laclede Gas Co. v. Godfrey, 468 S.W.2d 693, 698 (St. L. Mo. App. 1971); Coccia, *Getting Others To Assume or Share the Loss: A Discussion of Indemnity and Contribution,* 1976 TRIAL LAW. GUIDE 179, 184; Greenstone, *Spreading the Loss—Indemnity, Contribution, Comparative Negligence and Subrogation,* 13 FORUM 266, 268 (1977); Comment, *Procedure—Third Party Practice—Non-Contractual Indemnification,* 28 MO. L. REV. 307, 309 (1963).

13. *See, e.g.,* Kansas City S. Ry. v. Payway Feed Mills, Inc., 338 S.W.2d 1, 7 (Mo. 1960).

14. *See, e.g.,* Hales v. Green Colonial, Inc., 402 F. Supp. 738, 740 (W.D. Mo. 1975), *modified on other grounds,* Hales v. Monroe, 544 F.2d 331 (8th Cir. 1976).

15. As pointed out by the court in *Missouri Pacific,* the distinction between the terms active and passive has become so blurred that the right to obtain indemnity depends more on phraseology than on the actual responsibility of each tortfeasor for the plaintiff's loss. Thus, the rationale for allowing indemnity fails to be persuasive since there are no clear guidelines for determining when one is only technically responsible for the loss. 566 S.W.2d at 471.

16. Coccia, *Getting Others to Assume or Share the Loss: A Discussion of Indemnity and Contribution,* 1973 TRIAL LAW. GUIDE 179, 187.

17. *Id.*

18. ALASKA STAT. §§ 09.16.010-.060 (1973); ARK. STAT. ANN. §§ 34-1001

Uniform Contribution Among Tortfeasors Act.[19] An increasing number base contribution on relative fault; however, the majority simply divide the loss equally among the tortfeasors.[20] A few states have refused, despite the trend to the contrary, to abandon the no contribution rule.[21]

In *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, the

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to 1009 (1962) (apportionment based on relative fault); CAL. CIV. PRO. CODE § 875 (Supp. 1971); DEL. CODE ANN. tit. 10, §§ 6301-6308 (1953) (relative fault); GA. CODE ANN. § 105-2012 (1968); HAW. REV. LAWS §§ 663-11 to 16 (1968) (relative fault); IDAHO CODE § 6-803 (Supp. 1978); KY. REV. STAT. § 412.030 (1969); LA. CODE CIV. PRO. ANN. arts. 1111-1116 (1960); ME. REV. STAT ANN. tit. 14, § 156 (1978) (relative fault); MD. ANN. CODE art. 50, §§ 16-24 (1968); MASS. GEN. LAWS ANN. ch. 231, § 1-4 (1968); MICH. STAT. ANN. § 27A.2925 (1962); MINN. STAT. ANN. § 548.19 (1946) (relative fault); MISS. CODE ANN. § 335.5 (1956); RSMO § 537.060 (1978); MONT. REV. CODES ANN. § 58-607.2(1) (Supp. 1977) (relative fault); N.J. REV. STAT. §§ 2A:53A-1 to -5 (1951) (relative fault); N.M. STAT. ANN. § 24-1-11 to -18 (1953); N.Y. CIV. PRAC. § 141 (Supp. 1978) (relative fault); N.C. GEN. STAT. § 1B-1 (1969); N.D. CENT. CODE §§ 32-38-01 to -04 (1960); OHIO REV. CODE ANN. § 2307.31 (Supp. 1978) (relative fault); OR. REV. STAT. § 18.440 (1975) (relative fault); PA. STAT. tit. 12, §§ 2082-2089 (1967); R.I. GEN. LAWS ANN. §§ 10-6-1 to -11 (1969) (relative fault); S.D. CODE §§ 15-8-11 to -22 (1967) (relative fault); TENN. CODE ANN. § 23-3101 (Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 2212 (1964) (relative fault); UTAH CODE ANN. § 78-27-39 (1953) (relative fault); W. VA. CODE ANN. §§ 55-7-12 to -13 (1966); WIS. STAT. §§ 113.01-.05 (1957) (relative fault); WYO. STAT. ANN. §§ 1-1-110 to -113 (1977) (relative fault). Four states have adopted comparative negligence statutes which do away with joint and several liability. In these states, a tortfeasor is only liable for his allocated share, thus there is no need for contribution. KAN. STAT. ANN. § 60-258a(d) (Weeks 1976); NEV. REV. STAT. § 41-141(3)(a)(b) (1972); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1975); VT. STAT. ANN. § 1036 (1959). The District of Columbia and Iowa also allow contribution, having never adopted the common law rule against contribution. *See* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956). Nebraska also allows contribution. Royal Indem. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975).

19. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939 and 1955 versions). The 1939 version had an optional provision permitting apportionment based on relative fault of the tortfeasors. This provision was eliminated in the 1955 version and pro rata apportionment was adopted because, the Commissioners said in their comments to § 2, the "exclusion of intentional, wilful, and wanton actors from the right to contribution eliminates the better arguments for a relative degree of fault rule."

20. *See* notes 18 & 19 *supra*.

21. Sherman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co., 335 So. 2d 125 (Ala. 1976); Holmes v. Hoemako Hosp., 117 Ariz. 403, 537 P.2d 477 (1978); Publix Cab Co. v. Fessler, 138 Colo. 547, 335 P.2d 865 (1959); Fox v. Fox, 168 Conn. 592, 362 A.2d 854 (1975); National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967); Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 132 S.E.2d 172 (1963).

Missouri Supreme Court addressed itself to the indemnity exception[22] and the statutory joint judgment exception[23] to the rule denying contribution among joint tortfeasors. It found both to be lacking in their protection of the equitable principles embodied in the notion of contribution and indemnity. The court also found the active-passive negligence distinction to be insufficient as a guide for determining when indemnity should be allowed[24] since it often served to sanction inequities by requiring a tortfeasor who was not fully responsible to bear the entire amount of the loss.[25]

With respect to the statutory allowance of contribution among joint judgment tortfeasors, the court recognized that it was insufficient and unfair because it allowed the plaintiff, by choosing who to sue, to determine who would bear the entire financial responsibility for the tort.[26] Furthermore, the right to contribution did not automatically follow even where there was a joint judgment.[27] Based on these conclusions, the court in *Missouri Pacific* chose to totally abandon the no contribution rule. Contribution is now freely allowed based on the relative fault of each tortfeasor.[28] The judge or jury is to allocate the financial impact of the plaintiff's loss among all the tortfeasors regardless of whether each was sued by the plaintiff.[29] The decision allows a defendant to use third-party practice to bring into the original action any other joint tortfeasor who may be partly or wholly responsible for the plaintiff's loss. The decision does not affect the right of the plaintiff to sue whichever tortfeasors he chooses, nor does it stop him from collecting the entire judgment from any defendant.[30] The effect of the decision is limited to contribution and non-contractual indemnity;[31] it has no effect on contractual indemnity.

The court's decision raises but does not answer several questions and some of the language lends itself to interpretations which could severely restrict the application of the contribution rule. Chief among the

22. *See* notes 11-14 and accompanying text *supra.*

23. RSMo § 537.060 (1978).

24. 566 S.W.2d at 470-71.

25. *Id.* at 472.

26. *Id.*

27. A joint judgment against two or more tortfeasors makes a prima facie case of contribution, but contribution may, nevertheless, be denied if one of the defendant's negligence is determined to be passive while the other's is determined to be active. Hays-Fendler Constr. Co. v. Traroloc Invest. Co., 521 S.W.2d 171 (Mo. App., D. St. L. 1975).

28. "The principle of fairness imbedded within our law compels this adoption of a system for the distribution of joint tort liability on the basis of relative fault." 566 S.W.2d at 474.

29. The pros and cons of allocating negligence to nonparties is discussed in notes 35-41 and accompanying text *infra.*

30. 566 S.W.2d at 473.

31. The court defined non-contractual indemnity as "indemnity between joint tortfeasors culpably negligent, having no legal relation to each other. We do not include indemnity which comes about by reason of contracts or by reason of vicarious liability." 566 S.W.2d at 468 n.2.

unanswered questions are: When can the action for contribution be brought and what are the consequences of bringing the action at any particular time? How is the allocation of relative fault to be actually handled in specific situations and what type of damages and expenses can be allocated? Who can seek contribution? What is the effect of the party from whom contribution is sought having a defense to a direct suit brought by the plaintiff? These questions and other related problems are considered in subsequent sections of this comment. The existing authority in Missouri and other states, along with the language in *Missouri Pacific*, suggest answers to many of the problems.

III. PROCEDURAL PROBLEMS: THE WHO, WHAT, WHEN, AND HOW OF CONTRIBUTION

To allocate the liability of each joint tortfeasor for his relative share of the plaintiff's total damage,[32] the judge or jury must be made aware of those responsible for the damages. This requires the defendants to make use of a variety of procedural tools to bring joint tortfeasors before the court in the original action. If it is not possible to bring a joint tortfeasor before the court, those sued may be able to present evidence of the absent tortfeasor's responsibility for part of the plaintiff's loss,[33] or seek allocation in a separate action after the plaintiff has obtained a judgment in the original action.[34] The availability of these alternatives makes it necessary for a defendant in any action involving joint tortfeasors to initially determine when the allocation of fault will be made.

A. *Allocation in the Original Action*

There are two methods by which a defendant may have the relative responsibility for the plaintiff's damages allocated in the original action. First, it may be possible for him to merely present evidence showing the facts and circumstances which make an absent tortfeasor responsible for all or part of the plaintiff's loss, without formally making the tortfeasor a

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32. The final bill that a defendant tortfeasor incurs and for which he can claim contribution may be more than merely the plaintiff's verdict. A tortfeasor may be able to get contribution for the reasonable expenses expended in investigating, defending or compromising the claim. *See* Laws v. Spain, 312 F. Supp. 315 (E.D. Va. 1970). Missouri courts have previously held that a party entitled to indemnity may recover from the indemnitor court costs and attorney fees if notice of the lawsuit and an opportunity to defend are given to the indemnitor. This may lend support for applying the same rule to contribution cases. *See, e.g.*, Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192 (8th Cir. 1974); Ward v. City Nat'l Bank & Trust Co., 379 S.W.2d 614 (Mo. 1964); Sears Roebuck & Co. v. Peerless Prod. Inc., 539 S.W.2d 768 (Mo. App., D.K.C. 1976); 42 C.J.S. *Indemnity* § 24 (1965).

33. *See* notes 35-41 and accompanying text *infra*.

34. *See* notes 80-91 and accompanying text *infra*.

party in the action.[35] In *Missouri Pacific*, the court stated that "a jury in the same or separate trial . . . should be charged with the responsibility for determining a relative distribution of fault and liability for the damages flowing from the tort."[36] The phrase "damages flowing from the tort" arguably would allow the negligence of nonparties to be considered since the negligence of nonparties could have contributed to the damages flowing from the tort. However, another statement by the court concerning general verdicts under Missouri Rule of Civil Procedure 71.01 indicates that the negligence of nonparties is not to be considered. The court stated that "the jury's verdict could assess damages, in accordance with the instructions, and award indemnity in an amount proportionate to the relative fault of the *parties*."[37] Thus, it is not clear under *Missouri Pacific* whether or not nonparty negligence can be considered. It seems preferable, however, to place the responsibility on the plaintiff and the defendant to bring before the court all those accountable for the loss in order that considerations of nonparties' negligence can be avoided.[38] To do otherwise may encourage an overuse of evidence of "phantom fault," especially by third party defendants since they are not jointly and severally liable for the entire amount of the plaintiff's judgment.[39] If evidence of nonparty negligence is admissible, the amount of third party defendants'

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35. For a discussion of jury considerations of negligence of nonparties, *see* Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289; Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 762 (1976); Comment, *Comparative Negligence—A Look at the New Kansas Statute*, 23 KAN. L. REV. 113, 128 (1974); Note, *Multiple Party Litigation Under Comparative Negligence in Kansas—Damage Apportionment as a Replacement for Joint and Several Liability*, 16 WASHBURN L.J. 672, 678 (1977).

36. 566 S.W.2d at 474.

37. *Id.* at 473 (emphasis added).

38. Schwartz, *supra* note 35, at 762. Note, however, that the courts of Wisconsin strongly advocate considering the negligence of nonparties. "[T]he jury must be given the opportunity to consider the possible negligence of all persons, whether parties or not, who may have contributed to the total negligence." Reddington v. Beefeaters Tables, Inc., 72 Wis. 2d 119, 125, 240 N.W.2d 363, 367 (1976). *See also* Heldt v. Nicholson Mfg. Co., 72 Wis. 2d 110, 240 N.W.2d 154 (1976); Connar v. West Shore Equip. Co., 68 Wis. 2d 42, 227 N.W.2d 660 (1975); Payne v. Bilco Co., 54 Wis. 2d 345, 195 N.W.2d 641 (1972). This strong state policy may be explained in part by the use of the *Pierringer* release in Wisconsin. The released tortfeasor is only excused from contribution to the extent of the released tortfeasor's equitable share as determined by the jury and the released tortfeasor is, of course, not a party to the action. *See* discussion of the *Pierringer* release at notes 133-36 and accompanying text *infra*.

39. 566 S.W.2d at 474. *See also* Berliner v. Kacov, 79 Misc. 2d 891, 894, 361 N.Y.S.2d 477, 479 (1974), where the court stated, "[i]t is highly significant that the [third party defendants] did not become a party at the instance of the plaintiff. The plaintiff made no complaint against [them] and sought nothing from them. Therefore, [they] did not become responsive to the judgment of the plaintiff and do not bear several liability with the [defendants]."

liability can be reduced by the percentages of fault they can convince the jury to assign to the "phantom defendant."[40] This makes the jury's task of assigning responsibility for the loss difficult and may tempt them to impose liability on a person who was never before the jury to present his case.[41]

The second method by which a defendant may be able to have the allocation of responsibility determined in the original action and, in addition, obtain a *conditional* judgment for contribution,[42] is by the procedural tools of impleader, cross-claims, and counterclaims.

1. Impleader

Impleader is used by a defendant when the plaintiff has not brought suit against all joint tortfeasors. Missouri rule 52.11 allows a defendant to serve a summons and petition on a third party who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant.[43] The court in *Missouri Pacific* expressly sanctioned the use of impleader as an appropriate means of bringing a co-tortfeasor before the court in order to determine his relative responsibility.[44]

The simplest impleader situation exists where P sues D_1, and D_1 impleads D_2. It is illustrated as follows:

P----------D_1----------D_2

Assume that P receives a $100,000 judgment. Subsequent to the impleader, the plaintiff can collect his judgment only from D_1, unless he chose to join D_2 as a primary defendant in the action.[45] D_1, as a third party

40. For example, assume the plaintiff has sued defendants A and B and they implead defendant C. Assume further that without the evidence of X's (phantom defendant) negligence, the jury would allocate responsibility as A-(40%), B-(40%) and C-(20%). With the evidence of X's negligence the jury may now find that responsibility should be allocated as A-(35%), B-(35%), C-(15%) and X-(15%). A and B would be required to absorb the 15% attributable to X because they are jointly and severally liable for the entire amount of the plaintiff's loss. C, who was not sued by the plaintiff, has his liability reduced from 20% to 15% by merely presenting evidence of X's negligence.

41. Gross v. Midwest Speedways, Inc., 81 Wis. 2d 129, 145, 260 N.W.2d 36, 44 (1977) (Abrahamson, J., dissenting).

42. The actual right to obtain contribution from a co-tortfeasor does not arise until the responsibility for the plaintiff's loss has been allocated and one of the tortfeasors has paid more than his allocated share. *See, e.g.*, Albert v. Dietz, 283 F. Supp. 854 (D. Hawaii 1968); Simon v. Kansas City Rug Co., 460 S.W.2d 596 (Mo. 1970); Markey v. Skog, 129 N.J. Super. 192, 322 A.2d 513 (1974). Thus, while the allocation of responsibility will be determined in the original action, a tortfeasor's right to obtain contribution is conditioned upon his paying more than his share to the plaintiff.

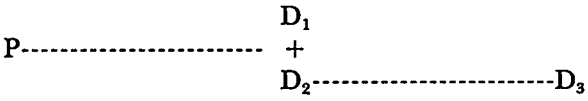
43. MO. R. CIV. P. 52.11.

44. 566 S.W.2d at 468.

45. MO. R. CIV. P. 52.11 allows a plaintiff to "assert any claim against the third-party defendant arising out of the transaction or occurrence that is the sub-

plaintiff, will have a judgment against D_2, the third party defendant, for the amount of damages allocated to D_2 in the original action. The judgment will be enforceable only after D_1 has paid more than his allocated share to the plaintiff.[46] Thus, if D_1 and D_2 were each found to be fifty percent at fault, D_1 can only collect from D_2 for the amount D_1 pays in excess of his $50,000 share of the plaintiff's judgment.

The situation may also arise where the plaintiff has sued two defendants, one of whom uses an impleader action to bring in a third party. For example, assume that the plaintiff has sued the drivers of two cars, D_1 and D_2, alleging that their negligence combined to produce his injury. D_2 impleads D_3, the manufacturer of his automobile, asserting that D_3 should be liable for all or part of any amount D_2 is found liable to the plaintiff. The action would be illustrated as follows:



The question of whether D_1 can also implead D_3, claiming D_3 is liable for all or part of the plaintiff's claim against D_1, remains unclear. Rule 52.11 only expressly allows a defending party to serve a third party complaint on a person not a party to the action.[47] Arguably, D_3 is already a party to the action; thus, he could not be made a party defendant liable to D_1. It could be argued, though, that D_1 should be allowed to implead D_3 on the basis that D_3 need only *not* be a party to the *original* action against D_1 and D_2.[48] Although this question must await clarification in Missouri, denial of an impleader action premised solely on a technical reading of rule 52.11 appears unjustifiable.

Another question which may arise in regard to the above example is whether D_3 could ever be allocated a greater share of the fault than D_2 who impleaded him, assuming that D_1 does not implead D_3 as a result of conscious choice or neglect, or when he cannot do so because of an immunity. Could the jury come back with a verdict finding D_1 forty percent at fault, D_2 twenty percent at fault, and D_3 forty percent at fault? Rule 52.11 seems to provide that the third party defendant, D_3, cannot be liable for any

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ject matter of the plaintiff's claim against the third-party plaintiff." It is clearly optional with the plaintiff, though, whether to accept a third-party defendant brought in by a third-party plaintiff. State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W.2d 126 (En Banc 1948).

46. *See* note 42 *supra.*

47. "[A] third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action . . . ." MO. R. CIV. P. 52.11.

48. Novak v. Tigani, 49 Del. 106, 107, 110 A.2d 298, 299 (1954). The court stated that "the phrase 'party to the action' as it appears in the first sentence of [DEL. CODE ANN.] Civil Rule 14(a) should be construed to mean party to the original action only." This rule is similar to MO. R. CIV. P. 52.11.

more than the plaintiff's claim against the third party plaintiff, D_2;[49] if D_3 is allocated a greater percentage of the plaintiff's loss than D_2, it would seem inconsistent with this rule for D_3 to pay for more of the plaintiff's loss than D_2. However, this apparent inconsistency can be resolved by noting that the plaintiff's true claim against each tortfeasor be sues is the total amount of the judgment rather than the allocated share of each.[50] As the court in *Missouri Pacific* stated:

> In a case such as we have before us, the jury should be instructed that if they find the third party defendant did certain acts or omissions and was thereby negligent and that the same directly contributed to cause the injuries and damage to the original plaintiff, then the jury should award the third party plaintiff such proportion of the total sum *paid* by it to plaintiff as corresponds to the degree of fault of the third party defendant.[51]

Therefore, it appears that D_3 could be allocated a greater percent of the fault than D_2, but not required to pay a greater amount of the damages than D_2. The approach taken by the New York courts simplifies this procedure by having a two stage instruction process. The liability of the primary defendants, D_1 and D_2, to plaintiff is first determined. The liability of the third party defendent, D_3, to the third party plaintiff, D_2, is then found by determining what percentage of the third party plaintiff's allocated share is attributable to the third party defendant.[52]

2. Counterclaims

A second tool available to a defendant seeking allocation in the original action is a counterclaim asserted against one or more plaintiffs who have joined their claims.[53] In a contribution action, a defendant asserting a counterclaim should charge that if the jury finds that the plaintiff against whom the counterclaim is asserted is contributorily negligent, then that plaintiff's claim against the counterclaiming defendant must be dismissed and the judge or jury should allocate the remaining plaintiff's

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49. MO. R. CIV. P. 52.11 provides that the third party defendant will be liable to the third-party plaintiff "for all or part of the plaintiff's claim against the third-party plaintiff."

50. The court noted in *Missouri Pacific* that the plaintiff could collect the entire amount of his judgment from any tortfeasor he sued. 566 S.W.2d at 473.

51. *Id.* at 472 (emphasis added).

52. In Liebman v. County of Westchester, 71 Misc. 2d 997, 337 N.Y.S. 2d 164 (1972), the two stage instruction process of the New York courts was used. The plaintiff sued two defendants, D_1 and D_2. D_2 impleaded D_3 and D_4. The jury found that the plaintiff should recover against D_1 and D_2 and that D_2 should recover against D_3 and D_4. The relative responsibility for the plaintiff's loss was first apportioned between D_1 at 20% and D_2 at 80%. The responsibility of D_3 and D_4 for D_2's allocated share of 80% was then determined to be D_3 at 10%, D_3 at 40% and D_4 at 50%. D_2 was thus able to recover 90% of his allocated share.

53. MO. R. CIV. P. 55.32.

damages between the defendant and the contributorily negligent plaintiff.[54]

It is unclear whether these counterclaims fall under the compulsory counterclaim rule.[55] A compulsory counterclaim under rule 55.32(a) is "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[56] At the time the plaintiff's injury occurs a tortfeasor possesses an inchoate right to institute suit to compel contribution.[57] However, this inchoate right should not be sufficient to qualify as a "claim" under the compulsory counterclaim rule. The defendant's true claim to contribution from the contributorily negligent plaintiff, even though inchoate as of the time of the original tort, does not become a cause of action until the defendant has discharged more than his share of the allocated fault.[58] Thus, the counterclaim does not appear to fall within the language of the rule that requires the claim to exist at the time of the serving of the pleading; the failure to assert it in the original action should not constitute a waiver of the right to seek contribution in a separate action.

3. Cross-Claims

A party can assert a cross-claim against a co-party alleging that the co-party may be liable to the cross-claimant for all or part of the claim asserted against the cross-claimant in the original action.[59] Since the party against whom the cross-claim has been asserted is already a co-defendant, it is unsettled whether there is any need for a cross-claim to be filed since the court on its own initiative would seem to be able to instruct the jury to apportion the damages between the defendants. This question of automatic allocation has arisen in New York; the courts there have reached contradictory results.[60]

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54. Lipson v. Gewirtz, 70 Misc. 2d 599, 603, 334 N.Y.S.2d 662, 665 (1972). This would be the case only where, as in Missouri, contributory negligence is a complete bar to a negligence action. *See* Chandler v. Mattox, 544 S.W.2d 85 (Mo. App., D. St. L. 1976).

55. MO. R. CIV. P. 55.32(a). *See also* State *ex rel.* Davis v. Moss, 392 S.W.2d 260 (Mo. En Banc 1965).

56. MO. R. CIV. P. 55.32(a).

57. Distefano v. Lamborn, 46 Del. 195, 81 A.2d 675 (1951). *See* 18 C.J.S. *Contribution* § 4 (1975).

58. *See* note 42 *supra.*

59. MO. R. CIV. P. 55.32(f). *See* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 473 (Mo. En Banc 1978).

60. For the proposition that allocation will be automatic in the absence of a cross-claim, *see* Stein v. Whitehead, 40 App. Div. 2d 89, 337 N.Y.S.2d 821 (1972); Lipson v. Gewirtz, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (1972). *Contra,* Caucci v. Fesko, 349 N.Y.S.2d 886 (1973) (defendant waived his right to apportionment where he failed to cross-claim against a defendant and asserted no such claim at trial or on appeal).

The court in *Missouri Pacific* indicated that allocation would not be automatic if cross-claims were not filed, because in the absence of cross-claims the only issue resolved at trial is the joint liability of the defendants to the plaintiff.[61] The court quoted from *Kinloch Telephone Co. v. City of St. Louis*[62] for the proposition that:

> If A recovers judgment against B and C, upon a contract, which judgment is paid by B, the liability of C to B in a subsequent action for contribution is still an open question, because as to it no issue was made or tried in the former suit. As between the several defendants therein a joint judgment establishes nothing but their joint liability to the plaintiff. Which of the defendants should pay the entire debt, or what proportion each should pay in case each is partly liable, is still unadjudicated.[63]

To insure allocation in the original action, then, the parties should file a cross-claim.

Regardless of whether the filing or non-filing of a cross-claim should determine when allocation is made, the failure to file the cross-claim may create other undesirable consequences.[64] One possibility is that it may preclude a defendant's ability to appeal a dismissal, directed verdict, judgment n.o.v., or a judgment in favor of the other defendant. The inability of a defendant to appeal and obtain reversal of a ruling or verdict exonerating a co-defendant could nullify his ability to later obtain contribution from the exonerated defendant. This would result if a separate action for contribution was not allowed, or if the exonerated defendant was able to use res judicata as a defense in the separate action. To illustrate, assume that a plaintiff had sued two defendants, D_1 and D_2, and neither defendant filed a cross-claim for contribution. A verdict is returned for the plaintiff against D_1, but against the plaintiff for D_2. The question that arises is whether D_1 can appeal the judgment in favor of D_2.

In at least one jurisdiction, D_1 is recognized as a party aggrieved by a judgment or ruling in favor of D_2 and has been allowed the right to appeal the ruling or judgment even in the absence of a cross-claim.[65] Another jurisdiction, however, has held that the unsuccessful defendant cannot challenge a verdict or ruling in favor of a co-defendant, holding that as between the co-defendants a judgment for or against one of them does nothing but establish their respective rights and liabilities toward the plaintiff.[66]

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61. 566 S.W.2d at 473-74.
62. 268 Mo. 485, 188 S.W. 182 (1916).
63. *Id.* at 496-97, 188 S.W. at 184.
64. *See* Ausubel, *The Impact of New York's Judicially Created Loss Apportionment Amongst Tortfeasors,* 38 ALB. L. REV. 155, 162 (1974).
65. *See* Muggenburg v. Leighton, 240 Minn. 21, 60 N.W.2d 9 (1953); Bocchi v. Karnstedt, 238 Minn. 257, 56 N.W.2d 628 (1953).
66. *See* North Shore Hosp. v. Martin, 344 So. 2d 256 (Fla. App. 1977).

Missouri courts have long held that a defendant in the absence of a cross-claim cannot complain of an error, ruling, or verdict in favor of his co-defendant even though such error, ruling, or verdict may affect his right to obtain contribution.[67] It is not clear if Missouri courts will continue to uphold this rule in light of the *Missouri Pacific* decision which seeks to afford a greater amount of protection to the defendant's right to obtain contribution than was previously available. In anticipation of a change in the Missouri rule, a prudent defendant should file his cross-claim in order to preserve his right to appeal a ruling favorable to his co-defendant.

The inability of a defendant to appeal a verdict or ruling in favor of his co-defendant will not be decisive if he is able to bring a separate action for contribution. However, a separate action for contribution may be completely barred if the co-defendant is able to assert the defense of res judicata.[68]

There is a split of authority on the availability of the defense of res judicata to an exonerated defendant when no cross-claim was asserted against him. The apparent majority hold that the defense is not available.[69] In the absence of the filing of a cross-claim against a co-defendant, it is held that the judgment in the prior action merely adjudicates the rights of the plaintiff against each defendant; it leaves unadjudicated the rights of co-defendants as between themselves because those rights have not been put into issue while the co-defendants occupied posi-

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67. *See, e.g.*, May v. Bradford, 369 S.W.2d 225 (Mo. 1963); Page v. Hamilton, 329 S.W.2d 758 (Mo. 1959); Stutte v. Brodtrick, 259 S.W.2d 820 (Mo. 1953); Brantley v. Couch, 383 S.W.2d 307 (St. L. Mo. App. 1964); Schneider v. Campbell 66 Express, Inc., 324 S.W.2d 363 (St. L. Mo. App. 1959); White v. Kuhnert, 207 S.W.2d 839 (K.C. Mo. App. 1948).

68. The rule of *res judicata* in Missouri has been described as follows:

> [M]aterial facts or questions which were in issue in a former action, and were there admitted or judicially determined, are . . . conclusively settled by a judgment rendered therein . . . become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different theories, or instituted for different purposes, and seek different relief.

Varnal v. Kansas City, 481 S.W.2d 575, 579 (Mo. App., D.K.C. 1972). Res judicata may apply in either of two ways: to the judgment rendered or to some particular fact or facts litigated between the parties. Ratermann v. Ratermann Realty & Inv. Co., 341 S.W.2d 280, 291 (St. L. Mo. App. 1960).

69. *See, e.g.*, George A. Fuller Co. v. Otis Elevator Co., 245 U.S. 489 (1918); Pennsylvania R.R. v. Gulf Oil Corp., 223 A.2d 79 (Del. 1966); Sattelberger v. Telep, 14 N.J. 353, 102 A.2d 577 (1954); Wiles v. Young, 167 Tenn. 224, 68 S.W.2d 114 (1934); Snyder v. Marken, 116 Wash. 270, 199 P. 302 (1921); Annot., 24 A.L.R.3d 318 (1969).

tions inimical to each other.[70] For the doctrine of res judicata to be applicable, the present parties must have been adversaries in the prior proceeding. Co-defendants do not become adversary parties merely because each attempts to blame the other for the plaintiff's injury.[71] In such a situation they are merely meeting an issue raised solely by the plaintiff and not by either co-defendant.

Other courts, however, invoke res judicata to bar a separate action for contribution even if a cross-claim was filed, if in a prior proceeding the defendant from whom contribution is now sought was found to have been not liable to the prior plaintiff. In *American Motorists Insurance Co. v. Vigen*,[72] the unsuccessful defendant was not allowed to relitigate the liability of the successful defendant to the original plaintiff. The court acknowledged that technically the co-defendants were not adversaries in the original action.[73] Nevertheless, the court stated that when a co-defendant for his own defense raises the issue with the injured plaintiff as to the wrongful conduct of his co-defendant, then in effect the co-defendants have become adversary parties.[74] Thus, the adjudication of the issue in the original action is conclusive between them as to all later actions for contribution.

One court has avoided the necessity of deciding this type of case on res judicata grounds while reaching the same result as *Vigen*. In *Liberty*

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70. *See* Annot., 24 A.L.R.3d 318, 325 n.20 (1969). *See also* Page v. Hamilton, 329 S.W.2d 758 (Mo. 1959) ("Absent filing of a cross-claim the rights of the defendants inter sese would not have been adjudicated because ordinarily a judgment in favor of a plaintiff does not determine the relative rights of codefendants unless their hostile or conflicting claims are actually brought into issue by pleadings and are litigated and determined."); Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co., 336 Mo. 453, 79 S.W.2d 257 (1934) (mere effort of one defendant to escape liability to plaintiff by throwing burden on co-defendant does not make defendants adversaries of each other as required to render the judgment against them conclusive as between themselves).

71. Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co., 363 Mo. 453, 79 S.W.2d 257 (1934).

72. 213 Minn. 120, 5 N.W.2d 397 (1942). The *Vigen* rule has had a tumultuous existence. Its application was limited in Bunge v. Yager, 236 Minn. 245, 52 N.W.2d 446 (1952) (the rule in *Vigen* does not extend to cases which do not involve the right to contribution or indemnity). The rule was reaffirmed in Bocchi v. Kornstedt, 238 Minn. 257, 56 N.W.2d 628 (1953), and American Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953). In 1962, the Minnesota court admitted to having "no little difficulty" deciding cases under the *Vigen* rule. Radmacher v. Cardinal, 264 Minn. 72, 75, 117 N.W.2d 738, 741 (1962). The rule was questioned again in Anderson v. Gabrielson, 267 Minn. 176, 126 N.W.2d 239 (1964). The *Vigen* rule has been criticized for foreclosing the trial of an issue which was not litigated by the parties to the contribution controversy. Note, *Contribution and Indemnity Among Tortfeasors in Minnesota*, 37 MINN. L. REV. 470, 478-79 (1953).

73. American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 5 N.W.2d 397 (1942).

74. *Id.* at 121, 5 N.W.2d at 398.

Mutual Insurance Co. v. Curtiss,[75] the court denied the claim of a party who sought contribution from his co-defendant who had been exonerated of liability to the plaintiff in the prior proceeding. The court based its denial on a determination that the co-defendants no longer shared a common liability to the injured party, generally an essential element in a contribution claim.[76]

The Missouri indemnity cases appear to indicate that the majority view of barring the defense will be followed because those cases have held that in the absence of the filing of a cross-claim, the relative rights of the defendants between themselves are not determined.[77] The question is undecided in Missouri because prior to *Missouri Pacific* it was necessary that there be a joint judgment to obtain contribution in accordance with statute.[78] If a co-defendant was exonerated in the original action, that precluded a joint judgment and in turn barred contribution. As observed earlier, Missouri courts have refused to allow a defendant to appeal a ruling or verdict favorable to his co-defendant when contribution rights would be affected.[79] If this rule is maintained, allowing the defense of res judicata would preclude the unsuccessful defendant from ever recovering contribution. While this may prove unduly harsh in some situations, it should provide sufficient incentive for the filing of cross-claims in the original action.

B. *Allocation in a Separate Action*

It is possible for the relative responsibility for the plaintiff's loss to be determined in an action subsequent to the original lawsuit. This could occur when the trial judge orders a separate trial as to particular parties or issues or when a defendant fails to use the procedural tools that force the determination to be made in the original action. In jurisdictions which base contribution on the relative fault of the co-tortfeasors, both of these

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75. 327 So. 2d 82 (Fla. App. 1976).

76. If to speak of rights and liabilities under law is finally but a prediction that the sovereign will dispose of competing interests in a certain way, it is hardly possible to speak any longer of X discharging a common liability of X and Y to Z when the sovereign has said that Y is not and never was liable to Z. And when a judgment has discharged Y of potential liability to Z, it is nonsense for X to say, that by paying Z, he has conferred on Y the benefit of nonliability to Z. No policy of Florida law requires that the congested judicial system offer X an opportunity to prove something which is not a fact and which cannot, by any skill of advocacy, be made a fact.

Id. at 86-87.

77. *See* Page v. Hamilton, 329 S.W.2d 758 (Mo. 1959); Missouri Dist. Tel. Co. v. Southwestern Bell Tel. Co., 363 Mo. 453, 79 S.W.2d 257 (1934); Kinlock Tel. Co. v. City of St. Louis, 268 Mo. 485, 188 S.W. 182 (1916).

78. *See* note 2 *supra*.

79. *See* text accompanying note 68 *supra*.

situations have occurred.[80] While there has been no attempt to preclude a judge from separating issues or claims for different trials, there has been discontent with allowing a defendant to choose to avoid having the contribution issue determined in the original lawsuit.[81] Some jurisdictions have forced the defendant to make use of procedural tools such as counterclaims and cross-claims to avoid a multiplicity of lawsuits and the resulting inconvenience to the parties involved.[82]

The court in *Missouri Pacific* expressly sanctioned the use of separate trials at the discretion of the trial court. The court stated that:

> [W]hether or not a separate trial is required of the issues between the third party plaintiff and third party defendant necessarily depends upon the particular case. Economy of litigation and avoidance of duplication of evidence, time, effort and expense is essential in these days of increasing demands on limited judicial resources, provided it is done without prejudice to the rights of parties.[83]

In Missouri a trial judge has the power to separate issues and claims for trial if in his discretion he feels it is necessary.[84] Also, by construction of rule 52.11(a), a trial judge has been given the authority to completely deny

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80. *See, e.g.*, Sattelberger v. Telep, 14 N.J. 353, 362, 102 A.2d 577, 586 (1954); Greenberg v. City of Yonkers, 45 App. Div. 2d 314, 358 N.Y.S.2d 453 (1974) (separate trials at judge's discretion); Lipson v. Gewirtz, 70 Misc. 2d 599, 604, 334 N.Y.S.2d 662, 665 (1972) (separate action may be brought by tortfeasor). *See also* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3a; 3 J. MOORE, FEDERAL PRACTICE § 14.06 (2d ed. 1948) ("it is no defense to an action for contribution that plaintiff when originally sued by the injured party in federal court failed to bring the defendant in as a third party").

81. In Meckley v. Hertz Corp., 88 Misc. 2d 605, 388 N.Y.S.2d 555 (1976), the court stated that asserting a claim for contribution in a separate action should be discouraged because it "adds to the burden of already crowded courts, creates the possibility of inconsistent verdicts in the two actions and makes more difficult the assessment of equitable shares in multi-party situations in which one of three or more wrongdoers is not joined in the initial action." *Id.* at 609, 388 N.Y.S.2d at 557, *quoting Twentieth Annual Report of the Judicial Conference* at 221 (1975).

82. *See* HAW. REV. STAT. § 663-17 (1968) (if party fails to cross-claim when it is available, no independent action may be maintained for contribution); MICH. STAT. ANN. § 27A.2925 (1978 Supp.) (tortfeasor who satisfies all or part of a judgment is not entitled to contribution if alleged contributee was not made a party to the action and reasonable effort not made to notify him of the commencement of the action); Rudolph v. Mundy, 226 Ark. 95, 288 S.W.2d 602 (1976) (must seek contribution from a party defendant in the original action); Distefano v. Lamborn, 46 Del. 195, 81 A.2d 675 (1951) (Delaware statute provides that "if relief can be obtained as provided in this subsection no independent action shall be maintained to enforce the claim for contribution.").

83. 566 S.W.2d at 474 n.8.

84. *See* MO. R. CIV. P. 66.02 (order separate trial for any claim, cross-claim, counterclaim or third party claim in furtherance of convenience or to avoid prejudice or where more conducive to expedition and economy); RSMO § 507.040(2) (1978) (order separate trials to prevent delay or prejudice).

a third party claim. The rule provides the time limits and procedure for filing third party claims.[85] It has been held that "the right to implead is not an absolute right even if the claim asserted is within the scope of Rule 52.11, but is a matter of discretion with the court."[86] The Missouri Supreme Court has held that a trial judge has the discretion to strike a third party petition even though it is filed within the ten day period for which the rule provides an absolute right to implead.[87]

The clear implication is that unlike a cross-claim or a counterclaim, a defendant is not entitled as a matter of right to assert a third party claim. Thus, even though a defendant may do all he can to have the relative responsibility for the plaintiff's loss determined in the original action, the trial court can order that there be a separate trial on the issue, or can completely deny the third party claim. In such a situation the defendant can only seek contribution in a separate action.

The ability of a defendant to forego the opportunity to have the contribution issue determined in the original action and choose instead to resolve it in a separate action is generally recognized.[88] Only a few jurisdictions deny this opportunity.[89] However, the consequences of a conscious choice to seek contribution in a separate action may be so detrimental that it will force the contribution issue to be raised in the original action. Specifically, the failure to assert a third party claim or counterclaim could result in requiring the defendant who now seeks contribution in a separate action to carry the burden of proof as to the negligence on the part of each of the joint tortfeasors and to relitigate all the issues tried in the prior proceeding. Some of the tortfeasors in the second action may not have been parties to the first action and may not be bound by the determination in the first action.[90] Additionally, as previously discussed, if the defendant

85. MO. R. CIV. P. 52.11(a).

86. State *ex rel.* Gamble Const. Co. v. Enright, 556 S.W.2d 726 (Mo. App., D. St. L. 1977).

87. State *ex rel.* Green v. Kimberlin, 517 S.W.2d 124 (Mo. En Banc 1974).

88. *See* note 79 *supra.*

89. *See* note 81 *supra.*

90. It may be possible to avoid these consequences by the process of "vouching in." In Listerman v. Day & Night Plumbing & Heating Serv., 384 S.W.2d 111 (Spr. Mo. App. 1964), the court stated that "[w]here one is bound to protect another from liability, he is bound by the result of the litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it." *See also* Missouri Pac. R.R. v. Rental Storage & Transit Co., 524 S.W.2d 898 (Mo. App., D. Spr. 1975) (contribution plaintiff who settled with original plaintiff after following "vouching in" process can obtain contractual indemnity without litigating question of its original liability to the plaintiff). In other jurisdictions, the questions open to litigation among defendants in a contribution proceeding generally depend on their participation at trial. Look v. Toney, 245 Md. 42, 224 A.2d 577 (1965); Mickens v. Marascio, 58 N.J. 569, 279 A.2d 666 (1971); Cooperman v. Ferrentino, 37 App. Div. 2d 474, 326 N.Y.S.2d 675 (1971); Mutual Auto Ins. Co. v. State Farm Mut. Auto. Ins. Co., 268 Wis. 6, 66 N.W.2d 697 (1954).

fails to assert a cross-claim he may run the risk of being unable to appeal a ruling or verdict favorable to his co-defendant and may find his separate action for contribution barred by the defense of res judicata.[91] Thus, while a tortfeasor may have the option to bring his claim for contribution in a separate action, it is unlikely that he will wish to exercise it in light of the possible adverse consequences which can result from such a decision.

IV. SUBSTANTIVE PROBLEMS: DEFENSES TO AN ACTION FOR CONTRIBUTION

The defenses available to a tortfeasor from whom contribution is sought fall into two general categories. The first focuses on the presence or lack of particular relationships existing between the tortfeasors. The defenses comprising this category deal with determining whether the parties are joint tortfeasors, intentional tortfeasors, or have some other relationship. For the most part, courts have had little difficulty fashioning rules applicable to these situations once they have overcome the definitional hurdle. The second category of defenses available are based on peculiar circumstances or relationships existing between the tortfeasors and the injured plaintiff. It is this category of defenses which has produced the most litigation and has given the courts considerable difficulty.

A. *Defenses Based on the Relationship Between the Defendants*

The applicability of the *Missouri Pacific* decision is limited to joint tortfeasors;[92] therefore, the initial defense a party should consider when he is being sued for contribution is that he and the party seeking contribution are not joint tortfeasors. Unfortunately, there has been confusion among the courts in this country regarding the meaning of the term joint tortfeasors.[93] At common law, joint tortfeasors were those who could be joined in the same action because their wilful concerted conduct had combined

91. *See* notes 66-67 and accompanying text *supra.*

92. 566 S.W.2d at 468.

93. Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413 (1937); Comment, *Contribution Among Tortfeasors: The Need for Clarification,* 8 J. MAR. J. PRAC. & PROC. 75 (1974). *See also* Germain, *Remedies, Kentucky Law Survey 1974-1975,* 64 KY. L.J. 233, 244, n.61 (1975), where the author writes:

> The term "*joint* tort-feasors" really should be reserved for situations involving concerted action or conspiracy between or among more than one tortfeasor, whereas the term "*concurrent* tort-feasor" is aptly applied to situations involving two or more tortfeasors whose wholly independent acts concurrently caused an indivisible injury. Because true concurrent tortfeasors are often "joined" as defendants in modern lawsuits, the term "*joint* tort-feasors" has been used generally by courts, albeit somewhat incorrectly, in reference to both types of tortfeasors.

to produce the plaintiff's loss.[94] American courts extended the term to include those whose negligent acts had concurred to produce the plaintiff's injury.[95] There is no Missouri case which defines joint tortfeasors. The federal courts have stated that in Missouri the term is used to describe those parties committing wrongful acts which are separate and distinct but concur in a point of time and directly cause a single injury;[96] wilful conduct is not required. Although no Missouri case has been found in which contribution was denied based on the defense that the parties were not joint tortfeasors, it should not be overlooked as a possible defense to a contribution claim.

The overwhelming majority of jurisdictions, including Missouri,[97] refuse to allow contribution among intentional joint tortfeasors.[98] In *Missouri Pacific*, the court applied its holding only to negligent tortfeasors.[99] A defendant may avoid liability for contribution if he can show that his own wrongdoing was intentional and that the wrongdoing of his co-tortfeasor was intentional or even grossly negligent.[100] Society's interests

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94. Comment, *Contribution Among Tortfeasors—The Need for Clarification*, 8 J. MAR. J. PRAC. & PROC. 75, 78 (1974).

95. W. PROSSER, *supra* note 5, at 306.

96. Swope v. General Motors Corp., 445 F. Supp. 1222 (W.D. Mo. 1978). *See also* Allen v. United States, 370 F. Supp. 992, 1004 (E.D. Mo. 1973); Mails v. Kansas City Pub. Serv. Co., 51 F. Supp. 562, 564 (W.D. Mo. 1943).

97. Kansas City Operating Corp. v. Durwood, 278 F.2d 354 (8th Cir. 1960); Avery v. Central Bank, 221 Mo. 71, 119 S.W. 1106 (1909); Eaton & Prince Co. v. Mississippi Valley Trust Co., 123 Mo. App. 117, 100 S.W. 551 (St. L. 1906). The award of punitive damages is often based on the defendant having exhibited conduct beyond mere negligence. Missouri courts have held that punitive damages can be apportioned by the court among joint tortfeasors depending on the degree of culpability or the existence of malice on the part of each defendant. State *ex rel.* Hall v. Cook, 400 S.W.2d 39 (Mo. En Banc 1966); State *ex rel.* Kubatzkey v. Holt, 483 S.W.2d 799 (Mo. App., D. St. L. 1972); Fordyce v. Montgomery, 424 S.W.2d 746 (Spr. Mo. App. 1968); Comment, *Punitive Damages in Missouri*, 42 MO. L. REV. 593, 610 (1977).

98. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. § 1(c) (1955); W. PROSSER, *supra* note 5, at 310. This rule was well established at common law. Recall that the no contribution rule credited to Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799), involved intentional conduct. *See* note 7 and accompanying text *supra*.

99. 566 S.W.2d at 468.

100. *See, e.g.*, W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388 (W.D. Pa. 1973); Hardware Mut. Cas. Co. v. Danberry, 234 Minn. 391, 38 N.E.2d 567 (1951); Roth v. Roth, 571 S.W.2d 659 (Mo. App., D. St. L. 1978). *Contra*, Maryland Lumber Co. v. White, 205 Md. 180, 107 A.2d 73 (1954); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954). The 1955 version of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) excludes, in an optional provision, the right to contribution for wilful or wanton conduct.

are said to be protected by the deterrent effect of this rule because wrongdoers know that they "must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of moral and of laws."[101] Although the deterrent effect of holding one party fully liable while permitting the other equally culpable party to go unscathed has been questioned,[102] the rule is firmly adhered to and has seldom been reversed when attacked as ineffectual.[103]

B. *Defenses Based on Circumstances or Relationships Existing Between the Plaintiff and One of the Joint Tortfeasors*

A co-tortfeasor may have been responsible for part of the plaintiff's loss but not be liable to the plaintiff because he holds a special defense, such as family immunity, or has a release which serves to effectively bar the plaintiff's action against him. The less fortunate co-tortfeasor, who enjoys no defense to the plaintiff's claim, will find himself liable for the entire amount of the plaintiff's loss. If the tortfeasor who was held liable for the entire amount of the damages seeks contribution from the co-tortfeasor who has a defense to the plaintiff's claim, the tortfeasor with the defense will assert the defense and claim that he cannot be made to pay for the plaintiff's damages indirectly when he could not have been made to do so directly. Courts are thus faced with the dilemma of whether to allow a tortfeasor to bear the plaintiff's entire loss or to allow the loss to be apportioned among those responsible regardless of any special defense enjoyed by one of them. To allow contribution is to extirpate the effectiveness of the defense. To deny contribution is to force a tortfeasor to bear more of the loss than he is responsible for and thus sanction an inequity sought to be abolished by the rule allowing contribution.

The common liability requirement recognized by most jurisdictions[104] dictates that the plaintiff have an enforceable right against the tortfeasor from whom contribution is sought, and that there be no contribution in the absence of this right.[105] The tortfeasor enjoying the direct defense

101. Bartle v. Nutt, 29 U.S. (4 Pet.) 45, 49 (1830); Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, HARV. L. REV. 176, 179 (1898).

102. *See* Note, *The Growth of Vicarious Liability for Torts Beyond the Scope of Employment*, 45 HARV. L. REV. 349, 354 n.28 (1931).

103. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).

104. *See, e.g.*, Highway Constr. Co. v. Moses, 483 F.2d 812 (8th Cir. 1973); Walker v. Patterson, 325 F. Supp. 1024 (D. Del. 1971); Rowe v. John C. Motter Printing Press Co., 273 F. Supp. 363 (D.R.I. 1967); Cox v. Maddux, 255 F. Supp. 517 (D. Ark. 1966), *rev'd on other grounds*, 382 F.2d 119 (8th Cir. 1967); Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960).

105. *See* Highway Constr. Co. v. Moses, 483 F.2d 812 (8th Cir. 1973) (con-

would thus be protected as he would be by the Uniform Act which states, "the common obligation contemplated by this act is the common liability to suffer adverse judgment at the instance of the injured person, whether or not the injured person elects to impose it."[106]

The court in *Missouri Pacific* in broad language indicated that it also would require a tortfeasor to be subject to an enforceable action by the plaintiff as a prerequisite to being subject to a contribution claim.[107] To avoid harsh or unjust application, a court should in fact examine the circumstances of each of the various situations in which one of the tortfeasors may not be liable to the plaintiff before deciding that contribution is not to be imposed.[108]

1. Statute of Limitations

In the majority of jurisdictions, if a plaintiff maintains a successful action against a joint tortfeasor before the statute of limitations has run, that tortfeasor can bring an action for contribution against a co-tortfeasor even though enough time has elapsed so that the statute would bar an action by the plaintiff against the tortfeasor.[109] It has previously been held in Missouri that the cause of action for contribution and indemnity does not arise and the statute of limitations does not begin to run until judgment is entered against one of the tortfeasors and he has paid more than his proportionate part.[110] Thus, the statute of limitations is applied separately to the plaintiff's claim and the co-tortfeasor's claim for contribution.

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tribution denied because of guest statute immunity); Oahu Ry. & Land Co. v. United States, 73 F. Supp. 707 (D. Hawaii 1947) (government immunity); Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961) (interspousal immunity); Bond v. City of Pittsburg, 368 Pa. 404, 84 A.2d 328 (1951) (charitable immunity); Cacchillo v. H. Leach Mach. Co., 111 R.I. 593, 305 A.2d 541 (1971) (workmen's compensation); McKay v. Citizens Rapid Trans. Co., 190 Va. 851, 59 S.E.2d 121 (1950) (statute of limitations); Mutual Auto. Ins. Co. v. State Farm Mut. Ins. Co., 268 Wis. 6, 66 N.W.2d 697 (1954) (contributory negligence); Saxby v. Cadigen, 266 Wis. 391, 63 N.W.2d 820 (1954) (assumption of risk).

106. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(a) (1955 version).

107. "[The] right to non-contractual indemnity presupposes actionable negligence of both parties toward a third party." 566 S.W.2d at 468.

108. *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).

109. *See, e.g.*, Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960); Cooper v. Philadelphia Dairy Prod. Co., 34 N.J. Super. 301, 308, 112 A.2d 121, 123-24 (1955); RESTATEMENT OF RESTITUTION § 86, Illustration 3 (1937); Annot., 20 A.L.R.2d 925 (1951).

110. *See* Simon v. Kansas City Rug Co., 460 S.W.2d 596 (Mo. 1970). The general tort statute of limitations in Missouri is five years. RSMo § 516.120 (1978).

The time period in which a tortfeasor can be held liable for the original tort to the plaintiff by way of contribution can be substantially beyond what it would have been if the statute ran concurrently on the plaintiff's and the co-tortfeasor's claim. By starting the statute of limitations running from the time of payment, a tortfeasor may find himself liable for contribution many years after the plaintiff's actual loss. This could happen if the tortfeasor seeking contribution had for a lengthy period failed to pay the plaintiff's judgment, and the plaintiff continually renewed the judgment until the tortfeasor paid. In order to avoid an inordinate lapse of time in the bringing of such actions, the Uniform Act requires that all actions for contribution be brought within one year after the plaintiff has been issued judgment.[111]

The purpose of the statute of limitations is to ensure the prompt settlement of claims so that a claim will not be revived when evidence has been destroyed and the memories of witnesses have lapsed.[112] It may be necessary for courts to impose an arbitrary time period for the bringing of contribution actions similar to that imposed by the Uniform Act.[113] The hardship of an arbitrary time period on an insolvent defendant who is unable to satisfy the judgment before the time period allowing a contribution claim has run could be resolved by allowing him to notify the person he will eventually seek contribution from that he intends to do so when he has satisfied the judgment and thus toll the statute until after payment.[114]

A problem closely associated with the statute of limitations which is bound to confront the Missouri courts is whether the *Missouri Pacific* decision should be applied retroactively. The rule in Missouri for determining whether to apply a case either prospectively or retrospectively requires that a procedural-substantive test be utilized.[115] If the overruling decision is one dealing with substantive principles, it is applied retroactively. If the decision involves procedural matters, it is applied prospectively only. A recent Missouri Court of Appeals decision held that at least as to apportionment of damages and the rights of recovery among joint tortfeasors, the

111. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) (1955 version).

112. *See* Exploration Co. v. United States, 247 U.S. 435, 448 (1918); Campbell v. Haverhill, 155 U.S. 610, 617 (1895).

113. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) (1955 version).

114. Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action By the Injured Party,* 52 CORNELL L.Q. 407, 415 (1967). For an excellent discussion of situations involving insolvent tortfeasors, *see* Myse, *The Problem of the Insolvent Contributor,* 60 MARQ. L. REV. 891 (1977).

115. Sheperd v. Consumers Coop. Ass'n, 384 S.W.2d 635, 640 (Mo. En Banc 1964); Barker v. St. Louis County, 340 Mo. 986, 104 S.W.2d 371 (1937); Koebel v. Tieman Coal & Material Co., 337 Mo. 561, 85 S.W.2d 519 (1935).

decision in *Missouri Pacific* affects substantive rights and, therefore, is to be applied retroactively.[116]

The decision could be applied to any one of a number of past events. First, it could be applied to any case where the injury, judgment, and payment of the judgment occurred before the decision. This would give the decision complete retroactive effect and would open up a flood gate to litigation involving what were thought to be closed cases. Second, it could apply to cases where the injury and judgment may have occurred before the decision but the payment had yet to be made as of the date of the decision. This would limit the "old" cases which could be reinstated to a far greater extent than the first alternative. Another alternative would be to limit the retroactivity of the decision to any case still in the judicial process as of the date of the decision. This was the approach taken by the New York courts when confronted with the same problem,[117] and limits to a manageable amount the additional litigation engendered. To give the decision a greater deal of retroactivity is to invite a significant increase of litigation involving stale claims and the inherent problems of destroyed evidence and forgetful witnesses.[118]

2. Settlements

It is common for a wrongdoer and the injured party to settle their dispute outside the judicial process. Typically, these settlements are accomplished by a release or a covenant not to sue. A release generally discharges any further claims the injured party may have against both the settling and the nonsettling tortfeasors.[119] In order to protect his rights against the nonsettling tortfeasors, the injured party often executes a covenant not to sue. A covenant not to sue is a contractual agreement by the injured party not to enforce his cause of action against the tortfeasor to whom the covenant was given; the other tortfeasors remain subject to the injured party's claims.[120]

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116. Roth v. Roth, 571 S.W.2d 659, 672 (Mo. App., D. St. L. 1978).

117. Liebman v. County of Westchester, 41 App. Div. 2d 756, 341 N.Y.S.2d 567 (1973); Hain v. Hewlett Arcade, Inc., 40 App. Div. 2d 991, 338 N.Y.S.2d 791 (1972); Brown v. City of New York, 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1972); Kelley v. Long Island Lighting Co., 31 N.Y.2d 25, 334 N.Y.S.2d 851 (1972). *See also* Augustus v. Bean, 56 Cal. 2d 270, 363 P.2d 873, 14 Cal. Rptr. 641 (1961); First Nat'l Bank v. Steel, 136 Mich. 588, 99 N.W. 786 (1904); Klaas v. Continental S. Lines, Inc., 225 Miss. 94, 82 So. 2d 705 (1955).

118. Some courts refuse to give a new contribution rule retroactive effect. Kansas City S. Ry. v. McDaniel, 131 F.2d 89 (8th Cir. 1942); F.H. Ross & Co. v. White, 224 Ga. 324, 161 S.E.2d 857 (1968); Massey v. Sullivan County, 225 Tenn. 132, 464 S.W.2d 548 (1971); Norfolk & S. Ry. v. Beskin, 140 Va. 744, 125 S.E. 678 (1924).

119. W. PROSSER, *supra* note 5, at 301.

120. McDonald v. Goddard Grocery Co., 184 Mo. App. 432, 171 S.W. 650 (K.C. 1914). RSMo § 537.060 (1978) allows an injured party to settle with one of several tortfeasors without impairing the injured party's right to proceed against

Numerous problems can arise when settlements and actions for contribution become intertwined. One such problem occurs when a tortfeasor settles with the injured party and obtains a complete discharge of all the tortfeasors. The settling tortfeasor then seeks contribution from the other tortfeasors who were not involved in the settlement. There is general agreement among the courts which allow contribution that the settling tortfeasor can obtain contribution from his co-tortfeasors who were not involved in the settlement.[121] It is usually held, though, that the burden of proof is on the settling tortfeasor to show his and the other tortfeasors' liability to the injured party, and that the settlement amount is reasonable.[122] Allowing contribution in this situation is conducive to both settlements and contribution.

Another problem arises when a release is given by one tortfeasor to his co-tortfeasor. Typically, the driver of one car, fearing suit, settles with the driver of the car he has collided with only to have a passenger in one of the cars sue the first driver; the first driver then seeks contribution from the

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the other tortfeasors. Therefore, the covenant not to sue is not the exclusive method to protect the cause of action against the nonsettling tortfeasors, but it is the safest approach. Missouri courts presume that a general release given to one tortfeasor is a release for full satisfaction of the injured party's claim against all the tortfeasors unless there is a specific and clear limitation of the scope of the intended settlement. Swope v. General Motors Corp., 445 F. Supp. 1222 (W.D. Mo. 1978); New Amsterdam Cas. Co. v. O'Brien, 330 S.W.2d 859 (Mo. 1960); Liberty v. J.A. Tobin Constr. Co., 512 S.W.2d 886 (Mo. App., D.K.C. 1974); Byers Bros. Real Estate & Ins. Agency v. Cambell, 329 S.W.2d 393 (K.C. Mo. App. 1959). The presumption does not arise, however, when the acts of the tortfeasors are independent. State *ex rel.* Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829 (Mo. En Banc 1979) (general release given to defendant-driver in automobile accident does not bar subsequent action against physician for negligent surgery following plaintiff's injury; extent of release is determined according to intention of the parties).

121. *See, e.g.,* Higgins v. Graves, 337 F.2d 486 (6th Cir. 1964); W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388 (W.D. Pa. 1973); Hawkeye-Security Ins. Co. v. Lowe Constr. Co., 251 Iowa 27, 99 N.W.2d 421 (1959); Morris v. Koespelich, 253 La. 413, 218 So. 2d 316 (1969); Missouri Pac. R.R. v. Reynolds Storage & Transit Co., 524 S.W.2d 898 (Mo. App., D. Spr. 1975) (a prudent settlement is not a voluntary payment but rather is one made out of legal compulsion and thus may be the basis for indemnity between the settling and nonsettling tortfeasors); Harper v. Caputo, 420 Pa. 528, 218 A.2d 108 (1966); Swartz v. Sunderland, 403 Pa. 222, 169 A.2d 289 (1961); Mong v. Hershberger, 200 Pa. Super. Ct. 68, 186 A.2d 427 (1962). *Contra,* Gentry v. Wilmington Trust Co., 321 F. Supp. 1379 (D. Del. 1970); Rock v. Reed-Prentice Div. of Pkg. Mach. Co., 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d 720 (1976) (§ 15-108 of the laws of New York provides that a tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person).

122. *See, e.g.,* W.D. Rubright Co. v. International Harvester Co., 358 F. Supp. 1388 (W.D. Pa. 1973); Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 107 N.W.2d 682 (1961); Duluth M & W Ry. v. McCarthy, 183 Minn. 414, 236 N.W. 766 (1931); Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 512, 99 N.W.2d 746 (1959).

released co-tortfeasor for the passenger's injuries.[123] It is not clear what effect such a release will have on the contribution rights of the releasing tortfeasor when he becomes liable to an injured party who also could have held the released tortfeasor liable. Courts that have considered the question generally look to the language of the release to see whether it specifically affected the right to contribution. If such a provision is contained in the release, courts generally give it effect.[124]

If there is no such provision, the court must determine if the "parties contemplated that, in addition to releasing the obvious personal injury or property damage claims, the tortfeasor-releasor would also surrender any claims for contribution he might have against the co-tortfeasor-releasee."[125] Some courts find that the right to contribution accrues only when the tortfeasor's common liability to the injured party has been discharged, and any release executed prior to that time is not effective to bar the subsequently arising contribution claim.[126] Courts which deny the claim for contribution find that the inchoate right to contribution comes into existence at the time the injured party has a cause of action against the tortfeasors. Therefore, the claim for contribution is in existence at the time the release is executed and presumably it is within the contemplation of the parties to include in the general language of the release any claims for contribution.[127] Missouri courts have previously held that the right to contribution is inchoate as of the time the tortfeasor's acts concur to produce the plaintiff's injury,[128] and would probably indulge the presumption that a release of a co-tortfeasor before the complete right to contribution has arisen is nonetheless effective to also release the contribution claim.

The typical contribution settlement conflict occurs where one of the tortfeasors has settled his liability to the injured party in return for a release and the nonsettling tortfeasors then seek contribution from him. One response to this problem is to hold that the tortfeasor who settles is not relieved from a contribution claim unless the release provides for a reduction of the judgment against the remaining tortfeasors to the extent of the pro rata share of the settling tortfeasor.[129] This can be accomplished by

123. For a discussion of the effect on contribution rights when a tortfeasor releases a co-tortfeasor, *see* Annot., 34 A.L.R.3d 1374 (1970).

124. *See* 66 AM. JUR. 2d *Release* § 27 (1973).

125. Annot., 34 A.L.R.3d 1374, 1377 (1970).

126. Martin v. Guttermuth, 403 S.W.2d 282 (Ky. 1966); Restifo v. McDonald, 426 Pa. 5, 230 A.2d 199 (1967).

127. Brown v. Eakin, 50 Del. 574, 137 A.2d 385 (1957); Norton v. Benjamin, 220 A.2d 248 (Me. 1966).

128. *See* note 43 *supra.*

129. *See, e.g.,* Pilosky v. Dougherty, 179 F. Supp. 148 (E.D. Pa. 1959); M.F.A. Mut. Ins. Co. v. Mullin, 156 F. Supp. 445 (D. Ark. 1957); Theebald v. Angelos, 44 N.J. 228, 208 A.2d 129 (1965); Garrison v. Navajo Freight Lines, Inc., 74 N.M. 238, 392 P.2d 580 (1964); Blanchard v. Wilt, 410 Pa. 356, 188 A.2d 722 (1963); Palestine Contractors, Inc., v. Perkins, 386 S.W.2d 764 (Tex. 1964). *See also* N.Y. CIV. PRAC. § 15-108(a) (1976) (a release reduces the claim

what has come to be called a *Pierringer* release.[130]

In *Pierringer* the plaintiff brought an action against six defendants for damages caused by an explosion. Prior to trial all the defendants except one settled with the plaintiff. Based on the releases they had received from the plaintiff, the settling defendants moved to dismiss the nonsettling defendant's cross-claim for contribution. The release the plaintiff had given the defendants provided that the defendants were released from that part of the plaintiff's cause of action for which each defendant's percentage of negligence determined at trial would make each liable to the plaintiff, that the plaintiff reserved the balance of his cause of action against the nonsettling defendant, and that the plaintiff agreed to indemnify the defendants for any claim of contribution made by the nonsettling defendant.[131] The trial court dismissed the cross-claim for contribution and the Wisconsin Supreme Court affirmed.[132] The court reasoned that the nonsettling defendant had no cause to complain because he was relieved from paying any more than what his share might prove to be.[133]

If the settling tortfeasor pays for his release an amount in excess of the share allocated to him by the jury, a problem arises as to whom the excess should be credited. This problem was addressed by the Supreme Court of Pennsylvania in *Daugherty v. Hershberger.*[134] The court concluded that the nonsettling tortfeasor was entitled to the credit, stating:

> [I]f the proportion of reduction provided by the release is greater than the amount of the consideration paid for the release, such proportion of reduction prevails, but if the consideration paid for

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against the others by the amount stipulated in the release, or the consideration paid for the release, or the amount of the tortfeasor's equitable share, whichever is greater). Section 5 of the 1939 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT provided that the release of any tortfeasor would not release him from liability for contribution unless it expressly provided for reduction "to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all other tortfeasors." This provision was dropped in the 1955 Act. *See* note 138 *infra.*

130. The release received its name from Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). Two earlier Wisconsin cases set the stage for the acceptance of this type of release. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); Heimbach v. Hagen, 1 Wis. 2d 294, 83 N.W.2d 710 (1957).

131. Pierringer v. Hoger, 21 Wis. 2d 182, 184, 124 N.W.2d 106, 108 (1963).

132. *Id.* at 188, 124 N.W.2d at 112.

133. *Id.* The court further observed that the settlement agreement should be set out in the plaintiff's complaint and that in any event the defendant could "set forth the facts of the release and such other pertinent matter" in his answer. *Id.*

134. 368 Pa. 367, 126 A.2d 730 (1956). Plaintiff settled with defendant Mong for $13,500 and gave him a release. The jury returned a verdict against defendant Hershberger for $11,720. The court held that in order to prevent a double recovery by the injured parties, the verdicts should be reduced by the amount received in settlement. Thus, Hershberger's liability to the plaintiffs was only $1,859 (the amount left unsatisfied by Mong's settlement) instead of $5,860 (one-half of the $11,720 verdict).

> the release is greater than the proportion of reduction provided by the release, then the amount of the consideration paid for the release prevails.[135]

There are jurisdictions which deny the contribution claim of the nonsettling tortfeasor even when the release does not provide for a reduction of the plaintiff's judgment to the extent of the settling tortfeasor's allocated share. These jurisdictions reduce the judgment either by the amount of consideration paid for the release, or by the amount the release provides that the judgment is to be reduced, whichever is greater.[136] This is the approach taken by the 1955 Uniform Contribution Among Tortfeasors Act.[137] In the Commissioner's note for the 1955 Act it is observed that "[i]t seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution."[138]

Missouri's contribution statute contains a provision concerning the situation where the injured party settles with one of the joint tortfeasors.[139]

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135. *Id.* at 370, 126 A.2d at 733. A strong dissent was written by Justice Musmanno in which he emphasized, "Mong recognized his fault in the motor collision and promptly liquidated his financial responsibilities in the matter. That he was generous enough to pay the subjects of his negligence more than the jury later awarded them is not something for Hershberger to capitalize on." *Id.* at 373, 126 A.2d at 736. The apparent unfairness to Mong was alleviated in part by the later case of Mong v. Hershberger, 200 Pa. Super. Ct. 68, 186 A.2d 427 (1962), in which Mong brought a contribution action for $4,021, the difference between $5,860, one-half of the jury verdict, and $1,839, the amount of the verdict paid by Hershberger. Even though the settlement had not completely extinguished all of plaintiff's claims against Hershberger, the court held a partial extinguishment sufficient to entitle the settling tortfeasor to a right to contribution. Mong was therefore allowed to recover contribution from Hershberger in the amount of $4,021.

136. *See, e.g.,* American Motorcycle Ass'n v. Superior Court, 574 P.2d 763, 143 Cal. Rptr. 692 (1978); Atlantic Ambulance & Convalescent Serv., Inc. v. Asbury, 330 So. 2d 477 (Fla. App. 1975); Ginoza v. Takai, 40 Hawaii 691 (1955); Gronquist v. Olson 242 Minn. 119, 64 N.W.2d 159 (1954); Degen v. Bayman, 241 N.W.2d 703 (S.D. 1976). *See also* IDAHO CODE ANN. § 6-805 (Supp. 1978); UTAH CODE ANN. § 78-27-42 (1953).

137. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(a) note (1955 version) (Commissioner's Comments).

138. *Id.*

139. RSMo § 537.060 (1978) provides:

> It shall be lawful for all persons having a claim or cause of action against two or more joint tort-feasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tort-feasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tort-feasors or wrongdoers against whom such person or persons has such claim or cause of action, and not so released.

This provision does not prevent a nonsettling tortfeasor from obtaining contribution from a tortfeasor who has settled with the plaintiff. It seemingly only provides protection to the settling tortfeasor from a further claim by the plaintiff, while preserving the plaintiff's right to proceed against the other tortfeasors. It is necessary, therefore, for either the courts or the legislature of Missouri to decide if the settling tortfeasor should be protected from a contribution claim. It is recommended that the settling tortfeasor be afforded some protection because not to do so would discourage the settlement of multiparty claims on an individual basis. Separate tortfeasors would be unwilling to settle their liability with the plaintiff if they feared their liability was not completely extinguished.[140] Any possible prejudice which may befall the nonsettling tortfeasor by denying his contribution claim can be alleviated, at least in part, by crediting either the amount paid for the release, the amount stipulated by the release, or the share of the fault attributable to the settling tortfeasor against any amount for which the nonsettling defendants become liable to the plaintiff.[141]

3. Family Immunity

In Missouri a person may not maintain a civil suit against his or her spouse during the marriage for a tort that occurred during the marriage.[142] Similarly, an unemancipated minor child cannot bring a civil action against his or her living parents based on the parents' negligence;[143]

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140. *See* Berg, *Comparative Contribution and its Alternatives: The Equitable Distribution of the Accident Losses,* 43 INS. COUNSEL J. 577, 590 (1976).

141. Although clearly the most favorable, a major drawback to using the settling tortfeasor's pro rata share as the amount of the credit is that it forces the plaintiff to bear the consequences of accepting a bad settlement offer. For example, assume the plaintiff sues *A* and *B* and settles with *A* for $10,000. The plaintiff gives a release and stipulates that the judgment obtained against *B* will be reduced by the percentage of fault attributable to the settling tortfeasor. The plaintiff is risking a potential loss. If the jury returns with a verdict of $50,000 and apportions negligence as 60% on *A* and 40% on *B,* the plaintiff would collect $20,000 (40% of $50,000) from *B*; his total recovery would be $30,000 ($20,000 plus the $10,000 settlement) despite the fact that he obtained a $50,000 verdict. Some argue that this secondary loss stemming from the settlement should rightfully be borne by the plaintiff "since he [and not the other defendant] agreed to the terms." Berg, *Comparative Contribution and its Alternatives: The Equitable Distribution of Accident Losses,* 43 INS. COUNSEL J. 577, 590 (1976). *See also* note 120 *supra.* The argument fails to recognize that this result will discourage plaintiff's attorneys from settling their claims since "they have no way of knowing what they are giving up." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) note (1955 version) (Commissioner's Comments).

142. Deatherage v. Deatherage, 328 S.W.2d 624, 625 (Mo. 1959); Brawner v. Brawner, 327 S.W.2d 808, 809 (Mo. En Banc), *cert. denied,* 361 U.S. 964 (1959); Noland v. Farmers Ins. Exch., 413 S.W.2d 530, 532 (K.C. Mo. App. 1967).

143. *But see* Fugate v. Fugate, No. 60,375 (Mo. En Banc, June 19, 1979)

nor can the parents bring an equivalent action against their child.[144] Suits among family members, it is argued, would disrupt the tranquility of that relationship.[145] The policy reasons underlying family immunity conflict with the policy of contribution if a joint tortfeasor seeks contribution from a co-tortfeasor who is the spouse, parent, or child of the injured plaintiff. The obvious question is whether the non-familial tortfeasor can force the familial tortfeasor to assume responsibility for part of the loss by way of contribution. The majority of states have refused to allow contribution in this situation on the ground that there is no common liability between the tortfeasors to the plaintiff.[146] However, the majority position is weakening and the modern trend is to allow contribution even though one of the tortfeasors enjoys the defense of family immunity.[147]

The Missouri Supreme Court has declined to determine the related issue of whether the defense of family immunity would defeat an indemnity claim.[148] Other cases in Missouri have shown a reluctance to allow the defense when one family member brings suit against another family member.[149] Therefore, it seems likely that Missouri will follow the growing trend and allow a tortfeasor to obtain contribution from his co-tortfeasor despite the fact that the tortfeasor asserts the defense of family immunity.

4. Workmen's Compensation

In Missouri, most employers are immune from common liability to

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(parental immunity doctrine not applicable when child is emancipated or when allowing the suit will not disrupt the family relationship).

144. Baker v. Baker, 364 Mo. 453, 263 S.W.2d 29 (1953).

145. Brennecke v. Kilpatrick, 336 S.W.2d 68, 71 (Mo. En Banc 1960). *See also* W. PROSSER, LAW OF TORTS § 122, at 859-64 (4th ed. 1971); Annot., 60 A.L.R.2d 1284, 1286 (1958).

146. *See* cases collected in 18 AM. JUR. 2d *Contribution* § 49 (1965); Annot., 60 A.L.R.2d 1366, § 8b (1958).

147. Note, *supra* note 108, at 408; Note, *Contribution Among Negligent Tortfeasors: The New Rule and Beyond,* 55 NEB. L. REV. 383, 397 (1976). *See also* Wymer v. Dedman, 233 Ark. 854, 350 S.W.2d 169 (1961); Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965); Fisher v. Diehl, 156 Pa. Super. Ct. 476, 484, 40 A.2d 912, 917 (1945); Zarella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966).

148. Crouch v. Tourtelot, 350 S.W.2d 799, 803 (Mo. En Banc 1961); State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W.2d 127 (Mo. En Banc 1948).

149. *See* Brennecke v. Kilpatrick, 336 S.W.2d 68, 73 (Mo. En Banc 1960) (unemancipated minor allowed to bring suit against estate of deceased parent); Wurth v. Wurth, 322 S.W.2d 745 (Mo. En Banc 1959) (emancipated minor allowed to bring negligence action against parent); Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1955) (wife may sue spouse for antenuptial torts). *But see* Ebel v. Ferguson, 478 S.W.2d 334 (Mo. En Banc 1972), in which the court refused to allow a spouse to sue after divorce for injuries negligently inflicted during the marriage. The court also overruled Ennis v. Truhitte, 306 S.W.2d 549 (Mo. En Banc 1957), which had allowed a surviving spouse to sue the estate of the deceased spouse for negligent acts committed during the marriage.

employees injured in the course of employment.[150] Frequently an employee will recover workmen's compensation benefits from his employer and then bring a common law action against a third party whose negligence concurred with the employer's to produce his injury.[151] If the third party seeks to obtain contribution from the employer for his share of the judgment of the common law action, the conflicting interests of the workmen's compensation system and the contribution system are brought into play. If contribution is allowed, the employer will be forced to pay indirectly to the employee what he could not have been forced to pay directly. By denying the contribution claim of the third party, the third party is forced to bear the plaintiff's entire loss even though the employer may be equally or more at fault. Furthermore, the third party's payment to the injured employee may end up subsidizing the employer's workmen's compensation liability.[152]

> Missouri's workmen's compensation law provides in part that:
>
> Every employer subject to the provisions of this chapter shall be liable irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.[153]

Missouri courts have consistently held that an employee or a person claiming through the employee does not have a common law action in negligence against his employer once the employer becomes obligated to

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150. *See* notes 155-56 and accompanying text *infra*.

151. *See, e.g.*, Bunner v. Patti, 343 Mo. 274, 121 S.W.2d 153 (1938); Reynolds v. Grain Belt Mills Co., 229 Mo. App. 380, 78 S.W.2d 124 (K.C. 1944). RSMo § 287.150(1) (1978) specifically recognizes the right of an injured employee to bring a common law action against a third party.

152. RSMo § 287.150(1) (1978) provides the employer a subrogation right against the negligent third party which allows him to recoup all or part of the workmen's compensation he has paid the employee. The third party action may be brought by either the employer, the employee, or both jointly. Veninga v. Liberty Mut. Ins. Co., 388 S.W.2d 535 (St. L. Mo. App. 1965). If the employer brings the action, he may recover even more than his compensation outlay; if so, he can deduct his recovery expenses and pay the remainder to the employee to be treated as advance payment of future installments. RSMo § 587.150(1) (1978). *See also* Ruediger v. Kallmeyer Bros. Serv., 501 S.W.2d 56 (Mo. En Banc 1973); Maryland Cas. Co. v. General Elec. Co., 418 S.W.2d 115 (Mo. En Banc 1967). RSMo § 287.150(3) (1978) governs the distribution of the proceeds when the employee brings the action. After deducting the expenses of the third party litigation from the recovery, the balance is then apportioned in the same ratio that the amount paid by the employer at the time of the third party recovery bears to the total amount recovered from the third party. Any part of the recovery paid to the employee or his dependents is treated as an advance payment by the employer on account of any future installments of compensation. *See* Ruediger v. Kallmeyer Bros. Serv., 501 S.W.2d 56, 60 (Mo. En Banc 1973).

153. RSMo § 287.120 (1978).

furnish compensation under the provisions of the Workmen's Compensation Act.[154] This holding is in line with the purpose of the Act, which "is to provide a simple and nontechnical method of compensation for injuries sustained by employees through accident[s] arising out of and in the course of employment and to place the burden of such losses on industry."[155] While the purpose of the Act is to benefit employees by giving them a speedy and certain measure of damages for work-related injury, such a benefit requires them to forego rights to obtain a common law measure of damages.[156] In return the employer accepts absolute but limited liability.[157] An attempt to increase the employer's liability to the employee through contribution may be viewed by the employer as an unlawful expansion of the limited liability he originally bargained for and which is protected by explicit statutory language.

Missouri has allowed a third party to recover indemnity from an employer for the damages resulting from an injury to an employee.[158] This

154. *See, e.g.*, West v. Atlas Chem. Indus., Inc., 264 F. Supp. 697 (E.D. Mo. 1966); Montgomery v. Mine La Motte Corp., 304 S.W.2d 885 (Mo. 1957); Gardner v. Stout, 342 Mo. 1206, 119 S.W.2d 790 (1938); State *ex rel.* National Lead Co. v. Smith, 134 S.W.2d 1061 (St. L. Mo. App. 1939).

155. Bethel v. Sunlight Janitor Serv., 551 S.W.2d 616, 618 (Mo. En Banc 1977).

156. Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo. App., D. St. L. 1978); Seabaugh v. Garver Lumber Mfg. Co., 193 S.W.2d 370, 381 (St. L. Mo. App. 1946), *rev'd on other grounds,* 355 Mo. 1153, 200 S.W.2d 55 (Mo. En Banc 1947); Reed v. Kansas City Wholesale Grocery Co., 236 Mo. App. 402, 405, 156 S.W.2d 747, 750 (K.C. 1941).

157. Leicht v. Venture Stores, Inc., 562 S.W.2d 401, 402 (Mo. App., D. St. L. 1978).

158. McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959). The Missouri Supreme Court held that the defendant, McDonnell, properly stated a cause of action in indemnity against the plaintiff's employer, Hartman, even though the employer had already furnished compensation to the employee under the provisions of the Workmen's Compensation Act. The court concluded that the obligation of the employer in undertaking to warn its employees of the location of certain power lines resulted in a contractual agreement between the employer and McDonnell which was sufficient to require the employer to indemnify McDonnell. As the court stated:

> We think the language of Sec. 287.120(1), "shall be released from all other liability *therefor* whatsoever," means all other liability "for personal injury or death of the employee"; and does not mean liability for breach of an independent duty or obligation owed to a third party by an employer whose liability for injury to his employee is under the compensation act. It seems unlikely that workmen's compensation acts were intended to affect the rights of third parties outside the employer-employee relationship . . . . Since such third parties receive no benefit from the compensation act (as does the employer), therefore in the absence of an express provision in the Act, it does not seem proper to hold that, by implication, the Act has taken from them rights which they had before. There does not seem to be any contention that the compensation act should prevent the enforcement of an express contract indemnity . . . . [W]e think it reasonable to rule that the Act does not prevent holding

result appears to rest on the principle of contractual rather than non-contractual indemnity or contribution. Nevertheless, it does show some willingness to narrow the immunity granted employers.

The question of whether a third party can obtain non-contractual indemnity from an employer was recently decided by the Missouri Supreme Court in *State ex rel. Maryland Heights Concrete Contractors, Inc. v. Ferriss.*[159] In that case, the defendant in a wrongful death suit filed a third party petition against the employer of the deceased. In a four to three decision, the court held not only that the relative fault doctrine announced in *Missouri Pacific* did not abrogate the immunity conferred upon an employer by the Workmen's Compensation Act, but also that the employer in this situation could not even be made a party to the cause of action.

In his dissent, Judge Donnelly advocated the retention of the employer as a third party defendant for the sole purpose of determining the relative fault of all tortfeasors, but recognized that in no event could a judgment be rendered against the employer "where judgment and recovery against one of multiple defendants is legally barred."[160] This would apply whether the legal bar was in the nature of the Workmen's Compensation Act or "in the form of a *release* given by the plaintiff to one of multiple defendants."[161]

Prior to *Missouri Pacific*, the issue of contribution between a third party and an employer could not arise since the contribution statute required a joint judgment, which was impossible since the employee could never join the employer with the third party in a common law action.[162] The

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Hartman liable to indemnify McDonnell, for loss caused McDonnell by the breach of its duty to McDonnell, which arose by reason of Hartman's express agreement to assume and perform it. Such a ruling does not hold the employer liable for personal injury or death of his employee but instead holds him liable for the breach of an independent duty to a third party which he expressly agreed to perform.

Id. at 796.

159. No. 61116 (Mo. En Banc, Sept. 11, 1979).

160. *Id.*, slip op. at 1. Judge Donnelly went on to state:

> Inability to render a judgment against all multiple tort-feasors, however, does not make it necessary that we narrow the application of the *relative fault* concept in this case. The *relative fault* of Maryland, the tort-feasor, against which there is no legal bar to judgment should still be determined. In my view, a pure concept of *relative fault* requires that the right of a claimant to recover from one tort-feasor be determined in accordance with a jury's finding of the respective percentages of fault as between *all* tort-feasors.

Id. at 2 (emphasis in original).

161. *Id.* (emphasis added). The dissent cited State *ex rel.* Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829 (Mo. En Banc 1979) as a situation in which the "purpose and function of a release would be circumvented if the released defendant could be held liable to other defendants for his relative fault in causing plaintiff's harm." State *ex rel.* Maryland Heights Concrete Contractors, Inc. v. Ferriss, No. 61116, slip op. at 2 (Mo. En Banc, Sept. 11, 1979).

162. *See* notes 155-56 and accompanying text *supra*.

majority of other jurisdictions which have addressed this issue have held that non-contractual indemnity or contribution between the employer and the third party is not allowed because of the limited liability afforded the employer by the Workmen's Compensation Act.[163]

The countervailing arguments generally advanced to deny contribution have been either that the Workmen's Compensation Act makes the employer's duty to the employee exclusive, or that contribution could not be allowed because there is no common liability between the employer and the third party.[164] The basis for an "exclusive remedy" argument in Missouri would be founded on the statutory language: "and [the employer] shall be released from all other liability therefor whatsoever, whether to the employee or any other person."[165] This language has been relied upon to find an employer's absolute liability and the employee's concomitant guaranteed but limited recovery thereunder to be exclusive.[166] The argument has been attacked on two grounds. First, courts rejecting the "exclusive remedy" argument have failed to accept that the trade-off between the employer and the employee should affect the rights of third parties.[167] As these courts view it, while both the employer and the employee have given up certain rights, they have also received benefits under the Act. In contrast, the third party receives no benefits from the Act, yet it subjects

163. *See* Note, *supra* note 114, at 415; 18 AM. JUR. 2d *Contribution* § 48 (1965).

164. Dawn V. Essex Conveyors, Inc. 498 F.2d 921 (6th Cir. 1974), *cert. denied,* 419 U.S. 1040 (1974); Kessler v. Bowie Mach. Works, Inc., 501 F.2d 617 (8th Cir. 1974); Petznick v. Clark Equip. Co., 333 F. Supp. 913 (D. Neb. 1971); White v. McKenzie Elec. Coop., 225 F. Supp. 940 (D.N.D. 1964). *See also* Golden Valley Elec. Ass'n v. City Elec. Serv., Inc., 518 P.2d 65 (Alas. 1974); Desert Steel Co. v. Superior Court, 22 Ariz. App. 279, 526 P.2d 1077 (1974); Jack Morgan Constr. Co. v. Larkan, 254 Ark. 838, 496 S.W.2d 431 (1973); Hilzer v. MacDonald, 169 Colo. 230, 454 P.2d 928 (1969); A.A. Equip., Inc., v. Farmoil, Inc., 31 Conn. Supp. 322, 330 A.2d 99 (1974); Howard v. Steers, 312 A.2d 621 (Del. 1973); Kamali v. Hawaiian Elec. Co., 54 Hawaii 153, 504 P.2d 861 (1972); Ashland Oil & Ref. Co. v. Bertam & Thacker, 453 S.W.2d 591 (Ky. 1970); LeJeune v. Highlands Ins. Co., 287 So. 2d 531 (La. App. 1973), *aff'd,* 290 So. 2d 903 (La. 1974); Roberts v. American Chain & Cable Co., 259 A.2d 43 (Me. 1969); American Radiator & Standard Sanitary Corp. v. Mark Eng'r Co., 230 Md. 584, 187 A.2d 864 (1963); Vaughn v. Vakula, 38 Mich. App. 368, 196 N.W.2d 319 (1972); Ruvolo v. United States Steel Corp., 133 N.J. Super. 362, 336 A.2d 508 (1975); Gulf Oil Corp. v. Rota-Cone Field Operating Co., 84 N.M. 483, 505 P.2d 78 (Ct. App. 1972); Cacchillo v. H. Leach Mach. Co., 111 R.I. 593, 305 A.2d 541 (1973).

165. RSMo § 287.120(1) (1978).

166. *See* White v. McKenzie Elec. Coop., 225 F. Supp. 940 (E.D.N.D. 1964); Golden Valley Elec. Ass'n v. City Elec. Serv., Inc., 518 P.2d 65 (Alas. 1974); Jack Morgan Constr. Co. v. Larkan, 254 Ark. 838, 496 S.W.2d 431 (1973).

167. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); United States Fidelity & Guar. Co. v. Kaiser Gypsum Co., 539 P.2d 1065 (Or. 1975).

him to liability to the employee and the employer.[168]

The second ground of attack by the courts is premised on the statutory language releasing the employers from liability to "any other person."[169] Rather than being read to cut off the employer's liability to all other persons, it is asserted that the provision must be read in conjunction with the rest of the language of the Act. Thus, it has been held to refer only to persons who are allowed by the Workmen's Compensation Act to sue for the injuries sustained by the employee.[170] Since a third party seeking contribution is not suing on behalf of the employee, he does not fall within the scope of "any other person."[171]

The lack of a common liability to the plaintiff is another argument that has been urged by employers seeking to deny a contribution claim of a third party.[172] Because the Act makes the employer immune from a common law action by the employee, there is no common liability (or actionable negligence) to sustain a contribution action.[173] Again, this argument fails to explain why the trade-off between the employer and the employee should have any effect on the rights of the third party who has received no benefits from the Act.[174]

Among those jurisdictions that do allow contribution from an employer, there is a split on the issue of the amount of recovery available to the third party from the employer. Some allow the third party to recover from the employer the same amount he would have been able to collect from any other tortfeasor.[175] Other courts have sought a compromise between the employer's limited statutory liability and the equitable policy underlying contribution which requires those jointly responsible for the plaintiff's loss to discharge their respective shares. These courts have limited the contribution recovery against the employer by allowing the third party a set-off in the common law action brought by the employee up to the amount of the employer's workmen's compensation liability, and the employer is deprived of any subrogation rights he may have had against the third party.[176]

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168. *See* cases cited note 156 *supra*. *See also* Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW.U.L. REV. 351 (1970).

169. RSMo § 287.120(1) (1978).

170. Lunderberg v. Bierman, 241 Minn. 349, 364, 63 N.W.2d 355, 365 (1954).

171. RSMo § 287.120(1) (1978).

172. Davis, *Third Party Tortfeasors' Rights Where Compensation Covered Employers Are Negligent—Where Do Dole and Sunspan Lead?*, 4 HOFSTRA L. REV. 571, 587-88 (1976).

173. *See* cases cited note 154 *supra*.

174. Davis, *supra* note 170, at 588.

175. *See* Larson, *supra* note 166. *See also* Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

176. Santisteven v. Dow Chem. Co., 506 F.2d 1216 (9th Cir. 1974); Brown v. Southern Ry., 204 N.C. 25, 168 S.E. 419 (1940); Maio v. Fahs, 339 Pa. 180, 14

V. CONCLUSION

The Missouri Supreme Court in *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.* greatly expanded a heretofore limited rule allowing contribution among joint tortfeasors. *Missouri Pacific* adopts an enlightened rule of allowing contribution between joint tortfeasors based on their relative degrees of fault. While it advances a more equitable and precise means of distributing economic responsibility for damages flowing from a tort, application of the new rule presents a host of unanswered substantive and procedural questions. Until Missouri courts resolve these questions, an attorney should proceed cautiously to protect his client's interests. Counterclaims, cross-claims and third party claims should be utilized rather than having the contribution issue determined in a separate action. This avoids the possibility that the contribution claim will be barred by res judicata or that the court will not allow a separate action to be brought by one of the tortfeasors. Finally, an attorney should urge the court to consider the policy reasons underlying the principle of contribution before deciding if contribution should be permitted.

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