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New Settlement Statute: Its History and Effect

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THE NEW SETTLEMENT STATUTE: ITS HISTORY AND EFFECT

The statute concerning releases in multiple tortfeasor cases was amended to encourage settlements in two ways. It protects the settling tortfeasor from future liability for contribution, and it protects the settling claimant from having future judgments against non-settling tortfeasors reduced by more than an amount ascertainable at the time of the settlement. This article discusses the operation of the new statute and its relation to the law of contribution, indemnity, and comparative fault in Missouri.

INTRODUCTION. The 82nd General Assembly amended Section 537.060, RSMo (1978) to clarify the effect of settlements with respect to the settling tortfeasor's liability for contribution to the non-settling tortfeasor.[1] This right is also sometimes referred to as non-contractual indemnity.[2] To simplify matters, it will be referred to as a right to contribution in this article. The statute, as amended, provides that a settling tortfeasor who has obtained a release from the claimant cannot be held liable for contribution in an action brought by a joint tortfeasor. The statute does not deal with his potential liability for indemnity, as opposed to contribution, and the effect of a settlement on this liability.

The statute, prior to amendment, dealt with two subjects. First, it created a right of contribution among joint judgment debtors. Second, it authorized a claimant to settle with one of several joint tortfeasors and release him without impairing his claim against the other joint tortfeasors. The amendment did not deal with the first part of the statute. It substituted the following new settlement provision for the old provision:

When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death such agreement shall not discharge any of the other tortfeasors for the damage unless the terms of the agreement so provide, however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor. The term "non-contractual indemnity" as used in this section refers to indemnity between joint tortfeasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

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The following example illustrates how the new settlement provision works:

Passenger is injured in an intersection collision involving a car in which he is riding and a truck. The car was driven by Driver and the truck was driven by Trucker. Passenger sues Driver and Trucker, alleging negligence, and claiming damages of $15,000. Each defendant cross-claims against the other for apportionment of fault. Prior to trial Passenger settles with Driver for $2,000 and releases him. Passenger proceeds to trial against Trucker, and obtains a verdict in his favor for $10,000.

Under the new statute Passenger would be able to recover only $8,000 from Trucker because the statute requires his judgment to be reduced by the amount of the settlement with Driver. If Passenger collects this sum, Trucker would not be entitled to contribution from Driver. The end result is that Driver pays $2,000 and Trucker pays $8,000.

The above analysis depends on certain assumptions. Passenger's action against Trucker would have been barred if the settlement had provided full compensation for the loss.[3] Also, the statute provides that Passenger would have been prohibited from proceeding against Trucker if the agreement had released him as well as Driver. Similarly, Passenger's judgment against Trucker would have been reduced by more than the $2,000 settlement amount if the agreement had so provided.

Another qualification is that Driver is protected from having to pay contribution only if the release was given in good faith. At a minimum this requires that the settlement with Passenger not be collusive.[4] Good faith may be broader than merely prohibiting collusion. One court held an agreement to have been made in bad faith because it gave the settling tortfeasor so much control over the claimant's right to settle with the remaining tortfeasors that the statutory objective of encouraging settlements was defeated.[5]

The amended statute treats a covenant not to sue and a covenant not to enforce a judgment in the same way as a release. A covenant not to enforce a judgment is like a covenant not to sue except it is given after suit is filed.[6] It protects the settling tortfeasor from a contribution action, but only if it is given prior to the entry of judgment.[7]

NEED FOR THE LEGISLATION. Prior to *Missouri Pacific Railroad v. Whitehead & Kales Co.*[8] the above hypothetical would have been resolved the same way under the old settlement statue as under the new statue, *i.e.*, the settling tortfeasor pays $2,000 and the non-settling tortfeasor pays $8,000. Under the old statute Plaintiff's verdict was reduced by the amount of the settlement,[9] and there was no right of contribution between concurrent or joint tortfeasors[10] who were not joint judgment debtors.[11] The right to indemnity, as recognized by Missouri courts, would not apply under these circumstances.[12]

The *Whitehead & Kales* case raised the possibility of a different result in that it created a right of contribution among joint tortfeasors regardless of whether a joint judgment had been rendered against them.[13] The court has not stated whether a release or covenant not to sue by the claimant would be a defense in a contribution action by the non-settling tortfeasor against the settling tortfeasor. However, the possibility that the court might hold that it is not a defense has inhibited settlements in Missouri, and the new settlement statute was enacted to cure this problem.

If Driver's release did not protect him from Trucker's action for contribution he would not have settled with Passenger because he would have remained subject to the risk of both paying additional damages and bearing the cost of litigating the case. From Driver's point of view, it makes no difference whether

he has to defend himself in an action for contribution or in an action seeking damages for negligence. No rational tortfeasor would settle under such circumstances because he has nothing to gain from the settlement.

It is possible for the tortfeasor to protect himself by obtaining an agreement from the claimant to indemnify him in the event he is held liable for contribution in an action brought by the non-settling tortfeasor;[14] unfortunately, a rational claimant would almost never agree to this. Therefore, this device is useful to facilitate settlements only in rare cases.

The disadvantage of the indemnity agreement is that it creates great uncertainty with regard to the outcome of the lawsuit against the non-settling tortfeasor. The basis for apportionment of damages under *Whitehead & Kales* is the relative fault of the joint tortfeasors.[15] At the time the claimant settles with a tortfeasor, he cannot know what percentage of fault the jury will later attribute to him. Yet this percentage is key to determining whether plaintiff will have to indemnify the settling tortfeasor, and if so, for how much.

The above example can be used to illustrate the degree of uncertainty created by this variable. If the jury were to find Driver 20% at fault and Trucker 80% at fault, then Driver's pro rata share of the damages is $2,000 and Trucker's pro rata share is $8,000. Under these circumstances Trucker would have no right of contribution against Driver, and Passenger would not have to indemnify Driver. However, if the jury were to find that Driver was 80% at fault and Trucker was 20% at fault, then Trucker's pro rata share of the damages would be only $2,000. If Passenger were to collect the $8,000 judgment from Trucker, then Trucker would have a right to collect $6,000 from Driver, and Passenger would have to indemnify Driver for this full amount. Passenger would ultimately receive a net amount of only $4,000. These illustrations show that where plaintiff gives the settling tortfeasor an indemnity agreement, his total recovery is drastically affected by the jury's determination of relative fault. Yet, predicting with accuracy how the jury will decide such issues is obviously impossible.

It is easy to understand why a claimant would be unwilling to inject this additional element of uncertainty into his lawsuit. This is especially true in view of the awkward position he finds himself in at trial with respect to the issue. The defendant, of course, has a strong incentive to place as much blame as possible on the settling tortfeasor,

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and the settling tortfeasor has no financial incentive to defend himself. Since the plaintiff has no control over the settling tortfeasor, he will have to spend a large part of his energy trying to convince the jury that the settling tortfeasor was not very much at fault. He would obviously be better off if he could devote his full effort making his case rather than trying to minimize the role of one of the wrongdoers.

The need to protect the settling tortfeasor from a contribution action by the non-settling tortfeasor is verified by the experience of the Commissioners of Uniform Laws under the 1939 version of the Uniform Contribution Among Tortfeasors Act.[16] That act provided that a release did not protect the settling tortfeasor unless it provided for a reduction of the claimant's damages "to the extent of the pro rata share of the released tortfeasor."[17] This provision was one of the chief objections to the adoption of the 1939 act and one of the main causes for complaint where it was adopted because it discouraged settlements.[18] The

Commissioners changed the rule in the 1955 version of the act in order to encourage settlements.[19]

HISTORY OF THE LEGISLATION. The amendment was largely based on section 4 of the 1955 version of the Uniform Contribution Among Tortfeasors Act. The Uniform Act is in nine sections, and creates a comprehensive scheme for permitting contribution among joint tortfeasors.[20] By express provision it does not impair any right to indemnity under existing law, and where a right to indemnity exists, contribution is not available.[21] Section 4 of the Uniform Act restricts the non-settling tortfeasor's right to contribution against the settling tortfeasor. It has no application to the effect of a settlement on the right to indemnity because indemnity and contribution are mutually exclusive remedies under the act, and the act does not impair any right to indemnity.[22]

Because section 4 of the Uniform Act neither creates the right to contribution, nor defines its essential characteristics, it is compatible with any scheme of contribution. The impact of section 4 on the law of contribution is limited to the effect that a settlement has on the right to contribution. It should in no other way affect the growth and development of the law of contribution in Missouri.

The final version of the bill to amend Section 537.060 was a House Committee Substitute for original House Bills 135 and 194. House Bill 135[23] was drafted by the Tort Law Committee of The Missouri Bar, was approved by the Board of Governors of The Missouri Bar, and was sponsored by Representative Smith. House Bill 194[24] was drafted by the Missouri Association of Trial Lawyers, and was sponsored by Representative Youngdahl. While both bills were based on section 4 of the Uniform Act, they did differ in the language used to describe the action brought by one joint tortfeasor against another joint tortfeasor seeking contribution.[25] The House Committee substitute ironed out this difference in language and added a clause defining one of the terms.[26]

The terminology problem arose because of the way Missouri courts use the word "indemnity." In most jurisdictions indemnity refers to a shifting of the entire loss from one party to another party, while contribution refers to a partial shifting of the loss.[27] Missouri used the terms in this way prior to the *Whitehead & Kales* decision.[28] That case, in effect, created a right of comparative contribution based on relative fault of the tortfeasors;[29] however, it referred to this as a right to "non-contractual indemnity"[30] rather than as a right to

It carefully defined contractual indemnity

contribution. It carefully defined non-contractual indemnity so as to restrict the right to cases where a partial shifting of the loss was appropriate, and to distinguish it from cases where it is appropriate to shift the entire loss.[31]

The resulting amendment to the statute is almost identical to section 4 of the Uniform Act, except that in addition to denying the non-settling tortfeasor a right to "contribution" from the settling tortfeasor, it also denies him the right to "non-contractual indemnity."[32] The amended statute defines the phrase "non-contractual indemnity" in the same way that the *Whitehead & Kales* case defines it.[33] Thus, the amendment refers to the right to contribution in the same language used by Missouri courts, and places a limitation on it in cases where there has been a settlement. The statute does not deal with situations where *Whitehead & Kales* does not apply because a sharing of the loss is inappropriate. Therefore, if a common law right to indemnity exists against the settling tortfeasor in such cases, the effect

of a settlement on that right is unaffected by the statute. This modification insures that the scope of the statute in Missouri is the same as the intended scope of section 4 of the Uniform Act in that it deals with the effect of a release on an action for contribution but it does not deal with the effect of a release on indemnity actions.[34] The other deviations from the Uniform Act were editorial.

CONTRIBUTION AND INDEMNITY IN MISSOURI. Situations where a right to contribution exists in Missouri may be briefly summarized as follows. The right only applies between concurrent tortfeasors who are culpably negligent, and whose negligence directly caused the victim's injuries.[35] There is no right to contribution between successive tortfeasors,[36] where the liability of one of the parties is purely vicarious,[37] or where an obligation to indemnity is based on contract.[38]

Where there is right to contribution, it applies regardless of whether the victim has obtained a joint judgment against the tortfeasors,[39] and regardless of whether contribution is sought in the original proceeding[40] or in a separate suit.[41] A concurrent tortfeasor settling with the claimant for the full amount of damages may maintain an action for contribution against the non-settling tortfeasor.[42]

While the right to full indemnity may be based on a contractual agreement,[43] courts recognize the right in several non-contractual situations as well.[44] For example, one who without fault is held vicariously liable for the negligence of another has a right to be fully indemnified by the other.[45] In the case of successive tortfeasors, where the original tortfeasor is liable for aggravation of injuries caused by the subsequent tortfeasor, the original tortfeasor has a right to be reimbursed for the full amount of damage caused by the subsequent tortfeasor.[46] However, the subsequent tortfeasor has no right to reimbursement from the original tortfeasor because he is liable only for the aggravation he caused, not the entire damage.[47] A seller of a defective product who is held strictly liable in tort may have a right to be indemnified by the manufacturer.[48]

EFFECT OF SETTLEMENT ON RIGHT OF INDEMNITY. Where a defendant has a right to be indemnified by another person, how does a release of that person by the plaintiff affect the right to indemnity? Because the amended statute does not deal with the effect of a release on the right of the non-settling party to be indemnified,[49] case law necessarily controls. The result will vary, depending upon the circumstances.

For example, where an original tortfeasor is liable for aggravation of injuries caused by a subsequent tortfeasor, the original tortfeasor's right to indemnity by the subsequent tortfeasor is not cut off by the victim's release of the subsequent tortfeasor.[50] A contrary result would be unfair because, as between the two tortfeasors, the subsequent tortfeasor ought to bear the loss since he negligently caused it.[51]

Where there is an express contract of indemnity, a release by the accident victim of the person having the obligation to indemnify does not cut off the other contracting party's right to be indemnified if he is held liable to the accident victim.[52]

In cases where a non-negligent master's right to indemnity is based on vicarious liability for the negligence of his servant, the right becomes moot when the victim releases the servant because the liability of the master is extinguished by the release.[53] Since the master's liability is derivative only, it would be unfair to hold him liable when the wrongdoer cannot be liable to the victim either because of a release[54] or covenant not to sue.[55] In the converse situation, where the non-negligent master settles with the victim and obtains a full re-

lease, it is not clear that his right to be indemnified by the negligent servant is affected. He may well have a right to prevail in an indemnity action against the servant upon a showing of the servant's negligence within the scope of employment.[56]

An argument can be made that the amended statute changes the common law rule that the release of the servant also releases the master[57] because the statute provides that "such agreement shall not discharge any of the other tortfeasors for the damage unless the terms of the agreement so provide. . . ."[58] The counter argument is that the statute does not change the common law rule because the above-quoted clause does not apply to a non-negligent master since he is not a tortfeasor.[59] Regardless of how this dispute is resolved, a settlement pursuant to the statute would not deprive the master of his right to indemnity since the statute does not purport to cut off this right.[60]

COMPATIBILITY WITH COMPARATIVE NEGLIGENCE. In *Gustafson v. Benda*[61] the Supreme Court of Missouri adopted a system of pure comparative fault to be applied "[i]nsofar as possible . . . in accordance with" sections 1-6 of the Uniform Comparative Fault Act, 12 U.L.A. Supp. 35-45 (1983). These sections of the act create a comprehensive system of comparative fault and comparative contribution among tortfeasors. They also specify the manner set-off is handled, and the effect of a release of one tortfeasor in joint tortfeasor cases.

The court recognized[62] that, in multiple tortfeasor cases, the effect of a release is different under the Uniform Comparative Fault Act than it is under the new Missouri statute in that it reduces the injured person's claim against other tortfeasors by "the amount of the released person's equitable share of the obligation. . . ."[63] The court urged the legislature to adopt the approach taken in the Uniform Comparative Fault Act, but indicated that it would abide by the terms of the statute in the meantime.

The new settlement statute is compatible with a scheme of pure comparative negligence. Other jurisdictions, with similar settlement statutes, have continued to enforce them after the adoption of pure comparative negligence.[64] The choice represented by the two statutory approaches is between the policy of encouraging settlements and the policy of allocating losses in accordance with proportionate fault.[65] Encouraging settlements remains a very worthy policy even after the adoption of comparative negligence.[66]

CONSTITUTIONALITY. *West v. Rollhaven Skating Arena*[67] held section 4 of the Uniform Contribution Among Tortfeasors Act constitutional. In the case the non-settling tortfeasor claimed that the act violated due process and equal protection because the settlement cut off his right to contribution from the settling tortfeasor. The court held that the termination of his right to contribution was justified by the state's interest in encouraging settlements.[68]

The *West* case appears to have correctly applied the underlying constitutional principles. Under the Due Process clause the statute is constitutional as long as the denial of the right to contribution bears a rational relationship to the objective of encouraging settlements.[69] This is essentially the same standard that applies in equal protection cases.[70] There is a rational basis for the statute.[71] As pointed out previously,[72] a rule permitting contribution against the settling tortfeasor greatly increases the difficulty of obtaining settlement in any case involving multiple tortfeasors. The statute is neither under-inclusive nor over-inclusive[73] because it removes a real impediment to settlements in all multiple tortfeasor cases, and it only applies in multiple tortfeasor cases. Furthermore, the non-settling tortfeasor is adequately protected from collusive settlements and settlements that do not

further the policy underlying the statute by having the opportunity to establish that the agreement was not made in good faith.[74]

In *State ex rel. Tarrasch v. Crow*[75] the court suggested that cutting off a non-settling tortfeasor's right to indemnity because of a settlement agreement to which he was not a party would violate due process. This, however, does not imply that the amended statute is unconstitutional because *Tarrasch* dealt with indemnity rather than contribution. In fact, the court in *Tarrasch* expressly distinguished cases from other jurisdictions terminating the right to contribution because of a settlement.[76] It is much harsher to extinguish the right to indemnity than the right to contribution because indemnity is normally awarded to one who, for policy reasons, has been required to pay for harm caused by another. His right to indemnity permits him to shift the loss back to the tortfeasor who is primarily at fault. If release of the tortfeasor who caused the harm cuts off the other's right to indemnity, he must permanently bear that loss.

RETROACTIVITY. Retroactive application of the amended statute to a release given prior to its effective date must be resolved by the courts because the amended statute does not deal with the issue. Guidance may be found in decisions of jurisdictions holding that section 4 of the Uniform Contribution Among Tortfeasors Act is not retroactive.[77]

INSTRUCTING THE JURY. In cases where plaintiff settles with one tortfeasor and proceeds to trial against another, the amended statute does not prescribe how to instruct the jury. Therefore, this remains a procedural matter which is appropriately handled by court rule. Under present rules, the judge merely credits any prior payments against the damages found by the jury.[78] The jury is not informed of the settlement unless it is required to resolve an issue of fact such as the existence or amount of a settlement payment.[79]

CONCLUSION. The new settlement statute will encourage settlements in multiple tortfeasor cases because it exonerates the settling tortfeasor from liability for contribution as long as the agreement was made in good faith. Yet, because the statute is drawn narrowly, it ought not inhibit the growth and development of the law of contribution and indemnity in Missouri. Since it is based on a uniform act, there is ample case law available to aid in interpreting the new provision. □

FOOTNOTES

[1] H.C.S. for H.B. 135 & 194, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983) reprinted in 3 Mo. Legis. Serv. 398 (Vernon 1983). The amended statute became effective September 28, 1983.

[2] *See* text at notes 27-31, *infra*.

[3] *See* Hayden v. Ford Motor Co., 278 F.Supp. 267, 271 (D.Mass. 1967).

[4] Unif. Contribution Among Tortfeasors Act sec. 4, Commissioners' Comment to subsection (b), 12 U.L.A. 99 (1975); *See*, Comment, *The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors*, 14 U.RICH.L.REV. 809, 821-24 (1980).

[5] In re Waverly Acc. of Feb. 22-24, 1978, 502 F.Supp. 1 (M.D.Tenn. 1979).

[6] Bishop v. Klein, 380 Mass. 285, 402 N.E.2d 1365, 1372 n.7 (1980).

[7] *Id.*

[8] 566 S.W.2d 466 (Mo. banc 1978).

[9] Roberts v. Atlas Life Ins. Co., 236 Mo.App. 1162, 1171-72, 163 S.W.2d 369, 374 (K.C. 1942).

[10] Whitehead & Kales, 566 S.W.2d 466, 469.

[11] *Id.*; Sec. 537.060 RSMo (1978).

[12] *See* Whitehead & Kales, 566 S.W.2d at 469-70; *See also*, text at notes 43-48, *infra*.

[13] 566 S.W.2d at 472-74.

[14] *See* State ex rel. Tarrasch v. Crow, 622 S.W.2d 928, 936-37 (Mo. banc 1981), apparently approving this type of agreement in a case involving successive tortfeasors rather than concurrent tortfeasors. There is no right of contribution among successive tortfeasors. *See* note 36, *infra*.

[15] 566 S.W.2d at 472-74.

[16] *See* Commissioner's Comment, note 4, *supra*.

[17] Unif. Contribution Among Tortfeasors Act sec. 5 (1939), 9 U.L.A. 245 (1957).

[18] Commissioners' Comment, note 4, *supra*.

[19] *Id.*

[20] *See* 12 U.L.A. 57-107 (1975).

[21] Unif. Contribution Among Tortfeasors Act sec. 1 (f) (1955 version), 12 U.L.A. 64 (1975).

[22] Craven v. Lawson, 534 S.W.2d 653, 656 (Tenn. 1976), noted in 44 TENN. L. REV. 188 (1976).

[23] H.B. 135, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983).

[24] H.B. 194, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983).

[25] House Bill 135 referred to it as "liability for contribution." H.B. 135, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983); House Bill 194 referred to it as "non-contractual liability for contribution or indemnity." H.B. 194, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983).

[26] *See* H.C.S. for H.B. 135 & 194, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983) reprinted in 3 Mo. Legis. Serv. 398 (Vernon 1983).

[27] Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727, 729 n.3 (Mo. banc 1982); Stephenson v. McClure, 606 S.W.2d 208, 210-11 (Mo.App.S.D. 1980).

[28] Whitehead & Kales, 566 S.W.2d at 469-70.

[29] *See* Whitehead & Kales, 566 S.W.2d at 472-74.

[30] Whitehead & Kales, 566 S.W.2d at 473.

[31] Whitehead & Kales, 566 S.W.2d at 468 n.2.

[32] H.C.S. for H.B. 135 & 194, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983) reprinted in 3 Mo. Legis. Serv. 398 (Vernon 1983).

[33] *Id.*; See Whitehead & Kales, 566 S.W.2d at 468 n.2.

[34] *See* text at notes 20-22, *supra*.

[35] Whitehead & Kales, 566 S.W.2d at 468 n.2.

[36] State ex rel. Tarrasch v. Crow, 622 S.W.2d 928, 932-33 (Mo. banc 1981); State ex rel. Baldwin v. Gaertner, 613 S.W.2d 638, 640-41 (Mo. banc 1981); State ex rel. Retherford v. Corcoran, 643 S.W.2d 844, 845-47 (Mo.App.E.D. 1982).

[37] Whitehead & Kales, 566 S.W.2d at 468 n.2, 473-74.

[38] Whitehead & Kales, 566 S.W.2d at 468 n.2.

[39] Whitehead & Kales, 566 S.W.2d at 473-74.

[40] Whitehead & Kales, 566 S.W.2d at 474.

[41] Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727 passim (Mo. banc 1982.

[42] Stephenson v. McClure, 606 S.W.2d 208, 212 (Mo.App.S.D. 1980). This is also permissible under the Uniform Act. Unif. Contribution Among Tortfeasors Act sec. 1, Commissioner's Comment to Subsection (d) (1955 version), 12 U.L.A. 65 (1975).

[43] Kansas City Power & Light Co. v. Federal Const. Corp., 351 S.W.2d 741, 745 (Mo. 1961).

[44] *See* Comment, *Procedure — Third Party Practice — Non-Contractual Indemnification*, 28 MO. L. REV. 307 (1963).

[45] Drake-O'Meara & Assoc. v. American Testing & Eng'g Corp., 459 S.W.2d 362, 364 (Mo. 1970).

[46] Tarrasch v. Crow, 622 S.W.2d at 932-34.

[47] State ex rel. Baldwin v. Gaertner, 613 S.W.2d at 640.

[48] Hales v. Green Colonial, Inc., 402 F.Supp. 738, 741-43 (W.D.Mo. 1975), judgment awarding indemnity aff'd, Hales v. Monroe, 544 F.2d 331, 332-33 (8th Cir. 1976).

[49] *See* text at notes 32-34, *supra*.

[50] Tarrasch v. Crow, 622 S.W.2d at 935.

[51] Tarrasch v. Crow, 622 S.W.2d at 934.

[52] *See* Northwest Airlines, Inc. v. Alaska Airlines, Inc., 343 F.Supp. 826, 827, 828, 830 (D.Alaska 1972); Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 926 and n.11 (Alaska 1977) (dicta).

[53] Bacon v. United States, 321 F.2d 880, 883-84 (8th Cir. 1963), aff'g, 209 F.Supp. 811 (E.D.Mo. 1962); Max v. Spaeth, 349 S.W.2d 1, 3 (Mo. 1961).

[54] Max v. Spaeth, 349 S.W.2d at 3.

[55] Bacon v. United States, 321 F.2d at 883-84.

[56] *See* Northwest Airlines, Inc. v. Alaska Airlines, Inc., 343 F.Supp. 826, 827, 828, 830 (D.Alaska 1972).

[57] *See* Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 928-30 (Alaska 1977); Comment, *The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors*, 14 U. RICH. L. REV. 809, 831-34 (1980); Note, 44 TENN. L. REV. 188 (1976).

[58] H.C.S. for H.B. 135 & 194, 82nd Gen. Assembly, 1st Reg. Sess. (Mo. 1983) reprinted in 3 Mo. Legis. Serv. 398 (Vernon 1983).

[59] Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 929 (Alaska 1977); *See* Bacon v. United States, 321 F.2d 880, 884-85 (8th Cir. 1963); Max v. Spaeth, 349 S.W.2d 1, 3 (Mo. 1961).

[60] *See* Note, 44 TENN.L.REV. 188, 197 (1976) and text at notes 32-34, *supra*.

[61] 661 S.W.2d 11 (Mo. banc, 1983).

[62] Gustafson v. Bend, 661 S.W.2d 11 n.10 (Mo. banc, 1983).

[63] Unif. Comparative Fault Act sec. 6 (1979), 12 U.L.A. Supp. 44 (1983).

[64] American Motorcycle Association v. The Superior Court of Los Angeles County, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899, 915-6 (Cal. Banc 1978); Mayhew v. Berrien County Road Commission, 326 N.W.2d 466 (Mich. banc 1982); Bacon v. State Highways, 320 N.W.2d 681 (Mich.App. 1982).

[65] Mayhew v. Berrien County Road Commission, 326 N.W.2d 366, 371 (Mich. banc 1982).

[66] American Motorcycle Association v. The Superior Court of Los Angeles County, 20 Cal.3d 578, 146 Cal.Rptr. 182, 578 P.2d 899, 915-6 (Cal. banc 1978); Mayhew v. Berrien County Road Commission, 326 N.W.2d 366, 371 (Mich. banc 1982).

[67] 105 Mich.App. 100, 103-06, 306 N.W.2d 408, 410-11 (Mich.App. 1981).

[68] *Id.* at 104-05, 306 N.W.2d at 410. The West case was cited with approval in Mayhew v. Berrien County Road Comm'n, 414 Mich. 399, 326 N.W.2d 366, 367 (1982), and Bacon v. Michigan Dept. of State Highways, 115 Mich.App. 382, 386, 387-89, 320 N.W.2d 681, 682, 683-84 (1982).

[69] *E.g.*, Williamson v. Lee. Optical Co., 348 U.S. 483, 489 (1955).

[70] Winston v. Reorganized Sch. Dist. R-2, 636 S.W.2d 324, 327 (Mo. banc 1982).

[71] *See* State ex rel. Stutz v. Campbell, 602 S.W.2d 874, 877 (Mo.App.E.D. 1980).

[72] *See* text at notes 13-19, *supra*.

[73] *See* Tussman & tenbroek, *Equal Protection of the Laws*, 37 CALIF.L.REV. 341, 347-353 (1949).

[74] *See* text at notes 4-5, *supra*.

[75] 622 S.W.2d 928, 935 (Mo. banc 1981).

[76] 622 S.W.2d at 934.

[77] Cingoranelli v. St. Paul Fire and Marine Ins. Co., 636 P.2d 1285, 1286-87 (Colo. App. 1981), rev'd on other grounds, 658 P.2d 863, 864, 866 (Colo. banc 1983); Miller v. Sohns, 225 Tenn. 158, 161-62, 464 S.W.2d 824, 826 (1971).

[78] MAI 1.06 [1983 New].

[79] *Id.* at Committee's Comment (1983 New); MAI 7.02 [1983 Revision]; MAI 36.19 [1983 New].

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