

#53

7/15/65

First Supplement to Memorandum 65-41

Subject: Study No. 53(L) - Personal Injury Damages as Separate Property

For your information, the Uniform Contribution Among Tortfeasors Act is attached on pink paper. Assembly Bill No. 620 is attached on yellow paper.

At the last session of the Legislature, Assembly Bill No. 620 was introduced to broaden the right of a joint tortfeasor to obtain contribution. As we know, existing law permits a tortfeasor to obtain contribution only from joint judgment tortfeasors. Assembly Bill No. 620 would have amended the existing contribution statute to permit a tortfeasor to obtain contribution from a joint tortfeasor whether or not judgment were rendered against all or any of the tortfeasors. The bill followed the Uniform Contribution Act to a certain extent, but it omitted certain provisions. The State Bar opposed the bill on the ground that it went too far in permitting an independent action for contribution without restriction. Specific objections were as follows:

(1) This permits a series of independent actions in which different verdicts may result.

(2) There is no period of limitations upon an independent action for contribution. If the cause of action arises upon payment of more than a Pro rata share, it will apply to "old" accidents. How far back should this be allowed?

(3) Where no action is pending or will be brought, should any type of suit be required as a condition to assertion of a claim for contribution without judgment? In this situation it would seem that a right to contribution is not yet involved. There is not yet an admitted tortfeasor seeking contribution or an ascertained amount of damages.

(4) What of notice to an alleged joint tortfeasor who has neither been joined by plaintiff nor sued by a joint tortfeasor?

(5) This may result in a number of cases being filed which would not otherwise be filed, i.e., encourages filings for contributions against other persons who have some remote connection with the transaction or persons who were not joined by plaintiff for their lack of financial ability.

(6) This will tend to increase litigation and court congestion. The law-suits in contribution will be just as complex as the original law-suits would have been.

(7) Third party practice should be probed, i.e., is a cross-complaint against a joint tortfeasor (a) permitted; (b) to be provided?

(8) This is not worth a slight improvement in equality at the price of serious procedural complexities and delays.

Some of the above objections apply to the limited contribution proposals contained in the draft statute now before you. They are discussed below:

(1) This permits a series of independent actions in which different verdicts may result.

Section 184 of the draft statute permits an independent action for contribution to be brought. The statute does not specifically deal with the problem of the binding force of the first judgment. The fact that an independent action may be brought to establish the right to contribution is not necessarily bad if the right to contribution is itself a worthwhile right to create. But the problem of differing judgments should be considered.

Under the Evidence Code, Section 1301, it seems likely that the first judgment would be at least admissible in the second action as evidence of any fact essential to the first judgment.

Should the first judgment be evidence only, or should it conclusively determine the liability of the first tortfeasor for purposes of later litigation? Some hypothetical situations will illustrate the problems involved:

(a) Suppose P sues D for negligence. D defends on the ground that he was not negligent. P recovers a judgment for \$10,000. After payment

of the judgment, D now seeks contribution from T on the ground that T's concurrent negligence contributed to P's injury. Should T be able to defend on the ground that, even though T was negligent, D was erroneously held liable to P? In this situation, T's theory is that T may have been negligent but D was not negligent, so T should not be required to contribute anything to the payment D was erroneously required to make. We suggest that the theory is unjust. Even if D was erroneously required to pay, if T was in fact negligent, he should be required to contribute.

(b) Suppose P sues D for assault, seeking both punitive and compensatory damages. P also includes a negligence claim in case he cannot prove D's intention. The jury returns a verdict for compensatory damages only, and by special verdict finds D guilty of negligence and innocent of assault. D now seeks contribution from T. T defends on the ground that D intentionally injured P and, hence, is not entitled to contribution. D argues that the first jury exonerated him from the claim of intentional injury and that this determination should now be binding on T.

Here, we think that T should have an opportunity to prove that the injury was, in fact, intentionally inflicted. All that the first jury determined was that P failed to prove intentional injury. It made no difference insofar as the damages were concerned. The additional element of malice was requisite to the awarding of punitive damages. P may not have litigated the point vigorously, being interested primarily in the compensatory damages. Therefore, T should not be stuck with the determination made by the jury in D's favor.

The situation is distinguishable from that presented in example (a). In that case, D must prove T's negligence contributed to P's injury in order

to obtain contribution. Since that must be proved, whether D also was negligent should not be determinative of his right to contribution. If he was and the first judgment was right, then contribution follows normally. But if he was not, and the first judgment was wrong, it enhances the effect of the error to deny him contribution from a person who was negligent and responsible for the injuries.

Accordingly, we think that as a matter of principle, the first judgment should be conclusive as to D's liability, but not conclusive in regard to any facts found in D's favor. (Of course, if there is no liability at all, there is no question of contribution.)

What about the damages? Should the first judgment conclusively establish the amount of the damages to P, or should T be permitted to assert that P's damages were in fact less than the amount of the first judgment?

It can be argued that the first judgment should be conclusive. D had every motive to litigate the damages to the utmost. D is not entitled to contribution unless he actually pays the judgment--or at least more than his pro rata share; and his right to contribution is only to the extent of the excess. Thus, there is little likelihood that the judgment will be collusive.

On the other hand, under the law of indemnity generally, a judgment against the indemnitee is not conclusive on the indemnitor unless the indemnitor was given notice of the first suit and an opportunity to defend. CIV. CODE § 2778. Without such notice and opportunity, the judgment is merely evidence (as under Evidence Code § 1301). Here, too, we think the judgment should be evidentiary only. T should have his day in court on the amount of the damages. The issue is distinguishable from the issue of liability. There, it should make no difference to T if D is not in fact liable, for T gets his day in court on his

own liability in the contribution action. But T does not get his day in court on the issue of damages unless it is given to him in the contribution action.

Accordingly, we recommend that the first judgment be deemed conclusive on the issue of D's liability only.

(2) There is no period of limitations upon an independent action for contribution. If the cause of action arises upon payment of more than a pro rata share, it will apply to "old" accidents. How far back should this be allowed?

The statute of limitations problem is met by the Uniform Contribution Act by providing that the independent action for contribution must be brought, if at all, within one year after the day the first judgment becomes final.

The situation is similar to that where a joint tortfeasor has a right of indemnity against another joint tortfeasor. No California cases have been found discussing the statute of limitations problem in that context; but language in some of the cases indicates that the basis of liability may be contractual or quasi-contractual. See, S.F. Unified Sch. Dist. v. Cal. Bldg. etc. Co., 162 Cal. App.2d 434, 328 P.2d 785 (1958). See also Conley & Sayre, Rights of Indemnity As They Affect Liability Insurance, 13 HAST. L. J. 214 (1961). This would tend to indicate that the two-year statute of limitations is applicable and that it runs from the date of the loss giving rise to the right of indemnity, i.e., the date of payment.

Some argument can be made for either the Uniform Act statute of limitations or a statute that begins to run on the date of payment.

The Uniform Act is based on the principle that it is desirable to settle contribution liability as quickly as possible. A tortfeasor usually expects that his liability for personal injury will be terminated if he is not sued

within one year of the injury. Extending his liability for contribution beyond that period is necessary if an independent action for contribution is to be permitted. But the extension should be regarded as exceptional and should be curtailed to the extent possible. The Uniform Law Commissioners thought that one year from the finality of the first judgment was a fair compromise between the competing interests.

On the other hand, the first tort defendant may be unable to discharge the first judgment within one year. Under the Uniform Act provision, if he is unable to do so, he loses his right to contribution; for his right to contribution does not arise until payment. It can be argued, therefore, that if the right to contribution is to be meaningful, the first defendant should be able to seek contribution within one year after payment. Unfortunately, this may result in the third party's tort liability being determined long after the event.

Possibly there is a compromise solution. The statute might require the action for contribution to be brought within one year after the finality of the first judgment but forbid execution until actual payment. The situation would then be analogous to that where the original judgment is against both tortfeasors. There, the right to contribution is established by the original judgment, but contribution is unenforceable until the defendant seeking contribution has paid more than his pro rata share of the liability.

(3) Where no action is pending or will be brought, should any type of suit be required as a condition to assertion of a claim for contribution without judgment? In this situation it would seem that a right to contribution is not yet involved. There is not yet an admitted tortfeasor seeking contribution or an ascertained amount of damages.

Objection (3) may not be raised here, because the draft statute does not permit contribution without a judgment. The objection does raise the question, however, whether the right of contribution should exist in the absence of a judgment. The Uniform Act permits contribution without judgment. We omitted provisions for contribution under such circumstances because of the complexity they would add to the statute. The lack of a right to contribution without judgment does not seriously prejudice anyone, because a defendant who wants to preserve his right to contribution may stipulate to a judgment against him. Such a stipulation does not prejudice the third party, for his liability must be made out independently before his contribution can be compelled.

(4) What of notice to an alleged joint tortfeasor who has neither been joined by plaintiff nor sued by a joint tortfeasor?

Under the proposals we have made, we think the third party is adequately protected even though he has no notice of the original litigation. His fault must be made out independently before he can be compelled to contribute.

(5) This may result in a number of cases being filed which would not otherwise be filed, i.e., encourages filings for contributions against other persons who have some remote connection with the transaction or persons who were not joined by plaintiff for their lack of financial ability.

This objection seems inapplicable to the limited right to contribution established by the draft statute.

(6) This will tend to increase litigation and court congestion. The law-suits in contribution will be just as complex as the original law-suits would have been.

(8) This is not worth a slight improvement in equality at the price of serious procedural complexities and delays.

(6) and (8) are basic objections to contribution generally.

(7) Third party practice should be probed, i.e., is a cross-complaint against a joint tortfeasor (a) permitted; (b) to be provided?

Our draft statute provides for a third party practice by cross-complaint, and it has ample precedent in the cases.

To meet the objections discussed above, we suggest that Section 184 of the draft statute be amended as follows:

184. (a) The right to obtain contribution from the spouse of the injured person, as provided in Section 183, may be claimed by cross-complaint against the spouse in the action brought by the injured person or may be claimed in an independent action against such spouse.

(b) An independent action to have the spouse of the injured person adjudged a joint tortfeasor shall be brought, if at all, within one year after the judgment in the action brought by the injured person becomes final,

(c) In an independent action to have the spouse of the injured person adjudged a joint tortfeasor, the judgment in the action brought by the injured person shall conclusively establish the liability of the defendant to the injured person, but it shall not be given conclusive effect as to the amount of the damages sustained by the injured person.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

**UNIFORM CONTRIBUTION AMONG TORTFEASORS
ACT.**

An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto.

1955 REVISED ACT

Sec.

1. Right to Contribution.
2. Pro Rata Shares.
3. Enforcement.
4. Release or Covenant Not to Sue.
5. Uniformity of Interpretation.
6. Short Title.
7. Severability.
8. Repeal.
9. Time of Taking Effect.

Be it enacted

§ 1. [Right to Contribution].—(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Act shall not apply to breaches of trust or of other fiduciary obligation.

§ 2. [Pro Rata Shares].—In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

§ 3. [Enforcement].—(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

§ 4. [Release or Covenant Not to Sue].—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Introduced by Assemblymen Willson, Stevens,
Deukmejian, and McMillan

January 27, 1965

REFERRED TO COMMITTEE ON RULES

An act to amend Sections 875, 876, 877, 878, and to repeal Section 880 of the Code of Civil Procedure, relating to contribution among joint and several tortfeasors.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 875 of the Code of Civil Procedure is
2 amended to read:
3 875. (a) Where a money judgment has been rendered two
4 or more persons become jointly against two or more defen-
5 dants in a tort action there shall be or severally liable in tort
6 for the same injury to person or property or for the same
7 wrongful death, there is a right of contribution among them
8 which shall arise when one tortfeasor has discharged the com-
9 mon liability or has paid more than his pro rata share thereof,
10 as hereinafter provided whether or not judgment has been
11 rendered against all or any of them in an action on the tort.

LEGISLATIVE COUNSEL'S DIGEST

AB 620, as introduced, Willson (Rls.). Contribution among tortfeasors.

Amends Secs. 875, 876, 877, 878, repeals Sec. 880, C.C.P.

Broadens right of contributions among joint and several tortfeasors, including liability insurers of such tortfeasors, now limited to cases where judgment has been recovered.

Provides, as to cases where, after effective date of bill, one tortfeasor (or his liability insurer) has discharged common liability or has paid more than his pro rata share that right of contribution shall exist whether or not judgment has been rendered. Permits, as to such cases, bringing of separate action to enforce right of contribution, whether or not judgment rendered, as well as retaining present procedures for enforcement of right where there is judgment. Specifies, as to such cases, that recovery of judgment for injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied and that satisfaction of the judgment does not impair any right of contribution. Specifies that judgments of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

- 1 (b) Such right of contribution shall be administered in ac-
2 cordance with the principles of equity.
- 3 (c) Such right of contribution ~~may be enforced only after~~
4 ~~one tortfeasor has, by payment, discharged the joint judgment~~
5 ~~or has paid more than his pro rata share thereof.~~ It shall be
6 limited to the excess so paid over the pro rata share of the
7 person so paying and in no event shall any tortfeasor be com-
8 pelled to make contribution beyond his own pro rata share of
9 the ~~entire judgment.~~ *common liability.*
- 10 (d) There shall be no right of contribution in favor of any
11 tortfeasor who has intentionally injured the injured person.
- 12 (e) A liability insurer who by payment has discharged the
13 *common liability* of a tortfeasor ~~judgment debtor~~ shall be sub-
14 rogated to his right of contribution.
- 15 (f) This title shall not impair any right of indemnity under
16 existing law, and where one tortfeasor ~~judgment debtor~~ is en-
17 titled to indemnity from another, there shall be no right of
18 contribution between them.
- 19 (g) This title shall not impair the right of a plaintiff to
20 satisfy a judgment in full as against any tortfeasor judgment
21 debtor.

22 Sec. 2. Section 876 of said code is amended to read:

23 876. (a) The pro rata share of each tortfeasor ~~judgment~~
24 ~~debtor~~ shall be determined by dividing the entire ~~judgment~~
25 *common liability* equally among all of them.

26 (b) Where one or more persons are held liable solely for
27 the tort of one of them or of another, as in the case of the
28 liability of a master for the tort of his servant, they shall con-
29 tribute a single pro rata share, as to which there may be
30 indemnity between them.

31 Sec. 3. Section 877 of said code is amended to read:

32 877. Where a release, dismissal with or without prejudice,
33 or a covenant not to sue or not to enforce judgment is given in
34 good faith ~~before verdict or judgment~~ to one or more of a
35 number of tortfeasors claimed to be liable for the same tort ...

36 (a) It shall not discharge any other such tortfeasor from
37 liability unless its terms so provide, but it shall reduce the
38 claims against the others in the amount stipulated by the re-
39 lease, the dismissal or the covenant, or in the amount of the
40 consideration paid for it whichever is the greater; and

41 (b) It shall discharge the tortfeasor to whom it is given
42 from all liability for any contribution to any other tortfeasors.

43 Sec. 4. Section 878 of said code is amended to read:

44 878. ~~Judgment for contribution may be entered by one~~
45 ~~tortfeasor judgment debtor against other tortfeasor judgment~~
46 ~~debtors by motion upon notice. Notice of such motion shall be~~
47 ~~given to all parties in the action, including the plaintiff or~~
48 ~~plaintiffs, at least 10 days before the hearing thereon. Such~~
49 ~~notice shall be accompanied by an affidavit setting forth any~~
50 ~~information which the moving party may have as to the assets~~
51 ~~of defendants available for satisfaction of the judgment or~~
52 ~~claim for contribution.~~

1 (a) *Whether or not judgment has been entered in an action*
2 *against two or more tortfeasors for the same injury or wrong-*
3 *ful death, contribution may be enforced by separate action.*

4 (b) *Where a judgment has been entered in an action against*
5 *two or more tortfeasors for the same injury or wrongful death,*
6 *a judgment for contribution may be entered by one such tort-*
7 *feasor judgment debtor against the other tortfeasor judgment*
8 *debtors by motion upon notice. Notice of such motion shall be*
9 *given to all parties in the action, including the plaintiff or*
10 *plaintiffs, at least ten (10) days before the hearing thereon.*
11 *Such notice shall be accompanied by an affidavit setting forth*
12 *any information which the moving party may have as to the*
13 *assets of defendants available for satisfaction of the judgment*
14 *or claim for contribution.*

15 (c) *The recovery of a judgment for an injury or wrongful*
16 *death against one tortfeasor does not of itself discharge the*
17 *other tortfeasors from liability for the injury or wrongful*
18 *death unless the judgment is satisfied. The satisfaction of the*
19 *judgment does not impair any right of contribution.*

20 (d) *The judgment of the court in determining the liability*
21 *of the several defendants to the claimant for an injury or*
22 *wrongful death shall be binding as among such defendants in*
23 *determining their right to contribution.*

24 Sec. 5. Section 880 of said code is hereby repealed.

25 ~~880.~~ This title shall become effective as to causes of action
26 accruing on or after January 1, 1958.

27 Sec. 6. The amendments to Section 875, 876, 877, and 878
28 of the Code of Civil Procedure contained in this act shall be
29 operative only in cases where one tortfeasor discharges a
30 common liability or pays more than his pro rata share thereof
31 after the effective date of this act. In other cases these sections
32 as they read before amendment shall continue to be applicable.