COMMON LAW INDEMNITY AMONG JOINT TORTFEASORS

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The purpose of this article is to consider those instances in which one joint tortfeasor is entitled to indemnity (full reimbursement) from another for amounts paid by the former to compromise or satisfy a plaintiff's claim or judgment. Excluded from this discussion are situations where it is possible to apportion a plaintiff's damages among several defendants, each of whose independent negligent act or omission causes the plaintiff a particular, ascertainable loss.[1] Excluded also are cases involving written contracts of indemnity.

INDEMNITY AND THE RULE AGAINST CONTRIBUTION

It may be stated generally that "a person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability."[2] When allowed to one joint tortfeasor against another, indemnity operates as an exception to the common-law rule denying contribution among joint tortfeasors. Indemnity involves shifting the entire loss to the primarily responsible tortfeasor; contribution permits the loss

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[1] *E.g.*, Wood v. Snider, 187 N.Y. 28, 36, 79 N.E. 858, 861 (1907). Cattle belonging to several persons damaged the plaintiff's property; the defendant was held "liable for such part of the damage done by all the cattle, as the number of cattle owned by him bears to the whole number of cattle trespassing upon the plaintiff's land." *Cf.*, Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (1964), holding that the defendant, whose negligence caused injury to the plaintiff's intestate's hand, requiring surgery, was entitled to maintain a third party "indemnity" claim against the hospital and its attendant, whose negligent administration of anesthesia resulted in the intestate's death. Although the defendant could properly be held liable to the plaintiff for all damages arising out of the injury, "the jury may, under proper instructions and by special verdict, decide the proportions of the recovery to be borne by the defendant Conte and by the third-party defendants impleaded by Conte." Musco v. Conte, *supra* at 594. See also 1 HARPER & JAMES, TORTS § 10.1 at 694 (1956) [hereinafter cited as 1 HARPER].

[2] RESTATEMENT, RESTITUTION § 96 (1937). See also 4 SHEARMAN & REDFIELD, NEGLIGENCE § 894 at 2007 (1941):

> One liable only by reason of a duty imposed by law for consequences flowing from the negligent conduct of another, and not an actual participant in that conduct, may recover over against the active perpetrator of the wrong. The latter stands in the relation of an indemnitor to the former.

See also 42 C.J.S. *Indemnity* § 21 (1944); PROSSER, TORTS § 46 at 249-51 (2d ed. 1955) [hereinafter cited as PROSSER].

to be apportioned among those jointly responsible.[3]

The no-contribution rule derives from Lord Kenyon's pronouncement in *Merryweather v. Nixan*,[4] "that he had never before heard of" an action by one joint tortfeasor against another to recover one-half of the judgment which had been rendered against both but wholly satisfied by the former. *Merryweather* involved an intentional tort and subsequent English decisions so confined its application. And with the passage of the Law Reform (Married Women and Tortfeasors) Act in 1935, England now permits contribution even among intentional tortfeasors.[5] On the other hand, in the absence of statute,[6] and with the exception of a few jurisdictions which have allowed contribution by judicial decision,[7] in the United States contribution is generally denied without regard to the character of the respective joint tortfeasors' acts of negligence.[8]

Arizona presently adheres to the rule denying contribution among

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[3] Thomas v. Malco Refineries, 214 F.2d 884, 885 (10th Cir. 1954):

> There are important and substantial distinctions between the right to contribution and the right to indemnity. Indemnity springs from a contract, express or implied, and enforces a duty on the primary or principal wrongdoer to respond for all the damages. On the other hand, contribution does not arise out of contract, but is an obligation imposed by law, and rests on the principle that, when the parties stand in aequali jure, the law requires equality, which is equity, and that all should contribute equally to the discharge of the common liability.

The Arizona Supreme Court has at least twice recognized and applied the equitable doctrine of contribution in cases not involving joint tortfeasors. See Ocean Acc. & Guar. Corp., Ltd. v. United States Fid. & Guar. Co., 63 Ariz. 352, 162 P.2d 609 (1945); Brown v. Brown, 58 Ariz. 333, 119 P.2d 938 (1941).

[4] 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799): "If A. recover in tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution." An even more dramatic example of the common-law courts' unwillingness to aid wrongdoers *inter se* is the famous Highwayman's Case, Everet v. Williams (Ex. 1725), noted in 9 L.Q. REV. 197 (1893). There one highwayman sued his fellow robber for an accounting of their plunder. The suit was dismissed; both of the plaintiff's solicitors were assessed costs and fined fifty pounds for contempt and one was deported. As for the parties, they were summarily hanged.

[5] 1 HARPER 715.

[6] The 1939 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT has been adopted in eight states: Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota. The 1955 revised act has been adopted by Massachusetts and North Dakota. In addition, thirteen other jurisdictions have contribution statutes in one form or another: Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Texas, Virginia, West Virginia and Wisconsin. See the Commissioners' Prefatory Note to the 1955 Act at 9 UNIFORM LAWS ANNOTATED 116 (Supp. 1964).

[7] Dean Prosser lists Pennsylvania, Wisconsin, Louisiana, Tennessee, District of Columbia and possibly Maine. PROSSER 248, nn. 58-64.

[8] 1 HARPER 715; RESTATEMENT, RESTITUTION § 102 (1937); Annot., 60 A.L.R.2d 1366 (1958). Dean Prosser's comments are typical of the criticism which commentators have leveled at the rule of no contribution:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free. [PROSSER 248.]

joint tortfeasors. In *Schade Transfer & Storage Co. v. Alabam Freight Lines*,[9] the Arizona Supreme Court affirmed judgment for a shipper against a carrier (Alabam) for damages arising out of the carrier's alleged negligent unloading of the shipper's goods. The carrier had impleaded a winch truck owner (Schade) which had been engaged by the carrier to help unload the goods. The trial judge had also given judgment over in favor of Alabam against Schade because the sole cause of the accident was the improper manner in which the winch hooked onto the goods. On appeal, the Arizona Supreme Court reversed the judgment in favor of Alabam because agents of both Alabam and Schade had participated in the improper hookup. The court remarked that the hookup "was a joint operation in its entirety" and, without citing any authority, held: "If this constitutes a tort the parties were joint tortfeasors, and we are not aware of any law that permits the recovery of one against the other under such circumstances."[10]

The right to indemnity is of particular importance in tort actions arising out of (1) construction work — (injured party sues owner, general contractor, subcontractor and individuals); (2) ownership and use of land, public or private — (injured party sues municipality and property owner); (3) operations of common carriers — (injured party sues shipper, one or more carriers and driver and/or operator); and (4) the supplying and distributing of chattels for use by the public — (injured party sues manufacturer, wholesaler, retailer and/or user). Thus, in such multiple party negligence actions a defense lawyer is often at least as concerned with the possibility of shifting the ultimate loss to a codefendant or third party defendant as he is with defending the plaintiff's claim on the merits.

Liability Without Personal Fault: The Traditional Requirement for Indemnity

For purposes of classification and analysis, there are four types

[9] 75 Ariz. 201, 254 P.2d 800 (1953).

[10] *Id.* at 204, 254 P.2d at 802. *Schade* furnished the basis for the conclusion of the United States Court of Appeals, Ninth Circuit, that Arizona does not allow contribution between joint tortfeasors. See United States v. Arizona, 216 F.2d 248, 249 (9th Cir. 1954), *denying rehearing in* United States v. Arizona, 214 F.2d 389 (9th Cir. 1954), where the court affirmed denial of contribution to the United States from Arizona respecting damages paid to the guardian ad litem of a boy injured by an exploding shell on an abandoned military reservation previously deeded to Arizona.

See also Blakely Oil v. Crowder, 80 Ariz. 72, 292 P.2d 842 (1956). Blakely, owner of a truck that crossed into the plaintiff's lane of traffic due to the presence of cattle on the highway, was not entitled to maintain a third party claim for indemnity against the cattle company. Blakely had stipulated to a judgment in favor of the plaintiff, which the court considered to be "res judicata as to the fact of negligence on the part of Blakely in proximately causing the collision and the consequent injury to plaintiff." 80 Ariz. at 76, 292 P.2d at 844. Therefore, even assuming the cattle company was negligent, Blakely had no right to indemnity. The cattle company, being a joint tortfeasor with Blakely, was *not* a "person . . . who is or may be liable to him [Blakely] for all or part of the plaintiff's claim against him." See Ariz. R. Civ. P. 14(a).

of tortfeasors whose conduct or status subjects them to joint and several liability to a plaintiff for the entire amount of the plaintiff's damages. Such joint and several liability is imposed: (1) where two or more persons act in concert and thereby harm the plaintiff;[11] (2) where two or more persons each violate a common duty to the plaintiff and thereby harm him;[12] (3) where, although not acting in concert, the negligent acts of two or more persons concur to harm the plaintiff;[13] and (4) in cases of vicarious liability or where liability is imposed by law upon one as a result of another's negligence.[14]

It may be stated generally that in cases falling under (1) (action in concert) and (2) (breach of common duty), there is no common law right of indemnity among the wrongdoers. Concurrently negligent tortfeasors under (3) usually, but not always, are denied the right to indemnity. Finally, and again speaking generally, in cases under (4), where the tortfeasors have a special legal relationship to one another upon which joint and several liability is predicated, usually one of them is entitled to indemnity.

Proceeding from the general to the particular in cases under (4), indemnity is available to a "joint tortfeasor" in those situations where:

A. the indemnitee, solely through the negligence of the indemnitor, breaches his duty to maintain his premises in a reasonably safe condition for use by invitees;[15]

B. The indemnitee (such as an owner or building contractor), solely through the negligence of the indemnitor (such as a contractor or subcontractor), breaches his nondelegable duty to furnish workmen[16] or seamen[17] with a reasonably safe place to work, or otherwise suffers

[11] RESTATEMENT, TORTS § 876 (1939).

[12] *Id.* § 878.

[13] *Id.* § 879; *e.g.*, Southwestern Freight Lines., Ltd. v. Floyd, 58 Ariz. 249, 119 P.2d 120 (1941) (owner of truck following bicycle-riding plaintiffs too closely, causing plaintiffs to veer into path of truck traveling in same direction, held concurrently negligent joint tortfeasor with owner of truck which struck plaintiffs).

[14] *E.g.*, RESTATEMENT (SECOND), AGENCY § 219 (1958); 1 HARPER 693, 694, 697-700.

[15] Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957), holding cotenant A entitled to indemnity respecting damages awarded to a delivery man injured by a fall through a trapdoor left open by cotenant B. See also Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964), affirming a grocery store owner's recovery of indemnity from a repair contractor whose negligent storage of materials in an aisle caused injury to a customer who sued the store owner; Scott v. Curtis, 195 N.Y. 424, 88 N.E. 794 (1909), recognizing a homeowner's right to indemnity from a coal dealer if a pedestrian's fall through a coal hole in the homeowner's sidewalk resulted from the coal dealer's negligence.

[16] Baltimore and Ohio R. Co. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955).

[17] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Curtis v. A. Garcia Y Cia., Ltda., 272 F.2d 235 (3d Cir. 1959), where judgment was affirmed for a shipowner on a third party indemnity claim against the stevedore-employer of longshoremen injured while unloading cargo; although actionable by the injured longshoremen, the shipowner's only negligence was in failing to prevent the stevedore-employer from making a hold an unsafe place in which to work—

loss solely by virtue of the indemnitor's negligence;[18]

C. the indemnitee-municipality, solely by virtue of the negligence of an abutting landowner or contractor, breaches its nondelegable duty to maintain its streets and sidewalks in a reasonably safe condition;[19]

D. the indemnitee-employer is liable to the plaintiff under respondeat superior only because of the indemnitor-employee's unauthorized negligent act;[20]

E. the indemnitee, upon whom strict liability is imposed by statute[21] or judicial decisions,[22] is liable to another solely because of the negligence of the indemnitor;

F. the indemnitee, a retailer or user of a chattel which is dangerously defective for its intended use because of the fault of the supplier

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actual cause of the longshoremen's injuries was the stevedore's improper discharge of cargo. See also Allen v. States Marine Corp. of Delaware, 132 F.Supp 146 (S.D. N.Y. 1955).

[18] *E.g.*, Epley v. S. Patti Constr. Co., 228 F. Supp. 1 (N.D. Iowa 1964); Listerman v. Day and Night Plumbing & Heating Serv., Inc., 384 S.W.2d 111 (Mo. App. 1964). See also Annot., 97 A.L.R.2d 616 (1964); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 528 (1952); Merriam and Thornton, *Indemnity Between Tort-Feasors: An Evolving Doctrine In The New York Court Of Appeals*, 25 N.Y.U.L. REV. 845, 850-58 (1950).

[19] *E.g.*, Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896); Reinach v. City and County of San Francisco, 164 Cal. App. 2d 763, 331 P.2d 1006 (1958); Annots., 70 A.L.R. at 1386-87 (1931); 62 A.L.R. at 1067, 1088-94 (1929); Davis, *supra* note 18, at 524-26.

[20] *E.g.*, Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 296 P.2d 801, 804 (1956); RESTATEMENT, RESTITUTION § 96 (1937). For a critical analysis of the historical foundations and present-day utility of the employer's right of indemnity, see Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465 (1958).

[21] Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960). A New Jersey statute made the defendant aircraft owner absolutely liable to the plaintiff for damages caused by objects falling from an aircraft. Defendant's aircraft collided with a television tower. It was held that the trial court erroneously dismissed defendant's third party claim against the television tower owner. "[I]f the aircraft owner is able to demonstrate that he is free of fault, and that the strict liability imposed by [the New Jersey statute] is merely an imputed or constructive fault, then a showing of another's sole responsibility for the losses will entitle the aircraft owner to indemnity from the person who actually caused the injuries originally complained of." 159 A.2d at 109.

[22] Rozmajzl v. Northland Greyhound Lines, 242 Iowa 1135, 49 N.W.2d 501 (1951). Plaintiff purchased a bus ticket from the defendant common carrier Northland, which, because of a breakdown, contracted with another carrier on a per-mile basis to provide a bus and driver for a particular trip. Defendant Northland, liable to the plaintiff for injuries received in the accident, was held entitled to indemnity from the second carrier, whose driver's actual negligence caused the accident. See also Joest v. Clarendon & Rosedale Packet Co., 122 Ark. 353, 183 S.W. 759 (1916) (holding initial common carrier, which paid shipper for goods destroyed because of negligence of connecting carrier, entitled to indemnity from connecting carrier); St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co., 180 Iowa 1292, 162 N.W. 812 (1917).

and/or manufacturer-indemnitor, becomes liable to another;[23]

G. the indemnitee (such as an employee or agent), at the request of, and in reliance upon, representations of the indemnitor, performs an authorized lawful act resulting in loss to a third person.[24]

EXCEPTIONS TO THE RULE DENYING INDEMNITY TO CONCURRENTLY NEGLIGENT TORTFEASORS

In explaining their reasons for granting indemnity in those situations described in *A* through *G* above, courts have often resorted to complicated, and somewhat confusing, word formulae. The indemnitee's fault or negligence has been characterized as "constructive," "secondary" or "passive," and the fault or negligence of the indemnitor as "actual," "primary" or "active." "The principle which has achieved the greatest currency is that a tortfeasor who is guilty of passive negligence only is entitled to indemnity against a tortfeasor who was guilty of active negligence."[25] Concurrently negligent tortfeasors have often seized upon such judicial terminology in order to portray their negligent acts as amounting to no more than "passive" negligence. And, as might be expected, courts have occasionally employed the terminology to "bend" the law somewhat and award indemnity to a tortfeasor whose actual negligent act has concurred with that of another to produce harm to a third person.

Strictly speaking, a concurrently negligent tortfeasor is not "without personal fault" and, therefore, is not entitled to indemnity.[26] Nevertheless, and although the active-passive dichotomy has long been criticized,[27] courts continue to employ the verbiage in the occasional

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[23] RESTATEMENT, RESTITUTION § 93 (1937). See Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 272 P.2d 352 (1954), where cotton farmers and their casualty insurer, who had settled claims of a cantaloupe grower whose melons were destroyed by an insecticide meant for cotton fields, were granted indemnity against the insecticide supplier. Defendant cotton farmers breached their nondelegable duty to the melon grower solely through the negligence of the third party defendant insecticide supplier in failing to warn of the danger to melons by crop dusting with the type of insecticide used; Boston Woven-Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 (1901), affirming an award of indemnity to the buyer-user of an exploding boiler against the manufacturer respecting damages paid to the buyer-user's injured employees; Hughes Provision Co. v. La Mear Poultry & Egg Co., 242 S.W.2d 285 (Mo. App. 1951), reversing dismissal of a food retailer's suit against a supplier of dressed rabbits for damages awarded to a customer's wife, who contracted tularemia from a diseased rabbit. See also Suvada v. White Motor Co., 51 Ill. App. 2d 318, 201 N.E.2d 313 (1964); Popkin Bros., Inc. v. Volk's Tire Co., 20 N.J. Misc. 1, 23 A.2d 162 (1941).

[24] RESTATEMENT, RESTITUTION § 90 (1937).

[25] Keeton, *Contribution And Indemnity Among Tortfeasors*, 27 INS. COUNSEL J. 630, 632 (1960).

[26] *Cf.*, RESTATEMENT, RESTITUTION § 96 (1937).

[27] Leflar, *Contribution And Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 156 (1932). See also Davis, *supra* note 18, at 539-44; Keeton, *supra* note 25; Comment, *Indemnity Among Joint Tort-Feasors In New York: Active And Passive Negligence And Impleader*, 28 FORDHAM L. REV. 782, 787 (1960).

grant of indemnity to a concurrently negligent tortfeasor. Such results, which are usually confined to instances of great disparity in the fault of the several wrongdoers, are probably best explained as hard cases where the application of the rule against contribution would result in an injustice. "The search is for the one who is more legally liable, the one who is not 'morally innocent,' in short, the ultimate ethical culprit."[28] Representative of this approach are the three cases next discussed.

In *United States v. Savage Truck Line*,[29] agents of the United States, as shipper, "were guilty of negligence in failing to fasten" certain large cylinders on the truck of the carrier, Savage, which was in turn "guilty of negligence in accepting the cargo for transportation and in operating the truck with knowledge of this condition."[30] Thus, judgment in the main action was rendered against both the United States and Savage in favor of the estate of a truck driver killed when one of the cylinders rolled off the Savage truck, striking the truck decedent was driving. Although both defendants were guilty of "actual" or "active" negligence, the Circuit Court allowed the United States full indemnity from Savage for the amount of plaintiff's judgment against the United States. In so holding, the court stated:

> In the infinite variety of circumstances where indemnity has been sought the courts have used various terms to distinguish between the grade of fault attributable to the participating wrongdoers so as to justify the imposition of the entire loss on the one who is regarded as the principal offender. The acts of the parties are variously contrasted as positive or negative . . . . . . active and passive . . . or as primary and secondary . . . and sometimes one party is said to have been merely constructively liable and therefore entitled to indemnity from the actual wrongdoer. . . .
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> Sometimes the principal fault is attributable to the party who performed the last act which resulted in the damage and without which it would not have occurred, that is, to the party who had the last clear chance to avoid the accident. . . .
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> *Whatever the terminology, the inquiry is always whether the difference in the gravity of the faults of the participants is so great as to throw the whole loss upon one. In such event there is contribution in the extreme form of indemnity.*[31] (Emphasis added.)

The court in *Savage* simply weighed the gravity of the fault of the shipper against that of the carrier and concluded that the carrier was the "principal offender" because it "was not only obligated to carry the goods safely but it had the last clear chance to avoid the catastrophe."[32]

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[28] Merriam and Thornton, *supra* note 18, at 860.
[29] 209 F.2d 442 (4th Cir. 1953), *cert. denied*, 347 U.S. 952 (1954).
[30] United States v. Savage Truck Line, 209 F.2d 442, 444 (4th Cir. 1953).
[31] *Id.* at 446-47.
[32] *Id.* at 447.

Similar language was used in *Stahlberg v. Hannifin Corp.*[33] where the court denied a motion to dismiss the third party complaint of a press manufacturer, which had been sued by plaintiff for injuries received in operating the press. The manufacturer had impleaded the plaintiff's employer on the ground that the latter was "actively" negligent in failing to properly maintain and repair the press in question, whereas the manufacturer was at most "passively" negligent in failing to warn the plaintiff of dangers involved in operating the press. The court stated:

> It seems plain that the allegations of the complaint are sufficient to permit recovery on several different theories. For example, it is alleged that [the press manufacturer] was negligent in its failure to warn the plaintiff as to the dangers to be apprehended in the operation of the machine. Assuming that hidden dangers existed which required such a warning by the manufacturer . . . if, as alleged in the third-party complaint, that [plaintiff's employer] altered or adjusted the machine thereby creating or increasing the dangers, it would seem plain to me that the evidence may well be such that negligence of [the manufacturer] might be found to be passive while that of [the employer] be found to be active, thereby permitting a recovery over.[34]

The court in *Stahlberg* specifically rejected the employer's argument that indemnity is only allowed in those situations where there exists a special legal relationship between indemnitor and indemnitee:

> [The employer's] argument that such terms ["passive," "secondary" or "implied"] are meaningless and that as applied to the defendant, [manufacturer], they mean only liability by reason of status is strongly urged but the terms continue to be used by the late decisions of the appellate courts, both state and federal, and it is hardly up to this court to banish them as either inappropriate or meaningless.
> A reading of the New York Appellate Court decisions . . . neither aids nor justifies this court in now attempting an all-inclusive definition of the above terms or in attempting to reconcile New York State court decisions. They do however indicate a continued attempt to ameliorate the state rule as to non-contribution among tort-feasors by the use of the theory of indemnity where the facts shown make it unequitable that the principal wrongdoer should escape liability.[35]

The most dramatic departure from the rule that concurrently negligent tortfeasors are not entitled to indemnity is *United Air Lines, Inc. v. Wiener.*[36] On April 21, 1958, near Las Vegas, Nevada, United's DC-7 airliner carrying 47 passengers and crew collided in mid-air with a U.S. Air Force jet fighter plane. No one survived. At the

[33] 157 F. Supp. 290 (N.D. N.Y. 1957).
[34] *Id.* at 293.
[35] *Id.* at 292.
[36] 335 F.2d 379 (9th Cir. 1964), *cert. dismissed,* 85 Sup. Ct. 452 (1964).

time of the crash the airliner was on a regularly scheduled flight from Los Angeles to Las Vegas by way of Victor 8, a major transcontinental airway. The jet fighter had two occupants, an instructor pilot in the front cockpit and a student pilot in the rear. The jet fighter was to have made an instrument penetration or "let down" from an altitude of 28,000 feet; for this purpose, the student pilot was under a hood and could not see out of his cockpit. The instructor pilot in front was required to keep a lookout for other aircraft and could take over the controls at any time. After receiving clearance from the Air Force for the "let down," the jet fighter commenced the descent. At 21,000 feet the collision occurred; visibility was "virtually unlimited (35 miles)."[37]

All told, thirty-one wrongful death actions were commenced. Twenty-four of these were consolidated for trial in the United States District Court for Southern California. The trial judge, applying Nevada law, gave judgment for all of the plaintiffs against both United and the United States. In twenty-two of the actions he also granted contribution in favor of United and the United States, each against the other. In all twenty-four cases United's claim for indemnity from the United States was denied.

In disposing of the indemnity and contribution claims involving the United States the trial judge also applied Nevada law as required by the Federal Tort Claims Act.[38] Nevada had neither statute nor decision on indemnity or contribution. The trial judge concluded that a Nevada court would deny United's claim for indemnity because of his finding "that there was active and not passive or secondary negligence on the part of both defendants which concurred, and that such concurrent (or joint) negligence on the part of both defendants was the primary, efficient and proximate cause of the mid-air collision."[39] Contribution was allowed because of the trial judge's opinion that Nevada would join the few jurisdictions to allow contribution by judicial decision.[40]

The Court of Appeals affirmed the twenty-four judgments against United and the United States.[41] In so doing, the court set forth, and apparently concurred in, the District Court's findings of four specific acts of negligence by United and thirteen specific acts of negligence by the United States. Nonetheless, the court reversed the District

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[37] *Id.* at 387.

[38] 28 U.S.C. § 2674 (1948). *Cf.*, United States v. Yellow Cab Co., 340 U.S. 543, 552 (1951), holding that the United States may be sued directly or impleaded on a claim for contribution, "substantive local law permitting."

[39] Wiener v. United Air Lines, 216 F.Supp. 701, 706 (S.D. Cal. 1962).

[40] *Id.* at 707-08. See also PROSSER, *op. cit. supra* note 7.

[41] United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964).

Court's denial of indemnity to United in twenty-two of the cases.[42] The court first reviewed the usual situations where indemnity is allowed[43] and then correctly pointed out that "there are . . . numerous cases permitting indemnity under circumstances which do not fit neatly into the above categories."[44] The court then weighed the respective acts of negligence of both United and the United States and concluded that United was entitled to indemnity as follows:

> United's duty to appellees' decedents was to exercise the highest degree of care; the government's duty was to exercise ordinary care. The government's negligent acts occurred literally from the start to the finish of this tragic incident. The cumulative effect of these negligent acts was to dispatch United's flight 736 and the government's highspeed jet training mission, conducted by a student pilot who was virtually blindfolded and an instructor whose cockpit preoccupations were greater than ordinarily demanded of pilots flying under VFR conditions and responsibilities, into the same area without warning to those in control of either craft. If we accept the government's assertions, the government's pilots discovered United's peril in time to effectively respond but engaged in a maneuver destined to encounter rather than to evade. Contrasted with all of this is the finding that United's pilots, to some disputed degree of probability, could have seen the jet and, in discharge of the obligation to exercise the highest degree of care for their passengers, should have seen and avoided the jet. In view of the disparity of duties, the clear disparity of culpability, the likely operation of the last clear chance doctrine and all the surrounding circumstances, the findings that United and the government were *in pari delicto* are clearly erroneous and *we hold that there is such difference in the contrasted character of fault as to warrant indemnity in favor of United in the non-government employee cases.*[45] (Emphasis added.)

The result in *United* cannot be explained as an example of judicial mitigation of the rule against contribution; as mentioned, the trial court had granted contribution to United and the United States. Apparently the Court of Appeals simply felt that the United States was the "ultimately ethical culprit."

Cases such as *Savage, Stahlberg* and *United* simply cannot be pigeonholed or classified under any of the traditional heads of indemnity law. They represent at best a commendable, albeit strained, judicial effort to shift the loss to the shoulders of those who, under the circumstances, were deemed more culpable and deserving of the

[42] Two of the suits consolidated for trial in California were on behalf of government employees covered by the Federal Employees' Compensation Act. The court held that the Act constituted the exclusive basis for the Government's liability to its employees and therefore precluded United's indemnity claim in the two cases.

[43] See notes 15 through 24 and accompanying text *supra.*

[44] United Air Lines, Inc. v. Wiener, 335 F.2d 379, 399 (9th Cir. 1964).

[45] *Id.* at 402.

burden. At worst such decisions create further unpredictability in the law of indemnity.

INDEMNITY IN ARIZONA: INDEMNITOR MUST BE WITHOUT PERSONAL FAULT

The leading case on indemnity in Arizona is *Busy Bee Buffet v. Ferrell.*[46] Plaintiff Ferrell, while delivering beer on the premises of defendant Buffet, fell through a trapdoor left open by defendant Pastis, a cotenant of the building with the Buffet. Plaintiff's judgment against the Buffet and Pastis was affirmed by the Arizona Supreme Court. The court also affirmed judgment over in favor of the Buffet against Pastis on the former's indemnity claim. The Buffet's liability to plaintiff was the result of its breach of its legal duty to maintain the premises in a reasonably safe condition for the use of the plaintiff, a business invitee. But in breaching its duty to plaintiff,

> the Buffet was guilty of no active fault in creating the danger to Ferrell. Its negligence was passive or static. Its negligence was incapable of producing injury to any one at that time except through the active negligence of another. Pastis, in opening the trap door and leaving it unguarded, was the immediate cause of Ferrell falling through the opening and sustaining the injuries which form the basis of this litigation.[47]

Although the court in *Busy Bee* employed the active-passive terminology in allowing indemnity, the actual holding of the case is simply that indemnity will be allowed a proprietor who, "without personal fault," breaches his nondelegable duty to maintain his premises in a reasonably safe condition for use by invitees.[48] Moreover, the court quoted with approval the following language from *Fidelity & Cas. Co. of New York v. Federal Express*:[49]

> It is also said that where one is the "active" tort-feasor, and the other, the "passive"—or where the primary or active fault rests upon one tort-feasor, he, as the active tort-feasor, is liable to the other. But this is only another way of expressing the same rule as otherwise above stated. It does not mean that the joint tort-feasor whose negligence is the lesser can have indemnity from the other for damages caused by the concurring negligent act of both.[50]

It seems safe to conclude, therefore, that Arizona follows the majority rule and restricts the right of indemnity to the situations mentioned in A through G above, and will continue to deny indemnity to a

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[46] 82 Ariz. 192, 310 P.2d 817 (1957).
[47] *Id.* at 197, 310 P.2d at 820-21.
[48] See note 15 and accompanying text *supra.*
[49] 136 F.2d 35 (6th Cir. 1943).
[50] *Id.* at 41. Other examples of judicial refusal to manipulate the active-passive verbiage to allow indemnity to the less negligent of two or more concurrently negligent tortfeasors are Bertone v. Turco Prod., 252 F.2d 726 (3rd Cir. 1958); Detroit Edison Co. v. Price Bros. Co., 249 F.2d 3 (6th Cir. 1957); and Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368 (1951).

tortfeasor who is actually concurrently negligent in producing a plaintiff's injury. Thus, any negligent act or omission actually committed by the "passively negligent" indemnitee himself, whether committed before, at the same time or after the "actively negligent" joint tortfeasor acts, should preclude the former's right to indemnity in an Arizona court.[51]

PROPOSAL: ADOPTION OF THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

Prosser notes that the rule barring contribution among joint tortfeasors "is in full retreat."[52] However that may be, until the rule is abrogated in Arizona, concurrently negligent tortfeasors will continue to seek indemnity by characterizing their acts as no more than "passive" negligence in the hope that a troubled court will grant relief. And in many situations, courts will be sorely tempted to compare and weigh the respective faults of the several wrongdoers and perhaps carve out what Learned Hand once described as "lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors."[53]

There is a solution to the problem. Rather than twist and manipulate the common law of indemnity to create "lenient exceptions" in favor of some concurrently negligent tortfeasors, the Arizona Legislature should adopt the revised Uniform Contribution Among Tortfeasors Act. The Act permits equal contribution among persons jointly liable in tort to another, intentional tortfeasors excepted, but does not "impair any right of indemnity under existing law."[54] Adoption of the Uniform Act would abrogate the unjust rule barring contribution; and those nonconcurrently negligent tortfeasors who actually have been cast in damages "without personal fault" would receive the full restitution which they, and only they, deserve.

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[51] This conclusion is also implicit in the *Schade* and *Blakely Oil* decisions discussed in note 10 and accompanying text *supra*.

[52] PROSSER 249.

[53] Slattery v. Marra Bros., Inc., 186 F.2d 134, 138 (2d Cir. 1951), *cert. denied*, 341 U.S. 915 (1951).

[54] REVISED UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(f), 9 UNIFORM LAWS ANNOTATED 118 (Supp. 1964). For a discussion of procedure under the 1955 Act see Hennessey, *Torts: Indemnity and Contribution*, 47 MASS. L.Q. 421 (1962).