



1960

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Recommended Citation

Paxton, Billy R. (1960) "Contribution and Indemnity Among Joint Tortfeasors in Kentucky," *Kentucky Law Journal*: Vol. 48 : Iss. 4 , Article 4.

Available at: <https://uknowledge.uky.edu/klj/vol48/iss4/4>

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Notes

CONTRIBUTION AND INDEMNITY AMONG JOINT TORTFEASORS IN KENTUCKY¹

Contribution² and indemnity³ are similar yet distinct actions. They are similar in that each involves controversies between parties admittedly liable for damages to a third party; they are distinct in that the measure of damages is determined in contribution by prorating the injured party's damages between the tortfeasors⁴ while it is determined in indemnity by shifting the entire loss from one tortfeasor to the other.⁵ The distinction may be pointed up by considering the following situation. Suppose *C* recovered a \$10,000 judgment against joint tortfeasors *A* and *B* that was satisfied by *A* alone. If *A*'s subsequent action against *B* was in contribution, his measure of damages would be \$5,000; if in indemnity, his measure of damages would be \$10,000. Despite this important distinction, the two actions are sometimes confused,⁶ and indemnity has been allowed under the name of contribution⁷ while contribution has been allowed where indemnity was the apparent remedy.⁸ The purpose of this

¹ "Joint tortfeasors" is used in this note to mean two or more tortfeasors whose liability for damages to a third person arose out of the same occurrence.

² "Contribution" is . . . the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part." Hodges, "Contribution and Indemnity Among Tortfeasors," 23 Texas L. Rev. 150 (1947).

³ "Indemnity" is . . . the payment of all of plaintiff's damages by one tortfeasor to another tortfeasor who had paid it to the plaintiff." Hodges, *supra* note 2, at 151.

⁴ *Campbellsville Lumber Co. v. Lawrence*, 268 S.W.2d 655 (Ky. 1954); *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36 (1934); *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S.W.2d 16 (1932) (dictum); Prosser, Torts § 46, at 249 (2d ed. 1955).

⁵ *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949) (dictum); *City of Georgetown v. Cantrill*, 158 Ky. 378, 164 S.W. 929 (1914); *Bd. of Councilmen of City of Harrodsburg v. Vanardsdall*, 148 Ky. 507, 147 S.W. 1 (1912); *Blocker v. City of Owensboro*, 129 Ky. 75, 110 S.W. 369 (1908); Prosser, Torts § 46, at 249 (2d ed. 1955). But see *Miles v. Southeastern Motor Truck Lines, Inc.*, 295 Ky. 156, 169, 172 S.W.2d 990, 997 (1943), where the court stated: "[I]t appears that the measure of damages in actions for contribution and indemnity are the same with the exception, however, that in an action for contribution the plaintiff admits that he was partly in fault for [sic] accident and may recover only one-half of his liability to third parties, while in a suit for indemnity the plaintiff denies any negligence on his part and may recover the full amount of his liability to third parties."

⁶ Prosser, Torts § 46, at 249 (2d ed. 1955); see also Oberst, "Recent Developments in Torts; Decisions of the Court of Appeals at the 1956-57 Terms," 46 Ky. L. J. 193, 214 (1958).

⁷ Prosser, Torts § 46, at 249 (2d ed. 1955).

⁸ *Phelps v. Brown*, 295 S.W.2d 804 (Ky. 1956).

note is to examine the Kentucky cases for factors which will aid in distinguishing the two actions.

The words "contribution" and "indemnity" are not always used in their technical sense.⁹ For example, the rule has been stated that indemnity would not be permitted at common law *except* where the tortfeasors were not in equal fault,¹⁰ or that neither contribution nor indemnity would be permitted *except* where the tortfeasors were not in equal fault.¹¹ Since indemnity is the proper remedy where tortfeasors are not in equal fault,¹² these statements are comparable to saying that indemnity will not be permitted except where indemnity will be permitted! The distinction was pointed up accurately in *Middlesboro Home Telephone Co. v. Louisville & N. R. Co.*:¹³

The difficulty in determining the cases in which recovery over may be had and those in which it will be denied grows out of the mis-conceived ideas expressed in some of the opinions that the rule is general that, as between tortfeasors, recovery over will not be allowed, and that all cases in which it has been allowed are exceptions to the general rule. The general rule is that recovery over as between wrongdoers may not be had where they are in *pari delicto*. . . . The cases which have permitted recovery over have not been exceptions to the general rule, but have done so because they do not measure up to the rule which forbids recovery over; that is, the parties are found not to be in *pari delicto*.¹⁴

The situation at common law was, then, that indemnity would be permitted between joint tortfeasors, but contribution would not be permitted.

Since contribution was not permitted between joint tortfeasors, the injured plaintiff, as a practical matter, determined which tortfeasor would stand the ultimate loss. For example, if he recovered a joint judgment, he could execute the entire judgment against either tortfeasor. The choice could be made on the basis of the avail-

⁹ For example, see *Louisville Gas & Electric Co. v. Beaucond*, 188 Ky. 725, 741, 224 S.W. 179, 186 (1920) where the court said:

If the right of contribution exists between the tortfeasors, when such one has satisfied the judgment, he may proceed against the others, whose negligence, concurring with his, caused the injury, for indemnity. If the right of contribution does not exist between the tortfeasors in the particular case, one cannot secure indemnity from the others whose negligence concurred with his in causing the injuries, although he is compelled to satisfy the entire damages.

This failure to distinguish properly the two actions probably accounts for the statement in *Miles v. Southeastern Motor Truck Lines, Inc.*, set out in note 5, *supra*.

¹⁰ See *City of Georgetown v. Groff*, 136 Ky. 662, 124 S.W. 888 (1910).

¹¹ *Owensboro City R. Co. v. Louisville, H. & St. L. Ry.*, 165 Ky. 683, 178 S.W. 1043 (1915).

¹² *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W. 2d 165 (1949).

¹³ 214 Ky. 822, 284 S.W. 104 (1926).

¹⁴ *Id.* at 827, 284 S.W. at 106.

ability of insurance coverage, the comparative wealth of the joint tortfeasors, or mere spite.¹⁵ The Kentucky court freely admitted that as between the joint tortfeasors, injustice might arise,¹⁶ but this injustice was thought to be overcome by the strong public policy against judicial balancing of equities between wrongdoers:

It is an anomalous if not unprecedented thing for a litigant, who is a confessed wrongdoer, to come into court and set up the fact that its own wrongful act, concurring with that of another, has destroyed human life, and ask the court to adjust the equities between it and the other wrongdoer.¹⁷

Despite this strong public policy, the common law was changed by statute in 1926 to permit contribution in favor of a merely negligent tortfeasor.¹⁸ The rule as respects indemnity was not affected.¹⁹ Consequently, recovery is now permitted between joint tortfeasors in all situations except where the one seeking it was guilty of an intentional tort or some act of moral turpitude. Whether indemnity will be permitted or whether the complaining tortfeasor will be restricted to contribution depends, broadly speaking, on whether the joint tortfeasors were in equal fault.

Contribution is the proper remedy where the tortfeasors were in equal fault;²⁰ indemnity is the proper remedy where the tortfeasors were not in equal fault.²¹ Equal fault, as used in this context, does not necessarily mean that each party is equally negligent. Nor does

¹⁵ For the view that such procedure is valuable as an efficient means of distributign losses through society, see James, "Contribution Among Joint Tortfeasors: A Progmatic Criticism," 54 Harv. L. Rev. 1156 (1941); James, "Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses," 21 NACCA L. J. 360 (1958). For the view that such procedure lacks sense and justice, see Prosser, Torts § 46, at 248 (2d ed. 1955).

¹⁶ *Owensboro City R.R. v. Louisville, H. & St. L. Ry.*, 165 Ky. 683, 689, 178 S.W. 1043, 1046 (1915).

¹⁷ *City of Louisville v. Louisville Ry. Co.*, 156 Ky. 141, 148, 160 S.W. 771, 775 (1913).

¹⁸ Ky. Rev. Stat. § 412.030 provides: "Contribiution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude." See *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36 (1934); *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S.W.2d 16 (1932).

¹⁹ *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949); *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, *supra* note 18.

²⁰ *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, *supra* note 18. But see the statement in *Gish Realty Co. v. Central City*, 260 S.W.2d 946, 950 (Ky. 1953) where the court said: "[W]here the joint tortfeasors are equally at fault, there may be no contribution. . . ." This is undoubtedly another example of a situation where contribution is used in a non-technical sense to mean indemnity. See note 9 *supra* and accompanying discussion.

²¹ See *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949); *Middlesboro Home Tel. Co. v. Louisville & N. R.R.*, 214 Ky. 822, 284 S.W. 104 (1926); *City of Georgetown v. Groff*, 136 Ky. 662, 124 S.W. 888 (1910).

it mean that they have committed identical negligent acts, caused the same amount of damage, nor even that their negligent acts were committed at the same time.²² It simply means that each tortfeasor was guilty of negligence of the same quality or degree that concurred in producing injury to a third party.²³ Joint tortfeasors are held not to be in equal fault where one was secondarily liable while the other was primarily liable;²⁴ or where one was passively negligent while the other was actively negligent.²⁵ The primary-secondary liability theory may be illustrated by the comparison of two cases. In *City of Louisville v. Louisville Ry.*,²⁶ the city permitted its streets to become defective. A traveler, because of these defects, was thrown from his wagon in front of a negligently driven streetcar which struck him. The city paid a judgment rendered against it and sued the railway company for indemnity, which was denied on the ground that the parties were in equal fault. In *City of Louisville v. Metropolitan Realty Co.*,²⁷ a pedestrian stumbled over an obstruction placed on the sidewalk by a contractor. The city paid a judgment rendered against it and brought action against the contractor for indemnity, which was permitted on the ground that the parties were not in equal fault since the city was only secondarily liable while the contractor was primarily liable to the injured party. In such cases the city has the primary duty to keep its streets in repair,²⁸ but only the secondary duty to remove any obstructions that have been created by others.²⁹ In the *Louisville Ry.* case, the city was primarily liable since it violated its duty to keep the streets in repair; in the *Metropolitan* case, the city was secondarily liable because it failed to discover and remove a defect that had been created by another.

²² See *Illinois Cent. R.R. v. Louisville Bridge Co.*, 171 Ky. 445, 188 S.W. 476 (1916); *Cumberland Tel. & Tel. Co. v. Mayfield Water & Light Co.*, 166 Ky. 429, 179 S.W. 388 (1915); *Owensboro City R.R. v. Louisville, H. & St. L. Ry.*, 165 Ky. 683, 178 S.W. 1043 (1915); *City of Louisville v. Louisville Ry.*, 156 Ky. 141, 160 S.W. 771 (1913).

²³ See *Campbellsville Lumber Co. v. Lawrence*, 268 S.W.2d 655 (Ky. 1954); *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W. 2d 36 (1934).

²⁴ *Parker v. Stewart*, 296 Ky. 48, 176 S.W.2d 88 (1943) (dictum); *City of Louisville v. Metropolitan Realty Co.*, 168 Ky. 204, 182 S.W. 172 (1916); *City of Georgetown v. Cantrell*, 158 Ky. 378, 164 S.W. 929 (1914); *Blocker v. City of Owensboro*, 129 Ky. 75, 110 S.W. 369 (1908).

²⁵ *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949).

²⁶ 156 Ky. 141, 160 S.W. 771 (1913).

²⁷ 168 Ky. 204, 182 S.W. 172 (1916).

²⁸ *City of Ashland v. Vansant Kitchen Lumber Co.*, 213 Ky. 518, 281 S.W. 503 (1926); *City of Louisville v. Louisville Ry.*, 156 Ky. 141, 160 S.W. 771 (1913).

²⁹ *City of Ashland v. Vansant Kitchen Lumber Co.*, *supra* note 28; *City of Louisville v. Metropolitan Realty Co.*, 168 Ky. 204, 182 S.W. 172 (1916).

The active-passive negligence theory may be best illustrated by the case of *Owensboro City R.R. v. Louisville, H. & St. L. Ry.*³⁰ There, Owensboro had contracted with Louisville to maintain a trolley wire at a safe height above the railroad tracks. Employees of Louisville broke a trolley wire that had been permitted to sag too low, injuring a pedestrian. Judgments of \$500 against Owensboro and \$1500 against Louisville were satisfied and Louisville brought suit against Owensboro for indemnity. Its claim was denied on the ground that it was an active participant in the wrong. Thus far the case is consistent with other cases on the point, but the court went on to say:

In the case at bar, if the wire, while sagged, had been innocently broken by a railroad servant or a stranger, to the injury of himself or others, and recovery had been against the railroad, although its negligence consisted in mere inattention, then there would then be reason in its claim for indemnity, and closer analogy to the Pullman case, because the railroad and its servants would then be guilty of *no conscious or active* wrongdoing, and the primary duty to maintain the wire was on the street car company. But here it is made to appear that the railroad, through its servants, was an active participant in the wrong, and it knew, or from the circumstances is in the law presumed to have known, that its wrong not only endangered the property of the street car company, but human life.³¹ [Emphasis added.]

This dictum would suggest that, if the court uses conscious wrongdoing and active wrongdoing synonymously, whether indemnity will be permitted depends on whether the party seeking it was merely negligent or guilty of conscious wrongdoing. The cases simply do not bear out this proposition; mere negligence is sufficient to preclude the action of indemnity.³² The *Pullman case*³³ is not a proper analogy to the hypothetical situation. In that case, the railroad company bought a gondola car that had a defective brake handle from the Pullman company. An employee of the railroad company was injured and recovered a judgment against the railroad company. It was held that the railroad company might have indemnity against the Pullman company. Thus, the *Pullman case* is simply one where the party seeking indemnity was guilty of mere failure to discover a dangerous condition that was created by the other party. In the

³⁰ *Owensboro City R.R. v. Louisville, H. & St. L. Ry.*, 165 Ky. 683, 178 S.W. 1043 (1915).

³¹ *Id.* at 696, 178 S.W. at 1049.

³² See *Ambrosius Industries v. Adams*, 293 S.W.2d 230 (Ky. 1956); *United States Casualty Co. v. Cincinnati, N.O. & T.P. Ry.*, 218 Ky. 455, 291 S.W. 709 (1927); *Illinois Cent. R.R. v. Louisville Bridge Co.*, 171 Ky. 445, 188 S.W. 476 (1916). *Cumberland Tel. & Tel. Co. v. Mayfield Water & Light Co.*, 166 Ky. 429, 179 S.W. 388 (1915).

³³ *Pullman Co. v. Cincinnati, N.O. & T.P. R.R.*, 147 Ky. 498, 144 S.W. 385 (1912).

Owensboro City R. R. case, the railroad not only failed to discover the sagging wire, its employees actually broke it.

Actually the two theories tend to combine into one, as illustrated by *Brown Hotel Co. v. Pittsburgh Fuel Co.*³⁴ There an employee of Pittsburgh left a manhole cover insecure on Brown's property. A pedestrian stepped on the insecure lid and was injured. He received separate judgments against Brown and Pittsburgh. Both judgments were satisfied and Brown sued Pittsburgh for indemnity, which was permitted on the ground that Brown was guilty of a negative tort while Pittsburgh's negligence was the primary, active cause of the pedestrian's injuries. This case presents basically the same situation that is posed in the municipality cases where the primary-secondary liability theory is used.

A look at some of the cases will show that there is a better way to solve the problem of whether contribution or indemnity is the proper action. Indemnity was not permitted between the following joint tortfeasors:

(1) A city and a streetcar company, where the city permitted its streets to get in a defective condition causing a traveler to be thrown in front of a negligently driven streetcar;³⁵

(2) A railroad company and a streetcar company, where a pedestrian was injured when employees of the railroad company broke a trolley wire that the streetcar company had permitted to "sag low;"³⁶

(3) A telephone company and an electric company, where the electric company did not insulate its wires and the telephone company placed its wires too close to the electric wires, causing the death of a telephone company employee who came in contact with the electric wire;³⁷

(4) A bridge company and a railroad company, where an employee of the railroad company put a trespasser off its train and the trespasser stepped into an unguarded frog on the bridge and his leg was cut off by an approaching train;³⁸

(5) A transfer company and a streetcar company, where the transfer truck left on the streetcar tracks was hit by an approaching streetcar, injuring a person about to board the streetcar;³⁹

³⁴ 311 Ky. 396, 224 S.W.2d 165 (1949).

³⁵ *City of Louisville v. Louisville Ry.*, 156 Ky. 141, 160 S.W. 771 (1913).

³⁶ *Owensboro City R.R. v. Louisville, H. & Et. L. Ry.*, 165 Ky. 683, 178 S.W. 1043 (1915).

³⁷ *Cumberland Tel. & Tel. Co. v. Mayfield Water & Light Co.*, 166 Ky. 429, 179 S.W. 388 (1915).

³⁸ *Illinois Cent. R.R. v. Louisville Bridge Co.*, 171 Ky. 445, 188 S.W. 476 (1915).

³⁹ *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S.W.2d 36 (1934).

(6) Two railroad companies, where an employee of one negligently sold tickets for an incorrect destination and an employee of the other wrongfully put them off its train.⁴⁰

On the other hand, indemnity has been permitted between the following joint tortfeasors:

(7) A city and a contractor, where the city failed to discover an obstruction, placed in its street by the contractor, that caused injury to a pedestrian.⁴¹

(8) A hotel company and a fuel company, where the hotel company failed to discover an insecure manhole cover that had been left in that condition by an employee of the fuel company;⁴²

(9) A railroad company and a manufacturer of railroad cars, where the railroad company failed to find a defect in one of the manufacturer's cars which caused injury to an employee of the railroad company;⁴³

(10) An employer and employee, where the employer was liable for the injuries of a customer solely because of the employer-employee relationship;⁴⁴

(11) A railroad company and a telephone company, where the telephone company permitted its cable to sag low, causing injury to an employee of the railroad company stationed on top of a railroad car.⁴⁵

Thus, in each of the cases in which indemnity was denied, the party seeking it had committed some negligent act of his own which was separate from the wrongful act of his co-tortfeasor. He had either aided in creating the dangerous condition (examples 1, 3, 4, 5, 6 *supra* or committed the last act in the chain of causation (example 2 *supra*). In each of the cases in which indemnity was permitted the party seeking it was held liable to the injured party because of either (1) his failure to discover a dangerous condition that had been created by another (examples 7, 8, 9 *supra*). So, rather than

⁴⁰ Louisville & N. R.R. v. Southern Ry., 237 Ky. 618, 36 S.W.2d 20 (1931).

⁴¹ City of Louisville v. Metropolitan Realty Co., 168 Ky. 204, 182 S.W. 172 (1916). For other municipality cases, see City of Louisville v. Nicholls, 158 Ky. 516, 165 S.W. 660 (1914); Board of Councilmen of City of Harrodsburg v. Vanardsdall, 148 Ky. 507, 147 S.W. 1 (1912); Robertson v. City of Paducah, 146 Ky. 188, 142 S.W. 370 (1912).

⁴² Brown Hotel Co. v. Pittsburgh Fuel Co., 311 Ky. 396, 224 S.W.2d 165 (1949).

⁴³ Pullman Co. v. Cincinnati, N.O. & T.R. R.R., 147 Ky. 498, 144 S.W. 385 (1912).

⁴⁴ Phelps v. Brown, 295 S.W.2d 804 (Ky. 1956) (dictum). Although this was an obvious case for indemnity, plaintiff, for practical reasons brought contribution. See also Aetna Life Ins. Co. v. Roper, 243 Ky. 811, 50 S.W.2d 8 (1932); Prosser, Torts § 46, at 250 (2d ed. 1955).

⁴⁵ Middlesboro Home Tel. Co. v. Louisville & N. R.R., 214 Ky. 822, 284 S.W. 104 (1926).

speak in terms that imply a comparison of the negligence of two defendants, it may be that the best approach would be to determine whether the party against whom indemnity is being asserted not only breached a duty to the injured plaintiff, but to his co-defendant as well. As stated by Professor Hodges in the *Texas Law Reviews*

*When there are two tortfeasors, either or both of whom are liable to an injured third person, but one of whom has breached a duty which he owed both to his co-tortfeasor and to the injured third person, then the tortfeasor who, to his co-tortfeasor, is blameless, should be allowed indemnity.*⁴⁶

This approach would permit the court to state the true basis for its decision without using the rather nebulous phrases that have already caused much confusion. For example, in the *Owensboro City R. R.* case, where the railway company was attempting to recovery in indemnity, the court would determine whether the streetcar company had breached a duty owed the railroad company. Undoubtedly it did by failing to maintain the wire at the proper height. But was the railroad company blameless so as to permit indemnity in its favor? No, since it also breached a duty it owed the streetcar company:

[I]t knew, or from the circumstances is in the law presumed to have known, that its wrong . . . endangered the property of the streetcar company. . . .⁴⁷

On the other hand, in a situation where a city fails to discover an obstruction that has been placed in its streets which causes injury to another, indemnity would be permitted. There, the actual wrongdoer has breached a duty it owes the city, while it is clear that the city has breached no duty to the wrongdoer.

EFFECT OF THE NEW RULES

The Kentucky Civil Code of Practice did not permit cross-actions between defendants.⁴⁸ Consequently, a judgment against co-defendants was not necessarily *res judicata* as respects their rights and liabilities toward each other, even though each defendant had argued in the main action that the other was solely at fault.⁴⁹ In fact, it was a condition precedent to bringing the action of contribution or indemnity that the party seeking it had satisfied the injured party's

⁴⁶ Hodges, *supra* note 2, at 162.

⁴⁷ *Owensboro City R.R. v. Louisville, H. & St. Ry.*, 165 Ky. 683, 696, 178 S.W. 1043, 1049 (1915).

⁴⁸ See, e.g., *Clark's Adm'x v. Rucker*, 258 S.W.2d 9, 10 (Ky. 1953).

⁴⁹ *Clark's Adm'x v. Rucker*, *supra* note 48; see also cases cited in notes 41-45 *supra*. Accord where a directed verdict was given in the original action in favor of the indemnitor: *Pullman Co. v. Cincinnati, N.O. & T.P. R.R.*, 147 Ky. 498, 144 S.W. 385 (1912).

claim against himself by either (1) effecting a good-faith settlement in pursuance of compromise or (2) paying a judgment rendered in a prior action.^{49a} Thus, in *Brown Hotel Co. v. Pittsburgh Fuel Co.*,⁵⁰ Brown and Pittsburgh had been joined in the main action, in which each had argued that the other was solely at fault. The case went to the jury under instructions which would permit the jury to find for or against both defendants, or for one and against the other. Equal verdicts were returned and the judgments rendered thereon were satisfied. Brown then sued Pittsburgh for indemnity which was permitted, the court holding that the prior judgment was not res judicata between the defendants since they were not adversaries. Such parties are adversaries only in a "colloquial sense";⁵¹ a former judgment is res judicata only where the subsequent litigation is between parties to the former judgment whose interests were adverse in the sense that they were on opposite sides according to the pleadings.⁵² And, since cross-actions were not permitted, defendants could be adversaries only in special circumstances.⁵³

Cross-actions are expressly permitted by the Kentucky Rules of Civil Procedure.⁵⁴ The first case to give an indication of the effect

^{49a} *Hargis v. Noel*, 310 Ky. 542, 221 S.W.2d 94 (1949); *Consolidated Coach Corp v. Burge*, 245 Ky. 631, 54 S.W.2d 16 (1932); *City of Georgetown v. Groff*, 136 Ky. 662, 124 S.W. 888 (1910); Annot., 85 A.L.R. 1091 (1933).

⁵⁰ 311 Ky. 396, 224 S.W.2d 165 (1949).

⁵¹ *Clark's Adm'x v. Rucker*, 258 S.W.2d 9, 10 (Ky. 1953).

⁵² *Ibid.*

⁵³ Such special circumstances occurred in *Vaughn's Adm'r v. Louisville & N. R.R.*, 297 Ky. 309, 779 S.W.2d 441 (1944). There, Robert Vaughn, Jr., while driving a truck used in the business of Mattie, Elizabeth and Robert Vaughn, Sr., collided with a train, killing himself and two companions. Personal representatives of the companions brought wrongful death actions against the Vaughns and the railroad company. The Vaughns filed a motion stating that their interests and the interests of the railroad were antagonistic and that their defenses were wholly inconsistent with the railroad company and moved the court to impanel a jury of 21 persons to that each set of defendants might have 3 peremptory challenges. The motion was granted, the case went to trial, and verdicts and judgments of \$400 against the Vaughns and \$2500 against the railroad company were returned. The Vaughns satisfied the judgment and Robert Vaughn, Sr., as personal representative of Robert Vaughn, Jr., brought an action against the railroad company for the wrongful death of Robert Vaughn, Jr. In dismissing the action, the court said:

As a general rule res judicata can be invoked only where the subsequent litigation is between the parties to the former judgment or their privies, and where their interests are adverse in the prior proceedings. This does not mean that they must have been plaintiff and defendant, respectively, but it is sufficient if they were asserting adverse interests, as here. . . . 297 Ky. at , 179 S.W.2d at 444. See also Annot., 152 A.L.R. 1066 (1944).

⁵⁴ Ky. R. Civ. P. 13.07 provides:

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the

of the rules on contribution and indemnity actions was *Gish Realty Co. v. Central City*,⁵⁵ a case that was practiced under the Federal Rules. There, Central City and Gish were joined as defendants in the main action and each filed cross-claims, alleging the sole negligence of the other. The case went to the jury under instructions similar to those given in the *Brown Hotel* case, permitting a finding for or against either or both defendants. Separate verdicts were returned of \$8,000 against the city and \$4,000 against Gish. Judgment was rendered on the verdicts and the city moved to dismiss its cross-claim, which was permitted without prejudice. Then the city satisfied the \$8,000 judgment against it and sued Gish for indemnity, which was denied on the ground that the original judgment was *res judicata*. The Court distinguished *Gish* from *Brown Hotel* on the ground that *Gish* was practiced under the new rules. But, as noted in the dissent, since the trial court did not rule on the cross-claim, the effect should have been the same as if the case had been tried under the code:

That the failure to . . . [rule on the cross-claim] was no mere oversight is evidenced by the fact that the Federal Court subsequently dismissed the cross-claim on the City's motion, specifically reciting by its order that the dismissal was "without prejudice to any further claim or action by the City of Central City, Kentucky, against the Gish Realty Company."⁵⁶

The rules should not be interpreted as giving the jury verdict more weight than before. The court is not compelled to rule on the cross-claim; it may under CR 42.02⁵⁷ hold a separate trial of the cross-claim in furtherance of convenience and to avoid prejudice. However, the court apparently gave some weight to the fact that the jury rendered separate verdicts against the defendants, the largest of which was against Central City. It said:

[I]f one party's fault is the lesser, he may recover from the more culpable. In the instant case, if the verdict is given any force, be-

party against whom it is asserted is *or may be liable* to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant. [Emphasis added.]

⁵⁵ 260 S.W.2d 946 (Ky. 1953). Since Kentucky's Rules are identical to the Federal Rules insofar as those applicable to the *Gish* case are concerned, it is safe to assume that they will be interpreted accordingly by the Kentucky court.

⁵⁶ *Id.* at 952.

⁵⁷ Ky. R. Civ. P. 42.02, identical to Fed. R. Civ. P. 42(b), provides:

If the court determines that separate trials will be in furtherance of convenience or will avoid prejudice it shall order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

fore indemnity may be had, it would be necessary to extend that rule and say the one in the *greater fault* could recover from the one who is guilty of the lesser wrongdoing.⁵⁸ [Emphasis added.]

But, as pointed out above,^{58a} fault is not synonymous with negligence. A party may be negligent and still recover from a co-defendant, provided their negligence was of a different degree or quality. A jury, in the absence of an issue joined between the defendants, simply determines whether the defendants were both negligent, not the degree or quality of the negligence. Had *Brown Hotel* been handled as *Gish* was handled, indemnity would have been denied, since the equal verdicts rendered in *Brown Hotel* would have meant that the parties were in equal fault.⁵⁹

In *Ambrosius Industries v. Adams*,⁶⁰ verdicts of \$25,000 against Holloway and \$50,000 against Ambrosius were returned. Holloway had filed a cross-claim for indemnity against Ambrosius but the court did not instruct on it. The Court of Appeals held that this failure to rule on the cross-claim was a peremptory instruction and that the cross-claim was properly denied since Holloway's negligence was a concurring cause as a matter of law. This decision, then, is a routine example of the manner in which the issues between *all* the parties may, under the rules, be settled in one suit. A more difficult question would have been presented, however, if Ambrosius had cross-claimed against Holloway for contribution.⁶¹ In other words, if Ambrosius had cross-claimed for contribution and the jury had returned a verdict of \$25,000 against Holloway and \$50,000 against Ambrosius, would the court have ruled as a matter of law that Ambrosius was entitled to contribution of \$12,500? A proper consideration of this question requires a look at a related matter, *i.e.*, the power of the jury to apportion damages between defendants.

The jury is permitted, by statute, to apportion the damages between defendants according to culpability.⁶² Thus, a jury may compare the negligence of the two defendants and award damages against them without regard to the amount of actual damage caused

⁵⁸ *Gish Realty Co. v. Central City*, 260 S.W.2d 946, 950 (Ky. 1953).

^{58a} See note 23 *supra*.

⁵⁹ See cases cited in notes 35-40 *supra*.

⁶⁰ 293 S.W.2d 230 (Ky. 1956).

⁶¹ Oberst, "Recent Developments in Torts; Decisions of the Court of Appeals at the 1956-57 Terms," 46 Ky. L. J. 193, 214 (1958).

⁶² Ky. Rev. Stat § 454.040 (1959), provides:

In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs.

by each.⁶³ The statute which authorizes contribution does not set up the measure of damages,⁶⁴ in contribution actions is the amount of the settlement or judgment divided by the number of tortfeasors.⁶⁵ Once the defendant in the contribution action is shown to have been negligent in the same quality or degree as the plaintiff, his liability to the plaintiff is fixed at his prorated share of the amount that the plaintiff has been forced to expend in satisfying the injured party's claim against himself.

It is clear, of course, that to permit contribution after separate verdicts were returned would nullify the statute permitting the jury to apportion damages. However, there is no case which has given this rationalization. In fact the only case that seems to be in point on the issue of whether contribution will be permitted after separate verdicts is *Vaughn's Adm'r v. Louisville & N. R. R.*⁶⁶ There, separate verdicts had been returned against the parties in the main action. Vaughn then sued the railroad in a wrongful death action which grew out of the same transaction. The railroad's counterclaim for contribution was dismissed. The court upheld this dismissal with summary discussion:

Whatever may have been the rights of the parties in the first action, the question of contribution was there determined and the judgment against the respective defendants were satisfied. The railroad company cannot now, in this independent action, ask for additional contribution from its co-defendants in the first action.⁶⁷

However, it is to be noted that the court felt that because of the peculiar type of practice⁶⁸ permitted in that case the parties were adverse in the original action.

Nevertheless, there is strong dictum in *Brown Hotel Co. v. Pittsburgh Fuel Co.*⁶⁹ which indicates that separate verdicts do not preclude the subsequent action of contribution. In that case, indemnity was permitted after separate verdicts had been given in a former case, the court saying:

We hold, in accord with the great weight of authority . . . that a judgment against codefendants is not conclusive as between themselves with respect to their rights and liabilities toward each other

⁶³ *Murphy v. Taxicabs of Louisville, Inc.*, 330 S.W.2d 395 (Ky. 1959); *McCulloch's Adm'r v. Abell's Adm'r*, 272 Ky. 756, 115 S.W.2d 386 (1938). Of course, the plaintiff's total award is determined by the actual damages suffered by the wrongful acts of the defendants. See *Louisville & N. R.R. v. Roth*, 130 Ky. 759, 114 S.W. 264 (1908).

⁶⁴ See statute set out in note 18 *supra*.

⁶⁵ See cases cited in note 4 *supra*.

⁶⁶ 297 Ky. 309, 179 S.W.2d 441 (1944).

⁶⁷ *Id.* at 317, 179 S.W.2d at 445.

⁶⁸ See comment in note 53 *supra*.

⁶⁹ 311 Ky. 396, 224 S.W.2d 165 (1949).

unless an issue was made between them or the parties in the second action were adversary parties in the first action. . . . This is so because the judgment established nothing but the joint liability to the person injured. The relative rights of the codefendants inter se were not litigated, and the question as to which should bear the entire cost of a wrongful act or *what proportion* each should pay remains undecided or not adjudicated.⁷⁰ [Emphasis added.]

This dictum would suggest that a jury's verdict only establishes the joint liability of the defendants and that, unless a *judgment* is rendered on a verdict where the parties were adversaries, the rights and liabilities of the parties toward each other are not determined. Consequently, in the problem raised in connection with the *Ambrosius* case, the court could, under existing law, equalize the burden between the tortfeasors even though it would mean that the effect of the statute permitting apportionment would be nullified. As professor Oberst has suggested,⁷¹ a statute in this field would be helpful. The legislature could clarify the situation by amending the contribution statute to provide a method of determining damages between the tortfeasors that would be compatible with the apportionment statute.

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⁷⁰ *Id.* at 402, 224 S.W.2d at 168; See Annot., 101 A.L.R. 104 (1936).

⁷¹ Oberst, *supra* note 61, at 214.