



1976

Contribution among Tortfeasors: A Comment on Amended Ohio House Bill 531

J. Patrick Browne

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J. Patrick Browne, *Contribution among Tortfeasors: A Comment on Amended Ohio House Bill 531*, 25 Clev. St. L. Rev. 151 (1976)
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ARTICLES

CONTRIBUTION AMONG TORTFEASORS: A COMMENT ON AMENDED OHIO HOUSE BILL 531

J. PATRICK BROWNE^o

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I. INTRODUCTION

ON OCTOBER 1, 1976, Amended House Bill 531 became effective as sections 2307.31 and 2307.32 of the Ohio Revised Code. As stated in the preamble,¹ the purpose of the Act is to provide for the contribution among two or more persons jointly or severally liable in tort. Like all new legislation, it is bound to have a certain amount of "teething problems" in its initial use. This Article will discuss some of the anticipated problems, and propose suggested means for resolving them.

These suggestions are, for the most part, based on Ohio law because the author is convinced that, in the first instance, the Act must be interpreted in the context of existing law. The reader should be aware, however, that the Act is an all but verbatim copy of the Uniform Contribution Among Tortfeasors Act, and the construction placed upon that statute by other states will be useful to the Ohio practitioner and courts.² Nevertheless, existing Ohio law is more relevant to the interpretation of the Act than the decisions of sister states which have like legislation because the basic, underlying law of those states may be quite different than the basic, underlying law of Ohio.

The heart of the new law is found in section 2307.31(A)³ which indicates that several elements must combine before the right of contribution comes into existence. In the following pages each of these elements will be discussed and the problems arising in connection with each will be explored. Following the discussion of the elements of the right to contribution there will appear a discussion of the various procedural means for enforcing the right to contribution.

II. THE ELEMENTS OF CONTRIBUTION

A. *Injury to Person or Property*

First, one or more persons must have been injured in their person or property, or must have been wrongfully killed. For the sake of convenience, we may refer to the person injured or the person killed as

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¹ OHIO REV. CODE ANN. §§ 2307.31-32 (Page Legis. Bull. 389 (1976)). For the full text of the Act see Appendix.

² The reader who wishes to consult the decisions of other states may look to the annotations to those decisions which accompany the text of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 57 (1975).

³ The text of section 2307.31(A) provides, in part:

[W]here two or more persons are 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. The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of the common liability, and his total recovery is limited to the amount paid by him in excess of his proportionate share.

OHIO REV. CODE ANN. § 2307.31(A) (Page Legis. Bull. 389 (1976)).

the claimant, since that is the short-hand term employed by the Act itself.⁴

The meaning of wrongful death is hardly in doubt; it is the death of a person caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued.⁵ But what is meant by injury to person, and injury to property?

Obviously, injury to person means physical injury to the body of the person. But is it limited to that, or does it mean more? Note that the Act speaks of "injury to person," and not "injury to *the* person," or "bodily injury to persons." Had the General Assembly intended to limit the phrase to physical injury to the body, it could have chosen "bodily injury to persons," as it did in Ohio Revised Code section 2305.31,⁶ or it could have chosen "injury to *the* person," which is not as precise, as "bodily injury," but which carries with it the same basic connotation. Indeed, in addition to section 2305.31, there are some 37 sections of the Ohio Revised Code in which the General Assembly has used the term "bodily injury" when it has meant physical injury to the body of a person, and at least 3 in which it has used "injury to the person." However, "injury to person or property," or a slight variation thereof, is used in at least 5 sections of the Code in a context which makes it clear that only physical injury to the body is meant by "injury to person."⁷ Thus, comparison of statutory language is, at best, inconclusive.

Nevertheless, the question demands resolution. There are a number of torts which invade personal rights without necessarily producing bodily injury. False arrest, defamation, and invasion of privacy are examples. Two or more tortfeasors, acting jointly or concurrently, can commit any one of these torts without having a specific intent to cause the resulting injury.⁸ If the phrase "injury to person" includes not only tortious invasions of the claimant's bodily integrity, but also tortious invasions of the claimant's rights as a person, a tortfeasor jointly or severally liable for such invasion, or his or her subrogated insurance carrier, might have a claim for contribution under the Act. On the other hand, a conservative reading of the Act will limit contribution to those torts which cause physical injury to the body. Which is the correct interpretation?

⁴ See, for example, OHIO REV. CODE ANN. § 2307.31(B) (Page Legis. Bull. 389 (1976)) which speaks of a tortfeasor's settlement "with a claimant," and OHIO REV. CODE ANN. § 2307.32(C) (Page Legis. Bull. 389 (1976)) which refers to a claimant's right of action against "the tortfeasor."

⁵ OHIO REV. CODE ANN. § 2125.01 (Page 1968); see also OHIO CONST. art. 1, § 19a.

⁶ See the text of OHIO REV. CODE ANN. § 2305.31 (Page Supp. 1975) at note 86 *infra*.

⁷ See OHIO REV. CODE ANN. § 723.54 (Page 1976); *id.* § 1302.89 (Page 1962); *id.* § 1533.181 (Page 1964); *id.* § 4155.13 (Page 1973); *id.* § 5503.02 (Page 1970).

⁸ While these torts are often described as intentional torts, they are not necessarily intentional as that term is used in the Act. See text accompanying notes 51-61 *infra*. Further, the Personal Injury Liability Insurance coverage part of the Comprehensive General Liability-Automobile Policy provides at least limited coverage for liability resulting from the commission of torts such as these. See note 52 *infra*.

Ohio Revised Code section 1.59 tells us that unless the statute specifies otherwise, person "includes an individual, corporation, business trust, estate, trust, partnership, and association."⁹ This gives some clue to the correct interpretation. Individuals, of course, have physical bodies which can be injured as well as personal rights which can be invaded; but corporations, business trusts, estates, trusts, partnerships, and associations are legal concepts and not physical entities. They only have personal rights to the extent that the law gives them rights. Therefore, since they are included within the meaning of the term person, the phrase "injury to person" must include invasion of personal rights as well as injury to the physical body; otherwise, these persons could not be injured in their person. This accords with Ohio Revised Code section 1.11, which urges a liberal reading of remedial laws.¹⁰

Therefore, it is suggested that injury to person means not only physical injuries to the body of the claimant; but also invasions of rights which belong to the claimant as a person, at least to the extent that the injury is not specifically intended and, possibly, to the extent that liability insurance is available against such invasions.¹¹ The fact that liability insurance is available against such torts is a strong indication that it would not be against public policy to permit contribution, for if the public policy of the state demanded that liability be left solely with the tortfeasor responsible, liability insurance for such torts would be prohibited.

Injury to property presents similar difficulties. Clearly, the phrase includes physical damage to tangible property. But is it limited to that or does it also include the taking of the claimant's property, or the interference with, or destruction of the claimant's property rights? Ohio Revised Code section 1.59 is again pertinent.¹² This section defines property as both real and personal property. Pertinent though this definition may be, it is not very helpful, for we must now ascertain the meaning of real and personal property. Real property consists of lands, tenements, and hereditaments,¹³ while personal property consists of all objects and rights which are capable of ownership except freehold estates in land, and incorporeal hereditaments issuing out of or exercisable within the same.¹⁴ In short, the term property extends to every species of valuable right and interest.¹⁵ That being so, injury to property is not limited to physical injury to tangible property, but embraces injury to intangible property rights as well.

⁹ OHIO REV. CODE ANN. § 1.59 (Page Supp. 1975).

¹⁰ *Id.* § 1.11 (Page 1969) which provides, in part: Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws

¹¹ See text accompanying notes 51-61 *infra*.

¹² OHIO REV. CODE ANN. § 1.59 (Page Supp. 1975).

¹³ 44 OHIO JUR. 2d *Property* §§ 8, 9 (1960).

¹⁴ *Id.* § 11.

¹⁵ *Turnpike Co. v. Parks*, 50 Ohio St. 568, 576, 35 N.E. 304, 305 (1893).

B. Common Liability for the Injury

Two or more tortfeasors must share a common liability for the injury to, or death of, the claimant. This common liability is liability in fact rather than judicially declared liability, since the right of contribution will exist "even though judgment has not been recovered against all or any of them,"¹⁶ and since contribution may be enforced by separate action "whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death."¹⁷ In addition, the liability must qualify as legal liability; moral liability is not sufficient to give rise to the right of contribution.¹⁸

But this concept of legal liability in fact presents some difficulties. Is legal liability "liability" within the meaning of the Act if it is not *susceptible* to judicial declaration as such? A common fact pattern will illustrate the problem. The XYZ Corporation contracts with the ABC Company for the construction of a building on land owned by XYZ. ABC is subject to, and fully complies with, the Workers' Compensation Law of Ohio. Doe and Roe are fellow employees, employed by ABC. While acting within the course and scope of his employment, Roe negligently creates a dangerous condition at the job site. By proper inspection, XYZ could have discovered the condition and could have required ABC to eliminate it. But XYZ made no inspection, and in time, the condition caused injury to Doe. In the abstract, Roe is legally liable to Doe for negligently creating the condition which caused Doe's injury; ABC is legally liable to Doe under the doctrine of *respondet superior*; and XYZ is legally liable to Doe for a violation of the "Frequentener" statute.¹⁹ However, Doe may not sue Roe if Doe's injury is compensable under the Workers' Compensation Law,²⁰ nor may he sue ABC whether or not his injury is compensable under that Law.²¹ Thus, the only liability which is susceptible to judicial declaration is the liability of XYZ. If XYZ is judicially found to be liable to Doe, may it

¹⁶ OHIO REV. CODE ANN. § 2307.31(A) (Page Legis. Bull. 389 (1976)).

¹⁷ *Id.* § 2307.31(G).

¹⁸ As it is said in section 2307.31(F), "principles of equity applicable to contribution generally shall apply." OHIO REV. CODE ANN. § 2307.31(F) (Page Legis. Bull. 389 (1976)). Thus, the right of contribution is, by its very nature, equitable, and as the old maxim has it, equity will not aid a volunteer. He who pays a "liability" which he is not legally bound to pay is a volunteer, and has no legitimate claim to a right of contribution. *Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N.E.2d 180 (1945).

¹⁹ OHIO REV. CODE ANN. §§ 4101.11-.12 (Page 1973).

²⁰ *Id.* § 4123.741, which provides in material part:

No employee . . . shall be liable to respond in damages at common law or by statute for any injury . . . received . . . by any other employee . . . in the course of and arising out of the latter employee's employment . . . on the condition that such injury . . . is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code.

²¹ *Id.* § 4123.74 provides, in material part:

Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury . . . received . . . by any employee in the course of or arising out of his employment . . . whether or not such injury . . . is compensable under section 4123.01 to 4123.94, inclusive, of the Revised Code.

seek contribution from either ABC or from Roe? In New York, it probably could,²² but in Ohio it may not be able to.²³

The Ohio cases most closely on point are those in which the third party tortfeasor attempts to obtain indemnity from the employer on the theory of primary-secondary negligence. In the absence of an express indemnity agreement, the courts have held that provisions of the Workers' Compensation Law and the Ohio Constitution bar such suits for indemnity.²⁴

While this conclusion is unwarranted by the actual language of the Constitution and the statute,²⁵ it is the prevailing view; and unless

²² *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). For an interesting introductory discussion of the problem, see W. MALONE, M. PLANT & J. LITTLE, *CASES AND MATERIALS ON THE EMPLOYMENT RELATION* 504 (1974).

²³ In *Republic Steel v. Glaros*, 12 Ohio App. 2d 29, 230 N.E.2d 667 (1967), it is said, without explanation, that the doctrine of contribution does not apply. This conclusion can be explained on any one of three grounds: (1) in that case, recovery was premised on the terms of an express indemnity agreement between the employer and the third party tortfeasor, and not upon the right of contribution; (2) there is nothing in the case which would indicate that the employer was in any way responsible for the injury to the employee; and (3) the doctrine of contribution was not recognized in Ohio at the time the case was decided.

²⁴ *Id.*; *St. Paul Mercury Indem. Co. v. Kopp*, 70 Ohio L. Abs. 259, 121 N.E.2d 23 (Ct. App. 1954); *Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N.E.2d 180, *appeal dismissed*, 145 Ohio St. 615, 62 N.E.2d 251 (1945).

Judge Morgan best states the rationale in his concurring opinion in *Bankers Indemnity*. He states that the provision in the Ohio Constitution, see note 25 *infra*,

is intended to give and does give to the employer who complies with the conditions complete protection from any and every claim against him based on the death of or injuries to any of his employees. . . . Employers in this state have been rightly encouraged to rely that by paying the premium and compensation provided by the workmen's compensation laws of the state they have complete protection from any further claims of any kind by reason of the death of or injuries to its employees, except where specific exceptions may be made by statute and none such is claimed in this case. To hold that employers are not so protected would undermine, in my opinion, the basic principles of workmen's compensation in this state.

77 Ohio App. at 134, 62 N.E.2d at 185 (emphasis added).

²⁵ OHIO CONST. art. II, § 35 states:

Such compensation shall be in lieu of all other rights to compensation or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

The language of the statutes is essentially the same: "Employers who comply . . . shall not be liable to respond in damages at common law or by statute for any injury . . ." OHIO REV. CODE ANN. § 4123.74 (Page 1973); "no employee . . . shall be liable to respond in damages at common law or by statute for any injury . . ." *Id.* § 4123.74. When this language is read in context, the clear implication is that the employer or fellow employee will not be liable to respond in damages to the injured employee. There is nothing in the language or the context that justifies the conclusion that the employer or the fellow employee is immune from claims presented by persons other than the injured employee; nothing that warrants the court in saying that the employer or fellow employee is to be held free "from any and every claim against him," or "from any further claims of any kind."

But this does not solve the problem. The problem lies in the meaning of the phrase "shall not be liable to respond in damages." Does this mean that the employer or fellow employee is liable for the injury, but cannot be sued for damages in a civil action, or does it mean that the employer or fellow employee is not liable at all, and therefore cannot be made to "respond in damages?" In other words, does the phrase defeat only

section 2307.31 can be construed as a specific statutory exception,²⁶ it precludes the application of the doctrine of contribution to the same extent the application of the doctrine of indemnity is precluded.²⁷

This example, however, does not necessarily conclude the question since it may be argued that the language of the Constitution as well as the language of sections 4123.74 and 4123.741 of the Ohio Revised Code defeats liability itself, and does not simply preclude a judicial determination of that liability. But that will be equally true in almost every case in which liability is not susceptible to judicial determination. Thus, while this specific example does not conclude the question, it does suggest the most likely answer: If legal liability is not susceptible to a judicial declaration of liability, it is not "liability" as that term is used in the Act.

To return to the second element of the right to contribution as exemplified by the language of the Act: The two or more tortfeasors must be "jointly or severally" liable, and it is here, in the use of the disjunctive "or" rather than the conjunctive "and" that another difficulty arises. No doubt the General Assembly had in mind the creation of a right of contribution between joint or concurrent tortfeasors.

the injured employee's right to sue, or does it defeat liability itself? If it only defeats the injured employee's right to sue, the third party tortfeasor's action for indemnity is not necessarily precluded. But, if liability itself is defeated a third party tortfeasor's action for indemnity is also necessarily precluded, and for two reasons.

In the absence of an express indemnity agreement, the third party tortfeasor's claim for indemnity will, as a general rule, be premised on the theory of primary-secondary liability — the third party tortfeasor alleging he is only secondarily liable, while the employer or the fellow employee is primarily liable. But if the Workers' Compensation Law defeats the liability of the employer or fellow employee there can be no question of primary-secondary liability and consequently no claim for indemnity. That is the first reason. The second reason looks to the origin of the third party tortfeasor's claim. In attempting to rationalize the claim for indemnity, many courts hold that when the secondarily liable third party tortfeasor compensates the injured party, he or she either becomes subrogated to that party's claim against the person primarily liable, or takes an equitable assignment of the injured party's claim against the person primarily liable. But the subrogee or assignee takes no greater right than that possessed by the subrogor or the assignor. Since the employer or fellow employee cannot be liable to the injured employee, the injured employee has no right to pass on to the third party tortfeasor. Therefore, the third party tortfeasor has no right which he or she can assert in the claim for indemnity.

How have the Ohio courts interpreted the phrase? The answer is far from clear, since the language used in the various decisions has been ambiguous. However, *Greenwalt v. Goodyear Tire & Rubber Co.*, 164 Ohio St. 1, 128 N.E.2d 116 (1955); and *Bevis v. Armco Steel Corp.*, 156 Ohio St. 295, 102 N.E.2d 444 (1951) strongly suggest the abolition of liability. Indeed, from the history of the constitutional provision and the statutes given in *Bevis*, one is compelled to the conclusion that it is the liability itself, and not merely the right to sue, which has been abrogated.

²⁶ There is nothing in the language of OHIO REV. CODE ANN. §§ 2307.31-.32 (Page Legis. Bull. 389-90 (1976)) which would lead one to the belief that the right of contribution is a specific exception to OHIO REV. CODE ANN. §§ 4123.74-.741 (Page 1973). To be a specific exception, the Act would have to at least make reference to these latter sections of the Revised Code, and it does not.

²⁷ This appears to be the prevailing view. See *Madrin v. Wareham*, 344 F. Supp. 166 (W.D. Pa. 1972) and the authorities therein cited. A review of the Ohio Act leads to the same conclusion. An essential element of contribution under the Act is that both tortfeasors be liable to the claimant. But the language of the Constitution and the Workers' Compensation Law abrogates the liability of the tortfeasor-employer or the tortfeasor-fellow employee. See note 25 *supra*. Since both tortfeasors cannot be liable to the claimant, the right of contribution does not arise.

Since the liability of both joint tortfeasors and concurrent tortfeasors is generally described as being "joint" or "joint *and* several,"²⁸ by using the phrase "jointly *or* severally" rather than the traditional "jointly *and* severally," the General Assembly may have intended to reach beyond joint and concurrent tortfeasors to provide for contribution between tortfeasors who are only "severally" liable to the claimant. Such an expansion might be legitimate in certain cases involving successive tortfeasors.

Were it not for the specific holding of the supreme court in *Travelers Indemnity Co. v. Trowbridge*,²⁹ the facts of that case would illustrate a situation that is susceptible to the application of the new doctrine. One Dlusky was injured in an explosion caused by the negligence of Republic Steel Corporation. While receiving surgical treatment for that injury, he was further injured through the negligence of the treating physician. The supreme court found that Republic and the physician were neither joint nor concurrent tortfeasors, but rather successive tortfeasors, and that both were severally liable to Dlusky for the second injury.³⁰ The court remarked further that if Republic was held liable for more than its proportionate share of the second injury, it was entitled to some equitable relief against the physician.³¹ Finally, the court noted the absence of a right of contribution in Ohio,³² and sought a remedy in contribution's nearest analog — indemnity. Thus, it held that Republic had a right to seek indemnity from the physician.³³ Had contribution been available, there is little doubt that the court would have employed it. Only in the absence of contribution did the court feel compelled to break new ground and fashion a remedy based on the principle of indemnity.³⁴ Ironically, it is this creation of the

²⁸ See, e.g., *Clauss v. Fields*, 29 Ohio App. 2d 93, 278 N.E.2d 677 (1971).

²⁹ 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975).

³⁰ *Id.* at 15, 321 N.E.2d at 790.

The physician and the tortfeasor are not typical concurrent tortfeasors but, rather, are more in the nature of successive tortfeasors. However, the original tortfeasor is responsible for the negligence of the physician because the tortfeasor's negligence created the risk (the injury) and the occasion for the independent negligence of the physician. The negligence of the physician does not constitute a sufficient break in the chain of causation to absolve the original tortfeasor from liability.

³¹ *Id.* at 16, 321 N.E.2d at 790.

[T]he rationale, that he who actively causes an injury should be responsible to another who is liable for such injury because of his own negligence but who did not actively create such injury, produces a just and equitable result.

³² *Id.* at 15-16, 321 N.E.2d at 790.

³³ *Id.* at 16, 321 N.E.2d at 790.

We conclude that a tortfeasor, who negligently causes an injury, has a right to indemnity from a physician who negligently causes a new injury or aggravates the existing injury during the course of his treatment of the injury caused by the tortfeasor.

³⁴ The novelty of the court's approach was noted *id.* at 16, 321 N.E.2d at 790.

Although the instant situation does not clearly fall either into the category of concurrent tortfeasors or into the category of the situations where primary and secondary liability exists, we find that the relationship between an original tortfeasor and a physician who negligently treats the injury caused by the tortfeasor falls closer, and more equitably, into the latter category than the former. We

right of indemnity in the absence of a right of contribution which, as a practical matter, precludes the application of the new doctrine of contribution in this specific instance.³⁵

While the *Trowbridge* decision appears to foreclose the application of the doctrine of contribution in cases where a physician's negligent treatment aggravates the original injury, the decision does not necessarily preclude the operation of the doctrine in other cases of several liability. In such cases, it would appear that the courts may now choose between the competing principles of indemnity and contribution. It will be interesting to observe whether they follow the trail blazed by *Trowbridge* and apply the principle of indemnity or make use of the leeway granted by the phrase "jointly or severally" to employ the principle of contribution.

It should be noted, however, that the doctrine of contribution will not apply in all cases involving successive tortfeasors who are severally liable to the claimant. If the above reading of the phrase "jointly or severally" is a correct one, the Act still requires that the two tortfeasors be severally liable for the "same injury to person or property or for the same wrongful death."³⁶ The *Trowbridge* situation qualified, at least in theory, because both tortfeasors were severally liable for the second injury. In many cases involving successive tortfeasors each tortfeasor is severally liable for separate acts which produce separate and distinct injuries, and in those cases the application of the doctrine of contribution is precluded. There may be situations, however, when two injuries may so merge in effect as to be medically inseparable. When the two injuries, though separable in point of time, become one indivisible injury in effect, the extent of the liability for each injury cannot be allocated with reasonable certainty as between the successive tortfeasors, and the injuries become, for all practical purposes, indivisible as to cause.

In *Ryan v. Mackolin*,³⁷ the Ohio Supreme Court was faced with a fact situation which nearly achieved that goal. Ryan received the first injury to his back when his automobile was "rear-ended" by Boley. Approximately 5 months later, Ryan again received injury to his back when his automobile was rear-ended by Mackolin. After the second injury, Ryan brought suit against both Boley and Mackolin, seeking a joint judgment on the theory that his injuries were indivisible and the liability could not be allocated with reasonable certainty between the successive collisions. The supreme court disagreed on the facts of the case, and disallowed a joint judgment, but in so doing the court sug-

view this issue as one of first impression, not controlled by any of the prior decisions of this court.

³⁵ OHIO REV. CODE ANN. § 2307.31(D) (Page Legis. Bull. 389 (1976)) states:

This Section 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.

³⁶ *Id.* § 2307.31(A).

³⁷ 14 Ohio St. 2d 213, 237 N.E.2d 377 (1968).

gested that under the right set of facts a joint judgment would have been appropriate even though the liability of each tortfeasor was several.³⁸ In the appropriate circumstances, it would seem only proper that the tortfeasor who paid more than his or her proportionate share of the joint judgment should have a right to seek contribution from the other tortfeasor, and the use of the disjunctive phrase "jointly or severally" would warrant an interpretation which would make the new Act applicable to such a situation.

While the use of the disjunctive may, in an appropriate case, permit the application of the Act to tortfeasors who are neither joint nor concurrent, such an interpretation is not mandated. There are explanations of the phrase "jointly or severally" which would justify a more narrow application of the doctrine. As previously noted,³⁹ the liability of joint tortfeasors and concurrent tortfeasors is traditionally described as "joint" or "joint and several." That liability would be described in the Act as "jointly or jointly and severally liable in tort for the same injury to person or property or for the same wrongful death." That is an awkward phrase. A draftsman with an eye to style might well try to compass "jointly or jointly and severally" with a short-hand reference, and "jointly or severally" would be a logical choice, because it contains both elements of the longer phrase: "joint" and "joint and several" liability.

The disjunctive may also have been used because of the ambivalence in the law with respect to the meaning of "jointly and severally liable." That phrase has one meaning with respect to how joint and concurrent tortfeasors may be sued by the injured party, but quite another when it comes to the type of judgment that may be entered against them.

As far as suit is concerned, the injured party may enforce his claim against either joint or concurrent tortfeasors in an action against all of them jointly, against any one of them severally, or against any number less than the whole. In this sense, then, both joint and concurrent tortfeasors are "jointly and severally liable." It is equally true that in this sense there is no particular magic in the use of the disjunctive or the conjunctive. When it is said that joint or concurrent tortfeasors are jointly and severally liable, it means that they may be joined in one suit against all, or they may be sued in actions against each severally. The phrase "jointly or severally" imports neither more nor less than that.

Judgments are a different matter. If the injured party sues the tort-

³⁸ *Id.* at 222, 237 N.E.2d at 383:

[F]ollowing the first collision Ryan was hospitalized and received medical treatment for an injury to his back. The nature and extent of the disabling effect of that collision having been subject to medical scrutiny, we cannot assume that however indivisible in effect plaintiff's back injury became after the second collision, it will be incapable of separation as to cause. The sequence of events here is not such that, however difficult, it should be insurmountable to chart the course of cause to effect as a subsequent event adds its force to the flow.

(Citations omitted.)

³⁹ See text accompanying note 28 *supra*.

feasors severally, he or she may obtain a several judgment against each, since each is severally liable for the full amount of the damage occasioned by the tortious wrong. This is true whether the tortfeasors are joint or concurrent. Likewise, if the injured party sues the tortfeasors jointly, he or she may obtain a several judgment against each regardless of whether they are characterized as joint or concurrent. But if the injured party seeks a joint judgment in a joint suit, he or she may receive it only as against joint tortfeasors; that is, tortfeasors who are *in pari delicto*. As for concurrent tortfeasors who do not act in concert, only several judgments are permitted. Thus, as far as judgments are concerned, only joint tortfeasors are truly jointly and severally liable.

The difficulty arises from the fact that the courts use the terms loosely. All joint tortfeasors are concurrent tortfeasors because their actions concur in point of time and in point of consequence, but not all concurrent tortfeasors are joint because they do not act in concert to produce the injury; at best, their actions concur only in point of consequence. To the extent that a concurrent tortfeasor does not qualify as a joint tortfeasor, he or she is subject only to a several judgment. Thus, concurrent tortfeasors are jointly or severally liable *in judgment* depending upon whether they are both joint and concurrent tortfeasors or concurrent only. Accordingly, the phrase "jointly or severally" more accurately captures the liability in judgment of both joint tortfeasors and truly concurrent tortfeasors than does the phrase "jointly and severally," and it may be that this is why it was used in the Act.⁴⁰

C. Liability in Tort

The joint or several common liability of the two or more tortfeasors must be liability in tort. As a practical matter, this element will present few problems since, in most cases, the claimant will be seeking recovery for injuries or death caused by the negligence of the tortfeasors. Nevertheless, the demise of the common law forms of action, and the substitution of more liberal requirements of Rules pleading have blurred the boundaries between tort and contract. Under the new Rules of Civil Procedure⁴¹ a complaint is sufficient if it sets forth the basic operative facts underlying the plaintiff's claim; it need no longer state the plaintiff's theory of recovery.⁴² It may be difficult to determine from a modern complaint whether the plaintiff's action sounds in tort or

⁴⁰ If neither of these two arguments are enough to satisfy a court seeking a conservative interpretation of the Act, that court can take refuge in OHIO REV. CODE ANN. § 1.02(H) (Page 1969) which provides:

As used in the Revised Code, unless the context otherwise requires. . . . (H) "And" may be read "or," and "or" may be read "and" if the sense requires it.

⁴¹ Specifically, OHIO R. Civ. P. 8.

⁴² See, e.g., *Slife v. Kuntz Properties*, 40 Ohio App. 2d 179, 182, 318 N.E.2d 557, 560 (1974) where the court said:

Actually few complaints fail to meet the liberal standards of Rule 8 and become subject to dismissal. . . . All that the civil rules require is a short, plain statement of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it is based.

in contract. *Iacono v. Anderson Concrete Corp.*⁴³ is a good example. Iacono entered into an oral agreement with Padovan Construction Company for the installation of a driveway, patio, and sidewalk at Iacono's home. Padovan secured the concrete for the job from Anderson Concrete Corp. Iacono was dissatisfied, and brought suit against both Padovan and Anderson. The trial court apparently thought the claim against Anderson sounded in tort for breach of an implied warranty. The court of appeals thought it sounded in contract, and reversed the judgment against Anderson due to a lack of privity of contract between Iacono and Anderson. The supreme court agreed with the lower court's interpretation and noted that under the modern rules of civil procedure "all pleadings shall be so construed as to do substantial justice."⁴⁴ One presumes that this same rule of liberality will apply when the pleadings are being tested for the purpose of obtaining contribution.

Of course, the pleadings alone are not controlling as to the nature of the tortfeasor's liability. If a case goes to judgment, the nature of the judgment debtor's liability will be determined on the basis of both the pleadings and the evidence presented at trial.⁴⁵ Thus, in some cases, contribution may appear appropriate from the pleadings, but will be defeated by the proofs. The basic fact pattern of *Iacono* will illustrate: Suppose that the pleadings allege breach of implied warranty against both Padovan and Anderson, and assume that contribution will lie if both are found liable on that claim. Suppose further that at the trial Iacono proves breach of implied warranty against Anderson, but only simple breach of contract against Padovan.⁴⁶ In such event, there could be no contribution between Padovan and Anderson because, as the Act states, each of the parties involved in the claim for contribution must be liable in tort to the claimant. Since, in our supposition, Padovan was liable to the claimant in contract and Anderson was liable in tort, the essential prerequisite of liability in tort would not exist, and should one pay the full judgment he could not seek contribution from the other.

At least two other situations can present problems: Suppose that a particular injury caused by two or more tortfeasors is inflicted under circumstances such that the claimant has the option of making the complaint sound in tort or in contract; and suppose that, in order to cut off a particular defendant's right to contribution, the claimant so drafts the complaint that it claims recovery for breach of contract only. Or, suppose that in a proper case a claimant believes that a restitutionary remedy would be more advantageous than compensatory dam-

⁴³ 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

⁴⁴ *Id.* at 92, 326 N.E.2d at 270 quoting from OHIO R. Civ. P. 8(F).

⁴⁵ *Raimonde v. Van Vlerah*, 42 Ohio St. 2d 21, 325 N.E.2d 544 (1975); *Slife v. Kundtz Properties*, 40 Ohio App. 2d 179, 318 N.E.2d 557 (1974); *Van Curen v. Mayfield*, 40 Ohio App. 2d 147, 318 N.E.2d 550 (1974).

⁴⁶ As the supreme court read the complaint in *Iacono*, it stated alternative claims for either breach of contract or for breach of an implied warranty. 42 Ohio St. 2d at 92, 326 N.E.2d at 270.

ages, and "waives the tort and sues in *assumpsit*."⁴⁷ In determining whether a claim for contribution lies, is the court bound by the form in which the action is brought, or may it go behind the form to the substance? The better answer is to be found in those cases which have dealt with a like problem in connection with the applicable statute of limitations. The supreme court in *Andrianos v. Community Traction Co.*, solved the problem by holding that an action to recover damages for bodily injury was governed by a two-year statute of limitations regardless of whether the action was in tort or for breach of contract.⁴⁸

An analogy can be drawn for the right of contribution. That right arises out of joint or several liability in tort for the same injury to person or property or for the same wrongful death. The right should be annexed to the cause of action rather than the form of action. Thus, the element of liability in tort refers to the nature or subject matter of the action and not to its form as a matter of remedial procedure. As the court in *Andrianos* concluded, it makes no difference whether the action to recover damages for injury to person or property, or for wrongful death, is in theory *ex contractu* or *ex delicto*; nor does it matter that the claimant may elect between the two forms of action.⁴⁹

Not all tort liability will support a claim for contribution. The Act contains two direct exceptions and one indirect exception to the general rule that there is a right of contribution between two or more tortfeasors who are jointly or severally liable in tort for the same injury to person or property or for the same wrongful death.

First, the Act explicitly denies the right of contribution to those tortfeasors who have "intentionally caused" the injury or wrongful death.⁵⁰ It should be noted that only the tortfeasor guilty of intentional conduct is deprived of the right of contribution. Thus, if one of two tortfeasors causes injury or wrongful death through negligence, and the other through intentional misconduct, the one guilty of negligence

⁴⁷ J. L. Adolphus puts it this way:

Thoughts much too deep for tears subdue the Court
When I *assumpsit* bring, and god-like waive a tort.
Adolphus, *The Circuitemers*, 1 L.Q. Rev. 232, 233 (1885).

⁴⁸ 155 Ohio St. 47, 51, 97 N.E.2d 549, 552 (1951):

Surely, the General Assembly did not intend to create different periods of limitations for the recovery of damages growing out of bodily injury, depending on the form of the action brought. No matter what form is adopted, the essence of the action is the wrongful injury, and that it arose from the breach of an express or implied contract is immaterial.

In other words, the term "action," as used in Section [2305.10, Revised Code], refers to the nature or subject matter thereof and not to its form as a matter of remedial procedure. Whether the action is strictly in tort or for breach of contract, it is nonetheless an action to recover damages for bodily injury and is governed by the two-year limitation prescribed by Section [2305.10, Revised Code].

⁴⁹ *Id.* OHIO REV. CODE ANN. § 1.47(C) (Page 1969) should not be overlooked. It provides: "In enacting a statute, it is presumed that . . . (C) a just and reasonable result is intended."

⁵⁰ OHIO REV. CODE ANN. § 2307.31(A) (Page Legis. Bull. 389 (1976)) provides:

There is no right of contribution in favor of any tortfeasor who has intentionally caused or intentionally contributed to the injury or wrongful death.

(all other things being equal) has the right of contribution from the one guilty of intentional wrong, but not vice versa.

But when is injury or wrongful death "intentionally caused?" The answer is not without difficulties in part created by the existence of liability insurance. Because subrogated liability insurers are entitled to the same right of contribution as their insured,⁵¹ it is reasonable to seek a definition in the judicial interpretations of similar clauses found in liability insurance policies. Indeed, it would be unjust to require a liability insurer to make payment because its insured's activities were considered nonintentional under the provisions of the policy's "intentional act" clause, and then turn around and deny that subrogated insurer the right of contribution on the ground that the injury or wrongful death was "intentionally caused" within the definition of the Act.

The liability policies most likely to be encountered are the Family Combination Automobile Policy, the Homeowners Policy, and the Comprehensive General Liability-Automobile Policy.⁵² Although the language of the "intentional act" clauses in each of these policies differs somewhat,⁵³ the interpretation given to each is about the same.⁵⁴ Because the "intentional act" clause of the Family Combination Automobile Policy has been the recipient of the most recent judicial scrutiny, and because its language is most like that of the Act, it may be used for the purposes of illustration. Thus:

⁵¹ As it is said in OHIO REV. CODE ANN. § 2307.31(C) (Page Legis. Bull. 389 (1976)):

A liability insurer, which 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 proportionate share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

⁵² The Personal Injury Liability Insurance coverage in the Comprehensive General Liability-Automobile Policy presents some unique problems because it provides liability coverage for false arrest, detention, or imprisonment; malicious prosecution; libel, slander, and other defamation; violation of the right of privacy; wrongful entry or eviction; and other invasions of the right of private occupancy — offenses which are generally considered to be intentional torts. See notes 6-11 and accompanying text *supra*.

⁵³ The standard Family Combination Automobile Policy provides:

This policy does not apply under Part I to bodily injury or property damage caused intentionally by or at the direction of the insured.

The standard Homeowners Policy states:

This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured.

The standard Comprehensive General Liability-Automobile Policy provides coverage on an occurrence basis, defining occurrence as follows:

"Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

⁵⁴ Compare *Cincinnati Ins. Co. v. Mosley*, 41 Ohio App. 2d 113, 322 N.E.2d 693 (1974) ("bodily injury . . . caused intentionally by . . . the insured") and *Sykes v. Midwestern Indem. Co.*, 38 Ohio Misc. 64, 311 N.E.2d 906 (Cuy. Cty. C.P. 1973) ("Property Damage . . . caused intentionally by . . . the insured") with *Murray v. Landenberger*, 5 Ohio App. 2d 294, 215 N.E.2d 412 (1966) ("caused by accident"). See also *Celina Mut. Ins. Co. v. Saylor*, 35 Ohio Misc. 81, 301 N.E.2d 721 (Hamilton Cty. C.P. 1973) for the proper meaning of "expected or intended from the standpoint of the insured."

**FAMILY COMBINATION
AUTOMOBILE POLICY:**

This policy does not apply under Part I to bodily injury or property damage caused intentionally by or at the direction of the insured.

Section 2307.31(A):

There is no right of contribution in favor of any tortfeasor who has intentionally caused or intentionally contributed to the injury or wrongful death.⁵⁵

Most of the recent decisions which have interpreted this or like language have drawn a distinction between an intentional injury and an intentional act which produces an injury.⁵⁶ In order to be within the language of the exclusion, the bodily injury or property damage must itself be intended by the insured; it is not enough that the insured intentionally committed the act which produced the bodily injury or property damage. *Cincinnati Ins. Co. v. Mosley*⁵⁷ is illustrative. While driving through Ripley, Ohio, Mosley observed Germann talking to Mosley's boyfriend. Jealous, Mosley turned her car around and drove it into a parking lot with the intention of hitting Germann. She missed Germann, and struck Maynard, who unfortunately found himself in the path of the car. Maynard sued Mosley, alleging that Mosley had driven off the highway striking and injuring him without characterizing Mosley's conduct as either "intentional" or "negligent." Mosley's insurer brought a declaratory judgment action seeking a declaration that coverage for Maynard's bodily injury was precluded by the "intentional act" clause of the policy which excluded coverage for "bodily injury . . . caused intentionally by . . . the insured."⁵⁸ The trial court granted judgment for the insurer, but the court of appeals reversed noting that:

To deny coverage here, we would be required to judicially amend the provision to read: "Bodily injury caused by intentional actions of the insured."⁵⁹

Although it is true that exclusions in insurance policies are to be strictly construed,⁶⁰ it is equally true that remedial statutes are to be liberally construed,⁶¹ so the effect is about the same. Thus, it may be concluded that the right of contribution is not defeated unless the tort-

⁵⁵ OHIO REV. CODE ANN. § 2307.31(A) (Page Legis. Bull. 389 (1976)).

⁵⁶ *Cincinnati Ins. Co. v. Mosley*, 41 Ohio App. 2d 113, 322 N.E.2d 693 (1974); *Sykes v. Midwestern Indem. Co.*, 38 Ohio Misc. 64, 311 N.E.2d 906 (Cuy. Cty. C.P. 1973); *Murray v. Landenberger*, 5 Ohio App. 2d 294, 215 N.E.2d 412 (1966).

⁵⁷ 41 Ohio App. 2d 113, 322 N.E.2d 693 (1974).

⁵⁸ Although such an action appeared proper at the time it was brought, it is now clear that to the extent that the insurance company seeks to avoid its duty to defend by such a declaratory judgment, it does not have a claim upon which relief can be granted. See *State Farm Fire & Cas. Co. v. Pildner*, 40 Ohio St. 2d 101, 321 N.E.2d 600 (1974); *Browne, The Demise of the Declaratory Judgment Action as a Device for Testing the Insurer's Duty to Defend: A Postscript*, 24 CLEV. ST. L. REV. 18 (1975).

⁵⁹ 41 Ohio App. 2d 113, 115-17, 322 N.E.2d 693, 695-96 (1974).

⁶⁰ *Id.* at 115-16, 322 N.E.2d at 695-96.

⁶¹ See note 10 *supra*.

feasor specifically intended the injury or wrongful death which gave rise to his or her liability.

There remains the problem of determining where wilful or wanton misconduct fits into the statutory scheme. The two terms have been so often conjoined in the phrase "wilful *and* wanton misconduct" that the fact that the terms stand for separate and distinct concepts has been obscured; in fact the two concepts are said to be antagonistic.⁶²

In order to establish wantonness, the conduct must demonstrate a disposition to perversity, such as acts of stubbornness, obstinacy, or persistency in opposing that which is reasonable, correct, or generally accepted as a proper course to follow in protecting the safety of others. The tortfeasor's conduct must be found to have been under such circumstances and existing conditions that he or she must have been conscious that his or her conduct would, in all probability, result in injury.⁶³ Such misconduct, perverse though it may be, involves something less than a specific intent to cause injury or death.⁶⁴ Accordingly, a tortfeasor who is found guilty of wanton misconduct cannot be deprived of a right to contribution on the ground that he or she has "intentionally caused or intentionally contributed to the injury or wrongful death" of the claimant. This raises another question: a finding of wanton misconduct may also carry with it an award of punitive damages.⁶⁵ The Act does not distinguish between punitive damages and compensatory damages; it merely speaks of "liability." In its broadest sense, "liability" could include liability for punitive damages. But since punitive damages are intended as punishment for reprehensible conduct,⁶⁶ it would be inconsistent with the concept of punishment to permit the wanton tortfeasor to "lay off" part of his or her punishment on another by way of contribution. Therefore, the better interpretation is that contribution extends to compensatory damages only, and does not include punitive damages. It follows then, that the term "liability" as used in the Act means liability for compensatory damages.

⁶² Red Star Yeast & Prod. Co. v. Engel, 21 Ohio L. Abs. 537, 542 (Ct. App. 1935):

It thus appears from the latest decision of the Supreme Court that the terms "wilful tort" and "wanton negligence" are not synonymous, but that they are antagonistic in meaning, one implying a design or purpose and the other the absence of such design and the failure to exercise any care.

⁶³ Roszman v. Sammett, 26 Ohio St. 2d 94, 97, 269 N.E.2d 420, 422-23 (1971).

⁶⁴ Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 575, 200 N.E. 843, 847 (1936) quoting 20 RULING CASE LAW, Negligence § 15 (1918):

[T]o constitute wanton negligence, the party doing the act or failing to act must be conscious, of his conduct, and, *though having no intent to injure*, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.

(Emphasis added.) See Tighe v. Diamond, 149 Ohio St. 520, 80 N.E.2d 122 (1948).

⁶⁵ Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 572, 200 N.E. 843, 845 (1936):

That is not the only "wallop" that the little word "wanton" carries with it. It permits, in addition to compensatory damages, the assessment of punitive damages — damages by way of punishment, if you please . . .

⁶⁶ *Id.*

Wilful misconduct, on the other hand, imports a more positive mental condition prompting an act than does the term wanton misconduct. Wilful misconduct implies an intentional deviation from a clear and accepted standard of conduct. The phrase implies intent, but the intention relates to the misconduct and not merely to the fact that the act was intentionally done. While wilful misconduct encompasses wilful torts, or intent to cause injury, an actual intent to injure is not necessary to a showing of wilful misconduct.⁶⁷ Thus, if we are correct in concluding that the right of contribution will not be defeated unless a specific intent to cause injury or death is shown, a mere finding that a tortfeasor is guilty of wilful misconduct will not preclude contribution because such a finding does not necessarily import the requisite specific intent. It may, but it need not; and because it need not, something more in the way of proof will be required. Accordingly, when the wilful misconduct of one or more of the tortfeasors is at issue, the jury's answers to interrogatories, or the court's findings of fact become all-important.⁶⁸

In sum, then, a tortfeasor's right to contribution will not be defeated under this exception unless the tortfeasor is liable for a wilful tort, since only a wilful tort involves design, purpose, or intent to injure.⁶⁹ The term wilful tort is not synonymous with wanton misconduct or wilful misconduct; wanton misconduct never amounts to a wilful tort, and wilful misconduct will not, unless a specific design, purpose, or intent to injure accompanies the wilful misconduct.⁷⁰

The second direct exception from contribution, as stated in the Act, excludes "breaches of trust or of other fiduciary obligations."⁷¹ The conjunction of the word "trust" with the phrase "or of other fiduciary obligations" indicates that the word is to be understood in its broadest sense rather than in the narrow, technical meaning of an express trust. Thus, it would not only comprehend a breach of an express trust, but also a breach of a resulting trust or a constructive trust. Indeed, until we are told otherwise by an authoritative decision, we may assume that this exception is intended to reach every relationship which a court of equity would consider to be fiduciary in nature; that is, it is intended to reach every relationship in which one person reposes trust and confidence in the integrity and fidelity of another. At the very least, the word "fiduciary" is intended to include those persons who qualify as fiduciaries under any particular statutory definition of that word.⁷²

⁶⁷ *Tighe v. Diamond*, 149 Ohio St. 520, 526-27, 80 N.E.2d 122, 127 (1948).

⁶⁸ OHIO REV. CODE ANN. § 2307.32(E) (Page Legis. Bull. 389 (1976)) provides that: [V]alid answers to interrogatories by a jury or findings by a court sitting without a jury in determining the liability of the several defendants for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

⁶⁹ *Tighe v. Diamond*, 149 Ohio St. 520, 525, 80 N.E.2d 122, 126 (1948); *Denzler v. Terpstra*, 129 Ohio St. 1, 193 N.E. 647 (1934); *Reserve Trucking Co. v. Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934).

⁷⁰ *Tighe v. Diamond*, 149 Ohio St. 520, 525, 80 N.E.2d 122, 126 (1948).

⁷¹ OHIO REV. CODE ANN. § 2307.31(E) (Page Legis. Bull. 389 (1976)).

⁷² *Id.* §§ 1339.01(A), 1339.03(B) (Page 1969); *id.* § 2109.01 (Page 1972).

The previous discussion of *Travelers Indemnity Co. v. Trowbridge*⁷³ touched upon the indirect exception — indemnity.⁷⁴ But when does a tortfeasor have a right of indemnity under “existing law?” If the phrase contemplates existing statutory law, in this connection, several sections of the Ohio Revised Code come immediately to mind.⁷⁵ One, in particular, can be of major importance. In very broad terms, this provision waives the sovereign immunity of hospitals owned or operated by political subdivisions of the State of Ohio, and authorizes the governing board of each such hospital to indemnify or agree to indemnify and hold harmless any of the hospital’s agents, employees, nurses, interns, residents, staff, and members of the governing board and committees for any liability they may incur for the death, disease, or injury of any person caused by their negligence, malpractice, or other action or inaction while they were acting within the scope of their duties for the hospital.⁷⁶ Since the sovereign immunity of the hospital has been waived, since the liability of the agent is tortious in nature, and since his or her liability must arise out of tortious acts performed within the scope of his or her duties for the hospital, it may be assumed that the hospital itself would be liable in tort under the doctrine of *respondeat superior*. Since the indemnity arises out of the joint or several liability in tort of the hospital and its agent for the same injury to the person or for the same wrongful death, the basic requisites for contribution are also satisfied. This would appear to be a situation when indemnity is provided for “under existing law.”

However, this alone does not necessarily preclude contribution under the Act. For section 2307.31(D) to be applicable there must be a *right* of indemnity “under existing law.” This statutory enactment does not of itself confer upon the hospital’s agent any right to indemnity; it merely provides that the hospital, through its governing board, may indemnify, or may agree to indemnify the hospital’s agents, employees, nurses, etc. if the governing board considers it appropriate to do so. In other words, the statute permits the governing board of the hospital, in the exercise of its sound discretion, to: grant indemnity on an *ad hoc* basis after liability has been incurred by the agent; agree to indemnify the agent after liability has been incurred; or enter into an agreement for indemnity with its agents before liability is incurred. If indemnity is granted on an *ad hoc*

⁷³ 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975). See text accompanying notes 29-35 *supra*.

⁷⁴ OHIO REV. CODE ANN. § 2307.31(D) (Page Legis. Bull. 389 (1976)) which provides: This section 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. . . .

⁷⁵ The first provides a surety with a right of action for indemnity against his or her principal under certain conditions. *Id.* § 1341.20 (Page 1969). However, since the principal’s liability to the surety arises out of the contractual relationship between them, and not out of their joint or several liability in tort to the claimant-creditor, this provision has no particular relevance here. The second and third have to do with indemnity in conjunction with letters of credit. *Id.* §§ 1305.12, 1305.16. Again, the right to indemnity does not arise out of joint or several liability in tort, so these provisions are not pertinent.

⁷⁶ *Id.* § 2743.02 (Page Supp. 1975).

basis after liability has been incurred, it is granted as a matter of grace rather than as a matter of right; if it is granted pursuant to agreement either before or after liability has been incurred, there is a right to indemnity, but this is a right arising out of a contractual agreement made pursuant to the statute rather than out of the statute itself. These considerations provoke two questions: (1) what effect does gracious indemnity have on the right to contribution, and (2) what effect does a contractual right to indemnity have on contribution? In answering both questions, it is assumed that in the absence of indemnity there would be a right to contribution under the Act.

The answer to the first question is suggested by the second sentence of section 2307.31(D): "Where one tortfeasor is *entitled* to indemnity from another, the *right* of the indemnity obligee is for indemnity and not contribution, . . ." ⁷⁷ Where indemnity is granted as a matter of grace, the hospital's tortfeasoring agent has neither a right nor an entitlement to indemnity. ⁷⁸ Thus, until the indemnity is actually paid by the hospital, the agent has a right to contribution. Once indemnity has been paid, it would seem that the right to contribution ceases to exist, not because of any right to indemnity, but because the claim for contribution has been satisfied by the payment of indemnity. The right to contribution is governed by the principles of equity, ⁷⁹ and equity will not permit the recovery of both indemnity and contribution.

The second question actually goes beyond the situation involving the hospital and its agents. Any number of agreements contain provisions whereby one party agrees to indemnify the other for certain types of liability. For the sake of convenience, we may call these provisions "express contracts of indemnity." The precise scope and thrust of each such contract will depend upon the language used and the rigidity with which a court will apply the principle that such contracts are to be narrowly construed. ⁸⁰ For our purposes, we shall assume a valid express contract of indemnity in which one tortfeasor jointly or severally liable for an injury or wrongful death agrees to indemnify another tortfeasor for that other tortfeasor's joint or several liability for the same injury or wrongful death. Thus, we have a right of indemnity arising out of an express contract, and the second question becomes: Does the phrase "existing law" include the law of contracts?

Again, the answer is suggested by the second sentence of the section: "Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, . . ." ⁸¹

⁷⁷ *Id.* § 2307.31(D) (Page Legis. Bull. 389 (1976)) (emphasis added).

⁷⁸ Of course, the equitable principle of estoppel may give the hospital's agent a right to indemnity if he or she forbears to exercise the right to contribution on the hospital's gratuitous promise to pay indemnity, but that is a matter that is not directly relevant to the meaning of the indemnity exception in the Act.

⁷⁹ As it is said in OHIO REV. CODE ANN. § 2307.31(F) (Page Legis. Bull. 389 (1976)), "principles of equity applicable to contribution generally shall apply."

⁸⁰ *George H. Dingley Lumber Co. v. Erie R.R. Co.*, 102 Ohio St. 236, 131 N.E. 723 (1921).

⁸¹ OHIO REV. CODE ANN. § 2307.31(D) (Page Legis. Bull. 389 (1976)).

The thrust of this clause is to the effect that a legally recognized right or entitlement to indemnity will not be defeated by the statutorily created right of contribution. Whether the right or entitlement gains its legal cognizance from the statutory law or the law of contracts appears insignificant. In other words, the phrase "existing law" should be given a broad, rather than a narrow, construction embracing all legally recognized rights of indemnity.

Accordingly, section 2307.31(D) should also extend to rights or entitlements to indemnity under the common law — that is, rights or entitlements to indemnity created by judicial decision rather than by statute or by express contract.⁸² Generally, the common law recognizes three situations in which one tortfeasor who has satisfied his or her liability to the claimant has a right to seek indemnity from another tortfeasor.⁸³

(1) When one person is held vicariously liable to the claimant for the tortious acts of another solely because of the relationship between them, the one vicariously liable may seek indemnity from the one whose active wrong gave rise to that liability. The master-servant relationship is a good example of this situation. When a master is thus held liable to the claimant on the basis of *respondeat superior*, he or she may seek indemnity from the servant.

(2) When two truly concurrent tortfeasors share a common duty toward the injured party, or combine in some form to achieve a common purpose affecting the injured party, the tortfeasor who did not participate

⁸² One might quarrel with the characterization of this right to indemnity as a common law right, since it is said that this right arises out of an implied contract of indemnity. See, e.g., paragraph 2 of the syllabus of *Maryland Cas. Co. v. Frederick Co.*, 142 Ohio St. 605, 53 N.E.2d 795 (1944):

Where judgment in a tort action is had against a party only secondarily or vicariously liable for the violation of a common duty owed by two persons, upon the payment of such judgment and necessary expenses by such party, there arises an implied contract of indemnity in favor of the party secondarily liable against the person (or persons) primarily liable.

However, it is also said that the right to indemnity arises out of legal (as opposed to conventional) subrogation. As paragraph 1 of the syllabus of *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940), states:

When, under the doctrine of *respondeat superior*, a master becomes liable in damages for personal injuries caused solely by the negligent act of his servant, the latter is primarily liable and the former secondarily liable to the injured party; and if the master is obliged to respond in damages by reason of such liability, he will be subrogated to the right of the injured party and may recover his loss from the servant, the one primarily liable.

See also *Hillyer v. City of East Cleveland*, 155 Ohio St. 552, 99 N.E.2d 772 (1951); *Herron v. City of Youngstown*, 136 Ohio St. 190, 24 N.E.2d 708 (1940), which are similar on their facts to the *Maryland Casualty Co.* case.

Since it is not our purpose here to attempt to rationalize the two theories or to determine when one applies, and when the other, it is convenient to group them both under the heading of common law theories of indemnity. In the final analysis, it does not matter which theory is the better of the two, since both the contract implied in law and legal subrogation are governed by the same equitable principles of restitution and unjust enrichment. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 222 (1973); R. HORN, *SUBROGATION IN INSURANCE THEORY AND PRACTICE* 24 (1964).

⁸³ The first two situations, and the various factual permutations which arise thereunder, are discussed in some detail in *Cochran v. B. & O. R.R.*, 41 Ohio App. 2d 186, 324 N.E.2d 759 (1974). To date, the sole authority for the third situation appears to be *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975).

in the act or omission causing the injury, or whose participation is indirect, implied, or remote, is only secondarily liable to the injured party, and may seek indemnity from the other tortfeasor who is primarily liable. This relationship between concurrent tortfeasors is most commonly described as primary and secondary, or active and passive.

(3) When the first of two successive tortfeasors is liable in tort for the intervening tortious acts of the second tortfeasor because those intervening acts were set in motion by the negligence of the first tortfeasor, the first tortfeasor may seek indemnity from the second tortfeasor for the subsequent injury. At the present time, case authority supports this right to indemnity only when the second tortfeasor is a physician who, in treating the first injury caused by the original tortfeasor negligently causes a new injury or aggravates the existing injury.⁸⁴ In principle, however, it is capable of extension to other like fact situations.

When one tortfeasor severally liable for injury or wrongful death has a right, under any one of these three common law situations, to seek indemnity from another tortfeasor severally liable for the same injury or wrongful death, the "right of the indemnity obligee is for indemnity and not contribution."⁸⁵

Particularly in connection with the "primary and secondary" situation, Ohio Revised Code section 2305.31 presents a problem. In substance, that statute prohibits express contracts of indemnity in connection with, or collateral to, construction contracts.⁸⁶ However, while it declares void as against public policy those express contracts which purport to indemnify for bodily injury to persons or damage to property, it says nothing about wrongful death unless it can be said that wrongful death is subsumed in the phrase "damages arising out of bodily injury." Further, the precise scope of the prohibition contained in the statute is not entirely clear from the language used, but the principal thrust of section 2305.31 appears to be the indemnitee's liability for bodily injury or property damage caused by negligence during construction. Broadly speaking, the indemnitee's liability may be one of three types. First, there may be liability for the indemnitee's own negligence which causes the bodily injury or property damage. There may be liability for negligently caused bodily injury or property damage which the indemnitee

⁸⁴ *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975).

⁸⁵ OHIO REV. CODE ANN. § 2307.31(D) (Page Legis. Bull. 389 (1976)).

⁸⁶ *Id.* § 2305.31 (Page Supp. 1975) reads:

A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

shares, either jointly or severally, with the indemnitor.⁸⁷ And thirdly, vicarious liability for bodily injury or property damage negligently caused by the indemnitor, which is imposed upon the indemnitee because of the indemnitee's legal relationship with the indemnitor.⁸⁸

The preferable reading of the statute would have it apply only to the first type of liability — that is, express contracts of indemnity which purport to indemnify the indemnitee for any liability arising solely out of the indemnitee's own negligence or other wrong are void as against public policy. The statute may be read, however, to extend its prohibition to the second type of liability as well, and with some strain, it can also be made to apply to the third type of liability. For our purpose here we shall assume that it at least extends to both the first and second types of liability.

Now, let us suppose that a subcontractor expressly contracts to indemnify the contractor for any and all liability for negligently caused bodily injury or property damage occurring during the construction of a building. Through the concurrent negligence of each, a third person not employed by either is injured. In the event, the subcontractor-indemnitor is primarily liable while the contractor indemnitee is only secondarily liable, the contractor-indemnitee has no claim for indemnity under the express contract since that contract is void as against public policy. Would he have a claim for indemnity under the second common law situation described above?

Probably not. The theory is that common law indemnity arises out of either a contract implied in law or legal subrogation. The law will scarcely imply a contract when an express contract covering the same matter would be void as against public policy; and, since "equity follows the law," equity will scarcely assign a claim under the doctrine of subrogation where public policy would prohibit an express assignment. Therefore, it may be concluded that there is no common law right to indemnity where there cannot be an express contract for indemnity.

But how does this affect contribution? The equitable principles of restitution and unjust enrichment which underlie and justify indemnity are essentially the same as those which underlie contribution.⁸⁹ In-

⁸⁷ In this situation, the indemnitee and the indemnitor may be coequally negligent, or one may be primarily and the other secondarily negligent.

⁸⁸ For example, the liability of an employer under the doctrine of *respondeat superior* for the acts of an employee or an independent contractor.

⁸⁹ In *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St. 2d 11, 13-14, 321 N.E.2d 787, 789 (1975) the court said:

Although the two forms of reimbursement are similar, there is a distinct difference. Contribution, when it exists, is the right of a person who has been compelled to pay what another should pay in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice. Indemnity, on the other hand, arises from contract, express or implied, and is a right of a person who has been compelled to pay what another should pay in full to require complete reimbursement.

(Citations omitted.) At first blush this quotation may appear to refute the statement made in the text, but this is not really so, for it begs the question. It fails to examine the nature of the implied contract which requires indemnity. Motivated by the same principles of equity and natural justice, the law implies a contract of indemnity.

demnity and contribution are identical in quality, if not in quantity; indeed, quantity is the principal difference between them.⁹⁰ Thus, it would seem that if it is contrary to public policy to imply a contract of indemnity or to permit subrogation, it would also be contrary to public policy to permit contribution. On the other hand, both section 2307.31 and section 2305.31 are statutory expressions of the public policy of the State of Ohio. Since the statute providing for contribution is more recent, and since it does not prohibit contribution in the situation covered by section 2305.31, it can be argued that in such a situation contribution is not contrary to public policy. Such a result is not necessarily inconsistent in law.⁹¹ Of course, if the courts limit the prohibition found in section 2305.31 to those situations in which the indemnitee is seeking indemnity for his or her own negligence, the problem is resolved, since such a situation will justify neither subrogation, an implied contract of indemnity, nor a right to contribution under section 2307.31.

In any event, indemnity is only an indirect exception to the right of contribution because it precludes the exercise of that right only in practice, and not in theory. The whole thrust of section 2307.31(D) is to the effect that the new statutory right to contribution does not impair an existing right to indemnity. Thus, if a tortfeasor has a right to indemnity "under existing law," and a right to contribution under the terms of the Act, he or she may choose between them, and exercise either right, but not both. As a practical matter, of course, the tortfeasor will choose indemnity since that will normally bring the greater monetary return.⁹² Accordingly, the right to indemnity — as a practical matter — indirectly precludes the exercise of the right to contribution.

In one sense, however, indemnity absolutely precludes the exercise of the right of contribution. As it is noted in the last clause of section 2307.31(D):

[T]he indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.⁹³

This presupposes that the two tortfeasors have rights to contribution against each other depending upon which of them satisfies the total liability to the claimant, and that the tortfeasor who has satisfied that liability, the indemnitee, has a valid claim for indemnity against the other, the indemnitor. When such a claim is made, the indemnitor cannot offset against it that amount which would be his or hers under

⁹⁰ *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975). Contribution provides for only partial reimbursement, while indemnity allows for total reimbursement. Therefore, the difference is one of quantity rather than quality.

⁹¹ As Oliver Wendell Holmes, Jr., once said:

It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: It has been experience. . . . The truth is, that the law is always approaching, and never reaching consistency. . . . It will become entirely consistent only when it ceases to grow.

O. HOLMES, JR., *THE COMMON LAW* 36 (1881).

⁹² *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St. 2d 11, 13-14, 321 N.E.2d 787, 788 (1975).

⁹³ OHIO REV. CODE ANN. § 2307.31(D) (*Page Legis. Bull.* 389 (1976)).

the right of contribution. In other words, in such a situation, the tortfeasor-indemnitor is going to wind up paying to the tortfeasor-indemnitee more than the tortfeasor-indemnitor's proportionate share of the total liability and, because the Act "does not impair any right of indemnity," he or she will not be able to recoup by way of contribution the amount paid in excess of his or her proportionate share.

D. *Payment by the Tortfeasor Seeking Contribution*

The next essential element of the right of contribution is that payment must have been made to the claimant by the tortfeasor seeking contribution. The right to contribution does not arise until payment has been made by the tortfeasor of "more than his proportionate share of the common liability."⁹⁴ This does not mean that the tortfeasor may not seek contribution from other tortfeasors until after he or she has made payment to the claimant. It merely means that he or she has no right to receive contribution until that payment has been made. Procedural devices exist which permit the acceleration of a judicial determination as to the right of contribution. The cross-claim⁹⁵ and the third party claim⁹⁶ are two such devices which permit one tortfeasor to seek a judicial declaration of the right to contribution from another tortfeasor before he or she has actually made payment to the claimant.

Of course, the tortfeasor need not make the payment personally; any person having an obligation to do so may make the payment on the tortfeasor's behalf.⁹⁷ In the vast majority of cases, the person so making payment on behalf of the tortfeasor will be that tortfeasor's liability carrier, but it need not be. The language of the Act⁹⁸ is broad enough to encompass any person who has an obligation to make payment for the tortfeasor. When a liability carrier makes payment, its obligation to do so can almost be assumed, since insurance companies are noticeably loathe to make payments that are not required of them; but when the person is someone other than a liability carrier, his or her obligation to make payment will become a matter of importance demanding inquiry by any other tortfeasor who may be subject to a claim for contribution. A person who makes payment on behalf of a tortfeasor under obligation will be subrogated to the tortfeasor's⁹⁹ right of contribution if that per-

⁹⁴ *Id.* § 2307.31(A).

⁹⁵ OHIO R. Civ. P. 13(G).

⁹⁶ *Id.* 14(A).

⁹⁷ This is a necessary inference from the language of OHIO REV. CODE ANN. § 2307.31(C) (Page Legis. Bull. 389 (1976)).

⁹⁸ *Id.* § 2307.31(C) speaks mostly of an insurance carrier's right of subrogation, but the section closes with the sentence: "This provision does not limit or impair any right of subrogation arising from any other relationship." From this it may reasonably be inferred that obligatory payments made on behalf of the tortfeasor by someone other than an insurer will also give rise to subrogation if the law otherwise requires it.

⁹⁹ This is actually the result of a double subrogation. To the extent that a tortfeasor pays more than his or her proportionate share of the liability to the claimant, he or she has paid on behalf of the other tortfeasor. To that extent, the paying tortfeasor is subrogated to the claimant's claim against the non-paying tortfeasor. But since, in this situation, it is the paying tortfeasor's liability insurer that is actually making the payment to

son thereby: (1) discharges the tortfeasor's liability to the claimant in full or in part, (2) discharges in full its obligation to the tortfeasor, and (3) pays to the claimant more than the tortfeasor's proportionate share of the common liability.¹⁰⁰ It should be noted, however, that one who makes payment on behalf of the tortfeasor without any obligation to do so is a mere volunteer with no right of subrogation,¹⁰¹ and consequently, no right to contribution. Voluntary payment is, therefore, an affirmative defense to a claim for contribution by one other than the tortfeasor who has made payment to the claimant and is seeking contribution from another tortfeasor.

E. *Calculation of the Amount of Contribution*

Section 2307.31(A) juxtaposes two principles with respect to the payment of contribution. The first limits the amount of contribution which the paying tortfeasor may seek to that amount which he or she has paid in excess of his or her proportionate share of the common liability.¹⁰² The complimentary principle is that the non-paying tortfeasor is only required to pay by way of contribution to the paying tortfeasor his or her proportionate share of the common liability.¹⁰³

Thus, for example, if there are three tortfeasors who are all equally at fault for the injury to the claimant, the proportionate share of each is one-third. If the total amount of the common liability is \$33,000, each is theoretically liable for \$11,000. Should one of the three pay the full \$33,000, he or she is entitled to seek \$22,000 from the other two, but neither of the other two need pay more than \$11,000 — his or her proportionate share of the whole. Accordingly, if the paying tortfeasor wishes to obtain full reimbursement for the \$22,000 which he or she has paid in excess of his or her proportionate share, contribution must be sought from both of the non-paying tortfeasors.

Central to both of these principles limiting contribution is the concept of "proportionate share." How is the proportionate share of each tortfeasor to be determined? Overall, the principles of equity applicable

the claimant, the liability insurer becomes subrogated to the claim which the tortfeasor obtained by subrogation from the claimant. Thus, in the final analysis, the "tortfeasor's right of contribution" to which the insurance company has become subrogated is actually the claimant's claim; a claim which has passed to the insurance company by means of double subrogation.

¹⁰⁰ As OHIO REV. CODE ANN. § 2307.31(C) (Page Legis. Bull. 389 (1976)) provides in part:

A liability insurer which 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 proportionate share of the common liability.

¹⁰¹ 50 OHIO JUR. 2d *Subrogation* § 10 (1961).

¹⁰² OHIO REV. CODE ANN. § 2307.31(A) (Page Legis. Bull. 389 (1976)) provides:

The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of the common liability, and his total recovery is limited to the amount paid by him in excess of his proportionate share.

¹⁰³ *Id.*

No tortfeasor is compelled to make contribution beyond his own proportionate share of the entire liability.

to contribution generally will apply,¹⁰⁴ except as otherwise provided in the Act itself.¹⁰⁵ As a general proposition, equity follows the maxim that "equality is equity," and holds that each tortfeasor must bear an equal share of the common liability. Thus, if there are two tortfeasors, the proportionate share of each is one-half; if there are three, the proportionate share of each is one-third, etc. This approach may be described as the "principle of equal fault." A majority of states allowing contribution take this approach,¹⁰⁶ as does the Uniform Contribution Among Tortfeasors Act.¹⁰⁷ The Ohio Act, however, rejects this approach, and substitutes the "principle of comparative fault" for the "principle of equal fault."¹⁰⁸

In theory, the principle of comparative fault will produce a more equitable result than will the principle of equal fault. In practice, however, this equity is apt to get lost in the difficulties of proof and in the shuffle of guesswork in which the trier of fact must necessarily indulge.

The difference between the two approaches can be illustrated by some reflections on the problem of proof. Suppose that two tortfeasors share a common liability to a claimant in the amount of \$10,000, and that one of them has paid the claimant the full \$10,000. Broadly speaking, under the principle of equal fault the paying tortfeasor seeking contribution from the non-paying tortfeasor need only prove the common liability and his or her payment of that liability. The presumption of equal shares would then arise and the proportionate share of each would be determined by dividing the amount of damages paid by the number of tortfeasors. Thus, the principle of equal fault automatically determines that the share of each tortfeasor is \$5,000; that the paying tortfeasor has paid \$5,000 more than his or her proportionate share; and that the non-paying tortfeasor is liable in contribution to the paying tortfeasor in the amount of \$5,000.

But no such presumption will arise under the principle of comparative fault as found in the Ohio Act. This simple calculation will not be available. Rather, it would seem that the paying Ohio tortfeasor must prove the common liability, payment of that liability, his or her own percentage of fault, and the percentage of fault attributable to the non-paying tortfeasor. In short, the tortfeasor seeking contribution will be required to resort to those techniques of proof that have been developed in states which have replaced contributory negligence with comparative negligence; techniques which are far from scientific or fool-

¹⁰⁴ *Id.* § 2307.31(F).

¹⁰⁵ *Id.* § 2307.31(A).

¹⁰⁶ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 50 (4th ed. 1971).

¹⁰⁷ Uniform Contribution Among Tortfeasors Act, 12 *UNIFORM LAWS ANNOTATED* 87 (1975) states:

In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered.

¹⁰⁸ OHIO REV. CODE ANN. § 2307.31(F) (Page Legis. Bull. 389 (1976)) provides in part: in determining the proportionate shares of tortfeasors in the entire liability their relative degrees of fault shall be considered.

proof.¹⁰⁹ Further, should all of the tortfeasors be joined as defendants in the claimant's action, each will seek to take advantage of the jury's answers to interrogatories since such answers will be binding for purposes of contribution.¹¹⁰ Accordingly, in any given case, the issues to be determined by the jury may include the contributory negligence of the claimant as between the claimant and the defendants, and the comparative negligence of the defendants as between themselves. The jury will have to be instructed on the application of both of these complex doctrines. That should keep the appellate courts busy!

To compound the confusion, not every tortfeasor liable in contribution will have a full share of the common liability. Since section 2307.31(F) provides that when a group is collectively liable the group as a whole is responsible for their share, in certain cases, some tortfeasors will be liable for only a proportionate share of a share.¹¹¹ For example, a claimant is injured in the amount of \$15,000 through the concurrent negligence of a motorist and a truck driver acting in the course and scope of his employment. The claimant sues the motorist, the truck driver, and the truck driver's employer obtaining several judgments against each. The motorist pays the full \$15,000, and seeks contribution from the truck driver and the truck driver's employer. If we suppose that the motorist and the truck driver were equally at fault, the motorist would argue that his proportionate share is one-third, or \$5,000, and that he is entitled to contribution in the amount of \$10,000 from the truck driver and the truck driver's employer, with each being liable in contribution for \$5,000, or one-third of the common liability.

But in this situation, there are only two tortfeasors, not three; the liability of the truck driver's employer is not real liability, but liability imposed by operation of law. The truck driver's employer is not a real tortfeasor in the sense of being guilty of some act of omission or commission which caused the claimant's injury. Accordingly, the truck driver's employer should not be made to bear a separate share, for if he must, the motorist would bear less than his true share of the common liability, and would have to pay only \$5,000 rather than the \$7,500 which he should pay.

In the case of *Martindale v. Griffin* with facts similar to those of

¹⁰⁹ See C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (1971); L. LAUFENBERG, *COMPARATIVE NEGLIGENCE PRIMER* (1975); V. SCHWARTZ *COMPARATIVE NEGLIGENCE* (1974).

¹¹⁰ AS it is said in OHIO REV. CODE ANN. § 2307.32(E) (Page Legis. Bull. 389 (1976)): Valid answers to interrogatories by a jury or findings by a court sitting without a jury in determining the liability of the several defendants for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

¹¹¹ *Id.* § 2307.31(F). UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 87, Comment (1975) states:

This section . . . invokes the rule of equity which requires class liability arising from vicarious relationships to be treated as a single share. For instance, the liability of a master and servant for the wrong of the servant should in fairness be treated as a single share. Other examples are those situations involving co-owners of property, members of an unincorporated association, those engaged in a joint enterprise and the like; where the problem is the allocation of liability between such a group on the one hand and a tortfeasor having no connection with the group.

the above example, the court distinguished between one who was "a direct participator in the wrong, and one who is liable only because he is responsible for the acts of one of said participators."¹¹² That court held that there were really only two, not three, joint tortfeasors.

Therefore, in situations such as this, where the liability of one tortfeasor is purely vicarious, that tortfeasor will not be made to bear a separate share of the common liability; rather, he or she will be grouped with the tortfeasor whose active wrong gave rise to the vicarious liability, and the two will bear a single separate share of the common liability as a group. Accordingly, in our example, there are but two shares in the common liability rather than three; the share of the motorist and the share of the group consisting of the truck driver and the truck driver's employer. Since we stipulated that the motorist and the truck driver were equally at fault, each share will be one-half of the whole, and the motorist will be entitled to contribution in the amount of \$7,500 rather than in the amount of \$10,000.

Under a comparative fault system, the application of this policy of group shares gives rise to some difficult questions: How is the group's share determined? What is the share of each member of the group? Is there any need for the policy of group shares? The answer to each question depends upon how vicarious liability will be treated under the principle of comparative fault.

First, how is the group's share determined? Under the principle of equal fault, the calculation is simple. The group is treated as a single tortfeasor, and the total common liability is divided by the total number of tortfeasors. Thus, in our previous example, the common liability was \$15,000, and there were two tortfeasors, the individual motorist and the "group" consisting of the truck driver and the truck driver's employer. The group share is determined by dividing \$15,000 by 2, which equals \$7,500, or one-half of the common liability. But that calculation will not apply under the principle of comparative fault unless it is proven that the group and all the individual tortfeasors are equally at fault. Under the principle of comparative fault, the liability of one of the members of the group must be selected as the standard by which the group's share of liability is measured. But which member? The answer is dictated by the principle which underlies the policy of group shares. Upon analysis, it becomes apparent that the underlying principle is the principle of comparative fault; and, accordingly, equity compares the fault of the tortfeasor vicariously liable with that of the other tortfeasors, and finds his or her fault to be zero percent. Therefore, for purposes of contribution, it groups that tortfeasor with the active tortfeasor whose wrong gave rise to the vicarious liability to produce a single share rather than two shares. It follows, therefore, that the group's share is to be measured by the fault of the active tortfeasor, and the fault of the vicarious tortfeasor — which is zero percent — is ignored.

¹¹² 233 App. Div. 510, 513-34, 253 N.Y.S. 578, 581 (1931), *aff'd*, 259 N.Y. 530, 182 N.E. 167 (1932). See *Wold v. Grozalsky*, 277 N.Y. 364, 14 N.E.2d 437 (1938).

Secondly, what is the share of each member of the group? The individual tortfeasor seeking contribution from the group need not go against all the members of the group; he or she may, albeit unwisely, select one member of the group and seek contribution from only that member. In such a case, what is that member's share of the group liability? The Commissioners' Comment to the Uniform Contribution Among Tortfeasors Act suggests that where the principle of equal fault prevails, each member's share is determined by dividing the total of the group's share by the number of members in the group.¹¹³ In our example, the group's share was \$7,500, and there were two members in the group. Accordingly, the share of each member would be \$3,750 — one half of the group's liability, and one-fourth of the total common liability of \$15,000. But this calculation is inconsistent with the principle of comparative fault. Since the principle of comparative fault would treat the vicariously liable tortfeasor's liability as zero for the purpose of creating the group, it should also treat it as zero for the purpose of determining his or her share of the group's share of liability. Therefore, as between the group, the truck driver's share of the group liability should be 100 percent and the employer's share of the group's liability should be zero percent. The same should be true as between the motorist and the employer; under the principle of comparative fault, the employer would owe nothing by way of contribution to the motorist, but the truck driver would owe one-half of the common liability, or \$7,500.

This result quite logically gives rise to the third question. Where the principle of comparative fault controls rather than the principle of equal fault, is there any need for the policy of group shares? If we are correct in concluding that the principle of comparative fault underlies the policy of group shares, and if we are also correct in concluding that that principle will give purely vicarious fault a value of zero, then the answer is clearly in the negative. There is no need to do indirectly that which can be accomplished directly. The policy of group shares is a necessary equitable balance to the principle of equal fault, but it serves no useful function when comparative fault is applicable, since this latter principle does directly what the policy of group shares accomplishes indirectly. Accordingly, for all practical purposes, that portion of section 2307.31(F) which enunciates the policy of group shares is mere surplusage.

¹¹³ UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 87, Comment (1975):

It [the Section of the Uniform Act which authorizes the policy of group shares] adopts the equitable principle involved in the case of *Wold v. Grozalsky*, 277 N.W. [sic] 364, 14 N.E.2d 437 (1938), where the plaintiff was injured by the collapse of a party wall between two buildings. One building was owned by A, the other jointly by B and C. It was held that B and C were liable each for only one-fourth of the entire liability, rather than one-third.

Actually, the case does not hold that at all; it holds that B and C are to be treated as a group, and as a group they are liable for only one-half of the entire liability rather than two-thirds. The conclusion that each member of the group is liable for one-fourth is an interpolation which, of necessity, must depend on the application of the principle of equal liability.

III. PROCEDURES FOR OBTAINING CONTRIBUTION

The above discussion has covered a good many of the substantive problems which will arise from the application of the Act, and we are now in a position to discuss the procedure for obtaining contribution. Before we do so, however, it might be well to create a scenario and a cast of characters which may be used to illustrate the various procedural options. Accordingly, let us suppose that Cassandra Claimant is riding as a passenger in an automobile operated by Connie Contributor, and that Tommy Tortfeasor is operating his automobile on a converging course with that of Contributor. Through the concurrent negligence of Contributor and Tortfeasor, the two automobiles attempt to defy the fundamental law that two bodies cannot occupy the same space at the same time. In short, the two automobiles collide, and Claimant is injured in the collision. Claimant is herself free of any contributory negligence or assumption of risk; that is, she has a "clean" case against both Contributor and Tortfeasor.¹¹⁴ Let us further suppose that Claimant is entitled to \$30,000 in compensatory damages for her injury and other loss, and that Contributor and Tortfeasor were equally negligent in causing the collision. Theoretically, then, the proportionate share of the common liability which each must bear is 50%, or \$15,000. Either by settlement or satisfaction of judgment, Tortfeasor will pay the full \$30,000, and will then seek contribution from Contributor. The procedures Tortfeasor uses to seek contribution will depend upon the circumstances; and, particularly, it will depend upon the actions of Claimant.

A. Settlement before Suit

If it can do so to advantage, Tortfeasor's insurance company will prefer to settle Claimant's claim before Claimant falls into the hands of an attorney and brings suit against Tortfeasor. If settlement is achieved, either before suit is commenced or judgment rendered, will it defeat Tortfeasor's right to contribution?

In principle, it will not, but there are some pitfalls which must be guarded against. First of all, it is clear from various provisions in the Act that a judgment against Tortfeasor is not a prerequisite of his seeking contribution.¹¹⁵ But there is nothing in the Act from which it may

¹¹⁴ It must be remembered that the Ohio guest statute, OHIO REV. CODE ANN. § 4515.02 (Page 1973) has been declared unconstitutional. *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

¹¹⁵ See OHIO REV. CODE ANN. § 2307.31(A) (Page Legis. Bull. 389 (1976)) which states: [T]here is a right of contribution among them [the tortfeasors] even though judgment has not been recovered against all or any of them.
Id. § 2307.31(C):

Whether or not judgment has been entered in an action . . . contribution may be enforced by separate action.

The placement of section 2307.31(C) in the Ohio Act is interesting. The Ohio Act is divided into two sections of the Code, sections 2307.31 and 2307.32. Section 2307.31 is substantive in nature, while section 2307.32 is procedural. Section 2307.31(C) is purely procedural, since it specifies one of the methods by which contribution may be obtained, yet it is found in the substantive section of the Act. Why this should be is unclear. In

be as clearly inferred that the commencement of suit by the claimant is not a prerequisite, and it can be argued that the reference to judgment in the statute presupposes the commencement of an action, since there cannot be a judgment in the absence of an action. Indeed, if we were to look at section 2307.31(G) alone, we would be forced to the conclusion that commencement of suit was necessary, since that section provides for contribution "[w]hether or not judgment has been entered in an action."

However, according to the Commissioners' Comment, it may be concluded that the commencement of an action is not required.¹¹⁶ Therefore, the only essential prerequisite to payment by way of settlement is the existence of legal liability in fact, and neither commencement of suit by Claimant nor judgment in Claimant's favor is a necessary prerequisite to the exercise of the right to contribution.

Section 2307.32(C) indicates the first procedural pitfall: The payment by way of settlement must be made before the applicable statute of limitations has expired.¹¹⁷ In our scenario, there is a two year statute of limitations applicable to Claimant's claim against Tortfeasor.¹¹⁸ Thus, if Tortfeasor wishes to settle and retain his right to contribution, he must actually make payment to Claimant within two years following the collision. It is not enough that an agreement to pay be reached within the two years. Accordingly, in the unlikely event that settlement negotiations become protracted, an eye must be kept on the calendar. This can be of special significance in a case such as ours where we assume Tortfeasor's liability insurance coverage is in the minimal amount of \$12,500 for each claimant and his liability carrier is conducting the settlement negotiations. Suppose that the insurance company is dithering over the negotiations. As the statute of limitations is about to expire,

the Uniform Contribution Among Tortfeasors Act, this provision is quite logically found as an integral part of the other procedural provisions. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 88 (1975). Since we have no legislative history of the Ohio Act, we shall probably never know whether the splitting off of this procedural provision from the other procedural provisions in section 2307.32 was accidental or intentional, and if intentional, what motivated it.

¹¹⁶ The first clause of OHIO REV. CODE ANN. § 2307.32(C) (Page Legis. Bull. 389 (1976)) reads:

If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right to contribution is barred unless he has either discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against him and has commenced his action for contribution within one year after payment,

and the Commissioners had this to say of it:

Clause (1) applies to situations where the entire liability to the injured party has been settled without action being filed.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 90, Comment (1975).

¹¹⁷ OHIO REV. CODE ANN. § 2307.32(C) (Page Legis. Bull. 389 (1976)) states that the: right of contribution is barred unless he has . . . discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against him

¹¹⁸ *Id.* § 2305.10 (Page 1953):

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Claimant threatens to obtain an attorney and file suit. To prevent that, the insurance company, without consulting Tortfeasor, agrees to waive the defense of the statute of limitations. Claimant and the company finally agree on a settlement of \$20,000, consisting of the policy limits of \$12,500 and \$7,500 of Tortfeasor's money. Tortfeasor concurs. The agreement is reached before the statute of limitations has expired, but the insurance company does not actually issue its check until after the expiration date. This supposition presents at least three important questions: (1) who has the right to contribution, (2) is the right to contribution preserved by the waiver of the defense of the statute of limitations, and (3) if Tortfeasor has lost his right to contribution, what recourse has he against his insurance company?

First, who has the right to contribution? The answer depends upon how the courts will interpret "common liability." Here, there are two potential measurements of common liability: the \$30,000 actual damages suffered by Claimant; or the \$20,000 paid by way of settlement. If the first figure is used, Tortfeasor's proportionate share (since we have stipulated that he and Contributor are equal in fault) is \$15,000; if the second figure is used, it will be \$10,000. In either event, the insurance company has paid \$12,500. However, the insurance company will not be subrogated to the right to contribution unless it has discharged in full or in part the liability of Tortfeasor; it has discharged in full its own obligation as insurer; and it has paid an amount in excess of Tortfeasor's proportionate share.¹¹⁹ The first two circumstances are satisfied whether we use the \$30,000 or the \$20,000 figure, but the third point requires further consideration. If the common liability of Tortfeasor and Contributor is valued at \$30,000, Tortfeasor's proportionate share is \$15,000, and the payment of \$12,500 by the insurance company does not include any amount "in excess of the tortfeasor's proportionate share."¹²⁰ Therefore, since the insurance company is only "subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's proportionate share of the common liability,"¹²¹ the sole right to contribution is in Tortfeasor, and Tortfeasor alone has the right to proceed against Contributor for \$5,000, provided the right to contribution has not been lost by late payment. On the other hand, if the common liability is measured at \$20,000, Tortfeasor's proportionate share is \$10,000 and the insurance company has paid \$2,500 in excess of that proportionate amount. Thus, the insurance company is partially subrogated to Tortfeasor, and the two together must join in seeking contribution,¹²² the insurance company for \$2,500 and Tortfeasor for \$7,500. In either event, Tortfeasor has a right to contribution, unless that right is barred by the late payment of the insurance company's \$12,500.

¹¹⁹ *Id.* § 2307.31(C) (Page Legis. Bull. 389 (1976)).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² OHIO R. CIV. P. 19(A)(3) provides that "A person who is subject to service of process shall be joined as a party in the action if . . . (3) he has an interest relating to the subject of the action as a . . . subrogor, or subrogee."

Is the right to contribution preserved by the waiver of the defense of the statute of limitations? Probably not. Since full payment of the settlement figure of \$20,000 was not made within the period of the statute of limitations, the right to contribution is barred by operation of section 2307.32(C) unless it can be said that the waiver of the limitations defense disposes of the bar. The better rule is that it does not. The bar in section 2307.32(C) is designed to grant Contributor the same repose which she would have had if she were the sole target of Claimant's claim, and the statute of limitations had run on that claim. Thus, Contributor can waive the defense of the statute of limitations, but Tortfeasor cannot waive it for her. By the running of the statute, she should be entitled to repose both from a claim by Claimant and a claim for contribution by Tortfeasor. The late payment has, in effect, made Tortfeasor a volunteer, and he has lost his right to contribution.

What recourse has Tortfeasor against his insurance company? Under the present state of Ohio law, probably none at all. Arguably, since the insurance company has reserved to itself the sole right to make settlement,¹²³ it at least impliedly agrees to exercise due care in doing so in order to avoid any injury to the rights of its insured. The company did not exercise due care here, and on the face of it, it would appear that Tortfeasor has a valid claim against his insurance company for negligence in making a settlement. However, the law of Ohio as reflected in the syllabus of *Hart v. Republic Mutual Insurance Co.* requires an insurance company to respond in damages to its insured only if it fails to act in good faith with respect to settlement.¹²⁴ This still appears to be the law of Ohio.¹²⁵ And, measured by the standards enunciated by the Supreme Court of Ohio,¹²⁶ the insurance company's conduct here does not amount to a failure to act in good faith. Thus, it would appear that Tortfeasor is remediless.

In any event, the payment made in settlement must discharge the common liability.¹²⁷ When examined in isolation, this discharge requirement appears to preclude a compromise settlement of less than the full amount of the liability, since anything less than full payment will

¹²³ The liability insuring agreement of most automobile policies will contain language similar to or the same as the following language found in the standard Family Combination Automobile Policy: "but the company may make such investigation and settlement of any claim or suit as it deems expedient."

¹²⁴ 152 Ohio St. 185, 187-88, 87 N.E.2d 347, 349 (1949).

¹²⁵ *Wasserman v. Buckeye Union Cas. Co.*, 32 Ohio St. 2d 69, 290 N.E.2d 837 (1972).

¹²⁶ *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962), where it is said in paragraph 2 of the Syllabus:

A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another.

See also *Wasserman v. Buckeye Union Cas. Co.*, 32 Ohio St. 2d 69, 290 N.E.2d 837, 838 (1972), which reaffirms the above statement and declares it to be "a complete and correct statement of the law of Ohio."

¹²⁷ OHIO REV. CODE ANN. § 2307.32(C) (Page Legis. Bull. 389 (1976)).

not discharge the common liability.¹²⁸ However, this provision must be read in conjunction with section 2307.31(B), which provides that a tortfeasor who settles is not entitled to contribution from another unless the other's liability has been "extinguished by the settlement."¹²⁹ Accordingly, discharged, as used in section 2307.32(C) is the equivalent of extinguished in section 2307.31(B), and if a compromise settlement is arranged so as to extinguish the liability of those tortfeasors from whom contribution is sought, the common liability will be deemed to have been discharged. On the other hand, if the compromise settlement is not arranged so as to extinguish the claim against the other tortfeasors, the tortfeasor entering into the settlement has no right to seek contribution from the others. Further, if the settling tortfeasor arranges things properly, he can obtain immunity from the obligation to contribute to those tortfeasors who have not settled.¹³⁰

Returning to our example, Tortfeasor, through his insurance company, has agreed to settle Claimant's claim for \$20,000. Since that sum is less than the full amount of the common liability, its payment will not automatically discharge the common liability, nor will it extinguish Claimant's claim against Contributor. By paying this amount, Tortfeasor will lose his right to contribution from Contributor unless he arranges for the extinguishment of the claim against Contributor. This may be done by the use of a release or a covenant not to sue. While Tortfeasor may lose his right to contribution from Contributor, he will gain immunity from contribution should Claimant proceed against Contributor and should Contributor then seek contribution from Tortfeasor. Thus, immunity from contribution is the *quid pro quo* for giving up the right to contribution.¹³¹

¹²⁸ A claimant may present his claim to as many defendants as he can find, and he may have judgments in his favor against each. But he is entitled to only one satisfaction of that claim or those judgments. Once the claimant has received full satisfaction, further action is barred, and his claim is extinguished. A full settlement of the claim is such satisfaction, and it discharges the common liability, and extinguishes the claimant's claim as against all other defendants. But a compromise settlement for less than the whole of plaintiff's claim will be only a *pro tanto* discharge of the common liability, and will not extinguish the claim as against other defendants unless the compromise settlement releases those other defendants by express agreement or by operation of law. *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940); *Whiteacre v. Board of Education*, 42 Ohio App. 2d 19, 326 N.E.2d 696 (1974).

¹²⁹ OHIO REV. CODE ANN. § 2307.31(B) (Page Legis. Bull. 389 (1976)).

¹³⁰ *Id.* § 2307.32(F)(2) (Page Legis. Bull. 390 (1976)):

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

¹³¹ The reader may well wonder what Tortfeasor has gained here. By paying the \$20,000 in settlement, he has paid \$5,000 more than his proportionate share of the common liability, and he has forfeited his right to go against Contributor for that \$5,000. In return, he has obtained immunity from nothing, since Contributor, if she paid the balance of \$10,000, would not have paid more than her proportionate share of the common liability and would not have a claim for contribution against Tortfeasor. But we know this to be the case only because it was stipulated that the value of the common liability is \$30,000. In a real negligence action, that value would not be known. All of the attorneys involved might have some good educated guesses as to what Claimant's case is worth, but none of

As noted, Tortfeasor may arrange the compromise settlement to discharge the common liability and extinguish the claim against Contributor through the adroit use of a release or a covenant not to sue. Herein lies a pitfall for Claimant. To illustrate, we must first examine the present Ohio law of releases and covenants not to sue, and then we must see how the provisions of the Act affect that law.

Broadly speaking, releases are either unqualified or qualified. When an agreement in absolute terms releases and discharges a wrongdoer it is an unqualified release¹³² and has the effect of releasing all other wrongdoers liable for the same wrong. As stated in *Whitt v. Hutchison*,¹³³ a general, unqualified release "is presumed in law to be a release for the benefit of all the wrongdoers."

Thus, unless section 2307.32(F)(1) compels a different conclusion, if Claimant gives Tortfeasor an unqualified release for a compromise settlement of less than the full amount of Claimant's damages, the settlement and release will discharge the common liability and will extinguish Claimant's claim against Contributor.¹³⁴

A release is qualified when it (a) either specifies that the amount received is not in full satisfaction of the claimant's damages, or fails to specify that the amount received is in full satisfaction of the claimant's damages; (b) expressly provides that it is solely and exclusively for the benefit of the parties thereto; or (c) expressly reserves a right of action as against any other wrongdoer. A qualified release will be interpreted according to the expressed intent of the parties. As a general rule, the express reservation of the right of action will be given effect, and the release will be interpreted as a release of only the wrongdoers who are parties to the release. Such a release will discharge the common liability only to the extent of the amount paid in settlement, and will not extinguish the claimant's claim against wrongdoers who are not parties to the release.¹³⁵ If, however, a release recites that the amount paid in settlement is received in full satisfaction of the claim but then attempts to expressly reserve a right of action against other wrongdoers not parties to the release, the recitation of full satisfaction and the express

them would know the true value of the common liability until the jury returned its verdict or until the court sitting without a jury announced its decision. Thus, in a real case, a \$20,000 settlement might appear to be a good gamble. Again, Tortfeasor might know that Contributor is judgment proof, and that any right of contribution which he might have would be illusory. Thus, rather than be held for the full \$30,000, he might feel it worthwhile to give up the illusory right of contribution and settle for \$20,000.

¹³² For an example of such an unqualified release, see *Whitt v. Hutchison*, 43 Ohio St. 2d 53, 330 N.E.2d 678 (1975).

¹³³ *Id.*

¹³⁴ *Garbe v. Halloran*, 150 Ohio St. 476, 83 N.E.2d 217 (1948). As stated in paragraph 4 of the syllabus:

Payment by one concurrent tort-feasor for his release from the injured person, even though not in full payment of the damage suffered but only in full payment of the claim of the injured person against him, operates to relieve from liability other concurrent tort-feasors likewise liable for the same tort, unless the injured person reserves the right to pursue such other concurrent tort-feasors for the remainder of his damage.

¹³⁵ *Adams Express Co. v. Beckwith*, 100 Ohio St. 348, 126 N.E. 300 (1919).

reservation are inconsistent. The recitation of full satisfaction will be given preference, and the release will be treated as unqualified.¹³⁶

If the wrongdoers are in a position vis-a-vis each other such that one would have a common law right of indemnity against the other, and a qualified release purports to release the potential indemnitor, such a release also operates to release the potential indemnitee, even though the claimant has attempted to reserve a right of action against the potential indemnitee. The theory being that the release of the wrongdoer primarily liable by discharging the claimant's claim against that wrongdoer, destroys the right of the wrongdoer secondarily liable to be subrogated to the claimant's claim, and thereby destroys the indemnity rights of the secondarily liable wrongdoer.¹³⁷

Since our scenario does not involve a primary-secondary liability situation, if Claimant and Tortfeasor enter into a properly qualified release which contains no inconsistencies, the release and the settlement will discharge the common liability only *pro tanto*, and should not extinguish Claimant's claim against Contributor. At least, that is true unless section 2307.32(F)(1) demands a different interpretation.

Thus, under the present Ohio law of releases, a compromise settlement for less than the full amount of Claimant's damages will preserve Tortfeasor's right of contribution against Contributor if the settlement is arranged through an unqualified release, but it will not if the settlement is arranged through a qualified release. The qualified release, however, will at least give Tortfeasor immunity from any claim for contribution which Contributor may later assert against him.¹³⁸

Now, how does the language of the Act affect the present law? Section 2307.32(F)(1) provides that a release or a covenant not to sue does not discharge other tortfeasors "unless its terms otherwise provide."¹³⁹ The difficulty springs from the phrase "unless its terms otherwise provide." Obviously, this section will have no effect on a properly qualified release. If a release purporting to be qualified contained such an express discharge of the other wrongdoers, it would contain an inconsistency which, according to *Riley v. Cincinnati*,¹⁴⁰ would convert it into an unqualified release. Thus, the problem is with the unqualified release. Does "unless its terms otherwise provide" require an express statement of discharge or is the legal inference of discharge which is drawn from an unqualified release sufficient? If an express statement of discharge is required, the Act changes the Ohio law of unqualified releases, at least in cases involving contribution. If the legal inference is sufficient, the Act works no change in the present Ohio law, since

¹³⁶ See *Riley v. Cincinnati*, 46 Ohio St. 2d 287, 294-95, 348 N.E.2d 135, 140-41 (1976) (interpreting *Hillyer v. City of East Cleveland*, 155 Ohio St. 552, 99 N.E.2d 772 (1951)).

¹³⁷ *Hillyer v. City of East Cleveland*, 155 Ohio St. 552, 99 N.E.2d 772 (1951); *Herron v. City of Youngstown*, 136 Ohio St. 190, 24 N.E.2d 708 (1940); *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940); *Bello v. City of Cleveland*, 106 Ohio St. 94, 138 N.E. 526 (1922).

¹³⁸ OHIO REV. CODE ANN. § 2307.32(F)(2) (Page Legis. Bull. 390 (1976)).

¹³⁹ *Id.* § 2307.32(F)(1).

¹⁴⁰ *Riley v. Cincinnati*, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1976).

an unqualified release is deemed to provide for the discharge of the other wrongdoers. The interpretation most often given to the Uniform Contribution Among Tortfeasors Act is that the joint tortfeasor "must be released *by name*."¹⁴¹ But this is not necessarily controlling, since there is a difference between the language of the Uniform Act and the language of the Ohio Act. The Uniform Act employs the phrase "unless its terms *so* provide," while the Ohio Act states "unless its terms *otherwise* provide." "So" can be interpreted to require specificity by name or otherwise, while "otherwise" can be read to mean the legal inference to be drawn from the terms used.

The Ohio Supreme Court has touched on the matter, but has left the question unresolved. Thus, *Whitt v. Hutchison*,¹⁴² noted that there was a conflict among the states which had adopted the Uniform Act regarding a tortfeasor who had not been discharged by name. From this, one would be hard put to guess how the Ohio Supreme Court would go now that Ohio has its own Act, especially since Ohio's Act differs significantly from the language of the Uniform Act.

Perhaps the solution lies in the difference. Without a legislative history, we cannot know for certain what the General Assembly intended, but it must have intended something when it substituted "unless its terms *otherwise* provide" for "unless its terms *so* provide." The latter phrase has a definite interpretation given it by the majority of states having the Uniform Act, but the former phrase does not. Further, the former phrase can be read in such a way that it does not mandate any change in the present law. Therefore, it is legitimate to conclude that the substitution was intended to retain the present Ohio law of unqualified releases without change or addition because of the Act, and was intended to reject the majority interpretation of the Uniform Act. This conclusion is buttressed by the fact that the majority view would add nothing but would subtract much. Under the present law, an unqualified release will subject Contributor to a claim for contribution from Tortfeasor, but will also immunize Contributor from any further claim for compensation from Claimant. But what is a release — otherwise unqualified — which does not comply with the majority view? Is it a qualified release for purposes of contribution, but an unqualified release for all other purposes, or is it a qualified release for all purposes? Therefore, since the majority view would add nothing of value to the existing law, but would be productive of mischief and confusion in an area that is already fraught with complexity, it is fair to assume that the

¹⁴¹ *United States v. Reilly*, 385 F.2d 225, 229 (10th Cir. 1967):

[T]he weight of authority under the Uniform Contribution Among Tortfeasors Act . . . holds that a joint tortfeasor must be released *by name* in order for the settling joint tortfeasor to recover contribution, and this notwithstanding language in the settlement or order of approval purporting to satisfy "all claims" arising out of the incident.

(Emphasis in the original.) See also *Allbright Bros., Contractors, Inc. v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953).

¹⁴² 43 Ohio St. 2d 53, 57-58, 330 N.E.2d 678, 681-82 (1975). The language quoted from the Uniform Act is taken from the 1939 Act rather than from the 1955 Revised Act. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 58 (1975).

General Assembly did not intend that Ohio follow the majority view, and it signaled this intent by substituting "otherwise" for "so."

Until recent years, there was considerable confusion as to the difference between a release and a covenant not to sue. A covenant not to sue, which does not purport to release or transfer any cause of action for an injury and which does not expressly recognize the consideration paid thereunder as full satisfaction for the injury, will not bar actions against others for causing the injury where the injury has not been fully compensated, and this is true whether such a covenant expressly reserves rights against others, or not.¹⁴³ Thus, a true covenant not to sue neither discharges the common liability nor extinguishes the claim; it is merely an agreement not to press the claim by means of legal action.¹⁴⁴

There is a very technical difference between a qualified release and a covenant not to sue. When money is paid in settlement for a qualified release, the claim itself is discharged *pro tanto*, and to that extent, the claim is transferred to the wrongdoer who is party to the release. In a primary-secondary liability situation, it is this transfer of the claim which destroys the indemnity rights of the wrongdoer secondarily liable, and converts the qualified release into an unqualified one.¹⁴⁵ When money is paid in settlement for a covenant not to sue, however, the wrongdoer who is party to the covenant merely buys freedom from a law suit and not a part of the claim. Thus, the claim is neither discharged *pro tanto*¹⁴⁶ nor is it in any way transferred to the wrongdoer. Since there is no transfer of the claim itself, the indemnity right of a wrongdoer secondarily liable are not affected, and the covenant not to sue does not become an unqualified release.¹⁴⁷

Section 2307.32(F)(1) works no change in the present law with respect to covenants not to sue. As that section notes, the covenant not to sue does not discharge wrongdoers who are not parties to it "unless its terms otherwise provide," but it reduces the claim against them to the extent of the amount either stipulated by the covenant or paid in consideration for it, whichever is greater. As for the phrase, "unless its terms otherwise provide," the terms of a true covenant not to sue do

¹⁴³ Whitt v. Hutchison, 43 Ohio St. 2d 53, 330 N.E.2d 678 (1975). See also Bacik v. Weaver, 173 Ohio St. 214, 180 N.E.2d 820 (1962).

¹⁴⁴ Rilev v. Cincinnati, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1976); Diamond v. Davis Bakery, Inc., 8 Ohio St. 2d 38, 222 N.E.2d 430 (1966).

¹⁴⁵ See cases cited note 137 *supra*.

¹⁴⁶ It has been said that the sum paid in settlement for a covenant not to sue discharges the claim *pro tanto*. Adams Express Co. v. Beckwith, 100 Ohio St. 348, 123 N.E. 300 (1919). That is not really true at all, since the covenant not to sue does not affect the claim. The practical effect, however, is much the same as a *pro tanto* discharge; since the claimant is entitled to but one full satisfaction of the claim and equity will demand that the satisfaction he obtains from the wrongdoers who are not parties to the covenant be reduced by the amount which he has previously received from the wrongdoers who are parties to the covenant. In other words, the non-party wrongdoers are given credit for the sum paid by the party wrongdoers. This distinction is only important when one or more of the non-party wrongdoers would have a common law claim for indemnity against the wrongdoer who is a party to the covenant.

¹⁴⁷ Riley v. Cincinnati, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1976).

not,¹⁴⁸ and should a document which purports to be a covenant not to sue contain terms which discharge non-party wrongdoers, it would be an unqualified release and not a true covenant not to sue. As for the reduction in the claim, that effect is already achieved by the present Ohio law with respect to covenants not to sue, so the Act adds nothing in this respect.

To summarize: If Tortfeasor settles in full Claimant's damages, the settlement will, by operation of law, discharge the common liability and extinguish the claim against Contributor since Claimant is entitled to but one satisfaction of her damages. Tortfeasor will have a right of contribution against Contributor to the extent that the amount paid in settlement exceeds his proportionate share of the common liability.

Likewise, if Tortfeasor partially settles Claimant's damages, but receives from Claimant an unqualified release in return therefor, the common liability is discharged, and the claim against Contributor extinguished, by the terms of the release. Tortfeasor will have a right of contribution against Contributor to the extent that the amount paid in settlement exceeds his proportionate share of the common liability.

But if Tortfeasor partially settles Claimant's damages, and receives a qualified release or a covenant not to sue in return therefor, the common liability is not discharged, and Claimant's claim against Contributor is not extinguished. Tortfeasor has no claim for contribution against Contributor even if he has paid in settlement more than his proportionate share of the common liability. On the other hand, the qualified release or the covenant not to sue discharges Tortfeasor from all liability for contribution to Contributor should he have paid less in settlement than his proportionate share, and should Contributor, by judgment or otherwise, be forced to pay Claimant more than her proportionate share.

The Act contains one further limitation on settlement and the right to contribution. By the terms of section 2307.31(B), a tortfeasor who enters into a settlement with the claimant is not entitled to recover contribution in respect to any amount paid by way of settlement which is in excess of what is reasonable. Thus, when Tortfeasor seeks contribution from Contributor, he must be prepared to prove that the amount paid in settlement was a reasonable amount.

There remains the unresolved problem of whether Contributor must be vouched into the controversy before Tortfeasor will acquire his right to contribution. If we look to cases involving the analogous remedy of indemnity, we find that the vouching in of the indemnitor is a prerequisite to a claim for indemnity.¹⁴⁹

¹⁴⁸ See, e.g., the terms of the covenant not to sue. *Id.* at 290-91, 348 N.E.2d at 136-37.

¹⁴⁹ Maryland Cas. Co. v. Frederick Co., 142 Ohio St. 605, 53 N.E.2d 795 (1944). As paragraph 4 of the syllabus states:

Before a tortfeasor secondarily liable may be entitled to indemnity from the one primarily liable, the latter must be fully and fairly informed of the claim and the pendency of the action and given full opportunity to defend or participate.

And in paragraph 4 of the syllabus of *Globe Indem. Co. v. Schmitt*, 142 Ohio St. 595, 53 N.E.2d 790 (1944):

Should vouching in be a prerequisite to contribution as well? Probably not. The right to indemnity is a common law right, and it is controlled by the common law. But the right to contribution between tortfeasors is purely statutory and nowhere in the statute is vouching in made a prerequisite to the exercise of the right to contribution. Since the statute does not require it by express terms, there is no justification for importing this common law requirement into the statute by judicial construction.

If the settlement is reasonable, if it discharges the common liability and extinguishes Claimant's claim against Contributor, and if the amount agreed upon in settlement has actually been paid by or on behalf of Tortfeasor before the statute of limitations applicable to Claimant's claim has expired, then Tortfeasor or his subrogee may bring a separate action against Contributor for contribution to the extent that the amount paid in settlement exceeds Tortfeasor's proportionate share of the common liability.

As stated in section 2307.32(C), the action for contribution must be commenced within one year after the date of payment. Commenced, of course, must be understood in the sense that it is used in Ohio Civil Rule 3(a), to wit: "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing."¹⁵⁰

Is either Tortfeasor or Contributor entitled to a jury trial in a separate action for contribution? This action, a creature of statute, is a type of action which did not exist prior to the adoption of the Ohio Constitution. Consequently, there was no right to trial by jury in such actions prior to the adoption of the Constitution. Therefore, there is no constitutional right to trial by jury; and if any such right exists, it must be found in the statutes of the state.¹⁵¹ No such right is found in the Act itself, but such a right can be found in Ohio Revised Code section 2311.04, which provides:

Issues of fact arising in actions for the recovery of money only, . . . shall be tried by a jury, unless a jury trial is waived, or a reference is ordered as provided in [The Ohio Rules of Civil Procedure].

Here, although the action is equitable in nature, the relief sought is a judgment for a precise and definite sum of money. Therefore, the action is "for the recovery of money only," and the issues of fact in the action are triable to a jury.¹⁵²

But how much may Tortfeasor recover? We know from the Act that

Whether the [indemnitee] settles the claim voluntarily or pays it by force of a judgment does not affect his right to indemnity. But in an action for indemnity after voluntary settlement, the [indemnitee] *must prove that he has given proper and timely notice* to the one from whom such indemnity is sought, that he was legally liable to respond, and that the settlement made was fair and reasonable. (Emphasis added.)

¹⁵⁰ OHIO R. CIV. P. 3(A).

¹⁵¹ Renee v. Sanders, 160 Ohio St. 279, 116 N.E.2d 420 (1953).

¹⁵² Taylor v. Brown, 92 Ohio St. 287, 110 N.E. 739 (1915).

he may recover that amount which he has paid in excess of his proportionate share of the common liability. But when there has been a settlement before judgment, how is the common liability measured? And once a value has been put on it, is Tortfeasor entitled to interest, or damages in the nature of interest, from the date of settlement?

*W. B. Rubright Co. v. International Harvester Co.*¹⁵³ suggests answers to both these questions. As to the common liability, the value of the common liability is the amount reasonably paid in settlement of the claim where the amount so paid discharges the liability and extinguishes the claim against the wrongdoer from whom contribution is sought. As to interest, or damages in the nature of interest, it will be allowed to the same extent that the claimant would be allowed interest in an action brought on his or her claim. As a general rule, pre-judgment interest is not allowed to the claimant in the type of action subject to the Act because the sum due the claimant cannot, before judgment, be established or ascertained with any degree of mathematical certainty. Therefore, since the claimant would not be entitled to pre-judgment interest, the tortfeasor who settles the claim and seeks contribution is not entitled to such interest either. A stipulation as to the reasonableness of the settlement might require a different result, depending upon when the stipulation was made. If the tortfeasor subject to contribution stipulates as to the reasonableness of the settlement in the action for contribution, the stipulation will not relate back to the time of the settlement, and will not warrant the award of interest. On the other hand, if the tortfeasor subject to contribution was vouched in before settlement was made, and stipulated to the reasonableness of the settlement at that time, but thereafter resisted or refused to make contribution, the stipulation could be construed as establishing the claimant's claim, or rendering the amount of the claim ascertainable with some degree of mathematical certainty. An award of interest, or damages in the nature of interest, would then be warranted from the date of settlement. Thus, while vouching in does not appear to be required, it could possibly be rewarding.

B. *Suit Against Tortfeasor Alone*

If Claimant brings suit against Tortfeasor alone, there are a number of ways in which Tortfeasor can seek contribution from Contributor.

(1) *Settlement before Judgment.* The first option open to Tortfeasor is settlement of the suit before judgment, followed by a separate suit for contribution against Contributor. Much that has been said above with respect to settlement before suit is also applicable here, but there are some differences. For example, if suit has been commenced, the settlement need not be paid before the applicable statute of limitations expires. Rather, it is sufficient if Tortfeasor agrees while the action is pending to discharge the common liability; pays the amount agreed upon within one year after the date of the agreement; and commences his separate suit for contribution within one year after the date of the

¹⁵³ 358 F. Supp. 1388 (W.D. Pa. 1973).

agreement.¹⁵⁴ The settlement, of course, must wholly discharge the common liability and extinguish the claim against Contributor.¹⁵⁵ As noted above, this may be accomplished either by the payment in full of Claimant's damages, or by a partial payment accompanied by an unqualified release. In either case, the amount agreed upon in payment must be reasonable in light of all the circumstances.¹⁵⁶ If the amount agreed upon and paid is a reasonable amount, it will be used as the measure of the common liability.¹⁵⁷ To revert to our example, if Tortfeasor pays \$20,000 in settlement, and that amount is reasonable in light of all the circumstances, the value of the common liability will be set at \$20,000. Since Tortfeasor and Contributor are equally at fault, Tortfeasor may seek \$10,000 in contribution from Contributor.

Note that section 2307.32(C) specifies that both payment and the commencement of the suit for contribution must occur within one year of the agreement. This must be read in conjunction with section 2307.31(A), which states that the right of contribution exists only in favor of a tortfeasor who has made payment. Thus, while payment and commencement of suit must both occur within the year, payment must precede commencement of suit.

Of course, the settlement and release alone are not sufficient. The lawsuit must still be terminated. This may best be done by a judgment entry dismissing the action with prejudice, which judgment entry may be obtained under the provisions of Ohio Civil Rule 41(a)(2).

(2) *Offer of Judgment.* By the adroit use of the offer of judgment technique suggested by Civil Rule 68, Tortfeasor may obtain all of the benefits of a settlement, and some additional advantages as well.

Tortfeasor's first step is the vouching in of Contributor. If Contributor accepts the invitation to participate in the defense, the ploy is foiled. But the likelihood is that Contributor will reject the invitation, and will not become a party to the lawsuit. If Contributor rejects the invitation, Tortfeasor and Claimant should waive the jury, if one had previously been demanded, and agree upon a sum which will satisfy the claim. Tortfeasor will then serve upon Claimant an offer to allow judgment to be taken against him for the amount agreed upon in advance. Claimant will respond by serving upon Tortfeasor a written notice that the offer is accepted. Either Tortfeasor or Claimant will then file the offer, the acceptance, and a draft judgment entry with the court. After the judgment entry has been approved and journalized, Tortfeasor will pay

¹⁵⁴ OHIO REV. CODE ANN. § 2307.32(C) (Page Legis. Bull. 389 (1976)) provides:

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 . . . 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.

¹⁵⁵ *Id.*; *Id.* § 2307.31(B).

¹⁵⁶ *Id.* § 2307.31(B).

¹⁵⁷ *W. D. Rubright Co. v. International Harvester Co.*, 358 F. Supp. 1388, 1392 (W.D. Pa. 1973).

the judgment,¹⁵⁸ and will commence his action against Contributor for contribution.¹⁵⁹

Since Contributor had been vouched into the action she will be concluded by the judgment. In the absence of fraud or collusion tainting the actions of Tortfeasor and Claimant, the judgment will be conclusive evidence against her as to the amount of the common liability, and will preclude her from asserting in the suit for contribution any defense that might have been interposed in Claimant's action against Tortfeasor.¹⁶⁰

(3) *Impleader.* If Tortfeasor is determined to contest Claimant's action, he may implead Contributor by means of a third party action, and thereby obtain a judicial declaration of Contributor's duty to contribute after Tortfeasor has paid whatever judgment Claimant may obtain against him. As Civil Rule 14(A) states:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is *or may be* liable to him for all *or part* of the plaintiff's claim against him.¹⁶¹

This fits contribution perfectly since, if there is common liability to Claimant, Contributor "may be" liable to Tortfeasor for "part of" Claim-

¹⁵⁸ Payment of the judgment is essential, since section 2307.31(A) specifies that the right of contribution exists only in favor of a tortfeasor who has paid more than his or her proportionate share. Payment of the judgment will, of course, automatically discharge and extinguish Claimant's claim against Contributor, but this will not bar Tortfeasor's action for contribution. As stated in OHIO REV. CODE ANN. § 2307.32(D) (Page Legis. Bull. 389 (1976)):

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.

¹⁵⁹ This separate action must be commenced within one year after the judgment has become final "by lapse of time for appeal or after appellate review." OHIO REV. CODE ANN. § 2307.32(B) (Page Legis. Bull. 389 (1976)). Since, in our particular situation, there will be no appellate review, the beginning day of this one year period of limitations will be the 31st day after the judgment has been journalized. In other words, when no appeal is taken, the separate action for contribution must be commenced within one year and 30 days from the date the judgment entry is journalized.

¹⁶⁰ 20 OHIO JUR. 2d *Indemnity* § 23 (1958). Although most of the cases so holding involve indemnity rather than contribution, there is no reason to believe that the principle does not apply to contribution as well. As it was said in *First Nat'l Bank v. First Nat'l Bank*, 68 Ohio St. 43, 50, 67 N.E. 91, 93 (1903):

The reason for the doctrine does not suggest that there should be any limit to its application because of the nature of the obligation over of the person notified. Upon examination of numerous decisions in other states and in the Federal courts, it appears that the doctrine is of general application, without regard to the nature of the liability over of the person notified, whether it arises out of contract or by operation of law. . . . They seem to recognize no exception to the rule that in an action to recover from one liable over on account of a demand upon which there has been a judgment against the plaintiff the defendant is bound by such judgment if he had due notice of the suit in which it was rendered, and an opportunity to defend.

¹⁶¹ OHIO R. CIV. P. 14(A) (emphasis added).

ant's claim against Tortfeasor.¹⁶² Thus, the issues respecting Claimant's claim for compensatory damages and the issues respecting Tortfeasor's claim for contribution can all be litigated in the same action.¹⁶³ The rights of Contributor are fully protected since she may not only fully defend against Tortfeasor's claim, but may also assert against Claimant any defenses which Tortfeasor has against Claimant.

The third party claim does not in any way circumvent section 2307.31(A)'s declaration that the right of contribution does not exist until Tortfeasor has paid more than his proportionate share of the common liability because the third party claim is not a claim for contribution. Rather, it is an action for a declaratory judgment: a judgment which declares the common liability of Tortfeasor and Contributor to Claimant; the proportionate share of that liability attributable to each; and the obligation of Contributor to pay to Tortfeasor a sum, not to exceed Contributor's own proportionate share of the liability, which will offset the amount Tortfeasor will pay to Claimant in excess of Tortfeasor's proportionate share of the common liability. This obligation will come into existence only after Tortfeasor has made payment to Claimant. In other words, the third party action is a device for accelerating the judicial determination that Contributor has an obligation to make contribution to Tortfeasor. The judgment in the third party action is of necessity contingent in nature; it is contingent upon Tortfeasor actually paying more than his proportionate share of the common liability to Claimant. If Tortfeasor never makes payment to Claimant, the third party judgment imposes no obligation on Contributor. But when Tortfeasor makes payment to Claimant, Contributor is obliged to make contribution in ac-

¹⁶² In paragraph 2 of the syllabus of *State Farm Mut. Ins. Co. v. Charlton*, 41 Ohio App. 2d 107, 322 N.E.2d 333 (1974) it was stated:

Where a plaintiff chooses to sue only one of two joint or concurrent tortfeasors, the defendant may not maintain a third-party complaint against the other tortfeasor because there is no right of contribution from a co-tortfeasor.

This statement is based on the Rules Advisory Committee's Staff Note to OHIO R. Civ. P. 14, which states in part:

In contrast, if a plaintiff chose to sue only one of two joint or concurrent tortfeasors, the defendant tortfeasor could not implead the other tortfeasor under Rule 14(A) because in Ohio a joint or concurrent tortfeasor is liable for the full amount of the claim and does not enjoy the right of contribution from a co-tortfeasor.

The implication to be drawn from each of these statements is that impleader could be used if the right of contribution was recognized in Ohio law. With the enactment of sections 2307.31 and 2307.32 of the Ohio Revised Code, that right is recognized, and impleader becomes available in this type of case.

¹⁶³ As the court noted in *Markey v. Skog*, 129 N.J. Super. 192, 200, 322 A.2d 513, 517 (1974):

The assertion by codefendants in a negligence action of a right of contribution *inter sese* and the right of a defendant to implead a joint tortfeasor by a third-party complaint before plaintiff's cause of action has been reduced to a judgment are merely devices of procedural convenience afforded by the rules of practice. . . . Thus, although a defendant is not necessarily bound to proceed against joint tortfeasors in the same action in which plaintiff seeks to establish his (defendant's) liability, he ordinarily will, nevertheless, do so because a single action is the most orderly manner in which proof of common liability can be established — and it is, of course, common liability which is the substantive basis of the right of contribution.

cordance with the terms of the third party judgment. Thus, the third party claim is not a claim for contribution in violation of section 2307.31 (A) since it does not require contribution until after payment has been made and the right of contribution comes into existence.

The third party action, of course, will be commenced before judgment is rendered in Claimant's action against Tortfeasor, and for this reason, it may be argued that, at least in some instances, section 2307.32(C) prohibits third party actions. That section stipulates that if there is no judgment against Tortfeasor, his right to contribution is barred unless he either discharges by payment the common liability within the statute of limitations period applicable to Claimant's right of action against him or agrees while the action is pending to discharge the common liability. In the usual case, Tortfeasor will have done neither of these two things before commencing the third party action. Indeed, in some cases, it might be impossible for Tortfeasor to accomplish the first requirement since Claimant may not commence the action against Tortfeasor until the last day or two of the limitations period, thereby giving Tortfeasor no time to discharge the common liability within the statutory period of limitations.

And it is this fact which indicates the inapplicability of section 2307.32 (C) to the present situation and which demonstrates the invalidity of the argument. Section 2307.32(C) is composed of two clauses. The first, in substance, requires discharge by payment before the statute of limitations runs, and the second requires an agreement to discharge by payment while Claimant's action is pending. It is clear that the first clause is applicable only to settlements made by Tortfeasor before suit is commenced against him, and the second clause is applicable only when Tortfeasor chooses to settle before judgment. The first clause has no applicability at all when Claimant has commenced suit against Tortfeasor, and the second clause has no applicability when Tortfeasor elects to contest such a suit to judgment rather than settle it. Thus, neither clause bars the third party action. In any event, should either clause be held applicable to the impleader situation, the statutory section would be in conflict with Ohio Civil Rule 14(A), and to the extent of that conflict, those statutory provisions would be invalid.¹⁶⁴

(4) *Separate Action after Judgment.* It may be that Tortfeasor wishes to contest Claimant's suit to judgment, but he cannot implead Contributor because Contributor is beyond the jurisdiction of the court. In such a case, Tortfeasor's only practical option will be a separate suit

¹⁶⁴ OHIO CONST. Art. IV, § 5(B) provides:

The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

This provision applies not only to laws which were in effect at the time the Rules were adopted but also to all laws which are passed thereafter and which are in conflict with the Rules. *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (Cuy. Cty. C.P. 1976).

against Contributor after Claimant has taken a judgment against him, and after he has satisfied that judgment.¹⁶⁵

The authority for such a separate action is not as clearly stated in the Act as it might be.¹⁶⁶ At first blush, the statutory provision might appear to apply only where the action is brought against two or more tortfeasors; but properly understood, it means that a judgment need not be rendered in a single action against all the tortfeasors before the right to contribution can be enforced by a separate action. By inference, then, when an action goes to judgment against only one tortfeasor, that tortfeasor may exercise his or her right to contribution from other tortfeasors by a separate action against them. This inference is reinforced by section 2307.32(B), which states the one year statute of limitations for separate actions to enforce the right of contribution.

Of course, Tortfeasor may obtain some of the benefits of impleader by vouching in Contributor. A person not a party to the action may be vouched in even though he or she is not amenable to service of process.¹⁶⁷ If Contributor is vouched in, and given an opportunity to defend, and the common liability of Tortfeasor and Contributor, as well as the percentage of fault of each therein, is fully and fairly litigated, the judgment and findings of fact with respect to Contributor's share of the common liability will be conclusive upon Contributor should she fail to accept the invitation to participate in the defense of the action.¹⁶⁸

If the case is tried to the jury, the provisions of Ohio Civil Rule 49(B) must be considered. That Rule states that "interrogatories may be directed to . . . determinative issues."¹⁶⁹ Determinative issues have been defined as ultimate issues which, when decided, will definitely settle the entire controversy between or among the parties, leaving nothing for the court to do but enter judgment for the party or parties in whose favor such determinative issues have been resolved by the jury.¹⁷⁰ In a negligence action the determinative issues are negligence, proximate cause, con-

¹⁶⁵ The reader should not imply from this remark that the use of impleader is mandatory if it is otherwise available. By the terms of OHIO R. CIV. P. 14, impleader is permissive; the defendant has the option of employing a third party claim before judgment, or a separate suit after judgment. This is equally true when the subject of the third party claim is contribution. *Markey v. Skog*, 129 N.J. Super. 192, 322 A.2d 513 (1974); *Maloney Concrete Co. v. District of Columbia Transit Sys., Inc.*, 241 Md. 420, 216 A.2d 895 (1966); *Murphy v. Barron*, 45 Misc. 2d 905, 258 N.Y.S.2d 139 (App. Div. 1965). As stated in *Maloney Concrete Co. v. District of Columbia Transit Sys., Inc.*, 241 Md. at 422, 216 A.2d at 896:

The purpose and meaning of the rule is clear. It *permits* a defendant to bring in anyone as a third party defendant who is or may be liable to the original defendant for all or part of the claim of the plaintiff, but it does not *require* the joinder of such party, nor *preclude* separate action against him.

(Emphasis in the original.)

¹⁶⁶ The authority is found in OHIO REV. CODE ANN. § 2307.31(C) (Page Legis. Bull. 389 (1976)):

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.

¹⁶⁷ *Hessler v. Hillwood Mfg. Co.*, 302 F.2d 61 (6th Cir. 1962).

¹⁶⁸ OHIO REV. CODE ANN. § 2307.32(E) (Page Legis. Bull. 389 (1976)).

¹⁶⁹ OHIO R. CIV. P. 49(B).

¹⁷⁰ *Miller v. McAllister*, 169 Ohio St. 487, 494, 160 N.E.2d 231, 237 (1959).

tributory negligence, and damages.¹⁷¹ In our situation, since Claimant is entitled to a several judgment against Tortfeasor, and a full satisfaction of that judgment from him, it is questionable whether the negligence of Contributor, or the percentage of fault Tortfeasor and Contributor each bear to the common liability, are in any sense determinative of Claimant's action against Tortfeasor. If they are not determinative issues, then any answers to interrogatories respecting these issues which the jury might give would not be valid answers;¹⁷² and, as such, would not be "binding as among such defendants in determining their right to contribution."

According to section 2307.32(B), the separate action 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." This follows through on the basic theme of the Act which imposes a one year statute of limitations on attempts to recover contribution.¹⁷³ However, the beginning of this one year period is not as easily discovered as is the beginning day of the year's limitation imposed by section 2307.32(C).

To begin with, the term judgment as used in section 2307.32(B) must be read in conjunction with Civil Rule 54.¹⁷⁴ Thus, the judgment itself must be a final order; that is, an order which meets one or more of the four tests for finality set down in Ohio Revised Code section 2505.02,¹⁷⁵ as well as the test for finality included in Ohio Civil Rule 54(B).¹⁷⁶ A judgment meeting these tests becomes a final order when it is filed with the clerk of the court for journalization.¹⁷⁷ This act of filing with the clerk for journalization is more commonly referred to as the "entry" of the judgment, even though the clerk may not physically enter the judgment in the journal until a later date.

Although an action for contribution commenced within one year of the date of journalization will be timely, the date of journalization is not the beginning date of the one year period. Rather, the beginning date

¹⁷¹ *Richley v. Leichty*, 44 Ohio App. 2d 359, 363, 338 N.E.2d 789, 792 (1975).

¹⁷² *See id.*

¹⁷³ *See* OHIO REV. CODE ANN. § 2307.32(C) (Page Legis. Bull. 389 (1976)), which mandates that the separate action for contribution must be brought within one year after payment in the event of settlement without suit, and within one year of the agreement to pay in the event of a settlement after suit has been commenced, but before judgment.

¹⁷⁴ As stated in OHIO R. CIV. P. 54(A): "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

¹⁷⁵ OHIO REV. CODE ANN. § 2505.02 (Page 1954) stipulates:

An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

¹⁷⁶ OHIO R. CIV. P. 54(B) applies to actions involving multiple claims and/or multiple parties. In such an action, a "judgment" which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties will not be a final order unless the judgment entry contains an express determination that there is no just reason for delay.

¹⁷⁷ *Id.* 58: "A judgment is effective only when filed with the clerk for journalization."

is the day after the day the judgment becomes final¹⁷⁸ either by lapse of time for appeal, or after appellate review.

Normally, a judgment becomes final by lapse of time for appeal if no notice of appeal is filed with the clerk of the trial court within 30 days after the judgment has been journalized.¹⁷⁹ Thus, in the normal case, the first day of the year in which the suit for contribution must be commenced will be the 31st day after the judgment has been journalized. The year will actually be one year and 30 days from the date of journalization. However, a timely made motion for a new trial or for judgment notwithstanding the verdict will suspend the time for filing a notice of appeal;¹⁸⁰ but a timely made motion for relief from judgment will not,¹⁸¹ nor will a motion for reconsideration,¹⁸² unless the latter motion can properly be viewed as a motion for a new trial.¹⁸³ Thus, if one or more appropriate "finality-suspending" motions are made, the finality of the judgment is suspended until an order has been entered either granting or denying such motions, and a full 30 days in which to file a notice of appeal commences to run, computed from the date the last of such orders is entered.¹⁸⁴ Suppose, for example, that

¹⁷⁸ *Id.* 6(A) states:

In computing any period of time prescribed or allowed . . . by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

And OHIO REV. CODE ANN. § 1.14 (Page 1969) provides:

The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; . . .

Thus, the first day of the year in which to commence the separate action for contribution will be the day following the day on which the judgment becomes final.

¹⁷⁹ OHIO R. APP. P. 4(A):

In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from.

¹⁸⁰ *Id.*; *Kauder v. Kauder*, 38 Ohio St. 2d 265, 267, 313 N.E.2d 797, 798 (1974):

In addition to establishing the 30-day period for appeal, App. R. 4(A) provides the exclusive means by which the running of that time may be suspended. The operation of the rule may be tolled by either the filing of a motion for judgment notwithstanding the verdict, pursuant to Civ. R. 50(B), or the filing of a motion for a new trial under Civ. R. 59.

¹⁸¹ OHIO R. CIV. P. 60(B); *Kauder v. Kauder*, 38 Ohio St. 2d 265, 267n., 313 N.E. 2d 797, 798n. (1974):

In specific terms, Rule 60(B) provides: "A motion [filed hereunder] . . . does not affect the finality of a judgment or suspend its operation." Thus, a Civ. R. 60(B) motion, by whatever name, does not toll the time in which an appeal can be filed.

¹⁸² *Kauder v. Kauder*, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974); *Taray v. Sadoff*, 71 Ohio Op. 2d 203, 331 N.E.2d 448 (Ct. App. 1974). Actually, a motion for reconsideration or a motion for rehearing does not lie if the "judgment" is a final order, since such motions may only be directed to interlocutory orders. *LaBarbera v. Batsch*, 117 Ohio App. 272, 182 N.E.2d 632 (1962). However, these motions are often mistakenly used as a substitute for the more appropriate motion for new trial, motion for judgment notwithstanding the verdict, or motion for relief from judgment; and usually with fatal results. See *Kauder v. Kauder*, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974); *Taray v. Sadoff*, 71 Ohio Op. 2d 203, 331 N.E.2d 448 (Ct. App. 1974); *Browne, The Fatal Pause — Summary Judgment and the Motion for Reconsideration*, 44 CLEV. B.J., Nov. 1972, at 7.

¹⁸³ *North Royalton Educ. Ass'n. v. Board of Educ.*, 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974).

¹⁸⁴ OHIO R. APP. P. 4(A).

the original judgment was journalized on the 31st of August. Normally, such a judgment would become "final by lapse of time for appeal" on the 30th of September. But if a motion for a new trial was served by the 14th of September, the "time for appeal" would be suspended. Suppose further that an order overruling the motion for a new trial is entered or journalized on the 30th of September. Now, the 30-day "time for appeal" begins to run with the 1st day of October, and continues to run through the 30th of October. Thus, the first day of the year in which to commence the suit for contribution is the 31st of October, as this is the first day after the original judgment has become "final by lapse of time for appeal." Therefore, in a given case, some calculations may be required to determine just when the magic year begins and ends.

If an appeal is commenced, when is the judgment final "after appellate review?" In part, this answer depends upon what the appellate court does; and, in part, it depends upon whether the phrase "by lapse of time for appeal" is applicable only to the original judgment or whether it also applies to the judgment of the appellate court. Assuming that a timely appeal has been taken, there are a number of possible permutations which will produce somewhat different calculations. All of these permutations boil down to one of two basic options: The appellate court will either remand the case to the trial court for further proceedings, or it will enter a final judgment at the appellate level. As a general rule, then, we may start with the proposition that a judgment is final after appellate review either after the appellate court has entered final judgment, or after the trial court has fully complied with the order of remand. This will be true unless the original judgment has been vacated by the appellate court, or it has ordered the trial court to vacate the original judgment and take further proceedings, such as a new trial. In that event there no longer exists a final judgment from which the tortfeasor can seek contribution.

Now we must deal with the second aspect of the problem. Does the "lapse of time for appeal" apply in cases where there has already been one appeal? As a practical matter, the chance for further appellate review in the supreme court is slim, but the possibility does exist, and the losing party has 30 days from the entry of the appellate judgment to seek review by the supreme court.¹⁸⁵ If the supreme court does hear the appeal, it may undo what the trial court and the court of appeals have done. Accordingly, the better view would require the application of "lapse of time for appeal" to an appellate judgment as well as a trial court judgment. Therefore, the judgment is "final . . . after appellate review" when the appellate court has entered a final order and the 30 days in which to appeal from that order has lapsed without an appeal being attempted, or when the trial court has fully complied with the order of remand from the appellate court, and the time in which to

¹⁸⁵ OHIO SUP. CT. R. PRAC. I § 1(A) provides:

The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within thirty days from the entry of the judgment or final order appealed from

appeal from the appellate court's order of remand has elapsed without an appeal being attempted.

The phrase "final by lapse of time for appeal or after appellate review" not only identifies the first day of the year within which the separate suit for contribution must be brought, but also defines the earliest date such suit may be commenced. To put it less enigmatically, the separate suit for contribution may not be brought until the original judgment has become final. In actions for contribution, a judgment is a prerequisite to the separate action since it is the judgment which establishes the amount of common liability. Thus, section 2307.32(B) presupposes the existence of a final judgment. The judgment must not only be final in the sense that it is appealable, it must also be final in the sense that it is not likely to be changed. In other words, it must be either "final by lapse of time for appeal or after appellate review." An example will illustrate this proposition. Suppose that after judgment is entered against Tortfeasor, he timely serves a motion for a new trial. However, since he forgot to also move for a stay of proceedings to enforce the judgment, Claimant executes upon his property, and obtains enough to fully satisfy the judgment. Thereafter, but before the court has passed on the motion for a new trial, Tortfeasor commences his separate action against Contributor. But how can that action logically go forward? It is based on the original judgment, but until the motion for a new trial has been disposed of, it cannot be known whether that judgment will remain in existence or not, for if the motion is granted, the original judgment will be vacated. Thus, the very basis for the suit may vanish before the suit is concluded.¹⁸⁶ Indeed, a worse result is possible, albeit unlikely. Suppose the separate suit for contribution is concluded in Tortfeasor's favor by a motion for summary judgment. Thereafter, Tortfeasor's earlier motion for a new trial is granted, the original judgment vacated, and a new trial ordered. What is now to be done with the judgment in the separate suit for contribution? Accordingly, where the separate suit for contribution is premised on a judgment in the claimant's favor solely against the tortfeasor seeking contribution, that suit may not be commenced until the judgment has become both

¹⁸⁶ As a matter of fact, the basis for the suit has vanished with the service of the motion for a new trial. As noted in the text, the essential prerequisite to the separate suit is a final order. But the service of a timely motion for a new trial suspends the finality of the original decision. Therefore, there is no "judgment" in existence at the time the separate suit is commenced, and Tortfeasor has no claim upon which relief can be granted. Since it is unlikely, however, that any of this will appear from the face of the complaint for contribution, and since the court in the contribution action may not take judicial notice of what occurred or is occurring in the action between Claimant and Tortfeasor the action is not subject to an OHIO R. CIV. P. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Geradot v. Parrish*, 44 Ohio App. 2d 293, 338 N.E.2d 531 (1975). If that defense is to be raised at all, it will probably have to be raised as an affirmative defense in the answer and determined on an OHIO R. CIV. P. 12(D) motion for preliminary hearing or by an OHIO R. CIV. P. 56 motion for summary judgment. The Rule 12(D) motion for preliminary hearing, like the Rule 56 motion for summary judgment, may be supported by affidavits and other documentary evidence in testimonial form. *Jurko v. Jobs Europe Agency*, 43 Ohio App. 2d 79, 334 N.E.2d 478 (1975). Thus, either motion may be used to put the necessary facts before the court. *But see note 187 infra*.

final for purpose of appeal and final by lapse of time for appeal or after appellate review. A separate suit commenced prior to that time is premature, and is vulnerable to a motion to strike from the files.

There is at least one possible situation, however, where the problem of inconsistency between a motion directed to the original judgment and the separate suit for contribution cannot be solved by invoking the doctrine of prematurity. Suppose a judgment and the satisfaction of the judgment by levy of execution or otherwise. After the time for appeal has lapsed, Tortfeasor commences his separate suit for contribution. Shortly thereafter, he discovers a ground which would warrant the vacation of the original judgment, and moves for relief from judgment under the provisions of Ohio Civil Rule 60(B). Before the suit for contribution is determined, the motion for relief from judgment is granted, the original judgment is vacated and a new trial ordered. Obviously, the suit for contribution cannot go forward since the very foundation for that suit has now disappeared. Tortfeasor should obtain the dismissal of the contribution suit by one of the means provided in Ohio Civil Rule 41(A), but if he fails to do so, Contributor may move for summary judgment on the ground that Tortfeasor no longer has a claim upon which relief can be granted.¹⁸⁷

There remains a problem that is common to both the third party claim and the separate suit after judgment. Suppose that the statute of limitations on Claimant's action has run before the third party action or the separate suit after judgment is commenced by Tortfeasor. Clearly, Claimant can no longer proceed against Contributor because her action is barred by the statute of limitations. Will the running of that statute also bar Tortfeasor's claim for contribution? The answer is in the negative. As stated in *Markey v. Skog*, the right to contribution does not accrue until Tortfeasor has paid more than his proportionate share of the common liability. Tortfeasor cannot be deprived of his inchoate right of contribution even though Claimant has lost the right of direct suit against Contributor.¹⁸⁸

What is it that preserves the right to contribution after the statute

¹⁸⁷ There is some initial difficulty with the thesis that there is no longer a claim upon which relief can be granted. As noted at the commencement of this Article, the two essential prerequisites for contribution are common liability *in fact*, as opposed to judicially declared liability, and payment of more than a proportionate share of that liability. In this situation, and in the previous situation involving the motion for a new trial, *see* note 186 *supra*, payment has been made through the levy of execution and remains paid. Thus, the key element is common liability. In both situations, the judicial declaration of liability has either been withdrawn or suspended, but this has no effect on liability *in fact*; that liability exists independently of the judicial declaration of liability. Accordingly, if liability *in fact* does exist, Tortfeasor still has a claim upon which relief can be granted since that liability has conjoined with the payment through the levy of execution. That does not affect the conclusion that the separate suit for contribution does not present a claim upon which relief can be granted, however, since the separate suit for contribution was premised on the judicially declared common liability and not upon the common liability *in fact*. Thus, where the judicial declaration of liability fails, the claim based upon it fails as well. In other words, Tortfeasor may have a claim for contribution based on liability *in fact*, but that is not the claim he has presented in his separate suit for contribution.

¹⁸⁸ 129 N.J. Super. 192, 200-01, 322 A.2d 513, 518 (1974).

of limitations has run on the injured party's claim? There is no unanimity on the point, but Rhode Island has the better answer: The right of contribution is a derivative right and not a new cause of action;¹⁸⁹ subrogation is the means by which the paying tortfeasor obtains the cause of action from the claimant. When the tortfeasor satisfies the common liability by payment he or she is subrogated to the claimant's cause of action as it exists at the time payment is made.¹⁹⁰ Thus, if suit was commenced on that cause of action before the statute of limitations had run, the cause of action remains alive throughout the subsequent proceedings; and, through legal subrogation, is transferred to the tortfeasor as a live cause of action when payment is made.¹⁹¹ On the other hand, if Claimant's cause of action was barred because suit thereon had not been timely commenced, or if no suit at all had been commenced on that cause of action and the statute has run, the paying tortfeasor is a mere volunteer, and upon payment is subrogated to a dead cause of action. Accordingly, he or she would have no derivative claim with which to seek contribution. Therefore, the statute of limitations applicable to the claimant's cause of action will bar a third party claim or a separate suit for contribution only if the running of the statute would have barred the cause of action itself at the time the paying tortfeasor satisfied the common liability. Such will never be the case if the claimant properly commenced suit before the statute of limitations had run.

C. *Suit against Tortfeasor and Contributor*

Here, Claimant has joined both Tortfeasor and Contributor as parties defendant. Again, we are concerned with Tortfeasor's rights against Contributor, and the options available to him for contribution. Much that has been said above will be fully applicable here. Here we shall concentrate on the options which are peculiar to a suit against all of the tortfeasors jointly.

(1) *The Cross-Claim.* The first option open to Tortfeasor is the cross-claim against his co-defendant, Contributor. As Ohio Civil Rule 13(G) provides, a cross-claim asserts that a co-party "is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."¹⁹²

Thus, Civil Rule 13(G) permits a cross-claim for contribution against a co-defendant to the same extent that Civil Rule 14(A) permitted a third party claim for contribution against a tortfeasor who was not a party to the action. Accordingly, all that has been said with respect to the third party claim is equally applicable here.

¹⁸⁹ *Rowe v. John C. Motter Printing Press Co.*, 273 F. Supp. 363, (D.R.I. 1967); *Cacchillo v. H. Leach Mach. Co.*, 111 R.I. 573, 305 A.2d 541 (1973).

¹⁹⁰ The more traditional way of putting it is to say that the subrogee of a claim stands in the shoes of the assignor or subrogor, and succeeds to all the rights and remedies of the latter. *Inter Ins. Exch. v. Wagstaff*, 144 Ohio St. 457, 59 N.E.2d 373 (1945).

¹⁹¹ *Am. Ins. Group v. McCowin*, 7 Ohio App. 2d 62, 218 N.E.2d 746 (1966).

¹⁹² Ohio R. Civ. P. 13(G).

(2) *The Post-Judgment Motion.* Where the tortfeasors have been joined as parties defendant, and where judgment has been entered against them, section 2307.32(A) provides a unique device by which one of the tortfeasors may obtain a judgment for contribution against the other. That section provides that contribution may be enforced in the same action "by motion upon notice to all parties."¹⁹³

This provision is, of course, taken from the Uniform Act,¹⁹⁴ which in turn is premised on the former New York statute.¹⁹⁵ Although the Commissioners' Comment states that the provision "appears to have worked well and no serious objection to it has developed,"¹⁹⁶ New York has dropped it, and has substituted the more traditional methods of determining a right of contribution.¹⁹⁷

As far as Ohio law is concerned, the proceeding is somewhat akin to a special statutory proceeding, but it is not quite that, since it is not begun by petition and because the judicial inquiry sought is not essentially independent of the principal action.¹⁹⁸ Rather, since it is begun by motion rather than by petition, it would appear to be a summary proceeding in an action after judgment.¹⁹⁹ Being summary in nature, such a proceeding does not require the issuance of process, hearing, findings of fact, or the elaborate process of a civil suit.²⁰⁰ However, if the proceeding is to be used to best advantage, care must be taken to lay a proper foundation for it in the principal action. This can best be done by employing interrogatories to the jury or, if the case is tried to the court, by requesting findings of fact by the court. Either will be binding

¹⁹³ OHIO REV. CODE ANN. § 2307.32(A) (Page Legis. Bull. 389 (1976)).

¹⁹⁴ UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 88-89 (1975).

¹⁹⁵ N.Y. CIV. PRAC. LAW & R. § 1401 (McKinney 1963):

Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action.

¹⁹⁶ UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOTATED 89 (1975).

¹⁹⁷ N.Y. CIV. PRAC. LAW & R. § 1401 (1963), as amended §§ 1401, 1403 (McKinney Supp. 1976-77). Effective Sept. 1, 1974, the provision was dropped from Section 1401, and the methods of obtaining contribution were transferred to Section 1403, which now reads:

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action.

¹⁹⁸ *In re Estate of Wyckoff*, 166 Ohio St. 354, 142 N.E.2d 660 (1957).

¹⁹⁹ See OHIO REV. CODE ANN. § 2505.02 (Page 1954), which identifies such a proceeding as one from which an appeal may be taken if the order made therein affects a substantial right.

²⁰⁰ *State ex rel. Civil Rights Comm'n v. Gunn*, 45 Ohio St. 2d 262, 344 N.E.2d 327 (1976).

upon the defendants in determining their right to contribution according to section 2307.32(E).²⁰¹

Clearly, this provision was intended to supplement section 2307.32 (A), and to provide the foundation for the summary proceeding upon application described in that section. The combination of these two sections, and their application to actions in which the tortfeasors have been joined as defendants make the common liability and the percentage of fault determinative issues for the purpose of Civil Rule 49(B). Thus, there should be no difficulty in employing the interrogatory procedure provided in that Rule.

Of course, this summary proceeding may only be used against co-defendants who have become co-judgment debtors by reason of a judgment in the claimant's favor. Further — and the New York cases decided under the former New York statute make this point clear — the summary proceeding may only be employed by the co-judgment debtor who has either satisfied the entire judgment or at least paid more than his or her proportionate share of that judgment.²⁰² This is in accord with the provisions of section 2307.31(A), which provide that the right of contribution exists only in favor of the tortfeasor who has paid more than his or her proportionate share of the common liability.

The judgment in the original action must be a true judgment, that is, it must be a final order for purposes of appeal. But apart from that, the Act imposes no time limitations on the motion; the co-judgment debtor intending to employ the motion need not wait until the judgment has become "final by lapse of time for appeal or after appellate review." Neither is there any express statute of limitations applicable to the making of the motion; if the court properly obtained jurisdiction of the defendants in the original action, it retains that jurisdiction after judgment, and the original action is deemed to continue for the purpose of enforcing contribution by means of the summary proceeding.²⁰³ Thus, the motion may be made after the original judgment has been affirmed on appeal, and this even though the co-judgment debtor from whom contribution is sought has left the state and is no longer subject to service of process.²⁰⁴ Indeed, at least one New York court has held that the motion for judgment may be made and granted against a co-judg-

²⁰¹ See note 68 *supra*.

²⁰² As said in *Jones v. All Boro Car Leasing, Inc.*, 67 Misc. 2d 567, 569, 325 N.Y.S.2d 535, 537 (N.Y. City Ct. 1971):

When the defendant against whom contribution is sought has appeared in the original action, the cases have recognized that a motion compelling such action is proper provided the supporting papers clearly establish that the conditions of Section 1401 have been met. To wit: the movant must establish that he has satisfied the judgment or paid more than his pro rata share.

²⁰³ *Ohlquist v. Nordstrom*, 143 Misc. 502, 504, 257 N.Y.S. 711, 713 (Sup. Ct. 1932), *aff'd mem.*, 261 N.Y.S. 1039, *aff'd mem.*, (App. Div.), 262 N.Y. 696, 188 N.E. 125 (1933). The lower court noted:

The statute does not say that the notice of motion is to be served personally upon the codefendant because of the fact that his appearance in the action had ceased. A proper construction is that the action continues because there is something that remains to be done and the authority of the attorneys under the original appearance continues.

²⁰⁴ *Id.*

ment debtor while that co-judgment debtor's appeal is pending in the appellate court.²⁰⁵ Ohio law might permit the making of the motion under this circumstance, but it would not permit a ruling on the motion unless and until the appellate court remanded the matter to the trial court for that purpose.²⁰⁶ In any event, the New York courts have held that the reversal of the original judgment automatically reversed an earlier order granting a motion for contribution.²⁰⁷ This appears to be a logical result and, by extension, should apply whenever the original judgment is vacated pursuant to a motion for a new trial, a motion for relief from judgment, or the like.²⁰⁸ Since there is no time limit beyond which the motion for judgment cannot be made, and since the vacation or reversal of the original judgment will automatically reverse an order granting the motion for contribution, it may be wise to wait until the original judgment becomes final before making the motion.

Finally, section 2307.32(A) requires that notice of the motion for contribution be given to all parties to the action. Since the proceeding is initiated by motion, we may assume that the usual rules of motion practice govern. That being so, notice may be given either by serving a copy of the written notice of the hearing of the motion where that procedure is still in vogue, or, in accordance with more recent practice, by serving a copy of the motion itself, upon all parties to the action.²⁰⁹ Because the court has jurisdiction of the parties, service may be made under the provisions of Ohio Civil Rule 5(B) rather than under the provisions of Rules 4 through 4.6. If the party to be served is not represented by an attorney, service will be made on that party; otherwise, service will be made upon the party's attorney of record, unless the court otherwise orders.²¹⁰ Service will ordinarily be made by regular

²⁰⁵ *Stern v. Yasuna*, 44 Misc. 2d 185, 253 N.Y.S.2d 439 (Sup. Ct. 1964). *But see* *Salvatore v. City of New York*, 184 Misc. 823, 55 N.Y.S.2d 463 (N.Y. City Ct. 1945).

²⁰⁶ *Majnaric v. Majnaric*, 46 Ohio App. 2d 157, 347 N.E.2d 552 (1975).

²⁰⁷ *Stern v. Yasuna*, 44 Misc. 2d 185, 253 N.Y.S.2d 439 (Sup. Ct. 1964); *Mulligan v. New York Univ.*, 254 App. Div. 107, 3 N.Y.S.2d 982 (1938).

²⁰⁸ Since a true judgment — that is, a final order — is a prerequisite to the motion for relief from judgment, it would seem to logically follow that the motion cannot be made while a motion for a new trial or a motion for judgment notwithstanding the verdict is pending since either of those motions will suspend the finality of the original judgment.

²⁰⁹ The phrase "all parties to the action" means precisely what it says; notice through service must be given to all of the plaintiffs as well as all of the defendants. As the Commissioners' Comment to The Uniform Contribution Among Tortfeasors Act explains:

The requirement of notice to all of the parties makes it necessary to give notice to the plaintiff as well as to joint tortfeasor defendants. This may on first impression seem unnecessary but it is done to give a plaintiff who may have been only partially paid, some protection against the exhausting of the assets to satisfy a contribution claim before the plaintiff (judgment creditor) has collected the balance on his judgment.

12 UNIFORM LAWS ANNOTATED 89 Comment(b)(1975). Even if the act did not require notice to "all parties," OHIO R. Civ. P. 5(A) would, since it requires that a copy of the motion be served "upon each of the parties." *See also id.* 7(B)(1).

²¹⁰ Service on the attorney of record is warranted by the presumption that the attorney has authority to receive notice on behalf of the client. There is authority for the proposition, however, that an attorney's authority to receive notice on behalf of the client ends with the rendition of a final judgment. *Reynolds v. Reynolds*, 12 Ohio App. 63 (1919). But such a rule is out of harmony with modern practice as provided by the Ohio Rules of

mail directed to the attorney's office, or by handing the copy of the motion to the attorney.²¹¹

A slight exception to these rules must be made in the case of defendants who are in default for failure to appear.²¹² Ohio Civil Rule 5(A) does not require service on such parties unless the pleading to be served asserts a new or additional claim for relief against them. Technically, the motion for judgment does not fall within the ambit of this Rule since it is not a pleading. Further, it may be questioned whether the claim for contribution is the type of "new or additional claim for relief" contemplated by the Rule. However, the better construction is that the Rule applies by analogy. Accordingly, service of the motion must be made on these parties as well. But Civil Rule 5(B) service will not suffice in this instance; Civil Rule 5(A) specifies that the document asserting the new or additional claim for relief must be served "in the manner provided for service of summons in Rule 4 through Rule 4.6." These Civil Rules require certified mail service on the party, though personal service or residence service may also be authorized. Ordinary mail service will not suffice,²¹³ unless certified mail service is unclaimed, or has been refused.

(3) *Separate Action after Judgment.* Although either the cross-claim or the post-judgment motion for contribution may be more convenient, Tortfeasor is not required to employ them; he may, if he so desires, bring a separate action for contribution after the judgment against the co-defendants becomes final. The separate action has been discussed above, and we need not repeat that discussion here.

D. *Suit by Claimant and Contributor against Tortfeasor*

Here, Claimant and Contributor have joined as parties plaintiff against Tortfeasor. Because we have stipulated that Contributor and Tortfeasor were both concurrently negligent in causing Claimant's injuries, we know that Contributor does not have a valid action against Tortfeasor. But that was an objective view of the matter. Subjectively, both Contributor

Civil Procedure. Those Rules recognize the existence of a number of post-judgment motions, and they mandate that those motions are to be served upon the attorneys of record for "each of the parties," unless the court otherwise orders. Thus it may be concluded that an attorney of record is authorized to receive notice on behalf of the client even after judgment unless the client has expressly discharged the attorney, or unless the attorney has recorded his withdrawal from the case with the court. This is in accord with the New York decisions. See *Ohlquist v. Nordstrom*, 143 Misc. 502, 257 N.Y.S. 711 (Sup. Ct. 1932).

²¹¹ In appropriate circumstances service can be made by leaving a copy of the motion with the clerk of courts, by leaving it at the attorney's office, or by leaving it at the attorney's dwelling house or usual place of abode with some person of suitable age and discretion residing therein.

²¹² There is no doubt that a default judgment against one tortfeasor will support a motion for judgment by the other. As it is said in *GTE Automatic Elec. v. ARC Indus.*, 47 Ohio St. 2d 146, 149-50, 351 N.E.2d 113, 115 (1976):

Regardless of whatever else may be said of a default judgment, it is a judgment. It is as good as any other judgment. It is a final determination of the rights of the parties.

²¹³ *Yonally v. Yonally*, 45 Ohio App. 2d 122, 341 N.E.2d 602 (1974). Motion to certify the record was overruled by the Supreme Court of Ohio, October 4, 1974.

and Tortfeasor may legitimately feel that neither was personally negligent in the circumstances, and the sole cause of the injuries was the negligence of the other. Thus, we may postulate that Contributor is acting in good faith when she sues Tortfeasor for negligence, and we may postulate that Tortfeasor is acting in good faith when he denies that negligence and avers that the negligence of Contributor was the sole cause of the injury to both Claimant and Contributor. We may also assume that Tortfeasor will deny his negligence in his answer, and will assert, as against Contributor, the affirmative defense of contributory negligence. Under these circumstances, and apart from settlement and separate action thereafter, what are Tortfeasor's options for obtaining contribution from Contributor?

(1) *The Cross-Claim.* Under the circumstances which we have described, the cross-claim will not lie since Tortfeasor and Contributor are not co-parties defendant.²¹⁴ Therefore, the cross-claim may be eliminated as a viable option.

(2) *The Counterclaim.* In our situation, the counterclaim comes to mind as the most logical procedural device for presenting the claim for contribution. Indeed, the New York statute specifically authorizes the use of a counterclaim for this purpose,²¹⁵ and at least one other state has permitted it.²¹⁶ However, Ohio's Civil Rule 13(A) specifies:

A pleading shall state as a counterclaim any claim which *at the time of serving the pleading the pleader has* against any opposing party, . . .²¹⁷

Now Tortfeasor will not "have" a claim for contribution until after he has paid more than his proportionate share of any judgment Claimant may obtain against him, and this will not be the case at the time he serves his answer. Therefore, since he does not "have" a claim for contribution "at the time of serving the pleading," he may not employ the counterclaim for the purpose of obtaining contribution.

However, Ohio Civil Rule 13(E) permits a claim to be presented by supplemental pleadings if the claim matured after service of the pleading. Assuming the consent of the court, the right combination of circumstances may permit Tortfeasor to present his claim for contribution by way of a counterclaim contained in a supplemental pleading. Suppose, for example, that Tortfeasor settled Claimant's claim in full, and thereby paid more than his proportionate share of the common liability. At that point, his claim for contribution matured, and if Contributor's action against him was still pending, he could serve a supplemental answer which would contain his counterclaim for contribution. On the other hand, suppose that Claimant's action proceeded to judgment before Contributor's action. If Tortfeasor satisfies that judgment, and thereby pays more than his proportionate share, and if Contributor's action is still

²¹⁴ *Danner v. Anskis*, 256 F.2d 123 (3d Cir. 1958).

²¹⁵ N.Y. CIV. PRAC. LAW & R. § 1403 (McKinney Supp. 1976-77).

²¹⁶ *Petersen v. City & Cty. of Honolulu*, 51 Hawaii 484, 462 P.2d 1007 (1970).

²¹⁷ OHIO R. CIV. P. 13(A) (emphasis added).

pending, Tortfeasor may again use the supplemental answer containing a counterclaim for contribution. But here Tortfeasor must be careful. As we noted above, when a judgment is the foundation for a claim to contribution, the judgment must be a final order. In the situation we have just described, the judgment in favor of Claimant will not be a final order unless the judgment entry contains an express finding by the court that there is no just reason for delay in making the judgment final.²¹⁸ Thus, Tortfeasor must insure that the judgment entry contains this magic language.

Although the language of Ohio Civil Rule 13(A) prohibits a direct counterclaim for contribution, there may be a way of avoiding that prohibition provided the ethical admonition contained in Civil Rule 11²¹⁹ can be observed. As an initial premise, we must assume that Tortfeasor believes in good faith that he is not guilty of negligence which proximately caused the injury and damage of which Claimant and Contributor complain, and that that injury and damage was proximately caused by the negligence of Contributor or, at the worst, by the concurrent negligence of Tortfeasor and Contributor. If he believes that in good faith, his first step is to tender a share of the defense of Claimant's action to Contributor (in a sense, he will vouch in Contributor). If Contributor rejects the tender, the next step will be a careful structuring of Tortfeasor's answer to Contributor's portion of the complaint. That answer should contain a denial of Contributor's allegations of negligence, and it should also contain, in the alternative, the affirmative defense of contributory negligence. If Tortfeasor has suffered property damage and/or personal injury in the collision, the answer will also contain a counterclaim against Contributor alleging that Contributor's negligence was the proximate cause of that damage or injury, and praying for compensatory damages therefor. Such a counterclaim will be valid under the provisions of Ohio Civil Rule 13(A). Indeed, that rule mandates that such a claim be presented by way of counterclaim since it arises out of the transaction or occurrence that is the subject matter of Contributor's claim against Tortfeasor, and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Under the provisions of Ohio Civil Rule 18(A),²²⁰ there will be added to that claim for money damages a second alternate claim. In essence, this second claim will allege the tender to Contributor of the defense of Claimant's action and Contributor's rejection of that tender. In addition it will allege the substance of Claimant's and Contributor's claim against

²¹⁸ *Id.* 54(B).

²¹⁹ In pertinent part, Rule 11 provides:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

OHIO R. CIV. P. 11.

²²⁰ *Id.* 18(A) states:

A party asserting a claim to relief as . . . [a] counterclaim . . . may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

Tortfeasor, and Tortfeasor's defense of contributory negligence asserted against Contributor. It will then ask the court to declare that if Tortfeasor is found liable to Claimant in negligence, but not liable to Contributor because of Contributor's contributory negligence, that the negligence of Tortfeasor and Contributor was concurrent, and that by reason thereof, Contributor will be obligated to Tortfeasor in contribution if Tortfeasor pays more than his proportionate share of the common liability to Claimant. In a nutshell, this second alternate claim is a claim for a declaratory judgment to the effect that if Tortfeasor pays more than his proportionate share of the common liability to Claimant, Contributor will be liable to him in contribution.

Is such a claim for declaratory judgment valid, and may the claim be presented in this manner? Turning to the second question first, and assuming the claim's validity, it is probably safe to say that such a claim could not be presented by way of counterclaim if it was the only claim available to Tortfeasor.²²¹ However, since Tortfeasor has a valid counterclaim for money damages, Civil Rule 18(A) permits this claim for declaratory judgment to ride "piggy-back" on the claim for damages. Thus, it may be presented in this manner.

Whether it is a valid claim for declaratory judgment or not is another matter, and one that is fairly debatable. The two essential questions are: whether such a claim presents a real controversy between the parties; and whether a declaratory judgment will terminate the controversy giving rise to the proceedings.²²² No doubt the declaratory judgment in Tortfeasor's favor would terminate the controversy to the same extent as a judgment on a cross-claim or a third party claim, so the second question can be answered in the affirmative. But is there a real controversy? The court in *Bilyeu v. Motorists Mutual Ins. Co.* stated that the granting or denial of declaratory relief would not lie where the controversy was contingent.²²³ In our example the controversy is contingent upon a finding of negligence against Tortfeasor, a finding of contributory negligence against Contributor, and a finding that the negligence of each concurred to proximately cause Claimant's injury. All of these contingencies may never occur, and in this respect this claim differs from the cross-claim or the third party claim where there is but one contingency — the liability of the cross-claimant or the third party claimant to the plaintiff. A determination whether to grant or deny declaratory relief is one of degree,²²⁴ resting within the sound discretion of the court. If there are too many contingencies, the facts upon which the relief is to be granted become hypothetical, and the judgment becomes nothing more than an advisory opinion. Are there

²²¹ This is so because it is essentially contingent in nature, and OHIO R. CIV. P. 13(A) allows only mature claims.

²²² OHIO REV. CODE ANN. § 2721.07 (Page 1954):

Courts of record may refuse to render or enter a declaratory judgment or decree when such judgment or decree would not terminate the uncertainty or controversy giving rise to the proceedings.

²²³ 36 Ohio St. 2d 35, 37, 303 N.E.2d 871, 873 (1973).

²²⁴ *Id.*

too many contingencies here? In the opinion of the author there are not, but the ultimate answer must be left to the courts.

(3) *Impleader*. As a general proposition, a third party claim is not available to Tortfeasor because Contributor is already a party to the action.²²⁵ However, *Sporia v. Pennsylvania Greyhound Lines*²²⁶ suggests a way of avoiding this restriction. The facts of *Sporia* are similar to our own hypothetical. There was an action to recover damages for injuries suffered by Sporia and Kosana as the result of a collision between an automobile driven by Sporia, in which Kosana was riding as a passenger, and a Greyhound bus. Sporia and Kosana had joined in the same action as parties plaintiff. Under the provisions of Rule 21 of the Federal Rules of Civil Procedure,²²⁷ Greyhound moved to have Sporia's claim severed from that of Kosana. In support of its motion, it pointed out that it had a possible claim for contribution against Sporia, but in the present posture of the case it might lose that claim because there was no procedural method by which it could be presented. It further pointed out that if the claims were severed, Sporia would become a technical "stranger" to Kosana's action, and Sporia could then be impleaded in that action as a third party defendant. The trial court denied the motion,²²⁸ but the appellate court reversed holding that the claims of the two plaintiffs, Sporia and Kosana, were separate and distinct and therefore severable.²²⁹ The court noted that severance of the two claims would work no injustice on any of the parties, but would permit Greyhound's right of contribution from Sporia which might otherwise be lost.

(4) *The Post-Judgment Motion*. In our situation, the post-judgment motion provided in section 2307.32(A) will not be available since Claimant will not have obtained a judgment against both Tortfeasor and Contributor,²³⁰ if Claimant prevails, her judgment will be against Tortfeasor only. If Claimant could cross-claim against Contributor, and prevail, then the language of section 2307.32(A) might be stretched to accommodate Tortfeasor, but under the accepted interpretation of Ohio Civil Rule 13(G), Claimant and Contributor may not cross-claim against each other because they are not in a defensive posture in the lawsuit.²³¹

²²⁵ In pertinent part, OHIO R. Civ. P. 14(A) states:

[A] defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a *person not a party* to the action

(Emphasis added.)

²²⁶ 143 F.2d 105 (3d Cir. 1944).

²²⁷ FED. R. Civ. P. 21. In this respect the Federal Rule and OHIO R. Civ. P. 21 are identical; both provide that "any claim against a party may be severed and proceeded with separately."

²²⁸ 3 F.R.D. 197 (W.D. Pa. 1943).

²²⁹ 143 F.2d at 106-08.

²³⁰ As a prerequisite to the summary proceeding after judgment, OHIO REV. CODE ANN. § 2307.32(A) (Page Legis. Bull. 389 (1976)) requires that a judgment be "entered in an action against two or more tortfeasors for the same injury or wrongful death."

²³¹ *Danner v. Anskis*, 256 F.2d 123, 124 (3d Cir. 1958). The court held that a cross-claim may only be instituted by plaintiff against a co-plaintiff when the defendant has

(5) *The Separate Action after Judgment.* If Claimant prevails against Tortfeasor on her claim of negligence, and if Tortfeasor prevails against Contributor on his affirmative defense of contributory negligence, then it would appear that Tortfeasor may attempt to obtain contribution from Contributor by means of the separate action after judgment.

IV. PROBLEMS OF RETROACTIVE APPLICATION

The previous pages have not, by any means, discussed all of the substantive and procedural ramifications of the Act, but they have discussed enough to give the reader the flavor of the Act and how it is apt to be employed. But one very substantial problem remains. The Act became effective on October 1, 1976, but that does not mean that it will immediately apply to all cases. It must yet be determined whether it applies to liability which has been incurred prior to that date, or whether it applies only to liability which is incurred on or after the 1st of October. Essentially, there are four situations: (1) liability incurred and satisfied after October 1, 1976; (2) liability incurred before October 1, 1976, but satisfied after October 1, 1976; (3) liability incurred and satisfied after October 1, 1975, but before October 1, 1976; and (4) liability incurred and satisfied before September 1, 1975.

Clearly, the Act applies to the first situation; and, with a few possible exceptions depending upon just when a judgment becomes final, it is just as clear that it does not apply to the fourth, since the general one-year statute of limitations contained in the Act will bar contribution in cases falling into that category. Thus, the two troublesome situations are the second and the third, and of these two, the second is the most troublesome of all.

There are two questions to be answered: May the Act be applied retrospectively, and if it may not, would its application to the second and third situations be a retrospective application?

The Ohio Constitution provides, in part, that "The General Assembly shall have no power to pass retroactive laws."²³² It has been held, however, that this prohibition has application only to laws affecting substantive rights, and has no reference to laws of a remedial nature providing rules of practice, courses of procedure, or methods of review. Thus, as far as the Constitutional prohibition is concerned, these latter laws are applicable to any proceedings conducted after the adoption of such laws.²³³ While a clear distinction between substantive law and procedural or remedial law is difficult to frame, it has been said that generally the substantive law creates duties, rights, and obligations while procedural law prescribes the methods for enforcing those rights.²³⁴

filed a counterclaim against the plaintiff. The cross-claim must state a claim which is ancillary to a claim stated in the complaint or counterclaim.

²³² OHIO CONST. art. II § 28.

²³³ Kilbreath v. Rudy, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968).

²³⁴ State *ex rel.* Holdridge v. Indus. Comm'n, 11 Ohio St. 2d 175, 178, 228 N.E.2d 621, 623 (1967).

As *Kacian v. Illes Constr. Co.*²³⁵ explained, substantive laws deal with questions of liability or the amount of damages; they create "new wrongs."

An analogy may be drawn between the Contribution Among Tortfeasors Act and the Wrongful Death Act,²³⁶ since both have many points in common. The common law recognized no right of action for wrongful death, nor did the Ohio legislature until 1851. In that year, the General Assembly passed the first Wrongful Death Act, and the Ohio Supreme Court recognized the wrongful death action as "an innovation upon the principles of the common law."²³⁷ Since a new cause of action was thereby created, the law was viewed as substantive although the statute also provided the means to remedy the injury.²³⁸ Thus, even though the Wrongful Death Act includes the procedural means by which the right of action is to be enforced, the whole is substantive in nature because the procedure is ancillary to the right itself, and it is the creation of the right which makes the Act substantive. From this it follows that the Wrongful Death Act could not have been given retroactive effect without violating the Constitutional injunction against retroactive laws.²³⁹

When measured by the above standards, it is clear that the Contribution Among Tortfeasors Act also creates a substantive right. The common law did not recognize such a right,²⁴⁰ and neither did the Ohio legislature until the enactment of the Act. Thus, the Contribution Among Tortfeasors Act must be regarded as an innovation upon the principles of the common law,²⁴¹ and as affording the only civil remedy whereby one tortfeasor may obtain contribution from another.

Technically, of course, only sections 2307.31(A) through 2307.31(F) are substantive in nature; sections 2307.31(G) and 2307.32(A) through 2307.32(F) are procedural. However, these last sections are meaningless without the substantive sections; they are merely ancillary to sections 2307.31(A) through 2307.31(F). Their character is derived from the part to which they are ancillary, and, therefore, the Act as a whole must be deemed substantive.²⁴² Accordingly, the Act as a whole is

²³⁵ 24 Ohio App. 2d 43, 48, 263 N.E.2d 680, 684 (1970), citing *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 72-73, 242 N.E.2d 658, 660 (1968).

²³⁶ OHIO REV. CODE ANN. §§ 2125.01-.03 (Page Supp. 1975).

²³⁷ *Davis v. Justice*, 31 Ohio St. 359, 363 (1877).

²³⁸ *Matz v. Erie-Lackawanna R.R. Co.*, 2 Ohio App. 2d 136, 140-41, 207 N.E.2d 250, 253 (1965):

In addition to the creation of a cause of action, the statutes provide for a specific remedy without which the cause of action cannot be maintained in a court of law.

²³⁹ *Spriggs v. Dredge*, 74 Ohio L. Abs. 264, 140 N.E.2d 45 (Ct. App. 1955).

²⁴⁰ *Royal Indem. Co. v. Becker*, 122 Ohio St. 582, 173 N.E. 194 (1930). The syllabus states:

There is no right of contribution between persons whose concurrent negligence has made them liable in damages.

²⁴¹ See note 237 *supra* and accompanying text.

²⁴² See *Matz v. Erie-Lackawanna R.R. Co.*, 2 Ohio App. 2d 136, 140-41, 207 N.E.2d 250, 253 (1965). More directly on point is *Massey v. Sullivan County*, 225 Tenn. 132, 134-35, 464 S.W.2d 548, 549 (1971) where it was said:

subject to article II, section 28 of the Ohio Constitution, and it may not constitutionally be applied retroactively.

Additionally, Ohio Revised Code section 1.48 provides: "A Statute is presumed to be prospective in its operation unless expressly made retrospective."²⁴³ There is nothing in the text of section 2307.31 or 2307.32 which expressly makes either or both retrospective. Therefore, even without the Constitutional prohibition, the Act may not be applied retrospectively.

But will it be retrospective application if the Act is applied to the second and third situations described above? In *Perk v. City of Euclid*, the Ohio Supreme Court adopted a test for retroactive application:

Any statute that impairs or eliminates vested rights or creates new obligations with respect to "transactions or considerations already passed" is retroactive in its application.²⁴⁴

Clearly, the Act "creates a new obligation" or "imposes a new duty" — the obligation or duty to pay contribution. But what is the "transaction" in respect to which this new "obligation" or "duty" is created or imposed?

The difficulty here is that the right to sue for contribution does not come into existence until two things occur — common liability in fact and payment of more than a proportionate share of that common liability. If the "transaction" is complete when the common liability comes into existence, then the application of the Act to either situation would obviously be a retrospective application because it would create a new obligation or impose a new duty with respect to a transaction which occurred before the effective date of the Act. On the other hand, if both elements are needed to create the "transaction," the Act would be retrospective if applied to the third situation, but not retrospective if applied to the second, since in the second situation the "transaction" does not come into existence until after the effective date of the Act.

Courts in other jurisdictions have struggled with this same problem, and in essence, they have concluded that the "transaction" is the occurrence which gives rise to the common liability.²⁴⁵ Put another way,

[T]he conclusion is inescapable that the purpose of this Uniform Act is to change the general rule that there is no contribution among joint tort-feasors and so to make a substantive change in the law

That this purpose is accomplished by an Act which mentions the procedures by which this primary change is to be availed of, does not change the true nature of the Act as substantive, and make it procedural.

The draftsmen of the 1939 version of the Uniform Act likewise deemed the Act to be substantive in nature. In their comment, they said:

The first Subsection of the second Section creates a right of contribution as a matter of substantive law amongst those who are jointly liable for injuries to the person or property of another.

16 ALI PROCEEDINGS 348 (1939). The subsection to which reference is made reads: "The right of contribution exists among joint tortfeasors." 12 UNIFORM LAWS ANNOTATED 57 (1975).

²⁴³ OHIO REV. CODE ANN. § 1.48 (Page Supp. 1975).

²⁴⁴ 17 Ohio St. 2d 4, 8, 244 N.E.2d 475, 477 (1969) citing *Soc'y for the Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (C.C.D. N.H. 1814).

²⁴⁵ *Massey v. Sullivan County*, 225 Tenn. 132, 464 S.W.2d 548 (1971); *Robertson v.*

there can be no contribution under the Act if the injury or wrongful death which gives rise to the common liability occurs prior to the effective date of the Act. *Distefano v. Lamborn*²⁴⁶ is very like our second situation, and best illustrates the thinking of these courts. Somewhat simplified, the facts are these: Distefano was injured in a construction accident which occurred prior to the effective date of the Delaware Contribution Act. His employer's workers' compensation carrier paid him compensation and became subrogated to his right of action. As subrogee, the carrier instituted suit against Lamborn and McCormick, two subcontractors, alleging that their negligence had caused the injuries to Distefano. While the precise chronology is not clear from the report, it would appear that the Delaware Contribution Among Tortfeasors Act became effective after this suit was commenced. Relying on the Act, Lamborn and McCormick commenced a third-party action against Huber, the owner of the building upon which the construction work was being performed, in which they sought contribution from Huber in the event they were found liable to the workers' compensation carrier. Huber moved for summary judgment on the ground that the injury to Distefano occurred prior to the effective date of the Act, and the Act could not be applied retrospectively. Lamborn and McCormick countered with the argument that the right of contribution does not become fixed until one joint tortfeasor has paid more than his or her pro rata share of the common liability. Since no judgment had yet been obtained in the action, no payment discharging the common liability had yet been made, and the Act having become effective before any right became fixed, the two subcontractors argued that the Act was applicable to the case, and that the third-party action was proper. The court rejected this argument stating that the right of contribution became fixed at the time of the accident and not when payment was made by one tortfeasor of more than his pro rata share.²⁴⁷ The court noted that while the procedural right to institute an action for contribution did not accrue until payment had been made, the inchoate, substantive right to contribution existed from the time of the accident. Since the injury occurred before the effective date of the Delaware Contribution Among Tortfeasors Act, and since that Act created substantive rights the Delaware court, held the Act inapplicable.²⁴⁸

This interpretation best accords with the commonly accepted meaning of the word transaction when used in conjunction with tortious injury. The transaction is the tortious act which gives rise to the common liability; it is the injury or wrongful death which gives rise to a cause of action.²⁴⁹ Accordingly, if Ohio's new act were to be applied to injuries

Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968); *Distefano v. Lamborn*, 81 A.2d 675 (Del. Super. Ct. 1951); *Commercial Cas. Ins. Co. v. Leonard*, 210 Ark. 575, 196 S.W.2d 919 (1946).

²⁴⁶ 81 A.2d 675 (Del. Super. Ct. 1951).

²⁴⁷ *Id.* at 679-81.

²⁴⁸ *Id.*

²⁴⁹ *Sylvester v. Evans*, 109 Ohio App. 211, 160 N.E.2d 142 (1959). "Cause of action" must be distinguished from "action." A "cause of action" is a right to relief, while an

or wrongful deaths which occurred prior to its effective date it would create new obligations or impose new duties with respect to transactions already passed, and would be retrospective in operation. Since retrospective application is forbidden both by the Constitution of Ohio and by Ohio Revised Code section 1.48, it must be concluded that the Act may only apply to injury or wrongful death suffered on or after October 1st, 1976.

V. CONCLUSION

This concludes the survey of the problems which will be encountered in the application of the new act providing for contribution among tortfeasors. Obviously, it has been impossible to survey all of the potential difficulties, because many of them simply cannot be anticipated before they occur. But some of the more important ones have been examined, and viable solutions have been suggested. There is, of course, no guarantee that the courts will agree with these solutions, or follow them, since other solutions are possible, but it will be interesting to observe how the courts will choose between the alternative solutions available to them.

“action” is the proceeding to enforce that right. *Spriggs v. Dredge*, 74 Ohio L. Abs. 264, 140 N.E.2d 45 (Ct. App. 1955). As indicated in the text, the “cause of action” accrues with the injury or wrongful death, but the right to bring an “action” for contribution does not accrue until one tortfeasor pays more than his or her proportionate share of the common liability arising out of the injury or wrongful death.

VI. APPENDIX

(Amended House Bill No. 531)

File 416

AN ACT

eff. 10-1-76

To enact sections 2307.31 and 2307.32 of the Revised Code to provide for the contribution among two or more persons jointly or severally liable in tort.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That sections 2307.31 and 2307.32 of the Revised Code be enacted to read as follows:

Sec. 2307.31. (A) Except as otherwise provided in this section or section 2307.32 of the revised code, where two or more persons are 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. The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of the common liability, and his total recovery is limited to the amount paid by him in excess of his proportionate share. No tortfeasor is compelled to make contribution beyond his own proportionate share of the entire liability. There is no right of contribution in favor of any tortfeasor who has intentionally caused or intentionally contributed to the injury or wrongful death.

(B) 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 is reasonable.

(C) A liability insurer, which 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 proportionate share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(D) This section 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.

(E) This section does not apply to breaches of trust or of other fiduciary obligations.

(F) In determining the proportionate shares of tortfeasors in the entire liability their relative degrees of fault shall be considered. If equity requires the collective liability of some as a group, the group shall

constitute a single share, and principles of equity applicable to contribution generally shall apply.

(G) 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.

Sec. 2307.32 (A) 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 debtors by motion upon notice to all parties to the action.

(B) 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.

(C) 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 discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against him and has commenced his action for contribution within one year after payment, or 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.

(D) 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.

(E) Valid answers to interrogatories by a jury or findings by a court sitting without a jury in determining the liability of the several defendants for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

(F) 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:

(1) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms otherwise provide, but it reduces the claim against the other 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;

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

