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Tort Law - Products Liability - Settlements - Contribution

Stephen J. Del Sole

TORT LAW—PRODUCTS LIABILITY—SETTLEMENTS—CONTRIBUTION—The Pennsylvania Supreme Court found that a manufacturer was independently liable under products liability for the failure to warn of a known defect in a component part. The court also held that a settlement by one joint tort-feasor reduced the verdict amount only by the settling defendant's pro-rata share, and that the non-settling joint tort-feasor owed its full pro-rata share to the plaintiff.

Walton v Avco Corp., Pa , 610 A2d 454 (1992).

On September 1, 1978, Dennis Earl McCracken was piloting a helicopter in North Carolina for the purpose of ferrying a passenger, Billy James Tincher.[1] Tincher was an employee of the owner of the aircraft, Phillips and Jordan Inc.[2] The helicopter, manufactured and sold by Hughes Helicopter Inc.,[3] had incorporated an engine in production that was manufactured by the Avco Corp.[4] The engine seized during flight causing the helicopter to crash, killing both McCracken and Tincher.[5] Subsequent investigation revealed that the malfunction was the result of the failure of an oil pump in the engine manufactured by Avco.[6] On July 30, 1976, thirteen months prior to the accident, Avco had become aware of defects in it's oil pumps and issued a service instruction informing of the condition and giving detailed instructions for it's correction.[7] Hughes received the service instruction but never forwarded it to the helicopter owners or any authorized service centers.[8]

Suits were filed by the estates of the decedents against both Avco and Summa.[9] Both cases were consolidated for the purposes

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1. *Walton v Avco Corp.*, Pa , 610 A2d 454 (1992).
2. *Walton*, 610 A2d at 456.
3. Id. Hughes is a division of the appellant, Summa Corp. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id at 457. The service instruction listed the next overhaul of the helicopter as the time for correction of the engine defect. The helicopter was overhauled on September 14, 1977, thirteen and a half months after issuance of the service instruction, however due to Hughes' failure to advise of the procedure the correction was never performed. Id.
9. Id at 456. Avco filed answers containing cross-claims against Hughes for contribution and or indemnity should an award be made in favor of the plaintiffs. Id.

of discovery and trial.[10] Both Plaintiffs negotiated a settlement with Avco of their respective claims, $922,355.00 for the Walton claim, and $1,000,000.00 for the Tincher claim.[11] The releases made by Avco to the plaintiffs provided that the verdict be reduced by the greater of either the amount of consideration paid for the release or for Avco's pro-rata share of liability as well as specifically retaining Avco's right to seek indemnity and/or contribution from Hughes.[12] Ultimately the cases were submitted to a jury which found both Avco and Hughes strictly liable and made awards to the plaintiffs for considerably less than the settlement amounts.[13] The jury found the engine produced by Avco to be defective in design and that this defect was a substantial factor in causing the fatal accident.[14] The jury also found that Hughes' failure to inform the purchasers of the helicopter or the service centers of the defect was an independent design defect and a substantial factor in causing the accident.[15] Avco was awarded contribution against Hughes for the amount Avco paid in excess of their pro-rata share of the judgement.[16] The superior court affirmed the award of contribution, but remanded for a determination of the amount owed to be made on a comparative fault basis.[17]

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10. Id.

11. Id at 457. Avco amended it's answers to plead the releases. Id.

12. Id at 463. The release agreement provided:

> It is further understood and agreed and it is the express intent of the parties to this agreement that this release shall not in any way affect the rights of Avco . . . to pursue claims of contribution and/or indemnity arising out of the same accident against Summa corporation and/or Executive Helicopters, Inc. . . .
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> IT IS FURTHER UNDERSTOOD AND AGREED, however, that if it should be determined that any person, firm or corporation not being released by the terms of this release is jointly or severally liable to the claimants with any party herein released, in tort or otherwise, the claim against and damages recoverable from such other person, firm or corporation shall be reduced by the greater of the amounts determined as follows
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> a. The amount of consideration paid for this release; or
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> b. The amount determined by the sum of the pro-rata share of legal responsibility or legal liability for which the parties herein released are found to be liable as a consequence of the aforesaid accident of September 1, 1978.

Id.

13. Id at 457. The cases were decided under products liability theory. The Waltons were awarded $891,203.00, and the Tinchers $415,902.00. Id.

14. Id.

15. Id.

16. Id. Avco's request for pre-judgement interest and delay damages on the amount of contribution awarded against Hughes was denied. The denial was affirmed by the superior court. Id.

17. Id. The trial court also found Hughes liable for delay damages to the Waltons from the time of filing the complaint to the date of the settlement with Avco. The superior

Hughes' claim for indemnification against Avco was denied due to the finding that both the defendants were found to be independently liable to the plaintiffs.[18]

A number of complex and interrelated issues came before the supreme court. First, whether Hughes, as a manufacturer of a product, had an independent duty to warn of a defect of a component part that was manufactured by another and of which Hughes had notice of subsequent to the sale of the product. If Hughes was found to have no independent duty, the court examined whether Hughes was entitled to obtain indemnification from the component part manufacturer.[19] Conversely, if such a duty was imposed on Hughes, whether Avco as a result of their settling with the plaintiffs for an amount which exceeded the judgement, should have been allowed contribution against Hughes, the non-settling joint tort-feasor, or, should the plaintiffs be awarded Hughes' full pro-rata share of liability of the judgement.[20] Lastly, whether the allocation of damages among joint tort-feasors who are strictly liable under products liability should be determined on a comparative fault basis.[21]

In addressing the issue of Hughes's duty to warn and its subsequent liability, the Pennsylvania Supreme Court[22] looked to section 402A of the Restatement (second) of Torts.[23] Strict products liability under section 402A developed to provide remedies for those injured in situations where negligence was impossible to prove due to the evolution of society and complex industrial techniques.[24] The broad social policy the court found reflected in section 402A is "when a product is released into the stream of commerce, it is the seller or manufacturer who is best able to shoulder the costs and to administer to the risks involved."[25] Section 402A

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court remanded this award as well for a determination of amount to be made on a comparative fault basis. Id.

18. Id.

19. Id.

20. Id at 458.

21. Id.

22. Nix, C.J., writing for the majority was joined by Larsen, J., Flaherty, J., McDermott, J., and Cappy, J.. Papadakos, J., filed a concurring opinion. Zappala, J., filed a concurring and dissenting opinion.

23. Id. Section 402A of the Restatement (Second) of Torts was adopted as the law in Pennsylvania in *Webb v Zern*, 422 Pa 424, 220 A2d 853 (1966). Id.

24. Id citing *Azzarello v Black Brothers Inc.*, 480 Pa 547, 391 A2d 1020 (1978).

25. Id. Section 402A of the Restatement (Second) of Torts reads:

402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the

requires only that a plaintiff prove that a product was sold in a defective condition[26] and that this defect was the proximate cause of the plaintiff's injuries.[27] The court stated that Pennsylvania has long held that the defective condition of a product includes the lack of sufficient warnings or instructions for a products safe use.[28]

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user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965).

26. The pertinent language of Section 402A of the Restatement (Second) of Torts provides:

g. Defective Condition. The rule stated in this section applies only where the product is, at the time it leaves the sellers hands, in a condition not contemplated by the average consumer, which will be unreasonably dangerous to him.

. . .

i. Unreasonably Dangerous. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

Restatement (Second) of Torts § 402A, comments g & i (1965).

Pennsylvania has followed the Restatement standard for determining what constitutes a defective product as well as judicially creating their own test for defective condition. Under this standard a defect is found if "the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for its intended use." *Azzarello*, 391 A2d at 1027.

27. *Walton* 610 A2d at 458 citing *Berkebile v Brantly Helicopter Corp.*, 462 Pa 83, 337 A2d 893 (1975).

28. *Walton* 610 A2d at 458. Comment h of the Restatement (Second) of Torts states:

h. A product is not in a defective condition when it is safe for normal handling and consumption . . . Where, however [the manufacturer or seller] has reason to anticipate that danger may result from a particular use . . . he may be required to give adequate warning of the danger (see comment j), and a product sold without such warning is in a defective condition.

j. Directions or Warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. . .and a product bearing such a warning, which is safe for use if followed, is not in defective condition, nor is it unreasonably dangerous.

Restatement (Second) of Torts § 402A, comments h & j (1965).

The court in its majority opinion in *Berkebile* wrote, " A defective condition is not limited to defects in design or manufacture. The seller must provide with the product every element necessary to make it safe for use. One such element may be warnings and/or instructions concerning use of the product. A seller must give such warnings and instructions as are required to inform the user or consumer of the possible risks and inherent limitations of his product. . . . If the product is defective absent such warnings, and the defect is a proximate cause of the plaintiff's injury, the seller is strictly liable without proof of negligence."

The court applied the language of Section 400 of the Restatement (Second) of Torts[29] which states "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."[30] This imposition of liability, the court stated, applied to manufacturers or sellers that are assemblers of component parts.[31] The court found that Hughes had incorporated a defective part within its helicopter and that Hughes had undisputed knowledge of the defect.[32] Having been informed of the defect the court found that Hughes' duty to warn was not extinguished merely because Avco had built the defective component part in the engine.[33] Hughes was required to make reasonable attempts to warn the user or consumer directly of the potentially dangerous defect.[34] The court looked to the specific peculiarity of the industry and the ease in which Hughes could have informed purchasers as another factor in imposing liability.[35] Thus, the court found it entirely proper to find Hughes independently liable by the imposition of strict liability for their failure to warn of a known defect.[36]

Once the court established the independent liability of the manufacturer for the failure to warn of a known defect in a component part,[37] disposing of the claim for indemnification against the component part manufacturer logically followed.[38] The court, following its recent decision in *Sirianni v Nugent Brothers Inc.*,[39] stated

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Berkebile, 337 A2d at 902-03.

29. Section 400 was adopted as law in Pennsylvania in *Forry v Gulf Oil Corp.*, 428 Pa 334, 237 A2d 593 (1968). *Walton*, 610 A2d at 459.

30. *Walton*, 610 A2d at 459 quoting section 400 Restatement (Second) of Torts (1965).

31. *Walton*, 610 A2d at 459.

32. Id. See note 8 and accompanying text.

33. Id.

34. Id.

35. Id. The superior court pointed out that helicopters as a product are unique in that they are not of the type to be mass produced or mass marketed and thus to be lost in the chain of commerce. It is not unusual for the seller or manufacturer to maintain close contact with the purchasers or the service stations. Id.

36. Id at 460.

37. Id.

38. Id.

39. 509 Pa 564, 506 A2d 868 (1986). The case arose out of an accident in which Nugent Bros., a demolition company, pursuant to a demolition contract entered into with the city of Philadelphia, caused a brick wall to crash into the home of Mr. and Mrs. Sirianni, killing Mrs. Sirianni and her unborn child. *Sirianni*, 506 A2d at 869. The Court held that the city, who was found by the trial court to have been equally as negligent as the owner of the demolished building was not entitled to indemnification from the owner of the building for the payment of the judgment against the defendants. Id.

that the right to indemnity is only for one who has been found liable merely by process of law against the party who rightfully should bear the cost.[40] The court refused to distinguish between Hughes and Avco as primarily and secondarily liable for the purpose of indemnification as per *Builders Supply Co. v McCabe*.[41] Rather, the court found the relationship between Hughes and Avco to be concurrent primary liability, neither defendant's liability was dependant or contingent upon the others, therefore the court held that there was no right of indemnification between them.[42]

The court then determined to whom Hughes owed its share of the damages.[43] The plaintiffs claimed that Hughes' full pro-rata share of the award was owed to them, while Avco maintained that by virtue of the release with the claimants and the Uniform Con-

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40. *Walton*, 610 A2d at 460. The *Walton* court noted:

> [U]nlike comparative negligence and contribution, the common law right of indemnity is not a fault sharing mechanism between one who was predominantly responsible for an accident and one whose negligence was relatively minor. Rather, it is a fault sharing mechanism, operable only when a defendant who has been liable to a plaintiff solely by operation of law, seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss.

Id quoting *Sirianni* 506 A2d at 871.

41. Id citing *Builders Supply Co. v McCabe*, 366 Pa 322, 77 A2d 368 (1951). In *Builders* the plaintiff brought an action for indemnity against the defendant arising out of an automobile accident. *Builders*, 77 A2d at 368-70. The plaintiff alleged that the defendant, due to his negligent driving, caused the plaintiff's truck to swerve into the path of an oncoming vehicle, resulting in an accident between the oncoming vehicle and the plaintiff's truck. Id at 370. The defendant's automobile did not come into contact with either vehicle. Id. The driver of the oncoming vehicle brought suit against the plaintiff for personal injuries and property damage arising out of the accident. The jury awarded a verdict for three thousand dollars. Id. The plaintiff paid the verdict and brought the present action. Id at 369. The Court distinguished between primary and secondary liability, stating that this difference is in the character or kind of wrong which caused the injury and in the nature of the legal obligation owed by each of the defendants toward the plaintiff, as opposed to the degree of comparable negligence among the defendants. Id at 370. The Court offered numerous examples of this distinction such as the relationship of employer and employee or that of principal and agent. Id. An employer or principal is vicariously or secondarily liable for the wrongs committed by his employee or agent, but the primary party that is liable is the employee or agent that committed the tort. Id. The Court stated that:

> the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only . . . .In the case of concurrent or joint tort-feasors, having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is a complete unanimity among the authorities everywhere that no right of indemnity exists on behalf of either against the other; in such a case, there is only a common liability and not a primary and secondary one, even though one may have been very much more negligent than the other.

Builders, 77 A2d at 371.

42. *Walton*, 610 A2d at 460.

43. Id.

tribution Among Tort-Feasors Act (hereinafter UCATA),[44] they were entitled to contribution against Hughes.[45] In following the precedent of its recently decided opinion of *Charles v Giant Eagle*,[46] where a similar issue was decided,[47] the court concluded the holding of *Charles*, that a non-settling tort-feasor is liable to the plaintiff for his full proportionate share of the damage award, regardless of the amount paid by the settling defendant, was controlling in the present case.[48] The importance of enforcing the *Giant Eagle* policy which would encourage settlements was stressed.[49] The opinion went on to state that crucial to the issue of the right to contribution under the UCATA was the requirement that the settling defendant extinguish the liability of the non settling joint tort-feasor.[50] Examining the release, the court opined that the release entered into by Avco was not made with the intent of releasing or extinguishing Hughes from liability as well.[51] In examining Avco's decision to settle the court stated its belief that Avco, after analyzing the possible risks and benefits, made a business decision to settle to avoid litigation and could not now ask Hughes to reimburse them for what had been shown to have been bad judgement.[52] Thus, the court held that *Giant Eagle* precluded a recovery of contribution by Avco against Hughes, and that the superior court erred in affirming the trial court's award of contribution.[53]

The final issue addressed by the supreme court was the determination of the proper apportionment of damages among the joint tort-feasors. The court rejected the superior court's determination that liability should be determined on a comparative fault basis.[54] The court found it improper in a case of strict liability, where neither defendant was found liable under the theory of negligence,

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44. 42 Pa Cons Stat Ann § 8321 (Purdon 1976).

45. *Walton*, 610 A2d at 460.

46. 513 Pa 474, 522 A2d 1 (1987). See note 101 and accompanying text.

47. *Walton* 610 A2d at 460.

48. Id at 461. See also *Charles*, 522 A2d at 3.

49. Id. The Court held "settlements are encouraged because they result in early receipt of funds by the plaintiffs and reduced volume of litigation." Id. See also *Charles*, 522 A2d at 1.

50. Id. The UCATA provides in section 8324 (c): "Effect of settlement.— A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement." 42 Pa Cons Stat Ann §§ 8324-8326 (Purdon 1982).

51. *Walton*, 610 A2d at 461.

52. Id.

53. Id.

54. Id at 462.

and both were found to be equally at fault, to introduce comparative causation concepts for apportionment of damages.[55] In rejecting the superior court's view, the court expressed its belief that it would be impossible to determine that one of the defendants was more liable than the other.[56]

Justice Zappala concurred as to the holding that Hughes was independently liable for its failure to warn of a known defect in its product, and that concepts of comparative fault should not be used in apportioning damages among strictly liable joint tort-feasors.[57] Justice Zappala dissented from the majority's holding that Avco has no right of contribution against Hughes.[58] The dissent looked to the specific terms of the release entered into between the plaintiff and Avco, and based on this language, distinguished *Walton* from the *Charles* decision upon which the majority relied.[59] The specific terms of the release expressly retained the settling tort-feasors right to contribution.[60] The dissent stated that the opinion of the superior court was more in keeping with the principles created in *Charles*, and would do more in furthering the policy of promoting settlements.[61] Justice Zappala pointed to the contradiction between the majority's statement that "the responsibility of the settling tort-feasor should be finally resolved by the terms of the settlement",[62] and the majority's disregard of the terms of the Avco settlement in *Walton*.[63] Further, Justice Zappala stated that under the majority's holding, the contractual agreement between the plaintiffs and the settling tort-feasor would be discarded, and that a right to contribution would never be upheld in a case involving a settlement by one joint tort-feasor.[64] He questioned the majority's willingness to decide cases based on a desire to further one policy, yet in doing so ignoring an equally important policy of en-

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55. Id. The supreme court has continued to refuse to incorporate concepts of negligence into areas of strict liability. Id. See *Azzarello v Black Brothers Company Inc.*, 480 Pa 547, 391 A2d 1020 (1978).

56. *Walton*, 610 A2d at 462. The court found both defendants equally liable stating "Had the engine not had a defect, no crash would have resulted. Had Hughes put its knowledge into action, the defect would have been cured and the accident prevented." Id.

57. Id at 463 (Zappala dissenting).

58. Id.

59. Id.

60. Id. See note 12 for the text of the release.

61. Id at 464. See note 116 and accompanying text.

62. Id citing *Charles*, 522 A2d at 3.

63. Id.

64. Id at 465.

forcing contractual obligations.[65]

The concept of multiple defendants is well rooted in the common law. In *Borough of Carlisle v Brisbane*[66] the principle was expressed that where one suffers an injury through the concurrent negligence of two or more persons, they are jointly liable for the injuries, and an action may be held against them either jointly or severally.[67] Once a judgement was obtained against joint tort-feasors, the law allowed for the plaintiff to proceed against either party for the payment of the entire judgement.[68] The courts have long held, however, that a plaintiff may have only one satisfaction of his claim.[69] Any payment of the judgement by one defendant acted as a satisfaction of the entire judgement, thus releasing all other wrongdoers and precluding the plaintiff from seeking payment from the other defendants.[70]

The effect that a pre-judgement settlement by one joint tort-feasor had on the plaintiff's ability to seek satisfaction of the judgement was expressed in *Thompson v Fox*.[71] The court found that a release of one joint tort-feasor either by payment of a judgement, or by consideration paid for a release of the tort-feasor, acted as a satisfaction of the claim and thus released all other defendants liable for the same injury.[72] The court stated that this rule held true even if unintended or if the release expressly stated that the other

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65. Id.

66. 113 Pa 554, 6 A 372 (1886). *Carlisle* arose out of an accident when a horse and sleigh in which the plaintiff was riding overturned due to the street being in a state of disrepair and the alleged negligence of the driver. *Carlisle*, 6 A at 372. The plaintiff sustained injuries and brought suit against the city of Carlisle and the driver of the sleigh. Id.

67. Id at 373.

68. *Seither v Philadelphia Traction Co.*, 125 Pa 397, 17 A 338 (1889). In *Seither* the plaintiff was injured in a collision between two street cars. *Seither*, 17 A at 338. He executed a release with the carrying car company in which he agreed to prosecute the claim against the other car company and to reimburse the settling tort-feasor should he recover. Id. The court held this agreement and release to be a bar to the subsequent action against the non-settling joint tort-feasor even though the non settling tort-feasor may be liable for the injury. Id at 339.

69. Id at 338 citing *Livingston v. Bishop*, 1 Johns 290.

70. Id. The court stated; "This agreement and release was a bar to recovery in this action. The plaintiff received one satisfaction; he was not entitled to a second." Id.

71. 326 Pa 209, 192 A 107 (1937). In *Thompson* the plaintiff was injured when struck by an automobile. *Thompson*, 192 A at 108. The plaintiff was then taken to the private hospital of the defendant wherein he was treated for his injuries. Id. Plaintiff brought an action in negligence against the driver of the automobile for his injuries.Id. The claim was settled with the driver by a written instrument that released the driver from all claims and demands arising out of the accident.Id. The plaintiff then proceeded in bringing an action for his injuries against the physician alleging negligence in his treatment. Id.

72. Id at 109.

tort-feasors should not be released.[73]

It was deeply rooted in the law that there existed no right of contribution among joint tort-feasors.[74] In *North Pennsylvania R. Co. v Mahoney*,[75] the court did not allow a tort-feasor, who was forced to discharge the common liability of the other joint tort-feasors by paying the full amount of the damage award to the injured party, to seek contribution from his fellow wrongdoers.[76] Two primary reasons were advanced in support of this rule. First, was the lack of ability to apportion damages among defendants by comparative causation.[77] Second, was the court's reluctance to allow wrongdoers redress for their acts from other wrongdoers.

The rule of law that disallowed contribution among joint tort-feasors was primarily confined to cases where the defendant, who had been forced to pay the damages, knew or was presumed to have known that the act in which he participated in and was found liable for was unlawful.[78] The concept of contribution, however, was applied broadly as in *Goldman v Mitchell-Fletcher*[79] to cases involving other forms of liability. The court in *Goldman* allowed for contribution between defendants found liable under the theory of negligence.[80] The court stated that a person would not be de-

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73. Id. The court reasoned that "the principle which underlies this rule is that the injured person is given a legal remedy only to obtain compensation for the damage done to him, and when that compensation has been received from any of the wrongdoers, his right to further remedy is at an end. . .[W]here both are liable for the same damage, no matter upon what theory their respective liabilities are predicated, the rule applies." Id.

74. *Merryweather v Nixan*, 8 T R 186 (1799).

75. 57 Pa 187 (1868). In *Mahoney* the plaintiff, a child of four years, was injured when struck by an oncoming train. *Mahoney*, 57 Pa at 187. At the time of the accident the child was being carried across the railroad tracks directly ahead of the train by an adult in an effort to avoid any harm. Id at 188. The adult dropped the plaintiff causing her to be struck by the train. Both the railroad company and the adult were found to have been negligent. Id. The plaintiff chose to bring an action against the railroad which subsequently paid the entire verdict. Id.

76. Id at 190.

77. *Railroad v Norton*, 24 Pa 465 (1855). The Court stated "the law has no scales to determine whose wrongdoing weighed most in the compound that occasioned the mischief." *Norton*, 24 Pa at 469.

78. *Boyer v Bolender*, 129 Pa 324, 18 A 127 (1889). Several directors of an insurance company had paid off a judgement recovered against them jointly for the fraudulent appropriation of funds from the company for their own use. *Boyer*, 18 A at 127. It was decided that the paying tort-feasors could not enforce contribution from the other defendants because they had participated in and known of the fraud. Id.

79. 292 Pa 354, 141 A 231 (1928).

80. *Goldman*, 141 A at 231. In *Goldman* a street car passenger recovered a judgement for personal injuries sustained in a collision between a street-car and a wagon. Contribution between the street-car company and the owner of the wagon as joint tort-feasors was allowed. Id at 234.

prived of contribution from another who was also liable, when the grounds of the liability was merely negligence of both in carrying out a lawful act.[81] The reasoning behind the right to contribution as stated in *Puller v Puller*,[82] was founded in the concept of equity. Since equity was seen as equality the court allowed contribution on equitable grounds, meaning that since all the defendants were responsible for the injury they should all share equally in the common burden of damages.[83]

The rules of contribution were codified and enacted as the Uniform Contribution Among Tort-feasors Act ("UCATA") of July 19, 1951.[84] Since the UCATA allows for contribution among joint tort-feasors,[85] an injured party may settle with one or more of the tort-

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81. Id at 235. The court opined that; "On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each codebtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free." Id at 233 citing *Palmer v Wick and Pulteneytown Steam Shipping Co.*, 1894 Appeal Cases 318, 322.

82. 380 Pa. 219, 110 A2d 175 (1955). The car in which Puller, his wife and daughter were riding, collided with a locomotive of the East Broad Top Railroad and Coal Co. *Puller*, 110 A2d at 176. The Railroad joined Puller as an additional defendant citing his negligence as a contributing cause. Id. The jury returned verdicts for the wife and daughter against both the Railroad and Puller as joint tort-feasors. Id at 177. The Railroad paid the verdicts in full and proceeded to seek contribution against Puller for half the amount. The court, while denying recovery for other reasons, stated that contribution among joint tort-feasors is allowable as a matter of equity. Id.

83. Id. The court held that "the theory is that as between two tort-feasors the contribution is not a recovery for the tort, but the enforcement of an equitable duty to share liability for the wrong done." Id at 177.

84. Uniform Contribution Among Tort-feasors Act, Act of July 19, 1951, 1951 Pa Laws 1130, codified at 42 Pa Cons Stat Ann § 8321 (Purdon 1976).

85. The UCATA as enacted in Pennsylvania reads in pertinent part:

Section 8324 Right of contribution

(a) General rule—The right of contribution exists among joint tort-feasors.

(b) Payment required—A joint tort-feasor is not entitled to a money judgement for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(c) Effect of settlement—A joint tort-feasor who enters into settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.

Section 8325 Effect of judgement

The recovery of a judgement by the injured person against one tort feasor does not discharge the other tort-feasor.

Section 8326 Effect of release as to other tort-feasors

A release by the injured person of one joint tort-feasor, whether before or after judgement, does not discharge the other tort-feasor unless the release so provides, but reduces the claim against the other tort-feasor in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

42 Pa Cons Stat Ann §§ 8324-8326 (Purdon 1982).

feasors and still have recourse against the remaining tort-feasors for the balance of any damages awarded and the settling tort-feasor may seek contribution from the other defendants. Specifically in *Swartz v Sunderland*[86] the court, looking to the intent of the UCATA, allowed contribution for one joint tort-feasor who had settled with the plaintiff against the non settling defendant, in absence of a jury verdict.[87]

The issue presented in *Daugherty v Hershberger*[88] was one of first impression for the Pennsylvania Supreme Court. In *Daugherty* the court was required to determine whether the amount of a judgment against joint tort-feasors would be reduced by the amount of consideration paid in a settlement with one tort-feasor in excess of their percentage fault or was it to be reduced by the settling defendant's pro rata share.[89] The court interpreted the language of the UCATA as "wholly unambiguous"[90] in opining that it was clear that the amount of the judgment should be reduced by the amount of consideration paid for the release or the defendants pro rata share, whichever is greater.[91] Thus where a plaintiff settled for more than his share of the damages, as determined by the jury, the settlement reduced the judgement dollar for dollar. In reaching this conclusion the court reasoned that such an

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86. 403 Pa 222, 169 A2d 289 (1961). The issue arose out of an automobile accident, one defendant settled with the injured parties before the entry of the suit and gained a release off all claims against both tort-feasors. *Swartz*, 169 A2d at 289. The settling tort-feasor then sought contribution of one-half the amount paid in settlement. Id at 290.

87. Id at 291. "Nobody would deny that payment of an injured persons claim by one of the tort-feasors, pursuant to a settlement instead of after judgement in a lawsuit, should entitle the paying tort-feasor to recover contribution to his payment from other joint tort-feasors." Id citing 9 U.L.A. 236.

88. 386 Pa 367, 126 A2d 730 (1956).

89. *Daugherty*, 126 A2d at 733. The action arose out of an automobile accident between Daugherty along with members of his family, and Hershberger and Mong. Id at 732. Mong settled with the plaintiffs and had releases executed in his favor discharging him of any and all liability and providing that any damages recovered against other tort-feasors would be reduced by Mong's pro rata share, that being fifty percent. Id. Verdicts were returned against both Mong and Hershberger for less than the settled amounts. Id. Plaintiffs maintained that the release with Mong stipulated for the verdicts to be reduced by his pro rata share and that therefor they should receive one-half the verdict amount from the non-settling tort-feasor, Hershberger. Id. Hershberger contended that his liability was reduced by the amount of the consideration of the release of Mong's in excess of his pro rata share, thus he is liable for less than his pro rata share. Id at 733.

90. Id at 733.

91. Id. "[I]f the proportion of reduction provided by the release is greater than the amount of consideration paid for the release, such proportion of reduction prevails, but if, on the other hand, the consideration paid for the release is greater than the proportion of reduction provided by the release, than the amount of consideration paid for the release prevails." Id.

interpretation of the UCATA prevented the plaintiff from obtaining a double recovery for his injuries.[92]

In the companion case of *Mong v Hershberger*[93] the superior court allowed contribution against Hershberger for the amount paid in the settlement that was greater than Mong's pro rata share of the judgment.[94] The court, following equitable principles, opined that it would be inequitable not to allow Mong contribution against Hershberger merely because he overestimated the value of the claims.[95] In reaching this conclusion, attention was given to section 8324(c) of the UCATA,[96] which provides that a settling tort-feasor cannot seek contribution from a non-settling defendant whose liability is not extinguished by the release. The court, interpreting this section, refused to believe that the legislature intended to give such a strict definition the term "extinguished" so as to require that the non-settling defendant's total pro-rata share be paid by the settlement. Instead the court allowed for any partial reduction of the non-settling tort-feasor's share by overpayment of the settling defendant to extinguish the judgment by the amount overpaid.[97]

The Comparative Negligence Act of 1976[98] adopted a comparative negligence system in Pennsylvania. This Act modified the law as to joint tort-feasors and the apportionment of damages. Under the Act the percentage of causal liability could be determined. *Charles v Giant Eagle*[99] was the first case in which the court ex-

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92. Id.

93. 200 Pa Super 68, 186 A2d 427 (1962). Mong brought an action in assumpsit against Hershberger for contribution for the amount Mong paid above his proportionate share. *Mong*, 186 A2d at 428.

94. Id at 429. The court, citing the equitable principles on which contribution rests, stated "As it would be inequitable for a plaintiff to recover twice, it is just as inequitable among joint tort-feasors to have one benefit at the expense of another." Id.

95. Id.

96. See note 85 for the language of the UCATA.

97. *Mong*, 186 A2d at 429.

98. The Comparative Negligence Act, Act of July 9, 1976, 1976 Pa Laws 855, codified at 42 Pa Cons Stat Ann § 7102, reads in pertinent part:

> (b) Recovery against joint defendant; contribution—Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

42 Pa Cons Stat Ann § 7102(b) (Purdon 1982 & Supp 1992).

99. 513 Pa 474, 522 A2d 1 (1987).

amined the effect of the Comparative Negligence Act[100] on settlements, contribution, and the liability of non-settling joint tort-feasors. In *Charles*, the supreme court interpreted the Comparative Negligence Act as applied to the UCATA. The court ruled that the judgement award should be reduced by the pro-rata share of the settling defendant, regardless of the amount of consideration paid for the release. The non-settling joint tort-feasor would thus be liable to the plaintiff for his full pro-rata share.[101] The court stressed that the result in *Charles* would work to encourage a policy of settlement of claims.[102] Also, the court rejected the appellee's contention that the jury verdict more accurately measures the tort-feasor's obligation than the amount agreed upon between the parties in the settlement.[103] The court stated that the result in *Charles* was compatible with the Comparative Negligence Act and the UCATA, and provided the parties to the release with an option to decide the amount that the total verdict shall be reduced by the settlement.[104]

The Pennsylvania Supreme Court's decisions in *Charles* and *Walton* were a sharp move away from the previous, well articulated rules governing settlements and releases. The rules of law in this area, as developed in *Daugherty* and its companion case of

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100. 42 Pa Cons Stat Ann § 7102 (Purdon 1982 & Supp 1992).

101. *Charles*, 522 A2d at 2. Appellant George Charles ("Charles") filed an action against appellee Giant Eagle Markets ("Giant Eagle") for damages resulting from injuries sustained in a fall near the door of one of Giant Eagle's stores. Id. Giant Eagle joined Stanley Magic Doors Inc., and Jed Door Inc., ("Stanley"), a single entity, as co-defendants. Id. Prior to trial Charles executed a release to Giant Eagle for $22,500.00. Id. The jury returned a verdict for Charles in the amount of $31,000.00. Id. The jury found Giant Eagle 60% negligent and Stanley 40% negligent. Id. Thus, had Giant Eagle not settled with Charles, their proportionate share of the verdict would have been $18,600.00, $3,900.00 less than the consideration paid for the release. Stanley's proportionate share of the verdict was $12,400.00. Id. Stanley paid Charles $8,500.00, maintaining that the verdict against it should be reduced by the amount by which Giant Eagle's payment exceeded 60% of the verdict. Id. Charles reserved his claim to the remainder of Stanley's share of the verdict, Stanley filed a petition to have the judgment marked satisfied arguing that the verdict had been paid in full. Id. The trial court granted the petition and the superior court affirmed.

102. Id at 3.

103. Id. The court held

> [A]ppellee's concern over a windfall to the plaintiff, if appellee were to be required to pay its full pro-rata share, is far overshadowed by the injustices of the result they now urge. In addition to the erosion such a policy would have upon a policy encouraging settlements, it is also bottomed on a fundamentally wrong premise..There is no basis for concluding that the jury verdict must serve as a cap on the total recovery that a plaintiff may receive.

Id.

104. Id at 4. See note 120 and accompanying text for the release language.

Mong, were completely disregarded by the court. In *Charles*, as pointed out by Justice Zappala, the court had given a new interpretation to the "wholly unambiguous"[105] language of the UCATA.[106] Justice Nix, writing for the majority in *Charles*, stated that the result of the new interpretation was to promote a strong policy toward the settlement of claims.[107] Again in *Walton* the majority maintained the "importance of encouraging settlements and . . . the necessity of respecting their finality . . . [were] the policies that fueled our decision in that case."[108] The court maintained that the rule that a release of one joint tort-feasor acts to reduce the verdict by that wrongdoer's pro-rata share, regardless of the amount of consideration paid, and that the non settling defendant is liable only to the plaintiff for his full pro-rata share, is one that will support the court's policy of encouraging settlement.[109] The statutory language of section 8326, however, provides that the amount of payment in a settlement works to reduce the verdict amount by the value of the consideration given for the release, or by the settling defendants share, whichever is greater.[110] The court in *Daugherty* was clear in its opinion that this interpretation was the proper legislative intent of the act.[111]

The court's current reliance on the Comparative Negligence Act as modifying the UCATA to the extent that it now supports its new interpretation is without basis in reason. In *Charles*, the court stated that due to the Act, any settling defendant must have only intended to settle for his pro-rata share.[112] However, the language of the release in *Walton* implied that the parties had contemplated that the settlement amount would be for more than the pro-rata share of the settling defendant's liability. The release provided for

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105. *Daugherty* 126 A2d at 733.

106. *Charles*, 522 A2d at 11 (Zappala dissenting). "By the stroke of its pen, the majority today has not only rewritten the [UCATA] so as to render it meaningless and senseless, it has obliterated the explicit legislative right of contribution which exists among joint tort-feasors . . .". Id.

107. Id at 2, "Settlement is a valuable tool in our arsenal of dispute resolution and it should not be undermined."Id.

108. *Walton*, 610 A2d at 461.

109. *Charles*, 522 A2d at 3, the court states, "[W]here a release has been executed, the verdict is reduced only by the proportionate share of the settling tort-feasor. The actual amount of the release, if it exceeds this sum, is of no consequence in the satisfaction of the judgement of the remaining defendants." Id.

110. 42 Pa Cons Stat Ann § 8326 (Purdon, 1982). For the actual text of the act see note 85 and accompanying text.

111. *Daugherty*, 125 A2d at 733.

112. *Charles*, 522 A2d at 10 (Papadakos concurring).

the reduction of the verdict by "the greater of" either the amount of consideration paid for the release or, the settling tort-feasor's pro-rata share of liability.[113] This clearly demonstrated that both parties considered that the amount of consideration may be for a dollar amount in excess of the settling defendant's proportional share of liability as determined by the jury. Thus, the non-settling joint tort-feasor's share of liability would be extinguished in the amount of consideration paid for the release that was in excess of the settling tort-feasor's proportionate share. In *Walton*, the amount extinguished was the non-settling defendant's total share due to the settlement amounts being greater than the entire jury award. The only effect the Act has on proportioning fault is to permit a determination of the percentage share of causal negligence, not to render the UCATA meaningless. Fault was apportioned among joint tort-feasors prior to the Comparative Negligence Act on an equal or pro-rata bases without rendering the language of the UCATA meaningless and the creation of proportional fault apportionment should not do so now.

The new interpretation of the Act developed in *Charles* and applied to *Walton*, creates the policy that there can be no contribution against a non-settling joint tort-feasor. The court, in *Walton*, stated that the right to seek contribution was determined by the provision of the Act which requires the liability of the non settling defendant to be extinguished first.[114] However, following the reasoning of the court's interpretation, a settlement will never act to extinguish more than the settling tort-feasors pro-rata share. In *Walton* the settlement amounts were for a sum greater than the entire jury verdict.[115] This was irrelevant to the court and was not seen to extinguish the common liability of the defendants pursuant to section 8321.

The basis for this drastic change in the law was to alleviate an overburdened judicial system and save resources by promoting a policy of settlement of claims. However as the superior court has stated, the rule created in *Daugherty* and abandoned in *Charles* may do more to further this policy objective:

> [T]he plaintiff is encouraged to settle in view of the fact that he will recover

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113. *Walton*, 610 A2d at 463 (Zappala concurring and dissenting). See note 12 and accompanying text for the Walton release language.

114. Id at 461.

115. Id at 457. The Walton action was settled for $922,355 and the jury award was for $891,203, the Tincher action was settled for $1,000,000 and the jury award was for $415,902. Id.

> at least the amount of the jury verdict entered against the joint defendants and perhaps a greater amount where the release consideration exceeds the total jury verdict. The non-settling defendant, where the settling defendant has preserved the right to seek contribution, has no incentive to allow the case to go to trial in hopes of securing a windfall at the settling defendants expense. The settling defendant, who protected his contribution rights, has appropriately reached an agreement which is satisfactory to the plaintiff and has at the same time protected his own interest in a fair and reasonable manner.[116]

The current interpretation by the court does not seem to be a rule that will work to encourage the policy of settlements. Defendants seeking to avoid the inconsistencies of trial are likely to be more hesitant in offering to settle when confronted with the realization that if the verdict proves them to be overly generous in their settlement, they have no opportunity to seek contribution and be reimbursed for their overpayment.

Regardless of the effect of the new rule toward settlements and releases, the court in an effort to encourage a policy should still be restrained by statutory language. The court, in pursuing a policy objective and reversing well established precedent, has acted legislatively to modify a statute that was clear in meaning and application. In this manner the court has overreached its authority. The language of the Act has not changed since first interpreted in *Daugherty*, however the court's interpretation of this "wholly unambiguous" language has. As Justice Zappala pointed out in *Charles* the will of the legislature has been substituted for that of the court.[117]

The key distinction between *Charles* and *Walton* lies in the difference of the expressed language of their respective releases. The most perplexing result of the court's application of *Charles* on the *Walton* decision was the disregard for the contractual rights and duties of parties to a release. The court expounded upon the importance of the contractual terms of a release in *Charles* stating that "the finality of the settlement agreement [the release] is crucial"[118] and that "the responsibility of settling tort-feasors should be finally resolved by the terms of the settlement."[119] The release in *Charles* provided that the amount of the release would serve to reduce the verdict only by the settling defendant's pro-rata

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116. Id at 464, 465 (Zappala concurring and dissenting citing *Walton v Avco*, 383 Pa Super 518, 542, 557 A2d 372, 385).

117. Charles, 522 A2d at 11 (Zappala dissenting).

118. Id at 2.

119. Id.

share.[120] Thus the rule that a release acts to reduce the verdict by the pro-rata share of the settling defendant regardless of the consideration paid for the release, can be reconciled with the specific terms of the *Charles* release.

The release in *Walton* however, specifically retained Avco's right of contribution, as well as providing for the reduction of the verdict by the greater of either the amount of the consideration paid or that defendant's pro-rata share.[121] When the holding of *Charles* was applied to the specific terms of this release, the court abandoned their position of the finality of the settlement agreement in determining the rights of the parties. In *Charles*, the court opined that "this section [8326 UCATA] affords the parties to the release an option to determine the amount or proportion by which the total claim shall be reduced provided that the total claim is greater than the consideration paid."[122] The court failed to follow that interpretation and rendered meaningless the contractual agreement when confronted with the express terms of the *Walton* release by not allowing the party's agreement to control. The court in *Charles* quoted Justice Musmanno's dissent in *Daugherty* stating: "The [Giant Eagle] settlement was a purely voluntary compact between two parties and we have no right to step in between them except to see that [Stanley] is not called upon to pay more than [40%] of the verdict. To go further is to intermeddle with the rights of people to settle their own affairs."[123] The ruling in *Walton* is a sharp detour from this rule and has shown the court's willingness to intermeddle and then disregard the expressed contractual rights and duties of parties to a settlement agreement.

Stephen J. Del Sole

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120. Id at 5. The release specifically provided, "I further agree that any recovery that I may obtain against any . . . corporation other than Giant Eagle Markets, Inc. . . . shall be reduced to the extent of the pro-rata share of . . . Giant Eagle." Id.

121. *Walton*, 610 A2d at 463 (Zappalla concurring and dissenting). See note 12 and accompanying text for the *Walton* release language.

122. *Charles*, 522 A2d at 4.

123. Id at 10 quoting *Daugherty*, 126 A2d at 737 (Justice Musmanno dissenting).