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Negligence: Aggravation of Injuries by Malpractice--Contribution or Indemnity

Carolyn A. Wilson

restrictions should not be so onerous as to reduce the effectiveness of collection in situations that demand expeditiousness; yet the Government should not be given the power to destroy a taxpayer financially at its unfettered discretion. The instant decision also serves to impede the evolution of the tax code into an adjunct of the criminal law. If it is to retain its legitimacy, the taxation function must not become ancillary to criminal prosecution.

STEVEN J. WOLK

NEGLIGENCE: AGGRAVATION OF INJURIES BY MALPRACTICE — CONTRIBUTION OR INDEMNITY?

Stuart v. Hertz Corp., 302 So. 2d 187 (4th D.C.A. Fla. 1974)

Suit was brought against an automobile rental corporation and a driver for injuries resulting from an automobile accident. Plaintiffs charged the defendants with liability for both the original injury and its aggravation caused by negligent treatment by a physician.[1] Defendants then filed a third party complaint against the physician for indemnification. A motion to dismiss the third party complaint was denied by the trial court, and the physician filed a

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Hall v. United States, 493 F.2d 1211, 74-1 U.S.T.C. ¶9296 (6th Cir. 1974) ($52,680.25); Boyd v. United States, 74-1 U.S.T.C. ¶9408 (E.D. Pa. 1974) ($13,693.30); Johnston v. Schmidt, 74-1 U.S.T.C. ¶9321 (S.D. Cal. 1974) ($10,044.75); Willits v. Richardson, 362 F. Supp. 456, 73-2 U.S.T.C. ¶9602 (S.D. Fla. 1973) ($25,549.00); Lisner v. McCanless, 356 F. Supp. 398, 73-1 U.S.T.C. ¶9299 (D. Ariz. 1973) ($100,000.00); Rambo v. United States, 353 F. Supp. 1021, 73-1 U.S.T.C. ¶9244 (W.D. Ky. 1972) ($28,446.88); Clark v. Campbell, 341 F. Supp. 171, 72-1 U.S.T.C. ¶9233 (N.D. Tex. 1972) ($104,697.20). This misplacement of the legal mandate sustaining jeopardy procedure has prompted misgivings even within the IRS. During the 1974 Hearings on Taxpayer Assistance, S. B. Wolfe, Director of the Audit Division of IRS, stated: "In our review of termination of taxable period cases . . . we are concerned about the emphasis being placed upon depriving the narcotics traffickers of their working capital as opposed to the emphasis that should be placed on enforcing the tax laws against them." *Hearings on Taxpayer Assistance, supra* note 20, at 622.

It has also been suggested that §6851, as interpreted by the IRS, denies the taxpayer equal protection of the law. With no discernible basis for a distinction, the Government's view results in denial of prompt post-seizure review to short-year jeopardy taxpayers although other jeopardy taxpayers are entitled to petition the Tax Court within sixty days of the assessment. Schreck v. United States, 301 F. Supp. 1265, 1281, 69-2 U.S.T.C. ¶9541, at 85,420 (D. Md. 1969).

1. In the course of an operation necessitated by injuries sustained in an automobile accident, the physician caused the plaintiff neurological damage through negligent severance of her carotid artery. 302 So. 2d 187 (4th D.C.A. Fla. 1974).

petition for certiorari.[2] The Fourth District Court of Appeal of Florida denied certiorari and HELD, a tortfeasor initially causing an injury has the right to indemnification from a physician for aggravation of the injury in the course of treatment.[3]

Fundamental to the law of torts is the principle that a person is held responsible for all the consequences of his tortious conduct.[4] According to this rule, the original injury caused by a tortfeasor is considered to be the proximate cause of the damages flowing from subsequent unskillful treatment by a physician.[5] Adherence to this principle results in placing an inequitable burden of the entire loss on the initial wrongdoer. Courts have long sought to find a just resolution of the problem through the doctrines of contribution and indemnity.[6]

Based on equitable principles, contribution seeks to distribute the loss incurred by joint tortfeasors where one of them has paid an unjust proportion of the burden.[7] Usually, for contribution to be available, there must be common liability of joint tortfeasors predicated on concert of action, or alternatively, the concurrent, independent acts of the tortfeasors must result in a single, indivisible injury.[8] Further, a rule denying contribution among tortfeasors, that originated in England and later was adopted by American courts,[9] was based on the policy that the law should not encourage tortious conduct among wrongdoers by allowing restitution to one at fault,[10] or make value

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2. Certiorari was the appropriate method of review here because no appeal was allowed from the interlocutory order of the circuit court dismissing the third party complaint. The court entertained jurisdiction, reasoning that petitioners could be materially injured throughout the remainder of the proceedings and be without adequate remedy if the order were given erroneously. *Id.* at 189.

3. *Id.*

4. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., Ltd. [1961] A.C. 388 (P.C. 1961) (N.S.W.) ("Wagon Mound No. 1").

5. J. Ray Arnold Lumber Corp. v. Richardson, 105 Fla. 204, 210, 141 So. 133. 135 (1932).

6. An additional theory on which relief has been granted in this situation is subrogation. Based on the premise that the plaintiff would be entitled to recover against the physician, subrogation to the plaintiff's rights has been permitted in an action by the original tortfeasor against the physician. Clark v. Halstead, 276 App. Div. 17, 93 N.Y.S.2d 49 (1949); Fisher v. Milwaukee Elec. Ry. & Light Co., 173 Wis. 57, 180 N.W. 269 (1929).

7. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). The Wisconsin court rejected the customary method of determining the amount of shares for contribution according to the number of tortfeasors, concluding that equity is best served by assigning liability in proportion to the percentage of causal negligence attributable to each tortfeasor. *Id.* at 4, 114 N.W.2d at 107.

8. Bost v. Metcalfe, 219 N.C. 607, 610, 14 S.E.2d 648, 651 (1941).

9. This rule was first introduced in the decision of Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). Although the principle set forth there was limited only to the commission of intentional and wilful torts, it was misinterpreted in America to include unintentional or negligent torts as well. *See* Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 403, 167 N.W. 1048, 1052 (1918); Comment, *Indemnity Among Joint Tortfeasors,* 43 Miss. L.J. 670, 671 (1972).

10. *See* Herrero v. Atkinson, 227 Cal. App. 2d 69, 39 Cal. Rptr. 490, 493 (Dist. Ct. App. 1964); Note, *Contribution and Indemnity Among Tortfeasors,* 31 Mont. L. Rev. 69, 71 (1969).

judgments of the relative culpability of tortfeasors.[11] Finding these reasons to be outweighed by the disadvantages of such an inflexible and inequitable rule,[12] approximately half of all American jurisdictions have eliminated the rule against contribution.[13] Even where the rule is still in force, courts have created exceptions in order to allow recovery in certain circumstances.[14] But, relief is granted under such exceptions only where the tortfeasors are both liable to the injured party but are not *in pari delicto* as to each other.[15] Generally, in situations where recovery is allowed, the negligence of one tortfeasor so exceeds that of another that one is deemed active and the other passive,[16] and the party primarily at fault is required to pay the full amount of damages.[17]

The present state of confusion surrounding the doctrines of contribution and indemnity developed when the courts, in an effort to circumvent the rule against contribution, created exceptions to the rule, categorized them as indemnity, and essentially equated the two theories.[18] In fact, indemnity is similar to contribution only in that it permits reimbursement for a loss paid by one party on behalf of another.[19] Its orgins were in contract law, however, and a contract, express or implied, was required in order to be secured against loss.[20] Thus, indemnity, unlike contribution, involves a shifting of the entire

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11. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972); Note, *supra* note 10, at 71.

12. For a discussion of the argument against the no-contribution rule, see Jones, *Contribution Among Tortfeasors,* 11 U. FLA. L. REV. 175 (1958).

13. This result has been accomplished by different means in the various states. The Uniform Contribution Among Tort-feasors Act, drafted in 1939 and modified in 1955, has been adopted in some states, while others passed their own laws allowing contribution. Coccia, *Getting Others To Assume or Share the Loss: A Discussion of Indemnity and Contribution,* 17 TRIAL LAWYER'S GUIDE 179, 188 (1973). The courts have also been responsible for rejection of the rule in some states. Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918).

14. *E.g.,* Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932) (breach of duty); Fincher Motor Sales, Inc. v. Lakin, 156 So. 2d 672 (3d D.C.A. Fla. 1963) (vicarious liability); McLaughlin v. Siegel, 166 Va. 374, 185 S.E. 873 (1936) (master-servant relationship).

15. *E.g.,* Union Stock Yards Co. v. Chicago, B. & Q. Ry., 196 U.S. 217 (1905); United States v. Acord, 209 F.2d 709 (10th Cir.), *cert. denied,* 347 U.S. 975 (1954); Stembler v. Smith, 242 So. 2d 472 (1st D.C.A. Fla. 1970); Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45 (1st D.C.A. Fla. 1963), *modified,* 160 So. 2d 102 (1964).

16. Maybarduk v. Bustamante, 294 So. 2d 374 (4th D.C.A. Fla. 1974); Peoples Gas Sys., Inc. v. B. & P. Restaurant Corp., 271 So. 2d 804 (3d D.C.A. Fla. 1973); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

17. Fincher Motor Sales, Inc. v. Lakin, 156 So. 2d 672, 674 (3d D.C.A. Fla. 1963).

18. *E.g.,* Panasuk v. Seaton, 277 F. Supp. 979 (D. Mont. 1968); Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Stembler v. Smith, 242 So. 2d 472 (1st D.C.A. Fla. 1970); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

19. *E.g.,* Mims Crane Serv., Inc. v. Insley Mfg. Corp., 226 So. 2d 836 (2d D.C.A. Fla. 1969); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

20. Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 492 (Dist. Ct. App. 1964); Mims Crane Serv., Inc. v. Insley Mfg. Corp., 226 So. 2d 836, 839 (2d D.C.A. Fla. 1969).

burden according to the agreement.[21] Furthermore, contribution requires that the parties be equally at fault; whereas one seeking indemnification must prove himself to be totally without personal fault.[22] Despite their established differences, courts have tended to interchange these doctrines,[23] muddling them beyond the possibility of maintaining a rational distinction.

The confusion is caused primarily by the difficulty in classifying the fault of the tortfeasors, a process that is necessary to the determination of the appropriate theory of relief to be invoked: either the exception to the rule against contribution or the indemnity doctrine.[24] Technically, the distinction is that the contribution exception requires that fault of the wrongdoers be varied in *degree*,[25] whereas indemnity demands that their negligence be of a different *character* so that, although theoretically both parties are liable, only one has actually committed a wrongful act.[26]

The subtleties involved in determining whether the fault differs in degree or kind are best illustrated by the situations in which the issue arises. The problem occurs most frequently when one person is held liable for the damages actually caused by the actions of another. For example, vicarious liability, imputed on the basis of a legal relationship of principal and agent[27] or employer and employee,[28] is merely a legal fiction that imposes responsibility on the individual required to pay the loss. Similarly, where the breach of a duty or agreement between wrongdoers is the proximate cause of the injury incurred by the plaintiff, the party held liable is generally only guilty of omission to act.[29] In these situations the question arises whether there is any negli-

21. Transcon Lines v. Barnes, 17 Ariz. App. 428, 435, 498 P.2d 502, 509 (1972); Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (Dist. Ct. App. 1964); *see* Note, *supra* note 10, at 69.

22. *E.g.*, Transcon Lines v. Barnes, 17 Ariz. App. 428, 498 P.2d 502 (1972); Stembler v. Smith, 242 So. 2d 472 (1st D.C.A. Fla. 1970); Aircraft Taxi Co. v. Perkins, 227 So. 2d 722 (3d D.C.A. Fla. 1969). *But see* Grand Union Co. v. Prudential Bldg. Maintenance Corp., 226 So. 2d 117 (3d D.C.A. Fla. 1969); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

23. *E.g.*, Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964); Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Maybarduk v. Bustamante, 294 So. 2d 374 (4th D.C.A. Fla. 1974); Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

24. *E.g.*, United States v. Acord, 209 F.2d 709, 714-15 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954); Herero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964); Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Maybarduk v. Bustamante, 294 So. 2d 374, 376-77 (4th D.C.A. Fla. 1974).

25. Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932).

26. Builders Supply Co. v. McCabe, 336 Pa. 322, 325, 77 A.2d 368, 370 (1951).

27. Fincher Motor Sales, Inc. v. Lakin, 156 So. 2d 672 (3d D.C.A. Fla. 1963) (liability of negligent driver imputed to owner).

28. United States v. Acord, 209 F.2d 709 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954); McLaughlin v. Siegel, 166 Va. 473, 185 S.E. 873 (1936) (employer liable for negligent acts of his employee).

29. Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Grand Union Co. v. Prudential Bldg. Maintenance Corp., 226 So. 2d 117 (3d D.C.A. Fla. 1969); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

gence on the part of an individual that warrants imposition of liability and, if so, whether there is a sufficient quantitative difference in fault between tortfeasors to render them not *in pari delicto*. Admittedly, this fine technical distinction poses a problem to courts confronted with a particular factual situation. Courts have shown little concern about this danger, however, frequently fusing the concepts intentionally by extracting the principles and terminology from one doctrine and applying them to the other.[30] For example, given the impossibility of providing a remedy under contribution, many courts in no-contribution jurisdictions have expanded the traditional limitations of indemnity in order to encompass these situations where recovery is warranted.[31] Reasoning that contract law furnishes too narrow a basis for indemnity, courts have recently infused principles of equity into the doctrine.[32] Although this amplification of indemnity may achieve what appears to be a more desirable result, it does so at the cost of improper application of the law.

The situation encountered by the Florida court in the instant case presents special difficulty because it does not fit neatly into the established form of either contribution or indemnity.[33] The problem is further aggravated by the rule denying contribution in Florida.[34] Recently, the Supreme Court of Florida was given the opportunity to overrule this burdensome obstacle to equitable relief in *Hoffman v. Jones*,[35] which abrogated existing loss distribution procedures in favor of a system based on comparative negligence. Unfortunately, the court declined to consider the issue and the no-contribution rule has since been reaffirmed by the district courts.[36]

The instant case demonstrates the need for an equitable solution in the situation of aggravation of injuries by a physician. Because the original tortfeasor and the physician are both clearly at fault, the loss should be distributed.[37] In Florida, however, relief through contribution is precluded,[38] and even where available the doctrine of contribution does not lend itself to this situation because either concert of action of joint tortfeasors or a single, in-

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30. Originally, the active-passive distinction was used to determine whether the negligence of joint tortfeasors varied sufficiently in degree to warrant invoking the exception to the no-contribution rule. These terms are now interchangeable with the primary-secondary test, properly used in reference to the differing character of fault between indemnitor and indemnitee. Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

31. *E.g.*, Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964); Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

32. Mims Crane Serv., Inc. v. Insley Mfg. Corp., 226 So. 2d 836, 837 (2d D.C.A. Fla. 1969).

33. 302 So. 2d at 192.

34. Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211 (1st D.C.A. Fla. 1964).

35. 280 So. 2d 431 (Fla. 1973).

36. *See* Maybarduk v. Bustamante, 294 So. 2d 374 (4th D.C.A. Fla. 1974); Rader v. Variety Children's Hosp., 293 So. 2d 778 (3d D.C.A. Fla. 1974); Issen v. Lincenberg, 293 So. 2d 777 (3d D.C.A. Fla. 1974).

37. 302 So. 2d at 189.

38. *Id.* at 190.

divisible injury caused by independent acts is required for recovery.[39] In the instant case the automobile driver and the physician acted independently at different times,[40] causing injuries that are separable and easily identifiable for assignment of culpability. Moreover, reliance on the active-passive exception is precluded because the injuries caused by neither party can be classified as resulting from passive negligence.[41]

In considering the doctrine of indemnity, the court was faced with a similar quandary. The court acknowledged that there was no contract, express or implied, on which to base recovery because there was neither an agreement nor a legal relationship between the parties.[42] Furthermore, as the physician was under no duty to the car driver, no breach warranting indemnification existed.[43] Because each party caused a separate injury, his individual fault was deemed to be primary,[44] making it improper to place the entire burden on one tortfeasor, which is the customary method of relief under indemnity.[45]

Unable to determine an appropriate means of recovery within the limitations of accepted tenets, the court resorted to a modification of the principles of indemnity. It established an equitable right to indemnity,[46] basing its decision on the arguments proposed in *Gertz v. Campbell*,[47] an Illinois case. Factually analogous to the instant case, *Gertz* held that a denial of recovery would result in an indefensible enrichment of the negligent physician and interposed principles of equity to prevent such unjust consequences.[48] The groundwork for this holding was laid in *Herrero v. Atkinson*,[49] where a similar dilemma was resolved under indemnity. The California court, acknowledging that the original tortfeasor has no opportunity to control the conduct of the physician or to protect himself against the possibility of negligent treatment of the plaintiff's injuries,[50] determined that a right to implied indemnity existed where required by principles of equity and good conscience.[51] The court

39. Bost v. Metcalfe, 219 N.C. 607, 610, 14 S.E.2d 648, 651 (1941). *Contra,* Applegate v. Riggall, 229 Ark. 773, 318 S.W.2d 596 (1958).

40. 302 So. 2d at 188-89.

41. *Id.* at 192.

42. *Id.*

43. *Id.*

44. *Id.*

45. *E.g.,* Transcon Lines v. Barnes, 17 Ariz. App. 428, 498 P.2d 502 (1972); Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964).

46. 302 So. 2d at 194.

47. 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

48. *Id.*

49. 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964).

50. *Id.* at 75, 38 Cal. Rptr. at 493. Recognizing that California law regards the act of the original tortfeasor as the proximate cause of damages flowing from subsequent negligent medical care, the court nevertheless determined that doctors are separately liable for their own negligent conduct. *Id.* In *Hoffman v. Jones* the Florida court also acknowledged the premise that each individual should be responsible for the damage proximately caused by his own acts. It therefore rejected the doctrine of contributory negligence, a legal fiction comparable to that involved in the instant case. 290 So. 2d at 438.

51. Herrera v. Atkinson, 227 Cal. App. 2d 69, 79, 39 Cal. Rptr. 490, 493 (Dist. Ct. App. 1964).

reasoned simply that "everyone is responsible for the consequences of his own wrong."[52] The *Gertz* court also relied on *Dole v. Dow Chemical Co.*,[53] where the high court of New York established for the first time the right of a tortfeasor to seek partial indemnity.[54] Rejecting the active-passive distinction as artificial and unpredictable,[55] the court favored apportionment of liability according to the relative responsibility of the parties for the loss.[56]

Although the decision in the instant case reaches a solution in accord with sound public policy, it nonetheless represents an anomalous deviation from established principles of law. Regardless of the fact that this situation requires an equitable distribution of the loss that should be achieved by some other form of contribution,[57] the court ventures to rationalize recovery through a tortured alteration of the indemnity doctrine. Not only does this creation of an equitable right to indemnity further obscure the distinctions between contribution and indemnity, it renders more remote the eventuality of elimination of the rule against contribution in Florida. By providing an alternate but limited means of circumventing the no-contribution rule, and thereby diminishing the necessity to reject it entirely, the ultimate impact of this decision will prove to be an impediment to the advancement of relief in equity.

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52. *Id.*
53. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
54. *Id.*
55. *Id.* at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389.
56. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.
57. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).