

CONTRIBUTION AMONG JOINT TORTFEASORS:
A PRAGMATIC CRITICISM

ONE of its leading advocates writes that "contribution among tortfeasors has become an important item of law reform in this country."¹ I suggest that under present conditions it is rather a step backward than a means of reform.

I

If tort liability is regarded as a means of *shifting* a loss from one who suffered it originally to another, through the traditional criterion of "fault," contribution among tortfeasors simply carries the fault basis of liability to a logical conclusion. But a different way of looking at tort liability is to regard it as a means for *distributing* losses over society as a whole or some fairly large segment of it.² This approach leads to an altogether different set of consequences. Most important among them is that some good accrues from the fact of distribution itself. It is true that the total cost of the direct loss — through accident, for example, — cannot be diminished by its distribution and, indeed, is increased by the cost which the distribution itself entails. Social gain accrues, nevertheless, since consistent distribution of losses over a large group tends to substitute (through the operation of the law of large numbers), a certain and calculable cost for the uncertain risk of ruinous losses to individuals. This removal of risk and uncertainty, moreover, eliminates fear inhibiting desirable enterprise, activity, and progress.³ Finally, the protection of its

¹ Gregory, *Contribution Among Tort-Feasors: A Uniform Practice* [1938] WIS. L. REV. 365. The appendix to this article, beginning at p. 398, sets forth an intermediate draft of the Uniform Contribution among Tortfeasors Act.

² Even before the advent of the automobile and liability insurance there was occasional realization that legal liability might be used as a means of bringing about wide distribution of certain types of losses. See *Martin v. New York & N. E. R. R.*, 52 Conn. 331, 340, 25 Atl. 239, 240 (1892); *City of Hartford v. Talcott*, 48 Conn. 525, 532 (1881). This seems to have been regarded as a legitimate objective — or at least effect — of legislation.

³ This is the conventional way of evaluating the contribution of commercial insurance to society. See WILLETT, *THE ECONOMIC THEORY OF RISK AND INSURANCE* (1901) 107 *et seq.*; 1 DUER, *MARINE INSURANCE* (1845) 54; KULP, *CASUALTY INSUR-*

members from financial ruin or great financial shock is a benefit to society as a whole quite apart from the gratification of humanitarian impulses. This has been regarded as a matter of individual benefit merely,⁴ but I think that there is no such thing as social good apart from the sum of the good accruing to individuals.⁵ And the repercussions of individual ruin are broader and more costly than the direct loss.⁶ The full blessings of distribution can best be attained by comprehensive social insurance, but some measure of advantage may be had within the present framework of our law of torts, for many of its rules tend in practice to shift losses to agencies which can and do distribute them. So my major proposition is simply this: *An existing rule of law which has some tendency to effect loss distribution over a large segment of society ought not to give way to a rule which will bring about a less effective distribution unless there is a very good reason for it.*

The question then arises: is a further refinement of the notion of fault—as exemplified in contribution—a sufficient reason? Let us assume that it may be in some kinds of cases, and narrow our inquiry to the field of accidental injury, where fault in the sense of clear moral delinquency is probably rare.⁷ When so

ANCE (1928) 13-14. It has, of course, less effect in the fields we are discussing than in others, where the risk is peculiar to some form of economic activity.

⁴ Duer quaintly puts it thus: “. . . but although from motives of humanity, we may rejoice that many are thus saved from the ruin in which they might otherwise be involved, it is not in this division of the loss that the public benefit of insurance consists.” 1 DUER, MARINE INSURANCE (1845) 53.

⁵ For judicial authority, see *New York C. R. R. v. White*, 243 U. S. 188, 206-207 (1917); *Holden v. Hardy*, 169 U. S. 366, 397 (1898).

⁶ See REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Columbia University Council for Research in the Social Sciences, 1932) 56, 66, 219, 220 (hereinafter referred to as REPORT BY THE COMMITTEE TO STUDY COMPENSATION); 6 PUBLICATIONS OF NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE (1938) 580 *et seq.*; Corstvet, *The Uncompensated Accident and Its Consequences* (1936) 3 LAW AND CONTEMP. PROB. 466; Douglas, *Wage Earner Bankruptcies—State vs. Federal Control* (1933) 42 YALE L. J. 591, 607; Douglas, *Some Functional Aspects of Bankruptcy* (1932) 41 YALE L. J. 329, 340. Recognition of this as a social benefit of insurance is accorded by modern authors. See 8 ENCYC. SOC. SCIENCES (1937) (*s. v.* “Insurance”) 95-98; RIEGEL AND LOMAN, INSURANCE PRINCIPLES AND PRACTICES (1921) 1-27.

⁷ The advocates of contribution themselves point out the rarity of moral guilt to demonstrate that tortfeasors do not deserve to be deprived of contribution. See, e.g., GREGORY AND BORCHARDT, CASES AND MATERIALS ON TORTS (unpublished, 1937) iii, 3; Notes (1932) 32 COL. L. REV. 94, 97; (1931) 16 MINN. L. REV. 73, 78, 82; (1928) 76 U. OF PA. L. REV. 979, 983; cf. Reath, *Contribution between Persons Jointly Charged for Negligence—Merryweather v. Nizan* (1898) 12 HARV. L. REV.

many of us drive machines capable of doing so much damage, it is inevitable that there will be many human failures fraught with serious consequences to life, limb, and property, which the victims as a class can ill afford. On this horizon the problem of accident prevention looms large, but it is more than doubtful whether a close adherence to the fault principle in civil liability can make a serious contribution to its solution. So far as civil damage goes, two other problems overshadow it: the need for assuring motor victims of compensation, and the need for an intelligent and expedient allocation of their losses so that society may absorb them with as little harm to itself as possible.⁸

Against this contention that the main task of accident law is mitigation of the social disutility occasioned by loss through accident, two counter-arguments may be advanced. It might be said, for example, that methods of adjusting losses must in the long run correspond pretty closely to the ethical sense of the community, which cannot be satisfied by a system which holds men liable who have done no wrong.⁹ That tort law must reflect social ethics is clear enough; but the second branch of this argument assumes that the loss rests where legal liability puts it, which is not necessarily or even generally true today. People are not blind to the ultimate incidence of tort liability, and if they see that some defendants are merely conduits for distributing losses over a large group, they may conclude that it is fair to impose losses on these defendants whenever it is fair for the group as a whole to bear them. There is already an increasing feeling that society should share some burdens which are inseparable from activities that benefit society. This feeling is free from all desire for vengeance or retribution, yet it may have an ethical quality for all that, and it may well come to dominate moral judgments in this field in the not too distant fu-

176; Bohlen, *Contribution and Indemnity between Tort-Feasors* (1936) 21 CORN. L. Q. 552, 559; Note (1930) 18 CALIF. L. REV. 522, 529.

⁸ The Massachusetts compulsory insurance legislation, for example, was addressed entirely to these problems. BOWERS, *COMPULSORY AUTOMOBILE INSURANCE* (1929) 107, 108, 111, 113. Insurance men are, perhaps increasingly, aware of this aspect. See (1939) *BEST'S INS. REP., CASUALTY* 77, 439. Cf. *Rosenblum v. Griffin*, 89 N. H. 314, 318, 197 Atl. 701, 704 (1938). In this country motor vehicles take an annual toll of between 30,000 and 40,000 killed and over 1,000,000 injured. See *ACCIDENT FACTS* (1492) (published by the National Safety Council, Inc.). The financial status of the victims is discussed in the materials cited *supra* note 6.

⁹ See HOLMES, *THE COMMON LAW* (1881) 96; Isaacs, *Fault and Liability* (1918) 31 HARV. L. REV. 954; 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906) 2-4.

ture.¹⁰ It might also be asserted that the imposition of liability without fault puts a burden on affirmative activity which works against the general good. If I were to put forward a system of liability without fault, this argument would have to be met, but no change whatever is here being proposed; I am simply opposing a change which would carry out further the implications of the fault principle. The burden of proof is on the proponents of change and I do not think they can show a social need to advance in the direction of individual liability measured by individual fault beyond the line charted by the common law of the nineteenth century.

II

My succeeding propositions cannot be proved from the reports of decided cases. When some branch of the law is undergoing a period of marked change, it often happens that facts which have

¹⁰ Obviously, I am proposing to keep a rule which would often exonerate an uninsured motorist at the expense of those who have become insured, but that, it is submitted, is only another way of stating a desirable result. If a loss equals 100, less social disutility will result from letting one unit of it fall on each of 100 people than from putting it all on one person, *A*. This is true whether *A* is one of the group of 100, or not; consequently, the rule which divides the loss among the 100 is *always* to be preferred over the rule which puts it on the one (where the choice is simply between these alternatives) in the absence of countervailing considerations. What countervailing considerations, then, can be urged? As I see it, they are these: (1) It may be unjust to make the 100 pay rather than *A*. Any sense of injustice on this score springs from an underlying feeling that *A* should pay his share because of his fault (while only one member of the group of 100 has shared *A*'s "fault"). My answer to that is simply that I prefer the benefits to be had from minimizing the social disutility of a loss through its distribution, to whatever social benefits may accrue from a nice apportionment of loss to fault (which I believe to be a pretty artificial concept in accident cases). (2) It may be unjust to make the 100 pay rather than some larger group — perhaps all beneficiaries of motor transportation. This may well be true. I should welcome any steps toward more complete social insurance; but this article — being directed only toward a choice between what we have and what contribution would give us — is merely a plea for keeping half a loaf rather than exchanging it for ideological symmetry, without any bread at all. (3) It may be inexpedient to make the 100 pay rather than *A* because the group of 100 is made up of those who voluntarily have become insured, and if the loss, or part of it, is cast on *A*, that will have a tendency to lower existing insurance rates and this in turn would have a tendency to induce more people to become insured. Logically, there seems to be something in this point; as a practical matter, probably nothing. The contribution claims which would fall so heavily upon a few scattered individuals would in all probability net so little to the insurance companies that premiums would not be affected in the least. At most, the effect would be negligible.

the greatest bearing on both the practical and the social problems which a case presents, are deemed legally irrelevant. So it is in our tort law today with the fact of insurance. Therefore, I have selected a small sample of reported cases and written the attorneys concerned in them for the facts — relevant here — which do not appear in the report. The sample consisted of all the cases found in the Fourth Decennial Digest under the fifth paragraph of the title "Contribution."¹¹ In the light of these cases, let us examine in detail some objections to contribution.

A. Contribution tends to embarrass and disfavor plaintiffs.— First of all, contribution will make it harder for claimants to settle cases where there are more wrongdoers than one. This is not a necessary consequence of the right to contribution, but it results from the subsidiary rule, sometimes — but not always — adopted as a corollary to a contribution scheme, that a claimant cannot by covenant protect one wrongdoer against contribution claims which might accrue to other wrongdoers.¹² The rule is logical

¹¹ This paragraph is headed "Common interest or liability — Joint wrongdoers," and lists 89 separate cases, some of which earned inclusion under the heading by the merest dictum. That, of course, is a very small sample — too small to afford the basis for any statistically valid statements as to the relative frequency of the various situations presented. Yet the study covers enough cases from widely scattered jurisdictions to show what the patterns are, and suggest in a general way which ones may be expected to recur.

¹² *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S. W.(2d) 36 (1934); *Fox v. Western Motor Lines, Inc.*, 232 App. Div. 308, 249 N. Y. Supp. 623 (4th Dep't 1931), *reversed* 257 N. Y. 305, 178 N. E. 289 (1931); *Blauvelt v. Village of Nyack*, 141 Misc. 730, 252 N. Y. Supp. 746 (Sup. Ct. 1931). Mr. Gregory has proposed the solution of the Kentucky and the lower New York courts. See GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE CASES* (1936) 19. For comments on this proposal, see Bohlen, *Book Review* (1936) 45 *YALE L. J.* 1528; James, *Book Review* (1936) 4 *U. OF CHI. L. REV.* 158. The Commissioners on Uniform Laws have done little better with their proposal. Instead of allowing the balance of a contribution claim to be pursued against the settling defendant, they suggest it be shifted directly to the plaintiff. See [1938] *WIS. L. REV.* 398, 400 (§ 9). All these suggestions show an utter lack of familiarity with accident law in operation. The only thing that makes our archaic tort rules bearable — to victim, insurance company, and court system alike — is the fact that well over 90% of all claims are settled before judgment. Court calendars are notoriously congested as it is, largely because of automobile tort cases. See, e.g., *NEW YORK LAW SOCIETY, A PROPOSAL FOR MINIMIZING CALENDAR DELAY IN JURY CASES* (1936). Insurance companies have realized increasingly that it is good business to make reasonable and early settlements. *NEW YORK LAW SOCIETY, A PROPOSAL FOR MINIMIZING CALENDAR DELAY IN JURY CASES* (1936) 14, 15. Note the attitude underlying *McCART, ADJUSTMENT OF AUTOMOBILE ACCIDENT CASES* (1937); *HIGHBAUGH, HOW*

enough, but its operation is unfortunate. Usually a man will settle a claim against him only to save money — that is, where the compromise figure is less than the probable amount of an adverse verdict. But if, in spite of his agreement with the plaintiff, one tortfeasor can be called upon to pay his share of any verdict which may be rendered against his fellow tortfeasors, he will not settle unless they all do. This puts the plaintiff at a disadvantage in his pre-trial bargaining, where he can no longer play one defendant off against the other,¹³ with the fear of each that unless he settles he may have to bear alone the full weight of the verdict.¹⁴ Instead the injured person has to persuade all the defendants to settle before he can offer any one of them an attractive proposition. The tune will be called by the toughest defendant — the one most re-

TO CONTROL THE HUMAN ELEMENT IN CLAIM HANDLING AND ELSEWHERE (1938). But in any given case the injured person is apt to be at a marked disadvantage in bargaining, and this disadvantage increases with the hardship that the injury has put upon him. Corstvet, *The Uncompensated Accident and Its Consequences* (1936) 3 LAW & CONTEMP. PROB. 466. In the light of this situation, a procedure which impedes settlement must have very great advantages indeed before it is worth adopting. Contribution rights, even if they are to be granted, are scarcely so sacred that it is worth this price just to secure them a little more fully.

¹³ Some proponents of contribution note how the common-law rule operates in this regard and consider the operation vicious. To them it seems that where a plaintiff takes advantage of his strategic position to force settlement from one defendant, there is (apparently improper) "collusion" between the plaintiff and that defendant. This is free use of a vituperative word. To practical lawyers it seems perfectly legitimate for the plaintiff to make what he can out of the no-contribution rule. That the inability of plaintiff to release a tortfeasor from contribution claims would — to say the least — discourage settlement where there are more wrongdoers than one, was observed by Coyle, J., in *Rothman v. Byron*, 141 Misc. 770, 773, 253 N. Y. Supp. 812, 815 (Westchester Co. Ct. 1931), and also in a letter from Arthur Wickham, Esq., of Milwaukee, Wis., to the writer. In his Defense, Mr. Gregory seems to accept this conclusion. *Infra* pp. 1172-73. But his Rejoinder suggests that his proposal would actually help plaintiffs to larger settlements. *Infra* pp. 1187-88. Where all wrongdoers are insured or amply solvent, however, each defendant stands to lose less under the contribution act than now — its share instead of the whole. I do not see how this can improve the plaintiff's bargaining position. It is true of course that today one insurance company often settles favorably by making the first substantial offer and persuading the claimant to look to the other insurers for the rest of his claim. This allows the needy victim to get present cash without sacrificing the bulk of his ultimate deserts. If this practice penalizes anyone, it is the insurance company which is reluctant to compromise and so is left "holding the bag." The removal of this penalty could scarcely facilitate settlement.

¹⁴ Probably the verdict must reflect the amount of any settlement. But the uncompromising defendant takes the risk (usually great) that the balance may far exceed the amount he would have to pay for a release.

luctant to compromise. Of course, contribution may be had without this particular set of untoward consequences. In Wisconsin, where the statute is silent upon the matter and the Supreme Court has not yet spoken, it is assumed in practice and generally ruled by the lower courts that if one wrongdoer settles with the claimant he cannot later be called on for contribution.¹⁵ Under this practice settlements flourish.¹⁶

Other disadvantages to accident victims inhere in any system of contribution which allows a defendant to have other alleged wrongdoers brought into the main action as co-defendants. This will appear from an examination of the reasons why plaintiffs sometimes omit possible defendants from the original suit. The most frequently recurring are:

(1) Cases where the plaintiff has settled with the wrongdoer not sued. In these cases the problem just discussed is presented again.

(2) Cases where the wrongdoer not sued is uninsured.¹⁷ The reason for omitting a possible defendant on this ground is usually the fear that the jury, believing all the defendants to be insured, may bring in a verdict against the uninsured defendant alone. Theoretically, of course, such a verdict means that the jury found only this defendant negligent; but practical men know that juries tend to hold whatever defendant is brought before them, a tend-

¹⁵ Letter from Arthur Wickham, Esq., of Milwaukee, to the writer. It should be said that all the Wisconsin lawyers who wrote me praised the principle and the operation of contribution in their state except for one or two minor points which are not dealt with here.

¹⁶ Letter referred to *supra* note 15. Also letters from Suel O. Arnold, Esq., of Milwaukee; John C. Fritschler, Esq., of Superior; Allan L. Park, Esq., of Wausau; William A. Hayes, Esq., of Milwaukee; E. L. McIntyre, Esq., of Milwaukee.

¹⁷ This was the case in *Booth v. Carleton Co.*, 236 App. Div. 296, 258 N. Y. Supp. 159 (1st Dep't 1932); *Daniels v. Eastern Greyhound Lines, Inc.*, 234 App. Div. 812, 253 N. Y. Supp. 1004 (3d Dep't 1931) (mem. opinion); *Schenck v. Bradshaw*, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931); *Ackerson v. Kibler*, 138 Misc. 695, 246 N. Y. Supp. 580 (Sup. Ct., 1931); *Nacklinger & Rayburn v. Prewitt*, 294 S. W. 977 (Tex. Civ. App. 1927); *Grant v. Asmuth*, 195 Wis. 458, 218 N. W. 834 (1928). Further evidence of the frequent importance of this reason for omitting a possible defendant is to be found in letters from Wisconsin lawyers to the writer containing the following comments: Arthur Wickham, Esq. ("a very important reason"); Suel O. Arnold, Esq. ("is very often the reason"); John C. Fritschler, Esq. ("almost always the reason"); Allan L. Park, Esq. ("basic reason is lack of insurance"); William A. Hayes, Esq. ("often a reason"); E. L. McIntyre, Esq. (lack of insurance rated as the second of two reasons).

ency which sometimes overrides logic — so that the chances of getting a verdict against solvent or insured defendants are actually greater where the financially irresponsible are not brought into the case at all.¹⁸ The importance of the insurance or financial responsibility factor in choosing among defendants is shown negatively in another way. The sample cases (at least those heard from) did not contain a single instance where an insured or a large corporate wrongdoer was omitted from a suit brought solely against an uninsured individual.

(3) Cases where the tortfeasor not sued was the driver of the car in which the plaintiff was riding.¹⁹ In many of these cases the plaintiff's driver was covered by insurance.²⁰ When a plaintiff omits his fully insured driver from suit, he does so not out of consideration for the insurance company's interests, but for tactical reasons, or out of consideration for the driver. Thus the plaintiff's lawyer may fear that a jury will, in spite of the charge, unconsciously identify driver and passenger and impute the former's negligence — at least if emphasized — to the latter.²¹ Or, more commonly, the plaintiff may be unwilling to prejudice the driver's own claims by trying to prove that his negligence contributed to the

¹⁸ Letter of Clayton R. Lusk, Esq., of Cortland, N. Y., to the writer. A similar observation occurs in the letter of Arthur Wickham, Esq.

¹⁹ The following cases in the sample were identifiably of this type. *Fidelity & Cas. Co. v. Christenson*, 183 Minn. 182, 236 N. W. 618 (1931); *Underwriters at Lloyds of Minneapolis v. Smith*, 166 Minn. 388, 208 N. W. 13 (1926); *Booth v. Carleton Co.*, 236 App. Div. 296, 258 N. Y. Supp. 159 (1st Dep't 1932); *Frey v. Fuller*, 234 App. Div. 819, 253 N. Y. Supp. 1005 (4th Dep't 1931) (mem. opinion); *Schenck v. Bradshaw*, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931); *Davis v. Hauk & Schmidt, Inc.*, 232 App. Div. 556, 250 N. Y. Supp. 537 (1st Dep't 1931); *Tirpaeck v. Sweet*, 231 App. Div. 353, 247 N. Y. Supp. 249 (4th Dep't 1931); *Ackerson v. Kibler*, 138 Misc. 695, 246 N. Y. Supp. 580 (Sup. Ct., 1931); *Rothman v. Byron*, 141 Misc. 770, 253 N. Y. Supp. 812 (Westchester Co. Ct. 1931); *Zurn v. Whatley*, 213 Wis. 365, 251 N. W. 435 (1933); *DeBrue v. Frank*, 213 Wis. 280, 251 N. W. 494 (1933); *Brown v. Haertel*, 210 Wis. 354, 246 N. W. 691 (1933); *Grant v. Asmuth*, 195 Wis. 458, 218 N. W. 834 (1928); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475 (1926).

²⁰ Of the cases in note 19 *supra*, the omitted defendant was ascertained to have insurance coverage in the following: *Fidelity & Cas. Co. of N. Y. v. Christenson*, *Underwriters at Lloyds of Minneapolis v. Smith*, *Frey v. Fuller*, *Tirpaeck v. Sweet*, *Ackerson v. Kibler* (plaintiff's driver was insured, but the driver of a third car, also cited in, was not), *Zurn v. Whatley*, *Brown v. Haertel*, *Wait v. Pierce*.

²¹ This seems to have been a contributing reason for omitting the plaintiff's driver as a possible defendant in *Booth v. Carleton Co.*, and *Frey v. Fuller*, both *supra* note 19.

accident.²² Both reasons have peculiar force where the plaintiff and his driver belong to the same family. There are also, apparently, some instances where a plaintiff is unwilling to sue a friend or relative even where the suit can work no pecuniary harm to such a defendant and even where the plaintiff seeks no tactical advantage in omitting him.²³

(4) Cases where the plaintiff omits a possible defendant for a miscellany of tactical reasons. These include popularity of the omitted defendant,²⁴ expectation that the omitted defendant will be a valuable witness in proving a case against the defendant sued,²⁵ and fear of confusing the jury with a multiplicity of issues.²⁶

These then are some of the considerations which may lead an accident victim to omit a possible defendant from the suit. If the defendant sued may bring in the other alleged wrongdoer, he will usually thwart the plaintiff's strategy and gain a corresponding tactical advantage for himself. This may be unobjectionable, but as between plaintiffs and defendants there seems to be no good reason for abandoning traditional attitudes to bring it about.²⁷

²² This seems to have been a contributing reason for omitting the plaintiff's driver as a possible defendant in *Frey v. Fuller*, *Ackerson v. Kibler*, *Brown v. Haertel*, and *Wait v. Pierce*, *supra* note 19.

²³ This seems to have been a contributing reason for omitting the plaintiff's driver as a possible defendant in *Tirpaek v. Sweet*, *supra* note 19.

²⁴ Cases where this was a contributing factor are *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S. W.(2d) 16 (1932); *Nacklinger & Rayburn v. Prewitt*, 294 S. W. 977 (Tex. Civ. App. 1927).

²⁵ Cases where this was a contributing factor are *Southwestern Bell Tel. Co. v. East Texas Public Service Co.*, 48 F.(2d) 23 (C. C. A. 5th, 1931); *Nacklinger & Rayburn v. Prewitt*, *supra* note 24.

²⁶ Cases where this was a contributing factor are *Schenck v. Bradshaw*, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931); *Nacklinger & Rayburn v. Prewitt*, *supra* note 24.

²⁷ The right of a defendant to implead other wrongdoers is not a necessary part of a contribution scheme. Even if the substantive right of contribution on some basis is recognized, the defendant may be required to bring a separate action to enforce it, except where the plaintiff has sued and secured a judgment against all the defendants. See GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936) c. 3. This procedure is less expeditious and efficient than the third party practice suggested by Mr. Gregory and the Commissioners of Uniform Laws. See GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936) 166-67; [1938] WIS. L. REV. 398. It will often require two trials of the fault issue instead of one. Yet it does leave the original plaintiff master of his suit and avoids prejudice to him. If, therefore, contribution is thought desirable in principle, a great deal more thought should be given to the choice between the procedural efficiency of adequate third party practice and the substantial disadvantages that such practice would cast upon accident victims.

This does not dispose of the question. While a proposed change ought to be evaluated in the light of all its consequences, it may be conceded that a rule which works out somewhat unfortunately as between plaintiffs and defendants may be justified if it is needed to prevent serious injustice among defendants. Indeed contribution is urged chiefly to attain justice among defendants and should perhaps in fairness be judged chiefly on that basis.

B. *As among defendants, contribution tends to favor the large and wealthy at the expense of the relatively poor and weak, and for this reason would bring about a less effective social distribution of accident losses than exists at present.* — In 62 of the 89 sample cases, one of the defendants sought contribution or indemnity, or sought to lay the basis for a later claim of this kind.²⁸ In 46 of these cases such a remedy would be barred by the common-law rule as to joint tortfeasors but would be available, upon a proper

²⁸ The remaining cases fell into the following categories: (a) Eight cases involved situations in which no right to contribution would exist under any present contribution scheme. *Bonadonna v. City of Buffalo*, 156 Misc. 225, 281 N. Y. Supp. 343 (Sup. Ct. 1935) (contribution sought by one primarily liable against one only secondarily liable); *Hoover v. Globe Indemnity Co.*, 202 N. C. 655, 163 S. E. 758 (1932); *Lottman v. Cuilla*, 279 S. W. 519 (Tex. Civ. App. 1925), *reversed*, 288 S. W. 123 (Tex. Comm. App. 1926); *Norfolk Southern R. R. v. Gretakis*, 162 Va. 597, 174 S. E. 841 (1934); *Britt v. Buggs*, 201 Wis. 533, 230 N. W. 621 (1930) (co-defendant's liability governed exclusively by workmen's compensation act); *Zutter v. O'Connell*, 200 Wis. 601, 229 N. W. 74 (1930) (parent and minor child); *Roehrer v. Pandl*, 200 Wis. 420, 228 N. W. 512 (1930) (co-defendant originally sued but not liable on the merits); *Michel v. McKenna*, 199 Wis. 608, 227 N. W. 396 (1929). (b) Six were cases in which the defendant paying the judgment was granted full indemnity against another wrongdoer under principles not deriving from any contribution statute. *Southwestern Bell Tel. Co. v. East Texas Public Service Co.*, 48 F.(2d) 23 (C. C. A. 5th, 1931); *Eureka Coal Co. v. Louisville & N. R. R.*, 219 Ala. 286, 122 So. 169 (1929); *Otis Elevator Co. v. Maryland Casualty Co.*, 95 Colo. 99, 33 P.(2d) 974 (1934); *Seaboard Air Line Ry. v. American District Electric Protective Co.*, 106 Fla. 330, 143 So. 316 (1932); *Bowman v. City of Greensboro*, 190 N. C. 611, 130 S. E. 502 (1925); *Cohen v. Noel*, 165 Tenn. 600, 56 S. W.(2d) 744 (1933). (c) Two cases were attempts to get contribution from defendants who had already settled with the plaintiff. *Fox v. Western New York Motor Lines, Inc.*, 257 N. Y. 305, 178 N. E. 289 (1931); *Blauvelt v. Village of Nyack*, 141 Misc. 730, 252 N. Y. Supp. 746 (Sup. Ct. 1931). In New York under the decision in the *Fox* case, this cannot be done; and it seems so clear that no contribution scheme ought to permit this, that I have ruled such New York cases out of consideration. A similar case from Kentucky, however, where contribution may be had from a defendant who has settled with the plaintiff, has been counted. *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S. W.(2d) 36 (1934). (d) A case wherein two wrongdoers agreed to bear the cost of an accident according to liability without reference to the rule denying contribution. *Rome Ry. & Light Co. v. Southern Ry.*, 42 Ga. App. 786, 157 S. E. 527 (1931).

showing of fact, under a contribution statute, or under judicial decisions adopting contribution principles. These, then, are the cases in which the existence of the right of contribution actually changed — or actually would have changed — the result so far as the defendants were concerned; but to nine of my inquiries there was no response. In 14²⁹ of the remaining 37 cases contribution was sought (or projected) by an insurance company, or a large self-insurer,³⁰ against an uninsured individual; in 23³¹ of

²⁹ These are *Gobble v. Bradford*, 226 Ala. 517, 147 So. 619 (1933); *Smith v. Fall River Joint Union H. S. Dist.*, 1 Cal.(2d) 331, 34 P.(2d) 994 (1934); *Quatray v. Wicker*, 178 La. 289, 151 So. 208 (1933); *Cosgrove v. Ellenstein*, 114 N. J. L. 155, 176 Atl. 178 (1935) (Ellenstein was originally insured, but his insurance company became insolvent and contribution was being sought against Ellenstein personally); *Public Service Ry. v. Matteucci*, 105 N. J. L. 114, 143 Atl. 221 (1928) (here Matteucci was insured for \$10,000 which had been paid on the original plaintiff's \$35,000 judgment, but contribution for half the balance was being sought from Matteucci personally); *Fiorentino v. Adkins*, 9 N. J. Misc. 446, 154 Atl. 429 (Sup. Ct. 1931) (per curiam); *Booth v. Carleton Co.*, 236 App. Div. 296, 258 N. Y. Supp. 159 (1st Dep't 1932); *Daniels v. Eastern Greyhound Lines, Inc.*, 234 App. Div. 812, 253 N. Y. Supp. 1004 (3d Dep't 1931); *Schenck v. Bradshaw*, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931); *Hadcock v. Wiggins*, 147 Misc. 252, 263 N. Y. Supp. 583 (Sup. Ct. 1933) (defendants McLane were insured, but their coverage did not extend to damages for loss of consortium, etc., and contribution was here being sought against them personally for half of a judgment based on such damages); *Ackerson v. Kibler*, 138 Misc. 695, 246 N. Y. Supp. 580 (Sup. Ct. 1931) (defendant Shamp not insured); *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 173 N. E. 194 (1930); *Nacklinger & Rayburn v. Prewitt*, 294 S. W. 977 (Tex. Civ. App. 1927); *Grant v. Asmuth*, 195 Wis. 458, 218 N. W. 834 (1928).

³⁰ The reference is to large concerns such as railroads which have so many risks of a given kind that they find it more profitable to set up their own reserves against this class of risks than to transfer it to an insurance company. Concerns that do this as a matter of deliberate business policy are called self-insurers. See WILLETT, *THE ECONOMIC THEORY OF RISK AND INSURANCE* (1901) 106.

³¹ *Southern Ry. v. City of Rome*, 179 Ga. 449, 176 S. E. 7 (1934); *Louisville Ry. v. Louisville Taxicab & Transfer Co.*, 256 Ky. 827, 77 S. W.(2d) 36 (1934); *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S. W.(2d) 16 (1932); *United States Casualty Co. v. Cincinnati, N. O. & T. P. Ry.*, 218 Ky. 455, 291 S. W. 709 (1927); *Fidelity & Casualty Co. v. Christenson*, 183 Minn. 182, 236 N. W. 618 (1931) (contribution denied because of claimant's graver fault, but case included here because contribution could be had under some proposals); *Underwriters at Lloyds of Minneapolis v. Smith*, 166 Minn. 388, 208 N. W. 13 (1926); *Bargeon v. Seashore Transportation Co.*, 196 N. C. 776, 147 S. E. 299 (1929); *Metropolitan Casualty Ins. Co. v. Union Indemnity Co.*, 255 N. Y. 591, 175 N. E. 326 (1931); *Iroquois Gas Corp. v. International Ry.*, 240 App. Div. 432, 270 N. Y. Supp. 197 (4th Dep't 1934); *Frey v. Fuller*, 234 App. Div. 819, 253 N. Y. Supp. 1005 (4th Dep't 1931); *Martindale v. Griffin*, 233 App. Div. 510, 253 N. Y. Supp. 578 (4th Dep't 1931), *aff'd*, 259 N. Y. 530, 182 N. E. 167 (1932) (possible that defendants would have contributed even without statute); *Tirpaeck v. Sweet*, 231 App. Div. 353, 247 N. Y. Supp. 249 (4th Dep't 1931); *Ackerson v. Kibler*, 138 Misc. 695, 246

them it was sought by one such company against another; but in no case was it sought by an uninsured individual against such a company.³²

This is not accidental. Something like it will always characterize contribution because it results from a process very like that of natural selection. We have seen how plaintiffs tend to sue insured or large corporate wrongdoers and to omit from suit those who do not fall within that class, wherever there is a choice among possible defendants. Moreover, a similar tendency is carried still further in seeking satisfaction. Proponents of contribution never tire of stressing the arbitrary power a plaintiff has in deciding how he will collect a judgment against two or more tortfeasors. He may be guided by whim, caprice, or spite. He *may* be, of course, but in fact he usually *is* guided by an intelligent self-interest. Thus even where a plaintiff has sued and has a judgment against an uninsured individual as well as an amply solvent or insured defendant he will almost invariably satisfy his entire judgment from the latter. So it is apparent that the remedy would be effectively used in a substantial number of instances to shift a loss *from* one strategically placed to distribute it *to* one who is unable to distribute it at all, while it would never be used to bring about the opposite result. It remains to consider whether this misfortune would be offset by the promotion of justice in cases where contribution is made available among insurance companies or their peers, or by any other collateral advantage.

C. Contribution will not confer any substantial countervailing benefits. — It will lead to no substantial improvement in doing justice even on the fault principle. The average individual is

N. Y. Supp. 580 (Sup. Ct. 1931) (defendant Ackerson insured); *Cain v. Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641 (1928); *Goldman v. Mitchell-Fletcher Co.*, 292 Pa. 354, 141 Atl. 231 (1928); *Texas Power & Light Co. v. Stone*, 84 S. W.(2d) 738 (Tex. Civ. App. 1935); *Morgan Warehouse & Commercial Co. v. Gilbert Mfg. Co.*, 60 S. W.(2d) 1053 (Tex. Civ. App. 1933); *Zurn v. Whatley*, 213 Wis. 365, 251 N. W. 435 (1933); *Western Casualty & Surety Co. v. Milwaukee Gen. Const. Co.*, 213 Wis. 302, 251 N. W. 491 (1933); *De Brue v. Frank*, 213 Wis. 280, 251 N. W. 494 (1933); *Brown v. Haertel*, 210 Wis. 354, 246 N. W. 691 (1933); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475 (1926). In *Montrief & Montrief v. Bragg*, 2 S. W.(2d) 276 (Tex. Comm. App. 1928), if the claim for indemnity had failed, presumably there would have been a right to contribution.

³² In no case was contribution sought by one uninsured defendant against another. The reason for this suggests itself. Where neither defendant is insured the plaintiff cannot easily get satisfaction from either one alone, and pursues both to the limit of their capacities to pay.

not sued as defendant in an accident case more than once in his life. Most of us are lucky enough to escape even that. If such a man would ever have occasion to invoke contribution, its absence might cause him real hardship and injustice. It is the thought of preventing such hardship and injustice which makes contribution seem so "fair" and gives it its greatest emotional appeal. But the thought is an illusion, for the situation it envisions practically never exists. Of course, insurance companies and self-insurers are fully as much entitled to be shielded from the hardships of injustice as individuals are, but the actual operation of the present rule is very different in its effect upon them because each company of this kind is a constant litigant. As among these perennial defendants it is inevitable that claims for contribution will cancel out in the long run. In most of the cases studied where contribution was invoked by one insurance company against another, the latter's assured had been deliberately omitted from suit by the plaintiff.³³ This fact has double significance. In the first place the factors which lead a plaintiff to make such an omission would operate without discrimination among insurers. Secondly, this narrow use of contribution probably indicates that where two or more amply solvent or insured defendants are joined in suit and suffer an adverse judgment, they voluntarily agree to share its burden; except in cases where the judgment against one becomes immediately enforceable before the judgment against the other.³⁴ So mutual accommodation and the law of averages are bound to even things up pretty well among these constant bedfellows. Moreover, cases where the fault of tortfeasors is grossly disproportionate are apt to fall within existing rules which give one of them a right of indemnity against another.³⁵

³³ This was true in *Consolidated Coach Corp. v. Burge*, *United States Casualty Co. v. Cincinnati, N. O. & T. P. Ry.*, *Fidelity & Casualty Co. v. Christenson*, *Underwriters at Lloyds of Minneapolis v. Smith*, *Bargeon v. Seashore Transportation Co.*, *Frey v. Fuller*, *Tirpaek v. Sweet*, *Ackerson v. Kibler*, *Cain v. Quannah Light & Ice Co.*, *Zurn v. Whatley*, *De Brue v. Frank*, *Brown v. Haertel*, *Wait v. Pierce*, all *supra* note 31.

³⁴ This was true in *Southern Ry. v. City of Rome*, and *Goldman v. Mitchell-Fletcher Co.*, *supra* note 31.

³⁵ See cases cited *supra* note 28(b) for a sample of situations where indemnity has been allowed. Cf. also *Colorado & S. Ry. v. Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30 (1923); *Nashua Iron & Steel Co. v. Worcester & N. R. R.*, 62 N. H. 159 (1882). All cases studied in which indemnity was disallowed have been treated as ones where contribution would be appropriate.

Contribution will not advance the cause of accident prevention or induce more people to become insured. If a man is not constrained to take out liability insurance by fear of a possible judgment against himself alone, it is preposterous to think that he may be affected by the slight additional hazard — even if he is aware of it — that he may be made to pay contribution.³⁶ Like considerations apply to the matter of accident prevention. The vague thought of possible civil liability *may* induce individual drivers to be more careful, but it is safe to guess that the vast majority of drivers have no idea whatever as to the law governing relationships among tortfeasors. And contribution could not materially change the risks of loss which carelessness involves.

CONCLUSION

Contribution in practice is mainly used in two types of cases: those in which an insurance company or a large self-insurer seeks it against an uninsured individual; and those in which a self-insurer or insurance company seeks it against another such company which the plaintiff has deliberately chosen not to implicate in his suit. It is virtually never used by an uninsured individual against a self-insurer or an insurance company. It is rarely used between two such companies when the plaintiff has sued them both. In the first situation, contribution allows defendants who are strategically placed to distribute the loss over society to cast it back instead onto the shoulders of individuals who cannot distribute it at all. In the second situation contribution does little good — for the injustices it would eliminate cancel each other out under the present law — but it does pose a dilemma between two evils, namely, transferring certain tactical advantages from plaintiffs as a class to defendants as a class, and allowing separate suits to enforce contribution claims with consequent duplication of trials and procedural waste. These results are unfortunate and they are not offset by any substantial countervailing advantage. The common law rule forbidding contribution among tortfeasors should therefore be retained, even though it mars a theoretical symmetry in the law of negligence.

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³⁶ The possible effect of contribution on insurance rates has already been noted. See note 10 *supra*.