Contribution among Tortfeasors in Nevada

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CONTRIBUTION AMONG TORTFEASORS IN NEVADA

In 1971 the Nevada legislature passed an act relating to the right of contribution among joint tortfeasors.\(^1\) With its adoption, Nevada joins other jurisdictions which have abandoned the common law rule prohibiting contribution.\(^2\)

It has been suggested that the stimulus for its passage was provided by the case of *Ponderosa Timber & Clearing Co. v. Emrich*,\(^3\) decided in 1970 by the Nevada Supreme Court. The decision in *Emrich* exemplified the inequitable situation which can result in a jurisdiction which forbids contribution. In this case a collusive settlement agreement between plaintiff and one of two joint tortfeasors resulted in the nonsettling tortfeasor having to satisfy the entire judgment.\(^4\) Without any right of contribution, the nonsettling tortfeasor had no remedy against his collusive co-defendants.\(^5\)

The new contribution legislation will have a striking effect on several facets of Nevada tort law. First, the contribution act will substantially affect the law of releases. The release of one joint tortfeasor no longer releases all others jointly and severally liable unless the “release so provides.”\(^6\) This is a modification of existing Nevada law on releases formerly controlled by the Uniform Joint Obligations Act as adopted by the legislature.\(^7\) Under the obligation act, the release of one joint tortfeasor automatically releases all others unless there is an express reservation of rights by the plaintiff against the nonsettling defendants.\(^8\) Second, section 4(2) of the new contributions act specifies that certain conditions precedent must be satisfied before a settling tortfeasor can be protected from a subsequent contribution claim. The

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4. Id. at 627, 472 P.2d at 359.
5. Id. at 628, 472 P.2d at 360.
7. *Id.* §§ 101.020-090 (1971) [hereinafter cited as the Obligations Act].
8. See note 60 & accompanying text *infra*. 

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conditions include the insertion of a clause in the settlement agreement which specifically provides that the nonsettling tortfeasor need satisfy only his pro rata share of the damages. As will be noted, the requirements of section 4(2) have proven to be unworkable in other jurisdictions.

Third, the new legislation introduced the concept of "relative degree of fault" into Nevada tort law. Its application is restricted to the liability of tortfeasors to one another and does not extend to the liability of a tortfeasor to an injured claimant. Though striving for equity, Nevada may have incurred some unbargained for problems. Out-of-court settlements will be made even more difficult since the plaintiff may not always be able to determine what he is giving up when he releases one of two joint tortfeasors.

Finally, though a tortfeasor is released by both the plaintiff and a third party joint tortfeasor, he may still be joined by the nonsettling defendant in an action brought by the injured party. Joinder could be crucially important to the potentially liable defendant to prove that the settling defendant actually is a joint tortfeasor. This proof may be necessary in order for the nonsettling defendant to retain his rights to contribution or to have the plaintiff's damages reduced by the settling defendant's share of the liability.

No Nevada cases have yet been decided on the basis of the new contribution act. It is therefore important to examine cases in jurisdictions which have adopted similar provisions to predict the prospective effect of the new Nevada statute.

Release

At common law the release of one tortfeasor effected the release of all other tortfeasors acting in concert with him. Under this rule, all tortfeasors joined in an action by virtue of concurrent or concerted acts were released by the release of any one joint tortfeasor. Nevada modified this harsh rule by the passage of the Uniform Joint Obli-
gations Act in 1927. This statute has been the subject of extensive criticism, however, and at least one Nevada writer has called for its repeal.

Under the obligations act, the effective release of one tortfeasor results in the release of all others jointly and severally liable unless there is an express reservation of right. This view became the holding in *Whittlesea v. Farmer.* The Nevada Supreme Court, in *Whittlesea,* considered the issue of whether the settlement agreement constituted a release or covenant not to execute. The court held that if construed as a release—and not a covenant not to execute—the agreement would extinguish the plaintiff’s cause of action against the remaining tortfeasor under the obligations act. The same interpretation of the 1927 act was similarly adopted by a federal district court construing New York’s modification of the obligations act. In *Western Newspaper Union v. Woodward* the court decided that

[i]there appears to be no doubt . . . that when a general release, without express reservation of rights against others, is given to one of several joint tortfeasors on a legal claim, or action at law, for an unliquidated sum of money, the legal effect is to work a full satisfaction of the claim, and, hence, a discharge of all the joint tortfeasors.

Release Under New Contribution Act

Section 4(1) of the Nevada contribution act provides that “[t]he release of one joint tortfeasor by the injured person, whether before or after judgement, does not discharge the other joint tortfeasors unless the release so provides . . . .” This provision was adopted from the 1939 Uniform Contribution Among Tortfeasors Act. Its purpose, according to the commissioners of the act who were responsible for its creation, was to alter the harsh common law rule under which a

22. Id. at 349, 469 P.2d at 58. The decision would seem to conclude, a fortiori, that had the agreement been a release, the plaintiff would have lost his rights against any third party who was jointly and severally liable.
24. Id. at 25.
release to one or more joint tortfeasors automatically released all others. The commissioners' intent has been recognized by judicial decision. In Brown v. City of Pittsburgh, a Pennsylvania action by a pedestrian and her husband against the city of Pittsburgh and a church for injuries sustained when plaintiff fell on a sidewalk, the court determined that the

Uniform Contribution Among Tortfeasors Act . . . drastically changed the law on this subject [of releases] and since that enactment a release by the injured party to one jointly liable does not release others also liable, unless the release expressly so provides.

Section 4(1) of the Nevada contribution act, adopted from the basic contribution act interpreted in Brown, seems to rectify the problem faced by an injured person seeking settlement with one tortfeasor but fearful of forfeiting his causes of action against other nonsettling defendants.

The contribution act also renders unimportant the difference between a covenant not to sue (or execute) and a release. Under the obligations act, the courts' determination of whether an agreement was a covenant or a release was critical in determining whether a plaintiff had forfeited his cause of action against the nonsettling tortfeasor. A covenant under the obligations act preserves plaintiff's rights against a nonsettling defendant, while a release effects a general discharge of all those actually and potentially liable for the injury. Accordingly, prior to passage of the new contribution act, the Nevada courts had generally taken the view that it is important to make the covenant versus release determination.

In Hansen v. Collett, for example, an action was brought for medical malpractice. The Nevada Supreme Court, in construing an agreement between plaintiff and one defendant, held that the agreement was a release by its very terms. The tendency of the courts to be guided by the express terms of an agreement, rather than the parties' intent,
was also followed in *Whittlesea v. Farmer*.\(^{35}\) In that decision the court determined that "[i]n some cases covenants are construed to be releases because the words used suggest that result."\(^{36}\) The majority opinion, however, provoked a sound rebuttal by Justice Zenoff. In a concurring opinion he concluded that the intent of the parties should be a more conclusive factor than the actual terms used in the agreement: \(^{37}\) "[i]t is the purpose [of the agreement] that counts, not the name tag."\(^{38}\)

Regardless of how the Nevada courts interpret an instrument under the obligations act, the distinction between a covenant and a release is of no importance under the contribution act. The language of section 4(1) protects a plaintiff from inadvertently forfeiting his cause of action via the covenant-release distinction; a release is no longer a general discharge of liability unless the release so provides.\(^{39}\) The former importance of settlement terminology is thus obviated by the new act.

**"Unless the Release so Provides"**

Section 2(3) of the contribution act provides that the settling tortfeasor is not entitled to contribution from nonsettling tortfeasors unless the release extinguishes the common liability among them.\(^{40}\) Thus, it is critical that the terms of the release reflect the settling defendant's intention to protect his right to seek contribution.\(^{41}\) Naming the nonsettling defendant in an out of court settlement, as one intended by the parties to be released, will extinguish that individual's liability.\(^{42}\) Is it necessary, however, to actually name the nonsettling defendant to discharge him?

In an action involving a nonsettling tortfeasor, appealing from a ruling ordering contribution to a settling tortfeasor, the court, in *Hodges v. United States Fidelity & Guaranty Co.*, held that

[i]f appellant's view were sound, we would have to read this requirement of the Act [that a third party is not released unless it is so provided] to be "does not discharge the other tortfeasors unless the release so provides by specifically naming the other tortfeasor. . . ." We think a release can "so provide" without so naming the other tortfeasors. . . .\(^{43}\)

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\(^{36}\) Id. at 350, 469 P.2d at 59.
\(^{37}\) Id. at 352, 469 P.2d at 60 (concurring opinion).
\(^{38}\) Id.
\(^{39}\) Nev. REV. STAT. § 17.230(1) (Supp. 1971).
\(^{40}\) Id. § 17.210(3).
\(^{41}\) A contribution action may be brought either in the original suit against the nonsettling defendant or in a separate action subsequent to the discharge of the common liability. *Id.* § 17.270(1)(2).
\(^{42}\) Cf., *id.* § 17.230(1).
\(^{43}\) 91 A.2d 473, 476 (D.C. Mun. Ct. 1952) (construing the 1939 Uniform Act
The release in *Hodges* provided for the discharge of the settling tortfeasor and "'all other persons, firms, and corporations, both known and unknown' . . ."44 This was deemed sufficient to release all other joint tortfeasors under the 1939 Uniform Act.46 Similar decisions have been reached in other jurisdictions adopting the contribution act.48 The court in *Peters v. Butler* determined that a general release to "all mankind" barred any further actions against any person responsible for the injury to the plaintiff.47 Should Nevada interpret section 4(1) in conformity with other jurisdictions which have adopted similar contribution provisions, it will adopt the view that a release is sufficient to discharge a defendant even though the released party was not named if the terms of the release indicate an intention to extinguish the defendants' common liability.

Another issue respecting the effect of releases which is raised by the Nevada contribution act concerns the situation in which plaintiff obtains judgment against a nonsettling tortfeasor for less than the consideration paid to him by a settling joint tortfeasor. There is authority in several jurisdictions for the view that a release is evidence that the settlement constituted full satisfaction of the claim and that plaintiff takes nothing additional via a judgment which is less than the amount of the settlement.48 This was the conclusion reached in *Raughley v. Delaware Coach Co.*49 where the court held that the nonsettling defendant had the right to plead a release given to a joint tortfeasor as a complete defense since

> [t]he jury may find that the plaintiff's damages do not exceed $20,000 [the amount of consideration paid for the release] . . . .
> The release, therefore, *may* constitute a complete defense. . . .60

A provision in the release reciting that the settlement constitutes a settlement in full is not, however, necessarily sufficient to extinguish liability of the nonsettling parties and thus would not be sufficient to support a subsequent contribution claim by the settling defendant.51 The Nevada practitioner should therefore include a discharge recital of each defendant's common liability to insure that the settling tortfeasor,

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44. 91 A.2d at 476.
45. Id.
47. 253 Md. 7, 8, 251 A.2d 600, 602 (1969).
49. 47 Del. 543, 91 A.2d 245 (1952).
50. Id. at 350, 91 A.2d at 248.
whom he represents, may maintain his claim for contribution against nonsettling tortfeasors.

Statutory Conflict

The differences between the obligations act and Nevada's new contribution act are particularly important because the obligations act has been neither repealed nor modified by the legislature. As already noted, a release under the obligations act discharges all tortfeasors jointly and severally liable. A release under the contribution act, however, does not release a nonsettling defendant unless it is so provided.

Hence, a statutory conflict has arisen with the passage of the contribution act. By enacting the contribution act without modifying the obligation act, the Nevada legislature has provided two conflicting provisions, each purporting to regulate the effect of a release on nonsettling third party tortfeasors.

The necessity for modifying the obligations act was recognized by the commissioners of the 1939 Uniform Contribution Act. They recommended that those states adopting the obligations act amend its provisions to make clear that the term "obligor" does not include persons liable in tort and that the term "obligee" does not include persons possessing causes of action in tort. As this modification of the obligations act has not been enacted, Nevada practitioners are faced with a perplexing problem: which law should the parties look to in determining rights and liabilities under the terms of a release in a tort action?

A logical solution was suggested in Nordyke v. Pastrell. In Nordyke the Nevada court suggested that "[w]hen two statutes are so repugnant that both cannot be executed, it is the rule that the latest enactment will control." The court also determined that there is a presumption against repeal by implication, and therefore the conflicting statutes should be reconciled if possible. This position was partially based on the holding in State ex rel. Pyne v. La Grave in which the court recognized a presumption that the legislature intended for the latest statute to control when an irreconcilable conflict arose. These

52. See notes 31-32 & accompanying text supra.
53. See notes 28-30 & accompanying text supra.
54. 9 UNIFORM LAWS ANN. 232 (Commissioners' Note) (1957).
55. Id.
56. 54 Nev. 98, 7 P.2d 598 (1932).
57. Id. at 107, 7 P.2d at 600; accord, Presson v. Presson, 38 Nev. 203, 147 P. 1081 (1915); State ex rel. Pacific Reclamation Co. v. Ducker, 35 Nev. 214, 127 P. 990 (1912).
58. 54 Nev. at 105, 7 P.2d at 599.
59. 23 Nev. 25, 41 P. 1075 (1895).
60. Id. at 28, 41 P. at 1076; accord, Cauble v. Beemer, 64 Neb. 77, 177 P.2d
cases indicate that the most reasonable solution to the contradicting statutes would be to determine that the obligations act is repealed by implication to the extent that it would no longer apply to torts or tortfeasors as recommended by the commissioners of the 1939 Uniform Contribution Act.61

**Right of a Settling Tortfeasor to Be Free from Subsequent Contribution Claims**

Upon being released from liability, the settling tortfeasor must be concerned with future claims of contribution against him. These claims may, under some circumstances, be asserted by a nonsettling tortfeasor if he has been forced to satisfy a subsequent judgment.62

Section 4(2) of the contribution act is directed to this problem. It provides in part:

> The release of one joint tortfeasor . . . does not relieve him from liability for contribution . . . unless the release provides for a reduction, to the extent of the pro rata share of the released joint tortfeasor, of the injured person's damages recoverable against all the other joint tortfeasors.63

This subsection was adopted directly from section 5 of the 1939 Uniform Act.64 The commissioners' note to that section documents its purpose as the prevention of collusive agreements between plaintiff and one of several tortfeasors:

> [A]n injured person, acting in collusion with or out of sympathy for one of the tortfeasors, cannot relieve him from the obligation to contribute to the other tortfeasors by releasing him. The only way in which such a release can free the released tortfeasor from his duty to contribute is to include a provision to the effect that [the liability of the other tortfeasor shall be reduced by the settling tortfeasor's pro rata share].65

Collusive agreements typically involve the plaintiff promising not to seek satisfaction from one of two joint tortfeasors if the tortfeasor agrees not to attempt to minimize plaintiff's recovery in any subsequent action brought by plaintiff against the two joint defendants.66 These types of agreements would serve the settling parties no practical use

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61. 9 UNIFORM LAWS ANN. 232 (Commissioners' Note) (1957).
63. NEV. REV. STAT. § 17.230(2) (1971).
64. 9 UNIFORM LAWS ANN. 245 (1957).
65. Id. at 245 (Commissioners' Note).
under the new act since the settling defendant would still be liable for contribution unless the agreement contained a pro rata reduction clause. The inclusion of such a clause would be unacceptable to plaintiff since any benefit he would otherwise receive from collusion would be vitiates by a reduction of his recovery from the nonsettling defendant.

Assume that plaintiff settles with \( A \) (one of two joint tortfeasors) for $5,000 on a claim for injuries sustained in an automobile collision. If the release does not provide for the discharge of \( B \) (the other tortfeasor), then the injured party is free to pursue an action against him. For example, if the resulting verdict awards the plaintiff $25,000 the court will credit the verdict with the $5,000 consideration the plaintiff received from \( A \) in settlement and enter a judgment for $20,000. \( A \) would then be potentially liable in contribution to \( B \) for $7,500. That is, \( A \) is responsible for his pro rata share of one-half of the common liability of $25,000, absent a provision determining the relative fault of each tortfeasor. This is reduced by the $5,000 \( A \) has already paid to the plaintiff.\(^6\) If \( A \) wishes to protect himself from contribution claims, his release must contain the provision for a pro rata reduction of the damages. This provision must provide that any damages recovered by plaintiff against a nonsettling tortfeasor would be reduced by the settling tortfeasor's pro rata share.\(^6\) If the release embodied such a provision in the foregoing example, a $25,000 judgment against \( A \) and \( B \), after \( A \)'s release, would result in a reduction of $12,500 of \( B \)'s ultimate liability. \( B \) would then have no right to seek contribution from \( A \).

Accordingly, without a pro rata reduction provision in the release, the plaintiff would recover $25,000—consideration for the release plus the amount of the judgment. With the inclusion of a pro rata provision, the plaintiff would be entitled to only $17,500—consideration for the release plus the judgment after it is reduced by the settling defendant's pro rata share. The propriety of section 4(2) has been the subject of continuing controversy in the states which have adopted similar provisions.\(^6\)

Arguments in favor of this provision include the elimination of collusive agreements between plaintiff and one defendant to the detriment of a co-defendant. The injustice of such collusive agreements was exemplified by *Ponderosa Timber & Clearing Co. v. Emrich.*\(^7\) In that

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67. If the judgment against \( B \) is for $10,000 or less, then \( B \) would not have any claim for contribution. That is, \( A \)'s pro rata share would be $5,000 (one-half of the judgment) which he already satisfied in consideration for the release.

68. NEV. REV. STAT. § 17.230(2) (1971).


case the plaintiff, Emrich, struck an agreement with the insurance carrier of one of several joint tortfeasors. The agreement guaranteed the plaintiff a recovery of $20,000. If the judgment against the multiple defendants exceeded $20,000, the plaintiff agreed not to look to the settling defendant for satisfaction of the judgment. The defendant would thereby benefit if the judgment exceeded $20,000. To benefit from the terms of the agreement, defendant's counsel's arguments to the jury were calculated to maximize the plaintiff's recovery rather than to minimize the verdict in the usual fashion.\textsuperscript{71} The court in \textit{Ponderosa} permitted the agreement to stand.\textsuperscript{72}

Under the contribution act, these agreements could not benefit settling joint tortfeasors since nonsettling defendants could look to the settling defendant for contribution. Under the facts of \textit{Ponderosa}, for example, the defendant who was party to the collusive agreement would be liable along with the other two defendants in contribution for his pro rata share of plaintiff's recovery of $35,000. The usefulness of such collusive settlements is thus obviated by section 4(2) of the new contribution act.

The validity of the \textit{Ponderosa}-type collusive agreements in Nevada, absent section 4(2), was already jeopardized in the decision of \textit{Lum v. Stinnett}.\textsuperscript{73} \textit{Lum} was an action against three doctors involving alleged negligence in failing to discover and treat a compression fracture in the spine of the plaintiff.\textsuperscript{74} An agreement, similar to that found in \textit{Ponderosa}, was made between the insurance carriers of two defendant doctors and the plaintiff.\textsuperscript{75} The court held that the agreement was "champerous"\textsuperscript{76} and violative of Nevada statutes binding members of the Nevada bar to rules of professional conduct.\textsuperscript{77} In distinguishing this case from \textit{Ponderosa}, the court determined that the validity of the agreement was not in issue in \textit{Ponderosa} and that \textit{Ponderosa} was therefore overruled by the \textit{Lum} decision.\textsuperscript{78} \textit{Lum} went far in protecting

\begin{footnotesize}
\begin{enumerate}
\item Id. at 629-31, 472 P.2d at 361 (dissenting opinion).
\item Id. at 627 n.1, 472 P.2d at 360 n.1.
\item 87 Nev. --, 488 P.2d 347 (1971).
\item Id. at --, 488 P.2d at 348.
\item Id.
\item Id. at --, 488 P.2d at 350. In the 14th and 15th centuries, champerous agreements were lawful. Parties would often assign their claims to men of wealth and reputation under an agreement by which the assignee would prosecute the claim in exchange for a percentage of the recovery. Such claims usually involved fraud or were of a dubious nature. Assignees could then use their influence in the legal structure to obtain a favorable result. These types of agreements were outlawed in the later stages of the common law and are largely controlled today by statute. 6 \textsc{A. Corbin on Contracts} § 1422, at 360-61 (1962).
\item 87 Nev. --, 488 P.2d at 352.
\item Id. at --, 488 P.2d at 352 n.7.
\end{enumerate}
\end{footnotesize}
the unwary nonsettling defendant from collusive settlements resulting in one or more defendants satisfying an unequally high share of a judgment.

Despite these advantages, section 4(2) has been found unworkable in other jurisdictions. According to the commissioners of the 1939 Uniform Act, section 5 of that act (which reads the same as section 4(2) of the Nevada act) was "one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption." Section 5 was intended to prevent plaintiff from discharging one defendant for a nominal consideration or, in the case of collusion, to prevent the settling defendant from promising to remain in the trial without striving to minimize the verdict. Either of these situations could result in a nonsettling defendant incurring disproportionate liability without the right of contribution.

With respect to the impracticability of the provision, it has been noted that:

"The effect of Section 5 . . . has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains [the reduction provisions] . . . because they have no way of knowing what they are giving up. The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors. . . . No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he [is not] a party."

An examination of the earlier example will best illustrate the statute's deleterious effect on the parties' willingness to settle. Assume plaintiff releases joint tortfeasor A for $5,000, and the release contains a clause providing for the reduction of a subsequent verdict against joint tortfeasor B by A's pro rata share. Plaintiff then wins a verdict of $25,000 against B. As already noted, the verdict is reduced to $12,500 since the other $12,500 representing A's pro rata share has already been bargained away by plaintiff. As a result, plaintiff must settle for a total recovery of $17,500 even though the trier of fact awarded him $25,000. On the other hand, if A accepted the release from plaintiff without a reduction provision he would be potentially liable to B for $7,500 which is one-half of the common liability reduced by the $5,000 plaintiff received from A in settlement. Thus both A and B would pay $12,500 even though A had accepted his liability, made an out of court settlement, and relieved plaintiff and the judicial system of the burdens of litigation.

79. 9 Uniform Laws Ann. 132 (Commissioners' Note) (Supp. 1967).
80. Id.
81. 9 Uniform Laws Ann. 245 (Commissioners' Note) (1957).
82. Id. at 132-33 (Supp. 1967).
83. See notes 67-68 & accompanying text supra.
The inequity of this result, and its effects upon the likelihood of settlement, was recognized in Judge Musmanno's dissenting opinion in *Daugherty v. Hershberger.* The case involved multiple plaintiffs who released one joint tortfeasor with a release containing a pro rata reduction clause. The settlement money was divided among the claimants based on their individual losses. Subsequently, the plaintiffs obtained a verdict against the nonsettling tortfeasor. Instead of reducing the verdict by settling defendant's pro rata share, the court deducted the settlement payments made by the released tortfeasor to the plaintiffs which as to some plaintiffs exceeded the verdict awarded them by the jury. As a result, the nonsettling defendant paid almost $12,000 less than the settling defendant. Judge Musmanno's dissent underscored the inequity of this result asserting that from a policy standpoint, the court's decision favored a nonsettling tortfeasor over the settling one.

Because of the inequities thus produced, section 5 was eliminated in the 1955 Uniform Contribution Among Tortfeasors Act, a revision of the 1939 act. The new act substituted a subsection providing that any covenant or release given in "good faith" relieved the settling defendant from any claims of contribution. The commissioners to the 1955 act believed that the requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive, and if so there is no discharge [from a claim of contribution].

This new proviso was criticized on the grounds that a collusive plaintiff and defendant could settle for a sum well below the settling defendant's share of the liability and still be considered within the area of

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85. *Id.* at 370, 126 A.2d at 732.
86. *Id.* at 370-71, 126 A.2d at 732.
87. In a subsequent action, the released tortfeasor sought contribution from the nonsettling tortfeasor for $4,021.23 representing the difference between the latter's pro rata share of the verdict and the reduced amount for which judgment was entered. The court allowed contribution even though the release did not extinguish the nonsettling tortfeasor's liability to the injured party which the 1939 Uniform Act as codified in Pennsylvania requires as a condition precedent. As the opinion states, "With equity the keynote of the doctrine of contribution, the Act . . . must be examined with equity in mind, for it is clearly inequitable to exonerate [the nonsettling tortfeasor] at the expense of [the released tortfeasor]." *Mong v. Hershberger,* 200 Pa. Super. 68, 72, 186 A.2d 427, 429 (1962).
88. 386 Pa. at 377, 126 A.2d at 735 (dissenting opinion).
89. See 9 *UNIFORM LAWS ANN.* 125 (Supp. 1967).
90. *Id.* at 125-26.
91. *Id.* at 132.
92. *Id.* (Commissioners' Note).
"good faith," and the settling defendant could thereby escape liability for a contribution claim. Since the 1939 act and the Nevada contribution act do not consider the "good faith" of a tortfeasor in determining his liability for contribution, the settling defendant in Nevada cannot defeat contribution by a showing of good faith. Liability for contribution can only be defeated if the settling defendant can show the existence of a pro rata reduction clause in the settlement agreement. The possibility of one tortfeasor satisfying a disproportionate percentage of the damages is remote since the absence of a reduction clause permits a nonsettling defendant to enforce contribution, while the presence of a reduction clause results in the diminution of damages by the settling party's pro rata share. The 1955 Uniform Act, however, permits the possibility that a nonsettling defendant could be forced to satisfy more than his share of the damages, with no contribution right, if the trier of fact is satisfied that the settling parties entered into the out of court settlement in "good faith." It is reasonable to conclude that the 1955 act will do less to prevent collusive side agreements, but substantially more to encourage out of court settlements with a single tortfeasor. Parties entering into settlement under the revised contribution act will not be faced with the dilemma of whether or not to include a pro rata reduction clause in the agreement.

The New York Law Revision Commission favored the 1939 pro rata reduction provision. In its report it explained that

[O]bjection to this requirement [of providing for reduction of damages by the pro rata share] has been made on the ground that it would make it difficult for one of several tortfeasors to obtain a separate settlement. But this would be true only where a release was sought for a nominal consideration or a payment substantially less than the pro rata share. . . .

This view is not consistent with the Nevada contribution act, however, which defines the "pro rata share" on the basis of each tortfeasor's "relative degrees of fault."

"Relative Fault"

Four states, not including Nevada, adopting the 1939 Uniform Act

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94. 9 Uniform Laws Ann. 132 (Commissioners' Note) (Supp. 1967).
95. 9 Uniform Laws Ann. 245 (1957).
96. Id.
97. Id. at 132 (Supp. 1967).
99. Id.
use *relative fault* as a basis for apportioning liability among tortfeasors.¹⁰¹ The new Nevada provision was adopted in part from an optional section of the 1939 Uniform Act. The provision, section 9(2) of the Nevada act, states in part:

The relative degrees of fault shall be determined so that no joint tortfeasor shall be called upon to bear more than his share of the liability as between the joint tortfeasors. . . .¹⁰²

Section 9(2) of the Nevada contribution act goes beyond the uniform act in that it requires a determination of the relative degree of fault for all contribution cases, while the 1939 Uniform Act required the determination of relative fault only in those cases where there was "such a disproportion of fault . . . as to render inequitable an equal distribution." The relative fault provision of the uniform act was eliminated by the commissioners in 1955.¹⁰³ Comparative negligence was considered an undesirable alternative since apportionment of ordinary acts of negligence leading to a single injury would not necessarily produce a just result.¹⁰⁴ The indivisibility of a single injury and the lack of any definite basis for apportionment could place too heavy a burden upon the finder of fact.¹⁰⁵

The relative fault provision, adopted by the Nevada legislature, will probably create several serious problems. One difficulty concerns the pro rata reduction requirements of section 4(2) previously discussed.¹⁰⁶

If a release must provide for a pro rata reduction of the injured person's damages to protect a settling tortfeasor from contribution claims, the settling plaintiff will be faced with an inquiry into the relative fault of the multiple tortfeasors before undertaking settlement. To illustrate, if plaintiff exacts payment from \( A \) in settlement of his claim and in consideration for the release provides for a pro rata reduction of his damages, he cannot know by what percentage his verdict against joint tortfeasor \( B \) will be reduced. If the plaintiff believes that \( A \) is 40 percent to blame and settles accordingly, but the jury determines that \( A \) is 70 percent at fault, the plaintiff's verdict against tortfeasor \( B \) will be reduced by more than he anticipated. On a $10,000 verdict, plaintiff would recover only $3,000 from \( B \) instead of the $6,000 he envisioned. If plaintiff is hesitant to include a pro rata reduction in the release knowing that his damages will be reduced by a mathematical division based on the number of tortfeasors, he would be even more hesitant to settle

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¹⁰¹ Included are Arkansas, Delaware, Hawaii, and South Dakota. See 9 Uniform Laws Ann. 129 (Supp. 1967).
¹⁰⁴ See id. (Commissioners' Note).
¹⁰⁶ See notes 62-66 & accompanying text supra.
if he knows that the reduction of these damages will depend upon an unknown quantity—the determination of relative fault by the trier of fact. Plaintiff would hesitate to settle with one tortfeasor except in cases in which the evidence substantiated that the settling tortfeasor contributed in a very small degree to the plaintiff’s injuries, or where the consideration for the release was so significant that it approached full satisfaction of his claim. In the application of relative fault, the plaintiff will need to prognosticate about how the finder of fact will apportion plaintiff’s damages among the several joint tortfeasors. On the other hand, if the release does not provide for a pro rata reduction, either tortfeasor may commence a contribution claim against the other on the belief that his degree of liability was less than the percentage of the judgment he was forced to satisfy.107

In Bielski v. Schulze108 the Wisconsin Supreme Court evaluated the effects of relative fault upon joint tortfeasors. The court predictably concluded that a defendant whose fault was greater than 50 percent should be more willing to contribute a greater proportion to settlement, while the less responsible defendant should settle for a sum commensurate with his lower percentage of fault.109 The court did not consider, however, the proper standards to guide a defendant in contributing his “fair” share toward settlement.

The only standard applicable is the discretion of the trier of fact; it is the function of the trier of fact to determine the relative degree of fault.110 The Hawaii Supreme Court in Mitchell v. Branch determined that it was a jury function to decide the degree of liability attributable to each tortfeasor if the court first determines that there is a disproportion of fault.111 The court concluded that “the most culpable party should sustain that share of the loss which is commensurate with his degree of fault.”112 Since determination of culpability is within the province of the trier of fact,113 so also is determination of the degree of culpability.114

107. See Mitchell v. Branch, 45 Hawaii 128, 363 P.2d 969 (1961). Suppose A settles with an injured claimant for $5,000 in exchange for a release which does not contain a pro rata reduction clause. Subsequently, claimant institutes an action against joint tortfeasor B. The jury determines that B was 10% at fault. Judgment is entered for $10,000 which B satisfies. A would be liable to B for $9,000 in contribution since A was determined to be 90% at fault and is thus liable for a similar percentage of the damages.

108. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
109. Id. at 12-13, 114 N.W.2d at 111.
112. Id. at 141, 363 P.2d at 978.
113. Id. at 142, 363 P.2d at 978.
114. Id. See Little v. Miles, 213 Ark. 725, 212 S.W.2d 935 (1948).
The settling tortfeasor and the injured party are therefore placed in guarded positions. The settling defendant must include a pro rata reduction clause to protect himself from future contribution claims which could cause him to incur a disproportionate share of the damages. Accordingly, the injured party may defeat his own right to full settlement of his claim by agreeing to a reduction clause in the release without first considering the ramifications of such a provision. If the trier of fact determines the relative degree of fault of the settling defendant to be substantially more than anticipated by the plaintiff, damages recoverable against the nonsettling defendant will be reduced accordingly, with the result that plaintiff will recover less by having settled than if he had permitted the case against both defendants to proceed to trial.

There is little doubt that the relative degree of fault doctrine is more equitable in its distribution of liability. It is equally certain, however, that parties will be more adverse to prospective settlement unless they are reasonably sure that the end result will not be detrimental to their respective interests. Relative fault, and its concomitant disquieting effect upon the expectations of prospective settling parties, will stand as an obstacle to pretrial settlement of tort claims against joint tortfeasors.

Joinder of Settling Defendant at Trial

An important issue raised by reduction of plaintiff's claim by a pro rata share upon settlement with one joint tortfeasor concerns the right of the nonsettling tortfeasor to join the settling tortfeasor as a third party defendant. The purpose of joinder of the settling defendant would be to establish him as a joint tortfeasor and thus establish that the pro rata reduction clause, given in a release to the settling tortfeasor, applies to permit reduction of the nonsettling defendant's liability.

In Davis v. Miller the Pennsylvania Supreme Court determined that a tortfeasor released by the injured party and the nonsettling defendant to the action could still be joined as a third party defendant. The case involved a negligence action stemming from an automobile collision. Since the possibility existed that the settling tortfeasor would be liable to both the nonsettling tortfeasor and the plaintiff, settlement was effected with both parties. The nonsettling defendant was deemed by the court to have a special interest in retaining the settling defendant at trial since his damages would be reduced if the trier of fact determined that the two defendants were joint tort-

116. Id. at 351, 123 A.2d at 424. The court based its decision on section 5 of the 1939 Uniform Act as codified in Pennsylvania. Pa. Stat. tit. 12, § 2086 (1967). This section is substantially the same as section 4(2) of the Nevada Contribution Act.
117. 385 Pa. at 350, 123 A.2d at 423.
feasors. Although the release held by the settling tortfeasor in Davis did not release the nonsettling defendant, it did provide for a pro rata reduction of plaintiff's damages and thereby protected the settling tortfeasor from a contribution claim. The court nonetheless permitted joinder. Moreover, the decision maintained that pro rata reduction of the plaintiff's damages necessitated that the released party be determined to be a joint tortfeasor before the nonsettling defendant could benefit from the reduction clause. If the released party was determined not to be a joint tortfeasor, "the releases given her by plaintiffs would not inure to . . . [the nonsettling defendant's] benefit." The court concluded that although the party defendant had no right to recover contribution from the settling defendant, he did have an extremely valuable right in retaining her in the case, because, if the jury should find her to be a joint tortfeasor, his liability to plaintiffs would be cut in half. Her continuance in the case is therefore necessary . . . .

Under the holding in Davis there is no automatic reduction of the plaintiff's damages simply because the party defendant alleges the existence of a pro rata reduction release given to the settling defendant. The defendant must prove that the settling tortfeasor was in fact a joint tortfeasor. If this requirement necessitates the joining of the released defendant, the court will permit such joinder.

There are few cases deciding the issue of joinder in those states which have enacted the equivalent of section 4(2) of the Nevada contribution act. In Swigert v. Welk the Maryland Supreme Court reached the same conclusion as the court in Davis; it held that the party defendant had the right to have the released defendant before the court. The court also determined, however, that whether the released defendant actively participated in the trial was a matter left to his discretion.

If the results of Davis and Swigert are followed by the Nevada courts, nonsettling defendants face an onerous burden. By failing to prove that the released defendant was a joint tortfeasor, the nonsettling defendant becomes subject to the plaintiff's entire claim for damages. He has no recourse against the released defendant since he cannot obtain contribution unless the settling defendant has been legally determined by the trier of fact to be jointly and severally liable.

118. Id. at 352, 123 A.2d at 424.
119. Id.
120. Id.
121. Id.
122. Id.
123. 213 Md. 613, 133 A.2d 428 (1957).
124. Id. at 622, 133 A.2d at 433.
If this view is adopted, the effect of joinder will be substantial in Nevada in view of the requirement that the defendants' relative degrees of fault need be determined. That is, since the plaintiff will be attempting to maximize his recovery by maximizing the nonsettling defendant's degree of fault, it will be beneficial for the party defendant to join the released defendant in order to shift the relative quantum of liability to the released defendant, thereby reducing his own share of liability. The defendant who does not join the released tortfeasor may find himself unable to challenge a finding of fact that the nonsettling defendant is solely responsible—a result which would force the nonsettling party defendant to satisfy the judgment in its entirety.

### Conclusion

The Nevada contribution act now gives parties contracting a release the ability to control the extent to which liability is extinguished by the agreement. No longer does a release automatically discharge the common liability of the joint defendants unless the parties to the agreement so provide. This change should prevent plaintiff from inadvertently releasing a party who gave nothing in settlement. Nevertheless, the Nevada courts must resolve the statutory conflict between the existing obligations act and the contribution act. If the obligations act is partially repealed by implication, the parties to a tort action may safely settle with the knowledge that the injured party may retain his cause of action against a nonsettling defendant. Moreover, if the plaintiff agrees to extinguish the common liability by providing a discharge recital in the release, the settling defendant has the right of contribution against other joint tortfeasors.

While the act preserves plaintiff's cause of action against a nonsettling defendant, the settling tortfeasor is not protected from a subsequent contribution claim unless the release contains a pro rata reduction clause. Since the presence or absence of a reduction clause may be unacceptable to one or all of the parties, out of court settlement is made more difficult. The plaintiff could give up a substantial part of his damages by agreeing to a pro rata reduction, while the defend-

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126. See text accompanying notes 105-07 supra.
128. See text accompanying notes 26-27 supra.
129. See note 27 & accompanying text supra.
130. See text accompanying notes 52-54 supra.
131. See text accompanying notes 26-27 supra.
134. See notes 67-68 & accompanying text supra.
ant would gain little from settlement without the inclusion of a reduction clause.\textsuperscript{135}

In construing the effect of a pro rata reduction, the parties must look to section 9(2) of the act containing the “relative fault” provision.\textsuperscript{136} Although it is more equitable to permit greater liability to rest with the greater degree of fault, the new provision will have the effect of making settlement less desirable. Plaintiff will be reluctant to include a pro rata reduction clause in the release since the amount of reduction of damages will depend upon the relative degree of fault assigned to each tortfeasor by the trier of fact.\textsuperscript{137} The plaintiff must prognosticate with respect to the degree of fault among the defendants before entering settlement with a tortfeasor; the risk of plaintiff’s misapportionment of relative fault will make him less willing to enter into settlement.

Though a settling tortfeasor may protect himself from contribution via pro rata reduction, he may nevertheless be subject to impleading by the codefendant. \textit{Davis v. Miller} stands for the proposition that joinder is necessary because the verdict cannot be reduced by the settling defendant’s pro rata share unless the party defendant can prove that the settling defendant is a joint tortfeasor.\textsuperscript{138}

With the enactment of the contribution act, no longer will one defendant be required to bear a grossly disproportionate share of plaintiff’s claim. The act may adversely affect, however, the ability of the parties to undertake successful settlement. If this effect is forthcoming, as this prospective analysis indicates that it may be, the deleterious effect of Nevada’s contribution act may outweigh its benefits.

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\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textsc{Nev. Rev. Stat.} § 17.280(2) (Supp. 1971).
\textsuperscript{137} See note 111 & accompanying text \textit{supra}.
\textsuperscript{138} 385 Pa. 348, 352, 123 A.2d 422, 424 (1956).

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