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EFFECT OF VIRGINIA WORKMEN'S COMPENSATION ACT UPON THE RIGHT OF A THIRD-PARTY TORTFEASOR TO OBTAIN CONTRIBUTION FROM AN EMPLOYER WHOSE CONCURRENT NEGLIGENCE CAUSED EMPLOYEE'S DEATH OR INJURY

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The Supreme Court of Virginia has never been asked to determine a third party's contribution rights where his negligence has combined with that of an employer to cause personal injury to an employee covered by the Virginia Workmen's Compensation Act [hereinafter referred to as the Act].[1] Although the question is a novel one in Virginia,[2] courts in other jurisdictions have coped with the problem and have arrived at diverse solutions.[3] At the outset, a brief review of the Act and of the Virginia contribution statute seems appropriate.

I. WORKMEN'S COMPENSATION IN VIRGINIA

The Act covers work-related injuries suffered by employees, and it establishes a compulsory[4] and exclusive[5] system of employer lia-

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1. VA. CODE ANN. §§ 65.1-1 to -137 (Repl. Vol. 1973 & Cum. Supp. 1978). It was recently estimated that 85% of all products liability cases entail work related injuries. Insurance Co. of North America Products Liability: Some Professional Considerations, Booklet HH-8306-3 (1976).

2. On the basis of an educated guess as to Virginia law, contribution has in recent years been denied by two United States District Courts. Jennings v. Franz Torwegge Mach. Works, 347 F. Supp. 1288 (W.D. Va. 1972); Mahone v. McGraw-Edison Co., 281 F. Supp. 582 (E.D. Va. 1968). In each instance it would have been helpful had Virginia either by Supreme Court rule or statute enacted the Uniform Certificate of Questions of Law Act. Florida has done so by court rule. FLA. APP. R. 4.61. Maryland and West Virginia have done so by statute. 2B MD. CODE ANN., Art. 26, § 161 (Repl. Vol. 1973 and 1978); W. VA. CODE § 51-1A-1 to -10 (Cum. Supp. 1978).

3. The cases are collected in Annot., 53 A.L.R.2d 977 (1957). *See generally* 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 76.20 (1976).

4. VA. CODE ANN. § 65.1-23 (Repl. Vol. 1973 & Cum. Supp. 1978).

5. *Id.* § 65.1-40.

bility therefor irrespective of fault.[6] When enacted in 1918, the Act contained no tie-in provision relating to an injured employee's right to recover damages for the same injury from a negligent third party. Because of this omission and because the Act has never purported to extinguish rights outside of the employment relationship,[7] a double recovery by the employee was permissible in that he was entitled not only to his compensation award, but also to the entire amount recovered from the third party.[8] Therefore, in 1920, the Act was amended by adding a section which automatically assigns to the employer the employee's cause of action against the third party and provides that, if the recovery in such action exceeds the compensation award, the excess is for the employee's benefit.[9] Hence, if the amount so recovered equals or exceeds the compensation award, the employer escapes scot-free. Though the result is appropriate where the employer is without blame, it is inequitable where both the employer and the third party have been negligent. This is the sort of inequity which the law of contribution should correct.

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6. As explained in Humphrees v. Boxley Bros. Co., 146 Va. 91, 95, 135 S.E. 890, 891 (1926), the Act is

> in the nature of a compromise between employer and employee to settle their differences arising out of personal injuries, but it is a compromise greatly to the advantage of the employee. By it the question of the negligence of the employer is eliminated, the common law doctrines of the assumption of risk, fellow servants, and contributory negligence are abolished, and the rules of evidence are laxly enforced. . . . The relief afforded is fixed, certain and speedy, and at a time when most needed. Under it there is no doubt or uncertainty as to the right of recovery or the amount thereof. The damage resulting from an accident is treated as a part of the expense of . . . repairing a piece of machinery which has broken down.

7. In Fauver v. Bell, 192 Va. 518, 522, 65 S.E.2d 575, 578 (1951), the court observed:

> The purpose and effect of the compensation act are to control and regulate the relations between employer and employee. As between them the remedies therein provided are exclusive. It does not extinguish rights outside of and beyond the employment. Consequently, as to these, the employee's common-law remedies remain unimpaired, and they are not to be considered as altered or changed except where the legislative intent has been plainly manifested by statute.

8. The result of this omission was described as follows in Feitig v. Chalkley, 185 Va. 96, 100, 38 S.E.2d 73, 75 (1946):

> Hence, an employee who has sustained an injury by accident arising out of and in the course of his employment would have been entitled to receive compensation under the statute from his employer and would have a right to full compensation from a negligent third party, a stranger to the employment. . . .

9. VA. CODE ANN. §§ 65.1-41 to -43 (Repl. Vol. 1973).

II. CONTRIBUTION IN VIRGINIA

For more than a half century, Virginia, by statute, has authorized "contribution among wrongdoers . . . when the wrong results from negligence and involves no moral turpitude."[10] Despite some dictum to the contrary, the statute replicates not only English common law,[11] but also Virginia common law.[12] Judge Martin P. Burks, the author of the statute, explained that the reason for its enactment was that "courts have had difficulty in declaring what the law is on the subject of contribution among wrongdoers."[13] Thus the statute

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10. *Id.* § 8.01-34 (Repl. Vol. 1977). The provision first appeared as § 5779 of the 1919 Virginia Code.

11. Palmer v. Wick and Pultneyville Steam Shipping Co., [1894] A.C. 318; Wooley v. Batte, 2 C. & P. 417, 172 Eng. Rep. 188 (1826). *See* CLARK & LINDSELL'S TORTS 56 (2d ed. 1896) where in note b, the authors say:

> It is sometimes loosely said that there is no contribution between joint tort-feasors, that is to say, that if, on an action being brought for a joint tort, one wrongdoer pays the whole damages recovered, he cannot, whatever the nature of the tort, recover a proportion of the damages from the others. For this wide proposition there is apparently no authority except the head-note to the report of Merryweather v. Nixan in the Term Reports (9 T.R. 186), which head-note does not seem to be borne out by the judgment.

12. Thweatt v. Jones, 22 Va. (1 Rand.) 328 (1823). A tobacco inspector had mistakenly delivered a quantity of tobacco covered by a negotiable warehouse receipt to someone not entitled thereto. Upon being held liable for this innocent misappropriation, he sought contribution from his equally culpable co-inspector. Judge Green of the Court of Appeals said at page 334:

> When parties are equally bound to bear a burden, and are *in aequali jure,* that is, liable from the same circumstances existing as to both, contribution is due of right, in equity: that this general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution, forfeits such right, if the joint liability arose from an act *malum in se,* a fraud or voluntary tort, in which he participated: that when it is shewn that the parties were originally equally bound, and stood *in aequali jure,* the party who has paid all, is entitled of course to contribution, unless it be shewn on the other side, that his right has been forfeited as aforesaid, by his own wrongful act. . . .
>
> I do not think, that the right to contribution ought to be considered as impaired by the fact . . . that one of the parties and his estate was absolved by his death from all liability to the party injured. He who claims contribution, does not claim by *substitution* to the rights of the party whose demand he has satisfied; but, upon the broader principle, that he who has exclusively borne the burden which ought to have been borne *jointly* with another, is entitled to be rateably indemnified. . . .

13. Address as a member of the Code Revision Commission before the Virginia State Bar Association (May 16, 1919) reprinted in 5 Va. L. Reg. (N.S.) 97, 115 (1919). The "difficulty" Judge Burks had in mind was apparently not one experienced in Virginia, but probably stemmed from an unfortunate reading of an early English case by Sir Frederick Pollock. *See* Reath, *Contribution Between Persons Jointly Charged for Negligence,* 12 HARV. L. REV. 176, 182 (1898).

amounts to a legislative reiteration of the equitable duty of contribution.[14]

III. Varying Responses to Underlying Problem

Some courts have denied contribution because the relevant workmen's compensation statute specifically relieves the employer of liability to anyone for the employee's injury except, of course, for compensation benefits.[15] Other courts, in denying contribution, have felt that their statute implicitly promises the employer immunization from such liability. In any event such decisions are irrelevant in Virginia where the statutory promise of employer immunity is limited to claims against the employer by the injured "employee, his personal representative, parents, dependents or next of kin. . . ."[16]

Still, other courts have refused contribution on the ground that since the employee under a workmen's compensation act has no tort action against his employer, the employer is not a co-tortfeasor and does not, therefore, share a common liability with the third party.[17] The argument may have force in a jurisdiction where the contribution remedy is only available against a "co-tortfeasor."[18] This, however, is not the case in Virginia where the contribution statute is as broad as the common law in making a remedy available against any negligent "wrongdoer."[19] The same argument also may have force

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14. *See* Restatement of Restitution § 81 (1937) where, with exceptions not presently material, the Institute states that "a person who has discharged more than his proportionate share of a duty owed by himself and another . . . is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct."

15. *See, e.g.*, Ward v. Denver & R.G.W.Ry. Co., 119 F. Supp. 112 (D. Colo. 1954). There, the state statute provided that "[a]ny employer who has . . . complied with the provisions [of the Colorado Workmen's Compensation Act] . . . (shall not) be subject to any other liability whatsoever for the death of or personal injury to any employee. . . ." *Id.* at 114.

16. Va. Code Ann. § 65.1-40 (Repl. Vol. 1973).

17. *See, e.g.*, Employers Mut. Liab. Ins. Co. v. Griffin Constr. Co., 280 S.W.2d 179 (1955).

18. Even in such a jurisdiction this result is not obligatory. As Justice Roberts of the Pennsylvania Supreme Court has noted, "the definition of 'joint tortfeasors' does not require that they have a common liability toward the injured party but only that their combined conduct be the cause of the injury." Elston v. Indus. Lift Truck Co., 420 Pa. 97, 216 A.2d 318, 320 n.2 (1966).

19. Va. Code Ann. § 8.01-34 (Repl. Vol. 1977). Given the breadth of the term "wrongdoer" as used in the Virginia statute, contribution would appear to be available whenever the judgment against the third party is based on his unintentional error, whether such judgment is technically grounded in negligence as a matter of tort law, so-called "strict" liability as

in a situation where the person against whom contribution is sought is without legal liability of any sort to the person injured.[20] This, however, is not the situation in Virginia,[21] where the Act has been described as "in the nature of a compromise between employer and employee"[22] and where the employer does have legal obligations—albeit of a different character from what they were at common law. Furthermore, the fact that legal obligations stem from technically different sources has never, in comparable situations, inhibited courts from allowing contribution. For example, absent a statute to the contrary, a person who has compromised his liability via a settlement with the injured person is not thereby relieved from liability in contribution to a co-tortfeasor.[23]

There is "an obvious lack of sense and justice in a rule which permits the entire burden of a loss for which two defendants were equally, unintentionally responsible, to be shouldered onto one

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embodied in RESTATEMENT (SECOND) OF TORTS § 402A (1965) or Article 2 of the U.C.C. The latter has been dubbed strict products liability under the U.C.C. *See* Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code,* 51 VA. L. REV. 804 (1965).

20. *See, e.g.,* Norfolk S. R.R. v. Gretakis, 162 Va. 597, 174 S.E. 84 (1934). The case arose at a time when Virginia law gave no civil remedy to an injured, but unemancipated minor as against his or her parent for what otherwise would constitute tortious conduct. Contribution was denied a third party whose negligence had concurred with that of the parent in causing the child's injuries.

21. *Supra* note 10. The non-subrogational quality of contribution also was true at common law. In the *Thweatt* case, Judge Green said at page 334, "He who claims contribution, does not claim by *substitution* to the rights of the party whose demand he has satisfied; but, upon the broader principle, that he who has exclusively borne the burden which ought to have been borne *jointly* with another, is entitled to be rateably indemnified. . . ."

22. Humphrees v. Boxley Bros. Co., 146 Va. 91, 95, 135 S.E. 890, 891 (1926).

23. Buckley v. Basford, 184 F. Supp. 870 (N.D. Me. 1960); Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry., 235 Minn. 304, 50 N.W.2d 689 (1951); Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N.Y.S. 746 (1931); Blanchard v. Wilt, 410 Pa. 356, 188 A.2d 722 (1963); State Farm Mut. Auto Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d 425 (1953).

The precise question would not, of course, arise in a state which, like Virginia, frowns on the utilization of covenents not to sue as an escape from the common law rule that the release of one tortfeasor destroys a cause of action against a concurrent tortfeasor. *See* Shortt v. Hudson Supply & Equip. Co., 191 Va. 306, 60 S.E.2d 900 (1950). As far as contribution is concerned, however, the philosophy of the above cases is reflected in VA. CODE ANN. § 8.01-443, which states:

> If there be a judgment against one or more joint wrongdoers, the full satisfaction of such judgment accepted as such by the plaintiff shall be a discharge of all joint wrongdoers, except as to the costs; *provided, however, this section shall have no effect on the right of contribution between joint wrongdoers.* . . . (emphasis added).

alone. . . ."[24] For this reason, Pennsylvania courts have allowed contribution for several decades, but have arbitrarily limited such contribution to the amount of the employer's compensation liability.[25] More recently, courts in Illinois,[26] Minnesota,[27] and New York[28] have decided to allow an open-ended recovery. The Minnesota court held that Federal constitutional law dictated the result.[29] In any event, it is both a fair and equitable approach which should appeal to a court in a state in which, as in Virginia, the question is open.[30]

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24. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 307 (4th ed. 1971).

25. *See, e.g.*, Socha v. Metz, 385 Pa. 632, 123 A.2d 837 (1956). A comparable rule is in force in California and in North Carolina. *See, e.g.*, Tate v. Superior Court of Los Angeles, 213 Cal. App.2d 238, 28 Cal. Rptr. 548 (1963) and Hunsucker v. High Point Bedding & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

26. Skinner v. Reed-Prentice Div., 70 Ill.2d 1, 374 N.E.2d 437 (1978). *See generally* Comment, *Skinner v. Reed-Prentice Division Package Co.: Adoption of Contribution in Illinois*, 9 LOY. UNIV. L.J. 1015 (1978).

27. Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974).

28. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972). *See also* Nelson v. Dykes Lumber Co., 52 App. Div.2d 808, 383 N.Y.S.2d 335 (1976); Lettiere v. Nameloc Estates, Inc., 53 App.Div. 2d 899, 385 N.Y.S.2d 629 (1976).

29. *See* Carlson, *supra* note 27. The court said that the legislation in denying recovery had provided no reasonable alternative to the common law right of contribution. The result seems questionable in terms of modern federal constitutional law. In effect, this would constitute a reversion to the substantive due process theories of the pre-New Deal Court. In this context Mr. Justice Holmes a half century ago referred to the concept of equal protection as the "last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927). Modern libertarians argue that the Court is institutionally incapable of making wealth reallocation decisions. *See* Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 Sup. Ct. Rev. 41. The Virginia Supreme Court appears not to have been overly enamored of the *deus ex machina* utility of constitutional law and has usually decided cases by the use of traditional legal concepts.

30. Furthermore, as this article illustrates, Holmes was correct when he observed that "lawyers spend a great deal of their time shoveling smoke."