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David H. Little

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Utah Allows Contribution Against Cotortfeasor Despite Immunity from Direct Suit: *Bishop v. Nielsen*

The common-law rule that a joint tortfeasor is not entitled to contribution from another who was a participant in the joint tort¹ has been severely criticized.² Responding to this criticism, most American jurisdictions have abrogated the rule either through legislative enactment³ or judicial decision.⁴ Prior to 1973 Utah was an adherent of the common-law rule.⁵ However, the legislature remedied the situation in 1973 by giving joint tortfeasors a cause of action for contribution as part of the Utah Comparative Negligence Act.⁶ Although the effect of the contribution decisions and statutes in the various states has been generally favorable, some courts have experienced difficulty in ap-

1. This rule originated in *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799).

2. "There is 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 by one alone . . . while the [other defendant] goes scot free." W. PROSSER, *LAW OF TORTS* § 50, at 307 (4th ed. 1971).

3. As of January 1, 1981, the Uniform Contribution Among Tortfeasors Act, UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 63 (1955), had been enacted by 20 states. See 12 U.L.A. 57 (Supp. 1982).

4. See, e.g., *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949) (joint tortfeasors liable for an unintentional tort judicially given a cause of action for contribution).

5. *Brunyer v. Salt Lake County*, 551 P.2d 521 (Utah 1976). See also *Hardman v. Matthews*, 1 Utah 2d 110, 262 P.2d 748 (1953) (contribution not allowed absent contribution statute).

6. 1973 Utah Laws ch. 209 (relevant sections 3 and 4 codified at UTAH CODE ANN. §§ 78-27-39 to -40 (1977)). The specific language giving joint tortfeasors a cause of action for contribution reads, "The right of contribution shall exist among joint tortfeasors but a joint tort-feasor shall not be entitled to a money judgment for contribution until he has, by payment, discharged the common liability or more than his prorata share thereof." UTAH CODE ANN. § 78-27-39 (1977). Although Utah did not adopt the Uniform Contribution Among Tortfeasors Act, its statute is very similar in a number of critical ways, particularly in its requirement that there be a "joint tort" and a discharge of a "common liability." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 63 (1955). The Utah act defines a joint tortfeasor as "one of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." UTAH CODE ANN. § 78-27-40(3) (1977). Similar language is found in RESTATEMENT (SECOND) OF TORTS § 886A(1) (1977). Justice Ellett of the Utah Supreme Court characterized the Utah approach as a direct response to the inequities of the common law. See *Brunyer v. Salt Lake County*, 551 P.2d 521, 522-23 (Utah 1976) (Ellett, J., dissenting).

plying contribution principles when the defendant in the contribution action would have been immune to suit had the injured party sued him directly.⁷ The Utah Supreme Court recently dealt with this problem in the context of parent-child immunity in the case of *Bishop v. Nielsen*⁸ and held that a child tortfeasor, immune to a suit brought by her parents, was not immune to a contribution action brought by a third party.

I. *Bishop*

George O. Bishop, Jr., brought this suit to recover for property loss sustained as a result of a collision between his automobile and an automobile owned and operated by Charles Hollis Nielsen. At the time of the collision, the Bishop auto was being driven by the plaintiff's unemancipated minor daughter, Genice Gay Bishop, who had borrowed it from her father. Responding to the suit, Nielsen joined the plaintiff's daughter as a third-party defendant in a contribution action, alleging that her negligence had contributed to the plaintiff's loss. The daughter moved for dismissal on the grounds that the parent-child immunity doctrine prevented direct liability to her father and thus precluded her from being a "joint tortfeasor" within the purview of the statute granting contribution rights. The court denied the motion. Subsequently, the jury found the relative fault of the defendant and third-party defendant to be seventy percent and thirty percent respectively. Accordingly, the third-party defendant was ordered to contribute thirty percent toward the judgment rendered against the defendant.⁹

In an appeal before the Utah Supreme Court, the third-party defendant urged the court, first, to expressly adopt the parent-child immunity doctrine and, second, to hold that by virtue of her immunity as the child of the plaintiff, she was not a joint tortfeasor subject to contribution.¹⁰ On the immunity issue, the court declined either to accept or reject the parent-child immunity doctrine, stating that the "disposition of the issue presented does not necessarily hinge upon the existence or non-

7. See Hertz, *The Tort Triangle: Contribution from Defendants Whom Plaintiffs Cannot Sue*, 32 ME. L. REV. 83 (1980).

8. 632 P.2d 864 (Utah 1981).

9. *Id.* at 865.

10. Brief of Third-Party Defendant-Appellant, *Bishop v. Nielsen*, 632 P.2d 864 (Utah 1981).

existence of the doctrine."¹¹ Nevertheless, the court proceeded to the contribution issue, assuming for purposes of analysis that the daughter would have been immune to suit.¹²

In arriving at its decision to allow contribution, the court considered how other jurisdictions had handled the same issue.¹³ The court noted that some jurisdictions recognizing the immunity hold that the third-party defendant's immunity to a direct suit defeats an action for contribution. On the other hand, jurisdictions that recognize no immunity hold that the issue of contribution is moot because the plaintiff's cause of action would lie against either party. The court, however, characterized both of these positions as "extreme" and opted instead for the "better reasoned" view that contribution should be allowed regardless of whether an immunity is recognized.¹⁴

The court recognized that under the contribution statute it must hold that there was both a "joint tort"¹⁵ against, and a "common liability" to, the injured party for the contribution action to lie. The joint tort element was easily found to exist because the daughter did not dispute that her negligence contributed to the property loss of her father.¹⁶ The court, however,

11. 632 P.2d at 865. Although Utah has expressly adopted interspousal immunity for unintentional torts, *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963), it has never expressly adopted parent-child immunity. The daughter, however, argued that adoption of parent-child immunity would be simply the natural extension of interspousal immunity and that the Utah court had implicitly adopted it when adopting interspousal immunity. 632 P.2d at 865. Had the court ultimately held for the daughter, it would have been compelled to consider and adopt the doctrine of parent-child immunity.

12. It is clear that the court made this assumption by virtue of the following considerations: First, it refused to reject the doctrine; second, its analysis of the case left the court free to accept the doctrine at a later time; third, the court relied heavily on cases from jurisdictions deciding the same issue in the shadow of express acceptance of an immunity appropriate to the factual situation; and fourth, most of the court's analysis would have been unnecessary had the assumption not been made. Language from the decision also supports this conclusion. The court said that its holding would be the same "even if the doctrine of parent-child immunity had been previously adopted in this jurisdiction." 632 P.2d at 868.

13. 632 P.2d at 866-67 & nn.6-8.

14. *Id.* at 866.

15. A "joint tort" has traditionally been found to exist only if the multiple tortfeasors' actions were found to be "concerted." The current trend, however, is to find a "joint tort" if the actions of two or more tortfeasors combine to cause an indivisible injury even if the actions are independent. See W. PROSSER, *supra* note 2, §§ 46, 52. See, e.g., *Hartford Fire Ins. Co. v. Osborn Plumbing & Heating, Inc.*, 66 Wis. 2d 454, 225 N.W.2d 628 (1975). That Utah takes the latter position is evidenced by the fact that the *Bishop* court simply required that the negligence of both parties be a proximate cause of the plaintiff's injury. 632 P.2d at 865.

16. 632 P.2d at 865.

faced a more difficult challenge in supporting its finding that the third-party defendant was liable in tort to her father and thus shared a "common liability" with the defendant, notwithstanding the fact that her immunity would have precluded her father from suing her directly. The court resolved this difficulty by reasoning that the liability of a person, whether immune or not, turns solely upon that person's culpability and not upon whether that person has a legal obligation to pay for damages resulting from his culpability. In other words, the injured party has a substantive cause of action against the culpable party even though the culpable party may be immune to suit, the immunity being a mere procedural bar.¹⁷ By this reasoning, the court found the third-party defendant liable to her father even though she might have had no legal obligation to pay. The court then concluded that the defendant, Nielsen, had discharged a liability that was common to him and the third-party defendant and was therefore entitled to contribution.

Although the above rationale satisfied the statutory requirements, the court attempted to strengthen its opinion by offering public policy and equitable justification as well. In the public policy area, the court asserted that the policies underlying parent-child immunity would not be compromised by this holding. Parental discipline and domestic harmony would not be disturbed since a contribution action such as this does not pit parent against child or vice versa, but merely puts the parent or child in an adversary relation with an outside party.¹⁸ The court offered as equitable support for its holding the argument that a tortfeasor's right to a cause of action for contribution should not turn on the fortuitous happenstance of his cotortfeasor having a special immunity to suit. It was thought that a contrary holding would give the immune party a windfall while placing an unconscionable burden on the nonimmune cotortfeasor.¹⁹

II. ANALYSIS

Since the daughter was thirty percent negligent in *Bishop*, the court arguably reached the most equitable result by allowing

17. The court drew this reasoning from *Zarella v. Miller*, 100 R.I. 545, 217 A.2d 673 (1966). 632 P.2d at 866, 867. *But see infra* text accompanying notes 27-28.

18. 632 P.2d at 866. —

19. The *Bishop* court quoted from *Shor v. Paoli*, 353 So. 2d 825, 826 (Fla. 1978), and *Bedell v. Reagan*, 159 Me. 292, 298, 192 A.2d 24, 27 (1963), in support of this proposition. 632 P.2d at 867-68.

thirty percent of the loss to fall upon her. However, the contribution cause of action is a legislative creation, not a judicial one, and it appears that the court contorted the requirements of the contribution statute in order to bring the third-party defendant within its ambit. It also appears that the court's interpretation of the statute will be inimical to the public policy behind the parent-child and other types of immunity when contribution is sought against parties protected by those immunities. Unfortunately, the court did not consider other factors, such as the effect of its holding on the insurability of risk by the immune party and subsequent developments in the jurisdictions it relied on to support its decision. This Case Note will focus on these deficiencies in the court's holding in light of the express statutory prerequisites to a contribution cause of action.

A. *Equating Liability with Culpability*

Utah's contribution statute contains the requirement, almost universal in such statutes, that a tortfeasor show that he discharged a "common liability" to the injured person as a condition precedent to his receiving an enforceable cause of action.²⁰ In arriving at the conclusion that the defendant and Bishop's daughter did share a common liability, the court relied heavily on the opinion of the Supreme Court of Rhode Island in *Zarella v. Miller*.²¹ In *Zarella* the plaintiff was injured by the combined negligence of her husband and one Miller, an unrelated party. Since Rhode Island recognized interspousal immunity, Mrs. Zarella sued Miller only. In deciding whether Miller had a cause of action for contribution against the plaintiff's husband, the Rhode Island court had to determine whether Mrs. Zarella's husband was a joint tortfeasor under the Rhode Island contribution statute, which, like the Utah statute, requires the "dis-

20. UTAH CODE ANN. § 78-27-39 (1977). Some jurisdictions require that the liability of each tortfeasor be reduced to judgment before a common liability exists. See Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, 47 HARV. L. REV. 209, 212 (1933). This creates some procedural difficulties since the contribution defendant must be joined in the original action and a judgment entered against him in favor of the plaintiff. In jurisdictions adhering to this rule, no contribution would be allowed against an immune party since the immunity would render it impossible for a judgment to be entered. Utah, however, merely requires that the contribution plaintiff show that the contribution defendant is jointly and severally liable to the plaintiff in the tort action. See UTAH CODE ANN. § 78-27-40(3) (1977). The statute specifically repudiates the notion that a judgment need be entered against the contribution defendant. *Id.*

21. 100 R.I. 545, 217 A.2d 673 (1966).

charge of a common liability."²² Equating culpability with liability, the court held that the husband's immunity was simply a procedural bar and that his culpability had nevertheless created a cause of action in Mrs. Zarella against him. The court concluded that the term "liable" in the Rhode Island statute "refers to the existence of a cause of action rather than the right to enforce the same."²³ The rationale used in *Zarella* has not been followed in other jurisdictions that have arrived at similar outcomes. Unfortunately, the Utah court, in accepting the sleight-of-hand performed by the *Zarella* court, failed to deal in any significant way with the almost overwhelming authority that neither culpability nor the existence of an unenforceable cause of action is the functional equivalent of liability for purposes of contribution.²⁴

The Utah statute, although revamped to incorporate comparative negligence, substantially tracks the Uniform Contribution Among Tortfeasors Act.²⁵ In fact, the requirements that there be "joint or several liability" and the discharge of a "common liability" are identical in both statutes.²⁶ It is therefore significant to note that the interpretation given these terms by the National Conference of Commissioners on Uniform State Laws is contrary to that of the Utah court. The commissioners' comments explain that the language used is adequate to exclude cases where the person from whom contribution is sought is not liable to the injured person by reason of immunities such as interspousal or parental immunity.²⁷ Likewise, the American Law Institute in summarizing the generally accepted state of the law commented:

If the one from whom contribution is sought is not in fact liable to the injured person, he is not liable for contribution. This is true, for example, if he has one of the immunities from liability heretofore recognized for members of the plaintiff's family. . . . In other words, his defense cannot be circumvented by the plaintiff's recovery against another tortfeasor, followed by a suit for contribution.²⁸

22. R.I. GEN. LAWS § 10-6-4 (1969).

23. 100 R.I. at 548, 217 A.2d at 675.

24. See *infra* notes 33-36 and accompanying text.

25. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 63 (1955).

26. *Id.* See *supra* note 6.

27. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, Commissioner's Comment on subsection (a), 12 U.L.A. 64 (1955).

28. RESTATEMENT (SECOND) OF TORTS § 886A comment g (1977).

In addition to these authorities, courts have held that "the right of contribution is determined by whether there is joint or several liability rather than by the presence of joint or concurring negligence."²⁹ Likewise, there is much authority holding that "the victim of the tort must have an exercisable right of action against the party from whom the contribution is sought."³⁰ Whether the immunity of the third-party defendant in *Bishop* is characterized as a procedural or as a substantive bar to the cause of action is immaterial. What is material is that the immunity made the plaintiff's cause of action unenforceable, thus precluding a finding that the third-party defendant was liable to the plaintiff. *Zarella* stands alone and its rationale was apparently adopted by the Rhode Island court because it perceived the statute as an obstacle to an equitable result and therefore invented legal reasoning that would give lip service to the statute yet still allow the desired result. Although the holding of the *Zarella* court has been adopted by other jurisdictions, the rationale is not sound and has been followed only in Rhode Island.³¹ The Utah court, therefore, should not have adopted the *Zarella* reasoning without at least explaining why its logic is "better reasoned" than that of the many contrary cases. Instead, the court chose simply to label the other cases as "extreme."³²

The court should have seen from the face of the statute that the *Zarella* interpretation was not intended by the legislature.³³ The culpability requirement that the court focuses on was certainly contemplated by the legislature and given its proper place in the statute through the implicit requirement that there be a joint tort.³⁴ Absent culpability, one has obviously not participated in a joint tort. If all the legislature intended to require of a contribution defendant is that he be culpable, it would have

29. *Highway Constr. Co. v. Moses*, 483 F.2d 812, 815 (8th Cir. 1973) (emphasis omitted). See, e.g., *Farmers Ins. Exch. v. Village of Hewitt*, 274 Minn. 246, 143 N.W.2d 230 (1966).

30. *North River Ins. Co. v. Davis*, 274 F. Supp. 146, 149 (W.D. Va. 1967), *aff'd* 392 F.2d 571 (4th Cir. 1968). See, e.g., *Bartlett v. Roberts Recapping, Inc.*, 207 Va. 789, 153 S.E.2d 193 (1967); *Renfrow v. Gojohn*, 600 S.W.2d 77 (Mo. Ct. App. 1980).

31. Arguably, even Rhode Island has abandoned the *Zarella* rationale. See *infra* note 49 and accompanying text.

32. 632 P.2d at 866.

33. "Foundational rules require that we assume that each term of a statute was used advisedly; and that each should be given an interpretation and application in accord with their usually accepted meaning, unless the context otherwise requires." *Grant v. Utah State Land Bd.*, 26 Utah 2d 100, 102, 485 P.2d 1035, 1036 (1971) (footnotes omitted).

34. UTAH CODE ANN. § 78-27-40(3) (1977).

stopped there; however, it went on to write in the common liability requirement.³⁵ With the culpability requirement already dealt with in the joint tort requirement, the court should have inquired as to why the legislature went further and required that there be a common liability as well. If common liability simply equates with culpability, as the court suggests, the legislature had no need to insert the common liability requirement and would have been merely repeating itself by doing so.³⁶ Therefore, it must be assumed that the legislature had some separate objective in mind when it added the common liability requirement. That objective must have been to deny contribution against a culpable party who, like the daughter in this case, does not share a common liability to an injured party. The court perhaps showed its reasons for interpreting the statute the way it did by quoting from *Bedell v. Reagan*³⁷ that "[t]he element of 'common liability' . . . has been suffered to become a fetish."³⁸ Nevertheless, it is a legislative "fetish" and should be cured by the legislature. The court should not simply have read the common liability requirement out of the statute by giving it a meaning encompassed by other requirements in the statute. The court should have confined itself to interpreting the statute and refrained from amending it.

The *Bishop* court also failed to deal with its own decision in *Phillips v. Union Pacific Railroad Company*,³⁹ decided just one year earlier, in which the court refused to allow contribution against an immune party simply upon a finding that the immune party was culpable. In *Phillips* the plaintiff's decedent was killed when the automobile in which he was riding collided with a freight train. The plaintiff brought a wrongful death action against the owner of the train, Union Pacific, claiming that its negligence was the proximate cause of the death. The defendant railroad then joined, as third-party defendants, Parham, a fellow employee of the decedent and driver of the vehicle, and Hammary Furniture Company, Parham's employer, claiming that Parham's negligence was a proximate cause of the decedent's

35. *Id.* § 78-27-39(1).

36. The court must interpret the statute, if possible, so that each term has meaning. It is to be presumed that the legislature was not merely repeating itself. *Grant v. Utah State Land Bd.*, 26 Utah 2d 100, 102, 485 P.2d 1035, 1036 (1971).

37. 159 Me. 292, 192 A.2d 24 (1963).

38. *Id.* at 298, 192 A.2d at 27 (emphasis omitted).

39. 614 P.2d 153 (Utah 1980).

death and that contribution should therefore be allowed. As to Parham, the court held that the trial court's action in dismissing the third-party complaint was proper because of Parham's statutory immunity to direct suit by virtue of his status as a fellow employee of the decedent.⁴⁰ The court reasoned that because "Parham and the plaintiff's decedent were fellow employees . . . at the time of the accident, the [Workmen's Compensation] statute would prohibit a third-party action against Parham directly. . . . [I]t follows that the defendant is similarly prohibited from joining Parham as a joint tortfeasor for purposes of contribution."⁴¹ The *Phillips* court refused to equate culpability with liability. For purposes of the motion being reviewed by the court, Parham was just as culpable as the third-party defendant in *Bishop*. However, the court found that this alone was not sufficient to justify contribution against Parham. Instead, the court applied the rule that for contribution to lie against a tortfeasor the plaintiff must have had an enforceable cause of action directly against the tortfeasor. Admittedly, the immunity granted to Parham was statutory while Genice Bishop's immunity, had the court chosen to grant it, would have been judicial. However, the effect of both immunities is the same; they both act as a bar to the plaintiff's cause of action. Therefore, unless the court can find a reasonable basis to differentiate the effect of a statutory immunity from a judicial immunity on an otherwise enforceable cause of action, *Phillips* was directly on point. Had the *Bishop* court followed *Phillips*, which adopts a well-supported interpretation of the common liability requirement,⁴² the outcome would have been different. The court, however, neither applied *Phillips* nor overruled it, but simply failed to consider it altogether.

B. Bishop's Effect on Other Immunities

Future application of the *Bishop* rule may have adverse effects when the immunity under consideration is one other than parent-child immunity. This can be illustrated by applying the *Bishop* rationale to the Utah court's holding in *Curtis v. Harmon Electronic, Inc.*,⁴³ decided five years earlier. In *Curtis*, the court was called upon to decide whether a negligent third-party

40. UTAH CODE ANN. § 35-1-62 (1974).

41. 614 P.2d at 154.

42. See generally 18 AM. JUR. 2d *Contribution* §§ 47, 49 (1965 & Supp. 1981).

43. 552 P.2d 117 (Utah 1976).

seeking contribution against the plaintiff's employer could prevail. The court held that the employer was not liable in tort because his liability was defined by the workmen's compensation statute and was therefore not subject to contribution.⁴⁴ This rationale is sound provided the employer is liable under the statute only because of his role as employer and not because his actions were culpable. However, it breaks down if the employee's injury was caused by culpability on the part of the employer. In this situation, the workmen's compensation statute takes on the nature of a partial immunity, protecting the employer from his tort liability. *Bishop*, however, would mandate a finding that the employer's culpability satisfies the common liability requirement of the contribution statute, therefore rendering the employer liable for contribution. The *Curtis* court offered a different, policy-oriented approach to deciding whether contribution should be allowed against an immune party. Under the policy approach, which is highly praised by some commentators,⁴⁵ the court analyzes the policy behind a particular immunity and then determines whether allowing contribution would be contrary to that policy. The court felt the policies behind workmen's compensation would be frustrated by allowing contribution, as evidenced by this language: "[I]n light of the letter and spirit, magnitude and almost all-encompassing declaration of rights and remedies under the [workmen's compensation] act, it would seem that no good purpose would be served in reporting the provisions of the tort-feasor contribution [act]. . . ."⁴⁶

Although the court is limited by the statute from engaging in a freewheeling policy approach in deciding whether contribution lies, public policy considerations should certainly be considered when the court applies a particular interpretation to the statute. The court must be flexible enough in interpreting the statute to allow contribution when public policy would be served and disallow it when it would not. The *Bishop* rule, however, ties the court's hands. If, as the court says, common liability simply equates with culpability, either the court will have to allow contribution against culpable third-party defendants in spite of personal immunity from suit by the plaintiff, or it will have to simply ignore *Bishop*. The Rhode Island court that created the

44. *Id.* at 118-19.

45. See Hertz, *supra* note 7, at 106-44.

46. 552 P.2d at 119 (footnote omitted).

culpability doctrine in *Zarella* recently retreated to the policy approach in a workmen's compensation case in which application of *Zarella* would have compromised the policies behind the workmen's compensation statute.⁴⁷ The Utah court too will face future cases, dealing with various types of immunities, in which it will be asked to allow contribution. The immune party could be an employer covered by workmen's compensation,⁴⁸ a host-driver made immune by the guest statute,⁴⁹ an employee granted immunity by the fellow employee statute,⁵⁰ the state, which enjoys governmental immunity,⁵¹ a tortfeasor against whom the statute of limitations has run,⁵² or a spouse protected by interspousal immunity.⁵³ In each of these cases, the policies and equities will be different and may call for a result contrary to *Bishop*. However, in each case, culpability will certainly be found, thus bringing into operation the *Bishop* rule, which will mandate the granting of contribution. Perhaps, however, the operation of the *Bishop* rule will not affect these cases, since the court has demonstrated in *Curtis*, *Phillips*, and *Bishop* a tendency to create a new rule regarding the application of the contribution statute if the old rule fails to bring equitable results.

C. Uninsurability of the Bishop Risk

In *Bishop* the stakes were very small, at least for the named parties. The defendant was adjudged liable to the plaintiff in the amount of \$664.97, of which the third-party defendant was ordered to contribute \$199.49.⁵⁴ Considering the small amount in controversy, as compared with the costs of trial court litigation and the preparation of the appeal, the logical conclusion is either that the parties were irrational, vengeful litigants, or that

47. *Cacchillo v. H. Leach Mach. Co.*, 111 R.I. 593, 305 A.2d 541 (1973). The Rhode Island court distinguished *Zarella* on the grounds that the policies underlying interspousal immunity, which was at issue in *Zarella*, were not undermined by allowing contribution, whereas the policies to be achieved by workmen's compensation would be circumvented if contribution were allowed against even a culpable employer.

48. *See, e.g., Anthony v. Norfleet*, 330 F. Supp. 1211 (D.D.C. 1971).

49. *See, e.g., Shonka v. Campbell*, 260 Iowa 1178, 152 N.W.2d 242 (1967).

50. *See, e.g., Phillips v. Union Pac. R.R.*, 614 P.2d 153 (Utah 1980).

51. *See, e.g., Hill v. United States*, 453 F.2d 839 (6th Cir. 1972) (applying Tennessee law).

52. *See, e.g., American Tobacco Co. v. Transport Corp.*, 277 F. Supp. 457 (E.D. Va. 1967).

53. *See, e.g., Renfrow v. Gojohn*, 600 S.W.2d 77 (Mo. Ct. App. 1980).

54. Brief of Third-Party Defendant-Appellant, *Bishop v. Nielson*, 632 P.2d 864 (Utah 1981).

broader insurance interests were being pursued by those bankrolling the litigation—the insurance companies. Inasmuch as the latter is obviously the case, the court should have acknowledged these interests and dealt with them in light of public policy considerations.

The insurance policy covering the Bishop automobile probably contained a “family exclusion” clause,⁵⁵ the validity of which has been recently upheld by the Utah court.⁵⁶ Although the court has not had occasion to consider further the applicability of the clause, the general rule is that “[a] family or household member exclusion is applicable where the question is the right of contribution as well as where the original claimant is involved.”⁵⁷ Since the family exclusion clause removes from insurance coverage an insured party’s liability to a family member, its operation has had relatively isolated consequences because it largely shadowed the doctrine of interspousal and parent-child immunity. The injured party could avoid the effect of the exclusion by collecting 100 percent of his loss from the unrelated tortfeasor’s insurance company. The *Bishop* holding, however, opens up a whole new category of uninsurable risk. The negligent family member will be open to contribution actions against which he cannot insure, and ultimately, the loss will fall either upon the injured party, who will oftentimes feel obligated to forgo part of his recovery to offset the contribution judgment, or directly upon the uninsured tortfeasor. In either case, the amount of damages attributable to the immune tortfeasor will not be insurable, but will have to be borne by those perhaps least able to do so.

Professor James proposed, at least in cases of unintentional torts, that “[a]n 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 good reason for it.”⁵⁸ Professors James and Harper would have seen the *Bishop* holding as just such a

55. The family exclusion clause restricts the liability coverage of an insured party to liability incurred to nonfamily members. For an example of a typical “family exclusion” clause, see *State Farm Mut. Auto Ins. Co. v. Kay*, 26 Utah 2d 195, 197, 487 P.2d 852, 853 (1971).

56. *Id.*

57. 12 M. RHODES, *COUCH CYCLOPEDIA OF INSURANCE LAW* § 45:517, at 916-17 (rev. 2d ed. 1981).

58. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1157 (1941).

rule. These two authorities felt that "when an insured defendant impleads or seeks contribution from an uninsured cotortfeasor, an efficient loss distributor shifts a part of the damages to a nondistributor, which, from the point of view of social policy, is undesirable."⁵⁹ The application of the *Bishop* rule will simply shift a loss, once widely distributed through the nonimmune tortfeasor's insurance, to the family of the injured person who is unable to insure against it.⁶⁰ Therefore, insurance considerations should have been accorded some weight in the court's decision.

D. *Subsequent Developments in Jurisdictions Relied on by Bishop*

The court found support for its holding in *Bishop* by relying on case law from five states: Pennsylvania,⁶¹ Rhode Island,⁶² Louisiana,⁶³ Florida,⁶⁴ and Maine,⁶⁵ all of which have allowed contribution against an immune family member. Perhaps the wisdom of the Utah decision to follow these five states, which comprise the minority position, could be weighed by considering subsequent developments in these states.

Less than one week after the *Bishop* decision was handed down, the Supreme Court of Pennsylvania mooted its holding in *Puller v. Puller*,⁶⁶ upon which the Utah court relied, by abrogating interspousal immunity. The Pennsylvania court considered it anomalous to retain interspousal immunity while at the same time allowing a contribution action to lie against a spouse of the injured person. The court reasoned:

The interspousal immunity doctrine as applied in this Commonwealth has barred an injured party from maintaining a di-

59. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 10.2, at 717 (1956).

60. Two jurisdictions on which the *Bishop* court relied, Florida and Pennsylvania, have held, in the face of their positions that contribution will be allowed against a family member, that the "family exclusion" clause is nevertheless valid and adequate to relieve the insurance company of any obligation to cover the contribution claim. See *Florida Farm Bureau Ins. Co. v. Government Employees Ins. Co.*, 387 So. 2d 932 (Fla. 1980); *Puller v. Puller*, 380 Pa. 219, 110 A.2d 175 (1955). Since the *Bishop* court has held that the immune third-party defendant is nevertheless liable to the plaintiff, it follows that it would also hold that a clause excluding coverage for liability to a family member would exclude coverage in the *Bishop* fact situation.

61. *Puller v. Puller*, 380 Pa. 219, 110 A.2d 175 (1955).

62. *Zarella v. Miller*, 100 R.I. 545, 217 A.2d 673 (1966).

63. *Walker v. Milton*, 263 La. 555, 268 So. 2d 654 (1972).

64. *Shor v. Paoli*, 353 So. 2d 825 (Fla. 1977).

65. *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963).

66. 380 Pa. 219, 110 A.2d 175 (1955).

rect tort suit against his or her spouse but has not barred an action against a third party, who may then bring in the negligent spouse as an additional defendant. Thus, although a direct suit against a spouse is not permitted, the object of such a suit—recovery of damages from the spouse—may nonetheless be achieved through indirect means.⁶⁷

Even before the *Bishop* opinion was handed down, the Rhode Island and Maine positions, also relied on by the Utah court, were mooted by the abrogation of interspousal immunity in those jurisdictions.⁶⁸ The Rhode Island court felt that since *Trotti v. Piacente*⁶⁹ and *Zarella* had already created such major holes in the doctrine of interspousal immunity, the next logical step was to abolish it altogether.⁷⁰ At this time, only Florida⁷¹ and Louisiana⁷² stand firmly with Utah. Thus, apparently it is the Utah position that is "extreme," and not the other positions which the court labeled as such.

III. CONCLUSION

Rather than adopt this minority position, the court should have confined itself to a more reasonable interpretation of the statute. Although the common liability requirement imposed by the legislature may be archaic when applied in some circumstances, the court is nevertheless bound to give credence to it. The court's action in weakening the requirement may have equally archaic consequences when the scope of contribution is at issue in light of the policies underlying other immunities. Perhaps the only true beneficiary of the *Bishop* holding is the insurance industry, which will now be relieved of covering certain risks heretofore insured. In light of the *Bishop* dilemma, the court and the legislature should work together to flesh out an approach that will neither compromise the ideals of contribution nor violate the policies behind tort immunity.

David H. Little

67. *Hack v. Hack*, ___ Pa. ___, ___, 433 A.2d 859, 865 (1981).

68. *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980); *Digby v. Digby*, ___ R.I. ___, 388 A.2d 1 (1978).

69. 99 R.I. 167, 206 A.2d 462 (1965).

70. *Digby*, ___ R.I. at ___, 388 A.2d at 2.

71. See *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979) (confirming the existence of interspousal immunity), *cert. denied*, 449 U.S. 886 (1980). But see *Ard v. Ard*, 395 So. 2d 586 (Fla. Dist. Ct. App. 1981) (abolishing parent-child immunity).

72. See *Walker v. Milton*, 263 La. 555, 268 So. 2d 654 (1972).