SECTION 6

SHIFTING OR SHARING OF LIABILITY AMONG THE TRANSPORTATION DEPARTMENT AND OTHERS

A. PROTECTING THE TRANSPORTATION DEPARTMENT FROM LIABILITY

A.1. Introduction

This section and the next discuss other means by which the transportation department may protect itself from liability through contractual indemnity, insurance, and statutory caps on damages. As seen in Part B, the transportation department may attempt to shift liability to another defendant or as yet unnamed defendant based on contribution, equitable indemnity,[1] or subrogation.[2]

A.2. Contractual Indemnity

A transportation department may include an indemnity provision in a contract to protect itself from claims arising out of the other party's conduct, leading to third-party claims against the department. In transportation construction contracts, the contractor may be required to indemnify the transportation department. For instance, the contract documents may provide that

> "[t]he Contractor shall indemnify and save harmless the [Transportation] Department, its officers and employees, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property on account of the operations of the Contractor; …or because of any act or omission, neglect, or misconduct of the Contractor[.]"[3] Where an accident occurs in a construction zone, the transportation department may have rights of indemnity from the contractor under the construction contract with the prime contractor for third-party lawsuits against the transportation department. Also, the transportation department may be named as an additional insured under the contractor's policy.

However, the transportation department is unlikely to be able to claim indemnity from others arising out of the department's own negligence. Indemnities are strictly construed. A party may contract to indemnify itself against its own negligence only if the other party knowingly and willingly agrees to indemnify; courts disfavor such clauses because "to obligate one party to pay for the negligence of the other party is a harsh burden…."[4]

In *State v. Thompson*,[5] the State sued a truck stop operator in a third-party action arising out of a highway accident. The court noted that "in order for an indemnitor to be liable for the indemnitee's own negligence, there must be a written contract between the parties which contains a clear and unequivocal provision by which the alleged indemnitor knowingly and willingly assumes the onerous burden of indemnification for the indemnitee's negligence." The court rejected any implied in law indemnity theory of the State,[6] ruling that Amoco, the truck stop operator, could not be held liable for negligent acts of the State: "This [contractual] provision contains no mention of the indemnification of the State by Amoco in case of the State's own negligence.… [T]his provision is simply too vague to impose the burden of indemnification upon Amoco…."[7]

Another form of contractual responsibility exists when the transportation department is engaged in an activity with another department or agency or with a business enterprise such that the two or more parties are joint venturers or partners. In such a situation, the transportation department may be held liable for the negligence of an employee of a co-venturer under the doctrine of the existence of a joint enterprise.[8]

A.3. Insurance

There are many issues that could be discussed in regard to insurance coverage issues. However, the principal issue considered here is whether the state's purchase of insurance affects the transportation agency's amenability to suit in tort. There is authority that the state waives its immunity when it procures liability insurance.[9] The state statute may or may not provide for a waiver, or there may be a limited waiver of immunity up to the limit of the liability insurance purchased.[10]

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[1] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 418 (1999).

[2] 73 AM. JUR. 2D Subrogation § 3 (2001)

[3] Vankirk v. Green Constr. Co., 195 W. Va. 714, 466 S.E.2d 782, 786, n.2 (1995)*, cert. denied,* 518 U.S. 1028 (1996).

[4] Moore Heating v. Huber, Hunt & Nichols, 583 N.E.2d 142, 145 (Ind. App. 1991).

[5] 179 Ind. App. 227, 385 N.E.2d 198, 216 (1979).

[6] 385 N.E.2d at 216–17.

[7] *Id.* at 217. The provision had been included because of Amoco's application for access to a limited access highway.

[8] Tex. Dep't of Transp. v. Able, 981 S.W.2d 765, 1998 Tex. App. LEXIS 5860 (Ct. App., Houston, 1998).

[9] HARPER & JAMES, THE LAW OF TORTS § 29.4; Wright v. State, 189 N.W.2d 675, 680 (N.D. 1971), *overruled* in Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 636 (1994). In *Wright*, the court held that it "was within the discretion of the State Highway Department to determine whether a policy of insurance against liability should be purchased, who should be covered, and the extent of the coverage.… [T]he purchase of the policy was not a waiver of the immunity of the State from suit.…" In *Bulman*, the North Dakota Supreme Court abolished the State's sovereign immunity from tort liability but noted that its "decision should not be interpreted as imposing tort liability on the State for the exercise of discretionary acts in its official capacity, including legislative, judicial, quasi-legislative, and quasi- judicial functions." Bulman, 521 N.W.2d at 640. Abrogation was prospective so that the legislature could implement a plan for liability insurance or self-insurance. Whether liability insurance itself was a waiver does not appear to have an issue in *Bulman*.

[10] Henry v. Okla. Turnpike Auth., 478 P.2d 898, 901 (Okla. 1970) (The "said statute requires only a limited insurance liability to be purchased.… This statute did not authorize a full and complete waiver [of sovereign immunity of the Turnpike Authority] and we so hold.").

In *Askew v. Miller Mutual Fire Insurance Co.*,[11] the court noted that the highway department was subject to suit only to the extent it was protected by liability insurance. Because of the policy's exclusions, the plaintiff's action could not be sustained, as the policy, *inter alia*, did not cover the nonexistence of signs warning motorists of animals.[12]

In *Smith v. Cooper,*[13] the court held that the legislature did not withdraw the immunity of state employees when it enacted a statute permitting state agencies to purchase insurance to protect their officers and employees against liability. The court held that "the insurance…would be useful with regard to matters in which the employees have traditionally not enjoyed immunity."[14] In *Hughes v. County of Burlington*,[15] the court ruled that the existence of liability insurance coverage for the County did not preclude the defense of governmental immunity: "the procurement by a governmental unit of liability insurance does not of itself effect a waiver of whatever governmental immunity from suit would otherwise prevail."[16]

The procurement of insurance may give rise to other issues under a state tort claims act. For instance, in *Kee v. State Highway Admin*.,[17] there were material issues on whether a suit came within the Tort Claims Act for which the State had waived tort immunity at the time of the accident and whether the claim was covered under an insurance policy also in effect at the time of the accident. Under the Tort Claims Act, the State had waived its immunity only to the extent that the State was covered by an insurance program. The treasurer was only authorized to provide insurance to the extent that funds were budgeted. Although there were other issues regarding what had been waived,[18] on the insurance issue the court held that the statutory provision "indicates a clear intent…to provide only a limited waiver of the State's immunity in the first year of the Tort Claims Act."[19] Furthermore, "the State had not waived its immunity from tort suit [under certain provisions of the Tort Claims Act] in 1982 because the Treasurer had no authority to purchase insurance coverage.… [T]he state defendants retained their immunity for causes of action accruing in 1982 and falling only within § 5-403(a)(5)…."[20]

In a concurring opinion in *Johnson v. County of Nicollet*,[21] which held that the decision of the County not to place a guardrail between the road and the river bank was not an immune discretionary act, the concurring judge stated that the County had waived its immunity by purchasing liability insurance, but noted that in another case,[22] the court had not considered whether a city's purchase of liability insurance was a waiver of discretionary immunity.

It appears that the effect of the transportation department's purchasing liability insurance and the extent to which defenses are waived in tort actions may vary among the states. State transportation attorneys should consult applicable statutory provisions and state court decisions before advising transportation officials on this issue.

A.4. Statutory Limitations on Damages, Punitive Damages, and Attorney's Fees

Some legislatures have enacted statutory maximums or caps on the amount and/or type of damages that may be recoverable against a governmental defendant. Although the statutes vary from state to state, they reflect public concerns about the effect of recoveries in tort against transportation and other public agencies that may seriously deplete public resources.

The type and scope of statutory caps vary. In some instances, the jurisdiction may only provide for a cap on a recovery for each plaintiff. In others, a cap on damages per plaintiff arising from the same cause of action or occurrence may be combined with an aggregate limit.[23] Sometimes the statutes provide that the court may not award prejudgment interest.[24]

In Florida, the state is liable "for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment."[25]

The constitutionality of statutory, monetary maximums, as well as provisions for requiring notice and special statutes of limitations, have been challenged in several jurisdictions. Their constitutionality has been upheld, usually for the same reasons.[26] In Minnesota, the court held that, because the $100,000 statutory cap on tort judgments against the state agency did not unfairly discriminate between governmental tortfeasors

[11] 86 N.M. 239, 522 P.2d 574 (1974).

[12] Askew, 522 P.2d at 575 (1974).

[13] 256 Or. 485, 475 P.2d 78, 83 (1970).

[14] *Id.*

[15] 99 N.J. Super. 405, 240 A.2d 177 (1968), *cert. denied,* 51 N.J. 575, 242 A.2d 379 (1968).

[16] 240 A.2d at 182; *see* Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) (rejecting waiver theory), *reh'g denied*, Oct. 21, 1997.

[17] 313 Md. 445, 545 A.2d 1312 (1988).

[18] Kee, 545 A.2d at 1319.

[19] *Id*. at 1318.

[20] *Id*.

[21] 387 N.W.2d 209 at 213 (Minn. App. 1986).

[22] Wilson v. Ramacher, 352 N.W.2d 389 (Minn. 1984).

[23] 42 PA. CONS. STAT. ANN. § 8528(b) (limiting damages arising from a single or related cause of action to $250,000 per plaintiff and $1,000,000 in the aggregate).

[24] FLA. STAT. ANN. § 768.28 (5); Nevins v. Ohio Dep't of Transp., 132 Ohio App. 3d 6, 724 N.E.2d 433, 1998 Ohio App. LEXIS 6265 (1998) (no prejudgment interest in tort claim against the transportation department).

[25] FLA. STAT. ANN. § 768.28 (5).

[26] Hart v. Salt Lake County Comm'n, 945 P.2d 125, 1997 Utah App. LEXIS 93 (Ut. Ct. App. 1997) (statutory damage cap did not violate state constitutional law).

and private tortfeasors, the statute did not violate the Equal Protection Clause. The court held that the state's classification was rationally related to its legitimate governmental interest in protecting public funds and aiding budgetary planning.[27]

The application of the statutory limit in some situations that may arise is not always simple, however. In *Tulewicz v. Southeastern Pennsylvania Transp. Agency*,[28] the Pennsylvania Supreme Court interpreted that state's statutory cap on damages. In *Tulewicz*, multiple claims for damages resulted after a Southeastern Pennsylvania Transportation Agency (SEPTA) bus killed the plaintiff's decedent.[29] After the actions were consolidated for trial, the court awarded plaintiff as a relative and as decedent's personal representative $2,500,000 under the Wrongful Death Act and $250,000 under the Survival Act.[30] SEPTA argued that the two claims and verdicts arose out of the same occurrence, and, therefore, had to be aggregated to avoid exceeding the statutory limitation of $250,000 per plaintiff.[31]

The court, rejecting the Agency's argument, reasoned that the two actions were designed to compensate two different categories of plaintiffs: on one hand, the spouse and members of the family for their loss, and on the other, the decedent through her legal representative.[32] Even though there was only one plaintiff, the case was brought on behalf of two distinct plaintiffs.[33] Thus, the statutory $250,000 limitation applied to the respective claims but not in the aggregate.

Insofar as punitive damages are concerned, statutes in some jurisdictions may exempt transportation and other public agencies from such damages.[34] If legislation does not do so, then the courts must decide the issue. The trend appears to favor denying punitive damages in successful suits against public agencies.[35]

Thus, as seen, there are several legal doctrines that may permit the transportation department to protect itself from liability. A contractual indemnity is unlikely to succeed if the transportation department is seeking indemnification for claims arising out of its own negligence. On the other hand, the transportation department may purchase insurance. Statutory limits on the amount of damages and the preclusion of punitive damages have been upheld in most states in which they have been imposed.

B. SHIFTING LIABILITY FROM THE TRANSPORTATION DEPARTMENT TO OTHERS

B.1. Contribution, Counterclaims, and Cross-claims

Contribution is based on equity.[36] The common-law prohibition against contribution among joint tortfeasors generally has been abrogated by statutes that create a substantive right of contribution.[37] Contribution distributes the loss by requiring each culpable party to pay a proportionate share to one who has discharged the joint liability.[38] By comparison, indemnity shifts the entire loss from one tortfeasor, who has been compelled to pay it, to another who should bear it instead.[39] Contribution sounds primarily in tort and is based on the duty of each tortfeasor to the injured party.[40]

There appear to be differences among the states on whether the remedy of contribution is available.[41] In the District of Columbia, for example, contribution is an equitable concept, which recognizes that each tortfeasor found to be liable should share the burden of making the plaintiff whole.[42] Contribution is available

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[27] Lienhard v. State, 417 N.W.2d 119, 1987 Minn. App. LEXIS 5121 (Minn. Ct. App. 1987), *aff'd in part and rev'd in part*, *en banc*, 431 N.W.2d 861, 1988 Minn. LEXIS 278 (Minn. 1988); *cf.* Lyles v. Commonwealth, Dep't of Transp., 516 A.2d 701 (Pa. 1986) (holding that the provision of the Pennsylvania Sovereign Immunity Act limiting tort liability of a Commonwealth party to $250,000 did not violate the equal protection provisions of the Federal or Pennsylvania Constitutions); *cf.* Schuman v. Chicago Transit Auth., 407 Ill. 313, 95 N.E.2d 447 (1950) (rejecting a constitutional challenge to the notice of claim requirement and the reduced statute of limitations for personal injury suits against the CTA).

[28] 529 Pa. 588, 606 A.2d 427 (1992).

[29] 606 A.2d at 428.

[30] *Id.*

[31] *Id.* at 430.

[32] *Id* at 431.

[33] *Id.*

[34] *E.g.*, CAL. GOV'T CODE § 818 (no exemplary damages); FLA. STAT. ANN. 768.28 (5) (no punitive damages); TEX. GOV'T CODE ANN. § 101.024 (same); 42 PA. CONS. STAT. § 8521(c) (omitting punitive damages from categories of recoverable damages).

[35] *E.g.,* Metropolitan Atlanta Rapid Transit Auth. v. Boswell, 261 Ga. 427, 405 S.E.2d 869 (1991); Teart v. Washington Metro. Area Transit Auth., 686 F. Supp. 12, 14 (D.D.C. 1988) (refusing to grant punitive damages in the absence of an express statutory grant); and George v. Chicago Transit Auth., 58 Ill. App. 3d 692, 374 N.E.2d 679, 1978 Ill. App. LEXIS 2375 (1st Dist. 1978); *but see* Magaw v. Mass. Bay Transp. Auth., 21 Mass. App. 129, 485 N.E.2d 695 (1985) (stating that any limitation on the transportation authority's tort liability is for the legislature to decide).

[36] 18 C.J.S., *Contribution* § 2, at 4–5.

[37] *Id.* § 12, at 15.

[38] *Id.* at 16.

[39] Eagle-Picher Indus. v. United States, 290 U.S. App. D.C. 307, 937 F.2d 625 (D.C. Cir. 1991).

[40] *Id.*

[41] Robinson v. Alaska Properties and Inv., 878 F. Supp. 1318 (D. Alaska 1995) (stating that under Alaska law, there is no recognition of either contribution among join tortfeasors or noncontractual indemnity.).

[42] Machesney v. Larry Bruni, P.C., 905 F. Supp. 1122 (D.D.C. 1995).

only to joint tortfeasors,[43] but there is authority that the tortfeasors need not be joint in the strict sense for the contribution statute to apply.[44] Contribution may be available whether the acts of the tortfeasors are separate, independent, or concurrent, and the applicable statute may cover tortfeasors who are liable in tort on separate legal theories.[45] All joint tortfeasors need not be defendants in the action by the plaintiff for contribution to be available.[46]

A model act, the Uniform Contribution Among Tortfeasors Act (UCATA), creates a substantive right of contribution among joint tortfeasors. There is authority both allowing and disallowing contribution in states with comparative negligence statutes.[47] Of course, there is no basis for contribution if the other tortfeasor is immune from liability.[48] There are several annotations on topics that are relevant to actions arising out of claims against transportation agencies,[49] as well as to issues arising under the UCATA.[50] Several sections of the *American Law of Torts* (1993) discuss the law of contribution, including the applicability of notice of claims provisions; prerequisites to contribution; and adjusting contribution for relative or comparative causal fault.

The state may claim contribution from other tortfeasors responsible for the plaintiff's injury, and Pennsylvania has permitted a private tortfeasor to recover by way of contribution against the transportation agency.[51] It has been held that the state is not excluded from the operation of the UCATA on the theory that government entities are not "persons" for the purposes of the Act.[52]

It should be noted that a Michigan decision compels the state to contribute, even though sovereign immunity was not expressly waived. In *Sziber v. Stout*,[53] involving the state's contribution statute, the third-party defendant county road commissions argued that the statute applied only to private tortfeasors. The road commissions maintained that "the only cause of action which may be maintained against the road commissions, otherwise immune from liability, is that for which the Legislature has specifically and narrowly waived immunity...."[54]

Relying on its prior decisions, the court disagreed, noting that in Michigan "contribution is substantive in nature and not dependent on the whim of the original plaintiff...."[55] The court held that "the Michigan statute abrogates the common-law bar prohibiting contribution among 'wrongdoers' and established a substantive cause of action independent of the underlying suit which gave rise to it...."[56] The court held that the Michigan statute created a substantive cause of action for contribution available to the third-party plaintiffs, "which is wholly independent of the underlying tort action, unaffected by the governmental immunity statute, and which may be prosecuted to judgment, providing that the other requirements of the contribution statute are met."[57] It should be noted that the court also held that the state statute requiring written notice by the injured person of the injury and the highway defect within 120 days of the accident was inapplicable to actions for contribution.[58]

In *Bernard v. State ex. rel. Dept. of Transp. & Development*,[59] the transportation department was not entitled to contribution from a highway contractor for an accident caused by the removal of a turning lane. It was held that the contractor was not the culpable party where the contractor had complied with department's plans and specifications, where the contractor was one of several on the project, and where the department had controlled the placement of warning signs.

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[43] In re Del-Val Fin. Corp. Sec. Litig., 868 F. Supp. 547 (S.D.N.Y. 1994), *appeal denied,* 874 F. Supp. 81 (S.D.N.Y. 1995), *application denied*, 162 F.R.D. 271 (S.D.N.Y. 1995).

[44] Berard v. Eagle Air Helicopter, 195 Ill. Dec. 913, 629 N.E.2d 221, 257 Ill. App. 3d 778 (1994).

[45] Employers Mut. Cas. Co. v. Petroleum Equip., Inc., 190 Mich. App. 57, 475 N.W.2d 418 (1991).

[46] Henry v. Consolidated Stores Int'l Corp., 89 Ohio App. 3d, 417, 624 N.E.2d 796 (1993).

[47] 18 C.J.S., *Contribution* § 12.

[48] *Id.* § 29.

[49] Annot., *Contribution Between Negligent Tortfeasors at Common Law,* 60 A.L.R. 2d 1366; Annot., *Extent To Which State Law is Applicable in Actions Under Federal Tort Claims Act*, 1 L. Ed. 2d 1647, § 14; Annot., *Right of United States Under Federal Tort Claims Act to Recover Contribution or Indemnity from Joint Tortfeasor,* 15 A.L.R. Fed. 665, Annot., *Tortfeasor's General Release of the Co-tortfeasor as Affecting Former's Right to Contribution Against Co-Tortfeasor,* 34 A.L.R. 3d 1374.

[50] Annot., *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort,* 57 A.L.R. 3d 867, and Annot., *Contribution or Indemnity Between Joint Tortfeasors On Basis of Relative Fault*, 53 A.L.R. 3d 184. Agreements and releases that may affect the liability of the other joint tortfeasor are discussed in 22 A.L.R. 5th 483, 6 A.L.R. 5th 883, and 24 A.L.R. 4th. 547

[51] Cruet v. Certain-Teed Corp., 432 Pa. Super. 554, 639 A.2d 478 (1994), *appeal denied,* 541 Pa. 639 (1995).

[52] Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994), *reh'g denied,* May 1994.

[53] 419 Mich. 514, 527, 358 N.W.2d 330, 335 (1984).

[54] 358 N.W.2d at 334.

[55] *Id.* at 335.

[56] *Id.*

[57] *Id*. at 336. (Footnote omitted).

[58] In that regard, the court overruled *Morgan v. McDermott*, 382 Mich. 333, 169 N.W.2d 897 (1969). As for the statute of limitations, the court ruled that the 6-month provision in the contribution statute applied; moreover, the cause of action accrued when the third party plaintiff has paid more than his or her share. Sziber, 358 N.W.2d at 337–38.

[59] 640 So. 2d 694 (La. App. 3d Cir. 1994), *cert. denied*, 643 So.2d 165 (La. 1994).

In *Scovell v. TRK Trans, Inc.*,[60] the appellate court had held that, because the State had waived its immunity from tort liability, liability was subject to the right of contribution. In *Scovell*, the plaintiff sued a trucking company for wrongful death; TRK filed a third-party claim against the State for contribution and indemnity. The appellate court held that the statutory scheme in Oregon did not require that the original plaintiff be able to maintain an action in tort against the third-party defendant, the State, at the time that the contribution action was commenced. It was not necessary for the plaintiff to have given any pre-suit notice to the transportation commission. "Because TRK provided the required notice of its claim, it is entitled to maintain its third-party action."[61] However, the court did agree that the third-party complaint "failed to allege any relationship between itself [the defendant] and the state, or between its duty, fault or liability, if any, and that of the state which would entitle it to indemnity."[62]

The Supreme Court of Oregon reversed the decision and reinstated the judgment of the circuit court pursuant to *Beaver v. Pelett*,[63] decided the same day as the appeal from *Scovell v. TRK Trans, Inc.* The court held in *Beaver* that the State had consented to the claim for contribution under the tort claims act, but that the claim was insufficient to satisfy the requirement that the injured party must provide notice to the State.[64] The court stated: "We do not believe that the legislature intended a public body to become indirectly liable to a third party for an alleged tort of which it had no notice and for which the original injured party therefore could not recover damages."[65]

In sum, in actions involving the transportation department, counsel will need to consult local statutes and decisions to determine whether contribution is an available remedy under the circumstances of the case.

B.2. Equitable Indemnity

Equitable indemnity allows one tortfeasor to receive a full or partial indemnity from a joint tortfeasor on a comparative fault basis.[66] The very nature of equitable indemnity is that a contract for indemnity is unnecessary and recovery is allowed where, as a result of the defendant's breach of contract or tortious activity, the cross-claimant is required either to defend itself or bring an action against a third party.[67] The doctrine is explained in one case as

> a restitutionary concept; it is "a right which inures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable...." "Indemnity does not invariably follow fault; it is premised on a joint legal obligation to another for damages...." Accordingly, "[t]here can be no indemnity without joint and several liability by the prospective indemnitor and indemnitee...."[68]

If there are joint tortfeasors, one may be compelled to pay damages for the negligent or tortious act of another, but such a general statement is subject to numerous exceptions.[69] For instance, there may be a recovery if "there is a great disparity in the fault of the parties"; where one is "less culpable than the principal wrongdoer"; or where "one tortfeasor was only technically or constructively at fault."[70] In California, for example, the doctrine permits the defendant to seek apportionment of the loss between wrongdoers in proportion to their relative culpability, so there will be equitable sharing of losses between multiple tortfeasors.[71] Under the "comparative equitable indemnity" doctrine, the defendant has the right to bring in other tortfeasors who are allegedly responsible for the plaintiff's injury through a cross-complaint or by a separate complaint for equitable indemnification.[72]

However, a motorist who had been sued along with the state department of transportation in an action arising out of a collision at an intersection did not have an implied indemnity claim against the transportation department for an award of statutory attorney's fees. The court stated that liability for implied indemnity cannot be founded merely upon the absence of fault of one codefendant.[73]

There is authority that comparative negligence principles do not preclude an award of restitution under the doctrine of equitable indemnity to a non-negligent, settling codefendant.[74] However, there is also authority that the alleged tortfeasor must have been at fault to

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[60] 71 Or. App. 186, 691 P.2d 911 (1984), *rev'd, en banc,* 299 Or. 679, 705 P.2d 1144 (1985).

[61] 691 P.2d at 915.

[62] *Id*.

[63] 299 Or. 664, 705 P.2d 1149 (1985).

[64] 705 P.2d at 1152–54.

[65] *Id*. at 1153.

[66] 42 C.J.S., *Indemnity §* 38; *see also* Annot., *Contribution or Indemnity Between Joint Tortfeasors on Basis of Relative Fault*, 53 A.L.R. 3d 184.

[67] Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992).

[68] Fieldstone Co. v. Briggs Plumbing Products, Inc., 54 Cal. App. 4th 357, 62 Cal. Rptr. 2d 701, 706 (4th Dist. 1997). (Citations omitted).

[69] 42 C.J.S., *Indemnity*, §§ 36 and 37; *see* Annot., *Release of or Covenant Not to Sue One Primarily Liable for Tort, But Expressly Reserving Rights Against One Secondarily Liable, As Bar to Recovery Against the Latter*, 24 A.L.R. 4th 547.

[70] 42 C.J.S., *Indemnity*, § *37.*

[71] GEM Developers v. Hallcraft Homes of San Diego, Inc., 213 Cal. App. 3d 419, 261 Cal. Rptr. 626 (4th Dist. 1989).

[72] 261 Col. Rept. at 631.

[73] Watson v. Department of Transp., 68 Cal. App. 4th 885, 1998 Cal. App. LEXIS 1046, 80 Cal. Rptr. 2d 594, 597–98 (1998).

[74] Rowley Plastering Co. v. Marvin Gardens Dev. Corp., 180 Ariz. 212, 883 P.2d 449 (Ariz. Ct. App. 1994).

some extent before being able to claim an indemnity. For example, in *Watson v. Dept. of Transp.,*[75] the trial court found the defendant motorist to be free of fault, the transportation department to be 90 percent at fault, and the plaintiff to be 10 percent at fault. The court held that the motorist who was held not liable could not recover his attorneys' fees by cross-complaint against the transportation department: "[i]f the alleged tortfeasor is not liable at all no tenable claim can be made for indemnity.... [L]iability for implied indemnity cannot be founded merely upon the absence of fault of one co-defendant."[76]

In cases involving multiple parties and equitable indemnity, the cross-complainant's failure to file a notice of claim under the applicable state torts claims act prior to asserting a claim against the transportation department has been litigated. Whether the action is permissible may turn on when the equitable indemnity claim accrued. In *People ex rel. Dept. of Transp. v. Superior Court of Los Angeles County,*[77] the plaintiff, who was injured in an automobile accident, instituted an action against a number of individuals. However, the plaintiff did not file a timely claim against California under its tort claims act. Several defendants, however, filed an equitable indemnity action against the State, alleging that the latter's negligence in blocking several lanes of the highway was the proximate cause of the plaintiff's injuries. The State argued that the claim had to be dismissed, because the cross-complainant had failed to file a timely claim under the statute.

The court held that a tort defendant's cross-claim for equitable indemnity is separate and distinct from the plaintiff's tort action: "a tort defendant does not lose [its] right to seek equitable indemnity from another tortfeasor simply because the original plaintiff's action against the additional defendant may be barred by the statute of limitations."[78] The court stated that "[i]t is well-settled that a cause of action for implied indemnity does not accrue or come into existence *until the indemnitee* [i.e., the initial defendant] *has suffered* actual loss through payment."[79] The statutory notice was not required where the cross-complaints were filed prior to the accrual of the cause of action for equitable indemnity: "[w]hen an equitable indemnity action is pursued prior to the accrual of the cause of action through a third party cross-complaint, it has been held that no prior claim need be filed."[80]

[75] 68 Cal. App. 4th 885, 80 Cal. Rptr. 2d 594 (3d Dist. 1998).

[76] Watson, 80 Cal. Rptr. 2d at 599.

[77] 163 Cal. Rptr. 585, 608 P.2d 673 (1980), *superseded by statute as stated in* Cal. v. Superior Court, 143 Cal. App. 3d 754, 192 Cal. Rptr. 198 (1st Dist. 1983).

[78] People ex rel. Dep't of Transp., 608 P.2d at 676.

[79] *Id*. at 677 (emphasis in original).

[80] *Id.* at 685. As for the plaintiff's failure to give a pre-suit notice to the state, the court ruled that "a preservation of the defendant's indemnity rights in these circumstances is [not] simply an 'indirect' way to permit an injured plaintiff to avoid the effect of the claims statute." *Id*. at 684.

B.3. Subrogation

Subrogation is an equitable principle that applies equally to tort and contract actions and that arises by operation of law.[81] "Subrogation that does not result from agreement between the parties is usually known as legal subrogation…a creature of equity, existing independently of custom or statute...."[82]

If a third person negligently causes a defect in a highway, resulting in a claim against the transportation authority, and if the department is compelled to pay damages, then the public authority is subrogated to the cause of action that the injured party primarily had against the one causing the defect.[83] Thus, subrogation is the substitution of one person in the place of another with reference to a lawful claim or right, so that one party (the substitute) succeeds to the rights of another. Once subrogation occurs, the substitute, in effect, steps into the shoes of the other party to whom the substitute became subrogated.[84] Equity seeks through subrogation to prevent the unearned enrichment of one party at the expense of another. The rule of subrogation does not apply to joint tortfeasors;[85] however, the initial tortfeasor may maintain an independent action for subrogation against a subsequent tortfeasor aggravating the injury.[86]

The doctrine arises in tort cases involving governmental authorities and highways: "Where a tort claim has been paid by one whose liability therefor was secondary, he may be subrogated to the rights of the injured party against the wrongdoer," provided, of course, he was legally chargeable with liability.[87] Subrogation claims, therefore, are possible against contractors, licensees, or other third persons.[88] For the public authority to recover, the general rule is that it must have been only "passively negligent."[89] In *Berliner v. Kacov*,[90] the city was not entitled to indemnification from an abutting owner where the jury found that the city had been "100%" negligent in failing to maintain the street in a reasonably safe condition.[91]

As in the discussion on equitable indemnity, an important issue that could be overlooked is the matter of the giving of a timely notice of a claim to the govern-

[81] Czyzewski v. Gleeson, 49 Ill App. 3d 655, 364 N.E.2d 557, 7 Ill. Dec. 396 (1977); and Consolidated Freightways v. Moore, 38 Wash. 2d 427, 229 P.2d 882 (1951).

[82] 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 3.

[83] *See* 73 AM. JUR. 2D *Subrogation*. Usually the obligation being paid must have been paid in full. *Id*. §§ 26, 30.

[84] State v. Tradewinds Elec. Serv. Contr., 80 Haw. 218, 908 P.2d 1204, 1208 (1995).

[85] W.A. Ellis, Inc. v. Ellis, 115 Colo. 12, 168 P.2d 549 (1946).

[86] Keith v. B.E.W. Ins. Group, 595 So. 2d 178 (Fla. App. 1992).

[87] 73 AM. JUR. 2D §§ 30, 31 (2001).

[88] *Id.*

[89] *Id.*

[90] 51 A.D.2d 962, 380 N.Y.S.2d 722 (App. Div. 1976).

[91] Berliner, 380 N.Y.S.2d at 725–26.

mental defendant. In *Allied Mutual Ins. Co. v. Director of N.D. Dept. of Transp.,*[92] an automobile insurer asserted subrogation rights in an action against the transportation department; the plaintiff's insured was injured and one passenger killed in a collision when the department's employee drove a loader across a highway median. The insurer's subrogation claim was defeated because of the failure to give the required written statutory notice of claim.

Insofar as the shifting of liability from the transportation department to others, if the defendants are joint tortfeasors, then the department may be able to recover against a codefendant or third party under the equitable indemnity doctrine. If the department pays on behalf of another party and is not itself negligent, then it may be possible to claim against the responsible party under subrogation principles. Subrogation may be precluded if the subrogor and the subrogee are joint tortfeasors. Finally, it may be possible for joint tortfeasors to seek contribution from the other.

[92] 1999 N.D. 2, 589 N.W.2d 201 (1999).