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Doctrine of Common Law Indemnity Abolished in Negligence Cases as Inconsistant with the Comparative Negligence and Contribution Statute.

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posed Federal Securities Code is enacted, the single fraud provision would bring uniformity and clarity to this area of securities law. Until such an enactment, the individual is going to have to initiate actions on his own behalf as the SEC watchdog has been put to sleep.

Laura L. Worsham

TORTS—Indemnity—Doctrine of Common Law Indemnity Abolished in Negligence Cases as Inconsistant with the Comparative Negligence and Contribution Statute

B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814 (Tex. 1980).

During the afternoon of September 9, 1977, while driving in a hard rain, a truck owned by Central Freight Lines jackknifed, crossed over the center line, and struck Raymond Pride's automobile causing him severe injury. B & B Auto Supply, Sand Pit, and Trucking Company (B & B) operated a clay pit adjacent to the highway near the scene of the accident. As a result of B & B's trucks leaving the clay pit fully loaded with dirt, and despite B & B's efforts to remove the material, large deposits of the dirt and clay had accumulated upon the highway causing it to become slick. The driver of the Central Freight Lines truck claimed the cause of the accident was the condition of the roadway due to the accumulation of mud and debris.[1] Raymond Pride brought suit against Central Freight Lines and B & B charging each with negligence and seeking joint and several recovery. Both Central Freight Lines and B & B sought contribution and indemnity from the other. The trial court found Central Freight Lines and B & B guilty of negligence,[2] which proximately caused injury to the plaintiff, and apportioned their fault at two-thirds and one-third, respectively. Central Freight Lines, however, was granted indemnity against B & B, thereby reducing its liability to zero.[3] The Beaumont Court of

1. *See* Central Freight Lines v. Pride, 588 S.W.2d 832, 834 (Tex. Civ. App.—Beaumont 1979), *rev'd and remanded sub nom.* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814 (Tex. 1980).

2. The jury found that Central Freight Lines was negligent by and through their driver's failure to keep a proper look out, improper application of brakes, and speed. B & B was found to be negligent because of its failure to remove the dirt and clay from the roadway. *See* Petitioner's Application for Writ of Error at 5, B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 816 (Tex. 1980).

3. *See* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603

Civil Appeals affirmed the trial court judgment and concluded that although both Central Freight Lines and B & B were negligent, B & B had breached a duty owed to Central Freight Lines by not removing the dirt and debris from the highway.[4] The Texas Supreme Court granted B & B's application for writ of error.[5] Held—*Reversed and Remanded.* The doctrine of common law indemnity is inconsistent with the Texas Comparative Negligence and Contribution statute codified in Texas Revised Civil Statutes Annotated article 2212a,[6] and therefore, common law indemnity is abolished in negligence cases.[7]

Negligent defendants like negligent plaintiffs were not favored at common law.[8] Any attempt among negligent defendants to transfer all or part

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S.W.2d 814, 816 (Tex. 1980).

4. *See* Central Freight Lines v. Pride, 588 S.W.2d 832, 834-35 (Tex. Civ. App.—Beaumont 1979), *rev'd and remanded sub nom.* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814 (Tex. 1980).

5. B & B's application for writ of error was granted on the following grounds: the court of civil appeals erred in 1) allowing indemnity to Central Freight Lines against B & B; and 2) not allowing B & B contribution against Central Freight Lines. *See* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 23 Tex. Sup. Ct. J. 342, 343 (May 3, 1980) (order granting writ of error).

6. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980). The statute provides in pertinent part:

> Modified comparative negligence. Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.
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> Contribution among joint tort-feasors. Section 2. (a) In this section: (1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant. (2) "Defendant" includes any party from whom a claimant seeks relief. (b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant. (c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

Id.

7. B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 817 (Tex. 1980).

8. *See* Gulf, Colo. & S.F. Ry. v. Bliss, 363 S.W.2d 343, 347 (Tex. Civ. App.—Beaumont 1962), *aff'd in part,* 368 S.W.2d 594 (1963); Everet v. Williams, Ex. (1725), *reprinted in* 9 L.Q. REV. 197 (1893); Hodges, *Contribution And Indemnity Among Tortfeasors,* 26 TEXAS L. REV. 150, 150 (1947); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases,* 10 ST. MARY'S L.J. 587,

of their liability to another defendant was stifled.[9] As negligence law developed, liability, in some instances, was attributed to persons not at fault but who were found to be vicariously responsible because of a pre-existing relationship with a negligent tortfeasor.[10] These individuals who were liable without fault were allowed to shift their liability to the negligent tortfeasor.[11] This shifting of liability from one tortfeasor, who is jointly and severally liable,[12] to another is recognized as common law indemnity.[13]

Texas has long recognized the right of common law indemnity.[14] The Texas courts, in search of a definite standard to apply in indemnity cases, have employed numerous tests to determine when common law indemnity is proper.[15] Due to the multiplicity of tests applied by the courts, the

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588 (1979). *See generally* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 130-32 (1932).

9. *See, e.g.*, Austin Rd. Co. v. Pope, 147 Tex. 430, 434, 216 S.W.2d 563, 564-65 (1949); Wheeler v. Glazer, 137 Tex. 341, 344-45, 153 S.W.2d 449, 451 (1941); Merryweather v. Nixan, 101 Eng. Rep. 1337, 1337 (K.B. 1799).

10. *See, e.g.*, Wheeler v. Glazer, 137 Tex. 341, 345, 153 S.W.2d 449, 451 (1941) (master-servant); Frantom v. Neal, 426 S.W.2d 268, 270, 272 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) (master-servant); Cameron Compress Co. v. Kubecka, 283 S.W. 285, 286 (Tex. Civ. App.—Austin 1926, writ ref'd) (agency). *See generally* Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 150 (1947); Oldham & Maynard, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants*, 28 FED'N INS. COUNSEL Q. 139 (Winter 1978).

11. *See* Kampmann v. Rothwell, 101 Tex. 535, 540, 109 S.W. 1089, 1090 (1908); South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 948 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

12. Joint and several liability arises when two or more tortfeasors join to cause an injury for which damages cannot be apportioned with a reasonable degree of certainty. *See* Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952).

13. The words "common law" indemnity are used to differentiate it from contractual indemnity. Common law indemnity is implied in law while contractual indemnity arises from an express contract. *See* Atchison, T., & S.F. Ry. v. Smith, 563 S.W.2d 660, 668 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.); Texas Constr. Assoc. v. Balli, 558 S.W.2d 513, 519 (Tex. Civ. App.—Corpus Christi 1977, no writ); Coastal States Crude Gathering Co. v. Williams, 476 S.W.2d 339, 349-50 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.).

14. *See* Brown & Root, Inc. v. United States, 92 F. Supp. 257, 261 (S.D. Tex. 1950), *aff'd*, 198 F.2d 138 (5th Cir. 1952); Texas Constr. Assoc. v. Balli, 558 S.W.2d 513, 519 (Tex. Civ. App.—Corpus Christi 1977, no writ); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 589 (1979). In addition to common law indemnity implied in law, Texas also recognizes contractual indemnity. *See* Gulf, Colo. & S.F. Ry. v. Coca-Cola Bottling Co., 363 F.2d 465, 468 (5th Cir. 1966); Eastman Kodak Co. v. Exxon Corp., 603 S.W.2d 208, 211 (Tex. 1980). *See generally* Reynolds, *Contracts of Indemnity in Texas*, 43 TEX. B.J. 297, 298 (April 1980).

15. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859-60 (Tex. 1977); Strakos v. Gehring, 360 S.W.2d 787, 789-98 (Tex. 1962); Connally, *Contribution and Indemnity*, 16

litigator has never been certain which test is applicable.[16] In addition to allowing indemnity to a non-negligent party who is vicariously liable,[17] the Texas courts have allowed indemnity to a negligent party based upon the following tests: the active versus passive negligence test;[18] the degree of duty test;[19] and the breach of duty test.[20] Generally, indemnity is allowed if the parties are found not to have been in pari delicto or equally at fault.[21]

The active versus passive negligence test allows indemnity when the tortfeasor seeking indemnity is liable due to an omission or failure to perform a duty, and the tortfeasor against whom indemnity is sought is guilty of some wrongful action.[22] The test turns on the fact that one party is actively negligent, while another party is only passively negligent.[23] The degree of duty test operates to allow indemnity based upon the "qualities" of each tortfeasor's negligence.[24] The breach of duty test allows

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TEX. B.J. 199, 200 (1953).

16. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859-60 (Tex. 1977) (impossible to identify one test applicable in all circumstances).

17. *See* Kampmann v. Rothwell, 101 Tex. 535, 540, 109 S.W. 1089, 1090 (1908); South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 948 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

18. *See* Oats v. Dublin Nat'l Bank, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936); San Antonio v. Smith, 94 Tex. 266, 271, 59 S.W. 1109, 1111 (1900). *But cf.* General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977) (test considered "unsound").

19. *See* Wheeler v. Glazer, 137 Tex. 341, 346, 153 S.W.2d 449, 452 (1941).

20. *See, e.g.*, Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W.2d 609, 623 (1950); Austin Rd. Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949); Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519, 535 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

21. *See, e.g.*, Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W.2d 609, 623 (1951); Krishnan v. Garza, 570 S.W.2d 578, 581-82 (Tex. Civ. App.—Corpus Christi 1978, no writ); Heil Co. v. Grant, 534 S.W.2d 916, 927 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

22. *See* Oats v. Dublin Nat'l Bank, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936); Weatherford Water, Light & Ice Co. v. Veit, 196 S.W. 986, 993 (Tex. Civ. App.—Fort Worth 1917, writ dism'd).

23. *See* Oats v. Dublin Nat'l Bank, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936). Under this test the party whose negligence is found to have been passive is allowed to shift his entire loss to the party whose negligence is found to have been active. *See generally* Traylor v. Gray, 547 S.W.2d 644, 658 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 158-59 (1947). The active versus passive negligence test has been severely criticized. *See* Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 158 (1947). As a result, the test was abandoned. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977); Austin Rd. Co. v. Evans, 499 S.W.2d 194, 200 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 594 (1979). The distinctions between "active" and "passive" negligence are not clear. *See* Pachowitz v. Milwaukee & Suburban Transp. Corp., 202 N.W.2d 268, 271-72 (Wis. 1972).

24. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977).

indemnity when one tortfeasor has breached a duty owed another tortfeasor.[25] The breach of duty test, also conceptualized as the "imaginary lawsuit" test,[26] became a general standard by which courts measured the right to indemnification;[27] however, this test is not always applicable.[28]

The doctrine of common law indemnity was used to place the total responsibility for an injury on a party who was more culpable than another.[29] Contribution, however, was adopted to allow a more equitable allocation of the burden of loss among joint tortfeasors.[30] The form of contribution first adopted in Texas was determined by dividing the total amount of recovery awarded by the total number of defendants.[31] This pro rata division of the loss between joint tortfeasors[32] should be distin-

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25. *See, e.g.*, Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W.2d 609, 623 (1950) (breached duty to keep entrance in repair); Austin Rd. Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949) (recognizing rule; however, neither co-defendant breached duty owed other); Air Shields, Inc. v. Spears, 590 S.W.2d 574, 582 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (co-defendant breached duty to warn others of dangerous product). If tortfeasor A was found to have breached a duty owed to tortfeasor B, B was entitled to indemnity. Renfro Drug Co. v. Lewis, 149 Tex. 507, 529, 235 S.W.2d 609, 623 (1950).

26. *See, e.g.*, Foster v. Ford Motor Co., 616 F.2d 1304, 1308 (5th Cir. 1980) (Texas applies "imaginary lawsuit" test); Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12, 16-17 (5th Cir. 1972) (applying "imaginary lawsuit" test); General Motors Corp. v. Simmons, 558 S.W.2d 855, 859 (Tex. 1977) (citing "imaginary lawsuit" test). *See generally* Austin Rd. Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949).

27. *See* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 816 (Tex. 1980). *See generally* Shelton, *Comparative Causation: A Legislative Proposal for the Equitable Allocation of Loss Between Strictly Liable and Negligent Parties*, 20 S. TEX. L.J. 123, 126 (1979).

28. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 859-60 (Tex. 1977) (unable to state an "all-inclusive" test).

29. *See* Austin Rd. Co. v. Evans, 499 S.W.2d 194, 200 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); Keeton, *Torts, Annual Survey of Texas Law*, 34 SW. L.J. 1, 19-20 (1980). Indemnity was a tool utilized by the courts to absolve one of liability who was not negligent or was thought to be less negligent than another party. *See, e.g.*, Wheeler v. Glazer, 137 Tex. 341, 345, 153 S.W.2d 449, 451 (1941); Oats v. Dublin Nat'l Bank, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936); Austin Rd. Co. v. Evans, 499 S.W.2d 194, 200 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

30. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 518 (Tex. 1978); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975); Deal v. Madison, 576 S.W.2d 409, 416 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); H.B. 88, 63d Legislative Session, *Judiciary Committee Hearing* (House Tapes, February 13, 1973 (tape 2, side 3) John H. Reagan State Office Bldg., Austin, Texas).

31. *See* TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971); Comment, *Indemnity and Contribution Among Joint Tortfeasors*, 15 HOUS. L. REV. 1004, 1009 (1978).

32. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977); TEX. REV. CIV. STAT. ANN. art 2212 (Vernon 1971); Keeton, *Torts, Annual Survey of Texas Law*, 34 SW. L.J. 1, 16-17 (1980). A pro rata division is simply a division of the judgment into equal shares corresponding to the number of defendants found jointly and severally liable. If there

guished from the form of contribution now applicable in negligence cases.[33]

In 1973 the Texas Legislature adopted a modified comparative negligence and contribution statute.[34] The objective of the statute was to

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are three defendants and the judgment is $3,000, each defendant would be responsible for one-third of the judgment or $1,000. *See* TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971); Comment, *Indemnity and Contribution Among Joint Tortfeasors*, 15 HOUS. L. REV. 1004, 1009 (1978).

33. *See* Austin v. Cooksey, 570 S.W.2d 386, 388 (Tex. 1978); Deal v. Madison, 576 S.W.2d 409, 416-17 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). *Compare* TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1980) *with id.* art. 2212 (Vernon 1971). The need for indemnity among joint tortfeasors was obviated with the enactment of article 2212a. *See* Butler, Inc. v. Henry, 589 S.W.2d 190, 193 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); Keeton, *Torts, Annual Survey of Texas Law*, 34 SW. L.J. 1, 19-20 (1980).

34. *See* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980). Article 2212a allows a plaintiff to recover damages from a defendant if the negligence attributed to the plaintiff is "not greater than" the negligence of the defendant. *Id.; see* Leyva v. Smith, 557 S.W.2d 169, 170-71 (Tex. Civ. App.—San Antonio 1977, no writ). When there is more than one defendant, the statute provides that in determining the extent, if any, of the plaintiff's recovery, the total of the negligence attributed to all the defendants is to be utilized to determine whether the plaintiff's negligence is greater than that of the defendants'. *See* TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1980). There are four widely accepted forms of comparative negligence: pure comparative; the forty-nine percent form of modified comparative negligence; the fifty percent form of modified comparative negligence; and slight versus gross negligence. In jurisdictions which have enacted a pure comparative negligence statute, the plaintiff may be entitled to a recovery regardless of the extent of his negligence. Theoretically, if a plaintiff was found to be ninety-nine percent negligent and the defendant one percent negligent, the plaintiff would be allowed to recover one percent of the damages determined by the jury. *See* MISS. CODE ANN. § 11-7-15 (1972); R.I. GEN. LAWS § 9-20-4 (Supp. 1979). Modified comparative negligence following the "not as great as" form allows a recovery to a plaintiff only if his causal negligence is less than that attributed to the defendant or defendants. Under these statutes, recovery would be barred if the plaintiff was found to be fifty percent or more at fault. *See* ARK. STAT. ANN. § 27-1765 (Supp. 1977) ("of less degree than"); ME. REV. STAT. ANN. tit. 14, § 156 (1964) (no recovery if plaintiff at equal fault). Modified comparative negligence statutes which follow the "not greater than" language allow recovery when the plaintiff's causal negligence is found to be fifty percent or less. *See* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1980) ("not greater than"); WIS. STAT. ANN. § 895.045 (West Supp. 1980-1981) ("not greater than"). Statutes following the slight versus gross form of comparative negligence allow recovery if the plaintiff's causal negligence is found to have been "slight" as compared to the defendants' "gross" negligence. *See* NEB. REV. STAT. § 25-1151 (1975) (using the slight-gross terminology); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979) (allowing recovery if the plaintiff's negligence is slight). Some states have adopted comparative negligence judicially. *See* Kaatz v. State, 540 P.2d 1037, 1047-50 (Alaska 1975); Nga Li v. Yellow Cab Co., 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973). A majority of jurisdictions have adopted comparative negligence by legislative action. *See* ARK. STAT. ANN. § 27-1763 to -1765 (Supp. 1977); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. ANN. § 52-572h (Supp. 1980); GA. CODE ANN. § 66-402 (1979); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE 6 § 801 (1979); KAN. STAT. ANN. § 60-258(a)-

obtain a more equitable distribution of the burden of loss among tortfeasors.[35] The contribution section of the statute permits defendants to seek contribution among themselves,[36] with each individual defendant ultimately being liable only for that portion of the negligence attributable to him.[37] The section of the statute allowing contribution among negligent joint tortfeasors supercedes the prior co-existing contribution statute[38] only "to the extent of any conflict."[39] Article 2212,[40] applicable to all tort actions other than negligence actions,[41] expressly reserves the right of

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(b) (1976); ME. REV. STAT. ANN. tit. 14, § 156 (1964); MASS. ANN LAWS ch. 231, § 85 (Michie/Law Co-op Supp. 1980); MINN. STAT. ANN. § 604.01 (West Supp. 1980); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES ANN. §§ 58-607, -607.1, -607.2 (1970 & Supp. 1977); NEB. REV. STAT. § 25-1151 (1975); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. 507:7a (Supp. 1977); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1980); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, §§ 13-14 (West Supp. 1979-1980); OR. REV. STAT. § 18.470 (1979); R.I. GEN. LAWS § 9-20-4 (Supp. 1979); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1980); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1980-1981); WIS. STAT. ANN. § 895.045 (West Supp. 1980-1981); WYO. STAT. § 1-1-109 (1977). Dean Schwartz has defined "comparative negligence" as "any system of law that by some method, in some situations, apportions costs of an accident, at least in part, on the basis of the relative fault of the responsible parties." V. SCHWARTZ, COMPARATIVE NEGLIGENCE 31 (1974). Dean Prosser, applying a more restricted definition, defined the doctrine as "properly refer[ring] only to a comparison of the fault of the plaintiff with that of the defendant." Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 465 n.2 (1953). Whenever the words "comparative negligence" are used herein, they will be used in the strict sense advanced by Dean Prosser. The word "contribution" will be used whenever the comparison of negligence or fault is between two defendants.

35. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 518 (Tex. 1978); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975). On the evening that the Judiciary Committee of the Texas House of Representatives voted that the proposed comparative negligence and contribution statute, then House Bill 88, be presented to the body of the House with the recommendation that "it do pass," testimony was heard at a public hearing. Among those persons before the judiciary committee to testify were James Nugent, a member of the Texas House of Representatives and sponsor of the bill, and David C. Cummins, a professor of law at Texas Tech University. Mr. Cummins stated that one reason for the adoption of the bill was that "it is loss sharing rather than loss shifting . . . and that . . . it is more fair and just than an all or nothing approach." H.B. 88, 63d Legislative Session, *Judiciary Committee Hearing* (House Tapes, February 13, 1973 (tape 2 side 3) John H. Reagan State Office Bldg., Austin, Texas).

36. *See* TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1980).

37. *See* Austin v. Cooksey, 570 S.W.2d 386, 388 (Tex. 1978); Deal v. Madison, 576 S.W.2d 409, 416-17 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

38. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 861-62 (Tex. 1977); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). *See generally* Comment, *Indemnity And Contribution Among Joint Tortfeasors*, 15 HOUS. L. REV. 1004, 1008-10 (1978).

39. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(h) (Vernon Supp. 1980).

40. *Id.* art. 2212 (Vernon 1971).

41. *See* General Motors Corp. v. Simmons, 558 S.W.2d 855, 862 (Tex. 1977); TEX. REV.

common law indemnity while article 2212a is silent as to indemnity.[42]

The Houston Court of Civil Appeals in *New Terminal Warehouse Corp. v. Wilson*[43] was the first Texas court to expressly question the validity of shifting the loss under common law indemnity in light of the sharing of the loss rationale found in article 2212a.[44] The case involved a wrongful death action in which the plaintiff was found to have been ten percent negligent and the defendants were found to have been forty percent and fifty percent negligent.[45] The court denied indemnity and granted contribution on the ground that the policy behind comparative negligence was to abolish the common law rules resulting in shifting liability from one tortfeasor to another.[46] Writ of error was originally granted in *New Terminal Warehouse*;[47] however, when *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*[48] was decided, the supreme court withdrew its order granting the application for writ of error "as having been improvidently granted."[49] The court seems to have implied that *New Terminal Warehouse* was controlled by its companion case *B & B Auto Supply*.[50]

In *B & B Auto Supply*,[51] the Texas Supreme Court considered whether

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CIV. STAT. ANN. art. 2212 (Vernon 1971); Keeton, *Torts, Annual Survey of Texas Law*, 34 SW. L.J. 1, 16-17 (1980).

42. *Compare* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980) (silent as to indemnity) *with id.* art. 2212 (Vernon 1971) (applicable to all tort actions except when a right of contribution or indemnity exists).

43. 589 S.W.2d 465 (Tex. Civ. App.—Houston [14th Dist.] 1979), *writ withdrawn sub nom.* Balaban v. New Terminal Warehouse, 605 S.W.2d 855 (Tex. 1980) (per curiam).

44. New Terminal Warehouse Corp. v. Wilson, 589 S.W.2d 465, 469-70 (Tex. Civ. App.—Houston [14th Dist.] 1979), *writ withdrawn sub nom.* Balaban v. New Terminal Warehouse Corp., 605 S.W.2d 855 (Tex. 1980) (per curiam). Subsequent to *New Terminal Warehouse* the Houston Court of Civil Appeals again held that the language of article 2212a required the court to deny indemnity to a negligent joint tortfeasor. *See* Hancock Fabrics, Inc. v. Martin, 596 S.W.2d 186, 189 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

45. New Terminal Warehouse Corp. v. Wilson, 589 S.W.2d 465, 466-67 (Tex. Civ. App.—Houston [14th Dist.] 1979), *writ withdrawn sub nom.* Balaban v. New Terminal Warehouse Corp., 605 S.W.2d 855 (Tex. 1980) (per curiam).

46. *See id.* at 470. The court based its opinion on the language and policies inherent in the Texas comparative negligence statute which sought erradication of common law doctrines forcing a choice between the success or defeat of a claim. *See id.* at 469-70.

47. 23 Tex. Sup. Ct. J. 341, 342 (May 3, 1980) (order granting writ of error).

48. 603 S.W.2d 814 (Tex. 1980).

49. New Terminal Warehouse Corp. v. Wilson, 589 S.W.2d 465 (Tex. Civ. App.— Houston [14th Dist.] 1979), *writ withdrawn sub nom.* Balaban v. New Terminal Warehouse, 605 S.W.2d 855 (Tex. 1980) (per curiam).

50. *See* Balaban v. New Terminal Warehouse Corp., 605 S.W.2d 855, 855-56 (Tex. 1980) (per curiam).

51. 603 S.W.2d 814 (Tex. 1980).

the right to common law indemnity should be allowed between joint tortfeasors in negligence cases under the Texas Comparative Negligence and Contribution statute.[52] The court held that under article 2212a[53] there is no justification for requiring one co-tortfeasor to indemnify another co-tortfeasor when both have been found negligent by a jury.[54] The majority reasoned that the win or loose element of common law indemnity conflicts with the sharing concept that is inherent in comparative negligence.[55] The court further indicated that since the enactment of comparative negligence, the Texas courts have endeavored to eradicate doctrines which force a choice between the success or defeat of a claim.[56] The holding in *B & B Auto Supply* was expressly limited to situations where both tortfeasors are negligent and is not applicable to cases dealing with contractual indemnity or vicarious liability.[57] The court specifically stated that it expressed no opinion whether the holding was to extend to cases involving joint tortfeasors when one is strictly liable and the other is negligent.[58]

As a result of the holding in *B & B Auto Supply*, in cases involving negligent tortfeasors a tortfeasor may seek indemnity from another only in the following situations:

1) when the liability of the party seeking indemnity is purely vicarious,[59] or

2) when there is an express contract between the parties providing for indemnity.[60]

By abolishing common law indemnity in negligence cases, except in those situations stated above, the court has eliminated the confusion over which test for indemnity will be applied.[61] The need for indemnity among

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52. *See id.* at 815; TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

53. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

54. *See* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 817 (Tex. 1980).

55. *See id.* at 816.

56. As evidence of the attempt to abolish "the old choice between total victory and total defeat," the court noted the abolition of the doctrines of no duty, imminent peril, and assumption of risk. *Id.* at 816-17. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978) (abolished doctrine of no duty); Davila v. Sanders, 557 S.W.2d 770, 771 (Tex. 1977) (abolished doctrine of imminent peril); Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (abolished doctrine of assumption of the risk).

57. B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 817 (Tex. 1980).

58. *See id.* at 817.

59. *Id.* at 817.

60. *Id.* at 817.

61. *Compare* B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814, 817 (Tex. 1980) (abolishing common law indemnity) *with* General