CONTRIBUTION, INDEMNITY AND SUBROGATION

RAWSON v. CITY OF OMAHA: CONTRIBUTION, INDEMNITY AND SUBROGATION—SHARING AND SHIFTING THE LOSS UNDER NEBRASKA LAW

INTRODUCTION

The trend in tort law has been toward a system of loss distribution among joint tortfeasors based on their proportionate share of fault. At common law there was no mechanism for loss distribution between joint tortfeasors. If a plaintiff was injured by joint tortfeasors, the plaintiff had a right to sue either one or both. If only one of the joint tortfeasors was sued and the injured party obtained a judgment which was satisfied by the defendant tortfeasor, the tortfeasor who paid the entire judgment was unable to recoup anything from the other tortfeasor.

Today this is no longer the case and a defendant need not rely on the plaintiff to join another culpable party. Modern third-party procedure permits a defendant to join a third party who contributed to the accident, and to thereby reduce or eliminate the defendant's potential liability. In addition, the courts have...
developed the theories of contribution, indemnity and subrogation to alleviate the inequitable effects of the common law rule.\textsuperscript{7} Under these theories, one of two or more responsible defendants may be allowed to recover part or all of his loss from other responsible tortfeasors.\textsuperscript{8}

It is desirable to distinguish these theories of recovery, especially the concepts of contribution and indemnity, since courts often confuse them in arriving at equitable solutions.\textsuperscript{9} More importantly, it is incumbent upon counsel to recognize the confusion that exists and to understand the effects of settlements with tortfeasors which may compromise the rights of clients.

Contribution and indemnity are variant remedies which may be available to a tortfeasor who wants to shift all or a part of the burden of a judgment to a fellow tortfeasor.\textsuperscript{10} Although these remedies are similar in nature, they differ in the relief afforded.\textsuperscript{11} Contribution rests upon the common liability of two or more actors for the same injury.\textsuperscript{12} It distributes the loss by requiring each tortfeasor to pay a pro-rata share.\textsuperscript{13} Indemnity, on the other hand, arises from contract, either express or implied, and enables one

\textsuperscript{7} See Greenstone, supra note 1, at 306 (“once the door was thrown open to joinder in one action of those who had merely caused the same damage, the origin of the rule and the reason for it were lost to sight”).
\textsuperscript{8} Id., W. Prosser, supra note 1, at 306.
\textsuperscript{9} Id. at 266-67. See text and accompanying notes 10-17 infra.
\textsuperscript{10} Greenstone, supra note 1, at 267-68. See W. Prosser, supra note 1, at 310 (“The two are often confused, and there are many decisions in which indemnity has been allowed under the name of ‘contribution’.”) (footnote omitted). For a more detailed distinction between these two remedies see text and accompanying notes 20-58 infra.
\textsuperscript{11} Busick, supra note 2, at 183. See also Greenstone, supra note 1, at 268.
\textsuperscript{12} Guillard v. Niaira Mach. & Tool Works, 488 F.2d 20, 22 (8th Cir. 1973). See also Hillman v. Wallin, 298 Minn. 346, —, 215 N.W.2d 810, 812 (1974). “Contribution and indemnity are both equitable remedies to provide restitution to a tortfeasor based on the degree of his culpability for a negligent act. The remedies differ in the character and amount of restitution allowed a joint tortfeasor.” Id.
\textsuperscript{13}Compare joint tort which is “where two or more persons owe to another the same duty and by their common negligence such other is injured . . .” and the joint negligence where “several people, proximately causing [an] accident . . . act together in concert and either do something together which they should not do or fail to do something which they are together obligated to do under circumstances.” Black’s Law Dictionary 973 (4th ed. 1968).
tortfeasor to shift the entire burden of the judgment to another. 14 When contribution is allowed, a tortfeasor who has satisfied a judgment is able to get restitution from another guilty party for a portion of the amount first paid. 15 When indemnity is allowed, the tortfeasor who has satisfied a judgment can recover the full amount paid. 16 Contribution involves a sharing of the loss, 17 while indemnity involves a shifting of the entire loss.

This article will define and discuss the theories of contribution, indemnity and subrogation. In addition, it will examine the application of these theories under Nebraska law. Finally, this article will discuss the recent case of Rawson v. City of Omaha, 18 to determine which, if any, of these theories is the correct doctrinal basis for recovery by an alleged tortfeasor who settles prior to trial, and is later adjudged not at fault.

**CONTRIBUTION**

The general rule of contribution is stated by the Restatement of Restitution as:

Unless otherwise agreed, a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct. 19

At common law, an exception to the general rule surfaced; it stated that there was no right of contribution among joint wrongdoers. 20

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14. Comment, supra note 2, at 79. See also W. Prosser, supra note 1, at 310; Busick, supra note 2, at 183; Greenstone, supra note 1, at 268.
15. Greenstone, supra note 1, at 268.
16. Id.
18. 212 Neb. 159, 322 N.W.2d 381 (1982).
19. Restatement of Restitution § 81 (1937). See also Royal Indemn. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183, 195-96 (1975). “The law regarding the right to contribution between joint wrongdoers appears to be an offshoot from, and an exception to, the general rules of contribution.” Id. (citing Exchange Elevator Co. v. Marshall, 147 Neb. 48, 61, 22 N.W.2d at 403, 410 (1946)).
20. Consolidated Coach Corp. v. Burge, 245 Ky. 631, —, 54 S.W.2d 15, 17-18 (1932). The Latin maxim *in pari delicto potior est conditio defendantis* translates: “in a case of equal or mutual fault (between two parties) the condition of the party in possession (or defending) is the better one. Where each party is equally in fault, the law favors him who is actually in possession. Where the fault is mutual, the law will leave the case as it finds it.” Black’s Law Dictionary 711 (5th ed. 1979). See generally W. Prosser, supra note 1, at 305-10. “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, intentionally responsible, to be shouldered onto one alone. . . .” Id. at 307.
This exception was originally adopted by the English courts in 1799, in the case of *Merryweather v. Nixan*. Although the court in *Merryweather* denied contribution between two intentional wrongdoers on the theory that it was against public policy "to allow anyone to found a cause of action upon his own deliberate wrong," subsequent cases interpreted this to be an absolute bar to contribution among all joint wrongdoers. In 1827, the rule of *Merryweather* was limited in its scope and application by the case of *Adamson v. Jarvis*, wherein the court stated that, "[T]he rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Thereafter, the English courts declined to follow the rule of *Merryweather* in cases where the liability of the wrongdoers was grounded solely on negligence. Consequently, only defendants who intentionally subjected themselves to liability were denied contribution.

In this country, it appears that the rule of *Merryweather* was followed, and the subsequent distinction made by the English courts between intentional and negligent tortfeasors in *Adamson* was not accepted. Once the applicable civil procedure rules evolved to permit joinder of defendants who were merely neglig-

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"There is a very meagre report of the case, but it seems clear that there had been an action for conversion and a joint judgment against two defendants, and that they had acted in concert, since they were joined at a time when joinder was not possible on any other basis. One of the two, who had been levied on for the whole judgment, sought 'contribution of a moiety' from the other on the theory of an implied promise, 'as for so much money paid to his use.'" *Id.*, Busick, supra note 2, at 184 ("[t]he *Merryweather* case refused to provide assistance to a defendant who deliberately subjected himself to liability").

22. RESTATEMENT (SECOND) OF TORTS § 886A comment a (1965). See also W. Prosser, supra note 1, at 305. "The ground of the decision would appear to have been simply the fact that the parties had acted intentionally and in concert, and the plaintiff's claim for contribution rested upon what was, in the eyes of the law, entirely his own deliberate wrong." (footnote omitted). *Id.*, Busick, supra note 2, at 184 ("Recovery was denied, apparently on the ground that his claim rested on his own intentional wrongdoing").


25. 193 Neb. at 756, 229 N.W.2d at 186.

26. Busick, supra note 2, at 184.

27. *Royal*, 193 Neb. at 757, 229 N.W.2d at 186. See also W. Prosser, supra note 1, at 306 ("The early American cases applied the rule against contribution to cases of willful misconduct, but refused to recognize it where the tort committed by the claimant was a matter of negligence or mistake.") (footnotes omitted).
gent, the reason for the rule against contribution was obscured.\(^2\) As a result, many American jurisdictions refused contribution between all joint wrongdoers and because of joinder, merely negligent tortfeasors were labeled “joint tortfeasors.” Thus the rule against contribution among intentional tortfeasors was mistakenly applied to merely negligent tortfeasors.\(^2\) The rule against contribution between joint tortfeasors has now been changed by a majority of the states either by statute or as a matter of common law.\(^3\)

\(^2\) W. Prosser, supra note 1, at 306. See also note 6 and accompanying text supra.

\(^2\) 193 Neb. at 757, 229 N.W.2d at 186.

\(^3\) Royal, 193 Neb. at 757, 299 N.W.2d at 186. See also Restatement (Second) of Torts § 886A comment a (1965) (“In recent years the trend, both of the legislation and of decisions in the absence of it, has been toward recognition of the right of contribution; and a substantial majority of the states now grant contributing.”); W. Prosser, supra note 1, at 307 (“[h]alf a century of vigorous attack upon the original rule has had its effect in the passage of statutes. . .”).

To date, 20 states have adopted the Uniform Contribution Among Tortfeasors Act: Alaska, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Wyoming. Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 58 (1975 & Supp. 1983). This act provides:

**§ 1. [Right to Contribution]**

(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasors is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor’s right of contribution to the extent of the amount it has paid in excess of the tortfeasor’s pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Act shall not apply to breaches of trust or of other fiduciary obligation.
Today the majority rule for contribution among joint

_Id._ Compare contributory negligence and comparative fault laws which have the effect of reducing or eliminating a plaintiff's recovery against a defendant where the plaintiff's fault has to some degree contributed to his injuries. J. HENDERSON & R. PEARSON, THE TORTS PROCESS 611-20 (2d ed. 1981). See generally W. PROSSER, *supra* note 1, at 416-39. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." (footnote omitted). _Id._ at 416-17.

For a look at how Nebraska treats contributory and comparative negligence see NEB. REV. STAT. § 25-1151 (Reissue 1979) which provides:

> Actions for injuries to person or property; contributory negligence; comparative negligence. In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

_Id._

There are two recognized methods for apportioning damages among joint tortfeasors. RESTATEMENT (SECOND) OF TORTS § 886A comment h (1965):

> The first method, still followed by a majority of the courts, derives from contribution among sureties and the maxim that 'equality is equity,' and provides that the tortfeasors who are liable will end by paying equal shares. Thus, if A, B and C are all liable to the plaintiff for the same harm and A discharges the liability of both by paying $12,000, he will have a right of contribution against B for $4,000 and against C for the same amount. This is sometimes called pro-rata contribution. It is simpler to administer and requires a holding of what parties had fault contributing to the injury.

_Id._

The second method, followed by a growing number of states, provides that contribution is based according to the comparative fault of the tortfeasors. Thus, if A, B and C are all liable to the plaintiff for the same harm and the plaintiff recovers $12,000 from A, A may maintain an action for contribution against B and C; if the court assesses A's negligence at 50%, B's at 30% and C's at 20%, A can recover $4,000 from B and $2,000 from C. This method seems fairer and more equitable but administration is somewhat more difficult, since percentages of fault must be ascertained. It fits particularly in a state that has adopted the rule of comparative negligence and is indeed, almost required for the effective administration of that rule, so that the negligence of the plaintiff can also be apportioned into the total amount of negligence of all the parties. It is sometimes called comparative contribution.

_Id._

Under both methods of apportionment, situations may call for some variation. Thus if B is the servant of C or an independent contractor and C has become liable only vicariously for the tort of B, it may be proper to hold B and C together for a single share of the total liability, rather than separate shares. Again, if the plaintiff suffers harm through the fall of a party wall between two lots, one of which is owned by A, and the other by B, C and D in common, it may be proper to hold B, C and D together liable for one share, rather than for separate shares.

_Id._ See also W. PROSSER, *supra* note 1, at 308-10.
tortfeasors is that the tortfeasors must be joint wrongdoers in the sense that their tort or torts imposed a common liability upon them to the injured party.\textsuperscript{31} Common liability exists when two or more actors are liable to an injured party for the same damages even though their liability may rest on different grounds.\textsuperscript{32} For example, if the injured party has no cause of action against the concurring negligence of the party from whom contribution is sought, the claimant cannot recover contribution—even though the other party’s concurring negligence was a proximate cause of the injury.\textsuperscript{33} The test is whether the tortfeasors share a common liability to the injured party, rather than their joint, common, or concurring negligence.\textsuperscript{34}

If one of the joint tortfeasors reaches a settlement instead of litigating his liability to the injured party, the settling tortfeasor is still entitled to contribution from the other negligent tortfeasor.\textsuperscript{35}

Under the statutes or apart from them, the tendency has been to continue the original rule that there is no contribution in favor of those who commit intentional torts, and even to extend it to include aggravated negligence; but some statutes have been construed to allow contribution even in such cases.

\textit{Id.} at 308 (footnotes omitted). \textit{Cf.} Restatement (Second) of Torts \S 886A comment 1 (1965).

In a state following comparative contribution, or contribution according to the comparative fault of the parties, contribution may tend to merge with indemnity, and the technical distinctions of indemnity may become less important. The all-or-nothing approach of indemnity is likely to become less desirable and some of the traditional bases for indemnity may be absorbed by contribution. Conversely a state that adopts a principle of equitable partial indemnity may find that it is absorbing the contribution cases unless contribution is changed to provide for apportionment on a comparative fault basis. The eventual outcome is likely to be a single remedy based on comparative fault.

\textit{Id.} (citations omitted). For cases in which comparative fault was the basis for apportioning damages, see, e.g., Little v. Miles, 213 Ark. 725, 212 S.W.2d 935 (1948) (for cases in which comparative fault was the basis for apportioning damages under the theory of contribution); Mitchell v. Branch, 45 Hawaii 123, 363 P.2d 983 (1961); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).


33. See \textit{id.} at —, 215 N.W. at 492.


35. \textit{Allied}, 252 Iowa at 833, 107 N.W.2d at 684. \textit{See also} Williams v. Johnston, 92 Idaho 292, —, 442 P.2d 178, 184 (1968), where the court stated:

[T]he law favors settlements and in protecting the best interests of his client, an attorney often is required to negotiate a reasonable settlement rather than trust to the uncertainties of a trial; that both reason and legal authority indicate that a party otherwise entitled to indemnity should not be penalized for attempting to protect his rights by entering into a settlement which appears favorable under the circumstances presented at the
In this instance, the settling tortfeasor must make his compromise in good faith and be able to prove that the settlement was reasonable.\textsuperscript{36} In addition, the party seeking contribution has the initial burden of proving common liability to the injured person.\textsuperscript{37} This means that the settling tortfeasor has the burden of proving not only his own actual liability to the injured person, but also the other tortfeasor's liability to the injured person.\textsuperscript{38} If common liability cannot be proved and a legal compulsion to settle has not been established, contribution will not be allowed.\textsuperscript{39}

**Indemnity**

Indemnity is an all-or-nothing remedy.\textsuperscript{40} When it is allowed it secures the right of a person to recover in full from another for the discharge of a liability which, as between them, should have been discharged by the other.\textsuperscript{41} Although the circumstances of recovery

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\textsuperscript{38} Id.

\textsuperscript{39} Western Casualty, 213 Wis. at —, 251 N.W. at 492. See also Allied Mut. Cas. Co., 252 Iowa at 839, 107 N.W.2d at 687 (“[B]efore there can be contribution among tortfeasors, there must be tortfeasors”).

\textsuperscript{40} RESTATEMENT (SECOND) OF TORTS § 886A comment 1 (1965).

\textsuperscript{41} Id. § 886B comment c. See also Busick, supra note 2, at 183; Greensitone, supra note 1, at 268; Comment, supra note 2, at 79 (quoting Suvada v. White Motor Co., 32 Ill.2d 612, 624, 210 N.E.2d 182, 188 (1955)). See generally W. Prosser, supra note 1, at 310-13. “There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportion-
for indemnity vary from jurisdiction to jurisdiction, it is generally agreed that the basis for indemnity is restitution and that it "will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other." The most common form of indemnity is contractual indemnity. Under this theory, indemnity is permitted when expressly provided for in a contract which sets out the type of loss involved. In addition, the right to indemnity may arise by operation of law, without an express agreement, to prevent an unjust result:

[I]t is generally agreed that there may be indemnity in favor of one who is held responsible solely by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of a servant, or an independent contractor; or an innocent partner or carrier is held liable for the acts of another, or the owner of an automobile for the conduct of the driver. Likewise where one is directed or employed by another to do an act not manifestly wrong, or is induced to act by the misrepresentations of the other, he is uniformly entitled to indemnity when a third party recovers against him.

Therefore, indemnity based upon an express contract must be clear and unequivocally expressed in the terms of the contract, while implied indemnity is dependent upon the existence of a special legal relationship which imposes certain duties and a subsequent breach of those duties.

If the party seeking indemnity is a joint tortfeasor with the person from whom indemnity is sought, an exception to the right of contractual or implied indemnity may arise. Some courts will
not grant indemnity to a joint tortfeasor on the theory that "one should not be permitted to found a cause of action on his own wrong." Still, there is authority for the theory that indemnity can be based upon a difference in the gravity of negligence between two tortfeasors. If the degree of fault differs greatly, the whole loss may be shifted to the more guilty of the two. The courts have developed a number of dichotomous tests for granting indemnity under this theory. Perhaps the most common of these is the "active-passive" test.

Case law does not provide a general rule as to when indemnity will be allowed between joint tortfeasors. However, it has been stated that:

[Indemnity] is permitted only where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a 'great difference' in the gravity of the fault of the two tortfeasors; or that it rests upon disproportion or difference in character of the duties owed by the two to the injured plaintiff.

A good faith settlement of a claim prior to trial will not bar a settling party's right to indemnity in a subsequent action. How-

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51. W. PROSSER, supra note 1, at 313. See also note 30 supra. See generally Williams v. Johnston, 92 Idaho at —, 442 P.2d at 180. "Various text writers and courts have recognized that the obligation to indemnity is not limited to the field of contracts, express or implied, and have placed the obligation of one party to indemnity another on the principle that '[t]he theory of such right of indemnity is sometimes explained as being implied in law from the relationship of the parties.'" Id.; RESTATEMENT (SECOND) OF TORTS § 886B comment k (1965) ("A second type of situation in which indemnity has sometimes been sought is that in which the two parties are guilty of different types of tortious conduct or are held to different standards of care.").


53. See, e.g., Greenstone, supra note 1, at 268. See also RESTATEMENT (SECOND) OF TORTS § 886B comment k (1965). Some cases have granted indemnity but others have been denied it, and there is no consensus justifying blackletter treatment. See also note 54 and accompanying text infra.

54. See notes 89-115 and accompanying text infra.

55. W. PROSSER, supra note 1, at 313 (footnotes omitted).

ever, because indemnity presupposes liability\(^{57}\) on the part of both
the indemnitee and the indemnitor, a party who settles a tort claim
with a third person, must be able to prove that he was legally liable
to the injured person in order to maintain an indemnity action
against the potential indemnitor.\(^{58}\) Therefore, a party seeking to
establish in an independent action a right of indemnity after a settle-
ment must plead and prove three elements: (1) liability to the
injured party; (2) reasonableness of the settlement; and (3) facts
sufficient to give rise to a duty on the part of the indemnitor to the
indemnitee.\(^{59}\)

**Subrogation**

Subrogation is the legal substitution of one person in the place
of another with reference to a lawful claim or right.\(^{60}\) It is a rem-
edy adopted by equity to compel the ultimate discharge of an en-
tire obligation by one who in good conscience ought to pay it.\(^{61}\)
Equity seeks by subrogation to prevent the unjust enrichment of
one party at the expense of another by creating an interest in all
legal rights held by the creditor.\(^{62}\) The effect of subrogation is to
pass the title to a cause of action from one person to another, in a
manner analogous to a constructive trust.\(^{63}\)

Subrogation is of two kinds: conventional and equitable.\(^{64}\)

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\(^{57}\) Williams v. Johnston, 92 Idaho at —, 442 P.2d at 182 (For indemnity, an ac-
tual legal liability must have been sustained). Accord Nelson v. Sponberg, 51
Wash.2d 371, —, 318 P.2d 951, 954 (1957) (a purported indemnitee is not entitled to
recover sums paid in settlement of a claim against an indemnitee in the absence of
a legal obligation to make such payments).

\(^{58}\) See-Wash Co., 177 N.W.2d at 10-11. “The authorities hold that to recover
indemnity it is necessary for the plaintiff to allege and prove that he was legally
liable to the person injured and consequently paid under compulsion.” Id. (quoting
Southwest Miss. Elec. Power Ass’n v. Harriagill, 245 Miss. 460, 468, 182 So.2d 220,
223 (1966)). See notes 35-39 and accompanying text supra.

\(^{59}\) Kee-Wash Co., 177 N.W.2d at 11.

\(^{60}\) BLACK’S LAW DICTIONARY 1595 (4th ed. 1968).

\(^{61}\) Rapp v. Rapp, 173 Neb. 136, 144, 112 N.W.2d 777, 782 (1962). See also Cagle
Inc. v. Sammons, 198 Neb. 595, 602, 254 N.W.2d 398, 403 (1977) (“The doctrine of
subrogation includes every instance in which one person pays a debt for which an-
other is primarily liable, and which in equity and good conscience should have been
discharged by the latter. . .”)) (quoting Sheridan v Dudden Implement, Inc., 174
Neb. 578, 581, 119 N.W.2d 64, 66 (1962)).

\(^{62}\) See RESTATEMENT OF RESTITUTION § 162 (1937). See also Detroit Steel

\(^{63}\) RESTATEMENT OF RESTITUTION § 162 comment a (1937).

\(^{64}\) Luikart v. Buck, 131 Neb. 866, 868, 270 N.W. 495, 496 (1936). See generally —.
Conventional subrogation can take effect only by agreement. It occurs where one having no relation to the matter pays the debt of another and, by virtue of an agreement, is entitled to the rights and securities of the payee. Equitable subrogation does not depend upon contract, assignment or privity. It is not created by the order of the court recognizing it; rather it follows as the legal consequence of the acts and the relationship of the parties.

It is generally agreed that “the doctrine of [subrogation] applies where a party is compelled to pay the debt of a third person to protect his own rights or interests, or to save his own property.” It is not administered by the courts as a legal right; whether subrogation is appropriate, depends on the equities and particular facts and circumstances of each case. It is essential that the party making payment to a third party be under an obligation to make such a payment or have a recognizable interest to protect. Subrogation will not be awarded to one who is merely a volunteer in paying the debt of another. The discharge of a liability by one who is under no legal or moral obligation to pay does not entitle that person to subrogation unless there is an express agreement.

Equitable subrogation and implied indemnity are so closely related that “oftentimes the possessor of one right is also the pos-

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65. Luikart, 131 Neb. at 866, 270 N.W.2d at 496. See also —. Harris, supra note 61, at 6-8.
66. See Cagle, Inc. v. Sammons, 198 Neb. at 602, 254 N.W.2d at 403 (“A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect.”) (citing Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc., 171 Neb. 681, 107 N.W.2d 542 (1961)).
68. Cagle, Inc. v. Sammons, 198 Neb. at 602, 254 N.W.2d at 403.
69. Cagle, Inc. v. Sammons, 198 Neb. at 602, 254 N.W.2d at 430. See also Luikart v. Buck, 131 Neb. at 868, 270 N.W. at 496.
70. Cagle, Inc. v. Sammons, 198 Neb. at 602, 254 N.W.2d at 403 (citations omitted).
71. Id. See also Luikart v. Buck, 131 Neb. at 868, 270 N.W.2d at 496. “To entitle one to subrogation his equity should be strong and his case case clear. . . . The person seeking subrogation must act fairly and equitable and be free from fault. It will not be allowed . . . where he would derive an advantage from, or establish his claim through, his own negligence or, in any way, would thereby reap advantage from his own wrong doing, or from the wrongful act of one under whom he claims.” Id. (citation omitted); Kapena v. Kaleleonulani, 6 Hawaii at 583. Subrogation “is not to be applied in favor of one who has officiously, and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it works any injustice to the rights of others.” Id.
72. Cagle, Inc. v. Sammons, 198 Neb. at 602, 254 N.W.2d at 403. See also note 63 supra.
sessor of the other. 773 In fact, there may be little practical difference between the two. 774 One court has stated: "[I]n their outer bounds the difference between them is about that between cherubim and seraphim in the angelic orders." 775 Both implied indemnity and equitable subrogation are applied to prevent an unjust enrichment when one party has discharged an obligation which should have been satisfied in whole by another. 776 Implied indemnity reaches this result by shifting the entire loss from one person held legally responsible to another person; equitable subrogation does so by allowing for the substitution of a third party in place of a party having a claim against another. 777

SPREADING THE LOSS UNDER NEBRASKA LAW

Contribution

The history of the doctrine of contribution in Nebraska has been sporadic and confusing. 778 The early cases indicate that the English law was followed and that contribution among joint tortfeasors was granted only where the party seeking contribution had not been guilty of intentional wrongdoing. 779 The Nebraska Supreme Court first addressed this issue in 1892, in the case of Johnson v. Torpy, 80 where it stated:

In determining whether the right of contribution exists in favor of one wrong-doer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy. 81

This was the rule in Nebraska until 1965, when the court an-

73. Id.
75. Reese v. Whittely, 420 F. Supp. at 494. Cherubim refers to any of the second order of angels, usually ranked just below the seraphim which is the highest ranking order of angels in Christian theology. WEBSTER'S DICTIONARY 244, 1299 (2d ed. 1976).
76. 420 F. Supp. at 989-90.
77. See notes 14, 67 and accompanying text supra.
78. Royal Indem. Co. v. Aetna Cas. & Jur. Co., 193 Neb. at 757, 229 N.W.2d at 186. See also Tober v. Hampton, 178 Neb. at 872, 136 N.W.2d at 203 (the decisions of this court do not present a definite and unquestionable rule with respect to the right of contribution as applied between negligent tortfeasors"; Busick, supra note 2, at 183 ("Nebraska cases having any present significance are neither numerous nor specifically instructive.")) (citation omitted).
79. Royal, 193 Neb. at 757, 229 N.W.2d at 186. See generally Busick, supra note 2, at 182-84.
80. 35 Neb. 604, 53 N.W. 575 (1892).
81. Id. at 606, 53 N.W. at 576.
ounced in the case of *Tober v. Hampton*,\(^8^2\) that it would deny contribution between all joint tortfeasors regardless of their state of mind and established the rule that, "*[O]ne of several wrongdoers, who has been compelled to pay the damages for the wrong committed, cannot compel contribution from the others who participated in the commission of the wrong.*"\(^8^3\)

In the 1975 case of *Royal Indemnity Co. v. Aetna Casualty & Surety Co.*,\(^8^4\) the Nebraska court rejected its rule prohibiting contribution between all joint tortfeasors and adopted the general rule that, "One who is compelled to pay or satisfy the whole or bear more that his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others."\(^8^5\) Thus this case established that a right to contribution exists among joint tortfeasors for damages negligently caused.\(^8^6\)

**Indemnity**

Indemnity will be permitted under Nebraska law when it has been provided for in a specifically drawn contract.\(^8^7\) Absent such an express agreement, the law is unsettled.\(^8^8\) The Nebraska Supreme Court has not rendered an opinion specifically allowing indemnity under an active-passive negligence test.\(^8^9\) Rather, the court has discussed a number of tests for granting implied indemnity without adopting any one in particular.\(^9^0\)

The court has allowed a party who satisfied a judgment to recover under the theory of implied indemnity as early as 1911 and as recently as 1980.\(^9^1\) In the 1911 case of *Omaha v. Philadelphia Mortgage & Trust Co.*,\(^9^2\) the court granted indemnity to the city of

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82. 178 Neb. 858, 136 N.W.2d 194 (1965).
83. *Id.* at 873, 136 N.W.2d at 204.
84. 193 Neb. 752, 229 N.W.2d 183 (1975).
85. *Id.* at 756, 764, 229 N.W.2d at 185, 190.
86. *Id.* at 764, 229 N.W.2d at 190. The court noted, however "'[i]f, as we think, this rule should be limited to cases where there is *intentiona* wrong, moral turpitude or concerted action, it seems to be entirely proper for us to so limit the rule without waiting for the legislature to do so.'" *Id.* (emphasis added).
88. *Id.* at 196.
90. *See* notes 91-112 and accompanying text infra.
92. 88 Neb. 519, 129 N.W. 996 (1911).
Omaha from the owner of a building. A judgment had been recovered against the city for damages resulting from an individual’s having fallen through an opening in a sidewalk. The court held that the owner of the building had a duty to maintain a proper and safe covering from the sidewalk, and his breach of this duty entitled the city to indemnity from the owner for the judgment it had satisfied. In 1980, in the case of Duffy Brothers Construction Co. v. Pistone Builders, the court granted indemnity to a general contractor from its subcontractor. The general contractor was held liable to one of the subcontractor’s employees in Workmen’s Compensation Court. The general contractor sought indemnity on the basis that the subcontractor was primarily liable and it was only secondarily liable. In granting indemnity to the general contractor the court stated:

The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own 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. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence. . . . It depends on a difference in the character of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. . . . But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive

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93. Id. at 525-26, 129 N.W. at 998.
94. Id. at 520-21, 129 N.W. at 996.
95. Id. at 521-22, 129 N.W. at 997.
96. 207 Neb. 360, 299 N.W.2d 170 (1980).
97. Id. at 365, 299 N.W.2d at 173.
98. Id. at 382-83, 299 N.W.2d at 172. For the applicable Nebraska Workmen’s Compensation Law see Neb. Rev. Stat. § 48-116 (Reissue 1978):
Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act, shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act.
99. 207 Neb. at 363, 299 N.W.2d at 172.
rule of common or statutory law. . . .\textsuperscript{100}

However, on at least three other occasions, the court has refused to grant indemnity under similar circumstances to a party who had satisfied a judgment.\textsuperscript{101} In 1965, in \textit{Tober v. Hampton},\textsuperscript{102} the court denied indemnity to a negligent gas company from a negligent contractor.\textsuperscript{103} The court noted that most courts which allow indemnity between joint tortfeasors do so under a "technical" or "constructive" fault test, and that, since the gas company in \textit{Tober} was "more than technically or constructively at fault," indemnity was refused.\textsuperscript{104}

In the 1969 case of \textit{Farmers Elevator Mutual Insurance Co. v. American Mutual Liability Insurance Co.},\textsuperscript{105} the issue of active-passive-negligence was raised for the first time.\textsuperscript{106} In this case, the court was presented with the question of whether a passive joint tortfeasor could recover under indemnity from the active joint tortfeasor.\textsuperscript{107} The court found that a determination of that issue was unnecessary in view of its holding that both tortfeasors were active wrongdoers.\textsuperscript{108} In the 1977 case of \textit{Danny's Construction Co. v. Havens Steel Co.},\textsuperscript{109} the issue of active-passive negligence was again raised.\textsuperscript{110} This time the court recognized that, "The law of Nebraska concerning apportionment of liability among tortfeasors remains unsettled," and that, "Whether the Nebraska court will apply principles of indemnity in appropriate cases to achieve an equitable apportionment of damages among wrongdoers is unclear."\textsuperscript{111} The court refused to grant indemnity to the plaintiff on the grounds that implied "indemnity is to be denied to a tortfeasor whose conduct was actively or affirmatively negligent."\textsuperscript{112}

Therefore, indemnity appears to be permitted under Nebraska law when it has been provided for in a contract or when liability has been charged to a party by virtue of his legal relationship to

\begin{footnotes}
\item[100] Id. at 363-64, 299 N.W.2d at 172 (citing Builders Supply Co. v. McCabe, 366 Pa. 322, 325-28, 77 A.2d 368, 370-71 (1951) (emphasis in original)).
\item[101] See notes 102-112 and accompanying text infra.
\item[102] 178 Neb. 858, 136 N.W.2d 194 (1966).
\item[103] Id. at 866-67, 872, 136 N.W.2d at 200, 203.
\item[104] Id. at 872, 136 N.W.2d at 203.
\item[105] 185 Neb. 4, 173 N.W.2d 378 (1969).
\item[106] Id. at 13-15, 173 N.W.2d at 385.
\item[107] Id. at 14, 173 N.W.2d at 385.
\item[108] Id. at 14-15, 173 N.W.2d at 385.
\item[109] Id. at 92.
\item[111] Id.
\end{footnotes}
the negligent party. It is not certain whether indemnity will be permitted when both parties have been negligent in differing degrees. Since the Nebraska court has not adopted either the active-passive test or the “more than technically at fault” test, it remains unclear under what circumstances, if any, the court will allow indemnity between negligent tortfeasors.

RAWSON V. CITY OF OMAHA

The doctrines of contribution, indemnity, and subrogation recently surfaced in the case of Rawson v. City of Omaha. In Rawson, the Nebraska Supreme Court was faced with the task of deciding which of these remedies, if any, is the appropriate doctrinal basis for recovery from a wrongdoer by a party who settles prior to a suit on a tort claim and is later found not negligent.

FACTS AND HOLDING

In February of 1978, Sharon Rawson, while driving down Blondo Street in Omaha, Nebraska, struck a chuckhole which caused her car to cross the center line and hit two other cars. As a result of this accident, a number of claims were brought against Rawson by the drivers and passengers of the two cars Rawson hit for property damages and personal injuries. Prior to any trial, Rawson settled all of the claims made against her by paying the total sum of $13,372.91.

Rawson filed suit against the city of Omaha after the city failed to respond to her claim filed pursuant to Nebraska’s Political Subdivisions Tort Claims Act. In her suit, Rawson sought reimbursement from the city under the theories of contribution and

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113. Busick, supra note 2, at 201. See also Brief of Appellant at 19, Rawson v. City of Omaha, 212 Neb. 159, 322 N.W.2d 381 (1982).
114. Busick, supra note 2, at 201.
115. Id. See notes 91-114 and accompanying text supra.
117. Id.
118. Id. at 161, 322 N.W.2d at 382-83.
119. Id. at 161, 322 N.W.2d at 383.
120. Id.
121. Id. at 160-62, 322 N.W.2d at 383. See NEB. REV. STAT. § 23-2401 to -2420 (Reissue 1977). The Political Subdivisions Tort Claims Act provides in pertinent part: No suit shall be permitted under this act unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under this act.
122. Id. s 23-2405.
The trial court overruled the City's demurrer to Rawson's claim for contribution, but sustained its demurrer to Rawson's claim for indemnity. Rawson's claim for indemnity was then dismissed and trial was thereafter had on her claim for contribution. The trial court held that the sole proximate cause of the accident was the negligence of the City but that, since Rawson was not negligent, she could not recover from the City under the theory of contribution.

On appeal, the Nebraska Supreme Court agreed with the trial court and held that "in order for a party to recover contribution after a settlement of a claim by one of the parties, there must be a common liability proved to exist between both the party settling the claim and the party from whom contribution is being sought." The court then concluded that Rawson was nevertheless entitled to recover the money she had paid in settlement of the claims made against her under the doctrine of equitable subrogation.

ANALYSIS

Under Rawson's cause of action for contribution there were three possible outcomes. First, if the trial court found that Rawson was 100 percent at fault, contribution would have been properly denied. Likewise, if the court found that the city was the sole proximate cause of the accident, then contribution would not have been the proper remedy. In either situation there would be no common liability between Rawson and the city to the injured claimants. It is well settled under Nebraska law that, in order for a party to recover from another potential defendant, the party seeking contribution must be able to prove a common liability. Finally, if the trial court found that both Rawson and the City were negligent, it could have ordered the City to reimburse Rawson for a proportionate share of the damages she had already paid.

122. 212 Neb. at 162, 322 N.W.2d at 383.
123. Id.
124. Id.
125. Id. at 163, 322 N.W.2d at 383-84.
126. Id. at 163, 322 N.W.2d at 384.
127. Id. at 163-64, 322 N.W.2d at 384.
128. See notes 30-39 and accompanying text supra.
129. 212 Neb. at 163-64, 322 N.W.2d at 384.
130. Id. See notes 30-34 and accompanying text supra.
132. See notes 84-86 and accompanying text supra.
is because, in Nebraska, contribution among joint tortfeasors is granted when one is "compelled to pay or satisfy the whole or bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge."\(^{133}\)

The trial court properly denied Rawson's prayer for contribution after it found the City to be the sole proximate cause of the accident.\(^{134}\) Nevertheless, the fact remained that Rawson had made payments in settlement of a number of claims for which the city alone was liable.\(^{135}\) Although the trial court could not grant Rawson relief under contribution, it could have ordered reimbursement from the city under the theory of implied indemnity.\(^{136}\) Due to the trial court's dismissal of Rawson's claim for indemnity, an equitable result under this theory was not reached at the trial level.\(^{137}\)

Rawson based her cause of action for implied indemnity on an active-passive theory of negligence.\(^{138}\) Under this theory, the court could have found that the City was actively negligent in creating a dangerous situation and that Rawson's negligence was merely passive in failing to discover the dangerous defect in the road.\(^{139}\) Alternatively, if it was found that Rawson's negligence had actively contributed to the claimant's injuries, then indemnity would have been properly denied.\(^{140}\) It appears that a determination that Rawson was passively negligent would not have been contrary to the trial court's finding that Rawson was without fault since under an active-passive theory of negligence, negligence is not based upon a difference in degree of culpability, but rather it is based on a difference in the character or kind of conduct involved.\(^{141}\) Thus, a finding of passive negligence would have the same effect as the

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\(^{133}\) Royal, 193 Neb. at 756, 229 N.W.2d at 185.

\(^{134}\) 212 Neb. at 163, 322 N.W.2d at 384.

\(^{135}\) Id. at 163-64, 322 N.W.2d at 384.

\(^{136}\) Brief of Appellant at 12, Rawson v. City of Omaha, 212 Neb. 159, 322 N.W.2d 381 (1982).

\(^{137}\) Id. at 11.

\(^{138}\) Id. at 12.

\(^{139}\) Id. See W. Prosser, supra note 1, at 312. "There is in addition considerable language in the cases to the effect that one whose negligence has consisted of mere passive neglect may have indemnity from an active wrongdoer. Where this has validity, it appears to be in situations where one tortfeasor, by his active conduct has created a danger to the plaintiff, and the other has merely failed to discover or remedy it." Id. (footnote omitted).

\(^{140}\) Brief of Appellant at 12; See also Danny's Constr. Co. v. Havens Steel Co., 437 F. Supp. at 93 ("Both joint tort-feasors being active wrongdoers, contribution or indemnity cannot be maintained by one against the other.") (citation omitted).

\(^{141}\) See note 50-54 and accompanying text supra.
determination of no fault in that they both result in a finding of no liability to the party.

As discussed above, the Nebraska Supreme Court has not yet expressly allowed indemnity under an active-passive theory.\textsuperscript{142} Perhaps this explains why the trial court sustained the City's demurrer to Rawson's claim for indemnity.\textsuperscript{143} This does not explain the Nebraska Supreme Court's failure to address Rawson's claim for indemnity on appeal.\textsuperscript{144} Rawson presented the court with the opportunity to either accept or reject the active-passive test for indemnity. Its failure to do so leaves it unclear under what circumstances, if any, the court will allow indemnity between "negligent" tortfeasors.\textsuperscript{145}

Notwithstanding the court's refusal to address Rawson's claim for indemnity, it held that Rawson was entitled to recover the money she had paid in settlement of the claims made against her under the doctrine of equitable subrogation.\textsuperscript{146} In a dissenting opinion, Justice Clinton argued that an unresolved tort liability is not a "debt" and that the majority's holding was an unjustifiable extension of the doctrine of subrogation.\textsuperscript{147} Although the majority failed to find that Rawson was under any legal obligation to pay the claimants, it reasoned that her settlement was a "debt" which she satisfied to protect her own interests.\textsuperscript{148}

The majority based its conclusion on § 71(2) of the Restatement of Restitution which states that, "[O]ne who has paid the debt of another in response to threat of civil proceedings by a third person, . . . is entitled to restitution."\textsuperscript{149} If an unresolved tort liability is to be considered a "debt" for purposes of granting restitution, and if Rawson's position can be likened to that of the general

\textsuperscript{143} 212 Neb. at 162, 322 N.W.2d at 383.
\textsuperscript{144} Id. at 159, 322 N.W.2d at 381.
\textsuperscript{145} See generally Busick, supra note 2, at 199-201 ("One of the reasons behind the fashioning of such a rule may be avoidance of the harshness of denying contribution.") Id. at 200.
\textsuperscript{146} 212 Neb. at 163-64, 322 N.W.2d at 384.
\textsuperscript{147} Id. at 167-68, 322 N.W.2d at 386 (Clinton, J., dissenting).
\textsuperscript{148} Id. at 165-67, 322 N.W.2d at 384-86. See RESTATEMENT OF RESTITUTION § 71(2) (1937). "A person who has paid the debt of another in response to the threat of civil proceedings by a third person, whether or not the third person is acting in good faith, is entitled to restitution from the other if the payor acted to avoid trouble and expense." Id. See, e.g., Alamida v. Wilson, 53 Hawaii 398, —, 495 P.2d 585, 590 (1972) (where the Supreme Court of Hawaii permitted the plaintiff, who was found not to be a joint tortfeasor, the right to recover money paid in settlement of a claim made against the plaintiff under the theory of equitable subrogation).
\textsuperscript{149} RESTATEMENT OF RESTITUTION § 71(2) (1937).
contractor in *Duffy*\textsuperscript{150} then implied indemnity could have been the remedy in *Rawson*, and the plaintiff would not have been left at the mercy of the court for equitable relief. This is because implied indemnity, like equitable subrogation, has its base in the concept of restitution and the prevention of unjust enrichment.\textsuperscript{151} The court’s failure to even consider this possibility is an indication that without a prior judgment as evidence of liability, a party defendant who wishes to seek restitution from another guilty party, will be left to the discretion of the court to grant an equitable remedy.\textsuperscript{152}

**CONCLUSION**

The court’s decision in *Rawson*, denying contribution and indemnity, in effect, discourages settlement.\textsuperscript{153} This is especially true where a settling party intends to seek reimbursement from a nonparty.\textsuperscript{154} *Rawson* demonstrates that there is always the chance that a court may subsequently find that the settling party was not at fault,\textsuperscript{155} and therefore is without proof of liability to the injured party. Consequently, the settling party, who was not at fault, may be held responsible for the entire claim.\textsuperscript{156} The potential for such a result is heightened with the court’s decision in *Rawson* because the plaintiff’s only hope for reimbursement was under the doctrine of equitable subrogation.\textsuperscript{157} Not only does this defeat the purposes of apportioning damages on the basis of fault, it frustrates public policy favoring settlement of lawsuits.\textsuperscript{158}

Although the court was able to provide *Rawson* with an equitable result, its refusal to address her claim for indemnity provides a warning to all future defendants considering settlement.\textsuperscript{159} That is, if they have any intentions of pursuing contribution or indemnification they had better have uncontroverted proof of their liability to the injured claimant, i.e., a prior adjudication by a judge or jury.\textsuperscript{160} Otherwise, the trial court in an independent action for reimbursement is free to deny an innocent party restitution for set-

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\textsuperscript{150} See notes 96-100 and accompanying text *supra*.


\textsuperscript{152} Brief of Appellant at 29, *Rawson* v. City of Omaha, 212 Neb. 159, 322 N.W.2d 381 (1982).

\textsuperscript{153} Id. at 27.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 29.

\textsuperscript{157} 212 Neb. at 159, 322 N.W.2d at 381.


\textsuperscript{159} Brief of Appellant at 29, *Rawson* v. City of Omaha, 212 Neb. at 159, 322 N.W.2d at 381 (1982).

\textsuperscript{160} Id.
tlement payments which benefit the party who is later found at fault.161

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161. Id.