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Andrew Kull

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# THE SOURCE OF LIABILITY IN INDEMNITY AND CONTRIBUTION

*Andrew Kull**

When *A*, having paid a judgment to *B*, obtains indemnity or contribution from *C*, what is the source of *C*'s liability to *A*? The inquiry is not purely a matter of academic interest—though it offers quite a lot of that—because it will sometimes determine whether the remedy is available. The question is no longer asked very often, but it still has a standard answer. Except when it is based on a contract, express or implied-in-fact, liability for indemnity or contribution is usually described as a species of restitution based on unjust enrichment.[1] The idea is that *A* has been compelled to pay *C*'s debt, or to contribute more than his own share of the parties' common liability.[2] Unjust enrichment offers a good explanation of the vast majority of indemnity and contribution cases, and it is consistent with salient features of the mechanics of the remedy: in particular, the fact that a claim to indemnity or contribution is almost universally treated for limitations purposes as an action in quasi contract.[3]

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* Professor of Law, Boston University.

1. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1979) ("The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay."); *see also* 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(4), at 607–08 (2d ed. 1993); 1 GEORGE E. PALMER, LAW OF RESTITUTION § 1.5(d), at 29–33 (1978). The general topic would seem to be a natural for law school courses on Remedies, but I could find only two textbooks whose current editions even mention it. *See* JAMES M. FISCHER, UNDERSTANDING REMEDIES § 57[c], at 342 (1999) ("[I]ndemnity is . . . a form of restitution . . . developed . . . to prevent unjust enrichment."); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 710 (3d ed. 2002) (stating that indemnity and contribution are restitutionary remedies).

2. *See* RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 25 cmt. a (Tentative Draft No. 2, 2002).

3. *See* Maurie T. Brunner, Annotation, *What Statute of Limitations Covers Actions for Indemnity*, 57 A.L.R.3d 833 (1974 & Supp. 2001); Maurie T.

A full answer is more complicated, however, because there is a limited but significant set of cases in which courts have allowed *A* to recover noncontractual indemnity or contribution even though *C* obtained no benefit whatever from *A*'s payment to *B*. This will be the case when *C*, despite having participated in some way in the acts giving rise to *B*'s claims, is himself under no liability to *B*. For example, the statute of limitations may bar *B*'s potential claim against *C* by the time *A*'s claim to indemnity would otherwise accrue. *C* may be immune to suit by *B* as a result of the parties' status: if *B* and *C* are married, for example, or if *C* is *B*'s employer and *B*'s claims are covered by worker's compensation, or if *B* and *C* made an enforceable agreement by which *B* exculpates *C* or limits *C*'s liability to *B*.

Courts facing these obstacles sometimes allow *A* to claim indemnity or contribution anyway. (It is customary to explain such a judgment by observing that *A*'s claim against *C* is independent of *B*'s underlying claim against *C*—though in context this is at best a half-truth.) Whatever the theory of indemnity or contribution is in such cases, it is not based on restitution. The object of the present note is to consider what else it might be. The cases offered as examples come disproportionately from New York, where the judicial attitude toward apportionment of responsibility has been especially open-minded. The point of the following discussion is not to conduct a survey, or to compare jurisdictions, but to argue for the abstract interest of a question that does not get the attention it deserves.

If *C*'s liability to indemnify *A* can be put on the basis of a contract between *A* and *C*, express or implied, the lack of any benefit to *C* is obviously not a problem.[4] If *A*'s claim to contribution from *C* is held to be authorized by statute, the answer is the same—however unpersuasive it may be as a matter of statutory construction.[5] That

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Brunner, Annotation, *What Statute of Limitations Applies to Action for Contribution Against Joint Tortfeaser*, 57 A.L.R.3d 927 (1974 & Supp. 2001).

4. Implied contract is probably the best explanation of indemnity between principal and agent, or between the maker of a promissory note and his accommodation party; likewise, of contribution between partners, or between co-sureties.

5. Statutes granting a right to contribution usually define an obligation between parties who are jointly and severally liable to a third. *See* UNIFORM CONTRIBUTIONS AMONG TORTFEASORS ACT § 1(a) cmt. a, 12 U.L.A. 194 (revised 1955) (noting in official comment that the statute's applicability to "two or more persons . . . jointly or severally liable in tort for the same injury"

leaves the decisions that are the subject of this note: those that hold *C* liable to *A*—despite the fact that *C* was under no liability to *B*—without relying on either contract or statute. There are three basic paths to this result. Briefly, they are (1) the idea that we can finesse the problem by reinterpreting or rewriting the statute of limitations; (2) the idea that *C*'s liability to *A* in indemnity or contribution is actually (or at least corresponds to) a liability in tort; and (3) the idea that *C*'s liability to *A* is simply a matter of equity and fairness. The last solution is the most interesting of the three, because it suggests a source of private civil liability that is without parallel in our legal system. If these decisions correctly state the law, we will have to revise our categories before we can describe them.

* * * * *

If and to the extent that noncontractual indemnity or contribution is based on *C*'s unjust enrichment at the expense of *A*, it is axiomatic that *C* can have no liability to *A* exceeding what would have been *C*'s liability to *B*, absent *A*'s intervention. Such is certainly the usual understanding. Some recent cases sum up this proposition with the rule of thumb that there can be "no indemnity without liability"—meaning, in this context, no indemnity obligation of *C* to *A* exceeding *C*'s potential liability to *B*.[6] The current draft of the *Restatement (Third) of Restitution and Unjust Enrichment* makes this limitation explicit,[7] and on this point it is consistent with other modern restatements.[8]

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has been "adequate to exclude cases where the person from whom contribution is sought was not liable to the injured person."); N.Y. C.P.L.R. 1401 (McKinney 1997 & Supp. 2002) (contribution between "two or more persons who are subject to liability for damages for the same personal injury"). Such a statute by its terms gives *A* no claim in contribution against *C* if *C* is not also liable to *B*.

6. *See, e.g.*, Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp., 8 Cal. 4th 100, 114–16, 876 P.2d 1062, 1072, 32 Cal. Rptr. 2d 263, 271 (1994) (referring to "the fundamental principle that 'there can be no indemnity without liability'" in holding that *C*'s liability to *A* could not exceed the limit, fixed by statute, of *C*'s underlying liability to *B*).

7. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 25 cmt. e (Tentative Draft No. 2, 2002) (noting that "there can be liability in restitution only to the extent that the claimant's intervention has reduced or discharged an enforceable legal obligation of the defendant").

8. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 22 cmt. c, 23 cmt. j (2000); RESTATEMENT (SECOND) OF TORTS § 886A

By contrast, a lawyer who tries to locate this basic proposition in the 1937 *Restatement of the Law of Restitution* will not find it right away. Warren Seavey and Austin Scott summarized the general rule of indemnity as follows:

> A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.[9]

So stated, the rule omits the basic requirement of restitution-based indemnity: namely, that the parties begin as joint obligors. Taken at face value and out of context, section 76 can thus be read as an independent, open-ended, and free-standing authorization of indemnity to any person who can allege that he has paid a debt that "as between himself and another should have been discharged by the other"—with no apparent limitation on the content of the "should have."

Of course, it is anachronistic to suppose that Seavey and Scott might have entertained any such conception in 1937. They chose the broad language of section 76 because they had decided to restate the law of indemnity and contribution *generally*, instead of describing those remedies only insofar as they were authorized by principles of unjust enrichment. Section 76 was thus designed to accommodate all possible sources of the obligation to indemnify, including those that are not based on restitution at all:

> In other cases, . . . the payor does not discharge a duty owed by the other . . . and hence he confers no benefit upon the other. In such cases indemnity or contribution is granted, if at all, only because of a contractual or other relation between the parties, or because the other has committed a breach of duty to the payor. With these latter situations in which the payor confers no benefit upon the other and in which, therefore, liability is based upon a breach of a contractual or relational duty or upon the commission of a

cmt. g ("If the one from whom contribution is sought is not in fact liable to the injured person, he is not liable for contribution.").

9. RESTATEMENT OF THE LAW OF RESTITUTION § 76 (1937).

> tort, the Restatement of this Subject is not directly concerned . . . .[10]

The wording of the old *Restatement* is pertinent to our general inquiry because, as we shall see, some recent decisions cite section 76 as though it authorized indemnity purely on the basis of the "should have," with the rule of the section being glossed as "simple fairness."[11] This is a misreading of the original *Restatement*, but it provides a convenient way to identify the sort of rule that a few courts are trying to justify.

In reality, Seavey and Scott assumed (as we see from the passage just quoted) that the source of the obligation to indemnify—when not based on restitution—could always be identified with some recognizable, identifiable, pre-existing obligation owed by *C* to *A*. To paraphrase: "Where *A*'s payment to *B* confers no benefit upon *C*, indemnity or contribution is granted, if at all, only because of a contractual or other relation between *A* and *C*, or because *C* has committed a breach of duty to *A*." Because the "other relation" is usually one we might analyze as an implied contract—for example, between principal and agent; between partners; or between the maker of a note and his accommodation party—the question of noncontractual liability in indemnity and contribution quickly boils down to "breach of duty." But what duty is being breached, and what happens when a breach of duty is no longer a plausible account of the relations between *A* and *C*?

## I. STATUTE OF LIMITATIONS

Sometimes *A* obtains indemnity or contribution from *C*, notwithstanding the lack of a contract between them and the absence of any ostensible benefit to *C*, because the court decides it can do justice simply by manipulating the statute of limitations. Suppose that *A* and *C*, strangers to each other, have violated independent duties to *B* in a way that would make them jointly and severally liable for *B*'s injuries. Shortly before *B*'s claims will be barred by the statute of limitations, *B* sues *A* but not *C*. Before *A* even has a reasonable opportunity to assert a cross-claim for contribution against *C*—and years before *B*'s claim against *A* is reduced to

10. *Id.*, ch. 3, Topic 3, Introductory Note, at 330.
11. *See infra* text accompanying note 29.

judgment, settled, or paid—*B*'s direct claim against *C* is time-barred. Modern courts, strongly inclined to apportion liability between responsible parties, find it intolerable that an equitable apportionment should be frustrated because of *B*'s choice of when (and whom) to sue. They rescue *A*'s contribution claim by repeating that *A*'s claim against *C* is "entirely independent" of *B*'s direct claim against *C*; moreover, that *A*'s claim in indemnity or contribution only accrues when *A* pays *B*. *A*'s claim against *C* cannot be prescribed before it accrues, so *A*'s claim is not time-barred.[12]

But while the limitations problem can certainly be solved, whether by legislation or by judicial fiat, allowing *C*'s contribution claim to proceed merely confronts us with the problem with which we began. If *A* pays *B* after *B* has sued *C* (or at a time when *B* could still sue *C*), the consensus of courts and restatements alike is that *A*'s claim against *C* is a species of restitution for unjust enrichment. The same authorities agree that the prescription of *B*'s direct claims against *C* must not be allowed to foreclose *A*'s claim for contribution. Yet *A*'s payment to *B* confers no benefit on *C*, if *B*'s direct claim against *C* is time-barred when *A*'s payment is made. The problem is not limitations, but the need to identify a different rationale for *A*'s cause of action. Certainly it seems anomalous that the source of liability for contribution should be understood to be restitution in the normal case—one in which all parties have been timely joined—yet something else entirely, if the same claims between the same parties are asserted after more time has elapsed.

## II. INDEPENDENT DUTY

Even if the difficulties presented by the statute of limitations may be brushed aside, a further set of cases presents the same problem in more intractable form: those in which *C* is not liable to *B* because of an effective contractual or legal limitation of liability. Traditional cases on this pattern include those in which *B* and *C* are husband and wife; or in which *C* is *B*'s employer, and *B*'s injury is

12. For a thoughtful judicial opinion reaching this conclusion, see *Koonce v. Quaker Safety Products* & Mfg. Co., 798 F.2d 700, 705–15 (5th Cir. 1986) (Garwood, J.). The torts restatements approve the outcome, though without explaining how it is to be justified. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 22 cmt. d, 23 cmt. k (2000); *cf.* RESTATEMENT (SECOND) OF TORTS § 886A cmt. g (acknowledging that "[t]he statute of limitations may offer some difficulty").

covered by worker's compensation which (by statute) constitutes *B*'s exclusive remedy against *C*. There is a significant conflict between rules and policies that limit *C*'s liability to *B*, on the one hand, and rules and policies that favor apportionment of liability between *A* and *C*, on the other, and outcomes—not surprisingly—diverge. What is clear is that *C*'s liability to *A* in such a case cannot be based on unjust enrichment. The usual way out of this impasse, for a court that wants to allow *A* to recover from *C*, is to say that *A*'s claim is not based on unjust enrichment at all, but on *C*'s breach of an independent duty owed by *C* to *A*. Contribution and indemnity thus become tort instead of restitution. The consequence is that we no longer have to explain how *C* obtained any benefit from *A*'s payment. On the other hand, we will now have to find that *C* has breached a duty to *A*—consistent with recognizable principles of liability in tort.

The "independent duty" approach got its start in cases where it offered a thoroughly plausible explanation of liability. There are circumstances in which *C*'s wrongful behavior, though creating no liability to *B*, nevertheless constitutes a tort independently actionable by *A*. For example, in the 1938 case of *Westchester Lighting v. Westchester County Small Estates Corporation*[13]—still cited by the New York courts to illustrate the "independent duty" principle—employees of *C*, engaged in building a drain, negligently broke a gas line belonging to *A*, the local gas company, then negligently repaired the damage they had done. Gas continued to leak and asphyxiated *B*, another employee of *C*. *B*'s estate sued *A*, alleging that *A*'s delay in discovering the leak had contributed to *B*'s death. The worker's compensation statute barred any claim by the estate against *C*. *A* sought indemnity from *C*. The Court of Appeals allowed the claim, reasoning that *A* "asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by [*C*]."[14] When the "independent duty" is this obvious, the logic is unexceptionable. To reach the result in a case of this kind it is enough to accept that *A*'s tort claim against *C* may include, as indirect damages, amounts for which *A* has become liable to *B* as a result of *C*'s wrong to *A*.

Predictably, a court that is more interested in the apportionment of liability than in the policies underlying the various sources of legal

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13. 15 N.E.2d 567 (N.Y. 1938).
14. *Id.* at 568.

immunity will eventually find itself enforcing "independent duties" at the outer limits of tort law, or even beyond. In *Garrett v. Holiday Inns, Inc.*,[15] *B* had been killed in a motel fire. The premises, owned and operated by *A*, were located in the Town of *C*. *B*'s estate sued both *A* and *C* for wrongful death: the plaintiff's theory against *C* was that *C* had failed to enforce its own fire and safety regulations against *A*. The Court of Appeals affirmed the dismissal of plaintiff's claim against *C*, on the ground that *C* owed no duty to *B* other than "a general duty owed by the town to the public at large," the breach of which was not actionable.[16] When the case continued against *A*, *A* sought contribution from *C* on the theory that *C*'s failure to enforce fire and safety regulations against *A* was a breach of *C*'s independent duty to *A*. A majority of the Court of Appeals agreed. While *C* owed no "special duty" to members of the public killed in the fire, it might be shown to owe such a duty to the owners and operators of the premises, whose wrongful conduct *C* might have prevented.[17]

It may be that a decision as tendentious as that in *Garrett* no longer tells us anything meaningful about the nature of the liability being enforced, given that—as seems evident—the Court of Appeals could not have cared less *why* *C* was liable to *A* for contribution. In another sense, however, a court's readiness to put all the problematic instances of indemnity and contribution on the ground of "independent duty" may still be significant for our analysis of the problem. So long as the doubtful cases are all instances of "independent duty," then—whether or not the court's reasoning is persuasive in a particular instance—the difficulties are a matter of local tort law. If liability for indemnity or contribution in New York (or anywhere else) sometimes appears arbitrary, unpredictable, or difficult to describe within regular contours, the conclusion is merely that tort liability in that jurisdiction includes some extenuated duties, some remote causes, and some unforeseeable plaintiffs. So long as *C*'s liability to *A* is explained by *C*'s breach of an "independent duty," in other words, there is no need to break new ground with any truly radical explanations of liability for indemnity and contribution. (A truly radical explanation would be, for example, that *A* has

15. 447 N.E.2d 717 (N.Y. 1983).
16. *Id.* at 719.
17. *See id.* at 721–22 n.5.

discharged a duty that "in simple fairness" should have been discharged by *C*.)

## III. SIMPLE FAIRNESS

This is why the most interesting decisions are those in which courts have allowed indemnity or contribution in the absence of a contract between *A* and *C*, in the absence of benefit to *C*, and without any assertion that *C* breached an independent duty to *A*.

*Sommer v. Federal Signal Corporation*[18] considered claims and cross-claims arising out of a fire causing damage to an office building. *B* in this case was the building owner, 810 Associates ("810"). *A* was an array of parties connected with *B*'s fire alarm system—"designers, manufacturers, parts suppliers, installers, inspectors"—known collectively as the "alarm defendants." *C* was Holmes Protection Inc., a fire alarm monitoring service under contract to *B*, whose job it was to call the fire department. Holmes was in a separate category from the other defendants because its contract with 810 contained an exculpatory clause excluding liability for its negligent performance.[19] Summary judgment in favor of Holmes was reversed by the Appellate Division, on the ground that Holmes could not by contract escape liability for gross negligence or recklessness; whether its conduct met that standard was a question for the jury. It followed, moreover, that Holmes would be liable to the alarm defendants on their claim for contribution, if its liability to 810 were established.

The disposition of the contribution claim in the Appellate Division is consistent with traditional analysis in terms of restitution. *C* is liable to *A* to the extent that *A* pays a claim for which *C* would have been liable to *B*. This meant, on the facts of *Sommer*, that the alarm defendants could seek contribution only if Holmes were shown to have been grossly negligent or reckless. Yet the facts made it entirely possible, perhaps even probable, that a jury would find Holmes guilty of no more than ordinary negligence. The Court of Appeals was unwilling to accept that Holmes, relying on the exculpatory clause of its contract, might avoid the liability for contribution to which it would have been subject in the absence of

18. 79 N.Y.2d 540, 593 N.E.2d 1365 (1992).
19. *See id.* at 549-50, 593 N.E. at 1368.

the clause. *Sommer* is interesting because it allows *A* to claim contribution from *C* when there is manifestly neither a contract, nor a benefit conferred, nor a breach of "independent duty," between *A* and *C*.

This revolution in the apportionment of liability is accomplished by means of a discussion that elides the critical distinctions. In an attempt to clarify what is going on here—and at the risk of appearing officious—I interpolate my own commentary in bracketed italics:

> As we noted in *Rogers v. Dorchester Assocs.* (32 NY2d 553, 564): "The rule of apportionment applies when two or more tort-feasors have shared, albeit in various degrees, in the responsibility by their conduct or omissions in causing an accident, in violation of the duties they respectively owed to the injured person."
>
> That Holmes owed no duty to the alarm defendants is thus immaterial if it breached a duty it owed to the injured person—plaintiff 810—and thereby contributed to 810's injury. *[C's lack of duty to A is indeed immaterial, so long as contribution is based on C's enrichment at the expense of A.]* In that we have concluded Holmes did owe such a duty, plainly the alarm defendants may seek contribution from Holmes. *[But not on restitution grounds, unless Holmes is legally liable to the plaintiff.]*
>
> The question remains whether contribution is activated only upon a finding that Holmes was grossly negligent (as the Appellate Division concluded) or whether a finding of ordinary negligence would suffice.
>
> In contribution cases, we have drawn a distinction between the absence of *liability* to an injured party, and the absence of a *duty* (*see, e.g., Garrett v Holiday Inns,* 58 NY2d 253, 259). *[The distinction between C's "liability" to B and C's "duty" to B is meaningless, if the question is C's unjust enrichment at the expense of A. In* Garrett, *as previously noted, liability for contribution was explicitly founded on the breach of an independent duty owed by C to A.]* Often, the absence of direct liability to plaintiff is merely the result of a special defense, such as the Statute of Limitations or the exclusivity of workers' compensation, and not because defendant was free of fault. In such cases,

> we have held that codefendants may seek contribution from the joint wrongdoer, despite the wrongdoer's own defense to plaintiff's claim. *[But the result in such cases has heretofore been justified on the basis of C's breach of C's independent duty to A.]* This principle is fully in accord with the rationale of [contribution between joint tortfeasors], which promotes equitable distribution of the loss in proportion to actual fault.
>
> To the extent Holmes' exculpatory clause insulates it from liability for ordinary negligence, we view it as akin to a special defense that does not affect the codefendants' ability to obtain contribution. Although Holmes' direct *liability* to 810 (by virtue of the exculpatory clause) is triggered only upon gross negligence, its *duty* is to avoid ordinary negligence. Upon breach of that duty, fairness requires that Holmes contribute to the judgment in proportion to its culpability. Indeed, it would be patently unfair to abrogate the alarm-related defendants' right to contribution based on an exculpatory clause to which they were not a party.[20]

The court is unconcerned with, and may be oblivious to, the analytical distinctions that its opinion ignores. To insist on the difference between liabilities based on contract, on tort, and on unjust enrichment may seem antiquated and fussy—and irrelevant, if the outcome (*C*'s liability to *A* for contribution) is always the same. But unless we distinguish the different grounds of apportioning liability, it is impossible to appreciate the significance of what the Court of Appeals has here proposed.

There are at least two large-scale explanations of what the court does in *Sommer,* not inconsistent with each other, both of them interesting. The first emphasizes the fact that *C*'s immunity in this case was the result of an exculpatory clause in *C*'s contract with *B*. After the decision in *Sommer*, Holmes is left in precisely the same position that it would have occupied if the relevant contractual provision had never been written. Indeed, this seems to be the immediate point of the exercise. The court believes that "it would be patently unfair to abrogate [*A*'s] right to contribution based on an

20. *Id.* at 557-58, 593 N.E.2d at 1373 (some citations omitted).

exculpatory clause [in the contract between *B* and *C*] to which [*A* was] not a party."[21] This amounts to saying that, in a regime that seeks to allocate liability for harm according to fault, a contract that limits *C*'s liability to *B* is unenforceable, as against public policy, to the extent that it interferes with what would otherwise be *A*'s rights of contribution or indemnity against *C*. The difficulty is to decide the proper limits of this reasoning, because the possibility of limiting liability by contract—leaving aside any inquiry into the benefits society might derive from that possibility—is only one of countless legal obstacles to a perfect apportionment of liability according to fault. How many of them is the Court of Appeals planning to uproot? To mention only the most obvious example, by the reasoning of *Sommer* it is also "patently unfair" if *C* is allowed to shield himself from liability to *A* by obtaining a release from *B* as part of a favorable settlement—in effect, an "exculpatory clause to which [*A* is] not a party." But the settling tortfeasor is not yet liable for contribution in New York or anywhere else.[22]

But it is the second point about *Sommer* that is relevant to our inquiry: the New York court's identification of the source of *C*'s liability to *A*. Plainly it is not contract or restitution, and the court makes a point of saying that it is not an "independent duty" either: "Holmes did not have a duty . . . to the alarm defendants."[23] That seems to leave "fairness" as the basis of liability, as the court concludes that "fairness requires that Holmes contribute to the judgment in proportion to its culpability."[24]

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21. *Id.*

22. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 23 cmt. i, 24 cmt. e (2000). In New York, the settling tortfeasor's immunity from contribution is guaranteed by statute. *See* N.Y. GEN. OBLIG. LAW. § 15-108(b) (McKinney 2002). The New York statute includes a claim-reduction provision. One consequence of *B*'s release of joint tortfeasor *C* is accordingly that *B*'s remaining claim against joint tortfeasor *A* is reduced by the "amount stipulated" in the release, by "the amount of the consideration paid for it," or "in the amount of [*C*'s] equitable share of the damages . . . whichever is the greatest." *Id.* § 15-108(a). The Court of Appeals might have decided *Sommer* in a manner consistent with New York's statutory scheme for contribution and apportionment by holding that 810's claim against the alarm defendants was reduced by the equitable share of the damages attributable to Holmes's ordinary negligence—treating the exculpatory clause in the Holmes contract, for purposes of apportionment, as the equivalent of the release.

23. *Sommer*, 593 N.E.2d at 1374.

24. *Id.* at 1373.

Fairness appears in some other New York decisions as the basis of a hard-to-explain liability in indemnity or contribution. One recent example is the lead-paint case, in which the City of New York sought indemnification from paint manufacturers for the cost of remedial measures taken by the City—in response to a command of the New York legislature—to abate lead hazards in City-owned apartment buildings.[25] Restitution was not a plausible basis of indemnity in this case, because it seemed unlikely that the manufacturers would be found to be under a pre-existing liability to anyone: the City's own products-liability claims had been dismissed on limitations grounds.[26] "Independent duty" was harder than usual to visualize on these facts, considering that the paint had been sold (to previous owners of the buildings) long before the City was required, by statute, to undertake remediation.[27] Given these difficulties with the alternative grounds of liability, the holding that the City had stated a valid claim for indemnity against the manufacturers appears to rest substantially on the court's observation that "[a]n implied indemnity action is based upon the law's notion of what is fair and proper between the parties"[28]—treating the law's notion of what is fair and proper as nothing less than a substantive basis of liability.

In an earlier, much-cited decision, the Court of Appeals had suggested that the City's indemnity claim against the manufacturer of a garbage truck—for injuries suffered by a municipal employee—was based on "simple fairness":

> It is nothing short of simple fairness to recognize that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" (Restatement, Restitution, § 76). To prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs.[29]

25. City of New York v. Lead Indus. Ass'n, 644 N.Y.S.2d 919 (N.Y. App. Div. 1996).

26. *See id.* at 921. A claim that the manufacturers had fraudulently misrepresented the safety of their products was allowed to proceed.

27. *See id.* at 923–25.

28. *Id.* at 925.

29. McDermott v. City of New York, 406 N.E.2d 460, 462 (N.Y. 1980).

Indemnity in the case of the garbage truck was not in restitution, however, because the employee's claims against the manufacturer were time-barred years before the City thought to assert a cross-claim for indemnity. There had once been an "independent duty" on the part of the manufacturer to the City, but both the nature and the normal limits of this duty, under the circumstances, were all too obvious. The City had purchased the truck from the manufacturer, but its claim to indemnity was asserted only after its claims derived from the sale transaction (whether in tort or on the seller's warranties) were also time-barred. These problems with the alternatives tend to support the conclusion that the basis of indemnity was indeed, as the court suggested, "simple fairness." Certainly there was no indication that a liability in indemnity required any additional justification.

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When all other explanations fail—no contract between the parties, no benefit conferred, no identifiable "independent duty"—some courts have been willing to allow *A* to obtain indemnity or contribution from *C* on the basis of "simple fairness" alone. Some of the decisions say this in so many words, or almost. A judicial tendency to blur the distinctions between the various rationales makes it harder to pin down the source of the liability in a particular case, but the conclusion is facilitated to the extent that we can logically eliminate the other possible sources of liability.

If my reading of the cases is correct, the remedies of indemnity and contribution furnish a context in which some American courts have been willing to enforce a legal obligation that will not be found in any law book. They have held that one person may be under a legal obligation to pay money to another because simple fairness (and nothing else) requires him to do so.

In countless cases, to be sure, a judge's conviction about the requirements of simple fairness helps to explain the judicial conclusion that a promise has been made and broken, a duty breached, or a benefit conferred. That much is perfectly obvious. What is unique and interesting about the indemnity and contribution cases is that some of them really do appear to be based on fairness alone, because the recognized sources of civil liability can all be logically eliminated.

If the courts impose liability that generally recognized legal principles cannot explain, there are two possibilities. One is that the decisions are wrong. (These cases would certainly be decided differently in the jurisdictions that say, "No indemnity without liability.") The other is that our account of the sources of civil liability is incomplete. Expanding it to accommodate the liability of *C* to *A* in a case like *Sommer* might proceed along various lines, but there seem to be two obvious choices. One is to extend our description of tort liability to include some injuries that, by traditional rules, would be regarded as remote and unforeseeable. The other is to say that, in a proper case, a person under no other recognized legal obligation may still be required to do what is fair.

Something like the second idea is what many people mistakenly expect to find in the law of restitution and unjust enrichment. Some more sophisticated commentators, recognizing that our law acknowledges no such rule, argue that we should find a place for it somewhere—under the heading of "restitution" or any other that might fit.[30] Marginal cases in indemnity and contribution reveal that a liability rule based avowedly on simple fairness may already exist. Whether recognition of such a rule represents the elevation or the abandonment of legal principle remains a question of jurisprudential taste.

30. *Compare* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695 (arguing for the necessity of interstitial liability rules to avoid unfairness), *with* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001) (responding that such rules are not properly found in the law of restitution).