

108.75 NEGLIGENCE OF THIRD PARTY TORT-FEASOR - CONTRIBUTION.¹

This issue reads:

"Did (*name third party defendant*) by *his* own negligence contribute to the [injury] [damage] to (*name plaintiff*)?"

The plaintiff in this case, (*name plaintiff*), has sued only (*name original defendant(s)*) claiming that [*his*] [*their*] negligence was a proximate cause of plaintiff's [injury] [damage]. The law does not require the plaintiff to bring suit against all of those who might be liable to *him*.

The defendant, (*name original defendant*), has filed a complaint against (*name third party defendant*). By this procedure, known as a third-party complaint or cross-action, (*name original defendant*) is attempting to assert a right of contribution against (*name third party defendant*).

The defendant, (*name original defendant*), claims, that if *he* was negligent and if *his* negligence was a proximate cause of [injury] [damage] to the plaintiff, which *he* denies, that (*name third party defendant*) also was negligent and that the negligence of (*name third party defendant*) was also a proximate cause of any [injury] [damage] that the plaintiff sustained.

If it is established that (*name third party defendant*) was negligent and that *his* negligence was also a proximate cause of any [injury] [damage], to the plaintiff (*name third party defendant*) will be required to contribute to any damages that are awarded to the (*name plaintiff*) on the claim asserted by (*name plaintiff*) against (*name original defendant*).

The burden of proof on this issue is on (*name original defendant*) to establish, by the greater weight of the evidence.

First, that (*name third party defendant*) was negligent, and

Second, that such negligence was a proximate cause of any [injury] [damage] to plaintiff along with the negligence of (*name original defendant*).

When I defined proximate cause,² I explained that there may be more than one proximate cause of [an injury] [damage]. Thus separate and independent acts or omissions of different persons can concur to produce a single result. If the separate negligent acts or omissions of [the drivers of two or more vehicles] [two or more persons] happen concurrently, or in sequence,³ so that the conduct of each of those [drivers] [persons] is a proximate cause producing the injury or damage complained of, then each is liable for all of the damages suffered. If the plaintiff does not sue all of these [drivers] [persons] then one (or more) of the defendants may, as in this case, seek to have one (or more) of those not sued by the plaintiff contribute to or share in any damages assessed. This right of contribution applies even though one may have been more or less negligent than [the other] [another].

In this case, the defendant, (*name original defendant*), contends, and the third party defendant, (*name third party defendant*), denies, that (*name third party defendant*) was negligent in one or more of the following respects:

(Read all contentions of negligence supported by the evidence.)

The defendant, (*name original defendant*), further contends and the third party defendant (*name third party defendant*) denies, that (*name third party defendant's*) negligence was a proximate cause of plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

(Give law as to each contention of negligence included above, using, as appropriate, the instructions numbered above 200).

Finally, as to this issue, on which *(name original defendant)* has the burden of proof, if you find by the greater weight of the evidence, that *(name third party defendant)* was negligent in any one or more of the *(state total number of contentions)* ways I have explained to you and that such negligence was a proximate cause of the plaintiff's [injury] [damage] concurring with negligence of *(name original defendant)*, then it would be your duty to answer this issue "Yes," in favor of *(name original defendant)*.

If, on the other hand, you fail to find such negligence or proximate cause then it would be your duty to answer this issue "No," in favor of *(name third party defendant)*.

1. See, N.C. Gen. Stat. § 1B. This instruction is drawn to deal with the common situation in which the defendant brings the third party into the original negligence action. The defendant may choose to bring a separate action to recover contribution. N.C. Gen. Stat. § 1B-3(a).

2. If N.C.P.I.-Civil 102.20, including the paragraph on multiple causes, has not been used, modify this language to state that there may be more than one proximate cause.

3. If there is a claim of insulating negligence in a sequence situation, use N.C.P.I.-Civil 102.65-Issue of Insulating Negligence-modified to fit the third party plaintiff-third party defendant situation.