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Kotecki v. Cyclops Welding Corp.: A Judicial Balancing Act

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KOTECKI v. CYCLOPS WELDING CORP.: A JUDICIAL BALANCING ACT

> Perhaps the most evenly-balanced controversy in all of compensation law is the question whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence has caused or contributed to the injury.[1]

INTRODUCTION

In 1977, the Illinois Supreme Court, in *Skinner v. Reed-Prentice Division Package Machinery Co.*,[2] allowed a defendant-manufacturer to seek contribution from the plaintiff's employer in an amount commensurate with the employer's degree of fault.[3] The plaintiff-employee had been injured at work while using the manufacturer's product.[4] The court's opinion demonstrated an interest in safeguarding the principle of equitable apportionment at the expense of the protection of employers granted by the Workers' Compensation Act and at the expense of the doctrine of strict liability. The decision in *Skinner*, therefore, was an attempt by the court to balance the competing interests of contribution, workers' compensation, and strict liability.

Fourteen years after *Skinner*, in *Kotecki v. Cyclops Welding Corp.*,[5] those same interests arose again, yet different policy considerations came up winners. In *Kotecki*, the Illinois Supreme Court held that an employer's liability in contribution to defendants sued by employees injured at work is limited by the employer's statutory liability to the employee under the Workers' Compensation Act.[6] Thus, the interest in preserving the integrity of the workers' compensation system emerged victorious. This triumph, however, came at the expense of a stranger to the workers' compensation system who gains nothing in that bargain — the third-party tortfeasor. An-

1. 2B ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 76.11 (1992).
2. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).
3. *Id.* at 443.
4. *Id.* at 438.
5. 585 N.E.2d 1023 (Ill. 1991).
6. *Id.* at 1028.

other victor was the doctrine of strict liability in defective products cases.

This Note begins by examining the origins and policies of contribution, workers' compensation, and strict liability. Next, it discusses how Illinois courts and other jurisdictions have balanced these concepts in the past. After this foundation is laid, this Note argues that the *Kotecki* decision is a dramatic break from precedent and represents a rebalancing of delicate policy considerations by the Illinois Supreme Court. The Note also examines the practical effects of the *Kotecki* decision and proposes some answers to some of the questions left open by the court's decision. Finally, this Note discusses the impact of the *Kotecki* decision upon employers, third-party tortfeasors, and employees.

I. BACKGROUND

The Illinois Supreme Court's decision in *Kotecki v. Cyclops Welding Corp.*[7] involved the interplay of several different legal concepts: the right of contribution, the employer immunity provided by the Workers' Compensation Act,[8] and strict liability. The history and development of these principles provide the necessary background for the *Kotecki* decision. This section begins by examining the basic principles and underlying policy considerations of the changing methods for apportionment of damages among multiple tortfeasors. Next, it discusses the origin and purpose of the Workers' Compensation Act. The doctrine of strict liability in product liability cases is then examined. Finally, this section explores how Illinois courts have dealt with the competing policy considerations supporting each of these concepts.

A. The Allocation of Damages among Multiple Tortfeasors

The issue of how to allocate damages among multiple tortfeasors arises when more than one party has contributed to the same injury to the same victim. In such cases, these parties are referred to as "joint tortfeasors."[9] The allocation of damages among joint

7. 585 N.E.2d 1023 (Ill. 1991).

8. ILL. REV. STAT. ch. 48, paras. 138.5(a), 138.11 (1991) (820 ILCS 305/5(a), 35/11 (1992)). Illinois Revised Statutes were replaced by Illinois Compiled Statutes on January 1, 1993. The text of this Note will refer to Illinois Revised Statute provisions; however, Illinois Compiled Statutes cites will be given parenthetically in the footnotes.

9. The term joint tortfeasors "refers to two or more persons jointly or severally liable in tort for

tortfeasors is a subject that has undergone many changes over time. The different methods of allocation that have been attempted include the common law approach, indemnity, and contribution.

1. The Common Law Approach

Under the common law rule, a plaintiff who was injured by a number of parties had complete autonomy to decide whether to sue one or all of the potential defendants.[10] A plaintiff not only could choose whom to sue, but upon successfully obtaining a judgment against joint tortfeasors, he also was free to decide from whom to collect.[11] The plaintiff was free to base this choice on the existence of liability insurance, on the plaintiff's own whim or spite, or on any other factors upon which the plaintiff cared to rely.[12]

At common law, a marginally culpable tortfeasor could be forced to pay the entire judgment while the major wrongdoer went "scot free."[13] One purpose for the no-contribution rule was that it served as a deterrent for wrongdoers by placing each tortfeasor in the position of being responsible for the entire amount of the plaintiff's damages.[14] Another major justification for the common law rule was the concern that courts not spend their time settling the disputes of wrongdoers.[15]

2. Indemnity

The unfair results yielded by the common law system of alloca-

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the same injury to person or property. Those persons who have acted in concert in their tortious conduct . . . are, accordingly, jointly and severally liable." BLACK'S LAW DICTIONARY 839 (6th ed. 1990).

10. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 336 (5th ed. 1984). Under the common law rule, if A, B, and C caused the same injury to the same victim, that victim could "place the entire loss on A, or on both A and B, or on A, B and C either in equal or unequal proportion." Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 732 (1968). If a judgment was entered against a defendant, that defendant had no recourse but to pay. A defendant had no way to recover partially from either a co-defendant or another culpable party not joined in the action. This made it possible for full liability to be imposed upon a defendant who was responsible for only a very small percentage of the harm.

11. KEETON ET AL., *supra* note 10 § 50, at 338.

12. *Id.*

13. *Id.*

14. Deborah Alley, *A Judicial Rule of Contribution Among Tortfeasors in Illinois*, 1978 LAW F. 633, 635.

15. *Id.* at 635-36; *see also* Reese v. Chicago, Burlington & Quincy R.R., 303 N.E.2d 382, 386 (Ill. 1973) ("[T]he principal objection to contribution [is] use of the courts for relief of wrongdoers . . . .").

tion of damages sparked the development of indemnity and contribution. Although both indemnity and contribution grant a defendant the right to reallocate the responsibility for the payment of the plaintiff's damages, there are distinct differences between the two methods. Indemnity allows a defendant who was forced to satisfy a judgment for an injury for which he and another tortfeasor are jointly and severally liable to recover the entire amount that he was forced to pay from the other tortfeasor or tortfeasors.[16] In other words, indemnity is the right of a defendant to get reimbursement for one-hundred percent of a judgment he paid from another liable party, but not for a smaller percentage.[17] Thus, indemnity is a right to an all-or-nothing recovery.

There are a number of different types of indemnity. The right to indemnification may arise from a contract[18] and is sometimes called express indemnity.[19] A right to indemnity may also arise from situations in which a promise to indemnify can be implied from the relationship among the tortfeasors.[20] Implied indemnity comes in two different forms. The first is quasi-contractual implied indemnity, which is based on equitable principles of restitution.[21] This right of implied indemnity exists when an indemnitee is without fault but is still subject to liability due to her legal relationship with the plaintiff or due to a nondelegable duty arising out of common or statutory law.[22] For example, an employer who is held liable in tort for the negligent acts of its employee under the doctrine of respondeat superior has a right to indemnification from its employee.[23]

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16. Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1251 (Ill. 1988).

17. *See* KEETON ET AL., *supra* note 10, § 51, at 341.

18. *Frazer*, 527 N.E.2d at 1251; *see* Westinghouse Elec. Elevator Co. v. LaSalle Monroe Bldg. Corp., 70 N.E.2d 604 (Ill. 1947) (holding that an indemnity contract will not be construed as indemnifying against a party's negligence unless such a construction is required by clear and explicit language in the contract).

19. Express indemnity is prohibited under certain circumstances. ILL. REV. STAT. ch. 29, para. 61 (1991) (740 ILCS 35/1 (1992)) provides the following:

> With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

Id.

20. *Frazer*, 527 N.E.2d at 1251.

21. *Id.*

22. *Id.* at 1252.

23. *Id.* This is true as long as the employer did not participate in the tortious conduct. *Id.*

The concept of implied indemnity was expanded to grant a right of indemnification not only to a defendant who is without fault, but also to include situations where there is a qualitative difference in the negligence of the culpable parties.[24] Under this second form of implied indemnity, which came to be known as active/passive implied indemnity, the courts found that where the conduct of one tortfeasor is the primary cause of the plaintiff's damages (i.e., the conduct is active negligence), and the conduct of the other tortfeasor is only a secondary cause of the injury (i.e., the conduct is passive negligence), the passively negligent party has the right to shift the entire burden of paying the plaintiff's damages to the actively negligent party.[25] Since the recognition of the right of contribution in Illinois, the Illinois Supreme Court has held that active/passive implied indemnity is no longer a viable doctrine.[26]

3. *Contribution*

While indemnity allows one defendant to shift the entire responsibility for payment of damages to another party, contribution allows a defendant who has satisfied a judgment to seek *partial* reimbursement from other tortfeasors who are also responsible for the plaintiff's injury.[27] The reimbursement is determined in accordance with

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24. *Id.*

25. See *Sargent v. Interstate Bakeries, Inc.*, where the plaintiff pedestrian was injured by a vehicle driven by the defendant while crossing the street at an intersection. 229 N.E.2d 769 (Ill. App. Ct. 1967). The second count of the plaintiff's complaint charged the co-defendants with negligently parking a vehicle in the crosswalk. *Id.* at 770. The court held that a jury could find the co-defendants only passively negligent and, thus, entitled to indemnification from the original defendant involved in the collision. *Id.* at 776. The court stated that " '[p]assive negligence exists where one person negligently brings about a condition or an occasion and active negligence exists where another party negligently acts upon that condition and perpetrates a wrong.' " *Id.* at 772 (quoting Southwestern Greyhound Lines v. Crown Coach Co., 178 F.2d 628, 632 (8th Cir. 1949)).

The qualitative distinction that creates a right of active/passive indemnity in product liability cases was defined differently by the Illinois Supreme Court: "Typically, it was the 'active' negligence of one party that creates a dangerous condition which caused the plaintiff's injury, and the other party's negligence amounted to no more than the failure to discover and correct it." *Frazer*, 527 N.E.2d at 1252.

26. Allison v. Shell, 495 N.E.2d 496, 501 (Ill. 1986).

27. See *Skinner v. Reed-Prentice Division Package Machinery Co.*, where the Illinois Supreme Court stated:

> "There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tort feasor who has been compelled to pay it to the shoulders of another who should bear it instead."

374 N.E.2d 437, 439 (Ill. 1979) (quoting Suvada v. White Motor Co., 210 N.E.2d 182, 188 (Ill.

each of the joint tortfeasors' shares of culpability.[28] Contribution is based on the theory of equitable apportionment, which allocates liability for damages in accordance with culpability.[29] The right of contribution allows a tortfeasor who is sued by a plaintiff to file a third-party action for contribution against a joint tortfeasor in order to force the third-party defendant to contribute his pro rata share of the plaintiff's damages, based on the third party's percentage of fault.[30]

B. The Illinois Workers' Compensation Act

At common law, an employee injured at work could maintain an action against her employer in tort if she could demonstrate that her injury was proximately caused by a breach of the employer's duty of care owed to her.[31] However, even if the employer was negligent, it often escaped liability through the defenses of contributory negligence and assumption of risk.[32] The common law system frequently left injured employees unable to work and dependent on the state for assistance.[33]

Workers' compensation statutes were enacted to create no-fault compensation systems. Generally, these statutes provide that when an employee is injured in an accident that arises out of and in the

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1965)), *cert. denied*, 436 U.S. 946 (1978).

28. *See* ILL. REV. STAT. ch. 70, para. 303 (1991) (740 ILCS 10/3 (1992)) ("The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability.").

29. Eileen M. Walsh & Eugene G. Doherty, *Section 2-1117: Several Liability's Effect on Settlement and Contribution*, 79 ILL. B.J. 122 (1991).

30. ILL. REV. STAT. ch. 70, paras. 302, 303, 305 (1991) (740 ILCS 100/2, 100/3, 100/5 (1992)).

31. KEETON ET AL., *supra* note 10, § 80, at 568-69. At common law, there were five duties owed by an employer to an employee for which the employer could be held liable:

1. The duty to provide a safe workplace.
2. The duty to provide safe appliances, tools, and equipment.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make work safe.

Id. at 569.

32. *Id.* at 569.

33. See *Leach v. Lauhoff Grain Co.*, where the court stated:

> The difficulty of proof and delay in the courts often provided no remedy, subjected the injured employee to deprivation of livelihood, reduced him to poverty, and produced antagonisms between employers and employees to the point that under the police power, something had to be done.

366 N.E.2d 1145, 1146 (Ill. App. Ct. 1977).

course of her employment, the employee has a right to workers' compensation benefits, regardless of fault.[34] Negligence is irrelevant to the determination of whether an employee is entitled to workers' compensation benefits.[35] The goals of workers' compensation statutes are to provide certain and swift financial protection to injured employees and their families[36] and to place the cost of workplace injuries on industry rather than on the public or on individual employees who incur work-related injuries.[37]

The Illinois Workers' Compensation Act defines the benefits that an employer must give an employee who has been injured in the course of her employment.[38] First, the employer must provide the

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34. 1 LARSON, *supra* note 1, § 2.10; *see* Orsini v. Industrial Comm'n, 509 N.E.2d 1005 (Ill. 1987). The court in *Orsini* stated:

> An injury is compensable under the Workers' Compensation Act only if it "aris[es] out of" and "in the course of" the employment. The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. . . . An injury "arising out of" one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury. For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. If the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then it does not arise out of it. Thus, an inquiry is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment.

Id. at 1008-09 (citations omitted).

35. 1 LARSON, *supra* note 1, § 2.10.

> Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude: if the accident arises out of and in the course of employment, the employee receives his award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee: the same award issues.

Id.

36. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1979); Laffoon v. Bell & Zoller Coal Co., 359 N.E.2d 125, 129 (Ill. 1976).

37. Vaught v. Industrial Comm'n, 287 N.E.2d 701, 706 (Ill. 1972). One commentator stated:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 LARSON, *supra* note 1, § 2.20.

38. ILL. REV. STAT. ch. 48, para. 138.8 (1991) (820 ILCS 35/8 (1992)). The amount of compensation to be awarded when an accidental injury to an employee results in death is addressed in ILL. REV. STAT. ch. 48, para. 138.7 (820 ILCS 305/7 (1992)). The Illinois Workers' Compensation Act is administered by the Illinois Industrial Commission. *Id.* para. 138.13 (820 ILCS 305/13 (1992)).

employee with medical care from the doctor of the employee's choice.[39] Second, the employee is entitled to two-thirds of her average weekly wage while she is unable to work and under a doctor's care.[40] Most importantly, the employer is required to compensate the injured employee for the permanent effect of her injury.[41] Pain and suffering is not compensable under the Workers' Compensation Act. In exchange for giving the previously mentioned benefits to every employee injured in the course of employment without regard to fault, the employer gains immunity from any action at law by the employee for damages for any injury that is compensable under the Workers' Compensation Act.[42]

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39. *Id.* para. 138.8(a) (820 ILCS 305/8(a) (1992)). This provision states:

> The employer shall provide and pay for all necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury. The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required.
>
> The employee may at any time elect to secure his own physician, surgeon and hospital services at the employer's expense . . . .

Id.

40. *Id.* para. 138.8(b)(1) (820 ILCS 305/8(b)(1) (1992)).

41. *Id.* para. 138.8(d)(2) (820 ILCS 305/8(d)(2) (1992)). The amount of compensation to which the employee is entitled is determined by multiplying sixty percent of the employee's average weekly wage by a certain number of weeks. The appropriate number of weeks to be used depends on the value ascribed to the injured part of the body by the Workers' Compensation Act. *Id.* para. 138.8(e) & (b)(2.1) (820 ILCS 305/8(e) & (b)(2.1) (1992)). For example, the complete loss of the use of a thumb is worth seventy weeks. *Id.* para. 138.8(e)(1) (820 ILCS 305/8(e)(1) (1992)). Thus, if an employee who was earning $300 per week lost her entire thumb in an accident which occurred in the course of her employment, she would be entitled to $12,600 as compensation for her permanent injury.

If, however, an employee sustained a complete disability which rendered her wholly and permanently incapable of work, or if she lost both of her hands, arms, feet, legs, or eyes, she would not recover compensation for the permanency of the injury. *Id.* para. 138.8(f) (820 ILCS 305/8(f) (1992)). Instead, she would receive 66 ⅔% of her salary for the duration of her life. *Id.* para. 138.8(b)(2) & (f) (820 ILCS 305/8(b)(2) & (f) (1992)). If, at any time, a completely disabled employee's weekly benefits fall below 50% of the statewide average weekly wage, she is entitled to supplemental benefits from the Rate Adjustment Fund. *Id.* para. 138.8(b)(4.1) & (f) (305/8(b)(4.1) & (f) (1992)).

42. *Id.* paras. 138.5(a), 138.11 (820 ILCS 35/5(a), 35/11) (1992)). The Workers' Compensation Act provides:

> § 5. (a) No common law or statutory right to recover damages from the employer . . . [or] his insurer . . . for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act . . . .
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> . . . .

Even though the employer is required to pay the statutory benefits to an employee whose injury arises out of and in the course of employment without regard to fault, the employer may have an opportunity to recoup the benefits it has paid.[43] If an employee injured at work recovers damages from a third party in a separate tort action arising from the same incident, the employer has a right to recoup the statutory benefits that the employer paid to the employee under the Workers' Compensation Act.[44] However, the amount that the employer is reimbursed is reduced by the employer's share of the costs and expenses incurred in the employee's third-party claim.[45]

An employer's liability under a workers' compensation statute is akin to an implied contract entered into between the employer and employee in which each side gives valuable consideration.[46] The tradeoff is the following: The employee gives up her right to an action in tort before a jury, where pain and suffering is an element of damages, in exchange for prompt compensation each time she sustains an injury which arises out of and in the course of employment, without regard to fault.[47] The employer gives up its right to raise

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§ 11. The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer . . . .

Id.

43. *Id.* para. 138.5(b) (820 ILCS 35/5(b) (1992)). This section provides in pertinent part:
Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, . . . [if] judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employer or personal representative.

Id.

44. *Id.*

45. *Id.* This section provides:
Out of any reimbursement received by the employer pursuant to this Section, the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim, action or suit and where the services of an attorney at law of the employee or dependents have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is reimbursed, then, in the absence of other agreement, the employer shall pay such attorney 25% of the gross amount of such reimbursement.

Id.

46. Huntoon v. Pritchard, 20 N.E.2d 53, 57 (Ill. 1939).

47. See *Kelsay v. Motorola, Inc.*, where the court stated:
Pursuant to the statutory scheme implemented by the [Workers' Compensation] Act, the employee gave up his common law rights to sue his employer in tort, but recovery for injuries arising out of and in the course of his employment became automatic without regard to any fault on his part. The employer, who gave up his right to plead the numerous common law defenses, was compelled to pay, but his liability became

common law defenses to mitigate its liability and must compensate every employee who is injured at work even if the employer is entirely free from fault. The employer then is immune from tort actions and does not have to compensate injured employees for their pain and suffering.[48]

C. *Product Liability*

The term "product liability" refers to the area of law that deals with the liability of suppliers of goods and products that are defective.[49] In Illinois, strict liability was first recognized as a basis for recovery in defective product cases by the Illinois Supreme Court in *Suvada v. White Motor Co.*[50] The court based its decision in that case on the strong public policy interest in protecting injured consumers.[51] The court felt that it was important to place the burden of loss on the party who creates the risks, invites purchases, or profits from the sale of the product.[52] Strict liability was intended to be " 'a

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fixed under a strict and comprehensive statutory scheme, and was not subjected to the sympathies of jurors whose compassion for fellow employees often led to high recovery. This trade-off between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them with prompt and equitable compensation for their injuries.

384 N.E.2d 353, 356 (Ill. 1978) (citations omitted).

48. *Id.*

49. *See* KEETON ET AL., *supra* note 10, § 95, at 677.

50. 210 N.E.2d 182 (Ill. 1965). In *Suvada*, the manufacturer of a component part was held strictly liable to a subpurchaser for damages resulting from the defective condition of the part. *Id.* at 186. The court extended liability in tort for a defective product to the manufacturer, the seller, the contractor, the supplier, one who holds himself out to be the manufacturer, the assembler of parts, and the manufacturer of a component part. *Id.* at 185. Further, the court noted that lack of privity of contract is no longer a defense in a tort action against any party liable for the defective condition of a product. *Id.*

The *Suvada* court embraced the position expressed in the *Restatement (Second) of Torts*, which states the following:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1964).

51. *Suvada*, 210 N.E.2d at 186.

52. *Id.*

liability based upon the placing into commerce of a product which if defective, is likely to be unreasonably dangerous under normal use' "[53] and should " 'trace back to the originally responsible party.' "[54]

Three theories have commonly been used to support the application of strict liability in product cases.[55] First, the one who puts the product into the stream of commerce is in the best position to bear the cost of accidents caused by defective products.[56] Furthermore, the manufacturer can shift the cost of accidents to consumers by charging higher prices.[57] Second, strict liability helps to deter the manufacture of defective products.[58] Third, it is especially difficult and expensive for plaintiffs to prove negligence in the sale and manufacture of a defective product.[59]

D. Application of the Principles of Indemnity, Contribution, and Strict Liability by Illinois Courts

1. The No-Contribution Rule

The rule against contribution among tortfeasors originated in 1799 in the case of *Merryweather v. Nixan.*[60] In *Merryweather,* two defendants acted together in the conversion of the plaintiff's property.[61] The defendant who was held accountable for the entire judgment sought contribution from his partner in the endeavor.[62] The court rejected his claim for contribution, holding that contribution

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> [I]t seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and . . . compelling in cases involving . . . products, where the defective condition makes them unreasonably dangerous to the user.

Id.

53. Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 338 N.E.2d 857, 860 (Ill. 1975). This case was a strict liability indemnity case in which the court refused to apply principles of active/passive indemnity and concluded that the manufacturer of a defective product could not shift the burden of loss to a subsequent commercial user of the product. *Id.*

54. *Id.* (quoting 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4)(b)(i)).

55. *See* KEETON ET AL., *supra* note 10, § 98, at 692.

56. *Id.* at 692-93.

57. *Id.* at 693.

58. *Id.* Some argue, however, that strict liability may not induce any greater standard of care than simple negligence and that the major impact of strict liability is a chilling effect upon the development of new products. *Id.*

59. *Id.*

60. 101 Eng. Rep. 1337 (K.B. 1799).

61. *Id.* at 1337.

62. *Id.*

between two parties liable in tort was impermissible.[63] However, at the time that *Merryweather* was decided, the term "tort" only referred to an intentional act;[64] it did not encompass acts of negligence.[65]

When American courts originally embraced the no-contribution rule, they restricted its application to cases involving defendants who sought contribution from each other after the commission of an intentional act.[66] Eventually, however, a vast majority of American courts extended the no-contribution rule to all tort cases.[67] The Illinois Supreme Court adopted the no-contribution rule in 1856.[68]

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63. *Id.*

64. Alley, *supra* note 14, at 635.

65. *See* Theodore W. Reath, *Contribution between Persons Jointly Charged for Negligence* — Merryweather v. Nixan, 12 HARV. L. REV. 176 (1898). Reath states:

> In considering the facts of *Merryweather v. Nixan*, and in applying that decision, it is important to bear in mind that the meaning of the word "tort" at the time of the decision in 1799 was limited and narrow. None of the early writers, such as Bacon, accurately defined torts, but the actions which they treat as torts are practically all actions such as batteries, slanders, etc., which were, of course, wilful or intentional wrongs. At that time the word "tort" had not come to be applied to the vast number of *quasi delicts* now known and classified as actions sounding in tort and arising out of mere negligence or unintentional injury.

Id. at 178.

66. KEETON ET AL., *supra* note 10, § 50, at 337; *see* Hunt v. Lane, 9 Ind. 248 (1857); Peck v. Ellis, 2 Johns. Ch. 131 (N.Y. Ch. 1816); Rhea v. White, 40 Tenn. (3 Head) 121 (1859); Atkins v. Johnson, 43 Vt. 78 (1870).

67. *See* KEETON ET AL., *supra* note 10, § 50, at 337.

> The great majority of our courts proceeded to apply [the no-contribution rule] generally, and refused to permit contribution even where independent, although concurrent, negligence had contributed to a single result. Until the 1970s — for a period of more than a century — only nine American jurisdictions came to the contrary conclusion, allowing contribution without legislation.

Id.; *see also* Reath, *supra* note 65, at 177 ("It is singularly unfortunate, and has led to misunderstanding, that Merryweather v. Nixan should have been continually treated as stating the 'general rule.' As a matter of fact that case states not the rule, but the exception.").

68. *See* Nelson v. Cook, 17 Ill. 443, 449 (1856) ("The principle laid down in *Merryweather v. Nixan*, . . . that there is no right of contribution as between tort-feasors . . . has been, and still is, recognized as unquestionable law."); *see also* Skala v. Lehon, 175 N.E.2d 832, 833 (Ill. 1931) ("It is true, as a general rule, that the right of contribution does not exist as between joint tort-feasors where there is concerted action in the commission of the wrong."); Consolidated Ice Mach. Co. v. Keifer, 25 N.E. 799, 802 (Ill. 1890) ("There can . . . be no apportionment of damages, as between the several parties whose negligent acts and conduct have contributed to the injury, nor can one of the wrongdoers compel contribution from the others."); Johnson v. Chicago & Pac. Elevator Co., 105 Ill. 462, 468 (1882) ("[T]here is no right of contribution between wrongdoers."). *But see* Farwell v. Becker, 21 N.E. 792 (Ill. 1889) (holding that the rule prohibiting contribution was limited to contribution among intentional wrongdoers or wrongdoers who knew that their acts were unlawful). In *Farwell*, a group of creditors negligently converted the chattel of a third person. *Id.* at 792. The court held that the one creditor who was forced to satisfy the entire judgment was entitled to contribution in equal shares from the other creditors. *Id.* at 794.

2. Miller v. DeWitt: *Indemnity against an Employer Upheld in Illinois*

Although Illinois refused to allow contribution between tortfeasors, indemnity was available to tortfeasors seeking to place the responsibility for payment of a plaintiff's damages elsewhere. In *Miller v. DeWitt*,[69] the plaintiffs sustained injuries when the roof of a school gymnasium on which they were working collapsed.[70] The plaintiffs sued the supervising architects and the school district which, in turn, filed a third-party indemnity action against the plaintiffs' employer.[71] The court rejected the employer's contention that the third-party action was precluded by sections five and eleven of the Workers' Compensation Act.[72] The court held that an actively negligent employer could be liable for indemnity to a third party who was not actively negligent, notwithstanding the limitations established by the Workers' Compensation Act.[73] The court was concerned that "unless a third party who has not been guilty of active negligence can succeed in an action against an employer who has been guilty of active negligence, the third party will be made to bear the ultimate burden of a loss which should fall on the employer."[74] In *Miller*, the amount of the employer's liability was not limited by the amount of the workers' compensation benefits paid by the employer.[75]

3. Skinner v. Reed-Prentice Division Package Machinery Co.: *The Abolition of the No-Contribution Rule in Illinois*

The no-contribution rule was abolished by the Illinois Supreme Court in *Skinner v. Reed-Prentice Division Package Machinery*

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69. 226 N.E.2d 630 (Ill. 1967).

70. *Id.* at 633.

71. *Id.* The architects and the school district sought indemnity from the employer pursuant to the doctrine of active/passive indemnity. *Id.* at 640.

72. ILL. REV. STAT. ch. 48, paras. 138.5(a), 138.11 (1991) (820 ILCS 35/5(A), 35/11 (1992)). The employer argued that since an employer's only responsibility to an injured employee is the payment of workers' compensation benefits, allowing a third-party action would make the employer indirectly liable in tort to the employee even though it could not be liable directly. *Miller*, 226 N.E.2d at 640.

73. *Miller*, 226 N.E.2d at 641-42. The court stated that "the argument in favor of allowing a third party who was not actively negligent to obtain indemnification from an employer who was actively negligent is the better view." *Id.* at 640.

74. *Id.* at 641.

75. *Id.* at 640.

Co.[76] The plaintiff in *Skinner* was an employee injured in an accident involving an injection molding machine.[77] He brought an action against the manufacturer of the machine under a strict liability theory.[78] The defendant manufacturer then filed a third-party action seeking contribution from the employer.[79] The Illinois Supreme Court held that a defendant manufacturer sued in strict liability had a right of contribution against the injured worker's employer whose conduct contributed to the worker's injuries.[80]

This decision represented a major departure from previous Illinois law, which had staunchly followed the principle laid down in *Merryweather v. Nixan*[81] that there is no right of contribution among tortfeasors.[82] Prior to *Skinner*, the only possible right a tortfeasor could have exercised against another tortfeasor was indemnity.[83] The principal objection to permitting contribution among tortfeasors was the use of the courts for the benefit of wrongdoers.[84] The *Skinner* court held that although this objection may have had merit when *Merryweather* was decided,[85] it was no longer proper support for the no-contribution rule.[86] The court found no valid reason for the continued existence of the no-contribution rule and recognized that there were many compelling arguments against it.[87] The court noted its agreement with Dean Prosser that

> "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident

76. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).
77. *Id.* at 438.
78. *Id.*
79. *Id.*
80. *Id.*
81. 101 Eng. Rep. 1337 (K.B. 1799).
82. *See* Carver v. Grossman, 305 N.E.2d 161 (Ill. 1973); Reese v. Chicago, Burlington & Quincy R.R., 303 N.E.2d 382 (Ill. 1973); Muhlbauer v. Kruzel, 234 N.E.2d 790 (Ill. 1968); Miller v. DeWitt, 226 N.E.2d 630 (Ill. 1967); Chicago & Ill. Midland Ry. v. Evans Constr. Co., 208 N.E.2d 573 (Ill. 1965); John Griffiths & Son Co. v. National Fireproofing Co., 141 N.E. 739 (Ill. 1923); Johnson v. Chicago & Pac. Elevator Co., 105 Ill. 462 (1882).
83. *See, e.g., Carver*, 305 N.E.2d at 162-63.
84. *Reese*, 303 N.E.2d at 386.
85. At that time, the term "tortfeasors" meant intentional wrongdoers. That meaning was not as broad as it is now that the term includes negligence and strict liability tortfeasors. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 442 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).
86. *Id.*
87. *Id.*

> of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free."[88]

Skinner also stirred debate because it allowed a strict liability defendant to seek contribution from another party. *Skinner* mitigated the positive public policy effects of strict liability in product cases because it divided the liability for injuries caused by defective products.[89] It allocated the loss by permitting a strictly liable manufacturer who placed a defective product into the stream of commerce to receive contribution from a party not involved in the product's manufacture.[90]

In *Skinner,* the court decided that the employer's immunity provided by the Workers' Compensation Act did not operate as a bar to the contribution action. The Workers' Compensation Act clearly states that the compensation provided in the Act shall be the full measure of the employer's responsibility when an employee is injured.[91] Nevertheless, the court placed no limitations on the amount for which the employer could be liable in contribution. Instead, the court mandated that "ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them."[92]

4. *The Illinois Contribution Act*

Less than two years after the Illinois Supreme Court's decision in *Skinner,* the Illinois legislature passed the Contribution Act.[93] This Act provides that a tortfeasor who has paid more than his pro rata share of the common liability[94] to the plaintiff has a right to contribution from another tortfeasor who is subject to liability in tort to the plaintiff for the same injury.[95] No tortfeasor is required to pay

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88. *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 307 (4th ed. 1971)).

89. *See* Susan H. Maynard, Note, Skinner v. Reed-Prentice: *The Application of Contribution to Strict Product Liability,* 12 J. MARSHALL J. PRAC. & PROC. 165, 175 (1978).

90. *Id.*

91. ILL. REV. STAT. ch. 48, para. 138.11 (1991) (820 ILCS 35/11 (1992)).

92. *Skinner,* 374 N.E.2d at 442.

93. ILL. REV. STAT. ch. 70, paras. 301-305 (1991) (740 ILCS 100/1-100/5 (1992)).

94. A tortfeasor's pro rata share of the common liability is based on the relative degree to which the conduct of the tortfeasor proximately caused the plaintiff's injuries. *Id.* para. 303 (740 ILCS 100/3 (1992)). *See* Doyle v. Rhodes, 461 N.E.2d 382, 389 (Ill. 1984).

95. ILL. REV. STAT. ch. 70, para. 302(a) & (b) (740 ILCS 100/2(a) & (b) (1992)). A tortfeasor can only have a right to contribution from another tortfeasor if it is jointly and severally

contribution in excess of his own pro rata share of the common liability unless one of the joint tortfeasors is insolvent or his portion is otherwise uncollectible.[96] In that case, the remaining tortfeasors must pay, in their proportionate share, the insolvent tortfeasor's portion of the damages.[97]

The operation of the Contribution Act was modified by passage of section 2-1117 of the Illinois Code of Civil Procedure.[98] This section altered the doctrine of joint and several liability in Illinois.[99] Before this section was passed, all defendants who were liable to the plaintiff were jointly and severally liable for the plaintiff's damages. Thus, if the party most responsible for the plaintiff's injury could not satisfy the judgment, a wealthy defendant who was only marginally negligent might be forced to pay all of the plaintiff's damages.

Section 2-1117 provides that a defendant who is liable for less than twenty-five percent of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third-party defendant who could have been sued by the plaintiff shall only be severally liable for the plaintiff's damages (i.e., only liable for his pro rata share).[100] Therefore, a defendant is jointly and severally liable for all of the plaintiff's damages only when a defendant's fault is determined to be twenty-five percent or greater.[101]

Courts originally interpreted the Contribution Act as having changed the right to contribution as it was created under *Skinner*.[102] In *Skinner*, the court decided that "[t]he fact that the employee's action against the employer is barred by the Workmen's Compensation Act would not preclude the [joint tortfeasor's] third-party action against the employer for indemnification and should not serve to bar its action for contribution."[103] However, an Illinois appellate court, in *Lake Motor Freight, Inc. v. Randy Trucking, Inc.*,[104] de-

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liable to the plaintiff. *See* Walsh & Doherty, *supra* note 29, at 124. "It makes no sense for a defendant who is not jointly liable to pursue a contribution action because, by definition, that defendant is not liable for 'more than its share' of damages." *Id.*

96. ILL. REV. STAT. ch. 70, para. 303 (740 ILCS 100/3 (1992)).

97. *Id.*

98. ILL. REV. STAT. ch. 110, para. 2-1117 (1991) (735 ILCS 52-1117 (1992)).

99. Section 2-1117 applies to cases involving bodily injury, death, or property damage based on negligence, or product liability based on strict liability. *Id.*

100. *Id.* All defendants found liable, however, remain jointly and severally liable for the plaintiff's medical expenses. *Id.*

101. *Id.*

102. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

103. *Id.* at 443 (citations omitted).

104. 455 N.E.2d 222 (Ill. App. Ct. 1983).

cided that the Illinois legislature's choice of wording in the Contribution Act (i.e., "subject to liability in tort"[105]) changed the right to contribution. The court decided that when an injury is compensable under the Workers' Compensation Act, the employer is not "subject to liability in tort" for the employee's injury.[106] Thus, the employer is not liable for contribution under the Contribution Act.[107] The court based its decision on the theory that the liability of the employer is not liability in tort, but liability imposed by law " 'in the nature of an implied contract by reason of the relation of the parties or the existence of an obligation or duty.' "[108]

5. Doyle v. Rhodes: Skinner *Reaffirmed*

In *Doyle v. Rhodes*,[109] the Illinois Supreme Court rejected the approach taken by the appellate court in *Lake Motor Freight*.[110] The plaintiff in *Doyle* was a highway flagman who was injured when he was struck by an automobile driven by the defendant.[111] After the plaintiff sued the defendant, the defendant filed a third-party complaint for contribution against the highway contractor that employed the plaintiff, alleging that the contractor had violated provisions of the Road Construction Injuries Act.[112] The employer argued that the Contribution Act did not apply because the employer was not "subject to liability in tort" to its employee and therefore no recovery could be had against the employer.[113]

The Illinois Supreme Court found that the Contribution Act was intended to codify, not modify, the Illinois Supreme Court's decision in *Skinner v. Reed-Prentice Division Package Machinery Co.*,[114] which had allowed a contribution action against an employer for injuries to its employee.[115] The *Doyle* court held that an employer is "subject to liability in tort" to an injured employee and thus liable

105. ILL. REV. STAT. ch. 70, para. 302(a) (1991) (740 ILCS 10/2(a) (1992)).
106. 455 N.E.2d at 224.
107. *Id.*
108. *Id.* (quoting Keller v. Industrial Comm'n, 183 N.E.2d 237 (Ill. 1932)).
109. 461 N.E.2d 382 (Ill. 1984).
110. 455 N.E.2d 222 (Ill. App. Ct. 1983).
111. 461 N.E.2d at 384.
112. ILL. REV. STAT. ch. 121, para. 314.1 (1991) (430 ILCS 15/1 (1992)).
113. *Doyle*, 461 N.E.2d at 384.
114. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).
115. *Doyle*, 461 N.E.2d at 385-86. "The phrase 'subject to liability in tort' [is not] inconsistent with the legislature's expressed desire to codify the *Skinner* decision . . . ." *Id.* at 388.

in contribution to a third party sued by that employee.[116] The court explained that although the exclusive remedy provision of section five of the Workers' Compensation Act provides the employer with a defense against any action that may be asserted by its employee, the defense is an affirmative one subject to being raised and proven.[117] In other words, the employer immunity provided by sections five and eleven of the Workers' Compensation Act is only a procedural bar to a direct suit by an employee against his employer. Under this rationale, the plaintiff still maintains a substantive cause of action against his employer.

The court decided that the focus of the Contribution Act is the culpability of the parties rather than the precise legal means by which the plaintiff is ultimately able to get compensation from a defendant.[118] It interpreted the intent of the contribution statute to "reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege."[119] On that basis, the court held that according to the Contribution Act, the employer's immunity from direct suit in tort by its employee as plaintiff is not a bar to a claim for contribution against it by a defendant held liable to such a plaintiff.[120] Therefore, a third-party defendant is liable for contribution as long as the plain-

116. *Id.* at 385-86.

117. *Id.* at 386. The court suggested that if the employer did not raise the immunity as an affirmative defense, the defense was waived. *Id.*

118. *Id.* at 388.

119. *Id.* at 386. Illinois courts reached the same result when dealing with the conflict between the right of contribution and the parent-child and the interspousal immunities. (Note that spousal immunity no longer exists in Illinois. ILL. REV. STAT. ch. 40, para. 1001 (1991) (750 ILCS 65/1 (1992)).) *See* Hartigan v. Beery, 470 N.E.2d 571, 572 (Ill. App. Ct. 1984) ("This court has recently noted that Illinois courts, when balancing the right of contribution with a conflicting immunity, have generally found that the law of contribution must prevail."); Moon v. Thompson, 469 N.E.2d 365, 368 (Ill. App. Ct. 1984) ("[W]e do not believe that the rationale underlying the parental tort immunity doctrine was sufficient to prevail over the allowance of an action for contribution in the case at bar."); Larson v. Buschkamp, 435 N.E.2d 221 (Ill. App. Ct. 1982) (holding that parent-child immunity did not bar a third-party action for contribution against an injured minor plaintiff's parent whose alleged negligence in operating a car allegedly contributed to the minor's injuries); Wirth v. City of Highland Park, 430 N.E.2d 236, 252 (Ill. App. Ct. 1981) (holding that interspousal tort immunity did not preclude a third-party action for contribution against the plaintiff's spouse even though the plaintiff was barred from suing her spouse directly). *But see* Duensing v. Tripp, 596 F. Supp. 389, 392 (S.D. Ill. 1984) (holding that there was no right of contribution against a minor's mother because Illinois does not recognize the tort of negligent supervision, and thus the mother was not subject to liability in tort). Note further that two Illinois courts have held that contribution may not be sought from a governmental unit when sovereign immunity is involved. Martin v. Lion Uniform Co., 536 N.E.2d 736, 743 (Ill. App. Ct. 1989); Stephens v. Cozadd, 512 N.E.2d 812, 816 (Ill. App. Ct. 1987).

120. *Doyle*, 461 N.E.2d at 388.

tiff has a substantive cause of action against the third-party defendant, thus making him "subject to liability in tort."[121]

In *Doyle,* as in *Skinner,* no limitations were placed on the amount the employer could be required to contribute other than its statutory "pro rata share."[122] The *Doyle* court did note in its holding that some "accommodation" between the Workers' Compensation Act and the Contribution Act may be necessary.[123] However, the court appeared only to address the employer's right of recoupment under the Workers' Compensation Act.[124] Other than raising this cautionary signal, the Illinois Supreme Court declined to address the issue and left employers liable for contribution limited only by their relative culpability.

E. Minnesota Law: The Model for Kotecki

The vast majority of other states (forty-five) do not allow a contribution action against an employer brought by a defendant sued in tort by an injured employee.[125] The rationale for this position is that

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121. *See* ILL. REV. STAT. ch. 70, para. 302(a) (740 ILCS 100/2(a) (1992)).

122. *See id.* paras. 302(b), 303 (740 ILCS 100/2(b), 100/3 (1992)).

123. *Doyle,* 461 N.E.2d at 389.

124. *Id.* If an employee injured at work also recovers damages from a separate tort action against a third party arising from the injury, the employer has a right to recoup the statutory benefits under the Workers' Compensation Act that it paid to the employee. ILL. REV. STAT. ch. 48, para. 138.5(b) (1991) (820 ILCS 35/5(b) (1992)). See *supra* notes 42 and 43 for the pertinent wording of this section.

125. *See* Kessler v. Bowie Mach. Works, 501 F.2d 617 (8th Cir. 1974) (South Dakota law); Stringfellow v. Reed, 739 F. Supp. 324 (S.D. Miss. 1990); O'Brien v. Tri-State Oil Tool Indus., Inc., 566 F. Supp. 1119 (S.D. W. Va. 1983); Paul Krebs & Assocs. v. Matthews & Fritts Constr. Co., 356 So. 2d 638 (Ala. 1978); Lake v. Construction Mach., Inc., 787 P.2d 1027 (Alaska 1990); Desert Steel Co. v. Superior Court, 526 P.2d 1077 (Ariz. Ct. App. 1974); W.M. Bashlin Co. v. Smith, 643 S.W.2d 526 (Ark. 1982); Witt v. Jackson, 366 P.2d 641 (Cal. 1961) (en banc); Public Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981) (en banc); Therrien v. Safeguard Mfg. Co., 408 A.2d 273 (Conn. Super. Ct. 1979); Powell v. Interstate Vendaway, Inc., 300 A.2d 241 (Del. Super. Ct. 1972); Houdaille Indus. v. Edwards, 374 So. 2d 490 (Fla. 1979); J.R. Mabbett & Son, Inc. v. Ripley, 365 S.E.2d 155 (Ga. Ct. App. 1988); Hanagami v. China Airlines, Ltd., 688 P.2d 1139 (Haw. 1984); Elcona Homes Corp. v. McMillan Bloedell, Ltd., 475 N.E.2d 713 (Ind. Ct. App. 1985); Mermigis v. Servicemaster Indus., Inc., 437 N.W.2d 242 (Iowa 1989); Houk v. Arrow Drilling Co., 439 P.2d 146 (Kan. 1968); Gros v. Steen Prod. Serv., Inc., 197 So. 2d 356 (La. Ct. App. 1967); Roberts v. American Chain & Cable Co., 259 A.2d 43 (Me. 1969); Baltimore Transit Co. v. State, 39 A.2d 858 (Md. 1944); Correia v. Firestone Tire & Rubber Co., 446 N.E.2d 1033 (Mass. 1983); Downie v. Kent Prods., Inc., 362 N.W.2d 605 (Mich. 1984); State *ex rel.* Hillyard Chem. Co. v. Schoenlaub, 610 S.W.2d 957 (Mo. 1981); Cordier v. Stetson-Ross, Inc., 604 P.2d 86 (Mont. 1979); Vangreen v. Interstate Mach. & Supply Co., 246 N.W.2d 652 (Neb. 1976); Outboard Marine Corp. v. Schupbach, 561 P.2d 450 (Nev. 1977); William H. Field Co. v. Nuroco Woodwork, Inc., 348 A.2d 716 (N.H. 1975); Beal v. Southern Union Gas Co., 304 P.2d 566 (N.M. 1956); Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768 (N.C. 1953); Barry v. Baker Elec. Coop., Inc., 354 N.W.2d 666 (N.D. 1984); Ramos v. Browning Ferris

the employer is not liable to the employee in tort because of the immunity provided to employers by workers' compensation statutes.[126] In these jurisdictions, the employer cannot be a joint tortfeasor and therefore cannot be liable for contribution.[127]

Only New York allows a defendant unlimited contribution from negligent employers.[128] Minnesota also provides an exception to the general rule. There, employers may be liable for contribution only to the extent of their workers' compensation liability.[129] The Illinois Supreme Court used the Minnesota Supreme Court's decision in *Lambertson v. Cincinnati Corp.*[130] as a model for its decision in *Kotecki v. Cyclops Welding Corp.* Therefore, a discussion of *Lambertson* and the decisions that follow it is of particular interest to Illinois observers attempting to analyze the impact of *Kotecki.*

Originally, Minnesota was in line with the majority position. For example, in *Hendrickson v. Minnesota Power & Light Co.,*[131] an employee was killed by contact with power lines.[132] The decedent's dependents recovered workers' compensation benefits from the decedent's employer and then filed a wrongful death action against the power company.[133] The power company brought a third-party action seeking contribution from the decedent's employer.[134] The court affirmed the dismissal of the third-party complaint, holding that the Workers' Compensation Act barred a defendant from seeking contribution from an employer where the concurrent negligence of the

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Indus. of South Jersey, Inc., 510 A.2d 1152 (N.J. 1986); Taylor v. Academy Iron & Metal Co., 522 N.E.2d 464 (Ohio 1988); Harter Concrete Prods., Inc. v. Harris, 592 P.2d 526 (Okla. 1979); Roberts v. Gray's Crane & Rigging, Inc., 697 P.2d 985 (Or. Ct. App. 1985); Beary v. Container Gen. Corp. 568 A.2d 190 (Pa. Super. Ct. 1989); Iorio v. Chin, 446 A.2d 1021 (R.I. 1982); Knight v. Autumn Co., 245 S.E.2d 602 (S.C. 1978); Rupe v. Durbin Durco, Inc., 557 S.W.2d 742 (Tenn. Ct. App. 1976), *overruled on other grounds by* Crosslin v. Alsup, 594 S.W.2d 379 (Tenn. 1980); Varela v. American Petrofina Co., 658 S.W.2d 561 (Tex. 1983); Curtis v. Harmon Elec., Inc., 552 P.2d 117 (Utah 1976); Hiltz v. John Deere Indus. Equip. Co., 497 A.2d 748 (Vt. 1985); Virginia Elec. & Power Co. v. Wilson, 277 S.E.2d 149 (Va. 1981); Glass v. Stahl Specialty Co., 652 P.2d 948 (Wash. 1982) (en banc); Jenkins v. Sabourin, 311 N.W.2d 600 (Wis. 1981); Mauch v. Stanley Structures, Inc., 641 P.2d 1247 (Wyo. 1982).

126. 1 LARSON, *supra* note 1, § 76.20.

127. 1 *id.*

128. *See* Dole v. Dow Chem. Co., 282 N.E.2d 288 (N.Y. 1972).

129. Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977). The Minnesota approach was adopted by statute in Kentucky, KY. REV. STAT. ANN. § 342.690(1) (Michie/Bobbs-Merrill 1983); and Idaho, IDAHO CODE § 72-209(2) (1989).

130. 257 N.W.2d 679 (Minn. 1977).

131. 104 N.W.2d 843 (Minn. 1960).

132. *Id.* at 846.

133. *Id.*

134. *Id.*

employer and a third party caused injury to the employee.[135] The court reasoned that because workers' compensation statutes represent the sole liability of the employer to the employee, there can be no common liability shared by the employer and the third party.[136] Therefore, since there can be no right of contribution without common liability, there is no basis for a right of contribution.[137]

In 1977, in *Lambertson v. Cincinnati Corp.*,[138] the Minnesota Supreme Court rejected the reasoning of the *Hendrickson* court. In *Lambertson,* the plaintiff suffered a crushed left forearm in a work-related accident involving a press brake.[139] After receiving workers' compensation benefits from his employer, the plaintiff brought an action in tort against the manufacturer of the press brake.[140] The manufacturer, in turn, sought contribution from the plaintiff's employer, alleging that the employer was negligent in declining to install new safety devices in the press brake that were offered to the employer by the manufacturer prior to the accident.[141]

The court ruled that the best way to balance the competing interests[142] was to allow the manufacturer contribution from the employer limited by the employer's workers' compensation liability to the employee.[143] The court deemed this approach the most equitable approach because it allowed the third party limited contribution

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135. *Id.* at 849.

136. *Id.*

137. *Id.*

138. 257 N.W.2d 679 (Minn. 1977). See Michael K. Steenson, *The Anatomy of Products Liability in Minnesota: Principles of Loss Allocation,* 6 WM. MITCHELL L. REV. 243, 285-309 (1980), for an excellent discussion of *Lambertson.*

139. 257 N.W.2d at 682.

140. *Id.* The jury found all parties negligent to the following degrees: Plaintiff — 15%; Cincinnati Corp. (manufacturer) — 25%; Hutchinson (employer) — 60%. Judgment was entered against the manufacturer for $34,000, the full amount of the verdict, less 15% due to the plaintiff's comparative negligence. *Id.* at 683.

141. *Id.*

142. The court described these interests as follows:

> In summary, the interests of the respective parties in the workers' compensation system are . . . as follows: The employer has a primary interest in limiting his payment for employee injury to the workers' compensation schedule and a secondary interest in receiving reimbursement when a third party has caused him to incur obligations to his employee. The employee has a primary interest in receiving full workers' compensation benefits and, to the extent a third party has caused him injury, a common-law recovery from that third party.
>
> In contrast, the third party's interest is that of any other co-tortfeasor — to limit its liability to no more than its established fault.

Id. at 685 (citation omitted).

143. *Id.* at 689.

while still preserving the employer's interest in limiting its liability to the workers' compensation benefits paid.[144] The court reasoned that there could be a right of contribution against an employer because, although there was no common liability in tort, the employer and the third party were both liable to the plaintiff for his injuries, the third party in tort, and the employer by statute.[145]

One major consequence of the *Lambertson* decision is that it placed the weighty burden of preserving the employer's immunity from tort actions on a third party who may only be marginally culpable for the plaintiff's injuries. The potential for inequity under the *Lambertson* rule was clearly illustrated in *Hahn v. Tri-Line Farmers Co-op.*[146] In *Hahn,* the plaintiff sustained injuries while moving a grain auger manufactured by Hutchinson Wil-Rich, Inc. (Hutchinson).[147] Hutchinson brought a third-party action for contribution against the plaintiff's employer, Tri-Line Farmers Co-op (Tri-Line). The jury awarded the plaintiff $2,197,918, finding that the employer, Tri-Line, was ninety-five percent at fault, the plaintiff was two percent at fault, and the manufacturer, Hutchinson, was *only three percent at fault.*[148] Nevertheless, because the employer's contribution liability was limited by the amount of workers' compensation benefits he paid the employee,[149] Hutchinson was forced to pay damages of $1,610,515, even though the jury had found that its conduct accounted for only three percent of the fault for the plaintiff's injuries.[150]

Although *Lambertson* decided that a limit would be placed on the employer's contribution liability, it did not address how the loss should be apportioned between the employer, the employee, and the third-party tortfeasor.[151] The Minnesota Supreme Court developed a procedure for this apportionment in the case of *Johnson v. Raske Building Systems, Inc.*[152] There, the court specified that the original

144. *Id.* The court stated that any further reform must come from the legislature. *Id.*

145. *Id.* at 688.

146. 478 N.W.2d 515 (Minn. Ct. App. 1991).

147. *Id.* at 519.

148. *Id.*

149. The employer had paid $543,445 in workers' compensation benefits to the plaintiff, which represented the employer's maximum liability for contribution. *Id.*

150. *Id.* Hutchinson's proportionate share of the damages, equal to its percentage share of the fault, was only $65,938. *Id.* at 520.

151. David C. Bohrer, *Northern Exposure: Minnesota Solutions to Unanswered* Kotecki *Questions,* 80 ILL. B.J. 118, 119 (1992).

152. 276 N.W.2d 79 (Minn. 1979). In this case, the plaintiff's decedent, an employee of N.H.

defendant should first pay the entire verdict to the plaintiff.[153] The employer should then pay contribution to the original defendant in an amount proportionate to its percentage of negligence, but not to exceed the amount of workers' compensation benefits payable to the employee.[154] The employee should then reimburse the employer for the compensation benefits paid.[155] Since the amount of reimbursement to the employer was exactly equal to the amount of contribution paid by the employer, the effective result was that "no money [would] change hands."[156] Thus, the result in *Johnson* was consistent with the intent of *Lambertson*.[157] This result was also consistent with the Minnesota Workers' Compensation Act[158] as it existed at that time.

However, in 1976, the Minnesota legislature amended the Minnesota Workers' Compensation Act to allow a reduction in the amount of reimbursement the employee was to pay to the employer.[159] This

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Sandberg Erection Co., died in a work-related accident on a construction site where Raske Building Systems, Inc. and H.K. Ferguson were general contractors. *Id.* at 79-80. The decedent's beneficiaries received $41,000 in workers' compensation benefits and then brought a wrongful death action against the general contractors, alleging negligence. *Id.* at 80. The jury set the plaintiff's damages at $105,000 and found the plaintiff's decedent 5% negligent, the employer 40% negligent, and the general contractors 55% negligent. *Id.*

153. *Id.* at 81.

154. *Id.*

155. *Id.*

156. *Id.*

157. The *Lambertson* court decided that the amount of contribution was limited to the lesser of either the percentage of the judgment owed or the employer's workers' compensation liability. Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 689 (Minn. 1977).

158. The Act provided in pertinent part:

> The proceeds of all actions for damages or settlement thereof under section 176.061, received by the injured employee . . . shall be divided as follows:
> (a) After deducting the reasonable cost of collection, including but not limited to attorneys fees and burial expenses in excess of the statutory liability, then
> (b) One-third of the remainder shall in any event be paid to the injured employee or his dependent, without being subject to any right of subrogation.
> (c) Out of the balance remaining, the employer shall be reimbursed for all compensation paid under chapter 176.
> (d) Any balance remaining shall be paid to the employee or his dependents, and shall be a credit to the employer for any compensation which employer is obligated to pay, but has not been paid, and for any compensation that such employer shall be obligated to make in the future.

MINN. STAT. § 176.061(6) (Supp. 1975).

159. The 1976 amendment reads as follows:

> Out of the balance remaining, the employer shall be reimbursed in an amount equal to all compensation paid under chapter 176 to the employee or his dependents by the employer less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or his dependents from the other party multiplied by all compensation paid by the employer to the employee or his dependents.

reduction was designed to reimburse the employee for a percentage of the amount of attorneys' fees and costs spent in the employee's tort action.[160] As one court explained, "The purpose of this provision is to ensure that those benefitted by the recovery share equitably in the cost of obtaining that recovery."[161] This amendment created the question of whether an employer's contribution liability should be equal to the amount of workers' compensation benefits paid to the employee or the amount that the employer is reimbursed from the employee after a recovery in a tort action.

The Minnesota Supreme Court, in accordance with the amendment, changed the scheme for apportionment of a verdict that it had laid out in *Johnson v. Raske Building Systems, Inc.*[162] In *Kordosky v. Conway Fire and Safety, Inc.*,[163] the court held that the employer's contribution liability was equal to the amount of workers' compensation benefits that it paid to the injured employee.[164] Because of the differential between the reduced right of lien recovery under the 1976 amendment and the need to pay the full amount of compensation as contribution, the employer lost money in the exchange.[165] The court noted that although its result did not "fully

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MINN. STAT. § 176.061(6)(c) (1992).

160. Kordosky v. Conway Fire & Safety, Inc., 304 N.W.2d 616, 620 (Minn. 1981).

161. Cronen v. Wegdahl Coop. Elevator Ass'n, 278 N.W.2d 102, 104 (Minn. 1979).

162. 276 N.W.2d 79, 81 (Minn. 1979).

163. 304 N.W.2d 616 (Minn. 1981).

164. *Id.* at 620-21. But see *Horton v. Orbeth*, where the court stated:

> [W]hile *Lambertson* speaks in terms of contribution, the real impact of the decision was the limitation of a negligent employer's right of subrogation. . . . In short, contribution was merely a vehicle for offsetting a negligent employer's right of subrogation. . . . [T]he effect of the decision . . . in *Lambertson* was to deny a negligent employer a right of reimbursement with respect to his statutory liability to the extent of the employer's proportionate share of the fault.

342 N.W.2d 112 (Minn. 1984). The language of the *Horton* court appears to support the position that the employer's contribution liability should only be equal to the amount that it would be reimbursed from the injured employee.

165. In *Kordosky*, the plaintiff sustained injuries while working at a Red Owl Store when a fire extinguisher sold to Red Owl by Conway Fire and Safety fell off the wall and struck her on the shoulders and neck. 304 N.W.2d at 616-17. The jury awarded $60,000 in damages to the plaintiff and $10,000 in damages to the plaintiff's husband, finding her employer, Red Owl, 60% negligent and Conway 40% negligent. *Id.* The plaintiff had already received $21,948 in workers' compensation benefits from Red Owl. *Id.* at 618. The court held that the payment of damages should be as follows: Conway should pay the $70,000 verdict to the plaintiff, and Red Owl should contribute $21,948 to Conway. *Id.* at 620. The difference in this case, under the 1976 amendment, is that the plaintiff should only reimburse the employer $14,632, not the full amount of the workers' compensation benefits received. *Id.* The employer's contribution liability is equal to the amount of workers' compensation benefits that he paid the employee, not only the amount he is reimbursed from the employee. *Id.* at 620-21. This leaves the employer in a situation where it loses more than just

achieve the equitable goals that form[ed] the underpinning of *Lambertson*," any further fine tuning would have to be done by the legislature.[166]

Another question left open by *Lambertson* was how to define the term "workers' compensation liability" in order to determine the employer's contribution liability when, at the time of trial, the employer was still paying benefits to the injured employee. This issue was addressed by the Minnesota Supreme Court in *Wilken v. International Harvester Co.*[167] In *Wilken,* the plaintiff's employer paid workers' compensation benefits for five years preceding the judgment in the tort action and was required to continue paying benefits after judgment in the tort action.[168] The court held that an employer's liability in contribution to a third-party tortfeasor was limited by the amount of workers' compensation benefits the employer had paid and *would pay in the future* to the employee.[169] The court reasoned that to limit the employer's contribution liability to the amount of benefits paid prior to judgment would place an even greater burden on the third-party tortfeasor by requiring him to pay more than his pro rata share in order to subsidize a workers' compensation system to which he was a stranger.[170] Furthermore, to do so would fix the employer's contribution liability on the fortuity of the timing of the trial of the tort case.[171] Therefore, the court de-

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the amount of its liability in workers' compensation benefits. The employer pays workers' compensation benefits to the employee, pays an amount equal to that in contribution to the third-party tortfeasor, and then is reimbursed less than that amount from the employee. *Id.*

166. *Id.* at 621.

167. 363 N.W.2d 763 (Minn. 1985). In *Wilken,* an employee of Clark Transport Co. was injured while unloading a semi-truck onto a transport trailer. *Id.* at 765. After collecting workers' compensation benefits from his employer for five years, the employee and his wife brought tort actions against International Harvester, the manufacturer of the semi-truck, and Traffic Transport Engineering, the manufacturer of the trailer. *Id.* The manufacturers, in turn, filed third-party actions for contribution against the plaintiff's employer. *Id.* The jury awarded the plaintiff $1,250,000, attributing 75% of the fault to International Harvester, 5% to Traffic Transport, and 20% to the employer, Clark Transport. *Id.* The employer had already paid $52,660 in workers' compensation benefits but was still required to pay future benefits. *Id.* at 766. The court held that the employer's contribution liability included not only the workers' compensation benefits that it had paid, but also those that it would pay in the future. *Id.* at 767.

168. *Id.* at 766.

169. *Id.* at 767.

170. *Id.* at 766. By limiting the amount of the employer's liability and requiring the third-party tortfeasor to pay the remainder of the tort judgment in excess of what the jury has determined to be its proportionate share, the third-party tortfeasor is, in essence, being asked to pay to support the workers' compensation system. *Id.*

171. *Id.* In other words, if the employer's contribution liability was fixed by the amount of workers' compensation benefits paid at the time of trial, an early trial date would result in lower

cided that the employer's contribution liability should equal the amount that it has paid in workers' compensation benefits up until trial plus the present value of the employer's future statutory liability to the employee as of the date of the contribution judgment in the tort action.[172] Thus, the contribution claim is to be paid in a single, lump sum payment.[173]

Another issue addressed by the *Wilken* court was whether the employers' contribution liability included supplementary benefits paid to injured employees when their compensation fell below a certain percentage of the statewide average weekly wage.[174] The supplementary benefits paid by Minnesota employers came from a special fund financed by employers.[175] The court held that supplementary benefits were not to be included in determining an employer's contribution liability because they were "not a direct part of any individual employer's total workers' compensation liability to a particular employee."[176]

The Illinois Supreme Court based its decision in *Kotecki* on the Minnesota Supreme Court's decision in *Lambertson v. Cincinnati Corp.* Therefore, the foregoing discussion of *Lambertson* and its progeny lends insight into the *Kotecki* decision.

II. SUBJECT OPINION

A. Facts and Procedure

The conflict between the Contribution Act[177] and the employer

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contribution liability.

172. *Id.* at 767-68. The calculation of the present value of future workers' compensation benefits should be done by the trial court in a special interrogatory to the jury following the entry of judgment in the tort action. *Id.* at 768. *See* Bohrer, *supra* note 151, at 121.

173. *Wilken*, 363 N.W.2d at 768.

174. *Id.* at 769. In Minnesota, supplementary benefits are paid in two situations:

> (1) when an employee has been totally disabled for a designated period and his compensation rate is less than a certain percentage of the statewide average weekly wage; and (2) when the employee is permanently and totally disabled for a designated period and, because of a set-off for government old age or disability benefits received by the employee, the employer has reduced his benefit payments below the designated percentage of the statewide average weekly wage.

Id. at 768 (citations omitted).

175. *Id.* at 769 (citing MINN. STAT. § 176.132(3) (1984)). The employers finance the special fund by paying a percentage of all workers' compensation benefits paid to injured employees. *Id.* (citing MINN. STAT. § 176.129 (1984)).

176. *Id.*

177. ILL. REV. STAT. ch. 70, paras. 300 to 305 (1991).

immunity provided by the Workers' Compensation Act[178] was recently examined by the Illinois Supreme Court in *Kotecki v. Cyclops Welding Corp.*[179] In this case, the plaintiff, Mark Kotecki, was injured while working for his employer, Carus Chemical Co. (Carus).[180] Kotecki's injury occurred when he caught his hand in the motor of an agitator that was designed, constructed, and installed by the defendant, Cyclops Welding Corp. (Cyclops).[181]

Kotecki filed a personal injury action against Cyclops on a strict liability theory.[182] Cyclops, in turn, filed a third-party action for contribution against Carus alleging that it was negligent in its use and maintenance of the agitator.[183] The ad damnum clause of the third-party complaint contained a prayer for judgment against Carus "in an amount proportionate with the degree of fault attributable to Carus' culpability."[184] In response to the contribution action, Carus filed a motion to strike the ad damnum clause of the third-party complaint, alleging that section 5 of the Workers' Compensation Act, when read in conjunction with the Contribution Act, limited the amount of an employer's liability to an amount no greater than its exposure under the Workers' Compensation Act.[185]

The trial court denied the employer's motion to strike the ad damnum clause[186] but certified the question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308.[187] The Third District Appellate Court denied the employer's petition to appeal.[188] On further appeal to the Illinois Supreme Court, the employer's petition

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178. ILL. REV. STAT. ch. 48, para. 138.5(b) (1991).

179. 585 N.E.2d 1023 (Ill. 1991).

180. *Id.* at 1023.

181. *Id.*

182. *Id.*

183. *Id.* at 1023-24.

184. *Id.* at 1024.

185. *Id.*

186. The Illinois Supreme Court upheld a contribution action without any limitation in a situation analogous to this case just six years before the trial court's decision. *See* Doyle v. Rhodes, 461 N.E.2d 382 (Ill. 1984).

187. *Kotecki*, 585 N.E.2d at 1023. Supreme Court Rule 308 provides for interlocutory appeal by permission. It states in pertinent part:

> Requests. When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. . . . The Appellate Court may thereupon in its discretion allow an appeal from the order.

ILL. REV. STAT. ch. 110A, para. 308(a) (1991).

188. *Kotecki*, 585 N.E.2d at 1024.

for leave to appeal the denial of the motion to strike the ad damnum clause was granted.[189] The question certified by the trial court and considered by the Illinois Supreme Court as the sole issue on appeal was "whether an employer sued as a third-party defendant in a products liability case is liable in contribution for any amount in excess of the employer's statutory liability under the Workers' Compensation Act."[190]

B. *The Court's Opinion*

In an opinion written by Justice Moran, the Illinois Supreme Court held that the employer's liability in a contribution action was limited to its liability under the Workers' Compensation statute. The court began by discussing the decisions that first analyzed the interplay of the Workers' Compensation Act and the Contribution Act: *Skinner v. Reed-Prentice Division Package Machinery Co.*[191] and *Doyle v. Rhodes.*[192] The court noted that in *Doyle* it decided only that there was a right to contribution against employers.[193] It did not, however, decide whether that right of contribution was limited by the Workers' Compensation Act.[194] The court based this assertion on the *Doyle* court's statement that "some accommodation" between the Contribution Act and the Workers' Compensation Act may be necessary.[195]

Cyclops took the position that the court should not rule on this issue because the legislature was considering various pending bills that would resolve the conflict. The court rejected this contention, asserting that the court has a duty to act in the face of legislative inaction.[196]

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189. 545 N.E.2d 112 (Ill. 1989).

190. *Kotecki*, 585 N.E.2d at 1024.

191. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

192. 461 N.E.2d 382 (Ill. 1984).

193. *Kotecki*, 585 N.E.2d at 1025.

194. *Id.*

> We find that *Doyle* does not squarely answer the question as to the *amount* of contribution that an employer may be liable for under the Contribution Act. Rather, *Doyle* stands for the proposition that a negligent employer *is liable* for contribution to a third party, regardless of the Workers' Compensation Act.

Id.

195. *Id.; see Doyle*, 461 N.E.2d at 389 ("[W]e caution that some accommodation between these two statutes may be in order.").

196. *Kotecki*, 585 N.E.2d at 1026. The court quoted the following passage from *Alvis v. Ribar:*

> There are . . . times when there exists a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court.

The court discussed the underlying conflict that exists between the employer immunity provided by workers' compensation statutes and the right of contribution.[197] According to the court, workers' compensation was designed to be a tradeoff between employers and employees.[198] Employees would be assured of receiving a certain and prompt no-fault recovery in exchange for giving up a potentially more lucrative action in tort.[199] Employers would have to compensate every employee who was injured in the course of employment regardless of the employer's fault. In exchange, the liability of employers for employee injuries was to be limited to the benefits required by the Workers' Compensation Act.

The court noted that the operation of contribution upsets this tradeoff. If contribution against employers is allowed, the employer may be forced to pay the employee, through the third-party tortfeasor, more than is required by the Workers' Compensation Act.[200] If contribution is not allowed, the third-party tortfeasor is required to pay an amount in excess of what is commensurate with his degree of fault.[201] In other words, a stranger to the workers' compensation tradeoff is forced to pay to support a system of which

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> Such a stalemate is a manifest injustice to the public. When such a stalemate exists and the legislature has, for whatever reason, failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society.

Kotecki, 585 N.E.2d at 1026 (quoting Alvis v. Ribar, 421 N.E.2d 886, 896 (Ill. 1981)).

197. *Kotecki*, 585 N.E.2d at 1026.

> The underlying controversy concerning workers' compensation and contribution was succinctly stated by the Minnesota Supreme Court: "If contribution or indemnity is allowed, the employer may be forced to pay his employee — through the conduit of the third-party tortfeasor — an amount in excess of his statutory workers' compensation liability. This arguably thwarts the central concept behind workers' compensation, i.e., that the employer and employee receive the benefits of a guaranteed, fixed-schedule, nonfault recovery system, which then constitutes the exclusive liability of the employer to his employee. If contribution or indemnity is not allowed, a third-party stranger to the workers' compensation system is made to bear the burden of a full common-law judgment despite possibly greater fault on the part of the employer. This obvious inequity is further exacerbated by the right of the employer to recover directly or indirectly from the third party the amount he has paid in compensation regardless of the employer's own negligence. Thus, the third party is forced to subsidize a workers' compensation system in a proportion greater than his own fault and at a financial level far in excess of the workers' compensation schedule."

Id. at 1026-27 (quoting Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 684 (Minn. 1977) (citations omitted)).

198. *Id.* at 1026.

199. *Id.*

200. *Id.* at 1027.

201. *Id.*

it is not a part.

The court then addressed what it considered the major issue of the case — whether the employer should be forced to pay damages based on its degree of fault, thereby losing the protection that the Workers' Compensation Act was intended to provide.[202] The court examined the way this conflict is handled in other jurisdictions. It noted that the vast majority of jurisdictions do not allow a contribution action against an employer from a defendant sued by an injured employee.[203] Only New York allows unlimited contribution against employers.[204] In Minnesota, an employer may be liable for contribution, but only to the extent of its workers' compensation liability.[205] The Illinois Supreme Court then decided that the approach adopted by the Minnesota Supreme Court provided the "fairest and most equitable balance between the competing interests of the employer and the third-party defendant."[206] On that basis, the court reversed the decision of the trial court. It directed the trial court to strike the ad damnum clause of the third-party complaint and to permit Cyclops to seek contribution from Carus in an amount not greater than Carus's workers' compensation liability to Kotecki.[207]

C. *Dissenting Opinion upon Denial of Rehearing*

The Illinois Supreme Court denied the petition for rehearing the *Kotecki* case on December 2, 1991. On February 5, 1992, Justice Freeman filed a dissenting opinion upon the denial of rehearing after concurring in the original opinion of the court.[208] Justice Freeman disagreed with the court's decision that the Workers' Compensation Act limits a product manufacturer's right of contribution from employers for the workplace injuries suffered by employees.[209] This dissent was based largely on the fact that the issue addressed by the court was one of statutory construction and legislative intent

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202. *Id.*

203. *Id.*; *see supra* note 125 and accompanying text.

204. *Kotecki*, 585 N.E.2d at 1027; *see supra* note 128 and accompanying text.

205. *Kotecki*, 585 N.E.2d at 1027; *see supra* notes 129-45 and accompanying text (discussing the Minnesota approach).

206. *Kotecki*, 585 N.E.2d at 1027. It should be noted that the *Lambertson* decision granted Minnesota third-party plaintiffs a right of contribution against employers that they previously did not have. The *Kotecki* decision operated to restrict a right to contribution against employers that already existed.

207. *Id.* at 1028.

208. *See id.* (Freeman, J., dissenting from denial of rehearing).

209. *Id.*

(i.e., how to interpret the apparent conflict between the Workers' Compensation Act and the Contribution Act).[210] Freeman noted that the Workers' Compensation Act was enacted prior to the Contribution Act.[211] Therefore, Justice Freeman reasoned that

> it could not have been the intent of the legislature which passed the current Workers' Compensation Act to limit *to any extent* the right to contribution from an employer of a manufacturer sued by an employee injured by a defective product. It could not have been that legislature's intent to limit that right because . . . contribution did not exist in Illinois at the time of the enactment of the original Workers' Compensation Act.[212]

Thus, Freeman reasoned, it was improper for the court to give the Workers' Compensation Act the effect of reducing Carus's right of contribution against Cyclops.[213]

Justice Freeman also pointed to the court's decision in *Stephens v. McBride*[214] to dispel the argument that allowing unlimited contribution against an employer would allow an employee to do indirectly what he could not do directly because of the Worker's Compensation Act. In *Stephens,* the court held that a plaintiff's failure to comply with the notice-of-injury requirement of the Local Governmental and Governmental Employees Tort Immunity Act[215] in a lawsuit against a private individual did not bar the defendant's contribution action against a municipality.[216] The Stephens court rea-

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210. *Id.* at 1029.

211. *Kotecki,* 585 N.E.2d at 1023. The Workers' Compensation Act was enacted in 1951. The right of contribution was first recognized in Illinois in 1977 by the Illinois Supreme Court's decision in Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied,* 436 U.S. 946 (1978).

212. *Kotecki,* 585 N.E.2d at 1029 (Freeman, J., dissenting from denial of rehearing).

213. *Id.*

214. 455 N.E.2d 54 (Ill. 1983). In *Stephens,* the plaintiff's motorcycle and the defendant's automobile collided at an intersection. *Id.* at 55. The defendant filed a third-party action for contribution against the Village of Maywood alleging that the village maintained shrubbery at the corner which obstructed motorists' vision. *Id.* at 56. The court reasoned that the village was liable for contribution because it was "subject to liability in tort" at the time the plaintiff was injured. *Id.* at 57. "[L]iability is determined at the time of the injury out of which the right of contribution arises, and not at the time the action for contribution is brought." *Id.*

215. ILL. REV. STAT. ch. 85, para. 8-102 (1991) (repealed Nov. 25, 1986).

216. *Stephens,* 455 N.E.2d at 59-60.

> [O]ur decision here does not permit the injured plaintiff to recover indirectly from the governmental entity although he is precluded from directly recovering from it. . . . [T]he doctrine of joint and several liability allows the plaintiff to recovery fully for his injuries from the nongovernmental defendant whether or not that defendant can recover from the governmental defendant. . . . [P]laintiff gains nothing if defendant is permitted to recover contribution from the village.

Id.

soned that because the original defendant was jointly and severally liable, the contribution action had no real effect on the plaintiff.[217] The true benefit of a contribution action flows to the defendant, not to the plaintiff.

Justice Freeman then discussed the well-established rules of statutory construction which require that a general statute give way to a specific statute and that an earlier statute give way to a later-enacted statute.[218] He reasoned that the Workers' Compensation Act cannot be considered "specific" on the subject of employer liability for contribution to third parties for injuries to employees, while the Contribution Act clearly allows an unrestricted right to contribution among all parties that are subject to liability in tort to a plaintiff.[219]

He noted that the Contribution Act, the more recently enacted statute, places no limitation on a right of contribution against employers in cases involving workplace injuries.[220] Therefore, he reasoned, the Workers' Compensation Act should not limit any rights provided by the more specific and more recently enacted Contribution Act.

Finally, Justice Freeman stated that settling the apparent conflict between the Workers' Compensation Act and the Contribution Act is the responsibility of the legislature and is beyond the authority of the judicial system.[221]

III. ANALYSIS

A. Kotecki *Represents a Drastic Departure from Precedent*

The *Kotecki* court stated that although *Doyle v. Rhodes*[222] and its forerunners stood for the proposition that a negligent employer is liable for contribution to a third party, regardless of the Workers' Compensation Act, it did not "squarely answer the question as to

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217. *Id.*

218. *Kotecki*, 585 N.E.2d at 1031 (Freeman, J., dissenting from denial of rehearing).

219. *Id.*

220. *Id.*

221. *Id.* at 1032.

> I believe we have usurped the proper role and authority of the Illinois legislature. In this regard, while this court has, as the opinion in this case notes, acted in the past in the face of legislative inaction upon an issue, I do not believe that any amount of legislative inaction can justify a transgression of our constitutional role.

Id.

222. 461 N.E.2d 382 (Ill. 1984). See *supra* notes 109-24 and accompanying text for a discussion of *Doyle*.

the amount of contribution that an employer may be liable for under the Contribution Act."[223] This, however, is truly a revisionist view of the evolution of the law of contribution in the state of Illinois. The question of whether contribution against a negligent employer of an injured worker should be limited or unlimited is not really a question of first impression before the Illinois Supreme Court. The previous decisions of the court have consistently affirmed the principle that the measure of liability of a negligent employer in a third-party action is its proportionate share of fault (i.e., that the employer's liability for contribution is limited only by the employer's degree of negligence in causing the injury).

In *Miller v. DeWitt,*[224] the court decided that the Workers' Compensation Act did not prevent or otherwise protect an actively negligent employer from liability for indemnity.[225] Because the action was for indemnity, the employer was responsible for paying one hundred percent of the plaintiff's damages notwithstanding the existence of the Workers' Compensation Act. In *Kotecki,* the manufacturer only sought to hold the employer liable for a pro rata share of the plaintiff's damages commensurate with the employer's culpability. It is reasonable to conclude that if the Workers' Compensation Act provided no protection to employers from actions for indemnity, it should not place a burden on a contribution action seeking to hold employers liable for some lesser percentage of the plaintiff's damages. Therefore, *Miller* stands for the proposition that the amount of the employer's liability in a third-party action for contribution should in no way be limited by the amount of the workers' compensation benefits paid. The court's staunch position in *Miller* never wavered until *Kotecki.*[226]

In *Skinner v. Reed-Prentice Division Package Machinery Co.,*[227] the court, in addition to overturning the judicially created prohibition on contribution actions, held that "on these facts the governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them."[228] *Skinner* involved facts almost identical to those involved

223. *Kotecki,* 585 N.E.2d at 1023.
224. 226 N.E.2d 630 (Ill. 1967).
225. *See supra* notes 69-75 and accompanying text (discussing *Miller*).
226. *Kotecki,* 585 N.E.2d at 1023.
227. 374 N.E.2d 437 (Ill. 1977), *cert. denied,* 436 U.S. 946 (1978).
228. *Id.* at 442; *see supra* notes 76-92 and accompanying text (discussing *Skinner*).

in *Kotecki*. Nonetheless, the only limitation placed on the employer's liability for contribution in *Skinner* was the employer's proportionate degree of fault. If the *Skinner* court intended the employer's liability to be shielded by the Workers' Compensation Act, it would have explicitly said so. However, the *Skinner* court, in formulating contribution in the state of Illinois, affirmatively stated that contribution was based on the doctrine of equitable apportionment. A defendant's degree of culpability was the only apparent limitation on a defendant's liability for contribution.

In response to *Skinner*, the legislature passed a statute which codified *Skinner*.[229] The Contribution Act[230] followed the Illinois Supreme Court's decisions in *Miller v. DeWitt*[231] and *Skinner* and imposed no artificial limitation on the liability of a negligent third-party defendant. The Contribution Act states only that each party causally negligent or otherwise at fault in causing a plaintiff's injuries is liable to the extent of its pro rata share of fault.[232] At this point, the legislature had every opportunity to alter *Skinner* and assert the Workers' Compensation Act as a limitation on the law of contribution as the court in *Kotecki* did. However, the legislature did not alter the *Skinner* formulation in any manner.

In *Lake Motor Freight, Inc. v. Randy Trucking, Inc.*,[233] an Illinois appellate court held that the Contribution Act changed the relationship between the right of contribution and the Workers' Compensation Act that was set forth in *Skinner*. The Illinois Supreme Court swiftly corrected that decision in *Doyle v. Rhodes*.[234] In *Doyle*, the Illinois Supreme Court had the opportunity to place a limitation on a negligent employer's liability for contribution once again. However, the court held that the only inquiry was whether the employer was "subject to liability in tort."[235] Once that was decided in the affirmative, the court reasoned that the employer was liable to the extent that he was culpable.

The legislature has not amended the Contribution Act since

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229. *See supra* notes 93-108 and accompanying text (discussing the Contribution Act).

230. ILL. REV. STAT. ch. 70, paras. 301-305 (1991) (740 ILCS 100/1-100/5 (1992)).

231. 226 N.E.2d 630 (Ill. 1967).

232. ILL. REV. STAT. ch. 70, para. 303 (740 ILCS 100/3 (1992)).

233. 455 N.E.2d 222 (Ill. App. Ct. 1983); *see supra* notes 104-08 and accompanying text (discussing *Lake Motor Freight*).

234. 461 N.E.2d 382 (Ill. 1984); *see supra* notes 109-24 and accompanying text (discussing *Doyle*).

235. *Kotecki*, 461 N.E.2d at 387.

Doyle. This fact alone seems to reaffirm the proposition that employers are subject to liability for contribution limited only by their culpability. The Illinois Supreme Court has stated that " 'where a statute has been judicially construed and the construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's exposition of legislative intent.' "[236] A number of bills has been proposed which would repeal the Contribution Act,[237] yet the Act has remained unchanged since it was first enacted. In 1986, Senate Bill 2263 was proposed containing Senate Amendment 12, which would have amended the Contribution Act to prohibit third-party actions for contribution against plaintiffs' employers.[238] The bill failed. The legislature had many opportunities to do what the *Kotecki* court eventually did but declined to change the Contribution Act.

The Illinois Supreme Court maintained that *Kotecki* was in line with previous Illinois law. In truth, however, the court, in deciding *Kotecki,* effectively rewrote section 5(b) of the Workers' Compensation Act and section 2(a) of the Contribution Act, and overruled its decisions in *Miller v. DeWitt,*[239] *Skinner v. Reed-Prentice Division Package Machinery Co.,*[240] and *Doyle v. Rhodes.*[241]

B. The Practical Effect of Kotecki

The best way to illustrate the impact of *Kotecki* is to use a hypothetical situation. Assume that a factory employee has been injured while working with a piece of machinery. The employee files a workers' compensation claim, and the employer pays the employee $100,000 in statutory benefits. The employer has a right to recoup these benefits if the employee recovers from a third party for his

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236. Kobylanski v. Chicago Bd. of Educ., 347 N.E.2d 705, 709 (Ill. 1976) (quoting People v. Hairston, 263 N.E.2d 840, 845 (Ill. 1970), *cert. denied,* 402 U.S. 972 (1971)).

237. *See* H.B. 658, 86th Ill. Gen. Ass. (1989-90) (on file with the DePaul Law Review); H.B. 3195, 84th Ill. Gen. Ass. (1985-86), *microformed on* Transcripts of the House Debates on the Eighty-Fourth General Assembly, Roll No. 72H-70 (Illinois State Library); S.B. 2086, 84th Ill. Gen. Ass. (1985-86), *microformed on* Transcripts of the Senate Debates on the Eighty-Fourth General Assembly, Roll No. 72-S51 (Illinois State Library); S.B. 636, 84th Ill. Gen. Ass. (1985-86), *microformed on* Transcripts of the Senate Debates on the Eighty-Fourth General Assembly, Roll No. 72-S46 (Illinois State Library).

238. S.B. 2263, amend. 12, 84th Ill. Gen. Ass., 3d Spec. Sess., 1 Senate J. of Ill. 1862 (1986).

239. 226 N.E.2d 630 (Ill. 1967).

240. 374 N.E.2d 437 (Ill. 1977), *cert. denied,* 436 U.S. 946 (1978).

241. 461 N.E.2d 382 (Ill. 1984).

injuries.[242] The employee then brings a product liability action against the manufacturer of the machinery. In turn, the manufacturer files a third-party action for contribution against the plaintiff's employer, alleging that the employer did not properly train the employee in the usage of the machinery. The tort case is tried and the verdict is $1,000,000 for the plaintiff. The jury finds the manufacturer twenty-five percent liable and the employer seventy-five percent liable.

Prior to *Kotecki,* the employer would be required to pay $750,000 to the manufacturer. The plaintiff then would repay the employer approximately $75,000.[243] The net result would have the employer recouping most of the benefits paid but also paying its seventy-five percent allocation of the damages. The manufacturer would have paid its twenty-five percent share.

The *Kotecki* decision drastically altered this result. Now, the plaintiff will still be able to collect $1,000,000 from the defendant manufacturer, but the manufacturer will only be able to collect $100,000 from the employer in contribution even though the jury determined that the employer was seventy-five percent liable.[244] The employer will still receive approximately $75,000 from the plaintiff in recoupment of the workers' compensation benefits paid out.[245]

1. The Nature and Extent of the Employer's Liability under Kotecki

In *Kotecki,* the Illinois Supreme Court adopted the Minnesota rule that limits an employer's liability in contribution to its workers' compensation liability.[246] Although this appears to be a straightforward, easily applied exposition of the law, it really leaves many

242. ILL. REV. STAT. ch. 48, para. 138.5(b) (1991) (820 ILCS 35/5(b) (1992)).

243. The employer will receive less than $100,000 from the employee because the plaintiff can reduce the amount that he repays his employer by a pro rata share of costs and expenses incurred in the tort action against the manufacturer. *Id.* The plaintiff would repay only approximately $75,000 to the employer in satisfaction of the employer's lien. In that case, the employer will have paid out a total of $775,000. (The employer paid $750,000 in contribution and $100,000 in workers' compensation benefits and recouped only $75,000 from the employee.)

244. Although this is the likely result, it is also possible that the employer will only be liable for $75,000, the amount it recouped from the employee, in contribution. *See infra* notes 246-52 and accompanying text.

245. Again, although the employee received $100,000 in benefits, he need only reimburse the employer for approximately 75% of those benefits. ILL. REV. STAT. ch. 48, para. 138.5(b) (820 ILCS 305/5(b)).

246. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1027 (Ill. 1991).

questions unanswered. One problem is that the employer's workers' compensation liability is unclear in many circumstances. In order to determine the amount of contribution that an employer will have to pay, it will be necessary to calculate the employer's workers' compensation liability at the time of judgment in the tort action. At that time, there are four possible directions that the employer's workers' compensation liability may have taken: the workers' compensation claim may have been settled via a lump sum payment to the injured employee; the workers' compensation claim may have been resolved but may require future payments to be made; the workers' compensation claim may still be pending for trial at the Illinois Industrial Commission; or the employee may not have filed a workers' compensation claim at all. Because Minnesota's scheme has been in place since 1977, it is useful to look at Minnesota court decisions for guidance in resolving many of *Kotecki's* unanswered questions.[247]

a. When the workers' compensation claim has been settled via a lump sum payment

In the first scenario, where the employee's workers' compensation claim was settled by a lump sum payment to the employee before the time of judgment in the tort action, there are two main issues to be addressed: 1) How is the employer's liability, and thus his contribution liability, to be calculated?; and 2) Can a lump sum settlement of a workers' compensation claim be challenged by the third-party plaintiff as not accurately representing the employer's contribution liability?

The first question is whether the employer is liable in contribution for the total workers' compensation benefits paid out to the employee or for the amount that the employer will recover from the employee in reimbursement. If the employer's contribution liability is equal to the former, then the employer will actually end up paying approximately twenty-five percent more than it was liable for under the Workers' Compensation Act.

For example, in the hypothetical situation mentioned earlier, the employer paid the employee $100,000 in workers' compensation benefits. Next, it paid the manufacturer $100,000 in contribution but was only reimbursed $75,000 from the employee. Thus, the net

247. *See generally* Bohrer, *supra* note 151 (determining that Illinois may need to look to Minnesota decisions to resolve the issues left open in *Kotecki*).

result was that the employer paid out $125,000, an amount twenty-five percent greater than its statutory workers' compensation liability. This consequence is not completely consistent with the policy interest of insulating employers from having to pay more than the amount required by the Workers' Compensation Act.[248] It is consistent, however, with the policy interest of trying to limit the amount that the third-party tortfeasor will have to pay to protect the workers' compensation system.

The Minnesota Supreme Court decided this issue by holding that the employer is liable in contribution for the total workers' compensation benefits it paid out to the employee, not just the amount the employer is reimbursed.[249] The Minnesota courts acknowledged that the employer would lose money in the exchange but decided that any other result would have to be achieved through the legislature.[250] However, in *Horton v. Orbeth, Inc.*,[251] the Minnesota Supreme Court stated that the effect of the decision in *Lambertson* "was to deny a negligent employer a right of reimbursement . . . ."[252] This statement supports the conclusion that the employer is liable in contribution for only the amount that the employer will recover from the employee in reimbursement. Thus, to some extent, the guidance from Minnesota is conflicting. The resolution of this question in Illinois will depend on a balancing of the protection of employers and the manufacturer's interest in only paying its proportionate share.

The second issue that arises when the workers' compensation claim has been settled for a lump sum is whether the sum that was paid by the employer can be challenged by the third-party plaintiff as not being fairly representative of the value of the claim, and thus not a true representation of the employer's contribution liability. If the workers' compensation claim, and thus his contribution liability, has been decided after a hearing by an arbitrator at the Illinois Industrial Commission, the amount of the employer's workers' compensation liability is clear. However, where the workers' compensation claim was settled for a lump sum, it is not obvious whether that amount necessarily represents the extent of the employer's liability

248. 585 N.E.2d at 1028.
249. Kordosky v. Conway Fire & Safety, Inc., 304 N.W.2d 616, 620 (Minn. 1981).
250. *Id.* at 620-21; *see supra* notes 163-66 and accompanying text (discussing *Kordosky*).
251. 342 N.W.2d 112 (Minn. 1984); *see supra* note 164 (discussing *Horton*).
252. 342 N.W.2d at 115.

in contribution. If the employer's liability in contribution is fixed at the amount of the lump sum settlement, it is almost certain that the amount of the settlement will also represent the employer's liability in contribution. However, the question remains whether the defendant in the tort action, the third-party plaintiff, could challenge the settlement as not adequately representing the employer's statutory liability under the Workers' Compensation Act.

In the syllabus of its opinion in *Lambertson v. Cincinnati Corp.*,[253] the Minnesota Supreme Court stated that "[t]he manufacturer is entitled to contribution from the employer in an amount not to exceed the compensation benefits *paid or to be paid* by the employer to the employee because of the accident."[254] Therefore, because the *Kotecki* decision was intended to adopt the rule espoused in *Lambertson,* the almost certain answer to this question is that the amount of the settlement would also represent the amount of the employer's liability in contribution. Still, a danger exists in deciding that the settlement amount fixes the employer's contribution liability. The employer and employee have a continuing relationship. There may be a threat that they will enter into a collusive agreement to decrease the employer's workers' compensation payment. The only way to prevent this result is to grant the third-party plaintiff a forum for challenging the settlement figure.

b. When the workers' compensation claim has been resolved but requires future payments to be made

In the second scenario, where the employee's workers' compensation claim may have been resolved but may require future payments to be made,[255] a variety of issues was left open by the court's decision in *Kotecki.* The first issue is how to calculate the amount that the employer will be forced to pay the original defendant in contribution. There are three potential methods for this calculation: limit the employer's contribution liability to only prejudgment payments made to the employee; have the employer contribute to the defendant as he would ordinarily pay the employee; or reduce the amount

253. 257 N.W.2d 679 (Minn. 1977).

254. *Id.* at 681 (emphasis added).

255. For example, in a case where the employee's disability renders him wholly and permanently incapable of work, the employer is required to make payments to the employee for the duration of the employee's life. ILL. REV. STAT. ch. 48, para. 138.8(b)(2) & (f) (1991) (820 ILCS 305/8(b)(2) & (f) (1992)).

of the future payments to present value.

The first solution was rejected with good reason by the Minnesota Supreme Court in *Wilken v. International Harvester Co.*[256] The Minnesota approach is designed, in part, to allow a third-party tortfeasor some amount of contribution from a negligent employer in order to limit the amount that the third party is required to subsidize the workers' compensation system.[257] To limit the employer's contribution liability merely to the amount of benefits that he has paid by the date of judgment would further exaggerate the unfairness of forcing the third party to pay to benefit the workers' compensation system.

The second solution, having the employer contribute to the defendant periodically as he would ordinarily pay the employee, was also rejected by the Minnesota Supreme Court.[258] The employer in *Wilken* argued that it should only be required to pay contribution to the third party as the future payments owed to the employee become due.[259] This method allows for a more exact representation of the employer's workers' compensation liability for the purpose of determining the employer's contribution liability. The procedure to be followed under this solution would be equivalent to a declaratory judgment handed down by the court which would provide for periodic accountings of future benefits, and, therefore, future contribution payments to be paid by the employer.

The third solution is to reduce the amount of the future payments the employer is statutorily required to pay to present value and then have the employer pay the contribution claim in a single, lump sum judgment. This approach was adopted by the Minnesota Supreme Court in *Wilken v. International Harvester Co.*[260] There, the court reasoned that reducing future workers' compensation payments to present value in a contribution claim is no more difficult than the calculation of past, present, and future damages in a tort action.[261]

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256. 363 N.W.2d 763 (Minn. 1985). The *Wilken* court held that "the employer contributes to the third-party tortfeasor an amount equal to its proportionate share of the employee's tort recovery but not to exceed the amount of workers' compensation benefits the employer has paid and *will in the future pay* to the employee." *Id.* at 767 (emphasis added).

257. *Id.* at 766.

258. *Id.* at 767.

259. *Id.*

260. *Id.*

261. The court stated: "The contribution award, like the tort verdict, necessarily involves approximations based on reasonable assumptions. True, the employee next year may die or recover, but these uncertainties do not prevent the measurement of a lump sum verdict against the third-

This approach best serves the interests of the third party and is supported by Minnesota precedent. However, the second solution most strongly protects the interests of employers, which was the major policy concern of the Illinois Supreme Court's *Kotecki* decision.

Another issue to be examined under the second scenario is whether supplementary benefits, either paid immediately or potentially payable in the future, are to be included as a measure of the employer's workers' compensation liability.[262] The *Wilken* court answered this question in the negative.[263] The court held that supplementary benefits in Minnesota are not a direct part of an individual employer's workers' compensation liability to a particular employee because payments of supplementary benefits by employers are reimbursed by a Special Compensation Fund which is funded by employers and their insurers.[264] In Illinois, payment of supplementary benefits is made directly from the Rate Adjustment Fund.[265] The connection between payment by employers and the receipt of supplementary benefits by the employee is even more attenuated in Illinois than it is in Minnesota.[266] Therefore, it seems probable in Illinois that the amount of supplementary benefits paid to employees will not be included in the employer's workers' compensation liability.

c. When the workers' compensation claim is still pending for trial at the Illinois Industrial Commission

Under the third scenario, where the employee's workers' compensation claim may be pending trial at the Illinois Industrial Commission at the time of judgment in the tort action, the perplexing issues that arise are: 1) how the extent of the employer's liability in contribution is determined and 2) who decides what constitutes the employer's statutory liability under the Workers' Compensation Act. Like the second scenario, the employer would argue that the employer's liability is capped at the amount of workers' compensation benefits that it has paid up to the time of the verdict in the employee's tort action. The third-party tortfeasor, however, would

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party tortfeasor." *Id.* at 767-68.

262. *See supra* notes 174-76 and accompanying text.

263. 363 N.W.2d at 768.

264. *Id.* at 769.

265. *See* ILL. REV. STAT. ch. 48, para. 138.8(g) (1991) (820 ILCS 305/8(g) (1992)).

266. *See* Bohrer, *supra* note 151, at 121.

maintain that the employer's contribution liability must be determined in accordance with a reasonable estimation of what the employee could ultimately receive in workers' compensation benefits if the claim was brought and taken to its fruition. As discussed above, the most logical conclusion is that the limit on the employer's contribution liability should equal the "value" of the workers' compensation claim, not just the amount paid at the time of the trial of the action.

The question that remains is who will measure that value. There are only three parties who could potentially complete this task: the jury, the trial judge, and an arbitrator at the Illinois Industrial Commission. The jury cannot determine the employer's workers' compensation liability because the collateral source rule forbids the admission of any evidence of workers' compensation benefits in an action by an injured employee against a third party.[267] If the trial judge were to make the determination as to the amount of the employer's workers' compensation liability, this decision would be made after a post-trial hearing in a proceeding that would be equivalent to, and have the same effect as, a declaratory judgment. If, however, the trial judge thinks that the determination of the employer's workers' compensation liability is one that is more properly made by an arbitrator at the Illinois Industrial Commission, the judge may request the state agency to review the facts and issue an opinion as to the amount of the employer's workers' compensation liability. The problem with this approach is that there is no statute that gives the circuit court the power to take such action.[268] It is also possible that the trial judge may stay the entry of judgment in the contribution action until the arbitrator at the Illinois Industrial Commission renders a decision on the employer's workers' compensation liability.[269]

d. When the employee has not filed a workers' compensation claim

Under the fourth scenario, where the employee never filed a workers' compensation claim, the major issue is whether the em-

267. Sweeney v. Max A.R. Matthews & Co., 264 N.E.2d 170, 173 (Ill. 1970).

268. ILL. REV. STAT. ch. 110, para. 3-111 (1991) (735 ILCS 53-111 (1992)) provides that the circuit court has the power to reverse and remand a state agency's decision, to proffer questions to a state agency that require further hearing, and even to give such instructions as may be proper, but only where a hearing has been held by the agency.

269. *See* Bohrer, *supra* note 151, at 121.

ployer has any liability under the Workers' Compensation Act at all. If the injured employee could still file a workers' compensation claim after judgment in the tort action, the employer may still be liable under the Workers' Compensation Act. The amount of that liability would be determined by the same means as used in the third scenario. However, if the employee's workers' compensation claim was barred by the statute of limitations,[270] then the extent of the employer's contribution liability is unclear.

The *Kotecki* decision states that the employer is not liable in contribution for any amount greater than its statutory liability under the Workers' Compensation Act.[271] It would seem to follow that if the employer's liability under the Workers' Compensation Act was extinguished, the employer's liability in contribution would similarly be disposed of. This result, however, is contrary to the policy goals of the *Kotecki* decision. The goal in *Kotecki* was to protect the immunity guaranteed to employers by passage of the Workers' Compensation Act, while allowing third-party tortfeasors some measure of contribution to support their interest in not being forced to pay more than their established fault.[272] Therefore, the probable result in this scenario would be that, even if the employer's workers' compensation liability was extinguished by operation of the statute of limitations, the employer would be liable in contribution limited by the "value" of the employee's workers' compensation claim had it been pursued.

2. *The Nature and Extent of the Manufacturer's Liability under* Kotecki

It is really the manufacturer who bears the burden of the *Kotecki* decision. The extent of that burden depends, to some degree, on how the Illinois Joint Liability Statute[273] is interpreted by the Illinois courts. That statute provides that in a contribution action,

> [a]ny defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages.[274]

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270. *See* ILL. REV. STAT. ch. 48, para. 138.6(d) (1991) (820 ILCS 305/6(d) (1992)).
271. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1028 (Ill. 1991).
272. *Id.* at 1027.
273. ILL. REV. STAT. ch. 110, para. 2-1117 (1991) (735 ILCS 52-1117 (1992)).
274. *Id.*

The question that arises is whether the fault of an employer in a *Kotecki* situation is included in the calculation of total fault under the Joint Liability Statute. If the employer's fault is included, the manufacturer may be only severally liable where its fault is less than twenty-five percent of the total fault attributable to the plaintiff, the employer, and itself. If the employer's fault is not included, then the manufacturer is jointly liable unless its fault is less than twenty-five percent of the fault attributable only to the plaintiff and itself.

The resolution of this issue centers around whether the employer is considered a "third party defendant who *could have been sued* by the plaintiff."[275] It is almost certain that the employer will be considered a party who could have been sued by the plaintiff since Illinois courts have held that the employer immunity provided by the Workers' Compensation Act is an affirmative defense, not a bar to the employee's substantive cause of action.[276] Thus, an employee can sue her employer successfully if the employer does not raise the immunity. Therefore, if the original defendant's fault is determined to be less than twenty-five percent of the total combined fault, the original defendant will probably only be liable for its pro rata share of the damages in accordance with its degree of fault. Nonetheless, if an original defendant is determined to be any more than twenty-five percent negligent, it will have to bear almost the entire burden of the judgment while the potentially more culpable employer will only pay the comparatively small workers' compensation liability.

However, if the employer is not considered a party "*who could have been sued by the plaintiff*,"[277] the original defendant will be liable for almost the entire judgment regardless of its share of fault. This result occurs only if the employer immunity is considered a substantive, not merely a procedural, bar to any cause of action by an employee against her employer. This is the conclusion suggested by the language of the Workers' Compensation Act, which states

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275. *Id.* (emphasis added).

276. Doyle v. Rhodes, 461 N.E.2d 382, 386 (Ill. 1984). The court held as follows:

> The Workers' Compensation Act provides employers with a defense against any action that may be asserted against them in tort, but that defense is an affirmative one whose elements — the employment relationship and the nexus between the employment and the injury — must be established by the employer, and which is waived if not asserted by him in the trial court.

Id.

277. ILL. REV. STAT. ch. 110, para. 2-1117 (735 ILCS 52-1117 (1992)) (emphasis added).

that "[n]o common law or statutory right to recover damages from the employer, . . . other than the [workers'] compensation [benefits] herein provided, is available to any employee . . . ."[278] Nevertheless, this result is contrary to the conclusion reached by the Illinois Supreme Court in *Doyle v. Rhodes*.[279]

The limitation of the employer's contribution liability comes at the expense of the original defendant. However, original defendants can take some comfort in the knowledge that in Illinois, they have a limited contribution right, which is not the case in the majority of jurisdictions.[280]

C. *The* Kotecki *Decision Represents a Rebalancing of Policy Considerations*

1. *The Right of Contribution*

Kotecki represents a blow to the policies that underlie the right of contribution. In *Skinner*,[281] the lower courts held that the plaintiff could not sue his employer in a tort action because the Workers' Compensation Act insulated employers from negligence actions brought by injured employees.[282] Nevertheless, the Illinois Supreme Court allowed a contribution action against the employer. In other words, the court felt that the interests in equitable apportionment of damages superseded the interests behind the no-fault system of workers' compensation. The court placed no limitation on the amount of contribution that the employer could be liable for because the doctrine of equitable apportionment demanded that liability be equal to the third-party defendant's culpability. To place a ceiling on the third-party defendant's liability would be contrary to the very principles that supported the contribution action in the first

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278. ILL. REV. STAT. ch. 48, para. 138.5(a) (1991) (820 ILCS 305/5(a) (1992)).

279. 461 N.E.2d 382, 386 (Ill. 1984).

280. The majority (45) of other jurisdictions do not allow a defendant sued in tort by an injured employee to maintain a contribution action against an employer. *See* Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1027 (Ill. 1991); *see also supra* note 125 and accompanying text (listing cases from these jurisdictions).

281. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

282. *Id.* at 438. The Workers' Compensation Act provides:

> No common law or statutory right to recover damages from the employer [or] his insurer . . . for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act.

ILL. REV. STAT. ch. 48, para. 138.5(a) (820 ILCS 305/5(a) (1992)).

place.

The court in *Kotecki* strenuously argued that it was not abandoning precedent and that both *Skinner* and *Doyle* left open the question of whether the employer's liability for contribution is limited to the employer's workers' compensation liability.[283] However, much to the contrary, *Kotecki* completely abandoned the principle behind the right of contribution that was created in *Skinner* and affirmed in *Doyle*. The result in *Kotecki* cannot be disputed. There was no equitable apportionment of damages based on relative fault, and thus there was no true contribution. The court in *Kotecki* implicitly rebalanced the policy considerations that support both employer immunity and the right to contribution, and it found the employer's interests to weigh more heavily than the third party's. In *Skinner*, the court weighed the same two factors and found that there is no equity if immunity prevents equitable apportionment.[284] The variables never changed. The court's conception of equity, however, did.

In the past, each time a court has been faced with a contribution action against a defendant protected by either a statutory or common law immunity, it balanced the competing policy considerations that support the right of contribution and that of immunity.[285] Courts consistently found that the policy of equitable apportionment outweighed the policy that supports immunity.[286] Illinois courts have consistently relied on the *Doyle* court's reasoning that the Contribution Act focuses on the "culpability of the parties rather than on the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss."[287] This is no longer the rule after *Kotecki*.

2. *Strict Liability*

There is an inherent conflict between the policies underlying contribution and those behind strict liability. Strict liability in product

283. *Kotecki*, 585 N.E.2d at 1025.

284. *Skinner*, 374 N.E.2d at 443.

285. *See* Hartigan v. Beery, 470 N.E.2d 571, 572 (Ill. App. Ct. 1984); Moon v. Thompson, 469 N.E.2d 365, 366 (Ill. App. Ct. 1984).

286. "[W]hen balancing the right of contribution with a conflicting immunity, the [Illinois courts] have generally found that the law of contribution must prevail." *Hartigan*, 470 N.E.2d at 572; *see supra* note 119 and accompanying text (discussing the purpose of the contribution statute and its interplay with various types of immunity).

287. Doyle v. Rhodes, 461 N.E.2d 382, 388 (Ill. 1984).

liability actions developed primarily to protect injured consumers and is designed to protect plaintiffs' rights.[288] Contribution is designed to promote fairness to defendants and focuses on defendants' rights.[289] The concept of fault is a key factor in the proper allocation of liability among tortfeasors in negligence actions, but theoretically, it has no place in strict liability actions.[290]

The rationale for allocating damages among parties with a common denominator such as negligence cannot be easily transferred to a situation such as that in *Skinner*[291] and *Kotecki* where contribution is sought among defendants who are potentially liable on the completely different theories of negligence and strict liability. While negligence is grounded in fault, strict liability considers fault to be irrelevant. As Chief Justice Ward pointed out in his dissenting opinion in *Skinner,* there is no common standard of comparison on which to base contribution.[292]

Skinner allowed a defendant sued in strict liability to seek contribution from another party. In doing so, it altered the effect intended by strict liability. *Skinner* relieved the originally responsible party of part of the burden of loss. Thus, under *Skinner,* strict liability loses much of its leverage as a means of consumer protection since manufacturers of defective products no longer necessarily bear the full burden of compensating victims for harm arising from defective products they offer to the public. Justice Dooley, dissenting in *Skinner,* persuasively criticized the decision on the basis that the doctrine of strict liability had been "implicitly overruled" and its intent frustrated by allowing the manufacturer of a defective product to

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288. *See* KEETON ET AL., *supra* note 10, § 98, at 692; *see also supra* notes 49-59 and accompanying text (discussing the principles of product liability).

289. *See* KEETON ET AL., *supra* note 10, § 50, at 337; *see also supra* notes 27-30 and accompanying text (discussing the principles of contribution).

290. KEETON ET AL., *supra* note 10, § 75, at 534.

291. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied,* 436 U.S. 946 (1978).

292. *Id.* at 445 (Ward, J., dissenting).

> The majority says that the extent of liability among tortfeasors should be determined by their relative roles in proximately causing the plaintiff's injuries, but it seems to me that this formula cannot properly be applied in the absence of a common standard of comparison. The plaintiffs seek to recover on the ground of strict liability; the defendants in their third-party complaints allege negligence by the employers. What will be the method of comparison, with negligence not a factor in determining the defendants' liability?

Id.

seek contribution.[293]

Kotecki placed the burden back on the manufacturer in a product liability action because the defendant manufacturer can no longer look to contribution from the employer to substantially mitigate its liability. The manufacturer can still receive contribution from a negligent employer. However, considering how small workers' compensation awards generally are in comparison to tort damages from the same injury, the bulk of the burden is retained by the manufacturer pursuant to the *Kotecki* decision. The public policy considerations that were discussed in *Suvada v. White Motor Co.*,[294] and that were largely abandoned in *Skinner*, are given new life under *Kotecki*.

3. *Workers' Compensation*

The *Kotecki* decision represented a rebalancing of the workers' compensation system and the right of contribution. The Illinois Supreme Court decided that the scales of justice should be tipped heavily in favor of the former. The court had balanced the same factors in *Skinner* and reached a very different result. In *Skinner*, the court decided that the doctrine of equitable apportionment could not be impinged by the employer immunity provided under the Workers' Compensation Act.[295] Under *Kotecki*, it appears as if no principle is weightier than employer immunity. Apparently, the integrity of the workers' compensation system is important enough to make a stranger to the system, a party that gained nothing from the quid pro quo of workers' compensation, pay well over its fair share of fault in order to protect the employer immunity. The pendulum has clearly and decisively swung in a new direction.

III. IMPACT

A. *Impact on Employers*

Employers are the true beneficiaries of the *Kotecki* decision. The employers' previously unlimited exposure in this context has been eliminated. The employer is no longer faced with full exposure to jury verdicts in cases where a third party is potentially liable to the employee. The exclusive protection granted to employers by the Illi-

293. *Id.* at 447, 449 (Dooley, J., dissenting).

294. 210 N.E.2d 182 (Ill. 1965); *see supra* notes 50-54 and accompanying text (discussing *Suvada*).

295. *See supra* notes 76-92 and accompanying text (discussing *Skinner*).

nois legislature in the Workers' Compensation Act has been, in large measure, restored. The employer now has the ability to predict its risk in the enterprise of creating and maintaining employment opportunities. The rule espoused by the court in *Kotecki* eliminates the previously illogical situation in which an employer was far better protected if it was the sole cause of the employee's injury.[296]

The purpose of the *Kotecki* decision is to insulate employers and protect the workers' compensation system. However, this decision has a number of negative policy implications. The new decision may discourage employers from following safe work practices. Safety costs money, and employers will no longer have the significant deterrent of unlimited tort liability to its workers under *Kotecki.* With this cap on employers' liability, there are fewer reasons for cost-conscious employers to take protective safety measures.

Still, for those same reasons, the *Kotecki* decision should operate to decrease insurance costs for businesses and, thus, help to entice industry into the state of Illinois. One of the major complaints of the *Skinner* decision was that it would drive industry out of the state. For instance, in his dissenting opinion in *Skinner,* Justice Dooley stated, "It is common knowledge that the high cost of workmen's compensation insurance is driving industry out of this state."[297] It appears that Justice Dooley's admonition has been heeded by the *Kotecki* court fourteen years later.

B. Impact on the Original Defendant

The Illinois Supreme Court decided that the policy considerations that support the no-fault workers' compensation system were so strong that the *Kotecki* decision was the most just result for the situation. The court stated that the "Minnesota rule provides the fairest and most equitable balance between the competing interests of the employer and the third-party defendant."[298] However, this conclusion ignores the fact that it is the original defendant that will

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296. If the employer was the sole cause of the injury, then its only potential liability would be the statutory benefits required under the Workers' Compensation Act. There is no possibility of a third-party action in this type of case; thus, there is no potential for a contribution action. ILL. REV. STAT. ch. 48, para. 138.5(a) (1991) (820 ILCS 305/5(a) (1992)).

297. *Skinner,* 374 N.E.2d at 453 (Dooley, J., dissenting).

298. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1027 (Ill. 1991). The Minnesota rule is the limitation on an employer's liability in contribution to the amount of statutory liability under workers' compensation as decided by the Minnesota Supreme Court in Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977).

pay the cost of supporting the policy interests of the workers' compensation system. A basic flaw of this decision is that one party may pay far more than its fair share of damages, while the other party will potentially pay far less than its proportionate share. The decision insulates the potentially very negligent employer while sacrificing the potentially marginally negligent defendant by limiting the employer's liability to the amount of workers' compensation benefits paid out to the plaintiff employee. The original defendant is forced to pay the rest of the judgment without regard to its degree of negligence.

C. *Impact on the Plaintiff*

Although the *Kotecki* decision comes mainly at the expense of the original defendant, the plaintiff also stands to lose. Now, instead of having two pockets to look to for satisfaction of the judgment, there will only be that of the original defendant. If the original defendant is insolvent, the plaintiff will have no way to collect reasonable compensation. Under the old law, if the original defendant was insolvent, the plaintiff could still collect her damages from the employer by assignment of the original defendant's contribution action. Under *Kotecki,* since the contribution action is of little value, little can be acquired by assigning a contribution claim to a plaintiff.

The interplay of *Kotecki* and the Illinois Joint Liability Statute[299] also works to the detriment of the plaintiff. The extent of this effect centers around these words of the statute: "defendant who could have been sued by the plaintiff."[300] The employer will probably be considered such a party.[301] This conclusion is reached by examination of the court's decisions that the plaintiff could, in fact, sue his employer successfully unless the employer raises the affirmative defense of the employer immunity.[302] Thus, because the employer would be considered a party "who could have been sued by the plaintiff," the employer's fault is included in determining the percentage of the original defendant's fault.[303] For example, if the original defendant was determined to be responsible for ten percent of

299. ILL. REV. STAT. ch. 110, para. 2-1117 (1991) (735 ILCS 52-1117 (1992)).

300. *Id.*

301. *See supra* notes 273-79 and accompanying text (discussing the nature and extent of manufacturer and employer liability).

302. ILL. REV. STAT. ch. 48, para. 138.5(a) (820 ILCS 305/5(a)).

303. ILL. REV. STAT. ch. 110, para. 2-1117 (735 ILCS 52-1117).

the fault, the employer was responsible for ninety percent of the fault, and the verdict was entered for $100,000, the original defendant would be responsible only for $10,000.[304] This is because the statute provides that where a party's fault is less than twenty-five percent of the total fault, it is only severally liable.[305] A defendant who is severally liable, by definition, cannot be required to pay more than its proportionate share.[306] Thus, when the Illinois Joint Liability statute operates to make the original defendant severally liable, no contribution can be sought from the employer. Furthermore, the employer has a right to recoup any benefits paid out under Workers' Compensation for any money recovered by the plaintiff from the original defendant.[307] Therefore, in the above example, not only would the employer not have to pay any part of the damages, but if the employer had paid out $10,000 in workers' compensation benefits, the plaintiff conceivably would have to reimburse the employer the $10,000 (minus the costs) and be left with almost nothing.

Another impact of *Kotecki* that works to the detriment of the plaintiff is that it will make it more difficult for plaintiffs to get settlements. *Kotecki* substantially reduced employers' contribution exposure. Therefore, employers will no longer waive their liens and offer additional money in order to settle cases in which contribution is sought from them. Plaintiffs will only be able to look to the defendant manufacturer for compensation. With only one pocket to look to for settlement, more cases will probably be tried, creating more expenses for both the parties and the courts.

D. Impact on the Law of Contribution in Other Contexts

When the Illinois Supreme Court rendered its decision in

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304. Because section 2-1117 provides that a defendant who is less than 25% negligent is only severally liable for the plaintiff's injuries, cases at trial will hinge on the determination of whether the manufacturer was more or less than 25% negligent. If the manufacturer is found to be less than 25% negligent, the plaintiff will only be able to recover the percentage of her damages equal to the percentage of the manufacturer's fault. If, hypothetically, the plaintiff's damages were adjudged to be $100,000, the manufacturer was found to be only 20% negligent, and the employer was found to be 80% negligent, the plaintiff would only recover $20,000 in damages. Thus, the primary goal of the plaintiff at trial will be to prove that the manufacturer was more than 25% negligent. If the manufacturer is more than 25% negligent, it will be jointly liable, thus enabling the plaintiff to recover 100% of her damages from the manufacturer.

305. ILL. REV. STAT. ch. 110, para. 2-1117 (735 ILCS 52-1117 (1992)).

306. *See* Walsh & Doherty, *supra* note 29, at 124.

307. ILL. REV. STAT. ch. 48, para. 138.5(b) (820 ILCS 305/5(b) (1992)); *see supra* notes 43-45 and accompanying text (outlining the employer's right to recoup benefits).

Kotecki, it implicitly balanced the competing policy considerations between the right of contribution and the conflicting employer immunity. In that case, the court found that the policy interests in employer immunity outweighed those supporting the doctrine of equitable apportionment upon which the right to contribution is based. The doctrine of equitable apportionment is the principle that all tortfeasors should be responsible for damages in accordance with their degree of fault. Clearly, in *Kotecki*, this did not occur. The court found that it was more important to protect employers and the workers' compensation system than to accomplish equitable apportionment via the right of contribution. Prior to *Kotecki*, the Illinois Supreme Court always favored the right of contribution over any conflicting common law or statutory immunity.[308]

The *Kotecki* court thus gave less deference to the right of contribution than it had in any case since the creation of the right to contribution in Illinois. Since *Kotecki* is the Illinois Supreme Court's latest interpretation of the right of contribution, it represents a new understanding of the weight to be given to contribution when it conflicts with various other common law or statutory immunities. Following *Kotecki*, a defendant may no longer be able to seek contribution from a third-party defendant protected by such an immunity.

CONCLUSION

Although the Illinois Supreme Court in *Kotecki* claimed that it was not changing the right of contribution as it was created fourteen years ago, it radically departed from its previous decisions interpreting the law of contribution. Equitable apportionment took a back seat to the protection of employers and their insulation from tort liability. In essence, this was a reformulation of the competing policies that support both employer immunity and the right to contribution. Nevertheless, many may feel that this is the proper balancing of policies and one that is most likely to help the economy by keeping industry within the Illinois borders.

However, original defendants are now forced to pay the costs of supporting the workers' compensation system and creating jobs in Illinois. This is certainly not the equitable result that was envisioned by the court in *Skinner v. Reed-Prentice Division Package Machin-*

308. *See supra* note 119.

ery Co., where it decided that the principle of equitable apportionment superseded all other competing considerations.

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