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THIRD PARTY PRACTICE IN ILLINOIS: EXPRESS AND IMPLIED INDEMNITY

Nicholas J. Bua*

To the Illinois practitioner, no area of law has proven more illusive or incapable of lending itself to definitive standards than indemnity. The following Article surveys the decisional law arising under express and implied indemnity; attempts to bring some semblance of order to the inconsistencies in the case law; and projects future trends of indemnity law. The author's examination of express indemnity discloses judicial hostility towards indemnification agreements, which has manifested itself in an emerging trend which may render these agreements even more difficult to sustain in the future. Similarly, the inconsistencies and inequities disclosed by the decisional law arising under circumstances allowing implied indemnification, leads the author to conclude that the present standard of comparing the qualitative conduct of the parties is the source of confusion. To alleviate this problem, the Article concludes with a persuasive case for allowing contribution among joint tortfeasors in Illinois.

INTRODUCTION¹

Indemnity, despite periodic attempts to categorize and coordinate its "rules of law," remains a subject of much confusion to practitioners of Illinois law.² While for the most part the problems associated with third party practice³ arise from the vagaries of the active-passive negligence theory⁴ used in implied indemnity, dif-

* Judge of the Circuit Court of Cook County, Illinois.

1. The author gratefully acknowledges the aid of Gregory Smith and Cynthia Salomone, second year law students at De Paul University, in the compilation and development of this article.

2. See, e.g., Drozdzik, *Implied Indemnity as a Substitute for Contribution Between Joint Tortfeasors*, 63 ILL. B.J. 142 (1974); Kissel, *Theories of Indemnity as Related to Third Party Practice*, 54 CHI. BAR REC. 157 (1973).

3. The terms "third party practice" and "indemnity" are herein used interchangeably, even though not all indemnity cases involve third parties. In some instances indemnity is pleaded as a defense barring an action between the original plaintiff and defendant. See, e.g., *Halperin v. Darling & Co.*, 80 Ill. App. 2d 353, 225 N.E. 2d 92 (1st Dist. 1967).

4. [W]here two or more parties are alleged to have been involved in causing an injury to a third party, the one whose conduct was merely passive or secondary is entitled to indemnity from the party whose conduct was active or primary.

ficulties also arise in the area of express indemnity. This Article examines express and implied indemnity; outlines their respective major problem areas; uses both recent and historically significant case law to draw conclusions concerning the present status of indemnity law in Illinois; and makes suggestions regarding the future of indemnity law, where it may be and where it should be headed.

EXPRESS INDEMNITY

Third party practice has special application where an express contract of indemnification has been entered into by third party plaintiffs and defendants. Cautious practitioners, however, should avoid making generalizations about the decisional law in Illinois which has interpreted and construed these indemnification agreements. This is especially true where a third party plaintiff seeks indemnification for his own negligence.⁵

The basic groundwork for construction of such agreements was laid in *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*⁶ where the Supreme Court of Illinois held that, "An indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract."⁷ Such agreements, therefore, are strictly construed against the indemnitee. Consequently, the wording of the indemnity agreement is the crucial factor in the ultimate outcome of third party cases.

In *Westinghouse*, a negligent employee of the LaSalle Monroe Building Corporation caused the death of an employee of Westinghouse Electric Elevator Company. An indemnity agreement between these parties stated as follows:

The Contractor [Westinghouse] further agrees to indemnify and hold the owner, [LaSalle Monroe Building Corporation] . . . wholly harmless from any damages, claims, demands or suit by any person or persons arising out of any acts or omissions

Drozdik, *supra* note 2, at 142. See also *Gulf, M. & O.R.R. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E. 2d 783 (1st Dist. 1951).

5. In the following materials on express indemnity it can be assumed, unless otherwise stated, that the indemnitee was the negligent party.

6. 395 Ill. 429, 70 N.E. 2d 604 (1946).

7. *Id.* at 433, 70 N.E. 2d at 607.

by the Contractor, his agents, servants, or employees in the course of any work done in connection with any of the matters set out in these specifications. . . .⁸

The supreme court found that there was no language in this agreement which would provide for the indemnification of La-Salle Monroe Building Corporation for its own negligence. Inasmuch as the contract specifically stated that Westinghouse indemnified only for its own negligence, the court refused to construe the contract to include negligent acts of other parties as a basis for indemnification. This case has been cited as authority in subsequent cases which have denied indemnification.⁹

In *Westinghouse* the contractual provision which provided for indemnification narrowly limited liability to negligent acts of the indemnitor, yet broader indemnity provisions have suffered a similar fate under appellate court interpretations of *Westinghouse*. The case of *Halperin v. Darling & Co.*¹⁰ provides an example. Plaintiff leased a truck from the defendant, L and L Auto Rental. The lease provided that the defendant-lessor would maintain and perform service upon the vehicle and that plaintiff-lessee would indemnify the lessor "from any loss or liability whatsoever with respect to or arising out of or in the course of the operation of any truck leased hereunder during the term that this lease shall be applicable to any such truck."¹¹ The plaintiff, while riding as a passenger in the leased truck, was injured in an accident, and brought suit against L and L Auto Rental. Defendant's motion to dismiss was granted by the trial court on the basis of the indemnity agreement. Irrespective of the broad wording of this indemnity clause the appellate court reversed and remanded,¹² indicating that the *Westinghouse* test is not satisfied

8. *Id.* at 432, 70 N.E. 2d at 606.

9. *See, e.g., Ford Motor Co. v. Commissory, Inc.*, 286 F. Supp. 229 (N.D. Ill. 1968); *Davis v. Marathon Oil Co.*, 28 Ill. App. 3d 525, 330 N.E. 2d 312 (4th Dist. 1975); *Kaspar v. Clinton-Jackson Corp.*, 118 Ill. App. 2d 364, 254 N.E. 2d 826 (1st Dist. 1969).

10. 80 Ill. App. 2d. 353, 225 N.E. 2d. 92 (1st Dist. 1967).

11. *Id.* at 356, 225 N.E. 2d. at 93.

12. The appellate court held that "Contracts of indemnity against one's own negligence are generally regarded as valid and enforceable. However, the unusual nature of such a contract requires that the agreement be strictly construed against the indemnitee". *Id.*

by the mere existence of a broadly worded agreement.¹³ The court adhered to the *Westinghouse* requirement of strictly construing the provisions of the agreement against the indemnitee. In this instance, the lessee had only agreed to indemnify for injuries arising out of *the operation* of the truck. If the parties had meant to include brake failure within the scope of the indemnity agreement, the clause should have stated that lessee would hold lessor harmless for injuries arising out of *the operation or maintenance* of the truck.¹⁴

Leach v. Eychaner,¹⁵ another case on point, involved a lease which contained an indemnity clause much broader than the one in *Westinghouse*. The clause read, in part:

Arvidson [third party defendant] will at all times protect, indemnify, and save and keep harmless Allied Warehouses [third party plaintiff] . . . against and from any and all loss, cost, damage, or expense, arising out of or from any accident or other occurrence on or about said premises, causing injury to any person or property whomsoever or whatsoever. . . .¹⁶

Again the appellate court was able to construe the agreement so as to deny indemnity. The cause of action did not arise from the operation of the warehouse involved in the lease but rather from the use of a gasoline lift truck which third party defendant (lessee) had rented separately from the third party plaintiff (lessor). The appellate court indicated that had the cause of action arisen from the actual operation of the warehouse itself, the agreement would have been sufficient to indemnify the indemnitee for his own negligent acts. Since the injury resulted from the use of a vehicle which was not in the original lease, however, the agreement was inapplicable.¹⁷

13. Such a conclusion differs in one respect from that advanced by James W. Kissel. If, however, one can come up with a general rule in this respect, it would be that if the indemnity clause expressly mentions that the indemnitee is to be protected against his own negligence, or if the language used covers the broadest possible situation that may confront the parties, then generally one will be protected against his own negligence.

Kissel, *supra* note 2, at 164 (emphasis added).

14. 80 Ill. App. 2d at 357, 225 N.E. 2d at 93.

15. 1 Ill. App. 3d 327, 273 N.E. 2d 55 (2d Dist. 1971).

16. *Id.* at 328, 273 N.E. 2d at 56.

17. "[N]evertheless, we believe the verbiage used sufficient to indemnify plaintiffs

More recently the Supreme Court of Illinois reaffirmed *Westinghouse* in *Tatar v. Maxon Construction Co.*¹⁸ Here, the subcontractor's employee brought suit against the general contractor who, in turn, filed a third party complaint against the subcontractor, seeking indemnification. The court refused to allow indemnification on the basis of a contract which provided that:

The Subcontractor agrees to indemnify the General Contractor and the Principal and to hold each of them forever harmless from and against all expenses, claims, suits, or judgments . . . arising out of, or connected with, accidents, injuries, or damages, which may occur upon or about the Subcontractor's work.¹⁹

Citing *Westinghouse*, the court again affirmed the need for explicit language in order to recover on an indemnity clause which purports to save a party from the consequences of his own negligence. Without further elaboration or analysis they found the clause in question did not meet the *Westinghouse* standards.²⁰

The supreme court confronted the issue again in *Zadak v. Cannon*,²¹ a case involving a purchase order containing an indemnity agreement. The purchase order called for the installation of certain equipment on the third party plaintiff's premises. An employee of the third party defendant was injured while employed in the task of installing the equipment pursuant to the purchase order. The purchase order provided that:

The seller [third party defendant] will insure its liability to

from their own negligence when such acts related to the leasing of the premises". *Id.* at 331, 273 N.E. 2d at 58. The court could, perhaps, afford to be more "liberal" in finding that this clause might allow indemnity since it had this alternative analysis for ultimately denying indemnity. It is an open question as to whether the interpretation would have differed if the injury had resulted from the operation of the warehouse itself.

18. 54 Ill. 2d 64, 294 N.E. 2d 272 (1973).

19. *Id.* at 66, 294 N.E. 2d at 273.

20. The court admitted that any attempts to reconcile the varied decisions in indemnity cases were futile.

The only guidance afforded is found in the accepted rule of interpretation which requires that the agreement be given a fair and reasonable interpretation based upon a consideration of all of its language and provisions.

Id. at 67, 294 N.E. 2d at 273-74. The court then proceeded to affirm dismissal of the claim without elucidating its "fair and reasonable interpretation" of the questioned clause.

21. 59 Ill. 2d 118, 319 N.E. 2d 469 (1974).

pay any compensation to employees engaged by seller in any work covered by or necessitated by, or performed to fill this order . . . seller also will indemnify and hold harmless the buyer of and from any and all suits, claims, liens, damages, taxes or demands whatsoever arising out of any such work covered by, necessitated or performed under this order.²²

The court in denying indemnity demonstrated its skills of strict construction by concentrating upon the phrase "arising out of any such work." They concluded that this only referred to injuries arising *directly from* the work performed by the installers under the contract, and not to injuries merely *incurred during* the installation work.²³ Here, the injuries were not attributable to the installation work, but instead to the negligence of one of indemnitee's employees while operating a forklift. It is true that the injured party was present for installation work purposes, however, that particular work *per se* did not cause his injuries.

The recent decision in *Davis v. Marathon Oil Co.*²⁴ may be indicative of appellate court interpretations of *Tatar* and *Zadak*. The indemnity clause at issue read:

[Plaintiff] shall not be liable for and [defendant] shall save and hold [plaintiff] harmless from all claims for injury to or death of any person or persons and for damages to or loss of property, attributal [*sic*], directly or indirectly to the operations of [plaintiff].²⁵

Instead of construing the clause so as not to cover the injury-causing event, the court simply stated, "[a]lthough each indemnity agreement must be construed according to its particular terms and circumstances, we can see no material difference between the agreement in question and those in *Tatar* and *Zadak*. The trial court properly struck this affirmative defense."²⁶ Thus, the court did not even bother to justify its interpretation of the clause in question.

These foregoing decisions, however, tend to paint a one-sided

22. *Id.* at 119, 319 N.E. 2d at 470-71.

23. *Id.* at 121, 319 N.E. 2d at 472.

24. 28 Ill. App. 3d 526, 330 N.E. 2d 312 (4th Dist. 1975).

25. *Id.* at 530, 330 N.E. 2d at 315.

26. *Id.* at 531, 330 N.E. 2d at 316.

picture of the law in Illinois. Indeed, there exists a second line of cases which allow indemnification for injuries caused by the indemnitee's own negligence.²⁷ These cases, for convenience's sake, are divided into two categories.²⁸

The first category involves broadly-worded indemnity clauses, but with the added dimension that both parties are negligent. In *Fosco v. Anthony R. Delisi, General Contractors, Inc.*²⁹ the third party plaintiff was a general contractor engaged in the construction of a school in a residential area. The third party defendant was a subcontractor who was responsible for the excavation and installation of caissons to support the building. Due to the negligence of both parties, these caissons were left open, resulting in a number of open pits from which protruded steel bars. A twelve year old girl fell into one of these and was injured.

The appellate court allowed for indemnification and based its decision upon the following agreement:

The subcontractor must keep and save the contractor harmless from any and all claims, demands, suits which may be brought against the contractor by the subcontractor, or subcontractor's employees or by the public in connection with or on account of any claim made by the public or employees, or any terms or provisions of any compensation act or any common law.³⁰

While this clause differs little from those in which indemnity was denied, there is less reason to strictly construe the indemnity agreement. The court need not have qualms that in allowing indemnification it is penalizing a totally innocent party; as may be the case in a *Westinghouse* factual context. Thus, the court

27. See, e.g., *Spurr v. La Salle Constr. Co.*, 385 F.2d 322 (7th Cir. 1967); *Halverson v. Campbell Soup Co.*, 374 F.2d 810 (7th Cir. 1967); *Patent Scaffolding Co. v. Standard Oil Co.*, 68 Ill. App. 2d 29, 215 N.E. 2d 1 (5th Dist. 1966); *Haynes v. Montgomery Ward & Co.*, 47 Ill. App. 2d 340, 198 N.E. 2d 548 (1st Dist. 1964); *DeTienne v. S. N. Nielson Co.*, 45 Ill. App. 2d 231, 195 N.E. 2d 240 (1st Dist. 1963); *Northern States Co., Inc. v. A. Finkl & Sons Co.*, 8 Ill. App. 2d 419, 132 N.E. 2d 59 (1st Dist. 1956).

28. A third category, which needs no clarification, would include cases wherein the contract or lease explicitly provides for indemnification, even where the indemnitee is negligent. No principle of strict construction could avoid indemnification in such cases. Cf. *Schek v. Chicago Transit Auth.*, 42 Ill. 2d 362, 247 N.E. 2d 886 (1969).

29. 103 Ill. App. 2d 457, 243 N.E. 2d 871 (1st Dist. 1968).

30. *Id.* at 459, 243 N.E. 2d at 872.

can view the contract in a more "reasonable" light.

The second category includes those instances which are most inconsistent with the *Westinghouse* line of cases.³¹ In these cases broadly worded clauses have been held to allow indemnity.³² *Deel v. United States Steel Corp.*,³³ for example, presents an interesting problem. An employee of third party defendant, Swindell-Dressler Corporation, was injured by a snapped cable while operating a forklift truck on the premises of third party plaintiff, United States Steel. The primary plaintiff sued and recovered from U.S. Steel the amount of \$25,000, and on its third party complaint, U.S. Steel was awarded \$5,000 by the jury. The trial court entered a judgment notwithstanding the verdict in favor of the third party defendant, and U.S. Steel appealed. The indemnity agreement between the third party plaintiff and defendant provided:

Contractor [Swindell-Dressler] shall save Owner [U.S. Steel] harmless from any and all claims, . . . growing out of injury to . . . any of Contractor's employees . . . while on or about Owner's premises in connection with any matters relating to the performance of this contract.³⁴

The appellate court granted judgment against the third party defendant for the full amount of plaintiff's award, \$25,000, without even attempting to strictly construe the clause.³⁵

A similar result was obtained in *Jeschke v. Mercury Builders, Inc.*³⁶ The appellate court allowed indemnification against third

31. As noted previously, *supra* note 20, even the Supreme Court of Illinois has despaired of reconciling indemnity case law and espoused the case by case approach.

32. Note that the two example cases in this category precede the supreme court decisions in *Tatar* and *Zadak*. Considered in light of these two cases their outcome might be different. Courts might be more tempted to search for a construction which denies indemnity, or they might take the approach of *Davis v. Marathon Oil Co.*, 28 Ill. App. 3d 526, 330 N.E. 2d 312 (4th Dist. 1975) discussed in text accompanying notes 24-26 *supra*.

33. 105 Ill. App. 2d 170, 245 N.E. 2d 109 (1st Dist. 1969).

34. *Id.* at 184, 245 N.E.2d at 116.

35. The court cited *Spurr v. La Salle Constr. Co.*, 385 F. 2d 322, 330 (7th Cir. 1967) for the proposition that:

The argument suggests that a specific reference to liability arising out of the indemnitee's negligence is required. General inclusive language has, however, been held sufficiently explicit in decisions of Illinois appellate courts and of this court, applying Illinois law.

105 Ill. App. 2d at 184, 245 N.E. 2d at 116.

36. 122 Ill. App. 2d 461, 259 N.E. 2d 342 (1st Dist. 1970).

party defendant Brule Incinerator Corporation after an injured employee of Brule obtained a judgment against the third party plaintiff Mercury Builders, Inc. The indemnity clause read, in part:

The Subcontractor hereby agrees to indemnify and deem harmless the Contractor . . . against all claims or demands for damages arising from accidents to the Subcontractor, his agents or employees, whether occasioned by said Subcontractor or his employees or by agents or employees of agents.³⁷

The court, in a brief opinion, interpreted this agreement as meaning that *whether or not* the injuries were occasioned by the subcontractor, he had agreed to hold the contractor harmless.

CONCLUSIONS

One conclusion suggested by such contradictory case law is that where possible, the Illinois courts will not allow indemnification for one's own negligence. Lawyers and clients should be cognizant of the fact that broad indemnity clauses will not be reviewed by courts in their most reasonable light. Only in those instances where the indemnity clause clearly states that "X will hold harmless Y for injuries resulting from Y's own negligence" will a third party claim have a good chance of succeeding.³⁸ While it is possible that a court will confront a situation in which it may feel obliged to grant indemnity, either because both parties were found negligent at the trial level or because of a unique fact pattern, these are likely to be few. The current trend, however, seems to indicate that a court will deny indemnity without even attempting to engage in a strict construction of the indemnity clause in question.³⁹ If this practice continues, the exceptional

37. *Id.* at 463, 259 N.E. 2d at 343. See also *Chicago, R. I. & P. R. R. v. Chicago, B. & Q. R. R.*, 437 F.2d 6, 9 (7th Cir. 1971), for a rationale rejecting exceedingly strict construction of indemnity provisions.

38. Two legislative caveats should be noted. ILL. REV. STAT. ch. 80, § 91 (1973) declares that such agreements in connection with the leasing of real property which holds harmless the lessor shall be deemed void as against public policy and unenforceable. Similarly, ILL. REV. STAT. ch. 29, § 61 (1973) declares such clauses in construction contracts, entered into after Sept. 21, 1971, void as against public policy. See *Davis v. Commonwealth Edison Co.*, Docket No. 47152 (Sup. Ct. Ill., Sept. 28, 1975), holding that the latter statute is also applicable to indemnity agreements in claims arising under the Structural Work Act.

39. See discussion of *Davis v. Marathon Oil Co.*, 28 Ill. App. 3d 526, 330 N.E. 2d 312

cases allowing indemnity will become even fewer.

IMPLIED INDEMNITY

Absent an express indemnity contract, a party may be indemnified if he is held liable for damages caused by the misconduct of another. This derivative liability may result from a legal doctrine such as *respondet superior*,⁴⁰ a lease arrangement, or a statutory tort. The indemnitee is liable to the injured party because of technicalities of legal doctrine or statute. The actual injury is a result of the acts of the indemnitor.

In Illinois the "no contribution between joint tortfeasors" rule has been applied to deny *pro rata* division of damages between negligent defendants.⁴¹ The theory of the active party indemnifying the passive-but-liable party has undergone expansion in response to the inequities which result from the present application of the no-contribution rule. In situations where one party's culpability is great in comparison to the other, the Illinois courts have allowed the shifting of the entire burden from the latter to the former. The use of this theory, however, has its own difficulties and inequities. The boundaries of active-passive negligence are elusive and the resulting decisions inconsistent. It precludes relief in many situations where justice would dictate that the tortfeasors distribute the burden among themselves.

Extension of Active-Passive Negligence

The Relationship Requirement

It is generally stated that in order for an indemnity action to succeed, the parties must have had a prior legal, or pre-tort, relationship. As the allowable use of indemnity has been expanded to ameliorate the harshness of the no-contribution rule,

(4th Dist. 1975) in text accompanying notes 24-26, *supra*.

40. In the recent case of *Virginia Corp. v. Russ*, 27 Ill. App. 3d 608, 327 N.E. 2d 403 (1st Dist. 1975), the court stated that an agent not guilty of illegal conduct may be indemnified by his principal for the cost of defending actions brought by third persons because of the agents authorized conduct.

41. *But see* Polelle, *Contribution Among Negligent Joint Tortfeasors in Illinois: A Squeamish Damsel Comes of Age*, 1 LOYOLA (CHI.) L.J. 267 (1970), arguing that case law does not prohibit contribution.

the requirement of a pre-tort legal relationship has similarly been relaxed. In several much debated cases, active-passive indemnity has been extended to strangers whose concurrent negligence caused an injury.

This extension was questioned, yet affirmed, in *Sargent v. Interstate Bakeries, Inc.*⁴² where a defendant who was parked illegally counterclaimed for indemnity from a defendant whose vehicle struck and injured plaintiff. The appeal on dismissal of the counterclaim centered on the validity of the decision in *Reynolds v. Illinois Bell Telephone Co.*,⁴³ involving a similar fact situation, wherein the court reversed the dismissal of a third party action between two parties who had had no pre-tort legal relationship. In its opinion, the court cited the principle that everyone is responsible for the consequence of his own negligence.⁴⁴ A pre-tort relationship is not necessary to effectuate this principle, nor is it necessary to prove that the co-defendants were not *in pari delicto*. Since judicially urged legislative action to abrogate the no-contribution rule had not been taken, the pre-tort relationship requirements had to be further relaxed and the emphasis placed upon determining the spectrum of blameworthiness.⁴⁵ Inequity would be unavoidable, however, until liability was proportioned to culpability.⁴⁶

The unequivocal language of *Sargent* did not settle the issue. A year later, in *Muhlbauer v. Kruzel*,⁴⁷ the supreme court affirmed dismissal of a third party action on pleadings which failed to allege any relationship between the parties, or circumstances

42. 86 Ill. App. 2d 187, 229 N.E. 2d 769 (1st Dist. 1967).

43. 51 Ill. App. 2d 334, 201 N.E. 2d 322 (1st Dist. 1964).

44. 86 Ill. App. 2d at 190, 229 N.E. 2d at 771.

45. The Illinois Judicial Conference of 1964 unanimously adopted a resolution favoring contribution between joint tortfeasors. The legislature has not acted upon the conference recommendations and the rule remains in force. However, the rule was court-made and can be court-changed. . . .

If the rule is not abrogated it must be further relaxed.

Id. at 197-98, 229 N.E. 2d at 774-75.

46. Total indemnity may appear unjust. . . . The possibility of inequity is unavoidable until the rule against contribution yields to a more rational approach which will place upon each tortfeasor liability in proportion to his own culpability.

Id. at 201-02, 229 N.E. 2d at 776-77.

47. 39 Ill. App. 2d 226, 234 N.E. 2d 790 (1st Dist. 1968).

giving rise to a duty to indemnify. The original action in *Muhlbauer* was against a store owner for personal injuries sustained in a crowd gathering around a clown hired by the Wilson Company to promote its meat products. The defendant-store owner filed a third party complaint for indemnity, charging that the acts alleged against him were committed by Wilson and concluding that these acts were active negligence. The court suggested that if the defendant had alleged that the clown was for the benefit of both parties, rather than completely divorcing himself from any connection with Wilson, a relationship could have been found on which to base indemnity. Yet the court cited *Reynolds* and *Sargent* without disapproval!⁴⁸

The *Muhlbauer* decision has caused confusion regarding the requirement of a pre-tort relationship and has produced conflicting interpretations. The relationship requirement of *Muhlbauer* can be read not as an attempt to reinstate the previous requirement but as a recognition of the distinction between stating a cause of action and tendering a new defendant.⁴⁹ The latter is not a function of third party practice and violates the principle that the plaintiff may choose its own defendants. The store owner in *Muhlbauer* denied any connection with Wilson and pleaded a defense that the charges in the original complaint were really the actions of another party.

Several courts have cited *Muhlbauer* for the bald proposition that there must be a pre-tort legal relationship on which to predicate indemnity. This was evidenced in the special concurrence to *Moody v. Silvercup Bakers, Inc.*⁵⁰ Justice Hallett felt that

48. Interestingly, if a *Reynolds-Sargent* analysis had been used in *Muhlbauer*, a dismissal of the third-party complaint still would have resulted. Under such an analysis, the food product manufacturer negligently brought about a condition (the crowd) and the store owner knew of this condition; however, neither party acted upon the condition to perpetrate the wrong (the injury to the pedestrian). The only active wrongdoer was the one or more members of the crowd who actually injured the pedestrian. Therefore, the passively negligent food product manufacturer was under no duty to indemnify.

Drozdik, *supra* note 2, at 145.

49. One may also conclude that *Muhlbauer* was simply a poorly pleaded case. See Kissel, *supra* note 2, at 160.

50. 17 Ill. App. 3d 113, 118, 307 N.E. 2d 789, 793 (1st Dist. 1974) (Hallett, J., concurring).

Muhlbauer overruled *Reynolds* and *Sargent* by implication and that the attempts by the courts in the latter cases to soften the no-contribution rule caused "difficulties in the trial and reviewing courts out of all proportion to the supposed 'harsh' rule it is supposed to 'mitigate.'"⁵¹

The recent case of *Young v. Gateway Transportation Co.*⁵² involved a fact situation quite similar to *Sargent* and *Reynolds*. A car struck a semi-trailer truck which was parked along the highway. In dismissing the third party complaint against the car driver, the court stated:

Additionally, a third-party complaint must disclose a pretort relationship upon which a duty to indemnify may be predicated. (See *Muhlbauer v. Kruzel*, 39 Ill. 2d 226, 234 N.E.2d 790) No such relationship between defendants and *Hammer* [third-party defendant] is alleged here.⁵³

The *Muhlbauer* precedent was viewed differently in *Mullins v. Crystal Lake Park District*.⁵⁴ In this case the minor third party defendant had given stolen fireworks to the plaintiff. When the plaintiff subsequently injured himself using the fireworks he sued both the thief and the lessee operators of the fireworks display. On appeal the court found that the minimal contact which took place when the third party defendant stole the fireworks from third party plaintiff's display established a sufficient pre-tort relationship upon which to base an indemnity action.⁵⁵

In *Parr v. Great Lakes Express Co.*⁵⁶ the Court of Appeals for the Seventh Circuit admitted to being uncertain regarding the interpretation to be given *Muhlbauer's* prior relationship requirement, and turned to that offered by attorney James Kissel.

"[L]ogic and reason [seem] to suggest that such a relationship . . . possibly might be nothing more than the involvement of

51. *Id.*

52. 26 Ill. App. 3d 864, 326 N.E. 2d 222 (1st Dist. 1975).

53. *Id.* at 874, 326 N.E. 2d at 230. See also *Warzynski v. Village of Dolton*, 23 Ill. App. 3d 50, 317 N.E. 2d 694 (1st Dist. 1974), *rev'd on other grounds*, Docket No. 47097 (Sup. Ct. Ill., Sept. 28, 1975); *Village of Lombard v. Jacobs*, 2 Ill. App. 3d 826, 277 N.E. 2d 758 (2d Dist. 1972).

54. 129 Ill. App. 2d 228, 262 N.E. 2d 622 (2d Dist. 1970).

55. *Id.* at 232, 262 N.E. 2d at 625.

56. 484 F. 2d 767 (7th Cir. 1973).

the two parties . . . in the causation of injury to the plaintiff under circumstances that clearly indicated a clear distinction in the quality of their misconduct."⁵⁷

In short, the involvement of two parties in causation is a sufficient relationship for indemnity.

The only legitimate conclusion to be drawn concerning the status of the pre-tort relationship requirement is that it is, at present, very nebulous. Whether the requirement will surface in a given case depends on the interpretation given *Muhlbauer* by a particular court.

The Definitional Dilemma

The second part of the implied indemnity equation creates as much confusion as the pre-tort relationship requirement; namely the struggle to develop a workable distinction between active and passive negligence. The trend is to view active and passive as "terms of art"⁵⁸ and to apply them on an ad hoc basis. The result is a myriad of anomalous decisions whose allocation of liability defies predictability and offends equity. Nevertheless, an attempt is made below to group together broad categories of actions in hopes of lending at least some guidance to the legal community.

The term "active" negligence is initially misleading since either an act or an omission may be characterized as "active". Where liability is predicated on a physical act, or on the presence of a mobile or supervising tortfeasor, the court will usually characterize it as "obviously" active, regardless of the degree of culpability of the other party.

Thus, in *Gillette v. Todd*⁵⁹ the plaintiff, a teacher, was struck by a door opened by a workman. The workman filed a third party complaint against the school for active negligence in designing the door without windows or a warning device. The appellate court affirmed dismissal of the complaint on the ground that the workman's physical action in pushing the door could only be

57. *Id.* at 772, citing *Kissel*, *supra* note 2, at 160.

58. *Moody v. Silvercup Bakers, Inc.*, 17 Ill. App. 3d 113, 117, 307 N.E. 2d 789, 792-93 (1st Dist. 1974).

59. 106 Ill. App. 2d 287, 245 N.E. 2d 923 (1st Dist. 1969).

characterized as active negligence since the condition of the door alone could not have injured the plaintiff. Similarly, the court in *Maas v. Ottawa Stockdale Fertilizer, Inc.*,⁶⁰ citing *Gillette*, characterized the physical act of spraying toxic brushkiller as active negligence and refused to grant indemnity from the party who furnished the poisonous substance.⁶¹ Lastly, in *Penzin v. Stratton*⁶² a speeding auto was denied indemnity for its active negligence, even though the other tortfeasor had entered the intersection against the light and had been pushed by the speeding auto into a pedestrian. Though both parties were equally negligent, one tortfeasor bore the economic burden.⁶³

The giving of directions has also been characterized as active negligence. In *United States v. Illinois*⁶⁴ the manager of a state fairgrounds told Green Beret troops where to tie a rope used in a traversing stunt. The manager misinformed them as to the type of construction, refused to allow inspection, and failed to supply them with blueprints. Injuries were sustained by onlookers when a portion of the catwalk was pulled down by the rope. The state was required to indemnify the United States for these injuries. More recently, in *St. Joseph Hospital v. Corbetta Construction Co.*,⁶⁵ a general contractor, at the direction of the architects, installed paneling which violated the building code. The architects' careless selection of the paneling and their ordering its installation were deemed active negligence and they had to indemnify the general contractor. The architects, in turn, were denied indemnity from the manufacturer, even though the latter

60. 9 Ill. App. 3d 33, 291 N.E. 2d 514 (3d Dist. 1972).

61. Note that while the court determined that they were concurrent causes of the injury, the supplier escaped liability. *Id.* at 37-38, 291 N.E.2d at 517-18.

62. 26 Ill. App. 3d 475, 325 N.E. 2d 732 (1st Dist. 1974).

63. See also *Parson v. Illinois Bell Tel. Co.*, 481 F.2d 458 (7th Cir. 1973), and *Preston v. National Broadcasting Co.*, 133 Ill. App. 2d, 272 N.E. 2d 700 (1st Dist. 1971), holding the drivers of moving automobiles to be active tortfeasors and thus denying indemnity, even where, as in *Parson*, the other party violated statutory guidelines.

64. 454 F.2d 297 (7th Cir. 1973). See also *Parr v. Great Lakes Express Co.*, 484 F.2d 767 (7th Cir. 1973) where a truck driver, who was being directed by the third party defendant, backed up and hit a pedestrian. The court suggested that evidence at the trial could show that the supervision and control of the third party defendant was active negligence and, by preempting the exercise of due care, the negligence of the driver could be relegated to secondary status.

65. 21 Ill. App. 2d 925, 316 N.E. 2d 51 (1st Dist. 1974).

was actively negligent in concealing test information on the sub-standard paneling.

The conclusion to be drawn from these cases is that tortfeasors are denied any relief from full liability under circumstances in which they were mobile or acting in a supervisory capacity. Their equally culpable co-tortfeasor, however, is free from any liability. In contrast, in several cases where the negligent act of the tortfeasor was to remain in one place, the courts have allowed relief,⁶⁶ yet the courts have consistently stressed that motion or lack of motion is not determinative of active or passive classification.⁶⁷

In what has become the classic situation, a plaintiff is injured by a moving vehicle, but the accident is concurrently caused by a negligently parked vehicle. This fact pattern, with minor variation, has produced different rulings. In both *Reynolds v. Illinois Bell Telephone Co.*⁶⁸ and *Sargent v. Interstate Bakeries, Inc.*⁶⁹ the courts reversed dismissal of a third party complaint brought by a parked vehicle against a moving vehicle, contending that after hearing the evidence a jury might determine that the parked vehicle was only passively negligent.

The *Sargent* court read *Reynolds* as departing from previous fault-weighting standards in finding the parked vehicle passive because it created a condition on which the independent act of the motorist operated to cause the injury. The court recited the cryptic maxim that:

“[O]ne is passively negligent if he merely fails to act in fulfillment of a duty of care which the law imposes on him. . . . One is actively negligent if he participates in some manner in the conduct or omission which caused the injury.”⁷⁰

66. See, e.g., *Sargent v. Interstate Bakeries, Inc.*, 86 Ill. App. 2d 187, 229 N.E. 2d 769 (1st Dist. 1967); *Reynolds v. Illinois Bell Tel. Co.*, 51 Ill. App. 2d 334, 201 N.E. 2d 322 (1st Dist. 1964).

67. See, e.g., *Moody v. Chicago Transit Auth.*, 17 Ill. App. 3d 113, 307 N.E. 2d 789 (1st Dist. 1974); *Tzyros v. Berman Leasing Co.*, 86 Ill. App. 2d 176, 229 N.E. 2d 787 (1st Dist. 1967); *Gulf, M. & O. R.R. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E. 2d 783 (1st Dist. 1951).

68. 51 Ill. App. 2d 334, 201 N.E. 2d 322 (1st Dist. 1964).

69. 86 Ill. App. 2d 187, 229 N.E. 2d 769 (1st Dist. 1967).

70. *Id.* at 193, 229 N.E. 2d at 772, citing *King v. Timber Structures, Inc.* 240 Cal. App. 2d 178, 182, 49 Cal. Rptr. 414, 417 (1st Dist. 1966). Note, however, that if the third party plaintiff had been in the act of parking rather than already parked, indemnity might have

By contrast, in *Moody v. Silvercup Bakers, Inc.*⁷¹ a truck was parked in a no parking area designated for buses and a pedestrian was injured when the bus swerved around the truck. The court held that inaction may be a primary cause of an event. Since each tortfeasor's contribution to the cause of the mishap was equally significant, indemnity was denied to the parked vehicle. While different in result, *Moody* is factually indistinguishable from the *Sargent* or *Reynolds* cases.

Similarly, in the recent case of *Young v. Gateway Transportation Co.*,⁷² the operator and owner of a semi-trailer truck parked without warning lights or flares was denied indemnity when a vehicle driving too close to another car struck the trailer and injured its passenger. The court held that compared with the automobile driver, the negligence of the semi-trailer operator could not be characterized as passive and the degree of culpability between the tortfeasors did not warrant shifting the burden.

Where an act is found to constitute "active" negligence, even the gross culpability of the co-tortfeasor will not provide relief. Even where the type of actions differ, the court will label a tortfeasor "active" and deny him relief where his culpability is considered equal to or greater than that of his co-tortfeasor. This analysis also applies to liability based on omissions. It is possible that a breach of duty, an omission, can create a condition upon which an independent force can work to cause injury. Under a *Sargent* analysis, the condition-creating negligence would be passive and the negligence that directly caused the injury would be active. However, where joint tortfeasors breach the same duty towards the plaintiff, neither can be indemnified. Thus, if a court defines duty by painting with a broad brush, it will usually be determined that the tortfeasors breached the same duty. The courts hold that to allow indemnity to a tortfeasor who has breached the same duty as the indemnitor would be to allow contribution. There must be a clear difference in degree to shift the burden.

been denied. In *Stewart v. Mr. Softee, Inc.*, 75 Ill. App. 2d 328, 221 N.E. 2d 11 (1st Dist. 1966) the gloss on the fact situation was that the double-parked ice cream truck chimed bells. The court determined that this was active negligence as the purpose was to entice children and it was therefore the primary cause of the child being hit by the motorist.

71. 17 Ill. App. 3d 113, 307 N.E. 2d 789 (1st Dist. 1974).

72. 26 Ill. App. 3d 864, 326 N.E. 2d 222 (1st Dist. 1975).

In *Carver v. Grossman*⁷³ an employee, while working on a car, was injured when the owner turned on the ignition and the car lurched forward. The gas station operator had left the car in drive and without blocks. The court rejected the owner's argument that his conduct was passive in nature because he merely created a condition which the owner failed to discover. The court held the owner knew or should have known the car would move and therefore, was the active catalyst which caused the injury. Since both parties were held to the same duty to exercise due care in insuring the plaintiff's safety, and since they both breached that duty, neither was entitled to indemnity.⁷⁴

In a more recent case,⁷⁵ plaintiff was forced to stop quickly when branches fell from an Illinois Bell truck. A speeding car driving too close hit the plaintiff. The court rejected Illinois Bell's contention that it had passively created a condition upon which the speeding motorist acted. The court held that the charges in the complaint that Illinois Bell negligently loaded the branches were sufficient to permit a finding of active negligence.

In *Warzynski v. Village of Dolton*,⁷⁶ the appellate court reversed a judgment granting indemnity to the village, which negligently maintained a water main. A passenger had been injured when a speeding driver was forced to make a sudden stop by the main. The court found that the village's failure to maintain the street was the primary cause of the accident. Because of the length of time the street had been in disrepair the village had constructive notice and could have foreseen a driver hitting the sewer cover.

The supplemental opinion⁷⁷ attempted to clarify those situations in which a breach of duty which creates a condition will be

73. 55 Ill. 2d 507, 305 N.E. 2d 161 (1973).

74. Where both parties breached a duty to warn employees that a crane transmitted an electrical charge from an uninsulated power line there was no basis for indemnification on either side. *Harris v. Algonquin Ready Mix, Inc.*, 59 Ill. 2d 445, 322 N.E. 2d 59 (1974).

75. *Loehr v. Illinois Bell Tel. Co.*, 21 Ill. App. 3d 555, 216 N.E. 2d 251 (1st Dist. 1974).

76. 23 Ill. App. 3d 50, 317 N.E. 2d 694 (1st Dist. 1974), *modified* 23 Ill. App. 3d 60, 317 N.E. 2d 701 (1st Dist. 1974), *rev'd on other grounds*, Docket No. 47097 (Sup. Ct. Ill., Sept. 28, 1975). The supreme court noted that they had no occasion to consider the question of the driver's obligation to indemnify the village. The court stated, however, that the fact that it did not discuss the issue did not "indicate approval of the opinion of the appellate court concerning it."

77. 23 Ill. App. 3d 60, 317 N.E. 2d 701 (1st Dist. 1974), *modifying* 23 Ill. App. 3d 50, 317 N.E. 2d 694 (1st Dist. 1974).

considered active negligence. It characterized such situations as involving "affirmative duties" and indicated that among these affirmative duties are:

a failure to discover an open and obvious condition, if there was a duty to inspect. . . . an improper inspection which failed to discover an obviously dangerous condition. . . .
. . . and failure to take some action regarding a peril known him, [third party plaintiff] or which in the exercise of due care should have been known to him.⁷⁸

Under such a standard it is almost impossible to have one's actions characterized as passive in nature. In addition, not only does this analysis conflict with the *Sargent* decision but it conflicts with numerous Structural Work Act cases wherein a failure to fulfill a duty to inspect was deemed to be only passive negligence.⁷⁹

A theory similar to that employed in *Warzynski* was applied in the recent case of *Garfield Park Community Hospital v. Vitacco*.⁸⁰ The plaintiff in the original action had to have a leg amputated because of loss of circulation caused by a questionably effective form of traction for a broken leg. The hospital sought indemnity from the doctor who had placed the boy in traction. The court denied indemnity based on what it termed the hospital's active negligence. The nurses had failed to recognize symptoms of loss of circulation and bring them to the attention of the doctor. This lack of action by the hospital was held to be the primary cause of the injury and a bar to indemnity.

The converse of this "passive condition-active cause" situation is the theory of indemnity of Section 95, Restatement of Restitution:

Where a person has become [*sic*] liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the

78. *Id.* at 61-62, 317 N.E. 2d at 702.

79. See text accompanying notes 99-101, *infra*.

80. 27 Ill. App. 3d 741, 327 N.E. 2d 408 (1st Dist. 1975).

discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.⁸¹

This section was cited with approval but held inapplicable in *Chicago & Illinois Midland Railway Co. v. Evans Construction Co.*⁸² An employee of the railway was injured on a tie which had been placed on land owned by the third party defendant. The railway settled the Federal Employers' Liability Act⁸³ claim and brought an action for indemnification. It charged that the landowner's placing or failing to remove the tie was active negligence which caused the injury. The evidence, however, failed to prove that the owner placed the tie on the land. The owner's liability, therefore, could only be based on a breach of duty to discover and remove the tie. This duty to inspect the premises rested on both parties and, therefore, the court could find no qualitative distinction on which to rationalize the shifting of the damage burden.

In *Peoria & Eastern Railway Co. v. Kenworthy*⁸⁴ the railway sued the defendant who had obstructed the view of the tracks by parking his trailer on railroad property, causing a collision between a train and an auto. Since the defendant clearly created the condition and the railroad merely failed to discover the hazard, indemnity was allowed.

Even in a situation where a railroad had knowledge of the defective construction of a trestle, its failure to warn its employees and provide a safe place for them to work was held to be passive. The owner of the property, who constructed and controlled the trestle was held liable for indemnity.⁸⁵ In contrast, the failure to provide the necessary and customary lookout to warn employees of an impending collision with an engine parked on the wrong side of the tracks has been held to be active negligence.⁸⁶

In reviewing the status of indemnity law in Illinois, this Article has focused upon various applications of the qualitative standard of active-passive negligence. These applications are by no means

81. RESTATEMENT OF RESTITUTION § 95 (1937).

82. 32 Ill. 2d 600, 208 N.E. 2d 573 (1965).

83. 45 U.S.C. §§ 51-60 (1970).

84. 7 Ill. App. 3d 350, 287 N.E. 2d 543 (4th Dist. 1972).

85. *Hayes v. Illinois Terminal R.R.*, 15 Ill. App. 3d 92, 303 N.E. 2d 625 (5th Dist. 1973).

86. *Doerge v. Wabash R.R.*, 4 Ill. App. 3d 914, 282 N.E. 2d 226 (5th Dist. 1972).

exclusive, and consequently, no survey of indemnity law would be complete without an examination of certain "specialized areas" of law. These cases differ from the general framework insofar as a particular statute or a different tort doctrine is involved; otherwise, they confront the same difficulties with the active-passive negligence standard of conduct as encountered above. The concluding portion of this Article will focus upon the case for contribution as a means of avoiding the inconsistencies and inequities which prevail in the area of indemnification under the present state of the law.

SPECIALIZED AREAS

Shifting the entire burden from one tortfeasor to another is based on the principle that one should be responsible for his own actions. In certain situations, however, statutes or case law have embodied public policy and placed the burden on a specific party often because that party had the economic resources to absorb the damages. The following materials will deal briefly with three such areas of law, summarizing their unique treatment of indemnity. Problems in these areas arise chiefly as a result of the aforementioned definitional dilemma of active-passive negligence. This is because, for the most part, in cases arising in a Structural Work Act or products liability framework, the parties to the indemnity action usually have a pre-tort relationship, such as contractor-subcontractor or manufacturer-distributor.

*Structural Work Act*⁸⁷

Liability for injuries under the Structural Work Act is placed on those persons "having charge of"⁸⁸ the work in progress. The courts, in order to provide protection for the injured workman, have construed "having charge of" broadly. Therefore, persons who had no direct contact with the injury may be held liable for damages because of their supervisory power in the general work area.⁸⁹ In such a situation it often happens that there is another

87. ILL. REV. STAT. ch. 48, §§ 60-69 (1973).

88. *Id.* § 69.

89. It often happens that it is the plaintiff's employer who has direct control and thus the plaintiff is barred by the provisions of the Workmen's Compensation Act, ILL. REV.

party, such as a subcontractor or the employer of the plaintiff, whose negligence exposed the party to liability, and the court will allow indemnity using the active-passive negligence concept.⁹⁰ While liability under the Structural Work Act does not rest on negligence, there can be degrees of fault on which indemnity can be predicated.⁹¹

The determination of degrees of fault in Structural Work Act cases is a jury question and the courts are hesitant to overturn the jury's determination.⁹² To the extent decisions under this Act are inconsistent, it is at least in part explained by the wide latitude given, and deference shown, to the jury and its findings.

For example, duty under the Structural Work Act is not limited to ensuring the safety of a provided scaffold, but extends to providing a scaffold where one is needed. Thus, in *Lambert v. D. J. Velo & Co.*,⁹³ the subcontractor appealed a decision holding him to indemnify the general contractor where a worker was injured because of failure to provide scaffolding. The subcontractor argued that since both had a duty to provide a scaffold, there was

STAT. ch. 48, § 138.5(a) (1973), from suing his employer directly. However, the employer can be held liable to indemnify and be brought into a third party action. See *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 165 N.E. 2d 346 (1st Dist. 1960). However, where an employer is held liable to indemnify another party the employer cannot file a counterclaim against its employee as such action would destroy the blanket protection afforded employees under the Structural Work Act. *Palier v. Dreis & Krump Co.*, 81 Ill. App. 2d 1, 225 N.E. 2d 67 (1st Dist. 1967).

90. Some indemnity actions under the Structural Work Act had been brought on an implied indemnity theory known as the Ryan Doctrine, which developed from a line of United States Supreme Court maritime cases, commencing with *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). This theory implied a duty to perform the contract in a reasonably safe manner. In *Wrobel v. Trapani*, 129 Ill. App. 2d 306, 264 N.E. 2d 240 (1st Dist. 1970), the court found that this doctrine was inapplicable to building contractor-subcontractor indemnity actions and, in the absence of express indemnity language in the contract, indemnity would have to be based on the active-passive theory.

91. See, e.g., *Rovekamp v. Central Constr. Co.*, 45 Ill. App. 2d 441, 449, 195 N.E. 2d 756, 759-60 (1st Dist. 1964).

92. Where third party actions are dismissed on the pleadings, the appellate courts generally have held that the active-passive question should go to the jury. In *Wrobel v. Trapani*, 129 Ill. App. 2d 306, 264 N.E. 2d 240 (1st Dist. 1970), plaintiff, employee of the subcontractor, placed and used a ladder leaning on the side of a building. The general contractor's employee lowered the sash of a window on which plaintiff was balancing himself causing the plaintiff to fall. The court held that the active-passive issue was to be resolved by a jury, not by a directed verdict.

93. 131 Ill. App. 2d 30, 268 N.E. 2d 170 (1st Dist. 1971).

no qualitative distinction between their negligent acts upon which to base the verdict for indemnity. The court held that the jury could have found that the subcontractor was doing the actual work and was therefore primarily responsible, while the general contractor was only technically liable because of "having charge of" the work.

In *Lindsey v. Harlan E. Moore & Co.*,⁹⁴ where employees of a subcontractor borrowed a scaffold from the contractor and assembled it, the contractor was allowed indemnity even though the contractor's superintendent had seen the employees, failed to tell them to put cleats on the scaffold, or warn them that they were moving the scaffold improperly. The court held that the employees' failure to erect the scaffold without cleats was a jury question, and a determination against them would constitute active negligence.

Such court deference has resulted in the following characterizations of various types of conduct. Where a party furnishes or erects the scaffold upon which the plaintiff is injured his negligence is usually termed active.⁹⁵ Having direct control over the operation and use of a scaffold,⁹⁶ or having control of the specific construction work where the injury took place,⁹⁷ may also be characterized as active conduct. Lastly, where a general contractor leaves a materials hoist in an area where no other scaffolds or ladders are available, knowing a roofer will soon be working in the area, he is determined to have supplied the scaffold by invitation. Indemnity is denied as he is exposed to liability under the Structural Work Act through his own acts.⁹⁸

A party may be found to have "charge of" the work if it had the power and duty to inspect the area. However, more often than not, a mere failure to inspect has been characterized as passive

94. 11 Ill. App. 3d 432, 297 N.E. 2d 8 (4th Dist. 1973). See also *Gimmeson v. Illinois Power Co.*, 18 Ill. App. 3d 736, 310 N.E. 2d 397 (5th Dist. 1974).

95. *Jones v. McDougal-Hartmann Co.*, 115 Ill. App. 2d 403, 253 N.E. 2d 581 (3d Dist. 1969).

96. *Isabelli v. Cowles Chem. Co.*, 7 Ill. App. 3d 888, 289 N.E. 2d 12 (1st Dist. 1974); *Jackson v. H.J. Friedrick & Sons, Inc.*, 1 Ill. App. 3d 381, 274 N.E.2d 189 (5th Dist. 1971).

97. *Buehler v. Toyman Constr. Co.*, 133 Ill. App. 2d 44, 272 N.E. 2d 861 (1st Dist. 1971), *aff'd*, 52 Ill. 2d 214, 287 N.E. 2d 691 (1972). See also *McInerney v. Hasbrook Constr. Co.*, Docket No. 46539 (Sup. Ct. Ill., Sept. 28, 1975).

98. *Pantaleo v. Gamm*, 106 Ill. App. 2d 116, 245 N.E. 2d 618 (1st Dist. 1969).

conduct.⁹⁹ Thus, in *O'Leary v. Siegel*,¹⁰⁰ the plaintiff and a fellow worker erected the scaffold from which plaintiff fell. Ownership of the scaffold was not determined. Since the general contractor had failed to inspect the scaffold, though it was on the job for at least two months, the absence of safety pins, which caused the accident, was not discovered. The court found that the failure to inspect was passive. It noted that judicial decisions have read "having charge of" liberally to effect the legislative intent behind the Act, but felt a contractor who is exposed to "technical" liability because of the actions of a subcontractor should be indemnified.

In *Gadd v. John Hancock Mutual Life Insurance Co.*,¹⁰¹ a subcontractor's employee was injured when he tripped and fell while walking on a plank upon which the general contractor's employees had placed a machine with cables. The floors below had not been planked by the subcontractor. After the employee had recovered from the general contractor, the latter filed a third party complaint against the subcontractor based on active-passive negligence. The court affirmed denial of a judgment n.o.v. in favor of the subcontractor since the jury should determine if the general contractor's negligence was active or passive. They could find that placing the machine on the plank was not the proximate cause of the injury. Thus, the general contractor's only negligence would be the failure to discover and remedy the defect, which the court held was passive conduct.

Architects may be held liable under the Structural Work Act where they have both general supervisory power and the ability to halt work. However, failure to stop work being performed in an unsafe manner may be considered passive conduct, especially where the contractor directly causes the injury by use of improper construction methods.¹⁰²

Finally, where the misconduct of both parties is equal, neither

99. See, e.g., *Lindner v. Kelso Burnett Elect. Co.*, 133 Ill. App. 2d 303, 273 N.E. 2d 194 (1st Dist. 1971) (failure to inspect held passive in contrast to erection of scaffold). *Contra*, *Topel v. Porter*, 95 Ill. App. 2d 315, 237 N.E. 2d 711 (1st Dist. 1968) (failure to check safety device active negligence where party notified of necessity of safety test).

100. 120 Ill. App. 2d 12, 256 N.E. 2d 127 (1st Dist. 1970).

101. 5 Ill. App. 3d 152, 275 N.E. 2d 285 (1st Dist. 1971).

102. *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E. 2d 630 (1967).

can be indemnified. In *Scully v. Otis Elevator Co.*,¹⁰³ Otis installed elevators and dumbwaiters while another contractor, Simmons, prepared the shafts. Otis directed Simmons to make holes in its scaffolding and an employee of Otis was fatally injured when a brick fell through one of the holes. The court held that there was sufficient evidence upon which to conclude that Simmons' negligence was equal to or greater than Otis', and thus indemnity was denied.

This brief discussion of litigation arising under the Structural Work Act discloses that the presence of a statutory cause of action, at least in this instance, has not deterred the courts from engaging in the same qualitative comparison of conduct as is employed in the general indemnification cases. In fact, conduct-comparison may be greater in the Structural Work Act area in light of the courts' hesitancy to rule out indemnity as a matter of law. The jury has great leeway, and wields more power than usual, in determining indemnity in such cases.

*Dram Shop Act*¹⁰⁴

While the courts have liberally allowed indemnity in Structural Work Act cases and have given the trier-of-fact permission to weigh the relative faults of the parties, the courts have denied such fault-weighting in actions brought under the Dram Shop Act.

In *Wessel v. Carmi Elks Home, Inc.*,¹⁰⁵ a third party injured by an intoxicant brought an action against the operator of the tavern and owner of the building. The defendants brought a third party action for indemnity, against the intoxicant. The trial court dismissed the complaint and the dismissal was affirmed by both the appellate court and the Supreme Court of Illinois.

The supreme court stated that the purpose of the Dram Shop Act was to place the ultimate cost burden on the liquor industry. Since the statute was penal in nature, public policy would be frustrated if the liquor industry could obtain indemnity from the intoxicated tortfeasor. The court expressly overruled *Geocaris v.*

103. 2 Ill. App. 3d 185, 275 N.E. 2d 905 (1st Dist. 1971).

104. ILL. REV. STAT. ch. 43, § 135 (1973).

105. 54 Ill. 2d 127, 295 N.E. 2d 718 (1973).

*Bangs*¹⁰⁶ and *Walker v. Service Liquor Store, Inc.*¹⁰⁷ which had allowed indemnity to the seller based on a qualitative comparison of the tortfeasors' conduct.

The dissent, however, affirmed the principle of imposing liability on the party principally at fault. Mr. Justice Ward noted that the purpose of the act was to provide an additional remedy to a person who is injured by an intoxicated person who may not have the resources to pay a judgment; therefore it is similar to the Structural Work Act, where the shifting of liability is allowed.¹⁰⁸ The dissent and the concurrence both noted that the Dram Shop Act is not based on fault or negligence. In this respect it also resembles the Structural Work Act, yet the Structural Work Act decisions have reiterated that there are degrees of fault on which indemnity can be based.

The distinction may well be in the moral opprobrium connected with alcoholic beverages, since the Liquor Control Act is designed to promote temperance in consumption of liquor by regulating its sale and distribution. Another consideration may be that dram shop actions can be absorbed by insurance coverage while the intoxicant may not have such resources. On the other hand a subcontractor, under the Structural Work Act, is more likely to be able to afford indemnity.

Products Liability

The fault-weighting concept upon which indemnity is based is also precluded in actions based on strict liability. Active-passive indemnity is based on a comparison of the respective negligence of tortfeasors, but in strict liability the manufacturer's liability is not based on negligence and fault-weighting is therefore inapplicable.¹⁰⁹ This is true even where the other party in the chain of distribution is negligent.¹¹⁰

For example, where an employer fails to inspect, give instructions, or warn an employee of an unreasonably dangerous

106. 91 Ill. App. 2d 81, 234 N.E. 2d 17 (1st Dist. 1968).

107. 120 Ill. App. 2d 112, 255 N.E. 2d 613 (4th Dist. 1970).

108. 54 Ill. 2d at 137, 295 N.E. 2d at 723.

109. *Kossifos v. Loudon Mach. Co.*, 22 Ill. App. 3d 587, 317 N.E. 2d 749 (1st Dist. 1974).

110. See *Stanfield v. Medalist Indus. Inc.*, 17 Ill. App. 3d 996, 309 N.E. 2d 104 (2d Dist. 1974).

machine, this conduct even if characterized as active negligence will not shift liability from the manufacturer to the employer. The essence of a strict liability action is that the item left the manufacturer in a dangerously defective condition which caused the injury.¹¹¹ If it is proven that the negligence of the employer, not a defect in the product, caused the injury, such facts are a defense, not a basis for indemnity.¹¹² However, if the product was defective when it left the manufacturer, whether or not due to the manufacturer's fault, the manufacturer will be held strictly liable for damages and the active negligence of the employer will not be a basis for indemnity.

Indemnity is possible within the context of products liability, however, without resort to the active-passive theory. Courts have allowed indemnity where, for example, a supplier in the distributive chain has been held strictly liable. For example, in *Texaco, Inc. v. McGrey Lumber Co.*¹¹³ the plaintiff had settled a claim under the Structural Work Act when a plank in a scaffold they had erected broke and injured a workman. Texaco filed a subsequent third party complaint against the supplier of the defective plank, who in turn filed an indemnity action against his own supplier. The court held that strict liability against a person in the distributive chain who placed a product in the stream of commerce with knowledge of its intended use eliminates active-passive analysis and justifies indemnity from the supplier.

Similarly, in *Krammer v. Edward Hines Lumber Co.*¹¹⁴ a scaffold manufacturer made alterations in a board which he bought from a lumber company. The plank, used for an outside railing on a scaffold, broke and a tuckpointer was injured. The manufacturer sought indemnity claiming that the lumber supplier knew the purpose for which the plank would be used. The court held that a product is defective when it fails to properly perform when used in a manner which is foreseeable, even if it is not the manner intended by the supplier or the manufacturer. Whether the lumber supplier could have foreseen the use to which the lumber

111. See RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

112. *Burke v. Sky Climber, Inc.*, 57 Ill. 2d 542, 316 N.E. 2d 516 (1974).

113. 117 Ill. App. 2d 351, 254 N.E. 2d 584 (1st Dist. 1969).

114. 16 Ill. App. 3d 763, 306 N.E. 2d 686 (1st Dist. 1974).

would be put and whether the plaintiff's injuries were caused by a defect in the lumber or by alteration of the manufacturer was a jury question.

INDEMNITY V. CONTRIBUTION

All attempted definitions of active-passive negligence break down in application, because they are being applied to situations where an indemnity concept is improper. The theory provides no relief to active tortfeasors, nor does it provide relief where the court has determined that the same duty was breached. The situations where indemnity is granted are inconsistent and unpredictable. Inequity results where relief is denied and where relief is afforded, since the proper relief for two parties who are both guilty of some type of negligence would be to prorate the damages in proportion to culpability. The obstacles preventing the acceptance of the doctrine of contribution, however, are steeped in history and misunderstanding.

It is an accepted axiom of Illinois law that there is no contribution among joint tortfeasors. At its origins the rule applied to tortfeasors acting in concert who committed a voluntary and intentional tort. In that context, "joint" tortfeasors were joined as defendants and held jointly and severally liable for the damage. Consequently two guilty parties were forbidden to use the courts to divide damages from an injury they had planned together.

As procedural rules were liberalized to allow joinder of negligent and independent tortfeasors, the rule against contribution was extended to them. However, they were in reality "joined" not joint tortfeasors.¹¹⁵ The inequity of forbidding contribution to such tortfeasors was a catalyst to the expansion and development of active-passive indemnity and the resultant lack of clarity surrounding the concept.

The Supreme Court of Illinois used the original definition of joint tortfeasor to afford relief in *Gertz v. Campbell*.¹¹⁶ A young boy was hit by a car. His attending physician failed to perform surgery in time and the boy's leg had to be amputated. The court

115. See Comment, *Contribution Among Tortfeasors: The Need for Clarification*, 8 JOHN MARSHALL J. PRAC. & PROC. 75 (1974).

116. 55 Ill. 2d 84, 302 N.E. 2d 40 (1973).

noted that these actions were not done in concert, were separated in time, and neither party had control of the other's conduct. While the motorist was liable to the plaintiff for the physician's actions which were foreseeable results of his own negligence, he was also entitled to an equitable apportionment of the damages—a hybrid of indemnity. The court awarded the motorist the proportional share of damages caused by the physician's malpractice. The effect was to allow contribution. However, by characterizing it as a type of indemnity, the distinction between indemnity and contribution and their application is further muddled. The indication is, however, that the judiciary is attempting to develop an equitable approach to damage apportionment. Other jurisdictions who have similar problems with the active-passive indemnity concept and the no-contribution rule are now permitting contribution among concurrent and successive tortfeasors.

For example, in *Dole v. Dow Chemical Co.*,¹¹⁷ the New York Court of Appeals allowed a chemical company to obtain contribution from the employer of the plaintiff's decedent who died from a poisonous fumigant manufactured by the chemical company. The employer had directed the decedent to work in a bin which had been sprayed with the fumigant. In reversing dismissal of the third party complaint against the employer, the court noted the inadequacy of the active-passive doctrine which was elusive and difficult to apply. The New York statute which allowed a tortfeasor to compel equal contribution from a co-defendant where both were subject to the same judgment was also inadequate since it depended on whom the plaintiff chose to sue. Therefore, fairness dictated that the court allowed contribution where the third party is responsible for part but not all the negligence which caused the damages.

The Seventh Circuit Court of Appeals has also taken the position that contribution is the most equitable method for apportioning damages. In *Kohr v. Allegheny Airlines, Inc.*¹¹⁸ the court decided to apply the federal doctrine of comparative negligence in aviation cases resulting from mid-air collisions. The court

117. 30 N.Y. 2d 143, 282 N.E. 2d 288, 331 N.Y.S. 2d 382 (1972).

118. 504 F. 2d 400 (7th Cir. 1974).

rejected the no-contribution rule, judging it better to have the trier-of-fact determine, on a percentage basis, the degree of negligence of each party and to distribute the loss in that proportion. Under the *Kohr* doctrine, each defendant is held liable to the plaintiff for the entire damages, so the plaintiff cannot be denied full recovery. The liability between the defendants, however, is in proportion to the negligence.¹¹⁹

It is widely recognized that contribution is the most equitable method of effecting the principle that each person is responsible for the consequences of his negligent acts. The concept is manageable and definable, and allowing contribution will clear up the confusion surrounding the indemnity concept, which has been stretched to do a job for which it was not designed.

The present broad application of the no-contribution rule is a product of judicial interpretation. No-contribution among joint tortfeasors serves a limited purpose beyond which it should not be applied. The judiciary should allow contribution where equity and reasonableness demand its application. Without it the inconsistency in apportioning tort damages will continue.

119. For a discussion of the workability of the *Kohr* doctrine see Kennelly, *Aviation Law: Domestic Air Travel—A Brief Diagnosis and Prognosis*, 56 CHI. BAR REC. 248 (1975).