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Contribution and Indemnity Among Joint Tortfeasors in Illinois: A Need For Reform

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Illinois traditionally has not allowed a right of contribution between joint tortfeasors. This harsh common law doctrine, which permits a plaintiff to proceed to judgment against one of several joint tortfeasors and denies that defendant any claim against other joint tortfeasors, originated in 1799 when Lord Kenyon declared that he had "never before heard of such an action having been brought, where the former recovery was for a tort."[1] In that case a joint judgment had been rendered against two defendants, who together had converted plaintiff's goods. Lord Kenyon expressly stated that the decision "would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves." Later English cases followed Kenyon's reasoning and prohibited contribution only when plaintiff was a conscious and wilful wrongdoer.

Originally American courts also restricted the rule to cases of wilful misconduct. As an early Massachusetts judge stated:

> No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed. But justice and sound policy . . . alike require, that it should not be extended to cases where parties have acted in good faith . . . . It is only when a person knows, or must be presumed to know that his acts were unlawful, that the law will refuse to aid him in seeking an indemnity or contribution.[2]

Eventually, however, the great majority of American courts abandoned this distinction and extended the prohibition to negligent

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1. Merryweather v. Nixon, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).
2. Jacobs v. Pollard, 64 Mass. (10 Cush.) 287, 288-89 (1852).

tortfeasors.[3] When liberalization of joinder rules permitted a plaintiff to join several defendants whose independent, albeit concurrent, acts of negligence had contributed to a single injury, the rule was extended even further and contribution was denied these "joinable" defendants as well.[4] Illinois adopted the English rule of no contribution in 1856[5] and expanded it to include both negligent and concurrent tortfeasors.[6]

Few commentators have had a good word for the prohibition against contribution,[7] cognizant of the potential for inequities inherent in its enforcement. The rule has been criticized as an anachronism dating back to a time when tortfeasors were akin to criminals, and courts therefore reluctant to permit wrongdoers to use the courts for their own relief.[8] This reluctance was accomapnied by a fear that an undue amount of judicial time and energy would necessarily be expended in making decisions concerning degrees of culpability among civil wrongdoers.[9] But however discredited the underlying rationale may be, the prohibition continues in full force in Illinois.

To alleviate the harsh results implicit in the rule, Illinois courts creatively have expanded the concept of indemnity beyond its common law definition. While at common law indemnity was given, as Lord Kenyon indicated, to a defendant held liable without personal fault, Illinois in some cases permits recovery by a party not completely free from fault.

A right to indemnification may arise by contract, or may be created by law. The courts of Illinois have permitted both types of indemnity. This article analyzes and evaluates the various devices by which such recovery has been permitted.

Contractual Indemnification

Contractual indemnification agreements are effective in permitting potential joint tortfeasors to decide among themselves how losses are to be allocated in the event of joint liability. These in-

3. W. Prosser, Law of Torts § 50, at 306 (4th ed. 1971) [hereinafter cited as Prosser].

4. *Id.* § 46, at 295-98.

5. Nelson v. Cook, 17 Ill. 443 (1856).

6. Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905) (dictum). *See also* Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 196, 229 N.E.2d 769, 774 (1967). For the remainder of this article, the term "joint tortfeasor" conforms to the Illinois usage.

7. James, *Contribution Among Joint Tortfeasors A Pragmatic Criticism*, 54 Harv. L. Rev. 1157 (1941).

8. Ill. Judicial Conference Ann. 1 Rep. 117 (1964) (unanimous resolution favoring contribution among joint tortfeasors).

9. Reese v. Chicago, Burlington & Quincy R.R. Co., 55 Ill. 2d 356, 303 N.E.2d 382 (1973).

demnity contracts have caused few problems when the intention of the parties is manifest, but the indemnity provision will not be construed as indemnifying one against his own negligence unless such construction is required by clear and explicit language of the contract, or such intention is expressed in unequivocal terms.[10] In 1971 the Illinois General Assembly invalidated all such provisions in construction contracts on public policy grounds.[11] This interdiction has been broadly construed. In *Davis v. Commonwealth Edison Co.*,[12] an architect, sued for a Structural Work Act[13] violation, filed a cross-claim for indemnification based on a contractual provision against the general contractor. The provision stated that the contractor would "pay all claims or judgment for any injuries whether caused by Bonesz's [the architect] negligence or not, arising out of the construction . . . including all claims or judgments under the Illinois Structural Work Act."[14] The Illinois Supreme Court struck the claim for indemnification. The court disposed of the contention that the statute is invalid on the basis of equal protection or special legislation in that it is limited to construction contracts by stating:

> The burden of demonstrating that a classification is unreasonable or arbitrary is upon the person attacking the validity of the classification . . . we consider there are sufficient differences between the industry affected . . . and others to form a reasonable basis for the classification.[15]

The court further held that in addition to clauses providing for indemnification from one's own negligence the "legislative intendment" was that the statute render invalid clauses by which a party seeks indemnification for its possible future liability under the

10. Tatar v. Maxon Constr. Co., 54 Ill. 2d 64, 294 N.E.2d 272 (1973).

11. ILL. REV. STAT. ch. 29, §§ 61 *et seq.* (1975). The statute applies only to contracts executed after the statutory effective date, September 23, 1971, and provides:

> 61. Indemnification of Person from Person's Own Negligence—Effect—Enforcement. 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.
>
> 62. Application of Act. This Act applies only to contracts or agreements entered into after its effective date.
>
> 63. Construction Bonds or Insurance Contracts—Application of Act. This Act does not apply to construction bonds or insurance contracts or agreements.

12. 61 Ill. 2d 494, 336 N.E.2d 881 (1975).

13. ILL. REV. STAT. ch. 48, §§ 60-69 (1975).

14. 61 Ill. 2d at 496, 336 N.E.2d at 882.

15. *Id.* at 498, 336 N.E.2d at 883-84.

Structural Work Act.[16] In *American Pecco Corp. v. Concrete Buildings Supply Co.*,[17] the court broadly interpreted "construction contract" as used in the statute to include what purported to be a lease of a crane and its operator for construction purposes.

In other cases it has been held that the indemnity clause will not be construed to indemnify one against the proximate results of what he has expressly ordered another to do[18] and it has long been the law in Illinois that a party may not seek contractual indemnification for his own intentional torts.[19]

Since the greater includes the lesser, it follows that in any case where the parties might provide for indemnification by contract, they could also provide for contribution or "partial" indemnification. It remains to be determined whether a construction contract providing for contribution for a liability incurred through a party's own negligence will also be held to be unenforceable under the statute.

But contractual indemnification is available only in those relatively few situations where the parties both foresee potential future joint liability, and are willing to allocate losses between themselves in advance of their occurrence. Clearly, most situations where the no contribution rule may cause inequitable results must be remedied, if they are to be remedied by indemnification at all, by a legally created implied right of indemnification.

Implied Indemnification

At common law indemnity was implied, in the absence of contract, in favor of a defendant who was vicariously liable against the person whose fault caused the injury. As was stated by the court in *Gulf, Mobile & Ohio R.R. Co. v. Arthur Dixon Transfer Co.*:[20]

> There are many exceptions to the general principle of noncontribution between tortfeasors recognized by the courts of this and other states and by the federal courts. The exceptions to the rule are embraced in four or five general groups. One is that a city has a right of action against contractors or abutting owners for liability which the city may have incurred to third persons for breach of its duty with respect to public ways . . . The rule has been applied

16. *Id.* at 502, 336 N.E.2d at 886.

17. 392 F. Supp. 798 (N.D. Ill. 1975).

18. St. Joseph Hosp. v. Corbetta Constr. Co., 21 Ill. App. 3d 925, 946-47, 316 N.E.2d 51, 66-67 (1974).

19. John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923).

20. 343 Ill. App. 148, 152-54, 98 N.E.2d 783, 785-86 (1951) (citations omitted).

> in nonmunicipal cases where the negligence of an outsider was the active cause of an injury and created the liability . . . [C]ases where a stranger is hurt by a subcontractor or subtenant and the contractor or owner is given a right of action against the subcontractor . . . [C]ases where one, supplying goods or services, by his active negligence caused the liability . . . [C]ases where the negligence of a third party caused a liability under the Federal Employer's Liability Act . . . .

In addition, indemnity has been applied in favor of an employer held liable for the negligence of his employee[21] and where an owner's liability arose because of the act of a lessee or lessor.[22]

The courts in Illinois found indemnity to be a useful device in alleviating the inequities caused by the no contribution rule. As the court indicated in the *Dixon* case:

> The vast growth of negligence law has markedly changed the characteristics of negligence actions. Legal negligence no longer embodies a concept of misbehavior just short of the criminal or the immoral. The courts have, therefore, had to find a way to do justice within the law so that one guilty of an act of negligence—affirmative, active, primary in its character—will not escape scot-free, leaving another whose fault was only technical or passive to assume complete liability.[23]

However, determination of whether conduct will be considered "active" or "passive" is not a matter of proceeding according to usual dictionary terms. It must be recognized at the outset that no precise definition can be formulated that will reconcile the many Illinois cases.

The Illinois Supreme Court, in classic understatement, recognized that ". . . [t]hese terms have not attained precise judicial definition . . ."[24] Further, in *Moody v. Chicago Transit Authority*,[25] the court stated:

> These words are terms of art and they must be applied in accordance with concepts worked out by courts of review upon a case by case basis. Under appropriate circumstances, inaction or passivity in the ordinary sense may well constitute the primary cause of a mishap or active negligence . . . It has been appropriately stated

21. Embree v. Gormley, 49 Ill. App. 2d 85, 199 N.E.2d 250 (1964).

22. Blaszak v. Union Tank Car Co., 37 Ill. App. 2d 12, 184 N.E.2d 808 (1962); Mierzeiwski v. Stronczek, 100 Ill. App. 2d 68, 241 N.E.2d 573 (1968).

23. 343 Ill. App. 148, 156, 98 N.E.2d 783, 787 (1951).

24. Carver v. Grossman, 55 Ill. 2d 507, 511, 305 N.E.2d 161, 163 (1973).

25. 17 Ill. App. 3d 113, 307 N.E.2d 789 (1974).

> that mere motion does not define the distinction between active and passive negligence.[26]

In *Garfield Park Community Hosp. v. Vitaco*,[27] the plaintiff was sharply elevated and left in traction for eleven days on the orders of his treating physician. The plaintiff sued the hospital which sought indemnification from the doctor. The court found that the hospital nurses, though fully aware of the dangerous condition did nothing, and stated:

> Under the legal definition adopted by the courts in indemnity cases, this complete inaction and passivity by the Hospital staff was active negligence and thus, by court definition, the primary cause of the mishap to the patient.[28]

Once it is recognized that mere motion is not the differentiating factor, and that the courts are doing more than attaching labels to conduct, it becomes necessary to seek out the underlying rationale of the distinction. The Illinois Supreme Court has formulated the test as follows:

> [A] tortfeasor may seek to impose indemnity upon another wrongdoer if there exists a qualitative distinction between the negligence of the two tortfeasors.[29]

The mandate to Illinois courts, then, is clear: compare the wrongs of the tortfeasors to determine whether the necessary "qualitative distinction" exists. If not, indemnity must be denied. To determine what the courts have done to carry out this mandate, it is instructive to examine those cases not based on negligence, in which indemnity has been granted or denied on other grounds.

In Dram Shop Act[30] cases, the parties responsible under the Act may not seek indemnification from the intoxicated person whose actions caused the injuries complained of because this would violate the public policy underlying the Act. This public policy has been defined as providing a basis for the "discipline of dramshop operators and owners for their indiscriminate sale of liquor and the evils resulting therefrom."[31] The cost accruing for violation of the statute must be borne by those profiting from the sale of liquor to the public, thus, as a matter of law, the conduct of the dramshop's

26. *Id.* at 117, 307 N.E.2d 792-93.
27. 27 Ill. App. 3d 741, 327 N.E.2d 408 (1975).
28. *Id.* at 749, 327 N.E.2d at 413.
29. Harris v. Algonquin Ready Mix, Inc., 59 Ill. 2d 445, 449, 322 N.E.2d 58, 60 (1974).
30. ILL. REV. STAT. ch. 43, § 135 (1975).
31. Wessel v. Carmi Elks Home, Inc., 54 Ill. 2d 127, 295 N.E.2d 718 (1973).

owner may never be considered as "secondary." Similarly, it has been held that the liabilities imposed on the owner and operator of the dramshop are strictly based upon statute. The statute makes no qualitative distinction between the actions of owning and serving, thus each "must be considered an active wrongdoer under that statute, regardless of the comparative passive nature of that conduct relative to the conduct of another statutory obligor."[32]

On the other hand, the Supreme Court of Illinois, in accordance with the minority position[33] has held that the public policy underlying the Workman's Compensation Statute[34] does not preclude the party whose "passive" conduct rendered him liable to the injured party from seeking indemnification from the injured party's employer in excess of the employer's statutory liability, if the employer's conduct was the "active" cause of the injury. A case which both exemplifies this principle and is indicative of the situations in which the courts will imply a duty of indemnification in Structural Work Act cases is *Miller v. DeWitt*.[35] In that case, plaintiffs were injured when a roof on which they were working as employees of the general contractor collapsed. They brought suit against the architect and the owner under the Structual Work Act. These defendants attempted to join the contractor as a third party defendant on grounds of implied indemnity. The court held that the third party complaint stated a cause of action.

The supervising architects and owners who were liable because they were technically "in control" of the premises and knew or in the exercise of ordinary care could have known of the dangerous condition, were allowed a right of indemnification against the contractor who had actually constructed the defective roof. The Court stated:

> [A]lthough the liability imposed by the Act does not rest on negligence there can be degrees of fault among those who under the Act are accountable to an injured plaintiff . . . .
> Neither can escape liability to the [injured] plaintiff—thus the purpose of the Act is accomplished—but the lesser deliquent, if held accountable to the plaintiff, can transfer its statutory liability to the active deliquent whose derelection from duty brought about plaintiff's injury.[36]

32. Hardin v. Desideri, 20 Ill. App. 3d 590, 601, 315 N.E.2d 235, 243 (1974).
33. *See* cases collected at Annot., 53 A.L.R.2d 977 (1957).
34. ILL. REV. STAT. ch. 48, §§ 138-138.28 (1975).
35. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
36. *Id.* at 291-92, 226 N.E.2d at 642.

Similarly, difficult policy questions have arisen in products liability cases based on strict liability in tort. It has long been the law that a party whose liability arose under strict liability because of a defective product was entitled to indemnification from those in the distributive chain who supplied the product to him.[37] As the Illinois Supreme Court explained,

> One of the basic grounds supporting the imposition of strict liability upon manufacturers is that losses should be borne by those who have created the risk and reaped the profit by placing the product in the stream of commerce . . . . A wholesaler or retailer who neither creates nor assumes the risk is entitled to indemnity.[38]

However, indemnity has been denied if sought by the manufacturer of the defective product against a party whose negligence was more proximate in the chain of distribtuion to the ultimate consumer. In denying the manufacturer, (Louden) indemnity from the allegedly negligent employer of the injured plaintiff the Illinois Appellate Court noted:

> . . . despite the inapplicability of the theory of "active-passive negligence", Louden is indeed asking us to compare apples with oranges and to create another exception to the policy against contribution between joint tortfeasors by holding that the tort of strict liability is a less culpable fault than the tort of ordinary negligence in terms of degree of social fault. Such an assessment has already been made adversely to Louden's position.[39]

In *Stanfield v. Medalist Industries*,[40] the plaintiff-employee's hand was partially amputated by a machine she was operating for the first time. She filed suit against the defendant manufacturer of the machine, alleging that the machine was defective and unreasonably dangerous because it was not equipped with a shield; no adequate warning had been given by the manufacturer. The manufacturer filed a third party complaint against the employer, alleging that the employer had been actively negligent in failing to instruct or supervise the employee, while the negligence on the manufacturer's part was merely passive. The court denied the right of the manufacturer to be heard, explaining that:

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37. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Texaco v. McGrew Lumber Co., 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).

38. Peterson v. Lou Bachrodt Chev., 61 Ill. 2d 17, 20, 329 N.E.2d 785, 786-87 (1975).

39. Kossifos v. Louden Machinery Co., 22 Ill. App. 3d 587, 592, 317 N.E.2d 749, 752 (1974).

40. 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974).

> [T]he basis of liability is the putting into the stream of commerce of a defective and dangerous product and the liability proceeding therefrom is not based on ordinary negligence but is based on the consideration of protecting the public from such products . . . . It appears that the liability in these cases is qualitatively *active* so far as the seller or manufacturer is concerned and because of his unique relationship to the product as its creator his negligence cannot be offset against that of a mere subsequent user . . . third party actions for indemnity against a subsequent user are not maintainable by the manufacturer or seller of the defective product.[41]

However, it has been held in Illinois that the fact that a manufacturer has been sued on a theory of strict liability for a defective product does not preclude a third party action by him against the plaintiff's employer, whose active negligence in the modification and altered use of the product allegedly was the proximate cause of the plaintiff's injuries.[42]

In *Liberty Mutual Insurance Co. v. Williams Machine Tool Co.*,[43] the Illinois Supreme Court had occasion to consider these questions. The plaintiff sought indemnity as subrogee for its insured, Charles Machine Works (Charles). Charles had settled suits arising from the collapse of an adjustable work platform (the Skywitch) assembled by Charles, and designed to hydraulically raise loads not exceeding 2000 pounds to heights up to 24 feet. The power to raise the Skywitch was generated by a pump, manufactured by the defendant and installed without alteration by Charles. Each pump was equipped with a relief valve, allowing defendant to halt pressure if the Skywitch encountered an obstruction or had excess weight placed on it while being raised.

The accident occurred when one corner of the Skywitch to which additional scaffolding had been added tipped over and became obstructed by a projection on the building against which it was being used. A failure of the relief valve permitted excessive pressure to be released, binding the rods of the platform and causing its collapse, with resulting injuries to the workmen using it.

In the indemnity action, defendant claimed that misconduct of the plaintiff's insured in failing to warn the user of the Skywitch that its planned addition of scaffolding to the platform could cause it to tip over was either active negligence or, alternatively, misuse of the product. Defendant urged that either type of misconduct was

41. *Id.* at 999-1000, 309 N.E.2d at 107-08.
42. Kuziw v. Lake Engineering Co., 385 F. Supp. 827 (N.D. Ill. 1974).
43. 62 Ill. 2d 77, 338 N.E.2d 857 (1975).

a concurrent cause of the accident, and since compensation to an injured consumer was not involved in this action between two manufacturers, indemnity between the two "joint tortfeasors" be denied. The court rejected this argument in the following terms:

> The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the "negligence" of the manufacturer. We believe that this purpose is best accomplished by eliminating negligence as an element of any strict liability action, including indemnity actions in which the parties are all manufacturers or sellers of the product.[44]

The court went on, however, to state:

> While we do not agree with the defendant's argument that "actively negligent" conduct on plaintiff's part is sufficient to bar indemnification, we do not intend to imply that a plaintiff's misconduct could never preclude recovery. In our judgment, indemnity here and elsewhere in the chain of distribution is not available to one whose conduct in connection with the product may be read to constitute a misuse of it or an assumption of the risk of its use. While the policy reasons movitating our adoption of strict liability in *Suvada* are somewhat less persuasive here, where we are concerned with ultimate liability as between those in the manufacturer-distributor chain, they are sufficient, in our judgment, to warrant application of the same recovery barring standards (misuse assumptions of the risk) as we determined in *Williams* ought to preclude recovery by users . . . .[45]

The court found no reason for Charles, as the assembler, to have been aware of any defect in the relief valve; therefore he had not assumed the risk. There was no misuse of the product since it was not used "for purpose neither intended nor foreseeable."[46] The presence of the relief valve itself was held to be demonstrable proof that excessive loading or obstruction were foreseeable. The judgment for the plaintiff was therefore affirmed.

Turning from the area of products liability to an area of statutory liability which, like the Structural Work Act, is based on fault, in *Chicago and Illinois Midland Ry. Co. v. Evans Constr. Co.*,[47] an employee of the railroad, in the course of his employment, stepped

44. *Id.* at 82, 338 N.E.2d at 860.
45. *Id.* at 83, 338 N.E.2d at 860.
46. *Id.*
47. 32 Ill. 2d 600, 208 N.E.2d 573 (1965).

down from a moving box car and stumbled over an old railroad tie which lay across the rails of adjoining tracks, falling and sustaining injuries. He asserted a claim against the plaintiff under the Federal Employees Liability Act.[48] The railroad settled this claim and then brought an action for indemnification against the owner of the premises on which the accident had occurred. A judgment for the plaintiff was appealed to the Illinois Supreme Court, which reversed, stating:

> In the present case the plaintiff was not the usual business invitee, but was one which, in the conduct of its hazardous operations, was subject to a non-delegable statutory duty to provide a safe place for its employees to work. That duty was no less stringent than the duty of the defendant as the owner of the premises.[49]

Earlier in the opinion the court had said in addressing the merits of plaintiff's claim:

> The difficulty with this position is that there is no proof as to how the tie came to be where it was when the accident occurred, or how long it had been there. The evidence supports the inference drawn by the trial court that the tie that caused the injury was one of the discarded ties belonging to the defendant, but it goes no further. The tie was a standard tie and weighed about 150 pounds. There is no evidence which suggests that the defendant or any of its employees placed the tie on the tracks, and there is no evidence which suggests that the defendant knew that it was there. In the language of the Restatement, the evidence does not show that the dangerous condition was created by the defendant. The breach of duty relied upon to shift the entire cost of the injury from the plaintiff to the defendant must therefore be the defendant's failure to discover and remove the tie, a failure to see that the premises were safe for the work that was to be done. But exactly that same duty rested upon the plaintiff.[50]

It is possible to discern a general trend from these decisions. The search for "qualitative distinction" necessary before a court implies the right to indemnity in favor of a tortfeasor not totally free of fault, has involved balancing the social reprehensibility involved in the behavior of the two tortfeasors. At its extremes this concept is easily perceived and applied. As the Illinois Supreme Court noted in *Davis*,

48. 45 U.S.C. §§ 51 *et seq.* (1970).
49. 32 Ill. 2d 600, 608, 208 N.E.2d 573, 577 (1965).
50. *Id.* at 605-06, 208 N.E.2d at 576.

> [A]n agreement to indemnity against wilful misconduct would, as a general rule, be contrary to public policy and unenforceable . . .[51]

In *St. Joseph Hospital v. Corbetta Const. Co.*,[52] the court indicated that a fraudulent party will not be entitled to indemnity from one who was merely careless. It is submitted that the principle is the same when nonintentional torts are involved, albeit its application is less obvious and more difficult to articulate.

A tavern owner may not be indemnified by the intoxicated person whose acts caused the injury; a manufacturer of a defective product may not seek indemnity from an employer who negligently used the product. In each case the court has decided that the social policy creating the liability has precluded indemnification.

On the other hand, in Structural Work Act cases, the court has stated there are "degrees of fault"[53] among defendants and the lesser deliquent can transfer its statutory liability "to the active delinquent, whose derelection from duty"[54] caused the injury. Thus in light of the public policy underlying this legislation the contractor who negligently built the scaffold is considered more culpable than the architect who knew or should have known of its condition.

Similarly, in strict products liability cases policy demands that the party who created the risk and reaped the profit by placing the product in the stream of commerce should bear the loss. A wholesaler or distributor who neither created nor assumed the risk may be indemnified by the manufacturer. The manufacturer is not entitled to indemnity when the employer of the injured party was merely negligent, but will be indemnified when the employer misused the product. It is significant that misuse by the injured party himself would be a defense to the manufacturer's liability.[55]

Finally, a railroad liable under the F.E.L.A. has no right of indemnification based on the alleged negligence of the landowner when the basis of the liability of both tortfeasors arises from a similar act, *i.e.*, failure to inspect the premises to insure their safety as a place of work.

The analysis of relative culpability on the part of the tortfeasors based on the policy underlying the liability of each is much more difficult to apply in cases of ordinary negligence. If both tortfeasors are negligent, their social fault would appear at first glance to be

51. Davis v. Commonwealth Edison Co., 61 Ill. 2d at 500-01, 336 N.E.2d at 885.
52. 21 Ill. App. 3d 925, 946-47, 316 N.E.2d 51, 66-67 (1974).
53. Miller v. DeWitt, 37 Ill. 2d 273, 291, 226 N.E.2d 630, 642 (1967).
54. *Id.* at 292, 226 N.E.2d at 642.
55. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

equal and it would follow that a different approach to implied indemnity is called for. The cases, however, have failed to articulate this distinction. Indeed, in *Chicago and Illinois Midland Ry. Co. v. Evans Constr. Co.*,[56] the F.E.L.A. case, the court declared:

> [I]t is necessary to draw a qualitative distinction between the negligence of the two tortfeasors if the action for indemnity is to succeed.[57]

While the language of the F.E.L.A. states that negligence is a requirement for the railroad's liability, case interpretations have so weakened this requirement that in fact the railroad was subject to a "non-delegable" statutory duty to provide a safe place for its employees to work. It is submitted that if the other party had negligently created a dangerous condition which the railroad merely failed to discover, the railroad would be entitled to indemnification. As the court in *Evans* stated:

> In these cases the dangerous condition that caused the injury was created by the defendant and plaintiff's negligence amounted to no more than the failure to discover and remedy it. Section 95 of the Restatement of Restitution is as follows: "Where a person has became [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 discharge of such liability, unless after discovery of the danger he acquiesced in the continuation of the condition."[58]

It may be noted that the right of indemnification recognized in *Miller*[59] is supportable under this theory.

There are two Illinois Supreme Court cases where the liability of each defendant was predicated on negligence. Significantly, in each case, indemnity was denied.

In *Carver v. Grossman*[60] a customer in a service station switched on his ignition when the proprietor asked him to "check the gas." As he did so, the car lurched forward injuring a station employee who sued the customer's estate. The administrator of the estate filed

56. 32 Ill. 2d 600, 208 N.E.2d 573 (1965).
57. *Id.* at 603, 208 N.E.2d at 574.
58. *Id.* at 604-05, 208 N.E.2d at 575.
59. 37 Ill. 2d 273, 266 N.E.2d 630 (1967). See text accompanying notes 35 through 37 *supra*.
60. 55 Ill. 2d 507, 306 N.E.2d 161 (1973).

a third party claim against the station proprietor on the grounds that the customer's conduct had been passive in that he was only following instructions. The court refused to categorize the customer's fault as "passive" because he knew or should have known that his car would start when he turned on the ignition, and by doing so he violated the duty he owed the employee:

> This cannot be characterized as passive negligence so that he can totally escape responsibility for his wrongful act. If [the customer] was guilty of active negligence he is not entitled to indemnity whether [the proprietor's] negligence is termed active or passive.[61]

The second Illinois Supreme Court decision denying indemnity between two negligent tortfeasors was *Harris v. Algonquin Ready Mix Inc.*[62] The plaintiff employee was severely injured when a nearby crane transmitted an electrical charge from an uninsulated power line owned by Commonwealth Edison. Plaintiff sued both Edison and the landowner for negligence. Edison cross-claimed for indemnification against the landowner. In holding this cross-claim invalid, the Illinois Supreme Court stated:

> The parties herein do not question prevailing law which holds that a tortfeasor may seek to impose indemnity upon another wrongdoer if there exists a "qualitative distinction between the negligence of the two tortfeasors." (Chicago and Illinois Midland Ry. Co. v. Evans Construction Co., 32 Ill. 2d 600, 603, 208 N.E.2d 573, 574.) The various decisions related to the question have allowed indemnity to a tortfeasor whose misconduct is "passive" compared to the other tortfeasor's wrongdoing which is "active" in nature. (Carver v. Grossman, 55 Ill. 2d 507, 511, 305 N.E.2d 161.) In the present case, Edison has conceded that it had a duty to warn plaintiff or Pre-Cast of the danger, and it has argued that Algonquin had the same duty. In Carver v. Grossman, we said at page 513, 305 N.E.2d at page 164, "this court [has] held that in light of the fact that both tortfeasors owed the plaintiff the same duty which they both breached, there could be no total shifting of responsibility from one to the other." Thus even assuming *arguendo* the validity of Edison's position in relation to the introduction of the prior accident involving Pre-Cast, Edison's action against Algonquin for indemnity was improper.[63]

While no Illinois Supreme Court decision has allowed a claim of

61. *Id.* at 514, 305 N.E.2d at 164.
62. 59 Ill. 2d 445, 322 N.E.2d 58 (1974).
63. *Id.* at 449, 322 N.E.2d at 60-61.

indemnification where the liability of both tortfeasors was based on negligence, the same is not true of the Illinois Appellate Court. Most appellate court cases have denied liability on "primary" and "secondary" cause analysis predicated on the definitions in the *Carver* case. Thus, in *Garfield Park Community Hosp. v. Vitaco*,[64] the court denied indemnity on the ground that the inaction of the hospital staff was the "primary cause" of the injury. Similarly, in *Moody v. Chicago Transit Authority*,[65] the court denied a claim for indemnification when plaintiff was injured as a bus swerved around an illegally parked truck. The court stated:

> [I]naction or passivity in the ordinary sense may well constitute the primary cause of a mishap or active negligence . . . . The contributions of both parties to cause the mishap were of equal significance. There is no "qualitative distinction between the negligence of the two" counterclaimants . . . . The conduct of each was "the primary cause or active negligence."[66]

Some appellate court decisions, however, have allowed one allegedly negligent tortfeasor to be indemnified by the other. In *Reynolds v. Illinois Bell Tel. Co.*[67] the plaintiff, who had been struck in a crosswalk by a passing motorist, sued the defendant whose truck had been parked illegally for two hours. The appellate court held that defendant's third party complaint against the motorist stated a cause of action for indemnity.

The court reasoned that "the jury might find that the motorist's act in speeding and failing to yield right of the way were the primary causes of the injury . . ."[68] *Reynolds* was cited and followed in *Sargent v. Inter State Bakeries Inc.*,[69] a case strikingly similar on its facts. Again a defendant whose liability was predicated on having illegally parked its vehicle was permitted to file a counterclaim against the defendant whose car struck the plaintiff. The court defined passive negligence as failure "to act in fulfillment of a duty of care . . ." and active negligence as participation "in some manner in conduct or omission which caused the injury."[70]

These cases went beyond those decided at the supreme court level, which appear to be limited to Restatement situations where the "active" tortfeasor has created a dangerous situation, capable

64. 27 Ill. App. 3d 741, 327 N.E.2d 408 (1975).
65. 17 Ill. App. 3d 113, 307 N.E.2d 789 (1974).
66. *Id.* at 117, 307 N.E.2d at 793.
67. 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964).
68. *Id.* at 336, 201 N.E.2d at 323.
69. 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).
70. *Id.* at 193, 229 N.E.2d at 772.

of causing the injuries, and the "passive" tortfeasor has merely failed to discover it. While it may be said that the reckless driver is more socially reprehensible than one who parks illegally, it can also be contended that since the liability of both is founded in negligence the necessary "qualitative distinction" needed to permit indemnity is missing.

Focus on this critical issue has been obscured in recent cases by the controversy over the necessity of a pre-tort relationship between the parties.

Reynolds was the first case in Illinois to permit indemnity between joint tortfeasors who were strangers prior to the accident. *Spivak v. Hara*[71] without reference to *Reynolds* decided that such a pre-tort relationship was necessary. In 1967 the *Sargent* court stated:

> It is true that the *Reynolds* decision did add a further dimension to the right of one negligent tortfeasor to recover indemnity from another. Generally, recovery had theretofore been allowed only in cases where the liability of the defendant seeking indemnity was derived from the defendant from whom indemnity was sought and the defendants had some community of interest in their relationship to the plaintiff which antedated the liability-creating incident . . . Under one analysis of Illinois cases, a pre-tort relationship between negligent tortfeasors provides a necessary substratum for implying an agreement that the one tortfeasor would perform the duties imposed by the relationship without subjecting the other to liability . . . . However, the right to indemnity stands upon the principle that everyone is responsible for the consequences of his own acts.[72]

Reviewing the criticism levied against the strict rule of disallowing contributions, and the efforts of Illinois courts to alleviate the harsh results, the court went on:

> If the rule is not abrogated it must be further relaxed. There cannot be rigid compliance with the rule without continuing injustices. Indemnity should not be limited to situations where there is derivative liability upon the third-party plaintiff by reason of operation of law, or where there has been a preaccident relationship with the third-party defendant. The law must be attuned to social developments and degrees of fault must be recognized which will permit indemnification from tortfeasors substantially at fault to those less blameworthy.[73]

71. 69 Ill. App. 2d 22, 216 N.E.2d 173 (1966).
72. 86 Ill. App. 2d at 190, 229 N.E.2d at 771 (citations omitted).
73. *Id.* at 198, 229 N.E.2d at 775.

Then in 1968, in *Muhlbauer v. Kruzel*,[74] the Illinois Supreme Court affirmed the dismissal of a third party complaint as a matter of law. The plaintiff sued a grocery store proprietor (Kruzel) for injuries sustained when plaintiff was injured while a member of a crowd attracted to the store by a promotional clown. The proprietor denied he had hired or caused the clown to be present, and filed a third party complaint against the supplier of the product sold in the store (Wilson), alleging that the clown had been hired by the supplier to promote its product. The court dismissed the complaint, stating:

> We recongize that the policy of section 25(2) can be frustrated by a rigid and formal approach to the pleadings; nevertheless, a third party complaint must disclose some relationship upon which a duty to indemnify may be predicated. To establish such a relationship between Wilson and himself, Kruzel, in his statement of facts in this court, augments the allegations of his pleadings by adopting the view of the trial judge that the clown was acting for the benefit of both Kruzel and Wilson, and was present to induce customers to come into Kruzel's store. If those facts had been alleged by Kruzel it would be possible to discern potential relationships that would support a duty on the part of Wilson to indemnify Kruzel. But no such facts were alleged, and, as the appellate court pointed out, the "amended third party complaint demonstrates no relationship or circumstance" that would give rise to a duty to indemnify. Kruzel's effort appears to have been to divorce himself completely from any connection with Wilson. His pleadings do not admit that he sold a product distributed by Wilson. The only allegations that suggest that the two are not complete strangers state:
>
> "If the wrongful acts alleged to have been performed by third party plaintiff were in fact performed by third party plaintiff, which third party plaintiff has denied in his answer, said acts of third party plaintiff were passive acts only and not active. *** If third party plaintiff is held liable for the injuries alleged in the complaint, it will not be on account of any wrongful acts, but will be on account of the active wrongful acts of third party defendant." Section 43 of the Civil Practice Act permits alternative or hypothetical averments of facts, but this hypothetical allegation asserts only the pleader's conclusion as to legal characterizations, without any facts to support that conclusion.[75]

Since *Muhlbauer*, there has been a division of opinion in the appellate court regarding the necessity of a pre-tort relationship

74. 39 Ill. 2d 226, 234 N.E.2d 790 (1968).

75. *Id.* at 231-32, 234 N.E.2d at 793 (citations omitted).

between the parties. In *Mullins v. Crystal Lake Park District*,[76] the plaintiff was injured when fireworks, stolen from the defendant Park District and given to plaintiff by the thief, exploded. The Park District's claim to indemnity against the thief was upheld at the pleading stage by the court citing *Reynolds* and *Sargent* with approval:

> The more recent authorities in this State have recognized that although there is no contractual or quasi-contractual relationship between the parties, a cause of action may be stated when two or more parties are alleged to have been involved in causing injury to a third person, entitling the party whose conduct is merely passive or secondary in the sense of culpability to indemnity against the party whose negligence is the active or primary cause of the injury . . .
> Although the pleadings were dismissed for failure to allege any relationship or circumstances connecting the parties in *Muhlbauer v. Kruzel*, . . . the Supreme Court recognized that the doctrine of implied indemnity exists if a potential relationship between the parties is pleaded and the liability of one party is primary and the other is secondary. Here, the counterplaintiffs do not deny any connection with Stokes. They allege that Stokes stole the fireworks from that display and admit that the fireworks taken from the display were given to plaintiff and caused his injury. We believe that this sufficiently alleges the relationship or circumstances between the parties sufficient upon which to predicate an action for indemnity.[77]

On the other hand, in *Village of Lombard v. Jacobs*,[78] the injured plaintiff had been rear-ended at an intersection where there was an alleged "dense fog" caused by the defendant village's efforts to spray the area with insecticide for mosquitoes. The Village then sought indemnification from the individual defendant on the theory that a municipality held liable solely on the basis of its duty to maintain its roads has a right to indemnity from the party whose act caused the injury. The court denied the Village the relief sought. Commenting on *Muhlbauer*, the court stated:

> [T]he court did strongly indicate that there would be no indemnification between two tortfeasors, even where one is passive and the other active, if they were complete strangers.[79]

76. 129 Ill. App. 2d 228, 262 N.E.2d 622 (1970).
77. *Id.* at 231-32, 262 N.E.2d at 624-25 (citations omitted).
78. 2 Ill. App. 3d 826, 277 N.E.2d 758 (1972).
79. *Id.* at 831, 277 N.E.2d at 761.

In *Moody v. Chicago Transit Authority*,[80] the majority dismissed the counterclaim on the ground that neither tortfeasor could be considered "passively" negligent. However, Justice Hallet, in concurrence, stated that in his view *Muhlbauer* overruled the "no prior relationship cases" by implication when "it affirmed the trial court's dismissal of a third party complaint for indemnity because such a complaint . . . 'must disclose some relationship upon which a duty to indemnify may be predicated.' "[81]

In *Warzynski v. Village of Dolton*,[82] plaintiff, a passenger in the individual defendant's car, was injured when the car hit a protruding sewer cover on a dark street. The Village's claim for indemnification against the driver was denied. The court first noted that the Village had to establish the necessary "measurable difference in the degree of fault," stating:

> We believe that the negligence of the Village in allowing the sewer on an unlighted street to be raised above street level was at least equal to the negligence of Novak as he drove in darkness over the said sewer and can only be viewed as an active or affirmative participation in the injury.[83]

However, the court went on to add that

> Furthermore . . . here, there is lacking any pre-tort relationship between Novak and the Village and, under the authority of Muhlbauer, the verdict against Novak cannot stand.[84]

It is submitted that those appellate courts which have interpreted *Muhlbauer* to require a pre-tort relationship between the tortfeasors before indemnity will be allowed to have unnecessarily extended the scope of that decision well beyond the facts of the case. It must be recalled that in the *Muhlbauer* case the third party complaint alleged that the food processor, not the grocery store proprietor, had hired the clown. The supreme court held that this allegation did not state a cause of action for indemnification. This is clearly correct; if proved, this allegation would merely establish that the grocery store proprietor was not liable. A defendant who alleges he is not liable cannot by a third party action bring the person he deems liable into the action. In essence, the grocer pleaded a defense,

80. 17 Ill. App. 2d 113, 307 N.E.2d 789 (1951).
81. *Id.* at 118, 307 N.E.2d at 793.
82. 23 Ill. App. 3d 50, 317 N.E.2d 694 (1974), *rev'd on other grounds*, ___ Ill. 2d ___, 338 N.E.2d 25 (1975).
83. *Id.* at 59, 317 N.E.2d at 700-01.
84. *Id.*

rather than a right to indemnification.[85] Within this context it is clear that the court's statements that "a third party complaint must disclose some relationship upon which a duty to indemnify may be predicated"[86] and "the amended third party complaint demonstrates no relationship or circumstance that would give rise to a duty to indemnify"[87] need not be interpreted as requiring a pre-tort relationship between the parties.

Essential to a cause of action for indemnity is that the pleader assert facts establishing his right to indemnity. First, he must admit liability and secondly, he must assert facts showing his right to reimbursement. This, of course, may be pleaded in the alternative together with a complete denial of liability, but it must nevertheless be pleaded. The remarks of the supreme court may easily be interpreted to signify that the pleadings simply were insufficient in failing to state any factual situation upon which a duty to indemnify may be predicated. Active-passive negligence might well be such a circumstance or relationship even absent a "pre-tort" relationship.

This interpretation is strengthened by the fact that the court in *Muhlbauer* stated that if the third party plaintiff had alleged that the clown was acting for the benefit of both the processor and the proprietor:

> It would be possible to discern potential relationships that would support a duty on the part of Wilson (the processor) to indemnify Kruzel (the proprietor). But no such facts were alleged . . . Kruzel's effort appears to have been to divorce himself completely from any connection with Wilson . . . . The only allegations that suggest that the two are not complete strangers state: "if the wrongful acts alleged to have been performed by third party plaintiff were in fact performed by third party plaintiff which third party plaintiff had denied in his answer, said acts of third party plaintiff were passive acts only and not active . . . ." This hypothetical allegation asserts only the pleader's conclusion as to legal characterizations without any facts to support that conclusion.[88]

Thus it would seem that if facts supporting these conclusions had been pleaded the necessary relationship to support a right to indemnify would have been established, even though no "pre-tort" relationship was alleged. It must be noted that the court in *Muhlbauer* cited *Reynolds* and *Sargent* with approval on the issue of the diffi-

85. *See also* Burke v. Sky Climber Inc., 57 Ill. 2d 542, 546, 316 N.E.2d 516, 518 (1974).
86. 39 Ill. 2d at 232, 234 N.E.2d at 793 (1968).
87. *Id.*
88. *Id.* at 231-32, 234 N.E.2d at 793.

culty of determining from the pleadings that no right of indemnification exists as a matter of law. Also it is significant that the court in *Chicago and Illinois Midland Ry. Co. v. Evans Constr. Co.*[89] cited with approval Section 95 of the *Restatement of Restitution* which, where applicable does not require a pre-tort relationship. Finally, in reversing the *Warzynski* case on other grounds the Illinois Supreme Court stated:

> . . . we have no occasion to consider the question of Novak's obligation to indemnify the Village. The fact that we do not discuss this issue does not indicate approval of the Appellate Court concerning it.[90]

The Illinois Supreme Court has yet to provide a definite answer to the precise issue of the necessity of a pre-tort relationship, and where it has spoken regarding such a requirement it has been generally, if cryptically, negative.

The question remains as to whether such a pre-tort relationship should be required before indemnity will be implied. To the extent that the purpose of extending implied indemnity to situations where the potential defendants are all at fault to some degree is to avoid the harshness of the no contribution rule, no reason exists to so limit the relief a court may provide. Clearly such harshness may equally occur in situations involving total strangers. To restate the problem: is the implied duty to indemnify implied "in fact" or "in law"? If the duty is implied in fact then it is true that a pre-tort relationship is essential to lay the basis for implying in fact the promise of one tortfeasor to indemnify the other. If however, as the authors believe and as the *Restatement of Restitution* indicates, the duty to indemnify is implied in law, then no such pre-tort relationships need be required, and those who have chosen this as the basis for opposing the *Reynolds* line of decisions may be unnecessarily restricting the right of indemnity.

The *Reynolds, Sargent* and *Mullens* cases may well be opposed, not because of the absence of a pre-tort relationship but because the necessary "qualitative distinction" between the wrongful conduct of the defendant and that of the joint tortfeasor necessary to imply a duty of indemnification in law was lacking. This, of course, is the basic issue which emphasis on the requirement of a pre-tort relationship has obscured. The alleged basis of liability of all the defendants in these cases was negligence, and the only two cases[91] in

89. 32 Ill. 2d 600, 208 N.E.2d 573 (1965).
90. Warzynski v. Village of Dolton, ___ Ill. 2d ___, 338 N.E.2d 25, 29 (1975).
91. Carver v. Grossman, 55 Ill. 2d 507, 305 N.E.2d 161 (1973); Harris v. Algonquin Ready

which the Illinois Supreme Court encountered negligence on the part of joint tortfeasors denied indemnification on the ground that the necessary "qualitative" distinction was missing. *Evans* indicated that even when both defendants are negligent this necessary distinction may be present if the active defendant creates a dangerous condition and the passive tortfeasor merely fails to discover and remedy it.

In *Reynolds, Sargent*, and *Mullens* the situation was different. It was the allegedly passive tortfeasor who had created the condition, in itself incapable of creating injury, but which nevertheless provided the opportunity for the allegedly active tortfeasor to cause the injury.

Indemnification may be opposed in these cases on the grounds that since both tortfeasors were negligent, the degrees of social culpability of negligent parties should not be compared, and the relative importance of the negligence of each in bringing about the injury could not be weighed once it is determined that the negligence of each was sufficiently proximate to warrant liability. In other words, Illinois courts should not adopt comparative negligence for apportioning responsibility between joint tortfeasors based on the all or nothing basis of indemnity.

The Illinois Supreme Court cases directly on point or closely related are not conclusive. *Miller v. DeWitt*[92] exhibited classic nondiscovery of the dangerous condition and indemnification was allowed. In *Harris v. Algonquin Ready Mix, Inc.*[93] and *Chicago and Midland Ry. Co. v. Evans Constr. Co.*,[94] the failure of both tortfeasors was a breach of the identical duty and indemnity was denied. *Carver v. Grossman*[95] is the most analogous case—the alleged liability of both the defendant car operator and defendant garage owner was negligence, yet the court did not state that indemnity should never be allowed in such situations, but merely that indemnity should not be permitted on the facts of that case. There was little if any difference in the social culpability of the actions of the two defendants. The court noted that in cases permitting indemnity, the conduct of the passive party has been characterized as the "secondary" cause of the injury. Here, however, the car owner knew, or should have known, his car would start when he turned the ignition key, so that

Mix, Inc., 59 Ill. 2d 445, 322 N.E.2d 58 (1974).

92. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

93. 59 Ill. 2d 445, 322 N.E.2d 58 (1974).

94. 32 Ill. 2d 600, 208 N.E.2d 573 (1965).

95. 55 Ill. 2d 507, 305 N.E.2d 161 (1973).

> the situation created by [the garage owner] at the very least required the active violation by [the car owner] of the duty which he owed [to the plaintiff] in order to cause the injury. This cannot be characterized as passive negligence so that he [the car owner] can totally escape responsibility for his wrongful act.[96]

It is submitted that in resolving this issue, the courts must determine whether it is socially desirable to impose a duty of full indemnification on a joint tortfeasor when both tortfeasors are guilty of negligence but a significant difference exists between the wrongs of the two, both in terms of their relative social culpability and in terms of their proximity in the chain of the causation of the injury.

In accordance with this approach, it may be argued that the activity of the speeding or reckless driver is more socially culpable than that of the negligent parker, *e.g.*, *Reynolds* and *Sargent*, and that the actions of the thief are more culpable than the merely negligent storage of explosives, *e.g.*, *Mullens*. In each of these cases, the act of the "active" tortfeasors was also a more significant factor in causing the injury. It is submitted that all three cases were therefore correctly decided, but that cases which fall within their stringent rationale will be rare indeed.

Equitable Indemnification

While the lower courts were striving to refine the concept of active-passive negligence, the Illinois Supreme Court in 1973 decided the case of *Gertz v. Campbell*.[97] In *Gertz*, plaintiff was struck by a car driven by defendant, who filed a third party claim against plaintiff's treating physician alleging malpractice in the treatment of plaintiff. The third party complaint sought recovery only for the amount of damage caused plaintiff "as a result of the new injury or aggravation of the plaintiff's existing injuries caused by the neglect and failure"[98] of the doctor. The trial court dismissed the third party complaint, but the Illinois Supreme Court held that it stated a cause of action. The actual holding, however, is quite narrow. First, the court emphasized that allowing the third party complaint to stand did not violate the Illinois rule against contribution because here the driver and doctor were not joint tortfeasors. The driver was liable for the injuries resulting from the doctor's alleged malpractice under the concept of proximate cause, but the doctor could not be held liable for the original injuries inflicted by the driver. Further-

96. *Id.* at 514, 305 N.E.2d at 164.
97. 55 Ill. 2d 84, 302 N.E.2d 40 (1973).
98. *Id.* at 86, 302 N.E.2d at 42.

more, the court emphasized that in seeking partial recovery for his liability, the driver did not violate established principles of indemnity, since he sought full indemnification for the entire amount of damages attributable to the fault of the doctor.

The case is significant nevertheless, and the full extent of its holding has yet to be determined. First, it permitted partial indemnification of one tortfeasor by another on other than a contractual basis. Second, it implied a duty for partial indemnification on a basis other than "active-passive" fault. Third, it allowed partial indemnification without pre-tort relationship; and finally it permitted partial indemnification between two tortfeasors whose liability was founded in negligence. These last two points lend further support to the position previously espoused in this article[99]—namely that no public policy in Illinois requires existence of a pre-tort relationship before indemnification will be permitted, and that in a proper case, indemnity will be implied by law even though both tortfeasors have been negligent.

The first two aspects of the *Gertz* case—the very allowance by the court of partial indemnification and the granting of indemnification on a basis other than active-passive negligence—require further consideration. Of course, partial indemnification is essentially contribution; in a sense, then, *Gertz* is the first case in Illinois to permit contribution among multiple tortfeasors. Such contribution was permitted, however, in a factual context where the damage allocable to each tortfeasor was identifiable and separable. The court permitted the partial indemnification on equitable considerations rather than active-passive misconduct. It remains to be seen whether the *Gertz* doctrine will be extended beyond the situation where the plaintiff's injuries are divisible and specifically allocable to the negligence of each tortfeasor. While the question cannot be definitely answered until the supreme court again considers the issue, two factors indicate that this concept may well be so extended. First, Justice Underwood's concurring opinion in *Gertz* noted the uncertainty of "equitable apportionment" and proposed that the same result could be reached, as indeed has been done in other states, by allowing the original tortfeasor to be subrogated to the plaintiff's rights against his doctor.[100] The existence of this concurrence confirms that the court considered this approach and rejected it in favor of "equitable indemnification."

99. See text accompanying notes 71 through 96 *supra*.

100. 55 Ill. 2d at 93-94, 302 N.E.2d at 45-46.

Even more significantly, the court commented on the doctor's contention that in Illinois indemnity is permitted only where there is an express or implied contract of indemnity or where there exists a "qualitative distinction" between the negligence of the two tortfeasors, stating:

> [We] do not consider that the right to indemnity must be unalterably restricted to the outlines he has described. The right should be capable of development to meet perceived requirements for just solutions in questions involving multiple tortfeasors. The historical aversion of courts to compare the fault of tortfeasors when contribution or indemnity has been sought has not prevented them from developing concepts which allowed indemnity when equity required. As an example, courts came to contrast the faults of an active tortfeasor with that of a passive one and to allow indemnity to the less culpable offender. And to illustrate there can and should be a continuing search for better solutions, the Court of Appeals of New York has recently supplanted this active-passive negligence criterion for indemnity with one founded on equitable principles. Dole v. Dow Chemical Co.[101]

This reference to the New York case of *Dole v. Dow Chemical*[102] with apparent approval is startling. In *Dole* an employee was assigned to clean a grain storage bin shortly after it had been sprayed with a fumigant manufactured by Dow. His exposure to the fumigant caused his death. In the wrongful death case Dow was sued for negligence in failing to properly label the fumigant and failure to warn users of its dangers. Dow filed a third party action against the employer (Urban) on an active-passive theory alleging that the employer failed to take proper precautions, used untrained personnel, failed to follow instructions on the label and failed to test and aerate the premises after fumigation. The Appellate Division dismissed the third party complaint on the grounds that Dow's negligence in mislabeling and insufficient warning, if established by the plaintiff, would be active negligence and would therefore preclude Dow from recovery against the user of the product, albeit the user also was negligent.[103]

The Court of Appeals reversed. After noting Dow's negligence was "active" the court said:

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101. *Id.* at 89, 302 N.E.2d at 43-44.
102. 30 N.Y.2d 143, 282 N.E.2d 288 (1972).
103. 35 A.D.2d 149, 316 N.Y.S.2d 348 (1970).

> But the policy problem involves more than terminology. If indemnification is allowed at all among joint tortfeasors, the important resulting question is how ultimate responsibility should be distributed. There are situations when the facts would in fairness warrant what Dow here seeks—passing on to Urban all responsibility that may be imposed on Dow for negligence, a traditional full indemnification. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification.[104]

Tracing the development of the New York rule against contribution, the court stated:

> This process in practical application became a measure of degree of differential culpability, although the degree was a large one. The "passive" negligent act was treated by the court as less a wrong than the "active" negligent act. The result has been that there has in fact emerged from the statutory change and from the judicial decisions an actual apportionment among those who participate responsibly in actionable torts.[105]

The court therefore concluded that henceforth:

> Right to apportionment of liability or to full indemnity, then, as among parties involved together in causing damage by negligence, should rest on relative responsibility and to be determined on the facts.[106]

This decision is far broader than *Gertz*. It permitted equitable indemnity, where damages were not divisible nor specifically allocable to each defendant, based on the relative responsibility of the multiple tortfeasors. If *Dole* were to be followed in Illinois, the "active-passive" doctrine would be replaced by a principle under which the court could allow either full or partial indemnity whenever equity so required. This approach clearly eliminates the harshness of the no contribution rule. It avoids the limitation of indemnification which forces the court to grant all-or-nothing relief and thereby requires the court to find a very real difference in the quality of wrongs involved before relief may be granted. The weakness of the solution lies in the lack of standards for its application.

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104. 30 N.Y.2d at 146, 282 N.E.2d at 291.
105. *Id.* at 148, 282 N.E.2d at 292.
106. *Id.* at 151, 282 N.E.2d at 295.

SUGGESTIONS FOR REFORM

The inequities inherent in the common law prohibition against contribution have been discussed.[107] It should come as no surprise that the rule has been abandoned by the great majority of jurisdictions.

Contribution is currently permitted in England by statute,[108] and in 38 American states.[109] The rapid expansion of the doctrine of comparative negligence has had a profound impact on contribution as well. Thirty-one American states have adopted comparative negligence: 28 by statute;[110] and three—Florida,[111] California,[112] and Alaska[113]—by judicial decision. While comparative negligence refers only to the negligence of the plaintiff as opposed to that of the defendant, principles of relative fault may be extended to suits among defendants. It has been argued that if comparative negligence is to fulfill its role of apportioning damages on the basis of fault the same principles must extend to tortfeasors,[114] and in the absence of statutory provision two courts have so ruled.[115] Of the 31

107. See text accompanying notes 7 through 9 *supra*.

108. PROSSER, *supra* note 3, § 50, at 306n.43.

109. *See* LAUFENBERG, PRIMER ON COMPARATIVE NEGLIGENCE (Defense Research Institute 1975) 26 [hereinafter cited as D.R.I.]. Jurisdictions are collected and classified in Note, 68 YALE L.J. 964, 981-84 (1959). 25 of 31 comparative negligence states currently permit contribution, as do 13 of 19 contributory negligence states. D.R.I., *supra* this note, at 26.

110. D.R.I., *supra* note 109, at 7n.4 listing the following statutes. The date in brackets is the year of adoption. Arkansas, ARK. STAT. ANN. §§ 27-1763 to 27-1765 [1955]; Colorado, COLO. REV. STAT. ANN. § 41-2-14 [1971]; Connecticut, CONN. GEN. STAT. § 38-324 [1973]; Georgia, GA. CODE ANN. §§ 94-703, 105-603 [1913]; Hawaii, HAWAII REV. STAT. § 663-31 [1969]; Idaho, IDAHO CODE ANN. §§ 6-801 to 6-806 [1971]; Kansas, KAN. STAT. ANN. § 60-258a [1974]; Maine, ME. REV. STAT. ANN. tit. 14, § 156 [1965]; Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85 [1969]; Minnesota, MINN. STAT. ANN. § 604.01 [1969]; Mississippi, MISS. CODE ANN. § 11-7-5 [1919]; Montana, MONT. STAT. § 58-607.1 [1975]; Nebraska, NEB. REV. STAT. § 25-1151 [1913]; Nevada, NEV. LAWS § 41.141 [1973]; New Hampshire, NH REV. STAT. ANN. § 507.7a [1969]; New Jersey, NJ STAT. ANN. §§ 2A:15-5.1 to 2A:15-5.3 [1973]; North Dakota, ND CENT. CODE § 9-10-107 [1973]; New York, NY CPLR art. 14-A, § 1411 [1975]; Oklahoma, OKLA. STAT. ANN. tit. 23, §§ 11-12 [1973]; Oregon, ORE. REV. STAT. § 18.470 [1971]; Rhode Island, RI GEN. LAWS ANN. § 9-20-4 [1972]; South Dakota, SD COMP. LAWS § 20-9-2 [1941]; Texas, TEX. VERNON'S CIV. STAT. art. 2212a, §§ 1, 2 [1973]; Utah, UTAH CODE ANN. §§ 78-27-37 to 78-27-43 [1973]; Vermont, VT. STAT. ANN. tit. 12, § 1036 [1970]; Washington, WASH. REV. CODE ch. 4.22.010 [1974]; Wisconsin, WIS. STAT. § 895.045 [1931]; Wyoming, WYO. STAT. ANN. § 1-7.2 [1973].

111. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

112. Ngali v. Yellow Cab of California, 13 Cal. 2d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975).

113. Kaatz v. State of Alaska, 540 P.2d 1037 (Alaska 1975).

114. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.7, at 260 (1974) [hereinafter cited as SCHWARTZ].

115. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); Packard v. Whitten, 274 A.2d 169 (Me. 1971).

comparative negligence states, only six continue to deny contribution,[116] five permit contribution by equal division,[117] and the remaining 20 permit contribution on principles of pure relative fault. It is interesting to note that while 24 states permit only modified comparative negligence in suits brought by plaintiff, permitting recovery only if plaintiff's negligence is "less than" that of the defendant (49 percent) or "no greater than" his formula (50 percent formula), no state denies contribution on the ground that the claiming defendant is more negligent than the other defendant. To do otherwise could be to deny recovery to a more negligent, hapless defendant solely because plaintiff had proceeded to judgment against him first; the possibilities of collusion are obvious, particularly in intra-family suits, and this limitation has therefore been everywhere rejected.[118]

Of the 19 states which still adhere to contributory negligence principles,[119] 13 now permit contribution among joint tortfeasors, two under principles of relative fault whether or not the defendant has been joined by the plaintiff,[120] and 11 under the principle of equal division.[121] There are six contributory negligence states which continue to deny contribution among joint tortfeasors, and Illinois,

116. D.R.I., *supra* note 109, at 26n.188 listing: Colorado, Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Col. App. 99, 517 P.2d 406 (1973); Connecticut, Kaplan v. Merberg Wrecking Corp., 152 Conn. 405, 207 A.2d 405 (1964); Florida, Kellenberger v. Widener, 159 So. 2d 267 (Fla. App. 1963); Nebraska, Tober v. Hampton, 194 Neb. 858, 136 N.W.2d 194 (1965); Oklahoma, National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority, 434 P.2d 238 (Okla. 1967); Washington, City of Tacoma v. Bonnell, 65 Wash. 569, 118 P. 648 (1911).

117. *Id.* at 26n.189, listing: Georgia, GA. CODE ANN. §§ 105-2011, 105-2012 (1973); Massachusetts, MASS. GEN. LAWS ANN. ch. 231B (1969); Mississippi, MISS. CODE ANN. § 85-5-5 (1973); Oregon, ORE. REV. STAT. § 18.440 (1971); Rhode Island, RI GEN. LAWS ANN. §§ 10-6-1 to 10-6-11 (1972).

118. SCHWARTZ, *supra* note 114, § 16.9, at 271.

119. These states are: Alaska, Arizona, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia and Louisiana.

120. Delaware, DEL. CODE ANN. tit. 10, §§ 6301-08 (1975); and Iowa, *see, e.g.*, Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 33 (1956).

121. Seven jurisdictions allow an action for contribution from a joint tortfeasor, whether joined by plaintiff or not: Kentucky, KY. REV. STAT. § 412.030 (1973); Maryland, MD. ANN. CODE art. 50, §§ 16-24 (1973); New Mexico, N.M. STAT. ANN. §§ 24-1-11 to 24-1-16 (1973); North Carolina, N.C. GEN. STAT. ANN. § 1-240 (1973); Pennsylvania, PA. STAT. ANN. tit. 12, §§ 2082-89 (1973); Tennessee, *see, e.g.*, American Cas. Co. v. Billingsley, 195 Tenn. 448, 260 S.W.2d 173 (1953); and Virginia, VA. CODE ANN. § 8-627 (1973).

Four jurisdictions allow an action for contribution only from a joint tortfeasor joined by plaintiff: Louisiana, LA. CIV. CODE ANN. art. 3, §§ 2103-05; Michigan, MICH. STAT. ANN. §§ 27.1683(1)-(4); Missouri, MO. ANN. STAT. § 537.060; and West Virginia, W.VA. CODE ANN. §§ 5481-82.

of course, is among this rapidly shrinking minority.[122]

As indicated previously,[123] the rationale for not allowing contribution among joint tortfeasors has been a reluctance to allow wrongdoers to use the courts for their own relief coupled with a fear that too large a portion of the court's time would be used in defining the degree of culpability of each wrongdoer. Under the present status of the law in Illinois, the no contribution rule does not achieve these purposes. In determining whether the wrong of the given tortfeasor is active or passive and whether the doctrine of *Gertz* is applicable the courts are granting relief to certain classes of "wrongdoers," and judging from the number of recent appellate court decisions in this area, an inordinate amount of judicial time and energy is being expended in this process.

Illinois stands presently at a crossroad. It must first be determined if the original rationale of the rule preventing contribution outweighs its potential inequities. If the rationale is determined to be still valid, definitive rules must be formulated regarding when indemnity will or will not be permitted so as to prevent the use of trial courts—and appellate courts—in deciding each claim on a case by case basis. To avoid this excessive expenditure of judicial time, the doctrine of active-passive fault, so troublesome and time consuming in application, should be restricted to situations where the "passive" tortfeasor merely failed to discover the dangerous condition created by the "active" one. In light of *Reynolds, Sargent* and *Mullens* the doctrine could also encompass those relatively rare situations where the "passive" tortfeasor created a potentially dangerous condition, but one which would not have resulted in any injury without the negligent act of the active tortfeasor. *Gertz* should then be restricted to cases where the injury to the plaintiff is divisible and specific portions are allocable to the wrong of each tortfeasor.

If, on the other hand, it is believed that the inequities inherent in the no contribution rule outweigh its benefits the rule should be abandoned, as it has been in 38 states and in England. In that case, a right of contribution should be recognized among multiple tortfeasors.

A right of contribution can be achieved either by statute or by judicial decision. A legislative enactment appears more desirable in this complex area since multiple problems may be thereby resolved

122. The remaining five states include Alabama, Arizona, Indiana, Ohio and South Carolina.

123. See text accompanying note 9 *supra*.

124. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939).

harmoniously. The Uniform Contribution Among Joint Tortfeasors Act, either in its 1939 form[124] or in its 1955 revision[125] might well be considered. If the General Assembly fails to act, or as an interim measure until it does, the courts could expand *Gertz* to its full *Dole* implications. The equitable principles which would determine when such contribution would be allowed, and the basis of allocation, would then be judicially resolved on a case by case basis.

It is submitted that the present uncertainty in Illinois law will continue until a basic judgment is made regarding retention of the policy underlying this eighteenth century prohibition. Once such determination is accomplished, the method of implementing change, if desired, can be specified and proper steps initiated. In the interest of beleaguered judges who must continue to attempt to "do justice within the law," such clarification is long overdue.

125. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1959).