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A perennial bane in the ordered growth of law is the misuse of two related but distinct principles with resultant detriment to both. Such is the fate of contribution and indemnity actions in Illinois negligence law. Although said on good judicial authority to seem a "squeamish damsel", contribution at one time led a robust courtship with negligent joint tortfeasors in Illinois.[1] If contribution now seems squeamish, it is simply that our jurisprudence has disowned contribution and so indulged active-passive indemnity that indemnity has now become an "impudent damsel". The time has come to reconsider why these two damsels have caused disturbance in the household of the law.

This article will seek to establish the following three propositions: (1) that Illinois case precedent does not categorically prohibit contribution between negligent joint tortfeasors; (2) that the failure to recognize contribution between negligent joint tortfeasors in Illinois has prompted judges to expand the active-passive indemnity doctrine into an unsatisfactory substitute for such contribution; and (3) that a judicial re-affirmation of contribution between negligent joint tortfeasors, in situations where indemnity is not the appropriate remedy, is necessary if logic and reason are to prevail over the current confused state of the law. In the context of this discussion, the term "contribution" means that where joint tortfeasors are each guilty of personal fault, each bears shared and proportionate liability for the total damage. "Indemnity", on the other hand, may be defined as the shifting of the total damage from a technical joint tortfeasor who is without personal fault to the actually negligent joint tortfeasor who is personally at

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1. Moroni v. Intrusion-Prepakt, Inc., 24 Ill. App. 2d 534, 538, 165 N.E.2d 346, 349, (1960).

fault.[2] Although separate and distinct principles designed for different situations, both serve the same fundamental tort policy of relating liability to fault.

I

A historical study of case law does not support the supposedly well-settled proposition that contribution is prohibited between negligent joint tortfeasors in Illinois.[3] The law is considered well-settled largely because it has become an unquestioned shibboleth. The original rule against contribution was first enunciated in the case of *Merryweather v. Nixan*[4], which arose as a result of a prior judgment entered against two converters who had acted in concert to perpetrate a conversion of property. One converter, having paid the entire judgment, was not allowed to obtain a one-half share of the payment from his fellow converter. On its very facts the *Merryweather* decision has nothing to do with negligence. The intentional tort of conspiratorial conversion in that case is clearly distinguishable from independent acts of concurrent negligence. Although the case broadly refers in passing to "joint wrong-doers", the common law of that time restricted the application of joint torts to persons who acted in concert and in pursuance of a common design.[5]

Nelson v. Cook[6] explicitly incorporated the *Merryweather* decision into Illinois law. The *Nelson* court said that a right of indemnity would exist in favor of an auctioneer or warehouseman who in good faith sold or delivered goods at the direction of the owner. The court also reasoned that a sheriff ordinarily has a similar right of indemnity against one who improperly directs him to levy on goods owned by another, where the act of the sheriff is not an apparent wrong or where title is in doubt. Although the sheriff in the actual case was denied recovery on other grounds, the court stated it would bar indemnity only where an agent knowingly commits a crime, trespass, or apparent wrong. It is unclear whether the court meant to distinguish the *Merryweather* decision on the basis that the English case involved contribution and not indemnity, or whether the court viewed its theory of known and apparent wrong as an exception to an expanded *Merryweather* doctrine

2. RESTATEMENT OF RESTITUTION §§ 96, 102 (1936). Comment a of § 102 says the no contribution rule is explainable only on historical grounds.
3. "It is generally recognized that in Illinois there is no contribution between joint tortfeasors, but under proper circumstances indemnity will be granted." Kissel, *Our Puzzling Third Party Practice*, 42 CHICAGO BAR RECORD 63, 64 (1960).
4. 8 Term. Rep. 186, 101 Eng. Rep. 133 (K.B. 1799).
5. W. PROSSER, LAW OF TORTS § 43 (3rd ed. 1964).
6. 17 Ill. 443 (1856).

which embraced indemnity as well as contribution.[7] This early uncertainty set the groundwork for the future confusion of both remedies in Illinois.

A decade later, contribution received specific approbation in *Selz v. Unna*.[8] The plaintiff in *Selz* agreed not to execute against two joint defendants. The plaintiff having nevertheless assigned judgment to a bona fide purchaser, that purchaser tried to execute against the two defendants on the basis of their proportionate share of the total liability. In allowing such execution the United States Supreme Court reasoned that where liability is joint, equal contribution between wrong-doers is just and equitable, even were the assignment designed as a subterfuge to avoid the plaintiff's agreement. Later, the case of *Goldsborough v. Darst*[9] went so far as to explicitly allow contribution between joint tortfeasors who were liable for an intentional fraud toward the plaintiff. The court, even at that early date, felt that the rule against contribution was so riddled with exceptions as to be no longer a general rule. This is the only Illinois case found which openly approves of allowing contribution between intentional joint tortfeasors.[10]

The succeeding case of *Farwell v. Becker*[11] is strong and direct authority for the proposition that contribution may be had between negligent joint tortfeasors. In that case creditors sued out an attachment against their debtor's goods, which they thought were sold to defraud them, although the purchaser of the goods insisted on his ownership to the creditors. The appellate court concluded that, although the *Merryweather* prohibition was confined to joint tortfeasors who knew or must be presumed to have known that they were committing a tortious act, the creditors in the case presumptively knew that they were committing a tort due to the purchaser's possession of the goods and his claim of ownership. Therefore, no contribution was allowed. In reversing the appellate decision by allowing contribution, the Illinois Supreme Court, speaking through Justice Craig, agreed with the lower court in two respects: (1) that the weight of authority did not sustain the broad statement in *Merryweather* depriving all joint tortfeasors of

7. The *Merryweather* case was explicit in stating that its decision "would not affect cases of indemnity." *Supra* note 4, at 186.
8. 21 F. Cas. 1051 (No. 12, 650) (C.C.N.D. Ill. 1866), *aff'd*, 73 U.S. 327 (1867).
9. 9 Ill. App. 205 (1881).
10. *Contra*, Rend v. Chicago West Division Ry., 8 Ill. App. 517 (1881) which speaks of not allowing contribution between joint tortfeasors. Although the case actually involved an indemnity action, the jury in effect awarded contribution. Johnson v. Chicago & Pacific Elevator Co., 105 Ill. 462 (1882), *aff'd*, 119 U.S. 388 (1886), also refers broadly to no contribution among joint tortfeasors but this is incidental to the case and devoid of analysis.
11. 25 Ill. App. 432 (1887), *rev'd*, 129 Ill. 261, 21 N.E. 792 (1889).

contribution, and (2) that the proper test was whether the joint tortfeasors knew or must be presumed to have known that they were committing a tort. The court noted that England itself had departed from the strict *Merryweather* prohibition by allowing contribution where the parties honestly believed they were doing a legal act, and denying contribution only where the tortfeasors were conscious of wrongdoing.[12] The Illinois Supreme Court reversed because it did not believe the creditors were barred by the application of this test. Justice Craig asked:

> Were not the facts surrounding the transaction such that a reasonably prudent person might well believe that an attempt had been made to defraud creditors? If so, it can not be said that the attaching creditors, in making the levy, *intentionally* violated the law. Nor were they presumed to have known the levy was unlawful.[13] (Emphasis added.)

The reference in *Farwell* to a "reasonably prudent person" seems at first sight to prohibit contribution among negligent as well as intentional joint tortfeasors. However, this first impression yields to the observation that the court speaks of intentional wrongdoing within the same context and relegates reasonable prudence to a type of circumstantial evidence which merely negates any inference or presumption of intent. The appellate court, on the other hand, had inferred or presumed just such an intent from the circumstances. But both courts agreed that intent or knowledge is the ultimate test. Where a man acts so unreasonably that a result is substantially certain to follow, courts naturally deal with this as a case of presumed intent.[14] Had the Illinois Supreme Court really meant to bar negligent joint tortfeasors as well, it certainly would not have allowed contribution where the parties honestly but erroneously thought they were doing a legal or proper act. Such a state of honest but erroneous inadvertence, falling below the standard of due care, occurs frequently in negligence cases. Finally, the *Farwell* decision purposely and explicitly limits the *Merryweather* doctrine as broadly interpreted by a minority of courts. This limitation would have been contradictory if the Illinois Supreme Court had really intended to bar any and all joint tortfeasors from contribution. It is unreasonable to assume that the *Farwell* court, which refused to bar contribution on the basis of the narrowly technical intention of concerted conversion which sufficed in *Merryweather*, would not allow contribu-

12. The English law now allows contribution between all joint tortfeasors by statute. Law Reform Act, 25 and 26 GEO. 5, Ch. 30 (1935).
13. 129 Ill. at 273, 21 N.E. at 793.
14. W. PROSSER, *supra* note 5, at § 8.

tion between negligent concurring tortfeasors acting independently without any intent. The conclusion must be that *Farwell* allowed isolated strands of care or lack thereof to be used only as circumstantial evidence of intent rather than a disjunctive cause of action sounding in negligence.[15]

Selz, Schwab & Co. v. Guthman[16] followed the reasoning of *Farwell* and *Nelson* by holding that a sheriff who in good faith levied on wrong property was entitled to indemnity from the directing creditors, who in turn could obtain contribution from one another due to the damage of the wrongful seizure. The only requirement set by the court was that the creditors sue out an execution in good faith, with no intention of committing trespass or injuring anyone, and in the honest belief that attachment could be maintained. Although prudence was required, this again seems to be a circumstantial admonition bearing only on the degree of good faith and lack of intention.

The next fully reasoned decision regarding the matter is the Illinois Supreme Court case of *Wanack v. Michels*.[17] There the court refused contribution to a saloonkeeper's co-surety, who, having paid the plaintiff under the Dram Shop Act, sought contribution from the owner of the premises for the owner's share of the liability. The decision itself is easily enough explained by the strong public policy thought to inhere in the Dram Shop Act. More significant, however, is the tribunal's categorical ruling that the prohibition of contribution is restricted to intentional wrong-doers. The court circumstantially decided that an owner who leases to a saloonkeeper, with knowledge that liquor would be sold on the premises, cannot be said to have acted unintentionally. Though one might conceivably differ as to the finding of intent, the court in any case found itself compelled to determine intent before implementing the rule prohibiting contribution. Had negligence been sufficient, the court would not have felt the clear necessity of grounding its decision on a finding of specific intent.[18]

15. Vieths v. Skinner, 47 Ill. App. 325 (1892), stated that as between the negligent tortfeasors in that case judgment and execution might be taken only against one because of the non-contribution rule among wrong-doers. This overly broad statement of the no-contribution rule is actually irrelevant to the holding that joint tortfeasors may be severally liable.

16. 62 Ill. App. 624 (1895).

17. 215 Ill. 87 (1905).

18. Consolidated Fire-Works v. Koehl, 92 Ill. App. 8 (1900), is similar to the *Vieths* case, *supra* note 15, inasmuch as the case really declared the joint and several liability of tortfeasors. The court only incidentally noted that because contribution did not exist between tortfeasors, a liable defendant could not complain that another might also have been held liable. But who has a better right to complain? The more joint the tortfeasors are, the greater the inequity to the tortfeasor who pays all.

Chicago Railways Co. v. Conway[19] made it clear that the reasoning of the *Farwell* and *Wanack* decisions was still viable in Illinois. In that case Chicago Railways, a streetcar company, successfully sought indemnity from a negligent paving contractor whom Chicago Railways had engaged to perform certain roadway repair. In the course of its repair the contractor removed a portion of the pavement. The plaintiff, a motorcycle policeman, was injured when he drove into the excavation at night. The plaintiff sued both Chicago Railways and the paving company for negligence and recovered against both. The sole basis for the liability of Chicago Railways was a city ordinance which required that every person digging in streets erect a fence and maintain lighting. The court declared in the course of its opinion:

> It is a general and long-established rule of law that neither contribution nor indemnity will be given to one of several joint tortfeasors against the others. The rule is only applied to cases of intentional or conscious wrongdoing.[20]

The court's decision is particularly significant in that *Chicago Railways* followed the lead of *Nelson* by explicitly broadening the no-contribution rule beyond *Merryweather* to include indemnity as well as contribution, and then limited the prohibition to intentional wrongs in compliance with *Farwell.* Thus broadened and thus limited, the rule was subjected to a novel exception in cases of indemnity: the active-passive doctrine. The court concluded that since no moral turpitude but only *malum prohibitum* was involved, it could permissibly examine the relative delinquency of the parties. Upon examination the court found that Chicago Railways was only technically liable for a statutory violation, whereas the contractor was the "primary cause" of liability. The court, consistent with the basic purpose of indemnity, required something more than a showing that both defendants acted unintentionally. The court correctly felt obliged to indicate what this further showing should contain in order to shift the entire burden of liability to another. Unlike *Nelson,* this court did not view mere lack of intention as sufficient to establish the right of indemnity.

But the important point is that *Chicago Railways* laid down an additional requirement only for those seeking indemnity. Nothing in the case remotely suggests that the primary-technical distinction is relevant to those seeking only contribution. It would indeed be fallacious to assume that as a result of *Chicago Railways* no remedy other than primary-technical indemnity existed for joint tortfeasors. On the con-

19. 219 Ill. App. 220 (1920).
20. *Id.* at 223.

trary, the reasoning of *Chicago Railways* implied that contribution might still be had between unintentional joint tortfeasors who seek contribution. If, for example, Chicago Railways had sought only contribution and not indemnity, the court clearly would have had no need to devise the primary-technical distinction. Especially since the earlier cases were left undisturbed, the recognition of indemnity on a primary-technical theory in no way necessitated the demise of contribution between negligent joint tortfeasors.[21]

Thus far, the formative law of Illinois, particularly as revealed through the Illinois Supreme Court, allowed contribution between unintentional, including negligent, joint tortfeasors. Although some of the early appellate cases seem to prohibit contribution between all joint tortfeasors, their remarks are really only broadly phrased propositions collateral to main issues and containing either sparse reasoning or none at all. The real test for contribution should depend only on the mental state involved: Did the joint tortfeasors act intentionally or did they not? The test has nothing to do with the causative or quantitative characterization of their acts as active or passive, primary or technical. As late as 1931, the case of *Skala v. Lehon*,[22] in the course of holding that master and servant could be joined in one suit, stated that although the right of contribution does not exist between joint tortfeasors acting in concert, it does exist where no concerted action exists. The landmark case of *George's Radio v. Capital Transit Co.*[23], which permitted contribution between negligent joint tortfeasors in the District of Columbia, cited the *Skala* decision as authority for the view that contribution is only denied to intentional joint tortfeasors. Ironically, this out-of-state court has seen in Illinois that very right to contribution which contemporary Illinois courts have refused to acknowledge.

II

The year 1923 marked the real eclipse of contribution by the rise of the active-passive doctrine. In that year *Griffiths v. National Fire-*

21. Steinhaus v. Radtke, 145 Ill. App. 232 (1908), held that suit, judgment, and execution might properly be brought against only one of two intentional joint tortfeasors. Aside from reasonless *dictum* that no contribution exists among joint tortfeasors, the actual decision did not deal with negligent tortfeasors. Vandalia R.R. v. Nordhaus, 161 Ill. App. 110 (1911), also states broadly that no contribution exists among joint tortfeasors, although the real holding is that a joint tortfeasor knowing of a covenant not to sue in favor of a co-defendant, prior to a motion for a new trial, is not prejudiced by the covenant.

22. 343 Ill. 602, 175 N.E. 832 (1931).

23. 126 F.2d 219 (D.C. Cir. 1942).

proofing Co.[24] was decided under the Illinois Scaffold Act. A subcontractor had agreed to install certain fireproofing for the general contractor and to use due diligence in performing the contract. The plaintiff, injured by tile falling from the scaffold, sued the general contractor, who in turn sought indemnity from the subcontractor. Unwilling to rest its decision solely on the express contractual provision of due care, the court decided that since no moral turpitude was involved the general contractor was entitled to indemnity. In so deciding the court said:

> The general rule is that where two parties acting together commit an illegal or wrongful act the party injured may hold both responsible for the damages resulting from their joint act and neither can recover from the other the damages he may have paid or any part of them. The further general principle is announced, however, in many cases, that where one does the act which produces the injury and the other does not join the act but is thereby exposed to liability and suffers damage the latter may recover against the principal delinquent, and the law will inquire into the real delinquency and place the ultimate liability upon him whose fault was the primary cause of the injury.[25]

This doctrinal statement omits that prior line of decisions which established contribution as a legal remedy for negligent joint tortfeasors. Unlike *Chicago Railways*, the *Griffiths* court seemed to assume that there was no contribution or indemnity between joint tortfeasors except to the extent that the active-passive doctrine or an express indemnity provision permitted otherwise. But this negative inference from omission, even if true, should not be viewed as overruling prior cases dealing with contribution, especially since the *Griffiths* court was concerned solely with indemnity sought under the terms of an express contract. In fact, the active-passive discussion in that case was merely an alternate holding.

Not until twenty-three years later in *Gulf, Mobile & Ohio R.R. v. Arthur Dixon Transfer Co.*[26] was the active-passive doctrine again invoked. A defendant railroad, having paid its employee under the Federal Employer's Liability Act, was allowed indemnity against a co-defendant trucking company which had contracted to do certain trucking for the railroad. The railroad contended that the trucker had breached an implied indemnity of due care in the contract when the plaintiff was crushed between a boxcar and one of the co-defendant's

24. 310 Ill. 331, 141 N.E. 739 (1923).
25. *Id* at 339, 141 N.E. at 742.
26. 343 Ill. App. 148, 98 N.E.2d 783 (1951).

trucks. The trial court struck the railroad's indemnity complaint on the ground that the railroad was a tortfeasor seeking "contribution" and, therefore, could not recover on its theory of implied indemnity. In reversing, the appellate court said that there were "many exceptions to the general principle of non-contribution between tortfeasors."[27] The court proceeded to list five categories of exception, all of which involved the active-passive doctrine of indemnity and none of which involved true contribution. The appellate court then granted indemnity to the railroad on the theory that negligence was not a form of moral turpitude which automatically barred indemnity. The court thus felt free to find the real delinquent in the case by use of the active-passive doctrine; but, in so deciding, neglected to define activity or passivity. The court did state that physical motion, or the lack of it, was not the proper criteria. Unfortunately, saying what the doctrine was not failed to reveal what it was.

The significance of the *Arthur Dixon* decision lies not only in its confusion of contribution with indemnity but in its assumption that indemnity situations alone are an exception to a general prohibition of recovery between joint tortfeasors. The *Griffiths-Arthur Dixon* analysis ignored earlier cases dealing with contribution for the probable reason that neither case was required to consider contribution. However, unlike the *Chicago Railways* statement of the doctrine, this analysis inadvertently left open the negative inference that no contributive remedy existed between joint tortfeasors except indemnity. Thus, indemnity became misconstrued as a form of contribution. This coalescence of distinct principles was probably abetted by the deceptive similarity between the moral turpitude—*malum prohibitum* distinction of the indemnity cases and the intentional-unintentional distinction of the contribution cases. The other major defect of the *Griffiths-Arthur Dixon* analysis was that it set no explicit limits to the active-passive doctrine. Although both cases involved contractual and statutory relationships on their facts, the *Arthur Dixon* case drew no such limitation in its list of five categories where active-passive indemnity was allowable. The truth of the matter is that Illinois courts have increasingly made the active-passive doctrine a separate basis for indemnity relief, irrespective of any prior existing legal relationship between the tortfeasors. The result in our day has been rank confusion.

The following cases reveal the confusing inconsistency which obtains when the active-passive doctrine is treated as a separate basis of

27. *Id.* at 152, 98 N.E.2d at 785.

indemnity. In *Reynolds v. Illinois Bell Telephone Co.*,[28] indemnity was allowed to the owner of a vehicle illegally parked near a crosswalk against a co-defendant who, because of this obstruction to his view, struck the plaintiff. On the other hand, in *Drell v. American National Bank & Trust Co.*,[29] a plumbing firm which had left an empty oxygen tank on a common walk was denied indemnity against a co-defendant who tied a dog to the abandoned tank, although the dog injured the plaintiff by toppling the tank. Then in *Stewart v. Mister Softee of Illinois, Inc.*,[30] the owner of a doubleparked ice cream truck was not allowed indemnity against the co-defendant whose vehicle injured the child plaintiff. The court held the doubleparking and sounding of chimes to constitute "active negligence" which barred indemnity. No sooner had the pre-*Reynolds*' era returned when it was hastily abandoned once again in *Sargent v. Interstate Bakeries, Inc.*[31]

In *Sargent*, a defendant who parked his vehicle at a crosswalk was allowed to file an indemnity counterclaim against a co-defendant whose vehicle actually injured the child plaintiff. The indemnitee successfully relied on *Reynolds* in reversing the adverse decision below. The appellee unsuccessfully urged that following *Reynolds* would unfairly shift the entire liability from one negligent joint tortfeasor to another. In reversing the dismissal of the counterclaim, the court ruled that active-passive indemnity should not depend upon some pre-accident relationship or community of interest between negligent tortfeasors. The court conceded that total indemnity would appear unjust if the evidence should disclose that the appellant, though in some measure to blame for the accident, was allowed to shift his entire liability under the active-passive doctrine. However, the court concluded that this inequity was unavoidable until the dubious no-contribution rule was abolished. Although apparently unwilling to attack the no-contribution rule head-on, the court did not find it disturbing that the *Reynolds* decision might lead to contribution. Concerning the no-contribution doctrine, the court said:

> The Illinois judiciary is keenly aware of the inequities flowing from the present rule, and the perplexities which have arisen from the indemnity exception, and has recommended the rule's abolition. The Illinois Judicial Conference of 1964 unanimously adopted a resolution favoring contribution between joint tortfeasors. The legislature has not acted upon the conference recommendation and the

28. 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964).
29. 57 Ill. App. 2d 129, 207 N.E.d 101 (1965).
30. 75 Ill. App. 2d 328, 221 N.E.2d 11 (1966).
31. 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).

> rule remains in force. However, the rule was court-made and can be court-changed.[32]

It is unlikely that the Illinois judiciary can much longer avoid a confrontation with the resultant injustices of the no-contribution slogan. The extension of the active-passive doctrine beyond its functional role has led to decisions which seem to confuse contribution with the indemnity relief actually rendered or, worse yet, which proceed as though indemnity and contribution were merely redundant words for the same concept.[33] Alongside this confusion is the new confusion of trying to determine what constitutes "active" and "passive" conduct between negligent joint tortfeasors who have had no prior legal relationships. The active-passive doctrine has generated mass uncertainty among trial practitioners and is responsible for an avalanche of questionable third-party and counterclaim actions which do nothing but invoke the active-passive jargon like some supposedly magical incantation whose meaning has long been forgotten. Even the courts have, on occasion, confessed that the active-passive doctrine is applied ad hoc and leads to no uniformity in result.[34]

It is understandable why the active-passive doctrine, when shorn of its historical and analytical roots, must generate confusion. The active-passive test was designed to shift the entire burden of liability only in those cases where the non-existent fault of a joint tortfeasor made such a shift easy to justify. However, to apply this indemnity principle to cases like *Reynolds*, *Drell*, *Mister Softee*, or *Sargent* will result either in meaningless metaphysical manipulations of "activity" or "passivity", for physical motion has no relevance, or else in an illusory weighing of closely balanced fault when the result is always a preordained double-or-nothing liability. In modern multiple-fault negligence situations, especially in the field of automobile law, the "principal delinquent" is usually a mythological character. The more nearly equal the negligence of joint tortfeasors, the more capricious the result produced by an unrealistic weighing of imponderables. The archetype of the active-passive doctrine presupposes the ideal of no fault in the indemnitee; the principle of contribution, however, is most fittingly employed where all joint tortfeasors are tainted by the tar of personal fault. Shar-

32. *Id.* at 197, 229 N.E.2d at 774.

33. Boston v. Old Orchard Business District, Inc., 26 Ill. App. 2d 324, 168 N.E.2d 52 (1960); Holcomb v. Flavin, 37 Ill. App. 2d 359, 185 N.E.2d 716 (1962); Embree v. DeKalb Forge Co., 49 Ill. App. 2d 85, 199 N.E.2d 250 (1964); Rovekamp v. Central Const. Co., 45 Ill. App. 2d 441, 195 N.E.2d 756 (1964).

34. Topel v. Porter, 95 Ill. App. 2d 315, 237 N.E.2d 711 (1968); Gillette v. Todd, 245 N.E.2d 923 (1969).

ing of liability and not the shifting thereof is the only satisfactory remedy in such cases. Contributive damage is the logical corollary to almost equally contributive causes.[35]

However, the most severe inadequacy of the process which makes active-passive indemnity serve in lieu of contribution appears in the common situation of two joint tortfeasors with no prior relationship, who, being found mutually active or mutually passive, are not allowed either to share or to shift liability. The active-passive doctrine comes into play only if the indemnitor is found "active" and the indemnitee "passive". Even if one assumes this to be a realistic task in the absence of a prior legal relationship, there seems to be no sound policy reason for a "passive" negligent tortfeasor to be completely exonerated when his counterpart is "active", yet left completely remediless when the counterpart is also "passive". The harshness of refusing a remedy in this type of case is heightened by the realization that even so-called "active" or "passive" tortfeasors bear traces of the opposite brand of negligence in their conduct. The law recognizes no partly active, partly passive joint tortfeasor who seeks indemnity. Why should so much turn on the fortuitous characterization of a co-defendant under the active-passive crystal ball test? A return to the intentional-unintentional test of contribution would assure that all indemnitees having the same mental state would be treated alike. The invidious distinctions made between tortfeasors based not only on their activity or passivity but also on that of their co-defendant would cease to exist.

Moreover, *McDonald v. Trampf*[36] illustrates the basic incongruity between the active-passive test of indemnity and the earlier intentional-unintentional test of contribution. There the court, in a careful analysis of prior Illinois law, conceded that contribution is only prohibited to intentional tortfeasors acting in concert. But it further concluded that once a negligent joint tortfeasor escapes that prohibition he must still meet the second hurdle of the active-passive test to obtain relief. Yet it is paradoxical to employ an active-passive indemnity test in a situation calling for contribution alone. Indeed, to employ both tests is self-defeating since one can often act unintentionally for contribution purposes and yet be actively negligent for indemnity purposes. The proposal of *McDonald* is superfluous for indemnity purposes and unduly

35. Illinois courts have recognized that the active-passive test was designed for situations where there was no personal fault of the indemnitee to weigh: Palmer House Co. v. Otto, 347 Ill. App. 198, 106 N.E.2d 753 (1952); Sleck v. Butler Bros., 53 Ill. App. 2d 7, 202 N.E.2d 64 (1964).

36. 49 Ill. App. 2d 106, 198 N.E.2d 537 (1964).

stringent for contribution purposes. The court, sensing the vital case law of contribution, tried valiantly to combine two tests into one. But they cannot be combined because their purposes and policies are different. The attempt to reconcile the irreconcilable only reveals the needless restrictions clamped upon legal development by a loosely applied active-passive test.

The Illinois Supreme Court has indicated, cautiously in *Miller v. DeWitt*,[37] and more explicitly in *Muhlbauer v. Kruzel*,[38] that the active-passive doctrine should be restricted to situations in which some prior relationship between the parties existed upon which a duty to indemnify might be predicated. Most of these prior relationships will likely arise in the traditional indemnity areas of contractural, statutory, or principal-agent relationships. One may have such a relationship and yet run afoul of the active-passive test which presupposes the relationship. Where the modern maze of statutory and contractual law bases liability on factors divorced from personal fault,[39] it is entirely consistent with the fault principle to hold that a defendant only legally liable should be indemnified for the actual and personal fault of a co-defendant. Restricted to a prior relationship situation where the potential indemnitee is not involved in the actual commission of the tort, the active-passive test can be applied consistently and justly.

However, the constantly reoccuring danger in present Illinois law is the temptation to extend the active-passive doctrine to non-contractual and non-statutory negligence cases where contribution is the natural remedy. As long as contribution is not recognized between negligent joint tortfeasors, Illinois judges will be understandably enticed into filling the void by stretching the active-passive doctrine until it unquestionably emerges as a separate basis for indemnity irrespective of any prior relationship either in law or in fact.[40] In their attempt to rectify inequity caused by the overstated no-contribution rule, judges have unfortunately spread the necessarily restricted active-passive parasite, along with its host, the law of indemnity, into areas that neither was intended to serve nor can serve without causing a corresponding inequity. These judges are trapped in the dilemma of trying to operate with the clumsy remedy of indemnity. They need the scalpel of con-

37. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
38. 39 Ill. 2d 226, 234 N.E.2d 790 (1968).
39. *E.g.*, Scaffold Acts, Workmen's Compensation Acts, the Federal Employer's Liability Act and certain non-delegable duties.
40. In Spivack v. Hara, 69 Ill. App. 2d 22, 216 N.E.2d 173 (1963), the court indicated that the active-passive doctrine was developed "[t]o combat the harshness of a rule prohibiting contribution among tortfeasors in all cases." *Supra* at 24, 216 N.E.2d at 174.

tribution for their judicial surgery, but have only the improper butcher knife of active-passive indemnity.[41]

The practical results of this dilemma can be seen in the following three cases, each of which would be susceptible of the contributive principle had contemporary Illinois law not emasculated that principle. In *Shapiro v. Gulf Mobile & Ohio Railroad*,[42] a railroad, charged with ordinary negligence for the improper speed of its train, for failure to maintain a lookout and for failure to use warning devices or to apply brakes, argued that even if found to be an active tortfeasor, it should, nevertheless, be allowed indemnity against a co-defendant motorist charged with wilful and wanton negligence in stalling his auto on the tracks, speeding, failing to keep a lookout, proceeding against signals and deserting plaintiff's decedent on the tracks. The court found both defendants to be active tortfeasors and denied indemnity since the respective negligence of the two wrongdoers could not be measured for the purpose of determining indemnity. The court may be inaccurate in assuming that Illinois courts do not weigh comparative fault so as to determine active-passive indemnity, but it is surely correct in its instinctive feeling that indemnity is not the proper device for this situation. But rather than leaving this relatively appealing third-party plaintiff without any remedy, contribution could have been used to bypass the admittedly hopeless task of finding a technical tortfeasor.

Dobbins v. Beachler[43] exhibits the sterility of the active-passive concept in automobile litigation. There the defendant driver of the forward vehicle stopped suddenly without signaling to the co-defendant, who smashed his following vehicle into the forward vehicle. A passenger in the first car obtained a verdict of $45,000 jointly against both drivers. The insurer of the first driver paid its full policy limit of $30,000 and brought a declaratory judgment action against the second motorist and his insurer for a contributive share of the $30,000 paid.[44] Predictably, the court held that since the first motorist was an "active" tortfeasor he could not recover contribution of any sort. Unconcerned that neither defendant was an intentional wrongdoer, the court applied the inapplicable indemnity terminology of "active-passive" to a situation where contribution alone was sought. Under the active-passive

41. For example, Bohannon v. Industrial Maintenance, 16 Ill. App. 2d 402, 148 N.E.2d 602 (1958), seems to brand all corporations as "active" tortfeasors since they can only "act" through agents.

42. 256 F.2d 193 (7th Cir. 1958).

43. 47 Ill. App. 2d 30, 197 N.E.2d 518 (1964) (ab.dec).

44. The contributive share sought being the amount paid in excess of the insured's proportionate part of the judgment. Gottschalk v. Gottschalk, 222 Ill. App. 56, 59 (1921); PROSSER, *supra* note 5, at § 46.

standard neither driver in such a common situation is able to distribute liability since both are "actively" negligent in having some personal fault. Whether or not indemnity is applied in such a case, inequity will result to one of the defendants. Contribution alone can balance the scale of fault.

Finally, the decision of *Chicago & Illinois Midland Ry. v. Evans Const. Co.*[45] further reveals the impotency of the active-passive test in instances of negligence. In the course of that decision, the court assumed that even if both third-party plaintiff and third-party defendant had the same duty to inspect, the third-party plaintiff would still be unable to recover, since the duty to inspect rested equally on both. It is precisely in this area of equal negligence that contribution is uniquely capable of rendering justice. However, the court assumed, in the face of earlier decisions, that contribution is not allowed in Illinois and that for indemnity to succeed it is necessary to draw a "qualitative" distinction between the negligence of the joint tortfeasors. But the majority of multiple-negligence cases, in the absence of strict liability imposed by statute or otherwise, do not have "qualitative" differences.

III

In conclusion, the Illinois courts can and should reassert the languishing principle of contribution between negligent joint tortfeasors. This reassertion would not be an innovation but rather the return to a once vital principle. Surely a judiciary which has forthrightly declared that courts can undo what they have once done will find it no more difficult a task to refurbish the principle of contribution on a case by case basis. Not only has the Illinois judiciary undercut judge-made governmental and charitable tort immunity rules, but it has also taken the lead in expanding the principle of strict tort liability and in relating strict liability to the needs of a modern, consumer-oriented society.[46] Moreover, the same judiciary was able to study anew the basic theory of contributory negligence.[47]

Although some will object that contribution is an unwieldy and covert substitute for a rejected comparative negligence rule, it should be remembered that the Illinois judiciary has not considered it inappropriate for an Illinois jury to apply the Wisconsin rule allowing contribu-

45. 32 Ill. 2d 600, 208 N.E.2d 573 (1965).
46. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
47. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

tion between negligent joint tortfeasors.[48] This same judiciary has found that the right to contribution or indemnity is no more likely to incite comparative negligence than any other tort action.[49] Two recent decisions indicate that Illinois courts may not be unaware of the propriety of restricting the no-contribution rule to intentional tortfeasors.[50] To avoid further confusion of both bench and bar, the problem should be rethought, even if rethinking leads to a clearly expressed judicial approval of contribution.

Such a task should not be left to an Illinois legislature whose activities must be directed by necessity to larger issues of the day.[51] The Illinois Civil Practice Act itself intimates that the legislature wished to leave this area largely in the hands of the judiciary. Rule 25 of the Act provides that third-party proceedings shall not create any substantive right to contribution among tortfeasors which did not exist before the Act. Clearly this leaves the judiciary free to re-examine and re-evaluate its own decisions and precedents. Moreover, legislative history indicates that on those infrequent occasions when the legislature has received relevant bills, those bills have not been considered.[52] This lack of action is not the type of legislative defeat, as after full debate and vote, which should preclude the judiciary from examining the matter anew. Moreover, a healthy common law should not normally await legislative action to extricate the courts from an impasse which the courts have created and from which the courts are capable of extricating themselves.

A flexible framework for the Illinois courts would be provided by abandoning the "active-passive" terminology and using the renamed primary-technical test for indemnity actions where a prior legal relationship exists between the tortfeasors. Since indemnity actions presuppose basic absence of personal fault in the indemnitee, the phrase "passive

48. Millsap v. Central Wisconsin Transport Co., 41 Ill. App. 2d 1, 189 N.E.2d 793 (1963).

49. Reynolds v. Illinois Bell Telephone Co., 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964). In fact, it seems the active-passive theory, by its process of comparing negligence between defendants to find the "active" one, is more akin to comparative negligence than contribution.

50. *See* American Tel. & Tel. Co. v. Leveque, 30 Ill. App. 2d 120, 173 N.E.2d 737 (1961), where the importance of intentional and conscious wrongdoing was reiterated. Even more significant is Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963), where the history of the rule and its limitation to intentionally concerted actions is set out.

51. The 76th Illinois General Assembly passed 2,207 pieces of legislation. Undated 1970 Bulletin from Illinois State Bar Association to its members.

52. S.B. 809, 76th Illinois General Assembly, introduced by Sen. Arrington, has remained in the Judiciary Committee. H. B. 1005 and 1006, 76th Illinois General Assembly, introduced by Rep. Copeland, were tabled. Letter from Legislative Reference Bureau to author, Jan. 9, 1970.

negligence" connotes an unacceptable implication of personal fault or negligence in fact, when what really occurs is the attribution of a fictional legal negligence to one tortfeasor for various policy reasons. It is reasonable that a tortfeasor who wishes to shift liability should bear the greater burden of showing that he is free of personal fault, whether that fault consists of an intentional tort or of negligence in fact. Contribution, on the other hand, would require only a showing of freedom from intent and not of freedom from personal fault or negligence in fact, since only a sharing of the common liability is being sought. Contribution could also be theoretically used in any indemnity case inasmuch as the broader remedy of indemnity logically includes the narrower remedy of contribution. By pleading in the alternative a party can be assured that he will at least have some remedy in the event a questionable indemnity theory fails.

Modern jurists are becoming increasingly aware that negligence is the accepted price of a complex society, and that in such a society negligence no longer carries the same moral and legal reproach it once did.[53] Having recognized negligence in fact as commonplace in a dynamic society, the legal profession is becoming cognizant of the anachronistic nature of the no-contribution rule. The courts have reached a point where they no longer need let shadow rule substance as they punitively ferret out "bad men" in their vigilance to deny contribution between negligent joint tortfeasors. The opportunity now exists to mend the seamless web of the law by restoring harmony between actions for indemnity and contribution.

53. In 1968, there were 351,065 reported motor vehicle accidents in Illinois which involved 614,427 drivers. Letter from National Safety Council to the author, Nov. 12, 1969. Clearly a large potential segment of automobile litigation involves multiple defendants without prior relationship.