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Skinner v. Reed-Prentice: The Application of Contribution to Strict Product Liability, 12 J. Marshall J. Prac. & Proc. 165 (1978)

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CASENOTES

SKINNER V. REED-PRENTICE: THE APPLICATION OF CONTRIBUTION TO STRICT PRODUCT LIABILITY

The allocation of damages among multiple tortfeasors who may be found liable to an injured plaintiff is the subject of extensive legislative and judicial action across the nation.[1] Forms of contribution and indemnity are supplanting former standards that precluded the shifting or spreading of loss among responsible parties. Historically, under the common law rule, loss remained where the victim imposed it.[2] A plaintiff had sole discretion over his choice of potential defendants in seeking recovery,[3] allowing his whim or spite to govern the imposition of liability.[4] Thus, an injured party could not only choose whom to sue, but upon receiving a judgment against multiple defendants he could also decide from whom to collect.[5] Tortfeasors excluded by the plaintiff from the action or from collection of a judgment got off "scot free."[6]

The development of contribution and indemnity has countered some of the inequities[7] arising from the common law rule of liability among multiple tortfeasors. Although both contribu-

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1. *See* Ferrini, *The Evolution from Indemnity to Contribution—A Question of the Future, if Any, of Indemnity*, 59 CHI. B. REC. 254 (1978) [hereinafter cited as Ferrini, *From Indemnity to Contribution*]. *See also* note 15 *infra*.

2. Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728 (1968) [hereinafter cited as *Allocation of Loss*].

3. *Id.* at 732. At common law a victim could place the "entire loss on A, or on both A and B, or on A, B and C either in equal or unequal proportion."

4. W. PROSSER, THE LAW OF TORTS 307, § 50 (4th ed. 1971) [hereinafter cited as PROSSER]; *see Allocation of Loss, supra* note 2, at 732 (the victim's choice of defendants was not necessarily predicated upon factors which served tort goals, such as retribution, deterrence, and loss spreading).

5. Where defendants were joined, each was liable for the entire amount of the judgment, and plaintiff could levy against any defendant. *See* PROSSER, *supra* note 4, § 50, at 307.

6. *Id.*

7. At common law there was no relief available for a defendant against whom a judgment was levied, regardless of how little his conduct actually contributed to a plaintiff's injury; he could recover from neither a co-defendant nor a responsible person not a party in the action, making it possible to impose full liability upon one who was responsible for only a very small percentage of the harm. *See* Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747, 764 (1976) [hereinafter cited as Schwartz, *Practice Under Comparative Negligence*].

tion and indemnity impair a plaintiff's ability to impose loss selectively, each is a distinct doctrine. Contribution, which originated in equity[8] and is commonly applied pro rata,[9] distributes loss by requiring each tortfeasor to pay a proportionate share of the whole; indemnity shifts the entire loss from the party upon whom it has been imposed to another who should bear it instead.[10]

A common law rule against contribution among joint tortfeasors stemmed from the 1799 case of *Merryweather v. Nixan*,[11] which denied contribution where the action upon which liability was predicated was a tort. At the time of *Merryweather*, however, "tort" designated willful or intentional wrongs, and the actual holding of the case was correspondingly limited to prohibiting contribution for only willful or intentional wrongs.[12] The courts subsequently carved out an exception to the general rule allowing contribution.[13] Early American cases applied the no-contribution rule to cases of willful misconduct but not to negligent torts. When joinder was extended to parties who had merely caused the same damage, the rule was applied generally to all torts without regard to its origin.[14] Courts and, more commonly, legislatures have revived contribution in varying forms in many states.[15]

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8. Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 726 (1974) [hereinafter cited as Jensvold, *A Modern Approach*].

9. *See Allocation of Loss, supra* note 2, at 734. Pro rata distribution of loss is an equal apportionment, but in some jurisdictions "the distribution of liability is in proportion to the comparative fault of the parties." PROSSER, *supra* note 4, § 51, at 310.

"The pro rata share of one joint tortfeasor is determined by dividing the total judgment by the number of the tortfeasors, excluding those who are insolvent or could not be made parties to the action." Comment, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1404 n. 64 (1974).

10. PROSSER, *supra* note 4, § 51, at 310. *See* notes 16-20 and accompanying text *infra*.

11. 101 Eng. Rep. 1337 (1799). In *Merryweather* a joint judgment had been entered against two defendants in a prior conversion action but levied against only one.

12. *See id.*

13. Note, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177-78 (1898).

14. PROSSER, *supra* note 4, § 50, at 306. At the time of the *Merryweather* decision, joinder was possible only for parties acting in concert. *Id.* at 305.

15. *See Allocation of Loss, supra* note 2, at 735. Some jurisdictions limit contribution to joint judgment defendants (Delaware, California, Michigan, Mississippi, North Carolina, Texas), some have adopted the Uniform Contribution Among Tortfeasors Act, which allows for contribution with or without a joint judgment (Arkansas, Hawaii, Maryland, Pennsylvania, South Dakota, Massachusetts), and some do not specify (Georgia, Kentucky, Louisiana, New Jersey, Wisconsin).

Whereas contribution is based upon spreading loss where there is a common liability, indemnity concentrates on the relationship of the parties and completely shifts the loss from one party to another. It may be grounded upon contract or implied by operation of law.[16] Confusion has existed as to when indemnity will operate, and hence the courts have developed a variety of tests—whether the parties are actively or passively negligent[17] or primarily or secondarily liable,[18] whether a duty existed between them, whether a contract can be implied, as well as general equitable considerations.[19] The relative culpability of the parties' actions often determines whether indemnity will lie,[20] with liability shifting to the party more directly responsible. Since the standards for indemnity are so varied, confusion and inconsistency have permeated its application.

Allocation of loss becomes even more complex when the doctrines of indemnity and contribution are invoked in strict liability cases. There is an inherent conflict in the policies underlying indemnity and contribution and those behind strict liability. Strict liability in product actions has developed primarily to protect injured consumers and is designed to protect plaintiffs' rights,[21] while indemnity and contribution are by their nature tools for promoting fairness to defendants and focus on defendants' rights.[22] The concept of fault is a key factor in the proper distribution of liability among tortfeasors in negligence actions, but theoretically it has no place in strict liability.[23] However, in product liability cases, the common existence of multiple potential defendants creates a natural situation for claims for contribution and indemnity among the parties.[24] The

16. *See* PROSSER, *supra* note 4, § 51, at 310.

17. *See Allocation of Loss, supra* note 2, at 738. The active-passive test is based on the relative causal connections of the liable parties' actions to the victim's harm, and the active tortfeasor indemnifies the passive party. *See also* notes 44-52 and accompanying text *infra*.

18. *See* Allocation of Loss, *supra* note 2, at 738-39. The distinction between primary and secondary liability is grounded on the type of duty owed to the victim; the party who is secondarily liable (for example, by virtue of a duty arising from a legal relation) is entitled to indemnity from the party primarily liable.

19. *Id.* at 738-43.

20. Jensvold, *A Modern Approach, supra* note 8, at 724. "Concepts of 'fault' and 'duty' . . . are often determinative of the rights of defendants *inter se*."

21. *See* notes 65-72 and accompanying text *infra*.

22. *See* Jensvold, *A Modern Approach, supra* note 8, at 723.

23. *Id.* at 724.

24. *See* Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 85 (1974) [hereinafter cited as Phillips, *Contribution and Indemnity*] which states:

The volume and complexity of [litigation in the products field concern-

many problems underlying the application of contribution and indemnity to strict liability, further complicated by the applicability of a workmen's compensation statute,[25] culminated in Illinois when the supreme court was called upon to decide *Skinner v. Reed-Prentice Division Package Machinery Company*.[26]

THE SKINNER CASE

Skinner was an action grounded in strict liability against Reed-Prentice Division Package Machinery Company (hereinafter referred to as Reed). Plaintiff, Rita Rae Skinner, sought to recover damages for personal injuries that she sustained during the course of her employment[27] with third-party defendant, Hinckley Plastic, Inc. (hereinafter referred to as Hinckley), as the result of the malfunction of a machine manufactured by Reed.[28] In its answer, Reed pleaded the defenses of misuse of the machine and assumption of risk by plaintiff.[29] Reed also filed a third-party complaint against Hinckley seeking contribution, in the event of a judgment for plaintiff against Reed, in such amount "as would be commensurate with the degree of misconduct attributable to the [employer]"[30] and charged negli-

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ing contribution and indemnity] have notably increased over previous years. This increase may be explained at least in part . . . by the fact that usually there are potentially multiple defendants in a products case, thus giving rise to the possibility of claims for contribution or indemnity between or among the parties.

25. The applicability of the Illinois Workmen's Compensation Act in the case at issue presented problems in that, although it limits liability of an employer, contribution was sought from an employer in excess of the amount governed by workmen's compensation. *See* ILL. REV. STAT. ch. 48, § 138.11 (1977).

> [T]he potential conflict between policies favoring apportionment of liability and those underlying workmen's compensation laws present special problems. Workmen's compensation laws are designed not only to liberalize the basis for an employee's claim against his employer arising out of and in the course of employment, but also limit the amount of the employee's claim against the employer.

Phillips, *Contribution and Indemnity, supra* note 24, at 108 (footnotes omitted).

26. 70 Ill. 2d 1, 374 N.E.2d 437 (1977). Two other cases were decided with *Skinner* on the same basis and rely on the *Skinner* opinion's discussion of the issues. *See* Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977) and Robinson v. International Harvester Co., 70 Ill. 2d 47, 374 N.E.2d 458 (1977).

27. Plaintiff was injured when an injection molding machine manufactured by Reed malfunctioned. 70 Ill. 2d at 4, 374 N.E.2d at 438.

28. Plaintiff's complaint alleged that, when manufactured and sold, the machine causing her injuries was defective and unreasonably dangerous for use for its intended purpose and that it was improperly designed and lacking in safety devices. Skinner v. Reed-Prentice Div. Package Mach. Co., 40 Ill. App. 3d 99, 100, 351 N.E.2d 405, 406 (1976).

29. *Id.*, 351 N.E.2d at 406.

30. 70 Ill. 2d at 5, 374 N.E.2d at 438.

gence on the part of the employer in using the machine.[31] Reed's third-party complaint was dismissed on Hinckley's motion[32] and the appellate court affirmed, from which Reed appealed.

On appeal, the supreme court, amid strong dissent, reversed the appellate court's decision, holding that the third-party complaint stated a cause of action for contribution based on Hinckley's assumption of risk or misuse of the product.[33] This note will analyze the several major areas of contention discussed by the supreme court in *Skinner*.

Historical Perspectives of Contribution and Indemnity in Illinois

The court, after reviewing existing law in Illinois, concludes that "there is no valid reason for the continued existence of the no-contribution rule."[34] Although this is a definitive step toward clarifying the status of contribution in Illinois, it is not as revolutionary as it sounds, since it is questionable whether a rule against contribution in fact ever existed in Illinois.[35]

The Illinois Supreme Court first indicated that it followed the *Merryweather* rule[36] in 1856 when it distinguished the right to indemnity from a right to contribution and articulated an in-

31. The manufacturer's third-party complaint alleged that the unreasonably dangerous condition of the machine when plaintiff was injured, if any, "was substantially and proximately caused by the negligent acts and omissions of the intervening owners of said machine and of the Employer" and that the employer was negligent in purchasing and operating a used machine in such poor state and which was no longer in the condition in which the manufacturer sold it. 40 Ill. App. 3d at 100-01, 351 N.E.2d at 406-07.

32. Hinckley filed a motion to strike the complaint on the ground that any negligence of Reed in its manufacture of the defective product, as alleged by plaintiff, was necessarily active and that therefore Reed would not be entitled to indemnity regardless of whether Hinckley's alleged negligence was active or passive, and that Illinois law prohibited contribution between co-tortfeasors. *Id.* at 101, 351 N.E.2d at 407.

33. 70 Ill. 2d at 16, 374 N.E.2d at 443, wherein the court held:

> [T]he third-party complaint, although pleaded in terms of negligence, alleges misuse of the product and assumption of risk on the part of the employer and states a cause of action for contribution based on the relative degree to which the defective product and the employer's misuse of the product or its assumption of the risk contributed to cause plaintiff's injuries.

34. *Id.* at 13, 374 N.E.2d at 442.

35. Polelle, *Contribution Among Negligent Joint Tortfeasors in Illinois: A Squeamish Damsel Comes of Age*, 1 LOY. CHI. L.J. 267, 268 (1970) [hereinafter cited as Polelle, *Contribution in Illinois*] states that "[a] historical study of case law does not support the supposedly well-settled proposition that contribution is prohibited between negligent joint tortfeasors in Illinois. The law is considered well-settled largely because it has become an unquestioned shibboleth."

36. *See* notes 11-13 and accompanying text *supra*.

tentional-unintentional test for indemnity.[37] Later, in what the *Skinner* court characterizes as the only previous case in which the supreme court explicitly has ruled on the contribution question,[38] contribution among unintentional tortfeasors was allowed.[39] The supreme court has oscillated in its treatment of contribution. The apparent general rule against contribution has been used, for example, to support both denials[40] and allowances[41] of joinder of parties as defendants. On the other hand, an intentional-unintentional test has been recognized as to whether a right to contribution *exists*,[42] as has the distinction of whether or not the parties acted in concert.[43] Although there was no decisive authority against a right to contribution among *unintentional* tortfeasors, there was a general consensus of judicial dicta that there was no right to contribution.

Despite the reluctance to reject the apparent no-contribution rule, the courts were dissatisfied with it and resorted to the concept of indemnity to compensate.[44] Active-passive negligence criteria were introduced[45] and extended to implied in-

37. Nelson v. Cook, 17 Ill. 443 (1856). In an action by a sheriff seeking recovery of the amount he had paid for improperly converting the goods of another from the person who had directed the conversion, the court held that a prohibition against contribution would not affect a right to indemnity, which would be barred only when the indemnitee knowingly commits a wrong. The sheriff was denied recovery on other grounds.

38. 70 Ill. 2d at 8, 374 N.E.2d at 440.

39. Farwell v. Becker, 129 Ill. 261, 21 N.E. 792 (1889). Creditors sought to attach their debtors' property under the belief that it had been sold to defraud the creditors, and a distinction was made between those who knowingly commit a wrong and are not entitled to contribution and those who are unintentional tortfeasors and have a right to contribution.

40. Johnson v. Chicago & Pac. Elevator Co., 105 Ill. 462 (1882). The court refused to join as a defendant a party who anticipated liability to the plaintiff in the case and requested joinder in order to defend its rights, saying there was no right to contribution.

41. Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N.E. 799 (1890). In upholding the joinder of two defendants who concurrently had injured plaintiff's deceased, the court stated that defendants could not seek contribution from one another and that the court would not apportion damages; however, the statement prohibiting contribution was dictum since the case was decided on the basis of joinder.

42. Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905). A saloonkeeper liable to plaintiff under the Dram Shop Act was held to have acted intentionally by virtue of his knowledge that liquor would be served and therefore was not entitled to contribution, implying that a negligent defendant could have received contribution.

43. Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931) (in a tort action against master and servant as joint tortfeasors in automobile collision, the rule against contribution was not applicable when parties are not in pari delicto).

44. *See* Polelle, *Contribution in Illinois, supra* note 35, at 267.

45. John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923). Here, the court upheld indemnification of a liable party who was guilty of no moral turpitude and who, though negligent, was not

demnity.[46] The active-passive distinction was inconsistently applied in the appellate court, however,[47] and as a result the courts began to lose sight of the original purpose of the active-passive doctrine.[48]

In an attempt to establish guidelines, subsequent supreme court cases employed a qualitative distinction as a basis for indemnity in light of the no-contribution rule[49] but continued to use active-passive principles.[50] Acknowledging that implied indemnity had been used to mitigate the harsh effect of no-contribution, the court nevertheless attempted to narrow indemnity by requiring a relationship between the parties that would give rise to indemnity.[51] Indemnity was further altered, almost be-

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primarily liable. A general contractor liable to plaintiff under the Illinois Scaffold Act received indemnity from a subcontractor. The court stated:

> [W]here 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.

Id. at 339, 141 N.E. at 742.

46. Gulf, Mobile & Ohio R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N.E.2d 783 (1951) (following *John Griffiths & Son*: One may recover damages from a third party after paying claims for which he is without fault).

47. Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967) (the defendant who drove the vehicle which struck plaintiff was ordered to indemnify the defendant who parked in a crosswalk and was found guilty of passive negligence); Stewart v. Mister Softee of Ill., Inc., 75 Ill. App. 2d 328, 221 N.E.2d 11 (1966) (the owner of a double-parked truck was denied indemnity against the driver who injured the plaintiff); Drell v. American Bank & Trust Co., 57 Ill. App. 2d 129, 207 N.E.2d 101 (1965) (the defendant who left an oxygen tank on a walkway was refused indemnity from a co-defendant whose dog injured plaintiff by upsetting the tank); Reynolds v. Illinois Bell Tel. Co., 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964) (a defendant who had illegally parked his car near a crosswalk, blocking the vision of the driver who injured plaintiff, was allowed indemnity from the driver, a co-defendant). Indemnity in these cases was denied if a defendant's conduct was construed to be active negligence but permitted if found to be passive. The cases, however, are not reconcilable on their facts.

48. *See* Polelle, *Contribution in Illinois, supra* note 35, at 277. "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."

49. Chicago & Ill. Midland Ry. v. Evans Constr. Co., 32 Ill. 2d 600, 208 N.E.2d 573 (1965). "[I]t is necessary to draw a qualitative distinction between the negligence of the two tortfeasors if the action for indemnity is to succeed." *Id.* at 603, 208 N.E.2d at 574. The court did not elaborate on what a "qualitative distinction" is, but it seems to denote that the character rather than amount of negligence is the key to liability.

50. Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967). Here the court approved of indemnity flowing from an actively negligent employer, notwithstanding workmen's compensation limitations, to a third party who was not actively negligent.

51. Muhlbauer v. Kruzel, 39 Ill. 2d 226, 231-32, 234 N.E.2d 790, 793 (1968) ("a third-party complaint [seeking indemnity] must disclose some relation-

yond recognition, in a case creating a partial "indemnity" for the amount of damages attributable to the fault of the indemnitor.[52]

The Court's Solution: Contribution

The *Skinner* court, after reviewing the status of contribution and indemnity in Illinois, concludes that "application of the no-contribution rule causes unjust results and . . . that the active-passive theory of indemnity was designed to mitigate the harsh effects of its application."[53] Notwithstanding the uncertainty of whether an authoritative rule against contribution in negligence situations actually existed, the courts had become restricted by such a rule.[54] Disapproving of its unfair results, the courts used the active-passive standards for indemnity to rectify the consequent injustice. The increasing application of indemnity, however, had led to a convolution of the original active-passive principles.[55] Thus the *Skinner* court's dissatisfaction with the so-called no-contribution rule was well-founded, and the court was easily able to rebut the original rationale for a no-contribution rule.[56]

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ship upon which a duty to indemnify may be predicated"). In this case, a grocer found liable to a person injured on the sidewalk in front of his store was denied indemnity from the company whose promotional entertainment had drawn a crowd to the store and caused plaintiff's injury, for failing to establish such a relationship.

52. Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973). In this case the negligent automobile driver who injured plaintiff was permitted to recover from a doctor the amount that the doctor's malpractice increased the plaintiff's injuries. Here, although the court refers to indemnity, which denotes the shifting of the entire burden of liability (*see* note 10 and accompanying text *supra*), they divided liability among the parties according to the extent for which each was at fault, which connotes contribution. The court said:

> It is true [the negligent driver] does not seek indemnity for the total recovery for the plaintiff, but he does seek indemnity for the total damages attributable to the fault of [the doctor]. He is not seeking to pass on any consequences of his own fault; he is saying that in justice he should not be required to bear the burden of consequences brought about solely by the malpractice.

Id. at 90, 302 N.E.2d at 44.

53. 70 Ill. 2d at 12, 374 N.E.2d at 442.

54. *See* notes 34-52 and accompanying text *supra*.

55. *See* Polelle, *Contribution in Illinois, supra* note 35, at 279-80.

56. In addressing the original basis of the rule against contribution, the court notes that the reluctance of courts to be used for the relief of wrongdoers was intended to apply to intentional wrongdoers; that the conservation of judicial time and effort is hardly aided by the absence of contribution since the "qualitative distinction between the negligence of the two tortfeasors," dictated by the active-passive test, demands specifications as tedious and elusive as would a determination of rights under contribution. In addition, the opportunity for fraud and collusion when contribution cannot be invoked further burdens the courts. 70 Ill. 2d at 12-13, 374 N.E.2d at 442. Another theory, not addressed by the court, which is used to justify the no-contribution rule, is that a wrongdoer would be deterred by unappor-

By emphasizing the weaknesses, problems, and inequities of allocating loss without the availability of contribution, the *Skinner* court makes a convincing argument for asserting contribution. However, the authority cited in the majority opinion is directed toward the apportionment of liability among *negligent* tortfeasors. The majority supports its stand for contribution by repeated reference to negligence cases and fault[57] and also relies on the recommendations of a judicial conference study committee that contribution be adopted and liability "apportioned on the basis of . . . pure relative *fault*."[58] The court cites *Gertz v. Campbell*[59] as "illustrative of the 'continuing search for better solutions' "[60] and distinguishes it from *Skinner* in that the third-party defendant's misconduct in *Gertz* was subsequent to that of the third-party plaintiff.[61] Another important distinction, which the court did not mention, is that in *Gertz* both parties between whom damages were apportioned were negligent. The *Skinner* court also alludes to the consideration in *Gertz* of adopting the New York rule set forth in *Dole v. Dow Chemical Company*[62] but again fails to note that *Dole* involved contribution between two negligent parties.

The rationale for allocating loss among parties with a common denominator of culpability, such as negligence, cannot be transferred categorically to a situation such as *Skinner* where contribution is sought among parties who are potentially liable on different theories—negligence and strict liability—one grounded in fault and one in which fault is considered irrele-

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tioned liability; but just as convincing is an argument that certainty of at least partial liability will have a deterring effect. Also, modern joinder rules defeat the old argument that contribution would encourage a multiplicity of suits. *See Allocation of Loss, supra* note 2, at 730-31.

57. Besides repeated citation of negligence cases, the court expressly refers to fault in its criticism of the no-contribution rule, stating that the application of "all-or-nothing liability based on terms of active-passive negligence . . . to the ever-increasing situations where there is some *fault* attributable to both parties produces harsh effects without uniformity of result," and repeating this language with respect to loan receipt agreements. 70 Ill. 2d at 12, 374 N.E.2d at 441 (emphasis added).

It should be noted that several references to fault were deleted by the majority from the slip opinion when it was revised. However, it has been suggested that this change was one of semantics rather than substance and was primarily to meet the objection of Justice Dooley that fault is outside the scope of strict product liability. Ferrini, *From Indemnity to Contribution, supra* note 1, at 254.

58. STUDY COMMITTEE REPORT ON INDEMNITY, THIRD PARTY ACTIONS AND EQUITABLE CONTRIBUTIONS, 1976 REPORT OF THE ILLINOIS JUDICIAL CONFERENCE (emphasis added). 70 Ill. 2d at 13, 374 N.E.2d at 442.

59. 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

60. 70 Ill. 2d at 10, 374 N.E.2d at 441.

61. *Id.*

62. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

vant.[63] Chief Justice Ward points out in his dissenting opinion that there is no "common standard of comparison" present in *Skinner* on which to base contribution.[64] To determine whether contribution should be extended to relieve parties found liable for their products under a theory of strict liability, a careful examination of the theories and policies underlying the adoption of strict liability is necessary.

Contribution in the Context of Strict Liability

In Illinois, strict liability was recognized as a basis for recovery in cases involving products in *Suvada v. White Motor Company*.[65] Crucial to the *Suvada* court's decision were strong public policy arguments for the protection of injured consumers, including an interest in guarding human life and health and in placing the burden of loss on the party who creates the risk, solicits purchasers, or profits from the enterprise.[66]

The *Suvada* court concurred with the Restatement position on product liability.[67] The Restatement comments express the

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63. *See* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 361 (1976) [hereinafter cited as Mitchell, *The Industrial Accident*].

64. 70 Ill. 2d at 19, 374 N.E.2d at 445.

65. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada* the manufacturer of a defective component part was held liable to a subpurchaser for amounts paid to persons injured as a result of the defect. The court explicitly held that privity was no longer a defense in tort actions against parties liable for defective products. The court noted that liability in tort for a defective product extends to a manufacturer, a seller, a contractor, a supplier, one who holds himself out to be a manufacturer, the assembler of parts, and the manufacturer of a component part.

66. The court stated:

> [P]ublic interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and . . . compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous.

Id. at 619, 210 N.E.2d at 186.

67. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

view that the marketor of a product has assumed a special responsibility to the consuming public and should therefore bear, as a cost of production, the burden of injuries caused by his products.[68] In this manner the loss is ultimately borne by the consuming public and thus distributed to society, since the manufacturer increases product prices to accomodate the cost of injuries incurred.[69] In return, the public receives protection via a reduced burden of proof of liability.[70] The deterrence of defective design and manufacture is another important policy favoring strict product liability. Furthermore, where proof of negligence was previously required for recovery, consumers were inadequately protected from the inevitable injury arising from mass production.[71]

The foregoing policies are compelling reasons for the imposition of loss upon manufacturers under strict liability theories in products cases.[72] Although public policy is the very heart of strict liability, the majority in *Skinner* addresses the policy issue superficially, citing *Suvada* for support. The court declares that the policies enumerated in *Suvada* are satisfied when strict liability has been imposed on *any* defendant.[73] This conclusion, however, does not necessarily follow.

Part of the *Suvada* rationale is to impose the burden of loss on the party creating the risk,[74] which would seem to be the party creating the defect in the product.[75] *Skinner* divides this loss by permitting a strictly liable manufacturer who creates a defective product to receive contribution from a party not even

68. *Id.* at Reporter's Note Comment c. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

69. *See* Mitchell, *The Industrial Accident, supra* note 63, at 361.

70. *Id.* Rather than bearing the burden of proving negligence, a plaintiff seeking recovery under a strict liability theory need only prove the elements enumerated in § 402A of the Restatement (Second). *See* note 67 *supra.*

71. *See* Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill. 2d 17, 20, 329 N.E.2d 785, 786 (1975); Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 344, 247 N.E.2d 401, 404 (1969); Jensvold, *A Modern Approach, supra* note 8, at 724.

72. Justice Dooley in his dissent contends that "[i]t is clear that the objectives of the doctrine are to protect the consumer and to make responsible the manufacturers who put into commerce unreasonably dangerous products which cause injury. If these goals are to be accomplished, ultimate liability for injury must rest on the manufacturer." 70 Ill. 2d at 28, 374 N.E.2d at 449.

73. *Id.* at 14, 374 N.E.2d at 443.

74. *See* note 66 *supra.*

75. In order to reconcile the *Skinner* holding with this policy, a third party's assumption of the risk of the danger of a defective product would be paramount to creating the risk for his portion of the blame. This undercuts the intention of strict product liability that the actual perpetrator of the defect bear total responsibility for injuries arising therefrom.

involved in its manufacture. This could substantially dilute the effectiveness of strict product liability in implementing its public policy objectives, as Justice Dooley notes.[76] The *Skinner* court also cites *Liberty Mutual Insurance Company v. Williams Machine & Tool Company*[77] for the proposition that contribution and indemnity should apply once strict liability has been imposed[78] but overlooks an important distinction between *Skinner* and *Liberty Mutual*; in *Liberty Mutual*, indemnity was sought from an entity higher in the chain of distribution of the product.

A major consideration in *Skinner* should be whether to permit indemnification to issue from parties lower in the chain of distribution.[79] In most strict liability jurisdictions, parties may seek recovery from those *above* them in the chain of distribution.[80] Thus, an injured party may sue the ultimate purchaser, who may sue the seller, who may sue the manufacturer of the finished product, who may sue the manufacturer of the defective component part; or any party could sue anyone above him in the progression. In *Liberty Mutual*,[81] although the plaintiff[82] sought indemnity for amounts paid in settlement with the injured parties, the court did refer to the fact that both manufacturers "could have been sued directly in strict liability by the

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76. 70 Ill. 2d at 28, 374 N.E.2d at 449.

77. 62 Ill. 2d 77, 338 N.E.2d 857 (1975). *Liberty Mutual* upheld a shifting of loss from a manufacturer of a product to the manufacturer of the defective component part causing the injury. The court held that the misconduct of a manufacturer will not necessarily preclude his seeking indemnity from the manufacturer of a component part, if it is merely contributory negligence. The court rejected the active-passive test and eliminated negligence as an element of strict liability and therefore contributory negligence as a defense to indemnity in strict liability cases; however, it designated misuse of a product and assumption of risk as bars to indemnity.

78. 70 Ill. 2d at 14, 374 N.E.2d at 443.

79. In one of *Skinner*'s companion cases, Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 45, 374 N.E.2d 455, 457 (1977), the third-party defendant argued that indemnity in product liability should be limited to "upstream" actions against parties whose handling of the product preceded that of the party seeking indemnity. The court merely states, "We do not agree," and cites *Skinner*.

80. *See* Jensvold, *A Modern Approach*, *supra* note 8, at 730 wherein the author states:

> The doctrinal underpinnings which allow the party at the beginning of the distribution chain to be held liable for the entire harm suffered by the plaintiff are not unique to strict liability cases. One who furnishes a defective product to another breaches an implied warranty of merchantability for which an action for indemnity will lie.

Id. (footnotes omitted).

81. 62 Ill. 2d 77, 338 N.E.2d 857 (1975).

82. The plaintiff was the manufacturer of a product and settled with a party injured by the product and then sought indemnity from the manufacturer of the component part whose defect caused the injury. *Id.*

injured party."[83] This suggests that even had there been an actual adjudication against the plaintiff manufacturer in strict liability, the manufacturer still could have sought indemnity from the defendant. Relying upon commentators,[84] the *Liberty Mutual* court quotes that strict liability "is a *liability based upon the placing into commerce* a product which, if defective, is likely to be unreasonably dangerous under normal use"[85] and should "trace back to the *originally responsible party*."[86]

In *Liberty Mutual* indemnity was employed to reach the "originally responsible party" and to impose the loss at the root of the problem. In *Skinner*, however, the court permitted a party found strictly liable in tort to seek partial recovery from a party *below* it in the distribution chain—one who could not even have been sued by plaintiff.[87] *Skinner* would relieve the "originally responsible party," the manufacturer of a defective product, of part of the burden of loss by transferring such loss to a party *beneath* it in the distribution chain.

Under the *Skinner* theory of allocation of loss, strict liability loses much of its leverage as a consumer protection instrument[88] since manufacturers of defective products no longer necessarily bear the full burden of compensating victims for harm arising from defective products they market. Justice Dooley adamantly criticizes the majority opinion, charging that the doctrine of strict liability has been "implicitly overruled" and its intent "frustrated" by allowing a manufacturer to pass his liability to another.[89] Even more difficult to understand than its attempted reconciliation of strict liability policies with contribution is the majority's use of assumption of risk and misuse of a product as the very basis of contribution.

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83. *Id.* at 82, 338 N.E.2d at 859.

84. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16A(4)(b)(i) (1978).

85. 62 Ill. 2d at 82, 338 N.E.2d at 860 (emphasis added).

86. *Id.* at 82, 338 N.E.2d at 860.

87. "The contribution defendant must be a tortfeasor, and originally liable to the plaintiff. If there was never any such liability, as where he has the defense of . . . assumption of risk, . . . or the substitution of workmen's compensation for common law liability, then he is not liable for contribution." PROSSER, *supra* note 4, § 50, at 309. Justice Dooley questions: "How can an employer, who cannot be termed a tortfeasor, be sued for apportionment of damages in the nature of contribution or indemnity?" 70 Ill. 2d at 29, 374 N.E.2d at 449.

88. *See* notes 65-72 and accompanying text *supra*.

89. 70 Ill. 2d at 22-23, 374 N.E.2d at 447.

Assumption of Risk and Misuse of Product as Grounds for Contribution

Assumption of risk and misuse of a product have traditionally been defenses to strict liability which, if proved, bar recovery.[90] The character of assumption of risk, originally a defense to negligence charges,[91] has been altered in its application to product liability actions[92] to conform to the different policy objectives.[93] Standards for the invocation of assumption of risk and misuse in strict liability cases in Illinois were set forth in *Williams v. Brown Manufacturing Company*,[94] wherein the court held that a plaintiff who assumes the risk[95] or misuses a product[96] could be barred from recovery.[97] Assumption of risk was designated as an affirmative defense which would bar recovery,[98] and misuse was recognized as a possible bar to recovery.[99]

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90. *See* PROSSER, *supra* note 4, § 68, at 456.

91. *Id.* at 439.

92. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 3 (1974). Assumption of risk as a defense to strict liability has been labeled "an amalgam of assumption of risk and contributory negligence." According to the RESTATEMENT (SECOND) OF TORTS, Reporter's Notes, § 402A, comment n (1965):

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

93. Comment, *The Knowledge Element of Assumption of Risk as a Defense to Strict Products Liability*, 10 J. MAR. J. 243, 249 (1977). Assumption of risk in product liability deals with the degree of responsibility a consumer should provide for his own protection in light of the manufacturer's superior capability to discover unreasonable danger in its products and the consumer's right to rely on the manufacturer's expertise.

94. 45 Ill. 2d 418, 261 N.E.2d 305 (1970). In *Williams*, the plaintiff brought an action in strict product liability in tort to recover for injuries sustained while operating a trenching machine manufactured by the defendant.

95. Assumption of risk arises when a plaintiff "knows a product is in a dangerous condition and proceeds in disregard of this known danger." *Id.* at 426, 261 N.E.2d at 309.

96. Misuse of a product is use by a plaintiff "for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant." *Id.* at 425, 261 N.E.2d at 309.

97. *Accord*, Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 81, 338 N.E.2d 357 859 (1973) ("misuse of the product or assumption of risk would bar recovery in a strict liability action").

98. 45 Ill. 2d at 430, 261 N.E.2d at 312 (1970). "We emphasize that 'assumption of risk' is an affirmative defense which does bar recovery, and which may be asserted in a strict liability action notwithstanding the absence of any contractual relationship between the parties." *See* Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 299 N.E.2d 497 (1973), where, in a work-

Thus, assumption of risk must be introduced by defendant, but misuse may relate to plaintiff's proof of causation.[100]

Assumption of risk and misuse of a product, the very crux of the court's holding in *Skinner*,[101] are discussed by the majority only fleetingly in the final two paragraphs of the opinion.[102] Whether described as an affirmative defense which completely bars recovery or as evidence against proximate cause, assumption of risk and misuse have previously operated to cut off recovery in strict liability actions.[103] The *Skinner* court does not expressly qualify the meaning of these terms for purposes of its opinion; but presupposing that the court uses "assumption of risk" and "misuse of a product" in their legal sense, a circuitous interpretation of the holding will ensue.

The concept that assumption of risk and misuse of a product bar recovery indicates that if these factors are proven, a manufacturer will not be liable in the first instance for loss due to injuries caused by his product. Under such a literal reading of the court's use of these terms, there could be no strict liability from which to seek contribution,[104] and the court's holding would be

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man's action against the manufacturer of a trencher with a hydraulic boring attachment to recover for personal injuries, the court found that "as a matter of law, he assumed the risk and is barred from recovering from the appellant." *Id.* at 98, 299 N.E.2d at 499.

99. 45 Ill. 2d at 431, 261 N.E.2d at 312 (1970). "[P]laintiff's misuse of the product may bar recovery. This issue may arise in connection with plaintiff's proof of an unreasonably dangerous condition or in proximate causation or both."

100. *See* Mullen v. General Motors Corp., 32 Ill. App. 3d 122, 133, 336 N.E.2d 338, 345 (1975) (in a strict liability action for personal injuries resulting from a tire blow-out, the court held that "[t]he plaintiff in an Illinois products liability case need not prove the exercise of care to discover a manufacturing defect, and it is the defendant's burden to raise the issue of assumption of risk"); Reese v. Chicago, B. & Q. R.R., 5 Ill. App. 3d 450, 454, 283 N.E.2d 517, 520 (1972) (in an action premised on strict liability to recover damages for the death of plaintiff's deceased when struck by the bucket of a crane while working for the railroad, the court held that misuse of a product "is [not] a facet of the affirmative defense of assumption of risk" and that "[d]efendant was entitled under *Williams* to show misuse of the product on the issue of causation").

101. It is clear that, although Reed charged Hinckley with negligence in seeking contribution, the supreme court intends to limit contribution to cases where assumption of risk and misuse exist. In three other cases seeking apportionment of loss, decided contemporaneously with *Skinner*, contribution was allowed in two of the cases where assumption of risk or misuse was alleged. *See* Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977); Robinson v. International Harvester, 70 Ill. 2d 47, 374 N.E.2d 458 (1977). However, where only contributory negligence existed, contribution was denied. *See* Buehler v. Whalen, 70 Ill. 2d 51, 374 N.E.2d 460 (1977).

102. *See* 70 Ill. 2d at 15-16, 374 N.E.2d at 443.

103. *See* notes 94-100 and accompanying text *supra*.

104. As Justice Underwood remarks: "If misuse and assumption of risk bar recovery, as they heretofore have, what is there to contribute to?" 70

devoid of meaning. Therefore, since the court must be using the terms in an innovative sense, it can be speculated that the court is suggesting a doctrine of assumption of *part* of the risk or implying that assumption of risk and misuse are partial defenses which reduce rather than bar liability.[105]

The court also fails to address another assumption of risk and misuse issue vital to its holding. The majority acknowledges that recovery is barred and indemnity precluded where a user assumes the risk or misuses a product,[106] but it fails to relate these principles to its conclusion that either may be the basis of a cause of action for contribution.[107] In the past assumption of risk and misuse have been tools for a party being sued to assert against the party suing him,[108] not a basis for a separate action to recovery from a third party. Justice Dooley points out that assumption of risk by an *uninjured* party is a "concept unknown to the law in the 140 years of the existence of the doctrine . . . . It cannot be the basis of a third party action."[109] The majority offers no explanation for its ambiguous holding and leaves the future application of these new principles to conjecture.

The Propriety of Judicial Action

Another area of concern in *Skinner* is whether the assertion of contribution, particularly in view of the state's workmen's compensation statute,[110] was a proper question for the courts. The dissenting opinions in *Skinner* suggest that the court overstepped its authority. Chief Justice Ward notes a parallel between apportionment under contribution and under compara-

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Ill. 2d at 21, 374 N.E.2d at 446. *See* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 869 (1962). "Because of [knowledge of the risk] recovery often is denied not only to the informed purchaser himself, who may be guilty of contributory fault, but also to third persons who are not informed of the danger, usually on the ground that the use of the product by the informed purchaser is a 'superseding cause' which insulates the manufacturer's negligence."

105. It has been suggested that economic loss be apportioned on a percentage basis among those responsible for all "independent and concurrent causes." Jensvold, *A Modern Approach, supra* note 8, at 725.

106. 70 Ill. 2d at 15, 374 N.E.2d at 443. "Misuse of the product or assumption of risk by a user will serve to bar his recovery . . . and indemnity is not available to one who misuses the product or assumes the risk of its use."

107. *Id.* "We are of the opinion that if the manufacturer's third-party complaint alleges that the employer's misuse of the product or assumption of risk of its use contributed to cause plaintiff's injuries, the manufacturer has stated a cause of action for contribution."

108. *See* note 94 and accompanying text *supra*.

109. 70 Ill. 2d at 23, 374 N.E.2d at 447.

110. ILL. REV. STAT. ch. 48, § 138.5 (1977).

tive negligence,[111] which the supreme court has previously ruled to be a matter for the legislature.[112] Justice Dooley states that, whether or not "the contentions of the majority are for the legislature . . . . they are not for us."[113] Justice Underwood reasons that such substantial change in Illinois tort law should be left to the legislature in compliance with constitutional separation of powers principles and in order to simultaneously and comprehensively consider and act upon all aspects of the new law.[114]

A related area of concern is the court's imposition of liability upon an employer in excess of workmen's compensation liability.[115] There is no discussion of the policy underlying workmen's compensation.[116] The majority merely remarks that Reed's action for contribution should not be precluded by the fact that the Workmen's Compensation Act bars plaintiff from suing Hinckley directly,[117] citing *Miller v. DeWitt*.[118] There the court upheld an architect's third-party complaint seeking indemnity from a contractor for liability for injuries to the contractor's employee. As Justice Underwood points out,[119] the fact that the contractor's conduct was more culpable than the architect's was instrumental in the *Miller* court's determination that an employer may be liable in excess of workmen's compensation limitations.[120] The fact that "tortfeasors are each chargea-

111. 70 Ill. 2d at 19, 374 N.E.2d at 445.

112. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). It should be noted, however, that Justice Ward dissented in *Maki*, maintaining that the court was a proper forum for establishing comparative negligence.

113. 70 Ill. 2d at 37, 374 N.E.2d at 453.

114. *Id.* at 22, 374 N.E.2d at 446.

115. ILL. REV. STAT. ch. 48, § 138.5(a) (1977). The Illinois Workmen's Compensation Act provides:

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

Workmen's compensation was developed as "a system of no-fault compensation" where an employer procures insurance which pays limited amounts to employees injured on the job, with no prerequisite of proof that the employer was negligent. "[P]ayment of compensation [is] determined by an evaluation of the employee's status at the time of his injury rather than an evaluation of the employer's fault." Mitchell, *The Industrial Accident*, *supra* note 63, at 352.

116. *See* note 25 *supra*.

117. 70 Ill. 2d at 16-17, 374 N.E.2d at 443.

118. 37 Ill. 2d 273, 226 N.E.2d 630 (1967). An architect's third-party complaint seeking indemnity from a contractor for injuries to contractor's employee was upheld.

119. 70 Ill. 2d at 20, 374 N.E.2d at 445.

120. The *Miller* court specifically allowed "a third party who was not actively negligent to obtain indemnification from an employer who was actively negligent." 37 Ill. 2d 273, 289, 226 N.E.2d 630, 640 (1967).

ble with active or affirmative negligence,"[121] as in *Skinner*, would distinguish it from *Miller*. Thus the court seems to be circumventing legislation by allowing to be done directly what cannot be done indirectly.[122]

CONCLUSION

The potential ramifications of *Skinner* are numerous but highly speculative due to the ambiguity of the holding. It is unclear whether contribution will be limited to factual situations similar to *Skinner* or expanded to include other circumstances.[123] A major omission in *Skinner* is a plan for the implementation of contribution once it is established as appropriate relief.[124] As Justice Dooley notes, the court does not address the theory upon which loss will be apportioned.[125] Although at common law contribution was generally applied equally among the liable parties,[126] the language of the court[127] indicates that in Illinois loss will be distributed among the parties in proportion to the percentage of harm each caused.[128] A consideration of the parallel between contribution and comparative negligence[129] illustrates the unresolved problems in this context. Under the modified comparative negligence doctrine, a plaintiff who is fifty percent or more contributorily negligent may recover nothing.[130] Applying this principle to contribution, the question arises whether a defendant who causes more than half of plaintiff's harm may seek contribution from another party who contrib-

121. 70 Ill. 2d at 33, 374 N.E.2d at 451.

122. In *Skinner*, Hinckley may be indirectly responsible to plaintiff for amounts above workmen's compensation limitations through its contribution to Reed.

123. It has been suggested that the *Skinner* court did not intend to restrict its holding to products cases and that contribution will find general application, as indicated by the court's unqualified conclusion that there "is no valid reason for the continued existence of the no-contribution rule." *See* Ferrini, *From Indemnity to Contribution, supra* note 1, at 267, 270-72. However, an appellate court opinion subsequent to *Skinner* was more cautious, noting that the supreme court "now permits contribution between joint tortfeasors based upon relative degrees of fault." *See* City of West Chicago v. Clark, 58 Ill. App. 3d 847, 856, 374 N.E.2d 1277, 1283 (1978).

124. 70 Ill. 2d at 23, 374 N.E.2d at 447.

125. *See id.* at 39, 374 N.E.2d at 454.

126. *See* note 9 and accompanying text *supra*.

127. The court bases contribution on "the relative degree" of the cause of plaintiff's harm. 70 Ill. 2d at 16, 374 N.E.2d at 443.

128. For example, for injuries amounting to $1,000, a party causing 60% of the harm would pay $600 and one causing 40% of the harm $400.

129. Both provide for a distribution of loss among parties who have contributed to the injury. *See generally* Schwartz, *Practice Under Comparative Negligence, supra* note 7.

130. *See id.* at 750.

uted to the injury.[131] Since Illinois does not follow comparative negligence,[132] it will not be bound by these principles, however.

The *Skinner* court's recognition of contribution also casts doubt upon how long Illinois' judicial rejection of comparative negligence principles[133] can endure. In *Skinner*, assumption of risk and misuse of a product were asserted by a manufacturer (*M*) against a third party, the employer (*E*), in an action for contribution. If *M* is to remain partially liable when assumption of risk or misuse of a product by a third party is shown, how can *M* rationally be totally absolved from liability when he uses the same doctrines defensively against the injured plaintiff (*P*)?[134] Such a result would hold *P* wholly responsible for his loss but would leave third-party *E* responsible only to the extent that he contributed to the harm, although the misconduct of both *P* and *E* is equally culpable. The extent of *M*'s net liability would then be predicated upon the finding of liability as to *P* or *E*. Even if both are liable for the same misconduct, the mere fact that *P* is the party injured and seeking recovery would relieve *M* of any responsibility whatever, whereas *M* would have to share the loss of a plaintiff's injury with an uninjured third party, *E*, who contributed to the injury in exactly the same manner. To achieve consistency and fairness where contribution is applied to strict liability, a manufacturer's responsibility should correspond to his portion of culpability and should not depend on whether or not the other culpable party is the party seeking recovery. This paradox should compel Illinois to re-evaluate the principles behind comparative responsibility where a plaintiff contributes to his own injury.[135]

The court also fails to designate under what procedural circumstances contribution may be sought.[136] In *Skinner* and its

131. However, pure comparative negligence allows a plaintiff to recover whatever amount a defendant contributes to his injury; thus a plaintiff 90% contributorily negligent may still recover 10% from the defendant, so under that analogy the problem would not arise with contribution. *See id.* at 748.

132. *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

133. *See* id.

134. An appellate court opinion stated that *Skinner* "reaffirmed, in *dictum*, previous case law that misuse of a product or assumption of the risk, bars recovery by a user or indemnity to a third-party plaintiff." Angelini v. Snow, 58 Ill. App. 3d 116, 120, 374 N.E.2d 218 (1978).

135. A post-*Skinner* appellate court decision disagrees that *Skinner* rejects the foundations of the rule against comparative negligence and concludes that contributory negligence law is unchanged by *Skinner*. *See id.* at 120-22, 374 N.E.2d at 218-19. There is nevertheless an unjustified inconsistency in permitting loss to be allocated among defendants but not between plaintiff and defendant.

136. Justice Dooley asks: "What will be the vehicle of apportionment of damages between wrongdoers? Will it be by third-party action, by counter-

progeny,[137] third-party complaints were filed. The *Skinner* court does not expressly limit contribution to third-party actions though. It leaves unresolved whether contribution may be sought via cross-claims among defendants joined in an action, or by independent actions against nonparties, or whether it may be applied automatically to multiple defendants. Extension of contribution in the latter case could adversely affect plaintiffs' rights. Traditionally, a plaintiff who sues several defendants can execute a judgment against *any* defendant for the entire amount.[138] If *Skinner* is construed so that liability is allocated among defendants and a plaintiff can recover from each defendant only to the extent of that defendant's liability, a plaintiff's ability to recover for his injuries will be impaired.[139] If *Skinner* is limited to third-party actions for contribution or cross-claims, plaintiffs' traditional rights may be preserved. A plaintiff could still execute a judgment against any defendant, and that defendant could then seek contribution in a separate action.[140] Since the *Skinner* court deals with rights of defendants as to each other, the latter approach appears more likely,[141] but the court did not indicate its position on the other possibilities and they remain open.

Besides potentially restricting plaintiffs' rights, it appears that *Skinner* also has narrowed defendants' rights. Previously, assumption of risk and misuse of a product operated to completely cut off a manufacturer's liability for harm resulting from its product.[142] If a finding of assumption of risk and misuse of product are construed to no longer preclude a finding of liability of a manufacturer sued in strict liability, manufacturers have lost what were once very favorable doctrines that completely negated liability.[143] Thus, although the court appears to be protecting manufacturers by providing a right to contribution, it actually has imposed liability where none would otherwise have

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claim between defendants, by independent actions, or by all such vehicles?" 70 Ill. 2d at 39, 374 N.E.2d at 454.

137. Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977); Robinson v. International Harvester Co., 70 Ill. 2d 47, 374 N.E.2d 458 (1977).

138. *See* notes 5-6 and accompanying text *supra*.

139. For example, a plaintiff who is unable to recover against an insolvent defendant will not be able to seek that party's share of the loss from a co-defendant with funds.

140. In this way, the burden of an insolvent defendant's share would be borne by the other defendants.

141. Matten, *Contribution Among Joint Tortfeasors*, 66 ILL. B.J. 478, 480 (1978).

142. *See* notes 94-100 and accompanying text *supra*.

143. Justice Underwood concludes that "the manufacturer has now been shorn of the sole protection he formerly had against strict liability actions and has become the insurer of the user." 70 Ill. 2d at 21-22, 374 N.E.2d at 446.

existed. In this sense it has enhanced plaintiff's position by increasing her chance of recovery, since upon failure to prove strict liability, plaintiff's only recourse would be a statutorily limited workmen's compensation claim.[144]

Another question that *Skinner* raises is whether indemnity still exists in Illinois, since the opinion concentrates on contribution as the new basis for apportioning loss among tortfeasors. Indemnity has been characterized as one extreme of the continuum of contribution.[145] It has been proposed that indemnity will retain a very viable function after the *Skinner* holding takes effect,[146] based upon the doctrine of active-passive misconduct, and that a complete shifting of loss will remain appropriate where one party is held liable on a purely technical basis and the other party is 100 percent culpable.[147] An appellate court decision has also indicated that *Skinner* will not affect specific indemnity agreements against negligence,[148] leaving the option of contractual indemnity intact.

It is ironic that a court which was a pioneer in strict product liability litigation has now weakened the doctrine by relieving the party who introduces an inherently dangerous defective product into commerce from exclusive responsibility for injuries arising therefrom.[149] Apparently strict liability can no longer be equated with sole liability for loss. The *Skinner* court has taken

144. Possibly if an employer's culpability exceeds mere negligence to the point of voluntary assumption of risk or misuse, plaintiff might have a cause of action against employer to recover amounts above workmen's compensation limitations, under a theory that workmen's compensation limits an employer's liability only for mere negligence. This would give plaintiff a cause of action against the party proximately causing the harm.

145. Ferrini, *From Indemnity to Contribution, supra* note 1, at 268. "Indemnity may be properly viewed . . . as simply the extremity of a broad spectrum, the same spectrum within which we find contribution."

146. The *Skinner* decision "will apply prospectively to causes of action arising out of occurrences on and after March 1, 1978." 70 Ill. 2d at 17, 374 N.E.2d at 444.

147. Ferrini, *From Indemnity to Contribution, supra* note 1, at 268. A post-*Skinner* appellate court decision continued its use of active-passive negligence criteria in requiring indemnity but indicated that results would differ if *Skinner* were applicable. *See* Johnson v. Equipment Specialists, Inc., 58 Ill. App. 3d 133, 373 N.E.2d 837 (1978) (defendant found to be actively negligent was denied indemnity, but the court said results would be different if *Skinner* were applicable at that time).

148. *See* Quilico v. Union Oil Co. of Cal., 58 Ill. App. 3d 87, 374 N.E.2d 219 (1978) (defendant found liable to plaintiff under the Structural Work Act received indemnity from plaintiff's employer; *Skinner* was not applied to the determination of indemnity due to both its prospective application and the contractual basis for the indemnity sought).

149. The dissentors are convinced that *Skinner* alters strict liability beyond recognition," 70 Ill. 2d at 21, 374 N.E.2d at 446, and Justice Dooley flatly states that facets of strict liability have been "implicitly overruled." *Id.* at 22-23, 374 N.E.2d at 447.

a result-orientated approach to what it viewed as an inequitable and unsatisfactory state of existing law governing the apportionment of liability. Perhaps the most rational approach to the holding until it is clarified by future litigation is that parties who may be found jointly liable for unintentionally harming a plaintiff, regardless of the theory of liability, will have a right of contribution as to each other.[150] Established notions of assumption of risk and misuse of a product and their relationship to strict liability must be modified to incorporate a balancing approach whereby responsibility of multiple parties for injury can be weighed and loss proportioned accordingly.

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150. "[C]ontribution and indemnity approaches should be combined . . . . It seems sensible under either doctrine to apportion liability on the basis of the comparative fault or responsibility of the tortfeasors and to allow contribution and indemnity regardless of whether the defendant is immune from liability to the original claimant." Phillips, *Contribution and Indemnity, supra* note 24, at 87. Loss allocation should be "among all persons whose conduct was in some significant manner responsible for the plaintiff's loss," under a "comparative responsibility" doctrine. Jensvold, *A Modern Approach, supra* note 8, at 739.