

TORT LOSS ALLOCATION AMONG JOINT TORTFEASORS IN ALASKA: A CALL FOR COMPARATIVE CONTRIBUTION

I. INTRODUCTION

Legal doctrines providing for the allocation of tort loss among tortfeasors have been slow to develop in Alaska. The first major development occurred in 1970 when the legislature enacted the Alaska Uniform Contribution Among Tortfeasors Act (Contribution Act),¹ which reversed the common law rule that barred courts from enforcing contribution, or loss sharing, among joint tortfeasors.² In 1975, the Alaska Supreme Court adopted comparative negligence,³ allowing tort victims who were themselves negligent to recover damages from concurrently negligent tortfeasors.⁴ Comparative negligence requires the apportionment of fault between plaintiffs and defendants and holds the defendants as a group liable for the percentage of the damage for which they are responsible.⁵ The enactment of the Contribution Act and the adoption of comparative negligence were intended to provide a system that attempts to match each tortfeasor's liability with his relative degree of fault.

Nonetheless, there is a fundamental inconsistency in the Alaska system. In adopting the Contribution Act, Alaska's legislature

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1. ALASKA STAT. §§ 09.16.010-.060 (1983).

2. See *infra* notes 32-39 and accompanying text.

3. *Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975).

4. The old contributory negligence rule prohibited negligent plaintiffs from recovering from negligent defendants. See *id.* at 1047; RESTATEMENT (SECOND) OF TORTS §§ 463, 467 (1965); see, e.g., *Bertram v. Harris*, 423 P.2d 909, 914 & n.9 (Alaska 1967) (using the definition of contributory negligence found in RESTATEMENT (SECOND) OF TORTS § 463 (1965)); *Odgen v. State*, 395 P.2d 371, 372 (Alaska 1964) (contributory negligence barred recovery by negligent plaintiff).

The origin of contributory negligence is generally attributed to the case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). See *Kaatz*, 540 P.2d at 1047. For a good discussion of the common law development of contributory negligence in Alaska, see Note, *Comparative Negligence: A Time for Change in Alaska*, 3 UCLA-ALASKA L. REV. 103, 105-09 (1973). The author discusses the inequities inherent in the contributory negligence rule and the judicial exceptions created to ease its harsh application. *Id.* at 108-09; see also RESTATEMENT (SECOND) OF TORTS § 886A comment a (1979).

5. Under "pure" comparative negligence, as adopted in Alaska, a negligent plaintiff may collect damages reduced in proportion to his fault regardless of his relative degree of fault. *Kaatz*, 540 P.2d at 1047.

followed many other states by requiring contribution on a pro rata basis.⁶ Each tortfeasor is required to pay an equal share of the damages, regardless of his degree of fault. The share is determined by dividing the amount of damages by the number of tortfeasors.⁷ The pro rata method was adopted partly because courts and juries were believed to be unwilling or incompetent to apportion fault among wrongdoers.⁸ The Alaska Supreme Court rejected this rationale, however, when it adopted comparative negligence in 1975. The court found that the state courts were capable of apportioning fault among wrongdoers.⁹ Since that time, the court has repeatedly noted the need for the legislature to amend the Contribution Act to permit the courts to apportion damages among tortfeasors according to their relative fault, as they do between negligent plaintiffs and defendants under comparative negligence.¹⁰

While urging legislative action on this issue, the court declined two opportunities to circumvent the pro rata apportionment mechanism established by the Contribution Act. In each case, the court was asked to expand the doctrine of implied indemnity — a remedy that allows one party to shift an entire damage award to another — to permit negligent tortfeasors to use the doctrine. In *Arctic Structures, Inc. v. Wedmore*,¹¹ decided in 1979, the court refused to adopt implied *partial* indemnity which allows courts to grant indemnity on a proportionate fault basis.¹² The court did not discuss the doctrine in its opinion, but noted that in order to bring the contribution system in line with comparative negligence, the legislature, not the court, must replace the pro rata contribution system with a comparative contribution system.¹³ In 1983, the court in *Vertecs Corp. v. Reichhold Chemicals, Inc.*¹⁴ considered, but ultimately rejected, the argument that the doctrine of implied indemnity should apply in cases of concurrent negligence.

This note focuses on these recent decisions which demonstrate the Alaska Supreme Court's hostility toward further judicial modification

6. ALASKA STAT. §§ 09.16.010-060 (1983); see Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964 (1959).

7. See ALASKA STAT. § 09.16.020 (1983).

8. See *Kaatz*, 540 P.2d at 1048.

9. See *id.*

10. See, e.g., *Criterion Ins. Co. v. Laitala*, 658 P.2d 112, 118 n.11 (Alaska 1983); *State Mechanical, Inc. v. Liquid Air, Inc.*, 665 P.2d 15, 17 n.2 (Alaska 1983) (noting that judicial expansion of the indemnity doctrine would abrogate existing contribution statute); *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 435 n.29 (Alaska 1979); *State v. Guinn*, 555 P.2d 530, 547 n.42 (Alaska 1976).

11. 605 P.2d 426 (Alaska 1979).

12. *Id.* at 435 n.27.

13. *Id.* at 435 n.29.

14. 661 P.2d 619 (Alaska 1983).

of the tort loss allocation system. First, the note traces the historical development of the loss allocation system and summarizes the current state of the law. Second, the note identifies some of the current issues and unsolved problems in the field. Third, it analyzes alternative approaches to resolving the problems in light of the current law, and offers a proposal for legislative reform by amendment of the Contribution Act. The proposed legislative amendment is modeled after the 1983 Uniform Comparative Fault Act, which is designed for jurisdictions that have adopted comparative negligence.¹⁵ The amendment would replace the current pro rata contribution system with a system that allocates contribution among joint tortfeasors on the basis of relative fault. Full indemnity would be reserved for cases of vicarious liability or prior contract.

II. HISTORICAL DEVELOPMENT OF LOSS ALLOCATION LAW

A. Early Development of Joint and Several Liability in England and the United States

Historically, a great deal of confusion surrounded the development of rules governing loss allocation among multiple tortfeasors.¹⁶ The confusion was largely attributable to the failure of both courts and legislatures to define terms and doctrines carefully and to their failure to respond promptly and consistently to changes in the law.¹⁷ For example, the meaning of the basic term "joint tortfeasors" has been uncertain and inconsistent over the years.¹⁸ Joint tortfeasors under the early common law were parties who acted intentionally or in concert, with a common purpose to carry out a joint enterprise.¹⁹ The plaintiff was permitted to sue any or all of the joint tortfeasors, who could then be held jointly and severally liable for the entire loss.²⁰ Under the strict joinder rules, the plaintiff could join only those defendants who had acted in concert.²¹ Where defendants acted independently, even though their acts combined to cause a single injury to the plaintiff, the plaintiff was required to maintain a separate suit against each defendant.²² As a result, separate trials produced verdicts against each defendant for an amount presumably corresponding

15. See *infra* note 178 and accompanying text.

16. See generally W. PROSSER & W. KEETON, *THE LAW OF TORTS* §§ 46-51 (W. Keeton ed. 5th ed. 1984) [hereinafter referred to as PROSSER].

17. See *id.*

18. *Id.* § 46, at 322.

19. *Id.*; see Sir John Heydon's Case, 11 Co. Rep. 5a, 77 Eng. Rep. 1150 (1613).

20. RESTATEMENT (SECOND) OF TORTS § 875 (1979); PROSSER, *supra* note 16, § 46, at 322-23.

21. PROSSER, *supra* note 16, § 47, at 325.

22. *Id.* at 324-25.

to his degree of fault.²³ Thus, the system of assigning tort liability was consistent with the system of procedural joinder.

The early American courts tended to follow the English rule of joint and several liability among joint tortfeasors, although they gradually permitted more flexible joinder rules.²⁴ The enactment of the New York Field Code of Procedure in 1848, followed by similar legislation in most other states, substantially liberalized procedural rules. The liberalized rules permitted the joinder of all parties necessary for a complete resolution of the plaintiff's case, thus permitting the joinder of concurrently negligent tortfeasors in a single action.²⁵ Moreover, *joined* tortfeasors were treated carelessly as *joint* tortfeasors, and were held jointly and severally liable for the entire loss, even though they had not acted in concert.²⁶ This liberal classification of joint tortfeasors blurred the distinction between the procedural rule of permissive joinder of parties and the substantive doctrine of joint and several liability of concurrently negligent tortfeasors for damages.²⁷ Originally, when party joinder was permitted as a matter of convenience, each defendant remained responsible only for his portion of the damages based on his degree of fault.²⁸ Over time, the courts came to use the term "joint tortfeasor" to refer to all tortfeasors whose negligence combined to produce a single injury, and each defendant was held liable for the entire damage.²⁹

The confusion surrounding permissive joinder and joint liability was intensified because American courts also required one verdict when defendants were joined in a single action.³⁰ The rationale for the one-verdict rule was that, because joint tortfeasors had acted in concert, the act of one was considered the act of all; therefore, the jury was not permitted to apportion damages because the injury was necessarily single and indivisible.³¹ This rationale, however, was no longer viable once the new procedural rules allowed joinder of defendants without concerted action. Thus, the expansion of party joinder rules,

23. *See id.* at 328-29. This is essentially the definition of concurrent negligence. *See infra* note 25.

24. PROSSER, *supra* note 16, § 47, at 325-26.

25. *Id.* Concurrently negligent tortfeasors are parties whose separate or unrelated negligent acts combine to cause a single and indivisible injury to another party. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 149 (1973).

26. PROSSER, *supra* note 16, § 47, at 328-29.

27. *Id.* The purpose behind the joinder statutes was to provide convenience and expediency, and to avoid multiplicity of suits, not to affect the substantive liability of the parties. *Id.* at 327.

28. *See id.* at 329.

29. *Id.* at 328-29; *see* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 252 (1974).

30. PROSSER, *supra* note 16, § 47, at 329.

31. *Id.* § 46, at 322-23, 325; *see* Sir John Heydon's Case, 11 Co. Rep. 5a, 77 Eng. Rep. 1150 (1613).

the careless application of the term "joint tortfeasor" to refer to all concurrently negligent tortfeasors, and the courts' adherence to strict rules against dividing damages among defendants — all combined to alter the substantive law of loss allocation.

B. Contribution

1. *Early Development.* Like the development of joint and several liability, the early development of the contribution doctrine was impeded by the application of traditional rules after their original rationales no longer applied. For example, courts continued to apply the common law rule that barred contribution among joint tortfeasors³² after the definition of "tort" was broadened to include negligent acts.³³ At the time the rule denying contribution among "tortfeasors" developed, the meaning of "tort" was limited to willful or intentional wrongs.³⁴ The rule against contribution emerged as an exception to the general rule that contribution was permitted among negligent wrongdoers.³⁵ The rationale for the rule against contribution was that although courts would allow negligent parties to sue for contribution, courts would not assist deliberate wrongdoers in settling their disputes.³⁶ Although the original rationale for denying contribution was "lost to sight,"³⁷ most American courts continued to deny contribution among concurrently negligent tortfeasors until the mid-1950's, even though English courts permitted contribution in cases of vicarious liability, accident, mistake, or *mere negligence*.³⁸ Thus, the judiciary's failure to evaluate clearly the meanings of "tort" and "joint tortfeasor," as they were understood when the rule against contribution was developed, led many American courts to apply the rule inappropriately to cases of concurrently negligent tortfeasors.³⁹

32. See, e.g., *Vertecs Corp. v. Reichhold Chem., Inc.*, 661 P.2d 619, 621 (Alaska 1983); see Comment, *A Criticism of Judicially Adopted Comparative Partial Indemnity as a Means of Circumventing Pro Rata Contribution Statutes*, 47 J. AIR. L. & COM. 117, 119 & n.6 (1981); see also PROSSER, *supra* note 16, § 50, at 336-37.

33. PROSSER, *supra* note 16, § 50, at 337.

34. See Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan*, 12 HARV. L. REV. 176, 178 (1898).

35. See *id.* at 177, 182-83. The original rule permitting contribution is generally attributed to *Battersey's Case*, Winch's Rep. 48 (C.D. 1623). "The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution and the [Merryweather v. Nixan] exception is that no assumpsit, either express or implied, will be enforced among wilful tort-feasors or wrongdoers." Reath, *supra* note 34, at 177.

36. Reath, *supra* note 34, at 186-87 (quoting *Bailey v. Bussing*, 28 Conn. 455 (1859) (Ellsworth, J.)).

37. *Id.*; RESTATEMENT (SECOND) OF TORTS § 886A comment a.

38. PROSSER, *supra* note 16, § 50, at 337.

39. See *id.*

Nevertheless, the rule denying contribution was consistent with the doctrine of contributory negligence.⁴⁰ The doctrine of contributory negligence prohibited a plaintiff from recovering damages if his negligence contributed to his own injury.⁴¹ The parallel between contributory negligence and the rule against contribution is clear: just as negligent plaintiffs could not recover against negligent defendants, negligent defendants could not recover against other negligent defendants.⁴² Together, the two doctrines barred negligent parties from recovering against other parties.

In practice, the rule against contribution permitted faultless plaintiffs to determine who would bear the loss for their injuries because defendants could not compel other tortfeasors to share the burden. Persistent criticism of the rule against contribution and recognition of its "obvious lack of sense and justice" led many state legislatures and courts to provide for contribution among joint tortfeasors.⁴³ Most of the reforms were statutory enactments based on

40. The endurance of contributory negligence is discussed in Note, *supra* note 4, at 108. The lengthy history of the rule against contribution is discussed in RESTATEMENT (SECOND) OF TORTS § 886A comment a.

41. *Kaatz v. State*, 540 P.2d 1037, 1046-47 (Alaska 1975).

42. The similarity of rationale and operation between the rule against contribution and contributory negligence is discussed in Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 132 (1932).

43. PROSSER, *supra* note 16, § 50, at 337. The persistent criticisms of contributory negligence by legal scholars and the judiciary are summarized in Note, *supra* note 4, at 103-04 & nn.5-12. The author suggests that "early acceptance of the rule was undoubtedly [influenced by] the desire to protect developing industry, particularly the hazardous yet essential railroads, from unlimited liability in the tort field." *Id.* at 107. The long retention of contributory negligence "may ultimately be attributed to the principle of stare decisis or to legislative neglect." *Id.* at 108 (footnote omitted); see also Williams & Davidson, *Kaatz v. State: The Rule of Comparative Negligence Afloat Upon Uncharted Alaskan Waters*, 6 UCLA-ALASKA L. REV. 175, 175-76 (1977) (noting the opposition of the insurance industry to adopting comparative negligence).

The status of contribution rules in American jurisdictions as of 1959 is summarized in Note, *supra* note 6, at 981-82 app. See, e.g., ALASKA STAT. §§ 09.16.010-.060 (1983); CAL. CIV. PROC. CODE §§ 875-77 (1980); MASS. ANN. LAWS ch. 231B, §§ 1-4 (Michie/Law Co-op 1974); N.C. GEN. STAT. §§ 1B-1 to -6 (1983); N.D. CENT. CODE §§ 32-38-01 to -04 (1976); TENN. CODE ANN. §§ 29-11-101 to -106 (1980). These statutes, except California's, were modeled after the 1955 version of the Uniform Contribution Among Tortfeasors Act and provide for pro rata contribution. 12 U.L.A. 63 (1975).

The 1939 version of the Uniform Contribution Among Tortfeasors Act requires contribution according to each tortfeasor's relative degree of fault. 9 U.L.A. 230 (1957). Many states have adopted relative fault statutes. See, e.g., ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE ANN. tit. 10, § 6302(d) (1975); FLA. STAT. ANN. § 768.31(3)(a) (West Supp. 1984); HAWAII REV. STAT. § 663-12 (1976); S.D. COMP. LAWS ANN. § 15-8-15 (1984); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon Supp. 1985); UTAH CODE ANN. § 78-27-40(2) (1977). Several other states' comparative contribution statutes are listed in Comment, *Comparative Contribution:*

the Uniform Contribution Among Joint Tortfeasors Act.⁴⁴

2. *Alaska's Uniform Contribution Among Tortfeasors Act.* Alaska's Contribution Act⁴⁵ was passed in 1970 to "avoid the injustice often resulting under the common law."⁴⁶ At that time, the doctrine of contributory negligence was still recognized in Alaska;⁴⁷ courts and juries were considered by many to be incompetent to apportion damages accurately or efficiently among wrongdoers.⁴⁸ Therefore, Alaska's Contribution Act, like most contribution acts,⁴⁹ limited contribution to pro rata shares.⁵⁰ Alaska's Act creates a right of contribution in favor of one tortfeasor who has paid more than his pro rata share⁵¹ and does not permit consideration of the relative fault of the tortfeasors in determining the appropriate loss allocation.⁵²

The drafters of Alaska's Contribution Act avoided several procedural restrictions that created problems in other states.⁵³ Alaska's statute does not require that a joint judgment be rendered against

The Legislative Enactment of the Skinner Doctrine, 14 J. MAR. L. REV. 173, 183 n.61 (1980).

44. The original Uniform Contribution Among Tortfeasors Act was approved in 1939 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. 9 U.L.A. 230 (1957). Few states adopted it, and those that did amended it extensively. The lack of uniformity prompted the withdrawal of the old Act and its replacement in 1955 with a new one designed to avoid many of the procedural issues that had created problems in many states. 12 U.L.A. 57, 59-60 (1975); PROSSER, *supra* note 16, § 50, at 338 n.20.

45. ALASKA STAT. §§ 09.16.010-060 (1983).

46. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 430 n.8 (Alaska 1979) (quoting the House Judiciary Committee Report, 1970 House Journal 437).

47. *Arctic Structures*, 605 P.2d at 430.

48. See Kaatz, 540 P.2d at 1048.

49. See generally Note, *supra* note 6.

50. See ALASKA STAT. § 09.16.020 (1983). The legislature did consider apportioning contribution according to relative degrees of fault when it considered the Contribution Act in 1970. The Judiciary Committee of the Alaska House of Representatives reported that:

The Judiciary Committee amendment would require each tortfeasor's share of the liability to be based on his relative degree of fault. After a review of the official comments accompanying the uniform Act and of the relevant pages of the transcript of the meeting of the national conference's committee which wrote this Act, the Judiciary Committee is unconvinced of the need to prohibit the degrees of fault from being considered (as is done in the original version).

Arctic Structures, 605 P.2d at 430 n.13. Without explanation, and despite the recommendation of the House Judiciary Committee, the legislature enacted the pro rata mechanism.

51. ALASKA STAT. § 09.16.010(b) (1983).

52. *Id.* § 09.16.020(2).

53. See generally Fischer, *The New Settlement Statute: Its History and Effect*, 40 J. MO. B. 13 (1984).

multiple tortfeasors before the right to contribution arises.⁵⁴ Thus, if a plaintiff is unable or unwilling to sue some of the individuals who are allegedly responsible for his injuries, the named defendant may join other tortfeasors or sue them separately for contribution. The Contribution Act also permits a tortfeasor to bring a claim for contribution even without satisfying the entire judgment, as long as the claimant has paid, or may have to pay, more than his pro rata share.⁵⁵

In addition, Alaska's Contribution Act creates an incentive for settlement. A tortfeasor who settles with the plaintiff in good faith is released from further liability for contribution to non-settling tortfeasors.⁵⁶ If a settling party negotiates a release for other tortfeasors, the settlement reduces the amount of the plaintiff's claim against non-settling, non-released tortfeasors by the amount of the settlement or by any amount stipulated in the release, whichever is greater. The settling party may then sue the released tortfeasors for contribution.⁵⁷

Significantly, Alaska's Contribution Act "does not impair any right [of] indemnity under existing law."⁵⁸ As discussed more fully below, the traditional form of indemnity is the common law equitable doctrine that shifts the entire burden of tort loss from one defendant to another. Alaska's Contribution Act makes it clear that contribution and indemnity are mutually exclusive remedies, yet it does not attempt to define or limit the law of indemnity in Alaska.⁵⁹ The Contribution Act also does not indicate when courts should apply indemnity instead of contribution, apparently leaving that determination to the courts.

C. Indemnity

1. *Early Development.* In multiple tortfeasor cases, damages may be allocated among the tortfeasors by way of either contribution or indemnity. The right to indemnity was recognized at early common

54. ALASKA STAT. § 09.16.030(a) (1983).

55. *See id.* § 09.16.010(a).

56. *Id.* § 09.16.040(2); *see* *Vertecs Corp. v. Fiberchem, Inc.*, 669 P.2d 958, 960-61 (Alaska 1983) (a settlement prompted by desire to avoid liability for contribution not necessarily in bad faith; settlement upheld).

57. ALASKA STAT. § 09.16.040(1) (1983). *But see infra* note 154, discussing *Criterion Ins. Co. v. Laitala*, 658 P.2d 112 (Alaska 1983).

58. *Id.* § 09.16.010(f).

59. Even though "one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation." *Id.* In *Industrial Risk Insurers v. Creole Prod. Servs., Inc.*, 568 F. Supp. 1323, 1328 (D. Alaska 1983), the federal district court noted that the Alaska Supreme Court has never "expressly identified the elements of a claim for implied indemnity."

law.⁶⁰ In its traditional form, indemnity allows a party to shift the entire liability for an injury from one tortfeasor to another.⁶¹ In contrast, contribution permits one tortfeasor to compel another to share the liability, either on an equal or on a percentage basis. The right to indemnity may arise in several ways. For example, it may arise contractually, either expressly or by implication.⁶² Indemnity may also arise "by operation of law to prevent a result which is regarded as unjust or unsatisfactory."⁶³ This is called implied or equitable indemnity. While the enforcement of contractual indemnity is justified by the express or implied agreement of the parties,⁶⁴ the enforcement of implied indemnity is based upon "a legal fiction founded not upon the parties' intent, express or implied, but upon justice, equity and the doctrine of unjust enrichment."⁶⁵ The remainder of this note focuses on implied, rather than contractual, indemnity.

Under early common law, the right to implied indemnity was narrowly defined.⁶⁶ Generally, courts implied an obligation to indemnify a tortfeasor only when there was a pre-existing relationship between the parties.⁶⁷ For example, an employer held vicariously liable for the tort of a servant or an independent contractor was entitled to indemnity from the "active tortfeasor" — the party who directly caused the injury.⁶⁸ Similarly, the right to implied indemnity was recognized for "an innocent partner or carrier held liable for the acts of another, or the owner of an automobile for the conduct of the driver."⁶⁹ Generally, the courts required an indemnitee to be innocent of any wrongdoing and exposed to liability only through the indemnitor's acts; in other words, the indemnitor was treated as having breached "his obligation not to expose the indemnitee to liability."⁷⁰

60. RESTATEMENT (SECOND) OF TORTS § 886B comment a (1979).

61. See PROSSER, *supra* note 16, § 51, at 341.

62. *Id.*

63. *Id.* Common law equitable or implied indemnity is a specific remedy available to a party who has paid or may have to pay an obligation for which another party was primarily liable. D. DOBBS, *supra* note 25, at 135.

64. See Ferrini, *The Evolution from Indemnity to Contribution — A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254, 255 (1978). This note is concerned primarily with implied indemnity; the law governing express and implied-in-fact indemnity contracts is discussed occasionally by way of contrast.

65. *Id.* The primary rationale for the doctrine of implied indemnity is said to be the aversion to unjust enrichment. "[O]ne who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good conscience should be paid by another can secure reimbursement from that other." Leflar, *supra* note 42, at 147.

66. Ferrini, *supra* note 64, at 254.

67. *Id.* at 255.

68. PROSSER, *supra* note 16, § 51, at 341-42.

69. *Id.*

70. Ferrini, *supra* note 64, at 255.

Over time, many courts expanded the doctrine of implied indemnity beyond its traditional limits. In response to the unavailability of contribution, even a *negligent* defendant was held to be entitled to indemnity, as long as the claimant was the less negligent party.⁷¹ In the process, the courts developed various tests to determine whether the entire loss should be shifted from the passive or secondary tortfeasor to the active or primary tortfeasor.⁷² For example, a passive tortfeasor might be a retailer who relies on a manufacturer's duty to guard against product defects, or a municipality that relies on a construction company to repair and maintain its streets.⁷³ The original significance of the active-passive distinction faded as courts expanded the doctrine to allow indemnity in favor of the less culpable of two or more negligent parties.⁷⁴ Because each court based its decision on equitable principles, the limits of implied indemnity became elusive and unpredictable.⁷⁵ As a result, it became "extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not."⁷⁶

71. See *Vertecs*, 661 P.2d at 621; Leflar, *supra* note 42, at 154-58. Professor Leflar, after summarizing the three areas of tort (non-contractual) indemnity already well-rooted in the common law when he wrote in 1932, described an additional body of cases using the active-passive negligence test to allow indemnity where the parties were not *in pari delicto*. *Id.* at 155. He criticized this approach for its uncertainty and lack of standards. He also described the cases in this field as granting indemnity only "to one whose only negligence was a failure to discover and remedy a dangerous condition formerly created by the misconduct of the one against whom indemnity is given." *Id.* at 156.

Since 1932, the courts using the active-passive and other tests have broadened the field to include any fact pattern where, for example, "there was a qualitative distinction between [the] relative culpability [of the parties]." Ferrini, *supra* note 64, at 257 (discussing Illinois law). Ferrini suggests that, incredible as it may seem, one "who is 49 percent negligent may obtain full indemnification from one who is 51 percent negligent. . . . Yet this was the natural and perhaps unavoidable consequence of the prohibition against contribution." *Id.*

72. The three primary tests have been described as (1) the active-passive test; (2) the primary-secondary test; and (3) the duty-no duty test. Other tests include misfeasance-nonfeasance and omission-commission tests, serving "basically the same function — to distinguish grades of fault." Comment, *Indemnity and Third-Party Tort Actions in South Dakota*, 21 S.D.L. REV. 393, 400-401 (1976) (citations omitted); see generally Annot., 28 A.L.R.3d 943, 950-89 (1969 & Supp. 1984) (listing states applying the active-passive and other tests in various factual settings).

73. PROSSER, *supra* note 16, § 51, at 342-43.

74. Ferrini, *supra* note 64, at 256 (quoting Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287, 296 (1976)).

75. See Ferrini, *supra* note 64, at 256; see generally Leflar, *supra* note 42, at 154-58 (discussing the vagueness already apparent by 1932).

76. PROSSER, *supra* note 16, § 51, at 343.

2. *Implied Indemnity in Alaska.* In addition to recognizing contractual indemnity,⁷⁷ the Alaska Supreme Court has occasionally discussed implied indemnity, and has allowed it in its traditional form as a means of shifting liability from a party who "is sued vicariously for the negligence of the indemnitor"⁷⁸ In 1981, the Alaska Supreme Court implied in dicta⁷⁹ that it might go beyond this traditional limit. The implication was that in addition to recognizing implied indemnity for vicarious liability, implied indemnity among concurrently negligent tortfeasors might be recognized in Alaska:

Three broad possible fact patterns can arise in the indemnity setting: (1) the indemnitee is sued vicariously for the negligence of

77. For examples of contractual indemnity cases in Alaska, see *City of Juneau v. Alaska Elec. Light & Power Co.*, 622 P.2d 954 (Alaska 1981); *Amoco Prod. Co. v. W.C. Church Welding & Contracting Inc.*, 580 P.2d 697 (Alaska 1978); *Manson-Osberg Co. v. State*, 552 P.2d 654 (Alaska 1976).

The importance of carefully drafting contractual indemnity clauses is likely to increase after *Vertecs*, discussed *infra* in text accompanying notes 101-26. A good example of a potential problem is an indemnity provision that serves to hold another party harmless for injuries for which the indemnitor is to some degree at fault. In *Industrial Risk Insurers v. Creole Prod. Servs., Inc.*, 568 F. Supp. 1323, 1329-30 (D. Alaska 1983), Creole had contracted with the Alyeska Pipeline Company to be in charge of starting up Alyeska's pump stations, and their contract included a provision whereby Creole would indemnify Alyeska for harm caused, in any degree, by Creole's negligence. Fluor Engineers and Constructors, Inc. had designed the pump stations. Alyeska sued Creole for indemnity under their contract after Alyeska had paid for injuries incurred in pipeline construction. Creole and Alyeska settled, but because Fluor was not released by the settlement agreement, Creole could not obtain contribution from Fluor.

The federal district court held that although the Alaska Supreme Court had never ruled on the issue, its previous decisions restricting implied indemnity in *Arctic Structures* and *Vertecs* demonstrated that the Alaska court would probably require Creole to prove its actual liability to Alyeska in order to prove that Fluor was under a legal obligation to indemnify Creole. Thus, in order to prove its liability to Alyeska, Creole had to prove its own negligence. The federal court noted the irony of the result but held that, under *Vertecs*, Creole would have to prove itself out of court — it it were negligent in any degree, implied indemnity would be unavailable.

78. See, e.g., *Austin v. Fulton Ins. Co.*, 498 P.2d 702, 705 (Alaska 1972) (insurer held vicariously liable for negligence of its agent); *Kastner v. Toombs*, 611 P.2d 62, 65 (Alaska 1980) (rules of indemnity apply where a master is held liable for his borrowed servant). The Alaska Supreme Court has neither adopted the definition of common law indemnity set out in the Restatement of Restitution, Section 76, nor expressly identified the standards it will apply. *Creole Production Services*, 568 F. Supp. at 1328. The federal district court in *Creole Production Services* assumed that the Alaska appellate courts would recognize the "essential elements of common law indemnity":

The indemnity claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter.

Id.

79. *Alaska Elec. Light & Power Co.*, 622 P.2d at 957.

the indemnitor, (2) *the indemnitee and indemnitor are concurrently negligent, but, because there exists a joint and several liability, only one party is sued*, or (3) the indemnitee is *solely* negligent and the indemnitor is, by agreement, liable.⁸⁰

The Alaska Supreme Court did not rule on the second fact pattern, however, because the case involved contractual indemnity.⁸¹ Two years later, all doubts were resolved against implied indemnity among concurrently negligent tortfeasors when the court held in *Vertecs Corp. v. Reichhold Chemicals, Inc.*, that "public policy dictates that Alaska should not adopt implied indemnity between concurrently negligent tortfeasors."⁸²

The following discussion analyzes two recent cases in which the Alaska Supreme Court rejected opportunities to modernize Alaska's tort loss allocation system. This analysis is necessary to understand the current issues and problems in this area.

a. Arctic Structures, Inc. v. Wedmore: No Implied Partial Indemnity Among Concurrently Negligent Tortfeasors. Implied partial indemnity is a judicial doctrine that some courts use to allow partial loss shifting despite the traditional rule that indemnity is a *total* loss shifting mechanism.⁸³ In 1979, the Alaska Supreme Court, without discussion, declined the opportunity to adopt the partial indemnity doctrine in *Arctic Structures, Inc. v. Wedmore*.⁸⁴ The petitioners in *Arctic Structures* argued that, because the court had rejected all the reasons for avoiding judicial apportionment of damages between plaintiff and defendant according to relative fault when it adopted comparative negligence, judicial apportionment of damages among multiple defendants according to relative fault should be permitted.⁸⁵ The petitioners contended that the rule of joint and several liability should be modified to assign percentages of fault among the defendants; this would be in harmony with the changed approach to tort loss allocation indicated by the new comparative negligence rule. In addition, the modification would further the Contribution Act's fundamental

80. *Id.* (emphasis added). The argument that the court had recognized implied indemnity among concurrently negligent tortfeasors in *Alaska Elec. Light & Power Co.* was raised in *Vertecs*. See *Vertecs*, 661 P.2d at 622.

81. *Alaska Elec. Light & Power Co.*, 622 P.2d at 957.

82. 661 P.2d 619, 626 (Alaska 1983). The court in *Vertecs* expressly noted that its comment in *Alaska Elec. Light & Power Co.* merely described fact patterns and in no way recognized implied indemnity among concurrently negligent tortfeasors. *Id.* at 622.

83. See, e.g., *American Motorcycle Ass'n, Inc. v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (discussing and applying the doctrine).

84. 605 P.2d 426, 435 n.27 (Alaska 1979).

85. *Id.* at 429, 431.

purpose of equitable loss apportionment.⁸⁶ The court refused to contravene the language of the Contribution Act and apportion fault among concurrently negligent tortfeasors.⁸⁷

The Alaska Supreme Court rejected petitioners' arguments primarily because the court believed it would have to abolish joint and several liability and therefore "cast the total risk of uncollectability upon the injured plaintiff."⁸⁸ In reaching its decision, the court relied heavily on the language of the Contribution Act, the limited legislative history of the statute, and the comments of the Commissioners on Uniform State Laws regarding the Uniform Contribution Among Tortfeasors Act — the model for Alaska's Act.⁸⁹ According to the court, the statute's direction that "principles of equity applicable to contribution generally shall apply" in determining tortfeasors' pro rata shares was intended "to govern contribution when one defendant is found to be insolvent, and [not] . . . to affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment."⁹⁰ The court also noted that the rule of joint and several liability had been retained in the Uniform Comparative Fault Act⁹¹ and in both California⁹² and Florida,⁹³ where comparative negligence and pro rata contribution coexisted.

The California Supreme Court, however, retained joint and several liability even though it had adopted the doctrine of implied partial indemnity.⁹⁴ In other words, although California courts may ignore the state's pro rata contribution statute for purposes of assigning percentages of fault, each tortfeasor remains jointly liable for the entire amount of the damages. California's method of using both joint and several liability and implied partial indemnity was designed partly to accommodate the same concern voiced by the Alaska Supreme Court: to protect plaintiffs from bearing the entire risk of uncollectability.⁹⁵ Nevertheless, in *Arctic Structures* the Alaska Supreme Court rejected the doctrine of implied partial indemnity without discussing its merits or viability.⁹⁶

As Justice Boochever pointed out in his dissenting opinion in *Arctic Structures*, joint and several liability can coexist with relative-fault

86. *Id.* at 431.

87. *Id.* at 430-32.

88. *Id.* at 431.

89. *Id.* at 430-32.

90. *Id.* at 430-31.

91. *Id.* at 431-32.

92. *Id.* at 433-35 (discussing primarily *American Motorcycle Ass'n*).

93. *Id.* at 432-33 (discussing *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973)).

94. See *American Motorcycle Ass'n*, 20 Cal. 3d at 590, 578 P.2d at 907, 146 Cal. Rptr. at 188-89.

95. See *id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 188.

96. 605 P.2d at 435 n.27.

contribution or indemnity. He argued that joint and several liability should be retained, *and* losses among defendants should be allocated in accordance with their relative degrees of fault.⁹⁷ Justice Boochever reasoned that such a scheme would be consistent both with earlier precedent in Alaska⁹⁸ and with the Contribution Act's purpose and language.⁹⁹ Thus, he asserted, despite the pro rata language of the Contribution Act, "the reason for dividing liability equally no longer exists."¹⁰⁰

b. Vertecs Corp. v. Reichhold Chemicals, Inc.: No Implied Indemnity Among Concurrently Negligent Tortfeasors. The most recent development in Alaska's loss allocation system was the decision in *Vertecs Corp. v. Reichhold Chemicals, Inc.*¹⁰¹ In *Vertecs*, the Alaska Supreme Court held that the right to implied indemnity does not exist among concurrently negligent tortfeasors.¹⁰² The following analysis of the *Vertecs* decision introduces some of the issues and problems presented by legislative inactivity in this field of law.

In 1970, Vertecs Corporation (Vertecs) was hired to install polyurethane foam insulation in a cold storage plant under construction for the City of Yakutat. Reichhold Chemicals, Inc. (Reichhold) supplied some of the foam that Vertecs used to insulate the building.¹⁰³ In 1977, a fire destroyed the cold storage plant, and the foam insulation supplied by Reichhold allegedly aggravated the fire damage. The City of Yakutat and the plant's former tenant brought an action against Vertecs and Reichhold,¹⁰⁴ alleging liability under eight theories including negligence. Reichhold settled with both plaintiffs in March 1981 and obtained a release. Subsequently, the action against Reichhold was dismissed with prejudice.¹⁰⁵

In March 1981, Vertecs filed a cross-claim against Reichhold for either contribution or indemnity, alleging that any negligence on its part was merely "passive," whereas Reichhold's negligence was "active."¹⁰⁶ The superior court ruled that "Alaska law did not provide

97. *Id.* at 440-41.

98. *Id.*

99. *Id.* at 441.

100. *Id.*

101. 661 P.2d 619 (Alaska 1983).

102. *Id.* at 626.

103. *Id.* at 620.

104. On May 11, 1979, the plaintiffs brought actions against fifteen parties, including Vertecs and Reichhold, in their amended complaint. *Id.*

105. *Id.*

106. *Id.* The superior court granted summary judgment to Reichhold on the contribution claim "since Reichhold had settled in good faith with the plaintiffs." *Id.* at 621.

for indemnity between concurrently negligent tortfeasors. Since only fault-based claims had been alleged against *Vertecs* . . . it could not obtain indemnity"¹⁰⁷

On appeal, the *Vertecs* case gave the Alaska Supreme Court the opportunity to adopt or reject the implied indemnity doctrine for concurrently negligent tortfeasors. The court reviewed the historic development of contribution and indemnity¹⁰⁸ and considered several aspects of the implied indemnity doctrine advanced by *Vertecs*.¹⁰⁹ The court concluded that public policy required denial of implied indemnity for tortfeasors who are negligent in any degree.¹¹⁰

The court identified three advantages that might result from allowing implied indemnity in favor of tortfeasors whose relative fault is slight.¹¹¹ The first was stated by the court as follows:

The most fundamental argument in favor of indemnity between two concurrently negligent tortfeasors is that of fairness. Even if two tortfeasors are held jointly and severally liable, often one will pay the entire judgment. If that tortfeasor bears only a minor degree of fault, it is indeed grating to contemplate that it may well shoulder the entire loss while the tortfeasor bearing a large degree of fault suffers none.¹¹²

The second advantage mentioned by the court in support of implied indemnity was that it would more accurately match the liability of each tortfeasor with his degree of fault. The court noted, however, that under the traditional doctrine of implied indemnity, the *entire* loss shifts to the more blameworthy tortfeasor, which is not in complete accord with the underlying tort principle of relative fault.¹¹³ The third advantage noted by the court was that "loss-shifting via indemnity may well serve the modern tort goal of shifting losses in a socially desirable fashion so that the loss is most efficiently spread throughout society."¹¹⁴

107. *Id.* at 620.

108. *See id.* at 621.

109. *See id.* at 623-26.

110. *Id.* at 626.

111. *See id.* at 623-24.

112. *Id.* (footnote omitted).

113. *Id.* at 624. The court did not discuss the doctrine of implied partial indemnity which it had previously rejected in a footnote in *Arctic Structures*, 605 P.2d at 435 n.27.

114. *Vertecs*, 661 P.2d at 624. The court suggested that if the indemnitor were insured, or were "a governmental entity, then the loss may be diffused among the large population of policy-holders, customers, or taxpayers." *Id.* (citation omitted). Nevertheless, local retailers may not be good loss-bearers, even for a pro rata share, because they may be underinsured and thus forced to pass their loss directly on to retail customers.

Despite the court's recognition of the advantages of allowing implied indemnity, the countervailing arguments persuaded the court that the doctrine should not be available to negligent parties.¹¹⁵ The court was understandably concerned with the vagueness of the doctrine.¹¹⁶ It would be difficult to determine which cases of concurrent negligence would justify implied indemnity in favor of one party.¹¹⁷ Vague and confusing judicial standards would result.¹¹⁸ A proliferation of indemnity actions in multiparty lawsuits would burden trial courts with "a bewildering array of issues."¹¹⁹ Furthermore, adopting the implied indemnity doctrine would disrupt the current scheme of incentives. In some cases, the deterrent of potential liability would be sacrificed,¹²⁰ and the incentive for potential indemnitors to settle would be lost because there would be no guarantee of a complete release from liability as long as another tortfeasor might sue for implied indemnity.¹²¹ Finally, the court was strongly influenced by the existence of Alaska's Contribution Act, which demonstrated the legislature's "considered policy judgment . . . that concurrently negligent tortfeasors should share equally in the loss caused by their tortious acts."¹²² In sum, the court believed that implied indemnity among

115. See *id.* at 624-26.

116. *Id.* at 624.

117. *Id.*

118. *Id.*

119. *Id.* at 624 (quoting *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367 (Minn. 1977)).

120. *Id.* at 625. The deterrence argument is weak for at least two reasons. First, many tort cases based on fault involve no moral culpability, and second, where the tortfeasor is insured, the only deterrent is the indirect cost of higher insurance premiums. Cf. D. DOBBS, *supra* note 25, at 586-87 (discussing deterrence in a different context).

121. See ALASKA STAT. § 09.16.020 (1983); see also *Vertecs*, 661 P.2d at 625. The court explained that while a tortfeasor who settles with the injured party would be discharged from liability for contribution under Alaska Statutes section 09.16.040(2), the tortfeasor would still be liable for indemnity under Alaska Statutes section 09.16.010(f). *Vertecs*, 661 P.2d at 625.

122. *Vertecs*, 661 P.2d at 625 (footnote omitted). The court in *Vertecs* also stated that "two distinguished commentators have concluded that once a state adopts contribution, that should be the sole method of non-contractual loss-shifting among concurrently negligent tortfeasors." *Id.* (footnote omitted). One of these commentators, Dean Keeton, acknowledged that his view was not consistent with the majority of scholars at that time. "Contrary to the views of most of my legal education colleagues, I have never believed that it was practical or feasible to compare faults other than in a general way, such as through the recklessness and negligence concepts." Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. COUNS. J. 630, 633 (1960). The other commentator, Professor Leflar, wrote in 1932 that "[i]ndemnity between tortfeasors serves a good purpose when as between them substantially the whole of the fault was in the one against whom indemnity was given. Roughly, that is the area within which it is now permitted." Leflar, *supra* note 42, at 159.

It is arguable that contribution should be the sole remedy only when it is *comparative* contribution, as opposed to *pro rata*. Thus, the greater liability would be placed

concurrently negligent tortfeasors should not be recognized.¹²³

The breadth of the *Vertecs* rule is demonstrated by the subsequent disposition of *Vertecs*'s indemnity claims that were not based on negligence.¹²⁴ On remand, the superior court relied on the Supreme Court's earlier decision in *Vertecs*, which broadly declared that any degree of negligence by a tortfeasor barred implied indemnity.¹²⁵ The superior court held that if the claimant were negligent in any degree, even nonnegligence claims labeled "breach of warranty" or "strict liability" would be barred as merely restated, and impermissible, indemnity claims.¹²⁶

upon the more blameworthy tortfeasor, and the need for implied indemnity would be greatly reduced. The court in *Vertecs* noted that the Alaska legislature chose the pro rata scheme over a relative fault amendment proposed by the House Judiciary Committee. 661 P.2d at 625. The court recognized the shortcomings of the pro rata method, but felt that the legislature had already decided the issue against comparative loss shifting among tortfeasors. This left two wooden alternatives: pro rata contribution and total loss shifting under implied indemnity. The court concluded that, given pro rata contribution, no modern function remained for implied indemnity among concurrently negligent tortfeasors, despite the unfairness of pro rata contribution in some cases. *Id.* at 626.

123. *Id.* at 625-26. Two months after *Vertecs*, the court clarified its position on this issue. "To the extent that an expansion of the common law of indemnity would overlap into and judicially abrogate portions of the contribution act, we are reluctant to create such an expansion." *State Mechanical, Inc. v. Liquid Air, Inc.*, 665 P.2d 15, 17 n.2 (Alaska 1983). In *State Mechanical*, the court applied the *Vertecs* rule "that no claim for non-contractual implied indemnity [lies] between concurrently negligent tortfeasors" to affirm a superior court decision precluding an indemnity claim by a negligent contractor against a manufacturer of a defective product. *State Mechanical*, 665 P.2d at 17.

124. See *Vertecs*, 671 P.2d at 1275 (outlining the complex series of procedural events in the *Vertecs* litigation). *Vertecs* had filed breach of express and implied warranty and strict liability counter-claims against Reichhold in July 1982. Reichhold challenged *Vertecs*'s right to amend its answer on the theory that *res judicata* barred *Vertecs*'s nonnegligence indemnity claims. The superior court dismissed *Vertecs*'s cross-claims and third party claims, but the Alaska Supreme Court reversed and remanded to the superior court to decide the merits of the nonnegligence theories. *Id.* at 1275, 1277. In May 1984, the superior court granted summary judgment in favor of Reichhold against *Vertecs*' nonnegligence indemnity claims. See *City of Yakutat v. Witco Chem. Corp.*, No. 3AN-79-1134 Civ. (Alaska Super. Ct., May 24, 1984).

125. *Witco Chem. Corp.* at 11, 13-14.

126. *Id.* at 15-18. The Alaska Supreme Court had previously held that attorney's fees, costs, and interest could not be recovered in an indemnity action unless the claimant were free of personal fault. See *D.G. Shelter Prod. Co. v. Moduline Indus., Inc.*, 684 P.2d 839, 841 n.5 (Alaska 1984).

III. CURRENT ISSUES AND PROBLEMS IN ALASKA'S PRO RATA ALLOCATION SYSTEM

A. Alaska's Contribution Act and Legislative Intent

In evaluating the degree of reliance the Alaska Supreme Court has placed on the policy decisions embodied in the Contribution Act, it is helpful to examine the legislative intent underlying the statute. The Alaska legislature passed the Contribution Act to relieve the harshness of the common law doctrine that barred contribution among joint tortfeasors.¹²⁷ The Act was passed to ensure that each joint tortfeasor would pay his fair share of the damages rather than have one tortfeasor bear the entire loss.¹²⁸ At the time the Contribution Act was passed, loss allocation on a comparative fault basis was considered judicially and administratively unworkable and inaccurate.¹²⁹

The pro rata Contribution Act represented a great improvement over the common law rule barring all contribution. Nevertheless, whether the Alaska legislature intended the Contribution Act to preclude the future development of implied indemnity remains unclear. The language of the Contribution Act arguably demonstrates an intent to leave the development of the doctrine of indemnity to the judiciary by providing in part:

This chapter does not impair any right [of] indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.¹³⁰

On one hand, the troublesome phrase "under existing law" supports the proposition that the legislature intended to preclude judicial expansion of implied indemnity to include negligent tortfeasors because

127. See *Criterion Ins. Co. v. Laitala*, 658 P.2d 112, 115-16 (Alaska 1983) (quoting HOUSE JUDICIARY COMM. REPORT, HOUSE JOURNAL OF 1970, at 437); see also *City of Juneau v. Alaska Elec. Light & Power Co.*, 622 P.2d 954, 959 (Alaska 1981); *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 430 n.8 (Alaska 1979) (quoting at length the report in 1970 HOUSE JOURNAL 437). The court in *Alaska Elec. Light & Power Co.* noted that the House Judiciary Committee Report on the bill stated that one purpose of the proposed legislation was to "avoid the injustice often resulting under the common law," due to the no contribution rule. 622 P.2d at 959 n.15 (quoting HOUSE JUDICIARY COMM. REPORT, HOUSE JOURNAL OF 1970, at 437).

128. *Laitala*, 658 P.2d at 115. The court in *Laitala* discussed the purpose of the Contribution Act when it determined whether a post-judgment settlement agreement satisfied the judgment so as to extinguish all the tortfeasors' liability to the plaintiff, and, if so, whether a right of contribution existed among the tortfeasors under Alaska Statutes sections 09.16.010(a),(d) and -.030(e) (1983). 658 P.2d at 115; see *supra* note 154.

129. See *Kaatz v. State*, 540 P.2d 1037, 1048 (Alaska 1975).

130. ALASKA STAT. § 09.16.010(f) (1983).

this form of implied indemnity did not exist in Alaska when the statute was drafted.¹³¹ On the other hand, perhaps the phrase indicates that the legislature wanted to give the courts the freedom to provide common law indemnity and to expand or contract the common law equitable doctrine as fairness and justice might require.¹³²

If the Alaska legislature did not intend to freeze judicial development of implied indemnity, how far can or should the courts expand the doctrine? The Contribution Act does not specify acceptable forms of indemnity. As noted above,¹³³ other states have allowed implied indemnity in favor of tortfeasors who are only slightly at fault against those who are greatly at fault because it is more equitable than enforcing the statutory remedy — a fifty percent split. Nonetheless, the Alaska Supreme Court apparently concluded that the legislature intended the Contribution Act to preclude implied indemnity even for tortfeasors whose relative fault was only slight.¹³⁴

The California Supreme Court interpreted a similar statute, which preserved indemnity “under existing law,” to permit the expansion of California’s implied indemnity doctrine to encompass implied partial indemnity.¹³⁵ The California court reasoned that the legislature could not have foreseen that equitable considerations would justify judicial creation of the doctrine.¹³⁶ The California legislature

131. *But cf. Alaska Elec. Light & Power Co.*, 622 P.2d at 959 n.17 (Contribution Act does not impair parties’ right to agree, in good faith, on an alternative loss allocation formula).

132. The argument against interpreting the legislative intent behind the passage of a contribution statute as to provide contribution as “the sole permissible remedy” is made in O’Donnell, *Implied Indemnity in Modern Tort Litigation: The Case for a Public Policy Analysis*, 6 SETON HALL L. REV. 268, 284 n.40 (1974-75). See also Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 518 n.9 (1952).

133. See *supra* text accompanying notes 71-76.

134. See *Vertecs*, 661 P.2d at 621.

135. *American Motorcycle Ass’n, Inc. v. Superior Court*, 20 Cal. 3d 578, 602, 578 P.2d 899, 914-15, 146 Cal. Rptr. 182, 197 (1978). In *American Motorcycle Ass’n*, the California Supreme Court relied upon the decision in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), in which the New York Court of Appeals created a right of implied partial indemnity despite the existence of a pro rata contribution statute. “In authorizing equally shared contribution among tortfeasors jointly found liable, this statute [CPLR § 1401, repealed in 1974] did not contemplate an apportionment already made in the judgment, and the joint responsibility described was not one of indemnity.” *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391. California’s contribution statute, CAL. CIV. PROC. CODE § 876(a) (West 1980), provides that “the pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.”

136. *American Motorcycle Ass’n*, 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

“had no intention of completely withdrawing the allocation of loss issue from judicial purview.”¹³⁷

In contrast, the Alaska Supreme Court in *Vertecs* found that the Alaska Contribution Act

represents the legislature’s considered policy judgment that concurrently negligent tortfeasors should share equally in the loss caused by their tortious acts. . . . Although pro rata contribution may not in all cases be the most fair method of loss-shifting, it seems more fair than the “blunt instrument” of indemnity where all tortfeasors are to some degree at fault.¹³⁸

It is now up to the legislature to determine whether its intent has been accurately construed and whether its 1970 policy judgments are still valid.

B. Balancing Fairness and Efficiency in *Vertecs*

In the *Vertecs* decision, the Alaska Supreme Court balanced public policy considerations for and against the implied indemnity doctrine. By balancing various concerns, the court implicitly recognized that neither contribution nor implied indemnity, standing alone, guarantees the fairest outcome in many cases. Nevertheless, the court did not focus on whether or how the two doctrines might coexist.

In order to analyze the merits of implied indemnity and contribution, it is important to recognize that the fairness of implied indemnity is crucially affected by the availability of contribution as an alternative loss-shifting remedy. The relative fairness of contribution and implied indemnity also varies as the relative fault percentages change. These interrelationships are best illustrated by considering how the remedies would affect two tortfeasors, A and B, under two scenarios. First, consider the case where A’s share of the fault for an injury is 5% and

137. *Id.* at 602, 578 P.2d at 915, 146 Cal. Rptr. at 198. The California Supreme Court also discussed the provision in its contribution act “which explicitly mandates that the ‘right of contribution shall be administered in accordance with the principles of equity.’” *Id.* (citing CAL. CIV. PROC. CODE § 875(b)). The court concluded that “this provision demonstrates that the Legislature did not conceive of its contribution legislation as a complete and inflexible system for the allocation of loss between multiple tortfeasors.” *Id.* at 602-03, 578 P.2d at 915, 146 Cal. Rptr. at 198 (citations omitted). Without deciding whether this provision would permit judicial alteration of the pro rata contribution formula, the court stated that the provision “refutes the argument that the Legislature intended to curtail judicial discretion in apportioning damages among multiple tortfeasors.” *Id.*

The Alaska Supreme Court, however, interpreted this provision in the Alaska Statute (ALASKA STAT. § 09.16.020(3) (1983)) as intended to apply only when one defendant is insolvent; it was not intended, according to the court, to “affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment.” *Arctic Structures*, 605 P.2d at 430-31 (footnote omitted) (relying on the commissioners’ comments interpreting the Uniform Contribution Among Tortfeasors Act).

138. *Vertecs*, 661 P.2d at 625-26.

B's is 95%.¹³⁹ Implied indemnity would allow A to shift all of the damages to B. Pro rata contribution would force each tortfeasor to bear 50% of the loss. Clearly, implied indemnity would provide a better match of liability with fault. A second scenario demonstrates that implied indemnity becomes less fair as relative percentages of fault became more equal: if A's share of the fault is 40% and B's is 60%, the pro rata, 50%-50% split is preferable to 0%-100% indemnity.

The expansion of the implied indemnity doctrine has been criticized for creating "confusion and unfairness."¹⁴⁰ The expansion occurred, however, during a period when contribution was unavailable. It is arguable that because contribution is now available, the standard for implied indemnity can be considerably more restrictive and concrete, allowing courts to apply the doctrine in narrowly defined types of cases.¹⁴¹ Moreover, if the focus is on fairness, the role for implied indemnity among concurrently negligent tortfeasors is even more important where pro rata contribution is the only alternative than where comparative contribution is available.

A standard which could accommodate both contribution and implied indemnity might be achieved by allowing implied indemnity instead of pro rata contribution only when the results otherwise would

139. This may occur, for example, where A, a retailer, fails to discover a defect in a product manufactured by B.

140. See Comment, *supra* note 72, at 400-02.

141. See generally Ferrini, *supra* note 64, at 268. Ferrini found a meaningful role for implied indemnity in Illinois, a state in which comparative contribution had been *judicially* adopted. He argued that while a tortfeasor who was 1% at fault had a right to contribution from a tortfeasor who was 99% at fault, indemnity should be permitted when one party's culpability exceeds 99%:

That point is found where the indemnitee is held liable by operation of law — where the indemnitor owed the indemnitee a duty of care not to expose the [indemnitee] to liability to a third party and, as a consequence of the indemnitor's breach of that duty, the indemnitee had been held liable on a technical basis only.

Id. This standard is essentially the standard for vicarious liability. Ferrini suggests that once comparative contribution is adopted, implied indemnity should be limited to cases of vicarious liability, respondeat superior, or similar cases involving pre-tort relationships. *Id.* In rejecting implied indemnity, the court in *Vertecs* relied in part on Comment, *supra* note 72, at 422, which urged a greater emphasis on contribution than on active-passive indemnity because South Dakota's contribution statute, based on relative degrees of fault, is consistent with the tort philosophy of comparative negligence in South Dakota.

The *Vertecs* court also cited Davis, *supra* note 132, at 560, which concluded that "there are legitimate rights of indemnity among negligent concurrent tortfeasors in a variety of factual situations." Davis proposed that the test for implied indemnity should be a "disproportionate duty" test. *Id.* at 546-53. Davis concluded that, "[i]n order to have a mature, well-rounded law governing relations between negligent tortfeasors, contribution should be allowed between them in proportion to their relative fault in cases where indemnity is not proper." *Id.* at 560.

be extremely harsh and unfair. A mere claim by one tortfeasor that he was less at fault than his co-tortfeasors would not suffice. Instead, implied indemnity could be restricted to specific types of cases in which the imbalance of fault is severe, for example, "where one tortfeasor, by his active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it."¹⁴² Just as Alaska recognizes a right of implied indemnity in cases of respondeat superior,¹⁴³ the courts also could recognize the right in favor of a retailer, whose negligence in failing to detect a product defect was only slight, against the manufacturer who created the dangerous condition. If the facts of a case were this simple, there would be a clear disparity in the degree of fault attributable to the retailer and the manufacturer. Total loss shifting in this case would not be difficult to justify and arguably would be preferable to pro rata contribution.¹⁴⁴

142. PROSSER, *supra* note 16, § 51, at 343. This approach — contribution plus a limited right to implied indemnity — was proposed at the Illinois Judicial Conference Study Committee on Indemnity, Third Party Actions, and Equitable Contributions:

5(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law except that the right to indemnification of one personally at fault shall be limited to those circumstances where he merely fails to discover the dangerous condition created by another.

Ferrini, *supra* note 64, at 269 (quoting Report of the Study Committee on Indemnity, Third Party Actions and Equitable Contributions, SR 21, SR 27, SR 28). The committee's comments explained that this language was intended to limit indemnity "to its common law uses once [comparative] contribution is accepted as the law" *Id.* The purpose was to avoid "the results of creative expansion of indemnity by Illinois courts, which the committee believes have developed only in response to the absence of contribution." *Id.* The rule could also be applied, as Prosser explains,

against a supplier of goods when a retailer or user of the goods incurs liability by reason of negligent reliance upon the supplier's proper care. The same is true where the owner of a building negligently relies upon a contractor who makes improvements or repairs. Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where a municipal corporation, held liable for failure to keep its streets in safe condition, seeks recovery from the person who has created the condition, or a property owner who has permitted it; or an owner of land held liable for injury received upon it sues the wrongdoer who created the hazard.

PROSSER, *supra* note 16, § 51, at 342-43 (footnotes omitted).

143. See *Austin v. Fulton Ins. Co.*, 498 P.2d 702, 705 (Alaska 1972).

144. See generally O'Donnell, *supra* note 132, at 287-88. The author contends that the issues involved in determining an indemnity claim will be argued, for example as defenses, in the plaintiff's case anyway. O'Donnell concludes that even if indemnity would add a slight burden to the judge or jury it is justified. "[The] sacrifice of fairness to the individual litigant would be a high price for what would often be a slight saving of judicial time." *Id.* at 287; see also Ferrini, *supra* note 64, at 268 (urging the continued vitality of indemnity, at least in its traditional form (applying in cases of pre-tort relationship) as part of a flexible and equitable system of comparative contribution and implied indemnity).

Other cases in which denying indemnity may be extremely harsh and unfair are

Unfortunately, the over-simplified example of the retailer is misleading. Defining clear standards for implied indemnity has proven extremely difficult and has resulted in a variety of vague formulations.¹⁴⁵ The Alaska Supreme Court's rejection of the implied indemnity doctrine in *Vertecs* was motivated in part by the difficulties it saw in determining the boundaries of a narrow category of slightly negligent tortfeasors.¹⁴⁶ Furthermore, the case by case development of the doctrine would be slow in producing a body of predictable authority. Numerous cross-claims and third party claims could be expected, and the volume and cost of litigation based on implied indemnity theories would increase.¹⁴⁷

In addition, as the *Vertecs* court noted,¹⁴⁸ adoption of implied indemnity could discourage settlements. When pro rata contribution affords the sole method of loss allocation, a good-faith settlement ends the litigation for the settling party by barring later contribution claims against him.¹⁴⁹ Indemnity rights, however, are unaffected by settlement under the statute.¹⁵⁰ Thus, if implied indemnity were available, settlement would not guarantee a discharge from liability for a settling party in all cases; a slightly negligent tortfeasor could not sue for contribution, but may sue for implied indemnity. This might reduce the attractiveness of settlement as a strategy.¹⁵¹ Nevertheless, it is the greatly blameworthy tortfeasor — the potential indemnitor — whose settlement is discouraged by the availability of implied indemnity, because a slightly blameworthy tortfeasor would not be sued for indemnity.

where the statute of limitations has run on the contribution claim, *see* ALASKA STAT. § 09.16.030(d) (1983), or culpable parties are not subject to service of process, forcing one tortfeasor to bear the entire loss.

145. *See Vertecs*, 661 P.2d at 624.

146. *See supra* notes 115-19 and accompanying text.

147. The projected increase in the volume of litigation may be viewed as a consequence of discouraging settlement.

148. *See supra* note 121 and accompanying text.

149. ALASKA STAT. § 09.16.040(2) (1983).

150. *See* ALASKA STAT. § 09.16.010(f) (1983).

151. This uncertainty could be avoided by discharging a settling tortfeasor from liability for implied indemnity as well as contribution. This approach was recently adopted by statute in Missouri:

When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith. . . . [it] shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor. The term "non-contractual indemnity" as used in this section refers to indemnity between joint tortfeasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

MO. ANN. STAT. § 537.060 (Vernon Supp. 1984). *See generally* Fischer, *supra* note 53.

The dynamics of the settlement process are illustrated, albeit simplistically, in the following hypothetical case. Assume that P sues D1 and D2 for negligence, seeking \$100,000 in damages. Assume further that D1 is 90% at fault for manufacturing a defective product, and D2 is 10% at fault for failing to discover the defect. Implied indemnity, if permitted, would allow D2 to shift his entire loss to D1 for breach of implied warranty. This creates a disincentive for D1 to settle because, although the settlement would discharge his potential liability to D2 for pro rata contribution,¹⁵² it would not discharge his potential liability for indemnity to D2, if D2 had to pay P.¹⁵³

The same case comes out differently when indemnity is unavailable pursuant to the *Vertecs* rule. D1 is able to offer P a settlement without the risk of subsequent liability to D2. If settlement were achieved between D1 and P, and D2 were not involved in the settlement, D2 would be liable either for contribution to D1 (if D1 paid the entire damages and obtained a release of D2),¹⁵⁴ or for damages to P for the unrecovered amount of P's loss. Moreover, D1 has some incentive to avoid litigation with D2, because if D1 merely obtained a release for D2, D2 could raise a defense of nonnegligence. Such a de-

152. ALASKA STAT. § 09.16.040(2) (1983).

153. *Id.* § 09.16.010(f).

154. *Id.* § 09.16.010(b),(d). In *Criterion Ins. Co. v. Laitala*, 658 P.2d 112, 116-17 (Alaska 1983) (distinguishing *Young v. State*, 455 P.2d 889, 893 (Alaska 1969)), the court held that a post-judgment settlement between a tortfeasor's insurer (Criterion) and an injured party discharged another tortfeasor (Laitala) from liability to the injured party even though Laitala was not specifically named in the release. The court reasoned that because the statute of limitations had run on any claims by the injured party against Laitala, the general release in effect discharged Laitala under Alaska Statutes section 09.16.010 (d) (barring a settling tortfeasor's contribution action unless the settlement extinguishes the non-settling tortfeasor's liability), and Laitala was liable for contribution to Criterion. *Id.*

In a concurring opinion, Justice Rabinowitz argued that precisely because the statute of limitations had run on the plaintiff's claims against Laitala, the release could not have discharged Laitala in any real sense. *Id.* at 118. Justice Rabinowitz noted that section 09.16.010 (d) "was intended only to protect a non-discharged tortfeasor . . . from being sued by both the settling tortfeasor and the injured party." *Id.* (footnote omitted). Thus, that section does not apply where the non-discharged tortfeasor is protected by the statute of limitations. *Id.* Nevertheless, even Justice Rabinowitz agreed that Laitala was liable for contribution because Criterion's contribution action was timely. *Id.* at 114 n.3, 118.

Justice Rabinowitz suggested that the plaintiff and Criterion probably did not consider Laitala when they settled because Laitala was protected by the statute of limitations. *Id.* at 118 n.1. However, the statute of limitations did not protect Laitala from a contribution action by Criterion; thus, in settling, Criterion may have contemplated a later suit against Laitala for contribution. Although a full discussion of the ramifications of *Laitala* is beyond the scope of this note, it is important to note that the supreme court will treat a tortfeasor as discharged with respect to the plaintiff under section 09.16.010 (d), for purposes of contribution liability, if the statute of limitations has run on the plaintiff's claims against him.

fense might be attractive to a sympathetic jury whose only other option would be forcing D2, who was only 10% at fault, to bear 50% of the loss.¹⁵⁵ Thus, the pro rata system might induce a highly culpable party to offer to pay more than a pro rata share of the damages in order to bring a slightly culpable party into the settlement process.

In sum, it is difficult to balance fairness and efficiency in Alaska's current tort loss allocation system. If the supreme court had adopted implied indemnity among joint tortfeasors, the resulting system would still strike only a rough balance. Therefore, other approaches should be considered.

IV. AN ALTERNATIVE APPROACH TO TORT LOSS ALLOCATION AMONG CONCURRENTLY NEGLIGENT TORTFEASORS: MATCHING LIABILITY WITH FAULT

A. Matching Liability with Relative Fault

The Alaska Supreme Court has considered several alternative systems of tort loss allocation. The system approved in *Vertecs* forces concurrently negligent tortfeasors to share the loss equally.¹⁵⁶ The *Vertecs* court rejected an alternative system that would split

155. D2, only 10% negligent, may be in a good position to appeal to the jury's sense of fairness if the jury understands that under the pro rata system D2 will pay either 50% of the damages, if D2 is found to be negligent, or none, if D2 is found not to be negligent. Jury confusion over this issue is demonstrated in *In re Barrow Air Crash*, No. 3AN-81-2321 Civ. (Alaska filed Oct 13, 1978). The plaintiff and each of two defendants were negligent in causing plaintiff's injuries. In accordance with the rule of comparative negligence, the jury instructions and verdict form required the jury to determine the relative percentages of fault between the plaintiff on one line and the defendants, as a group, on another line. The jury sent a note to the judge asking whether there should be three lines for percentages of fault, one each for the plaintiff, the first defendant, and the second defendant. After being instructed that they should simply subtract the plaintiff's percentage from 100% to find the defendants' percentage, the jury sent another note to the judge:

Are you saying we may *not* assign separate percentages to [defendant] Ehredt and [defendant] DeHavilland? We want to assign each party, *i.e.*, [plaintiff] Walters, Ehredt, and DeHavilland, the % we feel applies to each specific party.

(Transcript 3002-03). The judge refused to explain to the jury that relative fault among defendants was irrelevant and that no relative fault apportionment would occur. He sent a verdict to the jury with separate lines for percentages of fault for each of the three parties. The jury found the plaintiff 10% at fault, the first defendant 75% at fault, and the second defendant 15% at fault. The jurors later learned that the defendants would split the liability equally. Several jurors expressed their disappointment to the judge and indicated that the verdict might have come out differently had they known how the pro rata contribution system worked. Appellant's Opening Brief at 11-17, *In re Barrow Air Crash*.

156. The system of tort loss allocation in Alaska after *Vertecs* is pro rata contribution and no implied indemnity among currently negligent tortfeasors. See *Vertecs Corp. v. Reichhold Chem. Corp., Inc.*, 661 P.2d 619, 625-26 (Alaska 1983).

tortfeasors into two categories — those who should share equally in the loss and those whose minimal degree of negligence entitles them to shift the loss entirely.¹⁵⁷ Another alternative, which was not seriously considered by the court in *Vertecs* or in *Arctic Structures*, is a system of partial indemnity in which each tortfeasor's share of the loss is proportionate to his degree of fault.¹⁵⁸

This last alternative — matching liability with relative fault — is the tort loss allocation system most consistent with the comparative negligence system employed in Alaska.¹⁵⁹ Under comparative negligence, juries may consider the relative fault of the plaintiff and defendant in determining the plaintiff's maximum recovery. Consider a hypothetical case in which plaintiff (P) is found to be 10% at fault and the defendants 90% at fault in causing a \$100,000 loss to P. The old contributory negligence rule would have barred P's suit altogether. The comparative negligence rule permits P to recover \$90,000 from the defendants. As the Alaska Supreme Court noted: "The basic objection to [contributory negligence] — grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability — remains irresistible to reason and all intelligent notions of fairness."¹⁶⁰

The fundamental principle of fairness that supports the comparative negligence system also strongly supports the adoption of implied partial indemnity or comparative contribution for fault-based loss allocation among concurrently negligent *defendants*.¹⁶¹ For example,

157. A system dividing tortfeasors into two categories would result where pro rata contribution applies to all concurrently negligent tortfeasors except those determined to be non-participating, passive, or secondary. These tortfeasors would be entitled to indemnity.

158. Partial indemnity and comparative contribution are identical in outcome. Implied partial indemnity is used by some courts to accomplish apportionment based on relative fault where no statutory scheme accomplishes this. *See generally* Comment, *supra* note 32, at 130-44.

159. Both implied partial indemnity and comparative negligence apportion loss among defendant tortfeasors according to their relative degrees of fault. Apportionment by fault parallels the notion of comparative negligence and should be adopted in comparative negligence jurisdictions. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39, 40 commissioners' prefatory note (1985). Once a jury has apportioned fault in a plaintiff's action under the comparative negligence rule, it is intuitively unfair to require pro rata contribution among defendants. *See supra* note 155.

160. *Kaatz v. State*, 540 P.2d 1037, 1048 (quoting *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230-31, 119 Cal. Rptr. 858, 862 (1975) (footnotes omitted)). The court also quoted the following strong language from *Li*: "The essence of that criticism [of contributory negligence] has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task." *Id.*

161. *Cf. Sowle & Conkle, Comparative Negligence Versus the Constitutional Guar-*

under the current rule of pro rata contribution, if D1 and D2 were concurrently negligent defendants, they each would be liable under pro rata contribution for 50% of the judgment. Under a relative fault system, if a jury found D1 to be 90% at fault and D2 10% at fault, D1 would be liable for 90% and D2 for 10% of the damages awarded to the plaintiff. In deciding whether to settle, the defendants would estimate relative degrees of fault. Their estimates and presumably their settlements would more closely reflect actual culpability if litigation were expected to result in apportionment according to fault.

A recent trend toward more equitable treatment of concurrent tortfeasors is evident.¹⁶² The first step toward embracing this trend in

ante of Equal Protection: A Hypothetical Judicial Decision, 1979 DUKE L.J. 1083, 1124-33 (presenting a constitutional argument that there is no legally significant difference between a negligent plaintiff and a negligent defendant, each seeking to share a tort loss; there is no legitimate and meaningful government interest in treating the two categories differently; and the plaintiff-defendant allocation rules should match the defendant-defendant allocation rules).

162. See *Kaatz*, 540 P.2d at 1049. Apportioning loss among wrongdoers based upon relative fault appears to represent the modern wisdom in this area of jurisprudence. PROSSER, *supra* note 16, § 51, at 344-45. The Prosser treatise recognizes that changes in the law of contribution and relative fault will make courts reconsider indemnity rules. Now that the choice is no longer between the two stiff alternatives of pro rata contribution and total loss-shifting indemnity, comparative fault modifications have begun and can be expected to continue. Confusion over labels should not discourage attempts to modify the law. *Id.* at 344; see *Kaatz*, 540 P.2d at 1047 (recognizing the trend in the majority of American jurisdictions toward comparative fault systems); UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39 commissioners' prefatory note (1985); Ferrini, *supra* note 64, at 258, 260. See generally Comment, *supra* note 43; Williams & Davidson, *supra* note 43, at 175-76.

In *Vertecs* the Alaska Supreme Court relied in part on *American Motorcycle Ass'n, Inc. v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), for its statement that the doctrine of implied indemnity has left indemnity jurisprudence in disarray. See *Vertecs*, 661 P.2d at 624 n.12. In *American Motorcycle Ass'n*, the California court avoided potential problems resulting from vague standards for "active-passive" indemnity by permitting implied *partial* indemnity. See *American Motorcycle Ass'n*, 20 Cal. 3d at 595, 608, 578 P.2d at 910, 918, 146 Cal. Rptr. at 191, 199. The development of implied partial indemnity in California demonstrates two important points. First, the new doctrine highlights the current movement toward the development of equitable loss-shifting among wrongdoers. See, e.g., ILL. ANN. STAT. ch. 70, §§ 301-05 (Smith-Hurd Supp. 1983) (codifying comparative contribution — shifting loss according to relative degrees of fault — two years after the Illinois Supreme Court judicially created that right in *Skinner v. Reed-Prentice Div. Packing Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 439 (1977), *modified*, 70 Ill. 2d 16, *cert. denied*, 436 U.S. 946 (1978)); Comment, *supra* note 43, at 173.

Initially, indemnity jurisprudence was expanded to promote the goal of requiring each tortfeasor to bear the burden of the loss commensurate with his culpability. Later, courts and legislatures softened the harsh effects of all-or-nothing loss shifting by adopting comparative negligence. Comparative contribution is the next logical link in the evolution of these remedies. The Alaska Supreme Court joined this movement by judicially creating comparative negligence and noting that it requires amendment

Alaska was perhaps the supreme court's statement in *Kaatz* that it is willing to accept jury verdicts apportioning fault, even though not "precisely scientific," in order to avoid the harshness of contributory negligence.¹⁶³ The judicial efficiency and vagueness arguments advanced by opponents of comparative negligence were rejected by the court in *Kaatz*:

Judicial administration of the [comparative negligence] rule has not presented insuperable difficulties in those jurisdictions which have long employed it. Experience has not borne out the argument that comparative negligence is difficult for courts and juries to apply.

Similarly, careful studies tend to show that settlement of cases can be achieved as readily under the comparative negligence system as under the contributory negligence rule.¹⁶⁴

The supreme court has indicated the importance of altering the unfair rule of statutory pro rata contribution in Alaska.¹⁶⁵ In *State v. Guinn*,¹⁶⁶ decided one year after the court adopted comparative negligence, the court said in a footnote: "We are cognizant that this court's adoption of the doctrine of comparative negligence in *Kaatz v. State* will require amendment of Alaska's Uniform Contribution Among Tortfeasors Act."¹⁶⁷ Similarly, in *Vertecs*, the Alaska Supreme Court recognized that "pro rata contribution may not in all cases be the most fair method of loss-shifting"¹⁶⁸

The Alaska Supreme Court could have taken the initiative and adopted implied partial indemnity.¹⁶⁹ Judicial action in the face of legislative silence or indecision in the field of loss allocation is not new

of Alaska's Contribution Act. See *State v. Guinn*, 555 P.2d 530, 547 n.42 (Alaska 1976).

The second point highlighted by the development of implied partial indemnity is the crucial role the judiciary has played in the development of equitable loss shifting. In New York, for example, the judicial adoption of the implied partial indemnity doctrine was followed by legislative enactment of a comparative contribution statute two years later. See N.Y. CIV. PRAC. LAW §§ 1401-04 (McKinney 1976). The same process occurred in Illinois. See Comment, *supra* note 43, at 173. The Alaska Supreme Court has performed an equally significant role in the field of loss allocation. Alaska is one of a few states where the old contributory negligence rule was replaced by the judiciary with comparative negligence. The *Kaatz* decision was a judicial response to nine years of legislative indecision. See *infra* note 170 and accompanying text.

163. *Kaatz*, 540 P.2d at 1048. Juries may naturally want to apportion damages in cases of great disparity of fault. See *supra* note 155.

164. *Kaatz*, 540 P.2d at 1048 (footnote omitted).

165. *Guinn*, 555 P.2d at 547 n.42; see also *Arctic Structures*, 605 P.2d at 435 n.29.

166. 555 P.2d 530 (Alaska 1976).

167. *Id.* at 547 n.42 (citations omitted).

168. *Vertecs*, 661 P.2d at 625.

169. It has been noted recently that courts have more flexibility to modify common law indemnity than they do to modify statutory pro rata contribution; nevertheless, the respective role of the legislature should be considered. See PROSSER, *supra* note

in Alaska. The judicial adoption of comparative negligence in *Kaatz* occurred nine years after the legislature first considered, but failed to enact, a bill to adopt comparative negligence.¹⁷⁰ At the time *Kaatz* was decided, at least twenty-six states had enacted comparative negligence statutes, but only three states, including Alaska, had judicially adopted the doctrine.¹⁷¹ In contrast, the Alaska Supreme Court took a passive role in 1979 when it “considered and reject[ed] judicial creation of a partial indemnity rule of law,” without ever discussing the doctrine in its opinion.¹⁷² Similarly, the decision in *Vertecs* demonstrates that the Alaska Supreme Court is reluctant to intrude on the legislative role.

Clearly, the court believes that adopting implied indemnity would offend the policies of the Contribution Act. Thus, the court would almost certainly believe that adopting implied *partial* indemnity would be a far greater intrusion on the statutory pro rata mechanism, because implied partial indemnity would *replace* statutory contribution rather than supplement it in certain cases. Therefore, it is unlikely that the court will reconsider its rejection of implied partial indemnity in light of the decision in *Vertecs*.

B. Suggested Legislative Amendments to the Contribution Act to Permit Comparative Contribution

It is time for the Alaska legislature to replace its rigid pro rata contribution rule with the comparative fault provision proposed by the House Judiciary Committee in 1970.¹⁷³ States that have adopted a comparative fault system for plaintiffs, as Alaska did in *Kaatz*, should also adopt a comparative fault system for defendants.¹⁷⁴ The Alaska legislature could accept the judicial invitations and enact comparative contribution by simply amending the Contribution Act provision that provides: “in determining the pro rata shares of tortfeasors in the en-

16, § 51, at 344; *see also id.* § 3, at 20 (at least one current commentator believes courts should be more active in re-examining outmoded statutes).

170. For a brief recount of the unsuccessful attempts to pass comparative negligence legislation in Alaska, *see* Williams & Davidson, *supra* note 43, at 175 n.5.

171. *See id.* at 175 & nn.2-4.

172. *Arctic Structures*, 605 P.2d at 435 n.27.

173. *See* Heft, *Spreading the Burden: The Better Way to Accomplish Contribution Is by Comparative Negligence*, 22 FED. INS. COUNSEL Q. 37 (Summer 1972) (urging the adoption of comparative contribution and offering practical suggestions for attorneys who may later work with the doctrine); Note, *Reconciling Comparative Negligence, Contribution, and Joint and Several Liability*, 34 WASH. & LEE L. REV. 1159 (1977) (urging the adoption of comparative contribution); *see also supra* note 50.

174. *See* UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39, 40 commissioners' prefatory note (1985) (suggesting the enactment of a comparative contribution statute).

tire liability . . . their relative degrees of fault shall not be considered."¹⁷⁵ The amendment should allow consideration of relative fault. For clarity, the statute should also be amended by replacing the phrase "pro rata share" with "equitable share" wherever it appears in the Contribution Act.

In 1983, the Alaska Supreme Court recommended an amendment along these lines:

We question whether the rule [prohibiting consideration of relative fault] "distribute[s] the responsibility equitably among those who are jointly liable." . . . While the question of whether the Act should be amended is a matter committed to the judgment of the legislature, it is our view that where one joint tortfeasor seeks contribution from another, the tortfeasor's "pro rata share" should mean a share proportionate to his comparative fault. We add that such a rule would not undermine the rule of joint and several liability announced in *Arctic Structures, Inc. v. Wedmore*. We invite legislative consideration of this aspect of the Act.¹⁷⁶

The Uniform Comparative Fault Act (UCFA) would provide guidance to those drafting an amendment to the Contribution Act.¹⁷⁷ The UCFA is the most recent product of the National Conference of Commissioners on Uniform State Laws, approved in 1977, and is expressly intended to replace the 1955 pro rata Uniform Contribution Among Tortfeasors Act in those states that have adopted comparative negligence.¹⁷⁸ The UCFA requires that percentages of fault be established for each party in an action, including a plaintiff who is contributorily at fault.¹⁷⁹ The basis for contribution is each party's established equitable share, determined by considering relative degrees of fault in light of the nature of the conduct and its causal relationship to the damages.¹⁸⁰ Joint and several liability is retained, but reallocation of uncollectible shares occurs among all negligent parties, including negligent plaintiffs.¹⁸¹

V. CONCLUSION

The doctrines of implied indemnity and contribution were developed to remove common law obstacles to the fair allocation of tort loss. Alaska's tort loss allocation system is gradually advancing toward the goal of fairness, paralleling the increasing confidence in the judicial system's ability to apportion fault accurately and efficiently.

175. ALASKA STAT. § 09.16.020 (1983).

176. *Criterion Ins. Co. v. Laitala*, 658 P.2d 112, 118 n.11 (Alaska 1983) (citation omitted).

177. *See* 12 U.L.A. Supp. 39 (1985).

178. *Id.* at 40 commissioners' prefatory note.

179. *Id.* § 2(a), at 43.

180. *Id.* § 2(b); *see id.* at 43-44 commissioners' comment (listing circumstances relevant to determining relative fault).

181. *Id.* § 2(a)(2); *see id.* at 44 commissioners' comment.

The Alaska Supreme Court has participated in this development, most notably by adopting comparative negligence. Nonetheless, the court has clearly signalled its view that further improvement in this field requires the combined effort of the judiciary and the legislature.

The Alaska Supreme Court made it clear that, in light of the fact that the legislature chose and has left intact an equal sharing mechanism, the court will not impose on the legislature the court's view that contribution should be apportioned according to fault. As matters now stand, therefore, Alaska's tort loss allocation system forces joint tortfeasors to share losses equally regardless of their relative degrees of fault. Given the court's adherence to the statutory rule of pro rata contribution, its conclusion in *Vertecs* that adopting implied indemnity would create more uncertainty than it would resolve was correct. Rather than add a vague doctrine, Alaska should modernize its current rules to accomplish their intended result. The tradeoff between fairness and efficiency is unnecessary. The conflict should be resolved by amending the Contribution Act to permit comparative contribution. This legislative action would implement a tort loss allocation system that matches each party's liability with the percentage of damage for which he is responsible.

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