Loyola University Chicago Law Journal

Volume 14
Issue 3 *Spring 1983 Third-Party Practice Symposium*

Article 2

1983

Foreword

Allen Hartman Honorable
Justice, Illinois Appellate Court, First District

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*Honorable Allen Hartman**

> "[E]very one is responsible for the consequences of his own wrong, and, if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former."[1]

The foregoing statement, articulated in an indemnification setting, exemplifies the quest for simple equity and justice sought in third-party actions by litigants, lawyers and the courts. Although stated in many different ways and subjected to the vicissitudes of developing procedural and substantive law, the quest itself has remained constant for centuries.[2] The desire to allocate equitably the burdens of liability for wrongs caused by others is arguably the raison d'etre for third-party actions in common law. The course of such actions, however, has been neither easy nor straightforward.

Prior to 1955, Illinois civil procedure permitted a defendant to bring into an ongoing suit a third party who was or might have been liable to him for all or part of the plaintiff's claim against him by tendering to that third party the defense of the action. If the tender was rejected, the defense presented by the original defendant would be conclusive upon the third party as to all matters necessarily included in the adjudication.[3] The original

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1. Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 217, 67 N.E. 439, 439 (1903). *Accord* Gertz v. Campbell, 55 Ill. 2d 84, 90, 302 N.E.2d 40, 44 (1973).

2. See, e.g., Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898-1899), which traces common law contribution cases from the 17th century to the writer's own era, the late 19th century. Reath collects and explains many English and American authorities which permitted actions for contribution on similar equitable bases. Whereas many writers cited *Merryweather* as stating the general rule that equity will not enforce contribution as between intentional joint tortfeasors, Reath postulates that *Merryweather* actually states the exception. The general rule, asserts Reath, is that "among persons jointly liable the law implies an assumpsit either for indemnity or contribution . . . ." *Id.* at 177.

3. Sanitary Dist. v. United States Fidelity & Guar. Co., 392 Ill. 602, 612-13, 65 N.E.2d 364, 369 (1946).

defendant then bore the burden and expense of defending the original suit and of filing a second suit against the third party to ameliorate any injustice that resulted from a judgment against the defendant in the original lawsuit.[4]

To avoid this circuitous and onerous procedure, Illinois adopted a modern third-party practice procedure in 1955 by enacting section 25(2) of the Civil Practice Act, now section 2-406(b) of the Code of Civil Procedure.[5] This section conforms with the underlying policy of the Practice Act, the Code and rule 14 of the Federal Rules of Civil Procedure, which favors the disposition, in a single suit, of all issues between the parties and the avoidance of multiplicity of actions and inconsistent results.[6] The statute further provides for what is sometimes termed fourth and subsequent party actions as well, and sets forth the procedures to be followed by the parties in pursuing these remedies. Of course, section 2-406(b) is procedural only and creates no third-party substantive rights. For this reason, considerations of the substantive rules of law are inextricably intertwined in third-party practice analysis.

Recently, much attention has focused upon third-party practice due to the expanded and creative application of implied indemnity in tort and the legitimation of theories of contribution and comparative negligence. Yet, third-party practice has long been recognized as a useful and desirable procedure in other fields of law, as in actions between sureties on the obligation of another,[7] admiralty cases,[8] actions on negotiable instruments,[9] and breach of warranty or other obligations of a seller of goods.[10]

The erosion of the rule denying contribution between joint tortfeasors set forth in *Merryweather v. Nixan*[11] has also heightened interest in third-party practice. Attenuation of the rule occurred through the evolvement of various theories of implied

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4. Jenner & Tone, *Pleading, Parties and Trial Practice*, 50 NW. U.L. REV. 612, 613-14 (1955).

5. ILL. REV. STAT. ch. 110, ¶ 2-406(b) (1981).

6. Feirich, *Third-Party Practice*, 1967 U. ILL. L.F. 236, 237-38.

7. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 135 (1932) and cases therein collected.

8. Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 130 (1965) and cases therein collected.

9. Oulvey v. Converse, 326 Ill. 226, 229, 157 N.E. 245, 247 (1927) (codified at § 3-803 of the Uniform Commercial Code, ILL. REV. STAT. ch. 26, ¶ 3-803 (1981)).

10. ILL. REV. STAT. ch 26, ¶ 2-607(5)(a) (1981).

11. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

contract for indemnification in tort liability, including "active" and "passive" negligence, "misfeasance" and "nonfeasance,"[12] and "major" and "minor" fault,[13] often fashioned on unpredictable and ad hoc bases. The search for practical applications of appropriate procedural rules to initiate and determine litigation has intensified with the re-establishment of contribution among unintentional tortfeasors and the recognition of comparative negligence in many jurisdictions. Illinois, for instance, has recently adopted a comparative negligence standard in *Alvis v. Ribar*,[14] and has witnessed a resurgence of contribution actions following the supreme court decision in *Skinner v. Reed-Prentice Division Package Machinery Co.*[15] and the enactment of a statute governing contribution among joint tortfeasors.[16] These developments have increased appreciation of the utility of third-party procedure in Illinois.

This symposium on third-party practice is thus particularly timely and useful. It examines third-party practice in various contexts of tort law following *Skinner*, including consideration of joint and several liability addressed in *Coney v. J.L.G. Industries, Inc.*,[17] recently decided by the Illinois Supreme Court. Also considered is the federal courts' ancillary jurisdiction, which permits the addition of parties when the claims by or against them would not, standing alone, support federal jurisdiction. Procedural and substantive methods for shifting liability to third parties are also examined. Student notes forming the balance of the symposium include: a survey of contribution statutes across the fifty states, analysis of contribution in antitrust actions, the future of comparative negligence in Illinois, the effect of contribution on parent-child tort relationships, the application of contribution principles with reference to special statutory actions, such as the Illinois Dram Shop Act, and the proposal of a uniform standard for resolving conflicts between indemnity and contribution.

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12. Note, *supra* note 8.
13. ILLINOIS PATTERN JURY INSTRUCTIONS, CIVIL, NOS. 500.02, 500.22 (2d ed. 1977 Supp.).
14. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
15. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill. 2d 16, *cert. denied sub nom.* Hinckley Plastic, Inc., v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978) (abolishes the no-contribution rule, allowing a cause of action by the defendant against a third party based on relative degree of fault).
16. ILL. REV. STAT. ch. 70, ¶¶ 301-305 (1981).
17. No. 56306, slip op. (Ill. Sup. Ct. May 18, 1983).

The symposium is informative, practical and valuable to the legal profession and the courts and demonstrates the usefulness of continuing analysis of the law, as well as proposed procedures and remedies, of third-party practice for the future.