1985

Implied Indemnity in Illinois

Forrest Gunnison

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Torts Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol17/iss1/4

This Comment is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
Comments

Implied Indemnity in Illinois

INTRODUCTION

Under the common-law principle of joint and several liability, a single tortfeasor may be held liable for the entire loss sustained by an injured party even though the tortfeasor's act concurred with or combined with the act of another or others to produce the injury. A tortfeasor also may be held liable for subsequent injuries proximately caused by the tortfeasor's original wrongful act. At common law, the rule against contribution among joint tortfeasors prevented a party held liable for injury caused in part by the conduct of another from shifting part of the burden to the other wrongdoer. The common law, however, also recognized a right to implied indemnity which, in appropriate circumstances, permitted a tortfeasor to recoup his entire loss from another tortfeasor.

In 1977, the Illinois Supreme Court extinguished the common-law rule against contribution among joint tortfeasors. Thereafter, judges and juries were free to apportion liability as they saw fit

---


2. J. DOOLEY, 1 MODERN TORT LAW § 8.03 (1982); W. PROSSER, supra note 1, at 297.

3. The precise meaning of the expression "joint tortfeasor" has been the subject of much debate. The term was once limited to intentional tortfeasors who acted in concert, but it has evolved to include negligent tortfeasors whose acts result in a single indivisible injury to the plaintiff. Erickson v. Gliden, 76 Ill. App. 3d 218, 219, 394 N.E.2d 1076, 1078 (2d Dist. 1979) (indivisibility of the resultant injury is the test of jointness). See Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. PA. L. REV. 130, 131 n.9 (1932). In Illinois, the Contribution Among Joint Tortfeasors Act changed the basis for the definition of joint tortfeasor from the indivisibility of the resultant injury to liability for the same injury for causes of action which arose on or after March 1, 1978. ILL. REV. STAT. ch. 70, ¶ 301, 302(a) (1983). See infra note 63 for the text of this provision.

4. See infra notes 18, 22-23 and accompanying text.

5. See infra notes 17-56 and accompanying text.

whenever contribution was appropriate. The court, however, failed to address those situations in which, prior to the adoption of contribution, implied indemnity had permitted as a matter of law the complete shifting of liability from one tortfeasor to another. When the legislature codified the court's decision in the Contribution Among Joint Tortfeasors Act ("Contribution Act"), it too failed to address the status of implied indemnity. Various panels of the Illinois Appellate Court have disagreed as to the viability of implied indemnity after the adoption of contribution.

This note will address the status of implied indemnity in Illinois. After a brief description of implied indemnity and contribution, this note will review appellate court treatment of the relationship between contribution and implied indemnity. This note then will consider whether public policy suggests that implied indemnity should survive the adoption of contribution. Finally, principles of statutory construction will be used to examine the relationship between the Contribution Act and implied indemnity. This note will conclude that implied indemnity is still a viable concept in Illinois.

7. See infra note 128 and accompanying text.
8. The majority opinion in Skinner did not consider the status of indemnity. Justice Dooley, in dissent, indicated that the court should have resolved the relationship between indemnity and contribution. He believed the following questions should have been addressed: "What is the status of the tortfeasor who had a right to bona fide indemnity, not contribution? Has this right been impaired? Has the active-passive criterion of implied indemnity been abolished?" Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d at 38-39, 374 N.E.2d at 454 (Dooley, J., dissenting).
10. See infra note 63.
12. See infra notes 17-53 and accompanying text.
13. See infra notes 57-71 and accompanying text.
14. See infra notes 74-108 and accompanying text.
15. See infra notes 121-46 and accompanying text.
16. See infra notes 148-92 and accompanying text.
BACKGROUND

Indemnity in Illinois

Since Merryweather v. Nixan,17 the venerable case most often cited as the source of the common-law rule against contribution among joint tortfeasors,18 courts have distinguished between contribution and indemnity.19 Where two or more parties are held liable in tort to an injured party, contribution allows apportionment of liability among them.20 Indemnity, on the other hand, traditionally allowed a party who was legally responsible to a plaintiff for the plaintiff's damages, but who was not guilty of any fault or wrongdoing, to recoup his entire loss from a party whose fault or wrongful conduct actually gave rise to the plaintiff's injuries.21 Merryweather prohibited contribution22 and thus kept a culpable party from shifting part of the burden to other culpable tortfeasors.23 But indemnity, which permitted a complete shifting

18. Id. at 186, 101 Eng. Rep. at 1337. There is some question as to whether Merryweather actually stood for the proposition that there was no contribution among negligent tortfeasors. Merryweather involved intentional conduct, not negligence. However, the majority of American courts, including those in Illinois, extended the rule against contribution to include negligent tortfeasors. W. Prosser, supra note 1, at 306; see Wanack v. Michaels, 215 Ill. 87, 94-95, 74 N.E. 84, 87 (1905) (dictum); Michael & Appel, Contribution and Indemnity Among Joint Tortfeasors in Illinois: A Need for Reform, 7 Loy. U. Chi. L.J. 591, 591-92 (1976).

 Authorities encouraging adoption of contribution also have recognized that contribution and indemnity are distinct remedies. The Uniform Contribution Act specifically preserved the right to indemnity:

This Act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of 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. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(f) (1955). The 1976 Illinois Judicial Conference recommended both the adoption of contribution and the retention of some forms of implied indemnity. REPORT OF THE ILLINOIS JUDICIAL CONFERENCE 1976, at 198 (1976). See infra notes 173-75 and accompanying text.
20. W. Prosser, supra note 1, at 310.
of the burden from a nonculpable to a culpable defendant,\textsuperscript{24} survived the \textit{Merryweather} decision.\textsuperscript{25}

Prior to the adoption of contribution, Illinois had adopted not only the original form of implied contractual indemnity mentioned in \textit{Merryweather},\textsuperscript{26} but several other forms as well.\textsuperscript{27} The original implied contractual indemnity permitted indemnity in situations where one tortfeasor caused the injury but another party was exposed to vicarious or technical liability because of his relationship to the tortfeasor.\textsuperscript{28} Two elements were necessary to establish a cause of action for implied indemnity: a pre-tort relationship between the defendants sufficient to support the concept of an implied contract,\textsuperscript{29} and circumstances that demonstrated a duty to indemnify under the implied contract.\textsuperscript{30} Pre-tort relationships which sometimes gave rise to a duty to indemnify included principal-agent, employer-employee, lessor-lessee, contractor-subcontractor, and master-servant.\textsuperscript{31} A duty to indemnify was found in

\begin{itemize}
\item \textsuperscript{26} \textit{Merryweather}, 8 T.R. at 186, 101 Eng. Rep. at 1337.
\item \textsuperscript{28} See John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 339, 141 N.E. 739, 742 (1923), wherein the court announced the general principle that where one tortfeasor performs an act which produces injury and another party, who did not join in the act, is exposed to liability for the injury, the law will inquire into the real delinquency and place the ultimate liability upon the tortfeasor whose act caused the injury.
\item \textsuperscript{29} See Davis v. FMC Corp., 537 F. Supp. 466, 467 (C.D. Ill. 1982) ("Implied indemnity traditionally requires a pre-tort relationship which gives rise to a duty to indemnify."); Pryzbylski v. Perkins & Will Architects, 95 Ill. App. 3d 620, 623, 420 N.E.2d 524, 527 (1st Dist. 1981) (when implied indemnity is appropriate, the more culpable wrongdoer would be unjustly enriched if the less culpable party could not obtain indemnity); \textit{see also} S. SPEISER, C. KRAUSE & A. GANS, \textit{1 Law of Torts} § 3:26 (1983) (indemnity traditionally arises from contract, express or implied).
\item \textsuperscript{30} See Nelson v. Cook, 17 Ill. 443, 448-49 (1856) (an employee or an agent may have an implied promise of indemnity if directed to do an act that he does not know is wrong).
\item \textsuperscript{31} \textit{See, e.g.}, \textit{Id.} (principal-agent); Mierzewski v. Stronczek, 100 Ill. App. 2d 68, 241 N.E.2d 573 (1st Dist. 1968) (lessor-lessee); Palier v. New City Iron Works, 81 Ill. App. 2d 1, 225 N.E.2d 67 (1st Dist. 1967) (employer-employee); Chas. Indus. Co. v. Cecil B. Wood, Inc., 56 Ill. App. 2d 30, 205 N.E.2d 786 (2d Dist. 1965) (contractor-subcontrac-
situations where the one seeking indemnity incurred liability at the direction of, in reliance upon, and in the interest of the one sought to be charged,\(^3\) or the one seeking indemnity incurred liability because of a breach of duty owed to him by the one sought to be charged.\(^3\) In all of these cases, indemnity was granted only when the party seeking indemnity was without fault and was subject to mere vicarious or technical liability for the unauthorized and wrongful conduct of another.\(^3\)

A qualitative difference in the fault of joint tortfeasors and a pre-tort relationship between them also supported a claim for implied indemnity.\(^3\) The difference in fault could be either a qualitative

\(^{32}\) See Nelson v. Cook, 17 Ill. 443, 448-49 (1856); RESTATEMENT OF RESTITUTION § 90 (1937).


\(^{34}\) See Nelson v. Cook, 17 Ill. 443, 448-49 (1856); RESTATEMENT OF RESTITUTION § 96 (1937). The Illinois criteria for granting implied indemnity when the person seeking it is without fault are similar to those in the RESTATEMENT (SECOND) OF TORTS § 886B (1977):

Indemnity Between Tortfeasors. (1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.

(2) Instances in which indemnity is granted under this principle include the following:

(a) The indemnitee was liable only vicariously for the conduct of the indemnitor;

(b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful;

(c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied;

(d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(f) The indemnitor was under a duty to the indemnitee to protect him against the liability to the third person.

In the remainder of this note, the criteria for implied indemnity actions discussed here will be cumulatively referred to as "vicarious or technical implied indemnity."

\(^{35}\) See Harris v. Algonquin Ready Mix, Inc., 59 Ill. 2d 445, 449, 322 N.E.2d 58, 60 (1974) (a tortfeasor may seek indemnity from a joint tortfeasor if there exists a qualitative distinction between the negligence of the two tortfeasors); Tiffiny Decorating Co. v. Gen.
difference in negligence, i.e., one tortfeasor was actively negligent while the other was passively negligent ("active-passive" indemnity)\(^3\) or a difference in fault in a situation involving a safety statute, i.e., one tortfeasor's liability was mandated by the statute while the conduct of the second tortfeasor actually caused the injury.\(^3\)
Active-passive indemnity created the difficult problem of weighing degrees of negligence. A lack of uniformity in the application of "active-passive" indemnity produced inconsistent decisions. Furthermore, while "active-passive" indemnity was supposed to alleviate the harsh effects of the prohibition against contribution, this indemnity itself proved to be inequitable in that it allowed a negligent party, who participated in the wrongdoing, to shift the entire liability to another.

Equitable apportionment sometimes provided partial indemnity independent of either an implied contractual or an active-passive negligence basis, in situations where a tortfeasor was legally responsible for the reasonably foreseeable subsequent tortious acts of others. To obtain equitable apportionment, a tortfeasor had to demonstrate that the plaintiff had suffered a subsequent injury which was separate and distinct from the injury caused by the indemnity claim in terms of active-passive relationships. Id. at 454, 473 N.E.2d at 950.

The point at which negligence changes from active to passive is rather nebulous. Wheeler v. Ellison, 124 Ill. App. 3d 852, 857, 464 N.E.2d 857, 861 (2d Dist. 1984) ("What constitutes active negligence so as to preclude the shifting of liability between joint tortfeasors is not susceptible of precise definition and depends upon the facts of a particular case.") (citing Moody v. Chicago Transit Auth., 17 Ill. App. 3d 113, 117, 307 N.E.2d 789, 792-93 (1st Dist. 1974)). See Bua, Third Party Practice in Illinois: Express and Implied Indemnity, 25 DePaul L. Rev. 287, 300-07 (1976). In Moody, the court discussed the meaning of active and passive:

These words are terms of art and they must be applied in accordance with concepts worked out by the courts of review upon a case by case basis. Under appropriate circumstances, inaction or passivity in the ordinary sense may well constitute the primary cause of a mishap or active negligence. . . . It has been appropriately stated that "mere motion does not define the distinction between active and passive negligence."

17 Ill. App. 3d at 117, 307 N.E.2d at 792-93.

Skinner, 70 Ill. 2d at 12, 374 N.E.2d at 441 (application of active-passive indemnity where there is some fault attributable to both parties produces harsh effects without uniformity of results).

See infra note 55 and accompanying text.

Skinner, 70 Ill. 2d at 12, 374 N.E.2d at 441.

See Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973). In Gertz, improper treatment of a knee injury resulted in amputation of the plaintiff's leg. Id. at 86, 302 N.E.2d at 42. An automobile driver who hit the plaintiff was liable for the improper treatment under the principle that a tortfeasor is liable for subsequent injuries proximately caused by the original tortious act. Id. at 88, 302 N.E.2d at 43. The driver sought indemnity not for the full amount of the damages, but only for the damages directly attributable to the aggravation of the original injury. Id. at 86, 302 N.E.2d at 42. The court reasoned that equity required granting equitable apportionment in this situation. Id. at 89-92, 302 N.E.2d at 44-45.

party seeking apportionment.\textsuperscript{44} If he made the necessary showing, the tortfeasor was indemnified for any injuries attributable to the subsequent tortfeasor.\textsuperscript{45} Since both tortfeasors in such situations were actively at fault, equitable apportionment applied where traditionally both implied indemnity and contribution had been denied.\textsuperscript{46}

Finally even an actively negligent tortfeasor could bring an implied indemnity claim based upon products liability against the manufacturer of a defective product that had injured the plaintiff.\textsuperscript{47} Such a manufacturer could fortuitously escape liability if the injured party chose to sue a party "downstream" from the manufacturer unless the party downstream was permitted indemnification from the manufacturer for damages awarded to the plaintiff.\textsuperscript{48} Implied indemnity claims based upon upstream products liability\textsuperscript{49} thus furthered the goal of products liability\textsuperscript{50} by

\textsuperscript{44} Neuman v. City of Chicago, 110 Ill. App. 3d 907, 911, 443 N.E.2d 626, 630 (1st Dist. 1982). This requirement circumvented the rule against contribution among joint tortfeasors. For causes of action which arose prior to March 1, 1978, the accepted definition of joint tortfeasors was based upon the concept of a single indivisible injury. See supra note 3. Since the injuries in an equitable apportionment action were separate and distinct, the parties were not joint tortfeasors. Neuman, 110 Ill. App. 3d at 911, 443 N.E.2d at 629. The following facts had to be proved to sustain a cause of action for equitable indemnity: (1) The original tortfeasor was liable at law for the subsequent negligence of the other; (2) the parties were not joint tortfeasors; (3) they did not act in concert; (4) the injuries were sustained at different times; and (5) the original tortfeasor lacked control over the acts of the subsequent tortfeasor. \textit{Id.}

\textsuperscript{45} See, e.g., Gertz v. Campbell, 55 Ill. 2d 84, 90-92, 302 N.E.2d 40, 44 (1973).

\textsuperscript{46} \textit{Id.} at 94, 302 N.E.2d at 46. (Underwood, J., concurring) (apportionment sought is not cognizable under the Illinois approach to indemnification).


\textsuperscript{48} The terms "upstream" and "downstream" often are used in discussing implied indemnity claims based upon products liability. An "upstream" claim is one in which a seller, distributor, or a party in a similar position seeks indemnity from the manufacturer or other party further up the stream of commerce from the injured party. See Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 97-98, 463 N.E.2d 792, 805 (5th Dist. 1984). A "downstream" claim is one in which a manufacturer or similarly situated party seeks indemnity from a party down the stream of commerce, \textit{i.e.}, a party in a closer relationship with the injured party. See Gunderson v. Goodall Rubber Co., 120 Ill. App. 3d 748, 751, 458 N.E.2d 1099, 1101 (1st Dist. 1983) (Jiganti, J., dissenting), \textit{aff'd sub nom.} Van Slambrouck v. Economy Baler Co., 105 Ill. 2d 462, 475 N.E.2d 867 (1985).

\textsuperscript{49} See Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975) (citing L. \textsc{Frumer} & M. \textsc{Friedman}, \textsc{2 Products Liability \textsection 16A(4)(b)(i)).

\textsuperscript{50} See supra note 48.

\textsuperscript{51} See Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975) (citing L. \textsc{Frumer} & M. \textsc{Friedman}, \textsc{2 Products Liability, \textsection 16A(4)(b)(i)).
placing loss caused by a defective product on the manufacturer who placed the product in the stream of commerce. Such claims, however, were permitted only if the party seeking indemnity did not misuse the product or assume the risk of using the product.

Thus, the concept of implied indemnity was used historically to achieve the goal of products liability and to alleviate the harsh consequences of Illinois' rule against contribution among joint tortfeasors. Ultimately, the Illinois Supreme Court adopted contribution.

**Contribution in Illinois**

In a 1977 case, *Skinner v. Reed-Prentice Division Package Machinery Co.*, the Illinois Supreme Court overturned the common-law rule that prohibited contribution among joint tortfeasors. The supreme court recognized that "active-passive" indemnity had been used to mitigate the harsh results of the rule. However, the court also recognized that when there was fault attributable to more than one tortfeasor, the application of "active-passive" indemnity had itself produced some harsh results since indemnity required the active wrongdoer to compensate the injured party not only for the portion of the injury attributable to the active wrongdoer's negligence but also for the portion of the injury caused by

---

52. Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975). The negligence of a party seeking upstream implied indemnity based upon products liability does not bar the action. Simpson v. General Motors Corp., 108 Ill. 2d 146, 152, 483 N.E.2d 1, 3-4 (1985) (contributory negligence is not a factor in products liability); Liberty, 62 Ill. 2d at 82, 338 N.E.2d at 860 (purpose of strict liability is best served by eliminating negligence as an element of a strict liability action); see supra note 47 and accompanying text. However, misuse of a product, or assumption of the risk in using a product, is a bar to an upstream implied indemnity claim based upon products liability. Liberty, 62 Ill. 2d at 83, 338 N.E.2d at 860.


54. See supra notes 47-53 and accompanying text.


56. See infra notes 57-62 and accompanying text.


58. Id. at 16, 374 N.E.2d at 443. In Skinner, the plaintiff filed a products liability claim against a machine manufacturer for injuries suffered as a result of a machine malfunction. Id. at 4, 374 N.E.2d at 438. The manufacturer filed a third-party complaint against the plaintiff's employer. Id. The manufacturer argued that the employer should be held liable in the amount that would be commensurate with the degree to which the employer's misconduct contributed to the plaintiff's injuries. Id. at 5, 374 N.E.2d at 438.

59. Id. at 12, 374 N.E.2d at 441.
The court concluded that there was no valid reason for the continued existence of the no-contribution rule, but it failed to consider the status of implied indemnity after the adoption of contribution.

Following the court's lead, the Illinois General Assembly enacted the Contribution Act in 1981. This statute provides that a right of contribution exists where two or more persons are subject

---

60. Id. See supra notes 35-41 and accompanying text.
61. Skinner, 70 Ill. 2d at 13, 374 N.E.2d at 442.
62. Id. at 38-39, 374 N.E.2d at 454 (Dooley, J., dissenting).
63. ILL. REV. STAT. ch. 70, ¶¶ 301-05 (1983). The Act provides in relevant part as follows:

2. Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

(c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.

(d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.

(e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

3. Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability. If equity requires, the collective liability of some as a group shall constitute a single share.

4. Rights of Plaintiff Unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act.

5. Enforcement. A cause of action for contribution among joint tortfeasors may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action.

ILL. REV. STAT. ch. 70, ¶¶ 302-05 (1983).

For detailed discussions of the Contribution Act, see Horan, Contribution in Illinois: Skinner v. Reed-Prentice and Senate Bill 308, 61 CHI. B. REC. 331 (1980); O'Leary, Good
to liability in tort arising out of the same injury and one has paid more than his pro rata share of the common liability. The pro rata share of each tortfeasor is determined in accordance with his relative culpability. The statute protects tortfeasors that settle in good faith with the plaintiff against further suits for contribution.

The Contribution Act provides relief in several circumstances where implied indemnity historically had been the sole remedy. For example, contribution has been allowed in active-passive negligence situations and in situations in which the liability of one defendant is based on the special duties of a safety statute. Additionally, a party held liable to a plaintiff-employee is no longer restricted to an indemnity remedy but may now seek contribution from the plaintiff's employer.

---


64. ILL. REV. STAT. ch. 70, ¶ 302(b) (1983). See supra note 63 for the text of this provision.

65. ILL. REV. STAT. ch. 70, ¶ 303 (1983). See supra note 63 for the text of this provision.

66. ILL. REV. STAT. ch. 70, ¶ 302(d) (1983). See supra note 63 for the text of this provision.

67. See supra note 36 and accompanying text.

68. See Roberts v. Heilgeist, 124 Ill. App. 3d 1082, 1087, 465 N.E.2d 658, 662 (2d Dist. 1984) (contribution allowed where cotortfeasors are concurrent or successive as long as the same injury is involved); Morgan v. Kirk Bros., Inc., 111 Ill. App. 3d 914, 919, 444 N.E.2d 504, 508 (2d Dist. 1982) (contribution not prevented by fact that tortfeasors were subject to a common liability resting on different theories rather than on a common standard of wrongdoing).


70. See Miller v. Dewitt, 37 Ill. 2d 273, 289, 226 N.E.2d 630, 640-41 (1967) (allowing indemnity on theory that unless a third party, who was not guilty of active negligence, could succeed in an action against an employer who was guilty of active negligence, the third party would bear the burden of a loss that should fall on the employer).

The relationship between implied indemnity and contribution remains uncertain. Neither the *Skinner* decision nor the Contribution Act considered the status of implied indemnity after the adoption of contribution,\(^72\) and the Illinois Appellate Court cases are in conflict.\(^73\)

**THE APPELLATE COURT DECISIONS**

*Van Jacobs v. Parikh: Indemnity After the Adoption of Contribution*

The first appellate court decision that took a position on the vitality of implied indemnity after the adoption of contribution was *Van Jacobs v. Parikh*.\(^74\) In *Van Jacobs*, the widow of a motorcycle rider who died as a result of a collision with an automobile brought a wrongful death action against the driver of the automobile and the manufacturer of the helmet worn by the decedent at the time of the accident.\(^75\) The widow settled with the driver for the amount provided by his insurance policy and executed a covenant not to sue.\(^76\) The manufacturer then filed a three-count third-party complaint against the driver seeking equitable apportionment,\(^77\) contribution\(^78\) and implied indemnity.\(^79\)

The appellate court held that implied indemnity had not been nullified by the Contribution Act\(^80\) but had, rather, been placed back upon its theoretical foundation.\(^81\) The court held that a cause

---

\(^{72}\) See supra notes 62-63 and accompanying text.

\(^{73}\) See infra notes 74-108 and accompanying text.

\(^{74}\) 97 Ill. App. 3d 610, 422 N.E.2d 979 (1st Dist. 1981).

\(^{75}\) Id. at 611, 422 N.E.2d at 980.

\(^{76}\) Id.

\(^{77}\) Id. See supra notes 42-46 and accompanying text. The court upheld dismissal of the claim for equitable apportionment, holding that since the Contribution Act applied to tortfeasors subject to liability for the same injury, this claim was actually for contribution and thus barred by the good faith settlement. *Van Jacobs*, 97 Ill. App. 3d at 614, 422 N.E.2d at 982. See supra note 66 and infra notes 82, 136 and accompanying text.

\(^{78}\) *Van Jacobs*, 97 Ill. App. 3d at 611, 422 N.E.2d at 980. The court upheld dismissal of the contribution count because the driver had settled and was shielded from any contribution claim by the Contribution Act, ILL. REV. STAT. ch. 70, ¶ 302(d) (1983), which provides that for tortfeasors subject to its provisions, good faith settlements will discharge the settling parties' liabilities for contribution. *Van Jacobs*, 97 Ill. App. 3d at 612, 422 N.E.2d at 980-81.

\(^{79}\) Id. at 611, 422 N.E.2d at 980. See infra note 82.

\(^{80}\) *Van Jacobs*, 97 Ill. App. 3d at 613, 422 N.E.2d at 981.

\(^{81}\) Id.
of action for implied indemnity requires both a qualitative distinc-
tion between the conduct of joint tortfeasors and a duty to indem-
ify arising not from the relative fault of the tortfeasors but from
the pre-tort relationship between the tortfeasors. 82

The Van Jacobs court characterized active-passive negligence indem-
nity as a creative expansion of implied indemnity beyond its
traditional precepts, implemented to lessen the harshness of the no-
contribution rule. 83 Since the Contribution Act accomplished this
same purpose, the court found no further need for “active-passive”
indemnity. 84

In interpreting the Van Jacobs court’s holding that implied in-

82. Id. See supra notes 29-34 and accompanying text. The court upheld dismissal of the
claim for indemnity because there was no pre-tort relationship between the manufac-
turer and the driver. Van Jacobs, 97 Ill. App. 3d at 613, 422 N.E.2d at 982.
83. Van Jacobs, 97 Ill. App. 3d at 613, 422 N.E.2d at 981.
84. Id. See supra notes 35-36 and accompanying text. Other states with contribution
statutes also have limited implied indemnity to claims based upon vicarious or technical
liability. For example, Minnesota’s contribution statute, Minn. Stat. § 604.02 (1984),
like Illinois’ statute, does not mention the status of indemnity. Minnesota’s common law
implied indemnity was very similar to that of Illinois:

A joint tortfeasor may generally recover indemnity only in the following situa-
tions:
(1) Where the one seeking indemnity has only a derivative or vicarious liabil-
ity for damage caused by the one sought to be charged.
(2) Where the one seeking indemnity has incurred liability by action at the
direction, in the interest of, and in reliance upon the one sought to be charged.
(3) Where the one seeking indemnity has incurred liability because of a
breach of duty owed to him by the one sought to be charged.
(4) Where the one seeking indemnity has incurred liability merely because of
failure, even though negligent, to discover or prevent the misconduct of the one
sought to be charged.
(5) Where there is an express contract between the parties containing an
explicit undertaking to reimburse for liability of the character involved.
Hendrickson v. Minn. Power & Light Co., 258 Minn. 368, 372, 104 N.W.2d 843, 848
See supra notes 17-41 and accompanying text. In Tolbert, “active-passive” indemnity
was eliminated, but the other common-law implied indemnity actions, including implied
indemnity based upon a pre-tort relationship and technical or vicarious liability, survived
184 (Minn. 1979).

Several other states have reached similar conclusions even though their contribution
statutes specifically preserve all rights to indemnity. See, e.g., Houdaille Indus., Inc. v.
Edwards, 374 So. 2d 490, 493 (Fla. 1979) (weighing degrees of negligence “has no place
in the concept of indemnity for the one seeking indemnity must be without fault”); Rath-
of common law indemnity principles to transfer all the loss to the more negligent of two
tortfeasors would intrude on the apportionment rule of the contribution statute); Cartel
Capital Corp. v. Fireco of N.J., 81 N.J. 548, 566, 410 A.2d 674, 683 (1980) (it would be
inequitable to permit an active wrongdoer to obtain implied indemnity from another
wrongdoer and thus escape any responsibility). See generally 2 Comparative Neigli-
demnity claims based upon a qualitative distinction in the conduct of the parties and a pre-tort relationship survived the Contribution Act.\(^8\) appellate court panels have reached different conclusions. One panel has interpreted \textit{Van Jacobs} as preserving implied indemnity only for cases involving a pre-tort relationship and vicarious liability,\(^6\) while another panel has stated that according to \textit{Van Jacobs} the Contribution Act did not alter the right to implied indemnity in any way.\(^7\)

Lowe v. Norfolk & Western Railway: \textit{Indemnity and Products Liability After the Adoption of Contribution}

The Illinois Appellate Court also has preserved implied indemnity in a products liability action. In \textit{Lowe v. Norfolk & Western Railway},\(^8\) a tank car being transported by Norfolk & Western Railway Company ("N&W") was punctured by its own running gear, causing the release of an allegedly hazardous chemical.\(^9\) The plaintiffs, forty-seven employees of N&W who were exposed to the chemical, sued N&W for negligence.\(^10\) They also filed products liability complaints against the manufacturer of the tank car, the manufacturer of a portion of the tank car's running gear, and the manufacturer of the chemical.\(^1\) N&W filed counterclaims for con-

---

85. \textit{Van Jacobs}, 97 Ill. App. 3d at 613, 422 N.E.2d at 981. The court relied upon \textit{Muhlbauer} v. Kruzel, 39 Ill. 2d 226, 231-32, 234 N.E.2d 790, 793 (1968), for the proposition that a pre-tort relationship must be demonstrated to sustain a claim for implied indemnity. \textit{Van Jacobs}, 97 Ill. App. 3d at 613, 422 N.E.2d at 981. \textit{See supra} note 35. The argument has been raised that \textit{Muhlbauer} does not support this claim. \textit{See supra} note 35. However, this requirement can be supported by statutory interpretation, independent of \textit{Muhlbauer}. \textit{See infra} notes 148-75 and accompanying text.

86. \textit{Morizzo} v. \textit{Laverdure}, 127 Ill. App. 3d 767, 774, 469 N.E.2d 653, 658 (1st Dist. 1984). On appeal a party from whom the defendant sought implied indemnity argued specifically that the Contribution Act had replaced "active-passive" indemnity. \textit{Id.} at 770, 469 N.E.2d at 655. The court agreed and held that the Contribution Act extinguished implied indemnity in Illinois except where a pre-tort relationship between the parties created a duty to indemnify, or where the indemnity action was based upon upstream strict liability. \textit{Id.} at 774, 469 N.E.2d at 658. \textit{See infra} notes 109-16 and accompanying text.

87. \textit{Allison} v. \textit{Shell Oil Co.}, 133 Ill. App. 3d 607, 610, 479 N.E.2d 333, 335-36 (5th Dist. 1985). \textit{Van Jacobs} was interpreted to state that the Contribution Act did not alter the right to indemnity in any respect, \textit{see infra} notes 109-16 and accompanying text, but the \textit{Allison} court pointed out that neither a pre-tort relationship which gave rise to a duty to indemnify nor strict liability was involved in the instant case because the case arose under the Structural Work Act. \textit{Id.} at 610-11, 479 N.E.2d at 335-36. \textit{See supra} note 37. The court held that the best policy in Structural Work Act cases was to allow contribution rather than indemnity. \textit{Allison}, 133 Ill. App. 3d at 611, 479 N.E.2d at 337.


89. \textit{Id.} at 84-85, 463 N.E.2d at 797.

90. \textit{Id.} at 85, 463 N.E.2d at 797.

91. \textit{Id.} Plaintiffs sued the manufacturer of the tank car and the manufacturer of a
tribution and indemnity against each of the other defendants.\textsuperscript{92}

All of the counterdefendants to N&W's claims argued that the Contribution Act had abolished implied indemnity.\textsuperscript{93} The court noted that the policies underlying contribution and products liability were different: contribution encouraged settlements while products liability imposed liability for injuries caused by a defective product on the one who placed the defective product into the stream of commerce.\textsuperscript{94} The court held that since it was more important to protect the public from defective products by holding manufacturers strictly liable than to encourage settlements, the Contribution Act did not prohibit N&W's implied indemnity counterclaims based upon products liability.\textsuperscript{95}

All of the defendants except N&W settled with the plaintiffs before trial.\textsuperscript{96} Since the Contribution Act protects parties that settle in good faith against suits for contribution,\textsuperscript{97} the defendants to N&W's counterclaims moved for dismissal of all counterclaims including the implied indemnity counterclaims.\textsuperscript{98} The court held that a good faith settlement under the Contribution Act does not bar an implied indemnity claim based upon products liability.\textsuperscript{99} According to the court, if a manufacturer of a defective product could escape indemnity liability by making a contribution settlement, the policy of placing the liability for injuries on the one who placed a defective product in the stream of commerce would be frustrated because the manufacturer's contribution settlement portion of the tank car's running gear on a products liability theory, and the chemical manufacturer for negligence and willful and wanton misconduct in addition to products liability. \textit{Id.}

\textsuperscript{92} \textit{Id.} at 90, 463 N.E.2d at 801. There were six counts, two against each of the other defendants; each count sought contribution and implied indemnity. One count against each defendant alleged strict liability; the other alleged negligence. \textit{Id.} at 92-93, 463 N.E.2d at 802. Thus, the court had to consider contribution claims based upon negligence and strict liability, and implied indemnity claims based upon negligence and strict liability. \textit{Id.} at 93, 463 N.E.2d at 802.

\textsuperscript{93} \textit{Id.} at 93, 463 N.E.2d at 802.

\textsuperscript{94} \textit{Id.} at 97, 463 N.E.2d at 805.

\textsuperscript{95} \textit{Id.} at 98, 463 N.E.2d at 806. \textit{See infra} notes 131-34 and accompanying text.

\textsuperscript{96} Lowe, 124 Ill. App. 3d at 90-91, 463 N.E.2d at 801.

\textsuperscript{97} ILL. REV. STAT. ch. 70, ¶ 302(c), (d) (1983). \textit{See supra} note 63 for the text of these provisions.

\textsuperscript{98} Lowe, 124 Ill. App. 3d at 91, 463 N.E.2d at 801. The court held that N&W's contribution claims were barred under the good faith settlement provision of the Contribution Act. \textit{Id.} at 96, 463 N.E.2d at 804 (citing ILL. REV. STAT. ch. 70, ¶ 302(c), (d) (1983)). The court affirmed dismissal of the negligence counts, which were based on an active-passive theory, not because they failed to state a cause of action, but because the parties failed to brief them. Lowe, 124 Ill. App. 3d at 96, 463 N.E.2d at 804.

\textsuperscript{99} \textit{Id.} at 98-99, 463 N.E.2d at 806.
would shift any remaining liability for injuries caused by the defective product to the party seeking indemnification.100

Holmes v. Sahara Coal Co.: The Contribution Act Extinguished All Implied Indemnity Claims

In *Holmes v. Sahara Coal Co.*,101 another panel of the Illinois Appellate Court took a position which differed sharply from the *Van Jacobs* and *Lowe* opinions. *Holmes* involved a mechanic who brought an action to recover for personal injuries suffered while repairing a coal-mining tractor for the mine’s owner.102 The complaint charged the owner with negligence and stated a products liability claim against the manufacturer of the tractor.103 The mine owner filed a counterclaim for indemnity against the manufacturer of the tractor, and the manufacturer sought contribution from the mine owner.104

The court agreed with the manufacturer that the mine owner had failed to state a cause of action because the Contribution Act had extinguished common-law implied indemnity claims.105 Indemnity, the court stated, created a scheme in which the tortfeasor’s culpability bore no direct relation to his burden for the loss,106 whereas the Contribution Act determined a tortfeasor’s contribution share according to his relative culpability.107 Thus, indemnity, according to the court, would undermine the policy underlying the right to contribution.108

**ANALYSIS**

*The Conflict in the Appellate Court*

Various panels of the appellate court have reached different conclusions as to both the scope and the soundness of the *Van Jacobs* court’s conclusion that implied indemnity remains a viable cause of action where there is a qualitative distinction in the conduct of the parties and a pre-tort relationship.109 Panels considering *Van Ja-
cobs' scope have varied in their interpretation of Van Jacobs' re-


In Heinrich, the Illinois Supreme Court remanded the case to the appellate court for determination of whether implied indemnity survived the adoption of contribution. Heinrich, 99 Ill. 2d at 351, 459 N.E.2d at 939. As this note was going to press the appellate court issued a decision in Heinrich v. Peabody Int'l Corp., No. 81-1770 (Ill. App. Ct., 1st Dist. Dec. 13, 1985). The appellate court held that the Contribution Act extinguished all implied indemnity claims, Id. at 20, because contribution is an equitable remedy and implied indemnity defeats the purposes of contribution. Id. at 10. In support of its conclusion, the court cited 1) Report of the Illinois Judicial Conference 1976, which urged the adoption of contribution; Id. at 6; see supra note 19 and infra notes 173-75 and accompanying text; 2) the inequities of "active-passive" implied indemnity, Heinrich, No. 81-1770, slip op. at 5-9; see infra notes 121-26 and accompanying text; and 3) the argument that a party has little or no incentive to make a contribution settlement if the party remains liable for implied indemnity. Heinrich, No. 81-1770, slip op. at 13; see infra notes 135-46 and accompanying text.

The court failed to address the 1976 Judicial Conference recommendation that implied indemnity be returned to its common-law status after the adoption of contribution. REPORT OF THE ILLINOIS JUDICIAL CONFERENCE 1976, at 219 (1976); see infra notes 173-75 and accompanying text. Also, the decision suggests that the problems associated with "active-passive" implied indemnity are applicable to the original common-law bases for implied indemnity. The decision does not explain why permitting an implied indemnity claim is inequitable when a party is only technically or vicariously liable and there is a pre-tort relationship with the actual wrongdoer, nor does it explain why a technically or vicariously liable party should share in the damages. Rather, the court argued that contribution adequately protects such a party. Heinrich, No. 81-1770, slip op. at 15-16. The contrary argument raised in Jethroe v. Koehring Co., 603 F. Supp. 1200, 1204 (S.D. Ill. 1985) (in a contribution claim by a vicariously or technically liable party, that party would, more likely than not, pay some portion of the damages because the jury would assign a percentage based on damages rather than liability); see infra notes 121-46 and accompanying text, was not addressed.

The Heinrich appellate court criticized the decision in Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 422 N.E.2d 979 (1st Dist. 1981); see supra notes 74-87 and infra notes 110-16 and accompanying text, and in Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 463 N.E.2d 792 (5th Dist. 1984); see supra notes 88-100 and infra notes 138-39 and accompanying text. Heinrich, No. 81-1770, slip op. at 15-17. The appellate court panel did not challenge the holding of Van Jacobs directly, but instead challenged Van Jacobs' reliance upon Muhlbauer v. Kruzel, 39 Ill. 2d 226, 234 N.E.2d 790 (1968), for a pre-tort relationship; see supra note 35, and Van Jacobs' use of qualitative distinctions in conduct. Heinrich, No. 81-1770, slip op. at 15-16; see supra notes 74-87 and accompanying text. The criticism of the qualitative distinction in conduct of the tortfeasors is based upon the problems that arise with "active-passive" implied indemnity. Heinrich, No. 81-1770, slip op. at 15. Although the Heinrich court acknowledged that Van Jacobs held that "active-passive" implied indemnity no longer exists, Id. at 14, it failed to recognize that a qualitative distinction in conduct should be interpreted as supporting only implied indemnity claims based upon vicarious or technical liability. See supra note 36 and infra notes 110-16 and accompanying text. Furthermore, the court did not recognize that the requirement of a pre-tort relationship can be supported without reliance upon Muhlbauer. See supra note 84 and infra notes 148-75 and accompanying text. The criticism of Muhlbauer also ignores the Illinois Supreme Court's continued reliance upon the holding of that
requirement of a qualitative distinction in conduct. Such a distinction occurs not only when one tortfeasor is actively negligent and the other passively negligent, but also when one party is totally without fault but is vicariously or technically liable.

Since the *Van Jacobs* court explicitly held that active-passive negligence indemnity was no longer needed after the adoption of contribution, the court's reference to a qualitative distinction in conduct must refer to situations in which the party seeking indemnity is only vicariously or technically liable. This interpretation makes the *Van Jacobs* opinion internally consistent and contradicts any contention that *Van Jacobs* held that the Contribution Act did not alter the right to implied indemnity in any way.

The *Holmes* court denied the viability of indemnity not only where the party seeking indemnity is vicariously or technically liable but also, as in *Lowe*, where the indemnity claim is based

---

106 Loyola University Law Journal [Vol. 17


The *Heinrich* panel claimed that the *Lowe* court offered no justification for maintaining implied indemnity based upon upstream products liability. *Heinrich*, No. 81-1770, slip op. at 17. The *Lowe* court compared the policies of strict liability and contribution to arrive at its decision, *Lowe*, 124 Ill. App. 3d at 98-99, 463 N.E.2d at 806; see supra notes 88-100 and infra notes 131-42 and accompanying text, but the *Heinrich* panel concluded that the policies of strict liability are satisfied by not requiring the injured party to prove privity or negligence, and by imposing joint and several liability upon the defendants in the distributive chain. *Heinrich*, No. 81-1770, slip op. at 16-17. The *Lowe* court based its analysis upon the direction provided by the Illinois Supreme Court in *Suvada* v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *Lowe*, 124 Ill. App. 3d at 97, 463 N.E.2d at 805; see supra notes 88-100 and infra notes 131-42 and accompanying text. In *Suvada*, the court stated that the public policy consideration which motivated the adoption of strict liability was that the economic loss suffered by the injured party should be imposed on the manufacturer who created the risk and reaped the profit. *Suvada*, 32 Ill. 2d at 619, 210 N.E.2d at 186. Since the *Heinrich* court focused upon the attributes of a products liability claim rather than upon the public policy reason for the claim, the court's rejection of implied indemnity claims based upon upstream products liability is not well founded.

10. See supra notes 85-87 and accompanying text.

11. See supra notes 35-36 and accompanying text.

12. See supra notes 28-34 and accompanying text.

13. See supra notes 35-36 and accompanying text.


16. This was the interpretation of *Van Jacobs* in Allison v. Shell Oil Co., 133 Ill. App. 3d 607, 610, 479 N.E.2d 333, 335-36 (5th Dist. 1985). See supra note 87 and accompanying text.

17. See supra notes 99-100 and accompanying text.
upon upstream products liability. The *Holmes* court held that implied indemnity would defeat the equitable principles underlying the Contribution Act by creating a scheme in which the tortfeasor’s culpability bore no direct relation to his share of the burden for the plaintiff’s loss. An analysis of public policy, however, demonstrates that implied indemnity is not inequitable when it is based upon a combination of a pre-tort relationship and vicarious or technical liability, or upon upstream products liability.

*Retention of Indemnity in Limited Circumstances Assures Equitable Results*

Both contribution and indemnity are based upon the equitable concept of unjust enrichment. The appellate court consistently has held that a complete shifting of the liability from one tortfeasor to another when both are negligent is no longer viable. "Active-passive" implied indemnity permits such a complete shifting even though joint tortfeasors are both negligent. Thus, granting one tortfeasor indemnity based on active-passive negligence considerations would defeat the public policy of the Contribution Act favoring apportionment of liability according to relative fault.

However, when a person liable to the injured party is without fault, i.e., vicariously or technically liable, and the injury was caused by another party, implied indemnity is equitable. It does not destroy the assignment of liability in proportion to responsibil-

---


119. *Holmes*, 131 Ill. App. 3d at 676, 475 N.E.2d at 1390. See *supra* notes 105-08 and accompanying text.

120. See *infra* notes 121-46 and accompanying text. One panel of the appellate court has stated that implied indemnity survived the Contribution Act only in these two types of situations. *Allison v. Shell Oil Co.*, 133 Ill. App. 3d 607, 609-11, 479 N.E.2d 333, 336 (5th Dist. 1985). See *supra* notes 87, 116 and accompanying text.

121. See *infra* notes 121-46 and accompanying text. One panel of the appellate court has stated that implied indemnity survived the Contribution Act only in these two types of situations. Allison v. Shell Oil Co., 133 Ill. App. 3d 607, 609-11, 479 N.E.2d 333, 336 (5th Dist. 1985). See *supra* notes 87, 116 and accompanying text.


123. See *supra* note 36 and accompanying text.

ity for the tortious act since it permits the technically or vicariously liable tortfeasor to place the liability on the tortfeasor who performed the wrongful act.\textsuperscript{125} The wrongdoer is not liable for any damages other than those associated with the injuries his act caused.\textsuperscript{126}

Comparison of the potential results of contribution and implied indemnity when there is a pre-tort relationship between joint tortfeasors and one of the tortfeasors is only vicariously or technically liable demonstrates that only implied indemnity assures an equitable result. Consider the contractor who is not negligent in any respect but who is held technically or vicariously liable for the conduct of his negligent subcontractor.\textsuperscript{127} If contribution were the contractor's only remedy, the jury could apportion damages as it saw fit even if it determined that the contractor was only technically liable.\textsuperscript{128} The contractor in such a situation is more likely than not to pay some portion of the damages.\textsuperscript{129} The subcontractor is unjustly enriched to the extent that the jury assesses damages against the contractor. Thus, contribution can produce an inequitable result.

Implied indemnity, on the other hand, would prevent an inequitable result in this situation. If the contractor seeks implied indemnity, and the jury decides that he was not negligent but only technically or vicariously liable, then as a matter of law the subcontractor alone will compensate the victim.\textsuperscript{130} There is no possibility that the subcontractor will be unjustly enriched. Each tortfeasor is responsible only for the harm his act inflicted. Hence, equitable assessment of tort liability does not support elimination of this aspect of implied indemnity.

Similarly, implied indemnity based upon an upstream products liability claim is equitable and does not defeat products liability

\textsuperscript{125} See supra note 21 and accompanying text.
\textsuperscript{126} Id.
\textsuperscript{127} Jethroe v. Koehring Co., 603 F. Supp. 1200, 1204 (S.D. Ill. 1985). "In those cases where a party is more than technically negligent, as where the employer has failed to properly supervise the employee,. . . implied indemnity would no longer be an option to the employer since his negligence has proceeded past the mere technical negligence." Id.
\textsuperscript{128} Id. (in a claim for contribution, "once the jury determined that the employer was vicariously liable, or the contractor technically liable. . . , it would be free to apportion fault as it saw fit.").
\textsuperscript{129} Id. (in a contribution claim by a vicariously or technically liable party, that party would, more likely than not, pay some portion of the damages because the jury would assign a percentage based on damages rather than liability).
\textsuperscript{130} Id. ("[T]he Court believes that in the traditional implied indemnity situation, the entire loss should be placed on the indemnitor as a matter of law.").
Consider a distributor who is sued on a products liability theory for injuries caused by a defective product. Assume that the distributor acts innocently and does not assume the risk or misuse the product. Allowing the distributor to seek implied indemnity from the manufacturer of the defective product will accomplish the policy of products liability by placing the burden for injuries caused by the defective product on the manufacturer who placed the product in the stream of commerce. Moreover, implied indemnity will not require the manufacturer to pay more than it would have paid had it been sued directly. Here again, implied indemnity will not produce the inequity that the Holmes court feared.

**Implied Indemnity and Settlements**

While the continued vitality of implied indemnity in some circumstances is entirely consistent with equitable principles, it involves a potential conflict with another policy consideration underlying the Contribution Act. Public policy favors settlement of tort claims. The Contribution Act encourages settlement by protecting a party that settles in good faith from liability for contri-

131. See supra note 100 and infra notes 132-34 and accompanying text.
132. See Hammond v. North Am. Asbestos Corp., 97 Ill. 2d 195, 206, 454 N.E.2d 210, 216 (1983) ("all persons in the distributive chain are liable for injuries resulting from a defective product"). Although Illinois places the burden for a defective product on the manufacturer, see supra note 94 and infra note 133 and accompanying texts, the seller is held liable to help assure the injured plaintiff a source of recovery. See WALKOWIAK, UNIF. PRODUCTS LIABILITY ACT § 12.02[3] (1980). This concept is codified in Ill. Code of Civil Procedure § 2-621, ILL. REV. STAT. ch. 110, ¶ 2-621 (1983). Under this section, a seller may be dismissed from a products liability action once the manufacturer of the product is brought into the suit. ILL. REV. STAT. ch. 110, ¶ 2-621(b) (1983). However, if the plaintiff can demonstrate that the manufacturer no longer exists, is no longer able to satisfy a judgment, or would be unable to satisfy a reasonable settlement or other agreement with the plaintiff, the seller will be brought back into the action. Id.
133. See Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 14, 374 N.E.2d 437, 443 (1977), cert. denied sub nom. Hinckley Plastic, Inc. v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978) (public policy consideration which motivated the adoption of strict liability was that the economic loss suffered by the user should be imposed on the manufacturer who created the risk and reaped the profit); a similar conclusion was reached in Lawler, supra note 124, at 82. However, the author, while noting some appellate court decisions, did not consider the contrary arguments presented in Holmes v. Sahara Coal Co., 131 Ill. App. 3d 666, 676, 475 N.E.2d 1383, 1390 (5th Dist. 1985).
bution. One commentator has argued that implied indemnity should be included within the Contribution Act’s settlement provision because a party who remains liable for implied indemnity after settlement has no incentive to settle. The encouragement of settlements, however, must be balanced against other public policy considerations.

In products liability actions, encouragement of settlement should be subordinated to the more important policy of protecting the public from defective products. If the manufacturer of a defective product can escape a portion of its potential liability by making a settlement which will protect it from an implied indemnity action, then the products liability policy of placing the entire liability for a defective product on the party who places it in the stream of commerce will be frustrated.

As an example, consider a products liability action in which the plaintiff sues both the seller, who is without fault, and the manufacturer to recover $5,000,000 in damages for injuries caused by a defective product. The manufacturer settles in good faith with the plaintiff for $500,000. If the Contribution Act bars the seller from seeking indemnity from the manufacturer, the seller is faced with a dilemma: he may settle, despite his lack of culpability, or he may continue to defend the case with no hope of recouping anything from the manufacturer. If the case continues and the plaintiff prevails, the seller will have to pay the amount by which the judgment exceeds $500,000. In either of these situations, the manufacturer has successfully escaped part of the burden associated with the injuries caused by the defective product which it produced. Therefore, the manufacturer by settling has circumvented the policy underlying products liability.

138. Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 98, 463 N.E.2d 792, 806 (5th Dist. 1984) (“Settlements are to be encouraged, but more importantly the public is to be protected from defective products.”).
139. Id. See supra notes 99-100 and accompanying text. See Lawler, supra note 124, at 82 (also concludes that the analysis in Lowe correctly resolves the public policy conflict between products liability and the Contribution Act).
142. To prevent this result the seller must successfully challenge the good faith of the
Allowing the seller to seek implied indemnity would prevent the manufacturer from using a contribution settlement to force other parties to pay part of the costs associated with an injury arising from the defective product. With implied indemnity, a seller can shift the entire liability for a defective product to the manufacturer. This result upholds the public policy underlying products liability.

Similarly, in situations where a tortfeasor is only technically or vicariously liable, contribution may encourage inequitable settlements. If the actual wrongdoer can take advantage of the settlement provision of the Contribution Act, the vicariously or technically liable party will be forced to absorb any damages in excess of the amount of the wrongdoer’s settlement. Any payment by the technically or vicariously liable tortfeasor, however, defeats the policy underlying contribution, which requires that the wrongdoer compensate the injured party in proportion to the wrongdoer’s responsibility for the injuries. Such a payment results in an inequitable distribution of the damages since the wrongdoer is not held accountable for the complete consequences of his own fault. Instead, the wrongdoer is unjustly enriched to the extent that the vicariously or technically liable party compensates the injured party. An inequitable shifting of the liability among joint tortfeasors was one of the reasons for replacing “active-passive” implied indemnity with contribution. If the vicariously or technically liable tortfeasor is denied an action for indemnity, contribu-

---

143. See Jethroe v. Koehring Co., 603 F. Supp. 1200, 1204 (S.D. Ill. 1985) (“[I]f contribution were the only option available to the technically negligent party the possibility of settlement would increase. The technically negligent party, apprehensive of the jury's assigning him a percentage of fault, would be more willing to kick some money into the pot available for the plaintiff.”).

144. Id.


tion will have come full circle and will have contributed to the very inequity it was designed to prevent.

Thus, some of the public policies underlying both the Contribution Act and products liability provide strong support for the continued vitality of implied indemnity in cases in which the party seeking indemnity is only vicariously or technically liable or is "downstream" from the manufacturer of a defective product. Well-recognized principles of statutory construction also demonstrate that the Contribution Act can coexist with implied indemnity in these two situations.\footnote{147}

**Statutory Construction of the Contribution Act**

As shown by the conflicting opinions of the Illinois Appellate Court,\footnote{148} there is sufficient doubt as to the effect of the Contribution Act on implied indemnity to warrant reliance on traditional principles of statutory construction.\footnote{149} The purpose of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature.\footnote{150} Since the Contribution Act is silent on implied indemnity,\footnote{151} the courts must use extrinsic interpretive aids, such as the legislative history, to determine the true intent and meaning of the legislature.\footnote{152}

The published legislative history of the Contribution Act is not extensive.\footnote{153} One state senator noted that the contribution bill was

\footnote{147. See infra notes 148-92 and accompanying text.}
\footnote{148. See supra notes 74-108 and accompanying text.}
\footnote{149. See City of Carbondale v. Van Natta, 22 Ill. App. 3d 327, 329, 317 N.E.2d 356, 357 (5th Dist. 1974) ("before a court may employ rules of interpretation or construction of statutes there must be an ambiguity or inconsistency" in the statute), rev'd on other grounds, 61 Ill. 2d 483, 338 N.E.2d 19 (1975); Stice v. Beard, 46 Ill. App. 2d 304, 197 N.E.2d 102 (4th Dist. 1964) (before a statute is open to construction there must be ambiguity present).}
\footnote{151. Morizzo v. Laverdure, 127 Ill. App. 3d 767, 772, 469 N.E.2d 653, 656 (1st Dist. 1984) ("T]he Contribution Act is silent with respect to the interplay between its intent and the right to express or implied indemnity."). See supra note 63 for the text of relevant provisions of the Act.}
related to the *Skinner* decision,¹⁵⁴ and that the bill was intended to ameliorate the harshness of the common-law rule against contribution among joint tortfeasors.¹⁵⁵ A state representative stated that the purposes of the contribution bill were to codify the *Skinner* decision¹⁵⁶ and to add provisions clarifying the rights of and between tortfeasors.¹⁵⁷ At no time during the legislative debate was there any mention of the relationship between implied indemnity and contribution.¹⁵⁸

Legislative committee comments on the Contribution Act¹⁵⁹ specifically recommended that the statute not abrogate the then existing right of common-law indemnity.¹⁶⁰ One court has argued that the legislature's failure to incorporate this recommendation into the statute logically implies a legislative intent to eliminate the judicially created implied indemnity doctrine in active-passive negligence cases.¹⁶¹ However, an equally plausible argument can be made for the opposite position.¹⁶² Implied indemnity had an extended history in Illinois.¹⁶³ There was no need for the legislature to specifically address implied indemnity because the bill covered only cases where indemnity historically had been denied—cases where both tortfeasors were actively negligent.

Thus, the legislative history fails to demonstrate conclusively whether any form of implied indemnity survived enactment of the Contribution Act. However, principles of statutory construction, which the appellate court has yet to discuss,¹⁶⁴ support the contin-

---


¹⁵⁷. *Id.* at 21.


¹⁵⁹. Legislative committee comments are an appropriate and valuable source in determining legislative intent. *People v. Touhy*, 31 Ill. 2d 236, 239, 201 N.E.2d 425, 427 (1964).


¹⁶². See *Jethroe v. Koehring Co.*, 603 F. Supp. 1200, 1204 (S.D. Ill. 1985) (rejecting the *Morizzo* assertion that the legislature intended to extinguish indemnity because the Contribution Act failed specifically to reserve the right to indemnity).

¹⁶³. See *supra* notes 26-34 and accompanying text.

ued vitality of implied indemnity in appropriate situations.

A basic rule of statutory construction provides that repeal of the common law by implication is not favored. Thus, since the Contribution Act says nothing about implied indemnity, courts should avoid construing the Act as having repealed this common-law right. If the Act is construed as having replaced some but not all common-law implied indemnity, courts should not construe the statute as having changed the common law beyond what is expressed or necessarily implied by the words of the Act.

The Contribution Act clearly was intended to relieve the harsh consequences of the common-law rule against contribution. The legislature expressed the intent that in situations where both tortfeasors are negligent, contribution based upon the relative culpability of each is to be used. Therefore, the courts can reasonably infer an intent to extinguish implied indemnity based upon a distinction between active and passive negligence. However, since neither the Act nor the legislative history addresses the status of implied indemnity based upon a pre-tort relationship and vicarious or technical liability, the courts should not read into the statute a desire on the part of the legislature to abrogate this portion of common-law indemnity.

This approach is consistent with appellate court decisions which held that the Contribution Act extinguished "active-passive" implied indemnity but not implied indemnity based upon a pre-tort relationship and vicarious or technical liability. This interpreta-


166. See supra note 63 for text of relevant portions of the Contribution Act.


170. See supra notes 63, 153.

171. See Summers v. Summers, 40 Ill. 2d 338, 342, 239 N.E.2d 795, 798 (1968) (statutes in derogation of common law are to be strictly construed and nothing is to be read into such statutes by intendment or implication).

172. See, e.g., Morizzo v. Laverdure, 127 Ill. App. 3d 767, 774, 469 N.E.2d 653, 658 (1st Dist. 1984); Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 613, 422 N.E.2d 979, 981 (1st Dist. 1981). The claim in Holmes that the Contribution Act extinguished all indemnity, 131 Ill. App. 3d 666, 676, 475 N.E.2d 1383, 1390 (5th Dist. 1985); see supra notes 105-08 and accompanying text, cannot be reconciled with these principles of statutory construc-
tion also is consistent with the recommendations of the 1976 Illinois Judicial Conference. The Judicial Conference Committee recommended both the adoption of contribution and the retention of implied indemnity, but specifically provided that after the adoption of contribution, implied indemnity should be limited to its original common-law uses.

The conclusion that the Contribution Act replaced "active-passive" implied indemnity is of no help in analyzing the Act's effect on a claim for implied indemnity based on upstream products liability where negligence is not a factor. Neither the Contribution Act itself nor its legislative history contains any mention of contribution or implied indemnity claims based upon products liability. No inference can be drawn from the legislative intent to codify Skinner since Skinner involved a claim for contribution by a manufacturer against a party "downstream" from the manufacturer. The manufacturer claimed either misuse of the product or assumption of the risk by the downstream party. Thus, the case did not have to address the viability of a claim against the manufacturer by the downstream joint tortfeasor.

The legislature, however, has given some indication of its intent that indemnity claims based upon products liability survived the Contribution Act. When legislative intent is not clear, courts often compare the statute in question with statutes on related subjects even though they are not strictly in pari materia. Section 2-621 of the Illinois Code of Civil Procedure governs the pleading of

---

174. Id. at 217, 219.
175. Id. at 219.
176. See supra notes 148-75 and accompanying text.
177. See supra note 48.
179. See supra notes 63, 153.
182. Id.
products liability actions. Section 2-621(d) states: "Nothing in this Section shall be construed . . . to affect the right of any person to seek and obtain indemnity or contribution."

This provision was passed by the legislature after enactment of the Contribution Act, and its effective date was more than one year later than the effective date of the Contribution Act. If the legislature had intended to extinguish implied indemnity claims, or if it had perceived that the Contribution Act extinguished such claims, the caveat would most certainly have been limited to contractual indemnity. The legislature, therefore, appears to have expressed its belief that both implied indemnity and contribution remain available in products liability actions.

The Contribution Act, however, provides for contribution wherever two or more tortfeasors are liable for the same injury and is silent with respect to implied indemnity. Whenever possible, potentially conflicting statutes must be read so as to give meaning to both. Here, both Section 2-621 and the Contribution Act will have meaning if upstream indemnity claims are permitted when the person seeking indemnity did not misuse the product or assume the risk of using the product, and if contribution is used to allocate the relative culpability for the plaintiff's injury when a party downstream from the manufacturer of the defective product misused the product or assumed the risk.

185. ILL. REV. STAT. ch. 110, ¶ 2-621(d) (1983).
186. This section's effective date was September 24, 1979. ILL. REV. STAT. ch. 110, ¶ 2-621 (1983). The Contribution Act's effective date was March 1, 1978. ILL. REV. STAT. ch. 70, ¶ 301 (1983).
187. See supra note 21.
188. ILL. REV. STAT. ch. 70, ¶ 302(a) (1983). See supra note 63 for the text of this provision.
189. Morizzo v. Laverdure, 127 Ill. App. 3d 767, 772, 469 N.E.2d 653, 656 (1st Dist. 1984) ("[T]he Contribution Act is silent with respect to the interplay between its intent and the right to express or implied indemnity.").
190. In re Rice's Estate, 77 Ill. App. 3d 641, 653, 396 N.E.2d 298, 308 (2d Dist. 1979); People v. Patterson, 54 Ill. App. 3d 931, 935, 370 N.E.2d 819, 822 (1st Dist. 1977) ("statutes which relate to the same subject matter must be compared and construed with reference to each [so that effect may be given to all provisions of each] if such can be done by reasonable and fair construction").
191. See supra note 48.
192. This interpretation is consistent with Lowe, which held that the Contribution Act did not affect an indemnity claim based on upstream strict liability, Lowe v. Norfolk & W. Ry., 124 Ill. App. 3d 80, 99, 463 N.E.2d 792, 806 (5th Dist. 1984); see supra notes 99-100 and accompanying text, but not Holmes, where such a claim was denied. Holmes v. Sahara Coal Co., 131 Ill. App. 3d 666, 676, 475 N.E.2d 1383, 1390 (5th Dist. 1985); see supra notes 105-08 and accompanying text.
CONCLUSION

The failure of the Illinois Supreme Court and General Assembly to address the viability of implied indemnity has caused great uncertainty. The Contribution Act’s concern with equitable apportionment of liability, is, however, best served by a scheme which eliminates “active-passive” implied indemnity while preserving implied indemnity as a cause of action for the tortfeasor whose liability is solely vicarious or technical. Moreover, the public policy which seeks to hold manufacturers liable for losses caused by defective products supports a cause of action for implied indemnity based upon upstream products liability.

Well-recognized principles of statutory construction also support the viability of implied indemnity in these circumstances. Nothing in the legislative history of the Contribution Act or in the Act itself supports the Holmes court’s contention that the Act eliminated all forms of implied indemnity. Rather, by preserving implied indemnity in the vicarious or technical and products liability situations, courts can avoid repeal of the common law by implication and give meaning to the Code of Civil Procedure’s reference to indemnity in products liability actions.

FORREST GUNNISON