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Curt N. Rodin
Partner, Anesi, Ozmon, Lewin & Assoc., Chicago, IL

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Third-Party Actions: A Plaintiff’s Perspective

Curt N. Rodin*

INTRODUCTION

Paragraph 2-406 of the Illinois Code of Civil Procedure permits a defendant to join a third party who may be liable to him for all or part of the plaintiff’s claim against him. Although paragraph 2-406 pertains directly to actions that may be initiated by defendants, third-party practice poses significant ramifications for the plaintiff in terms of trial strategy and negotiation, since parties otherwise immune from direct suit by the plaintiff may nevertheless be drawn into the litigation by a third-party complaint. The approach ultimately adopted by the plaintiff is dependent, to a significant degree, on the particular theory supporting the cause of action and the likelihood of a third-party complaint.

This article will discuss third-party practice in the context of various areas of tort law frequently encountered by Illinois practitioners. First, the article will examine cases where an employer, immune from a direct suit by his employee under the Workers’ Compensation Act, is impleaded by the employee’s defendant as a third-party defendant, and where an initial tort injury is aggravated by another’s negligence. It will then discuss the

* Partner, Anesi, Ozmon, Lewin & Assoc., Chicago, Illinois; B.A. 1972, University of Illinois (Champaign); J.D. 1975, Loyola University of Chicago School of Law.

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1. ILL. REV. STAT. ch. 110, ¶ 2-406 (1981) (formerly ILL. REV. STAT. ch. 110, ¶ 25). Paragraph 2-406(b) provides in pertinent part:

Within the time for filing his or her answer or thereafter by leave of court, a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff’s claim against him or her. Subsequent pleadings shall be filed as in the case of a complaint and with like designation and effect. The third-party defendant may assert any defenses which he or she has to the third-party complaint or which the third-party plaintiff has to the plaintiff’s claim and shall have the same right to file a counterclaim or third-party complaint as any other defendant.
obsolescence of equitable apportionment and the erosion of immunities which traditionally prevented certain direct suits by plaintiffs. Each of these areas will be considered in light of *Skinner v. Reed-Prentice Division Package Machinery Co.*\(^2\) and Illinois’ Contribution Act\(^3\) and their effect on plaintiff’s litigation strategy. Also considered is the doctrine of joint and several liability, its implications for plaintiffs, and its reaffirmance in *Coney v. J.L.G. Industries, Inc.*\(^4\) recently decided by the Illinois Supreme Court.

**EMPLOYERS AS THIRD-PARTY DEFENDANTS: EROSION OF WORKERS’ COMPENSATION IMMUNITY**

**Background**

The Illinois Workers’ Compensation Act\(^5\) is remedial legislation designed to provide financial protection for the injured worker who might otherwise have to shoulder medical costs and lost wages by himself.\(^6\) Prior to the Act’s adoption in 1911, an injured employee could sue his employer in theory, but the common law defenses of contributory negligence, fellow servant negligence, and the assumption of risk doctrine were available against him.\(^7\) Consequently, it was difficult in practice for the injured worker to pursue an action against his employer successfully. The difficulty of proof and court delays often resulted in no remedy, deprived the injured employee of his livelihood, and engendered antagonisms between employers and employees.\(^8\)

The Workers’ Compensation Act was enacted as a substitute for the common law rights and liabilities of employers and employees regarding work-related injuries or death.\(^9\) Section 5 of

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6. See Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Pathfinder Co. v. Industrial Comm’n, 62 Ill. 2d 556, 343 N.E.2d 913 (1976); Vaught v. Industrial Comm’n, 52 Ill. 2d 158, 287 N.E.2d 701 (1972); Zimmerman v. Industrial Comm’n, 50 Ill. 2d 346, 278 N.E.2d 784 (1972); McDonald v. Industrial Comm’n, 39 Ill. 2d 396, 235 N.E.2d 824 (1968).
the Act provides that workers' compensation is the injured employee's exclusive remedy against his employer, thereby precluding an employee from bringing an action against his employer predicated upon any tort theory. In addition to the exclusivity provision, the Act provides that the liability of the employer is fixed. The amount of compensation under the Act is thus limited, and often is not as large as an employee would be awarded under a common law remedy.

In essence, the legislature effected a compromise when it enacted the Workers' Compensation Act. While the Act limits the exposure of the employer, it provides that recovery for work-related injuries is automatic and without regard to the employer's fault. Further, contributory negligence, assumption of risk and other common law defenses are not available under the Act. Hence, the conduct of the injured employee is similarly irrelevant to recovery under the Act.


12. For example, Ill. Rev. Stat. ch. 48, § 138.8(b) provides that an employee temporarily disabled is entitled to receive two-thirds of his lost weekly wage. Damages awarded in a successful negligence action may often equal several years worth of the employee's salary.

13. The liability of an employer under the Workers' Compensation Act is not a tort liability, but is an obligation imposed as an incident of the employment relationship, the cost of which is to be borne by the business enterprise. Arnold v. Industrial Comm'n, 21 Ill. 2d 57, 171 N.E.2d 26 (1961). See also Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Bryntesen v. Carroll Constr. Co., 27 Ill. 2d 566, 190 N.E.2d 315 (1963); Freeman v. Augustine's, Inc., 46 Ill. App. 3d 230, 360 N.E.2d 1245 (5th Dist. 1977).

14. See Ansell v. Industrial Comm'n, 85 Ill. 2d 69, 421 N.E. 2d 179 (1981) (contributory negligence); Scheffler Greenhouses, Inc. v. Industrial Comm'n, 66 Ill. 2d 361, 362 N.E.2d 325 (1977) (assumption of risk). Moreover, it is well established that an employee is
The exclusivity provision, however, may prove to be quite disadvantageous for the injured worker. For example, an employer may remove certain safety guards from a machine, making the machine unreasonably dangerous in light of its intended use. The employer may further fail to provide any warnings regarding the unreasonably dangerous nature of the machine. An employee injured while using the machine is, nevertheless, barred under section 5 from bringing an action against the employer premised on strict liability in tort and must rely on a claim for workers' compensation, which will likely result in an award significantly less than the verdict in a products liability case on the same facts.  

Although the employee in the foregoing example is prevented from suing his employer directly in tort, he is permitted to file an action against negligent third parties, such as the manufacturer of the defective product, even though he was compensated under the Act. By proceeding against the third party, the employee is thus able to obtain full compensation, notwithstanding the Act's limitation on recovery, and to involve indirectly in the same suit the employer, who may be liable as a third-party defendant under the Contribution Act and certain common law remedies. This practice occurs most often in products liability

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15. For limitations on workers' compensation recovery, see ILL. REV. STAT. ch. 48, § 138.8 (1981).


18. See infra notes 19-55 and accompanying text.
litigation and in suits under the Structural Work Act.\textsuperscript{19}

**Products Liability**

The doctrine of products liability in Illinois embodies a policy of placing the risk of loss from defective products upon manufacturers and other parties who create the risk and thereafter reap the profit.\textsuperscript{20} In 1974, in *Burke v. Sky Climber, Inc.*,\textsuperscript{21} the Illinois Supreme Court prevented a manufacturer from shifting the risk of loss to an employer who allegedly misused the product. In *Burke*, an employee of a housing authority was fatally injured when a cable on the scaffold he was using broke. The employee's widow brought a strict liability action against the manufacturer of the scaffold. The manufacturer, in turn, filed a third-party complaint against the housing authority for implied indemnity, alleging that the housing authority had misused the scaffold by failing to follow the manufacturer's maintenance and operational instructions.\textsuperscript{22} The supreme court affirmed the trial court’s dismissal of the third-party complaint. The court reasoned that the third-party complaint presented a defense to the widow’s claim, and thus no indemnity action against the housing authority would be necessary if the evidence sustained the manufacturer’s claim.\textsuperscript{23}

Three years later, the supreme court overruled its holding in *Burke*. The court upheld third-party complaints brought against employers in products liability actions in *Skinner v. Reed-Prentice Division Package Machinery Co.*\textsuperscript{24} and two companion cases, *Stevens v. Silver Manufacturing Co.*\textsuperscript{25} and *Robinson v. International Harvester Co.*\textsuperscript{26} In *Skinner*, an employee was injured

\textsuperscript{19} ILL. REV. STAT. ch. 48, ¶¶ 60-69 (1981). See infra notes 43-53 and accompanying text.
\textsuperscript{21} 57 Ill. 2d 542, 316 N.E.2d 516 (1974).
\textsuperscript{22} Id. at 543, 316 N.E.2d at 517.
\textsuperscript{23} Id. at 546, 316 N.E.2d at 519.
\textsuperscript{25} 70 Ill. 2d 41, 374 N.E.2d 455 (1977), modified, 70 Ill. 2d 41 (1978).
while working on an injection molding machine. The employee brought an action in strict liability against the manufacturer of the machine, Reed-Prentice. A third-party complaint, charging negligence and seeking contribution, was filed by Reed-Prentice against the employer. The employer's motion to dismiss the third-party complaint was granted by the trial court and affirmed by the appellate court. The supreme court, however, reversed the lower courts and held that the third-party complaint stated a cause of action for contribution against the employer. The court stated: "We hold that the third party complaint, although charging negligence, alleges misuse of the product and assumption of risk and states a cause of action based on the employer's relative degree of fault which contributed to cause plaintiff's injuries." Thus, following Skinner, the employer was no longer immune from tort liability.

The effect of Skinner on an employer's third-party liability was addressed recently in Doyle v. Rhodes. In Doyle, a highway flagman brought an action for personal injuries he received when struck by the defendant's car. The defendant filed a third-party complaint against the road contractor, the flagman's employer, seeking contribution. The trial court dismissed the third-party complaint on the ground that it was barred by the exclusivity provision of the Workers' Compensation Act. The appellate court in Doyle reversed the lower court and held that the original defendant was entitled to contribution from the employer. Moreover, the court interpreted Skinner as subjecting the employer to unlimited contribution by the original defendant. In permitting unlimited contribution, the appellate court found it significant that the majority opinion in Skinner did not

27. 70 Ill. 2d at 4, 5, 374 N.E.2d at 438.
32. 109 Ill. App. 3d at 591, 440 N.E.2d at 896. The trial court held that the Contribution Act was not broad enough to encompass an action by the defendant against the plaintiff's employer since the employer was not "subject to liability in tort" as the Act requires.
33. Id. at 594, 440 N.E.2d at 898.
34. Id.
refer to the policy of limited liability embodied under the Workers' Compensation Act, even though the employer and employee in that case were covered under the Act. The Doyle court further noted that the dissenters in Skinner "read the majority opinion as putting no limits on contribution, but simply basing contribution on relative causation of the injuries."

Skinner and its progeny have obvious beneficial implications for the plaintiff-employee. First, the Skinner holding will likely result in a safer work place. Prior to Skinner, an employer was immune to an action based on strict liability in tort, even though it was responsible for the unsafe modifications of a product. With liability limited to that imposed under the Workers' Compensation Act and the federal Occupational Safety and Health Act, the amount of damages and/or penalties an employer might incur was minimal compared with the potential verdict recoverable in a products liability case. After Skinner, however, an employer can be held fully liable for its actions as a result of a third-party claim for contribution by the manufacturer-defendant, thereby increasing the incentive for an employer to create a safer working environment.

Skinner has produced additional ramifications for the plaintiff with regard to trial strategy. Previously, in a products liability suit, if a manufacturer could show that certain conduct of the employer amounted to an intervening act and the proximate cause of the plaintiff's injuries, the manufacturer could avoid liability. Examples of such intervening conduct by the employer include modifying the product so as to make it unreasonably dangerous or failing to provide adequate warnings concerning

35. Id. at 593, 440 N.E.2d at 897.
36. Id.
39. See Gasdiel v. Federal Press Co., 78 Ill. App. 3d 222, 396 N.E.2d 1241 (1st Dist. 1979). In Gasdiel, the court held that the substitution by plaintiff's employer of a significantly different starting mechanism on a punch press manufactured and distributed by the defendants was a substantial change in the condition of the press. As such, it operated, absent a causal connection between the lack of additional point of operation safety guards in the original design of punch press and plaintiff's injury, to relieve defendants of liability. See also Rios v. Niagara Mach. & Tool Works, 59 Ill. 2d 79, 319 N.E.2d 232 (1974); Coleman v. Verson Allsteel Press Co., 64 Ill. App. 3d 974, 382 N.E.2d 36 (1978). For further discussion, see Goldich, Supervening Cause and Manufacturers' Nondelegable Duty, 1976 U. Ill. L.F. 396.
the unreasonably dangerous nature of the product.\textsuperscript{40} Similarly, prior to \textit{Skinner}, employers were not liable for such intervening acts.\textsuperscript{41} Thus, there was no incentive for an employer to try and establish the defective nature of the product as the proximate cause of the injury. Now that the employer can be named as a third-party defendant, many employers may be more willing to assist the plaintiff in proving his case against the manufacturer. The employer will try to show that the defective design or manufacture of the product was the proximate cause of the plaintiff's injuries, rather than the modifications made by the employer. Finally, in certain cases involving minor modifications unrelated to proximate cause, the employer may more readily waive his workers' compensation lien.\textsuperscript{42}

\textit{Structural Work Act}

The Structural Work Act of Illinois\textsuperscript{43} was enacted in 1907 with the avowed purpose of providing protection and safety for those persons engaged in and exposed to the historically recognized dangers of construction.\textsuperscript{44} In the hierarchical scheme within the construction industry, the worker possesses the least authority to specify his working conditions, and is least able, financially, to bargain for those conditions that would enhance his safety.\textsuperscript{45} As a result, it is the worker who is the usual victim of deviations

\ \textsuperscript{40} See Burke v. Sky Climber, Inc., 57 Ill. 2d 542, 316 N.E.2d 516 (1974).
\textsuperscript{41} ILL. REV. STAT. ch. 48, § 138.5(a) (1981).
\textsuperscript{42} See supra note 17.
\textsuperscript{43} ILL. REV. STAT. ch. 48, §§ 60-69 (1981).
\textsuperscript{44} The purpose of the Structural Work Act is indicated in the formal title to the Act which states it is an "Act providing for the protection and safety of persons in and about the construction, repair, alteration or removal of buildings." The scope of protection afforded workers under the Act is set forth in § 60, which provides in pertinent part:

All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed, and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

\textsuperscript{45} See N. OZMONT, \textit{Overview of State and Caselaw}, in ILLINOIS \textit{STRUCTURAL WORK ACT PRACTICE} 9 (1979). The author notes that the working man usually finds himself with two alternatives: he may accept conditions as he finds them or, impractically or unfeasibly, he may leave his employment and his wages behind after voicing his criticism of working conditions. Additionally, the working man, although an expert within his particular
from accepted safety practices. Cognizant of this situation, courts have given the Structural Work Act a liberal interpretation in order to effectuate its beneficial purposes. Inasmuch as the broadest protection possible for workers is desired, contributory negligence and assumption of risk are not defenses under the Act.

Liability under the Act extends to any owner, contractor, foreman or other person "having charge" of the work performed. The supreme court in Larson v. Commonwealth Edison Co. emphasized that the term "having charge" carries with it a broad meaning which cannot be reduced to "supervision and control." Larson effectively created two classes of potential defendants under the Act: those who have charge of a particular phase of the work and usually exercise immediate supervision.

The object to be attained by this statute was to prevent injuries to persons employed in this dangerous and extra hazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal. The language of the statute is mandatory and imperative that the scaffold shall be so constructed as to be safe and afford adequate protection to the persons working thereon, and the [defendant] cannot escape liability for a willful violation of the statute where he constructs an insufficient, unsafe, and dangerous scaffold.

The supreme court, on several occasions following Schultz, has considered this issue and has consistently reaffirmed that contributory negligence and assumption of risk are not defenses in a Structural Work Act suit. See Bryntesen v. Carrol Constr. Co., 27 Ill. 2d 566, 190 N.E.2d 315 (1963); Gannon v. Chicago, Milwaukee, St. Paul & Pac. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961); Kennerly v. Shell Oil Co., 13 Ill. 2d 431, 150 N.E.2d 134 (1958).

In Gannon v. Chicago, Milwaukee, St. Paul & Pac. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961), it was established that a defendant, even if it is one of the entities specified in § 69, must also "have charge" of the work. Much of the litigation in Structural Work Act cases involves the meaning of the "having charge" requirement. See, e.g., Przybylski v. Perkins & Will Architects, Inc., 95 Ill. App. 3d 620, 420 N.E.2d 524 (1st Dist. 1981); Bishop v. Crowther, 92 Ill. App. 3d 1, 415 N.E.2d 599 (1st Dist. 1980); Kjellesvik v. Commonwealth Edison Co., 73 Ill. App. 3d 773, 392 N.E.2d 116 (1st Dist. 1979); Long v. Duggan-Karasik Constr. Co., 23 Ill. App. 3d 812, 320 N.E.2d 553 (1st Dist. 1974).

33 Ill. 2d 316, 211 N.E.2d 247 (1965).
and control, and those who are in the upper levels of the construction hierarchy with overall responsibility for the work.\textsuperscript{50}

In many instances, the plaintiff's employer exercises direct control over and is one of the entities having charge of the work. The injured worker, however, is precluded by the exclusivity provision of the Workers' Compensation Act\textsuperscript{51} from bringing a Structural Work Act suit against his employer. The only remedy traditionally available to the worker against his employer would be a claim for workers' compensation. This is true even though the employer may be best able to alleviate the dangerous condition on the jobsite that gives rise to the accident.

Third-party practice prevents an employer from escaping liability for injuries under the Structural Work Act. For example, in certain situations, the owner of the premises where the work was performed may qualify as a party "having charge" of the work.\textsuperscript{52} The injured worker can thus bring a Structural Work Act suit against the owner, who may then bring a third-party action against the employer of the injured worker sounding in either indemnity or contribution. Because the Workers' Compensation Act does not preclude an indemnity action,\textsuperscript{53} a passively delinquent party, if held accountable, may transfer all its statutory liability to the actively delinquent party.\textsuperscript{54} Assuming the cause of action arose on or after March 1, 1978, pursuant to both

\textsuperscript{50} The expansive interpretation of the "having charge" requirement set forth in the Larson case was more recently reaffirmed by the supreme court in Norton v. Wilbur Waggoner Equip. Rental & Excavating Co., 76 Ill. 2d 481, 394 N.E.2d 403 (1979).

\textsuperscript{51} ILL. REV. STAT. ch. 48, ¶ 138.5(a) (1981).

\textsuperscript{52} See Banwart v. Okesson, 83 Ill. App. 3d 222, 403 N.E.2d 1234 (2d Dist. 1980). In that case, the defendant owner had charge of the work where he provided the scaffolding, assisted in assembling it, instructed workers where to place it and attempted to provide additional instructions to the workers. \textit{But cf.} Derrico v. Clark Equip. Co., 91 Ill. App. 3d 4, 413 N.E.2d 1345 (1st Dist. 1980), where the mere fact that the owner of the showroom where a window washer was injured had signed a job ticket was not sufficient to show the owner was "in charge" of work being done by the window washer.


\textsuperscript{54} An indemnity action is possible because varying degrees of fault are recognized under the Structural Work Act. See McInerney v. Hasbrook Constr. Co., 62 Ill. 2d 93, 338 N.E.2d 868 (1975); Malauskas v. Tishman Constr. Corp., 81 Ill. App. 3d 759, 401 N.E.2d 1013 (1st Dist. 1980); Mosley v. Northwestern Steel & Wire Co., 76 Ill. App. 3d 710, 394 N.E.2d 1230 (1st Dist. 1979). In \textit{Malauskas}, the court held that a third-party complaint, alleging the employer supplied plaintiff with a ladder it should have known was unsafe and ordered plaintiff to work in unsafe areas, stated a cause of action against the
Skinner and the Illinois’ Contribution Act, the principal defendant can also minimize its share of the damages by seeking contribution from the employer of the injured worker.

Implications of Contribution for Plaintiff-Employees

The Contribution Act has no direct legal effect on the plaintiff-employee. Rather, under contribution, the fault of the individual defendants is compared in an effort to apportion their liability for damages owed to the plaintiff. The Contribution Act specifically provides that it does not affect the right of the plaintiff to collect the total amount of his judgment from any defendant subject to liability. From a pragmatic viewpoint, however, the Act produces significant ramifications for the plaintiff during settlement negotiation and trial where the employer is a third-party defendant.

During the negotiation stage, for instance, the possibility of contribution permits the plaintiff’s attorney to appraise more realistically the parameters of liability and the responsibility of the individual defendants. When indemnity alone was available, an “all or nothing” type of resolution was presented. Accordingly, the primary defendant sought to shift the blame completely onto the employer of the plaintiff, with the result that little or no settlement offers were made during negotiations. With contribution, the defendant will more likely concede some liability, and settle for a percentage of the potential verdict. Incentive for such conduct derives from the Contribution Act itself, which provides that a potentially liable party who settles in good faith is discharged from all liability for contribution to any employer for indemnity. See also Bua, Third Party Practice in Illinois: Express and Implied Indemnity, 25 De Paul L. Rev. 287 (1976).


56. Following the enactment of the Contribution Act, the viability of the active-passive theory of indemnity was questioned. For a discussion of the impact of the Contribution Act on the implied indemnity doctrine, see Van Jacobs v. Farikh, 97 Ill. App. 3d 610, 422 N.E.2d 979 (1st Dist. 1981). See also Ferrini, The Evolution from Indemnity to Contribution—A Question of the Future, if any, of Indemnity, 59 Chi. B. Rev. 254 (1978); Widland, Contribution: The End to Active-Passive Indemnity, 69 Ill. B.J. 78 (1980).


58. The term “good faith” is not defined in the Act. See Widland, supra note 56, at 78.

other tortfeasor, even if the party settles before a judgment is entered.\textsuperscript{60}

The effects of the Contribution Act may also impinge on the plaintiff's case at trial, because of its tendency to increase the number of cross-claims filed by defendants. In the process of trying to prove their claims against each other, the defendants may help the plaintiff prove certain elements of his case. Additionally, the cross-claims help shift the jury's attention away from "plaintiff versus defendant" to "defendant versus defendant." As a result of this shift in focus, the jury may be more amenable to awarding a verdict for the plaintiff.

Conversely, the Contribution Act may work to the plaintiff's disadvantage in third-party actions brought by the primary defendant against the employer of the injured worker. In seeking contribution from the employer, the defendant will argue that the employer was guilty of wrongful acts which contributed to cause the plaintiff's injury. In making this argument, the defendant will attempt to prove misconduct on the part of the employees of the employer, including the plaintiff. The implication to the jury is that the plaintiff was in some way negligent.

The foregoing problem, of course, is not a new one. It existed under indemnity, prior to the adoption of contribution.\textsuperscript{61} The Contribution Act, however, compounds the problem. Under indemnity, a defendant was required to prove that the wrongful acts of the plaintiff's employer were the major cause of the injury.\textsuperscript{62} This burden was difficult for many defendants because their fault often equaled that of the employer.\textsuperscript{63} Thus, very few defendants were able to bring successful third-party actions against the employer. Now, under contribution, the defendant need only show some wrongdoing on the part of the employer.\textsuperscript{64} With this lesser burden, an increased number of third-party actions may be brought against employers with a concomitant increase in attempts to prove the plaintiff-employee's own negligence. The plaintiff can alleviate this problem to some degree with a motion in limine to exclude any mention of the plaintiff's

\textsuperscript{60} \textit{Id.} § 302(a).

\textsuperscript{61} See, e.g., Burke v. Skyclimber, 57 Ill. 2d 542, 545, 316 N.E.2d 516, 517-18 (1974).


\textsuperscript{63} See cases cited supra note 62.

\textsuperscript{64} See Skinner, 70 Ill. 2d at 15, 374 N.E.2d at 443.
conduct and to limit evidence of wrongful acts to those of the employer.

Although the Contribution Act has no direct legal effect on the plaintiff, its practical applications will continue to be a major concern in the planning and strategy of the plaintiff's case. Of equal concern in gauging the amount of plaintiff's recovery is the Act's effect on joint and several liability as it now exists in Illinois.

**Joint and Several Liability**

The Contribution Act expressly retains the common law doctrine of joint and several liability, which posits that each joint tortfeasor can be held liable for the entire amount of damages due the injured worker. Under joint and several liability in Illinois, the plaintiff is entitled to recover the full amount of his judgment, including the amount of damages resulting from the conduct of parties not named as defendants in the original suit, against any one of the defendants held liable. The fault of the unnamed or absent parties is not compared and does not reduce the plaintiff's verdict.

To illustrate, assume that in a Structural Work Act suit the plaintiff's employer is thirty percent at fault. The employer, however, is immune from direct liability to the plaintiff as a result of the workers' compensation exclusivity provision. If the plaintiff brings suit against the general contractor and the owner of the premises, each will be jointly and severally liable for the full

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65. ILL. REV. STAT. ch. 70, ¶ 304 (1981) states as follows: "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." The doctrine of joint and several liability has been entrenched in Illinois for about a century, since Wabash, St. Louis & Pac. Ry. v. Shacklet Adm'x, 105 Ill. 364 (1883). The doctrine was more recently reaffirmed by the supreme court in Buehler v. Whalen, 70 Ill. 2d 51, 374 N.E.2d 460 (1977), modified, 70 Ill.2d 51 (1978). Most recently, the Illinois Supreme Court in the case of Coney v. J.L.G. Indus., Inc., No. 56306, slip op. (Ill. Sup. Ct. May 18, 1983) upheld the doctrine once again.

66. The term "joint tortfeasors" refers to those wrongdoers whose independent, concurrent acts have contributed to cause plaintiff's single, indivisible injury. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 47-50 (4th ed. 1971).


68. See supra note 67.

69. ILL. REV. STAT. ch. 48, ¶ 138.5(a) (1981). See supra notes 10-16 and accompanying text.
amount of the verdict. The percentage of fault attributable to the employer, the absent party, is not subtracted from the total amount of damages awarded the plaintiff. Hence, under joint and several liability in Illinois, the burden of the absent party’s liability devolves upon the defendants, rather than the plaintiff. Although the defendants can seek contribution from the employer to recoup the amount of damages attributed to the latter, it is the defendants, not the plaintiff, who must prove fault on the part of the employer. The plaintiff need only prove his case against the primary defendants.

The case of *Coney v. J.L.G. Industries, Inc.*, recently decided by the Illinois Supreme Court, reaffirmed the doctrine of joint and several liability under the Contribution Act, thereby protecting Illinois plaintiffs from potential harm. The following comparison with Wisconsin, where the fault of the employer and other absent parties is compared and diminishes the plaintiff’s verdict, illustrates the ill effect that abandoning joint and several liability would produce.

Assume, for example, that in a particular case the plaintiff was ten percent at fault, the plaintiff’s absent employer was sixty percent at fault, and the general contractor was thirty percent at fault. Under joint and several liability in Illinois presently, the plaintiff would be entitled to recover 100 percent of his verdict from the general contractor. Neither the fault of the employer nor the injured plaintiff would be compared to reduce

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70. In the foregoing example, it is advantageous for the primary defendant to prove that the employer was 30 percent at fault in order to reduce its own liability to the plaintiff.

71. See [Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976); Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). In Pierringer, the plaintiff settled with all but one of the defendants. Although the settling defendants were dismissed from the plaintiff’s lawsuit, the jury was still required to calculate the negligence attributable to each. The supreme court held that the non-settling defendant was liable only for his proportionate negligence.](#)
the judgment.\textsuperscript{74} In Wisconsin, however, the same plaintiff would only be entitled to collect thirty percent of his verdict from the general contractor.\textsuperscript{75} He would be deprived of the remaining seventy percent of his judgment.\textsuperscript{76}

The result reached under the Wisconsin rule is inconsistent with the philosophy underlying the Illinois Structural Work Act, which attempts to spread the risk of loss and responsibility for

\textsuperscript{74} The contributory negligence or assumption of risk of the plaintiff has never been a defense under the Structural Work Act of Illinois. See Bryntesen v. Carroll Constr. Co., 27 Ill. 2d 566, 190 N.E.2d 315 (1963). The doctrine of comparative negligence, as adopted by the Illinois Supreme Court in the landmark case of Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), does not apply to causes of action under the Structural Work Act. The court in Alvis made clear that comparative negligence was to apply only in cases where the contributory negligence of the plaintiff had been a bar to recovery. The court stated:

We cannot continue to ignore the plight of plaintiffs who, because of some negligence on their part, are forced to bear the entire burden of their injuries. Neither can we condone the policy of allowing defendants to totally escape liability for injuries arising from their own negligence on the pretext that another party's negligence has contributed to such injuries. We therefore hold that in cases involving negligence the common law doctrine of contributory negligence is no longer the law in the State of Illinois, and in those instances where applicable it is replaced by the doctrine of comparative negligence.

85 Ill. 2d at 24-25, 421 N.E.2d at 896-97 (emphasis supplied).

\textsuperscript{75} Wisconsin has not enacted legislation similar in nature, purpose or effect to Illinois' Structural Work Act. It has enacted a safe-place statute, however, which provides that "[e]very employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards . . . ." Wis. STAT. § 101.11 (1981).

The Wisconsin workers' compensation statute is similar to Illinois' in that it contains an exclusivity provision which in effect prevents direct suits by employees against their employers. Wis. STAT. ANN. § 102.03(2) (West 1982-1983).

\textsuperscript{76} The Wisconsin rule was criticized in an amicus curiae brief filed by the Illinois Trial Lawyers Association in the Coney case. In their brief, the trial lawyers explained how the Wisconsin system poses problems for settlement potential:

This procedure is such a gamble for a plaintiff desirous of settlement that it is regarded as ill-advised for the plaintiff in the majority of circumstances and thus is a positive barrier to settlement. In fact, it leaves the plaintiff's attorney wide open to a malpractice claim unless the client understands perfectly what is being done and consents in writing. What happens is this: Suppose the plaintiff sues two defendants, figures they are equally liable for total damages of about $30,000.00, and settles with one for $14,000.00. When the case is tried, the remaining defendant argues, naturally, that the absent defendant is primarily at fault. If the jury decides that damages are $35,000.00 with the plaintiff twenty percent negligent, the settling defendant fifty percent negligent, the remaining defendant thirty percent negligent, the plaintiff in Wisconsin receives only an additional $10,500.00. By contrast, under joint and several liability if the $14,000.00 previously received were the only setoff allowed, the plaintiff would receive another $14,000.00 ($35,000.00 less twenty percent less $14,000.00). The Wisconsin practice has the potential for penalizing the plaintiff rather
job safety to those parties who are in a position to improve safety conditions. If the fault of those immune to suit is permitted to be compared so as to diminish judgments, the purpose of the Structural Work Act is thwarted. In such instance, the burden would fall upon the injured worker—the party least likely to be economically positioned to bargain for conditions to enhance job safety.

MULTIPLE TORTFEASORS AND DIVISIBLE INJURIES: THE DEMISE OF EQUITABLE APPORTIONMENT

Under Illinois tort law, an injured plaintiff may sue one of several joint tortfeasors and recover the entire verdict from one defendant. Prior to Skinner, such defendant could shift his entire liability to the other tortfeasors through indemnity only if he could prove a pre-tort relationship and a qualitative distinction between his acts and theirs. Where two tortfeasors were not acting jointly but the second tortfeasor aggravated the initial injury, the plaintiff could still sue the original tortfeasor alone and recover the entire judgment from him. Indemnity was not available because the parties did not have the necessary pre-tort relationship. In Gertz v. Campbell, however, the Illinois Supreme Court allowed a claim for equitable apportionment where the injury to the plaintiff was divisible between the two defendants. This decision was the forerunner to the supreme court’s adoption of contribution in Skinner v. Reed-Prentice.
In *Gertz*, a pedestrian brought a negligence action against a motorist who struck and injured him. Campbell, the motorist, filed a third-party complaint alleging malpractice against the physician, Dr. Snyder, who treated the pedestrian. The trial court's dismissal of the third-party complaint was reversed by the appellate court, which held that Campbell stated a claim for "equitable apportionment." The supreme court affirmed the appellate court decision, recognizing that the motorist, as the original tortfeasor, was liable under controlling case law for the aggravation of injuries suffered by the victim as a result of Dr. Snyder's negligence. The court noted that the defendant's third-party claim was not a traditional indemnity claim in that it did not attempt to shift the entire liability to the physician. Nor was it a claim for contribution, which was prohibited, because the motorist and physician were not joint tortfeasors. Stating that the relief the defendant sought was not "repugnant to the notion of indemnity," the court held that he had a right to indemnification from Dr. Snyder for the plaintiff's damages attributable to the physician's malpractice.

The query now is whether the Contribution Act affects the doctrine of equitable apportionment. The typical contribution case arises where one indivisible injury is caused by two or more tortfeasors. Damages are apportioned in accordance with the relative degree of fault attributable to each individual tortfeasor. Equitable apportionment cases require a divisible injury

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82. *Id.* at 85, 302 N.E.2d at 41. The plaintiff's leg was broken as a result of the car accident. Necessary surgery was postponed, the condition of the leg deteriorated and ultimately the leg was amputated.


84. The supreme court cited Chicago City Ry. v. Saxby, 213 Ill. 274, 72 N.E. 755 (1904), noting that a person injured through another's negligence can recover not only for the original injury, but for any aggravation of the injury caused by a physician's malpractice, assuming there was no lack of ordinary care by the injured party in selecting the physician. 55 Ill. 2d at 88, 302 N.E.2d at 43.

85. 55 Ill. 2d at 88-89, 302 N.E.2d at 43.

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

87. *Id.* at 92, 302 N.E.2d at 45.

In *Alberstett v. Country Mut. Ins. Co.*, 79 Ill. App. 3d 407, 398 N.E.2d 611 (2d Dist. 1979), *Gertz* was extended to permit prior allegedly malpracticing doctors to recover from subsequent allegedly malpracticing doctors a pro rata share of the cost of the release which the first doctors paid to the injured party. The court asserted: "It may be true, as appellees argue, that a doctor has the continuing duty to care for the patient. But that duty cannot be extended to make him liable for the negligence of doctors sought out for treatment by the plaintiffs independently." *Id.* at 411, 398 N.E.2d at 614.

88. For example, in *Skinner* the plaintiff was injured while working with an allegedly
caused by two or more tortfeasors, with damages determined in relation to the extent of the injury caused by each tortfeasor. In *Van Jacobs v. Parikh*, the Illinois Appellate Court held that a claim for equitable apportionment was actually a claim for contribution, since an original tortfeasor may seek contribution for damages attributable to an aggravating injury caused by successive tortfeasors. Unlike the common law contribution requirement that tortfeasors be jointly and severally liable, the Contribution Act requires only that the tortfeasors be “subject to liability” for the same injury. Thus, the *Van Jacobs* court concluded that the original tortfeasor who technically did not “cause” the aggravating injury may obtain contribution from the second tortfeasor who did cause the injury, because both were subject to liability for that injury.

By recognizing the availability of equitable apportionment, the *Gertz* decision significantly affected the pre-*Skinner* plaintiff in terms of litigation strategy. With the adoption of contribution, however, it is difficult to imagine a set of facts that would result in a claim for equitable apportionment but not contribution. In effect, the Act has supplanted the need for equitable apportionment. Nevertheless, the concerns of the plaintiff in equitable apportionment cases are still prevalent under contribution. The effects of subsequent third-party suits on the plaintiff’s case will vary depending on the original cause of action filed and the facts supporting the cause of action. A comparison of a medical malpractice case involving an indivisible injury and one involving a divisible injury will serve to illustrate these effects.

Assume a case where a plaintiff is injured following surgery involving a medical product which fails. The plaintiff may sue either the manufacturer of the product, the physician performing

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90. *Id.* at 409, 398 N.E.2d 611 (2d Dist. 1979).
91. *Id.* at 610, 422 N.E.2d 979 (1st Dist. 1981).
92. *Id.* at 614, 422 N.E.2d at 982. In *Van Jacobs*, the plaintiff’s husband was killed when defendant Purikh’s car ran into the decedent’s motorcycle. At the time of the collision, the decedent was wearing a helmet manufactured by defendant Roper. Roper filed a third-party complaint against the driver after the driver had settled with the plaintiff.
93. *Id.*
94. *Id.* The court also noted that the manufacturer’s complaint failed to state a claim for equitable apportionment since the injury was indivisible.
the surgery, or both parties for this indivisible injury. If the plaintiff sues only the manufacturer, the latter will likely bring a third-party action against the physician. Under these circumstances, the physician will benefit by aligning himself with the plaintiff and assisting him in proving that failure of the product was the sole proximate cause of the plaintiff’s injuries. Likewise, if only the physician is sued, a third-party action will probably be brought against the manufacturer, which will then seek to prove that the physician’s negligence and not the product caused plaintiff’s injuries. Even where neither party intentionally aligns itself with the plaintiff, the defendants’ attempts to shift the burden of liability to each other will assist the plaintiff in proving the elements of his case.

In the case where the plaintiff sustains an injury which is later aggravated by a treating physician, the plaintiff again may sue either the original tortfeasor, the physician, or both parties. Yet, because the parties were not acting jointly, neither party is in a position to align itself with the plaintiff and assist him in proving his case. Furthermore, the plaintiff is faced with the complications involved in litigation with multiple parties. Unlike the case of an indivisible injury, the plaintiff in a divisible injury case is not necessarily in a stronger position because of the addition of extra parties.

From the perspective of third parties seeking to shift liability, the adoption of contribution has eliminated the need for equitable apportionment. Nevertheless, the factual circumstances which distinguish a divisible injury from an indivisible injury remain a major factor affecting the alignment of the parties and ultimately the plaintiff’s entire litigation strategy. Plaintiffs’ attorneys must therefore keep these distinctions in mind when preparing for trial, notwithstanding the unlikelihood of confronting a claim for equitable apportionment.

94. Unlike joint tortfeasors, under Illinois tort law, a subsequent tortfeasor is liable only for the aggravation of the plaintiff’s injury and has no liability for the original injury. Therefore, a contribution suit by the physician against the original tortfeasor is unnecessary since the plaintiff will never recover the damages attributable to the original tortfeasor from the physician. See F. Harper, Law of Torts § 302 (1933).

95. These complications include the added complexity of issues and the possibility of confusing the jury. See Gosnell, Presenting the Defendant’s Case, in Illinois Civil Trial Practice 11-13 (1979). As one commentator has noted, the plaintiff is also helped by the addition of third parties through the increased chance of settlement and the reduction of the practical burden of persuasion. Record, Introduction to Third Party Practice, in Third Party Practice 1-6 (1981).
ABROGATION OF TRADITIONAL TORT IMMUNITIES AND THE ATTORNEY'S CONFLICT OF INTEREST

With the adoption of contribution in *Skinner v. Reed-Prentice*, a defendant could file a third-party claim against the plaintiff's employer, a party the plaintiff was prohibited from suing directly. Following *Skinner*, defendants began to attack other traditional and statutory immunity bars successfully. The fall of these traditional immunities has substantial repercussions for plaintiffs and their attorneys.

In 1981, the Illinois Appellate Court held that the Interspousal Tort Immunity Statute would not preclude a third-party action against the plaintiff's husband. In *Wirth v. City of Highland Park*, the plaintiff was injured when she fell down the stairway of a building owned by the defendant. The plaintiff's husband, as manager of the building, was named in a third-party complaint. The court cited several factors in upholding the claim against the plaintiff's husband. First, the court noted that many jurisdictions had already abrogated the interspousal immunity doctrine in whole or in part. In addition, the recent trend in Illinois had been to curtail common law immunities in favor of contribution and the Illinois Contribution Act did not specifically retain these immunities. Finally, the court relied on the legislative history of the Act which indicated the drafters' intent to preclude immunities as a bar to contribution.

   A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for tort to the person committed during coverture. An attachment or judgment in such action may be enforced by or against her as if she were a single woman.
100. Id. at 1078-80, 430 N.E.2d at 240-41.
103. 102 Ill. App. 3d at 1081, 430 N.E.2d at 242.
104. Id.
These same factors, among others, were discussed in *Larson v. Buschkamp.* In *Larson,* an action was brought on behalf of minor children against the driver and owner of the automobile that collided with the vehicle in which the children were passengers. The children’s vehicle was driven by their father at the time of the accident. The father was named by the plaintiff as a defendant and by the other defendants as a third-party defendant. The trial court granted the father’s motion to dismiss both the original claim and the third-party claim on the basis of parent-child immunity. The appellate court reversed, holding that the doctrine of parent-child immunity poses not a substantive bar to actions between a parent and child, but merely a procedural bar to enforcement. The parent was, therefore, “subject to liability” as required for a contribution action.

The preceding decisions will affect the plaintiff’s strategy in tort litigation where a marital or parent-child relationship exists between the parties involved in the tort. The factual situation of a two car accident with an injured passenger illustrates the possible effects. Where the passenger is related to one of the drivers involved, he or she will often opt not to sue or will be prohibited from suing the driver, yet the driver may be liable for contribution if any fault on his behalf is established. Of overriding concern to an attorney in such a case is the potential conflict of interest problem which may arise should he represent both the passenger and the driver. For example, if the plaintiff’s attorney proves the passenger’s case against the defendant,
he may indirectly create liability for the driver of the passenger's vehicle as a result of a third-party contribution action by the original defendant against the driver. Moreover, if the driver of the passenger's vehicle is uninsured, the passenger's attorney may be faced with representing the driver both as a plaintiff and a defendant.

In addition, the existence of the doctrine of joint and several liability creates potential conflict of interest problems.\textsuperscript{112} Consider the situation where an attorney represents both the injured passenger and the driver of an automobile, but only brings an action for the passenger against the second driver. Under joint and several liability, the defendant found guilty of any negligence proximately causing the plaintiff's injuries is liable for the entire amount of damages incurred by the plaintiff. Absent joint and several liability, however, the defendant in the above example would not be liable for the entire amount of damages unless his negligence was the sole proximate cause of the occurrence. Rather, he would incur liability only for the amount of damages attributed to his conduct. As a result, if the driver of the passenger's vehicle was partially responsible for the accident, the passenger would be required to name the driver as a defendant in order to recover the remainder of his damages. In such instance, it is incumbent upon the plaintiff's attorney to file suit against both the driver of the passenger’s automobile and the driver of the second automobile if it appears that both drivers were negligent. The obvious conflict of interest problem would preclude the attorney's representing both the passenger and the driver.

The rejection of traditional immunity bars in favor of third-party contribution actions creates a variety of potential conflicts of interest. Plaintiffs' attorneys must recognize these conflicts at the outset in order to represent their clients properly. Clients should be fully apprised of the ethical necessity of separate counsel for other family members involved in the case and the legal necessity of a lawsuit against those family members.

\textsuperscript{112} See supra notes 65-75.
CONCLUSION

Although third-party practice is commonly recognized as the tool of the defendant, its use greatly affects the original plaintiff in several ways. Evidence of its effects readily appears in cases involving employment related injuries. Although the Workers' Compensation Act protects an employer from a direct suit by the employee, the employer can be impleaded by the employee's defendant. Defendants in Structural Work Act suits, for instance, may implead employers who were "in charge of" the work and were in a position to alleviate dangerous working conditions. After Skinner, an employer is also amenable to a third-party suit for contribution by a manufacturer in a products liability action. As a result of this potential third-party exposure, increased incentive exists for an employer to create a safer working environment. In addition, the employer may be more willing to help the plaintiff prove his case against the defendants in products liability or Structural Work Act suits.

Similarly, in other areas of tort litigation, such as medical malpractice arising from a physician's use of a defective product, the plaintiff and third-party defendant may find their interests closely aligned. Any assistance each may offer the other in proving the defendant's negligence will work to the benefit of both. Finally, with the adoption of contribution, a plaintiff may find that a relative has been named a third-party defendant in a case that would have been barred under traditional immunity principles. Since these principles no longer apply to prevent the joinder of a relative in the plaintiff's suit, conflict of interest problems will arise if the plaintiff's attorney attempts to represent both parties. Such problems are readily apparent in automobile accident cases where the injured passenger and his driver are related.

A plaintiff's attorney must be cognizant of the law relating to third-party practice and fully understand its effect on the plaintiff's case. This awareness will prove especially useful in Illinois as a result of the Contribution Act and pertinent case law. Plaintiffs' practitioners will find it in the best interest of their clients to pursue an active role with regard to third-party actions, working jointly with defendants during negotiation and formulation of trial strategy.

113. See supra note 29 and accompanying text.
114. See supra notes 51-52 and accompanying text.