Risk Shifting Devices and Third-Party Practice: The Impact of *Skinner* and *Alvis*

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Risk Shifting Devices and Third-Party Practice:
The Impact of *Skinner* and *Alvis*

*Miles J. Zaremski*  
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INTRODUCTION

Defense counsel in Illinois have a number of legal theories at their disposal when seeking to avoid a plaintiff's claim or to transfer the potential liability of their clients in whole or in part to third parties. These theories can be divided into two major categories: those that seek to shift the entire burden of liability to the third party,1 and those that seek to shift only a portion of the burden. In the first group are claims for implied indemnity based on the common law theory of active-passive negligence, claims for contractual indemnity, and claims for breach of an agreement to purchase insurance. In the second group are claims based on equitable apportionment and claims for contribution.

The Illinois Supreme Court decisions of *Skinner v. Reed-Prentice Division Package Machinery Co.*2 and *Alvis v. Ribar*3 have affected these theories greatly. In its 1978 landmark opinion in *Skinner*, the supreme court radically altered tort law in Illinois

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1. Of course, the third party may also be a codefendant in the underlying action. In that instance, the third party demand would be styled as a counterclaim under Illinois rules of practice. Ill. Rev. Stat. ch. 110, ¶ 2-608 (1981). The theories of recovery are the same and in this article codefendants are included in the term third party.


3. 85 Ill. 2d 1, 421 N.E.2d 886 (1981). In *Alvis*, the court held plaintiffs were no longer barred from recovery because of their contributory negligence, but rather, plaintiffs' damages would be reduced by the percentage of fault attributable to them. The decision has prospective application for all cases tried on or after June 8, 1981.
by adopting the rule of contribution between joint tortfeasors. When first decided, *Skinner* was viewed by some commentators as but a harbinger for the acceptance of comparative fault principles. This prediction was borne out by the court's 1981 decision in *Alvis*, which replaced the common law doctrines of contributory negligence and last clear chance with the doctrine of comparative negligence in its pure form.

In *Skinner*, a products liability case, the plaintiff employee filed suit against the manufacturer of a piece of machinery that had injured the plaintiff. The defendant manufacturer asserted a third-party claim for equitable apportionment of liability against the plaintiff's employer for the latter's alleged negligence which contributed to the plaintiff's injuries. The trial court's dismissal of the claim was affirmed by the appellate court, but the Illinois Supreme Court reversed. While recognizing that because the injury was not divisible no grounds for an equitable apportionment claim existed, the court chose to construe the third-party complaint as a claim for contribution. It then overturned prior case law and held that a right to contribution does exist under Illinois common law. After rehearing, the court limited the application of the *Skinner* rule prospectively to those claims arising from occurrences on or after March 1, 1978. In 1979, the Illinois legislature codified the *Skinner* decision in the Contribution Among Joint Tortfeasors Act (Contribution Act).


5. 85 Ill. 2d at 25, 421 N.E.2d at 897. As explained by the court, under a "pure" form of comparative negligence, the plaintiff's damages are simply reduced by the percentage of fault attributable to him. Under a "modified" form of comparative negligence (which was rejected by the court), a negligent plaintiff may recover so long as the percentage of his fault does not exceed 50% of the total. *Id.*

6. 70 Ill. 2d at 4, 374 N.E.2d at 438.

7. *Id.* at 5, 374 N.E.2d at 438.

8. *Id.* at 16, 374 N.E.2d at 443.


10. 70 Ill. 2d at 16-17, 374 N.E.2d at 444.

11. ILL. REV. STAT. ch. 70, ¶§ 301-305 (1981). Although the court in *Skinner* gave its decision prospective application to "claims arising from occurrences on or after March 1, 1978," the Contribution Act used the language "causes of action arising on or after March 1, 1978." Many appellants have since argued that this deletion substantially altered the scope of applicability of the contribution rule. The argument is premised on the fact that a cause of action for contribution under common law could only arise at the time of payment of the underlying judgment or settlement. See RESTATEMENT (SECOND)
Alvis involved consolidated traffic accident cases in which the plaintiffs’ claims of negligence against the defendants were barred because of their own contributory negligence. On appeal, the Illinois Supreme Court again overruled well-established case law and held that the rule of contributory negligence was abolished and that comparative negligence in its pure form would apply to all Illinois cases reaching trial on or after June 8, 1981.

Skinner and Alvis can be viewed as but two halves of the same principle: the equitable distribution of liability according to fault. Indeed, the Alvis opinion itself described Skinner as the case in which “the collateral issue of contribution among joint tortfeasors [had] already been resolved under the principles of comparative negligence . . . .” Both cases illustrate that by fashioning this new system of liability distribution, the Illinois Supreme Court has sought to achieve the ideal of “total justice.” Nonetheless, Alvis and Skinner have left a host of interpretive problems in their wake. Although the Contribution Act has resolved some of these issues, it has spawned many others. And while several bills have been proposed to codify the doctrine of comparative negligence, none has passed to date, leaving the courts free to implement the doctrine on their own.


This rule was recently challenged in Coney v. J.L.G. Indus., Inc., No. 56306, slip op. (Ill. Sup. Ct. May 18, 1983). See infra notes 156-74 and accompanyint text.

12. 85 Ill. 2d at 4, 421 N.E.2d at 887.
13. Id. at 28, 421 N.E.2d at 888.
14. Id.
16. Two minor points should be noted before discussing the substantive theories. First, apportionment of liability can also be sought as a matter of defense without the
In light of *Skinner, Alvis* and their respective progeny, this article analyzes how Illinois tort law has been altered by the recent adoption of contribution and comparative negligence theories. Specifically, the authors examine the evolution of risk shifting devices and their future viability in the context of third-party practice. The article concludes with a discussion of recent Illinois decisions which prevent defendants from ending their liability through settlement and release agreements.

**THE TOTAL SHIFT OF LIABILITY**

*Implied Indemnity*

The common law right to implied indemnity provides that of two or more joint tortfeasors, the less culpable tortfeasor may obtain indemnification from the more culpable tortfeasor.\(^{17}\) The conduct of the indemnitor is characterized as active negligence or the primary cause of injury, while the conduct of the indemnitee is characterized as passive negligence or the secondary cause filing of formal claims against third parties. For example, with regard to the plaintiff, the liability which is attributable to his negligence would be raised as an affirmative defense under the scheme of pure comparative negligence as recognized by *Alvis*. Although the *Alvis* court did not state the procedural method for raising plaintiff’s negligence, this pleading suggestion seems appropriate in light of the defendant’s burden of proof. See Postel, *Contributory Negligence: Judge O’Brien’s Analysis of Pleading Requirements*, Chi. Daily L. Bull., May 24, 1982, at 1, col. 1.

Ultimately, upon a finding of plaintiff’s negligence, that portion of liability attributable to the plaintiff would reduce the judgment award. For a discussion of the mechanics of applying comparative negligence to an actual trial, see Kionka, *Comparative Negligence Comes to Illinois*, 70 Ill. B.J. 16 (1981); see also 1981 Ill. Judicial Conference: Comparative Negligence in Illinois, the Alvis Decision (particularly Part III) (available through the Illinois Supreme Court); Report of Illinois Supreme Court Committee on Jury Instructions in Civil Cases, Comparative Negligence Instructions (1981) (available through the Illinois Supreme Court). See generally H. Woods, *Comparative Fault: The Negligence Case* (1978); V. Schwartz, *Comparative Negligence* (1974).

Second, with regard to codefendants or absent third parties in those cases where no counterclaim or third-party claim for contribution has been filed, the Illinois Appellate Court has held, in *Cornell v. Langland*, 109 Ill. App. 3d 472, 476-77, 440 N.E.2d 985, 988 (1982), that the apportionment of liability cannot be raised by affirmative defense or otherwise. Even though the jury in that case held that 17.5% of the negligence was attributable to an absent third party, the court found that joint and several liability was still the law in Illinois and as such the defendant’s judgment could not be reduced by 17.5%. This rule has been affirmed by 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).

of injury. The theory arose as a judicial attempt to mitigate what was perceived to be the harsh effects of the inflexible common law rule which prohibited contribution between joint tortfeasors. As a result, implied indemnity has traditionally been treated as an exception to the no-contribution rule.

Historically, implied indemnity required between the parties some type of pre-tort relationship giving rise to the duty to indemnify. Typically, the indemnitee's liability was viewed as having derived from an implied term of the agreement between the two parties whose relationship was already well established in the law. Under such principles as respondeat superior or vicarious liability, implied indemnity would lie as between lessor and lessee, employer and employee, master and servant, and principal and agent. Thus, in this traditional context, implied indemnity rested on principles of contract or quasi-contract.

Active-Passive Negligence

In 1964, however, in a further effort to lessen the harshness of the no-contribution rule, the Illinois Appellate Court in Reynolds v. Illinois Bell Telephone Co. held that a pre-tort relationship was no longer required. Rather, the implied right to indemnity would be permitted between strangers, so long as there was some qualitative difference in their culpability to justify the shift in

the incidence of liability. Thus was born the contemporary notion of active-passive negligence. This creative expansion of the principle of implied indemnity beyond its traditional precepts was justified by the court’s strong antipathy to the no-contribution rule and its frustration at the legislature’s refusal to abrogate the rule. In the court’s view, the no-contribution bar was grounded in antiquity, when torts were in the main wrongs such as slander, libel, and assault. In the modern world, however, where torts primarily involve incidents of industrial accident or heightened commercial activity, the no-contribution rule thwarted just resolutions. Although some inequity would continue to exist until the no-contribution rule was totally abolished, the expansion of implied indemnity was at least a first step in the shift of liability from the less to the more culpable party, and was all that the conservative bench was then willing to take.

In trying a claim for common law implied indemnity prior to the adoption of contribution, the court compared the misconduct of the two tortfeasors and allowed indemnity only when the misconduct of the indemnitee appeared passive in comparison with the misconduct of the indemnitor. The conduct of the indemnitator, compared with that of the indemnitee, would thus be active in nature and the primary cause of the plaintiff’s injuries. Essential to indemnity relief was a recognizable, qualitative distinction between the conduct or negligence of the two tortfeasors. An active tortfeasor was never entitled to implied indemnity even if the party he sought indemnity from was also found actively negligent. Moreover, the issue of active-passive negli-

27. *Id.* at 336-37, 201 N.E.2d at 323.
30. See Harris v. Algonquin Ready Mix, Inc., 59 Ill. 2d 445, 322 N.E.2d 58 (1974) (workman was injured when crane brushed high voltage power line and electric utility was deemed actively negligent for failure to warn of danger); Carver v. Grossman, 55 Ill. 2d 507, 305 N.E.2d 161 (1973) (service station repairman injured when actively negligent customer turned ignition key while car was in gear).
gence and the imposition of third-party indemnity was a question of fact for the jury.\textsuperscript{33} If reasonable people could draw different inferences from the facts, the court could not weigh the evidence.\textsuperscript{34}

Perhaps the most oft-cited definition of active-passive negligence is that "passive negligence exists where one person negligently brings about a condition or an occasion and active negligence exists where another party negligently acts upon that condition and perpetrates a wrong."\textsuperscript{35} But beyond this nebulous phraseology, there are no clear-cut guidelines as to what constitutes active or passive negligence.\textsuperscript{36} The judiciary has frankly admitted that the concepts are imprecise and difficult to apply.\textsuperscript{37} Accordingly, the words "active" and "passive" are viewed as terms of art whose application must accord with standards developed on a case by case basis.\textsuperscript{38} Because the boundaries of active-passive negligence are so elusive, the appellate case law has been, to put it most charitably, inconsistent.\textsuperscript{39} Indeed, these concepts have probably caused more confusion in the appellate court opinions than any other aspect of third-party practice.\textsuperscript{40}

Procedure

As a matter of procedure, claims premised on implied indemnity are subject to the same general pleading requirements as apply to third-party complaints or, if the action is filed between codefendants, to counterclaims. Since Illinois remains primarily a fact-pleading jurisdiction, the complaint must allege facts to support the legal conclusion that the indemnitee was passively negligent while the indemnitor was actively negligent. A pleading which avers only the legal conclusion itself will be subject to a motion to dismiss. However, the party seeking indemnity is not bound by the characterization of his conduct as posed in the underlying complaint. Rather, the issue as to whether his conduct is active or primary is a factual question for the fact finder to resolve after a hearing on all the evidence. Because of the definitional problems inherent in the active-passive theory, judges are reluctant to grant a motion to dismiss where the complaint alleges active conduct on the part of the movant. The complaint need only evince some possibility of recovery and should not be dismissed unless it is clear that “in no event” would the pleader have a proper action against the third party.

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42. Fact pleading is defined as the requirement to plead the specific facts supporting the elements of one’s cause of action. It is to be distinguished from notice pleading, used in federal court for example, where the pleader need only give notice to the defendant of the type of claim or recovery which is sought. Illinois practice requires that a complaint contain specific allegations of fact from which conclusions may be drawn. Henkhaus v. Barton, 56 Ill. App. 3d 767, 769, 371 N.E.2d 1166, 1168 (1978). Compare Fed. R. Civ. P. 8.
44. Miller v. DeWitt, 37 Ill. 2d 273, 266 N.E.2d 630 (1967); Mierzejewski v. Stronczek, 100 Ill. App. 2d 68, 78, 241 N.E.2d 573, 578 (1978). This legal tenet is based on the practical recognition that complaints are frequently amended and, until the actual evidence is heard, it is difficult to execute the weighing process necessary to compare properly the indemnitor’s conduct with that of the indemnitee. Blaszer v. Union Tank Car Co., 37 Ill. App. 2d 12, 184 N.E.2d 808 (1962).
45. See Muhlauer v. Kruzel, 39 Ill. 2d 226, 231, 234 N.E.2d 790, 793 (1968) (where the supreme court cites numerous decisions which emphasize the difficulty of determining as a matter of law at the pleading stage that “in no event” would the defendant have an action). But see Donaldson v. Holy Family Hosp., 94 Ill. App. 3d 285, 418 N.E.2d 873 (1981) (where third-party complaint against plaintiff’s employer was dismissed at the pleading stage).
Under Illinois common law, an action for indemnification does not accrue until after the indemnitee has been held liable or has settled with the original plaintiff or claimant.\textsuperscript{48} To the contrary, paragraph 2-406(b) of the Illinois Code of Civil Procedure\textsuperscript{49} allows third-party claims against those "who may be liable" to the party seeking indemnity. As such, claims may be filed either during the pendency of the original claim or afterwards as a separate lawsuit.\textsuperscript{50} There does appear to be a split at the appellate level, however, as to whether the third-party claim can be determined before the initial claim establishing liability and damages is determined.\textsuperscript{51}

Finally, as a matter of procedure, a third-party claim for active-passive indemnity is not permitted where the case in chief is based on breach of contract.\textsuperscript{52} The rationale for this rule appears to be twofold. First, where the underlying claim sounds in contract, the negligence of the two parties is usually not at issue and cannot be compared.\textsuperscript{53} Second, a breach of contract


\textsuperscript{49} ILL REV. STAT. ch. 110, § 2-406(b) (1981).


\textsuperscript{51} Compare Klatt v. Commonwealth Edison Co., 55 Ill. App. 2d 120, 204 N.E.2d 319 (1964), rev'd on other grounds, 33 Ill. 2d 481, 211 N.E.2d 720 (1965) (where the court decided it could not determine the third-party claim before resolution of the primary claim) with Nogacz v. Procter & Gamble Mfg. Co., 37 Ill. App. 3d 636, 347 N.E.2d 112 (1975) (where the court held it could determine the third-party claim prior to resolution of the underlying complaint).


\textsuperscript{53} However, the active-passive indemnity concept has been applied to areas where traditionally negligence is not at issue. In the products liability area, for example, claims for indemnity are permissible despite the notion that strict liability in tort is unrelated to the measurement of negligence.

The Illinois Supreme Court adopted the products liability concept in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (indemnification allowed against manufacturer of defective product). Negligence is irrelevant in determining products liability because of the latter's doctrinal foundation. As stated in Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975): "The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the 'negligence' of the manufacturer."

Indemnity claims can be filed against any party who is positioned "up" the distribution stream of commerce. For example, a retailer may sue a wholesaler and a wholesaler
would be a breach of an affirmative duty—a matter customarily regarded as active wrongdoing. Thus, a stranger to a contract between two parties cannot be compelled to indemnify one of the parties for breach of contract without the stranger’s express or implied agreement to do so.\textsuperscript{54}

may sue a manufacturer, but the manufacturer must assume the ultimate liability for its product. Thus, the manufacturer of an unreasonably dangerous product is barred from seeking indemnity from the plaintiff’s employer, Burke v. Sky Climber, Inc., 57 Ill. 2d 542, 316 N.E.2d 516 (1974), but may be allowed to seek indemnity against a component manufacturer. Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 338 N.E.2d 857 (1975). Indemnity is barred only where the potential indemnitee is guilty of product misuse or assumes the risk of loss by its use. \textit{Id}. at 83, 338 N.E.2d at 860. The underlying rationale for these rules is not based on negligence principles but on the notion that since the function of products liability is to shift the burden of loss to its creator, the manufacturer, all parties in the distributive chain should be allowed to shift the responsibility for loss back to the originally responsible party. \textit{Id}. at 82, 338 N.E.2d at 860.

At first blush, Structural Work Act claims under ILL. REV. STAT. ch. 48, \textsection\textsection 60-69 (1981) would also seem to produce an inappropriate setting for the negligence weighing concept. The Act was passed in 1907 in order to promote safety on construction sites. Liability under the Act is based, at least theoretically, upon the defendant’s wilful violation of the Act. ILL. REV. STAT. ch. 48, \textsection 69 (1981). However, active-passive implied indemnity claims have been held permissible on the ground that although the liability imposed by the Act does not rest upon negligence principles, there can still be measurable degrees of fault among those who are accountable under the Act to the injured workman. McInerney v. Hasbrook Constr. Co., 62 Ill. 2d 93, 104, 338 N.E. 2d 868, 874-75 (1975); Lindner v. Kelso Burnett Elec. Co., 133 Ill. App. 2d 305, 273 N.E.2d 196 (1971).

For example, the party who is responsible for the scaffolding and the particular work which produces the injury is almost always held to be more culpable than the party who merely supervises or coordinates the overall project. Since neither of these parties can escape liability to the plaintiff, the purpose of the Act is accomplished, but the less delinquent party may still transfer his statutory liability to the active delinquent. McInerney v. Hasbrook Constr. Co., 62 Ill. 2d 93, 104, 338 N.E.2d 868, 874 (1975).

It is useful to note here that, in general, since the terms “active” and “passive” are so difficult to define in a way that is helpful or easily applied to concrete factual settings, courts have repeatedly held that the issue is to be determined on a case-by-case basis. In the Structural Work Act field, however, the primary factual scenario is so common and has been reviewed so often by the courts that the law is firmly established that the one who erects, constructs, builds and maintains the scaffold is the active tortfeasor as against the party whose only duty is to inspect or supervise. \textit{See}, \textit{e.g.}, Lindner v. Kelso Burnett Elec. Co., 133 Ill. App. 2d 305, 273 N.E.2d 196 (1971).


\textsuperscript{54} \textit{See}, \textit{e.g.}, Talandis Constr. Corp. v. Illinois Bldg. Auth., 23 Ill. App. 3d 929, 935, 321 N.E. 2d 154, 159 (1974). In Maxfield v. Simmons, 96 Ill. 2d 81, 449 N.E.2d 110 (1983), the Illinois Supreme Court held that an indemnity agreement can be implied from the contracted relationship existing between the parties.
Implied Indemnity After Contribution

At least one commentator predicted that the adoption of contribution would supplant the active-passive theory of implied indemnity, yet in Van Jacobs v. Parikh, the Illinois Appellate Court ruled that the concept of implied active-passive indemnity had not been nullified by either the adoption of contribution in the courts or the Contribution Act. As a result, active-passive indemnity is still a viable theory of recovery under Illinois' current tort system. By holding that the right to implied indemnity results from "a qualitative distinction between the conduct of the parties," the Van Jacobs court heralded a return to the classic definition of active-passive negligence. After Van Jacobs, a party seeking indemnity must allege and prove a pre-tort relationship between the parties which gives rise to the duty to indemnify. The decision thus sounded a retreat from the holding in Reynolds v. Illinois Bell Telephone Co., which had allowed a claim for indemnity between strangers with no pre-tort relationship.

While not destroying the law of active-passive indemnity, the adoption of contribution has significantly changed it. The Van Jacobs court noted that, traditionally, a clear distinction existed between the theories of contribution and indemnity. Contribution apportioned liability according to the relative fault of each party. Indemnity shifted the entire responsibility for the loss to the more culpable party where the indemnitee was only technically liable. In other words, the indemnitee's liability resulted solely from the indemnitor's conduct. Whereas the right to

57. Id. at 612, 422 N.E.2d at 981. See also Bednar v. Venture Stores, Inc., 106 Ill. App. 3d 454, 457, 436 N.E.2d 46, 48 (1982).
58. 97 Ill. App. 3d at 613, 422 N.E.2d at 981-82.
59. Id. at 613, 422 N.E.2d at 981.
60. 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964). See supra notes 21-29 and accompanying text.
61. 97 Ill. App. 3d at 612, 422 N.E.2d at 981.
62. Id. Technical liability arose in situations of respondeat superior and vicarious liability.
indemnity focused on the pre-tort relationship of the parties, the right to contribution focused on the culpable conduct of each party at the time of the injury.

According to Van Jacobs, these historic distinctions were blurred by judicial efforts to mollify the harsh effects of the no-contribution rule. This judicial expansion of implied indemnity beyond its original theoretical confines reached its zenith with the Reynolds decision, in which any need for a pre-tort relationship was wholly abandoned. With the adoption of contribution, however, the need for expanded indemnity disappeared. The Van Jacobs court could therefore place implied indemnity back on its proper theoretical foundation, the pre-tort relationship. Henceforth, all implied indemnity claims must be based not only on a qualitative distinction between the conduct of the two parties, but on the pre-tort relationship between them which gives rise to the duty to indemnify.

The Van Jacobs analysis up to this point is unassailable. Yet from its reasoning one would expect the court to revert to the "old law" of implied indemnity, where the pre-tort relationship was squarely fixed in contractual or quasi-contractual relationships. Indeed, the Van Jacobs court states that indemnity derives from principles of contract and cites to cases which demonstrate contractual or quasi-contractual relationships, such as lessor-lessee, employer-employee, and master-servant, in order to illustrate its point. But the Van Jacobs court did not return to the oldest precepts of pre-tort relationship. Instead, it based the requirement for a pre-tort relationship squarely on the Illinois Supreme Court's 1968 opinion in Muhlbauer v. Kruzel, which

63. Id. at 613, 422 N.E.2d at 981 (quoting Appel & Michael, Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation, 10 Loy. U. Chi. L.J. 169 (1979)).
64. See Bednar v. Venture Stores, Inc., 106 Ill. App. 3d 454, 457, 436 N.E.2d 46, 48 (1982). See also supra notes 22-25 and accompanying text. It should be noted that since the right to contribution does not apply to those cases where the occurrence or accident giving rise to the underlying claim took place prior to March 1, 1978, the implied indemnity issues in those cases will be governed by the law as it existed before Van Jacobs.
65. See supra notes 22-25 and accompanying text.
66. 39 Ill. 2d 226, 234 N.E.2d 790 (1968). The underlying action in Muhlbauer was brought against a store owner by a passer-by who sustained personal injuries when a crowd gathered in front of the store to watch a clown. The clown had been hired by one of the store's suppliers in order to promote the supplier's products. The indemnity complaint by the store owner against the supplier alleged that the active negligence was that of the clown who drew the crowd and, therefore, the supplier who hired the clown should
held that an indemnity complaint must be predicated on a pre-tort relationship, but which left the exact nature of such relationship in considerable doubt and confusion. In its analysis of the pre-tort relationship issue, the Muhlbauer court implied that had the defendant alleged certain facts, a sufficient pre-tort relationship may have existed upon which to base a legal claim for implied indemnity.67 Yet earlier in its discussion the court cited Reynolds and its progeny with approval, the very cases which reject any need for a pre-tort relationship.68

Subsequent opinions have often cited Muhlbauer for the pre-tort relationship requirement without providing any clarification as to its nature.69 According to one commentator, "such a relationship . . . possibly might be nothing more than the involvement of the two parties . . . in the causation of injury to the plaintiff under circumstances that clearly indicate a . . . distinction in the quality of their misconduct."70 The most that can be said about the requirement is that it remains, at present, very nebulous.71 Therefore, when courts grapple with this issue in the future, they will have to examine anew the nature of the pre-tort relationship and the methods for determining which parties are actively or passively negligent.

Nonetheless, the Van Jacobs court was correct in holding that the adoption of contribution undercuts the need to further expand implied indemnity and in resurrecting the pre-tort relationship test. This is not to encourage a radical reversion to the hoary law of quasi-contract, however, for there is no doubt that the pre-tort relationship concept should extend beyond those traditionally recognized, such as landlord-tenant, employer-employee, and lessor-lessee. But beyond this, any further alteration of the law should be grounded squarely on social utility and equity considerations, that is, public policy. Such public policy might best be

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67. Id. at 232, 234 N.E.2d at 793.
68. Id. at 231, 234 N.E.2d at 793.
70. Kissel, supra note 40, at 160.
71. Bua, supra note 29, at 300.
served by giving common sense recognition to generally accepted commercial expectations.

For example, to determine whether a pre-tort relationship exists, the courts might look to what could be called a "common enterprise" standard. Currently, in commercial settings where multiple parties are involved in a common enterprise, there is a mutual understanding that certain obligations will be performed only by certain of the parties. Not only are these parties not strangers to one another, but they have clear expectations as to the role each is to play in the common enterprise. Legal adoption of the "common enterprise" test would merely acknowledge these commonly understood roles and would greatly alleviate the present confusion in indemnity tort law.

To illustrate, the common enterprise test for pre-tort relationship could be used in the field of construction law or Structural Work Act liability. In any given construction project, there are a myriad of contractual relationships. Although not all of the parties involved will be in privity with each other, there are well-defined roles and expectations which all of the parties recognize. According to a well-established division of labor, it is expected that some of the parties will be responsible for safety and scaffolding while others will not. 72 Nevertheless, because the scope of the Structural Work Act has been interpreted so broadly, almost anyone who sets foot on the work site can be sued. 73

If the underlying goal of the Structural Work Act is to provide incentives to increase worker safety, it makes sense to allow those who have no control over safety measures at the job site to shift the incidence of liability to those who have control. Such shifting would further not only statutory goals but equitable goals as well. To further these goals even more, the lack of a direct contractual relationship should be deemed irrelevant to the

72. For example, a design professional such as an architect or structural engineer may visit the site periodically in order to answer definitional questions by the owner, the contractor, or subcontractors regarding the design plans. The design professional may also make a cursory examination of the work then in progress in order to discern whether or not the construction is being undertaken according to his design plans. Then too, the owner may engage the architect to check the progress of the work in order to verify the percentage of completion and to authorize partial payouts to the building trades. In these instances, the design professional is uninvolved with scaffolding or safety at the job site. He also may lack privity with the general contractor or subcontractors who are involved with such matters.

73. Regarding the broad interpretations given to the Illinois Structural Work Act, see generally Lurie & Stein, supra note 53.
issue of whether a pre-tort relationship exists which is sufficient to give rise to an implied indemnity right. By recognizing the accepted division of labor and real-life expectations in the construction industry under a common enterprise theory, the courts would be encouraging the safety goals intended by the Structural Work Act.

In sum, implied indemnity is still a viable risk shifting device in certain situations. With the adoption of contribution, the traditional requirement of a pre-tort relationship to establish an implied indemnity claim has reappeared. As a result, the contractual and quasi-contractual foundation for implied indemnity can be restored, as well as certainty in the case law.

**Contractual Indemnity**

Contracts for indemnity, commonly referred to as “hold harmless” agreements, have caused almost as much confusion as the theory of implied indemnity. Indemnity contracts provide a pre-arranged shift of liability. As in all contract actions, the wording of the agreement is crucial to the case; but beyond this simple statement, it is difficult to generalize about the case law of contractual indemnity with confidence.

The fountainhead for the judicial construction of indemnity agreements is the 1946 Illinois Supreme Court decision rendered in *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.* That opinion adopted the then general rule that “an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract.” Thus was born the *Westinghouse* rule which, by first presuming that any assumption of liability for another’s negligence was a rare and extraordinary event, easily justified strict construction of the contract against the indemnitee.

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75. 395 Ill. 429, 70 N.E.2d 604 (1946).
76. Id. at 433, 70 N.E.2d at 607.
The reluctance of the courts to shift liability from a negligent party to another party gained force after Westinghouse. While subsequent cases paid lip service to the notion that indemnity contracts for one's own negligence were generally valid and enforceable, most courts applied a tortured construction to the clear language of the indemnity provision and "strictly construed" it as violative of the Westinghouse rule. Some of these strained opinions seem irrational. In fact, at least one appellate court has admitted that any attempt to reconcile the various indemnity decisions is entirely futile. In those few cases where the indemnity agreement was upheld, the court usually found both parties negligent. For the courts, the transfer of liability was more easily justified where the indemnitor was not an innocent party, even though the contract language in such cases did not differ significantly from that in Westinghouse and its progeny.

If consistency in the law is a goal to be valued, these erratic decisions, where the outcome of the case is unrelated to the contract language at issue, should give jurists and practitioners alike cause for concern. Fortunately, the confusion surrounding the law of contractual indemnity may soon be lifted by the recent convergence of five events: the Illinois Appellate Court's interpretation of the Anti-Indemnity Act in Cox v. Lumber-


79. See, e.g., Zadak v. Cannon, 59 Ill. 2d 118, 319 N.E.2d 469 (1974), where a purchase order for certain machinery obligated the seller to indemnify the purchaser for injuries arising from the installation work performed by the seller. The court held that the phrase "arising out of any such work" referred only to injuries arising directly from the installation work and not injuries merely incurred during the installation work.


82. ILL REV. STAT. ch. 29, ¶¶ 61-63 (1981). The Act provides:

§ 1. Indemnification of person from person's own negligence—Effect—Enforcement.

§ 2. Application of Act
mens Mutual Casualty Co.,\textsuperscript{83} the adoption of the right to contribution, recognition of the contractual allocation of loss in Moorman Manufacturing Co. v. National Tank Co.,\textsuperscript{84} recognition of the right to enforce insurance purchase clauses in Zettel v. Paschen Contractors, Inc.,\textsuperscript{85} and the adoption of comparative negligence.

Section 1 of the Illinois Anti-Indemnity Act prohibits contracts for the indemnification of a party's own negligence where the contract pertains to a construction or excavation project and was entered into after September 23, 1971. The Anti-Indemnity Act as a whole is clearly limited to construction contracts.\textsuperscript{86} In Cox, however, the appellate court held that the Westinghouse rule of strict construction was no longer effective as to contracts signed after September 23, 1971, without limiting its ruling to construction contracts. According to Cox, enactment of section 1 of the Anti-Indemnity Act expunged any justification for the Westinghouse rule.\textsuperscript{87} While its doctrinal analysis would not appear to extend beyond the field of construction law, the Cox court made no such qualification. Hence, the rule of strict construction no longer exists.\textsuperscript{88}

With the adoption of contribution in Illinois\textsuperscript{89} prior to Cox, the indemnitor may have been subject to a third-party suit in any event. Because of the indemnitor's exposure to such liability, there is, arguably, less reason to strictly construe liability agreements to protect an innocent indemnitor after contribution.

Most important to the issue of contractual indemnity was the Illinois Supreme Court opinion in the Moorman case, which held that economic losses are not recoverable in tort and that the proper remedy is breach of contract.\textsuperscript{90} The court based its deci-

\begin{thebibliography}{99}
\bibitem{83} Construction bonds or insurance contracts—Application of Act § 3. This Act does not apply to construction insurance contracts or agreements.
\bibitem{84} 108 Ill. App. 3d 643, 646, 439 N.E.2d 126, 129 (1982).
\bibitem{85} 91 Ill. 2d 69, 435 N.E.2d 443 (1982).
\bibitem{86} 100 Ill. App. 3d 614, 427 N.E.2d 189 (1981).
\bibitem{87} See supra note 82.
\bibitem{88} 108 Ill. App. 3d at 646, 439 N.E.2d at 129. Westinghouse itself involved a contract for construction.
\bibitem{89} The Westinghouse rule is still applicable to contracts entered into before September 23, 1971, the effective date of the Anti-Indemnity Act.
\bibitem{90} See supra notes 2-11 and accompanying text.
\end{thebibliography}
sion, in part, on its willingness to defer to the contractual decisions of the parties themselves regarding the allocation of risk.\textsuperscript{91} In other words, absent bodily injury or physical damage to other property, the highest court of the state has officially pronounced its preference for contractual allocation of risk. The \textit{Moorman} ruling is a bold undertaking and an indication that the court clearly intends to demarcate carefully the proper division between tort claims and contract claims and the interests which they are intended to protect.\textsuperscript{92}

In the \textit{Zettel} case, the Illinois Appellate Court recognized the right of an indemnitee to sue the indemnitor for breach of contract where the latter has also promised to purchase liability insurance for the former for the same risks as outlined in the indemnity clause. Ironically, the \textit{Zettel} court also held that the indemnity clause itself was unenforceable because of the Anti-Indemnity Act.\textsuperscript{93} The practical result of the decision is that the astute indemnitee need only add an insurance purchase clause to his hold harmless agreement in order to preserve his right to shift the entire burden of liability to another party.\textsuperscript{94}

would eliminate certain malpractice claims, such as legal and accounting malpractice claims. \textit{Id.} at 354. But Bertschy fails to note that all contracts for professional services have an implied term that the services performed shall be executed in a professional and competent manner with reasonable care and skill. \textit{See}, e.g., Mississippi Meadows, Inc. v. Hodson, 13 Ill. App. 3d 24, 299 N.E.2d 359 (1973) (in the absence of a specific contractual term to the contrary, an architect implicitly represents to his client that he will perform his services according to the reasonable care and skill usually exercised by one in his profession). There is therefore no legitimate reason not to extend \textit{Moorman} to professional service contracts since its applicability will only serve to restrict the doctrinal basis for the malpractice claim to breach of contract. This interpretation comports with the philosophical exposition in \textit{Moorman} between the proper scope of tort law and contract law, and it has the salutary effect of clarifying the doctrinal distinction between those interests which are the proper concern of tort law and those which are the proper concern of contract law.

\textsuperscript{91} 91 Ill. 2d at 78-80, 435 N.E.2d at 447-48.

\textsuperscript{92} This trend in demarcation serves only to bolster the argument in favor of enforcing indemnity provisions, which are no more than the contractual allocation of risk. It should also be noted that \textit{Moorman} provides a new substantive defense under Illinois tort law. The court held that there was no right to recovery of economic loss on either a negligence or strict liability theory. Economic loss was defined basically as damages which are not attributable to personal injury or injury to property. Although there is no specific holding on this point as yet, the \textit{Moorman} defense should be available to third-party defendants sued for implied indemnity under the active-passive theory.

\textsuperscript{93} \textit{See infra} notes 97-118 and accompanying text.

\textsuperscript{94} Conversely, \textit{Zettel} will now serve to punish the unwary and those who cannot afford astute counsel.
Finally, with the adoption of comparative negligence, the liability exposure to both the indemnitor and the indemnitee is diminished to the extent of the plaintiff's culpability. This also serves to mitigate the need for, and clear the confusion surrounding, the *Westinghouse* rule.

In sum, the adoption of the right to contribution and the doctrine of comparative negligence has not directly affected the law of express contractual indemnity. When coupled with other recent trends, however, these developments do reinforce what is now a very compelling argument against strict construction of hold harmless agreements. The reluctance to allow one to shift the risk of loss attributable to one's own negligence is based on the same arguments previously used against allowing liability insurance.\(^9\) If one can buy insurance to cover his own negligence, barring the right to indemnity for this same risk is a curious anomaly.\(^6\) Under the recent changes in Illinois case law, the right to shift the risk of liability contractually through indemnification may soon be as acceptable as the purchase of insurance.

**Claims for Breach of Contract to Purchase Insurance**

Because section 1 of the Anti-Indemnity Act\(^9\) bars indemnification for one's own negligence, astute contract draftsmen have begun to place insurance purchase provisions immediately next to the hold harmless clause. Although the indemnification provisions have been uniformly stricken as violative of the Anti-Indemnity Act, two first district appellate court decisions, *Zettel v. Paschen Contractors, Inc.*\(^9\) and *Vandygriff v. Commonwealth*

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95. There are cases, of course, where these arguments are still compelling. Indemnity should not be allowed for intentional torts since this might encourage criminal acts. Similarly, although the states are now fairly evenly divided on this question, many states, including Illinois, do not allow insurance coverage for punitive damages except where such damages are imposed vicariously. Beaver v. Country Mut. Ins. Co., 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (1981). This outcome is also based on public policy arguments.


Edison Co., have recently upheld and enforced the insurance purchase contract.

In Vandygriff, the contract between the owner, Commonwealth Edison, and the contractor, Gust K. Newburg Construction, required the latter to purchase liability insurance naming the owner as an insured. The contractor purchased the insurance and the insurance carrier defended the owner in two personal injury claims brought under the Illinois Structural Work Act. The insurance counsel then filed third-party claims against the contractor seeking common law active-passive indemnity. The contractor moved to dismiss the indemnity claim on the ground that the insurance was intended to cover its indemnity obligations and, therefore, the contract to purchase insurance by implication provided mutual exculpation to the bargaining parties. The trial court dismissed the third-party complaint and the appellate court affirmed. In doing so, however, the Fourth Division of the First District Appellate Court acknowledged that its ruling in Vandygriff conflicted with another recent first district case, Rome v. Commonwealth Edison Co., involving almost identical facts.

In Rome, the Second Division of the First District Appellate Court had construed contractual provisions regarding the purchase of insurance which were identical to those at issue in Vandygriff. As in Vandygriff, the general contractor in Rome had purchased the required liability insurance for the owner, Commonwealth Edison. In Rome, however, the court allowed an insurance subrogation claim against the general contractor because, in its opinion, there was nothing in the contract to indicate that the parties intended the insurance policy to relieve the general contractor from indemnity liability to the owner.

The Vandygriff court found the reasoning of Rome unpersuasive. Instead, the court stated that since the general contractor paid the insurance premiums for the owner's coverage, it must have intended to use the insurance to protect itself from indemnity claims by the owner. An important additional fact pres-
ent in *Vandygriff* was testimony by representatives of the owner that the purchase of insurance under the construction contract was intended to replace the invalidated indemnity provision.\(^{106}\) From this the court concluded that the parties must also have intended to waive any implied indemnity rights under the common law active-passive theory.\(^{107}\)

More recently, in the *Zettel* case, a subcontractor failed to purchase the liability insurance required under its contract with the general contractor.\(^{108}\) As in *Rome* and *Vandygriff*, the construction contract contained both an indemnity provision and a separate insurance provision. The latter required the subcontractor to purchase liability insurance to protect both itself and the contractor.\(^{109}\) In addition, it provided that the subcontractor's own insurance policy must contain contractual liability endorsements to cover the liability exposure which the subcontractor had just assumed under the contract's indemnity provision. The trial court in *Zettel* held this insurance purchase provision void under section 1 of the Anti-Indemnity Act.\(^{110}\) The appellate court reversed, noting that an agreement to obtain insurance is not the same as an agreement of insurance and that the person who promises to purchase insurance does not thereby become an insurer.\(^{111}\) Nonetheless, the court held that where the promisor fails to purchase the necessary insurance and is therefore in breach of the agreement to purchase, the promisor will assume the liabilities of an insurer.\(^{112}\)

*Zettel* also held that the promise to obtain insurance is not the same as a promise to indemnify.\(^{113}\) Under an indemnity agree-

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106. *Id.* at 3, 408 N.E.2d at 1132.
107. *Id.*
108. 100 Ill. App. 3d at 615, 427 N.E.2d at 190.
109. *Id.* The terms of the contract also required that the liability insurance coverage extend to the owner and architect.
110. *Id.* at 616, 427 N.E.2d at 190.
111. *Id.* at 617, 427 N.E.2d at 191.
112. *Id.* at 617-18, 427 N.E.2d at 192.
113. It is important to note the difference between an indemnity agreement and an agreement to purchase insurance. Under an indemnity agreement, the promisor assumes all responsibility for damages. Under an agreement to obtain insurance, the promisor agrees only to procure insurance and pay the premium. The promisor's responsibility ends at that point, since even if the insurer wrongfully declines a claim, a breach of the insurance agreement would result and not a breach of the agreement to purchase insurance. This is an important distinction and one on which the *Zettel* court relied.

Generally, the doctrinal distinctions between insurance, indemnity, and contribution are important because of the manner in which the courts reach apparently conflicting
ment, the promisor agrees to assume all responsibility for liability for any damages. By an agreement to obtain insurance, however, the promisor merely agrees to procure an insurance policy and pay the premium. After the insurance is purchased, the obligations of the promisor are at an end. He is not liable for subsequent damages even if the insurer should wrongfully fail to provide coverage, since he was not at fault.  

The *Zettel* court held further that the agreement to purchase insurance coverage was enforceable even though it covered the same risk as the unenforceable indemnity agreement. The opinion pointed out that section 3 of the Anti-Indemnity Act allowed the general contractor to purchase insurance to cover its liabilities. In the court’s view, therefore, it was immaterial whether the contractor obtained this insurance through an insurance agent or through a subcontractor. The same purpose would be served in either event, that of assuring compensation for injured workers. Because it was proper under the statute to obtain insurance directly, there appeared no compelling reason why an agreement to obtain insurance should be voidable.

The decisions rendered in *Vandygriff* and *Zettel* call into serious question the future of the Anti-Indemnity Act. The cases hold that there is no compelling public policy reason for not enforcing agreements to purchase insurance where the purpose of the Act, protection of workers, is preserved. Logically, there is

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114. The *Zettel* court pointed out that the damages recoverable for the breach of a contract to obtain insurance include all damages caused by the breach. The court stated that this would include the amount of any judgment secured against the intended insured up to the amount of the policy limits bargained for (or perhaps even beyond the policy limits in instances where the insurer would have settled the case rather than allowed it to go to judgment), plus the cost of defending the tort action. 100 Ill. App. 3d at 618, 427 N.E.2d at 192. Query whether the recoverable damages would also include the cost of securing judgment against the indemmitor for its failure to honor the insurance purchase agreement.

115. *Id.* at 619, 427 N.E.2d at 192.

116. *Id.*

117. *Id.* at 619-20, 427 N.E.2d at 193.

118. *Id.*
no rational reason to uphold the Act at all, for its implementation only punishes those who fail to include an insurance purchase clause in their construction contracts.

**PARTIAL SHIFT OF LIABILITY**

*Equitable Apportionment*

The theory of equitable apportionment emerged in Illinois with the 1973 supreme court decision of *Gertz v. Campbell*.\(^{119}\) In *Gertz*, the plaintiff pedestrian was injured when struck by an automobile driven by the defendant, Campbell. Gertz was taken to a hospital where, due to alleged improper treatment by Dr. Snyder, his leg was amputated. Gertz, however, sued only Campbell, who then brought a third-party claim against Dr. Snyder seeking indemnity for any damages attributable to the doctor’s alleged malpractice. The trial court dismissed the third-party complaint, but the appellate court reversed and held that Campbell had stated a cognizable claim for “equitable apportionment.”\(^{120}\) The Illinois Supreme Court subsequently affirmed the appellate court ruling.\(^{121}\)

The supreme court first noted that Campbell’s claim could not be disallowed as one for contribution between joint tortfeasors (not then available in Illinois), since Campbell and Dr. Snyder were not joint tortfeasors.\(^{122}\) Under the court’s definition, because neither of the alleged tortfeasors had control over the acts of the other, and the wrongful conduct as well as the injuries occurred at different times, the physician and the driver could not be deemed joint tortfeasors.\(^{123}\) Instead, the court recognized Campbell’s claim as one for equitable apportionment, which it defined as the right of the original tortfeasor to recover for those damages caused solely by injuries attributable to the third party’s negligence.\(^{124}\)

The theory of equitable apportionment developed from the

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120. 4 Ill. App. 3d 806, 282 N.E.2d 28 (1972).
121. 55 Ill. 2d at 93, 302 N.E.2d at 45.
122. *Id.* at 88-89, 302 N.E.2d at 43.
123. *Id.* at 89, 302 N.E.2d at 43.
124. *Id.* at 91-92, 302 N.E.2d at 44-45.
principle that everyone is responsible for the consequences of his own wrongdoing. While not allowing the original tortfeasor to shift his own liability, the theory does allow him to recoup those damages which result solely from the subsequent tortfeasor's conduct. Under traditional rules, the plaintiff can recover from the original tortfeasor damages attributable to both the original injury and any aggravation of the injury caused by a subsequent tortfeasor's negligence. Under equitable apportionment, the original defendant can recover from the third-party defendant only where the injuries are divisible according to the respective negligence of the tortfeasors. As with the theory of active-passive indemnity, the defendant who seeks equitable apportionment is not bound by the allegations of the plaintiff's complaint, and even if he is sued for intentional misconduct, it is up to the fact finder to decide whether his conduct was intentional. But unlike active-passive implied indemnity, the court does not compare the culpability of the two parties in a claim for equitable apportionment.

After the adoption of contribution and comparative negligence, the Illinois Appellate Court took the position that there was no longer any need for an action based on Gertz. In Van Jacobs v. Parikh, for example, the court examined whether the third-party defendant's settlement with the original plaintiff barred the equitable apportionment claim by reason of section 2(d) of the Contribution Act. That provision discharges settling parties from liability for contribution. The Van Jacobs court held that the third-party claim was identical to a claim for contribution, although couched in terms of equitable apportionment, and as such was barred under section 2(d) because of the prior settlement.

With the adoption of contribution and the express equating of equitable apportionment with contribution, Gertz actions are no longer necessary. The policy considerations underlying Gertz, which sought mitigation of the inflexible and inequitable rule of

128. See infra note 132 for the text of § 2(d).
129. 97 Ill. App. 3d at 614, 422 N.E.2d at 982. The court noted that Skinner itself held that a claim mislabeled as one for indemnity will be construed as a claim for contribution.
130. Claims for equitable apportionment will be allowed in all instances where the
no contribution, are now carried out under contribution. Equitable apportionment is but an historical risk shifting device linking the common law prohibition and the current acceptance of contribution.

**Contribution**

The right to contribution was ushered into Illinois by the supreme court's 1978 decision in *Skinner v. Reed-Prentice Division Package Machinery Co.*\(^1\) This new right was subsequently codified in the Illinois Contribution Among Joint Tortfeasors Act.\(^2\) Basically, the Act provides that, whenever two or more persons are subject to liability in tort arising out of the same injury to person or property, there is a right of contribution underlying occurrence or accident took place prior to March 1, 1978. See *supra* note 11. See, e.g., Neuman v. City of Chicago, 110 Ill. App. 3d 907, 443 N.E.2d 626 (1982).


132. Public Act 81-601 (1981) (codified at ILL. REV. STAT. ch. 70, §§ 301-305 (1981) and ILL. REV. STAT. ch. 83, § 15.2 (1981)). The latter provision provides for a limitation of two years from payment. The Act provides as follows:

§1. This Act applies to causes of action arising on or after March 1, 1978.

§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 the terms so provide but it reduces the recovery on any claim against the others to the extent of any 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.

(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship.
among them. The amount of contribution is to be determined according to the relative culpability of each of the tortfeasors. The Act further provides that any tortfeasor who settles with the underlying claimant will be discharged from all liability for contribution to any of the remaining tortfeasors. Lastly, the statute allows a claim for contribution to be brought either before or after payment. In this regard, the Act changes the common law rule that such rights do not accrue until payment.

A great deal of decisional law has followed the enactment of the contribution right, with the scope of its applicability now fairly established. First, the right to contribution has been held to apply only to those cases involving accidents or occurrences which took place on or after March 1, 1978. Second, the right to statutory contribution is not limited to strict liability cases. Finally, the courts have sought to broaden the applicability of the contribution right and, concomitantly, have uniformly discarded any immunity bar.

§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 uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordace 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.

133. See supra note 132 for the text of § 2(a).
134. See supra note 132 for the text of § 3.
135. See supra note 132 for the text of § 2(d).
136. See supra note 132 for the text of § 5.
138. See supra note 11.
140. This would appear to contradict the rule that because the right to contribution only applies to those liable in tort to the underlying claimant, and because a party with a statutory or common law immunity is not liable to the underlying claimant, the immune
For instance, in *Stephens v. McBride*, the appellate court held that the notice provisions of the Local Governments and Governmental Employees' Tort Immunity Act will not bar a contribution claim. In other words, the party seeking contribution need not give the statutory notice of claim to the governmental entity which is required under the statute. The court reasoned that the public policy underlying the right of contribution outweighed that of the notice provisions. Equitable considerations also weighed heavily in the *Stephens* case, where the plaintiff had filed a tort action for personal injury only against an individual and within the general two-year statute of limitations, but after the one-year limitation in the notice provision had passed.

Ordinarily, under the Act, the plaintiff's failure to join the local government entity and to give the required notice would have barred the defendant's right to contribution from the negligent governmental entity. Because of this potential inequity, the court held that failure to comply with the notice provisions of the Act would only serve to bar direct suits by the injured party against the local entity.

Following *Stephens*, in *Wirth v. City of Highland Park*, the court held that statutory interspousal immunity would not bar a third-party claim for contribution. The rule of *Wirth* was extended

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party would not be liable for contribution claims to the underlying or non-immune defendant. This majority rule was stated in Glass v. Stahl Specialty Co., 10 PROD. SAFETY & IJAB REP. (BNA) 719 (1982); see also Doyle v. Rhodes, 109 Ill. App. 3d 590, 440 N.E.2d 895 (1982), *case under advisement*, No. 57540 (Ill. Sup. Ct. May Term 1983) (contribution claim against the plaintiff's employer allowed, even though the plaintiff's direct claim against the employer is barred by the Illinois Worker's Compensation Act); Morgan v. Kirk Bros., 111 Ill. App. 3d 914, 444 N.E.2d 504 (1982) (third-party complaint for contribution based on Dram Shop Act, ILL. REV. STAT. ch. 43, ¶ 135 (1981), allowed even though third-party plaintiff could not sue third-party defendant under the Dram Shop Act).

143. 105 Ill. App. 3d at 885, 435 N.E.2d at 166.
144. Id. at 881-82, 435 N.E.2d at 163.
145. Id.
146. Id. at 885, 435 N.E.2d at 166.
147. 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981). The *Wirth* case involved a two-car accident where one car contained a husband and wife. The spouse non-driver of the first car sued the driver of the second car. The driver of the second car then brought a third-party contribution claim against the spouse driver of the first car. The third-party defendant raised the statutory interspousal immunity as a bar to the contribution claim, but the court rejected this argument on equitable grounds.
still further in the case of *Larson v. Bushkamp.* Larson held that the common law parent-child tort immunity doctrine would not serve as a bar to contribution claims brought by the original defendant against the parent, where the original claimant was the child of the third-party parent.

The reason behind this continued expansion of contribution was most recently explained by the appellate court in *Doyle v. Rhodes.* The Doyle court specifically held that the Illinois Worker's Compensation Act prohibition against direct liability claims by the injured worker against his employer would not bar a third-party claim against the employer for contribution. In reaching its decision, the court reviewed both *Wirth* and *Larson* and found as a common thread the courts' recognition that underlying the right to contribution was the equitable doctrine of unjust enrichment. Contribution was, therefore, a separate right of restitution, and not a derivative right. As such, any common law or statutory immunity bar that would preclude the primary claimant from pursuing a direct action against the third party from whom contribution is sought would not necessarily bar the original defendant from seeking contribution against the same third party. The court also noted as significant the reference in the Contribution Act to the parties' relative culpability, rather than relative liability. Of primary importance to the

148. 105 Ill. App. 3d 965, 435 N.E.2d 221 (1982). *Larson* was also a two-car accident case in which a minor was injured while riding as a passenger in a car operated by his father. The minor sued the driver of the second car who then sought contribution from the father. The father moved to dismiss the contribution claim under the parent-child tort immunity doctrine. This motion was granted by the trial court, but the Illinois Appellate Court reversed after weighing the competing public policy considerations underlying the contribution statute and the common law bar to parent-child lawsuits.

The *Larson* court noted that several cases had already restricted application of the doctrine by sanctioning certain direct parent-child tort suits. According to this line of case law, the allowance of such claims would not endanger the parent-child relationship. In the court's view, the injury itself would be the truly disrupting factor to domestic peace, rather than the risk of depleting the family's financial resources. Moreover, as a practical matter, the widespread use of liability insurance mitigated the disruption possibility. Contribution would therefore be allowed against the parent of an injured minor plaintiff, where the parent's alleged negligence contributed to the minor's injuries. *Id.* at 970, 435 N.E.2d at 225.

149. *Id.* at 970-71, 435 N.E.2d at 225.


151. *Id.* at 593, 440 N.E.2d at 897.

152. *Id.* at 592, 440 N.E.2d at 897.

153. *Id.* at 593, 440 N.E.2d at 897.
Doyle court, however, was the Skinner decision itself, which had allowed a contribution claim by the original defendant manufacturer of a defective product against the plaintiff's employer.\textsuperscript{154} Skinner, however, made no mention of the Worker Compensation Act or its prohibition against direct actions. Doyle, therefore, provides the added doctrinal analysis to justify such risk shifting claims.

Contribution is one of the most important and prevalent methods for shifting liability. The policy concerns of placing the loss on the party responsible for causing it have overridden traditional immunity bars and will apparently continue to do so.

\textit{Comparative Negligence}

Comparative negligence is a device which allows the defendant to shift part of its liability to the plaintiff. Because it is not used to apportion liability among codefendants or other third parties, it is not a matter of third-party practice. Nevertheless, the recent adoption of comparative negligence in Illinois in Alvis \textit{v. Ribar}\textsuperscript{155} was said to have significantly affected several important rules governing third-party practice. This controversy has just recently been resolved by the Illinois Supreme Court in Coney \textit{v. J.L.G. Industries, Inc.}\textsuperscript{156}

In Coney, the plaintiff filed a product liability claim on behalf of the decedent who died on a hydraulic manlift manufactured by the defendant. The defendant raised two affirmative defenses: the comparative negligence of the decedent and the contributory negligence of the decedent's employer. The plaintiff could not sue

\textsuperscript{154} Id. As a procedural matter, the appellate court has suggested that when an action is pending, the contribution claim should be asserted by counterclaim or by third-party claim in that action. Tisoncik \textit{v. Szczepankiewicz}, 113 Ill. App. 3d 240, 446 N.E.2d 1271 (1983). Tisoncik held that the defendant-appellant had no standing to appeal a directed verdict in favor of a codefendant when the defendant-appellant had not filed a contribution claim against that codefendant. The appellant had argued that the res judicata effect of the directed verdict would bar a future contribution claim. Referring to judicial economy, however, the court held that the appellant should have filed its contribution claim before the directed verdict. Query whether this ruling actually bars the appellant's contribution claim. Compare Tisoncik with the appellate court's ruling in Gay \textit{v. Open Kitchens} discussed infra notes 177-86 and accompanying text.


\textsuperscript{156} No. 56306, slip op. (Ill. Sup. Ct. May 18, 1983).
the employer directly because of the Workers' Compensation Act bar. In addition, the manufacturer-defendant could not sue the decedent's employer for common law implied indemnity because a manufacturer of a defective product cannot seek "downstream" recovery. Nor could the defendant seek contribution because the decedent had died on January 24, 1978, prior to the operative date for such claims.

Both the manufacturer's affirmative defenses were dismissed pursuant to the plaintiff's motion to strike. The first affirmative defense based on the comparative negligence of the plaintiff's decedent was stricken on the ground that comparative negligence is not applicable to a products liability claim. The second affirmative defense which raised the contributory negligence of the decedent's employer was dismissed on the ground that the manufacturer-defendant was jointly and severally liable under existing case law and, therefore, the negligence of any absent third party could not be used to diminish the plaintiff's recovery.

The Illinois Supreme Court accepted the defendant's rule 308 petition for interlocutory appeal and addressed the following issues:

1. Whether the doctrine of comparative negligence or fault is applicable to actions seeking recovery under products liability or strict liability theories?
2. Whether the doctrine of comparative negligence or fault eliminates joint and several liability?
3. Whether the retention of joint and several liability in a system of comparative negligence or fault denies equal protection of the laws in violation of U.S. Constitutional Amendment XIV, Section 1, and Section 2 of the Illinois Constitution of 1970 as to causes of action arising on or before March 1, 1978?

As presented by the appellant's brief filed in Coney, the affirmative argument as to whether the common law doctrine of comparative negligence is applicable to proportionately reduce the plaintiff's damages in a strict liability action relies princi-
Risk Shifting and Third-Party Practice

pally on the Illinois Supreme Court's ruling in Skinner. The Skinner court had little difficulty applying the right to contribution in the third-party action, although the primary claim was based on strict liability. The court eschewed the "apples and oranges" argument that negligence theories cannot be mixed with underlying strict liability theories, by relying on comparative fault rather than comparative negligence. The subsequent adoption of the pure form of comparative negligence in the Alvis decision can be viewed as but the second half of a system of pure justice. Indeed, the Alvis decision itself stated that the "pure form of comparative negligence is the only system which truly apportions damages according to the relative fault of the parties and thus achieves total justice." 

In sum, the affirmative argument holds that negligence theories should be discarded or downplayed in favor of what has come to be called the doctrine of comparative fault, so that causation rather than questions of moral culpability will be emphasized. Frank recognition that our pure comparative negligence system is in reality a pure comparative fault system will lead to the conclusion that there is no mixture of "apples" and "oranges" when comparative fault is raised by a defendant in a products liability claim.

163. No. 56306, slip op. at 7 (Ill. Sup. Ct. May 18, 1983).
164. 85 Ill. 2d at 27, 421 N.E.2d at 898 (emphasis added).
165. See generally H. WOODS, supra note 155.
In *Coney*, the Illinois Supreme court agreed with the affirmative argument in holding the defense of comparative fault applicable to strict liability cases. The court found no doctrinal incompatibility between comparative fault and strict liability principles because the true conceptual basis for comparison is the causative contribution of each party to the particular loss or injury.\(^ {167}\) Accordingly, the *Coney* court held that the defenses of misuse and assumption of the risk will no longer bar recovery.\(^ {168}\) Instead, such misconduct will simply be factored into the ultimate apportionment of damages. In all future strict liability trials, therefore, where the defendant’s liability is established and where both the defective product and plaintiff’s misconduct contribute to cause the injury, the comparative fault principle will operate to reduce plaintiff’s recovery by the amount which the trier of fact finds him at fault.\(^ {169}\)

As to the second issue, whether comparative negligence has eliminated common law joint and several liability, the principal affirmative argument is that the doctrine of joint and several liability is itself a judicially created doctrine based on equitable considerations which no longer apply.\(^ {170}\) Historically, joint and several liability developed as a corollary to the common law contributory negligence doctrine, which barred the plaintiff from any recovery if found guilty of even the slightest negligence. To balance any inequity that might result from such a harsh rule, the innocent plaintiff was allowed to collect his entire judgment from any defendant who was guilty of even the slightest negligence. However, with the adoption of comparative negligence, since even a plaintiff who is ninety-nine percent responsible for

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\(^{167}\) No. 56306, slip op. at 8 (Ill. Sup. Ct. May 18, 1983).

\(^{168}\) *Id.* at 9.

\(^{169}\) In this sense, *Coney* is but the third leg in the trilogy; *Skinner* established contribution between tortfeasors, *Alvis* established comparative negligence, and *Coney* holds that application of such principles of causative apportionment in a strict liability context is not doctrinally incompatible.

\(^{170}\) The Illinois Contribution Act itself states that “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.” ILL. REV. STAT. ch. 70, ¶ 304 (1981). Of course, this merely begs the question as to whether the common law adoption of comparative negligence has affected the common law theory of joint and several liability. See infra text accompanying notes 172-74.
his own injuries may recover from the defendant who is only one percent responsible, it would appear that any justification for joint and several liability no longer exists.

Nevertheless, the Illinois Supreme Court in Coney preserved the doctrine of joint and several liability, holding that the adoption of comparative negligence in Alvis did not diminish the utility of this longstanding doctrine. The court found that the equities weighed in favor of the injured plaintiff, who need not bear the burden of insolvent or immune defendants. Lastly, the court easily dispatched the equal protection argument by citing the rule that prospective application of a new doctrine or rule of law does not violate equal protection laws under either the federal or Illinois Constitutions.

SETTLEMENT AND RELEASE

Frequently, rather than shifting liability, a defendant may attempt to end its liability by settling with the plaintiff. Accompanying the settlement is a release signed by the parties, wherein the plaintiff agrees not to pursue its claim in consideration of the settlement sum. However, assuming that settlements and the finality of judgments are goals to be encouraged, the present system of tort law in Illinois presents two curious anomalies. As a result, despite their well-meaning efforts to buy

171. See supra note 5; see also Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); and Laubach v. Morgan, 588 P.2d 1071, 1074 (Okla. 1978) (abolishing joint and several liability except in those cases where plaintiff is not contributorily negligent); Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413 (1937).

172. At least four states which have adopted comparative negligence have abrogated the rule of joint and several liability: KAN. STAT. ANN. § 60-248a (1982); NEV. REV. STAT. § 41-141 (1981); N.H. REV. STAT. ANN. § 507:7-a (1981); VT. STAT. ANN. tit. 12, § 1306 (1982-1983). At least two states, Oregon and Texas, retain joint and several liability only as to each defendant whose negligence is greater than that of the claimant. OR. REV. STAT. § 18.485 (1981); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1982).

173. See supra note 5; see also Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); and Laubach v. Morgan, 588 P.2d 1071, 1074 (Okla. 1978) (abolishing joint and several liability except in those cases where plaintiff is not contributorily negligent); Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413 (1937).

174. For a review of the argument in favor of the retention of joint and several liability in a comparative negligence system, see American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899 (1978).
complete peace, defendants may be kept in jeopardy.

The first disturbing flux in the law occurred in *Gay v. Open Kitchens, Inc.*,\(^\text{177}\) where the plaintiff brought a personal injury action against both the owner and the general contractor of the premises where he fell. The plaintiff claimed that he fell into a ramp-pit adjacent to a loading dock at the premises because the contractor had failed to install a restraining chain and the owner had failed to specify that this be done.\(^\text{178}\) The general contractor sought and secured a summary judgment against the plaintiff.\(^\text{179}\) Thereafter, the owner filed a third-party claim against the general contractor for implied indemnity under the theory of active-passive negligence. The general contractor then filed a second motion for summary judgment as to the third-party claim on the ground that the doctrine of collateral estoppel barred the action. The contractor argued that because summary judgment had been previously entered in its favor against the original plaintiff, it could not be liable to the owner on a third-party claim.\(^\text{180}\) Although the trial court granted this second motion for summary judgment, the appellate court reversed.\(^\text{181}\)

According to the appellate court, a prior judgment may constitute collateral estoppel only when the party against whom it is applied had an effective opportunity to litigate the issue in the prior action.\(^\text{182}\) In *Gay*, although the owner had notice of the contractor's first motion for summary judgment against the plaintiff, no third-party action was pending at that time. Thus, when the first summary judgment in favor of the general contractor was entered, the owner and the general contractor were mere codefendants and nonadversaries both legally and factually.\(^\text{183}\) As such, the owner had no right to appeal the first summary judgment. If the owner were then collaterally estopped from bringing a third-party claim against the general contractor, his rights against the general contractor would have been adjudicated without any right of review—a clearly unjust result. The

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\(^\text{177}\) 100 Ill. App. 3d 968, 427 N.E.2d 338 (1981).
\(^\text{178}\) Id. at 969-70, 427 N.E.2d at 340.
\(^\text{179}\) Id.
\(^\text{180}\) Id. at 971, 427 N.E.2d at 341.
\(^\text{181}\) Id. at 972, 427 N.E.2d at 342.
\(^\text{182}\) Id. at 971, 427 N.E.2d at 341.
\(^\text{183}\) Id.
court found this equitable consideration especially persuasive.\textsuperscript{184}

Nevertheless, the holding in \textit{Gay} contravenes previous rulings of the Illinois Appellate Court as well as a federal court decision interpreting Illinois law\textsuperscript{185} and will have several discouraging effects. First, it will add to the congestion of the courts by retaining parties who should have been dismissed following a favorable summary judgment order. In addition, the rule undermines the goal of finality of judgments.

The second unfavorable trend involves the discouragement of settlements. As \textit{Van Jacobs v. Parikh}\textsuperscript{186} makes clear, the settling defendant is only protected from contribution claims, not indemnity claims.\textsuperscript{187} Because the defendant will be unable to buy complete peace by compromising with the plaintiff, the incentive to settle will diminish. Nor is it likely that the defendant will be able to secure an indemnity agreement from the plaintiff, for that would destroy any incentive to pursue the remaining defendant should the latter appear to have a strong indemnity claim. Given the legislature’s stated policy preference in favor of settlements with its enactment of the Contribution Act, the \textit{Van Jacobs} court would have been justified in including indemnity claims within the purview of the Act’s bar.

\section*{Conclusion}

The adoption of contribution in \textit{Skinner} and comparative negligence in \textit{Alvis} has had a major impact on third-party practice in Illinois. Implied indemnity has apparently survived the adoption of contribution, but has been returned to its historical pos-

\textsuperscript{184} Id.


\textsuperscript{186} 97 Ill. App. 3d 610, 422 N.E.2d 979 (1981).

\textsuperscript{187} Where there are multiple plaintiffs and the party seeking contribution can only recover for the damages attributable to one of the plaintiffs, it is the defendant’s responsibility to allocate properly the amounts paid in settlement so that it can recover on its contribution claim. This allocation should be set out within the settlement documents. Houser v. Witt, 111 Ill. App. 3d 123, 443 N.E.2d 725 (1982). In addition, the employer’s settlement of his employee’s claims under the Worker’s Compensation Act will not give rise to the bar against contribution set out in sections 2(c) and 2(d) of the Contribution Act. \textit{See supra} note 132; Le Master v. Amsted Indus. Inc., 110 Ill. App. 3d 729, 442 N.E.2d 1367 (1982).
ture of requiring a pre-tort relationship in addition to a qualitative distinction between the parties' conduct. In the future, implied indemnity should be used by those parties having some kind of contractual relationship, such as lessor-lessee or common enterprise. Contractual indemnity also remains a viable risk shifting device, as the courts' preference for contractual allocation of risk and the dismantling of the *Westinghouse* rule illustrates.

Contribution has, however, eliminated the need for equitable apportionment. In fact, recent rulings indicate that traditional tort immunity bars will not prevent a contribution action and that the allocation of liability based on fault will prevail.

The effects of comparative negligence and its relationship to joint and several liability in Illinois have been recently explained by the supreme court in *Coney*. Unlike several comparative negligence states which have either modified the rule or abrogated it entirely, Illinois has opted to retain joint and several liability in its common law form.

In sum, defendants must be wary of dismissals and settlements in the primary suit which may leave them exposed to third-party actions. As recent case law has indicated, such measures will not end a defendant's liability completely.