Should Contribution Among Tortfeasors Be Permitted in Actions Arising Under the Illinois Dram Shop Act?

Pete Almeroth
NOTES

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INTRODUCTION

For more than a century, Illinois prohibited contribution among joint tortfeasors.¹ In 1978, the Illinois Supreme Court abandoned the no-contribution rule with the landmark decision


The primary purpose of contribution is to “take the sting out of the common-law rules” that permit an injured person to sue and collect the judgment solely from whom she pleases. Gregory, supra, at 367. For example, if a plaintiff were injured by two joint tortfeasors, A and B, she could place the entire loss on A alone, B alone, or both A and B in any proportion she wished. Comment, The Allocation of Loss Among Joint Tortfeasors, 41 S. Cal. L. Rev. 728, 732 (1968) [hereinafter cited as Comment, Allocation of Loss]. See also 1976 Illinois Judicial Conference Annual Report, Study Committee Report on Indemnity, Third Party Actions and Equitable Contributions 198, 199-200 [hereinafter cited as Judicial Report].

Illinois adopted the no-contribution rule in 1856. See Nelson v. Cook, 17 Ill. 443, 449 (1856). The rule was an anachronism dating back to a time when tortfeasors had been considered criminals and had therefore not been permitted to use the courts for their own relief. Michael & Appel, Contribution and Indemnity Among Joint Tortfeasors in Illinois: A Need for Reform, 7 Loy. U. Chi. L.J. 591, 592 (1976). See generally Comment, Comparative Contribution: The Legislative Enactment of the Skinner Doctrine, 14 J. Mar. L. Rev. 173, 173 (1980) [hereinafter cited as Comment, Comparative Contribution].

Ambiguity surrounds the term “joint tortfeasor.” Historically, its meaning depended upon the context in which it was used. See generally W. Prosser, Handbook of the Law of Torts §§ 46-47, at 291-98 (4th ed. 1971); Werner, Shared Liability: An Alternative to the Confusion of Joint, Several, and Joint and Several Obligations, 42 Ala. L. Rev. 1 (1977). In this article, joint tortfeasors means those persons whose conduct or status subjects them to tort liability for the same injury. See, e.g., Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 614, 422 N.E.2d 979, 982 (1st Dist. 1981).
of *Skinner v. Reed-Prentice Division Package Machinery Co.*

The Illinois legislature codified the decision by enacting the Contribution Among Joint Tortfeasors Act (Contribution Act). Uncertainty still exists, however, as to whether the Contribution Act should be applied to all types of tort actions, or whether public policy should bar its use in certain situations. In particular, courts and commentators have questioned whether policy considerations should prohibit contribution among tortfeasors in actions arising under the Illinois Dram Shop Act.

Five years before Illinois adopted contribution principles, the underlying purposes of the Dram Shop Act were examined by the Illinois Supreme Court in *Wessel v. Carmi Elks Home, Inc.* This case asked whether a dramshop defendant could use the doctrine of active-passive indemnity to shift the entire judgment for damages onto a drinker who has directly caused a plaintiff's injury. The court held that indemnity was improper because it would frustrate the public policy goal of disciplining dramshop owners and operators for their indiscriminate sale of liquor.

This article will consider whether the policy considerations that precluded the use of active-passive indemnity in dramshop actions should preclude contribution as well. After a brief dis-


7. See infra text accompanying notes 51-61.


9. 54 Ill. 2d at 131-32, 295 N.E.2d at 721.

10. The contribution issue in a dramshop cause may take many forms: (1) contribution from the drinker to a dramshop keeper, see, e.g., Anderson v. Comardo, 107 Misc. 2d 821,
Discussion of the Contribution and Illinois Dram Shop Acts, active-passive indemnity—and why its use was proscribed in dramshop actions—will be explained. The differences between contribution and indemnity will be examined, and an analysis will demonstrate how contribution, unlike indemnity, enhances rather than frustrates the policies underlying the Dram Shop Act. The analysis will also consider a troublesome fact situation that frequently occurs in dramshop cases. Finally, this article will provide a brief look at how other states have dealt with the issue of contribution in dramshop actions.

BACKGROUND

The Illinois Contribution Act

The single principle the Contribution Act endeavors to implement is that all solvent tortfeasors should be required to pay their just share of damages. Founded upon the doctrine of unjust enrichment, contribution requires each tortfeasor to pay his pro rata share of the common liability. Only a tortfeasor who has paid more than his pro rata share has a right to contribution. The trier of fact apportions the pro rata shares in accordance with the proportion of each tortfeasor’s “relative culpability.” If one or more of the tortfeasors are judgment-proof, the

436 N.Y.S.2d 669 (Sup. Ct. 1981) and infra notes 143-47 and accompanying text; (2) contribution from the dramshop defendant to the drinker, see, e.g., Farmers Ins. Exch. v. Village of Hewitt, 274 Minn. 246, 143 N.W.2d 230 (1966); (3) contribution between a third joint tortfeasor and the dramshop defendant or drinker, e.g., a negligent driver who along with the drinker contributes to the cause of an accident, see, e.g., Jones v. Fisher, 309 N.W.2d 736 (Minn. 1981); and (4) contribution between dramshop defendants inter se, see, e.g., Skaja v. Andrews Hotel Co., 281 Minn. 417, 161 N.W.2d 657 (1968) and infra notes 125-28 and accompanying text. This article will pay particular attention to the analysis of the situation described in (1) since it appears to present the greatest challenge to the policy considerations underlying the Act and is the issue presented in Wessel.

Jensvold, supra note 1, at 374. As Dean Prosser observed with respect to the underlying rationale:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff’s whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

W. Prosser, supra note 1, § 50, at 307, quoted in Skinner, 70 Ill. 2d at 13, 374 N.E.2d at 442.


13. ILL. REV. STAT. ch. 70, ¶ 302(b) (1981).

14. Id. ¶ 303. The term “relative culpability” is very flexible. It avoids the semantic
remaining tortfeasors are responsible for the uncollected amount in proportion to their pro rata liability. A claim for contribution is separate and distinct from the tort action that gave rise to liability.

The Contribution Act encourages settlements and joinder of actions. Any potential defendant who settles in good faith

difficulties of its forerunner "comparative negligence" by encompassing more than simply negligence. Horan, supra note 3, at 337. Traditional negligence notions of comparing fault are inapplicable to strict liability actions. For example, Skinner involved a strictly liable manufacturer seeking contribution from the negligent employer. The court apportioned the damages according to the relative degree each tortfeasor contributed to the cause of the plaintiff's injuries. 70 Ill. 2d at 16, 374 N.E.2d at 443. As one commentator has explained, "relative culpability" is a term of art. The intent is that it will be understood in its broadest sense, encompassing any causal relationship that the tortfeasor's status or conduct had to the injury. Horan, supra note 3, at 337.

Most of the current analysis of this subject is in the context of products liability. But as pointed out by some commentators, "Many of the problems created by the use of comparative negligence in dramshop actions will be similar to those difficulties in application of comparative negligence to products liability law." Hagglund, Muscoplat & Parrington, Developments in Minnesota Liquor Liability Law, 34 No. 6 BENCH & B. OF MINN. 31, 47 (1977). See generally Jensvold, supra note 1, at 725-39; Kionka, Comparative Negligence Comes to Illinois, 70 ILL. B.J. 16, 18 (1981); Wade, Products Liability and Plaintiff's Fault - The Uniform Comparative Fault Act, 29 MERCER L. REV. 373, 376-79 (1978); Comment, Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation, 13 CREIGHTON L. REV. 889, 891 (1980); Comment, Comparative Contribution, supra note 1, at 190-92.

16. "[T]he right to contribution... creates a separate right of restitution rather than a derivative right..." Doyle v. Rhodes, 109 Ill. App. 3d 590, 592, 440 N.E.2d 895, 897 (2d Dist. 1982), case under advisement, No. 57540 (Ill. Sup. Ct. May Term 1983); see Wirth v. City of Highland Park, 102 Ill. App. 3d 1074, 1081, 430 N.E.2d 236, 242 (2d Dist. 1981); Horan, supra note 3, at 332-33 (right to contribution is a new cause of action, separate from that giving rise to an immunity claim). A tortfeasor may seek contribution by counterclaim, third-party impleader, or by a separate action. ILL. REV. STAT. ch. 83, ¶ 15.2.
17. Horan, supra note 3, at 332.
18. Good faith means an honest, lawful intent, or acting without intent to assist in fraudulent or otherwise unlawful schemes. Crouch v. First Nat'l Bank, 156 Ill. 342, 357, 40 N.E. 974, 979 (1895). For a discussion of good faith settlements in relation to the Contribution Act, see LeMaster v. Amsted Indus., Inc., 110 Ill. App. 3d 729, 734-36, 442 N.E.2d 1367, 1372 (5th Dist. 1982) (settlement agreement between the plaintiff and his employer lacked consideration and thus failed to be a good faith settlement that would bar a claim against the employer for contribution). See generally Comment, Comparative Contribution, supra note 1, at 186-87.
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20. ILL. REV. STAT. ch. 70, ¶ 302(e) (1981). If an insurer discharges a tortfeasor’s obligation, the insurer is subrogated to that tortfeasor’s right to contribution. Id. ¶ 302(f).

21. See Comment, Comparative Contribution, supra note 1, at 189-90.

22. ILL. REV. STAT. ch. 70, ¶ 302(a) (1981).


25. See Legislative Synopsis, supra note 24, at 236. This deletion was the only substantial amendment to the bill before it was enacted into law.

for actions arising under the Dram Shop Act. That such an exception be made was suggested by the Study Committee of the 1976 Judicial Conference. This committee recommended the adoption of a contribution statute, but advised that contribution should not be extended to dramshop actions. It believed that the policy considerations that preclude active-passive indemnity in dramshop actions also should operate to deny contribution.

The Illinois Dram Shop Act

The Illinois Dram Shop Act provides a civil remedy for those who have suffered an injury to their person, property, or means of support as a result of the wrongful conduct of an intoxicated person. The Act imposes liability upon dramshop operators.

1982), case under advisement, No. 57540 (Ill. Sup. Ct. May Term 1983) (discusses the meaning of the phrase in the Contribution Act “subject to liability in tort” with respect to a balancing approach between the policies underlying contribution and statutory immunities).

27. Judicial Report, supra note 1, at 220. This committee researched and analyzed the status of Illinois law on indemnity, third-party actions, and contribution. The Committee proposed the adoption of a contribution statute similar to New York’s. See N.Y. CIV. PRAC. R. 1401 (McKinney 1976); Judicial Report, supra note 1, at 223.

28. Judicial Report, supra note 1 at 220. The Study Committee stated:

Strong consideration of public policy have prevented the granting of indemnity under the Dram Shop Act. It has been stated that the public policy underlying the Act provides a basis for the discipline of dram shop operators and owners, and that the costs of accruing for a violation of the statute must be ‘borne by those profiting from the sale of liquor.’ The Committee believes that similar public policy considerations should prevent contribution as well and therefore recommends contribution not be extended to Dram Shop Act cases.

Id.


30. The Act provides two theories of recovery: the “by” theory and the “in consequence” theory. Any person injured in person or in property by the direct act of the drinker can recover up to $15,000. All persons injured in their means of support, either by the direct act of the drinker or in consequence thereof, can recover, as a class, up to the aggregate limit of $20,000. ILL. REV. STAT. ch. 43, ¶ 135 (1981). See Note, Amendment, supra note 29, at 467.

A common type of injury to person or property or means of support results from alcohol-related automobile accidents. Comment, Tort Liability for Suppliers of Alcohol, 44 Mo. L. Rev. 757, 757 (1979). Injuries also often result from shootings or beatings by bellig-
and the owners of the property upon which the dramshop is situated. An operator of a dramshop incurs liability merely upon proof that she directly sold or gave the liquor that caused the wrongdoer's intoxication. An owner of the dramshop property incurs liability merely upon a showing that she knew liquor was sold on her property. The liability of either owner or operator


"Support" means all those resources from which necessities and comforts of living are, or may be, supplied. Weiner v. Trasatti, 19 Ill. App. 3d 240, 246, 311 N.E.2d 313, 319 (1st Dist. 1974). Loss of support damages occur if a wage earner is rendered incapable of providing at least some amount of support to the plaintiff. In this situation, the wage earner can be, and often is, the drinker who has injured herself or is unable to function normally due to habitual intoxication. J. Appleman, supra, at xxii.


31. Ill. Rev. Stat. ch. 43, ¶ 135 (1981). See Cruse v. Aden, 127 Ill. 231, 235, 20 N.E. 73, 75 (1889). Originally, a "dram shop" was a place where spirituous liquors were sold to the public in quantities less than one gallon. See South Shore Club v. People, 228 Ill. 75, 81 N.E. 85 (1907). However, the term "dramshop operator," or "dramshop keeper," has come to mean anyone engaged in the liquor trade for profit. See generally Voelker, Parties to Dram Shop Actions, 1958 U. Ill. L.F. 202, 214-16. In Cruse v. Aden, the Illinois Supreme Court held that the Act does not apply to a social host who furnishes alcohol to his guests. But cf. Stanner, Liability of a Social Host for Off Premises Negligence of Inebriated Guest, 68 Ill. B.J. 396 (1980) (discussing a recent case in which the trial court recognized a common law negligence claim against a social host).


33. Ill. Rev. Stat. ch. 43, ¶ 135 (1981). The courts generally have required that the sale or gift be directly to the drinker who causes the harm, even though this requirement is not specified in the statute. See discussion and cases cited in Welch v. Convenient Food Mart #550, 106 Ill. App. 3d 131, 435 N.E.2d 894 (4th Dist. 1982).

For Dram Shop Act purposes, a person is intoxicated if "as a result of drinking alcoholic liquor there is an impairment of his mental or physical faculties so as to diminish his ability to think and act with ordinary care." Illinois Pattern Jury Instruction, Civil, No. 150.15 (2d ed. 1971). See generally Note, Amendment, supra note 29, at 475.

34. Eggars v. Hardwick, 155 Ill. App. 254 (4th Dist. 1910). Most lessors, realizing the dangers involved when they lease to a dramshop keeper, usually require the lessee to
has no relation to the amount of care each may have exercised.\textsuperscript{35}

The Act grants a cause of action unknown at common law.\textsuperscript{36} At common law, the dramshop keeper could not be found liable for negligence because the act of drinking the liquor was considered the sole proximate cause of the plaintiff’s injury.\textsuperscript{37} In Illinois, this view was abolished when the legislature enacted the first dramshop statute in 1871 in response to the demand of the then-widespread temperance movement.\textsuperscript{38} That act remains the sole remedy against dramshop owners and operators.\textsuperscript{39} The current statute provides a ceiling for the amount of damages recoverable: $15,000 for each person injured in person or property, and $20,000 in the aggregate for all persons injured in means of support because of an injury to their mutual provider.\textsuperscript{40} These liability limitations, first imposed in 1949, have never been raised.\textsuperscript{41}
Illinois and jurisdictions with similar dramshop statutes have repeatedly struggled with the question of whether such statutes should be characterized as primarily remedial or penal. How this question is answered critically influences how these statutes are construed. If the statutes are intended primarily to punish violators, then they should be considered penal and, as such, construed strictly. If, however, the statutes are intended primarily to provide an additional means of relief for an injured plaintiff, then they should be considered remedial and construed liberally. In Illinois, the question of strict or liberal construc-

42. See infra note 122.


It is generally agreed that the purposes of the several dramshop statutes are to protect the health, safety, and welfare of the public through careful regulation of the distribution of liquor, to discipline the dramshop defendant, and to compensate any person injured as a result of the sale of liquor. But the courts do not agree on the primary nature of dramshop statutes. Id. at 170.

The word "penal," as applied to statutes, has many shades of meaning. Strictly speaking, penal statutes impose a punishment for an offense committed against the state, which the executive of the state has the power to pardon. Common usage, however, has enlarged this meaning to include all statutes that command or prohibit certain acts and establish penalties for their violations and even those that, without expressly prohibiting certain acts, impose a penalty on their commission. 82 C.J.S. Statutes § 389 (1953). See Salzman v. Boeing, 304 Ill. App. 405, 412, 26 N.E.2d 696, 699 (1st Dist. 1940); see generally Kutner, Judicial Identification of "Penal Laws" in the Conflict of Laws, 31 OKLA. L. REV. 590, 622-25 (1978).

A remedial statute is one that remedies defects in the common law or in civil jurisprudence generally. M.H. Vestal Co. v. Robertson, 277 Ill. 425, 429, 115 N.E. 629, 631 (1917). In this respect, the Dram Shop Act is remedial because, in abrogation of the common law, it grants an additional remedy to the injured party.

44. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889). "The Dram Shop Act now under consideration is a statute of a highly penal character, and provides rights of action unknown to the common law, and should, according to well understood canons, receive a strict construction." Id. at 239, 20 N.E. at 77.


45. To construe a statute liberally means to interpret it broadly to effectuate the pur-
tion is further complicated because the Dram Shop Act constitutes part of the Liquor Control Act of 1934, which expressly provides that it must be liberally construed. In Howlett v. Doglio, the Illinois Supreme Court held that the Dram Shop Act is both penal and remedial. Arguably, then the construction should depend on the issue before the court: the Act should be strictly construed whenever the penal aspect is involved, and liberally construed whenever necessary to "suppress the mischief and advance the remedy."

Active-Passive Indemnity

Illinois courts developed the doctrine of active-passive indemnity to mitigate the harsh effects of the no-contribution rule. The doctrine attempted to place the ultimate responsibility for damages upon the party whose conduct or status was the "primary" or "active" cause of the plaintiff's injury. Where indemnity was found appropriate, the indemnitee could shift all his liability to the indemnitor. Because the terms "active" and "passive" were never precisely defined, however, no general rule was ever developed as to when indemnity would be allowed. The Illinois

pose and spirit behind the statute. Zehender & Factor v. Murphy, 386 Ill. 258, 263, 53 N.E.2d 944, 947 (1944).
47. Id. ¶ 94. "This Act shall be liberally construed, to the end that the health, safety and welfare of the People . . . shall be protected . . . ." Id.
49. For a discussion of statutes that are both remedial and penal, see ILL. L. & PRAC., Statutes § 174 (1976).
50. Howlett, 402 Ill. at 318, 83 N.E.2d at 712. That the characterization of a dramshop statute as being either penal or remedial should depend on the nature of the issue before the court was suggested by Judge Blackmun (now Justice Blackmun) in Village of Brooten v. Cudahy Packing Co., 291 F.2d 284, 292 (8th Cir. 1961).
51. The courts have recognized three types of indemnity: (1) indemnity based on a pre-tort contract in which one party promises to recompense the other for any liability the indemnitee may incur; (2) indemnity based on a relationship between the tortfeasors, e.g., if an employer is liable under a theory of respondeat superior, he is entitled to indemnity from the employee who caused the injury; and (3) active-passive indemnity based on a qualitative distinction between the tortfeasors' wrongful conduct. Ferrini, The Evolution from Indemnity to Contribution - A Question of the Future, If Any, of Indemnity, 59 Chi. B. REC. 254, 254-56 (1978).

Frostell did not even attempt to define the doctrine and simply generalized that the duty to indemnify will be recognized in cases where community opinions would consider
Supreme Court said "active" and "passive" were terms of art to
be "worked out" by courts of review on a case-by-case basis. 53

Initially, courts granted indemnity only to an innocent party 54
who had some sort of pre-tort legal relationship with the other
tortfeasor. 55 However, the inequities of the no-contribution rule
gradually led the courts to expand the active-passive doctrine. 56
"[T]rapped in the dilemma of trying to operate with the clumsy
remedy of indemnity," 57 some courts stretched the definition of
an "innocent party" to a point where a negligent party was
allowed indemnity from a party whose conduct established a
greater degree of culpability for the injury. 58 Other courts expanded
the doctrine by relaxing the pre-tort legal relationship re-
quirement. 59

Before the courts began to relax these requirements, indemnity
had not been permitted in dramshop actions because the dram-
shop defendant had not been considered an innocent party nor
had she a pre-tort legal relationship with the drinker. 60 Once the
courts began to relax these requirements, however, it was not
long before the Illinios Supreme Court was forced to consider the
appropriateness of indemnification under the Dram Shop Act. 61

**Indemnity and the Dram Shop Act**

The court confronted the issue in *Wessel v. Carmi Elks Home, Inc.*, 62
where the vendee became intoxicated in the dramshop

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54. Note, supra note 8, at 351. An "innocent" party is one whose liability is merely
derivative, stemming from a legal technicality like respondeat superior or from a statu-
tory tort. See Bua, supra note 52, at 296.
55. See Bua, supra note 52, at 296-300.
56. Polelle, supra note 1, at 279.
57. Id.
58. See Wessel v. Carmi Elks Home, Inc., 54 Ill. 2d 127, 130, 295 N.E.2d 718, 720 (1973)
1967)).
59. See Bua, supra note 52, at 296-99.
Dist. 1957). See generally Note, supra note 8, at 351.
61. Note, supra note 8, at 351-53.
62. 54 Ill. 2d 127, 295 N.E.2d 718 (1973).
defendant’s bar. While intoxicated, he drove his car into the side of a house, killing one occupant, injuring another, and causing extensive property damage. The dramshop defendant filed a third-party complaint for indemnity against the vendee on the theory that the vendee was the active and primary cause of the injury.\textsuperscript{63}

The Illinois Supreme Court, resolving a split between the appellate courts,\textsuperscript{64} held that, as a matter of law, dramshop defendants may not seek indemnity from the drinker.\textsuperscript{65} The court stated that the decisions that had relaxed the requirements for allowing active-passive indemnity did not control here because those cases had dealt with common law negligence, not statutory liability as in a dramshop action.\textsuperscript{66} A dramshop action, the court said, was \textit{sui generis}, and policy considerations were of substantial importance.\textsuperscript{67}

The court found the policy underlying the Dram Shop Act penal in nature and concluded that indemnity could not be per-

\textsuperscript{63} Id. at 128-29, 295 N.E.2d at 719.


\textsuperscript{65} Wessel, 54 Ill. 2d at 133, 295 N.E.2d at 721. \textit{Wessel} dealt with whether a dramshop defendant could obtain indemnity from the intoxicated tortfeasor. A subsequent appellate case, Harden v. Desideri, 20 Ill. App. 3d 590, 315 N.E.2d 235 (1st Dist. 1974), applied the reasoning of \textit{Wessel} to deny a dramshop owner indemnity, under active-passive indemnity principles, from the dramshop operator-lessee.


\textsuperscript{66} Wessel, 54 Ill. 2d at 130-31, 295 N.E.2d at 720. In a concurring opinion, Justice Davis emphasized that the Dram Shop Act imposes a form of strict liability which simply could not be characterized as either active or passive negligence. He added that it would therefore be unreasonable to weigh the dramshop defendant’s liability against the liability of the drinker for purposes of indemnity. \textit{Id.} at 133-34, 295 N.E.2d at 722 (Davis, J., concurring).

Interestingly, in denying indemnity, Justice Davis stated, “We should not permit the ultimate responsibility for the sale or gift of . . . liquor to be minimized \textit{qualitatively} by the conduct of the intoxicated person.” \textit{Id.} at 134, 295 N.E.2d at 722 (emphasis added). This statement apparently left the door open to allow contribution, which distinguishes liability \textit{quantitatively} as opposed to qualitatively like active-passive indemnity.

\textsuperscript{67} \textit{Id.} at 131, 295 N.E.2d at 720.
mitted without frustrating that policy.\textsuperscript{68} The court stated that indemnity was improper for two reasons. First, indemnity would defeat the purpose of dramshop liability, which is to discipline dramshop keepers for their “indiscriminate sale of liquor and the evils resulting therefrom.” Second, indemnity would frustrate the legislative intent, evidenced by the Act itself, that the burden for a violation of the Act be borne ultimately by those who reap the profits from the sale of liquor.\textsuperscript{69}

In a strong dissent, Justice Ward emphasized the remedial aspect of the statute and downplayed its penal character. Drawing a comparison to the Structural Work Act,\textsuperscript{70} under which actions for indemnity had been permitted, Justice Ward argued that the Dram Shop Act was intended to provide an additional remedy for a plaintiff who could not recover full damages from the drinker. He added that, although the Act could be loosely characterized as penal because it imposed a strict liability not found under common law, this penal nature justified resolving doubtful matters of construction \textit{in favor} of those held liable under the Act.\textsuperscript{71}

\textsuperscript{68} Id. at 131-32, 295 N.E.2d at 720-21. As evidence of the Act’s penal nature, the court referred to both the preamble to the Liquor Control Act, see supra notes 46-47 and accompanying text, and the liability limitations within the Dram Shop Act, see supra notes 40-41 and accompanying text. Apparently, the majority believed that the ceiling on damages indicated the legislature intended the damages to act more as a penalty against dramshop defendants than as an additional remedy for the injured person.

\textsuperscript{69} Wessel, 54 Ill. 2d at 131-32, 295 N.E.2d at 721. See also Lichter v. Scher, 11 Ill. App. 2d 441, 138 N.E.2d 66 (1st Dist. 1956), in which the court stated that the Act is to discipline and regulate a “legal but ill-favored trade.”

The direct discipline on the dram shop operators and owners, originally effected by making them liable to the injured party, has now given way to an indirect discipline whereby the fear of losing insurance, or of prohibitive premiums, is a substantial motive for careful operation and leasing of [dram shops].


An operator who has been, or may be, indiscriminate in selling alcohol, and an owner who is careless about leasing her premises for dramshop use, are poor insurance risks, and without insurance, the risks of the liquor trade under the Act are too great. Thus, the fear of losing, or failing to obtain, insurance is a substantial motive for careful operation and leasing. Standard Indus., Inc. v. Thompson, 19 Ill. App. 2d 319, 326, 152 N.E.2d 500, 504 (1st Dist. 1958). See generally Graham v. General U.S. Grant Post #2665, 97 Ill. App. 2d 139, 143, 239 N.E.2d 856, 858 (1st Dist. 1968), \textit{aff'd in part, rev'd in part}, 43 Ill. 2d 1, 248 N.E.2d 657 (1969); Ogilvie, supra note 29, at 185.


\textsuperscript{71} 54 Ill. 2d at 136-37, 295 N.E.2d at 724 (Ward, J., dissenting) (citing Freese v. Tripp, 70 Ill. 496 (1873); Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Howlett v. Doglio, 402 Ill.
ANALYSIS

Contribution vs. Indemnity

Now that Illinois has abandoned the no-contribution rule, Illinois courts must eventually determine whether the policies precluding indemnity in dramshop actions should also bar contribution. The following analysis will show that permitting contribution in dramshop actions will not conflict with the policies underlying the Dram Shop Act.

The Illinois Supreme Court has emphasized the important distinction between contribution and indemnity: contribution distributes the loss among tortfeasors in accordance with each defendant's relative culpability, while indemnity shifts the entire loss from one tortfeasor to another. Although both doctrines relate liability to culpability, contribution is often suitable in situations where indemnity would be inappropriate.

The "all or nothing" objective of indemnity has no place where the conduct of each tortfeasor plays a part in causing the injury. Only under a rule of contribution does each defendant's obligation spring from her own conduct, apart from the liability of any other defendant. Under the active-passive doctrine, the decision to grant indemnity was, in effect, a choice between shifting the cost of damages to a defendant largely at fault or allowing the entire loss to rest upon a defendant who was only slightly culpable. In a dramshop action neither choice is satisfactory. To allow the dramshop defendant to shift the entire burden would defeat the penal policy of the statute; on the other hand, to force the dramshop defendant to pay for the part of the loss that the drinker should rightfully bear would frustrate

311, 83 N.E.2d 708 (1949). Penal statutes should be construed strictly in favor of those subject to their liability. See supra note 44.

72. Of course, the issue may never reach the appellate courts, unless the legislature removes or raises the liability limitations contained in the Dram Shop Act. In today's inflated economy, the relatively low ceiling on the Act's damages may not warrant the litigation costs involved in an appeal. However, because dramshop actions are extremely common in Illinois, the contribution issue will engender considerable interest at the trial level.

73. Skinner, 70 Ill. 2d at 7, 374 N.E.2d at 442.
74. Polelle, supra note 1, at 268.
75. See Appel & Michael, supra note 4, at 170.
77. Jensvold, supra note 1, at 737.
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equitable and tort law principles. Contribution, unlike indemnity, would not force a choice between these mutually exclusive alternatives. One defendant would not escape her obligation merely because another was forced to bear her part of the loss.

A more subtle difference between indemnity and contribution is that indemnity fosters rigidity where contribution permits flexibility. In theory, defendants’ tortious conduct should be labeled active or passive based on particular factual circumstances. In reality, however, once particular types of conduct have been labeled as such, courts tend to dispense with individual factual evaluations and apply the labels to later cases involving essentially the same form of conduct. Accordingly, if the Wessel court had determined that the dramshop defendant’s conduct had been merely passive, entitling her to indemnity, then dramshop keepers could have expected indemnification in future dramshop actions. This result would have diminished the disciplinary purpose of the Act by decreasing the liquor trade’s risk of liability without increasing its incentive to exercise more care. Contribution, in contrast, would have no such effect. It would permit the factfinder to compare culpability on a sliding scale, measuring liability according to the conduct of each particular defendant on a case-by-case basis.

Contribution fulfills a fundamental goal of tort law: that each person should pay for the consequences of her own torts. In a dramshop action, both the drinker and the dramshop defendant should share the liability—the drinker because tort policy requires it, the dramshop defendant because Dram Shop Act policy requires it. Contribution ensures that the requirements of both policies are fulfilled.

78. See id. at 734. Tort law attempts to achieve four principal purposes: (1) to provide compensation to the injured; (2) to allocate the costs of the injury so as to deter future injuries and promote safety; (3) to promote efficiency in providing compensation to the victim; and (4) to satisfy the popular sense of equity. Ashford & Johnson, Negligence vs. No-Fault Liability: An Analysis of the Workers’ Compensation Example, 12 SETON HALL L.REV. 725 (1982). See generally Leflar, supra note 1, at 136-37; Williams, The Aims of the Law of Tort, 4 CURRENT LEGAL PROBLEMS 137 (1951); Comment, Contribution and Indemnity in California, 57 CALIF. L. REV. 490, 495 (1969).


80. Id.

81. See Jensvold, supra note 1, at 734.

82. The alternative is to continue to let the plaintiff choose her defendants at whim. This, in effect, is a de facto delegation of responsibility to the plaintiff to carry out the policies underlying tort law and the Dram Shop Act. Objectives other than the fulfillment
Contribution’s Effect on the Penal Purpose of the Act

The disciplinary purpose of the Dram Shop Act seeks to encourage careful conduct on the part of dramshop owners and operators. To be an effective means of regulating behavior, discipline must be administered consistently. That is, it must be applied when it is deserved and in the amount it is deserved. Contribution will help satisfy both these requirements.

Contribution will ensure that dramshop keepers do not escape liability. If, for example, there is more than one potentially liable dramshop keeper, and a plaintiff chooses to sue only one, contribution will allow impleader of the other keepers. If a plaintiff chooses to sue only the drinker, contribution will permit the drinker to implead any of the dramshop keepers. Contribution will help satisfy both these requirements.

of public policy, of course, motivate the plaintiff. In fact, as frequently noted, a dramshop action creates many situations in which collusion may well occur.

[N]othing . . . prevents a victim [from recovering] . . . from the intoxicated person . . . directly, so query, why should the law prevent . . . a victim from recovering indirectly from the intoxicated person. To bar such indirect recovery opens the door to a certain cooperation between the intoxicated person and his victim which may amount to collusion and fraud, with the dram shop owner and his tenant suffering for the sins of the intoxicated person . . . for his original indiscretion and guilt.


83. See supra note 72 and accompanying text.

84. See van der Haag, Punishment as a Device for Controlling the Crime Rate, 33 Rutgers L. Rev. 706, 711-14 (1981). Although most studies about discipline deal with criminal sanctions, the penal objectives of tort damages are substantially the same—punishment and deterrence. See Mattyasovszky v. West Towns Bus Co., 61 Ill. 2d 31, 35, 330 N.E.2d 509, 511 (1975) (discussing punitive damages in a wrongful death action).

85. It is widely believed that the certainty of liability, not the magnitude, has the greatest effect on deterring undesired conduct. Comment, Loss Among Tortfeasors, supra note 1, at 212; Note, Contribution and Indemnity Between Tortfeasors, 45 Harv. L. Rev. 349, 354 n.28 (1931); Comment, Allocation of Loss, supra note 1, at 730; cf. Andenaes, The General Preventive Effects of Punishment, 114 U. Pa. L. Rev. 949, 964 (1966). The possibility of escaping all liability—a “sporting chance” of a type traditionally appealing to wrongdoers as a class—might cause many to be more, rather than less, willing to engage in the wrongful activity. Lefler, supra note 1, at 133. See also Skaja v. Andrews Hotel Co., 281 Minn. 417, 423, 161 N.W.2d 657, 660 (1968); Hammerschmidt v. Moore, 274 N.W.2d 79, 83 (Minn. 1978).


87. The drinker was not permitted indemnity from the dramshop defendant under the
tion may also encourage drinkers—who are in the best position to prevent intoxication—to assume a heightened sense of responsibility for their own behavior since they, too, will be unable to escape liability. 88

By increasing the certainty of discipline, contribution will increase the dramshop keeper's incentive to act carefully. By apportioning damages according to culpability, contribution will increase that incentive even further. This is because, with contribution, careful conduct on the part of the dramshop keeper will not only reduce the incidence of liability, it will also, in many cases, reduce the amount of her liability should an injury unavoidably occur. 89

Once the dramshop keeper is subjected to liability, the policy considerations of the Dram Shop Act are satisfied and ordinary active-passive indemnity doctrine. See McDonald v. Trampf, 49 Ill. App. 2d 106, 198 N.E.2d 537 (1st Dist. 1964); Economy Auto Ins. Co. v. Brown, 334 Ill. App. 579, 79 N.E.2d 854 (2d Dist. 1948). If the courts prohibit contribution rights to dramshop keepers because of the penal nature of the Dram Shop Act, then, to be consistent, they should also deny such rights to the drinker. A penal structure must be construed strictly in favor of those subject to its liability. See supra note 44.


Some examples of factors that the factfinder could use to measure the dramshop defendant's careful conduct, i.e., relative culpability, are as follows: (1) The extent that the dramshop keeper encouraged the inebriate to consume alcohol: Did she sponsor, for example, happy hours, minimum drink cover charges, or sale prices for package liquor? Did the dramshop keeper make any effort to prevent the intoxication? (2) The economic gains from the particular sale and from sales of liquor generally; (3) The extent the defendant was justified in relying on her patron to exercise proper care: Did the patron show physical signs of the influence of liquor? Should the defendant have realized the drinker was a minor? (4) The extent that the likelihood and magnitude of the "evil" resulting from the intoxication was foreseeable: Did the defendant furnish one drink or ten? Was the dramshop located where it was often frequented by motorists? (5) The likelihood of injury not occurring at all in the absence of the defendant's actions.

These factors could also be used to measure a dramshop lessor's culpability insofar as the lessor knew of, or could reasonably foreseen, their existence. Cf. Jensvold, supra note 1, at 742 (suggesting analogous criteria to adjudge culpability of a strictly liable but "faultless" product liability defendant); Note, Connecticut Law—Dram Shops: Third Party Recovery for Reckless and Wanton Misconduct—Kowal v. Hofher, 3 W. NEW ENG. L. REV. 769 (1981) (enumerating factors relevant to the measurement of culpability of the reckless dramshop defendant).

The use of these and other possible factors can only produce an approximate assessment of the dramshop defendant's culpability in relation to that of the drinker or other dramshop defendants. The application of contribution in any tort action is always imprecise and inherently broad. But, as evidenced by Skinner and the Contribution Act, such an assessment, representing the judgment of the community as embodied in the jury, is far better than no assessment at all. This balancing process does not inject negligence principles into the dramshop action. The dramshop defendant is still strictly liable to the plaintiff. The above factors would only be taken into consideration in the action for con-
principles of contribution may apply. The same reasoning was applied to the regulatory policy behind the strict product liability in *Skinner v. Reed-Prentice Division Package Machinery Co.* The policy underlying strict product liability is identical to the Dram Shop Act regulatory policy cited in *Wessel*: that the cost of the injury should be imposed upon those who create the risk and reap the profits. In *Skinner*, the Illinois Supreme Court determined that contribution does not conflict with this policy objective of strict product liability. The court recognized that contribution is a separate action, arising only after the defendant has borne the costs of the underlying claim. Since *Skinner* held that contribution does not conflict with the regulatory policy of imposing the economic loss on the party that created the risk, the courts should likewise hold that contribution does not conflict with the regulatory policy of the Dram Shop Act. In fact, by ensuring that all culpable dramshop keepers are joined, contribution may actually enhance that policy by spreading the loss throughout the liquor industry. Moreover, the legislative history of the Contribution Act and its all-encompassing language demonstrate an intent to make contribution available to all types of tortfeasors. Thus, any uncertainty as to the suitability of contribution in a particular setting should be resolved in favor of allowing contribution.


82. Compare *Skinner*, 70 Ill. 2d at 14, 374 N.E.2d at 443 with *Wessel*, 54 Ill. 2d at 132, 295 N.E.2d, at 721.

83. The right to contribution is not created by the tort, but by the satisfaction of the judgment. Comment, *Loss Among Tortfeasors*, supra note 1, at 213. See also *Wirth v. City of Highland Park*, 102 Ill. App. 3d 1074, 1081, 430 N.E.2d 236, 242 (2d Dist. 1981).

84. See supra notes 21-26 and accompanying text.
Contribution only affects the rights of the tortfeasors; it does not affect the substantive rights of the plaintiff. The plaintiff retains the right to determine from whom she wishes to receive her judgment. Nevertheless, two issues arise if the plaintiff happens to be the drinker's spouse or dependent. First, there is the issue whether interspousal or parent-child immunity bars the dramshop defendant's right to contribution. Second, there is the issue whether the drinker must pay contribution if the plaintiff-dependent's damages result from the drinker's loss of support.

The immunity issue, which affects tort actions generally, has apparently been resolved by the Illinois appellate courts. In two recent cases courts rejected immunity defenses and upheld the right to contribution: one case affected the plaintiff's spouse, and the other, the plaintiff's parent.

The second issue presents a problem unique to dramshop actions. Oftentimes, the drinker will be the one who suffers the injury or becomes incapacitated by alcoholism, in which case, one or more of her dependents may bring a dramshop action for loss of her support. Under these circumstances, it would be absurd to require contribution from the drinker because that would simply increase her inability to provide support.

The Minnesota Supreme Court faced this very issue in Ascheman v. Village of Hancock. Here, the wife and daughter of a drinker who injured himself in a one-car accident sued the village, as operator of a municipal bar, for loss of support damages. The village sought contribution from the drinker, contending that he shared a "common liability" with the village for the damages incurred.

95. ILL. REV. STAT. ch. 70, ¶ 304 (1981).
97. See supra note 30 and accompanying text.
99. 254 N.W.2d 382 (Minn. 1977). See infra notes 121-33 and accompanying text for a discussion of contribution under Minnesota's dramshop law.
100. Minnesota, like many other states, has injected a "common liability" requirement into its contribution rule. Hertz, supra note 98, at 100. The term "common liability" almost defines itself. It simply means that in order for a tortfeasor to obtain contribution
existed because recent Minnesota cases had overruled the traditional doctrine of intrafamilial immunity. The village premised liability upon the theory that the wife and daughter could bring a direct action against the drinker for the loss of support which resulted from his negligence. The court, however, identified a flaw in that theory by pointing out that the elimination of intrafamilial immunity defenses did not create a new cause of action or a new tort. The court acknowledged that state law imposes a duty on a husband to provide support, but the existence of that duty does not grant to a dependent a cause of action against a husband who negligently injures himself. Because the plaintiffs had no cause of action against the drinker, the court held that no common liability existed and consequently dismissed the third-party complaint.

Similarly, the Illinois Contribution Act grants a right to contribution only when the wrongdoers are "subject to liability in tort" for the same injury. Like Minnesota, Illinois does not recognize a tort cause of action for negligently failing to provide support. Therefore, regardless of the absence of intrafamilial immunity defenses, a dependent has no direct action in tort for loss of support against the drinker. In sum, granting a dramshop defendant a right to contribution in such cases not only would produce an absurdly circuitous result and diminish the remedial purpose of the Dram Shop Act, but also would violate

from another wrongdoer, that wrongdoer must be liable to the plaintiff at the instant the tort is committed. Spitzack v. Schumacher, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976). If the one from whom contribution is sought was not liable to the person harmed at the time of the injury, there is no basis for contribution. See also Jensvold, supra note 1, at 726.

101. Ascheman, 254 N.W.2d at 384.
102. Id. at 384.
103. Id. (citing Plain v. Plain, 307 Minn. 399, 240 N.W.2d 330 (1976), which held that a husband could not recover damages from his wife for loss of her consortium resulting when she negligently injured herself).
104. Id. Accord Conde v. City of Spring Lake Park, 290 N.W.2d 164 (Minn. 1980).
106. Although Ill. Rev. Stat. ch. 40, ¶ 1101 (1981) creates liability for one who, "without lawful excuse," fails to support a spouse or child, the spouse or child cannot bring an action in tort because ¶ 1101 is a criminal statute (notwithstanding the power of the court to direct the fine be paid to the defendant). People v. Flury, 173 Ill. App. 640 (1st Dist. 1912). Paragraph 1101 does provide a civil remedy, but only to the Department of Public Aid for the value of any assistance it had to provide to the dependent as a result of the spouse's breach of duty. ILL. REV. STAT. ch. 40, ¶ 1101 (1981) (citing The Illinois Public Aid Code, Act of April 11, 1967, ILL. Rev. Stat. ch. 23, ¶ 1-1 (1981)).
107. See supra note 99-101 and accompanying text.
the Contribution Act which requires that defendants be liable in
tort to the plaintiff.

As a final point, it should be noted that with its unrealistically
low damage provisions, the Illinois Dram Shop Act very often
fails to fulfill either its penal or its remedial purpose. With
respect to the penal aspect, the statutory ceiling for damages
sometimes serves to immunize rather than punish the dramshop
keeper, who might otherwise have to bear a larger part of the
actual damages for a particularly serious injury. With respect to
the remedial purpose, the liability limitations often leave a grie-
ously injured plaintiff without any means of suitable relief if
she were so unfortunate as to be injured by an uninsured or oth-
erwise insolvent drinker.

If contribution is permitted in dramshop actions, it may encour-
age the legislature to raise the statutory damages ceiling to a
more realistic level. The present limitations likely have persisted
because of the fear that, with the incidence of dramshop liability
being so common, imposition of actual damages would place an
intolerable burden on dramshop keepers who are liable on a no-
fault basis. Under a contribution scheme, this specter of un-
limited, no-fault liability should vanish because damages would
be apportioned according to culpability only. The dramshop
defendant would be required to bear more than her pro rata
share only if the injured plaintiff had no other means of recov-
er. This result would seem to be more in accord with the reme-
dial and penal purposes of the Dram Shop Act.

CONTRIBUTION AND DRAMSHOP ACTIONS
IN OTHER JURISDICTIONS

Fourteen states currently have dramshop laws (also known as
"civil damage acts") similar to Illinois’ statute. Only two of
these states, Minnesota and New York, have law relatively

108. See Stanner, supra note 31, at 404. Connecticut, which forbids contribution
between tortfeasors of any kind, is the only state with statutory damages as low as Illi-
Ulysses, 180 A. 2d 632 (Conn. 1966).

Stat. § 30-102 (West 1975); Iowa Code Ann. §§ 123.92 to 123.94 (West. Supp. 1982-83); Me.
Supp. 1982-83); N.D. Cent. Code § 5-01-06 (1975); Ohio Rev. Code Ann. § 4399.01 (Page
settled as to the issue of contribution in dramshop actions. Minnesota apparently grants a right of contribution to all the


Iowa has only dealt with two aspects of the contribution issue: whether a drinker can obtain contribution from a dramshop keeper, and whether dramshop keepers may obtain contribution inter se. With respect to the latter, see League v. Ehmk, 120 Iowa 464, 94 N.W. 938 (1903) (court stated each vendor should only be liable for a pro rata share of damages resulting from the drinker’s habitual intoxication). As to whether a drinker may obtain contribution from the dramshop defendant, Iowa law is unclear. The Iowa legislature seems to have overreacted to a dubious decision of the Iowa Supreme Court in which the drinker’s insurer was allowed to obtain contribution for injuries suffered by the drinker himself. See Federated Mut. Ins. Co. v. Dunkelberger, 172 N.W.2d 137 (Iowa 1969). This decision was tantamount to allowing the inebriate a cause of action under the dramshop statute for his own injuries. After the decision, the legislature added a provision to the dramshop statute, Iowa Code Ann. § 123.92 (West Supp. 1982-83), barring contribution to the drinker’s insurer from the dramshop defendant even though an innocent third person, not the drinker, suffered the injury the insurer recompensed. IOWA CODE ANN. § 123.94 (West Supp. 1982-83). See Dairyland Ins. Co. v. Mumert, 212 N.W.2d 436 (Iowa 1973). But cf. Shasteen v. Sojka, 269 N.W.2d 48 (Iowa 1977).

Maine recently faced the issue whether a dramshop defendant could obtain contribution. In Winchenback v. Steak House, Inc., 430 A.2d 45, (Me. 1982), the trial court had held that the dramshop defendant was not precluded from seeking contribution from the drinker. Id. at 46. Because of procedural deficiencies, however, the Supreme Judicial Court of Maine discharged the case without discussing the contribution issue.

Michigan law regarding contribution is far from settled. It is clear, however, that dramshop defendants inter se have a right to contribution. Duncan v. Beres, 15 Mich. App. 318, 166 N.W.2d 678 (1968). See also Friend v. Campbell, 102 Mich. App. 278, 301 N.W.2d 503, 507 (1981) (stating that Michigan law is well settled on this issue). As to contribution rights between the drinker and the vendor (in both directions), however, Michigan law is confused. Prior to 1970, contribution between any types of tortfeasors was permitted only if their liability was premised on the same tort theory of liability. See id. at 505. Accordingly, contribution was denied when one tortfeasor was liable under the dramshop law, and the other under common law negligence. See Reno v. Heineman, 56 Mich. App. 509, 224 N.W.2d 687 (1974); Virgilio v. Hartfield, 4 Mich. App. 582, 145 N.W.2d 367 (1966). Then, in 1970, the Michigan Supreme Court apparently abandoned the “common theory” rule and held that an equitable right to contribution belongs to all but intentional wrong-doers. See Moyes v. Spartan Asphalt Paving Co., 383 Mich. 314, 174 N.W.2d 797 (1970).

Three years after Moyes, the Sixth Circuit recognized a right of contribution between a dramshop defendant and a drinker. Frank v. Voris, 503 F.2d 1023 (6th Cir. 1974) (construing Michigan law). The Sixth Circuit held that Moyes superseded Virgilio, which had
possible defendants in dramshop actions.\footnote{With the decision in}

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denied a vendor the right to contribution from the drinker. But then, in Putney v. Gibson, 94 Mich. App. 466, 289 N.W.2d 837 (1979), rev'd sub nom. Putney v. Haskins, 414 Mich. 181, 324 N.W.2d 729 (1982), a panel of the Michigan Appellate Court denied a dramshop keeper the right to set off a sum the plaintiff had received in settlement from the drinker. Putney ignored both Moyses and Frank, and cited Virgilio as authority for the rule that no right of contribution exists between the dramshop defendant and the drinker because they are not liable under the same tort theory. \textit{Id.} at 842, 845. Putney was recently reversed, however, in Putney v. Haskins, 414 Mich. 181, 324 N.W.2d 729 (1982) (court did not discuss the set-off issue). To further complicate the situation, before Putney was reversed, another appellate court cited it as controlling law and held that neither a drinker nor a dramshop defendant may seek contribution from each other. See Friend v. Campbell, 102 Mich. App. 278, 301 N.W.2d 503, 506 (1980).

Whether or not Michigan courts prohibit vendor-drinker contribution, a unique provision in Michigan's dramshop statute rectifies some of the evils that arise when contribution is not available. \textit{See Mich. Comp. Laws Ann.} § 436.22 (West Supp. 1982-83). Called the "name and retain" provision, it requires the plaintiff, in an action against a dramshop vendor, to name the drinker as a codefendant and retain her in the action until the trial is completely over or until the dramshop defendant settles with the plaintiff. The provision eliminates the common practice whereby the drinker enters into a settlement with the injured plaintiff for a token sum and thereafter energetically assists the plaintiff's action against the defendant tavern owner. Sales v. Clements, 309 Mich. 103, 108-09, 247 N.W.2d 889, 891 (1976) (quoting 57 Mich. App. 367, 372, 26 N.W.2d 101, 104 (1975)). \textit{See generally Annual Survey of Michigan Law, 22 Wayn. L. Rev.} 629, 630 (1976).

North Dakota has yet to face the issue of contribution under its dramshop law. However, in Feuerheim v. Ertell, 286 N.W.2d 509 (N.D. 1979), the North Dakota Supreme Court held that North Dakota's comparative negligence statute, N.D. Cent. Code § 9-10-07 (Smith 1975), would not apply to dramshop actions. The decision dealt with the plaintiff's contributory negligence, but the very broad language of the decision seemingly eliminated the possibility of contribution as well.

Pennsylvania has no law regarding this subject. In Dick v. Lambert, 472 F. Supp. 560 (M.D. Pa. 1979), the issue was whether a dramshop defendant has a right to contribution from the drinker, but the federal court dismissed the case because Pennsylvania law was not applicable.

111. Generally, the Minnesota dramshop statute, Civil Damage Act, Minn. Stat. Ann. § 340.95 (West Supp. 1982), is comparable to that of Illinois. Village of Broten v. Cudahy Packing Co., 291 F.2d 284, 294-95 (8th Cir. 1961). The Minnesota statute grants a right of action to any person injured in person, property, or means of support as a result of the wrongful conduct of a drinker. It imposes strict liability upon dramshop operators who contribute to the intoxication by making an "illegal" sale. \textit{See Dahl v. Northwestern Nat'l Bank,} 265 Minn. 216, 121 N.W.2d 321 (1963). Although the statute does not define an "illegal" sale, the courts have interpreted it to mean a sale to a minor or an "obviously intoxicated" person. \textit{See Seeley v. Sobczak,} 281 N.W.2d 368 (Minn. 1979); Strand v. Village of Watson, 245 Minn. 414, 72 N.W.2d 609 (1955); \textit{see generally Hagglund, Mucoplat & Parrington, supra note 14, at 33-36; Note, Liability Under the Minnesota Civil Damage Act,} 46 Minn. L. Rev. 169, 185-88, 193-95 (1961) [hereinafter cited as Note, Liability]. Like Illinois, Minnesota has limited the amount of liability to which a vendor can be subjected. In 1977, the Minnesota legislature imposed a ceiling on the amount of damages recoverable under the statute: $250,000 for each person injured and a $500,000 aggregate per accident. Civil Damage Act, 1977 Minn. Laws ch. 390, § 1.

For discussions of the various aspects of the Minnesota statute, see generally Comment, \textit{Abandonment of Notice Requirement in Third-Party Claims for Contribution}
Skaja v. Andrews Hotel Co.,112 Minnesota became the first state to expressly grant contribution rights to dramshop defendants *inter se.*113 In *Skaja*, the court discussed whether contribution would “best effectuate the policy objectives” of its dramshop statute.114 The court found that contribution would further those objectives by increasing the incentive for liquor vendors to do everything in their power to avoid liability and by spreading the burden of economic loss more equitably throughout the liquor industry.115

Minnesota has also left no doubt that a drinker may seek contribution from a dramshop keeper.116 Similarly, there is every

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112. 281 Minn. 417, 161 N.W.2d 657 (1968). See also Hammerschmidt v. Moore, 274, N.W.2d 79 (Minn. 1978).

113. See *Skaja*, 281 Minn. at 420, 161 N.W.2d at 659. To do so, not only did the supreme court have to rebut the theory that contribution would defeat the penal aspect of the statute, but the court also had to modify a Minnesota common law presumption that a violator of a statute is guilty of an intentional tort and thus barred from contribution. Fidelity & Casualty Co. v. Christenson, 183 Minn. 182, 186, 236 N.W. 618, 619 (1931). See Note, *Inference*, infra note 111, at 1089; Note, *Upheaval*, infra note 111, at 120-123.

An early Illinois case, Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905) (dramshop case), also declared that a violation of a statute is an intentional tort. This aspect of *Wanack*, however, essentially has been ignored and is considered obsolete. See Wessel v. Carmi Elks Home, Inc., 133 Ill. App. 2d 902, 907-08, 272 N.E.2d 416, 421 (5th Dist. 1971) (Eberspacher, P.J., dissenting), aff'd, 54 Ill. 2d 127, 295 N.E.2d 718 (1973).

114. Civil Damage Act, MINN. STAT. ANN. § 340.95 (West Supp. 1982). See *Skaja*, 281 Minn. at 422, 161 N.W.2d at 660-61. Like Illinois, Minnesota has vacillated over how the statute should be construed, sometimes declaring it to be “highly penal,” Beck v. Groe, 245 Minn. 28, 38, 70 N.W.2d 778, 891 (1955), and other times declaring it to be remedial in character Hahn v. City of Ortonville, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1955). See generally Village of Brooten v. Cudahy Packaging Co., 291 F.2d 284 (8th Cir. 1961).

115. *Skaja*, 281 Minn. at 422, 161 N.W.2d at 661.

An early Illinois case, Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905) (dramshop case), also declared that a violation of a statute is an intentional tort. This aspect of *Wanack*, however, essentially has been ignored and is considered obsolete. See Wessel v. Carmi Elks Home, Inc., 133 Ill. App. 2d 902, 907-08, 272 N.E.2d 416, 421 (5th Dist. 1971) (Eberspacher, P.J., dissenting), aff'd, 54 Ill. 2d 127, 295 N.E.2d 718 (1973).

116. Beginning with Farmers Ins. Exch. v. Village of Hewitt, 274 Minn. 246, 143 N.W.2d 230 (1966), a string of Minnesota Supreme Court cases have reiterated that a right to contribution belongs to the drinker (or his insurer). Fitzer v. Bloom, 253 N.W.2d 395 (Minn. 1977); Reserve Ins. Co. v. Village of Big Lake, 304 Minn. 148, 230 N.W.2d 47 (1975); Milbank Mut. Ins. Co. v. Village of Rose Creek, 302 Minn. 282, 225 N.W.2d 6 (1974). Similarly, on the rare occasion when a third person, along with the dramshop keeper and the drinker, contributes to the cause of the injury, that third tortfeasor also has a right to contribution from the dramshop keeper. See, e.g., Jones v. Fisher, 309 N.W.2d 726 (Minn. 1981). In *Jones*, the drinker was a negligent pedestrian who was struck and killed by a negligent motorist. After the motorist settled with the decedent’s spouse for wrongful death, the motorist was allowed contribution from the dramshop keeper to the extent that the wrongful death settlement comprised damages for loss of
Contribution and the Dram Shop Act

Indication that the converse—contribution from a drinker to a dramshop keeper—is also permitted. For example, in Ascheman v. Village of Hancock, discussed above, it was presumed that dramshop keepers, in general, have a right to contribution from the drinker. The only reason why the court did not require the drinker to pay contribution in that case was because the injured plaintiffs were the drinker’s wife and daughter. The most compelling evidence that Minnesota recognizes a dramshop keeper’s right to contribution from a drinker is contained in the Minnesota Civil Damage Act itself. In 1977, the legislature amended the Civil Damage Act by incorporating by reference section 604.01 of the Minnesota Statutes. At that time, section 604.01 embodied Minnesota’s contribution rule. The amendment stipulated that section 604.01 should apply, i.e., contribution should be permitted, except in cases brought by a dependent of the drinker. The exception reflects the supreme court’s holding in Ascheman, while making clear that the legislature supported. See id. at 731 nn.6 & 9, for examples of jury instructions on damage allocation. See also Mutual Serv. Casualty Ins. Co. v. Clayton Club, 316 N.W.2d 531 (Minn. 1982) (following Jones).

117. 254 N.W.2d 382 (Minn. 1977). See supra notes 99-104 and accompanying text.
118. But see Conde v. City of Spring Lake, 290 N.W.2d 164 (Minn. 1980). The Conde court faced exactly the same issue as the Ascheman court and denied contribution, stating it was following Ascheman. But the Conde opinion includes some dicta that would seem to cast doubt upon whether a dramshop keeper may seek contribution even if the plaintiff is not a dependent of the drinker. Attributing the following statement to Skaja, the court said, “Imposing liability on the vendors and not allowing contribution from the intoxicated person acts as an incentive to the vendors to avoid illegal sales. Skaja v. Andrews Hotel Co. . . .” Id. at 166. The Skaja opinion, however, contains no such statement.

120. Minn. Stat. § 604.01 (1976) (current version at Minn. Stat. Ann. § 604.01 to § 604.05 (West Supp. 1982)).


The legislative practice of using so-called “reference statutes” to incorporate existing statutes is a generally recognized method of legislation. The result is that the reference to the other statute constitutes, in effect, a reenactment of that statute as it stands at the time when it is incorporated by reference. 82 C.J.S. Statutes § 70 (1953).

122. “Actions for damages based upon liability imposed by this [dramshop statute] shall be governed by section 604.01. [However] section 604.01 . . . [shall not be applicable] to actions . . . brought by a . . . dependent of an intoxicated person.” Minn. Stat. Ann. § 340.95 (West Supp. 1982).

123. Jones v. Fisher, 309 N.W.2d 726, 731 n.7 (Minn. 1981). For a discussion of Ascheman, see supra, notes 102-07 and accompanying text. Actually, the exception goes.
intends that a dramshop defendant should otherwise be permitted to obtain contribution from the drinker.

New York, like Minnesota, has relatively settled law on the subject of contribution in dramshop actions. As in Illinois, the New York courts have alternately characterized their dramshop statute as penal and remedial. One court, emphasizing the penal aspect of the statute, went so far as to say that the provision for (actual and exemplary) damages was comparable to a "civil fine." New York also had developed a doctrine of active-passive indemnity, but, as in Illinois, the courts had refused to apply the doctrine to dramshop actions.

Since 1973, when New York adopted a general rule permitting contribution among tortfeasors, the courts have granted contribution rights whenever, and in whatever context, the issue arises in dramshop actions. In Rubel v. Stakrow, the court found there was no basis in logic or policy for refusing to extend contribution rights to dramshop keepers inter se. In Weiss v. Muller, the court acknowledged the right of a drinker to receive contribution from a dramshop defendant. In Wood v. City of

farther than Ascheman. Strictly construed, it would prohibit contribution not only for damages from loss of support, but also for damages from injury to person or property—damages that Ascheman’s holding does not apply to.


130. "Whether the relative degree of fault should be determined on the basis of the number of drinks procured at each establishment, or other factors, is for a jury to determine after considering all the evidence." Id. at 735, 340 N.Y.S.2d at 693.

New York, the New York Appellate Division held that a dramshop defendant is permitted to seek contribution from the drinker. Each of these decisions, however, dealt with the issues rather summarily, and only recently in *Anderson v. Comar- do*, did a court extensively analyze whether, as a matter of policy, a dramshop defendant should be able to obtain contribution from a drinker.

In *Anderson*, the dramshop keeper requested either indemnity or contribution. The court denied the indemnity claim, but then distinguished indemnity from contribution. The court acknowledged the possibility that a right to contribution might defeat the intent behind certain strict liability statutes, but stated that the right should be recognized *unless it is clear* that contribution would actually produce such a detrimental effect.

*Anderson* explained that, although the dramshop statute was motivated in part by the desire to curb intemperance, one of its primary goals was to assure that injured persons would have an available remedy. Punishment, the court said, could be meted out by the imposition of exemplary damages. *Anderson* found that it would be incongruous to automatically deny a right of contribution to all dramshop defendants when such a right belongs even to intentional tortfeasors.

In closing, it is interesting to note that, in *Anderson*, the drinker cited the Illinois decision in *Wessel* to support his position that contribution should be denied. The *Anderson* court concurred with the decision in *Wessel*, but emphasized that *Wessel* dealt only with indemnity, not with contribution. "Apparently," the court said, "Illinois law did not apportion liability when *Wessel* was decided."

**CONCLUSION**

The right of contribution among defendants should be recognized in Illinois dramshop actions. Unlike the doctrine of indemn-
nity, the rule of contribution would equitably distribute costs in proportion to liability among dramshop keepers and drinkers. As such, contribution would enforce both the regulatory and punitive policies underlying the Illinois Dram Shop Act. Further, it would do so without impairing the plaintiff's right to recovery, even when the plaintiff is the spouse or the child of the drinker.

Allowing dramshop keepers a right to contribution may also serve to encourage the Illinois legislature to raise the Dram Shop Act's liability limitations. The equitable loss allocation of contribution should eliminate the fear that dramshop keepers would be exposed repeatedly to massive liability on a no-fault basis. A realistic increase in the liability limitations would render the Dram Shop Act genuinely capable of fulfilling its penal and remedial purposes.

Finally, an examination of the laws of other jurisdictions supports the application of contribution principles to dramshop actions in Illinois. Indeed, if the Illinois courts follow the precedent set by these other jurisdictions, they would only be establishing a rule consonant with their own contribution statute which was enacted to apply to every type of tort action and to permit the factfinder to assign the costs of liability according to the particular circumstances of each case.

PETE ALMEROOTH