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Implied Indemnity after *Skinner* and the Illinois Contribution Act: The Case for a Uniform Standard

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INTRODUCTION

Illinois tort law reflects the principle that each person should bear responsibility for his or her own conduct. In multiple defendant litigation this goal is best served by a method of loss allocation which recognizes that fault is rarely an all-or-nothing situation. Rather, fault can be seen as a continuum from zero to one hundred percent with most defendants falling somewhere in between.

In 1978, the Illinois Supreme Court adopted a system of contribution which allocates liability between tortfeasors on the basis of relative culpability. Prior to 1978, Illinois courts adhered to the traditional rule against contribution and allocated loss on an all-or-nothing basis under the doctrine of joint and several liability. Seeking to ameliorate the harsh results of this rule, the courts developed the active-passive doctrine of implied indemnity which enabled the "passive" tortfeasor to place the entire burden of damages on the "active" tortfeasor. Thus, the defendant

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5. The doctrine of joint and several liability states that where the concurrent negligence of two or more defendants results in injury or damage to another, the defendants are jointly and severally liable and the injured person may recover from any or all of them. Storen v. City of Chicago, 373 Ill. 530, 533, 27 N.E.2d 53, 55 (1940).
6. See infra notes 23-28 and accompanying text.
whose conduct was considered more socially reprehensible would not escape liability.

Now that Illinois has adopted contribution, the active-passive doctrine has outlived its usefulness. Courts may now evaluate situations which have traditionally given rise to indemnity claims on the basis of relative culpability. Instead of placing the entire burden of damages on one defendant, the courts may ensure that each defendant will bear responsibility for his or her own conduct.

This article will examine the interrelationship between the doctrine of indemnity and contribution. First, it will discuss the equitable purpose of indemnity as applied under the common law. Pursuant to this discussion, the article will suggest that modern contribution fulfills the equitable promise of the early indemnity cases. Next, the article will examine the manner in which Illinois courts have treated indemnity since the adoption of contribution. Finally, the article will conclude that the doctrine of indemnity is rendered obsolete in Illinois after the adoption of contribution, and that the retention of indemnity defeats the Illinois Supreme Court's equitable purpose in adopting contribution.

HISTORY OF INDEMNITY AND CONTRIBUTION

Prior to the Illinois Supreme Court's adoption of contribution, Illinois courts adhered to the common law rule barring contribution among tortfeasors. It was thought unjust and a waste of judicial effort to decide in court how wrongdoers should share damages. This sentiment traced back to the inception of the rule against contribution, at a time when most tort defendants were charged with intentional, quasi-criminal misconduct. Although the early rule barred contribution among intentional

8. See supra note 3.
9. Skinner, 70 Ill. 2d at 9, 374 N.E.2d at 440.
10. See Appel & Michael, Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation, 10 LOY. U. CHI. L.J. 169, 171 (1979) (tortfeasors were considered legally akin to criminals so that courts were unwilling to spend time and resources in determining relative culpability).
11. Skinner, 70 Ill. 2d at 9, 374 N.E.2d at 440. See also Reath, Contribution Between Persons Jointly Charged for Negligence - Merryweather v. Nixan, 12 HARV. L. REV. 176, 177-78 (1899), quoted in Skinner, 70 Ill. 2d at 9, 374 N.E.2d at 440.
wrongdoers only, later courts misconstrued the rule to apply to unintentional tortfeasors as well.

Whatever justice the no-contribution rule served when applied to the intentional near-criminal tortfeasor of an earlier time was lost when later courts applied the rule to negligent defendants. Under the doctrine of joint and several liability, a plaintiff could recover the entire amount of damages from any one defendant in a multiple defendant negligence case. The no-contribution rule left the unlucky defendant without recourse against a co-defendant who might be equally or more responsible for the injury.

The rule may be illustrated by the following hypothetical: A girl is waiting at an intersection to cross the street. She checks traffic before walking, but her vision is blocked by an illegally-parked truck. After she enters the intersection, she is struck by a speeding car which she would have seen but for the illegally-parked truck. In the girl's suit against the driver of the car and the owner of the truck, the jury awards her $100,000 in damages. Under the doctrine of joint and several liability, the girl may recover the $100,000 from either defendant or both. If she chooses to recover the entire amount from the owner of the truck alone, he will have to pay the full $100,000 without recourse against the driver of the car; hence the driver will pay nothing.

In spite of the inequity of this result, courts abrogated the no-contribution rule in only one situation. If the defendant forced to pay the damages could prove that he was entitled to indemnity from the other defendant, then the paying defendant could shift the entire burden of damages over to the other.

Indemnity

The right to indemnity traditionally arises out of an express or implied contract. The contract imposes upon one person, the

13. Id. at 9, 374 N.E.2d at 440.
15. See supra note 5.
indemnitor, the obligation to repay another, the indemnitee, who has incurred a loss by acting for the benefit of the indemnitior.\textsuperscript{18} An implied contract or duty to indemnify arises in favor of one who has paid damages because of the wrongful conduct of another who was primarily liable.\textsuperscript{19} For example, an employer held liable for the tort of his employee\textsuperscript{20} may seek indemnity from the employee.\textsuperscript{21}

The courts saw indemnity as a means of mitigating the harshness of the no-contribution rule.\textsuperscript{22} They expanded the concept into what became known as the active-passive doctrine of implied indemnity.\textsuperscript{23} Under this doctrine, a tortfeasor showing that her role was “passive” could shift the entire burden of damages to the other “active” tortfeasor.\textsuperscript{24} Although a step in the direction of equity, the active-passive doctrine essentially failed to mitigate the harsh effects of the no-contribution rule\textsuperscript{25} because one of two equally unintentional defendants still had to pay damages attributable to both defendants’ conduct.\textsuperscript{26}

\textsuperscript{18} Id.  
\textsuperscript{20} See, e.g., Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931).  
\textsuperscript{21} Klatt v. Commonwealth Edison Co., 55 Ill. App. 2d 120, 137-38, 204 N.E.2d 319, 328 (2d Dist. 1964). This rule has been attacked as subverting the policy behind respondeat superior. See infra notes 110-18 and accompanying text; see also W. PROSSER, supra note 16, § 51, at 311 & n.92 (notes criticism of allowing employer to seek indemnity from employee).  
\textsuperscript{22} See Gulf, Mobile \& O. R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 156, 98 N.E.2d 783, 787 (1st Dist. 1951) (“Legal negligence no longer embodies a concept of misbehavior just short of the criminal or the immoral. The courts have, therefore, had to find a way to do justice within the law so that one guilty of an act of negligence - affirmative, active, primary in its character - will not escape scot free . . . .”).  
\textsuperscript{25} Skinner, 70 Ill. 2d at 6-7, 374 N.E.2d at 439. Another problem with the active-passive doctrine was the courts’ inability to define it precisely. Id. at 12, 374 N.E.2d at 441. The meanings of active and passive shifted from case to case, never evolving into a usable test. See infra notes 29-38 and accompanying text. See also Bua, Third Party Practice in Illinois: Express and Implied Indemnity, 25 DE PAUL L. REV. 287, 296 (1976); Leflar, supra note 1, at 155-56. The resulting standard was so vague that it generated harsh effects of its own. Skinner, 70 Ill. 2d at 12, 374 N.E.2d at 441.  
\textsuperscript{26} Id. at 6-7, 374 N.E.2d at 439. For example, in the hypothetical, see supra p. 533, assume that the girl has recovered the entire judgment from the owner of the truck. If he can convince the jury that his conduct was passive and the driver’s active, then the owner may shift the entire burden of damages to the driver, even though the girl would have seen the speeding car in time to avoid it had the truck not been illegally parked. On
Characterization of conduct as active or passive necessitated the finding of a qualitative distinction between the defendants’ behavior in each case. Some courts also required that the defendants have had a relationship prior to the tort such as would give rise to a duty to indemnify.

Qualitative Distinction

Courts have held that indemnity is available only to defendants whose conduct can be labeled as passive. Some courts have defined passive conduct as not breaching an affirmative duty or not actively participating in the wrong. Passive conduct, however, does not necessarily signify inaction. In fact, inaction or passivity has been held to constitute the primary cause of an injury.

Another definition of passive conduct is liability arising solely out of a legal obligation. An example is the doctrine of respondeat superior under which courts hold an employer liable for the

the other hand, if the court adheres to the pre-tort relationship requirement, and the defendants were strangers prior to the tort, the owner would not be able to shift any of the burden, and the driver would escape liability.

27. The requirement of a qualitative distinction is associated with the old rule that defendants in pari delicto were barred from indemnity. In pari delicto means “In equal fault; equally culpable or criminal.” BLACK’S LAW DICTIONARY 711 (5th ed. 1979). The rule was stated in Lowell v. Boston & Lowell R.R., 23 Pick. (Mass.) 24, 32, 34 Am. Dec. 33, cited in Gray v. Boston Gaslight Co., 114 Mass. 149, 154 (1873), as follows: “If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for the damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and the courts will not inquire as to their relative guilt.” Illinois adopted the rule in Chicago Rys. v. R.F. Conway Co., 219 Ill. App. 220, 223 (1st Dist. 1920). Cf. Leflar, supra note 1, at 155 (in pari delicto not a useful test; used to support decisions already arrived at); accord Note, supra note 1, at 498-99 (meaningless verbal label).


torts of his employee. Some courts applying the active-passive doctrine have characterized the employer's conduct as passive because his liability arose as a result of a rule of law. On the other hand, other courts have held the employer to be actively negligent because he controlled or instructed his employee, even though the employee's acts proximately caused the injury.

Generally, where both defendants have been negligent, courts have denied indemnity because there was no qualitative distinction in conduct. Nevertheless, as the courts progressively expanded the scope of indemnity, they began to apply the active-passive doctrine to negligent conduct as well. The distinction was no longer qualitative but quantitative, suggesting that the underlying rationale for the doctrine was actually based on differences in degrees of fault. But under such a rationale, the equity of shifting liability entirely from one defendant to another became more questionable.

34. See Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931). See also 41 AM. JUR. 2D Indemnity § 417 (1968), which states the doctrine as follows: "a master must respond in damages for the injuries inflicted by his servant who was acting within the scope of his employment."


38. Gertz v. Campbell, 55 Ill. 2d at 84, 302 N.E.2d at 40; Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d at 187, 229 N.E.2d at 769; Reynolds v. Illinois Bell Tel. Co., 51 Ill. App. 2d at 334, 201 N.E.2d at 322.

39. See Gertz v. Campbell, 55 Ill. 2d at 89, 302 N.E.2d at 43-44 (courts compare fault when determining active-passive indemnity); Michael & Appel, supra note 7, at 613. Some courts held that indemnity rests not upon fault but upon whether a defendant's conduct was active or passive. See, e.g., Gulf, Mobile & O. R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 156, 98 N.E.2d 783, 787 (1st Dist. 1951). Other courts stated that a defendant is entitled to indemnity when he is without fault. See, e.g., Vassolo v. Comet Indus., Inc., 35 Ill. App. 3d 41, 44, 341 N.E.2d 54, 57 (1st Dist. 1975). Another view interpreted the doctrine as balancing the relative faults of the defendants, rather than their action or inaction. Burgdorff v. IBM, 35 Ill. App. 3d 192, 195, 341 N.E.2d 122, 125 (1st Dist. 1975).

40. See Michael & Appel, supra note 7, at 613 (the desirability of imposing complete indemnity where both defendants are negligent must be assessed in terms of social cul-
Pre-Tort Relationship

In addition to a qualitative distinction in conduct, some courts required that the defendants have had a relationship prior to the commission of the tort such as would give rise to a duty to indemnify. This requirement has been satisfied by prior contractual relationship, relationship imposed by statute, and by such tenuous grounds as the relationship between a park district and a child who stole fireworks from it. Arguably, the requirement of a pre-tort relationship makes the active-passive doctrine easier to apply. But some courts have held that such a relationship is not the most important, or even a necessary, ground for awarding indemnity.

Illinois did not permit indemnity between parties who were "strangers" prior to the litigation until relatively recently.

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44. Mullins v. Crystal Lake Park Dist., 129 Ill. App. 2d 228, 231-32, 262 N.E.2d 622, 624-25 (2d Dist. 1970). In upholding the park district's claim of indemnity, the Mullins court distinguished Muhlbauer on grounds that the park district had not denied any relationship with the child who stole the fireworks which caused the injury. The court stated that in Muhlbauer, the Supreme Court recognized that the doctrine of implied indemnity exists if a potential relationship between the parties is pleaded and the liability of one party is primary and the other is secondary. Here, the counter plaintiffs do not deny any connection with Stokes [the child]. . . . They allege that Stokes stole the fireworks from that display and admit that the fireworks taken from the display were given to plaintiff and caused his injury. We believe that this sufficiently alleges the relationship or circumstances between the parties sufficient upon which to predicate an action for indemnity.
46. See, e.g., Chicago & Ill. Midland Ry. v. Evans Constr. Co., 32 Ill. 2d 600, 603, 208 N.E.2d 573, 574 (1965) (right to indemnity rests on qualitative distinction). See also generally Gertz v. Campbell, 55 Ill. 2d at 84, 302 N.E.2d at 40; Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d at 187, 229 N.E.2d at 769; Reynolds v. Illinois Bell Tel. Co., 51 Ill. App. 2d at 384, 201 N.E.2d at 322. In both Sargent and Reynolds, the courts allowed defendants to claim indemnity despite the absence of a pre-tort relationship.
47. See supra note 46. The reason for the rule is unclear, although it may perhaps be attributed to the Illinois courts' traditional association of passive or secondary negligence with a legal duty created by contract, statute or respondeat superior, absent which
Whenever courts awarded indemnity between strangers, the apparent rationale was that the disparity in fault was so great that indemnity was justifiable despite the absence of a pre-tort relationship. This development in the history of the active-passive doctrine reflects the judicial attitude that equitable apportionment of loss should be the goal of indemnity. Nevertheless, in the 1968 case, *Muhlbauer v. Kruzel*, the Illinois Supreme Court held that, to succeed on a claim of indemnity, a defendant must allege some relationship or circumstance giving rise to a duty to indemnify. Subsequent courts and commentators disagreed over whether this holding reinstituted the requirement of a pre-tort relationship.

**Partial Indemnity**

Five years after *Muhlbauer*, in *Gertz v. Campbell*, the Illinois Supreme Court awarded “partial indemnity” where the defendants had no pre-tort relationship and there was no qualitative distinction in their conduct. The court held that a motorist who had struck and injured a minor plaintiff could recover indemnity from the treating physician for that portion of dam-


48. *See Drozdik*, *supra* note 45, at 144.

49. *See Sargent v. Interstate Bakeries*, Inc., 86 Ill. App. 2d at 190, 229 N.E.2d at 771 (right to indemnity based upon principle that everyone is responsible for his own acts); accord *LeMaster v. Amsted Indus.*, Inc., 110 Ill. App. 3d 729, 442 N.E.2d 1367, 1370 (5th Dist. 1982).


51. *Id.* at 231-32, 234 N.E.2d at 793.

52. *Compare Moody v. Chicago Transit Auth.*, 17 Ill. App. 3d 113, 118, 307 N.E.2d 789, 793 (1st Dist. 1974) (Hallett, J., concurring) (*Muhlbauer* overruled *Reynolds* and *Sargent* by implication. *See supra* notes 37-38 and accompanying text) *with Bua*, *supra* note 25, at 298 (relationship requirement of *Muhlbauer* was not an attempt to reinstate pre-tort relationship requirement but defined distinction between stating a cause of action and tendering a new defendant). *See also* Michael & Appel, *supra* note 7, at 609-11 (appellate courts have extended *Muhlbauer* beyond its facts); *Davis v. FMC Corp.*, 537 F. Supp. 466, 467 (C.D. Ill. 1982) (*Muhlbauer* indicates “outer bounds” of pre-tort relationship, not that traditional pre-tort relationship must be established).

53. 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

54. *Id.* at 87-88, 302 N.E.2d at 43. Third-party plaintiff driver sought recovery from third-party defendant physician, not for the total amount of judgment, but “for the amount of damages caused to the plaintiff as a result of the injury or aggravation of the plaintiff’s existing injuries caused by the neglect and failure of Dr. Snyder.” *Id.* The phrase “partial indemnity” was not used by the *Gertz* court, but by the Court of Appeals of New York in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972), a decision relied upon by the *Gertz* court. 55 Ill. 2d at 89, 302 N.E.2d at 44.
ages attributable to the physician’s misconduct. The court stated that the motorist was not asking for “traditional” contribution or indemnity. Yet his request to be indemnified for the amount of damages attributable to the physician’s misconduct was essentially a request for contribution.

The court reasoned that indemnity was capable of “development” where equity required, citing the active-passive doctrine as an example. The court noted that New York had recently replaced active-passive indemnity with indemnity “founded on equitable principles” and stated that precluding the motorist from seeking “indemnity” from the physician would unjustly enrich the physician.

Although an abrupt departure from the traditional active-passive analysis apparently reaffirmed in Muhlbauer, Gertz did not explicitly overrule Muhlbauer. Nevertheless, the supreme court demonstrated its willingness to depart from the no-contribution rule even though the traditional criteria for indemnity were not met. By allocating loss directly on the basis of fault, the decision opened the door to contribution.

**Contribution**

Contribution, a method of equitably allocating loss among multiple defendants, has been adopted in almost every state, either in its fault-based or “pro rata” form. Pro rata contribution allocates loss by dividing the total amount of damages by

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55. *Id.* at 92, 302 N.E.2d at 45.
56. *Id.* at 88, 302 N.E.2d at 43.
58. *Gertz*, 55 Ill. 2d at 89, 302 N.E.2d at 43.
59. *Id.* at 89, 302 N.E.2d at 43-44.
60. *Id.* at 91-92, 302 N.E.2d at 45.
61. The court did not mention *Muhlbauer* or even the pre-tort relationship/qualitative distinction requirements.
62. 55 Ill. 2d at 89, 302 N.E.2d at 43.
63. Third-party plaintiff requested to be indemnified for the total damages attributable to the fault of the physician. *Id.* at 90, 302 N.E.2d at 44. The court held that third-party plaintiff could be indemnified for the damages attributable to the physician’s malpractice. *Id.* at 92, 302 N.E.2d at 45.
the number of defendants without regard to fault.\textsuperscript{66} Fault-based contribution allocates loss directly on the basis of the defendants' relative fault.\textsuperscript{67} Illinois adopted fault-based contribution in \textit{Skinner v. Reed-Prentice Division Package Machine Co.},\textsuperscript{68} later codified in the Illinois Contribution Act.\textsuperscript{69} That fault-based contribution is the more equitable form may be illustrated by using the hypothetical situation involving the girl crossing the intersection discussed above:

Under pro rata contribution, damages would be divided by the number of defendants found liable. Thus, the driver and the owner of the truck would each pay half the damages, without regard to their relative roles in causing the injury. Even though the driver might be seventy percent at fault, he would pay only fifty percent of the damages. The truck owner, only thirty percent at fault, would also have to pay fifty percent of the damages.\textsuperscript{70} In contrast, under fault-based contribution, if the jury found the driver seventy percent at fault for the injury, he would pay seventy percent of the damages. Likewise, the owner, found thirty percent at fault, would pay the same in damages. This result is clearly the more equitable.

In \textit{Skinner}, the Illinois Supreme Court allowed a manufacturer charged with strict product liability to recover contribution from the injured plaintiff's employer.\textsuperscript{71} The court noted that the no-contribution rule was originally limited to intentional miscon-

\textsuperscript{66} \textit{Skinner}, 70 Ill. 2d at 18, 374 N.E.2d at 444 (Ward, C.J., dissenting).
\textsuperscript{67} W. PROSSER, supra note 16, § 50, at 310.
\textsuperscript{69} Contribution Among Joint Tortfeasors Act, ILL REV. STAT. ch. 70, 301-305 (1981). See infra note 75 for text of statute.
\textsuperscript{70} See Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), in which the Supreme Court of Wisconsin adopted fault-based instead of pro rata contribution:
\begin{quote}
If the doctrine is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury. This is merely a refinement of the equitable principle. It is difficult to justify, either on a layman's sense of justice or on natural justice, why a tortfeasor who is 5% causally negligent should only recover 50% of the amount he paid to plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent.
\end{quote}
\textit{Id.}, 114 N.W.2d at 109.
\textsuperscript{71} 70 Ill.2d at 16, 374 N.E.2d at 443. The court allowed defendant Reed-Prentice to claim contribution from plaintiff's employer, on grounds that the employer had misused the product or assumed the risk, even though Worker's Compensation barred a direct suit by plaintiff against her employer. The court cited Miller v. DeWitt, 37 Ill. 2d 273, 226
duct and that extending the rule to defendants guilty of unintentional torts was unduly harsh.\textsuperscript{72} Active-passive indemnity had failed to mitigate these harsh effects because, like the no-contribution rule, indemnity forced one of two or more unintentional tortfeasors to shoulder the entire burden of damages.\textsuperscript{73} Moreover, indemnity had harsh effects of its own and lacked uniformity of result.\textsuperscript{74}

In 1981, the Illinois legislature codified \textit{Skinner} in the Contribution Act,\textsuperscript{75} simultaneously expanding the scope of the decision

\begin{Verbatim}
N.E.2d 630 (1967), in which the court previously had allowed a manufacturer to recover indemnity from the plaintiff's employer on those same grounds. Furthermore, the \textit{Skinner} court noted that misuse of the product or assumption of risk by a user would bar his recovery in an indemnity action. \textit{Id.} at 16, 374 N.E.2d at 443.

\textsuperscript{72} \textit{Id.} at 8-9, 374 N.E.2d at 441.
\textsuperscript{73} \textit{Id.} at 12, 374 N.E.2d at 441.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} Contribution Among Joint Tortfeasors Act, ILL. REV. STAT. ch. 70, ¶¶ 301-305 (1981). The Act provides:

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

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

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

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

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

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

(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.

303. Amount of contribution
§ 3. Amount of Contribution. The pro rata share of each tortfeasor shall be
and answering many questions left open by the court. The statute provides that loss shall be allocated directly on the basis of relative culpability. In addition, the legislature designed certain provisions to promote settlements.

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

304. Rights of plaintiff unaffected
§ 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.

305. Enforcement
§ 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.

66. See Skinner, 70 Ill. 2d at 38-39, 374 N.E.2d at 454 (Dooley, J., dissenting) (questions left open by the court include: future status of indemnity, effect on Structural Work Act, effect on Dram Shop Act, effect of settlement on right to contribution, rights of insurer who discharges liability of tortfeasor insured, the procedures for apportioning damages, and the standard by which they will be apportioned). See also Appel & Michael, supra note 10, at 201 (areas needing clarification after Skinner include substantive issues: scope of doctrine in product liability cases, and in cases in which an employee is injured in an accident to which his employer proximately contributed; application of the doctrine to intentional torts, and the method of loss allocation in cases unlike Skinner. Procedural issues include: proper treatment of absent defendants, effect of pre-judgment settlement, and operation of statute of limitations). Most of these questions were answered by the Act. See supra note 75 for the text of the Act.

77. ILL REV. STAT. ch. 70, § 302(a), (c), (d), (f) (1981) (see supra note 75 for text). Any
Post-Skinner indemnity cases fall into three categories: those which recognize the conflict between indemnity and contribution but state that indemnity should survive, those which recognize the conflict and favor the abolition of indemnity, and those which have not addressed the conflict at all.

Into the first category of cases falls Van Jacobs v. Parikh, one of only two cases which have dealt with occurrences after the effective date of the Contribution Act when both contribution and indemnity were potentially available. In Van Jacobs, the court held that there is no need for the active-passive doctrine now that Illinois has contribution. Nevertheless, in an apparent contradiction, the court also held that indemnity, based on the same qualitative distinction/pre-tort relationship test which had formed the basis for the active-passive doctrine, survives contribution.

In Van Jacobs, Mrs. Van Jacobs' husband died when his motorcycle collided with a car driven by defendant Parikh. She joined as a defendant the manufacturer of the helmet her husband was wearing at the time of the accident. After Parikh settled with the plaintiff, the manufacturer of the helmet filed a third-party complaint against Parikh seeking indemnity, equitable apportionment, and contribution.

potentially liable person who settles in good faith is discharged from all liability for contribution. On the other hand, the settling party releases only himself unless the release or covenant expressly provides otherwise and is only entitled to receive contribution from other tortfeasors whose liabilities are extinguished by the settlement. Recovery against other tortfeasors is reduced "to the extent of any amount stated in the release or covenant, or the amount of consideration actually paid for it, whichever is greater." Widland, Contribution: The End to Active-Passive Indemnity, 69 ILL. B.J. 78, 78-79 (1980) (quoting, ILL. REV. STAT. ch. 70, ¶ 302(c) (1979)).


81. Van Jacobs v. Parikh, 97 Ill. App. 3d at 613, 422 N.E.2d at 981.
82. Id.
83. Id. at 611, 422 N.E.2d at 980.
84. Id.
85. Equitable apportionment is the same as Gertz partial indemnity. See supra note 54.
86. 97 Ill. App. 3d at 612, 422 N.E.2d at 980.
The court held that Parikh was immune from contribution under the Contribution Act because of his settlement, but refused to accept Parikh's contention that the Act extinguished indemnity in Illinois:

The Contribution Act has not extinguished indemnity in Illinois, but instead permits the courts to place indemnity back upon its theoretical foundation. We therefore follow Muhlbauer and its progeny and hold that, in addition to a qualitative distinction between the conduct of the parties, a cause of action requires a duty to indemnify, arising not from the relative fault of the parties but from the pre-tort relationship between the parties.

Thus, in the name of placing indemnity back on its theoretical foundations, Van Jacobs resurrected the grounds of active-passive indemnity, while rejecting the doctrine in name. This decision is incorrect for four reasons: first, it fails to recognize that pre-tort relationship and qualitative distinction are the criteria by which the courts apply the active-passive doctrine. Second, the court forgets that those criteria emerged as a result of efforts to cope with the no-contribution rule. Third, the decision works against the strong legislative policy favoring settlements. Fourth, and most important, by maintaining a separate system of loss allocation based on a fictional standard, the decision conflicts with the policy of the Illinois Supreme Court and legislature that loss is to be allocated on the basis of relative culpability.

The second category of cases favoring contribution to the exclusion of indemnity dealt with occurrences prior to the effective date of the Contribution Act. Hence, the courts' comments regarding the conflict between contribution and indemnity were dicta. These dicta have nevertheless been supported by a number of commentators.

87. Id. Paragraph 302(d) of the Contribution Act discharges settling parties of liability for contribution. See supra note 75 for text.
88. 97 Ill. App. 3d at 613, 422 N.E.2d at 981-82.
89. See supra notes 23-28 and accompanying text.
90. See supra notes 4, 5, 9-28 and accompanying text.
91. See supra note 78 and accompanying text.
92. See supra note 77 and accompanying text.
94. Bua, supra note 25, at 316; Cf. Jensvold, A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases, 58 MINN. L. REV. 723 passim (1974) (advocates abolition of indemnity in favor of contribution based on relative responsibil-
The greater number of post-*Skinner* indemnity cases, grouped in the third category, has not addressed the conflict at all. All but one of these cases involved occurrences prior to the effective date of the Contribution Act. In that case, *LeMaster v. Amsted Industries*, defendant Amsted claimed both contribution and indemnity from plaintiff's employer. The employer had settled with plaintiff, agreeing to pay $35,000 cash and waiving its right to seek reimbursement for worker's compensation, in return for a release from all liability. The employer contended that he was released from further liability for contribution under the settlement provisions of the Contribution Act, so that Amsted's third-party action should be dismissed. The court held that the employer's settlement with plaintiff did not bar contribution because the settlement was not in good faith as required by the Act.

The court held further that the settlement did not bar Amsted's claim for indemnity from the employer, citing three confusing reasons which reflect the court's misunderstanding of the purpose and function of indemnity and contribution. The court
first stated that barring the claim for indemnity would defeat the purpose of indemnity which was to shift the burden from one "only technically liable" to one "truly culpable." Second, if the evidence showed that Amsted were partially at fault and liable for contribution, Amsted could not present evidence on the issue of indemnity. Third, apportionment of damages would not be the result of assessment of relative fault, but of the difference between the amount of the settlement and the judgment against Amsted.102

If contribution is properly seen as a replacement for indemnity, these three problems would be solved. First, the defendant, "only technically liable,"103 would not have to shoulder the entire burden of damages; he could shift to the "truly culpable" defendant the amount for which the latter was responsible.104 Second, if the evidence showed that Amsted were partially at fault and liable for contribution, Amsted should not be allowed to force the employer to shoulder the entire burden through a claim for indemnity.105 Third, in contribution, apportionment of damages is the result of assessment of relative fault.106

The confusion evident in the appellate courts calls for the Illinois Supreme Court to decide this important issue. It should reaffirm the policy set forth in *Skinner* that traditional common law theories should give way to allocation of loss on equitable grounds.107 The court should state clearly that implied indemnity is abolished in favor of contribution.

THE MERGER OF INDEMNITY INTO CONTRIBUTION

Traditional fact situations giving rise to a claim for indemnity fall into two categories: 1) cases in which one tortfeasor is con-
sidered vicariously or technically liable, while the other is con-
considered the author of the wrong and 2) cases in which both par-
ties are considered to have participated in the wrong. Although the latter situation clearly calls for contribution, the vitality of indemnity in the first category remains in controversy.

A classic fact situation involving vicarious liability is when an employer is held liable for the tort of his employee under the doc-
trine of respondeat superior. Courts have traditionally allowed the employer who has been forced to pay the entire judgment to recover indemnity from the employee. The rationale has been that the employee who caused the injury is guilty of active negli-
gence, while the employer, held liable by operation of law, is only passively negligent.

The determination of whether to apply indemnity or contribu-
tion in this situation should be guided by consideration of which remedy would best serve tort policy. The doctrine of respon-


109. Included in this category are: Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973) (driver v. treating physician); Harris Trust & Sav. Bank v. Ali, 100 Ill. App. 3d 1, 425 N.E.2d 1359 (1st Dist. 1981) (treating physician and hospital v. another treating phy-


112. See Dumas v. Lloyd, 61 Ill. App. 3d 1026, 286 N.E.2d 566 (1st Dist. 1972); Schwartz v. Gilmore, 45 Ill. 455, 92 Am. Dec. 227 (1867). See also I.L.P. Agency § 181 at 786-87 (1953) (negligence of agent imputed to principal so that latter is liable to third persons suffering injury as a result of negligence of agent committed in course of employment).

113. See supra note 112.

deat superior is based on a policy determination that, because the employer has some control over his employee and expects to derive advantage from her acts, the employer should answer for any injury that a third person may suffer from the employee's conduct. This policy is best served by a method of loss allocation which ensures that the employer will bear that portion of the damages which can be attributed not only to his own affirmative conduct, but also to the benefit he enjoys from the acts of his employee. The employer should not be able to recover 100% of the damages from the employee in an indemnity suit because, except for the employer's direction, the employee presumably would not have been involved in the injury-causing situation. The employer, rather, should pay whatever portion of the total damages the jury decides is attributable to either his conduct or the benefit he received from his employee's conduct, or both.

Courts have already recognized that an employer bears responsibility for the conduct of his employee notwithstanding the apparently passive nature of his involvement in the wrong. Courts utilizing the active-passive doctrine have held that an employer who controls or instructs his employee is actively negligent and the employee passively negligent, even though the act of the latter proximately caused the injury. In all cases involving vicarious or "technical" liability, the technically liable defendant is liable because the legislature or the courts have determined that a finding of liability best serves public policy. To

728, 728 (1968).


116. Lundy v. Whiting Corp., 93 Ill. App. 3d 244, 258, 417 N.E.2d 154, 165-66 (1st Dist. 1981) (if jury found that plaintiff's employer controlled or directed contractor who installed the machine which injured plaintiff, then employer would be liable for indemnity to contractor); Richard v. Illinois Bell Tel. Co., 66 Ill. App. 3d 825, 840, 383 N.E.2d 1242, 1255-56 (1st Dist. 1978) (if jury found that contractor controlled employee of subcontractor, then subcontractor could claim indemnity from contractor for damages attributable to employee's negligence).


118. Skinner, 70 Ill. 2d at 14-15, 374 N.E.2d at 443 (public policy consideration which motivated adoption of strict liability was that economic loss suffered by user should be borne by one who created risk and reaped profit). *See supra* note 115.
allow the vicariously liable defendant to win indemnity, and thus escape liability entirely, undermines this policy.

Active-passive indemnity arose out of dissatisfaction with the no-contribution rule.\textsuperscript{119} Despite its equitable purpose, indemnity actually obscures the equities of a case because it focuses on fictional active-passive standards. Indemnity simultaneously conflicts with, and is rendered purposeless by, contribution, because contribution allows the court to perform equity directly, without the pretense of applying vague and fictional terms.

Since \textit{Skinner}, courts have tended to curtail various privileges and immunities in order to allow contribution.\textsuperscript{120} They recognize that allowing a loophole in contribution defeats the Illinois Supreme Court's and legislature's equitable purpose of avoiding unjust enrichment.\textsuperscript{121} Similarly, to allow a defendant liable for a portion of damages to win indemnity where she would otherwise be liable for contribution creates a loophole in contribution which defeats its equitable purpose.

Moreover, a double standard of loss allocation compounds the complexity and confusion of third-party practice. Courts will be faced with the impossible task of determining whether to allow contribution or indemnity. The amount a defendant will ultimately pay will be based not on his fair share of the damages but on whether the other defendant can prove a pre-tort relationship and qualitative distinction in the parties' conduct.

\textsuperscript{119} \textit{Skinner}, 70 Ill. 2d at 6-7, 374 N.E.2d at 439, 442 (no-contribution rule resulted in creative expansion of implied indemnity; active-passive doctrine designed to mitigate harsh effects of no-contribution rule (citing 1976 Illinois Judicial Conference, Study Committee on Indemnity, Third Party Actions and Equitable Contributions)).


\textsuperscript{121} \textit{Wirth v. City of Highland Park}, 102 Ill. App. 3d at 1081, 430 N.E.2d at 242.

The recent trend in Illinois has been to curtail common law tort doctrines to allow contribution . . . . For us to allow a loophole in contribution would mar our promising new contribution and comparative negligence schemes as well as to detract from an equitable development of these doctrines. . . . 'It is the further intent of the committee that the right of contribution thus created be recognized as founded upon the doctrine of unjust enrichment.'

The availability of indemnity will also discourage settlement. A party who remains liable for indemnity after settlement has no reason to settle. She cannot escape further liability except in the unlikely event that the plaintiff agrees to indemnify her from a future indemnity action by the non-settling defendant. This prospect completely undermines the carefully crafted settlement provisions of the Contribution Act.122

The following two hypotheticals illustrate the practical significance of maintaining both indemnity and contribution. The first involves vicarious liability. Plaintiff is hit by a truck driven by Employee and owned by Employer. Plaintiff settles with Employee, then sues Employer, alleging vicarious liability. Employer argues that the settlement rule operating under the Contribution Act123 reduces his liability by the amount of the negligent Employee’s share.124

If the court rejects this argument and holds that Employer’s claim for indemnity survives contribution, Employee’s prejudgment settlement with Plaintiff will not reduce the vicarious liability of Employer. Additionally, if Plaintiff succeeds against Employer, Employer can compel Employee to indemnify him so that Employee will pay not only his own share, but Employer’s as well.125

If indemnity is merged into contribution, then Employee’s prejudgment settlement with Plaintiff will reduce Employer’s share of liability — perhaps substantially.126 If Plaintiff succeeds against Employer, Employer will pay only his own share. Employee, not liable for indemnity to Employer, will pay only the settlement amount.

case under advisement, No. 57540 (Ill. Sup. Ct. May Term 1983).
122. See supra note 78.
123. ILL. REV. STAT. ch. 70, ¶ 302(d) (1981). See supra note 75 for text.
125. Id. This was the result in Riviello.
The second hypothetical also involves vicarious liability. Plaintiff patient sues both Hospital and Physician in a malpractice action. Physician settles with Plaintiff prior to judgment, and then seeks to be released from future liability and involvement in Plaintiff’s suit against Hospital.\(^{127}\)

If indemnity were to survive contribution, any further demand on Physician would depend on whether the court found him to be an employee of Hospital or an independent contractor.\(^{128}\) If an employee, Physician might be required to indemnify Hospital and pay more than his share. On the other hand, if an independent contractor, he might be released from further involvement in the suit because Hospital has no right of indemnity from him.\(^{129}\)

If indemnity were merged into contribution, Physician and Hospital would pay amounts dependent solely upon the jury’s assessment of their relative culpability. If Physician had settled in good faith and such were the perception of the jury, his liability would likely be limited to the settlement amount, and he would not be assessed Hospital’s share as well. Because the determination of the parties’ relative culpability invokes the jurors’ inherent sense of fairness and justice, any technical legal maneuvering would probably not succeed in clouding the jurors’ judgment. Hence, the merging of indemnity into contribution in all likelihood accomplishes a more equitable allocation of loss.

**CONCLUSION**

A single, equitable standard of loss allocation is the fairest and simplest approach to multiple defendant cases and is arguably mandated by the Illinois Supreme Court’s *Skinner* decision and the legislature’s enactment of the Contribution

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128. In hospital law, in particular, the line between employee and independent contractor is not always clear. In Darling v. Charleston Community Memorial Hosp., 50 Ill. App. 2d 253, 200 N.E.2d 149 (4th Dist. 1964), a hospital was held liable for injuries suffered by a patient even though the treating physician was an independent contractor and not an employee. Ordinarily, a master or principal is not liable for the acts of an independent contractor. See Gomein v. Wear-Ever Aluminum, Inc., 50 Ill. 2d 19, 21, 276 N.E.2d 336, 338 (1971).

129. ILL. REV. STAT., ch. 70, ¶ 302(d) (1981). See supra note 75 for text.
Act.130 *Skinner* adopted contribution after thorough consideration of the history of indemnity and contribution in Illinois. The court concluded that implied indemnity had developed in response to the rule against contribution, but that the active-passive doctrine also had harsh effects and lacked uniformity of result. The preservation of indemnity based on the pre-tort relationship/qualitative distinction test flies in the face of *Skinner* by maintaining the very situation which the court sought to eliminate. It also thwarts the court's and legislature's intent to promote settlement.

Placing indemnity on the contribution continuum would simplify third-party proceedings and enable defendants to know on what basis liability would be apportioned. It would encourage settlements because settling defendants would not remain liable for indemnity. Most important, a single standard of loss apportionment based on relative culpability would be the natural and logical fulfillment of the equitable promise that lay beneath the original expansion of indemnity through the active-passive doctrine.

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