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Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation

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INTRODUCTION

Courts of review within the common law tradition historically have performed two clearly distinct functions. The first, corrective in nature, serves to identify and remedy errors allegedly committed in earlier phases of the litigation. The second, or institutional function, serves to modify the law under which the litigation was conducted in the lower courts. In the exercise of the latter power, the reviewing court serves as an alternative to the legislature, responding to perceived needs resulting from changes in society or inequities in the application of existing precedents. While both the legislature and the courts have power to make changes in the law, the unique characteristics of each forum may make one mode of law-making preferable to the other in a given circumstance. Because courts must rule on facts presented to them in the context of an actual controversy when they undertake to modify a pre-existing rule of law, judicial decisions are more practically oriented than are the generalizations produced in the legislative process. This usually makes the judiciary ideally suited for legal changes of an interstitial nature. This same characteristic, however, frequently makes broad changes of a judicial nature undesirable, because the limitation of the judicial process to the resolution of the controversy before the court often precludes the adoption of a comprehensive code of rules to govern the foreseeable difficulties which may arise in the implementation of the new law. Nevertheless, courts are often required to undertake judicial law-making in an area where legislative action would have been preferable when legislative inaction has convinced a court that it must act if needed reforms are to be attained.

The recent decision of the Illinois Supreme Court in Skinner v. Reed-Prentice Division Package Machinery Co., which permitted

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4. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), modified, 70 Ill. 2d 16 (1978).
contribution among tortfeasors jointly and severally liable for the plaintiff’s injury, is a clear illustration of these concepts. Legislative inactivity was followed by judicial intervention to create needed reform in an area of law where legislative reform would have been preferable. As a result, the bench and bar of Illinois know that the principle of contribution among tortfeasors has been adopted in the state but are unsure of the precise circumstances in which it will be applicable. Furthermore, there is uncertainty regarding the procedural rules by which contribution will be implemented. One of the purposes of this article is to identify these areas of uncertainty, and to discuss possible solutions. The overriding purpose, however, is to urge prompt legislative action to implement the necessary reforms initiated by the judiciary.

RIGHTS OF JOINT TORTFEASORS IN ILLINOIS PRIOR TO SKINNER V. REED-PRENTICE DIVISION PACKAGE MACHINERY CO.: AN INTRODUCTION

A brief statement of the status of the law prior to Skinner governing the rights of joint tortfeasors among themselves is sufficient to establish that the case constitutes a judicial reaction to a perceived inequity of Illinois law. Traditionally, joint tortfeasors5 have been held jointly and severally liable to the plaintiff, who may proceed to full satisfaction of his judgment against one or more of them, as he deems appropriate.6 Contribution and indemnity are both doctrines which are applicable only after judgment for the plaintiff has been given or after his claim has been otherwise satisfied through an appropriate settlement. Neither doctrine has any effect on the rights of the plaintiff. Indemnity, as defined under the common law, is an “all or nothing” theory of recovery by which the party held judicially liable is able to recoup from another the entire amount he was obliged to pay.7 Contribution, however, is a concept which,

5. The term joint tortfeasor, although never used in the decision, is used in this article in its historical sense: those tortfeasors who together have contributed to a single indivisible injury of the plaintiff.

While once limited to intentional tortfeasors who acted in concert the term has come to include negligent tortfeasors whose independent, albeit concurrent, acts have resulted in a single indivisible injury. See W. Prosser, Law of Torts § 50 at 306 (4th ed. 1971) [hereinafter cited as Prosser]. See Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 196, 229 N.E.2d 769, 774 (1967).

6. Prosser, supra note 5, at 291.

7. The most commonly given example is the doctrine of respondeat superior. The employer, vicariously liable for the torts of his employee committed during the scope of his employment, may seek indemnification from the employee once the injured plaintiff has been paid. Other instances of common law indemnity are cited by the Illinois Appellate Court in Gulf, Mobile and Ohio R.R. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N.E.2d 783 (1951).

There are many exceptions to the general principle of noncontribution between tortfeasors recognized by the courts of this and other states and by the federal courts.
while also affecting only the rights of the defendants _inter-se_, apportioned liability for the injuries to the plaintiff in some equitable manner.\(^8\) Contribution among joint tortfeasors was not permitted under the common law.\(^9\) Thus, while the plaintiff was permitted to collect his entire judgment from any one of several joint tortfeasors, the defendant or defendants chosen, in the absence of a right of indemnification, were required to bear the entire financial burden for an injury to which several had contributed.

The traditional rationale for the retention of the rule denying contribution among joint tortfeasors has been both historical and practical. In the latter part of the eighteenth century when the rule evolved, tortfeasors were considered legally akin to criminals. Hence, courts were unwilling to grant them any relief for the consequences of their wrongful acts. Furthermore, courts have been unwilling to expend time and judicial resources in the determination of relative culpability among civil wrongdoers. The historical basis was not adequate to support the result in situations where the tortfeasors were guilty of negligence rather than intentional wrongs and it clearly led to inequitable results when modern concepts of risk sharing competed with fault as an underlying basis of tort liability.\(^{10}\) The practical objective of conserving judicial effort proved elusive and ultimately unsuccessful as the courts labored to avoid the inequities inherent in the rule under modern conditions. These considerations led sister jurisdictions to abandon the rule, and by 1976, Illinois was one of only twelve states which continued to adhere to the common law prohibition against contribution among joint tortfeasors.\(^{11}\)

The exceptions to the rule are embraced in four or five general groups. One is that a city has a right of action against contractors or abutting owners for a liability which the city may have incurred to third persons for breach of its duty with respect to public ways . . . . The rule has been applied in non-municipal cases where the negligence of an outsider was the active cause of an injury and created the liability . . . . Cases where a stranger is hurt by a subcontractor or subtenant and the contractor or owner is given a right of action against the subcontractor . . . . Cases where one, supplying goods or services, by his active negligence caused the liability . . . . Cases where the negligence of a third party caused a liability under the Federal Employer’s Liability Act . . . .

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\(^{8}\) Id. at 152-54, 98 N.E.2d at 785-86 [citations omitted].

\(^{9}\) While indemnification can be viewed as a total contribution, its historical origin is different, having first been recognized in cases where a promise to indemnify could be implied from the relationship among the parties. See Ferrini, _The Evolution from Indemnity to Contribution—A Question of the Future, If Any, of Indemnity_, 59 CHI. B. Rec. 254 (1978).

\(^{10}\) The doctrine was apparently first enunciated in Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), wherein two tortfeasors, in concert, converted plaintiff’s property.

\(^{11}\) _Michael and Appel, Contribution and Indemnity Among Joint Tortfeasors in Illinois: A Need For Reform_, 7 Loy. CTI. L.J. 591, 618 n.116 and 619 n.122 (1976), listing Alabama,
The theoretical and practical difficulties which were the concomitant of the retention of the "no contribution" rule were apparent to the Illinois bench and bar. In 1964 the Illinois Judicial Conference advocated the adoption of contribution among tortfeasors in Illinois. In 1970, a law review article proclaimed that "The Squeamish Damsel" of contribution among negligent joint tortfeasors in Illinois "Comes of Age." There was, however, no response from the Illinois General Assembly.

An earlier study by the authors of this article analyzed in detail the continuing burden placed on the Illinois judiciary to alleviate the hardships caused by the absence of a right of contribution among joint tortfeasors. The Illinois courts gradually and painfully expanded indemnity beyond its common law usages and searched for "a qualitative distinction" between the negligence of the two tortfeasors which would permit a grant of indemnity to the "passively" negligent party. Nevertheless, as the Illinois Supreme Court recognized, no precise formulation of terms was ever achieved.

The difficulty and uncertainty involved in the creative expansion of indemnity, together with the inherent inequity of a remedy which permitted only a total shifting of responsibility between the two responsible parties was underscored by the overwhelming vote of the 1976 Illinois Judicial Conference for the adoption of contribution among joint tortfeasors in Illinois. In his annual report to the President of the State Senate and to the Speaker of the Illinois House of Representatives, Chief Justice Ward of the Illinois Supreme Court urged the General Assembly to alleviate the inequities of a rule which "permits any one joint tortfeasor to be liable for the entire injury without evaluation of his or her relative fault and without recourse against the other joint tortfeasors." Nevertheless, the legislature failed to act on this recommendation. It is against this background that Skinner v. Reed-Prentice Division Package Machinery Co. and its companion cases Stevens v. Silver Manufacturing Co.

Arizona, Colorado, Connecticut, Florida, Indiana, Nebraska, Oklahoma, Ohio, South Carolina and Washington as states adhering to the common law prohibition at that time. See Note, Skinner v. Reed-Prentice Division Package Machinery Co.: Adoption of Contribution in Illinois, 9 Loy. Chi. L.J. 1015, 1016 (1978), which lists forty American jurisdictions that have abandoned the common law rule against contribution [hereinafter cited as Note, Contribution in Illinois].

17. 70 Ill. 2d 41, 374 N.E.2d 455 (1977), modified, 70 Ill. 2d 41 (1978).
and Robinson v. International Harvester Co. must be analyzed.

THE DECISIONS OF THE ILLINOIS SUPREME COURT ADOPTING A RULE OF CONTRIBUTION AMONG JOINT TORTFEASORS

Skinner, Stevens, and Robinson were decided by the Illinois Supreme Court on the same day. While they clearly abandon the common law prohibition against contribution among joint tortfeasors there is uncertainty regarding future situations to which the new rule will be applicable and the manner in which it will be implemented. A full discussion of these facts and their holdings is therefore essential as a predicate for the later analysis of these problems.

The Cases in the Lower Courts

In Skinner, the plaintiff-employee was injured while working on an injection molding machine manufactured by defendant Reed-Prentice. In a complaint based on strict liability she alleged malfunction of the machine. The manufacturer filed a third party complaint alleging negligence on the part of the employer Hinckley Plastics and seeking “by way of contribution, such amount as would be commensurate with the degree of misconduct attributable to the [Employer].” The circuit court dismissed the third party complaint, although the judge filed an opinion expressing sympathy for the position of the manufacturer as third party plaintiff, and stating the court would permit relief if it had the power to do so. The appellate court affirmed the dismissal stating: “a decision to apply theories of contribution in the instant case would require substantive and procedural formulations beyond the authority of this court.”

In Stevens, the plaintiff, a mentally retarded and physically handicapped employee of the General Box Company, was severely injured while operating a shredding machine manufactured by Silver Manufacturing. He sued Silver and the Steelcraft Corporation, the assembler of the machine, alleging the product was unreasonably dangerous. The defendants settled the plaintiff’s claim, and in amended third party complaints sought indemnity for “all or a part of the sum they had been obliged to pay” on the ground that their liability, if any, was based on passive conduct and that the em-
ployer's negligence or reckless conduct was the primary and active cause of the plaintiff's injuries. The trial court denied the employer's motion to strike, but certified several questions to the appellate court. The appellate court dismissed the third party complaint stating that indemnity was not obtainable by the manufacturer or seller of a defective product against a subsequent user. The court added that in any event, strict liability had been recognized as a more serious tort than ordinary negligence. There was no pre-tort relationship between the parties, and the employer breached no duty owed to the third party plaintiff. As to the allegation that the negligence of the employer was the sole proximate cause of the accident the court observed "[p]roof of the same however would have been a complete defense to the action brought by the employee" and thus could not serve as the basis of indemnity.

In Robinson the plaintiff, an employee of United States Steel, was injured while operating a truck manufactured by International Harvester. He sued the manufacturer in negligence and in strict liability alleging the truck was dangerous in that it had no protective canopy, was unstable and had no warning signs. Again the manufacturer filed a third party complaint against the employer seeking indemnification "for any sum that may be adjudged against it as a result of plaintiff's action." The employer's acts and omissions were alleged to have been active or willful and wanton. Therefore, it was contended, the necessary qualitative difference in conduct to permit the requested remedy existed. Both the circuit court and appellate court dismissed the complaint. There is a non-delegable duty to produce a reasonably safe product, the court stated, and "[i]f established, the manufacturer's claim that the employer misused the machine or allowed various dangerous practices, would be a complete defense to the action brought by the employee. As such, the manufacturer's claim cannot serve as the basis for an indemnity action against the employer-user." While denying the claim in the instant case, the court added "[t]he manufacturer's argument is not without appeal" but "[s]uch changes . . . should be decided

29. Id.
by the highest court in this State or the legislature. . . .”\(^{30}\)

Thus all three cases presented similar factual settings, although the relief sought in each third party complaint was couched in different language. Furthermore, the relief sought was denied in each case, consistent with then existing Illinois law.

**The Cases in the Supreme Court**

In three opinions filed December 12, 1977, the Illinois Supreme Court reversed the lower courts' decisions and held that the three third party complaints each stated a cause of action for contribution. After identifying the theme of the decisions, “[W]e are of the opinion that there is no valid reason for the continued existence of the no-contribution rule and many compelling arguments against it,”\(^{31}\) the court in language which was modified in the final version of the opinion stated the holding of the *Skinner* case in these words: “We hold that the third-party complaint, although charging negligence alleges misuse of the product and assumption of risk and states a cause of action based on the employer's relative degree of fault which contributed to cause plaintiff's injuries.”\(^{32}\) *Skinner* was cited as the primary authority for the reversal in *Stevens*\(^{33}\) and *Robinson*.\(^{34}\)

The late Justice Dooley filed an extensive dissent.\(^{35}\) He questioned “[h]ow can there be a comparison between the manufacturer's fault and the employer's fault, when fault is not the question?”\(^{36}\) He also asked, since “[i]t is indispensable in the law of contribution that there be a right of action in tort against both parties,” how contribution could be sought from an employer who was shielded from liability to the plaintiff by virtue of the Illinois Workmen's Compensation Statute.\(^{37}\) Finally, he itemized many of the implementation problems left unanswered in the majority decision.\(^{38}\)

A petition for rehearing was denied on January 26, 1978. However, in a Supplemental Opinion filed on that date the court ruled the decisions would apply only “prospectively to causes of action arising out of occurrences on and after March 1, 1978.”\(^{39}\)

\(^{30}\) Id. at 447, 358 N.E.2d at 323.

\(^{31}\) 70 Ill. 2d 1, 13, 374 N.E.2d 437, 442 (1977).


\(^{33}\) 70 Ill. 2d 41, 44, 374 N.E.2d 455, 457 (1977).

\(^{34}\) 70 Ill. 2d 47, 49-50, 374 N.E.2d 458, 459 (1977).

\(^{35}\) 70 Ill. 2d 1, 22, 374 N.E.2d 437, 446 (1977).

\(^{36}\) Id. at 24, 374 N.E.2d at 447 (Dooley, J., dissenting). (The paragraph incorporating this citation was inadvertently omitted from the Northeastern Reporter).

\(^{37}\) Id. at 29-30, 374 N.E.2d at 450.

\(^{38}\) Id. at 38-39, 374 N.E.2d at 454.

\(^{39}\) 70 Ill. 2d 1, 17, 374 N.E.2d 437, 444 (1977).
The majority opinion was modified on March 1, 1978. In the modified opinion the holding was restated to read:

We hold that the third-party complaint, although pleaded in terms of negligence, alleges misuse of the product and assumption of risk on the part of the employer and states a cause of action for contribution based on the relative degree to which the defective product and the employer's misuse of the product or its assumption of the risk contributed to cause plaintiff's injuries.40

In an unmodified portion of the original opinion Justice Dooley's concerns regarding the impact of the Workmen's Compensation Act were countered by citing Miller v. DeWitt.41 In that case the court had decided that although an employer could not be directly sued by an injured employee, indemnity actions against the employer by third parties were not precluded. Similarly, here, the employer's immunity from suit by the employee "should not serve to bar"42 an action for contribution.

Both Chief Justice Ward43 and Justice Underwood44 filed individual dissents on March first. Thus, the reversal was supported by a bare four to three majority of the court.

THE FUTURE IMPACT OF SKINNER: SUBSTANTIVE ISSUES

The uncertainty surrounding the future applicability of the Skinner rule is in part a normal concomitant of judicial, as distinguished from legislative, legal changes of more than interstitial nature. This natural uncertainty, however, has been compounded by the fact that the result in Skinner was approved by a bare majority, accompanied with vigorous dissents, and re-worded in a modified opinion. Moreover, some have found the decision in Buehler v. Whalen,45 also decided December 12, 1977, an additional source of confusion.

Certainly the Skinner decision raises many issues. Substantively, what effect if any does the result in Skinner have upon the rights of future plaintiffs? To which torts will the Skinner rule be applied? If the third party defendant is not directly liable to the plaintiff in the original action, to what extent will this immunity protect him from an obligation to contribute? In what manner will the plaintiff's damages be allocated among the defendants? And finally, what is

40. Id. at 16, 374 N.E.2d at 443.
41. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
42. 70 Ill. 2d 1, 15-16, 374 N.E.2d 437, 443 (1977).
43. Id. at 17, 374 N.E.2d at 444.
44. Id. at 20, 374 N.E.2d at 445.
45. 70 Ill. 2d 51, 374 N.E.2d 460 (1977), modified, (1978). This confusion is unnecessary. See discussion accompanying notes 48-51 infra.
the remaining vitality of prior precedents regarding active-passive negligence and the right to indemnity? These issues will be explored in order to provide some guidance in understanding this new development in Illinois law. It will also be demonstrated that while the areas of substantive uncertainty are not as great as some critics of these decisions have asserted, legislative clarification of these problems would be extremely helpful to those in Illinois who will be faced by them in the future.

The Prospective Application of Skinner

The supplemental opinion, filed on denial of rehearing January 26, 1978, provides that the decisions apply only "to causes of action arising out of occurrences on and after March 1, 1978." While it could be argued that the satisfaction of the plaintiff's claim is the occurrence giving rise to the right of contribution, and that therefore the date of that satisfaction is the controlling one, such an interpretation is highly unlikely. The apparent purpose of the court's action is to establish a precise test for those cases to which Skinner will apply. This purpose clearly would be frustrated if the parties themselves, by determining the date of the satisfaction of the plaintiff's claim, could determine the applicability or non-applicability of Skinner. Moreover, from a linguistic approach, the claim for contribution ultimately "arises out of" the occurrence in which the plaintiff was injured. The emphasis in language is not on the date of the occurrence when the cause of action for contribution arises, but rather on the date of the occurrence "out of" which the claim for it arises.

This construction, although clearly proper on the facts of Skinner and its companion cases, may cause difficulty in that relatively narrow class of cases where, for purposes of the statute of limitations, the cause of action is deemed to arise when the wrongful act is discovered, rather than when it occurred. In these cases, the statute of limitations' date should govern the applicability of contribution. The occurrence out of which the claim arises should be deemed to have taken place on the date the statute of limitations on the plaintiff's original claim begins to run. It appears inequitable

\[46\] 70 Ill. 2d 1, 16, 374 N.E.2d 437, 444 (1977), modified, 70 Ill. 2d 16 (1978).

to extend the period of a defendant's potential liability without
according him the benefit of contribution.

The Effect of Skinner on the Rights of the Plaintiff

Legally, the recognition of a right of contribution among joint
tortfeasors has no effect on the plaintiff. Thus, contribution is to be
carefully distinguished from the concept of comparative negligence.
For purposes of contribution it is the tortious acts of the defendants
which will be compared in order to allocate their financial responsi-
bility for the plaintiff's injury. When the liability of the defendants
is predicated on negligence, any negligence of the plaintiff which
proximately contributed to his injuries will continue to bar totally
his recovery. Similarly, in products liability cases, the plaintiff's
misuse of the product or the assumption of its risk will continue to
prevent his recovery.

While recognition of contribution among tortfeasors will not ex-
and the plaintiff's rights, it equally will not contract them. A
plaintiff will continue to possess the right to sue any or all of the
joint and several tortfeasors and to collect in full from any one of
them against whom a judgment is obtained. This fact provides the
key to a proper understanding of the decision in Buehler v.
Whalen.48

In the Buehler case, the plaintiff's vehicle was stopped on a two-
way highway waiting for an opportunity to make a left-hand turn.
As the car driven by the individual defendant attempted to pass,
the plaintiff executed the turn and was struck in the rear by the
defendant's car. The plaintiff's vehicle burst into flame upon im-
pact, allegedly because of a defectively designed gas tank. The
plaintiffs sued the individual defendant for negligence and the cor-
porate defendant on a product liability basis. No cross action or
third party action between the defendants was filed. At trial it
appeared that all the plaintiff's injuries were due solely to burns
caused by the fire. On this basis, the individual defendant objected
to the refusal of the trial court to instruct the jury to "'apportion'
damages by assessing all of them against Ford and none against
her."49 On appeal this refusal was held to be proper. The Illinois
Supreme Court said:

We have here a classic case of concurrent tortfeasors whose sepa-
rate acts combine to produce a single individual injury. Under
these circumstances there is no apportionment.

* * *

49. Id. at 63, 374 N.E.2d at 465.
Here, however, Whalen filed no third-party action. Had she done so, her own active negligence would have prohibited any claim of indemnity from Ford.\(^{50}\)

After the release of the original decisions there were those who contended that \textit{Skinner} and \textit{Buehler} were inconsistent. In apparent response to this criticism, the final version of \textit{Buehler} was modified by the insertion of the following paragraph: “We are aware of \textit{Skinner v. Reed-Prentice Division Package Machinery Co.} . . . filed this day. However, \textit{Skinner}’s applicability is prospective only, covering occurrences arising on and after March 1, 1978. Accordingly, this litigation remains unaffected.”\(^{51}\)

This explanation is unsatisfactory. If the doctrine of \textit{Skinner} had required a different result in \textit{Buehler}, the court should have reversed it as they did \textit{Stevens} and \textit{Robinson}, the other decisions rendered the same day as \textit{Skinner} where the rule of \textit{Skinner} was held to be applicable. However, if the rule of \textit{Skinner} were applied to \textit{Buehler} the result would remain unchanged for two reasons.

The first of these reasons is based on the state of the pleadings in \textit{Buehler}. Neither of the defendants had filed a cross action or third party action seeking indemnity or contribution from the other. The issue was simply not raised by the pleadings. An instruction seeking recovery on an unpleaded cause of action was clearly improper, and no cause of action at all was pleaded between the defendants.\(^{52}\)

Secondly, the requested instruction did not seek contribution or indemnity. It sought to have the jury award the plaintiff full recovery against Ford and no recovery against the individual defendant. This was not a request for contribution or indemnification among the defendants but a request that the plaintiff’s right to recover in full against either of two joint and severally liable tortfeasors be modified. Contribution and its recognition in \textit{Skinner} does not affect the basic rule of joint and several liability.

While this analysis indicates that the failure of the Illinois Supreme Court to apply the \textit{Skinner} rule in \textit{Buehler} does not establish that the rule would be inapplicable to the facts of the \textit{Buehler} case, neither does it establish that it would be applicable. The issue was simply not decided. Whether in the absence of a Workmen’s Compensation situation the right of contribution exists between the

\(^{50}\) Id. at 63-64, 374 N.E.2d at 465-66.

\(^{51}\) Id. at 51, 64, 374 N.E.2d 460, 466 (1977).

\(^{52}\) While it might be questioned why in light of the liberal construction given the pleadings in \textit{Robinson} and \textit{Stevens}, the court did not excuse the pleading requirement, it is submitted that any such action would have been improper. While the facts in a pleading may constitute a different cause of action than that intended \textit{(see notes 146-48 infra)} a claim should not be created by a court when none was asserted by the parties.
manufacturer of a defective product and a third party whose negligence (but not product misuse or assumption of risk) proximately contributed to plaintiff's injury is not yet definitively resolved.\textsuperscript{53}

While from a purely legal standpoint the right of the plaintiff remains unaffected by the recognition of contribution among tortfeasors, it is apparent that the change in Illinois law may well have a pragmatic impact on the plaintiff. In the absence of contribution, the plaintiff could sue any joint tortfeasor and proceed to satisfaction in full from the chosen defendant, who alone would have to bear the financial burden of the judgment. This fact provided the plaintiff with a powerful bargaining advantage. In an attempt to induce the plaintiff to seek satisfaction from another, a potential defendant would often offer the plaintiff a large sum of money. This could be given in exchange for a covenant not to sue, or more profitably from the negotiating defendant's viewpoint, a loan agreement, the proceeds to be repaid when and only if recovery was obtained by the plaintiff in the suit against the other tortfeasor.\textsuperscript{54} After \textit{Skinner}, the right of the defendant sued to be reimbursed on an equitable basis substantially ameliorates this potentially coercive situation. This practical result of \textit{Skinner} is desirable. While the plaintiff is entitled to full compensation for his injuries, no reason is apparent why one defendant should stand in jeopardy for more than his equitable share of the damages.

\textbf{The Scope of the Skinner Decision}

Most narrowly construed, the \textit{Skinner} decision holds that when an employee allegedly injured by a defective product sues the manufacturer, the manufacturer may seek contribution from the plaintiff's employer when the employer's misuse of the product or the assumption of its risk proximately contributed to the plaintiff's injuries.\textsuperscript{55} This is allowed even though the Workmen's Compensation statute bars a direct action by the employee against his employer.\textsuperscript{56}

While indemnification in products liability cases had been denied against one whose handling of the defective product was "downstream" or subsequent to that of the third party plaintiff,\textsuperscript{57}
the Stevens court rejected the employer's claim that contribution be similarly limited. The court stated:

We do not agree. As we said in Skinner: Misuse of the product or assumption of the risk by a user will serve to bar his recovery . . . and indemnity is not available to one who misuses the product or assumes the risk of its use . . . . We are of the opinion that if the manufacturer's third-party complaint alleges that the employer's misuse of the product or assumption of the risk of its use contributed to cause plaintiff's injuries, the manufacturer has stated a cause of action for contribution.58 [Citations omitted]

Any attempt to expand the holding beyond this narrow but precise formulation can be expected to encounter disagreement. Those advocating a narrow construction of Skinner have argued that the fact that contribution was not applied in Buehler indicates that Skinner is not to be extended beyond its immediate facts. While the failure of the Buehler court to apply the principles of contribution can be explained on other grounds,59 the narrow constructionists received some support for their position in the March first modifications of the opinions. The original Skinner opinion included the following statements, deleted from the final version: "In our system of liability based on fault there is obvious sense and justice in a rule that the extent of fault should govern the extent of liability among tortfeasors."60 "The obligation to contribute should extend to all tortfeasors responsible for the injury."61

While the deletion of these statements appears to narrow the impact of the cases, a closer reading of the opinions presents strong evidence that a broad result was intended. Significantly, the court devotes approximately eight pages of the official report to a detailed discussion of the history of the "no contribution" rule in Illinois,62 notes the many studies recommending change,63 emphasizes the "unjust results" of the rules,64 and stresses both the needless expenditure of judicial time and energy and the "opportunity for fraud and collusion among the parties, necessitating further judicial efforts in monitoring their out-of-court behavior."65 Noting that "[o]ther objections to contribution have been rejected by almost

58. 70 Ill. 2d 41, 45, 374 N.E.2d 455, 457 (1977).
59. See notes 48-53 supra and accompanying text.
61. Id. at 9, 70 Ill. 2d at 15, 374 N.E.2d at 443.
62. 70 Ill. 2d 1, 6-13, 374 N.E.2d 437, 439-42 (1977).
63. Id. at 6, 374 N.E.2d at 439.
64. Id. at 12, 374 N.E.2d at 442.
65. Id. at 13, 374 N.E.2d at 442.
every writer on the subject," the court states unequivocally: "We are of the opinion that there is no valid reason for the continued existence of the no-contribution rule and many compelling arguments against it." Furthermore, in discussing the application of contribution within a products liability framework the court states, "on these facts the governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them." This suggests that the majority believed it was applying a "governing equitable principle," i.e., contribution, to one specific factual context.

The changes made in the final version of the opinion can be seen as a response to the concerns raised by the dissenters. The principle objections, that contribution could not be predicated on comparative fault when "fault is not the question" in strict products liability, and that the allowance of contribution against an employer totally undercut the protection granted the employer under the Workmens' Compensation Statute were dealt with in the final version of the opinion. The first objection was answered by changing the basis for apportionment of the plaintiff's damages. Originally these were to be apportioned "on the basis of the relative degree of culpability of those whose conduct proximately caused them." In the modified and final version, contribution is based on the "relative degree to which the defective product and the employer's misuse of the product or its assumption of the risk contributed to cause plaintiff's injuries." No comparison of "fault" is thus required in the modified opinion.

Both Justice Underwood and Justice Dooley were concerned that the protection given the employer under workmen's compensation had been totally abrogated. Commenting on Miller v. DeWitt, which permitted indemnity against the employer, Justice Underwood remarked, "Because there is in this case no corresponding requirement that the employer's culpability be substantially greater than that of the manufacturer before the employer's limited liability
is again breached, it seems to me that the majority opinion repudiates, in a manner never contemplated by Miller, the very theory upon which the Workmen's Compensation Act became law. 74 Justice Dooley, similarly concerned, wrote "I am realistic enough to know that in every instance where an employee is injured, the manufacturer of a defective injury-causing product, to avoid liability or spread the risk, will charge the employer with multiple aspects of negligence". 75 As has been discussed, the modified opinion requires something more than negligence on the employer's part before his protection may be breached. The conduct required before the employer may be sued for contribution, misuse of the product or assumption of its risk, is the same conduct which would bar a plaintiff-user in his original action based on products liability against the manufacturer. 76

If Skinner extends beyond its immediate facts, and adopts contribution among joint tortfeasors as a general equitable principle for future application, it does not follow that it is to be universally applied. When one progresses beyond the facts in Skinner, conclusions become less certain, yet areas of prospective applicability and inapplicability may be identified.

If contribution among tortfeasors is the rule, there can be little doubt that it is applicable in the typical case where the alleged tortfeasors are all claimed to be guilty of negligence. It appears from the published comments on Skinner to date that there is general consensus on the applicability of Skinner in such a negligence case. 77 As one such commentator has observed:

[I]t might be argued, as in Mr. Justice Dooley's dissent to the Skinner case, that the nature of strict liability is incompatible with the doctrine of contribution. Such incompatibility creates an impediment to application of the theory of contribution to a case where one of the parties had been held liable under the theory of strict liability in tort. There is no like theoretical impediment to the permitting of contribution between joint tortfeasors. 78

Hence, if the court applied contribution to a case where there were theoretical obstacles, valid or invalid, it seems clear it is applicable to a negligence case where no such obstacles exist.

The extent to which the doctrine of contribution will be applica-

74. 70 Ill. 2d 1, 20-21, 374 N.E.2d 437, 446 (1977).
75. Id. at 33, 374 N.E.2d at 452 (emphasis added).
78. Ferrini, supra note 77, at 266.
ble in products liability cases is less certain. *Skinner* itself establishes the applicability of the doctrine in a products liability case where the manufacturer alleges a downstream party other than the plaintiff misused the product or assumed the risk of its use and contributed to the plaintiff's injuries. If the downstream party were merely negligent, *Skinner* suggests that when an employer is involved, the policy of the Workmen's Compensation Act may preclude an action for contribution against him.\(^79\) In the absence of such a legislative intent to limit the liability of the third party defendant, however, it would seem inequitable to bar contribution when the negligence of one party combines with the defective product of another to cause plaintiff's injuries. Other jurisdictions have surmounted the apparent difficulties of comparing "apples and oranges,"\(^80\) and it has been said that the problem is more semantic than real.\(^81\) Furthermore, if contribution is permitted, it should be permitted on a reciprocal basis regardless of which tortfeasor the plaintiff fortuitously chooses to pursue to judgment and recovery.

The full extension of reciprocity, however, dictates a modification in present Illinois law. If a nonemployee misuses a product or assumes its risk, and in so doing injures himself, he is denied recovery.\(^82\) However, if his misuse of the product or his assumption of its risk combines with a defective product to cause injury to another, and judgment is recovered, reciprocity would require that the manufacturer may also be sued for contribution. Thus, assumption of risk and misuse of product, doctrines which once totally shielded manufacturers from liability,\(^83\) will apparently not prevent liability for contribution. This is similar to a negligence case, where the negligence which renders a defendant liable to the plaintiff does not preclude his right to contribution on the basis of contributory negligence.

The critical issue in regard to the future development of contribution in products liability cases lies in determining why the *Skinner* holding was restricted to situations where the activity of the nonmanufacturer tortfeasor consisted of product misuse or assumption of the risk of its use. The carefully drafted language may be seen as a response to the objection that fault cannot be compared to liability without fault, or alternately, as a response to the fear that the

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79. See discussion accompanying notes 73-77 supra.
80. See notes 117-30 infra and accompanying text.
81. See notes 121-30 infra and accompanying text.
83. *Cf.* Liberty Mut. Ins. v. Williams Mach. & Tool, 62 Ill. 2d 77, 83, 338 N.E.2d 857, 860 (1975) (denying indemnity to one "whose conduct in connection with the product may be said to constitute a misuse of it or an assumption of the risk of its use.")
policy of the Workmen’s Compensation Act is being undercut.

In support of the first view, it has been noted that in products liability litigation the contributory negligence of a plaintiff is not compared with the strict liability of a defendant. Something different is required, assumption of risk or product misuse.\textsuperscript{4} It is only when the plaintiff’s conduct may be so classified that arguably, it is “compared” to that of the defendant, and in fact an “apples and apples” comparison bars his recovery. It could be argued that by permitting contribution under similar circumstances the court was merely consistent in its approach. Nevertheless, as earlier discussed, this would appear to constitute an overreaction to the semantic difficulties presented.\textsuperscript{5}

If, however, the limitation is construed as a response to the objection based on the Workmen’s Compensation Statute, it serves a useful purpose. It has been suggested that:

Subsequent to \textit{Skinner} an employer will be subject to potential liability in all products liability work-related situations. \textit{Skinner} will drastically modify the method of distributing losses in employee injury cases. Whether this modification will undermine the workmen’s compensation laws remains to be determined . . . . It is clear that if an employer’s liability consistently exceeds the rate of liability under workmen’s compensation, the viability of the statutory compensation scheme will be jeopardized. In order to preserve the integrity of the workmen’s compensation scheme, procedural steps may be necessary to insure that an employer’s liability is limited to the statutory rate.\textsuperscript{6}

If the limitation of claims for contribution in product liability cases to situations where the non-manufacturer’s actions constituted product misuse or assumption of its risk is restricted to cases where contribution is sought from an employer it would serve to protect the integrity of the workmen’s compensation system. This would also allow contribution in a situation like that in the \textit{Buehler} case\textsuperscript{7} where a defective product and a third party’s negligence combined to cause the plaintiff’s injury.\textsuperscript{8}

When the basis of liability is founded on statute, rather than common law, the public policy underlying the statute must be considered in determining whether contribution will be applicable. The same strong considerations which led the court to deny indemnity

\textsuperscript{4} See note 76 supra.
\textsuperscript{5} See notes 117-30 infra and accompanying text.
\textsuperscript{6} Note, \textit{Contribution in Illinois}, supra note 11, at 1030.
\textsuperscript{7} See notes 48-52 supra and accompanying text.
under the Dram Shop Act should preclude contribution claims by the parties liable under the Act. On the other hand, under the Structural Work Act, indemnity has been permitted to "the lesser delinquent" party and the extension of contribution would merely permit a more equitable apportionment of damages.

Intentional torts present additional considerations which will likely prevent the applicability of the equitable considerations underlying the concept of contribution. The common law rule against contribution among joint tortfeasors arose in the context of cases involving intentional torts. Dean Prosser's statement that: "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 . . . ." was relied on by the Skinner majority in support of their result. Furthermore, while other states have permitted intentional tortfeasors to recover contribution, the Illinois appellate court has denied intentional wrongdoers indemnity on the ground that "no just reason" appeared to the court to support the relief. Finally, Justice Ward in his dissent in Skinner commented on intentional misconduct and concerted action and asserted that: "Torts of this character do not come within the rationale of the doctrine of contribution and the rule denying contribution in that situation should be preserved.

Thus, while there are some ambiguities, particularly in the product liability area, generally the scope of applicability of the doctrine of contribution appears to be fairly predictable. The confusion which some have expressed is exaggerated.

**The Impact of Immunity from Suit by the Original Plaintiff on the Obligation to Contribution**

In Skinner and its companion cases, the employer was held responsible for contribution to the manufacturer even though by virtue of the Workmen's Compensation Act the employer could not have been sued by the injured employee. Although this aspect of the

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92. 70 Ill. 2d 1, 13, 374 N.E.2d 437, 442 (1977) (emphasis added).
95. 70 Ill. 2d 1, 19, 374 N.E.2d 437, 445 (1977).
case was questioned by the dissents of Justice Underwood and Justice Dooley, the result was sustained on the authority of Miller v. DeWitt which had held that an architect who was passively liable under the Structural Work Act could obtain indemnification from the employer of the injured person when the employer's culpability was substantially greater than that of the architect. In Miller the court had recognized that there were "many cases from other jurisdictions which construe their particular compensation acts as precluding such an action over.” However, because the provisions of the Act were subject to constant scrutiny by the legislature and there had been no clarification of the legislative intent since the holdings of the appellate courts allowing indemnification under those circumstances, the court adopted the minority position.

As previously discussed, it is believed that in a products liability case an employer would not be responsible for contribution to a manufacturer of a defective product unless the employer's conduct amounted to product misuse or assumption of risk. If, however, the original defendant were sued for negligence rather than under strict liability, or if his conduct was alleged to be an actively culpable violation of the Structural Work Act, could a negligent employer then be responsible for contribution?

The Skinner decision sheds little light on these problems. The Study Committee Report on Indemnity, Third Party Actions, and Equitable Contribution of the Illinois Judicial Conference recommended a revocation of the underlying result in Miller v. DeWitt. Because of the deference normally accorded to the General Assembly in matters concerning the Workmen's Compensation Act, a statutory resolution of these problems is desirable. For reasons previously indicated, in the absence of a prompt legislative resolution the apparent restriction in Skinner requiring product misuse or assumption of risk on the employer's part before contribution against him is permitted, should be seen as an interpretation of the Workmen's Compensation Act. Therefore, as suggested in Justice Under-
wood’s dissent, unless it is determined that the employer’s culpability is substantially greater than that of the original defendant, the statutory immunity should not be breached. When a given individual is immune from direct suit by virtue of interspousal or family immunity, only two states have permitted contribution. This situation is clearly beyond the *Skinner* facts, and legislative clarification is recommended. However, the fact that the statute of limitations may bar a direct suit by the plaintiff against a particular defendant at the time contribution is sought should have no effect on the contribution action. The right to contribution arises at a later point in the litigation, after judgment, and the corresponding statute of limitations does not begin to run until that time.

*The Manner of Allocation of the Plaintiff’s Damages Among Those Defendants Responsible for Contribution*

Where contribution has been recognized, the plaintiff’s damages have traditionally been allocated among the defendants either on a pro rata or on a relative basis. If the division is made on a pro rata basis the damages are divided by the number of legally responsible defendants and the resulting quotient represents the share of each. As Justice Ward’s dissenting opinion indicates, those jurisdictions which have retained the doctrine of contributory negligence normally utilize the pro rata approach to contribution while those jurisdictions which adopted comparative negligence have generally allocated the duty to contribute on the basis of relative fault.

In the original *Skinner* decision the allocation of responsibility for plaintiff’s injuries was to be made on the basis “of the relative degree of culpability of those whose conduct proximately caused them” or on the “relative degree of fault which contributed to cause plaintiff’s injuries.” In the final revision, this language was modified to state that the allocation was to be made “on the basis of the relative degree to which the defective product and the employer’s conduct proximately caused them.” It is significant that at all times and in all three cases the majority retained a relative

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107. See note 150 *infra*.
108. See notes 149-56 *infra* and accompanying text.
109. 70 Ill. 2d 1, 18, 374 N.E.2d 437, 444-45 (1977).
111. *Id.* at 9.
112. 70 Ill. 2d 1, 14, 374 N.E.2d 437, 442 (1977).
approach to the allocation of plaintiff's damages among the joint tortfeasors.\footnote{113} The original version of the opinion, however, apparently envisioned that the allocation be relative to the "fault" or "culpability of the parties," a qualitative analysis. Relative fault is the ordinary basis of allocation utilized by those states which do not utilize pro rata allocation.

The final version of the opinion altered the allocation approach to one predicated on proximate causation, a quantitative measure.\footnote{114} If this modification was motivated as a response to the concerns of the dissenters,\footnote{115} as previously suggested,\footnote{116} it constituted an overreaction to the expressed concern that a qualitative formula could not properly be applied in the absence of a common standard of comparison.

Other jurisdictions have struggled with the problem of comparing "apples and oranges" most often in the context of comparative negligence. The great majority of jurisdictions which have been confronted with this problem have permitted the comparison.\footnote{117} The California experience is particularly instructive. In 1975, the California Supreme Court decided that a contributorily negligent plaintiff would no longer be barred from recovery, but that "the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering."\footnote{118} California thus became the third state to adopt a form of pure comparative negligence by judicial decision.\footnote{119} Three years later the California court adopted a right of "comparative indemnity among joint tortfeasors" while holding that the adoption of comparative negligence did not abolish joint and several liability.\footnote{120} In Daly v. General Motors\footnote{121} the question posed by the Skinner dissenters was squarely before the

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\item 114. This would appear to preclude a result like that reached in Mitchell v. Branch, 45 Haw. 128, 363 P.2d 969 (1961), where damages were apportioned on a 65%/35% basis because one tortfeasor was guilty of gross negligence.
\item 115. 70 Ill. 2d 1, 18-19, 374 N.E.2d 437, 445 (1977) (Ward, J., dissenting); id. at 24, 374 N.E.2d at 447 (Dooley, J., dissenting).
\item 116. See notes 69-77 supra and accompanying text.
\item 118. Li v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 875, 532 P.2d 1226, 1243 (1975).
\item 120. American Motorcycle Ass'n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978).
\item 121. 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978).
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court—would principles of comparative negligence apply to actions founded on strict products liability? The California Supreme Court said:

Those counseling against the recognition of comparative fault principles in strict products liability cases vigorously stress, perhaps equally, not only the conceptual, but also the semantic difficulties incident to such a course. The task of merging the two concepts is said to be impossible, that apples and oranges cannot be compared, that oil and water do not mix, and that strict liability, which is not founded on negligence or fault, is inhospitable to comparative principles.

While fully recognizing the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence, we think they can be blended or accommodated. The inherent difficulty in the apples and oranges argument is its insistence on fixed and precise definitional treatment of legal concepts.122

Further in the opinion, the court stated:

Where, as here, a consumer or user sues the manufacturer or designer alone, technically, neither fault nor conduct is really compared functionally. The conduct of one party in combination with the product of another, or perhaps the placing of a defective article in the stream of projected and anticipated use, may produce the ultimate injury. In such a case, as in the situation before us, we think the term equitable apportionment or allocation of loss may be more descriptive than comparative fault.123

The court, noting that, “We, ourselves were perhaps the first court to give the new principle [strict liability in tort] judicial sanction,”124 concluded that “the expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative principles.”125 Reaffirming that “trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion,”126 the court cites the existence of a form of special verdict under Rule 49(a) of the Federal Rules of Civil Procedure, tailored to cases applying the maritime doctrine of strict liability as “illustrative of one technique by which the court

122. Id. at 734, 144 Cal. Rptr. at 385, 575 P.2d at 1167.
123. Id. at 736, 144 Cal. Rptr. at 386, 575 P.2d at 1168.
125. Id. at 737, 144 Cal. Rptr. at 387, 575 P.2d at 1169.
126. Id. at 743, 144 Cal. Rptr. at 390, 575 P.2d at 1172, quoting Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973).
and jury may approach the task of apportionment.”

Then, in Safeway Stores v. Nest Kart the California Supreme Court decided that comparative fault principles should be utilized as the basis for apportionment between two tortfeasors, one whose liability rested upon strict products liability and the other whose liability derived, at least in part, from negligence. The court stated:

Nothing in the rationale of strict product liability conflicts with a rule which apportions liability between a strictly liable defendant and other responsible tortfeasors. Although one of the principal social policies served by product liability doctrine is to assign liability to a party who possesses the ability to distribute losses over an appropriate segment of society,... this policy has never been viewed as so absolute as to require, or indeed as to permit, negligent tortfeasors who have also contributed to the injury to escape all liability whatsoever. Instead, from the initial adoption of strict product liability in Greenman, the propriety of awarding contribution between strictly liable and negligent defendants has been uniformly recognized.

The court referred to the existing contribution statute which required inflexible pro rata apportionment, and remarked that,

[W]e achieve a more precise apportionment of liability in circumstances such as the instant case by allocating damages on a comparative fault or a comparative responsibility basis....

It is sometimes suggested, however, that while apportionment between strictly liable and negligent defendants may be a desirable goal, we encounter a fundamental doctrinal obstacle to any such apportionment in that no logical basis can be found for comparing the relative fault of a negligent defendant with that of a defendant whose liability rests on the no fault concept of strict product liability. Viewing the problem as a vain attempt to compare apples and oranges, a number of commentators maintain that there is a significant difference in permitting a jury to apportion responsibility for an accident caused solely by a number of negligent parties and permitting such an apportionment for an accident caused by a combination of negligent and strictly liable parties.... As our recent decision in Daly v. General Motors Corp. ... explains, however, the suggested difficulties are more theoretical than practical, and experience in other jurisdictions demonstrates that juries are fully competent to apply comparative fault principles between negligent and strictly liable defendants.

127. Id. at 743, 144 Cal. Rptr. at 391, 575 P.2d at 1173.
129. Id. at 330, 146 Cal. Rptr. at 554, 579 P.2d at 445.
130. Id. at 331, 146 Cal. Rptr. at 554-55, 579 P.2d at 445-46.
The allocation of damages on the basis of comparative fault as envisioned by the original version of the Illinois decision could have been accomplished by adoption of the California approach. It is unfortunate that an apparent overreaction to the semantic difficulties involved presently precludes consideration of the respective fault of the parties to the contribution claim and requires the allocation to be made solely on the basis of proximate causation. It may be contended in future cases that this method of allocation should be limited to cases where a defective product and product misuse or assumption of its risk contributed to the accident because that situation involves apparently equal culpability on the part of both parties, an apples and apples comparison. This uncertainty could be best resolved by legislative action.

**The Present Viability of “Active-Passive” Indemnification**

There is some uncertainty regarding the impact of *Skinner* upon the pre-existing law of Illinois governing indemnification when the original defendants' actions were allegedly of a "passive" nature and those of a third party defendant were "active." It has been argued that because the third party complaints in *Stevens*¹³¹ and in *Robinson*¹³² had originally sought indemnification, but were treated by the Supreme Court as complaints for contribution, contribution has now supplanted indemnification in Illinois. A closer examination of the three cases reveals that none involve facts which prior to *Skinner* would have constituted a valid basis for indemnification. Indeed, indemnity was denied by the lower courts in both *Stevens* and *Robinson*. The action of the Supreme Court in holding that the facts pleaded alleged a valid basis for contribution may be seen as a *sub silentio* affirmation of the fact that indemnification was not allowed under Illinois law on the facts pleaded. For this reason counsel would be well advised to include an indemnification count in a third party complaint whenever it appears justified on the basis of Illinois law prior to *Skinner*.¹³³

Nevertheless, the recognition by the Illinois Supreme Court in *Skinner* that the concept of indemnity had been expanded beyond its traditional boundaries to avoid the harsh result inherent in the prohibition against contribution¹³⁴ leads to a conclusion that with the recognition of contribution among joint tortfeasors there is no further need for this "creative extension" of indemnity. We may

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¹³¹ 70 Ill. 2d 41, 46, 374 N.E.2d 455, 457 (1977).
¹³³ See Ferrini, supra note 8, at 288-89.
¹³⁴ 70 Ill. 2d 7, 374 N.E.2d 437, 439 (1977).
therefore expect that in future cases indemnity will be applicable to situations which more neatly fit within its traditional common law role. 135

THE FUTURE APPLICATION OF SKINNER: PROCEDURAL ISSUES

The problems concerning the procedural implementation of the Skinner decision illustrate the need for legislative action even more strongly than the unresolved questions of a substantive nature. A broad change of substantive law has been effectuated, but it is not clear what procedures shall be utilized to implement that change. The practical limitations of the judicial process, in particular the limitation of judicial law-making to the facts then before the court, are more apparent in this area than in the substantive one. Skinner and its companion cases were decided on the pleadings. They can therefore give little guidance to those procedural problems which will arise after the pleading stage of a law suit. For this reason the discussion of many procedural issues relating to the changes of substantive law which occurred in Skinner must be limited to an identification of the problems and an analysis of the approaches taken in other jurisdictions.

The Assertion of a Claim for Contribution

The first issue encountered by a joint tortfeasor who wishes to assert a claim for contribution concerns his choice of forums. In 1939, the Conference of Commissioners on Uniform State Laws approved a model act governing contribution among joint tortfeasors. 136 That act contained a provision limiting the right to seek contribution by an independent action to those situations in which contribution could not be obtained by the utilization of appropriate procedures in the action brought by the injured party. 137 Only two states adopted this provision. 138 When the Uniform Contribution Among Tortfeasors Act was revised in 1955 139 this provision was deleted. Thus, the vast majority of states which allow contribution allow it to be brought either in the original plaintiff's action or in an independent action. Illinois is likely to follow this approach.

If a tortfeasor named as a defendant in the original action may choose to seek contribution in that action or in an independent

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135. See note 7 supra and accompanying text.
136. Uniform Contribution Among Tortfeasors Act (1939) [hereinafter referred to as the 1939 Model Act].
137. Id. at § 7(3).
139. Uniform Contribution Among Tortfeasors Act (1955) [hereinafter referred to as the 1955 Model Act].
action, the factors that should guide his election must be consid-
ered. Either approach poses some disadvantages. If the issue of
contribution is litigated together with the original plaintiff's claim,
each defendant, by attempting to establish the extent to which the
tortious conduct of the other proximately contributed to the plain-
tiff's injury, will in effect be proving the plaintiff's case against that
defendant. On the other hand, under the doctrine of res judicata, a
defendant not joined in the first action cannot be bound by the facts
proved in that trial\textsuperscript{140} and a second trial to determine the extent of
his liability, if any, must be held. The tactical advantage for the
named defendant in proceeding in an independent action may well
be outweighed by the additional expense of a second trial, and the
accompanying expenditure of additional time by the judge, attor-
neys, parties, and witnesses, many of whom will be the same wit-
tnesses who appeared in the original action and who will be asked to
give the same testimony regarding the same incident a second
time.\textsuperscript{141}

Once the forum has been selected, if there are more than two joint
tortfeasors joinder problems must be considered by the party seek-
ing contribution. The decision will to a large degree depend on
whether, under Illinois law, the plaintiff's damages are to be allo-
cated only among the parties to the contribution action, or among
all tortfeasors whose conduct allegedly proximately contributed to
the plaintiff's injury, whether or not those parties are joined in the
contribution action.

The same equitable considerations which prompted the \textit{Skinner}
majority to adopt contribution support the conclusion that the allo-
cation should be limited to those who are actual parties in the
contribution action. For purposes of illustration, assume a case
where the trier of fact decided that three tortfeasors contributed
equally to cause the plaintiff's injury. If only two of the tortfeasors
are before the court, and the plaintiff elects to recover in full from
one, it appears inequitable to deny him the right to collect 50% of
that sum from his co-defendant. Since the absent tortfeasor is not
bound by the result of the original trial, a subsequent action against
him may not be successful, and he may be found not liable. Furth-
more, he may become judgment proof. If the absent party was sub-
ject to the jurisdiction of the court, any tortfeasor joined in the

\textsuperscript{140} See Hinkle v. Tri-State Transit Inc., 21 Ill. App. 3d 134, 315 N.E.2d 289 (1974); see
Ill. 2d 557, 322 N.E.2d 461 (1975).

\textsuperscript{141} If the party from whom contribution is sought is not subject to the jurisdiction of
the courts of the original forum, there is obviously no choice but to proceed against him in
an independent action in an appropriate forum.
original action could have brought him in as a party through a third party action. The decision not to join the tortfeasor in the original action should not preclude a later action for contribution by either or both of the tortfeasors originally joined. In this second action all facts are subject to relitigation. This approach reduces the possibility that the plaintiff, in electing to proceed to satisfaction of his judgment against one defendant, will impose upon that defendant a disproportionate share of the damages caused by several.

If the defendant or defendants in the original action can elect to seek contribution either in the original action or in an independent suit, *Buehler v. Whalen* suggests that it is necessary that a pleading be filed indicating the desire to litigate the issue in the original action. If all the alleged tortfeasors are already parties to the action this is done in Illinois by a counterclaim or in the federal courts by a cross claim. If the party or parties from whom contribution is sought are not already parties to the action, a third party complaint must be utilized, as was done in *Skinner* and its companion cases.

The manner in which the claim for contribution should be pleaded has caused concern among practicing attorneys. As in indemnification actions, a defendant may not tender a new party to the plaintiff. Hence, a defendant seeking contribution may not totally deny any liability on his part. He must, at least alternatively or hypothetically, plead that if he is liable to the plaintiff, the third party defendant's tortious conduct contributed to proximately cause plaintiff's injury and hence he is entitled to contribution from the third party defendant.

Because Illinois is a fact pleading jurisdiction it is necessary that the facts establishing a duty to contribute be pleaded. The requirement that facts, not theories of recovery, are to be pleaded is believed to answer Justice Dooley's dissenting argument that in *Stevens* and *Robinson* the complaints were rewritten by the court so as to assert a claim for contribution where it had not been asserted by the parties. Under Illinois law, if a pleading alleges facts which constitute a right of recovery, the pleading is valid even if the pleader mistakenly categorizes the right of recovery to which he is entitled. The third party complaints in *Stevens* and *Robinson*.

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142. See discussion accompanying note 52 supra.
143. Section 44 of the Illinois Civil Practice Act, ILL. REV. STAT. ch. 110, § 44 (1976), does not distinguish between cross claims and counterclaims.
144. See Fed. R. Civ. P. 13(g) - 13 (h) (1976).
146. 70 Ill. 2d 1, 33, 374 N.E.2d 437, 451 (1977) (Dooley, J., dissenting).
alleged facts which constituted product misuse or assumption of its risk by the employer, and hence they alleged facts which established a right to contribution under *Skinner* even though the facts were characterized by the pleader as "active" negligence and indemnification was sought. Therefore, the court properly treated them as stating a cause of action for contribution.

Thus, it is clear that to assert a claim for contribution, the party seeking it must file a pleading. In a products liability case when a manufacturer seeks contribution from the plaintiff's employer, he must allege facts and not conclusions which constitute misuse of the product or assumption of its risk by the employer which proximately caused or contributed to the plaintiff's injury. In a pure negligence case, facts must be alleged which show that the party from whom contribution is sought was negligent, and that this negligence proximately caused or contributed to the plaintiff's injury.

**Contribution and the Statute of Limitations**

It has already been suggested that the fact that the statute of limitations has run on the right of the originally injured party to sue a joint tortfeasor should not constitute an automatic defense to an action for contribution. The right of contribution is a separate cause of action which is not enforceable until the original plaintiff's claim is satisfied or reduced to judgment. The right to sue the party from whom contribution is sought on the original claim might not have expired if the original plaintiff's claim had not been satisfied. It is relevant to consider, however, whether the fact that a claim against the party was barred at the time of the original suit should affect his duty to contribute, since at that time he was no longer potentially liable to satisfy the claim of the original plaintiff. While statutory resolution of this issue appears desirable, the fact that in *Skinner* and its companion cases an employer who could not have been directly sued by the plaintiff was held liable for contribution indicates contribution in Illinois is predicated on the fact the tortious conduct of a party was a proximate cause of the plaintiff's injury and not on the fact that the party could have been originally sued by the plaintiff.

If the statute of limitations on the obligation to contribute is not governed by the statute governing the original right of the injured party to bring suit, it is necessary to consider when the statute on

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148. See notes 23-27 supra and accompanying text.
149. See note 107 supra and accompanying text.
150. See 1955 Model Act, supra note 139, at § 3.
151. But see 70 Ill. 2d 1, 30, 374 N.E.2d 437, 450 (1977) (Dooley, J., dissenting).
the contribution claim begins to run and its duration. The 1955 Model Act provides for a one year statutory period which begins to run at the time the judgment against the plaintiff becomes final or, in the absence of a judgment, the time the claim of the plaintiff is discharged by payment.\(^{152}\) Even in the absence of a statutory provision, the statute in Illinois would probably commence at the same time as specified in the Model Act even though some states have held that it does not begin until the judgment has been satisfied.\(^{153}\) This latter rule is undesirable because if a defendant were unable to immediately satisfy the judgment, litigation could be prolonged interminably. It may be noted, however, that since recovery on the contribution claim is precluded prior to payment of the judgment\(^{154}\) the inability to promptly satisfy the judgment could cause the statute to bar any right of contribution.

In the absence of a specific provision in Illinois law, however, the one year period recommended in the model act would apparently not be applicable. Either the normal two year tort statute in the case of personal injury actions,\(^{155}\) or the five year statute for unspecified causes of action,\(^{156}\) would most likely be applied. While five years seems to be an undesirably lengthy period, this statute appears to be the more logical choice because a contribution action technically does not sound in tort.

**The Effect of Settlements on the Action for Contribution**

When one joint tortfeasor settles with the injured party two issues are raised in regard to their reciprocal rights. The first concerns the right of the settling tortfeasor to obtain contribution from the other tortfeasors; the second concerns the right of another tortfeasor, if he is later sued by the injured party, to obtain contribution from the tortfeasor who settled with the plaintiff. Of necessity these issues are interrelated.

The 1955 Model Act provides that a tortfeasor who settles with the injured party may not seek contribution from a tortfeasor whose liability has not been extinguished by the settlement.\(^{157}\) While it does permit contribution if the liability of the joint tortfeasor has been extinguished, the amount of the settlement will not control the total amount of the plaintiff’s damages to be apportioned among the

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152. See 1955 Model Act, supra note 139, at § 3.
154. See 1955 Model Act, supra note 139, at § 3.
157. 1955 Model Act, supra note 139, § 1(d).
tortfeasors if it is unreasonable. The Stevens case which allowed a claim for contribution where the claim of the injured party had been extinguished by the settlement incorporates into Illinois law the inclusive aspect of this rule. While the question of whether its restrictive aspects are also to be adopted must await further developments, they appear to be clearly desirable.

Even where the settlement does discharge the obligation of the other tortfeasors it would be inequitable to require them to pay their appropriate share of a sum which is unreasonably large due to the lack of wisdom or perhaps bad faith of the settling party. In the absence of a judicial determination of the cost of the plaintiff's injuries the unilateral activity of one joint tortfeasor should not conclusively fix the total liability to be apportioned. While recognition of this rule may on occasion result in needless litigation about the reasonableness of the settlement, the inherent inequities of any other approach appear to make this possibility an undesirable necessity.

It is also recommended that contribution not be permitted a party if his settlement did not extinguish the obligation of the other parties. In such a case the present procedure for covenants not to sue should be followed. The existence of the settlement should be revealed to the court which hears the plaintiff's case against the other tortfeasors but not to the jury. Judgment should then be entered in the amount of the jury verdict less the amount received by the plaintiff from the settling tortfeasor. If the settlement is appropriate from the standpoint of both the plaintiff and the settling tortfeasor the sum should approximate that tortfeasor's proportional share of the plaintiff's injuries. If it is too high, he should be denied contribution as the corollary of the rule by which he is himself excused from further contribution if the settlement is too low.

The second problem involves the potential liability of a settling tortfeasor for contribution. The 1939 Model Act provided that a settlement by a joint tortfeasor did not excuse him from contribution. He was liable for his appropriate share of the plaintiff's damages, while he obtained credit for the amount given in settlement.

Obviously, the defendant's incentive to settle is substantially less

158. Id.
159. 70 Ill. 2d 41, 44, 374 N.E.2d 455-56 (1977).
160. See Section 5 of 1939 Model Act which basically provides a settling tortfeasor is not discharged from contribution unless the release expressly provides for a reduction of the injured party's recoverable damages "to the extent of the pro rata share of the released tortfeasor." According to the Commissioners' Comments to Section 4(b) of the 1955 Model Act, the exception was of little benefit because the plaintiff would not agree to a reduction of his damages where he has no way of knowing the value of the share he is releasing.
when the settlement does not limit his final potential exposure. Recognizing this fact, the drafters of the 1955 Model Act provided that a settlement with the plaintiff, if made in good faith, would discharge the settling tortfeasor from any future obligation to contribute. The insistence that the settlement be made in "good faith," like the requirement that the sum given by a tortfeasor whose settlement extinguished the plaintiff's claim be "reasonable" before it will determine the amount to be allocated among the tortfeasors, creates the possibility of needless litigation. Both requirements, however, seem necessary to prevent injustice. In the absence of such a good faith requirement, a plaintiff could release a favored tortfeasor for a relatively small sum and terminate the right to contribution of the target defendant. Alternatives to the good faith requirement are possible, and have been adopted in other jurisdictions.

While these recommendations appear to constitute the best solution to the problems created by a settling tortfeasor, some legislation on this issue is imperative. Until a definitive answer is provided, any plaintiff and joint tortfeasor who enter into a settlement in a case to which the Skinner rule applies do so at their peril.

The Trial of a Claim for Contribution

A major consideration in the trial of a contribution action is whether it is to be tried together with the plaintiff's claim. The same factors which were relevant to the discussion of whether the claim for contribution should be filed in the original case are relevant here. The same test which governs the propriety of severance of an indemnification action should be applied to the severance of a contribution action. Hence, severance is generally appropriate if the two claims arise from different factual settings or there is some other potential for jury confusion if the two claims were tried together.

An intermediate course of action short of total severance could be utilized. Under this approach a type of bifurcated hearing could be employed. The jury would first determine the right of the plaintiff against the defendants, and only after that determination had been

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161. See Commissioners' Comments to Section 4(b) of the 1955 Model Act.
162. See 1955 Model Act, supra note 139, at § 4(b).
163. For cases interpreting and applying such a "good faith" requirement see River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) and LaReau v. Southern Pacific Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975).
164. See, e.g., N.Y. GEN. OBLIG. LAW (McKinney) 15-108 (1978) which provides the tortfeasor's claim is to be reduced by the greater of the amount stipulated, the amount paid, or the released tortfeasor's equitable share.
made would the same jury be asked to hear the contribution claim. There are two variants of this prototype. Under one, all the evidence would be heard together but the jury would retire twice under separate instructions. Under the second variant, only the evidence relevant to the plaintiff's claim would be heard before the first verdict was returned. Only if the plaintiff recovered would the contribution claim be tried. While both procedures are feasible, the second appears more cumbersome, and presents a risk of redundancy and possible waste of witness time, since normally the testimony of the same witness would be relevant to both aspects of the case. It must be emphasized, however, that in any event the parties involved only in the third party action must participate fully in the selection of the jury and the interrogation of all the witnesses if their rights are to be tried by that jury and affected, even in part, by the evidence introduced in the initial stages of the case.

The issue of appropriate instructions and jury forms must also be addressed. Because contribution does not affect the rights of the plaintiff those instructions and forms now used should continue unchanged. Additional instructions and forms relevant only to contribution must be prepared. It is suggested that these be drafted substantially in accord with the language of Skinner and its companion cases. Thus, the jury should be instructed that contribution should be based on the relative degree to which the specified conduct of the party responsible for contribution, in comparison to that of the others, proximately caused or contributed to the plaintiff's injuries. The jury form should request the jurors to calculate this as either a ratio or a percentage figure.

CONCLUSION

The decision of the Illinois Supreme Court in Skinner constitutes a legal advance which will benefit the development of the law in Illinois. The practical and logical inequities of the rule against contribution among joint tortfeasors dictated reform. Yet despite the almost unanimous recommendation of the Illinois Judicial Conference, fourteen years elapsed with no legislative action. During that same period over three fourths of the states abolished the common law prohibition against contribution. While the inherent nature of the judicial process unavoidably creates uncertainty in adopting a change of this magnitude, the areas of uncertainty are not as great as some critics might contend.

This is not to suggest that major areas of the new law of contribution do not require immediate clarification. In the substantive area, the full reach of the doctrine in products liability cases, and the scope of its impact when an employee is injured in an accident to which his employer proximately contributed are not yet known. Further, the application of the doctrine to intentional torts and the methodology by which responsibility for the plaintiff's injuries will be apportioned among defendants in situations unlike Skinner and its companion decisions constitute major areas where clarification or re-analysis is needed. Major procedural questions remain unresolved as well. These involve the proper treatment of an absent defendant, the effect of a settlement with the plaintiff by one prospective defendant, and the operation of the statute of limitations on contribution claims.

The existence of these areas of uncertainty, however, should not be construed as a criticism of the Skinner court. In his work on legal reasoning, Edward Levi, speaking of uncertainty and ambiguity in judicial opinions, said: "It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity. On serious controversial issues it makes it possible to take the first step in the direction of what otherwise would be forbidden ends." 167

Too often judicial law-making and legislative law-making are thought of as exclusive alternatives; rarely are the courts and the legislature considered as partners. While typically the legislature establishes a policy which the courts implement, such an approach is not the only cooperative relationship possible. In the area of contribution itself, some states simply enacted statutes which merely declared the right to exist. 168 In those jurisdictions, the implementation of this policy was left to the judiciary. Conversely, ten states recognized the right of contribution by court decision, and in some of them legislation was later enacted. 169 In New York, for example, contribution was first recognized by the Court of Appeals in Dole v. Dow Chemical Co. 170 After that decision, the New York legislature adopted both a statute relating to contribution 171 and one adopting comparative negligence. 172

It is suggested that Illinois follow the New York approach. The rule allowing contribution is now judicially established in Illinois.

167. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949).
168. See statutes of Georgia, Kentucky, Louisiana, New Jersey and Virginia.
169. See the itemization in Note, Contribution in Illinois, supra note 11, at 1016.
171. N.Y. CIV. PRAC. LAW (McKinney) § 1401 (1976).
172. N.Y. CIV. PRAC. LAW (McKinney) § 1411 (1976).
The ambiguities and uncertainties of that decision have provided for the "participation of the community" in their resolution. This function would be best accomplished if the legislature, working in partnership with the judiciary, would now pass a comprehensive statute governing contribution among joint tortfeasors in Illinois, and thus complete the badly needed reform originated by the judiciary.