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Recent Developments in Tortfeasor Contribution in Illinois

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Recent Developments in Tortfeasor Contribution in Illinois

The Supreme Court of Illinois has recently taken a major step toward the abrogation of "a thoroughly unfortunate and valueless rule of law"[1]—the doctrine that no contribution may be had between joint tortfeasors. Indeed, it seems that the court has discarded the doctrine as it pertains to negligent tortfeasors not acting in concert. The decisions in *Reese v. Chicago, Burlington & Quincy R.R. Co.*[2] and *Gertz v. Campbell*[3] are strong indications which suggest that the court may be on the verge of expressly supplanting the rule against contribution with the doctrine of "equitable apportionment." Under this rule each joint tortfeasor would pay the proportionate share of the damages attributable to his negligence.[4]

Reese was the first of the two decisions handed down by the court. Plaintiff's decedent, Lowell Reese, an employee of the Chicago, Burlington & Quincy Railroad, and his fellow employees were engaged in loading a flat car, using a crane manufactured by the Koehring Company. Due to the defective condition of the crane, a "clam shell" bucket, suspended above Reese, fell causing his death. His widow brought suit against the railroad under the Federal Employers Liability Act[5] and against Koehring Company in strict liability in tort for its defective product. The railroad counterclaimed against Koehring. Prior to trial, the railroad and Mrs. Reese entered into a "loan-receipt" agreement[6] whereby the railroad loaned Mrs. Reese the sum of fifty-seven thousand, five hundred dollars ($57,500.00). The loan was to be repaid from any amounts recovered from the defendant Koehr-

1. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146 (1932).
2. 55 Ill. 2d 356, 303 N.E.2d 382 (1973).
3. 55 Ill. 2d 84, 302 N.E.2d 40 (1973).
4. Each tortfeasor is still liable to the plaintiff for the entire sum of damages which arise as the proximate result of his negligence. Chicago City Railway v. Saxby, 213 Ill. 274, 72 N.E. 755 (1904). Equitable apportionment would come into play when it comes time for the defendants to settle up among themselves—each paying the proportionate share attributable to his negligence.
5. 45 U.S.C. §§ 51-60 (1971).
6. 55 Ill. 2d at 358, 303 N.E.2d at 383-84.

ing.[7] The railroad was thereupon dismissed without prejudice upon plaintiff's motion. The jury returned a verdict in favor of the plaintiff against Koehring while the trial court found in favor of Koehring on the railroad's counterclaim. The trial court allowed Koehring a setoff in the amount of the loan, holding that the loan was a covenant not to sue. Both Koehring and the railroad appealed.

The appellate court for the second district reversed the trial court's ruling with respect to the setoff and held that the agreement was enforceable as written.[8] After noting that the question of the validity of such a "loan-receipt" agreement was one of first impression in Illinois, the supreme court sustained the appellate court, holding that such agreements were valid.

In so doing, the court expanded indemnity, the common law exception to the rule against contribution, to its breaking point.[9] The court assumed *arguendo* that both defendants could be found to have been joint tortfeasors and contemplated the validity of the "loan-receipt" agreement in those situations in which a concurrent tortfeasor, otherwise unable to obtain indemnity,[10] could escape liability through the use of such agreements.

INDEMNITY IN ILLINOIS

In addition to express contracts of indemnity, in Illinois indemnity is proper under the prevailing case law where there exists a "qualitative distinction" between the negligence of the tortfeasors.[11] Indemnity is said to lie where the conduct of the indemnitee may be characterized as "passive" negligence, while the negligence of the indemnitor is "active."[12] The passive tortfeasor can then shift the entire burden of liability for the damages to the actively negligent tortfeasor. Where each tortfeasor is equally culpable or is under a duty to exercise the same degree of care toward the plaintiff, no indemnity action may be maintained.

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7. The agreement further provided that Mrs. Reese would pursue all reasonable and legal means to obtain judgment against Koehring.

8. 5 Ill. App. 3d 450, 283 N.E.2d 517 (1972).

9. Indemnity shifts the entire burden of the loss from one tortfeasor to another; contribution distributes the loss among them.

10. Illinois courts allow indemnity where the indemnitee's conduct constitutes passive negligence and the indemnitor was actively negligent.

11. Lindner v. Kelso-Burnett Elec., 133 Ill. App. 2d 305, 273 N.E.2d 196 (1971); Sargeant v. Interstate Bakeries, 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967); Gillette v. Todd, 106 Ill. App. 2d 287, 245 N.E.2d 923 (1969); Spivack v. Hara, 69 Ill. App. 2d 22, 216 N.E.2d 173 (1966).

12. *Id.*; *accord*, John Griffiths Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923).

The principles of active-passive indemnity are not necessarily based upon motion alone but take into account the nature and quality of the tortious acts involved. The court in *Gulf, Mobile, & Ohio Ry. Co. v. Arthur Dixon Transfer Co.*,[13] held that it was "clear that mere motion does not define the distinction between active and passive negligence."[14] The terms are not easily susceptible to definition,[15] and the result in any given case may be the result of clever characterizations given the conduct by opposing counsel.[16] Although indemnity was originally proper only in situations where the indemnitee was entirely free from personal fault, the *Arthur Dixon* case extended the right to indemnity to a tortfeasor who was guilty of some lesser wrong than the indemnitor.[17] The *Reese* case takes this proppposition one step further. Although the defendant C.,B.&Q.R.R. was found actively negligent (the trial court finding for Koehring on the railroad's counterclaim since C.,B.&Q.R.R. was an active tortfeasor) the supreme court, in effect, still allowed the railroad to be indemnified. Had the plaintiff sued the railroad individually, it is clear that under the prevailing active-passive exception the railroad would not have been able to shift any portion of the loss to Koehring. But through the use of the "loan-receipt" agreement, the railroad effectively shifted the entire burden to the Koehring Company, absolving itself of any liability which could otherwise have been imposed. The court acknowledged the fact that the railroad was being allowed to do indirectly that which it could not do directly. But in so doing, the court declared that the public policy favoring out-of-court settlements outweighed the policy against contribution among tortfeasors.[18] Further, the use of the courts for the relief of wrongdoers, the principal objection to allowing contribution, was absent in the present case.

Three months after *Reese, Gertz* was handed down. In that case the plaintiff Gertz was struck by defendant Campbell's automobile.

13. 343 Ill. App. 148, 98 N.E.2d 783 (1951).
14. *Id.* at 158, 98 N.E.2d at 788.
15. The court in Sargeant v. Interstate Bakeries, 86 Ill. App. 2d 187, 193, 229 N.E.2d 769, 772 (1967), quoting King v. Timber Structures Inc., 240 Cal. App. 2d 178, 182, 49 Cal. Rptr. 414, 417 (1966), proposed the following definition:

> [O]ne is passively negligent if he merely fails to act in fulfillment of a duty of care which the law imposes on him. . . . One is actively negligent if he participates in some manner in the conduct or omission which caused the injury.

16. *See* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); *see also* Stewart v. Mr. Softee of Illinois Inc., 75 Ill. App. 2d 328, 221 N.E.2d 11 (1966); Reynolds v. Illinois Bell Tel. Co., 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964).
17. Comment, *Contribution and Indemnity in Illinois Negligence Cases*, 19 U. CHI. L. REV. 388 (1952).
18. 55 Ill. 2d at 363, 303 N.E.2d at 386.

Subsequently, the plaintiff in seeking medical attention was treated by Dr. Snyder, whose negligent malpractice aggravated the original injury. Campbell sought to implead[19] Snyder, seeking to be reimbursed for any damages assessed against Campbell which were attributable to Snyder's malpractice. The trial court dismissed the third-party complaint, but the appellate court reversed,[20] holding that Campbell had stated a cognizable claim for equitable apportionment. The supreme court affirmed, allowing Campbell to maintain his action over, and in effect to receive contribution from Snyder for the increase in damages attributable to the aggravation of the original injuries. The court first stated that what Campbell sought was neither indemnity nor contribution in the traditional sense—but rather indemnification for the entire amount of damages assignable to Snyder's fault.[21] Nevertheless, as the defendant properly asserted, no matter what terminology was being used, the court was granting contribution.

The distinction between indemnity and contribution was set forth in *Suvada v. White Motor Co.*,[22] quoting *Prosser On Torts*:

> There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead.[23]

Obviously, the purported indemnity to be allowed Campbell was contribution in the traditional sense as defined by Dean Prosser. The court went on to hold that Snyder and Campbell were not joint tortfeasors in the strict sense because there was no concert of action. The court readopted the original, preferable form of the rule, barring contribution only where the conduct of the tortfeasors was intentional.

CONTRIBUTION

The common law rule against contribution was first announced in *Merryweather v. Nixan.*[24] In that case the plaintiff, after having satisfied a judgment rendered against him and his co-defendant in the original action for conversion, sought contribution of a "moiety" from

19. ILL. REV. STAT. ch. 110, § 25(2) (1973), allows impleader. One legal writer has cited this statute for the proposition that it bars a right to contribution in Illinois. Paull, *Caveat Venditor: The "Sack and Slaughter" Proceeds*, 62 ILL. BAR J. 328 (1974). That writer's conclusion is clearly erroneous. Though the statute does not *create* a right to contribution, it does not bar such a right.
20. 4 Ill. App. 3d 806, 282 N.E.2d 28 (1972).
21. 55 Ill. 2d at 88, 302 N.E.2d at 43.
22. 32 Ill. 2d 612, 624, 210 N.E.2d 182, 188 (1965).
23. Prosser on Torts, § 51 at 310 (3d ed. 1964).
24. 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799).

Nixan for his share of the damages. The court, through Lord Kenyon, denied the action, holding that there should be no contribution between wrongdoers.[25] It is essential to note that in *Merryweather* the defendants were joint tortfeasors in the strict sense of the term (there being a concert of action) since this was the only basis upon which they could be joined in the original action under the then prevailing procedural law.[26] The reasoning behind the case is clear and is still a viable position today in light of modern considerations and policies: intentional wrongdoers should not be allowed to seek relief through the courts. A person who commits an intentional tort in concert with another should not be heard to complain of the fact that his fellow joint tortfeasor has not paid his share of the damages.[27] The result of such non-access is not considered inequitable even by modern standards of justice.

Early case law seized upon the limitation in *Merryweather* and held that the action for contribution would lie where the party seeking such contribution was free from personal fault,[28] did not know the unlawfulness of his act,[29] was a tortfeasor by implication of law,[30] or was not a knowing and meditating wrongdoer.[31] While the restrictive form of the *Merryweather* doctrine prevailed in England, early decisions in jurisdictions in the United States expanded the doctrine to encompass both negligent and intentional tortfeasors.[32] This broader interpretation of the rule arose mainly from a misreading of *Merryweather:* "Properly understood it [the rule] is confined to those cases wherein the joint wrong was confessedly intentional. . . ."[33]

A further complicating factor which led to the adoption of the broader version of the rule was the relaxation of procedural joinder rules. Many courts confused the procedural reforms with the applicable substantive law and applied the no contribution rule generally to both negligent and intentional tortfeasors. The reasons behind the doctrine were soon lost from sight and the rule came to be applied

25. *Id.*
26. Wilson v. Turnman, 6 M. & G. 236, 134 Eng. Rep. 879 (1843); Nicolle v. Glennie, 1 Mauder & S. 588 (1817); Chamberlain v. White, 79 Eng. Rep. 558 (1617).
27. For an amusing case, see the famous Highwayman's case cited in PROSSER ON TORTS, § 50, n. 40, at 305 (3d ed. 1964).
28. Wooley v. Batte, 2 Car. & P. 417, 172 Eng. Rep. 188 (1826).
29. Pearson v. Skelton, 1 M. & W. 504, 150 Eng. Rep. 533 (1836); Betts v. Gibbins, 2 Ad. & E. 57, 111 Eng. Rep. 22 (1834); Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Rep. 693 (1827).
30. Pearson v. Skelton, 1 M. & W. 503, 150 Eng. Rep. 533 (1836).
31. *Id.*
32. *See* Thweat's Adm'r v. Jones, 1 Rand. 328 (Va. 1825).
33. Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 180 (1898).

generally to all tortfeasors.[34] Only nine jurisdictions have allowed contribution through judicial decisions.[35] Most jurisdictions, recognizing the basic inequities inherent in the rule, have provided for contribution by statute,[36] as has England.[37]

Illinois first adopted the doctrine against contribution in 1856 in *Nelson v. Cook*.[38] Many subsequent Illinois decisions have properly interpreted the rule enunciated in *Merryweather*,[39] reflecting the fact that Illinois courts did not confuse the substantive and procedural law,[40] as had other jurisdictions. This has led some writers to doubt whether the broader rule had ever in fact been adopted.[41]

Early case law took into account the nature and degree of wrongdoing involved in the tortious conduct. One such case, emphasizing the criminal aspects of such conduct, was *Chicago Railways Co. v. R.E. Conway and Co.*,[42] which held:

> If the parties are not equally *criminal,* the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense. . . . [W]here the offense is merely *malum prohibitum,* and in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them although both parties are wrongdoers.[43]

Both early and modern case law, culminating in *Gertz,* lend strong support to the theory that the rule against contribution is limited only to instances of intentional, concerted tortious conduct. There is no reported Illinois case which expressly bars contribution between purely negligent tortfeasors. In fact, the court in *Gertz* held that Campbell and Snyder were not guilty of concerted tortious conduct, and as such the Illinois "holdings prohibiting contribution between joint tortfeasors

34. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937).
35. Prosser lists eight states in § 50, PROSSER ON TORTS, at 306-07 (3d ed. 1964), to which must be added New York. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
36. *See Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases,* 68 YALE L.J. 964 (1959).
37. Married Women and Tortfeasor Act, 25 & 26 Geo. 5. c. 30, Part II, sec. 6(I)(c) (1935).
38. 17 Ill. 443 (1856).
39. Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931); John Griffiths Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923); Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905); McDonald v. Trumpf, 49 Ill. App. 2d 106, 198 N.E.2d 537 (1964).
40. Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931); Farwell v. Becker, 129 Ill. 261, 21 N.E. 792 (1889); Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963).
41. Comment, *Contribution and Indemnity in Illinois Negligence Cases,* 19 U. CHI. L. REV. 388 (1952).
42. 219 Ill. App. 220 (1920).
43. *Id.* at 223 (emphasis added).

have no applicability."[44] Nevertheless, both the bench and the bar have proceeded upon the assumption that such a rule exists. Recent decisions have subjected the "rule" to blistering attacks as being an unfair, ancient doctrine which no longer has a place in the economic and social realities of modern times. An excellent exposition of the doctrine's antiquated features was set forth in *Moroni v. Intrusion-Prepakt, Inc.*[45] The *Moroni* court stated:

> The principle of no contribution and no indemnity between all joint tortfeasors is more a rule of ethics than a principle of law. The law simply closed its doors to *inter se* disputes of those whom it considered to be bad men. This originated at a time when torts were in the main such wrongs as slander, libel, and assault and battery. Today, torts are mainly the incidents of industry and transportation. To continue to apply the rule to such cases as that before us [negligence] would make the law no jealous mistress, but a squeamish damsel, refusing to have anything to do with a couple of respectable suitors because her grandfather once told her they were joint tortfeasors.[46]

Numerous Illinois decisions have noted the inconsistent application of the rule. In *Sargeant v. Interstate Bakeries*,[47] the court noted that Illinois case law tends to support the conclusion that contribution between purely negligent tortfeasors does exist and that the general rule against contribution has survived primarily through repetition[48] rather than consistency of application.[49] The *Sargeant* court also recognized the injustice involved in allowing one party to bear the entire burden of loss for which his fellow joint tortfeasor would also be liable. *Sargeant* called for total abrogation or at least a further relaxation of the rule since there could be no "rigid compliance with the rule without continuing injustices."[50] The court went on to say that the possibility of inequity could not be avoided until the no contribution doctrine was dropped in favor of a more rational approach which would place liability upon each tortfeasor in proportion to his own culpability.[51]

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44. 55 Ill. 2d at 89, 302 N.E.2d at 43.
45. 24 Ill. App. 2d 534, 165 N.E.2d 346 (1960).
46. *Id.* at 538, 165 N.E.2d at 349.
47. 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).
48. Most Illinois cases which deal with contribution merely state the rule, giving no explanation or justification for its existence. *See* Chicago and Illinois Midland Ry. Co. v. Evans Construction Co., 32 Ill. 2d 600, 208 N.E.2d 573 (1965).
49. 86 Ill. App. 2d at 196, 229 N.E.2d at 772-73.
50. *Id.* at 198, 229 N.E.2d at 775.
51. The court stated at 86 Ill. App. 2d at 198, 229 N.E.2d at 775: "The law must be attuned to social developments and degrees of fault must be recognized which will permit indemnification from tortfeasors substantially at fault to those less blameworthy."

The *Gertz* court, though not alluding to *Sargeant*, is in accord with the *Sargeant* rationale: the Illinois Supreme Court has finally returned to a proper interpretation of the *Merryweather* doctrine. Thus, concurrent tortfeasors not acting in concert and whose negligence merely coincides at a given point in time should be able to obtain contribution.

One point of uncertainty should be cleared. Many courts have confused the terms "contribution" and "indemnity." The court in *Gertz* spoke in terms of indemnity, stating that what defendant Campbell sought was total indemnity for that portion of damages attributable to Snyder's malpractice.[52] However, as Snyder properly asserted, what Campbell actually sought was contribution. If, as the court contended, Campbell sought indemnity by allowing relief, the court eroded even further the active-passive exception which had already been greatly eroded in *Reese*.

It must be kept in mind that indemnity in its traditional form is a contractual (express or implied) concept, although the loss is originally created by a tort.[53] Illinois courts have traditionally required that there must exist some pre-tort relationship or community of interest between the joint tortfeasors which would give rise to a duty to indemnify. Situations which have given rise to such a duty are circumstances wherein there exists the relationships of manufacturer-seller in strict liability,[54] lessor-lessee,[55] and employer-employee,[56] to name a few. The court in *Mulhbauer v. Kruzel*[57] held that unless the third-party complaint alleges some pre-existing relationship between the tortfeasors which would give rise to a duty to indemnify, the third-party complaint must be dismissed. The decisions in *Sargeant* and *Reynolds v. Illinois Bell Telephone Co.*[58] have held otherwise; but, as more recent decisions have indicated, *Sargeant* and *Reynolds* have not been generally followed on this point.[59] The requirement of a

52. 55 Ill. 2d at 88, 302 N.E.2d at 43.
53. Kissel, *Theories of Indemnity As Related to Third Party Practice*, 54 CHI. BAR RECORD 157 (1973).
54. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
55. Mierzejewski v. Stranczek, 100 Ill. App. 2d 68, 241 N.E.2d 573 (1968); Blaszak v. Union Tank Car Co., 37 Ill. App. 2d 12, 184 N.E.2d 808 (1962).
56. Holcomb v. Flavin, 37 Ill. App. 2d 359, 185 N.E.2d 716 (1962).
57. 39 Ill. 2d 226, 234 N.E.2d 790 (1968).
58. 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964).
59. *Reynolds* was decided within a month after the appellate court decision in Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), which adopted the comparative negligence doctrine. *Maki* was thought to have been very influential in the *Reynolds* court's reasoning. However, *Maki* was later reversed in the Illinois Supreme Court. 400 Ill. 2d 193, 239 N.E.2d 445 (1968).

pre-tort relationship was again set forth in *Village of Lombard v. Jacobs.*[60]

The requisite pre-tort relationship has never been concretely defined. Conceivably, nothing more than joint involvement of the tortfeasors in causing the plaintiff's injuries may be sufficient to give rise to a duty to indemnify where the circumstances clearly indicate a distinction between the quality of their misconduct.[61] An example of this type of case is *Mullins v. Crystal Lake Park District,*[62] in which the court held that there existed a sufficient relationship where a child was injured by fireworks given to him by a fellow playmate (minor) who had stolen them from the co-defendant. The co-defendant's counterclaim against the minor was sustained as stating a sufficient relationship upon which to base an action over. In *Gertz* there existed no pre-tort relationship upon which indemnity could properly be predicated. As such, following the court's rationale throughout the case, it is reasonable to conclude that contribution was granted between the purely negligent tortfeasors, Campbell and Snyder.

Originally, the indemnity exception was formulated so as to alleviate the harsh effects of the rule against contribution.[63] Nevertheless, the indemnity exception has likewise been fraught with inequities, and as the court in *Gertz* recognized, a better solution to the problem is desperately needed.

The *Sargeant* court long ago presented a viable solution—the adoption of a principle based on equitable apportionment grounds. Such a rule would do away with both the inequities and confusion caused by the active-passive exception to the no contribution rule. The court should make explicit what is implicit in *Gertz.* Direct confrontation of the issue, rather than the avoidance exhibited in *Carver v. Grossman,*[64] for example, is a much preferred course in order to clarify lingering confusions. The court adopted the rule against contribution, and it has the power to replace it[65] preferably with a doctrine based upon equitable principles such as those announced in *Dole v. Dow Chemical Co.*[66] (cited with approval in *Gertz*) and *Kelly v. Long Island Lighting Co.*[67] In the *Dole* case the New York Court of Appeals

60. 2 Ill. App. 3d 826, 277 N.E.2d 758 (1972).
61. Kissel, *Theories of Indemnity As Related to Third Party Practice,* 54 CHI. BAR RECORD 157, 160 (1973).
62. 129 Ill. App. 2d 228, 262 N.E.2d 622 (1970).
63. Palier v. Dries and Krump Mfg. Co., 81 Ill. App. 2d 1, 225 N.E.2d 67 (1967); Spivack v. Hara, 69 Ill. App. 2d 22, 216 N.E.2d 173 (1966).
64. 55 Ill. 2d 507, 305 N.E.2d 161 (1973).
65. Molitor v. Kaneland Community Unit, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).
66. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).
67. 37 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

did away with the active-passive negligence theory and replaced it with the doctrine of equitable apportionment. In so doing, the court of appeals noted the widespread dissatisfaction with the prevailing indemnity theory and the confusion caused by the looseness of the active-passive terminology. The *Dole* court concluded:

> [W]here a third party is found to have been responsible for part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of the responsibility in negligence between those parties.[68]

The *Dole* case was before the court only upon the pleadings; but *Kelly,* which came up on appeal after trial, reaffirmed *Dole* and left no doubt that equitable apportionment is now the rule in New York. In its decision in *Gertz,* the Illinois Supreme Court demonstrated its amenability to the adoption of the *Dole* rule. The language in *Gertz* was pervasively couched in equitable terms; the court expressly asserted that indemnity was based on equitable principles. *Gertz* went on to say that the right to indemnity (contribution) must be capable of development so as to reach *just* solutions to problems between multiple joint tortfeasors. Further, the court went on to state that to bar Campbell's action over would result in the "indefensible enrichment"[69] of Snyder.

What must be realized is that contribution and indemnity have the same goal—fair allocation of the ultimate burden of tort recovery among those legally responsible.[70] Viewed as such, the adoption of contribution on a fault weighing basis is not a radical departure from indemnity; in fact, the *Chicago Railways* case sanctioned such a process over fifty years ago. Rather, contribution is a logical extension of the fault weighing process already present in indemnity situations; it removes the inequity resultant whenever one of two negligent parties must bear the entire burden of loss which was occasioned by both.

One of the longstanding objections to contribution has been that the law has no machinery to determine relative fault of the tortfeasors. This, however, is not the case. The active-passive concept of indemnity always involved a fault weighing process by which the jury had to determine whether or not there existed that "qualitative distinction" in conduct so as to shift the liability from the passive to the active

68. 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.
69. 55 Ill. 2d at 91, 302, N.E.2d at 45.
70. Werner, *Contribution and Indemnity in California,* 57 CAL. L. REV. 490 (1969).

tortfeasor. Under equitable contribution principles, instead of determining the more pronounced disparities in conduct, the jury is called upon to perform a refined weighing process and determine the percentage of culpability attributable to each tortfeasor. The *Chicago Railways* case has held that such a weighing of the relative delinquencies is not against public policy.

Aside from indemnity cases, the courts have used fault weighing concepts in other areas. Admiralty law, the Federal Employers Liability Act, and comparative negligence jurisdictions, though operating under equitable concepts, have not been hampered in administering justice between plaintiffs and defendants. There exists no logical reason why such concepts would not be equally effective in contribution cases. It is conceded that in some cases the fault weighing process may be difficult, but such difficulty is not a sufficient justification for the imposition of the entire burden of loss upon one tortfeasor.[71] Moreover, the general principles of common law and equity, that those who stand in equal risk should bear equal burden[72] and that everyone is responsible for the proximate result of his own acts,[73] outweigh any difficulties involved in the apportionment of damages.

A final blow is dealt to the rule barring contribution when the two remaining rationales for its existence are considered: first, the courts have had a disdain for certain types of litigation between "bad" persons.[74] The previously cited quote[75] from the *Moroni* court is quite appropriate here and effectively answers this objection to contribution. The nature of conduct which has come to be defined as tortious has changed so much that today it is unrealistic to characterize most negligent persons as wrongdoers except in the legal tort sense. Although this objection may have been appropriate as to intentional tortfeasors, its usefulness as applied to negligent tortfeasors has long been lost. Secondly, the rule was stated as having a deterrent effect on concerted tortious conduct since access to the courts (and hence contribution) was denied. Although the reasoning may be rational as applied to intentional tortfeasors, when applied to purely negligent tortfeasors it has absolutely no deterrent effects.

Aside from the speciousness of deterrent arguments generally, the

71. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937).
72. Boehlen, *Contribution and Indemnity Between Joint Tortfeasors*, 21 CORNELL L.Q. 552 (1936).
73. Bituminous Casualty Corp. v. American Fidelity and Casualty Co., 22 Ill. App. 2d 26, 159 N.E.2d 7 (1959).
74. This is somewhat analogous to the "clean hands" doctrine in equity.
75. See text accompanying footnote 46 *supra*.

rationale fails completely in that most people do not have knowledge of the rule so as to be deterred. Further, most tortfeasors found guilty of negligence do not realize their negligence until injury or damage results or until a jury tells them so. In short, the rule against contribution has no logical or equitable basis to support it. The court should cease to perpetuate the inequities and confusion resultant therefrom.

Implicit in *Gertz* is the fact that the court has abrogated the rule and that a right of contribution does exist (and probably has existed) in Illinois as between purely negligent, non-intentional joint tortfeasors. Still, an express, clarifying statement to that effect by the Illinois Supreme Court is in order, especially since the court has totally emasculated and disregarded the principles of active-passive negligence in *Reese* and *Gertz*.

EFFECT OF CONTRIBUTION UPON NEGLIGENCE ACTIONS

As for the present, it is quite uncertain what effect a return to equitable principles will have on those areas previously governed by indemnity principles. One New York legal writer has already predicted that the introduction of equitable principles in the determination of loss distribution has sounded the "death knell" for the contributory negligence doctrine and that comparative negligence is not far behind.[76]

Such is not the case, since *Dole* and *Kelly* made it clear that they did not affect the rights of the plaintiff. Subsequent New York case law has affirmed this proposition.[77] Although the doctrine allowing contribution between joint tortfeasors is somewhat at odds with the doctrine of contributory negligence, the adoption of the former by no means requires the adoption of the latter. This is especially true in Illinois where the supreme court has specifically left the decision of whether or not to adopt comparative negligence to the legislature.[78] The court's position on this point has recently been buttressed by the denial of leave to appeal in *Erickson v. Walsh*,[79] in which the court refused to reconsider the issue.

The adoption of equitable apportionment should not affect rights among tortfeasors where they have provided for indemnity expressly

76. Schwabb, *Dole v. Dow Chemical: A Preliminary Analysis*, 45 N.Y.S.B.J. 144 (1973).
77. Zillman v. Meadowbrook Hospital, 73 Misc. 2d 726, 342 N.Y.S.2d 302 (Sup. Ct. 1973); Yarish v. Dowling, 70 Misc. 2d 467, 333 N.Y.S.2d 508 (Sup. Ct. 1972).
78. *See* note 59 *supra*.
79. 11 Ill. App. 3d 99, 296 N.E.2d 36 (1973), *leave to appeal denied*, September Term, 1973.

by contract. Even where the indemnitee has contracted to be held harmless of his own negligence, such contracts should remain enforceable according to their terms unless against public policy[80] or governed by statute.[81]

The contribution doctrine will have its greatest impact in those situations where implied indemnity has been granted. Where the indemnitor has previously been held liable derivatively for the actions of his servant or absolutely under the Structural Works Act,[82] or where the negligence of the two parties is merely concurrent, the contribution rule will go far to adjust any disputes among the tortfeasors in an equitable fashion. There is no overriding public policy militating against such a result. In fact, New York courts under *Dole* have allowed contribution in such situations.[83]

Another possible effect of the adoption of the rule may be to decrease the number of suits filed by parents in behalf of minor children who have been injured, since a finding could be made that the parent was partially at fault. The New York courts in *Hairston v. Broadwater,*[84] *Sorrentino v. United States,*[85] and *Kiernan v. Jones*[86] have recognized that a third-party action may be brought by the prime defendant against the parent for contribution. As such, the parent might be somewhat hesitant in bringing the original suit since the parent's liability may not be satisfied through the use of any portion of the child's recovery. Although as the *Hairston* court observed, there does exist less inducement to bring suit on the child's behalf, the parent would probably still file suit to obtain the prime defendant's share of the liability. Otherwise, the parent would bear the entire burden of medical care, etc., for the injured child.

Effect of Contribution on Strict Liability

A major concern is the effect of the contribution doctrine on the field of strict liability in tort. Under *Suvada v. White Motor Co.* a

80. Agreements covering the indemnitee's own negligence are not against public policy. Patent Scaffolding Co. v. Standard Oil Co. of Indiana, 68 Ill. App. 2d 29, 215 N.E.2d 1 (1966); Gust K. Newberg Const. Co. v. Fishback, Moore & Morrissey, Inc., 46 Ill. App. 2d 238, 196 N.E.2d 513 (1964).

81. Ill. Rev. Stat. ch. 29, § 61 (1973), provides that with respect to construction type contracts, indemnity or hold harmless clauses against a party's own negligence are void as against public policy.

82. Ill. Rev. Stat. ch. 48, §§ 60-69 (1973).

83. Keefe v. Balling Const. Co., 39 A.D. 638, 331 N.Y.S.2d 293 (1972) (contribution allowed in scaffold case).

84. 73 Misc. 2d 523, 342 N.Y.S.2d 787 (Sup. Ct. 1973).

85. 344 F. Supp. 1308 (E.D.N.Y. 1972).

86. 73 Misc. 2d 829, 342 N.Y.S.2d 873 (1973).

consumer may maintain an action against the original manufacturer for injuries resultant from the unreasonably dangerous condition of a product which existed at the time the product left the manufacturer's control. The question resolves itself into whether the burden of loss for a defective product should fall solely upon the manufacturer, or whether it should be apportioned between the manufacturer and any person whose negligence induced or contributed to the injury sustained. The appellate court for the first district in *Burke v. Skyclimber, Inc.*[87] has recently resolved the issue denying contribution and indemnity to the manufacturer. In *Burke* the plaintiff's decedent was killed while working upon a defective scaffold owned by the decedent's employer, the Chicago Housing Authority, and manufactured by Skyclimber. The plaintiff sued Skyclimber in strict liability in tort and in negligence. Skyclimber filed a third-party complaint against the Chicago Housing Authority alleging that Skyclimber was passively negligent whereas the Chicago Housing Authority was actively negligent in creating new defects in the scaffold. The complaint alleged further that the Chicago Housing Authority misused and failed to properly maintain the scaffold. On appeal, the trial court's dismissal of the third-party complaint was affirmed. Skyclimber argued that although it could be held strictly liable in tort, its action over against the Chicago Housing Authority was not precluded. In so doing, Skyclimber urged the court to adopt the same fault weighing process in products liability cases which had been disapproved in *Suvada* and *Texaco v. McGrew Lumber Co.*[88] The court disagreed, holding that the third-party action was improper in that (1) Skyclimber was actively negligent in creating a defective product and (2) if Skyclimber was not negligent, then it would not be liable and therefore could not seek indemnity.[89] The court felt that the underlying rationale in *Suvada* would prevent this type of indemnity from filtering down the chain of distribution.

The court was correct in not applying fault weighing concepts to strict liability cases. This becomes apparent when one realizes that the basis of liability in products liability is not one of negligence or fault. A manufacturer may be liable for the injuries caused by a defective product even where he is totally free from negligence.[90] The

87. 13 Ill. App. 3d 498, 301 N.E.2d 41 (1973), *leave to appeal granted*, November Term, 1973.
88. 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).
89. *Accord*, Lopez v. Brackett Stripping Machine Co., 303 F. Supp. 669 (N.D. Ill. 1969).
90. Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968).

first district reaffirmed *Burke* in *Kossifos v. Louden Machinery Co.*[91] The court realized that the basis of strict liability is the "condition of a product whereas the basis of negligence is the *conduct* of a person."[92] The court stated that these were fundamentally two different types of torts, and that in strict liability cases, the conduct of the defendant-manufacturer is not material.[93] As such, since negligence is not an issue in a strict liability case, there can be no weighing of the relative negligence between the manufacturer and a negligent third party. The court, therefore, concluded that indemnity (and therefore contribution) is not available to a party held strictly liable in tort.[94] The rationale of the *Kossifos* court is consonant with the *Suvada* decision and its progeny. In *Suvada* the supreme court noted:

> Indemnity here is not, however, premised on any theory of active and passive negligence. (To require proof that Bendix was actively negligent would be the antithesis of strict liability.)[95]

Arriving at the same conclusion, the court in *Texaco* held that the *Suvada* decision "intended to eliminate the fault weighing process of active-passive negligence in determining any grant of indemnity relief."[96] Basically, social policy allows recovery against a manufacturer for placing dangerous products into the stream of commerce. The manufacturer is to make profits from the sales of such products and as such, in justice, should also bear the losses resultant therefrom.This burden placed upon the manufacturer is shared by all segments of society, as reflected in the price of the product. Strict liability is a socially expedient way to make the plaintiff whole and to allow the loss to be spread over a broad spectrum of society.

The denial of contribution in products liability cases and its allowance in other tort cases is not necessarily inconsistent when one views the relevant tort goals to be served by each. The purpose of the tort law is to compensate the injured plaintiff and to distribute the loss in a socially desirable manner. The desirability of contribution in non-products cases has been discussed above. But to grant contribution in strict liability cases would defeat the underlying purpose of such liability—placing the burden on the party who places the product in the stream of commerce.

The appellate court in *Sweeney v. Matthews*[97] went so far as to

91. Appellate Court of Illinois, 1st District No. 56647 (Feb. 14, 1974).
92. *Id.* at 3.
93. Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).
94. Appellate Court of Illinois, 1st District, No. 56647 (Feb. 14, 1974) at 7.
95. 32 Ill. 2d at 624, 210 N.E.2d at 189.
96. 117 Ill. App. 2d at 357, 254 N.E.2d at 588.
97. Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968).

hold that the indemnitee's fault should be disregarded. Hence, any party in the distributive chain may seek indemnity up the chain against the manufacturer, regardless of the indemnitee's fault. To allow any actions down the distributive chain by the manufacturer would defeat efficient loss distribution[98] and not spread the loss over a broader spectrum of society which "should share some burdens which are inseparable from activities that benefit society."[99] These considerations militate against indemnity or contribution down the distributive chain.

Some courts have taken a different view, allowing indemnity on grounds analogous to the defenses to products liability suits—misuse and assumption of the risk. In *Goldenstein v. Compudyne Corp.*,[100] an indemnity action by the manufacturer against the plaintiff's employer was sustained where the employer continued to use the defendant's product despite the known defective condition, thus causing injury to the plaintiff. Nevertheless, most jurisdictions take the view that such an action over is not allowable. In *Fenton v. McCrory Corp.*,[101] although Pennsylvania allows contribution, the court stated:

> We believe that there is no right of contribution between a party whose liability is imposed under the strict liability rule . . . and a person whose liability is based on negligence or want of care.[102]

To hold otherwise would frustrate the purposes underlying strict liability in tort.

In conclusion, the adoption of a rational fault weighing process to determine the proportionate share of liability between joint tortfeasors will go far to effectuate justice between two or more negligent tortfeasors. The solution to the problem of apportionment lies in determining the duty owed by each defendant to the plaintiff and what percentage of the loss was caused by each in the breach of that duty.[103] In adopting the contribution rule the courts should be wary not to apply it to situations, *i.e.*, strict liability cases, where a paramount social policy exists, militating against contribution.

The passing of the rule barring contribution between joint tortfeasors will not be missed. As the court in *Lipson v. Gerwitz*[104] noted:

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98. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).
99. *Id.* at 1158.
100. 45 F.R.D. 467 (S.D.N.Y. 1968).
101. 47 F.R.D. 260 (W.D. Pa. 1969).
102. *Id.* at 262.
103. Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952).
104. 70 Misc. 2d 599, 334 N.Y.S.2d 662 (Dist. Ct. 1972).

> The entire concept of liability without fixing degrees of responsibilities was replete with inequities. The doctrine of active and passive negligence, at best, was a strained concept, difficult to understand and tedious to apply.[105]

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105. *Id.* at 601, 334 N.Y.S.2d at 664.