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Allison v. Shell Oil Company: The Viability of Active-Passive Indemnity after Illinois' Contribution among Joint Tortfeasors Act, 20 J. Marshall L. Rev. 363 (1986)

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*ALLISON v. SHELL OIL COMPANY:** THE VIABILITY OF ACTIVE-PASSIVE INDEMNITY AFTER ILLINOIS' CONTRIBUTION AMONG JOINT TORTFEASORS ACT**

Active-passive implied indemnity ("active-passive indemnity")[1] is a judicially created doctrine designed to mitigate the harsh consequences of the no contribution rule among joint tortfeasors.[2] Conse-

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* Allison v. Shell Oil Co., 113 Ill. 2d 26, 495 N.E.2d 496 (1986).

** Ill. Rev. Stat. ch. 70, §§ 301-305 (1983).

1. Indemnity is a common law principle which shifts the total costs from one tortfeasor, who has satisfied the judgment to the shoulders of another person. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 51 at 341 (5th ed. 1984).

Indemnity may be expressed or implied by contract or implied in law. Indemnity implied in law, classically requires a pretort relationship and a qualitative difference in the nature of the parties' conduct to justify shifting the liability from one tortfeasor to another. *See, e.g.*, Van Slambrouck v. Economy Co., 105 Ill. 2d 462, 469, 475 N.E.2d 867, 870 (1985). Pretort relationships which give rise to a duty to indemnity are generally: (1) master-servant, (2) lessor-lessee, (3) employer-employee, and (4) owner and his lessee. Allison v. Shell Oil Co., 133 Ill. App. 3d 607, 610-611, 479 N.E.2d 333, 336 (1985), *aff'd*, 113 Ill. 2d 26, 495 N.E. 2d 496 (1986). In Campbell v. Joslyn Mfg. Co., 65 Ill. App. 2d 344, 211 N.E.2d 512 (1965), the appellate court expanded the pretort relationship to include seller purchaser. *Id.* Justice Simon has argued that a pretort relationship should include seller-purchaser and manufacturer-purchaser. *Van Slambrouck* 105 Ill. 2d at 471, 475 N.E.2d at 871 (Simon, J., dissenting). Some cases recognize implied indemnity in the absence of a pretort relationship. *See, e.g.*, Loeher v. Illinois Bell Tel. Co., 21 Ill. App. 3d 555, 558, 316 N.E.2d 251, 254 (1974) (owner of negligently parked car indemnified by negligent driver of car). *See also* Miller v. Dewitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) (the supreme court stated in dictim that an active-passive indemnity action may lie absent a pretort relationship). *But see Van Slambrouck*, 105 Ill. 2d at 469, 475 N.E.2d at 870 (holding that a pretort relationship is necessary for indemnification). *See generally* Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287, 298 (1976) (Judge Bua discusses the confusion which has arisen regarding the pretort relationship).

In addition to a pretort requirement, a qualitative distinction between the parties conduct must exist to bring an implied indemnity action. *See, e.g., Van Slambrouch*, 105 Ill. 2d at 469, 475 N.E.2d at 870. A qualitative distinction exists between the parties conduct when one party's conduct is active and the other party's conduct is passive. Carver v. Grossman, 55 Ill. 2d 507, 513, 305 N.E.2d 161, 164 (1973); Zizzo v. Ben Pekin Corp., 79 Ill. App. 3d 386, 398, 398 N.E.2d 382, 391 (1979). For a discussion of the terms "active" and "passive," see *infra* note 3.

2. Contribution is a doctrine which apportions liability between negligent tortfeasors either on a *pro rata* basis or in proportion to the relative fault of each tortfeasor. W. PROSSER, *supra* note 1, § 50 at 340. The rule denying contribution among joint tortfeasors was originally set down in Merryweather v. Nixan, 101 Eng. Rep. 1337 8 Term. R. (K.B. 1799). The original rule in *Merryweather* applied only to intentional tortfeasors, but the majority of the American courts extended the rule to bar contribution of negligent tortfeasors. Skinner v. Reed-Prentice Div. Pack Co., 70 Ill. 2d 1, 8, 374 N.E.2d 437, 439 (1978). *See* Reath, *Contribution Between Persons Jointly Charged for Negligence-Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177

quently, where two or more tortfeasors are liable for an indivisible injury, active-passive indemnity allows the minimally culpable or passive tortfeasor to shift his entire loss to the truly culpable or active tortfeasor.[3] After the Illinois Supreme Court adopted the contri-

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(1898) (thorough analysis of the origin and expansion of the *Merryweather* rule). Illinois adopted the no contribution rule among intentional tortfeasors in Nelson v. Cook, 17 Ill. 443 (1856) and expanded the rule to negligent tortfeasors in Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905). *But see* Polelle, *Contribution Among Negligent Joint Tortfeasors in Illinois: A Squeamish Damsel Comes of Age*, 1 LOY. U. CHI. L.J. 267 (1970) (Professor Polelle argues that Illinois case law does not prohibit contribution).

The major policy reason for denying contribution among intentional tortfeasors was that the law will not help wrongdoers. *Skinner*, 70 Ill. 2d at 8-9, 374 N.E.2d at 439-40. However, this policy reason does not support barring contribution when liability is based on negligent rather than willful conduct. In fact the rule barring contribution among intentional tortfeasors was the exception to the rule permitting contribution. *See, e.g.*, Leflar, *Contribution And Indemnity between Tortfeasors*, 81 U. PA. L. REV. 130, 130-131 (1932) (analysis of *Merryweather* and of the historical relation between indemnity and contribution). The no contribution rule led to harsh results when applied to negligent tortfeasors because of the doctrine of joint and several liability. Under the doctrine of joint and several liability, the plaintiff could collect the full judgment from any joint tortfeasor. Bueler v. Whaler, 70 Ill. 2d 51, 374 N.E.2d 460 (1977). However, the tortfeasor who satisfied the judgment, regardless of his relative culpability was left without a remedy against the remaining tortfeasors who may have been equally or greater at fault. *See* W. PROSSER, *supra* note 1, § 50 at 337-38.

Illinois courts, in order to mitigate the harsh consequences of the no contribution rule without overruling prior precedent, created the doctrine of active-passive indemnity. Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 197, 224 N.E.2d 769, 774 (1967). Under the active-passive indemnity doctrine a passive negligent tortfeasor could bring an indemnity action against an active negligent tortfeasor if both parties were jointly liable for the same tort. For a discussion of the definition of "active" and "passive," see *infra* note 3. For example, "A" negligently parks his car too close to a cross walk partially blocking oncoming traffic. "B," is speeding and negligently runs down the plaintiff in the crosswalk. The plaintiff brings a negligence suit against A and B and obtains a $100,000 judgment. The trial court determines that A is passively negligent and 3% responsible for the plaintiff's injuries, while B is actively negligent and 97% responsible. The plaintiff decides to satisfy his judgment from A, who pays the plaintiff $100,000. Under the no contribution rule A has no remedy against B. However, A can recover 100% ($100,000) of his damages from B under the doctrine of active-passive indemnity. Although the active-passive indemnity doctrine provided a more equitable distribution between A and B, it does not mete out complete justice because A completely escapes liability. *See Skinner*, 70 Ill. 2d at 12, 373 N.E.2d at 442 (Implied indemnity not completely equitable); W. PROSSER, *supra* note 1, at 343 (Dean Prosser discusses the inequities of the active-passive doctrine); Judicial Committee, *infra* note 54, at 216.

3. *See* Carver v. Grossman, 55 Ill. 2d 507, 511-12, 305 N.E.2d 161, 163 (1973). There is much confusion regarding the distinction between "active" and "passive" conduct. In *Carver*, the Illinois Supreme Court, while referring to the difficulty of the distinguishing between "active" and "passive" conduct stated that "these terms have not attained precise judicial definition." *Id.* at 511, 305 N.E.2d at 163. These words are considered terms of art and are best determined on a case basis. Moody v. Chicago Trans. Auth., 17 Ill. App. 3d 113, 307 N.E.2d 789 (1974); Bua, *supra* note 1, at 300 ("the trend is to view active-passive as terms of art and apply them on an *ad hoc* basis"). The Illinois Supreme Court defined active and passive when it stated that "one 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." Sargent v. Interstate Bakeries, Inc., 86 Ill. 2d 187, 193, 229 N.E.2d 769, 772 (1967) (quoting King v.

bution rule in *Skinner v. Reed Prentice Division Package Machinery Co.*,[4] and after the rule's subsequent codification in the Contribution Among Joint Tortfeasors Act (the "Act"),[5] considerable disagreement developed in the Illinois appellate courts regarding the continued viability of the active-passive indemnity doctrine.[6] In

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Timber Structures, Inc., 240 Cal. App. 2d 178, 182, 49 Cal. Rptr. 414, 417 (1966).

Under some circumstances inaction or passivity will constitute the primary cause of the injury and is regarded as active conduct. Topel v. Porter, 95 Ill. App. 2d 315, 329, 237 N.E.2d 711, 712 (1968). Thus, mere motion is not the ultimate distinction between active and passive conduct. *See* Trzos v. Berman Leasing Co., 86 Ill. App. 2d 176, 184-85, 229 N.E.2d 787, 792 (1967); Garfield Park Comm. Hosp. v. Vitacco, 27 Ill. App. 3d 741, 327 N.E.2d 408 (1975). The 1976 Report of the Illinois Judicial Conference criticized the use of active and passive negligence and argued that courts, in reality, were not distinguishing between the conduct of the parties, rather they were determining relative culpability. *Judicial Committee, infra* note 54, at 216-17. For additional criticism of the active-passive distinction see Bua, *supra* note 1, at 314 ("all attempted definitions of active-passive negligence breakdown in application"); Cottrell & Zaremski, *Risk Shifting Devices and Third Party Practice: The Impact of Skinner and Alvis*, 14 LOY. U. CHI. L.J. 467, 473 (1983) (author argues that the active-passive distinction is nebulous); Comment, *Implied Indemnity After Skinner and the Illinois Contribution Act: The Case for a Uniform Standard*, 14 LOY. U. CHI. L.J. 531, 536 (1983) (author argues that passive rationale has become questionable) [hereinafter *Indemnity After Skinner*].

4. *See infra* note 28.

5. ILL. REV. STAT. ch. 70, §§ 301-05 (1983). The Illinois Supreme Court ruled that the Illinois Contribution Among Joint Tortfeasors Act ("the Act") was codification of the *Skinner* decision. *E.g.*, Doyle v. Rhodes, 101 Ill. 2d 1, 8-9, 461 N.E.2d 382, 386 (1984). The legislative debates provide little guidance as to the legislature's intent in passing the Act. *See* Heinrich v. Peabody Int'l Corp., 139 Ill. App. 3d 289, 295, 486 N.E.2d 1379, 1384, (citing 1979 Senate Floor Debate on S.B. 308, May 14, 1979, at 173-176 House Floor Debate on S.B. 308, June 14, 1979, at 17-23.

6. For example, in *Heinrich*, 139 Ill. App. 3d at 289, 486 N.E.2d at 1379, the appellate court abolished active-passive indemnity as well as implied indemnity. In *Heinrich*, the plaintiff's decedent was working on a trash compactor owned by his employer, Brookshore Lithographers, Inc. (Brookshore), when a janitor, Ignacio Ayala, started the trash compactor and decapitated the decedent. *Id.* at 290, 486 N.E.2d at 1381. The plaintiff brought a wrongful death action based on negligence against Ayala and his alleged employer, San-Dee. *Id.* San-Dee, in turn, brought a third party action against Brookshore seeking indemnity and contribution. *Id.*

The appellate court concluded that San-Dee had no right to indemnity from Brookshore because contribution replaced implied indemnity as a third party remedy in Illinois. In this regard the court noted that:

> We consider that the historical relationship between indemnity and contribution, the policies supporting the adoption of contribution by our supreme court, the legislature's intent in passing the Contribution Act evidenced by what was said, what was not said, the broad statutory scheme and the specific language of the Act setting forth the general application of contribution (ILL. REV. STAT. 1979, ch. 70 par. 302(a)), all weigh in favor of a finding that implied indemnity has been abolished.

Id. at 302, 486 N.E.2d at 1388. *See* 535 N. Mich. Condo. Ass'n v. BJF Dev. Inc., 143 Ill. App. 3d 749, 493 N.E.2d 111 (1986) (implied indemnity abolished); Holmes v. Sahara Coal Co., 131 Ill. App. 3d 666, 475 N.E.2d 1383 (1985) (implied indemnity abolished); Bristow v. Griffitts Constr. Co., 140 Ill. App. 3d 191, 488 N.E.2d 332 (1986) (Morthland, J., dissenting) (Contribution Act abrogates need for implied indemnity). *See also* Widland, *infra* note 40, at 552 (contribution has extinguished any need for implied indemnity).

In contrast to the appellate decisions mentioned above which have extinguished

Allison v. Shell,[7] the Illinois Supreme Court addressed the issue of whether the doctrine is no longer[8] a valid cause of action in Illinois.[9] The *Allison* court reasoned that the doctrine was originally designed to equitably counter the harsh affects of the no contribution rule.[10] However, the court concluded that after Illinois adoption of contribution, the doctrine serves to perpetrate the very inequality it was originally designed to mitigate: it imposes liability without regard to

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implied indemnity, are other appellate decisions which have held that implied indemnity still remains a viable third-party remedy in certain circumstances. For example, in Morizzo v. Laverdure, 127 Ill. App. 3d 767, 469 N.E.2d 653 (1984), the appellate court abolished active-passive indemnity but concluded that actions for indemnity will lie in vicarious and strict liability cases. *Id.* at 774, 469 N.E.2d at 658. In *Morizzo*, the plaintiff brought a negligence action against the general contractor and subcontractor when his building collapsed. *Id.* at 768, 469 N.E.2d at 654. The general contractor settled with the plaintiff and the subcontractor filed a third party action for indemnity against the general contractor and the architect. *Id.* The general contractor sought dismissal of the indemnity action on the ground that indemnity actions were barred by the Contribution Act. *Id.* at 767, 469 N.E.2d at 654-55. The trial court denied the motion, but certified the issue for appeal. *Id.* at 768, 469 N.E.2d at 654. On appeal, the appellate court held that the Contribution Act had extinguished active-passive indemnity but that implied indemnity still remains a viable remedy in certain circumstances. *Id.* at 774, 469 N.E.2d at 658. In this regard, the court stated:

> This court held that implied indemnity is not extinguished by the passing of the Contribution Act for cases involving some pretort relationship between the parties which gives rise to a duty to indemnify, *e.g.*, in cases involving vicarious liability (lessor-lessee; employer-employee; owner and lessee; master and servant). In *Lowe*, this court held that implied indemnity was still viable with respect to "upstream" claims in a strict liability action. Except possibly for those causes of action based on the theories of indemnity just enumerated, it is our opinion that the Contribution Act extinguished a cause of action for active-passive indemnity in Illinois.

Id. at 774, 469 N.E.2d at 658. *See also* Jethroe v. Koehring Co., 603 F. Supp. 1200 (S.D. Ill. 1985) (indemnity will lie for vicarious or technically liability claims and for upstream strict liability claims); Bristow v. Griffitts Constr. Co., 140 Ill. App. 3d 191, 488 N.E.2d 332 (1986) (implied indemnity permitted where one party's liability is solely derivative); *Allison*, 133 Ill. App. 3d 607, 479 N.E.2d 333 (1985) (implied indemnity viable only for upstream strict liability and vicarious liability claims); Van Jacobs v. Parikh, 97 Ill. App. 3d 610, 422 N.E.2d 979 (1981) (implied indemnity permitted in pretort and strict liability cases); Holmes v. Sahara Coal Co., 131 Ill. App. 3d 666, 475 N.E.2d 1383 (1985) (Kasserman, J., dissenting) (Contribution Act did not extinguish implied indemnity in "upstream" strict liability and vicarious liability claims); Ferrini, *The Evolution from Indemnity to Contribution - A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254 (1978) (implied indemnity workable in pretort cases). *See generally* (Judicial Conference, *infra* note 59 at 219-220 (The Judicial Conference recommended that indemnity be limited to common law uses).

7. *Allison*, 113 Ill. 2d at 26, 495 N.E.2d at 496.

8. The Illinois Supreme Court stated:

> This case presents for decision a question previously left unanswered by this court in *Simmons v. Union Electric Co.* (1984), 104 Ill. 2d 444, 454, and *Heinrich v. Peabody International Corp.* (1984), 99 Ill. 2d 344; whether implied indemnity remains a viable theory for shifting the costs of tortious conduct among jointly liable tortfeasors following adoption of an Act in relation to contribution among joint tortfeasors.

Allison, 113 Ill. 2d at 26, 495 N.E.2d at 497.

9. *Id.* at 35, 495 N.E.2d at 501.

10. *See supra* note 2.

fault.[11]

The circumstances which gave rise to the *Allison* litigation are typical in third-party litigation.[12] In August of 1979, Shell Oil Company ("Shell") contracted with Strange & Coleman, Inc. ("Strange & Coleman") to repair a "catcracker" unit at Shell's refinery.[13] Subsequently, Strange & Coleman contracted with J.J. Wuellner & Sons Inc. ("Wuellner"), a subcontractor, to provide scaffolding so that Strange & Coleman could rebuild the multistory catcracker.[14] Wuellner erected the scaffolding but left an area of the catcracker inaccessible to Strange & Coleman's employees.[15] In order to reach the inaccessible area, the employees ran a board from the scaffolding to a part of the catcracker.[16] The plaintiff, a Strange & Coleman employee, was injured when he fell from atop the board.[17]

The plaintiff then brought suit against Shell and Wuellner under the Illinois Structural Work Act.[18] Shell and Wuellner in turn

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11. *Allison*, 113 Ill. 2d at 34, 495 N.E.2d at 501. *See generally* U.S. Home Corp. v. George Kennedy Constr., 617 F. Supp. 893, 897 (1985) (Judge Shadur argues that after the adoption of contribution any rationale for active-passive indemnity has little substance).

12. The plaintiff did not sue his employer (Strange & Coleman) because of the bar by The Workmen's Compensation Act. ILL. REV. STAT. ch. 48 § 138 (1983). Consequently, Shell and Wuellner brought Strange & Coleman into the case as a third party defendant. The Illinois Supreme Court has ruled that even though the employee's action against his employer is barred by the Workmen's Compensation Act, the liable third parties may bring an indemnification or contribution action against the employer. *Skinner*, 70 Ill. 2d at 15-16, 374 N.E.2d at 443. Thus, in *Allison*, Shell and Wuellner were able to circumvent the Workmen's Compensation Act and hold Strange & Coleman liable for the injuries of the plaintiff. *See generally* Kissel, *Developments in Third Party Practice-Contribution and Indemnity*, ILL. B.J. 654, 668 (1983) (author discusses circumventing the Workmen's Compensation Act); Comment, *Development of Rights Against Negligent Third Parties Under the Illinois Workmen's Compensation Act*, 9 DEPAUL L. REV. 220 (1960).

13. The Illinois Supreme Court, quoted from the contract where it stated that, "Strange & Coleman agreed to 'furnish all labor, supervision, machinery, equipment, materials and supplies necessary to rebuild the catcracker while taking responsibility for all acts and omissions of its subcontractors.'" *Allison*, 113 Ill. 2d at 27, 495 N.E.2d at 497.

14. *Id.*

15. *Id.* at 27-28, 495 N.E.2d at 497.

16. The board which Strange & Coleman's employees ran in order to perform welding in the inaccessible area was 2-foot by 12-foot. *Id.* at 28, 495 N.E.2d at 497. Evidence admitted at trial showed that the board was not secured, although wire was available to make it secure. *Id.* Furthermore, one of Strange & Coleman's employees complained of the unsecured board, but the foreman failed to secure the board. Brief of Appellant, J.J. Wuellner & Sons, Inc. at 7.

17. The plaintiff was a boilermaker and attempting to weld the cyclone portion of the catcracker when he and the board fell. *Allison*, 113 Ill. 2d at 28, 495 N.E.2d at 497.

18. ILL. REV. STAT. ch. 48 §§ 60, 69 (1983). The Structural Work Act imposed a duty on all three defendants to provide for the safety of the plaintiff. *See id.* Liability under the Structural Work Act is not based on strict liability, rather, liability is imposed based on some degree of fault. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501. For liability to attach under the Structural Work Act, a party must have had charge of

filed a third-party action against Strange & Coleman seeking indemnification or in the alternative, contribution.[19] All three defendants settled with the plaintiff before the case went to trial.[20] Thus, the trial court did not address the plaintiff's claims; rather, the sole issue was the proper allocation of liability among the three defendants for the settlement amount.[21]

The trial court held that Shell and Wuellner were entitled to complete indemnity from Strange & Coleman.[22] On appeal, the Illinois Appellate Court reversed holding that the Act had rendered void the active-passive indemnity doctrine in Illinois.[23] The court did not limit its discussion to the facts of the case,[24] stating in dictim that implied indemnity actions would lie for claims based on vicarious or upstream strict liability.[25]

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the work. Simmons v. Union Elec. Co., 104 Ill. 2d 444, 451, 473 N.E.2d 946, 949 (1984). For the purpose of promoting safety in the construction business, the courts have construed the phrase "having charge of" liberally. M.F.A. Mutual Ins. Co. v. Crowthor, Inc., 120 Ill. App. 3d 387, 391, 458 N.E.2d 71, 74 (1983). Before the *Allison* decision, a party liable under the Structural Work Act could obtain indemnification from an active party if his conduct was passive. *See Crowther*, 120 Ill. App. 3d at 392, 458 N.E.2d at 74-75. However, the supreme court in *Allison*, eliminated active-passive implied indemnity when liability is based on the Structural Work Act. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501.

19. *Allison*, 113 Ill. 2d at 28, 495 N.E.2d at 498.

20. *Id.*

21. All three defendants agreed to settle with plaintiff for $240,000. Strange & Coleman paid this amount pursuant to the settlement agreement. *Allison*, 133 Ill. App. 3d 608, 479 N.E.2d at 334.

22. *Id.* The indemnification and contribution proceedings were submitted to the jury. *Id.* The jury was instructed first to consider claims for indemnification made by Shell, Wuellner and Strange & Coleman. *Id.* Then, if the jury found that Shell and Wuellner were entitled to indemnification, it was to disregard the additional instruction given concerning the theory of contribution. *Id.*

23. The appellate court concluded:

> With the advent of *Skinner* and the Contribution Act, the need no longer exists for retention of the judicially invented policy of permitting implied indemnity on a theory of active-passive negligence among tortfeasors. To this extent we concluded that the Contribution Act precludes recovery on the basis of implied indemnity. However, we adopt the rationale of those Illinois decisions which conclude that the Contribution Among Joint Tortfeasors Act does not extinguish implied indemnity in cases involving a pretort relationship between the parties which give rise to a duty to indemnify . . . . We further conclude that causes of action for implied indemnity have not been extinguished by the Contribution Act for upstream claims in a strict liability action.

Allison, 133 Ill. App. 3d at 610-11, 479 N.E.2d at 336. *See infra* note 24 and accompanying text (Justice Karns argues that the appellate court's expanded holding is dictum).

24. Justice Karn noted the court's dictum in a concurring opinion, stating:

> I concur in the decision reached by the majority. However, it is only necessary to decide that indemnity principles of active-passive fault has been abolished by the adoption of contribution in Illinois. The discussion of indemnity based on some pretort relationship and "upstream" indemnity in strict liability is unnecessary to resolve the more narrow issue before the court.

Allison, 133 Ill. App. 3d at 612, 479 N.E.2d at 337.

25. Some courts have distinguished active-passive indemnity cases from vicari-

The Illinois Supreme Court granted Shell and Wuellner leave to appeal.[26] The court addressed the issue of whether Illinois' passage of the Act served to eliminate active-passive indemnity as a third party remedy.[27] In affirming the appellate court's decision, the Illinois Supreme Court held that its adoption of apportionment principles in *Skinner*[28] and *Alvis v. Ribar*,[29] as well as the Illinois legisla-

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ous and strict liability indemnity cases because of public policy considerations. *See Van Jacobs*, 97 Ill. App. 3d at 613, 422 N.E.2d at 981-82. Active-passive indemnity developed to mitigate the harsh results under the no contribution rule. *See supra* note 2. However, implied indemnity based on vicarious liability rests on the principle of unjust enrichment. *Compare* RESTATEMENT OF RESTITUTION 96 comment a (1937).

Generally, a master or employer is vicariously liable for the torts of his servant or employee committed while acting within the scope of their employment. RESTATEMENT (SECOND) AGENCY 219 (1958). The master is held liable for the servants' torts solely for public policy reasons rather than any fault on his part. *See* M. CLOSEN, AGENCY, EMPLOYMENT, AND PARTNERSHIP LAW (1984) (author discusses the four principle policy reasons for holding a master liable for his servant's tort). Thus, implied indemnity is based on the policy that a master or employer who is held liable for anothers misconduct, without fault, has a right to restitution from the true wrongdoer.

Similarly, implied indemnity in "upstream" strict liability claims is supported by public policy consideration. *See* Lowe, 124 Ill. App. 3d at 80, 463 N.E.2d 792. The general reason advanced for allowing implied indemnity in upstream strict liability actions is that the manufacturer or party who put the defective product in the stream of commerce and reaped profit thereby, should bear the responsibility for injuries resulting from the product. *Id.* at 97, 463 N.E.2d at 805. Thus, the courts are reluctant to abolish implied indemnity in upstream strict liability actions and in vicarious liability actions because of public policy reasons.

26. *Allison*, 133 Ill. App. 3d at 607, 479 N.E.2d at 333.

27. *See supra* note 8.

28. Skinner v. Reed Prentice Div. Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978). In *Skinner*, the plaintiff was injured while using an injection molding machine manufactured by the defendant Reed-Prentice Div. Mach. Co. (manufacturer). The manufacturer filed a third-party complaint seeking contribution from the plaintiff's employer, Hinkley Plastic Inc., *Id.* at 4-5, 374 N.E.2d at 438. The trial court granted the employer's motion to dismiss on the ground that contribution is barred in Illinois. *Id.* at 5, 374 N.E.2d at 439. The appellate court affirmed, reasoning that the authority to adopt contribution rests with the Illinois Supreme Court. *Id.*

In *Skinner*, the Illinois Supreme Court discussed at length the history of the no contribution rule and implied indemnity which the courts created to mitigate the harsh effects of the no contribution rule. *Id.* In concluding that the no contribution rule is inequitable, the court adopted Dean Prosser's reasoning:

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

Id. at 13, 374 N.E.2d 442 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 307 (4th ed. 1971). For an interesting discussion of unanswered problems in the *Skinner* decision, see Note, *Contribution in Illinois*, 9 LOY. U. CHI. L.J. 1015 (1978). For an analysis of important decisions after *Skinner* see Kissel, *supra* note 12 at 654. *See also Bibliography: Contribution Among Tortfeasors*, 3 REV. LIT. 197 (1983) (bibliography of contribution articles in the United States and abroad).

29. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). In *Alvis*, two cases, Alvis v. Ribar 78 Ill. App. 3d 1117, 398 N.E.2d 124 (1981) [hereinafter Alvis I] and Krohr v. Abbott Lab., Inc., were consolidated to resolve the same issue of whether Illinois

ture's adoption of these principles in the Act, effectively eliminated the need for the active-passive indemnity doctrine.[30] Thus, based solely on its early expressions and the Act, the court ruled that apportionment principles are inconsistent with active-passive indemnity. However the court limited its holding, expressly declining to render an opinion on the continued viability of claims for indemnification where the underlying action involves a vicarious or strict liability claim.[31]

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should abolish the doctrine of contributory negligence and substitute the doctrine of comparative negligence in its place. *Alvis*, 85 Ill. 2d at 4, 421 N.E.2d at 889.

In *Alvis I*, the plaintiff was injured while a passenger in the defendant Ribar's vehicle. *Id.* Ribar's vehicle skidded out of control and collided with a metal barrel placed temporarily in the intersection by the defendant, contractor, under the supervision of the defendant, Cook County. *Id.* The plaintiff filed an action for damages from all three defendants. *Id.*

In *Krohn*, Klaus Krohn was killed when his eastbound vehicle collided with a westbound tractor trailer driven by defendant Sweetwood and owned by defendant Abbott Lab., Inc. *Id.* at 4-5, 421 N.E.2d at 887. Plaintiff, administrator of the decedent's estate, filed a wrongful death action against both defendants. *Id.* In both cases the contributory negligence of the plaintiffs, barred recovery under the doctrine of contributory negligence. *Id.* at 4, 421 N.E.2d at 887.

In reversing the appellate court's dismissal of the plaintiff's claims and abolishing contributory negligence, the Illinois Supreme Court concluded that the judiciary may reform the common law and remedy injustice when the legislature has failed to so. *Id.* at 23-4, 421 N.E.2d at 896. Noting that thirty-six states had adopted comparative negligence, the court determined it was time to adopt comparative negligence in Illinois. *Id.* The Supreme Court concluded that:

> This court can no longer ignore the fact that Illinois is currently out of step with the majority of states and common law countries of the world. We cannot continue to ignore the plight of plaintiffs who, because of some negligence on their part, are forced to bear the entire burden of their injuries. Neither can we condone the policy of allowing defendants to totally escape liability for injuries arising from their own negligence on the pretext that another party's negligence has contributed to such injuries. We therefore, hold that . . . contributory negligence . . . is replaced by the doctrine of comparative negligence.

Id. at 24-25, 421 N.E.2d at 904-905.

The Supreme Court in *Allison* relied heavily on the adoption of comparative negligence and apportionment principles in *Alvis* in abolishing active-passive indemnity. *Allison*, 113 Ill. 2d at 32, 495 N.E.2d at 499. *See Maki*, 85 Ill. App. 2d at 439, 229 N.E.2d at 284 (the rule of comparative negligence will eliminate any need for active-passive indemnity); Chicago & Illinois Midland Ry. Co. v. Evans Constr. Co., 32 Ill. 2d 600, 208 N.E.2d 573 (1965) (active-passive negligence dependent upon contributory negligence); *See generally* Cottrell & Zaremski, *supra* note 3 (discussion of contribution, indemnity, and comparative negligence after *Skinner* and *Alvis*); Kionka, *Comparative Negligence Comes to Illinois*, 70 ILL. B.J. 16 (1981) (thorough discussion of the unresolved issues in *Alvis*); Note, *Pure Comparative Negligence in Illinois: Alvis v. Ribar*, 58 CHI. KENT L. REV. 599 (1982) (discussion of unresolved issues associated with the adoption of comparative negligence); Comment, *Illinois Comparative Negligence: Multiple Parties, Multiple Problems*, S. ILL. U. L.J. 89 (1982) (discussion of the problem of apportionment principles in relation to contribution and settlements); Comment, *A Criticism of Judicially Adopted Comparative Partial Indemnity as a Means of Circumventing Pro Rata Contribution Statute*. 47 J. AIR. L. 117 (1981) (author discusses interaction between contribution, indemnity and comparative negligence).

30. *Allison*, 113 Ill. 2d at 34, 495 N.E.2d at 501.

31. *Id.* at 26, 495 N.E.2d 496.

The Illinois Supreme Court began its analysis by distinguishing quasi-contractual implied indemnity generally with active-passive indemnity involved specifically in *Allison*.[32] The court explained that, under common law, an action for quasi-contractual implied indemnity resulted solely from a pretort relationship which implied a promise by one party to indemnify another.[33] Active-passive indemnity, on the other hand is a tort doctrine, judicially created to mitigate the harshness of the no contribution rule among joint tortfeasors.[34]

In concluding that active-passive indemnity and contribution cannot coexist, the *Allison* court relied on the equitable principle expressed in *Alvis*, that the costs of negligent injury are to be apportioned in relation to the relative fault of all the parties liable in the action.[35] The court stated that the doctrine of active-passive indemnity is in conflict with this principle expressed in *Alvis* because it shifts the total cost of liability from one party to another, while in reality, both parties may actually be at fault.[36] In support of this argument the court drew an analogy between the active-passive indemnity doctrine and the last clear chance doctrine.[37] The court reasoned that just as comparative negligence evaporated the need for the last clear chance doctrine, similarly, the adoption of contribution principles evaporated any need for the active-passive indemnity doctrine.[38] Therefore, Shell and Wuellner's ability to prove Strange & Coleman substantially at fault, while they were relatively free from fault, was irrelevant. Complete justice, reasoned the court, requires that each party must bear his proportionate share of fault even if his share is minimal.[39]

The *Allison* court correctly held that the active-passive indemnity doctrine serves no valid purpose after Illinois adopted contribution in the Act and comparative negligence in *Alvis*. The *Allison*

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32. *Id.* at 28, 495 N.E.2d at 498.

33. *See generally Van Slambrouck*, 105 Ill. 2d 462, 475 N.E.2d 867. (The Illinois Supreme Court explains the pretort relationship requirement).

34. *See supra* note 2.

35. *See supra* note 29.

36. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501.

37. The doctrine of last clear chance arose to mitigate the harsh rule that a plaintiff who was contributory negligent was barred from bringing an action against the defendant. *See* W. PROSSER, *supra* note 1 § 66 at 463. Under the last clear chance doctrine, a contributory negligent plaintiff could recover from the defendant if the defendant had the last clear chance to avoid the accident. *Id.*

38. The court's analysis was sound because both the last clear chance doctrine and the active-passive indemnity doctrine were created by the judiciary for substantially similar reasons. The last clear chance doctrine was created to mitigate the harsh results of the contributory negligence rule, *see supra* note 37. Similarly, the active-passive indemnity doctrine was created to mitigate the harsh results of the no contribution rule. *See supra* note 2.

39. *Allison*, 113 Ill. 2d at 34, 495 N.E.2d at 501.

court soundly reasoned that the all-or-nothing division of liability which is characteristic of the active-passive indemnity doctrine, perpetuates inequality after Illinois' adoption of apportionment principles.[40] However, the court erred in ignoring the Illinois legislature's intent to completely abolish implied indemnity as well as active-passive indemnity. The court's error contravenes the intent of the Illinois legislature and leaves unresolved the issue of the continued viability of implied indemnity in strict and vicarious liability cases.[41]

The active-passive indemnity doctrine cannot co-exist, as the court properly determined, with the equitable principle of apportionment of liability based on fault.[42] Active-passive indemnity, which has become inequitable with the adoption of contribution, was originally derived from the quasi-contractual equitable remedy of implied indemnity.[43] Implied indemnity allows indemnity to a non-negligent party held liable for another's negligence solely because of some pretort relationship.[44] For example, if an employer were held vicariously liable for an employee's negligence, then the law implies a promise by the employee to indemnify the employer.[45] Otherwise, the employee is unjustly enriched because the employer, without any fault on his part, assumes liability for the employee's tort.

Although the implied indemnity doctrine had a sound theoretical justification based on principles of restitution in a vicarious or no-fault situation, the doctrine has no support in a fault based system.[46] In cases pre-dating active-passive indemnity it proved inequitable to permit an employee to become unjustly enriched at the expense of the employer. Similarly, in cases following the adoption of active-passive indemnity it is inequitable for the minimal negligent (passive) party to obtain complete indemnity from the principally negligent (active) party.[47] In this latter scenario, the passive negligent party is unjustly enriched because he is not obligated to pay for

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40. *Id.* at 35, 495 N.E.2d at 501. *See* Gustman & Schreiber, *Active-Passive Implied Indemnity: The Current Statute of this Obsolete Doctrine*, 74 ILL. B.J. 252 (1986) (the authors discuss the status of implied indemnity after the contribution act); Widland, *Contribution: The End to Active-Passive Indemnity*, 69 ILL. B.J. 78 (1980) (the author concludes that implied indemnity is not practical after the contribution act); *Indemnity After Skinner*, *supra* note 3 (author argues that a single equitable standard is needed).

41. *See supra* note 6.

42. *See supra* note 29.

43. For a thorough discussion of the historical basis for implied indemnity see KEENER, QUASI CONTRACTS 404-409 (1893); WOODWARD, QUASI CONTRACTS 142-145 (1913); Leflar, *supra* note 2.

44. *See supra* note 1.

45. *See* Pfau. v. Williamson, 63 Ill. 16 (1872); RESTATEMENT OF RESTITUTION § 95 (1937). *See also supra* note 25.

46. *See supra* note 2.

47. *See supra* note 28.

his share of negligence.

Nevertheless, the early courts extended the implied indemnity doctrine to negligence cases in which both defendants were at fault to mitigate the harsh results under the no contribution rule.[48] In acknowledging this creative extension of implied indemnity, the *Allison* court correctly concluded that, although the active-passive doctrine once eased the harsh results of the no contribution rule, under the Act today, the doctrine perpetuates inequality.[49] The court however, failed to acknowledge the legislature's intent to abolish indemnity as evidenced by both its passage of the Act and the circumstances surrounding the passage of the Act.[50] The *Allison* court erroneously concluded that the legislature and the Act expressed no view of the fate of implied indemnity.[51] Instead the court went on to hold that the active-passive indemnity doctrine is inconsistent with the general principles found in *Alvis*, *Skinner* and the Act.[52] Thus, the *Allison* court effectively ignored and contravened the legislature's intention to completely abolish active-passive and implied indemnity when it based its holding solely on the adoption of apportionment principles, rather than on the intent of the legislature.

The *Allison* court's reasoning is flawed because the court failed to recognize that the Illinois legislature intended contribution to be the exclusive remedy among joint tortfeasors.[53] This intent is evidenced by the circumstances surrounding the adoption of the Act. In 1976, the Illinois Judicial Conference Study Committee On Indemnity (Judicial Committee),[54] recommended that the Illinois legislature adopt a contribution statute similar to the statute in New York.[55] New York's statute contained the provision that nothing contained on this article shall impair any right of indemnity or subrogation under existing law.[56] Similarly, the legislation recommended by the Judicial Committee provided that the Act did not impair any right of indemnity under existing law.[57] When the legis-

48. *E.g.*, Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481 (1890).

49. *Allison*, 113 Ill. 2d at 31, 495 N.E.2d at 499.

50. *Id.*

51. *Id.* at 27, 495 N.E.2d at 497. The supreme court stated: "[N]either our decision in *Skinner* nor the language of the Act expressly answers whether contribution and active-passive indemnity can coexist. *Id.* at 32, 495 N.E.2d at 499.

52. *Id.* at 34, 495 N.E.2d at 501.

53. *Id.* at 35, 495 N.E.2d at 501.

54. *Study Committee Report on Indemnity, Third Party Actions and Equitable Contributions*, 1976 *Report of the Illinois Judicial Conference* [hereinafter *Judicial Committee*].

55. *Id.* at 223.

56. N.Y. CIV. PRAC. LAW. 1404(b) (McKinney 1976).

57. *Judicial Committee*, *supra* note 54, at 226. The statute recommended to the Illinois legislature provided:

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lature adopted the Act in 1978, however, it omitted the indemnity-saving clause found in the New York statute and the clause recommended by the Judicial Committee.[58] The legislature's omission of an indemnity-saving clause, when such a clause was so obvious and important, indicates that the legislature did not carelessly omit it, but did so after careful thought and for a reason. In other words, the Illinois legislature intended to completely abolish implied indemnity and to have contribution stand as the new, exclusive remedy for joint tortfeasors.[59]

Additional support for the proposition is derived from an analysis of the public policy behind the Act. A key policy of the Act is to promote settlements between all liable parties.[60] The Act provides

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Preserved. . . . (b) Nothing contained in the article shall impair any right of indemnity or subrogation under existing law except that the right to indemnification of one personally at fault shall be limited to those circumstances where he merely fails to discover the dangerous condition created by another.

Id.

58. ILL. REV. STAT. ch. 70, §§ 301-305 (1983).

59. *See Heinrich*, 139 Ill. App. 3d at 302, 486 N.E.2d at 1388. The appellate court in *Heinrich* considered the legislature's omission of an indemnity-saving clause in the Act as a substantial factor when the court abolished implied indemnity. *Id.* In *Morrizo*, 127 Ill. App. 3d at 775, 469 N.E.2d at 659 (Downing, J., dissenting), Justice Downing stated:

> In my opinion, I believe that, with the passage of the Contribution Act it is reasonable to conclude that the legislature intended, without qualification, implied indemnity should no longer exist. I see no reason to distinguish between vicarious liability, indemnity in tort cases, or cases alleging "upstream" strict liability.

Id. See also Bristow, 140 Ill. App. 3d at 200, 488 N.E.2d at 339 (Morthland, J., dissenting) ("if the General Assembly wished for indemnity to continue it would have said so in the Act").

60. ILL. REV. STAT. ch. 70, § 302 (1983). Section 302 provides in pertinent part:

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

Id. (emphasis added).

Not only does the Act promote settlements, the "good faith" requirement. ILL REV. STAT. ch. 70 § 302(c) (1982) protects the non-settling defendant from potential collusion between the plaintiff and the settling party. *See* Gustman & Schreiber, *supra* note 40, at 255 (the non-settling defendant is protected by the good faith requirement in the Act). Although the Act does not define "good faith," the appellate court in LeMaster v. Amsted Industries, 110 Ill. App. 3d 729, 442 N.E.2d 1367 (1982) adopted the ratio test which some California courts previously used in construing "good faith" in a California statute similar to Illinois Act. *Id.* The primary test for determining the good faith of a settlement is the ratio of the settlement to the final award of damages. *Id.* at 729, 442 N.E.2d at 1367 *citing* River Garder Forms, Inc., v. Superior Ct., 26 Cal. App. 3d 986, 996, 103 Cal. Rptr. 498, 505 (1972). *See* Comment, *The Co-Existence of Loan Receipt Agreement and Contribution in Illinois*, 12 LOY. U. CHI. L.J. 751, 765 (1981) (thorough discussion of good faith settlements and the

that any person who settles with the plaintiff in good faith is discharged from all liability from contribution to any other liable party.[61] The discharge of all liability would be virtually meaningless if a non-settling party could hold a settling party liable on an implied indemnity theory. Consequently, implied indemnity undermines the Act's goal of promoting settlements.[62]

In the final analysis the Illinois Supreme Court took a substantial step when it abolished the active-passive indemnity doctrine. However, the court failed to take the opportunity in *Allison* to once and for all resolve the ambiguity which has existed in the lower courts for seven years after the adoption of the Act. Namely, the court failed to answer to issue of whether all implied forms of indemnity should be abolished as being inconsistent with the contribution system adopted in the Act. The circumstances surrounding the enactment of the Act and the terms of the Act itself lead to the conclusion that the Act abolished all types of implied indemnity. However, ambiguity and inconsistency in the lower courts will persist on the issue of the continued viability of implied indemnity in

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River Garden decision).

In *Lowe*, 124 Ill. App. 3d at 94, 463 N.E.2d at 803, the appellate court, after citing various California jurisdictions which have abandoned the ratio test, adopted a different test for determining "good faith." Under the new test a settlement is made in good faith when no tortious or wrongful conduct has been shown on the part of the settling defendant. *Id.* Regardless of which test the appellate courts apply the nonsettling defendant is protected somewhat against unfair settlements by the good faith requirement. *See generally* Widland, *supra* note 40, at 80-82 (the author discusses settlements under the act).

61. *Ill. Rev. Stat.* ch. 70 § 302(c) (1982).

62. Some commentators are reluctant to permit a jury to apportion liability under contribution when liability is based on a vicarious or upstream strict liability theory. *See, e.g.*, Jethroe v. Koehing Co., 603 F. Supp. 1200, 1204 (1985) (Judge Foreman argues that the jury will not properly apportion liability because of the difficult concept of the technical liability). *But see Heinrich*, 139 Ill. App. 3d at 300-01, 486 N.E.2d at 1387 (competent juries can apportion liability). Some commentators have contended that where liability is not based on fault, the jury will ultimately assign some liability to the non negligent party because of the inability to assign a percent figure to technical negligence. Thus, contribution should not be extended in vicarious or no fault situations. *See, e.g., Jethroe*, 603 F. Supp. at 1200. However, a jury, under the Act can easily determine liability for any amount of culpability. There is nothing in the Act prohibition 0 percent to 100 percent contribution; thus, if an employer was held vicariously liable for the tort of his employee, then the jury can award 100 percent contribution. *See* Widland, *supra* note 40, at 81.

Moreover, *Allison* gives support for permitting a jury to apportion liability in vicarious or strict liability cases. In *Allison*, the Illinois Supreme Court ruled that the sole remedy of a third-party in a Structural Work case against another liable defendant is contribution. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501. Liability under the Structural Work Act is liberally construed to protect workers. Bennett v. Musgrave, 130 Ill. App. 2d 891, 895, 266 N.E.2d 128, 131 (1970). Any party "having charge of" the work is liable under the Act. Lyle v. Sester, 103 Ill. App. 3d 208, 430 N.E.2d 699 (1981). Therefore, many parties will be liable for the plaintiff's injuries based on "technical" liability without negligence. Since the jury can apportion the technical liability of Structural Work Act defendants, there seems no reason why a jury cannot apportion liability in strict or vicarious cases.

vicarious and strict liability claims until the supreme court takes another substantial step towards finally resolving this issue.

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