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COMPARATIVE CONTRIBUTION: THE LEGISLATIVE ENACTMENT OF THE *SKINNER* DOCTRINE

INTRODUCTION

Contribution is the right of a judgment paying tort defendant to seek partial reimbursement from other tortfeasors who are responsible for a plaintiff's injury.[1] Illinois adhered to the common law rule of no-contribution[2] until the landmark case of *Skinner v. Reed-Prentice Division Package Machinery Co.*[3] In *Skinner*, the Illinois Supreme Court held that a joint tortfeasor[4] may seek contribution from other tortfeasors based upon relative degree of the cause of plaintiff's harm.[5] Subsequently, and perhaps in response to several vigorous dissents in *Skinner*, the Illinois General Assembly enacted Public Act 81-601 which attempted to clarify the contribution doctrine in Illinois.[6]

This comment will examine the parameters of the new Illinois contribution statute and its application. This new statute is a major step in establishing a realistic and equitable means of distributing loss. The statute can also be read as radically altering the traditional notions of tort immunity, perhaps even abolishing these notions. Since the application of the statute is

1. Note, *A Judicial Rule of Contribution Among Tortfeasors in Illinois*, 1978 U. ILL. L.F. 633, 633. Stated differently, it is a means of equitably apportioning the liability arising from a particular tort among those responsible for the tort's occurrence. *See* Panichella v. Pennsylvania R.R., 167 F. Supp. 345, 351-52 (W.D. Pa. 1958); Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 688 (Minn. 1977); 18 AM. JUR. 2d *Contributions* § 1 (1975).

2. Illinois originally adopted the rule against contribution in cases involving intentional torts, but this was later expanded to include negligence as well. *See* Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905); Burgdorff v. International Business Machs., 35 Ill. App. 3d 192, 194, 341 N.E.2d 122, 124 (1975).

3. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill. 2d 16 (1978).

4. The term joint tortfeasor is used in this article to refer to persons who may be liable for the same injury to an injured plaintiff. While historically the term was once limited to intentional tortfeasors who acted in concert, the term has come to include negligent tortfeasors whose independent acts resulted in a single indivisible injury to the plaintiff. Indeed, the "indivisibility of the resultant injury is the test of jointness." Erickson v. Gilden, 76 Ill. App. 3d 218, 219, 394 N.E.2d 1076, 1078 (1979). *See* W. PROSSER, LAW OF TORTS § 50 at 306 (4th ed. 1971) [hereinafter cited as PROSSER].

5. 70 Ill. 2d at 23, 374 N.E.2d at 447.

6. ILL. REV. STAT. ch. 70, § 301 (1979). *See* the legislative history behind Senate Bill 308 published by the Chicago Bar Association's Civil Practice Committee [hereinafter cited as Legislative History]. Committee comments can be used by the courts to discern the intended purpose of the statute. *See, e.g.*, People v. Touhy, 31 Ill. 2d 236, 201 N.E.2d 425 (1964); Ketchmark v. Lynch, 107 Ill. App. 2d 36, 246 N.E.2d 133 (1969).

fraught with many potential problems, the focus of this comment will be to examine the substantive and procedural implications of the statute. In order to fully understand the new rule, it will be helpful to briefly survey the common law origins of contribution, and its development and acceptance in Illinois.

Common Law Development

The common law prohibition against contribution dates back to a 1799 English case, *Merryweather v. Nixan*.[7] Although *Merryweather* dealt solely with intentional conduct, courts misinterpreted the rule and applied the prohibition against contribution to negligent acts.[8] Since joint tortfeasors are jointly and severally liable for the entire injury, a plaintiff was allowed to collect the entire judgment from any one of several tortfeasors.[9] Thus the defendant chosen was required, in the absence of a right to indemnity, to bear the entire financial burden for an injury to which several had contributed. In response to this inherent inequity, contribution, which requires each tortfeasor to pay a proportionate share of the whole judgment, was adopted by a majority of American jurisdictions.[10]

Illinois courts, although never adopting contribution, attempted to avoid the harshness of the no-contribution rule by the creative expansion of the right to indemnification. Whereas contribution is based upon spreading loss where there is a common liability, indemnity concentrates on the relationship of the parties and completely shifts the loss from one party to another. It may be grounded upon express contract or implied by operation of law.[11] In order to expand indemnity to compensate for the no-contribution rule, active-passive criteria were introduced[12] and extended to implied indemnity.[13]

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7. 101 Eng. Rep. 1337 (1799). In *Merryweather*, a joint judgment had been entered against two defendants in a conversion action but levied against only one. *See* Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177-78 (1898).

8. *See* PROSSER, *supra* note 4, at 306.

9. Note, 1978 U. ILL. L.F. 633, 634. *See* Fleming, *Foreward: Comparative Negligence at Last: By Judicial Choice*, 64 CALIF. L. REV. 239, 251 (1976); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

10. 1976 REPORT OF THE ILLINOIS JUDICIAL CONFERENCE 198, 231 n.13.

11. *Id.* at 202. *See* PROSSER, *supra* note 4, at 310.

12. The active-passive test is that "[A] tortfeasor may seek to impose indemnity upon another wrongdoer if there exists a 'qualitative distinction between the negligence of the two tortfeasors.' " Harris v. Algonquin Ready Mix Inc., 59 Ill. 2d 445, 449, 322 N.E.2d 58, 60 (1974).

One of the problems with the active-passive test is that no precise definition can be formulated, which results in inconsistent application by courts. *See* cases cited in Note, *Skinner v. Reed-Prentice: The Application of Contribution to Strict Product Liability*, 12 J. MAR. J. 165, 171 n.47 (1978).

13. Implied indemnification is dependent on the character of the negli-

While the impetus for expanding the concept of indemnity through artificial conceptual distinctions had been lessened in over forty jurisdictions by legislative and judicial eradication of the no-contribution rule,[14] the Illinois courts waited in vain for the General Assembly to take action on the matter.[15] Finally, when the Illinois Supreme Court was presented with a case which dealt with the issue of contribution, it decided to take an affirmative step and adopt the doctrine of contribution among joint tortfeasors.

Judicial Action: The Skinner Decision

Skinner v. Reed-Prentice Division Package Machinery Co.[16] involved an action based on strict liability against Reed-Prentice Division Package Machinery Co. [hereinafter referred to as Reed]. Plaintiff sought to recover damages for personal injuries she received when Reed's machine malfunctioned.[17] Reed filed a third party complaint against plaintiff's employer, seeking an amount "commensurate with the degree of conduct attributable

gence whereas contribution depends on the difference in degrees of negligence between the tortfeasors. "The theory of implied indemnity has been developed judicially in order to attenuate the harsh effect which an inflexible application of this [no-contribution] rule could produce." Burgdorff v. International Business Machs., 35 Ill. App. 3d 192, 194, 341 N.E.2d 122, 124 (1975). *See generally* 1976 REPORT OF THE ILLINOIS JUDICIAL CONFERENCE 198, 204-16 [hereinafter cited as JUDICIAL CONFERENCE]; N. Appel & R. Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 LOY. CHI. L.J. 169, 170-71 (1979) [hereinafter cited as *Contribution Among Joint Tortfeasors*]; J. Ferrini, *The Evolution from Indemnity to Contribution—A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254 (1978).

14. See jurisdictions cited in Comment, *Contribution in Missouri—Procedure and Defense Under the New Rule*, 44 MO. L. REV. 691, 694-95 nn.18-19 (1979).

15. The courts felt that adoption of either comparative negligence or contribution was a proper matter for the legislature to decide. *See* Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). The legislature refused to act even in the face of repeated requests by the judiciary and commentators. *See, e.g.*, JUDICIAL CONFERENCE, note 13 *supra*; *Contributions Among Joint Tortfeasors*, note 14 *supra*, at 171-72; Polelle, *Contribution Among Negligent Joint Tortfeasors in Illinois: A Squeamish Damsel Comes of Age*, 1 LOY. CHI. L.J. 267 (1970).

16. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill. 2d 16 (1978). Two other cases dealing with the same issues were decided in conjunction with *Skinner* and rely on the *Skinner* opinion's discussion of the issues. *See* Stevens v. Silver Mfg. Co., 70 Ill. 2d 41, 374 N.E.2d 455 (1977), *modified*, 70 Ill. 2d 47; Robinson v. International Harvester Co., 70 Ill. 2d 47, 374 N.E.2d 458 (1977), *modified*, 70 Ill. 2d 47 (1978).

17. 70 Ill. 2d at 4, 374 N.E.2d at 438.

to the [employer],"[18] and alleging negligence on the part of the employer in using the machine.[19] The supreme court reversed the lower court's dismissal of the third party complaint and held that the complaint stated a cause of action for contribution based on the employer's assumption of risk and misuse of the product.[20] The court concluded, after an extensive review of contribution and indemnity in Illinois, that the continued application of the no-contribution rule caused unjust results.[21] The court made a convincing argument for allowing contribution by stressing the weaknesses and inequities of allocating loss without the availability of contribution. The authorities cited by the court, however, concerned the apportionment of liability among negligent tortfeasors[22] based on relative fault. Relative fault is irrelevant in strict liability cases.[23] The court also failed to adequately explain why it was imposing liability for contribution on employers who are statutorily immune from direct tort liability. The court concluded by providing that the decision be given only prospective application.[24]

Several vigorous dissents accentuated the inconsistencies and unresolved problems posed by the majority opinion. The dissenters were primarily concerned with the propriety of judicial adoption of contribution, particularly in view of the state

18. 70 Ill. 2d at 5, 374 N.E.2d at 438.

19. The manufacturer's third-party complaint alleged that the unreasonably dangerous condition of the machine when plaintiff was injured, "was substantially and proximately caused by the negligent acts and omissions of the intervening owners of said machine and of the Employer" and that the employer was negligent in purchasing and operating a used machine in such poor state and which was no longer in the condition in which the manufacturer sold it. 40 Ill. App. 3d at 100-01, 351 N.E.2d at 406-07.

20. 70 Ill. 2d at 16, 374 N.E.2d at 443, wherein the court held that the third-party complaint, although pleaded in terms of negligence, alleged misuse of the product and assumption of risk on the part of the employer and stated a cause of action for contribution based on the relative degree to which the defective product and the employer's misuse of the product or its assumption of the risk contributed to cause plaintiff's injuries.

21. 70 Ill. 2d at 12, 374 N.E.2d at 442.

22. *See, e.g.*, Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

23. A plaintiff seeking recovery under a strict liability theory need only prove the elements enumerated in RESTATEMENT (SECOND) OF TORTS § 402A (1965) rather than prove the elements of negligence. Note, 12 J. MAR. J. 165, 175 (1978). *See* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974).

24. 70 Ill. 2d at 16, 374 N.E.2d at 444. Limiting the cause of action to future occurrences is proper, for where a new potential liability in tort is created, or liability is extended to a new class of persons, the rights of litigants are better served by application of that new rule only to the case at bar and to future occurrences. *See* Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); Molitor v. Kaneland Comm. Unit Dist. No. 302, 18 Ill. 2d 11, 26-29, 163 N.E.2d 89, 96-98 (1959).

workmen's compensation statute.[25] The dissenters felt that the court seemed to be circumventing legislation by doing directly what could not be done indirectly.[26] These and other considerations,[27] which were not clarified by subsequent case law,[28] finally prodded the legislature into taking some action. The result of this legislative action was Public Act 81-601, Joint Tortfeasors-Contribution.[29]

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25. The Workmen's Compensation Act provides that the employer, in return for making premium payments, is immune from common law liability to his injured employee. The employee can only recover the statutory amount for job-related injuries. See ILL. REV. STAT. ch. 48, § 138.1-138.28 (1977).

Chief Justice Ward noted a parallel between apportionment under contribution and apportionment under comparative negligence which the supreme court had previously ruled to be a matter for the legislature. 70 Ill. 2d at 19, 374 N.E.2d at 445. *See* Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

Justice Dooley stated that whether or not the "contentions of the majority are for the legislature . . . they are not for us." 70 Ill. 2d at 37, 374 N.E.2d at 453.

Justice Underwood reasoned that such substantial changes in Illinois tort law should be left to the legislature in compliance with constitutional separation of powers principles and in order to comprehensively consider and act upon all aspects of the new law. *Id.* at 22, 374 N.E.2d at 446.

26. Note, 12 J. MAR. J. 165, 182 n.122 (1978). In this case, the employer could be indirectly responsible to the plaintiff for amounts above the workmen's compensation limitation through his contribution to Reed. *See* ILL. REV. STAT. ch. 48, § 138.5 (1977).

27. Some of the problems posed by the *Skinner* decision include: whether or not the contribution is limited to factual situations similar to *Skinner*, or expanded to include other circumstances; what plan should be used to implement contribution; whether this decision affects the doctrine of contributory negligence; whether the decision restricts plaintiff's rights; whether indemnity still exists; and whether statutory limitations will affect the right of contribution.

For some excellent articles on the *Skinner* decision, *see Contribution Among Tortfeasors*, note 14 *supra*; Note, 12 J. MAR. J. 165 (1978); Comment, *Skinner v. Reed-Prentice: Its Effect on the Doctrines of Contribution and Indemnity as Applied in Illinois Workmen's Compensation Third Party Actions*, 1978 S. ILL. U.L.J. 556; Note, 1978 U. ILL. L.F. 633.

28. The vast majority of post-*Skinner* cases were able to avoid dealing with the contribution issue due to the prospective nature of the holding, *see* note 25 *supra*. *See, e.g.*, Buehler v. Whalen, 70 Ill. 2d 51, 374 N.E.2d 460 (1977); City of West Chicago v. Clark, 58 Ill. App. 3d 847, 374 N.E.2d 1277 (1978); Goodrick v. Bassick, 58 Ill. App. 3d 447, 374 N.E.2d 1262 (1978).

One notable exception is Erickson v. Gilden, 76 Ill. App. 3d 218, 394 N.E.2d 1076 (1979) which provided a right of contribution between joint tortfeasors without limitation as to type of action in which it arose.

29. ILL. REV. STAT. ch. 70, §§ 301-05 (1979). This statute provides:

Section 301.

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

Section 302. Right of Contribution

(a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of

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The new contribution statute creates the equivalent of a comparative negligence action among the defendant

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contribution among them, even though judgment has not been entered against any or all of them.

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

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

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

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

(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship.

Section 303. Amount of Contribution

The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability.

If equity requires, the collective liability of some as a group shall constitute a single share.

Section 304. Rights of Plaintiff Unaffected

A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act.

Section 305. Enforcement

A cause of action for contribution among joint tortfeasors may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action.

The statute also established a limitation on contribution actions under ILL. REV. STAT. ch. 83, § 15.2 (1979) by providing that "[N]o action for contribution among joint tortfeasors shall be commenced with respect to any payment made in excess of a party's pro rata share more than 2 years after the party seeking contribution has made such payment towards discharge of his liability."

tortfeasors[30] based on the concept of unjust enrichment.[31] The Civil Practice Committee determined that the continued prohibition against contribution could not be justified upon either a social or theoretical basis.[32] While the Illinois Supreme Court had recently allowed contribution in the *Skinner* decision, the Committee felt that the decision left too many questions unanswered, and the answers to those questions would best be provided by legislative enactment.[33] The proposed statute, twice amended,[34] was overwhelmingly passed by both the Senate and the House and signed by the Governor on September 14, 1979.[35]

The new statute is a legislative enactment which attempts to clarify the *Skinner* decision. The statute's purpose is to bring "equity to an otherwise inequitable situation"[36] by allowing contribution by those responsible for the injury according to their degree of fault. While some may view the statute as only procedural in nature,[37] the statute creates the substantive right of contribution and will have a profound effect on all tortfeasor defendants.

THE PROCEDURAL ASPECTS OF CONTRIBUTION

The Rights of Plaintiffs

The Illinois contribution statute affects only the rights of the defendant tortfeasors to recover such amount paid in excess of their pro rata share of liability. The plaintiff's legal rights re-

30. PROSSER, *supra* note 4, at 310; Note, 25 VAND. L. REV. 1284, 1290 (1972).

31. Legislative History, *supra* note 7, at 2. *See* H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT, at §§ 13.3-13.13 (1978 and Supp. 1979).

32. Legislative History, *supra* note 7, at 1.

33. *Id.*

34. Of the two amendments, only one is noteworthy. Senate Amendment No. 1 deleted the clause dealing with contribution among intentional tortfeasors and made the effective date of the bill March 1, 1978. House Amendment No. 1 merely made technical corrections. *See* LEGISLATIVE SYNOPSIS & DIGEST OF THE 1979 SESSION OF THE 81ST GENERAL ASSEMBLY at 236. *See also* 1979 Senate Floor Debate on S.B. 308 at 14-15 [hereinafter referred to as Floor Debate].

35. Although the bill was effective September 14, 1979, the Act applies to causes of action arising on or after March 1, 1978. ILL. REV. STAT. ch. 70, § 301 (1979). This date corresponds to the modified opinion in the *Skinner* case, *see* note 4 *supra*, and avoids problems with retroactivity.

For an account of all action taken pursuant to Senate Bill 308, *see* LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1979 SESSION OF THE 81ST GENERAL ASSEMBLY at 236-37.

36. *Id.* at 176.

37. Procedural in the sense it sets out the means and methods of recovering contribution from a joint tortfeasor.

main unaffected.[38] Thus, as under the prior no-contribution rule, a plaintiff retains the right to sue and recover the entire amount from any tortfeasor he chooses, and each tortfeasor remains liable to the injured party for the entire injury.[39] Although legally the right of the plaintiff to recover is unaffected, he may be affected in a practical sense. Prior to *Skinner* and this statute, the plaintiff could sue any joint tortfeasor and proceed to satisfaction in full from the chosen defendant. This provided the plaintiff with a powerful advantage. In an attempt to induce the plaintiff to seek satisfaction from another, a potential defendant would frequently offer the plaintiff a large sum of money. This offer would be given in exchange for a covenant not to sue, or a loan agreement, the proceeds to be repaid only when and if recovery was obtained by the plaintiff in the suit against the other tortfeasor.[40] The right of the defendant sued to be reimbursed on an equitable basis substantially ameliorates this potentially coercive situation. While the plaintiff is entitled to full compensation for his injuries, there is no apparent reason why one defendant should stand in jeopardy for more than his equitable share of the damages.[41]

In addition to affecting plaintiff's practical ability to recover, the statute also affects two other aspects of recovery—contributory negligence, and joint and several tortfeasors. Contributory negligence is conduct amounting to want of ordinary care for which the plaintiff is responsible, which concurring with defendant's negligence, contributes as a proximate cause to the plaintiff's injury.[42] Contributory negligence is generally considered a

38. ILL. REV. STAT. ch. 70, § 304 (1979). *See* Legislative History, *supra* note 7, at 4.

39. *See* materials cited in notes 9-10 *supra*.

40. Harris v. Algonquin Ready Mix, Inc., 59 Ill. 2d 445, 322 N.E.2d 58 (1974); *see* Michael, *"Mary Carter" Agreements in Illinois*, 64 ILL. B.J. 514 (1976).

Loan receipt agreements were first upheld in Reese v. Chicago Burlington & Quincy R.R. Co., 5 Ill. App. 3d 450, 283 N.E.2d 517 (1972), *aff'd*, 55 Ill. 2d 356, 303 N.E.2d 382 (1973). The use of these agreements are not unlimited, however. To be valid, the sum received by the injured party with the agreement of a potential tortfeasor must be a true loan, repayable from any judgment collected from other tortfeasors, rather than a form of absolute payment. The agreement must be entered into before judgment is reached and must be disclosed to other parties. *See* Kerns v. Engelke, 76 Ill. 2d 154, 390 N.E.2d 859 (1979) (proper only where judgment has not been reached); Popovich v. Ram Pipe & Supply Co., 74 Ill. App. 3d 343, 392 N.E.2d 954 (1979) (held agreement with provision for repayment "in excess of $20,000" invalid).

41. *Contribution Among Tortfeasors, supra* note 14, at 180.

42. *See, e.g.*, Burroughs v. McGinness, 63 Ill. App. 3d 664, 380 N.E.2d 37 (1978); Borus v. Yellow Cab Co., 52 Ill. App. 3d 194, 367 N.E.2d 277 (1977). *See generally* 65A C.J.S. *Neglience* § 116 (1966).

complete bar to recovery.[43] Illinois's adoption of contribution does not abolish contributory negligence,[44] and the plaintiff must still plead and prove freedom from contributory negligence.[45]

Retaining plaintiff's legal rights also indicates Illinois has maintained the traditional concept of joint and several tortfeasors.[46] The joint and several tortfeasor concept allows the plaintiff to recover a joint and several judgment against each tortfeasor who is the proximate cause of plaintiff's indivisible injuries.[47] In multiparty actions, the co-tortfeasors have usually caused plaintiff indivisible injury through their separate acts and are therefore joint tortfeasors.

The continuation of joint and several liability is not very surprising however. Although some legislatures have enacted several liability as the rule in comparative negligence states, most legislatures and all courts of last resort which are free to do so have retained the rule of joint and several liability, even with regard to comparative negligence.[48] Joint and several liability ensures plaintiff's recovery for a single, indivisible injury and it is vital where the plaintiff has the burden of proving his lack of contributory negligence.[49]

Right of Contribution

A right of contribution exists only in favor of a person[50] who is subject to tort liability along with one or more persons for the same injury,[51] and pays more than his pro rata share of the com-

43. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); Verdonck v. Freeding, 56 Ill. App. 3d 575, 371 N.E.2d 1109 (1977).

44. Angelini v. Snow, 58 Ill. App. 3d 116, 120, 374 N.E.2d 215, 218 (1978) (applying contributory negligence after *Skinner*).

45. *See generally* 28 ILL. L. & P. *Negligence* § 184 (1957).

46. The retention of joint and several tortfeasors is shown by retaining the right of plaintiff to recover the entire judgment from any one defendant, ILL. REV. STAT. ch. 70, § 304 (1979), and the fact that the right of contribution arises where "2 or more persons are [liable] in tort arising out of the same injury, " *id.* at § 302(a).

47. PROSSER, *supra* note 4, at 317-20.

48. *See* cases and statutes cited in McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1, 3-4 nn.10-12 (1979).

49. This statute would not apply where the injury is divisible and caused by two separate tortfeasors, even if they acted concurrently. *See* PROSSER, *supra* note 4, at 317-20. The statute requires that for contribution to apply, 2 or more persons must be subject to liability in tort arising out of the same injury. ILL. REV. STAT. ch. 70, § 302(a) (1979).

50. "Person" refers to bodies politic and corporate as well as individuals. ILL. REV. STAT. ch. 131, § 1.05 (1977).

51. ILL. REV. STAT. ch. 70, § 302(a) (1979).

mon liability.[52] Should the claimant settle, he can only recover contribution from those tortfeasors whose liability he extinguished by the settlement.[53] Should the claimant's obligation be discharged in full or in part by one obligated to the tortfeasor, the discharging party is subrogated[54] to the tortfeasor's right of contribution.[55]

This broad language makes it clear that the right of contribution exists among joint or current tortfeasors and that it is not limited to those merely held liable in negligence.[56] In order to encourage settlements, there is no requirement that a judgment be entered against the party seeking contribution. Encouragement of settlement is also the force behind the subrogation clause. Without this clause, out of court settlements would not be favored if the parties who are usually responsible for such settlements—insurers—were not permitted to subject tortfeasors to their rightful responsibility for a pro rata portion of the loss.[57]

In comparison with other contribution statutes, the Illinois statute is quite similar in the establishment of the right.[58] All

52. *Id.* at § 302(b).

53. *Id.* at § 302(e).

54. Subrogation is the principle that when one person has been compelled to pay a debt which ought to have been paid by another, due for example to an insurance contract, he becomes entitled to exercise all the remedies which the creditor possessed. *See* 73 AM. JUR. 2d *Subrogation* § 2 (1938).

55. ILL. REV. STAT. ch. 70, § 302(f) (1979).

56. *See* Legislative History, *supra* note 7, at 1.

57. *Id.* at 3-4.

58. For example, the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 provides:

> 1. (Right to Contribution)
>
> (a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (b) The right of contribution exists in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

New York law, which greatly influenced the *Skinner* court, provides:

> 1401. Claim for Contribution
>
> Except as provided in section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.
>
> 1402. Amount of Contribution
>
> The amount of contribution to which a person is entitled shall be

are founded on the concept of unjust enrichment. Thus, when one pays another's share in excess of his own liability, he is entitled to a return of that excess. Although the actual right to contribution is similar, the apportionment of liability is what distinguishes Illinois from the majority of jurisdictions.

Amount of Contribution

The majority of jurisdictions determine the pro rata share by dividing the total liability by the number of tortfeasors.[53] While the equal distribution of loss among the actual number of tortfeasors would have the advantage of simplicity, it would have resulted in an inequitable distribution of the loss. Illinois differs from the majority by providing that the pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. No tortfeasor is liable to make contribution beyond his own share, unless the obligation of one or more joint tortfeasors is uncollectable. In that case, the remaining tortfeasors divide the unpaid portions of the uncollectable obligation in accordance with their own pro rata liability.[60]

The use of relative culpability to apportion loss among defendant tortfeasors establishes Illinois as employing a system of comparative fault among the defendants. This concept has been gaining favor in recent years, with both New York and California adopting it.[61] New York's procedure is interesting because, like Illinois, it originated with judicial action and both approaches are very similar. In *Dole v. Dow Chemical Co.*,[62] the New York Court of Appeals held that a defendant who is liable with an-

the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

N.Y. CIV. PRAC. LAWS §§ 1401-02 (McKinney 1974).

59. *See* PROSSER, *supra* note 4, at 310. *See* Comment, *Contribution in Missouri—Procedure and Defenses Under the New Rule*, 44 MO. L. REV. 691, 695 n.20 (1979).

60. ILL. REV. STAT. ch. 70, § 303 (1979).

61. A number of other states also base contribution on relative fault. *See* ARK. STAT. ANN. § 34-1002(4) (1962 Repl. Vol.); DEL. CODE ANN. tit. 10, § 6301-6308 (1953); FLA. STAT. ANN. § 768.31(3)(a) (West Supp. 1977); HAW. REV. STAT. §§ -11 to 16 (1968); ME. REV. STAT. ANN. tit. 14, § 156 (1978); MINN. STAT. ANN. § 548.19 (West 1946); MONT. REV. CODES ANN. § 58-607.2(1) (Supp. 1977); N.J. REV. STAT. §§ 2A:53A-1 to -5 (1951); OHIO REV. CODE ANN. § 2307.31 (Page 1973 & Supp. 1978); OR. REV. STAT. § 18.440 (1975); R.I. GEN. LAWS §§ 10-6-1 to -11 (1969); S.D. CODIFIED LAWS ANN. §§ 15-8-11 to -22 (1967); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1964); UTAH CODE ANN. § 78-27-39 (1953); WIS. STAT. § 113.01.-.05 (1957); WYO. STAT. §§ 1-1-110 to -113 (1977).

62. 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972). *See also* Note, 37 ALBANY L. REV. 154 (1972).

other for the same injury to a plaintiff is entitled to have a jury apportion the damages between the two wrongdoers. Each defendant will then be assigned an equitable share of the liability, generally termed as a percentage of the verdict. This decision was codified into statute two years later.[63]

The Supreme Court of California followed *Dole's* rationale and held that "the California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."[64] The court then abolished the distinctions between indemnity and contribution, at least as to joint tortfeasors, and merged them into a system of comparative fault to be apportioned among the tortfeasors.[65]

Though not without problems, notably requiring a quantitative comparison between defendants,[66] the use of relative culpability provides a large measure of fairness and permits the allocation of fault without regard to the theory of liability.[67] The only necessary consideration is predicated on wrongdoing as a proximate cause of the injury.[68]

The section of the statute relating to the amount of contribution provides two additional considerations. First, the section provides that "[i]f equity requires, the collective liability of some as a group shall constitute a single share." Second, although no person is required to contribute an amount greater than his pro rata share, if the obligation of one or more of the tortfeasors is uncollectable, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability.[69]

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63. *See* N.Y. CIV. PRAC. § 1402 (McKinney 1974) at note 58 *supra.*

64. American Motorcycle Ass'n v. Superior Ct., 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

65. This view has the support of several commentators. "[C]ontribution and indemnity approaches should be combined. . . . It seems sensible under either doctrine to apportion liability on the basis of the comparative fault or responsibility of the tortfeasors and to allow contribution and indemnity regardless of whether the defendant is immune from liability to the original claimant." Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 87 (1974).

Loss allocation should be "among all persons whose conduct was in some significant manner responsible for the plaintiff's loss, based on a comparative responsibility doctrine." Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 739 (1974).

66. *See* C.J. Ward's dissent in *Skinner*, 70 Ill. 2d at 19, 374 N.E.2d at 444.

67. *See* text accompanying notes 96-115 *infra.*

68. *Contribution Among Tortfeasors, supra* note 14, at 189.

69. ILL. REV. STAT. ch. 70, § 303 (1979).

The "single share" provision is directed to circumstances where class liability is involved and equity requires that the related parties be held liable for only a single share. For instance, the clause is designed to apply to situations where common liability arises from a vicarious relationship.[70] Also, where co-owners of property or members of an unincorporated association become jointly liable with a tortfeasor who has no connection with the group, those co-owners or members should be treated as a single class.[71]

The provision requiring all tortfeasors to share the obligation of an uncollectable tortfeasor may cause some difficulty. First, the provision is used against one seeking contribution, therefore a co-tortfeasor. Second, he need only contribute in excess of his pro rata share if another's obligation is uncollectable. The problem arises at this point. If an obligation of contribution is uncollectable, due for example, to insolvency or unavailability of a co-tortfeasor, the others must make up the difference. Suppose that *A-B-C-D* were each 25% culpable for plaintiff's injury. A judgment of $100,000 is rendered and the plaintiff seeks the entire amount from *A*. *A* pays the entire judgment to plaintiff and then seeks contribution from *B-C-D* in the amount of $25,000 each. If the amount from *D* is uncollectable, does the phrase "remaining tortfeasors" mean that *B* and *C* must provide $75,000, or does it mean that *A*, *B* and *C* are each liable for $33,333? Since each pro rata share is determined in accordance with each tortfeasor's relative culpability (of the entire injury), how can the remaining tortfeasors share the uncollectable obligation in accordance with their pro rata liability?[72] Although little information is available regarding the issue of insolvency and contribution in tort, the issue can be analogized to contract law.[73] Generally, in contract law situations, courts require a contributor to pay his own share plus a pro rata share of any insolvent contributor's share.[74] The Uniform Contribution Act also provides that equitable concepts of contribution shall govern the determination of the shares of liability of joint tortfeasors. Since the Illinois statute is governed by the same

70. For example, the liability of a master and servant for the wrong of the servant should be treated as a single share. *See* PROSSER, *supra* note 4 at 460-67, 475-80.

71. Legislative History, *supra* note 7, at 4.

72. For example, suppose that *A*'s relative culpability is 80%, *B*'s is 10%, and *C*'s is 10%. *B* pays the judgment of $10,000 and seeks contribution from *A* and *C*. *A*'s portion of $8,000, however, is uncollectable. Should *C* be liable for contribution of 10% of $8,000, or one-half? Here the better approach would be to allow *B* and *C* to share the loss equally.

73. Note, 1978 U. ILL. L.F. 633, 651. *See generally* Myse, *The Problem of the Insolvent Contributor*, 60 MARQ. L. REV. 891 (1977); 18 AM. JUR. 2d *Contributions* § 27 (1965).

74. Myse, *supra* note 73, at 893-96.

principles, courts can look to both contract law and equity to aid in determining each person's relative share.

The Effect of Settlement

When a release[75] or convenant not to sue[76] is given in good faith to one or more persons liable in a tort arising out of the same injury, it reduces the recovery on any claim against the others to the extent stated in the release or convenant, or in the amount of consideration actually paid, whichever is greater.[77] This policy is consistent with common law principles. Contrary to common law, however, a release does not discharge any of the other tortfeasors from liability unless its terms so provide.[78] One who settles is discharged from all liability for contribution to any other tortfeasor.[79] There is no right to contribution unless the settling tortfeasor assumes full responsibility to the claimant.[80]

In order to encourage settlements, the statute provides that a release in good faith discharges the tortfeasor outright from all liability for contribution. This is in agreement with the Uniform Contribution Act[81] and appears to place a premium on settlements rather than attempting to prevent discrimination by plaintiff or collusion in the suit.[82] Problems may develop, however, with the determination of "good faith" and with the language "amount stated in the release."[83]

Good faith means an honest, lawful intent, or acting without intent to assist in fraudulent or otherwise unlawful schemes.[84] It is a wholly subjective standard. Criteria must be developed which will establish: 1) whether or not a low settlement, or im-

75. A release is a surrender of the cause of action, which may be gratuitous or given for inadequate consideration. The term has been defined as the relinquishment of a right, claim or privilege in whom it exists to the person against whom it might have been enforced. 76 C.J.S. *Release* § 1 (1952). *See also* PROSSER, *supra* note 4, at 301.

76. A covenant not to sue is not a release. It is an agreement not to enforce an existing cause of action. 76 C.J.S. *Release* § 3 (1952).

77. ILL. REV. STAT. ch. 70, § 302(c) (1979).

78. *Id.* At common law, the release of one joint tortfeasor released all tortfeasors. Alberstell v. Country Mutual Ins. Co., 79 Ill. App. 3d 407, 398 N.E.2d 611 (1979). *See generally* 76 C.J.S. *Release* § 49 (1952); PROSSER, *supra* note 4, at 301.

79. ILL. REV. STAT. ch. 70, § 302(d) (1979).

80. *Id.* at § 302(e).

81. UNIFORM CONTRIBUTION AMONG TORTFEASOR ACT, § 4(a) (1955 version) (Commissioner's Comments).

82. The policy which favors settlement of lawsuits is one of the strongest in common law litigation. Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 120 (1974).

83. *See* ILL. REV. STAT. ch. 70, § 302(c) (1979).

84. Crouch v. First Nat'l Bank, 156 Ill. 342, 40 N.E. 274 (1895).

proper allocation of settlement funds, without more, constitutes a bad faith settlement; 2) who has the burden of proof to establish the good faith of the settlement; and 3) whether the issue of bad faith will be tried separately from and prior to the issue of the non-settling defendant's negligence. Courts should apply traditional equitable and contract notions to establish the criteria.[85]

Some authorities feel that the language "the amount stated in the release" will lead to a preponderance of bad faith claims by the non-settling defendants.[86] One method to cure this problem and to ensure that unjust enrichment does not occur is to interpret "amount stated in the release" to mean release of that tortfeasor's percentage of culpability.[87] A tortfeasor who is allowed to avoid liability for contribution by settling with the plaintiff will frustrate the "liability in proportion to fault" spirit of the statute if the settlement is lower than the tortfeasor's responsibility based on his degree of fault. When a joint tortfeasor settles for an amount below his degree of fault as ultimately determined, the non-settling defendant will be held liable for damages greater than his own degree of fault.[88] Liability in proportion to fault demands that when the plaintiff has settled with one or more joint tortfeasors, a subsequent judgment against co-tortfeasors should be reduced by the proportion of the plaintiff's damages attributable to the fault of the settled tortfeasor.[89]

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85. For a discussion of the practical difficulty of enforcing the good faith requirement in settlements, see Comment, *Comparative Negligence, Multiple Parties and Settlements*, 65 CALIF. L. REV. 1264, 1268 (1977). *See also* American Motorcycle Ass'n v. Superior Ct., 20 Cal. 3d 578, 614, 578 P.2d 899, 922, 146 Cal. Rptr. 182, 205 (1978) (Clark, J., dissenting).

For a discussion of the danger of collusion in settlements, see Comment, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 490 (1966).

86. *See* Comment, *Comparative Fault and Settlement in Joint Tortfeasor Cases: A Plea for Principle Over Policy*, 16 SAN DIEGO L. REV. 833 (1979).

87. For example, if the release states, "I, Plaintiff, release Defendant *A* for the consideration of $1,000. . . ," the other tortfeasors would be unduly burdened if *A* were the predominant wrongdoer. If the release went to *A*'s percentage of the whole, this would be credited against the remaining liability. Such a method is compatible with the statute since one would not be liable to make contribution beyond his pro rata share. If *B*'s share was initially 25%, it would remain 25% even after the release of *A*. This would also prevent the unjust enrichment of *A*, who once he makes a valid settlement, is immune from contribution actions by the remaining tortfeasors.

88. *See* Comment, *Comparative Fault and Settlement in Joint Tortfeasor Cases: A Plea for Principle over Policy*, 16 SAN DIEGO L. REV. 833, 836 (1979).

89. Some may argue that the policy of encouraging settlements is encouraged by insulating a settling tortfeasor from contribution. This policy, however, must be balanced with the stated purpose of the statute, that of apportioning liability according to relative culpability. Settlement with a

Action for Contribution

Allocation in the Original Action

A cause of action for contribution among joint tortfeasors may be asserted by a separate action before or after payment, by counterclaim, or by third party complaint in a pending action.[90] In addition to providing the procedural vehicles, this clause is a restatement of current Illinois law and gives the defendant the right to assume the position that he is not liable and to elect not to cross claim lest he create the impression that he is liable.[91]

The claim seeking contribution must be specifically raised by a pleading.[92] It is not automatically raised even if all tortfeasors are joined as defendants. If a particular tortfeasor has not been joined as a defendant, a co-tortfeasor must use either a third party procedure or a counterclaim in order to seek contribution. The language of the statute "before or after payment" along with the time of creation of the right, relieves the claimant of arguing ripeness prior to judgment.[93]

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tortfeasor for his proportion of culpability will not discourage settlements and will be more equitable for all parties. *Id.* at 837-42.

Plaintiff's rights are not harmed because he has the option of settling, and thus avoiding the expense and delay of litigation, or going to trial and recovering a full judgment.

For a discussion of avoiding responsibility for the fault of others as a motivation for settlement, see Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831, 858 (1977).

90. ILL. REV. STAT. ch. 70, § 305 (1979).

91. Legislative History, *supra* note 7, at 4.

92. For a good discussion on proper pleading, see *Contribution Among Tortfeasors, supra* note 14, at 194-96.

93. Some additional procedural matters are:

Tactical Considerations

1. Nature of the evidence. Will trying the claim in the plaintiff's suit aid plaintiff's case?
2. Can jurisdiction be obtained?
3. Binding nature of the judgment in the original case.
4. Possibility of severances.
5. Should the contribution claim be joined with one for indemnification?

Jury Instruction

A. If contribution is sought in the case originally filed by plaintiff.
1. Since contribution does not affect the right of the plaintiff, the same forms presently in use must be retained for that purpose.
2. In addition the forms and instructions directed to the contribution issue should track the operative language of the statute.

B. In a separate action, the forms utilized in 2 above must be used together with forms relating to the liability of the defendant in the contribution action to the original plaintiff.

Allocation in a Separate Action

Although only a few jurisdictions deny a defendant the opportunity to collect contribution in a separate action,[94] the consequences of seeking contribution in a separate action may be so detrimental that it could force the contribution issue to be raised in the original action. For example, the failure to assert either a third party claim or a counterclaim for contribution could result in the claimant being required to carry the entire burden of proof as to the negligence of each tortfeasor, and thus being forced to relitigate all the prior issues. Additionally, if the defendant fails to assert a cross-claim, he may run the risk of being unable to appeal a ruling favorable to his co-defendant, and may find his subsequent claim barred by res judicata.[95] Although the new statute provides the procedural framework in which to bring a contribution action, the underlying cause of action must be one which allows a right to contribution.

TORTS WHICH GIVE RISE TO AN ACTION FOR CONTRIBUTION

Traditionally, an individual may be liable in tort law under three separate theories: intentional tort, negligence, or strict liability, although he would only have a right to contribution under negligence. Under the new Illinois contribution statute, however, a defendant liable under *any* theory may have the right to contribution. Thus, the new statute represents a substantial advancement in a defendant's right to recover amounts paid in excess of his relative share of culpability.

Intentional Tort

At common law, no right of contribution existed between intentional tortfeasors.[96] This is still the law today in the vast majority of American jurisdictions[97] and under both the Uniform Contribution Among Tortfeasors Act[98] and the Uniform Comparative Fault Act.[99] Illinois, however, now allows contribution as between intentional tortfeasors.

SKINNER—CONTRIBUTION AMONG TORTFEASORS IN ILLINOIS (Ill. Inst. for CLE, 1978) at 3-3, 3-4.

94. *See* Comment, *Contribution in Missouri—Procedure and Defense Under the New Rule*, 44 MO. L. REV. 691, 708 n.89 (1979).

95. *Id.* at 708-09. This article contains an excellent discussion on the procedural aspects of contribution at pages 697-709.

96. *See* PROSSER, *supra* note 4, at 308-10. Recall that the no-contribution rule credited to Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799), involved intentional conduct.

97. *See* Comment, *Contribution in Missouri—Procedure and Defenses Under the New Rule*, 44 MO. L. REV. 691, 710 (1979).

98. 12 U.L.A. § 1(c) (1955).

99. 12 U.L.A. § 1, Commissioner's Comments (1980).

Although the new statute lacks an express provision allowing such contribution, three factors support this conclusion. First, the Senate Committee deleted a clause prohibiting contribution among intentional wrongdoers.[100] Second, the general language of "subject to liability in tort" does not limit contribution to negligence.[101] Finally, allowing such contribution would allow a uniform approach to be taken toward all torts and would permit the jury to resolve relative culpability,[102] thus giving effect to the overall intent of the statute.

Negligence

Contribution between negligent tortfeasors is now allowed in the overwhelming majority of jurisdictions. In fact, contribution was originally adopted to deal with negligent defendants.[103] The new statute, in keeping with the common law purpose of common sense and justice, expressly provides for contribution between negligent tortfeasors.[104]

Strict Liability

The *Skinner* case, in which contribution was first judicially adopted in Illinois, involved an action brought in strict liability. Although contribution in a strict liability context was the subject of heated debate and adopted by a bare 4 to 3 majority, the present statute affirms the *Skinner* position. The drafting committee intended that the right of contribution should be applied in cases involving tortfeasors held liable under a theory of strict

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100. *See* LEGISLATIVE SYNOPSIS & DIGEST OF THE 1979 SESSION OF THE 81ST GENERAL ASSEMBLY, at 236.

The deleted clause read, "[T]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." SKINNER-CONTRIBUTION AMONG TORTFEASORS IN ILLINOIS, C-2 (Ill. Inst. for CLE 1978).

101. ILL. REV. STAT. ch. 70, § 302(a) (1979). "In fact, the purpose of the provision is not to limit the right to those held liable in negligence." Legislative History, *supra* note 7, at 1.

102. This was the position of the 1976 Illinois Judicial Conference. JUDICIAL CONFERENCE, *supra* note 14, at 222. New York also allows contribution among intentional tortfeasors, *see* N.Y. CIV. PRAC. LAW § 1401 (McKinney 1974).

103. *See* Note, 12 J. MAR. J. 165, 166-68 (1979).

104. *Skinner*, upon which the statute was based, had already been extended to negligence actions. *See* Erickson v. Gilden, 76 Ill. App. 3d 218, 394 N.E.2d 1076 (1979). Most commentators similarly felt that contribution should be extended to negligence. *See, e.g.*, Ferrini, *The Evolution from Indemnity to Contribution—A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254 (1978).

liability in tort.[105] This approach was also recommended in the 1976 Illinois Judicial Conference Report which stated that the "Committee recommends contribution be permitted . . . based on relative responsibility . . . in which the jury can weigh the manufacturer's liability, based on policy considerations, against negligence."[106] Contribution in strict liability actions has also been allowed in comparative negligence jurisdictions.[107]

The difficulty and controversy arises in the application of fault in a strict liability situation. The rationale for allocating loss among parties with a common denominator of culpability cannot be transferred to a situation where potential liability is grounded on different theories, one grounded in fault (negligence) and one in which fault is considered irrelevant (strict liability).[108] Strict liability is based on strong public policy considerations for the protection of injured consumers, including an interest to protect human life and an interest in placing the burden of loss on the party who profits from the enterprise.[109] *Skinner* and the subsequent contribution statute appear to change this rationale.

Skinner established the applicability of contribution in a products liability case where the manufacturer alleges a downstream party other than the plaintiff misused the product or assumed the risk of its use and contributed to the plaintiff's injury.[110] If the downstream party is an employer, and he is merely negligent, *Skinner* suggests that the policy of the Workmen's Compensation Act[111] may preclude an action for contribution against him.[112] The legislature had the opportunity, indeed the duty, to clarify the application of contribution in a strict liability situation, and it failed to act.

Given the problem presented by strict liability cases, it is arguable that loss should be apportioned between co-tortfeasors on a broader basis of comparative *responsibility*, rather than on a basis of comparative *culpability*.[113] A broad reading of the

105. Legislative History, *supra* note 7, at 1.

106. JUDICIAL CONFERENCE, *supra* note 14, at 220.

107. *See* SCHWARTZ, COMPARATIVE NEGLIGENCE, ch. 12 (1974 and Supp. 1978).

108. Note, 12 J. MAR. J. 165, 173-74 (1979). *See* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 365 (1976).

109. Note, 12 J. MAR. J. 165, 174 (1979). *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

110. *Contribution Among Tortfeasors, supra* note 14, at 184.

111. ILL. REV. STAT. ch. 48, §§ 138.1-138.28 (1977).

112. *Contribution Among Tortfeasors, supra* note 14, at 182-83.

113. J. Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 102 (1974).

statute would support this approach and it would also be compatible with the purpose of the statute. Established notions of assumption of risk and misuse of a product and their relationship to strict liability[114] must be modified to incorporate a balancing approach whereby responsibility of multiple parties for injury is weighed and loss proportioned accordingly.[115]

SUBSTANTIVE PROBLEMS: DEFENSE AND IMMUNITIES

A person who is subject to an action for contribution by a judgment-paying tortfeasor has the normal procedural defenses. Thus, one should initially make certain that the person seeking contribution has complied with all the procedural aspects necessary for suit; for example, jurisdiction, or service. Next, the party from whom contribution is sought should verify that the tortfeasor has complied with all the statutory prerequisites. The statute's application is limited to a person who is subject with another to liability in tort for the same injury and who has paid more than his pro rata share. If the party seeking contribution has settled with the injured party without discharging another tortfeasor's liability, that person is immune from the settling party's action for contribution.[116] If these procedural prerequisites are met, one should then look to the area of substantive defenses. However, the new Illinois statute creates problems in the area of substantive defenses because it establishes a statute of limitations running from the date of payment and arguably removes the immunity defense.

Statute of Limitations

In the majority of jurisdictions, if a plaintiff successfully maintains an action against a joint tortfeasor before the statute of limitations has run, that tortfeasor can then bring an action for contribution against another tortfeasor. This is true even though sufficient time has elapsed so that the statute would bar an action by the plaintiff against such other tortfeasor.[117] Illinois follows this position since the two-year statute of limitations for a party seeking contribution begins to run only after

114. *See* PROSSER, *supra* note 4, at 310.

115. Note, 12 J. MAR. 165, 186 (1978). *See generally* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974); Phillips, note 113 *supra*; Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974).

116. *See* ILL. REV. STAT. ch. 70, § 302 (1979).

117. *See, e.g.*, Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960); Cooper v. Philadelphia Dairy Prod. Co., 34 N.J. Super. 301, 112 A.2d 121 (1955); RESTATEMENT OF RESTITUTION § 86, Illustration 3 (1937).

that party has made payments toward the discharge of his liability.[118]

The time period in which a tortfeasor can be held liable for contribution due to the original tort can substantially extend beyond what it would have been if the statute ran concurrently on both the plaintiff's and the co-tortfeasor's claim. By starting the statute of limitations from the date of a payment by a co-tortfeasor, a tortfeasor may find himself liable for contribution many years after the plaintiff's actual loss. This could happen if the tortfeasor seeking contribution had, for a lengthy period, failed to pay the plaintiff's judgment, and the plaintiff had continually renewed the judgment until the tortfeasor paid. In order to avoid an inordinate lapse of time in the bringing of such actions, other states require that all actions for contribution be brought within one year after the plaintiff has been issued judgment.[119] The Illinois statute should have adopted this position. Although attempting to insure that each culpable person pay his own way, the new statute has placed a premium on delay with no offsetting assurance that contribution will be ultimately recoverable.

Immunities

The common liability requirement recognized by most jurisdictions dictates that the plaintiff must have an enforceable right of action against the tortfeasor from whom contribution is sought.[120] Illinois may have drastically altered this concept. The legislative history behind the new statute states:

> [I]t is the further intent of the Committee that the right of contribution thus created be recognized as founded upon the doctrine of unjust enrichment. The right is a separate right of restitution. *It is not a derivative right and thus is not barred by any common law or statutory immunity* which would preclude the prime claimant from pursuing an action directly against the party from whom contribution is sought.[121]

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118. Legislative History, *supra* note 7, at 4-5. Although an action for contribution is quasi-contractual in nature, the statute adopts the tort statutory limitation. ILL. REV. STAT. ch. 83, § 15 (1977).

119. *See, e.g.*, UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) (1955 version).

120. *See, e.g.*, Highway Constr. Co. v. Moses, 483 F.2d 812 (8th Cir. 1973) (workmen's compensation immunity under S. Dakota law); Walker v. Patterson, 325 F. Supp. 1024 (D. Del. 1971) (statutory immunity for co-employees); Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960) (intrafamily immunity). *See also* cases cited in Note, 52 CORNELL L.Q. 407, 407 n.6 (1967).

121. Legislative History, *supra* note 14, at 2 (emphasis supplied). The committee further added, as an example, that the immunity of an employer to any common law action sought by an employee will not prevent one held liable to that employee from seeking contribution from the employer. This was the holding in the *Skinner* case.

This statement is the only reference to immunities in either the statute, the floor debate, or the legislative history. The only appropriate conclusion that can be drawn from this statement—considering the broad language of the statute, the desire for contribution based upon relative wrongdoing which caused the injury, and the desire to prevent unjust enrichment—is that one tortfeasor's immunity from plaintiff's suit is not a bar to an action for contribution.

Policies necessarily conflict whenever contribution is sought from a defendant who is immune to direct action by the injured party. If contribution is denied, the one defendant must bear the entire burden of the loss despite the policy considerations which led to the adoption of contribution. Several states have already recognized this incongruity and have allowed contribution even though one of the tortfeasors enjoys the defense of family immunity[122] or workmen's compensation.[123] The overall result of each culpable party paying his own way is desirable. Instead of forcing the courts to decide each case of contribution on the facts, courts now have a general, equitable rule which will apply in all situations; contribution exists among all culpable tortfeasors.

Illinois courts may be reluctant to go this far. Whenever courts are confronted with a proposal which may radically modify a long-standing rule of law, they understandably move with caution. However, the abandonment of immunity from contribution is supported by the statute's purpose and it is necessary, just, and logical. In *Skinner*, policy considerations which immunized an employer from direct suit by his employee[124] and which held the manufacturer of a defective, injury-causing prod-

122. *See, e.g.*, Smith v. Southern Farm Bur. Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945); Zarrella v. Miller, 217 A.2d 673 (R.I. 1966). *See* Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L.Q. 407 (1967); Note, *Contribution Among Negligent Tortfeasors: The New Rule and Beyond*, 55 NEB. L. REV. 383 (1976).

123. *See* Weisgall, *Product Liability in the Work Place: The Effect of Worker's Compensation on the Rights and Liabilities of Third Parties*, 1977 WISC. L. REV. 1035; Comment, 1978 S. ILL. U.L.J. 556.

124. ILL. REV. STAT. ch. 48, §§ 138.1-138.28 (1977).

Workmen's compensation statutes are enacted to ensure that the injured employee would receive certain minimum compensation. These statutes are, in theory, a self-contained no-fault system under which the injured employee receives benefits pursuant to a set compensation schedule and the costs related to the employee's benefits are treated by the employer as a cost of doing business. Weisgall, *Product Liability in the Workplace: The Effect of Worker's Compensation on the Rights and Liabilities of Third Parties*, 1977 WISC. L. REV. 1035, 1036. *See generally* LARSON, WORKMEN'S COMPENSATION LAW (1976).

uct strictly liable[125] were balanced with the policy considerations of making those people who caused an injury responsible for their degree of culpability. Of these latter considerations, contribution prevailed. This decision was subsequently affirmed by legislative enactment. Other policy considerations which prohibit direct suits between spouses,[126] parent and child,[127] child and teacher,[128] and against governmental workers,[129] cannot be stronger than those considerations in workmen's compensation and strict liability which serve to protect the health and welfare of people.

The concept of unlimited contribution can be supported by the statute. The statute does not talk in terms of relative *liability*, but rather relative *culpability*. One person's culpability can contribute to an injury although that person might be immune from a direct tort action. If one person's wrongful conduct actually causes another's injury, he should be liable for contribution.

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125. Strict liability is not based on fault, but rather on such considerations as "public interest in human life and health, the manufacturer's solicitation to purchase, and the justice of imposing liability on one who creates the risk and reaps the profits." Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 25, 374 N.E.2d 437, 448 (1977), *modified*, 70 Ill. 2d 16 (1978) (Dooley, J. dissenting).

126. Neither husband nor wife may sue the other for a tort to the person committed during coverture. ILL. REV. STAT. ch. 68, § 1 (1977). *See* McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 103 (1930); Peterson, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, 43 U.M.K.C. L. REV. 334 (1975). *Contra*, Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) (abolished intrafamily immunity).

The policy for allowing contribution has been stated as follows:

> Denying contribution from plaintiff's negligent spouse places an unfair share of the burden of loss on the third-party tortfeasor by allowing the defense of interspousal immunity to be raised against a person other than a spouse. . . . Such a result is contrary to the trend toward limiting that defense, and it ignores the fact that the primary policy sought to be implemented by the defense, the preservation of domestic harmony, is not violated by permitting contribution. The financial burden imposed on the family, by cutting in half its award from the third-party tortfeasor, is justly imposed because the family unit was as negligent as the third party.

Note, *Contribution Among Joint Tortfeasors When One Joint Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L.Q. 407, 411 (1967).

127. Children may not maintain an action for negligence against their parents absent willful or wanton conduct. *See, e.g.*, Thomas v. Chicago Bd. of Educ., 77 Ill. 2d 165, 171, 395 N.E.2d 921, 924 (1979). *See also* Ashdown, *Intrafamily Immunity, Pure Compensation and the Family Exclusion Clause*, 60 IOWA L. REV. 239 (1974).

128. Under ILL. REV. STAT. ch. 122, §§ 24-24, and 34-84(a) (1973), teachers have the same immunity from children's suits as parents. Thomas v. Chicago Bd. of Educ., 77 Ill. 2d 165, 171, 395 N.E.2d 921, 924 (1979).

129. *See* ILL. REV. STAT. ch. 85, §§ 2-201—2-212 (1975).

Should the courts decline to adopt an unlimited contribution rule, a balancing approach should be struck between the various policy considerations. Contribution should only be denied in those instances where the conflicting policy objectives are of greater magnitude than the equitable underpinnings of contribution.[130]

THE EFFECT OF CONTRIBUTION UPON INDEMNITY & COMPARATIVE NEGLIGENCE

Contribution determined in accordance with each defendant's relative culpability naturally raises questions concerning the future of indemnity and the concept of comparative negligence. The statute does not abrogate the presently existing right of common law indemnity.[131] Common law indemnity is a form of restitution which applies where there is a pre-tort relationship between the parties and one of those parties has by his active misconduct exposed the other to liability which is either established by the operation of law or technical in nature.[132]

Prior to this statute's enactment, third party indemnity was allowed with regard to a tortfeasor whose misconduct was passive in comparison to the misconduct of another whose wrongdoing could be characterized as the primary cause of the plaintiff's injury.[133] The issue of active-passive negligence and the imposition of third party indemnity is a question of fact for the jury[134]—much like the question of relative culpability. Some authorities may argue that third party indemnification is identical to contribution and, therefore, will be superseded by it.[135] While the statute does not attempt to abrogate the common law right of indemnity, it seems to return indemnity full circle to the traditional common law meaning prior to its "expansion" to help alleviate the harshness of the no-contribution rule. Indemnity may be properly viewed as simply the extremity of a broad spec-

130. Note, *Contribution Among Negligent Tortfeasors: The New Rule and Beyond*, 55 NEB. L. REV. 383, 396 (1976).

131. Legislative History, *supra* note 7, at 2.

132. *Id.*, *see* PROSSER, *supra* note 4, at 310-13.

133. *See, e.g.*, Harris v. Algonquin Ready Mix, Inc., 59 Ill. 2d 445, 322 N.E.2d 58 (1974); Zizzo v. Ben Pekin Corp., 79 Ill. App. 3d 386, 398 N.E.2d 382 (1979). Indemnification will not be granted, however, when the first tortfeasor is actively negligent despite the active negligence of the other tortfeasor. Goodrich v. Bassich Co., 58 Ill. App. 3d 447, 374 N.E.2d 1262 (1978).

134. McIlnerney v. Hasbrook Constr. Co., 62 Ill. 2d 93, 338 N.E.2d 868 (1975). *See* Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287 (1976).

135. *See, e.g.*, Solar v. Dominick's Finer Foods, Inc., 65 Ill. App. 3d 192, 382 N.E.2d 581 (1978) wherein it is stated that "implied indemnity will soon become a matter of historic value only" due to *Skinner*. *Id.* at 193, 382 N.E.2d at 581.

trum, the same spectrum on which we find contribution.[136] Indemnity will continue to be applicable where the indemnitee is held liable by operation of law, and by express contract provisions.[137]

Comparative negligence systems are generally designed to modify the harsh "all or nothing" approach of the doctrine of contributory negligence by apportioning damages between plaintiff and defendant based upon a comparison of their respective fault.[138] There are two types of comparative negligence—pure and modified. Under the pure system, plaintiff may recover damages reduced by his proportionate share of negligence so long as defendant's negligence was to *any* extent a proximate cause of plaintiff's injury.[139] Under the modified system, the plaintiff's recovery is diminished in proportion to his negligence if plaintiff's negligence exceeds a designated figure.[140] In order to recover, a plaintiff must either be less negligent than, or equally negligent with, the defendant.[141]

136. Ferrini, *The Evolution from Indemnity to Contribution—A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 255, 268 (1978).

137. *See* ILL. REV. STAT. ch. 70, § 303 (1979) (the last paragraph, which is designed to apply to situations where common liability arises from a vicarious relationship); Ferrini, *supra* note 136, at 268-69. *See also* SCHWARTZ, COMPARATIVE NEGLIGENCE 272, 274 (1974) where Professor Schwartz notes that indemnity is generally still permitted in comparative negligence jurisdictions in vicarious liability type situations, but that the courts are likely to substitute a comparative damage apportionment rule in cases where the active-passive negligence rule applied. "[C]ommon law imposed . . . indemnification when contribution was not allowed between joint tortfeasors. The general principle permitting indemnity to a passive joint tortfeasor from an active one was applied by courts in new and other contexts, probably because of the harshness of the 'no contribution among joint tortfeasors' rule." In comparative states that permit contribution, "it is likely that this principle will be curbed . . . [C]ases that allowed negligent tortfeasors to make an end run around the no-contribution-among-tortfeasors rule will be suspect. They certainly will not be expanded." Several cases support Professor Schwartz's prediction. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); American Motorcycle Ass'n v. Superior Ct., 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

138. *See* PROSSER, *supra* note 4, at 433-39.

139. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974). For jurisdictions which have adopted this system, see McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1 (1979).

140. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 246 (1976).

141. *See* SCHWARTZ note 139 *supra*; Abraham & Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411 (1973).

The two rules are commonly called the 49/51% version and the 50/50% version. Under the 49/51% version, plaintiff must be less negligent to recover. Under the 50/50% version, plaintiff can recover up to half his damages.

Illinois experimented with an early form of modified comparative negligence but discarded this approach due to unsatisfactory results.[142] Subsequently, Illinois has maintained the "all or nothing" concept of contributory negligence, as have a small minority of American jurisdictions. With the adoption of contribution based on relative culpability between defendants, the time has come for a reappraisal of this position.

The new contribution statute has no legal effect on the doctrine of contributory negligence.[143] In view of the legislative adoption of comparative contribution, however, the continuation of contributory negligence is overly harsh, unjust, and illogical. The no-contribution rule was discarded because it lacked common sense and justice. The same is true for contributory negligence. Contributory negligence is a harsh and discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree.[144] Contribution permits fairness and equity among wrongdoers by allowing the paying tortfeasor to recover all but his own share of wrongdoing. This advantage is denied to the injured plaintiff. Although some feel juries make a practical application of comparative negligence,[145] this practice does not satisfactorily guarantee plaintiff recovery. If a jury is capable of apportioning relative culpability among defendants, they can surely do so if the plaintiff is involved in the apportioning. Indeed, states which allow comparative contribution among defendants and continue contributory negligence as a total bar to recovery for plaintiffs, may be denying plaintiffs equal protection under the law.[146]

142. *See* PROSSER, *supra* note 4, at 434. *See also* Malone, *The Formitive Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

143. *See* text and notes pp. 10-12 *supra*.

144. Pope's Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953).

145. *See, e.g.*, Allison v. Davies, 64 Ill. App. 3d 900, 909, 381 N.E.2d 1034, 1040 (1978) (Alloy, J., concurring).

146. Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guarantee of Equal Protection: The Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083, suggests that only four states, California, Florida, New York, and Rhode Island—those in which the doctrine of pure comparative negligence is made available to both the plaintiff seeking damages and defendants seeking contribution—maintain loss distribution systems which are free from constitutional doubt. *Id.* at 1084.

Since Illinois' contribution statute is very similar to contribution procedures in New York and California, *see* text pp. 15-17 *supra*, Illinois would have a constitutional system if it abolished contributory negligence and adopted "pure" comparative negligence. *Cf.* O'Connell, *A Proposal to Abolish Contribution and Comparative Fault, with Compensatory Savings by also Abolishing the Collateral Source Rule*, 1979 U. ILL. L.F. 591, 598 (1980) (proposes an "Act to Abolish Contributory Negligence" in conjunction with the abolition of the collateral source rule).

Proceeding from proportional contribution to comparative negligence in a traditional plaintiff-defendant setting would be logically consistent.[147] Proportional contribution and comparative negligence represent complementary means of attacking the harshness of common law apportionment since both rest upon the single principle that fairness requires apportionment of damages on the basis of relative culpability of the parties.[148]

CONCLUSION

The Illinois Contribution Among Joint Tortfeasors Act is a landmark statute. Not only does it confirm the *Skinner* right to contribution and establish relative culpability as the basis for that contribution, but it apparently allows contribution between all tortfeasors whose culpability caused the plaintiff's injury. Thus, Illinois is finally rid of the outmoded theory of no-contribution and appears in the forefront of abolishing immunity as a defense to contribution. This statute may also be the harbinger of the abolition of contributory negligence and the adoption of comparative negligence. The statute already employs a comparison of fault between defendant tortfeasors. To continue to deny plaintiffs the same opportunity is both unjust and illogical.

Although the statute answers most of the procedural questions regarding contribution, it fails to adequately address the substantive problems concerning the scope of contribution. The statute fails to clarify the full impact of contribution on such areas as immunity, workmen's compensation, or dram shop liability which are governed by separate legislative enactments. Once again, as in the initial establishment of contribution in Illinois, the courts will be called upon to determine the extent and applicability of contribution.

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147. *Cf.* James, Kalven, Keeton, Leflair, Malone & Wade, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide*? 21 VAND. L. REV. 889, 921 (1968).

148. Note, 25 VAND. L. REV. 1284, 1290-91 (1972), citing C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS, 49-55 (1936).