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INTRODUCTION

Ever since Merryweather v. Nixan\(^1\) was decided almost two centuries ago, the principle that “as between joint tortfeasors, there is no right of contribution”\(^2\) has been almost hornbook law. Basically, contribution is an equitable concept which provides for the equalization of financial burdens and the fair division of losses between tortfeasors. Therefore:

[O]ne who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, . . . [may] obtain from [the others] payment of their respective shares.\(^3\)

While the published report of Merryweather is somewhat sketchy, it is apparent that the rule against contribution had a solid foundation both in logic and in equity. Faced in Merryweather with an action for conversion wherein two defendants had acted in concert, Lord Kenyon denied one defendant’s request for “contribution of a moiety” from the other. Since the parties had acted voluntarily, intentionally, and in concert, and were therefore joint tortfeasors, the act of one was the act of the other in the eyes of the law and each was considered guilty of the whole deliberate wrong.\(^4\)

Unfortunately, the term “joint tortfeasors” has come to mean many things to many courts, and sometimes different things to the same court. The failure to distinguish the various senses in which the term has been used has led to substantial uncertainty and confusion.\(^5\) Often the courts misapply the term to defendants who have been “joined” but who were not “joint” tortfeasors as the word “joint” was used in the era of Merryweather.\(^6\) Consequently, when the equities clearly favor one “joined” tort-

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3. 18 AM. JUR. 2d, Contribution, § 1 (1965).
6. See text accompanying notes 16-26 infra.
feasor, the courts today will sometimes allow partial indemnity,7 equitable apportionment,8 or subrogation9 in order to circumvent the rule against contribution among "joint" tortfeasors.

While it is generally believed that no contribution is ever allowed in any case in Illinois,10 this belief is largely based on dictum or on a misconstruction of terms and a lack of research. The question of whether contribution is allowed in Illinois is far from settled.11 Two recent Illinois Supreme Court decisions clearly demonstrate the need for clarification or explanation of the rule regarding contribution and its exceptions. In Gertz v. Campbell12 the court approved the appellate court's application of the doctrine of "equitable apportionment" among successive tortfeasors. Subsequently, in Carver v. Grossman,13 the court denied indemnity between two concurrent tortfeasors, noting that while the rationale for the Illinois rule against contribution has been severely questioned, the issue of whether the time was ripe for a judicial modification of the rule without legislative enactment was irrelevant to the case at bar.14

Judicial modification of the rule is probably not necessary, nor is legislative action. What is needed is a judicial explanation of the rule and a definition of its terms. "Joint" must be distinguished from "joined," and "contribution" must be distinguished from "indemnity."

In the past, several respected authors have indicated that contribution is probably allowed in Illinois.15 Undoubtedly this view would gain wider acceptance if the confusion in terminology were ended. The introduction of such concepts as equitable apportionment and partial indemnity as substitutes for, or alternatives to, contribution distorts the law. Contribution should be denied only when the tortfeasors are joint. When they are not, contribution should be allowed, and it should be called by its proper name.

14. Id. at 510-11, 305 N.E.2d at 162-63.
This article will first define and explain the terminology used, and trace the history and development of the rule. It will then analyze the *Gertz* and *Carver* decisions to show that in neither case were the tortfeasors joint and therefore contribution per se could have been allowed.

**"JOINT" v. "JOINDER"**

**THE NEED FOR PRECISE LANGUAGE**

Originally "joint tort" meant "vicarious liability for concerted action." Persons acting in concert to commit a trespass were considered joint venturers and were liable for the entire result of their actions. Also it was frequently held that those who actively participate in the wrongful act, by cooperation or request, or who lend aid, encouragement or countenance to the wrongdoer, or approval to his acts done for their benefit are equally liable with him. Express agreement is not necessary; all that is required is that there shall be a common design or understanding. Since the act involved a common purpose and mutual aid, the "act of one is the act of all" and the jury was not allowed to apportion the damages.

In the time of *Merryweather*, "joinder of defendants" was also limited to cases of concerted action, where a mutual agency might be found. Consequently, when defendants did not act in concert and/or the case did not involve the doctrine of *respondent superior*,

the defendants could not be sued jointly even though the acts that they had committed were identical in character and the combined effect of their acts was to cause a single, indivisible injury to the plaintiff.

Thus when Lord Kenyon determined in *Merryweather* that there could be no contribution among joint tortfeasors, his words had a precise and narrow meaning. His joint tortfeasors were two men who had committed a "joint tort" by acting in concert and giving mutual aid, and thus were properly "joined as defendants."

The early American cases adopted this position, refusing to permit joinder of defendants in the absence of concerted action,

17. Id.
20. Id.
21. Id. at 293.
22. Even without concerted action a master and servant could be joined because each was responsible for the same act. Prosser, *supra* note 5, at 414.
or mutual responsibility for the same act.\textsuperscript{24} But with the advent of procedural codes in the United States in the mid-1800's,\textsuperscript{25} the terms "joint" and "joinder" lost their relative synonymity. Joinder no longer depended on concert of action. It became, instead, a procedural convenience which allowed the courts to combine many parties and issues arising from one incident into one trial, as long as the rights of the parties were not prejudiced.\textsuperscript{26} Unfortunately, the courts failed to recognize that the change was merely procedural and that rules of law regarding "joint" tortfeasors did not necessarily apply to tortfeasors who could now be "joined" procedurally in the same action. This failure laid the foundation for the confusion concerning proper application of the rule against contribution which exists today.

\textbf{Entire Liability}

Another common law principle, which evolved quite apart from the question of joinder of defendants, also contributed to the confusion. As this principle developed, a tortfeasor became liable for the entire loss sustained by the plaintiff even though the tortfeasor's act concurred or combined with that of another wrongdoer to produce the injury. The rationale behind the principle was that the defendant should be liable for all consequences proximately caused by his wrongful act.\textsuperscript{27}

In England, such concurrent but independent tortfeasors were never confused with "joint" tortfeasors because, without concerted action, they could not be joined in the same action.\textsuperscript{28} They had to be sued separately, and each might be liable for the entire loss. However,

\textquote{Under the more liberal American rules as to joinder, defendants whose negligence has concurred to produce a single result have been joined in one action, and have become at once, by careless usage 'joint tortfeasors.' One immediate result has been to confuse joinder of parties with liability for entire damages . . . .}\textsuperscript{29}

It has been said that the "so-called 'rule' against contribution, where it exists at all, is due to a historical mistake,"\textsuperscript{30} and also that

a rule intended to apply only to tortfeasors acting intentionally and in concert was thoughtlessly allowed to come in also to

\textsuperscript{24.} Prosser, supra note 5, at 415.
\textsuperscript{25.} The Field Code of Procedure came into effect in New York in 1848.
\textsuperscript{26.} Prosser, Torts, 294.
\textsuperscript{27.} Id. at 297.
\textsuperscript{28.} Id. at 297-98.
\textsuperscript{29.} Prosser, supra note 5, at 420.
\textsuperscript{30.} Kissel, supra note 15, at 425. The Restatement of Restitution is slightly more charitable. At comment a to § 102 the Restaters note that the rule is "explainable only on historical grounds."
plague negligent actors where the damages were indivisible. Procedure was thus allowed to alter the substantive law.\textsuperscript{31} The failure of the courts to clearly distinguish between joint liability and joint tort thus accounts for many misapplications of the rule.

**Indemnity and Contribution**

**Some Elementary Definitions**

Before discussing case law regarding contribution it is necessary to clearly distinguish the concepts of indemnity and contribution, since these terms are often confused.\textsuperscript{32} Contribution "distributes the loss among the tort-feasors by requiring each to pay his proportionate share,"\textsuperscript{33} while indemnity "shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead."\textsuperscript{34} Indemnity arises from contract, either express or implied; contribution is founded on principles of equality and equity.\textsuperscript{35} The distinction is probably best illustrated by Selz, Schwab & Co. v. Guthman,\textsuperscript{36} an early Illinois case, in which several creditors had the sheriff levy on their debtor's property. The levy proved to be wrongful and the debtor obtained judgment against the sheriff. The court held that the innocent sheriff (agent) was entitled to indemnity from the creditors (principals), presumably on the theory of implied contract; the creditor who indemnified the sheriff would then be entitled to contribution from the other creditors.

Indemnity was originally applied when the liability of the prospective indemnitee arose only as a matter of law, such as a master's liability for the torts of his servant, rather than by the indemnitee's own overt physical act. Eventually the master came to be thought of as the "passive" tortfeasor and the servant as the "active" tortfeasor. Gradually the courts eliminated the requirement of an actual contractual relationship (i.e., master-servant, principal-agent) and found an implied contract of indemnity.

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\textsuperscript{31} Proehl, supra note 15, at 882.
\textsuperscript{32} "It may be noted that the courts are not always careful in their use of the terms 'contribution' and 'indemnity.'" Annot., 60 A.L.R.2d 1366, 1369 n.6 (1958).
\textsuperscript{34} Suvada v. White Motor Co., 32 Ill. 2d 612, 624, 210 N.E.2d 182, 188 (1965). The distinction is also drawn at Annot., 60 A.L.R.2d 1366, 1369 (1958) and 13 AM. JUR., Contribution § 2.
\textsuperscript{35} Annot., 8 A.L.R.3d 639, 640-41 states that contribution is distinguishable from [indemnity] in that, while indemnity springs from contract express or implied, the doctrine of contribution is not founded on contract, but is based on the principle that equality of burden as to a common right is equity, and that wherever there is a common right, the burden is also common.
between tortfeasors. Thus when the courts could find a "measurable degree of difference between joint tortfeasors . . . [they] permitted indemnity claims by the less culpable indemnitee against the more culpable indemnitor." 37 In Carver the court stated that

[w]here indemnity has been allowed the conduct of the indemnitee has usually been characterized as the primary cause or active negligence while that of the indemnitee has been characterized as the secondary cause or passive negligence. 38

While the allowance of indemnity in "active-passive" negligence cases has led some authors and courts to refer to indemnity as an exception to the rule against contribution, 39 the two concepts are not directly related and arise on different sets of facts. A strict application of the rule against contribution and a liberal interpretation of the requirements for "active-passive" indemnity tends to create anomalous decisions, in that a less negligent tortfeasor can recover full damages through indemnity from his co-tortfeasors, but he cannot recover a part of the damages through contribution. 40 This has led one author to propose that

[a]n enlightened Illinois court . . . dispel the confusion produced by intermingling the terms indemnity and contribution and award indemnity only where one party is without fault and contribution in all other cases. 41

For clarification, indemnity as used in this article means the entire shifting of liability from one whose liability arose as a matter of law, or by contract, to one whose direct, overt act caused the injury. Contribution will mean an equitable sharing of a liability between parties whose acts, whether independent or not, combined to cause injury to a third party.

DEVELOPMENT OF THE RULE IN ILLINOIS

The early cases in the United States applied the rule against contribution to instances of wilful or intentional misconduct, 42

39. "[T]here is an exception to the general rule prohibiting contribution among tortfeasors where the indemnitee is guilty only of passive negligence and the indemnitor is guilty of active negligence." Feirich, supra note 37, at 247.
41. Id. at 400; accord, Feirich, supra note 37, at 247; Kissel, supra note 15, at 425.
42. Prosser, supra note 5, at 426-27, citing Hunt v. Lane, 9 Ind. 248 (1857); Miller v. Fenton, 11 Paige (N.Y.) 18 (1844); Peck v. Ellis, 2
but refused to recognize it in cases of torts resulting from negligence or mistake.43 Today, a majority of American jurisdictions apply the rule to negligent tortfeasors,44 but the minority, allowing contribution, seems to be growing.45

The status of the rule in Illinois is not entirely clear,46 and Illinois cases have been cited as supporting both the majority and the minority rules—sometimes in the same article.47 Several authors have stated that the no-contribution rule has never been squarely addressed by an Illinois court.48 Basically, this author agrees. An analysis of some of the major Illinois decisions will expose the extent of the confusion surrounding the rule against contribution among joint tortfeasors in Illinois. The following discussion is not intended to be exhaustive, and it should be noted that many of the cases are analyzed only to show that they are not properly contribution cases.

The rule of no contribution was first stated in 1856 in Nelson v. Cook,49 which involved a wrongful levy on a debtor's property. The court there stated: "The principle laid down in Merryweather v. Nixan . . . that there is no right of contribution as between tort-feasors, or trespassers, has been, and still is, recognized as unquestionable law."50 This statement, however, was only dictum and was made simply to reinforce the subsequent point that such a rule does not affect the right of indemnity where it exists.51

A few years later, the problem of contribution again arose in the courts. In Rend v. Chicago West Division Railway Co.62

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43. Prosser, supra note 5, at 426-27, citing Bailey v. Bussing, 28 Conn. 455 (1859); Acheson v. Miller, 2 Ohio St. 203 (1853); Horback v. Elder, 18 Pa. 33 (1851).
44. Annot., 60 A.L.R.2d 1366, 1371 (1958); accord, RESTATEMENT OF RESTITUTION which states in section 102:
Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both become liable in tort to the third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other.
46. Id. at 1374 n.2.
47. Compare Annot., 60 A.L.R.2d at 1374 n.2 with 1377-78 n.11.
49. 17 Ill. 443 (1856).
50. Id. at 448. The law is misstated in that Merryweather involved not just tortfeasors, but joint, intentional tortfeasors.
51. This "dicta caused far greater confusion than clarification." Proehl, supra note 15, at 885-86.
52. 8 Ill. App. 517 (1881).
a wagon and a horse car collided, injuring a passenger in the horse car. Plaintiff, owner of the horse car, sued to recover the amount paid in damages to the passenger. The court held that if the injury resulted from the joint operation of the negligence of both drivers, neither could recover from the other since "[t]he law will enforce no contribution as between joint tort-feasors." While it has been said that Rend really involved indemnity, the holding is also explainable in terms of contribution. The drivers of both the wagon and the horse car were racing to be the first across a Chicago bridge, exchanging epithets periodically. Such conduct could be considered "intentional" in that it involved a reckless disregard of safety, or "concerted action" arising from a tacit agreement of the drivers to race. Under either interpretation, the drivers, and hence their masters, would truly be "joint tortfeasors" as the term was used at English common law and contribution would be properly denied.

In the same year as Rend was decided, the appellate court stated in Goldsborough v. Darst that "there are so many exceptions to the rule [against contribution] that it has ceased to be a general one." The court then proceeded to allow contribution between two wrongdoers who had fraudulently attempted to acquire property through a foreclosure sale, even though the "entire transaction [bore] the impress of collusion between the appellees." Thus contribution was allowed between intentional tortfeasors acting in concert.

The first extensive discussion by the Illinois Supreme Court of the rule against contribution and its ramifications appeared in 1889 in Farwell v. Becker. After considering authority from various jurisdictions, the court concluded that the rule against contribution applies only where there has been an intentional violation of the law or where the wrongdoer must be presumed to have known that the act was unlawful. In explaining the proper interpretation of the rule against contribution the court quoted, *inter alia*, Story on Partnership: "[the rule applies] where the tort is a known, meditated wrong;" Bailey v. Bussing:

53. Id. at 525.
54. Proehl, supra note 15, at 886 n.29; accord, Comment, supra note 40, at 392-93. The case is probably considered one for indemnity only because plaintiff was suing for a full reimbursement rather than an apportionment of damages.
55. See Frossen, Torts 292.
56. 9 Ill. App. 205 (1861).
57. Id. at 211.
58. Id. at 214.
59. 129 Ill. 261 (1889) (involving a wrongful levy on a debtor's property).
60. Id. at 271-72, where the court discussed Bailey v. Bussing, 28 Conn. 455 (1859), Acheson v. Miller, 2 Ohio St. 203 (1853), and Armstrong County v. Clarion County, 66 Pa. St. 218 (1870).
61. 129 Ill. 261, 270-71 (1889).
"[the rule] applies properly only to cases where there has been an intentional violation of the law, or where the wrongdoer is presumed to have known that the act was unlawful;" and Acheson v. Miller: "it only applies to cases where the persons have engaged together in doing, wantonly or knowingly, a wrong."

While there is some dispute over whether this language is dictum, both the opinion itself and the authorities cited leave no doubt as to the court's belief that the rule of no contribution was limited to cases in which wilfulness or malice was present.

In Wanack v. Michels, the Illinois Supreme Court denied a demand by the surety on a dram shop bond for contribution from the owner of the building housing the tavern. The court stated that "[i]t is a general rule that there is no right of contribution as between tort feasors . . . [but] this rule is only applied to cases of intentional and conscious wrongdoing." The court held that by knowingly leasing a building for use as a dram shop, the owner exhibits "intent" and there can be no contribution among intentional (joint) tortfeasors.

In John Griffiths & Son Co. v. National Fireproofing Co., a general contractor was seeking reimbursement for damages paid for injuries caused by the subcontractor's negligence. Though the case is often cited as supporting the rule against contribution, the suit was based on an express contract of indemnity.
nity, and therefore any reference to contribution in the opinion would be clearly dictum. In Griffiths the court stated that "where two parties acting together commit an illegal or wrongful act,"71 neither can recover from the other the damages paid. The rule as stated is accurate since tortfeasors acting in concert have never been allowed contribution. However, negligent tortfeasors cannot properly be considered as acting in concert, even though their acts may combine to cause one indivisible injury.72

In Skala v. Lehon73 the Illinois Supreme Court stated:

It is true, as a general rule, that the right of contribution does not exist as between joint tort feasors where there is concerted action in the commission of the wrong. Where, however, there is no concerted action the rule does not apply, as the parties in such case are not in pari delicto as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing between them.74

While Skala is often cited for the rule against contribution, unfortunately, as in Griffiths, the court's discussion of contribution is only dictum.75

Further, the court's use of "in pari delicto"76 has been criticized77 because historically the application of the rule was only dependent on "intent" or "concert of action," and within these confines, relative fault was immaterial. Subsequent cases, however, have interpreted the phrase as meaning that the parties have not acted intentionally or in concert.78

71. 310 Ill. 331, 339, 141 N.E. 739, 742 (1923) (emphasis added).
72. See text at notes 23 and 149-50.
73. 343 Ill. 602, 175 N.E. 322 (1931).
74. Id. at 605, 175 N.E. at 833.
75. The issue on appeal was whether a master and a servant could be jointly charged as tortfeasors, and whether, consequently, a subsequent amendment deleting the servant as a defendant, constituted a new cause of action, thus violating the Statute of Limitations.
76. The "in pari delicto" qualification has appeared several times in Illinois case law, most notably in dicta in two 1962 indemnity cases. In Holcomb v. Flavin, 37 Ill. App. 359, 362, 185 N.E.2d 710, 718 (1962) the court said: "Contribution among tort-feasors is permissible and can be enforced so long as the parties do not stand in pari delicto." In Blass v. Union Tank Car Co., 37 Ill. App. 12, 18, 184 N.E.2d 808, 811 (1962) the court said: "[T]he Illinois rule against contribution or indemnification among joint tort feasors does not extend to the situation where the parties were not acting in pari delicto." In neither case was it particularly clear what exactly the court meant by the phrase, nor was it clear at what qualitative or quantitative level of fault of one party would the parties no longer be "in equal fault." See also, Bohannon v. Joseph T. Ryerson & Son, Inc., 16 Ill. App. 2d 402, 148 N.E.2d 602 (1958); Pennsylvania Co. v. Roberts & Schaefer Co., 250 Ill. App. 330 (1928).
77. Proehl, supra note 15, at 888-89.

[When the courts say that the parties are not in pari delicto as to each other, and therefore the passive tortfeasor can collect against the active tortfeasor, it means that the parties have not intentionally and concertedely committed a wrongful act.
While Aldridge v. Morris, a 1949 case, has been cited for the proposition that Illinois follows the no-contribution rule, the court's holding in that case had the practical effect of allowing contribution. Defendant, driver of a vehicle in which plaintiff's decedent was killed, contended that any judgment against him should be reduced by the amount paid by an oil company to the plaintiff for a covenant not to sue. The oil company's truck had started into an intersection and had been hit by the auto driven by the defendant. The court first stated that

[w]hile it is elementary that contribution by joint tortfeasors will not be enforced and that each is liable for the full damage on the ground that the law will not undertake to adjust the burdens of misconduct, it is an equally well-established precept of justice that a person is entitled to only one satisfaction for an injury.

The court in Aldridge then allowed the deduction of the amount paid for the covenant, rationalizing that "the court would not be adjusting the burdens of misconduct, but merely assuring a single recovery for the damages sustained. . . ." Nevertheless, the practical effect of the decision was an apportionment of damages between two negligent tortfeasors.

In Gulf, Mobile & Ohio Railroad Co. v. Arthur Dixon Transfer Co., the plaintiff railroad had settled a claim by an employee who had been injured when he was caught between plaintiff's train and defendant's truck. The trial court had dismissed the complaint "undoubtedly . . . on the supposition that the railroad was a tort-feasor seeking contribution from another and therefore could not recover on its theory of implied indemnity."

In reversing the dismissal the appellate court said:

[W]here the offense is merely malum prohibitum and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them although both parties are wrongdoers.

Since plaintiff was seeking full reimbursement for monies paid,
the action was one for indemnity, and again, the court’s statement is only dictum in regard to contribution.87

Sometimes a simple misinterpretation of the rule, or the substitution of one word for another in the mistaken belief that the two are synonymous, ultimately leads to a wholly improper result, as in Coffey v. ABC Liquor Stores.88 In that case, a liquor store and several tavern owners had filed a third party complaint against one of their customers who, after becoming intoxicated, had injured the plaintiff Coffey. The Illinois Appellate Court affirmed the trial court’s dismissal of the third party complaint “since on principle, indemnity or contribution or subrogation is allowed only to innocent parties.”89 The court cited Wanack v. Michels90 and Geneva Const. Co. v. Martin Transfer & Storage Co.91 but neither case spoke in terms of “innocent parties.”92 Recovery should have been allowed in Coffey, probably under some theory of indemnity.93

McDonald v. Trampf,94 though arguably a case dealing with indemnity rather than contribution,95 contains the most extensive review of the law on contribution since Farwell. In McDonald, a drunken driver,96 who had paid damages to the party he had injured, sought partial reimbursement from the tavern owners who had sold him the liquor. After discussing the leading Illinois cases dealing with contribution97 the court seemed to

87. The factual situation was such, however, that contribution may have been more appropriate than indemnity. See Proehl, supra note 15, at 889 n.44, citing Jones, Contribution Among Tortfeasors, 11 U. Fla. L. Rev. 175 (1958).
89. Id. at 514, 142 N.E.2d at 707.
90. 215 Ill. 87, 74 N.E. 84 (1905).
91. 4 Ill. 2d 273, 122 N.E.2d 540 (1954).
92. The court in Wanack denied contribution between two tortfeasors who they found had acted with intent (see text accompanying note 68 supra), and “innocent” is certainly not the opposite of “intentional.” In Geneva, the prospective indemnitee was considered “passive,” not “innocent.”
93. Indemnity should have been allowed either because the liquor dealers’ liability arose only by operation of law (i.e., the Dram Shop Act) after some overt act by another, or on the theory that the liquor dealers were “passive” tortfeasors while the customer was “active.” The result seems terribly inequitable because the primary wrongdoer was not held liable.
95. The usual indemnity case would have the “passive” tavern owners, whose potential liability arises as a matter of law under the Dram Shop Act suing the “active” tortfeasor, the driver. Even though the parties are reversed, normal indemnity principles should still apply, and the driver’s third party complaint was properly dismissed. See also note 114 infra.
96. The third party complaint was actually brought by the driver’s insurance company as subrogee.
agree with the Griffiths court that “contribution or indemnity would be denied only among joint tortfeasors who acted concertedly and intentionally.”98 While the court found that the third party plaintiff and defendants had not acted either intentionally or in concert, contribution was denied since “[a]s the driver of the car that injured the plaintiff, Trampf is the active tortfeasor and therefore cannot seek reimbursement from the tavern operators or their insurers.”99 Thus, after an extensive discussion of contribution, the court used indemnity language (i.e., “active tortfeasor”) to decide the case.100

As the above cases indicate, one of the primary causes of the confusion surrounding the rule against contribution in Illinois is the frequent failure of many courts to either be precise in their use of terms or to define the terms used. Consequently, when a court states that “in jurisdictions like this one, in which contribution among joint tortfeasors is not allowed,”101 and fails to either define “joint tortfeasor” or state the various exceptions to the rule,102 a reader or researcher may be left with the erroneous impression that contribution is never allowed in any case. Also, because indemnity cases are frequently cited for contribution principles, the ultimate result has been a breakdown in the distinctions between the two terms so that they are often used synonymously.103

Thus, when the court in Stewart v. Mister Softee of Illinois,104 an indemnity case, stated that “[t]o combat the harshness of a rule prohibiting contribution among tortfeasors in all cases, Illinois courts have developed certain exceptions where indemnity is allowed,”105 the court had drawn two unfounded conclusions,

99. Id. at 120, 198 N.E.2d at 544.
100. The conclusion that McDonald was decided on indemnity principles is bolstered by the court's statement that “[t]his conclusion is based on . . . the holding of the Economy Auto Ins. Co. v. Brown case.” Id. Economy Auto was a suit for indemnity. 334 Ill. App. 579, 79 N.E.2d 854 (1948).
102. The basic exception is that the rule does not apply unless the tortfeasors acted intentionally, wilfully, or in concert.
103. In Sleck v. Butler Bros., 53 Ill. App. 2d 7, 202 N.E.2d 64 (1964), an indemnity case, the court said at 15, 202 N.E.2d at 68:
Where a party without fault has been subjected to tort liability because of the wrongful conduct of another person, the party who is without fault is entitled to contribution from the party primarily liable.
The court, however, was obviously speaking of indemnity rather than contribution.
105. Id. at 330, 221 N.E.2d at 13.
both based on imprecise usage and incorrect definitions. First
the court concluded that contribution among tortfeasors is pro-
hibited in all cases. However, contribution is not prohibited in
Illinois in all cases. Secondly, the rules concerning indemnity are
independent of, not merely exceptions to, the no-contribution
rule.106

Any attempt to categorize the preceding cases to determine
how many cases state the rule regarding contribution in dicta,
how many are in reality indemnity cases, or how many have mis-
interpreted the rule, would almost prove futile. It is clear, how-
ever, that the status of the supposed “rule against contribution”
in Illinois is totally confused, and that no one case holds un-
equivocally and squarely that contribution will not be allowed
between negligent tortfeasors who have not acted in concert. An
examination of the recent Gertz and Carver decisions exemplifies
the lack of understanding of the rule in Illinois. Such lack of
understanding often leads to the development of new theories,
as in Gertz, or to an arbitrary denial of any form of recovery,
as in Carver.

GERTZ V. CAMPBELL
THE DOCTRINE OF EQUITABLE APPORTIONMENT

James Gertz, a minor, was struck by an automobile driven
by Campbell, and his right leg was fractured. At the hospital,
an initial examination showed poor circulation in the leg and im-
mediate surgery was indicated. However, Dr. Snyder, the treat-
ing physician, delayed the operation for seventeen hours; by then
the limb had become so necrotic that it had to be amputated be-
tween the ankle and the knee. Campbell filed a third party com-
plaint against the doctor. He alleged malpractice and sought in-
demnity for the damages assessed against him which were attrib-
utable to the alleged malpractice, since under Illinois case law
the original tortfeasor is liable for aggravation of an injury
caused by a physician's malpractice.107

The trial court had dismissed the third party complaint, ap-
parently on the ground that Campbell was seeking contribu-
tion.108 The appellate court, after first stating that contribu-

106. For the distinction between contribution and indemnity, see text
accompanying notes 32-41, supra.
(1972), citing Variety Mfg. Co. v. Landaker, 227 Ill. 22, 25, 81 N.E. 47,
48 (1907); Chicago City Ry. v. Saxby, 213 Ill. 274, 276-78, 72 N.E. 755,
756 (1904). The apparent rationale for the rule is that
the unskillful treatment or malpractice by the doctor is a result or
intervening cause which reasonably ought to have been anticipated
by the tort-feasor.
between joint tortfeasors is barred by decisional law,109 decided that the rule was not a bar to the action since the defendants in Gertz had not committed a "joint tort."110 The defendants had not acted in concert, the injuries were severable in point of time, neither had control over, or an opportunity to guard against, the acts of the other, and the causes of action were based on different duties to plaintiff.111 Therefore, the court concluded that "[b]y any meaningful test of joint responsibility there would appear to be no basis to apply deterrent rules to prevent an equitable apportionment of the loss between the original and the successive wrongdoer."112 The Illinois Supreme Court agreed that Campbell and Dr. Snyder were not joint tortfeasors and also that prior Illinois holdings prohibiting contribution between joint tortfeasors were not applicable.113

In considering Campbell's claim of a right to indemnity, the supreme court looked to a recent New York case114 which had based an indemnity action on equitable principles. While impliedly admitting that indemnity normally shifts the entire loss to the tortfeasor whose conduct is more culpable,115 the court in Gertz indicated that the right to indemnity "should be capable of development to meet perceived requirements for just solutions in questions involving multiple tortfeasors."116 Using rather tortuous reasoning, the court held that the proposed action was not repugnant to the notion of indemnity, because Campbell, while not seeking indemnity for the total damages, "does seek indemnity for the total damages attributable to the fault of Snyder."117 The court further noted that other courts have recognized "a right in the original tortfeasor to recover for the damages caused by the third party's malpractice."118

111. Id.
112. Id.
114. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288 (1972) (invoking the death of an employee while cleaning a recently fumigated storage bin. The chemical company which manufactured the fumigant, though allegedly negligent in failing to properly label the fumigant, was allowed to sue the employer for an apportionment of damages).
115. Gertz v. Campbell, 55 Ill. 2d 84, 94, 302 N.E.2d 40, 46 (1973), Chief Justice Underwood, specially concurring. The Chief Justice contended that Campbell should be subrogated to the rights of the injured party against the physician.
116. Id. at 89, 302 N.E.2d at 43.
117. Id. at 90, 302 N.E.2d at 44.
The supreme court and the appellate court reached the correct result in *Gertz*, but for the wrong reasons. Both courts correctly stated the common law and Illinois rule that there can be no contribution among *joint* tortfeasors, and both correctly determined that Campbell and Snyder were not *joint* tortfeasors. But neither court even considered the next logical inquiry: Is contribution allowed among *successive* or *concurrent* negligent tortfeasors, like Campbell and Snyder? While the status of the law in Illinois is obviously unsettled, neither legislative action nor the weight of authority would bar an affirmative response to the question.

**CARVER V. GROSSMAN**

"ACTIVE" NEGLIGENCE BARS INDEMNITY

To avoid the rule against contribution, Illinois courts have defined certain situations in which indemnity will be allowed to shift the whole loss from one tortfeasor to another. In general, these situations "arise where the party seeking indemnity has been guilty of only 'legal' or 'technical' negligence while the indemnitee has committed the 'active' or 'primary' negligence."121

In *Carver v. Grossman*122 a customer brought his car into a gas station for an oil change. The operator of the station drove the car into the service bay and turned off the ignition, but left the car in gear. While an employee was working on the car, the station operator asked the customer to check the gas. The customer turned on the ignition and the car lurched forward, injuring the employee.

The Illinois Supreme Court held that the customer could not maintain a third party action for indemnity against the station operator since the customer had been guilty of "active" negligence, and indemnity is only allowed when the indemnitee's negligence is passive or arises by operation of law.123 The court did not mention the *Gertz* case, possibly because the equities here

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120. Many cases cited in support of the rule state it only in dicta or misinterpret or misapply the rule. The weight of authority in Illinois is considered in the text accompanying notes 46-106, infra.


122. 55 Ill. 2d 507, 305 N.E.2d 161 (1973).

123. Id. at 511, 305 N.E.2d at 163.
were not as strongly in favor of the third party plaintiff as they were in *Gertz*.

Even though the court had noted in dictum that the wisdom and reason for the Illinois rule against contribution has been severely questioned, the court failed to look at this case in light of that rule. Here both tortfeasors were negligent—the station owner in leaving the car in gear, in not blocking the wheels, and in not applying the emergency brake; and the customer in not depressing the clutch or taking the car out of gear before starting it. These negligent acts combined to cause one indivisible injury which would not have occurred without the acts of both parties. The result in *Carver* seems inherently unfair in that, while both parties were equally negligent, only one paid the entire damages and the other paid nothing.125

**STATUTORY ENACTMENTS**

*An Interpretation of Section 25(2) of the Illinois Civil Practice Act*

While some states have changed or modified the common law rule regarding contribution by legislative enactment, Illinois has not. One sentence in Section 25(2) of the Illinois Civil Practice Act however, has led at least one author to conclude that contribution is barred by statute in Illinois. This sentence reads: "Nothing herein . . . creates any substantive right to contribution among tortfeasors . . . which has not heretofore existed." While the Joint Committee Comments to the section state that "[t]he last sentence is designed to allay any fears that substantive law of contribution is sought to be changed," the Comments give no indication of what the Committee thinks the substantive law of contribution is and what rights to contribution, if any, have "heretofore existed." The Historical & Practice Notes to the section are also of no help in interpreting the sentence, since they simply point out that the sentence does not affect those situations where indemnity is available.126

124. *Id.* at 510–11, 305 N.E.2d at 162.
125. See text accompanying note 145, infra.
131. *Id.*
132. *Id.* at 290:
While the last sentence of subsection (2) warns that no substantive right of contribution among tort-feasors is created, it should be remembered that there are situations in which one tort-feasor de-
Five cases have mentioned this section of the statute but they provide little aid in construing it. Two of the cases, *McDonald v. Trampf* and *Coffey v. ABC Liquor Stores*, merely reiterate the Joint Committee Comments. *Carver v. Grossman* and *Miller v. DeWitt* only mention the section to point out its effect, or lack thereof, on principles of indemnity. Finally, while *Holcomb v. Flavin* determines that the section only applies to “joint” tortfeasors, the court’s definition of “joint tortfeasor” could easily apply to concurrent or successive tortfeasors as well.

The logical and reasonable interpretation of section 25(2) is that it reflects the Legislature’s recognition that a procedural rule regarding joinder of parties has no effect on the substantive meanings of “joint tort” and “joint liability.” Had this point been clearly made in the mid-1800’s when the codification of rules of joinder muddied the concept of “jointness,” much of the confusion in this area of the law would not exist today. If this interpretation is accepted, then the section of the statute has no effect on any rules regarding contribution among concurrent or successive negligent tortfeasors.

It should be noted that no overriding public policy prohibiting contribution appears to exist since the Legislature has al-

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135. 13 Ill. App. 2d 510, 142 N.E.2d 705 (1957). In *McDonald* the court said:

Paragraph 2 of section 25 was designed to allay any fears that the substantive law of contribution was sought to be changed or that the question of liability insurance could be injected into an action. The recent case of *Coffey v. ABC Liquor Stores, Inc.*, [citations omitted] makes this clear.

49 Ill. App. 2d at 109, 198 N.E.2d at 539. However, the *Coffey* case did not expressly discuss the section in question.


While the Illinois Act authorizing the third party complaint specifically provides that nothing in the Act creates any substantive right to contribute among tortfeasors, such provision obviously relates to joint tortfeasors, that is, those whose concurrent acts of [sic] omissions combine to cause the injury.

The court’s determination that the section refers to joint tortfeasors is probably correct, even though the subsequent definition is not.

139. For a discussion of this point, see the text accompanying notes 16-25, supra.
Contribution Among Tortfeasors

Also the supreme court's statement in Carver that "[w]hether the time has arrived or conditions are ripe for a modification of this rule through judicial decision or legislative enactment is . . . not relevant" would seem to indicate that the court feels that the Legislature has not yet acted, through section 25(2) or otherwise, and that judicial decision is still possible.

CONCLUSION

Gertz and Carver Revisited

Ever since Merryweather, courts and legal scholars have wrestled with the definitions of such terms as "contribution," "indemnity," "joint tort," and "joint tortfeasors." It would be pretentious to propose here a set of definitions of those terms which would purport to fit all possible situations. It is evident, however, that only such a set of definitions, laid down by the Illinois Supreme Court, will resolve the conflict and confusion surrounding those terms in Illinois case law.

Even without explicit definitions, much of the confusion would end if the courts would simply recognize the elementary distinctions between indemnity and contribution, and use these terms in their proper context. As discussed previously, indemnity involves the shifting of the entire loss from one tortfeasor to another, while contribution involves a sharing of the loss, with each tortfeasor paying only a proportionate share. Contribution is founded on principles of equity. Indemnity arises by contract, either express, or implied, as in the case of a master and servant, or implied by law, as where one tortfeasor who has been passively negligent is liable by operation of law for damages caused by the overt and direct negligence of another.

In both Gertz and Carver the tortfeasors were found not to be joint tortfeasors but the courts then failed to further classify them. Perhaps the problems of apportionment of damages would have been clearer if the court in those cases had distinguished between three kinds of tortfeasors:

Joint tortfeasors—those who have acted intentionally or in concert to injure a third party.

142. See generally text accompanying notes 32-41, supra.
143. The finding was express in Gertz and at least strongly implied in Carver.
Concurrent tortfeasors—those whose independent, negligent acts combined or concurred at one point in time to injure a third party.

Successive tortfeasors—those whose independent, negligent acts, though severable in point of time, caused injury to the same third party.

Historically, contribution, or an equitable apportionment of damages, was denied between joint tortfeasors because their concerted action created a mutual agency, making the acts of one the acts of the other. Each was therefore liable for the whole damage. In cases involving negligent tortfeasors, apportionment was sometimes denied, not because of the jointness of their actions, but because of the indivisibility of the injury. Divisibility of the damage was not at all dependent on the type of tortfeasors who caused it. The victim's death, which was indivisible, could have been caused by successive negligent tortfeasors, by concurrently negligent tortfeasors, or by intentional tortfeasors. Similarly, divisible injuries could have been caused by any of the above sets of tortfeasors with, for example, one tortfeasor fracturing the victim's skull and the other breaking his leg.

Between concurrent or successive tortfeasors whose acts had caused one indivisible injury, the refusal to apportion was predicated on the fact that no logical basis for an apportionment existed—the court or jury could not say with any reasonable degree of accuracy how much of the injury was caused by any one tortfeasor. Since either party's act could be considered the proximate cause of the injury, either could be held liable for the entire damages. But as Dean Prosser states:

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 scot free.

In cases involving successive tortfeasors there can be no objection that the damages are not severable because they are severable in point of time. It is possible, in theory at least, to determine where one tort stopped and the other started. While "[a]s a practical matter, it may be difficult or impossible to produce satisfactory evidence as to the extent of the damages caused by each," this difficulty hardly warrants holding one tortfeasor liable for damages with which he was not connected.

144. See generally Prosser, Torts, 315.
145. Id. at 307.
146. Prosser, supra note 5, at 434-35.
In any event, whether the injury is truly indivisible or whether the evidence is insufficient to make an accurate division, there would appear to be no good reason why the court could not find that the "defendants are equally responsible, and the damages may be divided equally between them." 147

Denying an apportionment of damages among such negligent tortfeasors has the practical effect of "providing legal, although non-criminal punishment for negligent acts," 148 while failing to provide "reasonable, legally sanctioned, modes for distributing the risk of tort liability." 149

The result in Carver, therefore, was arguably incorrect. The parties were concurrent tortfeasors and although the injury they caused was indivisible, the damages could have been divided in half. As the case stands, one tortfeasor was charged totally for an injury which would never have occurred, but for the simultaneous negligence of another.

While the result in Gertz was correct, the supreme court missed a golden opportunity to clarify the status of the "rule against contribution" in Illinois. The appellate court's "equitable apportionment" and the supreme court's "partial indemnity" were equivalent to an allowance of contribution between successive tortfeasors. Case law should not have been muddled further by the introduction of these two new phrases for an old concept.

Don C. Hammer

147. Id. at 439.
149. Id. See also Harper & James, The Law of Torts, 717 (1956), where the comment is made that the limitations placed on contribution seem illogical.