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Richard A. Michael
Loyola University of Chicago, School of Law

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Joint Liability: Should It Be Reformed or Abolished?—The Illinois Experience

Richard A. Michael*

I. INTRODUCTION

Joint and several liability, a common law doctrine, generally provides that each tortfeasor whose tortious conduct was a proximate cause of the plaintiff’s indivisible injury should be held fully liable for that injury.1 In recent years, there has been a concerted attempt by proponents of tort reform either to abolish or limit this doctrine, and to replace it with several liability. Under several liability, a tortfeasor’s liability is limited to the fraction of the injury allocated to that tortfeasor’s conduct.2

A conflict exists as to whether replacing joint and several liability with only several liability will adversely affect the legal system of tort remedy allocation. Proponents of the change claim that joint and several liability unfairly requires a defendant who was only partially responsible for the plaintiff’s injury to bear full responsibility for all of the plaintiff’s damages.3 Additionally, the proponents assert that

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* Professor of Law, Loyola University of Chicago School of Law; J.D., 1958, Loyola University of Chicago; LL.M., 1960, University of Illinois.

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1. One commentator described joint and several liability as follows:

According to this rule, when more than one defendant has tortiously contributed to the same injury, each tortfeasor is held jointly and severally liable for the entire injury. The plaintiff may recover compensation for the full amount of the injury from any one, or any combination, of the defendants who tortiously contributed to the injury, but cannot receive compensation for more than the full amount of the injury in the aggregate.


adopts comparative negligence to replace contributory negligence eliminated, or at least substantially weakened, the justification for joint and several liability. 4

Opponents of the change to several liability contest both points. They argue that joint and several liability is not unfair because, although more than one tortfeasor exists, each individual tortfeasor's actions are an actual and proximate cause of the entire injury.5 Therefore, each individual tortfeasor should be liable for the full amount of the plaintiff's damages regardless of how many tortfeasors contributed to those damages. The opponents also assert that no inconsistency exists between comparative negligence and joint and several liability.6

In a series of tort reform legislation, the Illinois General Assembly first limited and then abolished joint and several liability. In legislation that became effective November 25, 1986, the General Assembly limited joint and several liability.7 Under the 1986 legislation, tortfeasors to whom the jury allocated no more than 25% of the fault for the injury could be held only severally liable.8 Subsequently, in legislation that became effective March 1995, the General Assembly abolished joint and several liability altogether.9

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4. U.S. ATT'Y GEN. REPORT, supra note 3, at 64; U.S. ATT'Y GEN. UPDATE, supra note 3. Under a contributory negligence system, a plaintiff who is found to have contributed in any way to the plaintiff's injuries cannot, in most circumstances, recover from any defendant. Wright, supra note 1, at 1156. The plaintiff could still recover under a contributory negligence system if the defendant "(1) had the last clear chance to avoid the injury and negligently failed to do so, (2) acted intentionally or recklessly (unless the plaintiff also acted intentionally or recklessly), or, in some jurisdictions, (3) was grossly negligent or otherwise had a degree of fault substantially higher than the plaintiff's." Id. at 1156-57. In contrast, under a pure comparative negligence system, a plaintiff who is found to have contributed to his injuries can recover from a defendant; the amount the plaintiff can recover, however, will be reduced by the percentage attributable to the plaintiff's contribution. See id. at 1158. Most states have adopted a variation of this comparative negligence system. See VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 1-30 (3d ed. 1994) (tracing the history of comparative negligence and noting that, as of 1994, only four states still apply the contributory negligence rule).

5. Wright, supra note 1, at 1152.

6. See, e.g., id. at 1153-61.


8. Id. (amended 1995). The "25% rule" contained some exceptions, primarily medical malpractice and environmental cases. See ILL. COMP. STAT. ANN. ch. 735, § 5/2-1118 (West 1992) (repealed 1995) (providing for exceptions to § 5/2-1117, where complete joint and several liability would be maintained).

The 1995 legislation presents an opportunity for a retrospective evaluation of Illinois’ experience with joint and several liability. An examination of how the Illinois experience enlightens the debate between the proponents and opponents of joint and several liability can provide guidance for legislatures in other states that may be considering these issues, and further legislative efforts in Illinois.

This Article will begin by examining the origins of the problems with joint and several liability in Illinois. Specifically, this Article will examine Illinois’ approach to contribution, settlement under the Contribution Act, and the problem of “good faith” under the Contribution Act. This Article will then evaluate Illinois’ approach to contribution, identifying joint and several liability’s inequities and weaknesses which have developed in Illinois as a result of Illinois’ approach to contribution. In addition, this Article will discuss the impact of the adoption of a comparative fault system in Illinois.

Next, this Article will discuss the effect of the Tort Reform Act of 1986 on the Illinois tort system and its significance as Illinois’ first attempt at limiting the scope of joint and several liability. This Article will then discuss the Civil Justice Reform Amendments of 1995, which abolished joint and several liability altogether. This Article will analyze the benefits and problems created by these Amendments. In addition, this Article will propose a plan by which the inequities and weaknesses in joint and several liability can be cured without suffering the inequities and weaknesses that follow from its abolition. Finally, this Article concludes by suggesting action from the Illinois legislature to solve the problems presented.


10. See infra part II.
11. See infra part II.A.
12. See infra part II.A.1.
13. See infra part II.A.2.
14. See infra part II.B.
15. See infra part II.C.
16. See infra part III.
17. See infra part IV.
18. See infra part V.A.
19. See infra part V.B.
20. See infra part VI.
21. See infra part VII.
II. THE ORIGINS OF THE PROBLEM

At American common law, there was no need for the allocation of fault among the parties to an accident: joint tortfeasors were jointly and severally liable; there was no contribution between joint tortfeasors; and any negligence of the plaintiff that constituted a proximate factor in causing his or her injuries barred any recovery. Over time, the Illinois law governing the allocation of responsibility in tort cases underwent a major revolution. For example, contribution between tortfeasors was adopted, comparative negligence replaced contributory negligence, and several liability replaced joint and several liability for those tortfeasors whose share of the fault was less than 25%. By their very nature, each of these changes required an allocation of the fault among the parties whose conduct led to the injury.

The enactment of laws requiring an allocation of fault created certain difficulties. For instance, it became necessary to determine the effect of an unavailable defendant on the allocation of liability, including a defendant who was unavailable because of a settlement with the plain-

22. The term "joint tortfeasors" is used in this article in its historical sense: it refers to those tortfeasors who together have contributed to a single indivisible injury of the plaintiff. While once limited to intentional tortfeasors who acted in concert, the term has come to include negligent tortfeasors whose independent, albeit concurrent, acts have resulted in a single indivisible injury. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 336 (5th ed. 1984). See also Sargent v. Interstate Bakeries, Inc., 229 N.E.2d 769, 774 (Ill. App. 1st Dist. 1967) (circumventing the Illinois rule which extended the prohibition of contribution among joint tortfeasors to those tortfeasors whose conduct was merely negligent, by applying expanded indemnification theory to allow third party recovery).

23. KEETON ET AL., supra note 22, § 47, at 328.

24. This doctrine, which permits a plaintiff to proceed to judgment against any one of several joint tortfeasors and denies that defendant any claim against other joint tortfeasors, originated in 1799 when Lord Kenyon declared that "he had never before heard of such an action having been brought, where the former recovery was for a tort." Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799). Illinois adopted the English rule of no contribution in 1856. See Nelson v. Cook, 17 Ill. 443, 449 (1856).

25. This result is the essence of contributory negligence. See supra note 4 for a discussion of contributory negligence.


27. Alvis v. Ribar, 421 N.E.2d 886, 897 (Ill. 1981). For a discussion of this topic, see infra part II.C.

28. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1117 (West 1992) (amended 1995). For a discussion of this limitation, see infra part III.
The Illinois courts treated inconsistently the allocation of fault for an absent tortfeasor under each of these new fault allocation systems. These inconsistencies may be explicable in light of the different purposes intended to be achieved by the different laws. Nevertheless, these inconsistencies created difficulties for juries required to apply those laws. Furthermore, while an approach was adopted in Illinois for treatment of an absent tortfeasor in the areas of contribution and comparative negligence, uncertainty remained about the treatment of that situation when joint and several liability was inapplicable.

A. The Contribution Act: The Illinois Approach to Contribution

In 1977, the Illinois Supreme Court adopted contribution among joint tortfeasors in Skinner v. Reed-Prentice Division Package Machine Co. In Skinner, the court addressed the inequity of allowing one party, often the least culpable one, to bear the entire cost of compensating the plaintiff for his or her injuries where more than one party was at fault in causing those injuries. The court set out to cure that inequity in a decision that would significantly change the law in Illinois.

The Skinner decision reflected one of the earliest interpretational difficulties concerning the standard by which to determine the pro rata share of each tortfeasor. Because there was no general allocation of fault among the parties at common law, there was no preexisting standard which could be employed for this purpose. In Skinner, the manufacturer had been found liable under the theory of strict liability—essentially liability without fault. The manufacturer then sued the employer/third party defendant under a theory of negligence. In the original version of the Skinner decision, the court held that the allocation of fault for the plaintiff's injuries must be made "on the basis of

29. See infra notes 147-50, 172-90 and accompanying text.
30. See infra note 147 and accompanying text.
31. See infra text accompanying notes 143-46.
32. See infra notes 172-90 and accompanying text.
33. This uncertainty has not been totally dispelled, even by the new legislation.
35. Id. at 442. In 1977, the then Chief Justice of the Illinois Supreme Court, Daniel J. Ward, in his annual report to the President of the Illinois Senate and the Speaker of the Illinois House of Representatives, urged the General Assembly "to alleviate the inequities of a rule which 'permits any one joint tortfeasor to be liable for the entire injury without evaluation of his relative fault and without recourse against the other joint tortfeasors.'" Nina S. Appel & Richard A. Michael, Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation, 10 Loy. U. Chi. L.J. 169, 172 (1979).
36. See supra notes 22-25 and accompanying text.
the relative degree of culpability of those whose conduct proximately caused them.'”

The employer/third party defendant objected to this comparison, arguing that fault cannot be compared where the liability of one of the parties is predicated on liability without fault. In response to the employer’s objection, the court modified the opinion, changing the language to read that the allocation was to be “based on the relative degree to which the defective product and the employer’s misuse of the product or its assumption of risk contributed to cause the plaintiff’s injuries.” Thus, the court refused to distinguish between strict liability and negligence in suits for contribution, and, to facilitate their comparison, believed it necessary to predicate the comparison on the basis of causation alone without reference to egregiousness of conduct.

Subsequently, the General Assembly codified the Skinner holding in the Illinois Contribution Among Joint Tortfeasors Act (“Contribution Act”). Under the Contribution Act, a right and duty

39. Id. at 443; see also Appel & Michael, supra note 35, at 188-92 (analyzing and criticizing the court’s language). Basing the pro rata share of each tortfeasor on the extent to which his or her acts or omissions proximately caused the injury contains an internal contradiction because causation is not a matter of degree. Wright, supra note 1, at 1146. As Professor Wright points out, “[s]ome condition either was or was not a cause (in the proper scientific sense) of a particular injury.” Id. For examples of cases where the courts base the pro rata share on causation, see Victory Memorial Hosp. Ass’n v. Schmidt, Garden & Erickson, 511 N.E.2d 953, 956 (Ill. App. 2d Dist. 1987) (stating that a defendant bears “the loss for harm inflicted in proportion to his responsibility for the tortious act”); Pipes v. American Logging Tool Corp., 487 N.E.2d 424, 427 (Ill. App. 5th Dist. 1985) (allocating the loss in proportionate amounts to all actors proximately causing the injury).
40. ILL. COMP. STAT. ANN. ch. 740, §§ 100/0.01-100/5 (West 1992), amended by Pub. Act No. 89-7, § 25, 1995 Ill. Legis. Serv. 243 (West).

Problems relating to the proper limitation periods plagued the application of contribution in Illinois. Prior to January 1, 1995 (and even now in medical or healing art malpractice cases), the two-year limitation period for a contribution claim did not commence until the party seeking contribution made a payment in excess of his or her pro rata share toward the discharge of his or her liability. See ILL. COMP. STAT. ANN. ch. 735, § 5/13-204 (West 1992) (amended 1995). The Illinois Supreme Court, however, held that the four year repose period of ILL. COMP. STAT. ANN. ch. 735, § 5/13-212(a) (West 1992), as well as the normal limitation period, governed contribution actions based on medical malpractice claims that were brought on the basis of underlying complaints which also alleged medical malpractice. See Vogt v. Corbett, 563 N.E.2d 447, 449 (Ill. 1990); Hayès v. Mercy Hosp. & Medical Ctr., 557 N.E.2d 873, 876 (Ill. 1990). In Antunes v. Sookhakitch, 588 N.E.2d 1111 (Ill. 1992), the court reasoned that the impact of Hayes and Vogt is that contribution actions must be filed within the same repose period as that applicable to the plaintiff in the underlying action. Id. at 1116. Accordingly, the court held that if the plaintiff in the underlying action is a minor, the defendant or defendants have the extended (up to eight years) repose period of ILL. COMP.
of contribution existed between two parties who were both “subject to liability in tort” for the same injury. For contribution, the parties who are “subject to liability in tort” may be joint, concurrent, or successive tortfeasors. Under the Contribution Act, a right to contribution existed only in favor of a party paying more than that party’s pro

STAT. ANN. ch. 735, § 5/13-212(b) (West 1992), in which to bring their contribution action. Antunes, 588 N.E.2d at 1118. Likewise, in Hartford Fire Ins. Co. v. Architectural Management, Inc., 511 N.E.2d 706 (Ill. App. 1st Dist.), appeal denied, 517 N.E.2d 1086 (Ill. 1987), the court held that a repose period in the statute governing the commencement of actions arising from the construction of improvements to real estate may bar a claim for contribution before it would be barred under ILL. COMP. STAT. ANN. ch. 735, § 13/204 (West 1992). Hartford Fire Ins., 511 N.E.2d at 708; see also ILL. COMP. STAT. ANN. ch. 735, § 5/13-214 (West 1992) (providing that tort actions against persons involved in design, planning, or management of construction or improvement to real property must be commenced within four years from the time the person bringing the action knew or should have known of the act or omission). Accordingly, a contribution claim must have been filed within two years of the time the party seeking contribution made a payment in excess of his or her pro rata share toward the discharge of his or her liability, but not longer than any applicable repose period from the date of the underlying occurrence. Hartford Fire Ins., 511 N.E.2d at 708.

Effective January 1, 1995, the statute was amended. See Pub. Act No. 88-538 § 5, 1994 Ill. Laws 157 (codified at ILL. COMP. STAT. ANN. ch. 735, § 5/13-204 (West Supp. 1996) (amending ILL. COMP. STAT. ANN. ch. 735, § 5/13-204 (West 1992))). Under the 1995 provisions, there are two periods which may be applicable. If there is no underlying action filed by an injured party, a contribution action by one who made a payment to the injured party must be commenced in two years from the date of that payment. ILL. COMP. STAT. ANN. ch. 735, § 5/13-204(a). If an underlying action has been filed, the contribution action must be commenced within two years from the date the party seeking contribution or indemnification is served with process in that action or within two years from the time that party, or his privy, knew or should have known of the act or omission “giving rise to the action for contribution or indemnification, whichever period expires later.” Id. § 5/13-204(b). The new period is applicable even where a repose period would have barred the action prior to its enactment. Id. § 5/13-204(c). The statute expressly provides that it “shall be applied retroactively . . . to all pending actions without regard to when the cause of action accrued,” but shall not affect limitations or repose rights which have fully vested prior to its effective date. Id. § 5/13-204(d). Finally, it excludes contribution claims against a party whose alleged negligence occurred in a medical or healing art malpractice situation. Id. § 5/13-204(e). Accordingly, in malpractice situations, the § 212 period remains applicable. Id. § 5/13-212.

41. ILL. COMP. STAT. ANN. ch 740, § 100/2(a) (West 1992). The facts alleged in a complaint seeking contribution must show a common injury, which the party seeking contribution and the contribution-defendant “combined to bring about and which makes them both subject to liability in tort.” Heinrich v. Peabody Int’l Corp., 459 N.E.2d 935, 938 (Ill. 1984), aff’d in part, rev’d in part, 510 N.E.2d 889 (Ill. 1987). Each party subject to contribution is liable for no more than “his pro rata share of the common liability as measured by the extent to which his acts or omissions . . . proximately caused the injury.” Id. See also Roberts v. Heilgeist, 465 N.E.2d 658, 662 (Ill. App. 2d Dist. 1984) (holding that the defendant is entitled to contribution only if the injury caused by the defendant’s negligence is the same as the injury caused by the contribution-defendant’s negligence).

The pro rata share of the common liability, and only for the amount paid in excess of that pro rata share.\textsuperscript{43}

The requirement under the Contribution Act that all the parties to a contribution claim be subject to liability in tort precluded a claim for contribution where a third party defendant has been held to be not liable to the plaintiff because his or her conduct was not culpable.\textsuperscript{44} The parties need not be found liable under the same theory of liability, however. Hence, a party held liable on the basis of product liability could seek contribution from a party whose alleged misuse of the product proximately contributed to the injury,\textsuperscript{45} or from a party whose negligence proximately contributed to the injury.\textsuperscript{46} Similarly, a party liable for ordinary negligence could seek contribution from a party who was liable on the basis of a violation of a statute.\textsuperscript{47}

Additionally, the fact that a party was immune from suit by the original plaintiff did not limit the liability of that party for contribution.\textsuperscript{48} Accordingly, a defendant was obligated to contribute even if that defendant was immune from the plaintiff’s suit by reason of the Workers’ Compensation Act,\textsuperscript{49} interspousal immunity,\textsuperscript{50} parent-child

\begin{itemize}
\item \textsuperscript{43} ILL. COMP. STAT. ANN. ch. 740, § 100/2(b) (West 1992).
\item \textsuperscript{44} McCombs v. Dexter, 542 N.E.2d 1245, 1246 (Ill. App. 3d Dist. 1989).
\item \textsuperscript{46} J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc., 516 N.E.2d 260, 267 (Ill. 1987).
\item \textsuperscript{47} See Doyle v. Rhodes, 461 N.E.2d 382, 390 (Ill. 1984). A party liable under the Structural Work Act may seek contribution from a party also alleged to have violated the Act. LeMaster v. Amsted Indus., Inc., 442 N.E.2d 1367, 1371 (Ill. App. 5th Dist. 1982). In People v. Brockman, 574 N.E.2d 626 (Ill. 1991), and People v. Fiorini, 574 N.E.2d 612 (Ill. 1991), the court held that, in an action brought under the Illinois Environmental Protection Act, the landowner who is sued by the State for a violation of that Act may seek contribution under the Contribution Act from its customers whose waste contributed to the violation. Brockman, 574 N.E.2d at 636; Fiorini, 574 N.E.2d at 621.
\item \textsuperscript{48} The general principle governing this question was stated by the Illinois Supreme Court: “[T]he intent of the contribution statute was to reach anyone who is culpable regardless of whether they have been immunized from a direct tort action by some special defense or privilege.” Doyle, 461 N.E.2d at 386.
\item \textsuperscript{49} Id. The Workers’ Compensation Act may be found at ILL. COMP. STAT. ANN. ch. 820, § 305/1-305/30 (West 1992) (amended 1995). Note, however, that Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023 (Ill. 1991), holds that the employer’s liability for contribution cannot exceed its statutory liability under the Workers’ Compensation Act. Id. at 1028.
\item \textsuperscript{50} The question of the extent of the injured party’s employer’s liability for contribution when the injury occurred on the job and under circumstances where the fault of the employer was a proximate cause of the injury was one of the most troublesome issues faced by the Illinois courts. It created a direct conflict between the philosophy of the Workers’ Compensation Act, that an employer should not be liable in tort to an employee injured on the job, and the philosophy of the Contribution Act, that all par-
immunity,\(^\text{51}\) or the immunity of a local governmental entity that had not received the required statutory notice.\(^\text{52}\)

The Illinois Supreme Court, however, imposed some important limitations on the right of a defendant to seek contribution from other tortfeasors. For example, a party liable for negligence while intoxicated could not seek contribution from the establishment whose alleged violation of the Dramshop Act\(^\text{53}\) proximately contributed to the injury.\(^\text{54}\) The court has also held that a party guilty of intentional mis-

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\(^\text{54}\) Hopkins v. Powers, 497 N.E.2d 757, 759 (Ill. 1986). Contribution is not allowed because Dramshop liability is not liability "in tort." Id. For the same reason, a person liable for injuring an intoxicated person may not seek contribution from the establishment where the injured party had been drinking on the basis of the Dramshop Act. Jodelis v. Harris, 517 N.E.2d 1055, 1057-58 (Ill. 1987).
conduct may not seek contribution.\textsuperscript{55}

1. Settlements and the Contribution Act

The Contribution Act also addressed the effect of settlements on contribution among joint tortfeasors. The Act substantially modified the impact of a release from that which prevailed at common law. These modifications related to three situations: (1) where the injured party sued another alleged tortfeasor for the same injury for which the settling tortfeasor had been released; (2) where the settling tortfeasor sued another alleged tortfeasor for contribution; and (3) where another alleged tortfeasor sued the settling tortfeasor for contribution.\textsuperscript{56}

\textit{a. First Tortfeasor Settles—Plaintiff Sues Second Tortfeasor}

Prior to the Contribution Act, Illinois common law provided that a release of one joint tortfeasor released all other joint tortfeasors.\textsuperscript{57}

\textsuperscript{55} Gerill Corp. v. Jack L. Hargrove Builders, Inc., 538 N.E.2d 530, 542 (Ill.), cert. denied, 493 U.S. 894 (1989). Gerill left open the question of whether a party guilty of willful and wanton misconduct could seek contribution from a negligent party. This question was answered in Ziarko v. Soo Line R.R., 641 N.E.2d 402 (Ill. 1994). In Ziarko, the Illinois Supreme Court held that a party guilty of willful and wanton misconduct could seek contribution from a negligent party, so long as the party's conduct, while reckless, was not intentional. \textit{Id.} at 409.

\textsuperscript{56} If a release of a potential defendant does not discharge the liability of the settling tortfeasor to the injured party, it is not a valid release and will have no effect on determinations involving other parties whose fault contributed to the injury. Once the defendant establishes the existence of a release that is legal and binding on its face, the burden shifts to the plaintiff to prove that it is invalid. \textit{See} Brady v. Prairie Material Sales, Inc., 546 N.E.2d 802, 807 (Ill. App. 2d Dist. 1989), \textit{appeal denied}, 550 N.E.2d 802 (Ill. 1990); Turner v. Cosmopolitan Nat'l Bank, 536 N.E.2d 806, 811 (Ill. App. 1st Dist. 1989). Generally, the injured party may set aside a release only in limited circumstances. A release may be set aside by showing fraud in the inducement or execution of the release. \textit{See} Harris v. Walker, 519 N.E.2d 917, 920 (Ill. 1988) (indicating, though not expressly holding, that a release induced by fraud could be set aside); Blaylock v. Toledo, Peoria & W. R.R., 356 N.E.2d 639, 641 (Ill. App. 3d Dist. 1976) (stating that fraud in the inducement is a valid argument to vitiate a release). A release may be set aside for lack of consideration or mutual mistake. \textit{See} Castro v. Chicago, R.I. & P. R.R., 415 N.E.2d 365, 368 (Ill. 1980), \textit{cert. denied}, 452 U.S. 941 (1981). A release may also be set aside for lack of capacity. \textit{See} McCormick v. McCormick, 455 N.E.2d 103, 112 (Ill. App. 1st Dist. 1983). Normally, the fact that the plaintiff was unaware of the extent of his injuries when he received the settlement award will not void a release. \textit{See} Castro, 415 N.E.2d at 368. In Meyer v. Murray, 387 N.E.2d 878 (Ill. App. 1st Dist. 1979), however, the court noted a trend of liberality in setting aside settlement agreements that subsequently proved to be unfair and unjust to the degree that some courts articulate the issue in terms of whether the result was unconscionable. \textit{Id.} at 883. In Murray, the court set aside a release given in return for $250 where the injury sued for was the alleged cause of the settling party's death. \textit{Id.} at 885; \textit{cf.} Turner, 536 N.E.2d at 811 (stating that settlements will not be easily altered or set aside, and that a mistake by one party is insufficient grounds to invalidate a settlement).

\textsuperscript{57} Porter v. Ford Motor Co., 449 N.E.2d 827, 829 (Ill. 1983) (citing Rice v.
Two exceptions existed to this common law rule wherein a release pertaining to one joint tortfeasor did not bar the plaintiff's action against other potential tortfeasors: covenants not to sue and releases with an express reservation of rights against others.\(^5\)

The Contribution Act changed the common law rule pertaining to releases. The Act provided that a release, a covenant not to sue, and a covenant not to enforce judgment would not discharge any other tortfeasors unless the terms of the document so provided.\(^5\) Courts interpreted this provision to mean that a release does not discharge any other tortfeasors unless they are named or otherwise specifically designated in the document.\(^5\) Although a release did not discharge tortfeasors other than those specifically designated, the release did reduce any recovery against them.\(^6\) This reduction was determined by the

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59. ILL. COMP. STAT. ANN. ch. 740, § 100/2(c) (West 1992). This section provides:

(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.

Id. In Batteast v. Wyeth Lab., Inc., 560 N.E.2d 315 (Ill. 1990), the court held that in cases decided after Alsup v. Firestone Tire & Rubber Co., 461 N.E.2d 361 (Ill. 1984), but to which the Contribution Act was inapplicable because the incident leading to the cause of action occurred before the Act's effective date, the document would be interpreted in accord with the manifested intent of the parties. Batteast, 560 N.E.2d at 318. See also infra note 60 (discussing Alsup).

60. Alsup, 461 N.E.2d at 364. In Alsup, the releases provided for the release of the payor and "all other persons, firms, and corporations, both known and unknown." Id. at 362. After the plaintiff settled with the driver of the vehicle that struck the plaintiff's car, the plaintiff filed a suit against the manufacturer of the tires on the car that struck the plaintiff's vehicle. Id. The court held that the tire manufacturer was not discharged by the release given the driver of the car. Id. at 364. This rule applies to releases executed after January 20, 1984. Id. at 364-65.

Compare Rakowski v. Lucente, 472 N.E.2d 791 (Ill. 1984), with Alsup, 461 N.E.2d at 361. In Rakowski, the court held that, unlike different parties, different claims against the same party or parties may be released implicitly. Rakowski, 472 N.E.2d at 794-95. In Rakowski, a plaintiff driver settled his claim against the defendant driver. Id. at 792. Subsequently, the defendant driver and two of his passengers sued the plaintiff driver for their injuries. Id. When the plaintiff driver sought contribution from the defendant driver, the court held that, under the wording of the release, that claim had been released. Id. at 794-95.

61. ILL. COMP. STAT. ANN. ch. 740, § 100/2(c) (West 1992).
consideration actually received for the release or the amount stated in the document as the consideration received for it, whichever was greater.62

b. **Settling Tortfeasor Sues for Contribution/ Settling Tortfeasor Gets Sued for Contribution**

The Contribution Act prohibited a tortfeasor who settled with the plaintiff from recovering contribution from any tortfeasor whose liability was not extinguished by the settlement.63 Thus, assume the settling tortfeasor paid the plaintiff $100,000 in return for a release, and that the plaintiff never pursued any other tortfeasor. Under the Contribution Act, the settling tortfeasor could not pursue other tortfeasors for

62. *Id.* If an employee releases his or her employer in consideration of a waiver of the employer's Workers' Compensation lien, any judgment must be reduced by the amount of that lien. *See* Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 530 (Ill. 1989).

At least one judicially created exception to this rule existed. In American Nat’l Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Ctr., 609 N.E.2d 285 (Ill. 1992), the Illinois Supreme Court held “that common law implied indemnity was not abolished by the Contribution Act in quasi-contractual relationships involving vicarious liability.” *Id.* at 289. The court also held, however, that if an agent settles with the plaintiff, the plaintiff’s claim against the principal based on vicarious liability is extinguished. *Id.* Conversely, if the principal settles, the result is governed by the Contribution Act. *Id.* at 290. Accordingly, the agent is discharged only if designated in the release, and the principal is entitled to implied indemnification only in that case. *Id.*

In Allison v. Shell Oil Co., 495 N.E.2d 496 (Ill. 1986) the court substantially abolished implied indemnification. *Id.* at 500-01. The court left open only two areas for its possible application: vicarious liability and situations where there is an “explicit undertaking[] among two or more parties to shift from one party to another the ultimate cost of liability which may arise in favor of a third party.” *Id.* at 497. The court declined to express an opinion on the continued viability of implied indemnity in those two situations. *Id.* The court later held that a claim for indemnity based upon such an underlying action cannot be maintained where the one seeking indemnity was found negligent in the underlying action, but the court again left open the question involving vicarious or derivative liability of the one claiming indemnity. Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1255 (Ill. 1988).

Further, applying the concept that a party whose actual fault contributed in a causal way to the plaintiff’s harm may not seek indemnification, the court held that a settling party whose settlement reflects a recognition of its fault may not obtain indemnification. Thatcher v. Commonwealth Edison Co., 527 N.E.2d 1261, 1263 (Ill. 1988). A few years later, a court held that the theory on which the plaintiff sues the indemnitee determines whether its fault was strictly vicarious or derivative for purposes of entitlement to indemnification. Diamond v. General Tel. Co., 569 N.E.2d 1263, 1268 (Ill. App. 2d Dist.), *appeal denied*, 580 N.E.2d 111 (Ill. 1991). According to Hackett v. Equipment Specialists, Inc., 559 N.E.2d 752 (Ill. App. 1st Dist.), *appeal denied*, 564 N.E.2d 837 (Ill. 1990), 100% contribution is the equivalent of indemnification and cannot be sustained in those situations where indemnity is unavailable. *Id.* at 762.

63. ILL. COMP. STAT. ANN. ch. 740, § 100/2(e) (West 1992). Courts have held that this statute also precludes any such recovery based on equitable apportionment. *See*, e.g., Mayhew Steel Prods., Inc. v. Hirschfelder, 501 N.E.2d 904, 906 (Ill. App. 5th Dist. 1986), *appeal denied*, 508 N.E.2d 730 (Ill. 1987).
contribution without an explicit provision in the settlement agreement immunizing the other tortfeasors from suit by the plaintiff.\textsuperscript{64}

A settling tortfeasor, however, could bring a suit for contribution against any other tortfeasor whose liability was extinguished by the settlement.\textsuperscript{65} In addition, if the amount of the settlement was reasonable and/or in good faith, the settlement amount determined the remaining amount of damages to be apportioned among those subject to liability in tort to the injured party.\textsuperscript{66} Moreover, if the release did not dis-

\textsuperscript{64} Stro-Wold Farms v. Finnell, 569 N.E.2d 1156, 1158-59 (Ill. App. 4th Dist.), appeal denied, 580 N.E.2d 136 (Ill. 1991). In \textit{Stro-Wold Farms}, the court held that there was a bright-line rule that the tortfeasor had to be explicitly named in the settlement agreement in order to be subject to a suit for contribution. \textit{Id.} at 1159. The court explained:

\textquote[An obvious purpose of the Act is to reduce the amount of litigation. A limitation on the right to obtain contribution ought to reduce the amount of litigation. The situation where the statute of limitations runs on a joint tortfeasor or where a plaintiff chooses not to sue such a person is a rather rare occasion. We do not choose to torture the language of section 2(e) to permit the seeking of contribution here even though it might seem fair to do so. To disregard the limitation of section 2(e) each time it might seem fair to do so would cause intolerable confusion. \textit{Id.} at 1158-59 (quoting Pearson Bros. v. Allen, 476 N.E.2d 73, 75 (Ill. App. 4th Dist. 1985)).]


The Contribution Act does not require a settling party to eliminate every obligation of that party to the original plaintiff, only liability derived from negligent or otherwise culpable conduct. Accordingly, in \textit{Hall} v. Archer-Daniels-Midland Co., 524 N.E.2d 586 (Ill. 1988), the court held that contribution could be obtained from the injured party's employer even if the settlement did not extinguish its workers' compensation liability to the injured party. \textit{Id.} at 589-90.

In Houser v. Witt, 443 N.E.2d 725 (Ill. App. 4th Dist. 1982), a husband and wife driving in one automobile collided with another automobile. \textit{Id.} at 726. The husband and wife settled with the driver of the other car, and that driver then sought contribution from the husband, the driver of the couple's car, for the injuries to the wife. \textit{Id.} The reviewing court denied contribution. \textit{Id.} The court reasoned that the lack of allocation of the amount paid by the party seeking contribution between the claims of the husband and wife precluded contribution because it could not be established that he had paid more than his pro rata share. \textit{Id.} at 726-27. This case was distinguished in \textit{Hall}, where the court held that failure to allocate separate amounts of the settlement for the plaintiff's compensatory and punitive damage claims did not preclude contribution based on the whole unless a lack of good faith was established. \textit{Hall}, 524 N.E.2d at 591-92.

\textsuperscript{66} 535 N. Mich. Condominium Ass'n, 493 N.E.2d at 116 (Quinlan, J., specially concurring). \textit{See also} \textit{Uniform Contribution Among Tortfeasors Act} § 4 (1955)
charge the other alleged tortfeasors, but rather was used to reduce the plaintiff's damages, and if the release was in good faith, the tortfeasors sued by the plaintiff could not sue the settling tortfeasor for contribution. The settling tortfeasor, however, could be liable in contribution if the court determined that the settlement was not made in good faith.

2. The Problem of "Good Faith"

Illinois courts encountered difficult problems when defining "good faith" for the purpose of determining whether a settling tortfeasor should be excused from liability for contribution. The normal interpretive problems were aggravated by the intersection of two competing goals: the goal of fairly apportioning the plaintiff's injuries among the responsible parties versus the goal of promoting settlements.

The goal of fair apportionment among the responsible parties implies that courts cannot discharge a tortfeasor's duty of contribution where the amount of the settlement with the plaintiff was substantially less than the pro rata share of that tortfeasor's liability to the plaintiff. If the settling tortfeasor paid substantially less than his or her pro rata share, the set-off given the other tortfeasors would not be adequate. Thus, the non-settling tortfeasors would have to pay significantly more than their appropriate share of the plaintiff's damages.

(discussing the effect of a good faith release of one joint tortfeasor). These authorities indicate that the burden is on the plaintiff to establish the reasonableness of the amount of the settlement. In Bituminous Ins. Cos., however, the court ruled that the issue is the good faith of the plaintiff (not the reasonableness of the settlement) and that the party challenging the release carries the burden of proving any invalidity. Bituminous Ins. Cos., 501 N.E.2d at 909. The court stated, however, that even if it was assumed that the plaintiff was required to make a preliminary showing of good faith, such a showing had been made on the facts of the case. Id. The difference between a "reasonable" settlement and a "good faith" one appears to consist of an objective rather than a subjective test. In Mallaney, 533 N.E.2d at 1114, the majority followed the "good faith" rule. Id. at 1117. In dissent, Justice Heiple asserted his belief that for purposes of contribution, either party should be able to contest the correctness of the settlement amount. Mallaney, 533 N.E.2d at 1118 (Heiple, J., dissenting).

68. ILL. COMP. STAT. ANN. ch. 740, § 100/2(d). In O'Conner v. Pinto Trucking Serv., Inc., 501 N.E.2d 263 (III. App. 1st Dist. 1986), this provision was upheld against the contention that it violated Art. I, §12 of the 1970 Illinois Constitution by depriving the plaintiff's right to a remedy. Id. at 268.
71. For example, assume the following: Plaintiff sustains an indivisible injury
Allowing non-settling tortfeasors to sue for contribution, however, conflicted with the policy of encouraging settlements. For example, a tortfeasor usually decides to settle when it appears that settlement would be less costly than the results of a trial. A tortfeasor would have little incentive to settle if he or she would be subject to a claim for contribution if a suit by the plaintiff against another tortfeasor resulted in a pro rata liability larger than the amount of the settlement. Depriving a tortfeasor of the benefit of a settlement undermines public policy favoring settlements. Moreover, if the settlement agreement was higher than the settling tortfeasor’s pro rata share, he or she would be bound by the settlement agreement, thus paying an excessive amount without an ability to seek contribution from the other defendants. In this situation, as in the example given above, universal application of the contribution rules contravened the desirability of pre-trial settlements.

In order to protect the settling joint tortfeasor, the Contribution Act provided that a settling tortfeasor was immune from a suit for contribution so long as the settlement agreement was made in good faith. Unfortunately, the Act never defined good faith. Without any statutory guidance, the question of what constituted good faith arose when settlements were proportionately low compared to the settling tortfeasors’ pro rata liability. In \textit{LeMaster v. Amstead Industries}, an early case interpreting the good faith provision, an Illinois appellate court held that one test for determining whether the settlement agreement caused by two defendants; the plaintiff is found 0% liable, defendant 1 is found 10% liable, and defendant 2 is found 90% liable. If defendant 2 settles for $60,000 and the plaintiff then sues defendant 1 and receives a judgment for $100,000, under the Contribution Act, defendant 2’s settlement would offset the judgment by only $60,000. Thus, defendant 1 would be liable for $40,000 or 40%. This result would be unfair to defendant 1 as he or she was only 10% liable and yet paid 40%.

72. See \textit{Babb}, 642 N.E.2d at 1203 (indicating case discussing pro-settlement policy of the Illinois courts).

73. Assume that, as in \textit{supra} note 71, plaintiff is 0% liable, defendant 1 is 10% liable and defendant 2 is 90% liable. If defendant 2 settled for $50,000 and then was subject to a suit in contribution brought by defendant 1 for the pro rata distribution of $100,000, defendant 2 would end up paying $90,000 regardless of whether defendant 2 settled or not, thus not promoting the goal of settlements. If defendant 2 settled for $95,000, defendant 1 would have to pay only $5,000 and thus would come out ahead by $5,000, as defendant 2 could not sue for contribution against defendant 1.

74. No right of contribution exists unless the other tortfeasors were discharged. See \textit{supra} notes 63-65 and accompanying text.

75. \textit{ILL. COMP. STAT. ANN.} ch. 740, § 100/2(e) (West 1992).


77. 442 N.E.2d 1367 (Ill. App. 5th Dist. 1982).
was fair and had been made in good faith included comparing the ratio of the settlement amount to the amount of the verdict. The \textit{LeMaster} court also held that a settlement by an employer with its employee is not one made in good faith because the employee has no common law tort claim against his employer to surrender as consideration.\footnote{Id. at 1372.}

In \textit{Ballweg v. City of Springfield},\footnote{Id. at 1373.} the Illinois Supreme Court rejected both aspects of \textit{LeMaster}.\footnote{Id. at 1374.} In \textit{Ballweg}, the court held that a settlement of $15,000 was in good faith even though the final verdict exceeded $300,000 in compensatory damages.\footnote{Id. at 1375.} Thus, \textit{Ballweg} effectively invalidated the "ratio" test as a conclusive method for showing an absence of good faith.\footnote{Id. at 1380.} The court in \textit{Ballweg} further concluded that a settlement can be in good faith even though the limitation period governing the plaintiff's suit against the settling tortfeasor
expired by the time of the settlement. The court reasoned that the mere applicability of an affirmative defense does not extinguish the potential for tort liability. The settling defendant remained potentially liable because the defendant had not yet raised the affirmative defense. Accordingly, the court held that the release was supported by consideration.

Ballweg established that the mere presence of an affirmative defense and a proportionately small settlement does not necessarily negate good faith. The court, however, did not set out a test by which future courts could analyze good faith claims outside the affirmative defense realm. Subsequently, the Illinois Supreme Court formulated a "totality of the circumstances" test for determining whether settlement agreements were made in good faith. For example, in Wilson v. Hoffman Group, Inc., the court ruled that in the determination of good faith, no one factor is controlling, but rather courts must consider the totality of the circumstances surrounding the settlement.

Under this "totality of the circumstances" approach, Illinois courts have been very liberal in finding that settlements were made in good faith.

84. Ballweg, 499 N.E.2d at 1380.
85. Id.
86. Id.
87. Id. See also Bryant v. Perry, 504 N.E.2d 1245, 1247-48 (Ill. App. 2d Dist. 1986) (applying the rationale of Ballweg). In Bryant, a mother represented herself and her minor daughter as plaintiffs in personal injury claims arising from an automobile collision. Id. at 1246. The defendants counterclaimed against the mother seeking contribution for the child's injuries. Id. The mother then entered a settlement between herself as the driver of the car and herself as representative of her daughter. Id. The court held that the settlement was in good faith. Id. at 1250. The court reasoned that parental immunity was no bar after Ballweg because there had been no judicial determination that a suit against the mother by her daughter was barred, and the settlement was not collusive despite the mother's dual role. Id. at 1248-49.
88. Ballweg, 499 N.E.2d at 1380.
89. 546 N.E.2d 524 (Ill. 1989).
90. Id. at 529. The court indicated that the fact that the opinion of the trial judge, who was involved in the entire settlement procedure, was an important factor. Id. at 526. "The trial court found that the plaintiff's position was contrary to law and evidenced a lack of good faith on the part of the plaintiff, and refused to certify the settlement as being in good faith." Id. See also Ruffino v. Hinze, 537 N.E.2d 871, 874 (Ill. App. 1st Dist.) (concluding that the trial court has discretion in determining whether a settlement constitutes "good faith"), appeal denied, 545 N.E.2d 130 (Ill. 1989); Dixon v. Northwestern Publishing Co., 520 N.E.2d 932, 937 (Ill. App. 4th Dist.) (reasoning that because the Contribution Act does not explicitly define "good faith," the determination of "good faith" rests largely within the court's discretion), appeal denied, 535 N.E.2d 400 (Ill. 1988). In Ellis v. E.W. Bliss & Co., 527 N.E.2d 1022 (Ill. App. 1st Dist.), appeal dismissed, 535 N.E.2d 400 (Ill. 1988), the court held that the fact that the defendant had already prevailed on the defense does not affect this logic. Ellis, 527 N.E.2d at 1024.
faith. For example, in *Smith v. Texaco, Inc.*, the plaintiff, injured in an explosion while working on an underground gas storage tank, settled with two of multiple defendants for $35,000 and $200,000, respectively. The non-settling defendants attacked these settlements, asserting that those sums were not reasonable approximations of the settling defendants’ pro rata shares and, therefore, were in bad faith. The trial court disagreed, finding the settlements to be in good faith because there was no indication of fraud, duress, collusion, or tortious conduct in the negotiations. On appeal, the reviewing court affirmed under the totality of the circumstances test even though one defendant had settled for less than four percent of its coverage. The court reasoned that these were "arm’s length" negotiations in which the settling defendants denied any liability.

*Ruffino v. Hinze* and *Snoddy v. Teepak, Inc.* also illustrate the liberal approach courts have taken in determining good faith. These cases, respectively, involved settlements between close family members and settlements with employers where the employer has no tort liability to the plaintiff, and raised serious concerns about the good faith of the settlement. Despite the existence of these "red flags," both settlements were upheld. The court in *Ruffino* upheld as a good faith settlement an agreement between a plaintiff and his grandfather. The court in *Snoddy* upheld as a good faith settlement an agreement where the plaintiffs and their employer settled for $191,000 and a waiver of the employer’s $513,000 workers’ compensation lien. *Ruffino* and *Snoddy* illustrate that, for all practical purposes, there is a strong presumption in favor of finding settlement agreements to be in good faith.

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92. *Id.* at 753.
93. *Id.*
94. *Id.*
95. *Id.* at 756.
96. *Id.* at 755. The court refused to adopt the "California test," which requires that the settlement sum fall within a "reasonable range" in light of two factors: the plaintiff’s probability of recovery and the settling defendant’s proportionate liability. *Id.* at 756 (citing *Tech-Bilt v. Woodward-Clyde & Assoc.*, 698 P.2d 159 (Cal. 1985)). For a description of the "California test," see *Tech-Bilt*, 698 P.2d at 166-68.
100. *Snoddy*, 556 N.E.2d at 683.
103. *See also* *Alvis v. Ribar*, 421 N.E.2d 886, 894 (Ill. 1981). The court in *Alvis*
Only a few cases have held settlements not to be in good faith. Illustrative cases include *Blagg v. Illinois F.W.D. Truck & Equipment Co.*,\(^{104}\) *Higginbottom v. Pillsbury Co.*,\(^{105}\) and *In re Guardianship of Babb*.\(^{106}\) In *Blagg*, the settling parties manipulated the settlement allocation between a man’s claim and his spouse’s loss of consortium claim in a way that deprived the non-settling employer of his worker’s compensation lien.\(^{107}\) The court concluded that the settlement was not in good faith.\(^{108}\) The *Higginbottom* court held that the employer’s settlement with the plaintiff employee was not in good faith: everything that the employer gave the plaintiff in return for the settlement could be recovered under the workers’ compensation lien, which was retained.\(^{109}\) The court found this to constitute a lack of good faith, stating that good faith requires some “net consideration” to the employee from the employer.\(^{111}\)

Finally, in *Babb*, the court held that loan agreements\(^{112}\) are not in good faith.\(^{113}\) Essentially, the court determined that loan agreements conflicted with the Contribution Act’s provision prohibiting a settling tortfeasor from receiving contribution from another tortfeasor whose liability is not extinguished by the settlement.\(^{114}\) Accordingly, the

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104. 572 N.E.2d 920 (Ill. 1991).
106. 642 N.E.2d 1195 (Ill. 1994). In *Babb*, the court held this decision would apply prospectively only. *Id.* at 1207.
108. *Id.*
110. *Id.* at 853.
111. *Id.* at 854.
112. In essence, a loan agreement consists of an agreement by the injured party in a multi-tortfeasor situation not to sue one defendant or not to execute a judgment against that defendant in return for a sum of money which is to be repaid if, and only to the extent that the plaintiff recovers a judgment from the other tortfeasors. Many variations on these terms are possible. For a further discussion of loan agreements, see Richard A. Michael, “Mary Carter” Agreements in Illinois, 64 Ill. B.J. 514 (1976).
114. *Id.* (citing Ill. Comp. Stat. Ann. ch. 740, § 100/2(c) (West 1992)). The court provided two main reasons for concluding that loan agreements cannot be in good faith: (1) they deprive the non-settling tortfeasors of their statutory right to a reduction of the judgment by the amount of the settlement; and (2) they violate the Contribution Act’s policy of equitably distributing among all joint tortfeasors the burden of compensating an injured plaintiff. *Id.*
court concluded that loan agreements cannot be held to be in good faith.\textsuperscript{115}

In addition to the difficulty encountered in defining “good faith,” the courts also encountered difficulty in determining the appropriate procedure for litigating whether a settlement was made in good faith.\textsuperscript{116} The issue was whether the contribution plaintiff should have the burden of proof on the issue of good faith. Proof of good faith would require the negation of all possible improper motives, whereas proof that good faith was absent would require proof of only one fact. The Illinois Supreme Court resolved this issue by holding that “once a preliminary showing of good faith has been made, the burden then shifts to the party challenging the settlement” to prove that the settlement was not made in good faith.\textsuperscript{117} In addition, Illinois courts ruled that an absence of good faith must be proven by clear and convincing evidence because the law favors voluntary settlements, and because an essential part of the statutory scheme is to promote certainty and encourage settlements.\textsuperscript{118}

Trial courts were given the discretion to determine both the type of hearing to be held and the extent of evidence necessary to be presented when determining whether good faith existed.\textsuperscript{119} A hearing on the issue would be held only if the party seeking contribution asserted facts establishing that the settlement was not in good faith.\textsuperscript{120} If such facts were not shown, the contribution plaintiff failed to carry the burden of going forward, and good faith could be determined without a hearing.\textsuperscript{121}

\textsuperscript{115} Id. at 1207. The court also held that the agreement in the case before it violated the policy of encouraging settlements because it granted the settling defendant control over the plaintiff’s ability to settle with any other party. Id. at 1206.


\textsuperscript{117} Id. at 529.


\textsuperscript{119} Pritchard v. Swedish Am. Hosp., 557 N.E.2d 988, 992 (Ill. App. 2d Dist. 1990); Ruffino v. Hinze, 537 N.E.2d 871, 874 (Ill. App. 1st Dist. 1989). In \textit{Ruffino}, the court held that the absence of “meaningful discovery” that prevented the establishment of the “relative liabilities of the parties” did not prevent a finding of good faith. Id. at 872, 874.

\textsuperscript{120} In the cases where courts have denied a hearing, the party seeking contribution failed to carry this burden. \textit{See}, e.g., Christmas v. Hughes, 543 N.E.2d 274, 276 (Ill. App. 1st Dist. 1989); \textit{Ruffino}, 537 N.E.2d at 874; Lorenz v. Air Ill., Inc., 522 N.E.2d 1352, 1355 (Ill. App. 1st Dist. 1988).

\textsuperscript{121} Barreto v. City of Waukegan, 478 N.E.2d 581 (Ill. App. 2d Dist. 1985), held that the right to trial by jury does not extend to special or statutory proceedings unknown at common law, and because the issue of good faith settlement is such a proceeding, there is no right to a jury trial on it. Id. at 588. The opposing argument is that
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B. An Evaluation of Illinois' Approach to Contribution

The Contribution Act fulfilled its objective of alleviating the inequity that resulted prior to the Act when one tortfeasor (often the least culpable one) was, in the absence of active-passive negligence indemnification,\(^\text{122}\) forced to bear the total cost of making the plaintiff whole. Despite this improvement, a defendant was still required to bear more than his or her pro rata share of the plaintiff’s damages in the following situations: where another defendant was insolvent\(^\text{123}\) or where another defendant had immunity from the duty to contribute;\(^\text{124}\) or where another defendant had made a settlement on favorable terms with the plaintiff.\(^\text{125}\)

Careful analysis reveals that, in insolvency\(^\text{126}\)/immunity-type situations,\(^\text{127}\) placing the entire burden of the plaintiff’s injury on the remaining defendant was indeed fair. While it might appear unjust that one tortfeasor must bear the entire burden when the other joint tortfeasor is insolvent or immune, fairness seems to dictate that the burden

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122. There were at least two difficulties with the use of this concept to address the problem: (1) it was an all or nothing remedy that did not permit the responsible parties to share the cost; and (2) it was not normally applicable, and where it might be, it was difficult to determine its applicability and apply it properly. See Michael & Appel, supra note 57, at 594-95.

123. The Contribution Act expressly provides that “no person shall be required to contribute to one seeking contribution in a amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible.” ILL. COMP. STAT. ANN. ch. 740, § 100/3 (West 1992). In the event that one of the joint tortfeasors is uncollectible, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability. Id.

124. An example of this situation would be when the state is a joint tortfeasor, in which case sovereign immunity could cause this inequity to arise. Any inequity resulting from a potential defendant who is not subject to the court’s jurisdiction might be alleviated by suing that defendant for contribution in another jurisdiction where he or she is subject to suit. An inequity might arise in this situation if the cost of a contribution suit would be such that the separate suit would not be economically sound. But, by definition, this inequity would be minor if measured in dollars.

125. ILL. COMP. STAT. ANN. ch. 740, §§ 100/2(c), (d) (West 1992).

126. Insolvency includes, for these purposes, a situation where the claim against a tortfeasor was so small that it was not economically feasible. This situation would normally apply only if that tortfeasor was not subject to jurisdiction in the state where the underlying action was litigated.

127. Because of the very limited extent to which the Illinois courts permitted immunity from suit by the plaintiff to bar a claim for contribution, immunity from contribution appears to be primarily limited to suits against the State, and, arguably, an employer to the extent that its liability exceeds its compensation liability. See supra notes 48-52 and accompanying text.
fall on the liable defendant rather than the injured plaintiff. Essentially, each tortfeasor's tortious conduct proximately caused the plaintiff's injuries.\textsuperscript{128} Thus, when it is said that one tortfeasor was 33% responsible for the accident, this does not mean his wrongful conduct was not a 100% cause of the accident. Rather it means, that, as between all the defendants, 33% of the liability should be allocated to this defendant's conduct. Used in this sense, causation is treated as an allocation device, not as true proximate causation.\textsuperscript{129}

Furthermore, when contribution was first adopted, Illinois followed the common law rule of contributory negligence.\textsuperscript{130} Accordingly, if the plaintiff committed any wrongdoing which was in any way a proximate cause of the injuries, contributory negligence barred any recovery.\textsuperscript{131} As between an innocent plaintiff and a defendant whose conduct was a proximate cause of the accident, it was just that the risk of the loss caused by an insolvent or immune tortfeasor should fall on any remaining defendants rather than on the plaintiff. The only inequity in this situation existed between the defendants and arose from the fact that they were not all each paying their pro rata share of the damages. No injustice existed between the plaintiff and the defendants held liable because the innocent plaintiff was assured recovery.

The settlement situation, however, required a different analysis. As long as the amount of any settlement by a tortfeasor accurately reflected that tortfeasor's pro rata share of the damages, the immunity of that defendant from any contribution claim caused no one any prejudice. For example, assume there were three potential defendants, all of whom caused the plaintiff's injury. Further, assume that no basis existed to attribute any greater proportion of the fault to any one of the defendants. In this situation, assume that one defendant settled with the plaintiff for an amount that was, for practical purposes, equal to one-third of the damages to which the plaintiff is found to be entitled. Then, in a trial against the second and third tortfeasor, the plaintiff's damages would be reduced by the amount of the settlement (one-third). This reduced judgment would be entered against the defendants. By reason of contribution, each defendant would be liable for one-half of this judgment, which equals one-third of the total liability for each defendant. Thus, no inequity would exist.

\textsuperscript{128} See supra notes 48-52 and accompanying text.
\textsuperscript{130} See infra text accompanying notes 139-144.
\textsuperscript{131} See supra note 4.
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Inequity resulted, however, in settlement situations where a settling tortfeasor made an advantageous bargain with the plaintiff. For example, assume that the tortfeasor in the above example settled for a small percentage (e.g., one-tenth) of the damages to which the plaintiff was later found to be entitled. In that event, in a trial against the other two tortfeasors, the plaintiff’s damages would be reduced by the amount of the settlement (one-tenth). This reduced judgment would be entered against the defendants. Each of these defendants would then be liable for 45% of the damages although their allocated pro rata share of the fault would only be one-third; this scheme is clearly an inequitable distribution of damages.

The method embodied in the Illinois contribution system, however, is not the only way to treat a settlement. In actuality, there are three possible ways to treat a settlement for the purpose of determining contribution:

1. requiring that the plaintiff bear the risk that the amount of the settlement is substantially less than the released tortfeasor’s pro rata share of the damages by reducing the judgment by the percentage of fault applicable to the released defendant (the New York approach);
2. requiring that the settling tortfeasor bear that risk by extinguishing the settling tortfeasor’s duty to contribute.
3. reducing the claim that the injured party has against other tortfeasors by “the amount of the equitable share of the obligation of the released tortfeasor.”

The selection of the proper approach presents a very difficult no-win situation. The Restatement of Torts (Second) § 886A contains a caveat that “[t]he Institute takes no position on the effect of a release of one tortfeasor . . . upon the right of other tortfeasors to contribution from him.” RESTATEMENT (SECOND) OF TORTS § 886A caveat (1977). A comment on this caveat explains that, while there are three possible ways to handle a settlement for less than the full amount of the claim, each has weaknesses and none is satisfactory. Id. cmt. m. The first possibility is to credit the amount received against the judgment but not to release the settling party from contribution claims insofar as they exceed that amount. Id. cmt. m(1). The comment to the Restatement characterizes this as the fairest approach, although it is “very discouraging to settlements.” Id. The second possibility is to extinguish the settling tortfeasor’s duty to contribute. Id. cmt. m(2). The comment considers this approach as not only very unfair to the other tortfeasors, but also an incentive to collusion which may necessitate the imposition of a requirement of “good faith.” Id. The Restatement recognizes, however, that “once there is an attempt to provide objective criteria’’ to determine if the transaction is in good faith, the finality of the settlement is questioned and the major advantage of the solution is lost. Id. The third possibility is to reduce the claim that the injured party has against other tortfeasors by “the amount of the equitable share of the obligation of the released tortfeasor.” Id. cmt. m(3). The Restatement recognizes, however, that this approach may discourage the injured party from settling. Id. After acknowledging that the 1939 Uniform Act adopted the first position, the 1955 Act, the second, and the 1977 Act, the third, the Restatement concludes by taking no position on the issue. Id.

Gonzales v. Armac Indus., 611 N.E.2d 261 (N.Y. 1993). In Gonzales, the court described the New York approach as follows:

A settlement, or release, by one tortfeasor does not relieve the others from liability, but it does reduce the amount which can be recovered from them by (1) the amount stipulated by the settlement, (2) the amount of consideration paid for it, or (3) the released tortfeasor’s equitable share of the damages.
holding that a settlement is not in good faith and does not discharge the settling tortfeasor from a duty of contribution unless the consideration for the release lies in the "reasonable range" of that tortfeasor's liability (the California approach); or (3) requiring that the other tortfeasors bear that risk (the Illinois approach). Of the three approaches, the Illinois approach seems least fair because it made the only group not a party to the settlement agreement bear the risk of an unwise or improper settlement. The Illinois approach, however, ensured that neither party to the settlement bore the risk that the settlement did not adequately reflect the proper pro rata liability of the defendant released. In this way, the Illinois approach promoted settlements. This fact remained the only advantage to the Illinois approach, but the adoption of this position indicates that the Illinois courts believed that promoting settlement agreements outweighed any unequal distribution of liability.

C. The Impact of Comparative Fault

In 1981, the Illinois Supreme Court adopted comparative fault in negligence and product liability cases. In so doing, the court abandoned the former rule that any fault of the plaintiff which was a proximate cause of his injury barred recovery, and the concomitant pleading rule that the absence of contributory negligence was an affirmative allegation of the complaint. The comparative fault of the plaintiff became an affirmative defense which would reduce the plaintiff's recovery by the proportion of the total fault attributable to him, but would not totally bar recovery. Accordingly, the defendant had to raise comparative fault for it to apply to the case.

whichever is greatest.

Id. at 262-63 (citation omitted).


135. See supra part II.A.1 (describing the Illinois approach).

136. See supra part II.A.1 (describing the Illinois approach).

137. See supra part II.A.1 (describing the Illinois approach).

138. Alvis v. Ribar, 421 N.E.2d 886, 889 (Ill. 1981) (rejecting contributory negligence and adopting "pure" comparative negligence in which a plaintiff's damages are simply reduced by the percentage of fault attributable to the plaintiff).

139. See supra note 4.

140. See Leon Green, Illinois Negligence Law II: Contributory Negligence, 39 ILL. L. REV. 116, 117 (1944) (noting that the plaintiff had the burden of showing freedom from contributory negligence).

141. Alvis, 421 N.E.2d at 890-91.

142. Id. See also Casey v. Baseden, 490 N.E.2d 4, 6 (Ill. 1986) (holding that the defendant in a comparative negligence case bears the burden of persuading the trier of
The Illinois Supreme Court adopted comparative fault because of the perceived injustice of denying the plaintiff any recovery if the plaintiff's own fault proximately contributed to the accident even to a minor degree.\textsuperscript{143} If, for example, under contributory negligence, a plaintiff was found 1\% negligent, that plaintiff would be barred from any recovery from the defendant who was 99\% liable. By contrast, under comparative negligence, the plaintiff who was found 1\% negligent would merely have the amount of recovery reduced by 1\% and recover the remaining 99\% from the defendant. In addition, the adoption of comparative fault constituted a recognition by the court that juries were not following the dictates of the former law in that situation.\textsuperscript{144}

The new comparative negligence system functioned separately from the Contribution Act. Comparative negligence determines the liability which exists between the plaintiff and the defendant (a vertical relationship) and applies even where only one potential defendant exists. In contrast, contribution is designed to alleviate inequality among potential defendants by determining the pro rata liability as distributed between joint tortfeasors (a horizontal relationship) and applies only in a multi-tortfeasor situation.

Although the goals of the contribution and comparative negligence doctrines are quite different, both applied when more than one person was responsible for the accident. In addition, the methodology of both doctrines remained quite similar. Both doctrines required the trier of fact to allocate the responsibility for the accident among the parties to it. For contribution, the jury was asked to make this allocation on the basis of the extent that the acts or omissions of each defendant proximately caused the injury.\textsuperscript{145} For comparative negligence, this approach was extended to the plaintiff, whose recovery would be reduced by the percentage that his or her conduct proximately contributed to the causation of the accident.\textsuperscript{146}

There was, however, one major difference in methodology. For comparative negligence, the fault of absent parties was to be included when calculating the plaintiff's portion of the fault; whereas, for contribution, the fault of absent parties was to be excluded when determining the fault of the remaining defendants.\textsuperscript{147} By way of illustration,
assume that a plaintiff and three defendants were each 25% responsible for an accident. Further assume that the plaintiff settled prior to trial with one defendant. In this situation, the plaintiff’s judgment, before reduction by the amount he or she received in settlement, would be reduced, one-fourth, not one-third, because of the plaintiff’s own negligence. In contribution, however, the remaining defendants must allocate any remaining liability among themselves, and could subtract only the amount the plaintiff received in the settlement agreement and/or the amount subtracted due to the plaintiff’s own negligence.

The difference in methodology regarding absent tortfeasors presented procedural complexities in cases involving both comparative negligence and contribution. The fault of an absent tortfeasor must be considered in determining the allocation of the fault which proximately caused the accident for purposes of comparative negligence but not for contribution. When a case contains both issues, the allocation of fault must be made twice, once for each purpose. In comparative negligence, the fault of the absent parties must be determined and allocated, while for contribution purposes, the fault of the absent parties is ignored.

466 N.E.2d 1064, 1069 (Ill. App. 1st Dist. 1984), the court approved Illinois Pattern Jury Instruction Civil No. A45.05, which required the jury’s “consideration not only of plaintiff’s and defendant’s fault, but that of non-party tortfeasors as well” in determining comparative fault. Bofman, 466 N.E.2d at 1069. Compare ILLINOIS PATTERN JURY INSTRUCTIONS § 45.05 cmt. (West 1995) (accruing before November 25, 1986) with id. § B45.03 A cmt. (accruing on and after November 25, 1986 but before the 1995 tort reform legislation).

148. Note that the other defendants still must pay the excess to the extent a settling tortfeasor makes an advantageous bargain with the plaintiff. Assume that the plaintiff and three others are each 25% responsible for the accident and the total damages are determined to be $800,000. If one potential defendant settles with the plaintiff prior to trial for $100,000, the judgment will be reduced to $600,000 by reason of the plaintiff’s fault, and to $500,000 by the settlement. The remaining two defendants would be jointly and severally liable for $500,000, or $250,000 each after contribution, rather than $200,000, which would have been their after-contribution share if the third defendant had not settled but was sued with them. This result is the same if the third potential defendant is insolvent, except that the remaining defendants’ after-contribution share is $300,000 each because there is no reduction for a settlement amount received.

149. See supra note 148.

150. This dual allocation permits inconsistency in the allocation of fault among those whose fault must be allocated for each purpose. See Hackett v. Equipment Specialist Inc., 559 N.E.2d 752, 761-62 (Ill. App. 1st Dist.) (finding impermissible the jury’s apportionment of fault between manufacturer and employer attributing 100% of the fault to the employer after the jury previously determined the manufacturer to be 55% at fault and the employee 45% at fault), appeal denied, 564 N.E.2d 837 (Ill. 1990). At the time of Hackett, two separate verdict forms were recommended. Since January 1994, only one verdict form is recommended. The judge is required to recompute the percentages depend-
While the adoption of comparative negligence ameliorated the injustice of denying any recovery to a plaintiff whose fault was a minor factor in causing the accident, it aggravated the two situations where the Contribution Act failed to achieve an equitable apportionment of damages: the insolvent/immune situation and the favorable settlement situation.\textsuperscript{151} When a tortfeasor settled with the plaintiff for less than the tortfeasor's pro rata share, the remaining tortfeasor could be responsible for all of the plaintiff's damages after those damages attributable to the plaintiff's proportion of the fault are deducted together with the amount of the settlement.\textsuperscript{152} This remained true under comparative negligence even if the plaintiff's fault was greater than that of the remaining defendant.\textsuperscript{153}

In the case of an immune or insolvent defendant, the remaining tortfeasor no longer was assured of facing a completely innocent plaintiff. Requiring a tortfeasor whose fault, however small, was a proximate cause of the accident to bear the risk of an immune or insolvent tortfeasor presented little problem where the plaintiff was necessarily an innocent party. The situation changed significantly, however, when the plaintiff's fault for the accident could exceed that of the remaining defendant. In this situation, it would appear to be inequitable to place the entire burden on the remaining defendants, regardless of the level of fault.

Furthermore, proponents of the elimination of joint and several liability argue that joint and several liability, which makes a defendant liable for the entire injury even where his or her fault was not the entire cause of it, is inconsistent with only reducing a plaintiff's damages because of his or her partial responsibility for the accident. Thus, the plaintiff's proximate fault results in only a proportionate reduction of his or her recovery, while a defendant's proximate fault made him totally liable.

\textsuperscript{151} See supra notes 148-50.
\textsuperscript{152} ILL. COMP. STAT. ANN. ch. 740, §§ 100/2(c), (d) (West 1992).
\textsuperscript{153} For example, assume the plaintiff is 40% liable, defendant 1 is 30% liable, and defendant 2 was 30% liable. Further assume that the plaintiff's total damages equal $100,000. If the plaintiff settles with defendant 2 for $10,000, defendant 1 would be liable for $50,000—$100,000 minus $10,000 for the settlement and $40,000 for the plaintiff's fault. Thus, defendant 1, who is less liable than the plaintiff would be responsible for one-half of all the damages.
III. THE EFFECT OF THE TORT REFORM ACT OF 1986

The adoption of contribution and comparative negligence did not affect the joint and several liability of all the defendants to the plaintiff. Contribution was designed to allocate the damages among the defendants, but not to affect the plaintiff’s right to collect in full from any one. Comparative negligence was designed to alleviate the plaintiff’s hardship that had been caused by disallowing any recovery if his or her fault in any way proximately contributed to the cause of the injury. The Tort Reform Act of 1986, however, changed both the protection that comparative negligence afforded the plaintiff and the application of joint and several liability for certain defendants.

The Tort Reform Act of 1986 contained two provisions that modified the allocation of fault among the parties to an accident. First, a provision in section 2-1116 precluded recovery by a plaintiff whose own fault constituted more than 50% of the fault related to the accident. Second, section 2-1117 provided that, except in medical malpractice and environmental cases, any defendant whose fault was deemed to be less than 25% was liable to the plaintiff only severally for his or her proportion of the damages.

Section 2-1116 precluded the plaintiff’s right to recover in those situations where the plaintiff’s fault was the predominant cause of the accident. The comparative fault plan previously adopted by the Illinois Supreme Court in Alvis v. Ribar was “pure” comparative negligence, reducing the plaintiff’s recovery by the percentage of fault applicable to him or her. In contrast, section 2-1116 barred recovery if the fault of the plaintiff exceeded 50% of the proximate cause of

154. See supra note 37 and accompanying text.
155. See supra note 4.
158. Id. § 5/2-1118, repealed by Pub. Act No. 89-7, § 20, 1995 Ill. Legis. Serv. 243 (West).
159. Id. § 5/2-1117, amended by Pub. Act No. 89-7, § 15, 1995 Ill. Legis. Serv. 235 (West).
160. Id. § 5/2-1116, amended by Pub. Act No. 89-7 § 15, 1995 Ill. Legis. Serv. 234-35 (West). Perhaps this change was fueled by the liberalization of the plaintiff’s right to recover resulting from pure comparative negligence combined with the resulting aggravation of the injustice caused by a missing defendant in the two troublesome contribution situations. See supra part II.B.
162. Id. at 890-91.
the injury or damage. In all other cases, the rule remained that the plaintiff’s fault served not as a complete defense, but rather, reduced the plaintiff’s recovery by the percentage of the fault attributable to the plaintiff.

The adoption of the 50% rule, however, failed to eliminate the injustice possible in the two troublesome areas. Although there was no definitive holding on the point, the fault of any absent defendants was considered in determining the plaintiff’s fault and calculating the plaintiff’s recovery, just as it had been prior to the 1986 Act. This method, of course, made it more difficult for the plaintiff to lose a case on comparative negligence grounds. Indeed, any other result would have had a serious chilling effect on prospective settlements between the plaintiff and a defendant unless it was clear that the fault of that defendant played a negligible role in proximately causing the accident. The two trouble spots, while not eliminated, were substantially ameliorated, however, because the risk of an insolvent or favorably settling


164. Assumption of risk and product misuse were comparative fault affirmative defenses in product liability cases, but negligence of the plaintiff was not. See Simpson v. General Motors Corp., 483 N.E.2d 1, 4 (Ill. 1985) (holding that the doctrine of comparative fault does not require consideration of contributory negligence in strict products liability); Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 202 (Ill. 1983) (concluding that the application of comparative negligence in strict product liability actions does not frustrate these actions). In negligence cases, comparative negligence did not affect express assumption of risk, nor primary implied assumption of risk, where the plaintiff voluntarily assumes the risks inherent in a particular situation. Secondary implied assumption of risk, where the plaintiff implicitly assumed the risks inherent in the defendant’s conduct, however, was no longer a complete defense unless it exceeded 50% of the fault. Rather, it reduced the plaintiff’s recovery. See ILL. COMP. STAT. ANN. ch. 625, § 5/12-603.1 (West 1992); Duffy v. Midlothian Country Club, 481 N.E.2d 1037, 1040 (III. App. 1st Dist. 1985) (determining that implied assumption of risk taken by attending golf tournament “will merely aid in the apportionment of damages”); see also Clarkson v. Wright, 483 N.E.2d 268, 279 (Ill. 1985) (holding that evidence of failure to wear a seat belt is inadmissible with respect to negligence or damages).

Comparative negligence applied in cases where the defendant’s conduct was willful and wanton. State Farm Mut. Auto. Ins. Co. v. Mendenhall, 517 N.E.2d 341, 343-44 (Ill. App. 4th Dist. 1987); see also Burke v. 12 Rothschild’s Liquor Mart, Inc., 593 N.E.2d 522, 532 (Ill. 1992) (reserving the issue of “whether a plaintiff’s willful and wanton conduct can be compared with the willful and wanton conduct of the defendant”). Comparative negligence did not apply to Structural Work Act cases. Prewein v. Caterpillar Tractor Co., 483 N.E.2d 224, 225 (Ill. 1985). The Structural Work Act can be found at ILL. COMP. STAT. ANN. ch. 740, §§ 150/0.01-150/9 (West 1992), repealed by Pub. Act No. 89-2, § 5, 1995 Ill. Legis. Serv. 5 (West).

165. See supra part II.B (describing the problems with insolvency/immunity and favorable settlements).

166. See supra text accompanying notes 147-48.
defendant could not be placed on the remaining defendants if the plaintiff's fault was the primary cause of the accident.167

In addition to the 50% rule, the Tort Reform Act of 1986 narrowed the potential liability of a defendant found to be less than 25% at fault.168 In actions to which section 2-1117 applied, any defendant whose allocated share of the fault was determined to be 25% or higher remained jointly and severally liable.169 If, however, a defendant's allocated fault was determined to be less than 25%, that defendant was liable for only that defendant's pro rata share of the plaintiff's damages after excluding the plaintiff's medical expenses.170 Because a defendant found to be less than 25% liable paid only his or her pro rata share of those damages, such a defendant had no right of contribution with respect to those damages.171

The primary issue created by this amended version of section 2-1117 related to whether to consider the fault of a settling party or otherwise absent defendant in determining if a given defendant's negligence constituted less than 25% of the allocated fault. Was his fault to be considered as it was for purposes of comparative negligence? Or was his fault to be excluded as it was for purposes of contribution?

The language of the statute, taken literally, indicated that the fault of a settling party was to be excluded in the calculation attributing fault to

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168. Id. § 5/2-1117 (amended 1995).
169. Id. (amended 1995). The statute provided:
   Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages.
170. Id. (amended 1995). Section 2-1118 excluded any medical malpractice action based on negligence and actions "based on the discharge into the environment of any pollutants."
171. Id. (amended 1995).
the remaining defendants.\textsuperscript{172} The statute defines the fault to be considered as the “total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff.”\textsuperscript{173} Thus, apart from the fault of the plaintiff and the defendants sued by the plaintiff, the statute provides that the only other fault to be considered is that of any third party defendant who could have been sued by the plaintiff.

Interpreting the statutory language as referring to any third party who might have been sued by the plaintiff fails to give meaning to the word “defendant.” Therefore, reading the statute literally, the language seems to include only the fault of those additional potentially liable parties who are actually joined in the case as third party defendants. This literal interpretation was criticized, however, as frustrating the legislature’s intent in enacting the provision.\textsuperscript{174} Because a settling party can never be joined as a third party defendant, the Act, interpreted literally, excludes the settling party’s fault for purposes of contribution.

The Illinois courts first addressed this issue of allocating liability under section 2-1117 in two cases: \textit{Alvarez v. Hintze Construction}\textsuperscript{175} and \textit{Lannom v. Kosco}.\textsuperscript{176} In both cases, the factual setting was similar. The employer/joint tortfeasor settled with the employee/plaintiff by waiving the plaintiff’s workers’ compensation lien.\textsuperscript{177} The remaining defendant argued that the removal of the fault of the employer from the calculation of fault made the remaining defendant jointly liable for all of the plaintiff’s injuries by lowering the total amount of allocated fault and thereby raising the remaining defendant’s share over 25%.\textsuperscript{178} Both cases held that section 2-1117 did not prevent the dismissal of the third party claim against the employer. They appeared to disagree, however, on the impact of that dismissal on the liability of the remaining defendant.

Responding to the defendant’s contention that the settlement deprived it of the benefit of section 2-1117’s 25% rule, the court in

\begin{itemize}
\item \textsuperscript{172} \textit{Id.} (amended 1995).
\item \textsuperscript{173} \textit{Id.} (amended 1995) (emphasis added).
\item \textsuperscript{175} 617 N.E.2d 821 (Ill. App. 3d Dist. 1993).
\item \textsuperscript{176} 616 N.E.2d 731 (Ill. App. 5th Dist. 1993), aff’d, 634 N.E.2d 1097 (Ill. 1994).
\item \textsuperscript{177} \textit{Alvarez}, 617 N.E.2d at 823; \textit{Lannom}, 616 N.E.2d at 732.
\item \textsuperscript{178} \textit{Alvarez}, 617 N.E.2d at 825-26; \textit{Lannom}, 616 N.E.2d at 736-37. In both cases, the defendant argued that if the fault of the employer was considered, his percentage of the fault would be less than 25%, but it would be over that critical figure if the fault of the employer was not considered.
\end{itemize}
Alvarez stated that its decision did not necessarily deprive a non-settling defendant of the benefit of that statute. The court reasoned that the jury could still assess the defendant's relative culpability at or below 25%. The court refused to abrogate the rights of the non-settling defendant simply because another tortfeasor settled with the plaintiff. Thus, if the defendant's level of fault falls below the 25% threshold, its liability is several only and is not affected by the plaintiff's settlement with the other tortfeasor. By way of contrast, the court in Lannom held that where one defendant settles with the plaintiff, the remaining defendant's liability should be reduced by the amount of the settlement, not the amount of the dismissed defendant's pro rata liability.

The Illinois Supreme Court heard Lannom v. Kosco, but the controversy over the effect of a dismissal remained. In response to the contention of the defendant that the removal of the fault of the employer unfairly made him jointly liable for all of the plaintiff's injuries, the court replied that section 2-1117 did not preclude dismissal of the third party action against the employer. The court further stated:

[T]he defendants' rights under section 2-1117 are not abolished simply because a defendant or third party settles or is dismissed from an action. The jury may still assess the remaining defendant's relative culpability, and if the degree of fault attributable to one or more defendants is less than 25%, those defendants' liability is several only.

The court reaffirmed the Alvarez decision and the authority that the Alvarez court used in reaching its conclusion.

Some commentators argued that the above quoted language meant that only the fault of the remaining defendants was to be considered in the determination of the entire fault attributable to the accident. This interpretation, however, is unreasonable in light of the contention that the court was responding to, and contrary to the materials cited by the

179. Alvarez, 617 N.E.2d at 826.
180. Id. (citing Walsh & Doherty, supra note 174, at 125).
181. Id.
182. Id.
183. Lannom, 616 N.E.2d at 737 (citing Snoddy v. Teepak, Inc. 556 N.E.2d 682, 685 (Ill. App. 1st Dist. 1990)).
184. 634 N.E.2d 1097 (Ill. 1994).
185. Id. at 1101.
186. Id.
187. Id. (citing Walsh & Doherty, supra note 174, at 125).
court in support of the determination. With these considerations in mind, the most likely interpretation is that a determination of whether a defendant's fault was less than 25% of the total fault should be made in consideration of the fault of all the parties whose fault contributed to the accident.

The provision of the Tort Reform Act of 1986 that precluded recovery by a plaintiff whose own fault constituted over 50% of the fault related to the accident did not eliminate the two most troubling areas remaining after the adoption of contribution and comparative negligence: the situation where one tortfeasor was immune or insolvent and the situation where one tortfeasor was released on the basis of a favorable settlement with the plaintiff. It did, however, substantially ameliorate them. The risk of an insolvent or favorably settling defendant could no longer be placed on the remaining defendant if the plaintiff's fault was the primary cause of the accident.

The provision of that act that eliminated (except in medical malpractice and environmental cases and except for damages for medical expenses) the joint liability of any defendant whose fault was deemed to be less than 25% of the fault attributable to the accident did eliminate the two troubling areas for the defendants that qualified under its terms. Because the relative degree of fault attributable to each defendant was the key to section 2-1117 relief, the focus of this provision was whether the fault of a settling party or otherwise absent defendant should be considered in determining the allocated fault of remaining tortfeasors. This fact, plus the low percentage of allocated fault necessary to free a defendant from joint and several liability, tended to mask the issue of whether an abolition of joint and several liability would

188. Walsh & Doherty, supra note 174, at 125, 144.
189. At a minimum, it would include the fault of the party that settled out.
190. The Alvarez case involved another potential interpretive problem, in that it applied the statute to a Structural Work Act case. See ILL. COMP. STAT. ANN. ch. 740, §§ 150.01-150/9 (West 1992), repealed by Pub. Act No. 89-2, § 5, 1995 Ill. Legis. Serv. 5 (West). The wording of § 2-1117, which stated that the section applies only to "actions on account of bodily injury or death or physical damage to property based on negligence, or product liability based on strict tort liability," was generally read as limiting its application to negligence and product cases. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1117 (West 1992), amended by ILL. COMP. STAT. ANN. ch. 735, § 5/2-1117 (West Supp. 1996). While it might be construed as applying to all bodily injury and death cases as well as to negligence or product liability cases involving physical damage to property, Alvarez, which did not discuss the problem, should probably not be read as definitively adopting the latter interpretation. See R. Courtney Hughes, Several Liability and the Structural Work Act, 82 ILL. B.J. 608, 611-13 (1994). The subsequent repeal of the Structural Work Act and amendment of § 2-1117 have rendered this and other questions of the interpretation of this section unlikely to be definitively resolved.
create more areas of potential injustice than it cured. That question lay dormant until the total abolition of joint and several liability.

IV. THE CIVIL JUSTICE REFORM AMENDMENTS OF 1995

The Civil Justice Reform Amendments of 199591 (the "Amendments"), the latest in a series of tort reform laws enacted by the Illinois General Assembly, totally abolished joint and several liability. The Amendments dictate generally that procedural changes are applicable to all cases filed after the law's effective date.92 Contrarily, the substantive changes generally are applicable to causes of action accruing after that date.93 Of its many provisions germane to this study, the most important include its amendments to sections 2-111694 and 2-1117.95

Section 2-1116 retains the basic provision that a plaintiff is barred from recovery if the relative fault allocable to him or her is more than 50%; the application of the section, however, has been modified in three ways. First, the 50% fault limitation on a plaintiff's right to recover now applies to all death, bodily injury, and property damage cases,96 not just to negligence and product liability cases.97 This amendment makes the limitation applicable to all statutorily created causes of action seeking recovery for death, bodily injury, or property damage and to breach of warranty cases seeking such a recovery. Furthermore, the statute now clearly specifies that a plaintiff's negligence, not only assumption of risk or product misuse,98 will reduce

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92. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1117(b) (West Supp. 1996).
93. Id. § 5/2-1116(e).
94. Id. § 5/2-1116.
95. Id. § 5/2-1117.
96. Id. § 5/2-1116(c). This section provides that it applies to "all actions on account of death, bodily injury or physical damage to property in which recovery is predicated upon fault." Id. The statute defines "fault" as:
[A]ny act or omission that (i) is negligent, willful and wanton, or reckless, is a breach of an express or implied warranty, gives rise to strict liability in tort, or gives rise to liability under the provisions of any State statute, rule, or local ordinance and (ii) is a proximate cause of death, bodily injury to person, or physical damage to property for which recovery is sought.
97. The prior version of § 2-1116 applied only to negligence and product liability claims. See ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116 (West 1992) (amended 1995).
98. See ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116(b).
the plaintiff's recovery in a product liability case. These changes are effective for claims which accrue on or after March 9, 1995.

Second, for all cases filed after March 9, 1995, the rules governing the instructions to be given the jury have been changed. Prior to the Amendments, the law required that the judge instruct the jury to find the defendant not liable if the contributory fault of the plaintiff was more than 50% of the proximate cause of the injury or damage. The 1995 amendment prohibits any instruction to this effect and requires the court to convert such a finding into one of non-liability.

The third change relates to joint and several liability. The 1995 Amendments provide that, with respect to causes of action filed on or after March 9, 1995:

In any action brought on account of death, bodily injury to person, or physical damage to property in which recovery is predicated upon fault as defined in Section 2-1116, a defendant is severally liable only and is liable only for that proportion of recoverable economic and non-economic damages, if any, that the amount of the defendant's fault, if any, bears to the aggregate amount of fault of all other tortfeasors, as defined in Section 2-1116, whose fault was a proximate cause of the death, bodily injury, economic loss, or physical damage to property for which recovery is sought.

199. It has been contended that the original provisions of ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116 had effectuated such a change. See Frank I. Powers, Modified Contributory Fault and Strict Products Liability: Illinois' Silent Disposal of Misuse and Assumption of Risk Turns Back the Evolution, 23 J. MARSHALL L. REV. 247, 249 (1990). The Illinois Courts never ruled on this contention, but, because the new provision applies only to causes of action accruing on or after March 9, 1995, it may be necessary to resolve this issue for causes of action arising between November 25, 1986 and that date.

200. March 9, 1995, is the date that Governor Jim Edgar signed the 1995 Civil Justice Reform Amendments into law, and, therefore, is the effective date of the amendments.

201. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1107.1 (West Supp. 1996).


203. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1107.1 (West Supp. 1996).

204. See supra note 196 for the 1995 Act definition of "fault."

205. "Tortfeasor" is defined as

[A]ny person, excluding the injured person, whose fault is a proximate cause of the death, bodily injury to person, or physical damage to property for which recovery is sought, regardless of whether that person is the plaintiff's employer, regardless of whether that person is joined as a party to the action, and regardless of whether that person may have settled with the plaintiff.

ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116(b) (West Supp. 1996).

206. Id. § 5/2-1117(a). Section 2-1117(b) creates a conditional exception for "healing art malpractice actions based on negligence or wrongful death" which is operative only if the statutory limitation on non-economic damages is determined to be
Accordingly, under the newly amended section 2-1117, the prior elimination of joint and several liability for those tortfeasors whose fault was less than 25% of the total fault expands to include all defendants. The 1995 Amendments eliminate any need for the defendant's allocated responsibility to be less than a specified amount.\textsuperscript{207}

Additionally, whereas the former "less than 25%" abrogation of joint and several liability previously applied only to negligence and product liability cases,\textsuperscript{208} the newly amended section 2-1117 applies to all statutorily created causes of action seeking recovery for death, bodily injury, and property damage, and to breach of warranty cases seeking such a recovery.\textsuperscript{209} Furthermore, the Amendments eliminate the exemptions for environmental claims, and healing art malpractice cases and medical expenses.\textsuperscript{210}

In addition to the changes made to sections 2-1116 and 2-1117 discussed above, the Amendments altered the calculation of fault among the parties to a suit.\textsuperscript{211} The Amendments added a provision that requires the fault of non-parties to be considered in the determination of the pro rata share of the damages to be allocated to each defendant.\textsuperscript{212} The Amendment provides that the amount the plaintiff can recover from any tortfeasor is to be reduced by the plaintiff's own fault and by the fault attributable to all other tortfeasors whose fault was a proximate cause of the injury or damage, regardless of whether that person is joined as a party to the action.\textsuperscript{213}

The Amendments also affected the Illinois law of contribution. While the Amendments eliminated joint liability, they did not eliminate

\begin{quote}
\textsuperscript{207} This expansion also eliminates any issue relating to whose fault is considered in determining if a defendant's fault is less than 25%. \textit{See supra} notes 166-67 and accompanying text.
\end{quote}

\begin{quote}
\textsuperscript{208} \textsc{Ill. Comp. Stat. Ann.} ch. 735, § 5/2-1117 (West 1992).
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\textsuperscript{209} \textsc{Ill. Comp. Stat. Ann.} ch. 735, § 5/2-1117 (West Supp. 1996).
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\begin{quote}
\textsuperscript{210} One conditional exception exists: If the damage caps delineated in \textsc{Ill. Comp. Stat. Ann.} ch. 735, § 5/2-1115.1 (West Supp. 1996), are declared invalid, then all defendants in healing art malpractice cases shall continue to be jointly and severally liable. \textsc{Ill. Comp. Stat. Ann.} ch. 735, § 5/2-1117(b) (West Supp. 1996).
\end{quote}

\begin{quote}
\textsuperscript{211} \textit{See id.} § 5/2-1116(c).
\end{quote}

\begin{quote}
\textsuperscript{212} \textit{Id.}
\end{quote}

\begin{quote}
\textsuperscript{213} The exact language of the provision reads as follows:

\begin{quote}
(c) In all actions on account of death, bodily injury or physical damage to property in which recovery is predicated upon fault, the contributory fault chargeable to the plaintiff shall be compared with the fault of all tortfeasors whose fault was a proximate cause of the death, injury, loss, or damage for which recovery is sought.
\end{quote}

\textit{Id.}
Not only was the Contribution Act not repealed, at least two amendments of that law are included in the 1995 tort reform legislation. The Amendments provide, in accordance with the Illinois Supreme Court decision in *Kotecki v. Cyclops Welding Corp.*, that an employer's liability for contribution shall not exceed the amount of the employer's liability to the plaintiff under the Workers' Compensation Act or the Workers' Occupational Diseases Act. With respect to actions accruing after March 9, 1995, however, the Amendment further provides that, if the plaintiff's employer is held liable for contribution, in lieu of receiving money, the contribution plaintiff shall receive a credit against his or her liability to the injured party. The credit shall be "in an amount equal to the amount of contribution, if any, for which the employer is found to be liable to that tortfeasor, even if the amount exceeds the employer's liability under the Workers' Compensation Act or the Workers' Occupational Diseases Act." This provision apparently provides that while the employer may not be liable for contribution in an amount greater than its workers' compensation liability, the successful contribution plaintiff will receive a credit which will reduce his or her liability to the plaintiff by the pro rata share of the fault allocated to the employer. This is true even if the credit is in excess of the employer's workers' compensation liability. Accordingly, the plaintiff bears the employer's allocated fault.

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214. *See* ILL. COMP. STAT. ANN. ch. 740, §§ 100/3.5, 100/5 (West Supp. 1996). Section 100/5 is designed to reverse the earlier decision of the Illinois Supreme Court in *Laue v. Leifheit*, 473 N.E.2d 939 (Ill. 1984). In *Laue*, the court held that a claim for contribution must be brought in the action by the injured party or it will be lost if the defendant in the contribution action was subject to the jurisdiction of that court. *Laue*, 473 N.E.2d at 942. The 1995 amendments provide that, on or after March 9, 1995, a claim for contribution "is not required to be asserted during the pendency of litigation brought by a claimant and may be asserted by a separate action before or after payment of a settlement or judgment in favor of the" plaintiff as well as by a counterclaim or third-party complaint in the original action. ILL. COMP. STAT. ANN. ch. 740, § 100/5 (West Supp. 1996). Healing art malpractice cases are exempted from this provision, so, as to them, the *Laue* case remains a controlling precedent. *Id.*


219. *Id.*

220. *Id.*
even if the employer’s pro rata share of the damages was in excess of its workers’ compensation liability.\textsuperscript{221}

V. ANALYSIS

To properly analyze the impact and desirability of the abolition of joint and several liability, it is necessary to consider its benefits and its weaknesses. Only then can a valid determination of its desirability be made.

A. Benefits of the Amendments

The total abolition of joint and several liability in favor of several liability has at least two advantages over the immediately prior law. First, the method of calculating the several liability of each defendant is now clear. The Amendments eliminate the prior interpretational problems concerning whose fault is to be considered.\textsuperscript{222} Under the newly amended section 2-1116, the plaintiff’s damages are determined and reduced by the share of the fault attributable to the plaintiff.\textsuperscript{223} After that determination is made, the fault of each defendant is compared to all other tortfeasors whose fault was a proximate cause of the accident.\textsuperscript{224} This comparison occurs regardless of whether that tortfeasor was joined in the case, whether that tortfeasor had settled with the plaintiff, or whether that tortfeasor was the plaintiff’s employer.\textsuperscript{225} Accordingly, if any tortfeasor is insolvent or immune from suit, or if a suit against any tortfeasor is not economically feasible, the plaintiff bears the loss of that tortfeasor’s pro rata share.\textsuperscript{226}

In addition, the Amendments eliminate the two areas of possible inequity that existed in the former system. Prior to the 1995 tort reform

\textsuperscript{221} \textit{Id.} This provision applies in conjunction with an amendment to the Workers’ Compensation Act. ILL. COMP. STAT. ANN. ch. 820, para. 138.5, § 305/5 (West 1992), amended by Pub. Act No. 89-7, § 55, 1995 Ill. Legis. Serv. 250 (West). The Workers’ Compensation amendment states that the employer’s lien on the proceeds of any tort recovery by the employee is to be reduced “by an amount equal to the amount found by the trier of fact to be the employer’s pro rata share of the common liability in the action.” \textit{Id.} See infra notes 263 and 266 for examples of the application of the Workers’ Compensation Act.

\textsuperscript{222} \textit{See supra} text accompanying notes 172-90.

\textsuperscript{223} ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116(c) (West Supp. 1996).

\textsuperscript{224} \textit{Id.} § 5/2-1117(a).

\textsuperscript{225} \textit{Id.} § 5/2-1116(b).

\textsuperscript{226} It should be noted that the employer’s fault is considered in determining the other tortfeasors’ liability. As a result, the amount of damages proportional to the degree of fault attributed to the employer may not be recovered by the plaintiff even if a third party has liability for the accident. This is true even if that proportion of the damages far exceeds the worker’s compensation recovery.
legislation, there were two instances where joint and several liability created inequitable situations in Illinois: the settling tortfeasor problem and the insolvency/immunity problem. These two inequitable situations have been eliminated by the new legislation. In the insolvency/immunity situation, no other defendant will be responsible for the percentage of the plaintiff's damages allocated to the fault of the insolvent/immune tortfeasor. In the settlement situation, the newly amended section 2-1117 clearly requires that, in determining each defendant's allocation of fault, the starting point, or 100% fault, is "the aggregate amount of fault of all ... tortfeasors." Thus, the fault of any settling party is to be included in calculating the several liability of all other defendants. This means that, to the extent the plaintiff releases a settling defendant for less than that party's pro rata share, the plaintiff and only the plaintiff will bear that loss. To the extent the settling tortfeasor pays more than his or her share, that tortfeasor must bear that loss. While the Amendments eliminate these two problem areas, further analysis indicates that they do so in a way that is itself inequitable.

B. Inequities Caused by the Amendments

1. The Elimination of Joint and Several Liability

The Amendments, unfortunately, do not always produce equitable results. Even where they address a preexisting inequity, the Amend-
ments often create other significant problems and inequities. In settlement situations, for example, section 2-1117 requires that the fault of all tortfeasors who have settled must be included in the calculation of the pro rata distribution of liability of all defendants. Hence, the plaintiff will bear the loss if he or she makes a bargain with a particular defendant for less than that defendant’s pro rata share. This fact, as previously indicated, will cure the inequity caused by requiring the other tortfeasors to bear the risk of one tortfeasor making a favorable settlement with the plaintiff; it will, however, make settlements substantially less common, with a negative impact on the docket backlogs. Previously, Illinois courts permitted the inequity created by the tortfeasor who settles for less than his or her pro rata share to avoid this settlement deterrence.

More significantly, the plaintiff must now bear the loss if one or more tortfeasors is insolvent or immune from suit. This allocation eliminates the situation where a defendant who was determined to be less at fault than the plaintiff was required to bear the insolvent or immune tortfeasor’s share. This appears to be a clearly unjust result, however, where no fault for the injury can be allocated to the plaintiff, or where the fault allocated to the plaintiff is less than that allocated to the defendant.

This injustice becomes clear when one considers that, historically, joint and several liability applied in four situations: (1) where the actors knowingly joined to perform the tortious act (concert of action); (2) where there was a failure to perform a common duty; (3) where there was some special relationship (i.e., vicarious liability); and (4) where the independent acts of several actors concurred to produce indivisible harmful consequences. Scholars Harper and James further subdivide the fourth category into three subclasses: (a) situations where the acts of a single tortfeasor alone would have been sufficient to cause the entire damage; (b) situations where no damage would have resulted from the acts of a single tortfeasor but resulted from the com-

232. See supra note 71 and accompanying text.
234. This was the only situation where the American Bar Association Action Commission recommended the abolition of joint and several liability. See American Bar Ass’n, Report of the Action Comm’n to Improve the Tort Liability System 21-23 (1987).
236. Id. at 18.
237. Harper and James use the example of a building which is burned by two negligently started fires, each of which would have caused the destruction alone. Id. at 18-19.
bination of two independent acts; and (c) situations where each tortfe
er was responsible for some but not all of the plaintiff’s dam-
age. In this final situation, joint and several liability was not imposed if it was reasonably possible to apportion the damage among the tortfeasors, but it was imposed if it was not possible to apportion the damages. The burden of proof in this situation remained with the defendants to establish the portion of the damages for which they were not responsible.

Consideration of these six situations exposes the injustice in forcing the plaintiff to bear the risk of an insolvent/immune defendant and rebuts the critics of joint and several liability who argue that it is unfair to require a defendant who caused a small portion of the damages to pay for them in their entirety. In the six historical scenarios where

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238. For example, the plaintiff is injured by a collision that would not have resulted except for the concurrent negligence of the drivers of two cars. See id. at 23-25. See also Economy Light & Power Co. v. Hiller, 68 N.E. 72 (Ill. 1903) (discussing the result of power lines coming into contact with telephone wires and the resulting damage); RESTATEMENT (SECOND) OF TORTS § 879 (1979) (discussing concurring or consecutive independent acts and the resulting liability).

239. HARPER ET AL., supra note 235, at 18.

240. Often, in this situation, the damage is theoretically but not practicably divisible. Id.

241. Id. See RESTATEMENT (SECOND) OF TORTS § 433B(2) (1979). Furthermore, in Illinois, where there were successor tortfeasors, the original tortfeasor could have been jointly and severally liable, but the second was liable for the damage caused by the first only if the damages were not divisible. See Patton v. Carbondale Clinic, 641 N.E.2d 427, 431 (Ill. 1994). This problem was discussed by the Illinois Supreme Court in Gertz v. Campbell, 302 N.E.2d 40 (Ill. 1973). In Gertz, the plaintiff was struck by a car driven by the defendant who filed a third-party malpractice action against the physician who had treated the plaintiff. Id. at 41. The third-party complaint sought recovery for any new injury or aggravation of existing injuries resulting from the neglect of the doctor. Id. at 42. The Illinois Supreme Court held that the third-party complaint stated a cause of action. Id. at 45. The court, however, emphasized that the driver and doctor were not joint tortfeasors. Id. at 43. While the driver was liable for the injuries caused by the doctor’s alleged malpractice under concepts of proximate cause, the doctor was not responsible for the original injuries inflicted by the driver. Id. The Illinois Supreme Court, however, has emphasized that this doctrine is not available where the action of concurrent tortfeasors combine to produce a single injury. See Buehler v. Whalen, 374 N.E.2d 460, 466 (Ill. 1978).

242. See, e.g., Stephen J. O’Neil, A New Day, The Civil Justice Reform Amendments of 1995, CHI. B. ASS’N REC., May 1995, at 18. The author, discussing the abolition of joint and several liability, states that “[a]lthough it may seem unjust to leave a plaintiff uncompensated for the entire loss, it may be equally unfair to require a defendant who caused a small portion of those damages to pay them in their entirety.” Id. at 20. He also opines that “[p]ublic policy . . . holds that bankrupt persons, certain governmental agencies, or spouses are immune from suit in certain cases. No compelling social policy requires that defendants who cannot claim these immunities bear the cost of those who can.” Id.
joint and several liability was imposed, the plaintiff's damages were caused in full by each defendant in all except the sixth situation. In the sixth situation, a tortfeasor could avoid joint and several liability if he or she could establish that portion of the damages for which he or she is not responsible. Thus, the fact remains that a defendant held liable for all the plaintiff's damages under joint and several liability either did cause them all, or cannot prove which portion he or she did not cause. For this reason, it is fair to require the defendants to bear the burden of any insolvent or immune defendant where the plaintiff remains innocent of any fault, and egregiously unfair to require the plaintiff to bear it alone.

Furthermore, the adoption of comparative negligence should not affect this result. No reason exists why an innocent plaintiff should be worse off under a comparative negligence system than he or she was under a contributory negligence system. While comparative negligence does permit a less than innocent plaintiff to recover the pro rata share of his damages attributable to the conduct of an insolvent or immune defendant in full from the other defendants, that result does not change the fact that requiring the defendants to bear the burden of an insolvent or immune defendant is fair. Likewise, requiring the plaintiff to bear all risks remains egregiously unfair.

2. Implementation Problems

The preceding analysis demonstrates the inequity inherent in any bill that completely eliminates joint and several liability. The act adopted in Illinois, however, contains other significant problems in addition to those necessarily found in any statute eliminating joint and several liability. This section identifies those problems; the next section then proposes solutions to them.

243. See supra notes 235-39 and accompanying text.
244. "Full" causation means that: (1) all of the plaintiff's damages would not have occurred but for the fault of each defendant; (2) the fault of each defendant was a substantial factor in bringing about those damages; (3) and there was no intervening cause sufficient to break the chain of proximate causation.
245. See supra notes 239-41 and accompanying text.
246. To the extent that one disagrees and finds a philosophical contradiction between comparative negligence and joint and several liability, one would more logically support a limitation of comparative negligence, the later doctrine to develop, rather than joint and several liability, the earlier one.
248. See infra part V.B.2.a-d.
249. See infra part VI.
a. Proof of the Fault of Non-Parties

The first problem specific to the Illinois statute relates to the absence of any provision regulating the manner in which the fault of non-parties is to be introduced for purposes of the determination of the pro rata share of the damages to be allocated to each defendant. The newly amended section 2-1116(c) provides that the amount the plaintiff can recover from any tortfeasor is to be reduced by the fault attributable to all other tortfeasors whose fault was a proximate cause of the injury or damage, regardless of whether that person is joined as a party to the action. This scheme creates an evidentiary problem: how can the parties introduce evidence of the fault of a non-party to the trier of fact?

Fairness appears to dictate that any defendant who wishes to introduce evidence of the fault of any third person should have to plead it. Otherwise, the plaintiff will not be notified that such fault will be an issue in the case. Thus, the plaintiff will be deprived of an opportunity to engage in discovery pertaining to the third party’s fault and to prepare to counter evidence of it at trial. As the statute is written, nothing would prevent a defendant from asserting the fault of a third person in the later stages of a trial, thereby preventing the plaintiff from adequately countering that evidence. The Supreme Court of Montana has held that a statute such as this, without some procedural protection for the plaintiff, is unconstitutional.

b. Situations Where One Tortfeasor Is Responsible for the Acts of Another

Another interpretational problem arises from consideration of the six situations that historically gave rise to joint and several liability. In two of these situations, concert of action and vicarious liability, one tortfeasor is held responsible for the tortious actions of another. Thus, it is inconsistent with that rule to allocate fault between them. Indeed, if the Amendments were interpreted to require this allocation, it would mean that they not only abolished joint and several liability, but also respondeat superior. Rather than dividing responsibility between them, the Amendments should treat the two tortfeasors as one unit for purposes of allocation of fault. The statute, however, contains no

250. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116(c) (West 1992), amended by Pub. Act No. 89-7, § 15, 1995 Ill. Legis. Serv. 234 (West).
251. Id.
253. See supra notes 235-39 and accompanying text.
254. Cf. Michael K. Steenson, Joint & Several Liability Minnesota Style, 15 WM.
language which would authorize this treatment of tortfeasors in those categories.

c. Contribution and Workers' Compensation Issues

Another difficulty created by the statutory enactment relates to the area of contribution. The continuation of contribution is apparently inconsistent with the abolition of joint and several liability. Contribution arises only because of the possibility of one tortfeasor paying more than his or her pro rata share of the damages. This result is not possible after the elimination of joint and several liability. Under several liability, a defendant cannot be liable for more than his or her pro rata share of the damages. Nevertheless, the drafters of the Amendments apparently believed that contribution has continuing significance. Indeed, the drafters not only failed to abolish contribution, but they also amended the contribution laws.

The amendment of the Contribution Act also creates serious difficulties regarding the Kotecki issue. The amendment provides that


255. The New Mexico tort liability statute expressly provides that a person who is severally liable shall be neither entitled to contribution nor a reduction in any judgment in favor of the plaintiff against him by the amount the plaintiff may have received from any other tortfeasor. N.M. STAT. ANN. § 41-3A-1(E) (Michie 1987).

256. See O'Neil, supra note 242, at 20 (stating that contribution claims may become obsolete because a defendant will never pay more than his pro rata share of the damages except perhaps through settlement).

257. While a tortfeasor may settle for more than his or her pro rata share, contribution is precluded by the provision disallowing it unless the other tortfeasors are discharged by the terms of the settlement. See supra notes 63-64 and accompanying text.

It may be theoretically possible that one tortfeasor will settle with the plaintiff for his or her full damages in return for the discharge of all defendants (perhaps to prevent knowledge of the event from becoming public). Contribution, however, should be denied even in that situation. Without a possibility of liability to the plaintiff for the liability of those defendants, it would be the equivalent of a non-party to an accident settling with the plaintiff and expressly discharging the defendants and suing for contribution. The law should not aid such a volunteer. Until this issue is definitively resolved, however, no plaintiff should agree to a settlement with a tortfeasor that discharges his or her employer. See supra notes 63-64.

258. This inconsistency between the amendments to the Contribution Act and the elimination of joint and several liability is further reflected by an amendment to the Contribution Act which provides that the modification of the rules governing an employer's liability in a contribution situation constitutes an exception to the provision of the Contribution Act that a plaintiff's right to recover his or her judgment in full from any one or more defendants is not affected by the provisions of the act. ILL. COMP. STAT. ch. 740, § 100/4.

an employer may not be liable for contribution in an amount greater than its compensation liability.\textsuperscript{260} The successful contribution plaintiff, however, will receive a credit which will reduce his or her liability to the plaintiff by the pro rata share of the fault allocated to the employer.\textsuperscript{261} This is true even if the credit exceeds the employer’s workers’ compensation liability.\textsuperscript{262} To analyze the significance of this provision, first consider its operation under joint and several liability, and then in the absence of joint and several liability. In conjunction with joint and several liability, under this provision, the plaintiff would bear the employer’s allocated fault even if the employer’s pro rata share of the damages was in excess of its workers’ compensation liability.\textsuperscript{263}

To the extent that the employer’s allocated share of the fault does not exceed the employer’s workers’ compensation payments, no inequity results from this provision alone; the injured worker has no right to be overcompensated for the injuries. If, however, the employer’s pro rata share of the damages exceeds the workers’ compensation payments, the injured worker will not be fully compensated by this provision alone. While it can be argued that the employee is not fully compensated if the injuries exceed the compensation payments and the accident was the sole fault of the employer, this is a result of the compensation trade-off: reduced damages in return for a certain and more expeditious recovery. Because third party tortfeasors are not parties to this trade-off, there is no reason why they should receive the benefit given to the employer by the Workers’ Compensation Act. Nor is there any reason why an innocent or less culpable plaintiff should bear the burden of the employer’s tort immunity rather than a third party

\begin{footnotes}
\item[260] See supra note 49.
\item[261] See supra notes 220-21 and accompanying text.
\item[262] See supra notes 220-21 and accompanying text.
\item[263] For example, assume that joint and several liability applies, the plaintiff is 0% liable, defendant 1 is 50% liable, and employer/defendant 2 is 50% liable. Further assume that the total damages equal $100,000. If the employer’s workers’ compensation covers only $10,000 and thus limits the plaintiff’s recovery from the employer to this amount, defendant 1 will be liable to the plaintiff for $100,000 less $50,000 allocated to the employer, and thus be liable for only $50,000. The plaintiff bears the burden of the $50,000 allocated to the employer less the $10,000 compensation, or $40,000.
\end{footnotes}
tortfeasor whose actions were a proximate cause of the plaintiff’s injuries.

The inequity created by allowing a third party tortfeasor to obtain the advantage of the tort immunity granted an employer by the workers’ compensation statute is compounded by the abolition of joint and several liability in the newly amended section 2-1117. Because of that provision, each defendant is liable to the plaintiff only for that proportion of the damages equal to the amount the defendant’s fault bears to the aggregate amount of fault of all other tortfeasors. Accordingly, the plaintiff’s total recovery will be reduced by the pro rata fault of his or her employer, and then the judgment so calculated will be reduced by that pro rata share in the form of a credit to the defendant. In other words, the plaintiff will bear the burden of his or her employer’s fault twice. The combination of these two provisions results in an egregious inequity to the injured worker.

The continued existence of the Contribution Act after the abolition of joint and several liability creates still another problem. A provision of that Act requires the plaintiff’s recovery to be reduced by the amount the plaintiff receives in return for the release of any defendant. This provision makes sense only in reference to a unitary judgment which fully compensates the plaintiff for all the damages he or she incurred. It is incompatible with separate judgments entered against each defendant for each defendant’s individual share of the plaintiff’s damages as required by the abolition of joint and several liability. A judgment against one defendant based on his or her pro rata share of the damages should not be reduced because the plaintiff and another defendant have reached a settlement with respect to that defendant’s pro rata share of the damages.

264. For a discussion of this provision, see supra notes 207-10 and accompanying text.
265. See supra notes 220-21 and accompanying text.
266. Continuing the example from note 263, defendant 1 would only be liable for his share of the fault, $50,000, and would receive a credit for the employer’s allocated share of the fault, $50,000, and thus would incur no liability. The plaintiff would be limited to his $10,000 compensation recovery.
267. See supra notes 61-62 and accompanying text.
268. See, e.g., N.M. STAT. ANN. § 41-3A-1(E) (Michie 1991) (providing that a person who is severally liable shall not be entitled to reduce any judgment in favor of the plaintiff against him by the amount the plaintiff may have received from any other tortfeasor). See, e.g., Servants of the Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1573-76 (D.N.M. 1988) (stating that the amount of the victim’s settlement of claims against other tortfeasors was irrelevant).
d. **Retroactivity**

A final problem created by the Amendments lies in the fact that they differentiate with respect to the effective date of those changes that are deemed substantive and those changes that are deemed procedural. The procedural changes are applicable to all cases filed after the Amendments’ effective date;\(^{269}\) whereas, the substantive changes are applicable to causes of action accruing after that date.\(^ {270}\) The provision that the elimination of joint and several liability applies to all cases filed after the effective date\(^ {271}\) is inconsistent with that pattern, because it is the only substantive provision that is given retroactive application.\(^ {272}\)

Making the abolition of joint and several liability retroactive violates a basic concept of fairness. As the United States Supreme Court said:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly: settled expectations should not be lightly disrupted. For that reason, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.”\(^ {273}\)

For this reason, the normal rule is that substantive changes in the law will be presumed to be prospective.\(^ {274}\) Even though this presumption can be overcome by an express indication of the legislative will to the contrary, a retroactive application of substantive law can constitute a violation of due process of law.\(^ {275}\) Accordingly, the underlying unfairness of a retroactive substantive modification of the law, and the policy of avoiding constitutional issues whenever possible, indicate

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271. Id.


274. See Nelson v. Miller, 143 N.E.2d 673, 676 (Ill. 1957).

275. In Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), aff’d, 446 U.S. 359 (1980), the court adopted a four-pronged test to analyze the constitutionality of retroactive substantive legislation. Id. at 960. The court considered (1) the reliance interests of the parties affected; (2) the inclusion of statutory provisions designed to limit or moderate the impact of the burden; (3) the equities of imposing legislative burdens; and (4) whether the impairment of the private interest affects an area previously subject to regulatory control. Id.
that the abolition of joint and several liability should be prospective only.

VI. PROPOSALS

As established in the previous section of this article, the Civil Justice Reform Amendments have created inequities and problems that should be addressed in subsequent legislation. These inequities and problems are of two different types: the inequities that necessarily result from any abolition of joint and several liability, and the inequities and problems that are created by this specific legislation but which are not necessarily a concomitant of any abolition of joint and several liability. The proposals submitted in this article will, therefore, be divided in the same manner.

A. Reinstatement of Joint and Several Liability

It is submitted that any total abolition of joint and several liability is inequitable. The prior Illinois system of joint and several liability contained only two areas of serious inequity: situations where the plaintiff released one joint tortfeasor on favorable terms, and situations where other tortfeasors were required to bear the burden of the fault allocated to another tortfeasor who was insolvent or immune while the plaintiff's fault also contributed to cause the accident. The abolition of joint and several liability, however, while curing these inequities, creates inequities of its own by requiring that a plaintiff, who may be totally innocent or whose fault may have been a lesser factor in the causation of the accident, bear the burden of the damages allocated to any defendant who is not a party to the suit. The inequities existing under the prior Illinois system could have been rectified more fairly if they had been directly addressed.

The inequity caused when the plaintiff settled with a tortfeasor for an amount significantly less than his or her proportionate share of the plaintiff's damages could have been cured through reducing the plaintiff's damages by the settling tortfeasor's pro rata share of the damages. As previously established, Illinois did not adopt this approach because it would deter settlements. That deterrence would, however, be no greater than the deterrence of settlements caused by the total elimination of joint and several liability, and it would avoid the inequity which that elimination creates. As such, the General Assembly should have addressed the settlement problem by

276. See supra part II.A.1.
enacting a provision reducing the plaintiff's damages in accordance with the pro rata share attributable to the settling tortfeasor.

The inequity caused by requiring a defendant to bear the full share of the damages attributable to any insolvent or immune tortfeasor, even when that defendant's fault is adjudged to be less than the fault attributable to the plaintiff, could have more easily been avoided in either of two ways. The law could have been amended to prohibit recovery by a plaintiff from a defendant whose allocated responsibility was less than that of the plaintiff.\(^{277}\) The other solution would be to provide that the share of the damages allocated to insolvent or immune defendants should be borne by the plaintiff and the other defendants proportionately to their pro rata share of the damages.\(^{278}\) It is also possible to combine these two approaches.\(^{279}\) An approach combining these two provisions would constitute a complete answer to critics who argued that joint and several liability, which makes a defendant liable for the entire injury even where his fault was not the entire cause of it, is inconsistent with allowing a plaintiff to have his partial liability for the accident only reduce his damages. All whose fault contributed to the accident would be treated alike.

Accordingly, if the object of the legislation was to cure the inequities that had arisen under the Illinois administration of the doctrines of contribution and comparative negligence, alternatives existed—alternatives which would not have created significant injustices of their own. Thus, the legislation enacted was an over-broad cure to a limited problem. The legislature should take action to cure this overreaching by enacting an amendment reinstating joint and several liability and the remedial provisions discussed above.\(^{280}\)

Some commentators suggest, however, that the aim of the legislature went beyond curing the pre-existing inequities. One article on the Amendments states that the previously discussed goal ensured that all

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277. See, e.g., Minn. Stat. § 604.01 subd. 1 (1969) (amended 1978, 1990) (providing that contributory fault by the plaintiff does not bar recovery if the contributory fault was not greater than the fault of the person from whom recovery is sought). See also Steenson, supra note 254, at 972 (noting that the two limitations on the rule of joint and several liability are based on the type of loss and on the type of claim). In Illinois, the 50% limitation on comparative negligence in § 5/2-1116 achieved this result in a case of one plaintiff against one defendant. Ill. Comp. Stat. Ann. ch. 735, § 5/2-1116 (West Supp. 1996).

278. This is the recommendation suggested by the Uniform Comparative Fault Act in § 2(d). See Uniform Comp. Fault Act § 2(d), 12 U.L.A. 50 (1988).

279. Minnesota has done so. See Steenson, supra note 254, at 972, 976.

280. See supra notes 276-79 and accompanying text.
defendants would bear liability in proportion to their fault. In addition, the article states that proponents of the abolition of joint and several liability believed that the joint and several liability concept promoted suits against "deep pocket" defendants—essentially, those defendants who had little or no responsibility for the plaintiff's injuries in cases where the primary wrongdoer had limited insurance or was otherwise unable to pay a large judgment.

This suggestion does not significantly alter the foregoing analysis. Joint and several liability does permit a plaintiff to recover from the defendant with the "deepest pocket," from the defendant who may not be the tortfeasor most egregiously at fault, and from the defendant who may not be able to recover the full share due him or her in contribution because the other tortfeasors may have limited assets or limited insurance coverage (in keeping with their "shallower pockets"). Nevertheless, this "deep pocket" argument is, in reality, another version of the insolvent tortfeasor contention. A party at fault for causing all of an innocent plaintiff's injuries should be responsible for all of the damages even if that party cannot recover full contribution from the other defendants. For such a defendant to bear a disproportionate share of the plaintiff's damages may be unjust as between that defendant and the other defendants, but as between that defendant and the plaintiff, it is fair that the defendant, and not the innocent or less culpable plaintiff, bear the risk of other tortfeasors with less than adequate resources.

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281. Zimmerman et al., supra note 272, at 282.
282. Id. at 285. Another commentator contends that this is the primary motivation behind the movement to abolish or limit joint and several liability. Aaron D. Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U.C. DAVIS L. REV. 1125, 1130 (1989).
283. Professor Twerski suggests that this problem is compounded in a situation where a jury may allocate only 10% of the fault to the deep pocket defendant. Twerski, supra note 282, at 1139. Professor Twerski believes that such a finding of fault in a multi-defendant case is not difficult to obtain because juries parcel out small portions of liability without significant evidence to support it. Id. He concludes that because a 10% allocation of fault could result in 100% liability under joint and several liability, an institutional defendant with a defensible case would be forced to settle on less than favorable terms. Id.

While the former 25% allocation of fault required for joint and several liability under the 1986 Tort Reform legislation contained some of the inequities in the present act, it is worth noting that, because of this provision, the Illinois law prior to the enactment of the present Act clearly prevented this type of situation from arising.

To the extent the draftsmen of the Act were concerned about the jury awarding damages in a larger amount than proper because the defendant was one of a "target" nature, this problem could have been ameliorated by the target defendant's ability to join the others as third-party defendants in contribution claims. Furthermore, under the "caps" put on non-economic loss in the new statute, such excessive damages should not be possible.
B. Proposals Directed to the Implementation Problems

Regardless of whether joint and several liability is reinstated, it is imperative that the legislature enact remedial legislation directed to those problems and inequities created by this particular legislation that are not essential to the abolition of joint and several liability. Because the abolition of joint and several liability is a substantive matter, it should apply only to causes of action accruing after the effective date of the legislation. The other recommendations proposed by this article require a more detailed explanation.

1. Proof of the Fault of Non-Parties

The Amendments should be changed to resolve the problem as to which party bears the burden of proving the fault of an absent tortfeasor. Under the Amendments, evidence of a non-party's fault reduces the recovery of the plaintiff from the defendants that the plaintiff sues. Accordingly, the burden of proof on the issue should rest on the defendants.\(^{284}\) If, however, the defendants raise the issue, the plaintiff would be required to defend any third party whose fault was properly asserted to have contributed to the accident. The Amendments, however, do not contain any procedure for raising this issue. As previously indicated, fairness would appear to dictate that any defendant who wishes to introduce evidence of the fault of any third person should have to plead it. Otherwise, the plaintiff will not be notified that such fault will be an issue in the case and will be deprived of an opportunity to engage in discovery pertaining to it and to prepare to counter evidence of it at trial. Unfortunately, as the statute is written, nothing would prevent a defendant from asserting the fault of a third person in the later stages of a trial, thereby preventing the plaintiff from adequately countering that evidence.\(^{285}\)

Many of the states that have restricted or eliminated joint and several liability limit the right of a defendant to assert the fault of a party not joined in the action. Some of the jurisdictions make the defendant join such a third party before their fault can be considered and allow a procedure for this step.\(^{286}\) Some other jurisdictions require the parties to


\(^{285}\) This situation has been held to be unconstitutional in at least one state. See supra note 252 and accompanying text.

raise this issue in the pleadings,\textsuperscript{287} while still other jurisdictions require some form of early notice.\textsuperscript{288} Without some procedural protection, the rights of the plaintiff are at risk of undue prejudice. To avoid such a constitutional impairment, the Illinois Act should be amended to either exclude consideration of the fault of third persons or to adopt a procedure by which that issue may be fairly raised and litigated.\textsuperscript{289}

2. Situations Where One Tortfeasor Is Responsible for the Acts of Another

Another problem arises in concert of action and vicarious liability situations where one tortfeasor is held responsible for the tortious actions of another. If one tortfeasor is responsible for the acts of another, it is inconsistent with that rule to allocate fault between them. As previously discussed,\textsuperscript{290} such an interpretation of the Amendments would abolish \textit{respondeat superior}.\textsuperscript{291} Rather than divide responsibility between the tortfeasors where one is responsible for the acts of another, the Amendments should treat the two as one unit for purposes of allocation of fault between them and other possible tortfeasors.\textsuperscript{292} Currently, the statute contains no language which would authorize this treatment of tortfeasors in those categories. The statute should be amended to specifically provide for this result. For the time being, hopefully the logic inherent in the situation will constitute sufficient justification for the courts to rule that the principle that one tortfeasor is

\begin{itemize}
  \item \textsuperscript{287}Indiana allows the consideration of the fault of a third party if it is asserted as part of an answer filed more than 45 days before the expiration of the limitation period for a suit against that party. \textit{IND. CODE} § 34-4-33-10(c) (1985) (amended 1993).
  \item \textsuperscript{288}Colorado allows the consideration of the fault of a third party if notice of the intent to do so is given by the defendant within 90 days of the commencement of the action. \textit{COLO. REV. STAT.} § 13-21-111.5(3)(b) (1987) (amended 1990). Arizona requires notice naming the third party as a nonparty at fault by the commencement of the trial. \textit{ARIZ. REV. STAT. ANN.} § 12-2506(B) (1988) (amended 1993, 1995).
  \item \textsuperscript{289}It should be noted, however, that the fault of third parties is being considered without undue unfairness in the determination of the comparative negligence of the plaintiff.
  \item \textsuperscript{290}See supra notes 253-54 and accompanying text.
  \item \textsuperscript{291}\textit{Black's Law Dictionary} defines \textit{respondeat superior} as follows:
    
    This doctrine or maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent . . . . Under doctrine an employer is liable for injury to person or property of another proximately resulting from acts of employee done within scope of his employment in the employer's service.
\end{itemize}
responsible for the actions of the other prevents the allocation of fault between them.\textsuperscript{293}

3. Contribution and Workers' Compensation

While the ability of a third party tortfeasor to receive a credit to be used to satisfy a portion of the plaintiff's judgment by a contribution action against the plaintiff's employer in an industrial accident setting may constitute the only reason to retain contribution after the abolition of joint and several liability, it is inequitable to do so. Thus, contribution should be abolished if the abolition of joint and several liability is retained.\textsuperscript{294}

Essentially, the Illinois legislature needs to make the following revisions if the abolition of joint and several liability is retained. First, contribution should be abolished.\textsuperscript{295} Second, section 2-1117 should be amended to prevent the finder of fact from allocating any of the damages to one who has not been formally named as a responsible tortfeasor within a year of the institution of the lawsuit. Third, where one tortfeasor is held responsible for the acts of another, both tortfeasors should be treated as a unit for purposes of allocation of fault between them and other possible tortfeasors. Finally, the abolition of joint and several liability should be treated as the change of substantive law that it is, and apply only to causes of action that arise after the effective date of its abolition.

VII. CONCLUSION

Illinois has now gone much further than the tort reform advocated in the "Contract with America"\textsuperscript{296} and joined the very small number of


\textsuperscript{294} If contribution is abolished, the amendment to section 305/5 of the Workers' Compensation Act should likewise be repealed. See Pub. Act No. 89-7, para. 138.5, § 55, 1995 Ill. Legis. Serv. 250 (West) (amending ILL. COMP. STAT. ANN. ch. 820, § 305/5 (West 1992)). For a discussion of section 305/5 and the 1995 amendment, see supra note 221.

\textsuperscript{295} Note that this abolition would still result in the plaintiff bearing the pro rata share of the employer's liability to the extent that it exceeds the employer's compensation liability.

states that have totally abolished joint and several liability. This was a mistake because it places the burden of an insolvent, underinsured, or immune defendant on the plaintiff. This is true even for a plaintiff who may be totally free from fault to the benefit of a defendant whose conduct was either a proximate cause of all of the plaintiff's damages or who is unable to establish that portion of the damages for which he or she is not responsible.

Injustices existed in the prior Illinois law relating to the allocation of liability in multiple tortfeasor cases. These injustices resulted under the prior law when the plaintiff settled with one tortfeasor for a sum significantly less than that tortfeasor's pro rata share of the damages, or when a defendant, whose share of the allocated responsibility was less than that of the plaintiff, remained responsible for the share of the damages allocated to all insolvent or immune tortfeasors. Nevertheless, these injustices could have and should have been eliminated by less undesirable means. Joint liability in Illinois should have been reformed, not abolished.

The Illinois General Assembly should rethink the total abolition of joint and several liability and address the injustices that have arisen in the system in the manner herein suggested. In the absence of such a total reevaluation, the Illinois legislature should enact a series of amendments to the present plan to ensure fairer and more equitable results. It is hoped that other jurisdictions will learn from the Illinois experience and refuse to abolish joint and several liability in order to remedy injustices that have manifested themselves in the treatment of multi-tortfeasor lawsuits. Other jurisdictions should address these injustices directly.