Worker's Compensation Third Party Suits: The Effect of Employer Negligence on Third Party Rights

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ON THIRD PARTY RIGHTS

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When the negligence of two or more parties combines to cause injury, the wrongdoers are “joint tort-feasors,” and each is jointly and severally liable to a plaintiff for the whole amount of his damages.¹ Historically, when only one of the negligent parties was obliged to satisfy the entire judgment, he was not entitled to recover any part of the loss from his fellow tort-feasors.² In response to heavy criticism of this common law rule, courts and legislatures have begun to recognize the principle of contribution, whereby tort-feasors are required to share the liability created by their combined negligence.³ The purpose of allowing contribution is to prevent the unjust enrichment of the tort-feasor who, by chance or by design of the plaintiff, is not called on to satisfy the judgment.⁴ Additionally, principles of indemnity may be brought into operation to shift the entire liability from the tort-feasor against whom there has been a recovery to another who should pay instead.⁵ Although the right to indemnity usually depends on an express contractual obligation, indemnification also frequently exists in favor of those whose liability is only technical, i.e., either based on a no-fault principle or arising under circumstances in which the conduct of another is more blameworthy.⁶ The principles under which indemnity may be secured are not well-settled at this time.⁷

Before either contribution or indemnity is allowed, one requirement is certain: there must be a legally enforceable liability on the part of each tort-feasor toward the injured person; the defendant must have been obliged to satisfy an obligation for which the other

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5. Id. at 310.
6. Id. at 310-12.
7. Id. at 313.
tort-feasor could have been held liable. For this reason, contribution and indemnity become more complex when one of the tort-feasors has personal immunity negating the possibility of tort liability on his part. There are a number of different settings in which this might occur. For example, an employee may be injured by the concurrent negligence of his employer and a third party completely foreign to the business concern. The employer and employee are parties to the statutorily mandated workers' compensation scheme. This system grants the employer tort immunity in return for his obligation to pay compensation for all work-related injuries, whether or not he is at fault. Although the employee is allowed only a compensation claim against his employer, the employee is free to pursue a negligence action against others who harm him. When both the employer and a third party have negligently caused the employee's injury, two valid claims are in conflict. The employer asserts his immunity from tort liability, which, he insists, should not be impaired by an obligation to reimburse the third party. Conversely, the third party has a right to contribution or indemnity from his co-tort-

8. F. Harper & F. James, supra note 1, at 718.

9. Individual immunity from tort liability is granted in Louisiana in several different settings. In two situations non-liability is based on the personal relationship between the injured party and the tort-feasor. LA. R.S. 9:291 (Supp. 1960) was modified in the recent comprehensive revision of Louisiana matrimonial regimes law to authorize certain suits between husband and wife. See 1978 La. Acts, No. 627, § 4. But claims by one spouse against another for his or her personal negligence are still prohibited. A parent in Louisiana may not be sued in tort by his minor unemancipated child by virtue of LA. R.S. 9:571 (Supp. 1960). However, both of these statutes have been interpreted by the Louisiana Supreme Court as merely procedural bars to the right to sue which do not destroy the substantive cause of action arising as the result of the tort. Thus, the spouse or parent whose negligence combines with that of a third party to cause the injury remains a joint tort-feasor liable for contribution. Walker v. Milton, 263 La. 555, 268 So. 2d 654 (1972) (parent whose negligence contributed to child's injury liable for contribution); Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 695, 174 So. 2d 122 (1965) (defendant accorded right to contribution from plaintiff's husband). Additionally, the state and its political subdivisions traditionally were immune to suits for personal injury or property damage. Sovereign immunity was abrogated by the 1974 Louisiana Constitution. LA. CONST. art. XII, § 10. A good discussion of individual defenses in relation to contribution may be found in Larson, A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party, 1940 Wis. L. Rev. 467.

10. This distinction between the procedural bar to suit and the substantive cause of action recognized in Louisiana in the husband-wife and parent-child settings, see note 9, supra, is not similarly valid in workers' compensation cases. The Louisiana Supreme Court has denied the third party the right to contribution from the concurrently negligent employer. The employer's liability to the employee for compensation benefits is considered absolute and not based on fault. Therefore, the employer is not a joint tort-feasor and is not liable for contribution or indemnity. LeJeune v. Highlands Ins. Co., 287 So. 2d 531 (La. App. 3d Cir. 1973), cert. denied, 290 So. 2d 903 (La. 1974).
feasor, which right, he believes, should not be withdrawn because of the sheer fortuity that the injured party is an employee entitled to receive compensation benefits. Historically, the employer's interest has prevailed over that of the third party. Even in cases in which contribution or indemnity would be allowed under accepted fault principles, courts generally place primary emphasis on preserving the tort immunity of the employer and, to accomplish this goal, deny the third party his right to contribution.

The situation is further complicated by the fact the employer enjoys an additional right. In most states, when the employee is successful in his personal injury action, the employer is entitled by statute to be reimbursed for all of the compensation benefits he has paid. This is usually accomplished by statutorily granting the employer a lien against the proceeds of the employee's tort recovery. Traditionally this right is granted to employers even when their fault contributes to the employee's accident. The result is that the employer is allowed to shift the entire loss outside of the employment industry, even though the injury was caused at least in part by wrongful acts or omissions originating within the business. The unqualified reimbursement of the employer raises the question of whether, despite the belief that the compensation principle justifies providing even the negligent employer with freedom from direct tort liability to his employees and with immunity to claims for contribution or indemnity, the law should also secure for the employer repayment of the compensation benefits he has paid. Perhaps a preferable solution would be to leave this loss with the employer by denying reimbursement when his negligence contributes to the employee's injury. The benefit of such a refusal would have to be allocated to one of two people, the third party or the injured employee. If denying reimbursement were coupled with a reduction of the third party's tort liability, the advantage given the third party could serve as a compromise between his rights and

12. Id.
13. Id. at § 71.20.
14. See, e.g., Williams Bros. Lumber Co. v. Meisel, 85 Ga. App. 72, 68 S.E.2d 384 (1951); Fidelity & Cas. Co. v. Cedar Valley Elec. Co., 187 Iowa 1014, 174 N.W. 709 (1919). However, the present rule in Louisiana is that the employer or his insurer is entitled to reimbursement only when the employer is not chargeable with any personal negligence. See 1 W. Malone & A. Johnson, Workers' Compensation Law and Practice § 371 in 14 Louisiana Civil Law Treatise 193 (2d ed. 1980). The Third Circuit Court of Appeal indicated in Highlands Insurance Co. v. L. J. Denny & Son, 328 So. 2d 779 (La. App. 3d Cir. 1976), that the employer's negligence, whether personal or imputed, would not bar his recovery; however, the statement is dicta, since the employer's personal negligence was not proved in the case.
those of the employer. The third party would be relieved of the obligation of repaying to the employer the compensation benefits paid before judgment and, concomitantly, the third party's tort liability would be reduced by that amount. On the other hand, the windfall might inure more properly to the injured employee; the worker would then be entitled to retain both his tort damages and compensation with no obligation to repay his employer.

It has been suggested that certain advantages would accrue if the alternative favoring the employee were adopted. The third party would be liable for the full amount of the employee's damages, while the employer would be denied reimbursement of the compensation he has paid. The employee who receives both workers' compensation and tort damages for his injury gets a double recovery. Arguably, this might be justified on the grounds that compensation benefits are similar to insurance proceeds. In ordinary negligence actions the collateral benefits rule entitles the victim to retain his private insurance proceeds without suffering a diminution of tort recovery. The receipt of compensation benefits might also be viewed as a fortuity not affecting the amount of damages due from a tortfeasor. Furthermore, the mandatory compensation scheme may be regarded as a means of providing insurance protection against disability or death for wage-earners who would not otherwise be able to afford insurance. The employee's compensation benefits are more analogous to insurance coverage than to tort damages; therefore, recovery of compensation benefits should have no effect on a negligent third party's liability. However, this approach consistently has been rejected by the courts, because a double recovery is considered undesirable. Nevertheless, the employee has not been mistreated. In all cases his common law rights against negligent third parties remain unimpaired, and the employee in effect receives the full amount of his tort judgment.

The court's aversion to allowing a negligent employer to escape all responsibility is most likely to inure to the benefit of the third party by relieving him of the obligation of reimbursement. The judgment against the third party then can be reduced by the amount of compensation paid, without diminishing the employee's rights. The

16. Id. at 363. But cf. A. Larson, supra note 11, at § 71.30 (workmen's compensation not the equivalent of accident insurance).
17. A. Larson, supra note 11, at § 71.20. However, California courts do allow a partial double recovery in the context of an employer's claim that the employee's tort recovery should be credited against any compensation liability which remains after the third party suit. See notes 57-138, infra, and accompanying text.
employee will receive this reduced recovery free and clear of any claims or liens by the employer. Thus, the employee’s total recovery will amount to full tort damages, but with only part coming from the third party and the rest provided by the employer.

Although this approach divides the loss between the two negligent parties, it is not technically contribution from the employer. The right to contribution exists only when one tort-feasor discharges the entire claim by paying more than his share, unjustly enriching the other negligent parties. The party who has paid is then entitled to proceed against the other equally liable parties through a third party action or a separate suit, depending on the procedural rules of the jurisdiction.\(^8\) The compensation situation differs in several respects. The employer’s reimbursement is not denied in order to prevent his unjust enrichment at the expense of the third party; rather, disallowing reimbursement to the employer assures that he is penalized appropriately for his wrongdoing. When the negligent employer is denied reimbursement, the reduction of the tort judgment has the effect of preventing a double recovery by the employee, rather than of accommodating a third party’s right to contribution. Admittedly, the net effect is that both tort-feasors pay part of the tort damages, the same result achieved by contribution rules. However, the fact that the third party has not paid the full amount and then proceeded against the employer to recover his share and the absence of tort liability on the part of the employer negate a conclusion that conventional contribution occurs. Considering these discrepancies, analysis of this problem by comparison to principles of indemnity and contribution among joint tort-feasors may seem anomalous, but both theories of recovery share similar rationales and repercussions. Both principles are designed to prevent negligent parties from enjoying undeserved relief from liability. Likewise, both remove part of the burden from a party who could have been forced to pay the entire amount of the damages. These similarities and the recent trend toward holding the employer liable for his full share of the loss give validity to the comparison between workers’ compensation third party suits and the tort principles of contribution and indemnity.

The growing social concern for more equitable distribution of loss-bearing has affected the workers’ compensation scheme in several ways. The modern preference for comparative negligence and its concomitant, comparative contribution, has called into question the practice of denying the employer all reimbursement when he has been found slightly negligent. Comparative negligence is

\(^{18}\) See, e.g., RESTATEMENT (SECOND) OF TORTS § 886A, Comments f & i (1979).
hard to apply in ordinary negligence actions and raises even more challenging questions in compensation actions, in which the denial of reimbursement is the rule. For example, the compensation benefits paid may actually exceed the employer's true percentage share of the tort damages. If the employer is denied reimbursement completely, he will be forced to bear a heavier burden than would the ordinary tort-feasor. On the other hand, if the employer has paid less compensation than his proportional share of the damages, it seems unfair to expect the third party to make up the difference. In either event, it is difficult to determine whether the negligent employer should be reimbursed nothing, should receive the full amount he has expended, or should be repaid on a percentage basis. Only one state supreme court has faced squarely the intricate interaction of the tort and compensation systems and has attempted to reconcile the policies underlying both.\textsuperscript{19}

Some recent decisions have resolved the conflict between the rights of the negligent employer and of the negligent third party by subjecting the employer to full liability for contribution or indemnity. This approach strikes at what traditionally has been considered an indispensable element of workers' compensation law—the employer's freedom from tort liability for injuries to his employees. The employer's freedom from direct negligence claims by his employees is embodied in each jurisdiction's statutes and remains inviolate. This immunity universally is regarded as essential to sustain the basic compromise of the compensation principle.\textsuperscript{20} Even in jurisdictions where the careless employer is denied reimbursement, his tort immunity remains intact if he is never forced to pay more than compensation. However, the scope of the employer's protection from claims other than direct claims by employees is currently in question. The idea that an employer's personal immunity must also preclude third party claims for contribution or indemnity is no longer unquestionably accepted as necessary to the integrity of the compensation system. In fact, a new approach which forces the employer to pay his full share of the tort damages has already gained recognition in at least two states.\textsuperscript{21} In these jurisdictions, the third party who is sued for the entire amount of the employee's damages may obtain contribution or indemnity from the concurrently negligent employer in accordance with the general principles of tort law. The employer's duty to the third party is measured by the extent to


\textsuperscript{20} A. Larson, supra note 11, at § 65.10.

which the employer's actions contributed to the employee's injury. The customary insulation of the employer from all tort liability, whether direct or indirect, makes this approach both novel and radical.

When the employer is required to contribute or indemnify like any other tort-feasor, his right to be reimbursed or to receive a credit for the compensation he has paid must be determined. If the employer is denied reimbursement, the employee will receive a double recovery, and the employer will bear a double burden. Any request for such a rule is probably doomed to failure by judicial reluctance to award the employee both compensation and full tort damages and by the obvious unfairness of requiring the employer to pay both compensation and tort damages. Instead, the employer would probably be allowed reimbursement or a credit of the amount of the compensation paid and would actually pay only his portion of the tort judgment.

No matter how the conflict is resolved, an additional complication may develop after the third party has paid his share of the judgment. At this point, the employee often has received only temporary disability benefits from his employer and thus remains entitled to a determination of the full extent of his disability and of the remaining amount of compensation due him. The non-negligent employer generally is allowed a credit in the tort recovery against his remaining compensation liability; the blameworthy employer's right to this same benefit is not so clear. In states where the negligent employer is reimbursed regardless of his fault, he should likewise be entitled to the credit; but if the employer is in a jurisdiction where reimbursement is denied as a penalty for carelessness, it seems inconsistent to allow the set-off to reduce his liability. Arguably, the credit is proper even in states where reimbursement would be denied, since the third party has already discharged his obligation, and denying the credit cannot retroactively reduce the amount of the judgment against him. However, the denial of reimbursement generally is seen as punishment of the employer, rather than as amelioration of the third party's condition. Therefore, the lack of a benefit to the third party as a result of the denial of the credit is irrelevant, except insofar as the employee may get double recovery, a possibility rejected in the reimbursement context. 22

Recent trends on employer liability may extinguish the employee's right to receive further compensation benefits after completion of the tort suit against the third party. When the negligent employer is required to contribute or indemnify, whether he should

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22. See note 17, supra.
bear additional compensation liability is questionable, since the employee receives full tort damages. The employer probably should not incur additional liability, as there is no justification for granting the employee the right to recover more than his full tort damages, an amount sufficient to cover all elements of his loss. If the employee is entitled to proceed, whether the employer should receive a credit against his remaining liability, despite his negligence, and, if so, whether the credit should reflect the compensation paid prior to the third party suit or the employer's contribution to the tort judgment, remain problematical. Furthermore, the application of comparative negligence principles to the third party suit may affect the employer's right to a credit against his future responsibilities to the injured employee. Solving this dilemma requires balancing the court's distaste for rewarding a negligent employer against the policy favoring limitation of the employee's recovery to full tort damages. Ultimately, the issue must be resolved in the context of the negligent employer's rights in each jurisdiction.

For the most part, the difficult process of resolving these conflicts and inequities has been sidestepped by a blanket preservation of the employer's tort immunity against claims by employees or by third parties. However, innovative and improved, if not completely satisfactory, answers have been posited; three unorthodox approaches define more fully the problems which arise when the employer and the third party are joint tortfeasors and present novel solutions.

NORTH CAROLINA

Nearly fifty years ago, North Carolina became the first state to attempt to resolve the conflict between the interests of the employer and the third party; the North Carolina Supreme Court formulated a rule, later clarified and embodied in statutes and still regarded as liberal. In an unprecedented decision, the court adopted a compromise approach denying reimbursement to the negligent employer for the compensation benefits he has paid and reducing the third party's tort liability by the amount of compensation due the plaintiff. Even today North Carolina's position is the extreme minority view, as the great majority of jurisdictions allow the

24. The holding was first announced in Brown v. Southern Ry. Co., 204 N.C. 668, 169 S.E. 419 (1933), but the decision is made confusing by technical rules requiring the employee to choose between collecting compensation and pursuing his third party action. The abrogation of the "election doctrine" in 1933 makes much of the discussion in this case obsolete and needlessly confusing.
negligent employer to seek reimbursement. The 1950 decision enunciating the compromise approach was Essick v. City of Lexington; in Essick, an employee who had received compensation from his concurrently negligent employer sought full tort damages from a third party. The court, relying on the exclusive remedy provision of the state's workmen's compensation act, refused the third party's request to join the employer as a defendant for purposes of contribution. The third party was granted extraordinary relief, however, since the court upheld his right to plead the employer's contributory negligence as a defense by reducing the damages award by the amount that would have been applied toward reimbursement. This partial defense, entitling the third party to a pro tanto reduction in his liability, is also effective when a co-worker, rather than the employer himself, is negligent. The employer's direct wrongdoing or his vicarious responsibility for the acts of his employees bars only his right to repayment, and the injured employee remains entitled to proceed against the third party to recover the tort damages which exceed the amount of compensation paid. Thus, the employee recovers full tort damages, part from his employer by way of compensation payments and the remainder from the negligent third party.

If, for example, the compensation liability of the employer is $5,000 and the total tort damages equal $15,000 and both the employer and the third party negligently contributed to the injury, the employer owes $5,000 in compensation benefits. But he is denied reimbursement out of the tort recovery because of negligence attributable to his enterprise. The third party's tort liability of $15,000 (representing full damages for the employee's injury) is reduced by the amount of compensation paid to $10,000. The employee receives $15,000, an amount sufficient to cover all expenses of his injury.

North Carolina's is the minority position, but there have been other progressive approaches to the third party suit. For example, Pennsylvania also denies reimbursement to the negligent employer

25. A. Larson, supra note 11, at § 75.23.
27. 232 N.C. at 209, 60 S.E.2d at 112.
28. 232 N.C. at 211, 60 S.E.2d at 114.
30. The percentages of fault contributed by the employer and the third party are irrelevant under this scheme, since the amount deducted from the third party's liability is always the amount of compensation due the employee, regardless of the employer's degree of responsibility for the harm.
and reduces the third party's liability pro tanto. However, the Pennsylvania rule is not based on the "partial defense" rationale. Instead, in *Maio v. Fahs*, a case decided only seven years after North Carolina framed its rule, the Pennsylvania Supreme Court worded its holding in terms of the employer's duty to contribute. In *Maio* the third party was allowed to join the employer as a co-defendant. The employer argued that he was liable to his employees solely for compensation under the exclusive remedy provision of the workmen's compensation act and that he was not a joint tort-feasor subject to joinder as a defendant or to liability for contribution. The court held that the employer was liable for contribution, but limited his share to the amount of benefits due to the employee under the compensation act. Because the employer's obligation was thus limited, it was not true contribution, and confusion would have been avoided had the *Maio* holding been couched in other terms. But, regardless of terminology, the result is the same as that reached in North Carolina.

At one time California embraced the North Carolina position, but has recently modified its approach. In 1961 the California Supreme Court held in *Witt v. Jackson* that the employer could not recover the compensation he had paid if his own carelessness or that of one of his employees contributed to the plaintiff's injuries. To avoid a double recovery, the court reduced the injured employee's recovery of tort damages from the negligent third party by the amount of compensation received. Although the California Supreme Court relied heavily on the North Carolina scheme in reaching its decision, the holding is not based on the partial defense rationale. Instead, the court attached an additional substantive requirement, freedom from fault, to the employer's reimbursement rights. The adoption of comparative negligence in California has altered substantially that state's resolution of this issue.

32. 339 Pa. 180, 14 A.2d 105 (1940).
33. 339 Pa. at 192, 14 A.2d at 111. This principle has been applied once in Louisiana at the appellate level. In *Moak v. Link-Belt Co.*, 229 So. 2d 395 (La. App. 4th Cir. 1969), the court granted the negligent employer reimbursement of the compensation he had paid, but then held him liable for "partial contribution or quasi-contribution" in this same amount—up to a limit of one-half of the tort damages awarded because of the pro rata contribution rule in effect in Louisiana at that time. The *Moak* case was considered by the Louisiana Supreme Court, but by that time the claim which raised the issue had been dismissed on motion of the parties, and the supreme court did not reach the question. *Moak v. Link-Belt Co.*, 257 La. 281, 242 So. 2d 515 (1970).
34. 339 Pa. at 187, 14 A.2d at 109.
The basic elements of the North Carolina method are simple, but there are several areas in which complications may develop. For example, one difficulty arises from the fact that the employee often receives only temporary disability payments before the third party suit and does not proceed against the employer for the bulk of his benefits until later. The question presented is whether the third party's tort liability should be reduced by the amount of compensation which has actually been paid prior to the judgment or by the total quantity which is due the employee. If only those payments prior to the judgment are deducted and the employer is allowed to credit the remaining amount of the tort recovery against his future liability, the credit seems inappropriate, particularly in light of the court's earlier denial of reimbursement because of fault. But, if the set-off is denied, to the extent that compensation payments are made after the third party suit, the employee's recovery will exceed full tort damages. The North Carolina court wisely avoided these logical inconsistencies by providing that the judgment against the third party is to be reduced by the amount of compensation which has been paid or is payable to the employee. The total compensation is determined on the basis of a stipulation between the interested parties or after evidence on the issue is submitted to the court. Thus, under the North Carolina scheme, the negligent employer clearly has no right to a credit against his future compensation liability, because the employee's tort recovery has already been adjusted.

The likelihood that some employees will settle their third party claims is also a potential source of confusion. The North Carolina statute requires the consent of both the employer and the employee if release of a third party is to be enforceable against both. One exception to this rule exists when the employee and the third party execute the agreement and provide for full reimbursement of the employer from the proceeds. In this situation there is no need to require the employer's consent, because he has been granted complete relief by the terms of the contract, and his approval should be presumed. If the employer consents to a release which does not grant reimbursement rights, he is denied reimbursement and loses his right to sue the third party separately; conversely, an employer is not bound by a compromise agreement prejudicing his rights if he does not sign it. Under the North Carolina Act, when the employer withholds his consent, he retains the right to file his own suit

39. *Id.*
against the third party to recover his compensation expenditure. Presumably, the third party also will retain the right to assert the employer's contributory negligence as a defense to the reimbursement claim. No cases or statutes directly address the point, but this approach accords the employer and the third party the same rights they would have if the employee were a party to the suit. The third party pays tort damages in excess of compensation due. The third party and the negligent employer then either litigate the issue of employer-fault or reach a compromise based on the employer's chances of success if he brings a lawsuit for reimbursement.

There are simple reasons to shield the employer from tort claims but to deny him reimbursement. Because the employer assumes the responsibility to pay compensation to all injured employees, it would be unfair to subject him to direct tort liability to his employees, even when he is personally negligent. But his fault need not be ignored when he steps out of the compensation system to seek reimbursement from a third party tort-feasor. To deny reimbursement to a negligent employer is not an unduly harsh penalty. As one North Carolina judge observed, when the employer seeks to recover from the third party, "his hands ought not to have the blood of the dead or injured workman upon them . . . ." A rule which would allow a negligent employer to reimburse himself at the expense of the third party and thus to escape responsibility for his misconduct is distasteful to the courts. The "moral indignation" caused by that prospect explains the North Carolina court's willingness to deny the employer relief under these circumstances.

The same rule is not so easily accepted when the negligence attributable to the employment enterprise is that of a co-worker of the injured employee and when the employer is personally blameless. If the reason for withholding reimbursement is indeed retribution for the employer's misconduct, it may plausibly be contended that he should not lose the right if the negligent is solely that of his employee. Influenced by such reasoning, one prominent writer has expressed the view that reimbursement properly is denied only when the employer is personally at fault. "Moral indignation" evaporates when the employer seeking reimbursement was indeed a careful person, but yet was forced to pay compensation for the tortious acts of others. Some courts have reached this conclusion and grant reimbursement when the negligence is that of a co-employee.

41. A. Larson, supra note 11, at § 75.23.
42. The Louisiana Supreme Court has declared that the negligence of a co-
The force of such reasoning seems acceptable until the logical extension of the rule is considered. When the employer's rights are made to turn on the nature of his negligence, it might be consistent to consider the basis of the third party's liability. The third party often is liable only under respondeat superior or another form of vicarious liability and is also an innocent party. Then the contest to decide who should bear the costs involves two blameless parties, each liable only under technical no-fault principles. The employer already has received the benefit of the statutory exclusive remedy provision; his liability for his employees' negligent acts is reduced to the benefits prescribed by the compensation system. It is doubtful that he also should get the further advantage of being reimbursed even this amount, while the third party, equally free of fault, is required to pay full tort damages. In the suit for reimbursement, the same principles should apply to both the employer and the third party when each is chargeable with wrongdoing only through vicarious liability.

The practical effects of a rule which would deny reimbursement when the employer was personally negligent but not when the carelessness was that of a co-employee should also be considered. In the modern business world, most employers are corporations which can carry on their business only through their employees. In such cases the wrongful act which contributes to the plaintiff-employee's injury must necessarily be that of a co-employee, as the corporate employer is incapable of personal negligence. If the negligence of a co-employee did not bar the corporation's right to reimbursement, the cost of compensation would be shifted to the third party in the majority of suits; seldom would the employment enterprise bear the burden of the risks it has created. Such a rule would assure the corporation of relief from all liability whenever a third party was responsible, even in part, for the employee's injury. This is inconsistent with the strong social policy of encouraging employers to provide safe working conditions for their employees.

A court which denies reimbursement when the employer is personally negligent faces a dilemma when it seeks to distinguish the case in which a co-employee is the blameworthy party. In terms of social policy and equity, the court might be wise to follow the lead of North Carolina and to deny reimbursement whenever the employee does not bar the employer's right to reimbursement of the compensation benefits paid to his employee. The court based its holding on the language of LA. R.S. 23:1101 (1950), which grants the absolute right of reimbursement to all employers with no requirement of blamelessness. Vidrine v. Michigan Millers Mut. Ins. Co., 263 La. 300, 268 So. 2d 233 (1972).
employer or a co-employee is negligent. Such a rule is consistent with the sound legal principle that one should not profit by his own wrongdoing; the principle is morally palatable because it would treat alike all those liable under no-fault principles. A contrary rule, requiring the court to ascertain the basis of each party's liability, would be difficult to administer and would complicate all third party suits.

The complete denial of reimbursement whenever the employer or a co-employee is negligent in any degree may, at first glance, seem surprising. However, the reasoning behind the rule becomes clearer when one examines the corresponding principles in ordinary negligence actions. North Carolina is among the dwindling number of states in which any contributory negligence on the part of the plaintiff in a tort suit acts as a complete bar to recovery. Joint tort-feasors liable for negligence are entitled to contribution on a pro rata basis, with degrees of fault irrelevant. In light of this treatment of the ordinary negligence action, total denial of reimbursement to the employer when he is negligent in any degree is not surprising. Also, the injured employee's contributory negligence bars his right to recover any amount from the third party, and even the blameless employer has no right to reimbursement when this is the case.

The North Carolina Supreme Court acknowledges no analogy between its approach to reimbursement in the third party suit and true contribution. Instead, the employer's fault is said to form the basis for a "partial defense" entitling the third party to a pro tanto reduction of the judgment against him in the amount of the compensation benefits due. Nevertheless, the result is some degree of loss sharing between the negligent parties. In the third party suit, the employer's share is always the amount of compensation paid or payable under the workmen's compensation act, regardless of what his pro rata share of the tort judgment would be. In most cases the employer escapes with a much lighter penalty than does the joint tort-feasor, because the tort damages usually greatly exceed the compensation benefits. However, the employer could conceivably be required to pay more than the third party if the amount of compen-

43. See N.C. Gen. Stat. § 1-139 (1887).
44. Section 1B-1 establishes the right to pro rata contribution among joint tort-feasors. Section 1B-2 states that relative degrees of fault shall not be considered in determining pro rata shares.
sation due were nearly equal to the full tort damages. For example, if full tort damages were $10,000 and the compensation benefits were $7,500, the employer's share under a strict application of the partial defense rule would be $7,500, and the third party would pay only the excess of $2,500. Thus, the employer would pay more than his $5,000 pro rata share, and the third party would receive a windfall. The careless third party could escape liability altogether if the compensation benefits exceeded the tort damages. Admittedly, the total release of the third party would be an unusual occurrence. The chance that the third party could be liable for less than his pro rata share, regardless of his culpability, is a more probable and less shocking occurrence, but is nonetheless inconsistent with placing the loss upon the wrongdoer, the underlying philosophy of fault-based liability.

North Carolina retains that part of the original common law tort rule which denies contribution to any tort-feasor who intentionally commits a wrongful act. To keep the defendants in tort actions and in third party suits on equal footing, the third party who has intentionally injured or killed an employee should be denied the benefit of the partial defense based on the employer's negligence. The employer guilty of the lesser wrongdoing, a careless rather than a purposeful tort, could be granted reimbursement regardless of his negligence, as a penalty to the third party.

The American majority rule prohibits a negligent third party from securing contribution from a concurrently negligent employer, but relief is also sought on indemnity principles. Indemnity, unlike contribution, shifts the entire loss from one joint tort-feasor to another who should pay instead. Even in ordinary negligence actions in which no tort-feasors with personal immunity are involved, indemnity principles vary greatly from one jurisdiction to another. There is common agreement only as to two bases for such recovery. The simplest and most frequent basis is an express contract which provides indemnity between the parties. Courts generally have held that one who is liable vicariously under respondeat superior or another no-fault principle is entitled to be repaid by the actual wrongdoer. Other theories have been advanced and either accepted or rejected on a state-by-state basis. For instance, one who by rely-

47. N.C. GEN. STAT. § 1B-1(c) (1967).
48. A. Larson, supra note 11, at § 76.21 states that "[t]he great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law."
49. W. Prosser, supra note 2, at 310.
ing on the misrepresentations of another has caused damage often is
granted indemnity against the person who made the statements.
Considerable support also exists for the view that when one tort-
feasor has actively created a danger which results in injury to the
plaintiff, the party who is held liable due to his passive negligence
(i.e., because he merely failed to discover or remove the risk) is en-
titled to indemnity. Similarly, it has been suggested that one who is
guilty of ordinary negligence should be indemnified by a joint tort-
feasor who has committed an intentional or grossly negligent act.
Overall, there is little uniformity when indemnity is based on
grounds other than a contractual right or vicarious liability.50

Defendants in North Carolina attempted to apply principles of
indemnity which had been recognized in ordinary tort actions to
third party suits in which the employer was guilty of concurrent
negligence. In one North Carolina case, Lovette v. Lloyd,51 the third
party asked for full indemnity from the employer under the passive-
active negligence dichotomy available in that state in pure
negligence actions.52 The defendant claimed that the employer was
actively negligent in creating a risk of harm to the employee and,
therefore, should indemnify the third party, who was only passively
negligent in failing to remove the danger. The court rejected this
demand without regard for the nature of either party's negligence,
because both contribution and indemnity are available only when
there are joint tort-feasors, all of whom are liable in tort to the
plaintiff. The court reasoned that the employer's personal tort im-
munity shields him from the status of a joint tort-feasor and thus
relieves him of the obligation of indemnity.

Later that year in Hunsucker v. High Point Bending & Chair
Co.,53 the supreme court reinforced its denial of common law indem-

50. Id. at 310-13.
51. 236 N.C. 663, 670, 73 S.E.2d 886, 892 (1953).
52. There is some support for the view that one who is guilty of only passive
neglect should be indemnified by the active wrongdoer, but the rule is far from being
universally accepted even in ordinary tort suits. W. Prosser, supra note 2, at 312. The
right to indemnity based on the active-passive negligence dichotomy has been recognized
in North Carolina but in a suit which involved no elements of an employment enter-
prise. Gregg v. City of Wilmington, 155 N.C. 18, 70 S.E. 1070 (1911). The defendant in
Lovette failed to include sufficient facts in his answer to support a conclusion that his
negligence was passive in nature or that the employer's negligence was active. Conse-
sequently, he would not have been entitled to indemnity even if his joint tort-feasor had
not been an employer endowed with personal immunity. In all probability the court
would have denied his demand regardless of the sufficiency of his proof of active and
passive negligence, because common law indemnity is available only against a joint
tort-feasor.
53. 237 N.C. 559, 75 S.E.2d 768 (1953).
nity based on the active wrongdoing of the employer when the third party was only passively negligent. By 1953 the North Carolina legislature had inserted the partial defense rule based on employer negligence in the compensation act.  

Nevertheless, the third party complained that North Carolina law did nothing to alleviate the inequitable position of a passively negligent third party who ordinarily would be entitled to common law indemnity. At that time the compensation acts of a majority of the states also would have denied the third party indemnity from the employer on any basis except express contract. The Hunsucker court acknowledged the majority view and stated that, although common law indemnity is not available against the employer, the North Carolina statute does reduce the third party's liability by the amount of compensation received by the employee and, therefore, is far more liberal than the provisions of most jurisdictions. In addition, the court expressed a willingness to uphold express indemnity contracts between the employer and the third party or to grant relief when some special legal relationship exists between the parties.

The supreme court was asked to enforce an express indemnity agreement between a third party power company and one of its subcontractors, the plaintiff's employer in Gibbs v. Carolina Power & Light Co. Accepting the invitation and upholding the third party's right to indemnity, the court noted that the contract was clear, unambiguous, and not against public policy. The defendant asserted the employer's contributory negligence as an alternative defense, but there was no factual finding on the issue, presumably because the presence or absence of employer fault would be immaterial once the third party's contractual rights were established. In light of this fact, the judicial enforcement of indemnity contracts between the employer and the third party is relevant here only in revealing that other bases for shifting the loss between the parties may exist. Because the contractual rights existing between the third party and the employer have nothing to do with the employee's tort action, the court will not allow litigation of the indemnity contract to be interleaved into the plaintiff's suit against the third party in the absence of extraordinary circumstances. Normally, the third party must bring a separate suit against the employer on the indemnity contract. The procedural difficulties and constitutional problems presented when a court denies an employer his reimbursement rights in a proceeding to which he may not be a party have been

55. 265 N.C. 459, 144 S.E.2d 393 (1965).
solved neatly by the North Carolina legislature. The statute provides:

If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of the employer joined and concurred with the negligence of the third party in producing injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding.56

Further, the amount of compensation which has been paid or is payable is not admissible into evidence in an action against the third party because of the danger that this might affect improperly the jury's assessment of damages. Instead, the issue of the employer's negligence is the last issue presented to the jury, and if the verdict is that the employer was guilty of such conduct, the court reduces the judgment by the amount of compensation due.

CALIFORNIA

California recently redefined the negligent employer's right to reimbursement in the third party suit and abandoned its earlier decision to follow North Carolina.57 The change is a response to judicial adoption of the comparative negligence standard in ordinary tort actions,58 rather then a reaction to modifications in compensation law. In fact, the entire history of the California employer's rights against those who injure his employees closely follows that state's development of negligence law.

The earliest decisions rendered after California enacted its workers' compensation system upheld even the grossly negligent employer's right to repayment of his compensation expenditure.59 Reduction of the third party's liability by relieving him of the obligation of reimbursement was seen as a form of contribution

among joint tort-feasors, which was impermissible at that time.\textsuperscript{60} The abrogation of the anachronistic no-contribution rule in 1957\textsuperscript{61} made the reasoning of the earlier decisions obsolete. A few years later in \textit{Witt v. Jackson}\textsuperscript{62} the California Supreme Court, relying almost exclusively on North Carolina's lead, held that the employer's negligence defeated his right to reimbursement. Recognition of the right to contribution among joint tort-feasors generally, coupled with the contributory negligence rule, played a large part in the decision. These two precepts convinced the court that it was proper to deny the employer's repayment claim completely if he was guilty of even the slightest negligence and to reduce the third party's liability by that amount in a manner similar to contribution.\textsuperscript{63} Although the \textit{Witt} court relied heavily on North Carolina case law,\textsuperscript{64} the decision is not based expressly on assertion of the employer's contributory negligence as a partial defense to the employee's claim. The basis of the decision, although not clearly articulated in the opinion, has been characterized as the attachment of an additional substantive requirement to the employer's statutory subrogation rights—the requirement of freedom from fault.\textsuperscript{65} However, the most recent pronouncement of the California Supreme Court refers to the rule as the "\textit{Witt} defense."\textsuperscript{66} The distinction is largely meaningless, as loss distribution is the same under either rationale, but in California the burden of proof may be on the employer rather than the third party. Even though California basically adhered to the minority view of North Carolina, some differences existed between the two approaches. Most importantly, the formula announced in \textit{Witt} reduced the third party's liability only by the amount of compensation actually paid prior to the judgment against him,\textsuperscript{67} while in North Carolina, the total amount of compensation due the employee, whether paid before or after the third party suit, is deducted.\textsuperscript{68} This distinction led to problems in California because employees are entitled to seek

\begin{footnotes}
\textsuperscript{61} CAL. [CIV. PROC.] CODE § 875 (Deering).
\textsuperscript{63} 57 Cal. 2d at 73, 366 P.2d at 650, 17 Cal. Rptr. at 378.
\textsuperscript{64} 57 Cal. 2d at 71, 366 P.2d at 649, 17 Cal. Rptr. at 377.
\textsuperscript{66} In \textit{Associated Construction}, 22 Cal. 3d at 842, 587 P.2d at 692, 150 Cal. Rptr. at 896, the court stated that "[t]he third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of \textit{Witt}."
\textsuperscript{67} 57 Cal. 2d at 73, 366 P.2d at 650, 17 Cal. Rptr. at 378.
\textsuperscript{68} See note 37, supra.
\end{footnotes}
the remainder of the compensation benefits due from their employers for the ultimate extent of their disability after completion of the third party suit.\(^9\) In North Carolina the employer clearly is entitled to no credit based on the employee’s tort recovery,\(^7\) but Witt left unclear the negligent employer’s right to a set-off. In the succeeding decade the state district appellate courts reached inconsistent results; some denied the credit if the employer’s negligence had been established in the third party suit, while others allowed the credit if the issue of employer fault was not raised until the employee’s later proceeding before the appeals board for the remainder of his benefits.\(^7\) In 1974 the California Supreme Court resolved the issue in Roe v. Workmen’s Compensation Appeals Board.\(^2\) Because a decision that the negligent employer should be denied the credit in all cases would increase recovery to the employee, the court found it necessary to balance two competing policies—the desire to prevent the employer from profiting by his own wrongdoing and the traditional reluctance to allow double recovery on the part of the employee.\(^7\) In the credit situation, the court placed greater emphasis on the societal interest in not allowing the wrongdoing employer to escape all responsibility for his misconduct, especially since the beneficiary of the prohibition against double recovery in the third party suit was seen as the third party and not the employer.\(^7\) The Roe court held that the negligent employer was to be denied a credit whether his carelessness was established in the third party suit or in the employee’s later proceeding before the board for full benefits.\(^7\) The employee enjoyed a double recovery to the extent that his receipt of compensation benefits was delayed until after final judgment or settlement of his third party claim.\(^7\) The probability that this kind of extensive duplication of damages will occur has lessened with the appearance of comparative negligence, but the chance that there will be some double recovery continues to exist.

69. See Cal. [Lab.] Code §§ 3858 & 3861 (Deering).
70. See note 37, supra, and accompanying text.
73. 12 Cal. 3d at 888, 528 P.2d at 774, 117 Cal. Rptr. at 686.
74. 12 Cal. 3d at 889, 528 P.2d at 775, 117 Cal. Rptr. at 687.
75. Id.
76. Id.
The *Witt* and *Roe* decisions were dictated to a large extent by two principles of tort law formerly in effect in California—contributory negligence and pro rata contribution among joint tortfeasors. Shortly after *Roe*, these two rules were abrogated by the California Supreme Court and replaced with comparative fault principles in the 1975 case of *Li v. Yellow Cab Co.* The court judicially adopted comparative negligence in response to its belief that liability for loss should be assigned in proportion to the amount of negligence of each responsible party, rather than on an arbitrary virile shares basis. The decision expanded the right of the contributorily negligent employee to recover from the third party by imposing a reduction based on the employee's share of responsibility for his own injury, rather than finding contributory negligence a complete bar to recovery. But the California court did not make it clear whether the employer's reimbursement and credit rights also would be adjusted in light of these developments. In fact, *Li* cautioned against an assumption that the decision supplied the rule for allocation of responsibility in all situations. Nevertheless, in keeping with its policy of reconciling the tort and compensation systems, the court in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board* refashioned the rights and duties of the negligent employer and the third party defendants in accord with the earlier *Li* decision. The *Associated Construction & Engineering Co.* case marks an important step in the evolution of the third party suit in response to changes in pure tort law. The exclusive remedy provision of the compensation scheme precluded a comprehensive application of comparative negligence principles to the negligent employer. But the *Witt-Roe* total denial of reimbursement and credit was based on the doctrine of contributory negligence, and the rule of these cases had to be adjusted in light of *Li*.

The judicial conversion to comparative negligence compelled the California court to depart substantially from its North Carolina heritage, but even today there is a similarity in the jurisprudence of the two states. Both states' compensation schemes are progressive.

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77. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
78. Id.
79. 13 Cal. 3d at 812, 532 P.2d at 1232, 119 Cal. Rptr. at 864. See also The Supreme Court of California 1974-1975—Foreword: Comparative Negligence at Last—By Judicial Choice, 64 Cal. L. Rev. 239, 241 (1976).
80. 13 Cal. 3d at 826, 532 P.2d at 1242, 119 Cal. Rptr. at 874.
82. CAL. [LAB.] CODE § 3601 (Deering).
83. Id.
84. 22 Cal. 3d at 840, 587 P.2d at 690-91, 150 Cal. Rptr. at 894.
attempts to structure the employer's rights in at least partial con-
formity with the tort system which governs the assertion of a reim-
bursement or credit claim. The divergence of the two schemes
results from the fact that North Carolina remains a contributory
negligence state, while California has carried its philosophy of
fault-based liability one step further through the adoption of com-
parative negligence. To maintain the balance between the tort and
compensation systems which the California courts had previously
achieved by following the North Carolina lead, the supreme court
was forced to reassess the rights of the concurrently negligent
employer and third party. The court determined that, to the extent
that comparative negligence was consistent with the employer's im-
munity from tort liability, the parties responsible for the damage
should thereafter share liability for the employee's injury in propor-
tion to their percentages of fault. Applying this principle, the court
concluded that the negligent employer should receive no reimburse-
ment or credit until the compensation he had paid exceeded the
amount for which he would be liable if he were an ordinary defen-
dant. The application of this rule will be examined in the context of
the reimbursement and credit situations.

REIMBURSEMENT

The employer may seek reimbursement by joining his
employee's tort suit or by bringing a separate action against the
third party if the employee has settled his claim. When reimburse-
ment is sought in the employee's suit against the third party, the
facts necessary to apply comparative negligence concepts must be
established there. The trier of fact assesses the parts that the
employer, the third party, and the employee played in causing the
injury, and specific percentages of fault are assigned to each party.
The employer's share of the employee's total tort recovery under
negligence principles is determined by multiplying the percentage of
fault assigned to the employer by the full damages incurred. The
court must then deduct this sum from the third party's liability.
However, the entire amount is subtracted only if it is equal to or ex-
ceeded by the amount of compensation benefits which have been

85. See notes 43 & 44, supra, and accompanying text.
86. See note 79, supra.
87. 22 Cal. 3d at 842-43, 587 P.2d at 691-92, 150 Cal. Rptr. at 985-96.
88. 22 Cal. 3d at 842, 587 P.2d at 692, 150 Cal. Rptr. at 896.
89. CAL. [LAB.] CODE §§ 3601, 3852-53, 3856(b) (Deering).
90. Associated Constr. & Eng'r Co. v. Workers' Compensation Appeals Bd., 22
91. Id.
paid prior to that time. If the employer's true percentage share is less than the compensation he had paid, only the amount for which he would be liable as an ordinary tort-feasor (and not the actual amount of compensation paid) is deducted from the third party's liability. The employer is reimbursed the difference. On the other hand, if the employer's tort liability would equal or exceed the compensation benefits received by the employee, the full amount of compensation paid is subtracted from the judgment against the third party. In this case the employer is denied his reimbursement lien, because the contribution he has made does not exceed what his share of the judgment would be if he were an ordinary tort-feasor.

This scheme is illustrated by a situation in which the employee's tort damages are $15,000 and his employer has paid $5,000 in compensation benefits prior to judgment. If the employer and the third party are each found fifty percent negligent, the employer's share under pure comparative negligence rules would be fifty percent of $15,000 or $7,500. The third party is eligible for a maximum reduction of $7,500, the employer's true share. However, in this instance the reduction will be limited to $5,000, the amount of compensation which has in fact been paid. The employer is entitled to no reimbursement, because his contribution of $5,000 in compensation benefits falls short of his actual percentage share of $7,500. The third party receives limited relief, but his liability is greater than it would be in a situation in which his joint tort-feasor enjoys no personal immunity from negligence claims. As in all third party suits, the innocent employee's right to receive full tort damages is preserved. The employer's tort immunity is intact, since he is not required to contribute more than the amount of compensation he has already paid.

In a second example using the same amounts of tort damages and compensation paid, the result is altered if the employer is only ten percent negligent and the third party is ninety percent at fault. The employer's percentage share would then be ten percent of $15,000, or $1,500. The third party's tort liability would be reduced, but only by the employer's virile share, $1,500, and not by the amount of compensation which had in fact been paid. The employer would be entitled to reimbursement of $3,500, the amount by which

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92. Id.
93. Id.
94. Id.
95. The following computations do not take into account the payment of "expenses or attorney's fees" within the meaning of section 3861 of the California Labor Code when figuring the employee's net tort recovery.
his contribution of $5,000 in compensation benefits exceeded his actual percentage share of $1,500.

In a third example, the possibility of the employee's own partial responsibility for his harm should be considered. Associated Construction did not involve employee carelessness; the court expressly disclaims any holding on how such negligence would effect the proportional contribution of the employer. Presumably, the employee's total recovery would first be reduced by his own percentage of negligence, just as in any other tort suit. The liability of the employer and the third party would continue to be calculated on their percentage shares of the entire tort damages. In this way one hundred percent of the loss will be apportioned among the responsible parties. If the employees were ten percent negligent, the employer ten percent negligent, and the third party eighty percent negligent, the recovery would be as follows: the third party's liability of $15,000 would be reduced by $1,500 for the employee's negligence and by $1,500 for the employer's negligence, to $12,000, which is eighty percent of $15,000. The employer who had paid $5,000 would be entitled to reimbursement of $3,500, the amount by which the compensation he paid exceeded his percentage share of liability. In this example the employee does not receive full tort damages, but the involvement of the compensation system is not the cause of the partial recovery. Instead, the employee suffers a reduction in his recovery for his contributory negligence, as any other less-than-perfect plaintiff would under the rules of comparative negligence.

At this point it may be worthwhile to note the general objectives of the law which are involved and sometimes endangered when a negligent employer claims reimbursement from a third party. The soundness of the decision in Associated Construction may be judged in light of its tendency to promote to the fullest extent possible each of the somewhat contradictory goals. First, the employee's right to recover complete damages from any tort-feasor, other than his employer, should not be diminished by the fact that the employee also is entitled to receive compensation. The concurrent negligence of the employer and his immunity to contribution claims do not lessen the third party's liability. The employee's recovery will be reduced for his own negligence, but otherwise he should receive complete reparation for all elements of his injury. After Associated Construction apportionment of the loss will vary, depending on each party's degree of negligence and on the amount of compensation which has been paid prior to the judgment; but, regardless of the

96. 22 Cal. 3d at 842 n.9, 587 P.2d at 692 n.9, 150 Cal. Rptr. at 896 n.9.
ultimate distribution of the loss, the employee will receive the sum he would get if the compensation system were not involved.

The second goal is preservation of the employer's personal immunity from tort claims resulting from injuries to his employees, a right important for equitable and economic reasons. To require the employer to pay compensation for all work-related injuries on a no-fault basis and, at the same time, to subject him to tort liability to his employees would be unfair and perhaps even disastrous. The court in *Associated Construction* balanced the employer's rights and obligations to reach an acceptable compromise. Since the all-or-nothing rule of *Witt* has been abandoned, the careless employer will be entitled to partial reimbursement if the compensation paid exceeds his true share of the tort damages. Conversely, if the employer's liability as an ordinary tort-feasor exceeds the compensation he has paid, he will receive no reimbursement, but he will also bear no further responsibility for contribution to the third party. The employer is simultaneously protected by both negligence and compensation principles, since he never pays more than either his proportionate share of the tort damages or the compensation remitted before judgment in the third party suit, whichever is less. This double protection is justifiable when one considers the alternatives. If the employer were always denied reimbursement of the entire amount of his compensation, regardless of how great or slight his negligence, either the employee would receive a double recovery or the third party would enjoy an undeserved windfall. In either case the employer who supposedly exchanged tort immunity for no-fault compensation liability would be the loser. Instead of supporting such an unfair rule, *Associated Construction* assures the financial integrity of the compensation system and, at the same time, sufficiently punishes both the employer and the third party to deter careless conduct.

The third objective is accommodation, so far as possible, of the third party's right to contribution from his joint tort-feasors. This goal can be met only to the extent that relief is compatible with the preservation of the employer's tort immunity. Indeed, if the employee is contributorily negligent, the third party's liability is reduced, but this is a feature of comparative negligence and has nothing to do with the compensation system. Since the California Supreme Court's decision in *Witt*, the third party enjoys a decrease in liability similar in effect to contribution whenever the employer is even partially responsible for the employee's harm.97 In earlier deci-

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97. 57 Cal. 2d at 73, 366 P.2d at 650, 17 Cal. Rptr. at 378.
sions the reduction always equaled the amount of compensation paid prior to the third party judgment.\textsuperscript{98} The employer received no reimbursement whatsoever, but he had no further liability to the third party for contribution. Thus, the employer's tort immunity was preserved to that extent. The \textit{Associated Construction} decision incorporates comparative negligence into the reimbursement formula in a way that retains the employer's freedom from tort liability. The balance continues to favor the employer, with less emphasis placed on the third party's right to contribution. However, in light of the American majority rule which grants even the negligent employer the right to reimbursement and casts the entire burden on the third party in all cases, the California rule does not seem harsh.\textsuperscript{99}

\textbf{CREDIT RIGHTS}

To this point, inquiry into the California compensation scheme has been limited to the effect of comparative negligence on the employer's right to reimbursement. When the issue of employer negligence is raised in the context of a credit claim, the respective rights of the parties are also altered by the \textit{Li} decision. The employee who has received remuneration for his tort claim, either by judgment or settlement, has the right to seek the remainder of his compensation benefits from his employer in a proceeding before the Workers' Compensation Appeals Board.\textsuperscript{100} Often the employer has paid only temporary disability benefits prior to disposition of the third party claim, and he may seek to avoid further payments to the employee by asserting a credit or set-off against his liability in the amount of the employee's tort recovery. At this point the employee raises the issue of the employer's negligence as grounds for denial of the credit. If there has been a percentage determination of the employer's responsibility for the accident and of the employee's damages in a third party suit, the finding has a res judicata effect in a later proceeding before the board.\textsuperscript{101} If no prior resolution of these issues has taken place, they must be decided by

\textsuperscript{98} \textit{Id.}
\textsuperscript{99} See note 14, \textit{supra.}
\textsuperscript{100} See note 69, \textit{supra.}
\textsuperscript{101} In \textit{Associated Construction}, the employee reached an out-of-court settlement with the third party tort-feasor, making any direct statements about the res judicata effect of a prior court determination of the issues irrelevant. Although \textit{Roe} also involved a settlement of the employee's third party claim, the court suggested that improper manipulation of the reimbursement and credit cycles could be reduced by a system in which both the trial court and the Worker's Compensation Board were bound to accept the other tribunal's prior determination of the employer's fault and the employee's damages. 12 Cal. 3d at 892, 528 P.2d at 777, 117 Cal. Rptr. at 689.
The employer receives the benefit of the third party judgment only after he has paid his share of the employee's tort damages. A sufficient amount may have been paid prior to the third party suit. If not, the employer must make up the deficiency before the board will allow the credit; then the net amount of the tort recovery is credited against the employer's remaining liability to reduce it pro tanto. Theoretically, the employer should have to pay the same amount of compensation to be eligible for the credit whether the employee's tort recovery came by way of settlement or judgment. However, discrepancies are certain to exist, depending on whether the issues of fact are decided in court or in an administrative proceeding. But these differences are likely to be minor, since much of the same evidence on damages and fault would be presented before either tribunal.

Before the employer is entitled to a credit, his total payments to the employee must equal the amount that his contribution liability to the third party would be if the employer were considered an ordinary tort-feasor. Choosing this amount may seem arbitrary, particularly in light of the fact that it is the employee rather than the third party who receives the benefit of this requirement. However, the logic of Associated Construction becomes more apparent when the decision is viewed in light of its main purpose, to deter careless conduct on the part of the employer. The court shows more concern for enforcing the equitable principle that a negligent employer should not profit by his own wrong than for increasing the employee's recovery or decreasing the third party's liability. Even denying reimbursement to the blameworthy employer in the third party suit, which incidentally serves to reduce the third party's tort liability, is viewed more as a punishment of the employer than as a means of preserving the third party's right to contribution. Requiring the employer to pay his true share of the tort damages is the method used to assure that he is appropriately penalized for his misconduct.

Although the negligent employer remains immune to solidary liability for the entire tort award to his employee, he loses the traditional protection of the compensation act when he is forced to pay his percentage of the tort judgment before he receives any credit.
Once payments by the employer equal what he would pay as an ordinary defendant, he should enjoy the right to contribution that is granted to other tort-feasors. After Associated Construction, an employer who pays this amount is granted the right to receive a benefit similar to contribution by way of a credit against his remaining liability after the third party suit. The Associated Construction court countered arguments that its decision allowed the negligent employer to profit from his own wrongdoing by stating:

It is contended that such an extension would permit a negligent employer to profit from its own wrong and thus violate the important policy effectuated through the Witt-Roe doctrine. Under the rule we announce, however, the employer does not so profit; no credit is available until the employer has fully satisfied its share of tort damages. Allowing the concurrently negligent employer a credit limited in this fashion is rational if non-negligent employers are to be permitted credit; each profits, if at all, only to the extent it committed no wrong.107

Examples also help explain the complex California credit rules. If an employer has paid $20,000 in compensation benefits before an employee’s successful suit against a third party, if full tort damages are $90,000, and if the employer and the third party are both held fifty percent responsible for the damages, in the third party tort suit the distribution of responsibility would be as follows: the employer would be denied reimbursement because his share (fifty percent) of $90,000, or $45,000, exceeds the contribution of $20,000 which he made through compensation payments. The third party’s liability of $90,000 would be reduced by the employer’s share, but only up to the $20,000 compensation which has been paid, leaving the third party liable for $70,000. The innocent employee receives full tort damages of $90,000.

After prosecution of the third party suit, the employee is free to seek from his employer further compensation benefits based on the ultimate extent of the employee’s disability.108 If the board classifies the employee as totally and permanently disabled and if full benefits for such a disability are $70,000, the employer can claim no credit for the amount received from the third party until compensation paid to the employee reaches the employer’s true comparative liability of $45,000. The employer has already paid $20,000 in temporary disability benefits; thus he must remit an additional $25,000 to the employee to bring his total up to $45,000 before he will be en-

107. 22 Cal. 3d at 846, 587 P.2d at 694, 150 Cal. Rptr. at 898.
108. See note 69, supra.
titled to a credit. The $45,000 that the employer has now paid is applied to the $70,000 due the employee for total and permanent disability; this payment reduces the debt to $25,000. After this payment, the $70,000 that the employee received from the third party may be applied to the employer's residual liability. Thus, the credit of the $70,000 tort recovery relieves the employer of any further responsibility to the employee.

On the surface it may seem that the employer has been forced to contribute to the tort judgment as an ordinary tort-feasor. Indeed the employer does pay the share for which he would be liable if pure comparative contribution principles were applied to him in the third party suit. However, the employer has reduced the third party's liability by only $20,000. The employer's ultimate loss is what his share of the damages would be if the compensation act were not involved, but the employee, rather than the third party, benefits from employer's increased liability. From the third party's point of view, contribution clearly is not taking place. Even after Associated Construction the employee retains to some extent the benefit of the double recovery sanctioned in Roe, when contributory negligence was the rule; but after the adoption of comparative negligence, the compensation and tort damages overlap only to the extent that the employer's percentage share exceeds the benefits he has paid prior to judgment.

A different situation occurs when the employer has paid $20,000 in compensation benefits before resolution of the employee's claim against the third party, and full tort damages are determined to be $90,000. However, in this example the employer is ten percent, rather than fifty percent negligent, and the third party is held ninety percent responsible for the accident. In the third party suit, the employer's initial compensation payment of $20,000 exceeds his proportional share of $9,000. The employer is entitled to reimbursement of $11,000, the amount by which is contribution exceeds his share of liability under comparative negligence. The third party must bear ninety percent of the $90,000 loss, and the employee receives full tort damages because he was guilty of no contributory negligence.

Later, when the employee seeks full compensation benefits of $70,000 for total and permanent disability, the employer already will have contributed his $9,000 share of the tort judgment. Thus, the employer is entitled to credit the entire $81,000 received from the third party against his remaining compensation liability of $61,000 ($70,000-$9,000) to cancel it completely.

When the employer asserts credit rights based on a third party settlement rather than a judgment, the application of comparative
negligence principles is more complex. Following the Associated Construction analysis, the Workers' Compensation Appeals Board then must determine the appropriate contribution by the employer which will entitle him to credit rights, since there has been no prior judicial determination of the employer's percentage of negligence or of the employee's full tort damages. The supreme court in Roe upheld the authority of the appeals board to determine such fault issues over objections of unconstitutionality and of the board's lack of experience in adjudicating negligence claims.

Specifically, the board must determine: (1) the degree of fault of the employer and (2) the total tort damages to which the employee is entitled. The employer cannot credit the settlement against his liability until he has paid the employee an amount equal to the employer's proportional share of the tort damages. The computation is identical to the case in which the employer's degree of fault and the employee's tort damages are established in a judicial proceeding. The only difference is that when there has been a settlement, the fault and damages issues are determined by the board rather than by the court.

RIGHT OF EMPLOYEE TO SETTLE THIRD PARTY SUITS

Settlements between injured employees and third party defendants affect, but do not erase, the employer's reimbursement and credit claims. From codification of compensation law in California in 1937 until 1971, section 3859 of the California Labor Code required the consent of both the employer and the employee for a valid settlement agreement with the third party. This consent requirement encouraged simultaneous resolution of all issues in the third party suit; the requirement also served to "protect the rights and interests of employer and employee and to prevent or discourage either of them from obtaining a recovery from the third party at the expense or the disadvantage of the other." The rule made sense when one considered that the proof required for the employee's tort recovery and the employer's reimbursement claim were essentially the same—the employee's freedom from contributory negligence and the third party's responsibility for the employee's harm. At this time the employer's negligence played no part in the compensation

109. 22 Cal. 3d at 843, 587 P.2d at 692, 150 Cal. Rptr. at 896.
110. 12 Cal. 3d at 891-92, 528 P.2d at 776-77, 117 Cal. Rptr. at 688-89.
111. The Associated Construction court made this issue clear. 22 Cal. 3d at 843, 587 P.2d at 692, 15 Cal. Rptr. at 896.
112. CAL. [LAB.] CODE § 3859 (Deering).
scheme, but in 1961 Witt added an element to the employer's claim for reimbursement which was not essential to the employee's suit—the employer's freedom from fault.114 After Witt the negligent employer had no right to reimbursement, but he retained his veto power over the employee's settlement negotiations with the third party. As a result, the Associated Construction employer enjoyed a tactical advantage in his dealings with the third party which did not accurately reflect his chances of succeeding in his claim for reimbursement at trial.115 A third party who desired to settle the larger employee claims against him was forced to "buy" the employer's consent by reimbursing him at least part of the compensation paid, when in reality the employer's fault deprived him of the legal right to be repaid at all.

In 1970 the supreme court, rather than the legislature, took action in Brown v. Superior Court of San Bernadino County116 to correct the situation. The court considered a situation in which the third party's liability to the employee and the lack of any claimed contributory negligence on the part of the employee were not determined or conceded in the settlement, which was executed without the consent of the employer. The release of the third party was held invalid, but the clear implication of the opinion was that when these issues were resolved in the settlement agreement, the employee could reach an independent compromise of his claim against the third party without the employer's consent.117 The employer would be required to pursue his reimbursement rights in a separate proceeding against the third party. In this situation the employer would have no more difficult a burden of proof than if the employee were also a party to the suit. In fact, the litigation would be less complicated, since the issue would be reduced to the employer's own lack of negligence.118

The next year the legislature responded to this decision by amending the consent provision of the Labor Code. For a settlement to foreclose the claims of all parties, the written consent of both the employer and the employee is still required.119 However, the right accorded the employee by judicial decision to settle without the employer's consent was codified by the addition of subdivision (b) to section 3859:

114. See notes 54-58, supra, and accompanying text.
115. 22 Cal. 3d at 837, 587 P.2d at 688, 150 Cal. Rptr. at 892.
117. Id.
118. Id.
119. CAL. LAB. CODE § 3859 (Deering).
Notwithstanding anything to the contrary contained in this chapter, an employee may settle and release any claim he may have against a third party without the consent of the employer. Such settlement or release shall be subject to the employer's right to proceed to recover compensation he has paid in accordance with Section 3852. 120

Section 3852 embodies the employer's right to bring an action against the third party to recover the compensation he has paid. 121

The language of sections 3859 and 3852, when read together, leave no doubt that the employee's right to enter into an independent settlement agreement does not affect the employer's right to reimbursement. 122 The employer has the same rights and the same burden of proof, whether his claim is prosecuted by lien, by intervention in the employee's tort suit, or in a separate action against the third party. The determination of third party negligence in the employee's suit or the concession of this issue in the settlement has a res judicata effect, and the employer need not reestablish this element of his claim. 123 The employer need establish only that he is free of fault to receive complete repayment or that his compensation payments exceed his percentage of the damages to receive partial reimbursement.

Because the legislature did not modify the credit provisions of the act in response to changes in the settlement procedure, the extent of the employer's post-settlement credit rights was uncertain after the amendments. Associated Construction, the 1978 case which integrated comparative negligence into the third party suit, also answered this question. 124 The court found that the legislature did not intend to deny the employer a credit based on the employee's independent settlement of his third party claim. 125 An opposite view would have forced the employer to file suit against the third party for reimbursement in order to receive any benefit from the settlement. To take full advantage of his rights, the employer would be required to postpone this action until the employee's permanent benefits were fixed by the board, because the employer would have no right to recover amounts not yet determined to be due. 126 The court believed this to be an undue hardship on the employer. In

120. Id.
121. Cal. [Lab.] Code § 3852 (Deering).
123. Id.
124. Id.
125. Id.
126. 22 Cal. 3d at 839-40, 587 P.2d at 690, 150 Cal. Rptr. at 894.
short, the court found no reason for the employer to be denied the right to seek a credit based on the employee's independent settlement contract. The employer is not required to reestablish the third party's negligence in a credit claim. Instead, he only has to prove his future liability for compensation and to defeat assertions that he has been negligent to an extent which would deny him the right to a credit altogether.

INDEMNITY

The California history of the third party's right to indemnity from the employer is unique. Most states deny both contribution and indemnity, because the employer's personal immunity from negligence claims by his employees prevents his acquiring the status of a joint tort-feasor. The California rule regarding contribution from the concurrently negligent employer is consistent with this viewpoint. The employer may be denied reimbursement as a penalty for his misconduct, but he is never required to pay more to the third party. Although the employer's tort immunity defeats claims for contribution, the immunity has not always been effective against third party requests for indemnity.

Prior to 1959 the employer was subject to liability under the common law doctrine of implied indemnity. In some cases the employer was required to indemnify the third party when the negligence of the employer was active and the third party was merely passively negligent. Other cases held that a contract between the employer and the third party to perform services in a specified manner and to be "responsible for... any and all damages" resulting from its operations could form the basis for an implied agreement to indemnify. Under either theory of common law indemnity, the employer was subject to the dual burden of compensation liability through direct payments to the employee and of tort liability as the result of an obligation to indemnify the third party for any amounts the employee recovered through a third party suit.

128. See text at notes 10-22, supra.
130. Id.
In 1959 the legislature responded to the inequity of the double burden on the employer by enacting section 3864 of the Labor Code. Under this statute, the employer is no longer required to indemnify the third party in the absence of an express written indemnification agreement executed prior to the injury. The legislature felt that imposing an obligation to indemnify on the employer contravened the exclusive remedy theory of the compensation statutes and undermined the stability of the entire system.

The California statute is desirable in light of the preference for freedom of contract among equal parties. In practical terms, the only parties who will execute specific indemnity contracts will be employers and third parties who enter into business ventures for exchanging goods or services. Basing the right to indemnity on the existence of a written contract ensures that both parties will know who ultimately will be liable for tort damages to the employees. The employer who has agreed to indemnify the third party will then be aware of his responsibility to procure liability insurance and will include its cost when pricing his product or service.

Since the statute was enacted, questions regarding the third party's right to indemnity have centered on the sufficiency of terms of the contract. The cases have not required that the employer specifically agree to reimburse the third party or to hold him harmless for judgments arising out of injuries to the employer's own workers. On the contrary, an agreement for the employer to indemnify the third party for "any and all claims, suits, or liability ... for injuries to persons" is broad enough to cover claims by employees of the indemnitor against the third party. Similarly, a contract providing coverage of "all claims for damages to persons ... growing out of the execution of the work" includes recovery by the employees of the indemnitor against the third party in the absence of extrinsic evidence supporting a contrary conclusion. The language which has been held sufficient to constitute a specific indemnity contract is so broad that it is likely that many of the pre-1959 cases based on implied indemnity would be resolved in the same way today.

An indemnity contract which does not specifically entitle the

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132. Cal. [Lab.] Code § 3864 (Deering).
third party to indemnity regardless of his own negligence is a "general" indemnity clause. Such a clause has been held to provide indemnity for a loss which results in part from the third party's passive negligence but has not been interpreted to provide indemnity to the third party who is actively negligent in causing the employee's injury. At the present time, the inclusion of the general indemnity clause is the employer's only realistic hope of escaping the burden of repaying the third party with whom any sort of indemnity contract has been executed.

ILLINOIS

The most extreme method of resolving the dispute between the employer and the third party involves subjecting the negligent employer to unlimited liability for contribution and indemnity. Surprisingly, this approach is not unknown in American jurisdictions. In Skinner v. Reed-Prentice Package Machinery Co., Illinois became the second state to apportion the employee's damages between the negligent employer and the third party according to the rules governing contribution between ordinary joint tort-feasors. This task was performed with little regard to the equally applicable principles of the compensation act. In Skinner the Illinois court considered a defendant manufacturer's request for contribution from the employer based on the latter's negligence. The court held that, although the manufacturer was responsible under the theory of strict liability for defective products, his request for contribution alleging the employer's negligence in misuse of the product or assumption of the risk of the defect stated a valid cause of action. The amount due from the employer would depend on the relative degrees to which the third party's manufacture of a defective product and the employer's subsequent misuse of the product or assumption of the risk caused the employee's injury. The decision is problematic, dictating major changes in both tort and compensation law without adequate consideration or guidance from the majority.

Prior to Skinner the Illinois rules regarding contribution and indemnity were badly in need of revision. Relying on the old English

138. Id.
139. 70 Ill. 2d 1, 374 N.E.2d 437 (1978).
141. 70 Ill. 2d at 15-16, 374 N.E.2d at 443.
142. Id.
common law rule. Illinois adhered to the view that contribution is not allowed among joint tort-feasors. Early decisions attempted to restrict the rule's application to intentional wrongdoers or to only those tort-feasors who acted in concert, but for the most part these exceptions gave way to the broad general rule denying contribution. The continued existence of this concept has been widely criticized as inappropriate and unfair, especially when applied, as in Illinois, to those whose misconduct is negligent rather than intentional. Even the Illinois Supreme Court acknowledged the questionable nature of the doctrine, but nevertheless persisted in its application.

Since Illinois courts applied the "no contribution" rule to even negligent joint tort-feasors, defendants cast in judgment were unable to recoup any part of their loss from others also responsible for the damage. Because of the unfairness of this result, principles of indemnity, not prohibited by the "no contribution" rule, were successfully used to shift the entire loss from one tort-feasor to another. Three broad bases for indemnity have been recognized in Illinois: the express indemnity agreement; indemnity based on an implied contractual agreement or the existence of a special relationship (e.g., vicarious liability); and common law indemnity. Common law indemnity, the variety most important to the Skinner case, rests upon the theory that a tort-feasor who was actively negligent should indemnify a tort-feasor who was merely passively

143. Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799). The use of Merryweather as authority for the rule that there should be no contribution among joint tort-feasors liable on the basis of their negligence has often been questioned. In Merryweather the defendants acted in concert and intentionally when they wrongfully converted the plaintiff's goods. At most, the rule of no contribution among joint tort-feasors should be limited to these unusual facts and not applied to those whose negligent acts combined to cause injury. See Reath, Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan, 12 HARV. L. REV. 176, 177-78 (1898).
144. STUDY COMM. REPORT ON INDEMNITY, THIRD PARTY ACTIONS AND EQUITABLE CONTRIBUTIONS, REPORT OF THE ILLINOIS JUDICIAL CONFERENCE 202 (1976).
145. See Wanack v. Michels, 215 Ill. 87, 74 N.E. 84 (1905); Farwell v. Becker, 129 Ill. 261, 21 N.E. 792 (1889).
146. Skala v. Lehon, 343 Ill. 602, 175 N.E. 832 (1931).
147. See W. PROSSER, supra note 2, at 307.
Because of the difficulty involved in applying this standard on a case-by-case basis, courts have attempted to define the terms "active" and "passive" in various ways. One frequently cited definition is found in Sargent v. Interstate Bakeries, in which the court said that "[o]ne is passively negligent if he merely fails to act in fulfillment of a duty of care which the law imposes on him . . . . One is actively negligent if he participates in some manner in the conduct or omission which caused the injury."

The widespread use of this theory of indemnity has produced somewhat ironic results. Before Skinner a passively negligent party could not shift part of his loss to another through contribution because of the non-contribution rule; however, in some cases the passive party was entitled to shift the entire loss to his actively negligent joint tort-feasor through use of the active-passive theory of indemnity. This seems an improper use of the doctrines of contribution and indemnity. When the defendant has been negligent in any degree, whether passively or actively, it is fair to require him to bear at least part of the responsibility for the damage he has caused. If a court wishes to divide equitably the damages in this situation, contribution is the proper mechanism. Indemnity is more appropriately reserved for situations in which policy and equity demand that the party cast in judgment be relieved of liability entirely because of the existence of a contract to that effect or because he lacks personal fault. The use of indemnity in situations in which both the indemnitor and the indemnitee are at fault merely replaces one inequitable concept, the non-contribution rule, with another just as unfair. In Illinois there seems to be no clear understanding of the distinction between contribution and indemnity. The confusion may stem from an early case in which the court discussed exceptions to the rule of non-contribution between tort-feasors, all of which exceptions appeared to include active-passive indemnification. This intermingling of terms led practitioners to conclude that contribution is a form of partial indemnity and indemnity an extreme form of contribution. As recently as Skinner, the Illinois Supreme Court referred to indemnity based on the active-passive negligence of the tort-feasors as an exception to the non-contribution rule. The failure of

152. W. Prosser, supra note 2, at 312.
156. 70 Ill. 2d at 6, 374 N.E.2d at 438.
the court to distinguish properly between contribution and indemnity may have led to the theoretical inconsistencies found in many Illinois decisions.

The unsatisfactory condition of the Illinois rules regarding contribution and indemnity became even worse when the supreme court began to extend the principles to new areas in which their application seemed inappropriate. In an important decision in 1967, the Illinois Supreme Court applied the doctrine of common law indemnity to a case involving the workers' compensation system. In *Miller v. DeWitt*\(^{157}\) employees were injured by the combined negligence of their employer, the general contractor, and a third party, the architect on the construction project. After receiving compensation the employees brought a third party action against the architect based on his negligence and violations of the Structural Work Act. The architect filed a demand for indemnity from the plaintiff's employer, the general contractor.\(^{158}\) The supreme court allowed indemnification of the architect by the contractor, even though the contractor argued that the workers' compensation act precluded such a remedy.\(^{159}\) The court noted that several previous cases had allowed indemnification from an actively negligent employer and that the legislature had taken no action to overrule the decisions.\(^{160}\) Accordingly, the court stated that "the act does not bar a third party from seeking indemnity from the employer who has paid compensation under the act"\(^{161}\) even when the payment exceeds the employer's liability under the compensation statute.

The *Miller* decision had important implications for workers' compensation. The exclusive remedy provision of the compensation act was not interpreted to limit the employer's liability to the amount of compensation paid to the employee, despite what seems to be clear statutory language to the contrary.\(^{162}\) This successful attack on the employer's tort immunity was later used by the majority in *Skinner* as a basis for arguing that the compensation act did not protect the employer from liability for contribution.

\(^{157}\) 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
\(^{158}\) 37 Ill. 2d at 276, 226 N.E.2d at 633.
\(^{159}\) ILL. REV. STAT. ch. 48, § 138.5(a) (1977) provides, in part: "No common law or statutory right to recover damages from the employer . . . for injury or death . . . , other than the compensation herein provided is available to any employee . . . , or any one otherwise entitled to recover damages for such injury." ILL. REV. STAT. ch. 48, (1977) § 138.11 states that "the measure of responsibility of an employer" is to be compensation as provided in the act.
\(^{160}\) 37 Ill. 2d at 290, 226 N.E.2d at 641.
\(^{161}\) Id.
\(^{162}\) See note 159, supra.
Illinois courts were also asked to decide whether a defendant strictly liable in tort should be allowed indemnification based upon
the negligence of another. During the years immediately preceding Skinner, the court was besieged with requests for indemnity from
manufacturers held liable on the basis of strict liability for defective
products. The leading case in Illinois which established strict liability
for defective products was Suvada v. White Motor Co. In Suvada
the court held that the party whose liability arose because of a
defective product was entitled to indemnification from the manufac-
turer of a defective part on a strict liability theory. The court did
not reach the issue of the manufacturer's right to indemnity from a
subsequent user of the product.

In a line of cases decided between Suvada and Skinner, the Il-
linois appellate courts consistently denied the manufacturers' re-
quests for indemnity. The common basis for the decisions appears to
be the relative impossibility of applying the active-passive negli-
gence test to a defendant held liable on the basis of strict liability. Eventually the supreme court heard an appeal from a manufacturer
who had been denied indemnification. However, the high court's
decision did not settle authoritatively the issue of the
manufacturer's right to indemnity, since the dismissal of the indem-
nification action was upheld on the ground that indemnification was
insufficiently pleaded and that the claim did not state a valid cause
of action.

At approximately the same time that these questions were be-
ing considered by courts throughout Illinois, another significant deci-

d was rendered by the state supreme court. In Gertz v. Camp-
bell the court held that equitable indemnification, based on the
relative fault of the two negligent tort-feasors (rather than the
active-passive theory of indemnification), was a valid method of
distributing losses. The case is patterned after the important New
York decision of Dole v. Dow Chemical Co., which involved an
employee's third party action based on a manufacturer's negligent
labeling of a poisonous fumigant. The manufacturer requested in-
demnification from the employer, using the passive-active theory of
indemnity. The New York Court of Appeals held that the defendant-

163. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
164. 32 Ill. 2d at 624, 210 N.E.2d at 188-89.
167. 55 Ill. 2d 584, 302 N.E.2d 40 (1973).
manufacturer and the employer, who was negligent in failing to instruct the employee in the proper use of the product, should each be required to bear a proportion of the loss. Thus, *Dole* effected two important changes in New York law. First, the decision replaced the active-passive negligence theory in indemnification actions with a system of equitable apportionment based on the relative fault of those responsible; second, *Dole* held that the employer is subject to liability for "partial indemnity" (contribution) to the third party to the full extent of his responsibility for the loss.\(^{169}\) Neither *Dole* nor *Gertz* answers the questions posed in *Skinner* concerning the strictly liable manufacturer’s right to be indemnified because of the negligence of another, or concerning the negligent employer’s liability for contribution. Yet, *Gertz* is important in that it began the practice in Illinois of apportioning damages according to the relative fault of each tort-feasor.

This background clarifies the posture of the *Skinner* case. The propriety of the supreme court’s decision to tackle the convoluted issues of contribution, indemnity, strict liability, and workers’ compensation in one case is likewise more apparent. Nevertheless, the decision remains a cause for concern. The court’s discussion centers on the desirability of overruling the outdated rule which denied contribution among joint tort-feasors and of substituting a method of loss-sharing based on the relative fault of those responsible.\(^{170}\) While this is certainly a worthy topic for the court’s consideration, such an important pronouncement should be made in a case free of extraneous elements such as workers’ compensation and strict liability. Even then the task of judicially instituting an entirely new method of loss distribution would be complex. The theoretical and practical difficulties involved in attacking the issue in a case which spans three different loss reparation systems are staggering.

In *Skinner* the Illinois Supreme Court intended to establish a generally applicable rule of loss distribution based on the relative fault of the wrongdoers and to abolish the common law doctrine denying contribution among joint tort-feasors.\(^{171}\) However, the facts and language of the opinion may have restricted unnecessarily the court’s holding. Under *Skinner* the manufacturer can recover from the employer contribution based on the relative fault of each party only if the request for contribution alleges misuse of the product or assumption of the risk of the defect on the part of the employer. Therefore, it seems that only employer fault in terms of misuse or

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169. 30 N.Y.2d at 147, 282 N.E.2d at 292, 331 N.Y.S.2d at 386.
170. 70 Ill. 2d at 13, 374 N.E.2d at 442.
171. *Id.*
assumption of the risk will suffice to allow contribution, while an objective standard of negligence does not seem to be sufficient. Thus, under Miller v. DeWitt a employer's active negligence will entitle a manufacturer to indemnity in a negligence action, but generally an employer's negligence will not entitle a manufacturer to indemnity in a strict liability action.

Perhaps this narrow statement of the holding would not be entirely satisfactory to the majority of the court; but, it is, at least, more compatible with the basic nature of the workers' compensation scheme than a rule which subjects the employer to contribution in all cases in which he is found to be at fault in any degree. The court in Skinner showed virtually no concern for the no-fault basis of the compensation system or for the employer's corresponding freedom from tort liability to his employees. As Justice Dooley's dissenting opinion correctly pointed out, the employer cannot be termed a tortfeasor and, therefore, should not be subject to liability for contribution or indemnity. Instead, the employer is absolutely liable for the benefits fixed by the compensation act, while the employee's action against the third party is for common law damages. The differences in the two forms of recovery should not result in a common liability. Justice Dooley further stated that the majority opinion did not give adequate consideration to the basic compromise struck when the compensation act was enacted—the employer's assumption of no-fault responsibility for all work-related accidents in return for his immunity from common law actions. Skinner removed the employer's protection from common law actions, at least in situations in which he is found to be guilty of assuming the risk of injury through a defect or of misusing the product. The majority dealt with the workers' compensation issue in one sentence: "The fact that the employee's action against the employer is barred by the Workmen's Compensation Act would not preclude the manufacturer's third party action against the employer for indemnification [citing Miller v. DeWitt] and should not serve to bar its action for contribution." The majority's complete reliance on Miller is misplaced. Miller subjected the employer to liability for indemnification in negligence

172. 37 Ill. 2d 273, 226 N.E.2d 630 (1967).
173. 70 Ill. 2d at 29, 374 N.E.2d at 449 (Dooley, J., dissenting). Justice Dooley relied on the definition of a joint tortfeasor as stated by Prosser: "The contribution defendant must be a tortfeasor, and originally liable to the plaintiff. If there was never any such liability, . . . then he is not liable for contribution." W. PROSSER, supra note 2, at 309.
174. 70 Ill. 2d at 29, 374 N.E.2d at 449 (Dooley, J., dissenting).
175. 70 Ill. 2d at 34, 374 N.E.2d at 452 (Dooley, J., dissenting).
176. 70 Ill. 2d at 15, 374 N.E.2d at 443.
actions on the active-passive theory of indemnity. It does not automatically follow that the employer's immunity is similarly abrogated in contribution claims. As Justice Underwood's dissenting opinion in *Skinner* pointed out, indemnity was allowed in *Miller* to avoid the unfairness of casting the entire burden of loss on a passively negligent third party when the employer was actively responsible for the damage. The fact that the employer in *Miller* was more culpable or guilty of greater negligence than the third party convinced the court to breach the employer's immunity.\(^{178}\)

Because there is no corresponding requirement in *Skinner* that the employer's wrongdoing be greater than that of the manufacturer before contribution is allowed, Justice Underwood felt that the employer's limited liability had been breached in a manner never contemplated by *Miller*.\(^{179}\)

The financial damage done to the workers' compensation system by decisions such as *Miller* and *Skinner* should not be underestimated. As pointed out in one dissent to *Skinner*, workers' compensation benefits are at their highest point ever in Illinois history.\(^{180}\) In fact, the high cost of compensation insurance has been credited with driving industry out of the state.\(^{181}\) After *Skinner* the employer must not only bear the cost of workers' compensation insurance; he must also secure insurance coverage for liability based on product misuse. Accordingly, the manufacturer's responsibility for the safe condition and operation of his products has been thrust on the employer. This result seems inconsistent with the policy justifying the imposition of strict liability on the manufacturers of defective products in the first place—to place the ultimate liability for personal injury caused by an unreasonably dangerous product on the creator of the product and on the supplier, the parties who reaped the profits from its manufacture.\(^{182}\)

Major flaws in the majority's reasoning on strict liability also may be discovered. While a complete study of the impact of *Skinner* on strict liability is beyond the scope of this inquiry, a brief examination of the strict liability elements of the decision which are most relevant to the compensation system may be helpful. Most important is the concern that the policy behind the imposition of strict liability has been frustrated by the majority opinion.\(^{183}\) The manufacturer who put the unreasonably dangerous product into the stream

\(^{178}\) 70 Ill. 2d at 20, 374 N.E.2d at 445-46 (Underwood, J., dissenting).

\(^{179}\) *Id.*

\(^{180}\) 70 Ill. 2d at 36, 374 N.E.2d at 453 (Dooley, J., dissenting).

\(^{181}\) *Id.*


\(^{183}\) 70 Ill. 2d at 28, 374 N.E.2d at 449 (Dooley, J., dissenting).
of commerce is expected to bear the cost of injury to the public as part of the cost of doing business and as an incentive to the production of safer products. After Skinner at least part of the loss ultimately will be absorbed by the employer rather than by the manufacturing enterprise. The temporary imposition of the risk of loss on the manufacturer, only until it can be transferred to the employer, doubtless will tend to frustrate the policies behind strict liability for products. In addition, there are obvious problems involved in applying a relative fault standard to a manufacturer responsible on a strict liability theory. The court will lack a common standard of comparison when the injured employee recovers on the basis of strict liability, while the manufacturer's request for contribution alleges negligence on the part of the employer. Finally, concern is expressed that the holding in Skinner has overruled the contributory negligence rule in Illinois in favor of comparative negligence. Previously the court had held that any change in the law of contributory negligence should be left to the legislature. While comparative negligence involves comparison of the fault of all parties, including the plaintiff, Skinner is concerned only with the relative fault of the tort-feasors. Nevertheless, the two concepts are closely related, and as a result of Skinner, Illinois courts are one step closer to the judicial adoption of comparative negligence.

Practical application of the rules of Skinner and Miller to employee actions against third parties is relatively simple. The main complications which may arise in a Skinner-like situation stem from the difficulty of comparing the relative degrees of fault of a strictly liable defendant-manufacturer and a negligent employer. However, these difficulties are present whether or not the indemnification action is aimed at an employer. After receiving compensation benefits from his employer, the injured employee retains the right to proceed against any third party whose fault was in any manner responsible for his injury. If the employee is successful in his third party suit, the third party may be entitled to recover some or all of his loss from the plaintiff's employer, if the employer was also at fault in causing the employee's injury. At this point the analysis differs, depending on whether the third party was held liable under negligence or strict liability principles. If the third party is liable because of his negligence, Miller v. DeWitt supplies the con-

184. 70 Ill. 2d at 34, 374 N.E.2d at 452 (Dooley, J., dissenting).
185. 70 Ill. 2d at 18-19, 374 N.E.2d at 445 (Underwood, J., dissenting).
186. 70 Ill. 2d at 19, 374 N.E.2d at 445 (Underwood, J., dissenting).
trolling rule and, if the third party succeeds in establishing the acti-
ve negligence of the employer as compared to his own passive
eglect, the third party is entitled to indemnification from the
employer of the entire judgment for the employee. On the other
hand, if the third party is a manufacturer liable on the basis of strict
liability, *Skinner* determines his right to recover part of the loss
from the employer. In this case the manufacturer is entitled to con-
tribution from the employer only if the employer is negligent for
either assumption of the risk or misuse of the product which con-
tributed to the employee’s injuries. It is unlikely that the manufac-
turer proceeding under the *Skinner* rationale could ever recover the
entire amount of the tort judgment, since his manufacture of the
defective product must have been at least a partial cause of the
employee’s injury.

Whether the negligent employer is liable to the third party for
part or all of the employee’s tort damages, he retains the right to be
reimbursed the compensation he has paid before the third party
suit.190 The employer’s concurring negligence in causing the injury
has not been held to preclude his statutory right to
reimbursement.191 As in other states, the employer’s reimbursement
lien is intended to prevent a double recovery by the employee.192 To
further this goal, the employer who is held liable to the third party
retains a right to reimbursement. Therefore, the employer actually
pays only the amount for which he is liable to the third party de-
fendant under the doctrines of implied indemnity or equitable con-
tribution. Although the employer has lost his immunity to tort
liability, he is spared the double burden of paying both tort damages
and compensation benefits. Since the negligent employer is entitled
to reimbursement of his compensation payments, he similarly should
be entitled to credit the employee’s tort recovery against any re-
main ing compensation liability he may have after the third party
suit. However, there are no reported cases on this issue.

CONCLUSION

A survey of compensation law on third party suits reveals that
the issue of the employer’s liability for his negligence, at one point
conclusively resolved in favor of the employer, is not dead. The
employer and his insurer continue to argue that the only workable
solution is one which shields them from liability for contribution or

189. 70 Ill. 2d 1, 374 N.E.2d 437 (1978).
191. *Id*.
indemnity, at the very least, and ideally would also grant the employer reimbursement of the compensation paid to the employee, regardless of the employer's negligence. This position has some merit but is becoming harder to defend as sympathy for the third party's plight grows, perhaps as a result of the increased rights generally afforded joint tort-feasors. Granting the employer reimbursement in all cases regardless of his misconduct and, in addition, shielding him from contribution or indemnity claims asserted by the third party, has proved to be both unfair to the third party and unlikely to promote safe working conditions for employees. At the other extreme, subjecting the employer to tort liability like any other joint tort-feasor is unjust to the employer, who has assumed the duty of no-fault compensation in exchange for immunity to negligence actions. Surprisingly, the Illinois court has adopted that extreme approach, subjecting the employer to full tort liability under certain circumstances, in apparent disregard for the compensation principle. Considering the nature of the problem, the most satisfactory approach is one which negotiates a compromise between the employer's right to tort immunity and the third party's right to share his loss with joint tort-feasors. The North Carolina and California decisions on this subject are admirable attempts to effect such a solution. A perfect plan which would accommodate fully the rights of both the employer and the third party is impossible, but at least the lawyers, judges, and legislators in North Carolina, California, and Illinois are rethinking the problem and working toward a more satisfactory resolution of what Professor Arthur Larson has characterized as "perhaps the most evenly-balanced controversy in all of workmen's compensation law . . . ."

Although Louisiana's rules regarding the rights and obligations of an employer whose negligence combines with that of a third party to injure an employee have not been discussed here, many of the criticisms of other states' systems, past and present, may be equally applicable to the Louisiana system. Perhaps Louisiana lawmakers will consider innovative approaches instituted in other jurisdictions when the question of the ramifications of the employer's negligence arises again, as it must, in this state.
