IMPLIED INDEMNITY IN MODERN TORT LITIGATION: THE CASE FOR A PUBLIC POLICY ANALYSIS

*Edward T. O'Donnell**

INTRODUCTION

One tortfeasor often claims that he has a common law right to indemnity from another defendant. The scope of that remedy, in its traditional form, is the same as that of contractual indemnity—the entire burden of the judgment is shifted to the shoulders of the indemnitor.[1] However, it is more difficult to say why one claimant should receive this boon while another should not. There are an abundance of formulae and theories which purport to provide the answer, but none is wholly satisfactory. Those which are most widely accepted are little more than conclusory statements; others, more carefully thought out, have considerable merit in limited fields, or as descriptions of past results, but offer little practical guidance for the judge who is confronted by a case with novel aspects.

* A.B., Harvard College; J.D., Harvard Law School; LL.M., New York University School of Law; Member, New Jersey Bar.

[1] In Guillard v. Niagara Mach. & Tool Works, 488 F.2d 20 (8th Cir. 1973), the court defined indemnity as

> the remedy securing the right of a person to recover reimbursement from another for the discharge of a liability which, as between them, should have been discharged by the other.

Id. at 23. *See also* W. PROSSER, THE LAW OF TORTS § 51, at 310 (4th ed. 1971) [hereinafter cited as W. PROSSER]; Meriam & Thornton, *Indemnity between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals,* 25 N.Y.U.L. REV. 845 (1950).

The basic distinction between indemnity and the related remedy of contribution lies in the fact that "[a] claim for indemnity involves a shifting of the entire loss, and a claim for contribution involves a sharing of the loss." Chicago & N.W. Ry. v. Chicago, R.I. & P.R.R., 179 F. Supp. 33, 42 (N.D. Iowa 1959). *See also* Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 370-74, 104 N.W.2d 843, 846-49 (1960); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 327-28, 107 N.E.2d 463, 470-71 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 130-31 (1932); Comment, *Contribution and Indemnity Among Joint Tortfeasors,* 33 TENN. L REV. 184, 187 (1966). N.J. STAT. ANN. § 2A:53A-1 *et seq.* (1952) establishes the right to contribution for joint tortfeasors in New Jersey. *See generally* Dauber, *New Jersey Joint Tortfeasors Contribution Law,* 7 RUTGERS L. REV. 380 (1953).

For an analysis of the problems which arise in determining whether indemnity or contribution ought to be applied under a particular set of circumstances see 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 44.02[2] (1973) [hereinafter cited as L. FRUMER & M. FRIEDMAN].

Moreover, changes in the nature of important areas of tort law, such as products liability, have heightened the importance of many considerations which these approaches do not take into account and, at the same time, increased the need for a remedy flexible enough to permit the rational apportionment of the burden of a judgment.

It is our thesis that the weaknesses in the law of implied indemnity are not likely to be cured by the creation of yet another universal test. Instead, the answer lies, in part, in more discriminating application of the basic insights embodied in the accepted principles and, in complex and novel cases, in an effort to analyze the public policies which have led to the award to the plaintiff, so that the court may make a reasoned decision as to whether or not an award of indemnity also would further those objectives. Thus, trial courts should be encouraged to think of implied indemnity as nothing more than one remedy which may be of use in some tort cases, rather than as something akin to an independent cause of action with its own technical requirements. Were that change to take place, the emphasis in each case would not be, as it is now, on characterizing the tortious conduct in order to fit it within a formula, or determining whether some single essential factor is present. Instead, the stress would be on the more fundamental question of whether the facts of the individual case are such that an award of indemnity would accomplish something worthwhile, be it fairness to the individual litigants or some broader social objective.

PRECEDENT FOR THE RIGHT OF IMPLIED INDEMNITY

A claim for indemnity between tortfeasors may be based upon an express contract[2] or a statute.[3] However, we are concerned

[2] *See* W. PROSSER, *supra* note 1, § 51, at 310. The contractual right of indemnity, and its relationship to the implied right, were discussed in Mayer v. Fairlawn Jewish Center, 38 N.J. 549, 186 A.2d 274 (1962). There an invitee was injured on the premises of a religious social center, and filed a negligence claim against it. The center cross-claimed against the contractor who had been hired to make repairs, seeking reimbursement for any award to the plaintiff against it, relying upon express language by which the contractor had assumed the burden of protecting invitees on the premises from injury arising out of the work. *Id.* at 552-53, 186 A.2d at 276-77. The supreme court held that the assumption clause bound the contractor to relieve the center of responsibility for injuries inflicted upon third persons as a result of the contractor's work. The court reasoned that if the injured person recovered a judgment against the center based totally upon the contractor's negligence, that fact would trigger the assumption clause of the contract because the center's liability would arise from the contractor's negligence, which by imputation of law, also constituted a violation of the center's own nondelegable duty to exercise care for the safety of its invitees. *Id.* at 556, 186 A.2d at 278. Moreover, the result would be the same if the center's liability were based not only on the

primarily with those decisions which have held that the right also may exist at common law because of the relationship of the parties, the nature of the conduct of each, or some other circumstance.

Such cases abound. For instance, a retailer or a restauranteur often has been said to be entitled, in principle, to recover from the manufacturer or wholesaler whose defective product has made it liable to a third party consumer.[4] The same is true of the owner of a defective article which injures another person,[5] and even of the manufacturer of a product which injures someone solely because of the failure of a component made by another company.[6]

---

contractor's violation of his duty but also on the center's failure to correct the defects in the work after actual or constructive notice of the danger. *Id.* at 558, 186 A.2d at 280. But, if the center itself were "guilty of separate and independent active negligence which concur[red] with that of the contractor in producing the invitee's injury," it would not be entitled to reimbursement under the clause, absent explicit language clearly imposing such an unusually broad obligation. *Id.* at 559-60, 186 A.2d at 280-81.

An agreement of indemnification against the consequences of one's own negligence is not against public policy. *See, e.g.,* Southern Pacific Co. v. Morrison-Knudsen Co., 216 Ore. 398, 410, 338 P.2d 665, 671 (1959). Under the law of New York, Pennsylvania, and New Jersey, one can contract for indemnity against his own negligence, provided the intention to do so is expressed clearly. Frankel v. Johns-Manville Corp., 257 F.2d 508, 511 (3d Cir. 1958). *See also* Rommell v. United States Steel Corp., 66 N.J. Super. 30, 43, 168 A.2d 437, 443 (App. Div. 1961).

[3] For an example of a statutory right see N.J. STAT. ANN. § 18A:16-6 (1968) (right of employees of a board of education to indemnification by the board against lawsuits concerning acts performed by them in the course of their duties). In Hartmann v. Maplewood School Transp. Co., 106 N.J. Super. 187, 195, 254 A.2d 547, 552 (L. Div. 1969), *aff'd,* 109 N.J. Super. 497, 263 A.2d 815 (App. Div. 1970), it was held that the Act did not apply to a bus driver employed by a company which had contracted with the board of education.

Another example of statutory indemnification appears in Brum v. International Terminal Operating Co., 125 N.J. Super. 558, 312 A.2d 507 (App. Div. 1973), which deals with N.J. STAT. ANN. § 34:15-40 (1959), the portion of the Workmen's Compensation Act which preserves an injured workman's right to sue a third party and grants his employer a right to reimbursement for compensation payments in the event that the employee recovers from the third party for the same injury. The court held that an employer had a right to reimbursement from a physician for that part of the workmen's compensation benefits it had paid which were attributable to his malpractice. 125 N.J. Super. at 561-62, 312 A.2d at 509.

[4] *See, e.g.,* Jeub v. B/G Foods, Inc., 2 F.R.D. 238, 240-41 (D. Minn. 1942); Pfarr v. Standard Oil Co., 165 Iowa 657, 667, 146 N.W. 851, 855 (1914); Newmark v. Gimbel's Inc., 54 N.J. 585, 600-01, 258 A.2d 697, 705 (1969); Alphin v. La Salle Diners, Inc., 197 Misc. 415, 417, 98 N.Y.S.2d 511, 513-14 (New York City Ct. 1950).

[5] *See, e.g.,* Allied Mut. Cas. Corp. v. General Motors Corp., 279 F.2d 455, 458 (10th Cir. 1960); John Wanamaker, New York, Inc. v. Otis Elevator Co., 228 N.Y. 192, 199-200, 126 N.E. 718, 720 (1920); *cf.* B.F.G. Builders v. Weisner & Coover Co., 206 Cal. App. 2d 752, 762-63, 23 Cal. Rptr. 815, 822 (Dist. Ct. App. 1962). *See generally* 3 L. FRUMER & M. FRIEDMAN, *supra* note 1, § 44.02[3][f].

[6] *See, e.g.,* Tromza v. Tecumseh Prods. Co., 378 F.2d 601, 606 (3d Cir. 1967) (right of refrigerator manufacturer to indemnification by manufacturer of compressor unit which exploded); Burbage v. Boiler Eng'r & Supply Co., 433 Pa. 319, 327, 249 A.2d 563, 567 (1969) (boiler manufacturer entitled to indemnification from manufacturer of valve which was a component part of the boiler).

Although many of these cases have involved manufactured articles, that is not an essential prerequisite.[7] A master who is liable because of his servant's acts has a right to indemnity from the servant,[8] and a principal may recover from his agent.[9] Municipalities, too, have been granted the remedy in cases in which they have been subjected to liability to third parties because servants or contractors performed their duties improperly.[10]

---

[7] For a variety of situations in which indemnity is appropriate, many of which do not involve products liability see RESTATEMENT OF RESTITUTION §§ 86-98 (1937).

[8] *See, e.g.*, Frank Martz Coach Co. v. Hudson Bus Transp. Co., 23 N.J. Misc. 342, 44 A.2d 488 (Sup. Ct. 1945). The case concerned a bus company which hired a bus and driver from a second company. The first company's insurer settled a passenger's claims after a collision and then sued the driver. *Id.* at 343-44, 44 A.2d at 489. It was held that the first company, because of its nondelegable duties as common carrier, had the legal status of master of the driver, and therefore one suing in its place was entitled to indemnity from him. *Id.* at 348-49, 44 A.2d at 491. *See also* Simpson v. Townsley, 283 F.2d 743, 746-47 (10th Cir. 1960); Jones v. Kinney, 113 F. Supp. 923, 925 (W.D. Mo. 1953); Continental Cas. Co. v. Phoenix Constr. Co., 46 Cal. 2d 423, 428-29, 296 P.2d 801, 804 (1956); RESTATEMENT OF RESTITUTION § 96 (1937). Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 519 (1952), provides a discussion of a master's derivative liability for his servant's acts. *See generally* Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465 (1958).

Some authorities have suggested that this rule is archaic. *See, e.g.*, Eule v. Eule Motor Sales, 34 N.J. 537, 540, 170 A.2d 241, 242 (1961); 2 F. HARPER & F. JAMES, TORTS § 26.1, at 1,363 (1956). However, one modern case, Surnack v. Surnack, 116 N.J. Super. 294, 298-99, 282 A.2d 66, 68 (L. Div. 1971), permitted the employer to enforce its indemnity claim against the automobile insurer of its employee while recognizing that *Eule* meant that the employee would not expect to have to pay the judgment from his own assets. For a variation see Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc., 31 N.J. 124, 144-45, 155 A.2d 536, 543 (1959), where the supreme court held that engineers employed by the State Highway Department were entitled to summary judgment against a claim by a subcontractor for implied indemnity for extra work performed for a second company which in turn had a contract with the Highway Department. The engineers had assisted in the work, but it was conceded that they had acted in reasonable good faith, believing that it was necessary for safety, and that there was exculpatory language in the contract. *Id.* at 136-38, 155 A.2d at 542-43. The court emphasized the need to shield public officials from such claims for work for which they receive no individual benefit (although the state benefits by it). *See id.* at 137-38, 155 A.2d at 544. For a similar holding permitting indemnity where a blameless employee was subjected to liability because of his employer's negligent directions see Hagen v. Koerner, 64 N.J. Super. 580, 588, 166 A.2d 784, 788 (App. Div. 1960).

[9] *See, e.g.*, Abajian v. Aetna Cas. & Sur. Co., 232 F. Supp. 710, 713 (D. Vt. 1964); Roe v. Bryant & Johnston Co., 193 F. Supp. 804, 807 (E.D. Mich. 1961); State *ex rel.* Algiere v. Russell, 359 Mo. 800, 803, 223 S.W.2d 481, 483 (1949); Muldowney v. Middleman, 176 Pa. Super. 75, 77-78, 107 A.2d 173, 175 (1954).

[10] *See, e.g.*, Becker v. City of Newark, 72 N.J. Super. 355, 358, 178 A.2d 364, 366 (App. Div. 1962). *See generally* Meriam & Thornton, *supra* note 1, at 847-48; Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 744-45 (1968). For a reverse twist see Male v. Pompton Lakes Borough Municipal Utils. Auth., 105 N.J. Super. 348, 360, 252 A.2d 224, 231 (Ch. 1969), wherein a contractor was entitled to indemnity from a municipal sewerage authority for the consequences of its failure to pay its workmen the rate required by the Prevailing Wage Act, N.J. STAT. ANN. § 34:11-56.25 *et seq.* (1965). The

More generally, there is authority that an owner who is held liable for an injury caused by the unsafe condition of his property can obtain indemnification if he can show that another's negligence brought about the unsafe condition.[11] And still other cases have held that a person whose liability is based upon an inspection which failed to reveal a danger can claim indemnity from the party who first created the condition and whose dereliction continued undiscovered and uninterrupted until it caused the injury.[12]

There are many more holdings of this general nature. However, the reasons given for these decisions vary widely, both in nature and in quality, and few of them stand up well when they are put to use in the analysis of a case which does not duplicate the facts of an earlier controversy.

---

authority had erroneously concluded that it was exempt from this law and so had not included the wage rate schedules in the general conditions of its agreement with the contractor. The court determined that although the Prevailing Wage Act did not make the authority directly responsible for paying the worker, nonetheless, the authority was charged with notice of the applicability of the law to its job. Therefore, it had to reimburse the contractor which it had inadvertently lured into bidding on the job in the belief that it would not have to pay the higher scale. 105 N.J. Super. at 360-61, 252 A.2d at 231.

[11] *See, e.g.*, Choate v. United States, 233 F. Supp. 463, 464 (W.D. Okla. 1964) (government entitled to indemnity where driver of a tractor was injured on government land when his vehicle fell into a trench which had been negligently filled in by a contractor); Lipman Wolfe & Co. v. Teeples & Thatcher, Inc., — Ore. —, —, 522 P.2d 467, 471-72 (1974) (storekeeper was entitled to indemnity from an independent contractor, hired to remodel the store, whose negligence caused injury to a customer of the store); Scott v. Curtis, 195 N.Y. 424, 428-29, 88 N.E. 794, 796 (1909) (owner of premises who was liable to passerby injured when he fell into an unguarded coal hole entitled to indemnification from negligent coal dealer). *See also* Davis, *supra* note 8, at 522; Meriam & Thornton, *supra* note 1, at 852.

In Bree v. Jalbert, 87 N.J. Super. 452, 456-57, 209 A.2d 836, 838-39 (L. Div. 1965), *aff'd per curiam*, 91 N.J. Super. 38, 219 A.2d 178 (App. Div. 1966), an apartment complex owner was sued by a tenant for injuries in a fall. He claimed contribution and indemnity from the contractor who had graded the area. 87 N.J. Super. at 457, 209 A.2d at 839. After the jury found no cause, the plaintiff moved for a new trial on the grounds that the jury's failure to answer interrogatories on the question of the negligence of each codefendant invalidated the verdict. *See id.* at 460-61, 209 A.2d at 841. The motion was denied for reasons unrelated to the indemnity issue, but in dicta the trial judge stated that the owner would be entitled to indemnity if it were not guilty of negligence itself, but only to contribution if it were. *Id.* at 460, 209 A.2d at 840.

See also Cavanaugh v. Pappas, 91 N.J. Super. 597, 222 A.2d 34 (Union County Ct. 1966). In that case a tenant fell and sued the Plainfield Housing Authority which cross-claimed for indemnity and contribution against Pappas, from whom it had bought the property five days earlier. *Id.* at 599-600, 222 A.2d at 36. Pappas' summary judgment motion was denied, the court reasoning that a vendor remains liable for unsafe conditions for a reasonable time, and that there was a jury issue as to whether five days was "reasonable." *Id.* at 604-05, 222 A.2d at 39.

[12] *See, e.g.*, Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 116, 192 N.E.2d 167, 169-70, 242 N.Y.S.2d 210, 214 (1963).

A VARIETY OF RULES AND PRINCIPLES—NONE WHOLLY SATISFACTORY

For the most part, judges grant or deny the remedy without any extensive theoretical discussion. But the typical opinion on the subject does contain terse and often undifferentiated references to two or three of the many rationales which commentators and scholarly judges have developed. These approaches, in turn, range from the uncritical application of a label in order to reach a result desired for unarticulated reasons, to attempts to isolate a single factor. Unfortunately, none seem to be both sufficiently universal to embrace the myriad possible fact patterns and yet still precise enough to provide a workable guide for decision in a complicated case.[13] Indeed, it would be an exaggeration to speak of the majority of them as "theories." Still, these "approaches" or "tests" do reflect a variety of insights.

The Active-Passive Negligence Test

Judicial opinions tend to rely upon supposedly fundamental differences among the types of conduct which gave rise to the liability of the various defendants. The best known of these formulae is that which distinguishes between "active" and "passive" wrongdoing.[14] Unfortunately no one has yet offered a persuasive rationale for that distinction. One commentator has suggested that the distinction has merit in the case in which the "active" wrongdoer is the one who had the "last clear chance" to prevent the injury to the plaintiff.[15] But he does not go so far as to argue that relative opportunity is the sole factor which should be considered in any case. Furthermore, the holdings that the fact that a defendant had the last opportunity to prevent the accident should excuse a plaintiff from the consequences of his own contributory negligence, the apparent inspiration for the idea, themselves are controversial and lack a clear-cut rationale;[16] it compounds the problem to remove the concept from its normal context and to insert it into the different question of the liability of multiple de-

[13] *See* W. PROSSER, *supra* note 1, § 51, at 313; *cf.* United Air Lines, Inc. v. Wiener, 335 F.2d 379, 398 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964).

[14] *See* Davis, *supra* note 8, at 538-39.

[15] Leflar, *supra* note 1, at 153-54.

[16] *See generally* W. PROSSER, *supra* note 1, § 66.

fendants to each other.[17] More importantly, the idea probably has had little to do with the way the cases have been decided over the years. If judges had had a "last clear chance" analysis in mind, one would think that they would have referred to it directly rather than conceal it with the opaque language of the active-passive formula.

The traditional common law reluctance to impose an affirmative duty upon one person to protect another[18] probably played a greater role in the actual process of decision, by predisposing judges to respond favorably to the idea that the "passive" defendant should not bear the burden of the judgment and that they have leeway to soften the blow for him. But, strictly speaking, the fact that the "passive" defendant was held liable to the plaintiff in the first place necessarily meant that he did owe the plaintiff a duty which he violated by inaction. Therefore, the difference between the liability of the two tortfeasors is solely one of degree, and it is difficult to reconcile that fact with the basic premise of the active-passive test that rulings can and should be made on the basis of some distinct and critical difference in the basic nature of the two wrongs.

In reality, the principle seems most understandable when it is viewed as a product of history and intuitive feeling rather than of analytical thought. It strikes a chord because it summarizes a rule of thumb as to the moral quality of the act—the supposed human experience over the years that "active" wrongdoing which creates a hazard generally shows a markedly higher degree of recklessness or disregard for the rights of others than does the "passive" failure to provide protection against a risk.

In any event, the point is largely academic; the test has been subjected to critical assault because of its vagueness, not the flimsiness of its theoretical basis.[19] There are situations in which it seems

---

[17] *Cf. id.* § 51, at 313.

[18] *See generally id* § 56; Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

[19] *See* Davis, *supra* note 8, at 538-42; Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 157-59 (1947); Leflar, *supra* note 1, at 155-56.

One commentator lists a variety of comparable labels:

> Other catch words which have been used by the courts include: "constructive" and "actual" negligence, "party immediately in fault," "positive tort" and "primary and efficient cause," "primary and active wrongdoer," "principal wrongdoer," "principal delinquent," "primary cause," "real cause," "principal and moving cause," "the wrongdoer in the physically participative sense and the wrongdoer in the legally relative sense," "concurrent or joint tort-feasors as distinguished from related tort-feasors," "active wrongdoer or primarily negligent party."

Davis, *supra* at 543-44 (footnotes omitted).

The New Jersey supreme court specifically rejected the active-passive negligence test in

only common sense to regard one defendant as "active" and the other as "passive," but there are many others in which the actions in question could be given either label just as well, depending upon which factor the commentator chooses to emphasize. For instance, in one case a garage employee was injured when a car struck the ladder on which he was standing.[20] The court held that the owner of the car was entitled to indemnity because her chauffeur was passively negligent, while the owner of the garage was actively negligent in failing to keep the premises clear and well lit.[21] But the formulation could just as well have been the opposite—that the driver of the car was the active wrongdoer because he was responsible for the physical impact, while the garage owner simply failed to prevent blunders such as that of the driver from having their natural ill effect.

The Primary-Secondary Test

The rule which distinguishes between primary and secondary liability is far more respected than the "active-passive" distinction, yet it too has weaknesses. Typically a person whose duty arises solely from some statutory obligation, or from a legal relationship with another wrongdoer, is said to be "secondarily liable" and, therefore, entitled to indemnity from the one who is "primarily liable."[22] For example, a number of cases have held that a municipality, held liable for failing to meet its duty to maintain streets in safe conditions, is entitled to indemnity from the party who actually created the physical hazard by failing to do the work properly.[23]

The point of this formula, in general, is the distinction between liability for one's own actions and liability for the actions of another person, such as an employee, imposed by statute or common law because of the nature of the relationship. This approach,

---

Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 81, 159 A.2d 97, 110-11 (1960). It was also discussed unfavorably in Public Serv. Elec. & Gas Co. v. Waldroup, 38 N.J. Super. 419, 119 A.2d 172 (App. Div. 1955). In that case an employee of a contractor hired by Public Service was killed when a bulldozer driven by a fellow employee broke a guy wire, causing power lines to fall and electrocute him. *Id.* at 423, 119 A.2d at 174. The dismissal of Public Service's claim for indemnification from the contractor and a fellow employee was affirmed because Public Service itself was guilty of "primary" negligence in the placement of the power lines. *Id.* at 432, 119 A.2d at 179-80.

[20] Cohen v. Noel, 165 Tenn. 600, 602, 56 S.W.2d 744, 744 (1933).

[21] *See id.* at 608, 56 S.W.2d at 746.

[22] *See, e.g.*, Builders Supply Co. v. McCabe, 366 Pa. 322, 325-26, 77 A.2d 368, 370 (1951). *See also* Comment, *supra* note 10, at 738-39.

[23] *See* Leflar, *supra* note 1, at 149-50.

too, probably has a basis in an intuitive feeling that a breach of a duty which is merely "technical" and does not represent any moral failing, should be excused if it is possible to do so while compensating the plaintiff. The terminology is more acceptable to the legal mind than the "active-passive" rubric, perhaps because of its association with the law of suretyship.[24] However, in that context it describes deliberate bargains which businessmen and lawyers make on the basis of a relatively coherent body of law. In contrast, in tort litigation the liability is imposed upon one or the other side, long after the events have occurred, and without bargaining. Thus, the reassuring familiarity of the language may be deceptive.

Moreover, it often is as difficult to say why one legal duty is "secondary" while another is "primary" as it is to define the factor which makes one type of misconduct "active" and another "passive."[25] For instance, if a city were to attempt to delegate its duty to keep its streets clean to a contractor and a worker employed by the contractor were to fail to do the job properly, both city and contractor might be held liable to an injured pedestrian. The weight of authority would permit the city to claim indemnity from the contractor; the explanation would be that the city is only secondarily liable for the failure to see to it that its statutory duty was satisfied by the person to whom it was delegated, and that the contractor is primarily liable as against the city, because of its own failure to supervise its employees. But if the contractor, in turn, claimed indemnity from its employees, it could cite a number of precedents for an argument that it was only "secondarily" liable in that context and, therefore, entitled to recover from him.[26]

Each of these results may be just or unjust, in spite of their apparent inconsistency, but neither appears to be a necessary function of an obvious logical difference between "primary" and "secondary" liability. Instead, they reflect obedience to judgments which other courts have made in the past on social and political issues. But when a court is confronted with a novel case, it must make those decisions itself and the primary-secondary terminology is little help. It provides a convenient label for the final result but it does not isolate the fundamental questions, much less provide any insight into how they should be answered.

---

[24] *See* RESTATEMENT OF SECURITY § 82, comment *f*, at 229-30 (1941); J. WHITE & R. SUMMERS, THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-12, at 426-27 (1972).

[25] *See* Comment, *supra* note 10, at 739.

[26] *See* notes 8-9 *supra* and accompanying text.

Comparative Wrongs and Duties

The general idea that indemnity should depend upon a drastic difference in the nature of the conduct of the parties also underlies several negative formulations. Thus, it has been said that the right to indemnity does not exist where the parties are *in pari delicto* or both are guilty of moral turpitude;[27] and that the claim to indemnity cannot be based on a mere "difference in the degrees of the negligence of the parties" but instead must stem from a distinct difference in the character of the basic liabilities.[28] A more sophisticated version of the same approach calls for intense scrutiny of the differences among the duties owed by the tortfeasors to the plaintiff and to each other.[29] The author would limit indemnity, with few exceptions, to cases in which one tortfeasor *"has breached a duty which he owed both to his co-tortfeasor and to the injured third person,"* while the other has not violated a duty he owed to his co-tortfeasor, although he is at fault as far as the plaintiff is concerned.[30]

This "comparative duty" test operates neatly enough in some situations. For instance, a bus company, as a common carrier, owes a duty of highest care to its passengers, but only ordinary care to others. If the driver of a passenger car were involved in a collision with a bus because of his own negligence, and the company had failed to provide the highest care, but had met the standard of ordinary care, the carrier would be liable to its passengers and would be entitled to indemnity from the other driver.[31] But the test would be difficult to apply in a situation where the respective duties of care were not conveniently defined and labelled, and it might well exclude many situations in which an award of indemnity would serve a valid purpose even though the indemnitee had been guilty of a breach of some duty he owed the indemnitor.

Fairness and Equity

Other writers suggest that the traditional approaches we have discussed are far too technical and that the key is simply the

[27] *See, e.g.,* Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 327-28 (1896); Dolnick v. Edward Donner Lumber Corp., 275 App. Div. 954, 955, 89 N.Y.S.2d 783, 784 (1949), *aff'd,* 300 N.Y. 660, 91 N.E.2d 322 (1950); Comment, *Procedure—Third Party Practice—Non-Contractual Indemnification,* 28 Mo. L. Rev. 307, 308 (1963).

[28] Comment, *supra* note 27, at 309.

[29] *See* Hodges, *supra* note 19, at 160-63. This approach has been criticized as doing no more than identifying one class of cases where indemnity was suitable, without indicating how the existence of the duty is to be determined. Comment, *supra* note 10, at 741.

[30] Hodges, *supra* note 19, at 162-65 (emphasis in original).

[31] *See, e.g.,* Wheeler v. Glazer, 137 Tex. 341, 345-46, 153 S.W.2d 449, 451-52 (1941).

disparity of guilt,[32] or that the emphasis instead should be upon achieving some positive objective. Thus, at least one commentator argues that the critical question should be the degree to which a particular type of misconduct would be deterred if the tortfeasor guilty of it were required to indemnify his codefendant.[33] And yet another school rejects utilitarianism, arguing that the true objective

[32] The question of whether disparity of "moral" responsibility (assuming, arguendo, that it can be measured) is a basis for implied indemnity has been debated and the general concept may underlie some of the tests which purport to be more technical. For instance, one author argues that a defendant liable solely because of ordinary negligence is entitled to indemnity from one whose guilt is based on intentionally wrongful or reckless conduct. Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. COUNSEL J. 630, 631 (1960). Dean Prosser states that that proposition has been "firmly rejected" when the point has been litigated. W. PROSSER, *supra* note 1, § 51, at 312-13 & n.9 (citing Panasuk v. Seaton, 277 F. Supp. 979, 985 (D. Mont. 1968); Warner v. Capital Transit Co., 162 F. Supp. 253, 255 (D.D.C. 1958); Jacobs v. General Accident Fire & Life Assur. Corp., 14 Wis. 2d 1, 11-12, 109 N.W.2d 462, 467-68 (1961)). On the other hand, Prosser cites as contrary authority United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964). W. PROSSER, *supra*, § 51, at 313 n.9. That case arose from a collision between an Air Force trainer jet and a civilian airline. After a lucid discussion of the various theoretical bases for non-contractual indemnity, the Ninth Circuit reversed the district court's denial of one of United's claims for indemnity from the Government. 335 F.2d at 398-402. The evidence showed that the Air Force had been guilty of a number of significant planning errors, while United's failures had been lesser and more technical. *See id.* at 402. Judge Jertberg held:

> In view of the disparity of duties, the clear disparity of culpability, the likely operation of the last clear chance doctrine and all the surrounding circumstances, the findings that United and the government were *in pari delicto* are clearly erroneous and we hold that there is such difference in the contrasted character of fault as to warrant indemnity in favor of United . . . .

Id.

For a variation of this theme see Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969), which says, in dicta, that where neither manufacturer nor retailer is at fault, since the consumer's claim is in strict liability, the retailer can still have a right to indemnity. *Id.* at 600-01, 258 A.2d at 705. Presumably this is because the public policy reasons for holding the manufacturer liable under the circumstances are far stronger than those concerning the retailer.

Note, however, Chief Justice Weintraub's dissent in Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960), which states, approvingly, that the majority opinion began "with the proposition that one at fault may not seek indemnification from others upon an evaluation of degrees of fault." *Id.* at 84, 159 A.2d at 112. But query whether the majority's dictum necessarily went that far, or instead merely rejected the unsatisfactory "active-passive" test for indemnity. *See id.* at 80-81, 159 A.2d at 110-11. Similarly, in Public Serv. Elec. & Gas Co. v. Waldroup, 38 N.J. Super. 419, 437-38, 119 A.2d 172, 182-83 (App. Div. 1955), the appellate division quoted portions of Judge Learned Hand's opinion in Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951), in the process of denying an indemnity claim. The court seemed to reject a "disproportionate wrong" test, at least where only one defendant had any legal relationship with the victim. *Compare* 38 N.J. Super. at 437-38, 119 A.2d at 182 *with id.* at 432, 119 A.2d at 179-80. However, if anything, the indemnity claimant seemed more at fault than the other defendants in *Waldroup*, reducing the weight of the dicta. *See also* Grieco v. Grieco, 38 N.J. Super. 593, 120 A.2d 260 (App. Div. 1956) (analogous equitable remedy of exoneration, although not in a tort context).

[33] Comment, *supra* note 10, at 746.

is simple fairness and, accordingly, that the question should be whether the wrong done by one tortfeasor is so disproportionately great in comparison to that done by the other who seeks indemnity that the former would be unjustly enriched unless the court intervenes.[34]

Tests of this type do not offer specific guidance. A court attempting to decide which defendant would be most readily deterred would have to balance a number of imponderable factors, and, as long as they stand alone, such terms as "fairness" and "disproportionate harm" are little more than conclusory labels. Still, these approaches are a step forward from the pseudo-science of the "active-passive" test in that they force the decision-maker to consider the consequences of his action.

In contrast, the more commonly accepted tests may be positively harmful, as well as intellectually unsatisfactory, because they tend to discourage thoughtful analysis. For example, a busy judge or lawyer might well be tempted to accept a superficial rationalization or analogy, sufficient to satisfy the active-passive or primary-secondary rules as a matter of semantics, rather than analyze the private and public interests at stake in a difficult case.

[34] In Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951), Judge Learned Hand suggested in dicta that Popkin Bros. v. Volk's Tire Co., 20 N.J. Misc. 1, 23 A.2d 162 (Sup. Ct. 1941), could be read as supporting this general approach under New Jersey law. 186 F.2d at 138-39. However, Judge Hand stated that no other case supports such a rule and that *Popkin* itself can be read as holding only that the party liable for indemnity had breached its contract to set the tire properly. Accordingly, he dismissed the indemnity claim before him in *Slattery*. *Id.* at 139.

See also Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (Dist. Ct. App. 1964) (indemnity allowed when "equity and good conscience" require); Davis, *supra* note 8, at 552-53. One commentator has praised the honesty of those who make this the test for indemnity, but added that precision is impossible and that the question still remains: Which cases have such appeal to equity? Comment, *supra* note 10, at 741.

Another author, in a conservative application of this approach, suggests that the question should be whether "substantially the whole of the fault" is borne by the prospective indemnitor. Leflar, *supra* note 1, at 159. But he also says that that could only happen in four types of situations and that contribution is an adequate remedy for all situations outside those categories.

The categories Professor Leflar recognizes as deserving are those in which: (1) The wrongful act of one person produces injury, but the law permits the injured person to recover from him and also from some other person who is without personal fault (*e.g.*, respondeat superior, strict liability of municipalities for defective highways); (2) one is held liable for voluntarily, but innocently, performing an action at someone else's direction, which seems proper but which in reality is tortious (*e.g.*, a sheriff who mistakenly levies on goods at the direction of an attorney); (3) two are held to be joint tortfeasors but one had the "last clear chance" to prevent the injury to the third party, an idea which Leflar suggests is the real basis for the "active-passive" distinction; (4) one person has been held liable "for his own negligence in failing to discover and remedy a dangerous condition created by the negligence" of another. *Id.* at 147-58.

A Hypothetical Products Liability Case

A hypothetical may illuminate some of the considerations which we believe should receive greater weight when implied indemnity claims are decided. Therefore, let us consider a case in which the estate of a passenger, killed in a crash following a glancing collision between an automobile and a motorcycle on which he was riding, sues the motorcycle manufacturer contending that the death would not have occurred if the cycle had been reasonably stable and "crashworthy."[35] The manufacturer must decide whether to seek indemnity from one or more of the following people: the cyclist who probably was driving recklessly; the driver of the automobile who also could have been negligent; or the dealer which may have repaired the steering gear improperly.[36]

---

[35] For a case holding that a motorcycle maker can be held liable in negligence or breach of warranty for injuries sustained during collision see Bolm v. Triumph Corp., 33 N.Y.2d 151, 159, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973). Contrast Evans v. General Motors Corp., 359 F.2d 822, 825 (7th Cir. 1966), which rejected the idea that the manufacturer must build a vehicle which will withstand reasonably foreseeable crashes with Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968), which imposes liability on the manufacturer for failure to do so. The problems involved are analyzed in Sklaw, *"Second Collision" Liability: The Need for Uniformity*, 4 SETON HALL L. REV. 499 (1973).

[36] The attempts of a manufacturer to receive indemnity from other defendants in a products liability action have often been rejected with a cursory invocation of the active-passive negligence test. *See* Guarnieri v. Kewanee-Ross Corp., 270 F.2d 575, 579 (2d Cir. 1959) (defective boiler weld and failure to inspect not passive negligence); Lopez v. Brackett Stripping Mach. Co., 303 F. Supp. 669, 670-71 (N.D. Ill. 1969) (manufacturer's strict liability for defective product leaving its control not "passive, secondary or merely technical negligence"); Roberts v. Richland Mfg. Co., 260 F. Supp. 274, 276 (W.D. Mich. 1966) (manufacturer charged with negligent design and assembly "active joint tort feasor"); Wegorzewski v. De Mattia Mach. & Tool Co., 12 App. Div. 825, 826, 210 N.Y.S.2d 426, 429 (1961) (manufacturer of defective machine is "an active wrongdoer"); Catronio v. Rodenhurst Chevrolet, 28 Misc. 2d 234, 235-36, 213 N.Y.S.2d 362, 365-66 (Special T. 1961) (manufacture of and failure to discover defects constitutes "active or primary negligence"); *cf.* Stanfield v. Medalist Indus., Inc., 17 Ill. App. 3d 996, 1000, 309 N.E.2d 104, 107-08 (1974) (emphasis in original) (liability for defective product "is qualitatively *active*" but strictly liable manufacturer is outside active-passive test in indemnity action against user for policy reasons); Burke v. Sky Climber, Inc., 13 Ill. App. 3d 498, 503-04, 301 N.E.2d 41, 45-46 (1973) (manufacturer actively negligent but also precluded from indemnity because of "the basic underlying reasons of policy" of strict liability).

One commentator has noted "a general reluctance . . . to allow a manufacturer to obtain indemnity from his buyer even though it may seem that the manufacturer is less at fault." Note, *The Right to Indemnity in Products Liability Cases*, 1964 U. ILL. L. F. 614, 620. The author concludes:

> There is a tendency for the courts to say that if the manufacturer is negligent at all, he is actively negligent. The manufacturer assembles the parts and sends the finished product into the flow of commerce. He is not a mere conduit, and he therefore has the original duty to inspect. The courts apparently feel that if a party

The case involves several conflicting, but plausible explanations for the plaintiff's injuries. Thus each potential third party defendant would have an arguable basis for a counterclaim for indemnity from the manufacturer; and each lawyer faces a situation as complex as those found in many contemporary tort suits rather than one of the relatively simple fact patterns typical of the cases in which the terminology and theory of implied indemnity have developed. As a result, it would immediately become apparent to the lawyer that some aspects of that doctrine are not serviceable in a modern case.

The Futility of the Standard Tests

The leading tests lend themselves to the arguments of either side.[37] For instance, the alleged misconduct of the manufacturer

---

is later injured by a defect caused by someone's negligence, the manufacturer should not be able to deny that he had a substantial part in causing the injury.

Id. See also McClish v. Niagara Mach. & Tool Works, 266 F. Supp. 987, 990 (S.D. Ind. 1967) (manufacturer's "concurrent negligence" prevents indemnity disregarding active-passive test).

However, manufacturers' claims for implied indemnity have sometimes been allowed particularly at the pleading stage. *See* Goldstein v. Compudyne Corp., 45 F.R.D. 467 (S.D.N.Y. 1968); Stahlberg v. Hannifin Corp., 157 F. Supp. 290 (N.D.N.Y. 1957); Campbell v. Joslyn Mfg. & Supply Co., 65 Ill. App. 2d 344, 212 N.E.2d 512 (1965).

[37] Realistically, of course, the need for an intellectually satisfying theoretical basis for implied indemnity would be the least of the trial counsel's troubles. Even if the judge did not feel free to go beyond labeling one side or the other "passive," an argument still could be made on that level. Indeed, the difficult question might not be which rationale to choose, but whether to assert the indemnity claim at all. A defense lawyer's instincts may be against taking such a "defeatist" stance, lest judge, plaintiff, or jury interpret it as a tacit admission. That risk could be minimized by a skillful trial presentation, but there are others. For instance, even if there are logical arguments in favor of indemnity, the absence of commanding precedent might mean that a trial judge not only would refuse to grant such a remedy, but might even be antagonized by an unfamiliar, and so vaguely alarming, maneuver. And, more importantly, our hypothetical manufacturer might be cutting its own throat by even suggesting that the court has the power to make a decision based upon its view of the relative moral culpability of the various defendants. It is not at all inconceivable that a judge might rule that the wrongdoing of a rider who speeds, or even gets drunk, is no more than a typical human failing, far less morally abhorrent than that of a manufacturer which designs inherently dangerous vehicles; and that the manufacturer should bear the entire burden of the judgment in view of the disparity in their guilt—a question originally injected by the manufacturer's own indemnity claim.

On the other hand, the benefits of an implied indemnity claim could be great. Even if it eventually were denied, the existence of the claim would serve to keep other defendants, such as the driver of the second vehicle, in the case after they settle with the plaintiff (since a settlement between other parties could not destroy the manufacturer's claim for indemnity from the driver). The potential tactical benefit of that fact would lie in the possibility that it would permit the manufacturer to point to the second driver's wrongdoing with more dramatic effect than if he had left the case and his conduct were merely something to be

could be characterized just as well as either (a) an "active failure" in designing and marketing a large number of vehicles which were

referred to as part of the circumstances of the accident. The three-sided battle, of course, would be inherently more complex. But that too could be an advantage. At times it may be unwise to clutter the manufacturer's case with a claim over against another party, since that would obscure or confuse a strong defense, but this might be one of those unfortunate cases in which confusion could only help.

Finally, the assertion of an indemnity claim at an early stage could create leverage for bargaining. Even if the chance that it ultimately would be successful were small, another defendant might be more willing to join in a settlement offer if the existence of the indemnity claim as a sort of wild card created a risk that he might wind up bearing the entire burden of an adverse judgment. Conversely, of course, judgments also would have to be made as to whether the other defendant would be more valuable as a target or as an ally; and as to how likely he would be to assert his own cross-claims if his ire were not stirred by the manufacturer's indemnity claim.

If he decides that the potential benefits of seeking indemnity justify the risks, the defense lawyer must outline his brief. We suggest that the statement of facts highlight any element of moral culpability in the actions of the other defendant. This is not a cynical effort to sway the judge by extraneous factors: The quality of the other defendant's actions is not only relevant, but critical. No matter what theoretical rationale for indemnity prevails in the jurisdiction, the claim will have little appeal unless the court believes that the party seeking indemnity is relatively innocent and so entitled to seek a quasi-equitable remedy. For example, in our hypothetical, the court would have to be persuaded that a motorcyclist who hits another vehicle, killing his passenger, cannot reasonably claim that his fault is of the same order of magnitude as that of the manufacturer which may not have fulfilled a previously unknown duty to design a vehicle which could withstand such treatment. Any additional misconduct by the cyclist, such as speeding or drunken driving, would be highly relevant to the question of the morality of his actions.

Once the statement of facts has set forth some common-sense reasons why his client is significantly less blameworthy than the other defendant, the lawyer can proceed with formal argument. In our hypothetical, the manufacturer could begin by pointing out that if the court imposes liability on the manufacturer as well as on the reckless motorcyclist, the defendants as a group will be liable to the plaintiffs for the full amount. But the question then would become whether the manufacturer ultimately should have to bear half the expense of that recovery (assuming contribution) instead of merely any amount of that judgment which the cyclist could not pay, even though that would benefit only the cyclist, the person who caused the collision. The final step would be to say that there is no need for a court to permit such an unfair result since the remedy of indemnity has long been available to those who have been subjected to liability to third persons by the wrongdoing of another.

At this point whatever favorable precedent there may be in the jurisdiction could be set forth. The objective is not to show that there is an implied right to indemnity in some circumstances—an intuitively obvious proposition—but to prevent the adversary from persuading the court that the right is confined to one or another narrow class of case. Since his claim does not fall within one of the familiar categories in which indemnity typically has been allowed heretofore—principal and agent, municipality, etc.—the manufacturer would have to cite academic texts in order to show that the cases are not merely a collection of discrete and unrelated situations in which indemnity has been allowed on an ad hoc basis, but instead represent a principle of general application, however ill-defined its boundaries may be. In practice, it should not be difficult to make this point in most cases involving manufactured goods. After all, the most striking aspect of the recent development of products liability law is the extent to which it has departed from traditional ideas of negligence and veered toward strict liability in order to accommodate policies unrelated to fault,

unstable or unduly susceptible to impact or (b) the "passive failure" of not taking some action which would have prevented the active wrongdoing of a third party, such as the reckless cyclist, from injuring a passenger in a collision.

Nor is the "primary-secondary" formula more helpful. For instance, either label could fit strict liability—"primary" because it flows from the manufacturer's own actions in designing, building and marketing a product or "secondary" because it is an artificial construction, imposed by the courts regardless of fault, unlike "primary" negligence.

The more sophisticated comparative duty test is not much more helpful in a situation in which the duties of the parties are not as conveniently stratified as they are in the common carrier's case. The court could not use the test without first deciding precisely what duty the cyclist owed the manufacturer and vice versa; and that is but another way of stating the original question—should one of them be required to give the other indemnity?

Is the Concept of Implied Indemnity Still Valid and Useful?

There are more fundamental questions. To begin, can indemnity accomplish anything worthwhile in spite of the vagueness of the traditional doctrines and the subjectivity of alternatives such as the test of "disproportionately great fault"? And is "fault," the concept central to traditional theories of implied indemnity, still

---

such as loss distribution. Thus, a verdict against a manufacturer is likely to depend upon some form of "technical" or "imputed" liability, rather than traditional negligence and it follows that the manufacturer should be entitled to indemnity, even if the court believes that the right arises only under the formulations which distinguish between "primary" and "secondary" liability and the like.

If the cases do not even set forth one of the general theories, the manufacturer's argument might be that the dearth of precedent is only an incidental by-product of the novelty of the plaintiff's theory; and that judicial approval of novel aspects of the plaintiff's claim should be accompanied by a reexamination of related legal doctrines and attitudes such as the refusal to grant indemnity, in order to test whether their basis in logic or policy has been undermined by the new rule. In many jurisdictions a decision to create liability under a "second accident" or "crashworthiness" theory itself would be a great departure from precedent. A court which worked that change in the law logically should not fall back on a position of rigid adherence to stare decisis on the issue of indemnity in the same case. Aside from the question of intellectual consistency, to do so would be to ignore the magnitude of the change the court itself had wrought by going beyond the traditional bounds of negligence for the sake of modern public policy values such as loss distribution. At the least, the court also should consider the question of whether the adoption of the principle of implied indemnity would permit it to give the individual defendant fair treatment while still accomplishing those objectives.

important enough after the spread of strict liability and insurance to justify the effort involved in reallocating the burden of the judgment?

The response may have to be defensive. True, the values which indemnity serves are not susceptible of quantitative measurement and that may be a reason for the courts to be cautious in granting the remedy; but that should not necessarily bar every such claim as a matter of law. Whether or not it is strictly logical, people still do think in terms of "fault." And no matter how inarticulately the basic idea has been expressed, over the years the courts have used the concept of implied indemnity in a variety of situations. This history suggests that it fills a need, by permitting the judge to single out the defendant perceived to be morally blameworthy when two or more are liable on technical, legal grounds, thus making the law more consistent with the public's sense of basic fairness.[38] A doctrine which is capable of serving such a useful social function should not be cast aside lightly. Moreover, we shall see that there may be strong reasons of public policy why one defendant should bear the burden of the judgment even if that result could not be justified on the grounds of comparative fault.

In rejoinder, one attacking the whole idea of implied indemnity might grant that the general concept may serve some purpose, but then go on to say that contribution, a remedy allowed by statute in many states, accomplishes the same result or at least comes close enough to approximate rough justice, and that the factors involved are too subjective to justify any attempt to achieve a more precise result through indemnity. Or he might take a somewhat different tack and say that contribution permits an allocation which comes closer to being proportionate to guilt than the all-or-nothing nature of indemnity permits.[39]

These contentions are not strawmen. The proponent of the doctrine in its traditional form might have to concede that contribution may be more appropriate in many, or even most, cases, and then say that that fact still should not exclude indemnity from the list of possible remedies for the relatively rare case which calls for a more drastic remedy. But there may be a better answer. Indemnity itself seems to be evolving toward greater flexibility, making the point moot.[40]

---

[38] *See* Meriam & Thornton, *supra* note 1, at 861-62.

[39] *Cf.* Davis, *supra* note 8, at 553.

[40] It could also be argued that the existence of a statute providing for contribution

Consistency with Modern Policy Objectives

Perhaps the most troubling argument against indemnity would be one which commandeered the "loss spreading" principle.[41] It might be said that the cases which have permitted indemnity in the past have involved traditional negligence theories, and that they should have no weight in a case brought under modern theories of products liability. For instance, to permit indemnity in a case such as our hypothetical would relieve the manufacturer of the loss and place it upon the shoulders of an individual wrongdoer such as one of the drivers, or, at best, the dealer—a relatively small business. Yet the manufacturer is a large business in a strategic position to distribute the loss among all purchasers, while the individual driver or dealer cannot shift the burden. Thus, at first glance, indemnity would seem to be inconsistent with one of the basic principles underlying modern products liability law—"enterprise liability," the belief that losses should be placed on the shoulders of those who can pass them on to society in an efficient manner.[42]

---

shows that the legislature intended that contribution should be the sole permissible remedy, even if indemnity may seem more appropriate in an occasional case with unusual facts. One answering this preemption analysis might begin by pointing out that there is no reason why the passage of such an act must necessarily obliterate the common law principles of indemnity. While the law of implied indemnity was developing, contribution between joint tortfeasors usually was denied because of the equitable principle that the law should not adjust the burdens of misconduct. *See* W. PROSSER, *supra* note 1, § 51, at 310-11. This obviously left room for inequities and the contribution statutes were passed to remedy the situation. *See* Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 386-87, 102 A.2d 587, 593-94 (1954) (construing N.J. STAT. ANN. § 2A:53A-1 *et seq.* (1952)). The whole purpose of those acts was to require that common responsibilities be shared. It would be inconsistent with that purpose—furthering the fair allocation of liability in the routine multi-defendant case—to say that the contribution statutes also were meant to nullify the rules which already had developed permitting indemnity in the relatively few situations in which the courts thought called for a more drastic form of allocation. For example, N.J. STAT. ANN. § 2A:53A-3 (1952), expressly recognizes the right to indemnity in precluding the recovery of contribution from a person entitled to indemnity.

[41] *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). *See also* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

[42] The principles of enterprise liability were recognized early by Dean Roscoe Pound:

> Today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking. There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there has been no fault.

Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 233 (1914).

For extensive discussion of the risk distribution, cost spreading, and loss-bearing capac-

But the argument can be met on its own terms in some cases. If indemnity shifts the loss to an individual driver, in all probability the ultimate burden of paying the indemnity judgment will fall upon an insurance company, by definition a professional loss spreader and one likely to be more efficient at that task than even the largest manufacturer. Therefore the benefits of distributing the burden through society would not be lost.[43] To be sure, if the indemnitor had no insurance the loss would not be distributed. But it would not make sense to reward an uninsured driver by relieving him of the duty to indemnify other defendants. Instead, his fate should serve as an object lesson, encouraging others to accept the cost of insurance. More importantly, a person probably decides to go without insurance because there is nothing left eleven days after payday, not from any cunning calculation of maximum advantage. And if that were the case, the manufacturer could not collect on an indemnity judgment against him, and it still would bear the full burden of their joint liability to the plaintiff until it passed the loss to its customers in the form of higher prices. Thus, the benefit of loss spreading—if such there is[44]—would not be lost.

The loss spreading principle also suggests what may seem to be a related drawback to indemnity in a case such as our hypothetical, the idea that it would tend to reduce the pressure upon the manufacturer to remedy defects in its designs and to take affirmative steps to foster safety.[45] But, in the absence of empirical evi-

---

ity principles of enterprise liabiliy see Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* (pts. 1 & 2), 78 U. PA. L. REV. 805 (1930), 79 U. PA. L. REV. 742 (1931); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961). An argument for continued experimentation with an extension of enterprise liability is made in O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973).

[43] *See* Meriam & Thornton, *supra* note 1, at 860-61; *cf.* Comment, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490, 500-02 (1969).

[44] *See* Cooperrider, *A Comment on The Law of Torts*, 56 MICH. L. REV. 1291, 1305-07 (1958); Peairs, *The God in the Machine: A Study in Precedent*, 29 B.U.L. REV. 37, 73-78 (1949); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945-48 (1957).

[45] This "pressure" principle has been espoused in many cases. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); Newmark v. Gimbel's Inc., 54 N.J. 585, 600, 258 A.2d 697, 705 (1969); Brody v. Overlook Hosp., 121 N.J. Super. 299, 307-08, 296 A.2d 668, 672-73 (L. Div. 1972), *rev'd*, 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975).

On the other hand, the validity of the "pressure" principle has been challenged by legal commentators. *See, e.g.*, Plant, *supra* note 44, at 945. Dean Prosser also suggests that this "pressure" argument for increased safety has "a specious and unconvincing sound." Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119 (1960).

dence, it would seem naive to give much weight to this point. Except for the possibility that it might lead to an increase in governmental regulation and pressure for improved design, the impact upon the manufacturer of a few isolated judgments, with or without indemnity, probably would be minimal. The same would not be true of a decline in sales after a general loss of public confidence because of adverse publicity concerning litigation. But it seems improbable that the impact of such publicity would be affected significantly by technical provisions in the judgment, whether they grant indemnity or deny it.

Furthermore, accepting the "pressure" argument on its own terms, the manufacturer could say that denying indemnity must decrease the pressure upon individual drivers, and more importantly, upon their insurance companies, to take steps to encourage more careful driving. If this seems an unrealistic analysis of the pressures on an individual, the same can be said of the argument against indemnity, which it merely counters.

Administrative Difficulties

A far more persuasive argument might be directed at the judge's natural fear that a trial would be hopelessly long if numerous defendants were permitted to introduce evidence concerning the degree of responsibility each bore in comparison to the others.[46] For example, in our hypothetical, the question of whether the drivers and the dealer were guilty of substantially greater wrongdoing than the manufacturer might involve a time consuming study of the engineering reasons for the latter's decision not to include a possible safety feature in its product,[47] to say nothing of whatever evidence the other defendants might introduce to mitigate the gravity of their own mistakes. At first glance, the potential for delay and confusion in such a case might seem to justify the prohibition of indemnity claims altogether. But the sacrifice of fairness to the individual litigant would be a high price for what would often be a slight saving of judicial time. The degree of difficulty the manufacturer faced in taking precautions would be just as relevant to the plaintiff's efforts to prove negligence or breach of warranty as it would be to the battle among the defendants over indemnity. Thus it could not be eliminated from the trial without distorting the results reached in both the main case

[46] Concerns of this type were among the reasons given for the denial of indemnity in Jacobs v. General Accident Fire & Life Assur. Corp., 14 Wis. 2d 1, 12, 109 N.W. 2d 462, 468 (1961).

[47] *Cf.* Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 411, 290 A.2d 281, 285 (1972).

and the cross-claims; and conversely, it would not be a significantly added burden for either judge or jury to go on to decide whether the evidence which the manufacturer originally offered in a vain effort to show that his product was not defective at least would justify an award of indemnity.

In some cases, the evidence bearing upon indemnity could be deferred until a later, separate proceeding, but that approach would require caution. Often, the issues and evidence involved in the main claim and cross-claim would be as closely linked as they are in our hypothetical and any attempt to sever the two controversies necessarily would be unfair. Furthermore, there is a significant risk that a bifurcated proceeding would take even more time than a unified trial if the parties were to fight it out to the bitter end, particularly if a second jury had to be selected.

THE CASE FOR ABANDONING THE SEARCH FOR A UNIVERSAL RULE

Some of the considerations we have discussed would call for conflicting results in any given case; and even recognized public policy goals such as loss spreading and economy of administration do not offer a touchstone to all controversies. However, it is clear that the courts which have taken the lead in developing modern tort doctrines place great emphasis upon such considerations and, also, that the accepted approaches to implied indemnity encourage the courts to leave them out of account. As a result it is entirely possible that a judge may undertake a thoughtful analysis of the issues of public policy at stake in a plaintiff's case against several defendants, but then decide the indemnity issues in the same case by simply labelling one side or the other "active" or "passive."

Conceivably the answer might lie in yet another all-encompassing rule or principle, designed to produce, mechanically, a result which will take all of the competing interests, public and private, into consideration. But history suggests that the prospects for such a solution are few. After all, litigants are free to claim implied indemnity in an infinite variety of possible situations. Therefore, a principle which is precise enough to offer meaningful guidance in some situations probably will be useless in many others (the comparative duty test); while one which is broad enough to be universal is likely to be too vague to be of service in a complex matter (fairness between litigants). Nor is there reason to hope that the future will bring significantly fewer tort cases, that they will grow less complicated, or that the number of parties involved in each will decrease.

THE PUBLIC POLICY ANALYSIS AS AN ALTERNATIVE TO THE ESTABLISHED RULES

If the difficulties which confront the would-be rulemaker are as great as we suggest and the past successes of such efforts as scant, the time may have come to give up the search for a single rule or principle. We suggest a more modest approach, beginning with the premise that implied indemnity should not be treated as a separate body of law governed by its own universal rules or principles. Instead it is best approached as nothing more than one possible remedy, appropriate in some cases but not in others, depending upon whether it will or will not produce a desirable result under the circumstances. In other words, the emphasis should be on the facts of the individual case and their implications for the litigants and society, not on some evasive "essential nature" of the right of implied indemnity.

We shall see that this approach need not necessarily exclude the use of the traditional tests in some litigation. However, in the novel or complex case, such as our hypothetical, it would call for a more wide-ranging analysis than has been customary. The decision-maker should attempt to isolate the aspects of public policy which led to the decision in favor of the plaintiff and then decide whether the most important of those purposes (or, perhaps, some other policy which is involved only in the indemnity claim) would be served by an award of indemnity to one defendant or the other.

In practice, our approach would require a factors analysis, keyed to the nature of the individual case. For example, the indemnity award in the motorcycle hypothetical might well have a drastic effect upon the extent to which the loss is spread over society and the responsible parties are encouraged to devote more funds to the development of safety measures. Other critical considerations might include the quality of the act of each defendant, judged in terms of popular morality; the extent to which each defendant acted as part of its regular business or in the hopes of commercial profit; the relative ability of the defendants to distribute loss; the extent to which a verdict could reasonably be hoped to deter future repetition by the various actors; or the degree to which the legal liability of each defendant is based upon his own conduct or, instead, is attributable to justifiable reliance on another defendant.

Similarly in the case of the city held liable because its contractor's employees failed to clean the streets properly, the critical factors might include the likelihood that a party may take greater

care in performing if there is no possibility that it later can shift the liability for failure to any other person; the difficulty of supervising performance by independent contractors or employees; or the desirability of spreading the loss through the city's ability to raise taxes or the company's ability to raise prices or reduce dividends to shareholders. In addition, the question whether an employee should bear the full burden would present a serious social issue.

We do not suggest that a factors analysis of this type offers an automatic formula or that any one result necessarily is correct in either of the cases we have just discussed. Instead, our point is that indemnity issues often will involve questions of public policy as important as those in the plaintiff's claim against the defendants and that the most logical way to approach them is to recognize that fact and then to attempt to decide whether an award of indemnity would be consistent with the public interest. This requires the courts to make extremely difficult judgments and to balance intangible values. However, the court often will have had to undertake that burden in the main case. It is not logical for it to ignore the same considerations when it deals with indemnity issues, which arise from the same accident and which may well involve the same cluster of policies. And it would make even less sense for the court to nullify its own earlier efforts by making an award of indemnity which fits the language of an accepted test but which also relieves one who would be deterred by the impact of a judgment, or which is otherwise inconsistent with the court's policy objectives.

The Continued Value of the Older Tests

The shift to a public policy or factors analysis would be evolutionary rather than revolutionary. We suggest only that courts feel free to pick and choose among the accepted tests with greater skepticism toward verbal and conceptual differences, and more concern for the possibility that the indemnity claim may have public policy implications as significant as those of the plaintiff's case. They need not give up the legitimate advantages of the older tests. If the facts duplicate those in which the remedy has been granted for many years, judicial economy might well be a good enough reason for the court to follow precedent unless counsel were to produce a compelling argument for a new approach. Futhermore, a judge who does re-examine the suitability of indemnity in a commonplace situation may find that the traditional approach embodies a worthwhile insight for the particular case. For instance, to the extent that a defendant plays a "passive" role in the

sense that his failure to prevent the accident does seem significantly less worthy of moral censure than that of the other actor when all of the circumstances are taken into consideration, there is no reason why that should not constitute an important reason for a decision in his favor. And in many other cases, the process of decision need be no more than an effort to reach the result which is most fair to the individual litigants. If, after reflection, it seems that the particular case does not involve any broader social interests, it would be pointless to complicate matters by pretending that it does.

Burdens and Risks of a Factors Analysis

Candor requires that we admit that the factors analysis approach will not eradicate all of the weaknesses of the older tests. Our proposal amounts to a call for a change in emphasis and an admonition to the courts to go more deeply into the consequences of their indemnity rulings and, also, to consider other social interests as well as fairness to the individual litigants. By nature, then, it cannot offer the trial judge detailed guidance, any more than do the approaches we have criticized. Indeed, because our proposal would require decision-makers to undertake the independent analysis of cases and to pay far less deference to rules and precedent, it would place a greater intellectual burden on them than the traditional rules do.

It might well be asked whether the improvements in the quality of decision would justify the burdens and risks. We are hopeful that it would—in part because the drawbacks may be less severe than they appear at first glance. For instance, one might fear inconsistent results and abuses of power if trial judges or jurors are encouraged to apply their own ideas of desirable public policy. But predictability of result is less important in tort litigation than in any other field.[48] And, more importantly, we doubt that the existing rules restrain judges or juries from making crude policy judgments, any more than they provide realistic guidance. A headstrong or prejudiced judge certainly would have little difficulty in reaching the result he desired for his own reasons even if it were necessary for him to embellish that conclusion with formal terminology such as "primary" and "secondary" liability.

Furthermore, the fact that the existing doctrine of implied indemnity is as superficial as it is suggests that conscientious judges

[48] *Cf.* W. PROSSER, *supra* note 1, § 1, at 3-4.

always have had to try to balance competing public policies as best they could in order to decide a case at all, even though that fact was obscured when they expressed the final result in terms of one or more of the traditional rules. For instance, in *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*,[49] the New Jersey supreme court reached the conclusion that the fact that one defendant's liability to the plaintiff arose from strict liability for violation of a statute should not bar it from seeking indemnity from another defendant.[50] The decision was couched in the traditional terminology of primary-secondary liability.[51] Yet the nature of the controversy necessarily required the court to analyze the public interest which the statute embodied and the question of whether that interest required the dismissal of claims for contribution and indemnity between the defendants.[52] Thus, there are risks in giving the

[49] 32 N.J. 55, 159 A.2d 97 (1960).

[50] *Id.* at 79, 159 A.2d at 109. The court stated that the strict liability imposed by the statute only settled the issue of loss between the injured party and the owner of the airplane which had crashed. It did not preclude the owner "from seeking to place the loss on the person responsible for it." *Id.*

[51] *Id.* at 79-80, 159 A.2d at 109-10.

[52] *Id.* at 73-81, 159 A.2d at 106-11. The court examined N.J. STAT. ANN. § 2A:53A-3 (1952) which provides for contribution where there is an injury resulting from "the wrongful act, neglect or default of joint tortfeasors." The court rejected the contention that " 'wrongful act' necessarily connotes fault." 32 N.J. at 74, 159 A.2d at 106. The operation of the aircraft with the resulting injuries was a "wrongful act" by operation of the statute, regardless of intent or negligence. *Id.* at 75, 159 A.2d at 107.

The court also rejected the argument that there could be no contribution since Gaseteria and RKO had not committed the same tort. It indicated that the requirements for contribution were only that there be a cause of action against both of the parties. *Id.* at 75-76, 159 A.2d at 107-08.

Granting contribution, RKO further argued, would frustrate the legislative intent to make proof of negligence in the operation of the aircraft unnecessary. The court rejected this contention out of hand, noting that the statute spoke only of "innocent injured persons" and not of the actions of third parties. *Id.* at 78, 159 A.2d at 108-09.

> There is a fundamental distinction between a person who has suffered damages through no fault of his own and who seeks to shift those damages to another better able to bear them, and a person who has suffered no damages but whose fault could have contributed to or been the sole cause of injuries to others.

Id., 159 A.2d at 109. The court also considered the disparity in the problems of proof encountered by an innocent injured person and by the defendants seeking and resisting contribution. Consequently, it concluded that an action for contribution between the strictly liable party and third parties was "to be governed by ordinary tort law." *Id.*

The court found that these same interests were involved in the indemnity claim. Therefore, it held that the owner would have to show three things to be entitled to indemnity: (1) freedom from fault, (2) that its strict liability under the statute was "merely an imputed or constructive fault," and (3) that another was solely responsible for the losses. *Id.* at 79, 159 A.2d at 109.

Chief Justice Weintraub dissented from the majority's decision on the issue of indemnity:

> The majority find the Legislature imposed liability *without fault* solely to place the

decision-maker the broad latitude we suggest, but they have existed ever since the courts began to grant implied indemnity.

Furthermore, both the burdens and the risks may grow less severe as time passes. If the judges are required to articulate the reasoning which underlies their attempts to reconcile the social interests and principles of law involved in the individual controversy, a coherent body of precedent may develop, gradually making the factors analysis less burdensome in each successive case. By the same token, the requirement of articulation would make it easier for the appellate courts to cure the occasional irrational judgment. What might once have been masked by a bland statement that the liability of one side or the other was "passive" would have to be defended, and a decision made on the basis of what is actually at stake.

THE CHANGING NATURE OF THE REMEDY ITSELF

The courts are changing the nature of the remedy and this, in turn, may speed the evolution of the factors approach. Recent decisions show an accelerating shift away from the "all-or-nothing" approach of traditional implied indemnity and the rigidity of pro

---

economic burden where it may best be carried. If the premise were accurate, the ultimate conclusion of the majority would be correct. However, it seems to us the Legislature imposed absolute liability *because of probable fault,* upon the thesis that in sending his plane aloft the owner undertakes an operation fraught with danger of ground damage; that unless commensurate care is exercised, such injury will follow; that in most cases ground damage probably is caused by the owner's negligence; that evidence of fault is destroyed in the crash itself; and hence it is unfair to subject the land-based victim to a result made speculative by the destruction of vital evidence. Accordingly the statute itself establishes fault.

Id. at 84-85, 159 A.2d at 112 (emphasis in original). Since the airplane owner should be conclusively presumed at fault and RKO, as a landowner, was one of "the beneficiaries of the statute," indemnity should not be allowed. The remedy would be available, however, against someone outside the scope of the statute such as "the owner of another plane involved in a collision." *Id.* at 85, 159 A.2d at 113.

See also Stanfield v. Medalist Indus., Inc., 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974); Burke v. Sky Climber, Inc., 13 Ill. App. 3d 498, 301 N.E.2d 41 (1973). In *Burke,* the manufacturer sought indemnity from the plaintiff's employer. The court considered the reasons for imposing strict liability. Since the manufacturer was the one who had created and profited from the manufacture and distribution of the defective product, it was the one that should bear "the ultimate liability." 13 Ill. App. 3d at 504-05, 301 N.E.2d at 46. In *Stanfield,* the court again looked to the underlying policy of strict liability for defective products, concluding that it was "not based on ordinary negligence but is based on the consideration of protecting the public." 17 Ill. App. 3d at 999-1000, 309 N.E.2d at 107-08. Consequently, the court found the active-passive negligence test used in Illinois for awarding indemnity inapplicable to a products liability action. The imposition through indemnity of strict liability on the employer—a user outside the distributive chain—was "unfair." *Id.* at 1000, 309 N.E.2d at 108.

rata statutory contribution, toward a far more flexible hybrid approach which permits the fractional apportionment of liability among several defendants. By way of illustration: In a case in which defendants A and B are both liable, traditional implied indemnity would require one or the other to bear the entire burden of the judgment; contribution would require A and B each to bear one-half of the burden; and the developing fractional doctrine would permit the jurors to divide the burden according to their view of the relative responsibility or guilt of each defendant so that the proportions might be ninety to ten, forty-five to fifty-five, or any other ratio.

The leading case is *Dole v. Dow Chemical Co.*[53] There, the administratrix of the estate of a deceased employee sued Dow, claiming that the decedent had been killed by a poisonous fumigant which the company had failed to label properly.[54] Dow denied negligence and filed a third party indemnity claim against the decedent's employer, claiming that it had labelled the product properly, that the employer had been furnished with printed instructions, and that the death had occurred because the employer failed to follow those instructions.[55] The trial court denied the motion to dismiss the third party complaint.[56] The appellate division reversed, reasoning that any negligence on Dow's part would be active, thus barring it from recovery against the employer, even if the latter also were found to be negligent.[57] The court of appeals in turn reversed the appellate division and reinstated the third party complaint.[58]

After expressing his dissatisfaction with the active-passive and primary-secondary analyses,[59] Judge Bergan made the more fundamental point that the results reached under the traditional form of implied indemnity, which either denies any relief or forces one defendant to bear the entire burden, must be unfair in many cases.[60] He then set forth a new rule under which the jury is to

---

[53] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See generally* Ausubel, *The Impact of New York's Judicially Created Loss Apportionment Amongst Tortfeasors–Dole v. Dow Chemical Co.*, 38 ALBANY L. REV. 155 (1974); Note, *The New Right of Relative Contribution: Dole v. Dow Chemical Co.*, 37 ALBANY L. REV. 154 (1972).

[54] 30 N.Y.2d at 145-46, 282 N.E.2d at 290, 331 N.Y.S.2d at 384-85.

[55] *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

[56] *Id.*

[57] 35 App. Div. 2d 149, 151-52, 316 N.Y.S.2d 348, 351-52 (1970).

[58] 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 392.

[59] *Id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386. The court stated that the active-passive test "has in practice proven elusive and difficult of fair application." *Id.*

[60] *See id.* at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

apportion liability among negligent defendants on the basis of fairness and the degree of responsibility borne by each defendant.[61]

In *Kelly v. Long Island Lighting Co.*,[62] the court of appeals reiterated the basic reasoning of *Dole*, but this time referred to the fractional apportionment of liability as "relative contribution,"[63] in effect obliterating the differences between contribution and implied indemnity.[64] Later cases have broadened the rule still further by applying it in products liability cases without distinguishing between liability for negligence and breach of implied warranty.[65]

The tests of "fairness" and "comparative degree of responsibility" are neither new nor as broad as the factors analysis we propose. However, *Dole* and the cases which follow it are consistent with our view in that they place their primary emphasis on the consequences which flow from an award, rather than mere form. Judge Bergan made the point explicit when he remarked in *Dole* that the award of indemnity involves "more than terminology" and that the true issue "is how ultimate responsibility should be distributed."[66] More specifically, a judge or juror who made a conscientious effort to carry out his duties under the *Dole* rule almost certainly would go more deeply into the basis of each party's liability than would one who followed the traditional approach; and this in turn might well lead him to consider whatever policy issues are present, whether or not he had that in mind at the outset. Equally important, the flexibility of the new remedy would permit him to reach a result which would reflect more closely the weight he placed on the conflicting or divergent public policy goals involved in the case.

Before following *Dole*, another court would have to decide for itself whether there is anything in the essential nature of indemnity which is inconsistent with fractional allocation. We think that there is not. It is true that fractional allocation assumes that each defendant contributed to causation and that this often could not be

[61] *See id.* at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

[62] 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

[63] *Id.* at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854.

[64] Note, *supra* note 53, at 168.

[65] *See, e.g.*, Langford v. Chrysler Motors Corp., 373 F. Supp. 1251, 1255 (E.D.N.Y. 1974); Coons v. Washington Mirror Works, Inc., 344 F. Supp. 653, 657-58 (S.D.N.Y. 1972), *rev'd in part*, 477 F.2d 864 (2d Cir. 1973); Noble v. Desco Shoe Corp., 41 App. Div. 2d 908, 909-10, 343 N.Y.S.2d 134, 136 (1973); Walsh v. Ford Motor Co., 70 Misc. 2d 1031, 1033, 335 N.Y.S.2d 110, 114 (Trial T. 1972); *cf.* Medici v. Dalton Schools, Inc., 43 App. Div. 2d 677, 677-78, 349 N.Y.S.2d 726, 727 (1973).

[66] 30 N.Y.2d at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.

reconciled with the view that no defendant should receive indemnity if he is *in pari delicto,* as well as those analyses which make the availability of the remedy turn upon some critical difference in the quality of the act where both tortfeasors are guilty of the same offense, such as negligence. However, those doctrines derive their strength from precedent rather than from intrinsic logic or suitability to modern conditions. To the extent that either has a policy basis, it is simple distaste for the wrongdoer on grounds of morality, or an overriding concern for judicial economy. While neither attitude is illogical, the trend of modern tort law is away from them.[67]

On the other hand, a case could be made for the proposition that the fractional approach itself suffers from a number of logical weaknesses. The fairness of the idea that the amounts of the various defendants' liability should be proportional to their fault may seem self-evident on first examination, but the question actually is a complex one. Any judgment as to "comparative fault" is likely to be highly subjective. The liability of the defendants may be imposed for radically different conduct and it is a fair question whether the actions of each can be compared in any meaningful way.[68] And even if the facts make some general proportion seem reasonable, to translate it into an arithmetical figure may give the process a spurious air of precision. For instance, one might feel that the manufacturer in our hypothetical should bear the largest share of the burden, all things considered, but that would not mean that it would be possible to demonstrate why that share should be sixty-three percent of the total rather than sixty-six or fifty-one. But the same objection could be made to the entire system of tort damages, there being no "objective" way in which pain can be measured and translated into money.[69] Yet the courts ignore the theoretical problem in order to accomplish a result they think constitutes rough justice. On balance, we believe that they should take the same approach to indemnity issues. After all, the idea that one defendant should be excused completely even though he played a substantial role in the case is even more difficult to justify than the attempt to construct a ratio which will give approximate expression to the best judgments court or jury can make concerning the imponderables and social values at stake.

---

[67] *See* W. PROSSER, *supra* note 1, § 4, at 18-19, 21-22.

[68] *See generally* Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation,* 53 MARQ. L. REV. 293, 303-15 (1970).

[69] *See* Botta v. Brunner, 26 N.J. 82, 92-99, 138 A.2d 713, 718-22 (1958).

COMPARATIVE NEGLIGENCE AND FRACTIONAL APPORTIONMENT

The court need not concern itself with the question of the desirability of fractional allocation in a negligence case if the jurisdiction has a comparative negligence statute which, like the New Jersey Act, applies to the contribution claims between the defendants as well as to the plaintiff's claims against the defendants.[70] The statute itself would require that each defendant who is held liable bear a share of the total liability more or less equivalent to his share of the causal negligence. However, the judge would still have to decide whether to follow the same general approach in cases which involve theories of liability other than negligence, such as warranty or strict liability. Some courts have done just that;[71] another has held that the effect of the statute is strictly limited to negligence claims.[72] We favor a middle position.

The passage of a comparative negligence statute would seem to indicate that the legislature would not favor the oldest argument against any form of implied indemnity, the idea that it is immoral for the courts to give any aid to a wrongdoer,[73] and, in addition, that it does not object, in principle, to the idea of the courts devoting some of their resources to an effort to make fine distinctions among those who have erred.

---

[70] N.J. STAT. ANN. § 2A:15-5.3 (Supp. 1974-75). The Comparative Negligence Statute provides for contribution where one tortfeasor pays more than his "percentage share." This is in contrast to the "pro rata share" language of the Joint Tortfeasors Contribution Law, N.J. STAT. ANN. § 2A:53A-3 (1952). Prior to comparative negligence, the amount of contribution was dependent upon the number of tortfeasors. M. IAVICOLI, NO FAULT & COMPARATIVE NEGLIGENCE IN NEW JERSEY § 81, at 182-83 (1973). Now the amount of contribution apparently is to be determined by "the extent of one's culpability" rather than "the number of defendants who are culpable." *Id.* at 183.

Four states expressly provide that "relative degrees of fault" are to be considered in determining the extent of contribution. *See* ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE ANN. tit. 10, § 6302(d) (1953); HAWAII REV. STAT. § 663-12 (Supp. 1973); S.D. COMPILED LAWS ANN. § 15-8-15 (1969).

Wisconsin also utilizes a relative degree of fault approach. However, this remedy evolved through judicial innovation rather than legislative enactment. In Bielski v. Schulze, 16 Wis. 2d 1, 7-9, 114 N.W.2d 105, 108-09 (1962), the supreme court decided that since contribution was a doctrine of equitable origin, it should be applied equitably. A joint tortfeasor's share of the common liability is "the percentage of the causal negligence which contributed to the injury." *Id.* at 9, 114 N.W.2d at 109.

[71] *Compare* Dippel v. Sciano, 37 Wis. 2d 443, 459-62, 155 N.W.2d 55, 63-65 (1967) (strict liability in tort for defective product analogized to "negligence per se") *with* City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 653, 207 N.W.2d 866, 871-72 (1973) (proportional contribution applicable to both negligence and strict liability actions).

[72] Cyr v. B. Offen & Co., 501 F.2d 1145, 1155 (1st Cir. 1974) (applying New Hampshire law).

[73] *See* Merryweather v. Nixan, 101 Eng. Rep. 1337, 1337 (K.B. 1799).

The fact that the remedy is required in negligence actions, the most common category of cases, also suggests that it should be available in other tort actions such as strict liability cases, at least in the absence of special circumstances.[74] As we have suggested, a substantial case could be made for the proposition that the inherent difficulty of assigning any meaningful arithmetical value to the responsibility which various defendants bear for different types of conduct makes the hope of greater fairness to individual parties illusory. But if the courts are to make the act of faith, and to endure the lost time and intellectual discomfort necessary to make these allocations in ordinary negligence cases, there seems to be no compelling reason why they should not do the same in strict liability cases and other types of sophisticated tort litigation which presumably will not occur as often and which may well involve more significant controversies.

The practical question may be whether apportionment will accomplish enough to justify the added complexity, particularly in view of the availability of contribution in many cases. But we think that the decision on that point should be left to the good judgment of future litigants; until experience proves the contrary, it would seem that the theoretical danger that one party might waste a great deal of the court's time by trying to present a complicated case for fractional indemnity in a small controversy would be limited by mundane considerations such as the amount that it would cost him to make the attempt.

However, we must add several caveats. A comparative negligence statute may not provide workable guidelines for fractional indemnity in every case, even though it does provide support for the general concept. For instance, such statutes may excuse certain defendants from liability for reasons which have nothing to do with indemnity doctrine, new or old. Thus, the New Jersey statute, and a number of others, only permit the plaintiff to recover from the defendants if the defendants' share of the total negligence exceeds

---

[74] The fact that such statutes are phrased solely in terms of negligence does not provide strong evidence that the legislators intended to perpetuate the existing form of implied indemnity in other types of action. The doctrine of comparative negligence is a variation on contributory negligence. The need for brevity and simplicity may be a sufficient explanation for the draftsman's decision to limit his consideration to that type of case, rather than go into every other form of action in which the concept might play a role. Furthermore, the concept of implied indemnity is judge-made and it would be natural to leave it to the courts to reconcile it with the new statute as they might see fit—if, indeed, the legislature ever gave any thought at all to such technical matters.

that of the plaintiff.[75] If the defendant is guilty of some negligence, but his contribution to the total causative negligence is less than that of the plaintiff, he is still excused from liability just as he would be under traditional contributory negligence. In a multiple defendant situation, this would mean that if a defendant's negligence were less than that of the plaintiff, he would escape all liability, and need not contribute to the total judgment.[76] This may be logical enough as a first step in the reform of contributory negligence or as a precaution against the complexity which an abundance of de minimis claims would produce. But it does not necessarily lead to a desirable or logical result in the different context of the indemnity claims between the defendants. It is entirely possible that one defendant might contribute less to the total causative negligence than the plaintiff did, but that he still would be the person most readily deterred by an adverse judgment. Therefore, the question of whether he should be excused from indemnity liability should turn on its own merits, and not be decided by the uncritical application of the formula which appears in the comparative negligence statute.[77]

This in turn leads to a more fundamental difference between the two doctrines. If one accepts the idea, which we have argued earlier in this paper, that factors other than fault—such as the public interest in deterrence and loss distribution—should play a role in the resolution of some indemnity claims, it follows that it is not necessarily sufficient to examine the fault of the various actors. Instead, the decision-maker should consider the possibility that those additional public interest factors may be significant in individual cases and the percentage of liability which he imposes upon each defendant should be adjusted to give whatever weight he thinks appropriate to them as well as to the individual's role in causation.

---

[75] *Compare* N.J. STAT. ANN. § 2A:15-5.1 (Supp. 1974-75) *with* TEX. REV. CIV. STAT. art. 2212a(1) (Supp. 1974-75) *and* VT. STAT. ANN. tit. 12, § 1036 (1973) *and* WIS. STAT. ANN. § 895.045 (Supp. 1974-75).

Wisconsin compares the extent of negligence on the plaintiff's part with that of each defendant separately. Chille v. Howell, 34 Wis. 2d 491, 499-500, 149 N.W.2d 600, 604-05 (1967). On the other hand, Arkansas measures the plaintiff's negligence against that of the defendants in the aggregate. Riddell v. Little, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972).

[76] Mutual Auto. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 268 Wis. 6, 8-9, 66 N.W.2d 697, 699 (1954). This conclusion requires acceptance of the Wisconsin—rather than Arkansas—approach for determining comparative negligence. *See* note 75 *supra*.

[77] And, it follows that it should be possible for one defendant to seek indemnity from another even if the latter is excused from liability to the plaintiff because his percentage of negligence is less than that of the plaintiff.

A SHIFT IN THE DECISION-MAKING POWER

In the past, judges tended to make the critical decisions themselves, on the assumption that they involved questions of law. The indemnity issue might simply be left to the jury on occasion, but the judge often exercised his power to dismiss the claim on the grounds that the claimant's negligence was "active," that he was "primarily" liable, or the like.[78] Or he might submit special interrogatories to the jury concerning the factual issues which he thought most important, but then decide the claim himself on the basis of those findings.[79]

As long as all that was required was the application of a label such as "primary" or "secondary," or perhaps a decision as to the legislature's intention in passing the statute which created the liability borne by one defendant, the judge's power seemed beyond challenge. However, the relevance of judicial expertise has decreased as the nature of indemnity has changed. If the right to indemnity depends upon the relative moral guilt of the defendant, some feeling of "fairness" which need not be explained further, or a choice between competing goals of public policy, the decision does not require technical, legal thinking. Instead, it calls for the sort of rough judgment of intangibles normally made by legislators, voters, and, in this instance, jurors. Thus, once the New York court of appeals indicated that each defendant would bear the percentage of liability which was "fair" under its doctrine of fractional indemnity, it is not surprising that the judges also said that the jurors should make that allocation.[80]

It also will not be surprising if other courts resist the trend, whatever its theoretical merit. True, the increase in the role of the jury is consistent with developments in substantive product liability law, which, in effect, serve to permit jurors to make the ultimate judgment on many economic and social issues which they had not been able to reach in the past because of technical defenses such as privity. And one who places a high value on citizen participation in the process of government might find the shift in power from a professional elite to laymen desirable for its own sake. But many others would fear that the jurors would make their decision on the

[78] *See, e.g.*, Public Serv. Elec. & Gas Co. v. Waldroup, 38 N.J. Super. 419, 424-25, 119 A.2d 172, 175 (App. Div. 1955); Hut v. Antonio, 95 N.J. Super. 62, 69, 229 A.2d 823, 827 (L. Div. 1967).

[79] *See, e.g.*, Bree v. Jalbert, 87 N.J. Super. 452, 459-60, 209 A.2d 836, 840 (L. Div. 1965), *aff'd*, 91 N.J. Super. 38, 219 A.2d 178 (App. Div. 1966).

[80] *See* 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.

basis of emotion alone; and that once the right of indemnity is assumed to be a jury issue, the scope of appellate review will be so narrow that only the most obvious injustices can be corrected. This is the routine reaction to any proposal that the jury's area of responsibility be increased, but there is no denying the fact that it has some substance.

Whether or not one approves of the trend, it makes little sense to charge jurors in the traditional terms, since words like "active" and "primary" and the like must seem even more amorphous to them than they do to judges and lawyers. And the problem is more severe if one would have them use their power to advance public policy. It would be unduly optimistic to assume that they will reach a desirable result through simple common sense. That might occur in relatively simple cases, like those in which the doctrine of implied indemnity first developed, since jurors presumably would pay a great deal of attention to the question of elemental fairness. But in a more complex case such as our motorcycle hypothetical, it is not likely that they would give any thought to policy goals such as loss spreading unless the concepts were planted in their minds by the judge. The solution may lie in the direction of detailed instructions, designed to inform them of the scope of their power, and to encourage them to take an analytical approach to the conduct of the litigants and to assess public policy considerations rather than to fall back on mere intuition. Conversely, special interrogatories, similar to those which the comparative negligence statute requires,[81] might force the jurors to disclose the outline of their reasoning, thus providing a basis for closer appellate review.

CONCLUSION

The most widely accepted analyses of the right to implied indemnity are vague in theory and difficult to apply. Worse, the equations they produce often fail to include many of the most important interests, public and private, which are at stake. The solution to the problem is not still another universal test. Instead, we suggest the courts take a far more skeptical view of the established principles of indemnity law and that they take advantage of fractional apportionment in order to shape the remedy more closely to the facts of the individual case. An indemnity claim should be analyzed and decided on the basis of the substantive

[81] *See* N.J. STAT. ANN. § 2A:15-5.2 (Supp. 1974-75).

legal principles and public policies which are involved in it, or in the action from which it springs. This does not mean that the older approaches must be abandoned; even though they fall short of universality, they embody insights which are useful in a number of cases. It does mean that courts should consciously strive to make their findings in indemnity claims consistent with the analysis which has led to the decision in the main case, and that they should offer the jurors instructions which will encourage them to undertake the same type of factors analysis when, as will be the case more and more often, the critical decision is entrusted to the jury rather than the judge.