

THE LAW OF CONTRIBUTION AND TORT-BASED INDEMNITY IN IOWA

*Jeffrey A. Stone**

TABLE OF CONTENTS

I.	Introduction.....	114
II.	Historical Development of the Law of Contribution and Indemnity.....	116
	A. Prohibiting an Intentional Tortfeasor from Seeking Contribution or Indemnity.....	118
	B. Prohibiting a Negligent Tortfeasor from Seeking Contribution or Indemnity.....	119
	C. Allowing Tortfeasors to Seek Contribution	127
	D. Adoption of Comparative Fault.....	129
III.	The Law of Contribution	130
	A. The Scope of Iowa Code Chapter 668.....	131
	B. Contribution Requires Common Liability.....	131
	C. Defenses to Common Liability.....	134
	D. Contribution as the Remedy for Active-Passive Negligence or Primary-Secondary Liability	135
	1. Acting at the Direction and on Account of Another.....	138
	2. Failure to Discover a Dangerous Condition or Prevent Wrongful Conduct.....	140
	3. Products Liability	141
	4. Liability for an Independent Contractor	143
	5. A Party Only Statutorily Liable Seeking Indemnity from a Tortfeasor	148

* Law Clerk to the Honorable William J. Riley, United States Court of Appeals for the Eighth Circuit; B.A., Grinnell College, 2003; J.D., University of Iowa, 2006. The Author wishes to thank Professor Patrick Bauer, University of Iowa College of Law, who edited early drafts and provided invaluable comments and suggestions, and the Author's former employer, the Honorable Linda R. Reade, United States District Court Judge for the Northern District of Iowa.

IV. The Law of Indemnity.....	149
A. Vicarious Liability.....	149
B. Breach of an Independent Duty.....	151
C. A Negligent Tortfeasor Seeking Indemnity from an Intentional Tortfeasor	155
D. Comparing the Scope of Tort-Based Indemnity and Contractual Indemnity	157
1. Indemnification for One's Own Negligence.....	157
2. Indemnification of Corporate Directors.....	158
V. Iowa's Workers' Compensation Statute.....	158
A. Workers' Compensation Paid to an Employee	160
B. Employer's Recovery Pursuant to Section 85.22 of the Iowa Code	161
C. Iowa's Workers' Compensation Statute as a Defense to Common Liability	162
VI. Conclusion	163

I. INTRODUCTION

Contribution and indemnity are forms of restitution designed to prevent unjust enrichment.¹ Contribution distributes responsibility for a liability among parties; in contrast, indemnity shifts the entire responsibility for a liability from the indemnitee to the indemnitor.² Disputes involving contribution and indemnity frequently arise when multiple parties share responsibility for a liability. Often, several different theories of liability support a claim for either contribution or indemnity.³ Contribution and

1. See, e.g., *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 (Iowa 2002). In a recent Iowa Supreme Court case discussing indemnity, the court used the term “tort-based indemnity” rather than “common law indemnity,” “equitable indemnity,” “non-contractual indemnity,” or “implied-in-law indemnity.” *Id.* at 570 n.1. Each phrase has been used synonymously to describe the idea of shifting the entire responsibility for a liability to prevent the unjust enrichment of the indemnitor. In this Article, the term “indemnity” signifies “tort-based indemnity,” unless otherwise specified.

2. *Ayers v. Straight*, 422 N.W.2d 643, 646 (Iowa 1988).

3. See *Peters v. Lyons*, 168 N.W.2d 759, 766–67 (Iowa 1969); see also *W. Cas. & Sur. Co. v. Grolier Inc.*, 501 F.2d 434, 438 (8th Cir. 1974) (stating in *Peters* “indemnity was predicated on an independent duty”); *Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1285 (N.D. Iowa 2000) (“The breach of nondelegable duties may constitute a basis for an action in indemnity against a third party who creates a

indemnity attempt to allocate responsibility for a liability in a way that is fair and just.⁴

Contribution allocates responsibility for liabilities between parties who share a common liability.⁵ By distributing responsibility based on the fault of each party, contribution distributes liability according to the principles of comparative fault.⁶ Contribution is the appropriate remedy for any amount for which a party has been held liable for in excess of the party's fault.⁷

Indemnity places the entire responsibility for a liability on the more culpable party.⁸ The Iowa Supreme Court has allowed indemnity “where one person has discharged an obligation that another person should bear; it places the final responsibility where equity would lay the ultimate burden.”⁹ Indemnity shifts the entire responsibility for a liability to the indemnitor in order to prevent unjust enrichment.¹⁰

This Article concerns contribution and tort-based indemnity.¹¹ This

dangerous condition.” (quoting *Peters*, 168 N.W.2d at 766)); *State v. Philip Morris Inc.*, 577 N.W.2d 401, 406 (Iowa 1998) (recognizing *Peters* was a classic case involving vicarious liability); *Sweeny v. Pease*, 294 N.W.2d 819, 822 (Iowa 1980) (“*Peters* provides another illustration of primary-secondary liability”).

4. See *Peters*, 168 N.W.2d at 766–67; see also *Goebel*, 91 F. Supp. 2d at 1285 (quoting *Peters* for the proposition that a “breach of nondelegable duties may constitute a basis for an action in indemnity against a third party who creates a dangerous condition.”); *Philip Morris, Inc.*, 577 N.W.2d at 406 (saying *Peters* was a classic case “involving vicarious liability”); *Sweeny*, 294 N.W.2d at 822 (“*Peters* provides another illustration of primary-secondary liability.”); *W. Cas. & Sur. Co.*, 501 F.2d at 438 (saying that in *Peters* “indemnity was predicated on an independent duty”).

5. See *infra* Part III.B.

6. IOWA CODE §§ 668.1–6 (2005); *Goetzman v. Wichern*, 327 N.W.2d 742, 753 (Iowa 1982).

7. See IOWA CODE § 668.5(1).

8. See, e.g., *Hansen v. Anderson, Wilmarth, & Van Der Maaten (Hansen III)*, 630 N.W.2d 818, 823 (Iowa 2001).

9. *Id.* at 824 (quoting *Hunt*, 252 N.W.2d at 447–48).

10. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576 (Iowa 2002).

11. Claims for indemnity based on equitable principles should be treated differently than claims based on express indemnification agreements because “specific rules applicable to contractual indemnification may not neatly apply to other types of indemnification, and vice versa.” *Id.* at 574. Nonetheless, the scope of indemnity pursuant to express indemnification agreements and tort-based indemnity is similar. See *infra* Part IV.D; see also Roger W. Stone & Jeffrey A. Stone, *Indemnity in Iowa*

Article surveys Iowa cases and statutes setting forth the grounds for contribution and indemnity. It hopes to clarify contribution and indemnity law and address several issues Iowa courts may consider in the future. The Article consists of four parts. First, it addresses the historical development of the law of contribution and indemnity and discusses how the adoption of comparative fault has affected the law of contribution and indemnity. Second, it sets forth the requirements of a claim for contribution and the grounds on which contribution is permitted. Third, it presents the grounds on which indemnity is permitted and compares the scope of tort-based indemnity and contractual indemnity. Fourth, it concludes by discussing situations where contribution and indemnity have been sought by and from employers.

II. HISTORICAL DEVELOPMENT OF THE LAW OF CONTRIBUTION AND INDEMNITY

The present law of contribution and indemnity is a product of history. Professor Furnish accurately observed in 1966 that the law of “[c]ontribution and indemnity in America has developed more as a product of experience than logic.”¹² This statement continues to depict the state of the law.

The law of contribution and indemnity in Iowa developed when Iowa courts recognized the defense of contributory negligence, and had yet to adopt the principles of comparative fault.¹³ Prior to abandoning the defense of contributory negligence and permitting contribution between tortfeasors, a party liable to an injured party could only recover from a commonly liable party by bringing a claim for indemnity. The liable party could not recover by bringing a claim for negligence because, before 1983, the doctrine of contributory negligence prohibited any party who caused

Construction Law, 54 DRAKE L. REV. 125, 137–43 (2005).

12. Dale B. Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31, 32 (1966).

13. The rule of contributory negligence was “[i]f the injured party contributed in any way . . . to the injury, there [could] be no recovery.” *Towberman v. Des Moines City Ry. Co.*, 211 N.W. 854, 854 (Iowa 1927) (quoting *Banning v. Chi., R. I. & P. Ry. Co.*, 56 N.W. 277, 279 (Iowa 1893)). See also *Chi. & N.W. Ry. Co. v. Chi., Rock Island & Pac. R.R. Co.*, 179 F. Supp. 33, 56 (N.D. Iowa 1959) (discussing contributory negligence in Iowa). The doctrine of contributory negligence precluded a commonly liable party from bringing a negligence claim against any other commonly liable party, and thus a commonly liable party could only bring a claim for indemnity, or after 1956, a claim for contribution. See *infra* Part II.C.

the injury from recovering.¹⁴ Moreover, before 1956, the liable party could not recover by bringing a claim for contribution because contribution was not allowed among tortfeasors.¹⁵ The prohibition on a commonly liable party stating a claim for negligence or contribution caused parties to seek indemnity based on the distinctions between active and passive negligence as well as primary and secondary liability.¹⁶ Absent a claim for negligence, contribution, or indemnity, a commonly liable party not named as a defendant could avoid any responsibility for a liability despite being at fault.¹⁷ Without indemnity, the injured party could effectively allocate responsibility for liabilities by naming certain defendants and omitting others.¹⁸ To avoid this result, courts used the doctrine of indemnity to prevent unjust enrichment by shifting responsibility for liabilities.¹⁹

14. *Chi. & N.W. Ry. Co.*, 179 F. Supp. at 56; *see* *Constantine v. Scheidel*, 90 N.W.2d 10, 13 (Iowa 1958); *City of Des Moines v. Des Moines Water Co.*, 175 N.W. 821, 824 (Iowa 1920).

15. *See infra* Part II.C.

16. *Chi. & N.W. Ry. Co.*, 179 F. Supp. at 60. The United States District Court for the Northern District of Iowa stated:

Prior to the pronouncement of the Iowa Supreme Court in *Best v. Yerkes*, [77 N.W.2d 23 (Iowa 1956)], that there could be contribution among concurrent tortfeasors, a concurrent tortfeasor who had discharged a common liability was, under the Iowa law, faced with an all-or-nothing situation. Because of that situation, a concurrent tortfeasor who had discharged the common liability but who was not free from personal fault generally tried to fit his claim into one of the indemnity semantic cubicles, more generally the “active-passive” or “primary-secondary” cubicle, and the courts in Iowa were continually being urged to allow indemnity upon the theory that the indemnity claimant had successfully fitted his claim into one of those cubicles. In many such cases the claimant, while unable to establish a claim for indemnity, did establish a strong case for contribution, but contribution was regarded as not being available.

Id.

17. *See Koppinger v. Cullen-Schiltz & Assocs.*, 513 F.2d 901, 910 (8th Cir. 1975) (“In short, this is not a case where the entire liability for the loss should rest on one of the parties. The record is replete with evidence of negligence against all three defendants.”(citations omitted)); *Chi. & N.W. Ry. Co.*, 179 F. Supp. at 59–60.

18. *See, e.g., Chi. & N.W. Ry. Co.*, 179 F. Supp. at 722–23. *See generally* *Goetzman v. Wichern*, 327 N.W.2d 742, 752–53 (Iowa 1982) (adopting the principles of comparative fault).

19. *See Chi. & N.W. Ry. Co.*, 179 F. Supp. at 60.

A. *Prohibiting an Intentional Tortfeasor from Seeking Contribution or Indemnity*

Merryweather v. Nixan set forth the English rule prohibiting an intentional tortfeasor from seeking contribution.²⁰ It precluded intentional tortfeasors from seeking contribution for any liability resulting from an intentional tort because the law offered no relief to intentional tortfeasors.²¹ Moreover, intentional tortfeasors could not seek indemnity because public policy demanded that wrongful acts be deterred.²² The English courts restricted the scope of the *Merryweather* rule to the denial of restitution to intentional tortfeasors.²³

20. *Merryweather v. Nixan*, (1799) 8 T.R. 185, 101 Eng. Rep. 1337 (K.B.). *But see* *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 170 (Iowa 1984) (extending the *Merryweather* rule to reckless tortfeasors). This extension of the *Merryweather* rule was later made ineffective by the enactment of Iowa Code Section 668.1(1), which includes recklessness in the definition of fault. IOWA CODE § 668.1(1) (2005) (including recklessness in the definition of fault).

21. *Best v. Yerkes*, 77 N.W.2d 23, 27 (Iowa 1956). In *Best*, the court stated:

The origin of the rule that such contribution may not be had is apparently in the English case of *Merryweather v. Nixon* [sic]. The logic behind it was said to be that where two persons are each guilty of an intentional wrong toward a third party, and one is compelled to bear the whole or an unequal share of the burden of recompense, the law will leave them where it finds them; it will not interfere to settle controversies between such wrongdoers.

Id. (citation omitted).

22. *Id.* at 28; *see also* *Olan Mills, Inc. v. Linn Photo Co.*, 795 F. Supp. 1423, 1437 (N.D. Iowa 1991) (“Indemnity is not available where there has been a showing of an intentional wrong.”), *rev'd on other grounds*, 23 F.3d 1345 (8th Cir. 1994); *Wright v. Haskins*, 260 N.W.2d 536, 539 (Iowa 1977) (quoting *Judson v. Peoples Bank & Trust Co. of Westfield*, 110 A.2d 24, 34 (N.J. 1954)); *Horrabin v. Des Moines*, 199 N.W. 988, 990 (Iowa 1924). In *Judson v. Peoples Bank & Trust Co. of Westfield*, Justice William J. Brennan Jr., then of the New Jersey Supreme Court, cited authorities questioning the logic of *Merryweather*. *Judson*, 110 A.2d at 34.

23. WILLIAM L. PROSSER, *LAW OF TORTS* § 50 at 305–06 (1971); *see also* *Reimers v. Honeywell, Inc.*, 457 N.W.2d 336, 339 (Iowa 1990) (noting contribution and indemnity may be available as remedies when the liability is independent of the intentional tort).

B. *Prohibiting a Negligent Tortfeasor from Seeking Contribution or Indemnity*

Iowa courts adopted an expanded version of the *Merryweather* rule.²⁴ In addition to forbidding intentional tortfeasors from seeking contribution,²⁵ Iowa courts did not allow contribution among negligent tortfeasors until 1956.²⁶ Prior to 1956, the general rule was “no contribution between joint tort-feasors.”²⁷ In 1951, the Iowa Supreme Court stated “in the absence of [a] statute there can be no contribution or indemnity between joint tort-feasors.”²⁸

The general rule refusing to permit contribution or indemnity among tortfeasors was subject to numerous exceptions.²⁹ Some exceptions to the general rule forbidding contribution and indemnity rested “upon reasons at least as forcible as those which support[ed] the rule itself.”³⁰ Iowa courts routinely permitted indemnity between joint tortfeasors when the parties shared a liability, yet were not equally at fault.³¹ These exceptions based

24. See E. Eugene Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 517–18 (1952) (discussing the English foundation of contribution among tortfeasors and its presence in American law).

25. *Horrabin*, 199 N.W. at 989 (“Where two parties commit an unlawful act involving moral turpitude or delinquency to the injury of another, they are equally guilty, and as between them the law will not inquire into their relative delinquency or compel contribution at the instance of one who has paid the damages.”).

26. *Best*, 77 N.W.2d at 27. *But see Horrabin*, 199 N.W. at 989 (“But if [the joint tortfeasors’] act be merely *malum prohibitum*, and is in no respect immoral, while they are both liable to one injured by their unlawful act, if one has paid the damages the law will not refuse as between the wrongdoers to determine their relative guilt and administer justice between them.”).

27. *Best*, 77 N.W.2d at 27; *see also Chi. & N.W. Ry. Co. v. Chi., Rock Island, & Pac. R.R. Co.*, 179 F. Supp. 33, 59–60 (N.D. Iowa 1959) (“Although the Iowa Supreme Court had never expressly so held, many members of the Iowa Bar and many Iowa trial judges had long assumed that there could be no contribution between joint tortfeasors.”); *Pfarr v. Standard Oil Co.*, 146 N.W. 851, 853–54 (Iowa 1914); *Chi. & N.W. Ry. Co. v. Dunn*, 13 N.W. 722, 722 (Iowa 1882).

28. *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951).

29. *See, e.g., Chi. & N.W. Ry. Co.*, 179 F. Supp. at 60.

30. *Horrabin*, 199 N.W. at 989 (quoting THOMAS M. COOLEY, COOLEY ON TORTS 167 (2d ed. 1888)); *see Davis, supra* note 25, at 518 (“[S]ome writers, perhaps more correctly, speak of indemnity as the general rule with the joint tortfeasor doctrine as the exception.”).

31. *Rozmajzl*, 49 N.W.2d at 506.

on specific factual situations became the accepted grounds for indemnity.

The classic exception to the general rule forbidding indemnity between tortfeasors was when a passively negligent or secondarily liable indemnitee sought indemnity from an actively negligent or primarily liable indemnitor.³² The Iowa Supreme Court ordered indemnity on these grounds in *Chicago & Northwestern Railway Co. v. Dunn*.³³ In *Dunn*, a horse had wandered onto the railroad tracks because a neighbor had removed the gate installed by the railroad to keep animals off the tracks.³⁴ A locomotive struck the horse.³⁵ The owner of the horse could have brought a claim against the railroad or the neighboring landowner.³⁶ In an initial suit against the railroad, the owner of the horse recovered the value of the deceased horse.³⁷ In a later and separate suit against the neighbor, the railroad sought indemnity for the amount that it had paid to the owner of the horse.³⁸ The court ordered the neighbor to indemnify the railroad because, although the parties shared liability, the owner of the horse could have recovered from either the neighbor or railroad, and as between the neighbor and the railroad, the railroad was not a wrongdoer; thus, equity demanded the neighbor pay for the entire liability.³⁹

32. See *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980). In *Sweeny*, the court stated:

The active-passive negligence distinction is predicated on the principles governing primary-secondary liability generally. Active negligence is the negligent conduct of active operations. It involves some positive act or some breach of duty to act which is the equivalent of a positive act. It exists when the person seeking indemnity has personally participated in an affirmative act of negligence, was connected with a negligent act or omission by knowledge or acquiescence, or has failed to perform a precise duty in breach of an agreement. The crucial issue is whether the person seeking indemnity has participated in some manner in the conduct or omission which caused the injury beyond a mere failure to perform a duty imposed by law. In contract, passive negligence is nonfeasance or inaction, such as the failure to discover a dangerous condition or to perform a duty imposed by law. However, a negligent failure to act when one is charged with a duty to do so is active rather than passive negligence. The difference is qualitative rather than quantitative.

Id.

33. *Chi. & N.W. Ry. Co. v. Dunn*, 13 N.W. 722, 722–23 (Iowa 1882).

34. *Id.* at 722.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 723. The court ordered the neighboring landowner to indemnify the

Often, municipalities sought indemnity from tortfeasors when they incurred a liability by operation of a statute. For example, a citizen recovered \$2000 from a municipality for injuries suffered as a result of a street collapsing.⁴⁰ An adjoining landowner had been excavating under and near the street.⁴¹ In a suit for indemnity against the landowner, the municipality recovered both the personal injury judgment and the costs of defending the suit because the landowner had breached a duty owed to both the citizen and the municipality.⁴²

Claims for indemnity based on the distinction between active and passive negligence and primary and secondary liability have been rejected absent a disparity in culpability between the indemnitor and indemnitee.⁴³ For example, in *City of Des Moines v. Barber Asphalt Co.*, the court rejected a claim for indemnity brought by a municipality for a liability resulting from cracks in the pavement.⁴⁴ The municipality had entered into a contract with a road contractor to repair cracks in a public road or to pay the reasonable cost of repairs.⁴⁵ The contractor failed to repair the road

railroad even though the injury to the horse resulted from an act by the railroad and a failure to act by the neighbor. *Id.* The court flexibly interpreted the distinction between active and passive negligence and primary and secondary liability to distribute responsibility for liabilities according to the culpability of the parties.

40. *City of Ottumwa v. Parks*, 43 Iowa 119, 119 (1876).

41. *Id.*

42. *Id.* at 123; The Iowa Supreme Court in *City of Des Moines v. Barnes*, 30 N.W.2d 170, 174–75 (Iowa 1947) held that Iowa Code Section 389.12 required the municipality “to keep the streets ‘open and in repair and free from nuisances’” and the common law held a property owner liable for “negligence in creating and maintaining the dangerous condition.” *Id.* at 173–74. The Iowa Supreme Court characterized the liability of the property owner as primary and the liability of the municipality as secondary, and ordered indemnity on those grounds. *Id.*

43. *See, e.g., Weidert v. Monahan Post Legionnaire Club, Inc.*, 51 N.W.2d 400, 404–05 (Iowa 1952). In *Weidert*, water streaming down from the second and third floors of a building damaged merchandise located on the first floor. *Id.* at 400–01. The first floor tenant brought an action against the tenant that occupied the second and third floors. *Id.* at 400. The court held the upstairs tenant had a viable claim for indemnity against the plumber who had performed repairs in the hours preceding the leak. *Id.* at 404–05.

44. *City of Des Moines v. Barber Asphalt Co.*, 208 F. 828, 831–32 (S.D. Iowa 1913).

45. *Id.* at 829 (setting forth contract text stating that “the contractor will, within ten days from the time of being notified of such defect, make the same good *or* will pay to the city of Des Moines the reasonable cost of remedying such defect” (internal quotation marks omitted)).

after the municipality had given notice of the cracks.⁴⁶ An individual then slipped and recovered from the municipality.⁴⁷ The municipality could not seek indemnity because neither party was actively negligent; rather, both parties were passively negligent.⁴⁸ The court left the parties as it had found them.⁴⁹ In contrast, in *Franzen v. Dimock Gould & Co.*, an individual walking on a public sidewalk slipped on ice in a private driveway that crossed the sidewalk.⁵⁰ The injured person brought an action against the corporation and the municipality.⁵¹ The corporation was primarily liable and had to indemnify the municipality.⁵² The disparity in culpability between the indemnitor and indemnitee explains why indemnity was ordered in *Franzen* but not in *Barber Asphalt*.

In addition to permitting indemnity based on disparate culpability, courts have ordered indemnity based on a disparity in duties between the indemnitor and indemnitee. In *City of Des Moines v. Des Moines Water Co.*, a municipality obtained indemnity from a water company for the costs of settling a personal injury claim.⁵³ The municipality and an individual's estate settled a claim for a fall caused by a protruding water stop located near a sidewalk.⁵⁴ The water company owed a duty to the municipality to construct and maintain the water stop so as to not create a nuisance because the duty was implicit in the license granted by the municipality to use public lands for private profit.⁵⁵ The court concluded that "as between the company and the city, the primary duty to so maintain the pipe as to avoid endangering the walk for public use was upon the former."⁵⁶

The disparity in duties between the indemnitor and indemnitee has also supported claims for indemnity in the private sector. In *Pfarr v.*

46. *Id.*

47. *Id.*

48. *Id.* at 831–32.

49. *Id.* at 832.

50. *Franzen v. Dimock Gould & Co.*, 101 N.W.2d 4, 6 (Iowa 1960).

51. *Id.*

52. *Id.* at 7, 10–11.

53. *City of Des Moines v. Des Moines Water Co.*, 175 N.W. 821, 824–25 (Iowa 1920). The trial court dismissed the action brought by the municipality against the water company "under the familiar rule that one joint tortfeasor cannot maintain an action to enforce contribution from another." *Id.* at 824.

54. *Id.* at 821.

55. *Id.* at 823–24 (discussing *Wash. Gas Light Co. v. D.C.*, 161 U.S. 316 (1896)).

56. *Id.* at 824.

Standard Oil Co., a general store purchased and resold defective oil.⁵⁷ The oil contained gasoline, and the distributor of the oil was aware it did not conform to specifications.⁵⁸ An explosion occurred as a result of the defect, killing four people and injuring another.⁵⁹ The victims were able to recover against the general store.⁶⁰ The Iowa Supreme Court concluded the distributor was more culpable than the retailer for the defective oil, and thus ordered the distributor to indemnify the retailer.⁶¹

In contrast to claims brought by municipalities, in *Horrabin v. City of Des Moines*, the Iowa Supreme Court ordered a municipality to indemnify a bridge contractor for damages resulting from a trespass on private property.⁶² The municipality and bridge contractor had entered into a contract to build a bridge across a river.⁶³ The contract required the municipality to procure the necessary right-of-way.⁶⁴ Despite never obtaining the right-of-way, a municipal engineer directed the contractor to begin work.⁶⁵ As a result, the owner of the land on which the contractor trespassed recovered a judgment against the contractor.⁶⁶ The contractor then sought indemnity from the municipality.⁶⁷ The court stated, “[w]here one is employed or directed by another to do an act not manifestly wrong, the law implies a promise of indemnity by the principal for damages resulting proximately from the good-faith execution of the agency.”⁶⁸ For this reason, the court ordered the municipality to indemnify the contractor for the liability resulting from the trespass.⁶⁹

The Iowa Supreme Court also required a bus operator to indemnify a

57. Pfarr v. Standard Oil Co., 146 N.W. 851, 851–52 (Iowa 1914).

58. *Id.* at 852.

59. *Id.*

60. *Id.*

61. *Id.* at 853.

62. *Horrabin v. City of Des Moines*, 199 N.W. 988, 990–91 (Iowa 1924).

63. *Id.* at 989.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 990; *see also* *Hathaway v. Sioux City*, 57 N.W.2d 228, 233–34 (Iowa 1953) (ordering a municipality to indemnify a contractor when both shared liability to an adjacent property owner for damages resulting from removal of a lateral support because the municipality ordered the work and had a duty to protect the landowner).

69. *Horrabin*, 199 N.W. at 990–91.

ticket seller when the parties shared liability for an injury.⁷⁰ A woman suffered injuries when a car crashed into the bus.⁷¹ She named both the seller and the operator as defendants and recovered against both.⁷² Between the seller and the operator, the operator was primarily at fault and the seller, therefore, was entitled to indemnity from the operator.⁷³ Among the seller, operator, and driver, however, the driver was primarily at fault and either the seller or operator, therefore, could seek indemnity from the driver.⁷⁴ The court permitted indemnity because the owner of the bus was at fault only by operation of a statute, while the operator of the bus was “the active perpetrator of the wrong.”⁷⁵

In a ruling later overturned on other grounds, the Iowa Supreme Court held the remedy for a breach of an independent duty is indemnity in favor of the party to whom the duty was owed.⁷⁶ In *Blackford v. Sioux City Dressed Pork, Inc.*, an independent contractor agreed to clean a meat packing plant and accepted responsibility for his employees.⁷⁷ An employee of the independent contractor suffered an injury and then recovered from the meat packing plant.⁷⁸ The court ruled that the independent contractor had breached an independent duty “to see that the work was done safely.”⁷⁹ Therefore, the court ordered the independent contractor to indemnify the meat packing plant for the liability owed to the

70. *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 508 (Iowa 1951).

71. *Id.* at 504.

72. *Id.* at 503.

73. *Id.* at 506.

74. *Id.*; see also *Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co.*, 73 N.W.2d 22, 26 (Iowa 1955) (“A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.” (quoting RESTATEMENT (FIRST) OF RESTITUTION § 96 (1937))). The bus driver had a duty to indemnify both the seller of the ticket and owner of the bus for any liability resulting from the crash, even though the driver had been authorized to operate the bus in a manner similar to the manner in which the driver was operating the bus at the time of the accident. *Rozmajzl*, 49 N.W.2d at 506–07.

75. *Id.* at 506.

76. *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 563–64 (Iowa 1963), *overruled by* *Woodward Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 787 (Iowa 1987).

77. *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 560 (Iowa 1963).

78. *Id.* at 559.

79. *Id.* at 562.

injured employee.⁸⁰ The court concluded the independent contractor had the primary duty of care compared to the meat packing plant.⁸¹

Indemnity based on the distinction between active and passive negligence or primary and secondary liability was permitted when the indemnitor was relatively more culpable than the indemnitee or when the indemnitor had breached a duty owed to the indemnitee.⁸² Judge Learned Hand described this type of indemnity as an “extreme form of contribution.”⁸³ Indemnity based on these distinctions presupposed the indemnitor and indemnitee shared a common liability.⁸⁴ Even though commonly liable parties could not bring a claim for contribution prior to 1956 or negligence prior to 1982,⁸⁵ by bringing a claim for indemnity, the indemnitee could shift the entire responsibility for any shared liability to the indemnitor even though both parties were at fault. Under this regime, the indemnitee’s lesser culpability did not offset or reduce the indemnity award.⁸⁶

In 1964, United States District Court Judge William C. Hanson surveyed the law of indemnity in Iowa and outlined specific situations where courts had permitted indemnity based on the distinction between active and passive negligence or primary and secondary liability.⁸⁷ Specifically, in *Epley v. S. Patti Construction Co.*, Judge Hanson concluded Iowa courts recognized the right of a negligent party, in the absence of a

80. *Id.* at 565.

81. *Id.* at 562.

82. *See, e.g.*, *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir. 1951).

83. *Id.*; *see also Hansen III*, 630 N.W.2d 818, 826 (Iowa 2001) (“This court perceived the active-passive theory as ‘an extreme form of contribution,’ and in a sense, the theory ‘was a precursor of modern systems of comparative fault because it attempted to transfer ultimate legal liability to the defendant truly in the wrong.’” (quoting *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 309 (1966))); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 501 (5th Cir. 1982).

84. *See Am. Trust & Sav. Bank v. United States Fid. & Guar. Co.*, 439 N.W.2d 188, 189 (Iowa 1989) (addressing contribution); *Rees v. Dallas County*, 372 N.W.2d 503, 506 (Iowa 1985) (concluding that “to allow indemnity based on active-passive negligence in the absence of common liability would be inconsistent with the statutory scheme of chapter 668”).

85. *See supra* text accompanying note 13; *infra* Part II.C.

86. *See, e.g.*, *Hawkins Constr. Co. v. First Fed. Sav. & Loan Ass’n*, 416 F. Supp. 388, 397 (S.D. Iowa 1976) (granting indemnity to the owner of the building for damages to an adjacent structure based on the active and primary negligence of the building contractor even though the owner was negligent).

87. *See Epley v. S. Patti Constr. Co.*, 228 F. Supp. 1, 5 (N.D. Iowa 1964).

contract for indemnity, to be indemnified in four situations:

- (1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.
- (2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.
- (3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.
- (4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.⁸⁸

Each specific situation arose out of a passively negligent or secondarily liable indemnitee seeking indemnity from an actively negligent or primarily liable indemnitor.⁸⁹ Moreover, each situation was a specific example of the general principle that actively negligent or primarily liable parties must indemnify passively negligent or secondarily liable parties for any common liability.⁹⁰ Courts permitted passive tortfeasors to seek indemnity from active tortfeasors to avoid the inequitable result of holding

88. *Id.* (citing *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 565 (Iowa 1963) (ordering an employer to indemnify a third-party because the employer breached an implied duty to perform the work in a safe manner); *Franzen v. Dimock Gould & Co.*, 101 N.W.2d 4, 10 (Iowa 1960) (finding sufficient evidence to support a municipality's claim for indemnity from an abutting property owner pursuant to common law and Iowa Code Section 368.34); *Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co.*, 73 N.W.2d 22, 26 (Iowa 1955) (quoting RESTATEMENT (FIRST) OF RESTITUTION § 96 (1937)); *Weidert v. Monahan Post Legionnaire Club*, 51 N.W.2d 400, 404–05 (Iowa 1952) (ordering a plumber to indemnify the upstairs tenant for damages paid to the downstairs tenant resulting from defective plumbing); *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951) (requiring the owner and driver of a bus to indemnify the seller of the bus ticket for liabilities resulting from an accident).

89. *See Epley*, 228 F. Supp. at 5; *Blackford*, 118 N.W.2d at 565; *Franzen*, 101 N.W.2d at 10; *Iowa Home Mut. Cas. Co.*, 73 N.W.2d at 26; *Weidert*, 51 N.W.2d at 404–05.

90. *See Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 309 (Iowa 1966) (“[T]hose instances in which the party passively negligent has been allowed indemnity from the party actively negligent . . . involve concurrent negligence (of different degrees) of the tort-feasors toward the injured party.”).

passive tortfeasors liable for the entire amount.⁹¹

C. Allowing Tortfeasors to Seek Contribution

Best v. Yerkes involved a three-car accident caused by the negligent acts of two of the three drivers.⁹² The court examined the history of the *Merryweather* rule and concluded the rule prohibiting contribution between tortfeasors should be limited to intentional wrongdoers, and to prevent unjust enrichment, a negligent tortfeasor should be allowed to recover from other tortfeasors.⁹³

After *Best*, responsibility for a liability was distributed equally, that is, the responsibility for the liability was apportioned equally among the liable parties regardless of the relative faults of each party.⁹⁴ The advantage of this formula was that courts avoided inquiring into the relative wrongdoing of the parties. The disadvantages were that responsibility for liabilities was not distributed based on culpability of each liable party and that similarly situated parties had to be grouped together for the purpose of distributing liability.⁹⁵ Under this framework, responsibility for liability was distributed based on the number of liable parties regardless of the degree of

91. See *Rees v. Dallas County*, 372 N.W.2d 503, 506 (Iowa 1985). The Court of Appeals for the Fifth Circuit stated:

The principle that an actively negligent tortfeasor should be required to indemnify a tortfeasor only passively negligent was developed to alleviate the harsh rule that prohibited apportionment among tortfeasors. In a sense, then, the indemnity rule was a precursor of modern systems of comparative fault because it attempted to transfer ultimate legal liability to the defendant truly in the wrong.

Loose v. Offshore Navigation, Inc., 670 F.2d 493, 501 (5th Cir. 1982) (footnote omitted).

92. *Best v. Yerkes*, 77 N.W.2d 23, 25 (Iowa 1956).

93. *Id.* at 28–29; see also *Comments on Recent Cases*, 42 IOWA L. REV. 450, 454 (“The logic of permitting contribution is that it is obviously unfair to force one defendant to bear an entire loss for which two defendants are equally, unintentionally responsible.”).

94. *Best*, 77 N.W.2d at 29 (establishing the principle of equitable contribution in Iowa); see, e.g., *Schnebly v. Baker*, 217 N.W.2d 708, 731 (Iowa 1974) (“Ordinarily the total amount of the judgment is divided equally among those liable to the injured person.”).

95. *Schnebly*, 217 N.W.2d at 731 (“When a person is vicariously liable, that person and the tortfeasor whose negligence is imputed to him are considered together for contribution purposes.”).

culpability, the theory of liability, or the relative duties of the parties.⁹⁶

After negligent tortfeasors were allowed to seek contribution from other commonly liable parties, courts began using contribution, rather than indemnity, to distribute responsibility among negligent parties.⁹⁷ Contribution replaced indemnity as the typical cause of action used to prevent unjust enrichment.⁹⁸ Nevertheless, in light of the decision to permit contribution, indemnity remained important. After permitting contribution in *Best*, the Iowa Supreme Court articulated several reasons to permit indemnity in light of the decision to permit contribution. Specifically, in *Iowa Power & Light Co. v. Abild Construction Co.*, the court stated: “There are several different reasons for permitting indemnity: (1) express contract; (2) vicarious liability (respondeat superior or the statutory liability imposed on the owners of automobiles); (3) breach of an independent duty running from the employer to the third party; [and] (4) active (primary) as opposed to passive (secondary) negligence.”⁹⁹

The last three of these reasons all seek to prevent unjust enrichment and to place final responsibility for the liability “where equity would lay the ultimate burden.”¹⁰⁰ In *Peters v. Lyons*, the Iowa Supreme Court discussed both the reasons set forth in *Abild* and the common law grounds for indemnity set forth in *Epley*.¹⁰¹ In *Peters*, a man had purchased a leash for his large dog from K-Mart.¹⁰² The leash broke and the dog attacked

96. *Id.*

97. *See, e.g.*, *Constantine v. Scheidel*, 90 N.W.2d 10, 13 (Iowa 1958).

98. *See Hawkeye-Sec. Ins. Co. v. Lowe Constr. Co.*, 99 N.W.2d 421, 426 (Iowa 1959).

99. *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 308 (Iowa 1966) (citations omitted), *abrogated by* *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989) (rejecting indemnity based on the distinction between active and passive negligence). Although both the vicarious liability and breach of independent duty grounds for permitting indemnity developed when courts permitted indemnity based on the distinction between active and passive negligence and primary and secondary liability, these two reasons for permitting indemnity are not examples based on the distinction between active and passive negligence or primary and secondary liability because the grounds do not depend on the negligence or common liability of the indemnitor and indemnitee. *See infra* Part III.D.

100. *Hunt v. Ernzen*, 252 N.W.2d 445, 447–48 (Iowa 1977).

101. *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969); *Epley v. S. Patti Constr. Co.*, 228 F. Supp. 1, 5 (Iowa 1964).

102. *Peters*, 168 N.W.2d at 761.

and injured an individual.¹⁰³ Section 351.28 of the Iowa Code imposes absolute liability for any injuries on the owner of the dog.¹⁰⁴ Regardless, the dog owner had a claim for indemnity against K-Mart because the sale of the defective leash created a dangerous condition and because “[o]ne who is liable only by reason of a duty imposed by law for the consequences of another’s negligence may recover over against the active perpetrator of the wrong.”¹⁰⁵ Here, K-Mart was actively negligent in failing to warn about the danger and failing to inspect the product, while the dog owner was only passively negligent.¹⁰⁶ *Peters* provides an excellent example of a court reaching a just result by applying the amorphous concepts of active and passive negligence.¹⁰⁷

D. Adoption of Comparative Fault

The defense of contributory negligence was eliminated in *Goetzman v. Wichern* in favor of a system of pure comparative fault designed to “assign[] responsibility for damages in proportion to a party’s fault in proximately causing them.”¹⁰⁸ The principles of equity, however, demanded that responsibility for liabilities be distributed according to the culpabilities of the parties.¹⁰⁹

As a result, the Iowa Legislature responded to *Goetzman* by enacting chapter 668 of the Iowa Code—a modified system of comparative fault.¹¹⁰ This section provides:

A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. . . . The basis for contribution is each person’s equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with section 668.3.¹¹¹

103. *Id.*

104. *Id.* at 766; *see* IOWA CODE § 351.28 (2005).

105. *Peters*, 168 N.W.2d at 766 (quoting *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951)).

106. *Id.* at 768.

107. *See generally* *Hawkeye-Sec. Ins. Co. v. Lowe Constr. Co.*, 99 N.W.2d 421, 426 (Iowa 1959) (explaining that the terms active and passive are difficult to define).

108. *Goetzman v. Wichern*, 327 N.W.2d 742, 752 (Iowa 1982).

109. *Thomas v. Solberg*, 442 N.W.2d 73, 76 (Iowa 1989).

110. IOWA CODE § 668 (2005).

111. *Id.* § 668.5(1).

To determine the degree of fault for each party, “the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed.”¹¹²

III. THE LAW OF CONTRIBUTION

Iowa Code Section 668.5 codified the common law right of contribution. Contribution requires parties who are commonly liable “to share the burden of damages.”¹¹³ To state a claim for contribution, a party must prove the injured third party had a cause of action against itself as well as the party from whom contribution is sought.¹¹⁴ The law will not support a claim for contribution if the party voluntarily made payments.¹¹⁵

A claim for contribution may be brought “either in the original action or by a separate action brought for that purpose.”¹¹⁶ A party who is or may be liable can settle or defend the underlying claim and seek contribution in the same or a different suit.¹¹⁷ Settling the dispute without adjudicating fault requires the party seeking contribution to prove its own liability, the liability of the party from whom it seeks contribution,¹¹⁸ the reasonableness of the settlement amount,¹¹⁹ and that it obtained a release.¹²⁰ Agreeing to a

112. *Id.* § 668.3(3).

113. *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 21 (Iowa 2000); *see also Boyle v. Burt*, 179 N.W.2d 513, 515 (Iowa 1970) (stating contribution “indicates liability for loss occasioned by a tort is shared by those responsible for it”).

114. *Nat'l Farmers Union Prop. & Cas. Co. v. Nelson*, 147 N.W.2d 839, 843 (Iowa 1967); *see also Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 9–10 (Iowa 1970) (“We have held where a party seeking contribution makes a settlement with the injured third party, he must plead and prove his own actionable negligence. Further, he must prove the negligence of the party from whom contribution is sought.”).

115. *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 574 (Iowa 2002).

116. IOWA CODE § 668.5(1).

117. *See id.* § 668.5.

118. *Buchop v. Gen. Growth Prop. & Gen. Growth Mgmt. Corp.*, 235 N.W.2d 301, 302 (Iowa 1975) (citing *Ke-Wash*, 177 N.W.2d at 10). *Cf. McNally*, 648 N.W.2d at 574.

119. *Cook v. State*, 476 N.W.2d 617, 622 n.2 (Iowa 1991) (stating a party seeking to defeat a claim for contribution cannot argue the settlement is too low); *Thomas v. Solberg*, 442 N.W.2d 73, 75 (Iowa 1989).

120. *Cincinnati Ins. Co. v. Evans*, 493 N.W.2d 798, 800 (Iowa 1992); *Aid Ins. Co. v. Davis County*, 426 N.W.2d 631, 632 (Iowa 1988). A release discharges the liability of the settling defendant. *Thomas*, 442 N.W.2d at 76. The settling plaintiff

settlement with a tortfeasor reduces the recovery of the injured party in proportion to the fault of the settling tortfeasor.¹²¹

A. *The Scope of Iowa Code Chapter 668*

A claim for contribution requires fault on behalf of the party from whom contribution is sought. Section 668.1(1) of the Iowa Code defines fault as any “acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.”¹²² Strict tort liability includes liability for abnormally dangerous activities, liability for products, and negligence per se.¹²³ Breach of contract¹²⁴ and intentional tort claims¹²⁵ are beyond the purview of Iowa Code Chapter 668. Moreover, any claim for punitive damages is outside the scope of Iowa’s Comparative Fault Act.¹²⁶

B. *Contribution Requires Common Liability*

A party may seek contribution from another party only if they share common liability.¹²⁷ Parties share common liability when an injured

bears the upside and downside risk of settling because a recovery from another tortfeasor will be reduced according to the proportion of fault attributable to the settling defendants. *See id.* at 75.

121. *Beeck v. Aquaslide ‘N’ Dive Corp.*, 350 N.W.2d 149, 167 (Iowa 1984) (“Consideration received from a joint tortfeasor reduces pro tanto the recovery against the other tortfeasors. This includes a party the plaintiff could have sued but in fact did not . . . though it does not include payments by non-wrongdoers.”(citation omitted)). Thus, after settling with a commonly liable party, the remaining recovery of the injured party (or the liability of the non-settling parties) is the product of the total damages suffered multiplied by the percentage of fault attributable to the non-settling and commonly liable tortfeasors. *Thomas*, 442 N.W.2d at 78.

122. IOWA CODE § 668.1; *see Chi. Cent. & Pac. R.R. Co. v. Union Pac. R.R. Co.*, 558 N.W.2d 711, 716 (Iowa 1997).

123. *Slager v. HWA Corp.*, 435 N.W.2d 349, 355 (Iowa 1989) (quoting UNIF. COMPARATIVE FAULT ACT § 1, cmt. 12, U.L.A. 39 (Supp. 1988)).

124. *State v. Paxton*, 674 N.W.2d 106, 109 (Iowa 2004).

125. *See, e.g., Freeman v. Ernst & Young*, 516 N.W.2d 835, 837 (Iowa 1994); *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 180–81 (Iowa 1990).

126. *Godbersen v. Miller*, 439 N.W.2d 206, 208 (Iowa 1989); *see also Reimers v. Honeywell*, 457 N.W.2d 336, 339 (Iowa 1990) (“Punitive damages lie outside the sweep of the comparative fault Act.”).

127. *McDonald v. Delhi Sav. Bank*, 440 N.W.2d 839, 841 (Iowa 1989); *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 189 (Iowa 1989).

plaintiff may enforce liability against each party individually.¹²⁸ In other words, common liability exists among parties when the injured party has a cause of action for the same harm against each party.¹²⁹ A party cannot claim contribution from a party who may only be liable to that party yet not the injured plaintiff.¹³⁰ Rather, to state a claim for contribution, the liability of the party from whom contribution is sought must be to the injured party.¹³¹

Common liability does not depend on the injured party having an identical cause of action against each commonly liable party.¹³² For example, parties can share common liability when an injured party may state a claim for breach of contract,¹³³ tortious conduct,¹³⁴ or a violation of a

128. *McDonald*, 440 N.W.2d at 841.

129. *See Shonka v. Campbell*, 152 N.W.2d 242, 245 (Iowa 1967) (“This common liability may be joint or several, but under our prior holdings in order that a right of contribution exist, the injured party must have a legally recognized remedy against both the party seeking contribution and the party from whom contribution is sought.”). *Compare McDonald*, 440 N.W.2d at 841, and *Rees v. Dallas County*, 372 N.W.2d 503, 505 (Iowa 1985) (“A common liability exists when the injured party has a legally cognizable remedy against both the party seeking contribution and the party from whom contribution is sought.”), with *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 543 (Iowa 2002) (“[A]ccording to the joint and several liability rule, each defendant was liable for the total amount of the judgment.”).

130. *Rees*, 372 N.W.2d at 504 (“Iowa has long adhered to the commonly accepted theory that contribution is available between concurrent tortfeasors only when those tortfeasors have a common liability to the injured party.”).

131. *See, e.g., State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 153 (Iowa 2001).

132. *Id.* at 152–53; *Allied Mut. Ins. Co. v. State*, 473 N.W.2d 24, 27 (Iowa 1991).

133. *See, e.g., Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1280 (N.D. Iowa 2000) (stating that where a duty separate from a contractual duty is breached, a tort action may arise); *Haupt v. Miller*, 514 N.W.2d 905, 910 (Iowa 1994) (“[W]e recognized that under some circumstances, breach of a contractual duty may give rise to an independent action in tort.”); *Farris v. Gen. Growth Dev. Corp.*, 354 N.W.2d 251, 255 (Iowa 1984) (stating that “where a contract imposes a duty upon a person, the neglect of that duty is a tort”); *Giarratano v. Weitz Co.*, 147 N.W.2d 824, 832 (Iowa 1967) (“It appears to be well settled in Iowa that where a contract imposes a duty upon a person, the neglect of that duty is a tort, and an action ex delicto will lie.”). To state a claim for contribution based on a breach of contract, the breach must be able to be remedied either in contract or tort. Unless the breach of contract may be remedied under tort, and thus would be within the purview of Iowa Code Chapter 668, a court is faced with distributing liability between a tortfeasor and someone who breached a contract even though the principles of comparative fault do not apply to breaches of contract.

134. *See discussion infra* Part III.D.1–3.

statute.¹³⁵ Nonetheless, common liability only exists among parties when the parties are “liable to the injured party for the same damage” that is, the measurement of liability must be the same for each commonly liable party.¹³⁶ Common liability only exists when the measurement of liability is the same for each liable party.¹³⁷ For example, parties do not share common liability when the injured party can seek restitution from one party and damages from another because “the burdens placed on the parties are different.”¹³⁸

Whether the parties are joint tortfeasors is not relevant to determining whether the parties share common liability.¹³⁹ For example, even though a third party and an employer jointly created a dangerous condition that caused an injury to an employee, the third party cannot seek indemnity from the employer for injuries suffered by an employee because the employer has a defense to common liability.¹⁴⁰ Without liability to the injured party, a party does not share common liability and has no duty to contribute.¹⁴¹ When a party has a defense to common liability, the party’s fault cannot be considered by the trier of fact in determining the liability of the parties who do share common liability.¹⁴² Additionally, parties who are only severally liable for an obligation do not share common liability.¹⁴³ Parties who are severally liable are only responsible “for the portion of the total harm” they caused.¹⁴⁴

135. See discussion *infra* Part III.D.5.

136. *Unisys Corp.*, 637 N.W.2d at 153 (holding a party liable for breaching a contract could not seek contribution from a party who had reaped some of the rewards of the breach because the parties did not share similar burdens).

137. *Id.*

138. *Id.*

139. See, e.g., *Chi. Cent. & Pac. R.R. Co. v. Union Pac. R.R. Co.*, 558 N.W.2d 711, 715 (Iowa 1997).

140. See, e.g., *Cochran v. Gehrke Constr. (Cochran I)*, 235 F. Supp. 2d 991, 1005, 1008 (N.D. Iowa 2002).

141. See, e.g., *Chi. Cent. & Pac. R.R. Co.*, 558 N.W.2d at 715; *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 10 (Iowa 1970) (stating when a party is seeking contribution, it must “prove the negligence of the party from whom contribution is sought”); cf. *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 574 (Iowa 2002) (“Thus, if an indemnitee had no liability for the loss in the inception, then any payment made by the indemnitee is considered purely voluntary and not subject to indemnification.”).

142. *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 706 (Iowa 1995).

143. *Unisys Corp.*, 637 N.W.2d at 154.

144. *Howell v. River Prods. Co.*, 379 N.W.2d 919, 922 (Iowa 1986) (quoting

C. Defenses to Common Liability

Iowa courts have refused to allow parties to seek contribution (or indemnity based on the distinction between active and passive negligence or primary and secondary liability) from those who have a special defense against the injured party.

The classic example of a special defense is Iowa's workers' compensation statute.¹⁴⁵ The Iowa Supreme Court has consistently held "no common liability exists between a third-party tortfeasor and an employer by virtue of [the Iowa] Workers' Compensation Act."¹⁴⁶ Section 85.20 of the Iowa Code provides that the Workers' Compensation Act is an employee's exclusive remedy against an employer for injuries arising from work, and the exclusive nature of the remedy precludes any liability in tort;¹⁴⁷ therefore, an employer cannot share liability in tort with a third-party tortfeasor.¹⁴⁸

The now repealed host-driver guest statute provided an injured guest only had a cause of action against the owner or operator of the automobile if the driver was drunk or reckless.¹⁴⁹ Absent drunkenness or recklessness, the injured party could not bring a claim against the owner or operator of the automobile, and thus the owner or operator did not share common liability with the driver for the guest's injuries.¹⁵⁰

The Iowa dram shop statute¹⁵¹ precludes an intoxicated patron from bringing a cause of action against a dram shop for injuries resulting from

RESTATEMENT (SECOND) OF TORTS § 881 (1979)).

145. IOWA CODE § 85.20 (2005).

146. *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 136 (Iowa 1984); accord *Larimer v. Raque Mfg. Co.*, 498 F. Supp. 37, 38–39 (S.D. Iowa 1980); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 310 (Iowa 1966).

147. IOWA CODE § 85.20.

148. See *infra* Part V.C. Even though an employer does not share common liability with a third party for an employee's injuries, a third party may disprove its own liability by proving the negligence of the employer was the sole proximate cause of the injury. By using the employer's negligence to deny, rather than mitigate liability, a third party is not circumventing the exclusivity of the workers' compensation statute.

149. 1984 Iowa Acts 344; *Shonka v. Campbell*, 152 N.W.2d 242, 244 (Iowa 1967).

150. *Shonka*, 152 N.W.2d at 245.

151. IOWA CODE § 123.92 (2005); see also *Slager v. HWA Corp.*, 435 N.W.2d 349, 352 (Iowa 1989) (holding comparative fault principles do not apply in dram shop cases).

his or her intoxication.¹⁵² A dram shop does not share common liability with a patron for the patron's own injuries.¹⁵³ Dram shops, however, share common liability with patrons for injuries to third parties caused by the acts of intoxicated patrons.¹⁵⁴

The relationship between an injured party and a tortfeasor may prevent the injured party from bringing a cause of action against the tortfeasor. For example, a wife cannot bring a loss of consortium claim against her husband¹⁵⁵ and a parent may not be able to bring a cause of action against his or her child.¹⁵⁶ Therefore, because certain plaintiffs cannot bring causes of action against related parties, the related parties cannot share common liability with a third-party tortfeasor.

Agreeing to a consent decree may preclude common liability. The Iowa Supreme Court stated, “[a consent decree] constitutes a special defense . . . which now bars any subsequent liability.”¹⁵⁷ This special defense has not, however, been expanded beyond an action to quiet title.

Although Iowa courts have not labeled it as a special defense, a party cannot seek contribution when another party from whom contribution is sought has a right of indemnity from the party seeking contribution.¹⁵⁸ Similarly, an insurer cannot seek contribution, indemnity, or recover by right of subrogation from its own insured.¹⁵⁹

D. Contribution as the Remedy for Active-Passive Negligence or Primary-Secondary Liability

Prior to the adoption of comparative fault, a passively negligent or

152. Rees v. Dallas County, 372 N.W.2d 503, 505 (Iowa 1985).

153. *Id.*; see also IOWA CODE § 123.94 (holding an insurer liable for the acts of an intoxicated person cannot seek indemnity or contribution from a dram shop).

154. Ayers v. Straight, 422 N.W.2d 643, 646–47 (Iowa 1988); see also Schreier v. Sonderleiter, 420 N.W.2d 821, 824 (Iowa 1988) (holding a dram shop that has paid more than its equitable share of a liability may seek contribution from another dram shop in proportion to relative fault).

155. McIntosh v. Barr, 397 N.W.2d 516, 517 (Iowa 1986).

156. Tel. Herald, Inc. v. McDowell, 397 N.W.2d 518, 520 (Iowa 1986).

157. McDonald v. Delhi Sav. Bank, 440 N.W.2d 839, 842 (Iowa 1989).

158. Stowe v. Wood, 199 N.W.2d 323, 326 (Iowa 1972); see also Hawkins Constr. Co. v. First Fed. Sav. & Loan Ass'n, 416 F. Supp. 388, 394 (S.D. Iowa 1976).

159. Universal Underwriters Ins. Co. v. Am. Family Ins. Group, 587 N.W.2d 224, 226 (Iowa 1998); Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d 767, 771 (Iowa 1989).

secondarily liable indemnitee could seek indemnity from an actively negligent or primarily liable indemnitor.¹⁶⁰ At first, courts permitted indemnity based on these grounds in several specific factual situations: when an indemnitee was only vicariously liable, when an indemnitee acted at the direction and in the interest of the indemnitor, when an indemnitor breached an independent duty owed to the indemnitee, and when an indemnitee incurred liability as a result of nonfeasance as compared to the misfeasance of the indemnitor.¹⁶¹

Over time, these factual situations have changed. Although they expanded to include products liability, liability for independent contractors, and violations of statutes,¹⁶² claims for indemnity based on vicarious liability or a breach of an independent duty have not been treated as claims for indemnity based on the distinction between active and passive negligence or primary and secondary liability.¹⁶³ These grounds for indemnity are different than the other grounds because claims for indemnity based on the vicarious nature of the liability or a breach of an independent duty depend upon the relationship between the indemnitor and indemnitee rather than negligence or fault of the indemnitor.¹⁶⁴

Recently, the Iowa Supreme Court held that indemnity based on the distinction between active and passive negligence or primary and secondary liability is “incompatible with ‘our statutory network of comparative fault.’”¹⁶⁵ To be consistent with Iowa Code Chapter 668 and

160. Iowa Power & Light Co. v. Abild Constr. Co., 144 N.W.2d 303, 309 (Iowa 1966).

161. Epley v. S. Patti Constr. Co., 228 F. Supp. 1, 5 (N.D. Iowa 1964).

162. See *infra* Part III.D.3–5.

163. See *infra* Part IV.A–B.

164. Hysell v. Iowa Pub. Serv. Co., 534 F.2d 775, 782 (8th Cir. 1976).

165. *Hansen III*, 630 N.W.2d 818, 823 (Iowa 2001) (quoting *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989)). When the court first reached this conclusion is not clear. Compare *State v. Philip Morris Inc.*, 577 N.W.2d 401, 406 (Iowa 1998) (“[C]ommon law indemnity is limited to circumstances where there is an express contract, vicarious liability, or a breach of an independent duty of the indemnitor to the indemnitee.”), *Am. Trust*, 439 N.W.2d at 190 (“abandon[ing] indemnity based on active-passive negligence”), and *Farmers Coop. Co. v. Stockdales’ Corp.*, 366 N.W.2d 184 (Iowa 1985) (abandoning the primary/active versus secondary/passive liability distinction because it is incompatible with comparative fault principles), with *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1, 576 (Iowa 2002) (restating the common law grounds for indemnity and discussing primary and secondary liability), *Britt-Tech Corp. v. Am. Magnetics Corp.*, 487 N.W.2d 671, 673 (Iowa 1992), and *Rees v. Werts Corp.*, 379 N.W.2d 1, 5

the principles of comparative fault, claims seeking restitution based on fault—such as claims for indemnity based on the distinctions between active and passive negligence or primary and secondary liability—should be brought as claims for contribution.¹⁶⁶ In contrast, claims seeking restitution based on grounds other than fault—such as claims based on vicarious liability or a breach of an independent duty—should be brought as claims for indemnity.¹⁶⁷ When parties are commonly liable because each party is at fault, contribution, not indemnity, is the appropriate remedy. Ordering indemnity based on the indemnitor's fault is incompatible with principles of comparative fault, because indemnity does not distribute responsibility for liabilities based on fault.¹⁶⁸

Although these reasons for permitting indemnity are no longer valid, the change may be one of form rather than substance because the party seeking restitution may now bring a contribution claim for the entire amount of a liability,¹⁶⁹ minus a nominal amount to reflect the party's own liability.¹⁷⁰ By shifting almost the entire responsibility for the liability, a claim for contribution can achieve effectively the same result as a claim for indemnity.¹⁷¹ Thus, claims that have historically been pleaded as claims for indemnity based on the distinction between active and passive negligence or primary and secondary liability should be pleaded as claims for

(Iowa 1985) (holding the Iowa Workers' Compensation statute bars claims for indemnity based on active-passive negligence against an employer).

166. See *supra* notes 134–37 and accompanying text.

167. See *infra* Part IV.A–B.

168. Permitting recovery by an indemnitee who is at fault shifts the entire responsibility to the indemnitor even though the indemnitee is at fault. See *Am. Trust*, 439 N.W.2d at 190 (“Under the principles of comparative fault, liability should be assessed and apportioned according to fault, each party bearing one's own share of the loss. Indemnity, on the other hand, shifts the entire loss of the passively-negligent party to the actively-negligent party.”).

169. See, e.g., *Auto. Underwriters Corp. v. Harrelson*, 409 N.W.2d 688, 692 (Iowa 1987) (treating negligence for the purpose of contribution the same as indemnity based on active-passive negligence); see also *Symington v. Great W. Trucking Co.*, 668 F. Supp. 1278, 1284 (S.D. Iowa 1987) (“Indemnity is the extreme form of contribution, justified when the differences in the parties' degree of fault is so great as to throw the whole loss upon one.”).

170. Cf. *McNally*, 648 N.W.2d at 574–75. A party who is not liable and is without obligation to make any payment cannot state a claim for contribution, and thus the entire responsibility for a liability cannot be shifted. *Id.*

171. See *Cochran I*, 235 F. Supp. 2d 991, 998–99 (N.D. Iowa 2002) (discussing the distinction between contribution and indemnity); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 309 (Iowa 1966) (same).

contribution.¹⁷² Since abandoning the defense of contributory negligence and indemnity based on the distinction between active and passive negligence as well as primary and secondary liability, contribution has replaced indemnity as the primary remedy among parties who share a common liability.

1. *Acting at the Direction and on Account of Another*

The general rule is that an agent must indemnify his or her principal for any liability vicariously incurred as a result of the agent's acts.¹⁷³ Traditionally, a corollary to this rule has been that a principal has a duty to indemnify an agent when the agent has incurred liability while "act[ing] at the direction, in the interest of, and in reliance upon" the principal.¹⁷⁴ Under this corollary, to state a claim for indemnity, the agent must have incurred liability while acting under the principal's direction and must not have incurred liability as a result of any other act.¹⁷⁵

When the principal is not free of fault,¹⁷⁶ because the act was authorized or for some other reason, the agent may seek contribution from the principal according to the principal's fault.¹⁷⁷ The agent or independent

172. Cf. IOWA CODE § 668.5 (2005) ("The basis for contribution is each person's equitable share of the obligations.").

173. *Vlotho v. Hardin County*, 509 N.W.2d 350, 353 (Iowa 1993).

174. *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969) (quoting *Epley v. S. Patti Constr. Co.*, 288 F. Supp. 1, 5 (N.D. Iowa 1964)). *But see Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951) (holding the owner of a bus had no duty to indemnify the employee/driver of the bus when the negligence of the driver resulted in injuries to passengers). Additionally, an employer of an independent contractor may have a similar obligation to indemnify an independent contractor when it directs the independent contractor's actions. See RESTATEMENT (FIRST) OF RESTITUTION § 90 cmt. a (1937); *infra* Part III.D.1.

175. See *C.F. Sales, Inc. v. Amfert, Inc.*, 344 N.W.2d 543, 554 (Iowa 1983) (denying a claim for indemnity when the indemnitee wrongfully reclaimed property, an act beyond the scope of the employment).

176. See *W. Cas. & Sur. Co. v. Grolier Inc.*, 501 F.2d 434, 439 (8th Cir. 1974) (finding no duty to indemnify "because [the injured party] ha[d] been unable to point to any relationship . . . from which a duty to indemnify might arise"); *Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co.*, 73 N.W.2d 22, 26 (Iowa 1955) ("A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful contact of another is entitled to indemnity" (quoting RESTATEMENT (FIRST) OF RESTITUTION § 96 (1937))).

177. *Horrabin v. City of Des Moines*, 199 N.W. 988, 990 (Iowa 1924) ("Where one is employed or directed by another to do an act not manifestly wrong, the law

contractor must seek contribution rather than indemnity from the principal because Iowa Code Chapter 668 requires the fault of the principal and the agent or independent contractor to be compared.¹⁷⁸

In addition to an agent seeking indemnity for any liability incurred while acting under the direction of the principal, Iowa Code Sections 669.21 and 670.8 also require the state and its municipalities “to defend and indemnify officers and employees against any tort claims arising out of their employment.”¹⁷⁹ United States District Court Judge Mark Bennett stated:

[This] provision does not provide for the immunity of such individuals, only that a defense and indemnity must be provided by the municipal employer. Furthermore, the duty to defend, indemnify, and save harmless does not extend to liability for punitive damages. Thus, even the provisions of Iowa Code § 670.8 do not excuse [the employee] from liability, but only transfer part of the costs of [the employee’s] liability to [the] municipal employer.¹⁸⁰

An employer has no duty to indemnify an employee for any liability incurred outside the scope of employment.¹⁸¹ Sections 669.2 and 670.8 of the Iowa Code limit the duty of the state or its municipalities to indemnify claims “caused by the negligent or wrongful act or omission . . . while acting within the scope of . . . employment.”¹⁸²

implies a promise of indemnity by the principal for damages resulting proximately from the good-faith execution of the agency.”).

178. *Compare Cochran I*, 235 F. Supp. 2d 991, 1005, 1007 (N.D. Iowa 2002) (stating “liability merely because of failure, even though negligent, to discover or prevent misconduct” is preempted by the Iowa Workers’ Compensation Act (quoting RESTATEMENT (FIRST) OF RESTITUTION § 90 (1937))), *with Epley v. S. Patti Constr. Co.*, 228 F. Supp. 1, 4–5 (N.D. Iowa 1964) (requiring a subcontractor to indemnify a general contractor even though the jury found the general contractor negligent).

179. *City of W. Branch v. Miller*, 546 N.W.2d 598, 603 (Iowa 1996).

180. *Fink v. Kitzman*, 881 F. Supp. 1347, 1392 (N.D. Iowa 1995) (citations omitted); *see also Vermeer v. Sneller*, 190 N.W.2d 389, 392 (Iowa 1971) (“Because it provides for indemnification for an employee’s liability, [Iowa Code Chapter 670.8] implies an employee can be held liable in an individual cause of action.”).

181. *Vlotho v. Hardin County*, 509 N.W.2d 350, 353 (Iowa 1993).

182. IOWA CODE § 669.2(3)(b) (2005); *see also id.* § 670.8 (stating that governmental entities shall defend employees for claims “arising out of an alleged act or omission occurring within the scope of their employment or duties”). Iowa courts have not distinguished between the relative scopes of public and private employment. *See Vlotho*, 509 N.W.2d at 354.

2. *Failure to Discover a Dangerous Condition or Prevent Wrongful Conduct*

The traditional rule required the creator of a dangerous condition to indemnify anyone else held liable for failing to discover or prevent the danger.¹⁸³ Now, section 886B(e) of the Restatement (Second) of Torts provides indemnity should be granted where “[t]he indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect.”¹⁸⁴ Iowa courts have found dangerous conditions include: a golf cart with keys in the ignition left around kindergarten-aged children,¹⁸⁵ an unlocked electrical transformer box,¹⁸⁶ a defective leash for a large dog,¹⁸⁷ and an open manhole cover.¹⁸⁸

The rule that an indemnitee held liable for a failure to discover a dangerous condition or to prevent wrongful conduct could seek indemnity from the wrongdoer developed when courts still permitted indemnity based on the distinction between active and passive negligence.¹⁸⁹ To comport with principles of comparative fault, any party held liable as a result of failing to discover or prevent a dangerous condition should seek contribution, not indemnity, from the creator of the condition.¹⁹⁰

183. See *Union Stock Yards Co. of Omaha v. Chi., Burlington, & Quincy R.R. Co.*, 196 U.S. 217, 228 (1905) (“The principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.”).

184. *Bellman v. Cedar Falls*, 617 N.W.2d 11, 21 (Iowa 2000); accord *Iowa Elec. & Power Co v. Gen. Elec. Co.*, 352 N.W.2d 231, 238 (Iowa 1984); *Mundy v. Warren*, 268 N.W.2d 213, 218 (Iowa 1982).

185. *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 15 (Iowa 2000).

186. *Iowa Elec.*, 352 N.W.2d at 233.

187. *Peters v. Lyons*, 168 N.W.2d 759, 766 (Iowa 1969).

188. *Mundy v. Warren*, 268 N.W.2d 213, 218 (Iowa 1978).

189. See, e.g., *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980) (showing the active-passive negligence distinction). In *Peters*, the court said that “[t]he breach of nondelegable duties may constitute a basis for an action in indemnity against a third person who creates a dangerous condition.” 168 N.W.2d at 766.

190. See, e.g., *Cedar Falls*, 617 N.W.2d at 21 (explaining the nature and underlying rationale of contribution as opposed to indemnity).

3. *Products Liability*

Section 886B(d) of the Restatement (Second) of Torts requires manufacturers of defective chattels and performers of defective work to indemnify innocent parties held liable for the products or work.¹⁹¹ Accordingly, the manufacturers of defective products and performers of defective work cannot seek indemnity from someone who fails to discover the defective condition.¹⁹² Sections 886B(d) and 886B(e) combine to shift liability to the culpable party.¹⁹³

As a general rule, a manufacturer of a defective product is strictly liable¹⁹⁴ and cannot seek indemnity from a wholesaler, retailer, or consumer.¹⁹⁵ For example, a manufacturer held liable “based on the sale of a defective product unreasonably dangerous to the consumer” may not seek indemnity from the consumer on grounds that harm resulted from misuse or alteration of the product because the manufacturer placed the product on the market.¹⁹⁶ Permitting a producer of an unreasonably dangerous product¹⁹⁷ to seek indemnity would not prevent unjust

191. RESTATEMENT (SECOND) OF TORTS § 886B(d) (1979).

192. *See* *Britt-Tech Corp. v. Am. Magnetics Corp.*, 487 N.W.2d 671, 673 (Iowa 1992). *See generally* *Lovick v. Wil-Rich*, 588 N.W.2d 688, 698 (Iowa 1999). The *Lovick* court stated:

Products liability law broadly refers to the legal responsibility for injury resulting from the use of a product. It encompasses three separate and distinct theories of liability: negligence, strict liability, and breach of warranty. Although each is a separate and distinct theory of recovery, the same facts often give rise to all three claims.

Id. (citations omitted).

193. RESTATEMENT (SECOND) OF TORTS § 886B cmt. i (1979).

194. *Hawkeye-Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 683 (Iowa 1970).

195. *Weggen v. Elwell-Parker Elec. Co.*, 510 F. Supp. 252, 254 (S.D. Iowa 1981) (“The general rule is that indemnity is not available to the manufacturer of a defective product from its purchaser.”).

196. *Britt-Tech*, 487 N.W.2d at 673.

197. *See* IOWA CODE § 668.1(1) (2005) (defining fault as including “acts or omissions . . . that subject a person to strict tort liability”); *Britt-Tech*, 487 N.W.2d at 674 (“A strict products liability action is not analogous to vicarious liability, resulting in the imposition of liability without regard to fault.” (quoting *Rosado v. Proctor & Schwartz Inc.*, 484 N.E.2d 1354, 1357 (N.Y. 1985))). Although Iowa courts have not yet held contribution is the appropriate remedy for distributing responsibility for products liability claims, to be consistent with the principles of comparative fault, contribution, not indemnity, should be the remedy.

enrichment because the wrongdoer would be made whole.¹⁹⁸ Moreover, allowing the manufacturer or retailer to seek restitution would undermine the goals of strict liability: deterring “the sale of defective goods by holding those who control the manufacturing process strictly liable” and providing “compensation to those injured by defective goods.”¹⁹⁹ Between an innocent injured party and the manufacturer or the seller, equity places responsibility on the entity better positioned to prevent the harm.²⁰⁰

If, however, the liability of the retailer resulted from a failure to warn rather than an unreasonable condition, comparative fault principles will permit a claim for contribution.²⁰¹ In *Olson v. Prosoco Inc.*, the Iowa

198. See *Union Stock Yards Co. of Omaha v. Chi., Burlington, & Quincy R.R. Co.*, 196 U.S. 217, 228 (1905) (“In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted.”); *Peters v. Lyons*, 168 N.W.2d 759, 767–68 (Iowa 1969) (“[T]he supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person” (quoting RESTATEMENT OF RESTITUTION § 93(1) (1937))).

199. *Grimes v. Axtell Ford Lincoln-Mercury*, 403 N.W.2d 781, 783 (Iowa 1987) (applying strict liability to retailers as well as manufacturers because “[r]etailers are in a position to inspect and repair their products or to exert pressure on manufacturers to improve product safety” (citations omitted)); *accord Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373, 382 (Iowa 1972) (“Recovery under a theory of strict liability in tort results from a public policy decision that protects the consumer from the inevitable risks of damage or harm brought about by mass production and complex marketing conditions. Thus, strict liability in tort serves a necessary purpose.”); *cf. Speck v. Unit Handling Div. of Litton Sys., Inc.*, 366 N.W.2d 543, 545 (Iowa 1985) (refusing to recognize contributory negligence in its ordinary sense as a defense to strict liability); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 544 (Iowa 1980) (“Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.” (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965))).

200. See *Hawkeye Sec. Ins. Co.*, 199 N.W.2d at 380 (stating that between an innocent retailer and consumer, the retailer should bear responsibility for the loss). *But see Bingham v. Marshall & Huschart Mach. Co.*, 485 N.W.2d 78, 79 (Iowa 1992) (“With the adoption of . . . Iowa Code section 613.18, a statutory limitation was imposed upon strict liability and implied warranty claims against nonmanufacturers.”).

201. See, e.g., *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980) (“Where there is a negligent failure to warn of a defective condition by one who has knowledge of the defect and an opportunity to issue a warning, the distinction between strict liability by a manufacturer and negligence by a purchaser or user is one of form rather than substance.”); see also *Iowa Elec. Light & Power Co. v. Gen. Elec. Co.*, 352 N.W.2d 231, 238 (Iowa 1984). In this case, although the trial court found General Electric (GE) liable to the injured party under both a strict liability theory for selling

Supreme Court remanded the case with instructions that “a failure to warn claim for damages is under a theory of negligence and the claim should not be submitted as a theory of strict liability.”²⁰² This rule has been extended to post-sale failure to warn products liability cases.²⁰³ While upstream claims for restitution have been permitted, downstream claims have not.

4. *Liability for an Independent Contractor*

The Iowa Supreme Court has adopted the general rule set forth in the Restatement (Second) of Torts section 409: “[A]n employer of an independent contractor is not liable for the negligence of the contractor or the contractor’s employees.”²⁰⁴ The court has, however, noted “this general rule ‘is riddled with . . . common-law exceptions that have practically subsumed the rule.’”²⁰⁵

When an employer of an independent contractor controls the work of the independent contractor, the general rule that the employer is not liable for the acts of the contractor is not applicable.²⁰⁶ The general rule assumes the employer has no control over the work, and thus the independent

an unreasonably dangerous product and a breach of the duty to warn, the Iowa Supreme Court stated that “GE’s liability was thus premised on its inadequate warning of the dangerous condition.” *Id.* at 237. That is, the court rejected the indemnity claim brought by Iowa Electric, an actively negligent party, by recharacterizing GE’s basis for liability. An alternative interpretation of this case is that the court permitted GE to seek contribution from Iowa Electric rather than permit Iowa Electric to seek indemnity for its own negligence.

202. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994).

203. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 694 (Iowa 1999).

204. *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 702 (Iowa 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 409 (1965)); accord *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 523–24 (Iowa 1992) (“[A]n employer of an independent contractor is not vicariously liable for injuries arising out of the contractor’s negligence.” (quoting *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 475 (Iowa 1980))).

205. *Kragel*, 537 N.W.2d at 702.

206. See *Eischeid v. Dover Constr., Inc. (Dover IV)*, 217 F.R.D. 448, 460 (N.D. Iowa 2003) (labeling this exception the “control of the job” exception). In addition to the Restatement (Second) of Torts section 414, Iowa courts have addressed other sections of the Restatement in the context of contribution and indemnity. *Giarratano v. Weitz Co.*, 147 N.W.2d 824, 833–34 (Iowa 1967) (addressing the Restatement (Second) of Torts sections 413, 416, and 427); see also *Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1276–77 (N.D. Iowa 2000) (discussing the duty to inspect under Restatement (Second) of Torts section 412).

contractor is completely and solely liable for any harm.²⁰⁷ To avoid a claim for contribution by an independent contractor for workplace injuries suffered by an independent contractor's employee, the employer of an independent contractor must exercise reasonable care when retaining possession of the premises and control over the work.²⁰⁸ A general contractor has retained control of the work when he regularly supervised and inspected construction, directed work, coordinated subcontractors, and operated a trailer at the site.²⁰⁹ In contrast, an employer has not retained control by reserving the right to stop work, inspect progress, make suggestions, or issue change orders.²¹⁰ When the independent "contractor is not entirely free to do the work in his own way," the employer of the independent contractor may be held responsible for the contractor's negligent acts.²¹¹

Even though exercising control over the work can make the employer liable for the acts of an independent contractor, the fault of both must be compared, and either party, if held liable for the entire amount, will have a claim for contribution against the other.²¹² Contribution, rather than indemnity, is the appropriate remedy because liability for the acts of independent contractors is based on the employer's fault.²¹³

In addition to controlling the work, employing an independent contractor to perform peculiarly dangerous work may cause the employer to be held liable for any harm resulting from the performance of the work.²¹⁴ To determine whether the type of work involves a peculiar risk, courts have asked "whether the risks incurred inhered in the nature of the work itself, or from collateral acts of negligence."²¹⁵ Iowa courts have

207. See RESTATEMENT (SECOND) OF TORTS § 414 (1965).

208. *Farris v. Gen. Growth Dev. Corp.*, 354 N.W.2d 251, 254 (Iowa Ct. App. 1984).

209. *Id.*

210. *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 525 (Iowa 1992).

211. RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965).

212. See *Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1285 (N.D. Iowa 2000); cf. *Stalter v. Iowa Res., Inc.*, 468 N.W.2d 796, 798–99 (Iowa 1991) (describing contribution by vendor to vendee of land).

213. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 410–415 (1965).

214. *Id.* § 427.

215. *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 877 (Iowa 1996) (quoting *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 477–78 (Iowa 1980)). Iowa courts have indicated that because ordinary construction is not inherently or intrinsically dangerous, the employer of the independent contractor is not liable for any negligence of the contractor in performing such work. *Downs*, 481 N.W.2d at 526.

adopted the Restatement (Second) of Torts sections 413, 416, and 427, which concern peculiarly dangerous work.²¹⁶ These sections are closely intertwined, yet each imposes a distinct duty on the employers of independent contractors.²¹⁷

Section 413 of the Restatement (Second) of Torts provides that an employer of an independent contractor may avoid liability for physical harm when the work presents a peculiar risk of unreasonable harm by contracting to require the independent contractor to take special precautions or by exercising reasonable care to provide special precautions.²¹⁸ Failure to contract for or exercise reasonable care regarding the peculiar risks of the work exposes the employer to liability for the negligence of the independent contractor.²¹⁹ Nonetheless, an employer of an independent contractor is not liable when the peculiar risk did not cause the injury that gave rise to the liability.²²⁰ Therefore, when the contract demands performance of specific safety measures and a breach by the contractor results in an injury, the loss should fall on the independent contractor, not the employer of the independent contractor.²²¹

Section 416 of the Restatement (Second) of Torts imposes a nondelegable duty on employers of independent contractors to exercise reasonable care in taking special precautions when the work presents a peculiar risk of physical harm.²²² An employer may be held liable for the breach of a nondelegable duty²²³ even if the employer delegated the duty to

216. *Downs*, 481 N.W.2d at 526; *see also* *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 704 (Iowa 1995) (adopting Restatement (Second) of Torts section 425 to compliment section 422 in the context of business invitees).

217. *See* *Clausen v. R.W. Gilbert Constr. Co.*, 309 N.W.2d 462, 465–66 (Iowa 1981) (describing the liability imposed on employers of independent contractors).

218. *See* *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 232 (Iowa 1974) (discussing section 413 of the Restatement (Second) of Torts).

219. *See* *Giarratano v. Weitz Co.*, 147 N.W.2d 824, 833–34 (Iowa 1967); *Downs*, 481 N.W.2d at 525–26 (discussing sections 413 and 427 of the Restatement (Second) of Torts and *Giarratano*).

220. *See* *Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116, 129 (Iowa 1976) (denying general contractor's claim for common law indemnity against a subcontractor because "it [was] difficult indeed to find wherein any negligence attending [the employee's] fall could be linked to [the subcontractor]").

221. *Id.* at 128 (citing RESTATEMENT (SECOND) OF TORTS § 416 cmt. c (1970)); *accord* *Giarratano*, 147 N.W.2d at 834.

222. *Porter*, 217 N.W.2d at 232.

223. *See* *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 703 (Iowa 1995). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 416–425 (1965).

the independent contractor.²²⁴ Performance of a nondelegable duty, imposed by law or contract, cannot be escaped by delegating it to an independent contractor because “this delegation does not relieve the [employer] of the duty to act, or of [the] duty to act with due care.”²²⁵ Contractual language requiring performance of all precautions and implementation of safeguards to ensure the safety of worker creates a nondelegable duty.²²⁶ An employee of an independent contractor injured

224. See *Cochran III*, 305 F. Supp. 2d 1045, 1058 (N.D. Iowa 2004) (“[The general contractor] may have delegated to [the subcontractor] performance of precautions for a safe work place for subcontractor’s employees, but [the general contractor] could not delegate its ultimate responsibility under its contract with [the owner] to exercise at all times precautions for the protection of anyone on the work site, including subcontractors’ employees.”); *Cochran v. Gehrke, Inc. (Cochran II)*, 293 F. Supp. 2d 986, 1001 (N.D. Iowa 2003) (citing *Dover IV*, 217 F.R.D. 448, 465 (N.D. Iowa 2003), for the proposition that “where a party retains responsibility for work, that party is subject to a nondelegable duty to exercise reasonable care to prevent a subcontractor from doing even details of the work in an unreasonably dangerous manner”).

225. *Giarratano*, 147 N.W.2d at 824 (quoting *Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 277 N.W. 226, 228 (Minn. 1937)); see also *Lane v. Coe College*, 581 N.W.2d 214, 217 (Iowa Ct. App. 1998). The *Lane* court stated:

A party who assumes a duty under a contract for the safety of the public or certain individuals cannot delegate the duty to an independent contractor, even when it is the independent contractor who is doing the actual work. The contracting party owes a positive duty to the public or individual who benefits under the contract and will be liable for injuries resulting from the contractor’s negligence in the performance of the contractual duty.

Id. (citation omitted).

226. See, e.g., *Farris v. Gen. Growth Dev. Corp.*, 354 N.W.2d 251, 255 (Iowa Ct. App. 1984) (providing the contract text stating “[s]afety nets should be installed when men are likely to fall” and “any and all floor openings that exceed 12 inches or more in least dimension in area should be planked over or barricaded with substantial railing” and stating further that the contractor “agreed to take all reasonable precautions for the safety of its employees” (internal quotation marks omitted)); *Giarratano*, 147 N.W.2d at 828. The *Giarratano* court quoted a contract stating:

The contractor shall take *all necessary precautions for the safety of employees on the work*, and shall comply with all applicable provisions of federal, state, and municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall *erect and properly maintain at all times*, as required by the conditions and progress of the work, all *necessary safeguards for the protection of workmen* and the public and shall post danger signs warning against the hazards created by such features of construction as protruding nails, hod

as a result of a breach of a nondelegable duty by the independent contractor may recover as a third-party beneficiary of the contract that provided for the employee's safety.²²⁷

Under Restatement (Second) of Torts section 427, an employer of an independent contractor is liable for the independent contractor's failure to take reasonable precautions against danger when the work inherently involves a special danger to others.²²⁸ The Iowa Supreme Court has stated that "the employer remains liable for injuries resulting from dangers which he should contemplate at the time he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them."²²⁹

Contribution is the appropriate remedy against an employer of an independent contractor who fails to contract to take special precautions, breaches a nondelegable duty, or fails to take special precautions when the work presents a special danger.²³⁰ For purposes of distributing liability, the

hoists, well holes, elevator hatchways, scaffolding, window openings, stairways and falling materials.

Id. (internal quotation marks omitted). In *Cochran III*, the court quoted the following contract provisions:

Precautions shall be exercised at all times by the Contractor . . . for the protection of persons, employees and property. The safety provisions of applicable laws and local building and construction codes shall be observed. The operations of the Contractor for the protection of persons, and for guarding against hazards of machinery and equipment, shall meet the requirements of state law.

Cochran III, 305 F. Supp. 2d at 1054 (internal quotation marks omitted).

227. *Dover IV*, 217 F.R.D. at 464.

228. *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 232 (Iowa 1974); RESTATEMENT (SECOND) OF TORTS § 427 (1965).

229. *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 526 (Iowa 1992) (quoting RESTATEMENT (SECOND) OF TORTS § 416 cmt. a (1965)).

230. *See, e.g., Dover IV*, 217 F.R.D. at 464; *Eischeid v. Dover Constr., Inc. (Dover II)*, 265 F. Supp. 2d 1047, 1058 (N.D. Iowa 2003) (seeking indemnity for one's own negligence); *Stalter v. Iowa Res., Inc.*, 468 N.W.2d 796, 798 (Iowa 1991) (treating contribution as the appropriate remedy for premises liability); *Peters v. Lyons*, 168 N.W.2d 759, 766–67 (Iowa 1969) (permitting indemnity rather than contribution as a remedy for a breach of a nondelegable duty because other grounds support a claim for indemnity and Iowa had not yet adopted the principles of comparative fault); *see also Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1285 (N.D. Iowa 2000) ("Common-law indemnity will lie here . . . because [the general contractor] could be held vicariously liable for omissions of [the subcontractor] pursuant to § 404 and § 412 of the

underlying theory is only relevant to the trier of fact in determining the amount of fault for each party.

5. *A Party Only Statutorily Liable Seeking Indemnity from a Tortfeasor*

Prior to Iowa's abandonment of indemnity based on the distinction between active and passive negligence and primary and secondary liability, an indemnitee held liable by operation of a statute could seek indemnity from any commonly liable tortfeasor.²³¹ Specifically, Iowa courts permitted indemnity when an indemnitee had been held liable by operation of: (1) Iowa Code Section 321.493 (the owner-liability statute);²³² (2) Iowa Code Section 562A.15(1)(c) (the residential landlord and tenant statute);²³³ (3) Iowa Code Section 351.28 (the dog-bite statute);²³⁴ and (4) Iowa Code Section 85.22 (the workers' compensation statute).²³⁵

RESTATEMENT (SECOND) OF TORTS.”). In *Goebel v. Dean & Associates*, the court ordered contribution even though it used the language “common law indemnity.” *Goebel*, 91 F. Supp. 2d at 1283 (“The cross-claim also alleges that, if a judgment is entered against [the contractor] that represents [the subcontractor’s] proportionate percentage of liability, [the contractor] will be entitled to judgment in that amount against [the subcontractor].”). Although the duty is nondelegable, responsibility for damages should be allocated according to the fault of each liable party. *Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116, 128–29 (Iowa 1976).

231. See, e.g., *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980).

232. *Estate of Bruce v. B.C.D., Inc.*, 396 F. Supp. 157, 162 (S.D. Iowa 1975). Traditionally, the owner-liability statute imposed vicarious liability upon an owner of a vehicle for damages caused by the negligence of any driver operating the vehicle with the owner's consent. See IOWA CODE § 321.493(1)(a) (2005) (“[I]n all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage.”). The Iowa Supreme Court has stated: “[I]f an owner of the vehicle is liable only vicariously by operation of law, such as under Iowa Code Section 321.493, the owner may seek indemnity against the operator.” *Universal Underwriters Ins. Co. v. Am. Family Ins. Group.*, 587 N.W.2d 224, 225 (Iowa 1998). Section 321.493 of the Iowa Code imposes vicarious liability on the owners of automobiles; however, contribution, not indemnity, is the appropriate remedy between the driver and the owner of the vehicle because both are at fault, as defined in Iowa Code Section 668.1.

233. *Iowa Elec. Light & Power Co. v. Gen. Elec. Co.*, 352 N.W.2d 231, 239 (Iowa 1984) (requiring landlord to maintain premises in a reasonably safe condition).

234. *Peters*, 168 N.W.2d at 766 (imposing absolute liability on the owner for injuries caused by the dog). Although the trespassing or stray livestock statute resembles the dog-bite statute by imposing liability on the owner of the animal, a court has not yet held that the trespassing or stray livestock statute imposes statutory liability for purposes of indemnity. See IOWA CODE § 169C.4 (2005).

235. See *infra* Part V.B.

When an indemnitee shared liability with an actively negligent indemnitor only because the indemnitee had violated a statute, the indemnitee could seek indemnity from the indemnitor.²³⁶ With the adoption of comparative fault, contribution has replaced indemnity as the appropriate remedy between tortfeasors because both parties are at fault under Iowa Code Chapter 668.²³⁷

IV. THE LAW OF INDEMNITY

Tort-based indemnity is consistent with the principles of comparative fault when the entire responsibility for a liability has shifted to the indemnitor on a ground other than fault as defined under Iowa Code Section 668.1.²³⁸ Contribution is the exclusive remedy when fault is at issue.²³⁹ When liability is due to something other than fault, such as vicarious liability, a breach of an independent duty, or an intentional tort, indemnity remains available as a remedy.

A. *Vicarious Liability*

A claim for indemnity on the grounds that the indemnitee has been held vicariously liable for the acts of the indemnitor is derived from the nature of the liability.²⁴⁰ Typically, claims for indemnity based on vicarious liability arise from agency relationships.²⁴¹

Any principal held vicariously liable for the negligent acts of an agent has a right to seek indemnity from the actual tortfeasor.²⁴² Iowa courts have considered two questions when determining whether a principal may seek indemnity from an agent for liabilities resulting from the acts of the

236. *See, e.g.,* *City of Des Moines v. Barnes*, 30 N.W.2d 170, 174 (Iowa 1947).

237. *See supra* Part III.A. As defined in Iowa Code Section 668.1, fault includes violations of statutes. *Slager v. HWA Corp.*, 435 N.W.2d 349, 354 (Iowa 1989).

238. *See supra* text accompanying note 169.

239. *See supra* text accompanying note 166.

240. *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576 (Iowa 2002).

241. *See, e.g.,* *Biddle v. Sartori Mem'l Hosp.*, 518 N.W.2d 795, 797 (Iowa 1994) (stating that “vicarious liability rests on proof of an agency relationship”); *see also* *State v. Philip Morris*, 577 N.W.2d 401, 406 (Iowa 1998).

242. *Id.* at 799; *Dairyland Ins. Co. v. Concrete Prods. Co.*, 203 N.W.2d 558, 564 (Iowa 1973).

agent: (1) Is the agent liable?²⁴³ and (2) is the principal vicariously liable for the acts of the agent?²⁴⁴

An agent must be found liable before the principal may be held vicariously liable.²⁴⁵ For example, if an injured party settles a claim and releases the agent, then the injured party has also released the principal and cannot seek further recovery from the principal.²⁴⁶

Typically, the injured party attempting to prove vicarious liability must prove the existence of an agency relationship. The Iowa Supreme Court has stated to hold an employer vicariously liable for the acts of an employee, the injured party must offer “proof of an employer/employee relationship, and proof that the injury occurred within the scope of that employment.”²⁴⁷ Any liability incurred by an agent acting at the direction of and in the interest of the principal enables the agent to state a claim for contribution against the principal.²⁴⁸

Historically, claims for indemnity based on vicarious or derivative liability occurred when a secondarily liable principal sought indemnity from a primarily liable agent.²⁴⁹ When a secondarily liable indemnitee sought indemnity from a primarily liable indemnitor, courts typically compared the relative culpability and duties of the tortfeasors and ordered indemnity if the relative culpability or duty was sufficiently disparate. In contrast, the vicarious nature of the indemnitee’s liability establishes, by itself, the disparity in culpability between the indemnitee and the indemnitor.

When the principal is only vicariously liable, the principal may seek indemnity from the agent.²⁵⁰ As long as the principal is only vicariously

243. See *Estate of Bruce v. B.C.D., Inc.*, 396 F. Supp. 157, 160 (S.D. Iowa 1975) (“The liability of the employer for the negligent acts of his [or her] servant is based upon the familiar doctrine of *respondeat superior*. Unless the servant is liable, there can be no liability on the part of the master.”).

244. See *Dairyland*, 203 N.W.2d at 564 (explaining “a subrogated right of one vicariously liable for full indemnity against the actual tort-feasor is well known in our Iowa law”).

245. *Estate of Bruce*, 396 F. Supp. at 160.

246. *Biddle*, 518 N.W.2d at 799.

247. *Id.* at 797.

248. See *supra* Part III.D.1.

249. See *supra* Part III.D.

250. *Biddle*, 518 N.W.2d at 799 (“This right of indemnity held by the principal is neither governed by chapter 668 nor otherwise tempered by its provisions regarding contribution among joint tortfeasors.”).

liable, indemnity is the proper remedy because the fault of the principal is not alleged.²⁵¹ If, however, the injured party alleges the principal is at fault for ordering the agent to act or for some other reason, then contribution is the proper remedy because the fault of the principal must be compared with the fault of the agent.²⁵² This is because vicarious liability is not included in the definition of fault for purposes of Iowa Code Chapter 668.²⁵³

B. Breach of an Independent Duty

An indemnitee can have a right to indemnity “based on the breach of an independent duty of care owed by the indemnitor.”²⁵⁴ Only in exceptional circumstances have Iowa courts found an indemnitor owes an independent duty to the indemnitee.²⁵⁵ Typically, an indemnitor owes an independent duty to an indemnitee only after the parties have entered into a contract with specific and defined duties.²⁵⁶ The standard for finding an independent duty is high because indemnity, in the absence of an express indemnification clause, is not a remedy typically contemplated by contracting parties.²⁵⁷

The Iowa Supreme Court has held a lawyer who created fraudulent documents and provided those documents to another law firm breached an independent duty.²⁵⁸ In *Hansen v. Anderson, Wilmarth & Van Der Matten*,

251. *See id.*

252. *See id.*

253. *See id.*

254. *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1 (Iowa 2002).

255. *See Stone & Stone, supra* note 11, at 148–50.

256. *See, e.g., Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 319 (Iowa 1992) (holding a contractual duty to inspect, repair, or maintain may be an independent duty); *Stowe v. Wood*, 199 N.W.2d 323, 326 (Iowa 1972) (holding a contractual duty to shovel snow is an independent duty); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 313 (Iowa 1966) (holding a contractual duty to notify is an independent duty). *See generally Stone & Stone, supra* note 11, at 148.

257. *See Citicorp of N. Am., Inc. v. Lifestyles Commc'ns Corp.*, 836 F. Supp. 644, 666 (S.D. Iowa 1993) (holding contracting parties typically do not owe duties outside of the contract).

258. *Hansen III*, 630 N.W.2d 818, 825–26 (Iowa 2001). The court issued four separate opinions related to the fraudulent sale of Precision Torque Converters of Iowa (PTCI): *Ezzone v. Hansen (Hansen I)*, 474 N.W.2d 548, 550 (Iowa 1991) (concerning judicial estoppel); *Ezzone v. Riccardi (Hansen II)*, 525 N.W.2d 388, 401–03 (Iowa 1994) (concerning damages); *Hansen III*, 630 N.W.2d at 827 (concerning an

a law firm sought indemnity from the lawyer who had created fraudulent documents that purported to show that an employee had the authority to sell the company,²⁵⁹ when in fact the employee had no such authority.²⁶⁰ In a separate suit, the owners of the company recovered from the subsequent purchasers under the theory that the purchasers, in concert with the employee and the bank, breached the confidential relationship between the company and its employee.²⁶¹

The purchasers of the company brought a malpractice action against

indemnity claim for a legal malpractice action); *Hansen v. Anderson, Wilmarth & Van Der Matten (Hansen IV)*, 657 N.W.2d 711, 713–15 (Iowa 2003) (concerning proximate cause). As background, Harold Ezzone and Patricia LaRosa owned PTCI and Ronald Riccardi was a non-owner employee. *Hansen IV*, 657 N.W.2d at 713; *Hansen II*, 525 N.W.2d at 391–92. The State Bank of Lawler had provided PTCI with loans before the asset sale. *Id.* at 391–92. Willis Hansen operated the State Bank of Lawler. *Id.* at 391–92. Riccardi sold PTCI and kept the proceeds even though he had no authority to sell PTCI. *Id.* at 392.

259. *Hansen III*, 630 N.W.2d at 821. The Iowa Supreme Court found the lawyer knew the documents were false, expected the other lawyer to rely on the documents, and knew the other lawyer would not question the integrity of a fellow member of the bar. *Id.* at 822.

260. *Hansen II*, 525 N.W.2d at 397.

261. The owners of the company also recovered under two other theories: intentional and improper interference with a contract and conversion of ownership. *Id.* at 392. Jury verdicts pursuant to interference with contract and conversion duplicated the breach of confidential relationship theory. *Id.* at 393–94, 397. The jury awarded Ezzone and LaRosa \$675,000 in compensatory damages, offset by an \$87,500 settlement with Michael Kennedy, Ezzone's attorney. *Id.* at 402–03. Ezzone recovered \$325,000 and LaRosa recovered \$350,000. *Id.* at 392. The amount of the compensatory damage award, more than one and a half times the sale price, may have surprised the Iowa Supreme Court. *Id.* at 391 (“The jury subscribed to plaintiffs’ factual contentions, contentions that clearly would have been rejected by many fact finders. Because we cannot say there is no substantial evidence supporting plaintiffs’ claims, and because the case was submitted on instructions without defendants’ trial counsel objections, we affirm the findings of liability and compensatory damages.”). Ezzone had testified at trial that PTCI needed to sell its assets and that \$250,000 was a fair price. *Hansen IV*, 657 N.W.2d at 713. Moreover, counsel for Ezzone and LaRosa disclaimed any damage claim resulting from the sale of assets to Willis and Dennis Hansen. *Id.* The court found that sufficient evidence supported the jury verdict because \$500,000 had been drained from PTCI's accounts since 1987. *Hansen II*, 525 N.W.2d at 395. Each defendant was jointly and severally liable for the compensatory damage award. *Id.* at 402. The Iowa Supreme Court remitted the award of punitive damages to a maximum of \$118,500. *Id.* at 399. At most, Willis Hansen was liable for \$108,000, Dennis Hansen for \$8,500, and the State Bank of Lawler for the amount of \$2,000. *Id.*

the law firm²⁶² which had represented them in the transaction.²⁶³ In the malpractice action, the law firm sought indemnity from the lawyer who had created the fraudulent documents. The trial court granted summary judgment against the law firm on the claim for indemnity and stated “there was no special relationship which could give rise to something more than a ‘general duty that every member of society owes to every other member—the duty not to harm through tortious acts.’”²⁶⁴

The Supreme Court of Iowa reversed the trial court and held “once a lawyer responds to a request for information in an arm’s-length transaction and undertakes to give that information, the lawyer has a duty to the lawyer requesting the information to give it truthfully.”²⁶⁵ The court then labeled the duty as an independent duty without explaining why this duty is

262. The law firm of Anderson, Wilmarth & Van der Maaten represented Willis and Dennis Hansen in the asset purchase of PTCI and the resulting litigation brought by Ezzone and LaRosa against Willis Hansen, Dennis Hansen, Precision of New Hampton, Inc., and the State Bank of Lawler. *Hansen IV*, 657 N.W.2d at 712.

263. *Hansen II*, 525 N.W.2d at 394 (concluding that sufficient evidence had been produced at trial for the jury to conclude that Willis Hansen knew that Ezzone and LaRosa, not Riccardi, owned PTCI, that the documents purporting to show Riccardi had authority to sell PTCI were fraudulent, and that Riccardi lacked authority to sell PTCI).

264. *Hansen III*, 630 N.W.2d at 822. Prior to *Hansen*, Iowa courts had held tort principles did not give rise to independent duties. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 320 (Iowa 1992). The Iowa Supreme Court stated “the general duty that every member of society owes to every other member—the duty not to harm him through tortious acts” does not create an independent duty. *Johnson*, 481 N.W.2d at 320 (quoting *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775, 783 (8th Cir. 1976)); see *Cochran I*, 235 F. Supp. 2d 991, 1003 (N.D. Iowa 2002) (“Thus, the pleaded duty, safe set up and operation of the crane, is only ‘the general duty that every member of society owes to every other member—the duty not to harm him through tortious acts,’ not some ‘independent duty’ to [the subcontractor] of a ‘specific, defined nature.’” (quoting *Hysell*, 534 F.2d at 782–83)); *Allied Mut. Ins. Co. v. State*, 473 N.W.2d 24, 27 (Iowa 1991) (rejecting the proposition that a general duty “not to cause injury to another by one’s negligent act” creates an independent duty (internal quotation marks omitted)). Similarly, the Eighth Circuit held that a duty owed to each member of society did not create an independent duty. *Merryman v. Iowa Beef Processors, Inc.*, 978 F.2d 443, 445 (8th Cir. 1992); accord *Hysell*, 534 F.2d at 783; *Iowa W. Cas. & Sur. Co. v. Grolier Inc.*, 501 F.2d 434, 438 (8th Cir. 1974). Iowa courts have held that a general duty not to harm does give rise to an independent duty only in the context of a negligent tortfeasor. See *Johnson*, 481 N.W.2d at 320–21 (discussing a duty not to harm other members of society through one’s negligent acts is too generalized to create an independent duty).

265. *Hansen III*, 630 N.W.2d at 825–26.

different than other duties.²⁶⁶ Now, under the law of indemnity in Iowa, indemnity is an appropriate remedy for torts.²⁶⁷

In *Hansen III*, the Iowa Supreme Court broke from precedent by holding that the general duty not to harm establishes an independent duty.²⁶⁸ Specifically, the court stated “[i]f there can be a basis for liability when the injured lawyer sues the defrauding lawyer directly, we see no reason why the rule should not be the same where the injured lawyer sues the defrauding lawyer for indemnity.”²⁶⁹ The reason an injured lawyer should sue a defrauding lawyer directly and should not sue for indemnity is because a direct action requires proving the elements of a tort claim, which include proving the element of proximate cause, while a suit for indemnity shifts the entire responsibility for a liability, even if the tortious act did not proximately cause the entire liability.²⁷⁰

As an alternative to permitting indemnity, the law firm could have brought an action in tort for fraudulent misrepresentation.²⁷¹ Rather than find an independent duty based on tort principles, the result in *Hansen III*

266. Simply labeling a duty as an independent duty when doing so reaches a fair and just result has unnecessarily complicated the law of indemnity. Moreover, permitting indemnity based on the breach of an independent duty when the court has not provided a definition of what is and what is not an independent duty needlessly increases litigation regarding independent duties. *Cf.* *Chi. & N.W. Ry. Co. v. Chi., Rock Island & Pac. R.R. Co.*, 179 F. Supp. 33, 60 (N.D. Iowa 1959) (noting lawyers attempted to fit claims for indemnity into the category of active and passive negligence). The law of indemnity is less than clear in part because what constitutes and what does not constitute an independent duty has never been clearly defined.

267. *Cf. Hansen III*, 630 N.W.2d at 825. Though much of the opinion concerns the unique role of lawyers in society, the rule was not limited to permitting indemnity only between lawyers.

268. *Id.* at 825–26.

269. *Id.* at 825.

270. In *Hansen III*, the court assumed that the elements of the tort of fraudulent misrepresentation could be established by the law firm. *See id.* (“Finally, comment g provides that “[i]n general, a lawyer who makes a fraudulent misrepresentation is subject to liability to the injured person when the other elements of the tort are established””) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. g (2000)). An element of the tort of fraudulent misrepresentation is proximate cause. RESTATEMENT (SECOND) OF TORTS § 546 (1977). In the end, the fraudulent misrepresentation by the lawyer, and the malpractice of the law firm, did not proximately cause the injuries suffered by the owners of the company. *Hansen IV*, 657 N.W.2d 711, 713–15 (Iowa 2003).

271. The Anderson, Wilmarth & Van der Maaten law firm could have recovered from Kennedy by bringing a timely action for fraudulent misrepresentation.

may be better explained by interpreting the case as that of a negligent tortfeasor seeking indemnity from an intentional tortfeasor.²⁷²

C. *A Negligent Tortfeasor Seeking Indemnity from an Intentional Tortfeasor*

A negligent tortfeasor may seek indemnity from an intentional tortfeasor for any common liability even though the negligent tortfeasor cannot seek indemnity from another negligent tortfeasor because to do so would be incompatible with the principles of comparative fault.²⁷³ Specifically, “those guilty of intentional misconduct are not entitled to contribution”²⁷⁴ because the “intentional wrongdoer[s] should not benefit from the contributory negligence of [the indemnitee]” and “shifting the full responsibility for the loss to the intentional tortfeasor[s] serves the policy of deterring conduct which society considers to be substantially more egregious than negligence.”²⁷⁵ Even though allowing a negligent tortfeasor to seek indemnity from an intentional tortfeasor distributes responsibility for liabilities according to something other than relative fault, public policy reasons justify such distribution without regard to the fault of the parties.²⁷⁶

272. *Hansen III*, 630 N.W.2d at 827. Perhaps abandoning indemnity based on the breach of an independent duty and allowing tortfeasors to recover in tort according to the principles of comparative fault and parties to a contract to recover in contract according to the rules of special and consequential damages would result in a more uniform and simple framework to resolve indemnity disputes.

273. *See id.*

274. *Id.* (quoting *Fleming v. Threshmen’s Mut. Ins. Co.*, 388 N.W.2d 908, 910–11 (Wis. 1986)). Iowa courts have not resolved the question of whether the scope of an express indemnification agreement may include willful acts. *See id.* at 1348. The United States District Court for the Northern District of Iowa stated:

In this case, the court need not address the difficult question of whether the indemnity agreement at issue here is sufficient to require the signer of the agreement to indemnify Linn Photo from its strict statutory liability for any copyright infringement which may occur, and in particular from any infringement on Linn Photo’s part which is found to have been willful Thus, the court need not determine if the agreement is sufficient to indemnify Linn Photo against liability for copyright infringement

Id. The Eighth Circuit refused to give effect to the indemnity agreement because Linn Photo acted in bad faith. *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994).

275. *Hansen III*, 630 N.W.2d at 827 (quoting *Fleming*, 388 N.W.2d at 911).

276. *Id.*

The reasons prohibiting an intentional tortfeasor from seeking contribution and indemnity do not justify denying these remedies to a negligent tortfeasor.²⁷⁷ First, the culpability of an intentional tortfeasor and a negligent tortfeasor differ in quality. In contrast, the culpability of negligent tortfeasors differ only in degree.²⁷⁸ Second, the definition of fault in Iowa's comparative fault statute does not include intentional torts.²⁷⁹ Therefore, the culpability of the intentional tortfeasor and negligent tortfeasor need not be compared.²⁸⁰ Third, negligence is premised on a failure to appreciate a risk, not a failure of moral judgment.²⁸¹ Therefore, deterrence is not relevant in the context of negligence because it attempts to alter the risk-reward calculations of rational actors.²⁸²

The refusal to allow intentional tortfeasors to seek restitution is similar to the reluctance to allow insurance policies to provide coverage for intentional acts. In *Grinnell Mutual Reinsurance Co. v. Jungling*, the Iowa Supreme Court abandoned the doctrine that insuring intentional or willful wrongdoing controverts public policy.²⁸³ Rather, the court now balances concerns about creating a moral hazard and compensating the victim on a case-by-case basis to determine the appropriateness of insurance coverage.²⁸⁴ Permitting one intentional tortfeasor to seek contribution from another intentional tortfeasor may eliminate the moral hazard that exists when an intentional tortfeasor avoids responsibility because of the *Merryweather* rule.²⁸⁵ To retain its validity, the per se rule announced in *Merryweather* may need to be modified when retribution and deterrence

277. See *id.* (“[T]o limit a negligent tortfeasor to only a right of contribution against an intentional tortfeasor would, in effect, amount to the intentional tortfeasor receiving the benefit of contribution from the negligent tortfeasor.”).

278. See IOWA CODE Chapter 668 (2005).

279. See IOWA CODE § 668.1.

280. *Hansen III*, 630 N.W.2d at 827 (“[A] negligent tortfeasor has a right to indemnity from an intentional joint tortfeasor.” (quoting *Fleming*, 388 N.W.2d at 909)).

281. See 1 DAN B. DOBBS, THE LAW OF TORTS § 112 (2001).

282. *Id.* § 116.

283. *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 537–41 (Iowa 2002). The insurance agreement did not contain a specific exclusion for intentional misconduct. *Id.* at 537.

284. *Id.* at 539.

285. In the context of contribution and indemnity, which distributes responsibility for liabilities between parties, the goal of compensating the victim is not relevant. See *supra* Part I; see, e.g., *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 9–10 (Iowa 1970).

require that each intentional tortfeasor be held responsible for a portion of the liability.

D. *Comparing the Scope of Tort-Based Indemnity and Contractual Indemnity*

In addition to tort-based indemnity, parties may agree to an express indemnification clause in a contract.²⁸⁶ When a duty to indemnify arises by contract, the doctrine of tort-based indemnity is inapplicable.²⁸⁷ Nonetheless, the scope of contractual indemnity and tort-based indemnity are similar because both doctrines are reluctant to indemnify a party for its own negligence.

1. *Indemnification for One's Own Negligence*

In the context of both contractual indemnity and tort-based indemnity, Iowa courts have been hostile toward shifting responsibility for one's own negligence toward another entity. This is because parties should be held responsible for the consequences of their actions.²⁸⁸ The Iowa Supreme Court summarily rejected the notion that tort-based indemnity implied a right of indemnity in favor of a tortfeasor.²⁸⁹ Similarly, in the absence of a contract providing for indemnification of one's own negligence in clear and unequivocal language, Iowa courts have refused to permit indemnification for one's own negligence.²⁹⁰ Indemnification for

286. *Farmers Coop. Co. v. Stockdales' Corp.*, 366 N.W.2d 184, 186 (Iowa 1985); *see McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 574 (Iowa 2002) ("Indemnity is a mix of contract and tort law, together with an array of equitable considerations."). *See generally* Stone & Stone, *supra* note 11, at 131–33.

287. *McNally*, 648 N.W.2d at 576.

288. *See id.* at 574; *cf.* IOWA CODE § 668.5(1) (2005) (providing for contribution in proportion to the degree of relative fault).

289. *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987) ("[S]ummarily reject[ing] the argument that the law implies a right to indemnify a party to recover damages attributed to its own negligence.").

290. *McNally*, 648 N.W.2d at 571 ("The traditional reluctance of courts to allow the burden of one who is negligent to be transferred to another who is not at fault, especially where there is a disparity in the bargaining power and economic resources of the parties, can be traced to public policy considerations."); *see* Stone & Stone, *supra* note 11, at 138. Courts have not insisted on the same clear and unequivocal standard when a party has contracted away the right to seek indemnity from a tortfeasor. *Page County Appliance Ctr., Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 181 (Iowa 1984) (quoting contract provisions stating "ITT's 'exclusive remedy and

one's own negligence never occurs based solely on the need to prevent unjust enrichment.²⁹¹

2. *Indemnification of Corporate Directors*

Section 490.851 of the Iowa Code allows corporations to indemnify directors for any liability incurred as a result of any official acts as long as the director has acted in good faith and in the best interests of the corporation.²⁹² The corporation's articles of incorporation may alter this default rule by requiring the corporation to indemnify the directors either for liabilities solely attributable to the director's status with the corporation²⁹³ or for liabilities incurred for any reason other than for a breach of the duty of loyalty, bad faith, or any acts involving intentional misconduct.²⁹⁴ If the corporation intends to indemnify a director for the director's own negligence, the intention should be expressed in clear and unequivocal language.

V. IOWA'S WORKERS' COMPENSATION STATUTE

The Iowa Code establishes statutory rights of indemnity and subrogation.²⁹⁵ Without section 85.22, an employee injured on the job could receive workers' compensation benefits from an employer and could also recover from any third party tortfeasor. The purpose of section 85.22 is to prevent this type of double recovery²⁹⁶ and to encourage employers to pay the medical bills of injured employees by permitting the employer to

Honeywell's entire liability in contract, tort or otherwise' shall be the repair or exchange of equipment parts; and that '[i]n no event will Honeywell be liable for any indirect, special or consequential damages arising out of this Agreement or the use of any equipment, Software Product, documentation or service provided under this Agreement''").

291. See, e.g., *C.F. Sales, Inc. v. Amfert, Inc.*, 344 N.W.2d 543, 553-54 (Iowa 1983) (setting forth the grounds for indemnity).

292. IOWA CODE § 490.851(1); see Edgar F. Hansell, Bradford L. Austin & Gregory B. Wilcox, *Duties of the Board of Directors Under the Iowa Business Corporation Act*, 40 DRAKE L. REV. 687, 723 (1991).

293. IOWA CODE § 490.852.

294. Hansell, Austin & Wilcox, *supra* note 292, at 725-26.

295. IOWA CODE § 85.22 (2005). A workers' compensation insurer has rights and interests identical to the rights and interests of the employer who paid workers' compensation benefits. For simplicity, a workers' compensation insurer and an employer will be treated in this Article as one party.

296. *Shirley v. Pothast*, 508 N.W.2d 712, 717 (Iowa 1993).

recoup these payments from any liable third party.²⁹⁷

Section 85.22 of the Iowa Code permits an employer to seek indemnity from a third party or be subrogated to the claims of an employee against a third party.²⁹⁸ Pursuant to section 85.22, an employer may seek indemnity from a liable third party whose conduct caused the injury that required the employer to pay workers' compensation benefits.²⁹⁹ An injured employee must repay the employer for workers' compensation benefits out of any damages recovered from a third party tortfeasor, less reasonable attorneys' fees.

Alternatively, if an injured employee fails to assert a claim against a responsible third party, then the employer has a right of subrogation.³⁰⁰ Section 85.22(2) provides that an employer may step into the shoes of the employee only if the injured employee has failed to pursue all or part of a claim against a responsible third party.³⁰¹ As a subrogee, an employer is able to recover to the same extent as an injured employee,³⁰² but any recovery on behalf of the injured employee by the employer in excess of the amount paid in workers' compensation benefits must be paid over to the employee.³⁰³ The employee can retain control of the action and prevent the employer from stating a claim for subrogation by pursuing all possible causes of action against any responsible third party.³⁰⁴

An employer and a third party will often share fault for an injury. Although a third party is held liable for damage in proportion to its fault,³⁰⁵

297. Sladek v. K Mart Corp., 493 N.W.2d 838, 840 (Iowa 1992).

298. IOWA CODE § 85.22.

299. Bankers Standard Ins. Co. v. Stanley, 661 N.W.2d 178, 181 (Iowa 2003). An employer must enforce its lien rights and not release its indemnity rights to recover under Iowa Code Section 85.22. *Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfeleiderer, Inc.*, 540 N.W.2d 647, 649 (Iowa 1995).

300. Daniels v. Hi-Way Truck Equip., Inc., 505 N.W.2d 485, 487 (Iowa 1993) (“If the employee fails to bring an action against a third-party tortfeasor, the employer or the employer’s insurer has a right of subrogation and may maintain an action against such third-party tortfeasor.”).

301. Krapfl v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 877, 880 (Iowa 1996).

302. IOWA CODE § 85.22(2).

303. *Id.* § 85.22(2)(c).

304. *Bride v. Heckart*, 556 N.W.2d 449, 454 (Iowa 1996) (holding an employer or insurer may only control the claim when the employee has failed to bring all or part of a claim).

305. *Ahlers v. Emcasco Ins. Co.*, 548 N.W.2d 892, 893–94 (Iowa 1996); *see also Fisher v. Keller Indus., Inc.*, 485 N.W.2d 626, 629 (Iowa 1992) (“The insurer’s right of

the fault of the employer is irrelevant to allocating fault between the employee and third party because the workers' compensation statute provides the employer a defense. In other words, the fault of the employee and third party is determined without regard to the fault of the employer.³⁰⁶ Despite this, an alleged third party tortfeasor may argue that the negligence of either the employer or the injured employee is the sole proximate cause of the employee's injuries.³⁰⁷

A. *Workers' Compensation Paid to an Employee*

An employer may seek indemnification only for workers' compensation payments made to or on behalf of the employee and interest.³⁰⁸ Iowa courts have held workers' compensation includes weekly benefits,³⁰⁹ unpaid wages,³¹⁰ reasonable medical and hospital expenses,³¹¹ transportation and burial expenses,³¹² and payments made to the beneficiaries of the employee for losses suffered and services rendered.³¹³ An employer paying for these items may seek indemnity from a third party tortfeasor.³¹⁴

Not all expenditures made by employers pursuant to Iowa Code Section 85 constitute workers' compensation disbursements. Payments made to the Second Injury Fund are not compensation paid to the employee, and thus are not classified as workers' compensation payments.³¹⁵ Although an employer cannot seek indemnity for future

indemnity under this provision is against the worker's entire recovery, which has already been reduced because of the worker's comparative fault.").

306. For example, even if an employer is ninety percent at fault, a third party is ten percent at fault, and the injured employee bears no fault, the employee may be able to fully recover for all injuries suffered against the third party tortfeasor.

307. *Sorenson v. Morbark Indus., Inc.*, 153 F.R.D. 144, 150 (N.D. Iowa 1993) (permitting the third party to "plead the employer's fault as part of a defense on issue of sole proximate cause").

308. *See infra* Part V.C.

309. *Johnson v. Harlan Cmty. Sch. Dist.*, 427 N.W.2d 460, 462 (Iowa 1988).

310. *Daniels v. Hi-Way Truck Equip. Inc.*, 505 N.W.2d 485, 489 (Iowa 1993).

311. *Sourbier v. State*, 498 N.W.2d 720, 724 (Iowa 1993) (allowing employer "to recover the cost of medicine and hospital services furnished by the employer").

312. *Daniels*, 505 N.W.2d at 488.

313. *Id.* at 489.

314. *Id.*

315. *Id.*

payments,³¹⁶ an employer can secure future payments due to the employee through a lien.³¹⁷

B. *Employer's Recovery Pursuant to Section 85.22 of the Iowa Code*

An employer may be indemnified from any element of an employee's recovery against a third party.³¹⁸ For example, even though an employee may not recover for pain and suffering under Iowa's Workers' Compensation scheme, an employer may be indemnified from an employee's recovery for pain and suffering from a third party.³¹⁹ An employer, however, cannot seek indemnity from amounts paid to parties other than the employee.³²⁰ For example, an employer cannot recover from loss of consortium claims the third party may pay to family members.³²¹ A settlement cannot be structured to minimize the employer's recovery by shifting money to the loss of consortium claims from the claims allocated to the injured employee.³²²

The amount an employer receives must be reduced by the attorneys' fees and litigation expenses paid by the injured employee.³²³ The proportion of these fees allocated to the employer is the proportion of the employer's recovery compared to the total recovery.³²⁴ The Iowa Supreme Court has approved contingent fees of up to one-third of workers' compensation claims.³²⁵ The cost of litigation is added to the contingent fee arrangement to arrive at the attorneys' fees for the purposes of Iowa Code Section 85.22.³²⁶

316. Fisher v. Keller Indus., Inc., 485 N.W.2d 626, 630 (Iowa 1992).

317. Shirley v. Pothast, 508 N.W.2d 712, 718 (Iowa 1993).

318. Fisher, 485 N.W.2d at 629; Hofer v. Bituminous Cas. Corp., 148 N.W.2d 485, 487 (Iowa 1967).

319. Sourbier v. State, 498 N.W.2d 720, 724 (Iowa 1993).

320. Estate of Sylvester v. Cincinnati Ins. Co., 559 N.W.2d 285, 288 (Iowa 1997); Mata v. Clarion Farmers Elevator Coop., 380 N.W.2d 425, 429 (Iowa 1986).

321. Estate of Sylvester, 559 N.W.2d at 288.

322. Shirley, 508 N.W.2d at 716.

323. Aspelmeier, Fisch, Power, Warner & Engberg v. Allied Group Ins. Co., 556 N.W.2d 805, 807 (Iowa 1996) (holding a subrogated party must pay the part of attorneys' fees attributable to the subrogated party's recovery); accord Ahlers v. Emasco Ins. Co., 548 N.W.2d 892, 894 (Iowa 1996); Krapfl v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 877, 879 (Iowa 1996).

324. Krapfl, 548 N.W.2d at 879–80.

325. Farris v. Gen. Growth Dev. Corp., 381 N.W.2d 625, 626–27 (Iowa 1986).

326. Sourbier v. State, 498 N.W.2d 720, 725 (Iowa 1993).

C. Iowa's Workers' Compensation Statute as a Defense to Common Liability

Iowa courts have articulated several reasons justifying the rule that employers do not share common liability with third party tortfeasors in the workers' compensation context. The court in *Williams v. Weiler & Co.* reasoned:

The employer's liability to its employee is governed by the Iowa Worker's Compensation Act and is not dependent upon negligence. The Iowa Worker's Compensation Act deprives the employee of the right to sue the employer for damages. Thus, coverage under the Act provides a special defense to the employer to suits by the employee. Therefore, where the Iowa Worker's Compensation Act is applicable, there can be no common liability between the employer and the third party.³²⁷

Other courts have denied the right of contribution and indemnity based on common liability on other grounds. For example, United States District Court Judge O'Brien stated: "The central concept behind worker's compensation is that the employer and employee receive the benefits of a guaranteed, fixed-schedule, non-fault recovery system, which constitutes the exclusive liability of the employer. It must be remembered that this system has nothing to do with the concepts of negligence."³²⁸

Iowa courts have refused to allow a third party to seek contribution or indemnity from an employer when the liability of the employer is based on the employer's fault.³²⁹ By refusing to hold employers liable in some instances, Iowa courts have placed responsibility for workplace injuries on third party tortfeasors in excess of their culpability. Iowa courts have ordered an employer to indemnify a third party for liabilities arising out of workplace injuries pursuant to an express contract or a breach of an independent duty.³³⁰ Iowa courts have ordered indemnity on these grounds because the payments are made to a third party and the rights of the

327. *Williams v. Weiler & Co.*, 498 F. Supp. 917, 919 (S.D. Iowa 1979) (citation omitted)); *accord* *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303 (Iowa 1966).

328. *Id.* at 920.

329. *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 134 (Iowa 1984); *Iowa Power*, 144 N.W.2d at 307-08.

330. *Cochran I*, 235 F. Supp. 2d 991, 998-99 (N.D. Iowa 2002) (quoting *Abild*, 144 N.W.2d at 308-09); *Rees v. Werts Corp.*, 379 N.W.2d 1, 5 (Iowa 1985).

employee are not vindicated.³³¹ Pursuant to these grounds for indemnity, courts have ordered employers to indemnify third parties for liabilities resulting from injuries to employees³³² even though the Iowa Workers' Compensation Statute provides the "exclusive and only rights and remedies of the employee" for workplace injuries.³³³ This rationale proves too much because it also distinguishes payments made by an employer to a third party for an injury to an employee when the injury occurred because the employer was at fault from payments made pursuant to an express contract or due to a breach of an independent duty owed the third party.³³⁴

Interpreting the Iowa Workers' Compensation Statute to preclude an employer from sharing common liability for injuries to an employee runs counter to several legal tenets. First, Iowa adopted its workers' compensation statute "to impose upon industrial enterprises the burden and cost of their hazards, and to make such cost a part of the 'overhead' of the trade or enterprise."³³⁵ Placing the entire liability for an injury on a third party even though the employer was at fault does not force the employer to bear the burden of the liability due to an employee's injury. Second, the trend in Iowa has been to allocate responsibility for a liability according to the fault of the party, regardless of the relationship between the tortfeasor and injured party.³³⁶ Third, courts seek to place responsibility for losses on the party in the best position to avoid the loss to create an incentive to avoid incurring future liabilities.³³⁷ Placing liability on the party in the best position to avoid the loss would place responsibility on the employer for injuries to employees resulting from the employer's actions.

VI. CONCLUSION

As between negligent parties, contribution has replaced indemnity as the primary remedy to allocate responsibility for common liabilities. Prior

331. Cf. *Abild*, 144 N.W.2d at 311, 314.

332. See *supra* note 330 and accompanying text.

333. IOWA CODE § 85.20 (2005).

334. See *Abild*, 144 N.W.2d at 311.

335. *Am. Dist. Tel. Co. v. Kittleson*, 179 F.2d 946, 953 (8th Cir. 1950) (quoting *Pfister v. Doon Elec. Co.*, 202 N.W. 371, 373 (Iowa 1925)).

336. See *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989) ("Under the principles of comparative fault, liability should be assessed and apportioned according to fault, each party bearing one's own share of the loss.").

337. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 274 (1979) (Blackmun, J., dissenting).

to abandoning the doctrine of contributory negligence and adopting comparative fault, Iowa courts used indemnity to shift the entire responsibility for a liability to the indemnitor to attempt to prevent unjust enrichment. Since the adoption of Iowa Code Chapter 668, Iowa courts have distributed responsibility for liabilities between negligent parties who share a common liability based on their respective fault. A negligent party may seek contribution from another negligent party and a court will distribute responsibility for the common liability according to the fault of each party.

The trend in the law of contribution and indemnity is to distribute responsibility for liability according to the culpability of the responsible parties. Nonetheless, contribution has not entirely displaced indemnity. Extending the holding that indemnity based on “primary/active versus secondary/passive liability”³³⁸ is inconsistent with Iowa Code Chapter 668 to the specific examples of tort-based indemnity would be consistent with the trend of allocating responsibility for common liabilities in accordance with the fault of each liable party.

338. *Hansen III*, 630 N.W.2d 818, 823 (Iowa 2001).