Torts: Contribution and Indemnity in Cases of Absolute Statutory Liability—In Search of the Minnesota Rule [Zerby v. Warren, ___, Minn. ___, 210 N.W. 2d 58 (1973)]

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation

Available at: http://open.mitchellhamline.edu/wmlr/vol1/iss1/6

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law
I. INTRODUCTION

Civil liability arising out of the violation of a criminal statute is ordinarily grounded in negligence. Unless the legislature explicitly so provides, a criminal statute does not create tort liability, although it does establish a duty which each individual owes to society. The courts interpret these statutory duties to run to each person in the class which the legislature intended to protect, and, thus, adopt them, in addition to the general common law duty to exercise due care, as standards for judging whether injurious conduct is tortious. Since negligence consists of the breach of a legal duty, violation of a statute imposing such a duty is negligence, not mere evidence of negligence. Except for the nature and source of the defendant's duty, then, an action based upon violation of a statute is much like any other negligence case.

In rare instances, however, the courts will construe a criminal statute as creating an absolute duty, the violation of which will give rise to strict liability. Strong public policy considerations underlie these decisions. The statute in question is always one which protects the public health or safety, and in addition, it typically is designed to protect the members of a limited class against their own inability to protect themselves. Although the courts occasionally do so, it is technically inaccurate to speak of liability arising...
out of violations of these exceptional statutes as "negligence per se." Instead, it is a special breed of strict statutory liability, differing from most others. Because of the seriousness of the evil to be protected against, or because the plaintiff is a person to be protected from his own inability to care for himself, contributory negligence and assumption of risk will not relieve the defendant of liability. Consequently, some courts and commentators avoid the use of the term "strict liability," applying the appellation "absolute liability," instead.

Though "absolute liability" is something of a misnomer, the Minnesota Supreme Court, in a recent decision, applied the phrase literally, refusing to grant contribution to or enforce a contract of indemnity in favor of a defendant who had violated one of these exceptional statutes. *Zerby v. Warren* was an action brought by a trustee for the wrongful death of his minor son. The defendant sold toxic glue to decedent's companion who, in turn, gave the glue to the decedent to inhale. Named as third-party defendants were the companion and the manufacturer of the glue. The supreme court affirmed the trial court's decision that only the defendant retailer was liable.

The unique factual setting of *Zerby* offers an excellent framework for an analysis of the role of contribution and indemnity in tort actions involving violation of a criminal statute. Decedent, Steven Zerby, 14, and Randy Rieken, 13, purchased two pint cans of "Weldwood" glue, containing toluene, an aromatic hydrocarbon solvent in defendant Warren's Coast-to-Coast Store. The two boys then inhaled the fumes of the glue. Zerby suffered injury to his central nervous system causing him to fall into a creek and drown. Warren had purchased the glue from United States Plywood through Coast-to-Coast Central Organization, Inc., on whose purchase order form appeared a provision indemnifying the buyer against all liability consequent to the sale of the glue. Warren was held liable in the lower court on the theory that his violation of a glue sales-abuse statute made him absolutely liable. On appeal,

---

10. *Id.*
13. The term "absolute liability" would seem to ignore questions of proximate and concurrent causation, yet it is usually used merely to describe situations where assumption of risk and contributory negligence are unavailable as defenses. Dart v. Pure Oil Co., 223 Minn. 526, 535-36, 27 N.W.2d 555, 560 (1947); Restatement (Second) of Torts §§ 430, comment e, 431, comment e (1965).

Subdivision 1. No person shall sell to a person under 19 years of age any glue or cement containing toluene, benzene, xylene, or other aromatic hydrocarbon solvents, or any similar substance which the state board of health has . . . declared to have potential for abuse and toxic effects on the central nervous system. This section does not apply if the glue or cement is contained in a packaged kit for the construction of a model.
he did not dispute his liability but claimed that Zerby's own actions, including violation of a glue possession-abuse statute, constituted assumption of risk and contributory negligence; that he was entitled to contribution from the negligent companion, Rieken, who had violated both subdivisions of the possession-abuse statute by buying and giving the glue to Zerby; and that the contract of indemnity with United States Plywood should be enforced as written.

The supreme court affirmed the judgment of the trial court rejecting each of Warren's claims. The sales-abuse statute makes it a misdemeanor to sell certain toxic glues to persons under 19, and the court held that Warren's violation of this statutory duty of care constituted negligence per se. Further, since the statute was intended to protect a limited class of persons from their inability to protect themselves, the court held that Warren's liability was "absolute," precluding the defenses of contributory negligence and assumption of risk. The court also dismissed Warren's claim of contribution from Rieken, characterizing the latter's actions as not "superseding" or "substantial" causes, but mere "reaction" to the wrongful sale. Finally, the court rejected Warren's claim of contractual indemnity because "any agreement which relieves the defendants of the consequences of the violation of the public duty imposed by [Minn. Stat.] Sec. 145.38 [1971] is against public

Subd. 2. No person shall openly display for sale any item prohibited in subdivision 1.
16. Id. § 145.39:
Subdivision 1. No person under 19 years of age shall use or possess any glue, cement or any other substance containing toluene, benzene, zylene, or other aromatic hydrocarbon solvents, or any similar substance which the state board of health has ... declared to have potential for abuse and toxic effects on the central nervous system, except under the direction and supervision of a medical doctor.
Subd. 2. No person shall intentionally aid another in violation of subdivision 1.
17. ___ Minn. at ___. 210 N.W.2d at 60.
18. MINN. STAT. § 145.38, subd. 1 (1971).
19. ___ Minn. at ___. 210 N.W.2d at 62.
20. Id.
21. Id., citing Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 176 N.W. 482 (1920), and quoting Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W.2d 555 (1947), and also citing RESTATEMENT (SECOND) OF TORTS § 483, comment c (1965), and PROSSER § 36, at 201, § 65, at 425, § 68, at 435-36.
22. ___ Minn. at ___. 210 N.W.2d at 62. See, e.g., Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W.2d 555 (1947); Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N.W. 428 (1909). Accord, Doherty v. S.S. Kresge Co., 227 Wis. 661, 278 N.W. 437 (1938) (applying Minnesota law). The RESTATEMENT (SECOND) OF TORTS § 483 (1965) is also in accord: "The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant." Note, however, that the term "absolute liability" may be somewhat unfortunate, as it connotes complete responsibility regardless of cross claims. Only the defenses relating to the plaintiff's own negligence are specifically countenanced by the above authorities, however.
23. ___ Minn. at ___. 210 N.W.2d at 64.
Though the Zerby court's threshold findings of negligence per se and absolute liability have the forces of authority and logic behind them, this note will argue that the desultory rejection of contribution and summary denial of contractual indemnity pose issues of factual analysis and public policy worthy of consideration. A review of actual and proximate causation will show that the court's "reaction" characterization is at least questionable: an inspection of the cases cited by the court in support of its holding that Rieken's actions were not independent will reveal that its conclusion is groundless, and the public policy considerations underlying the long history of contribution liability among concurrent tortfeasors in Minnesota indicate that no legislative purpose would have been undermined by allowing contribution. Similarly, the court's refusal to enforce the indemnity contract, unsupported by citation of authority or specific reasons, is contrary to the weight of authority which would uphold such contracts unless they induce or have as their consideration the performance of criminal or illegal acts. Similar contractual indemnities, such as liquor liability insurance may be endangered by the Zerby holding, despite the fact that the public policy arguments for forbidding them are opposed by equally strong arguments in their favor.

II. REJECTION OF THE CONTRIBUTION CLAIM

The right of contribution arises out of separate acts creating common liability, regardless of whether the wrongdoers act in concert. When one tortfeasor has been held liable for damage caused by many, contribution spreads the loss among those responsible and promotes justice. The critical point is that the party from whom contribution is sought must have concurred in causing the injury. Thus Warren should have been granted contribution upon a showing of the elements necessary to establish Zerby's cause of action against Rieken.

On the surface, that appears a simple burden to meet. It would seem that Rieken had a duty not to injure Zerby by giving him toxic glue, that he breached that duty, and that his breach was a proximate cause of Zerby's death. First, it is necessary to establish that Rieken did have a duty to re-

24. Id.
25. See authorities cited note 22 supra.
26. Since the statute is designed to protect the plaintiff from his inability to protect himself, it should follow that his negligence would not bar his recovery.
27. ___ Minn. at ___. 210 N.W.2d at 64.
28. PROSSER § 50.
29. "Contribution rests on common liability, not on joint negligence or joint tort. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds." Farmers Ins. Exch. v. Village of Hewitt, 274 Minn. 246, 249, 143 N.W.2d 230, 233 (1966).
frain from giving Zerby glue to inhale. Recognizing the known, grave risks of glue-sniffing, the deterrent effect of liability, and the strong moral imperatives involved, the Minnesota Legislature imposed a statutory duty of care. It is a misdemeanor for a minor to possess glues of certain types with the intention of inhaling them to become intoxicated and for any person to aid minors in achieving that illegal end. There appears to be no reason why that statute should not serve as a civil standard of conduct, just as the sales-abuse statute does. Surely, the harm complained of was within the scope of the evil which the statute was enacted to prevent. The legislative purpose underlying both statutes is to protect against "the potential harm which could result to minors from the sniffing of glue." In the words of the Zerby court, "the duty imposed by statute is fixed, so its breach ordinarily constitutes conclusive evidence of negligence, or negligence per se...." By the court's own logic and authority, then, Rieken's statutory violation constitutes negligence per se.

While it seems proper that Rieken's own minority be taken into consideration in determining whether Rieken breached the statutory duty, his age is certainly not a complete defense. While the statute establishing the duty makes possession of potentially harmful glue by any "person under 19 years of age" a misdemeanor, the subdivision of the statute prohibiting aiding a minor to possess contains no age limit. Thus, the court would be justified in looking to the standard of conduct of a child of the defendant's "age, intelligence, and experience." Unfortunately, the court failed to analyze Rieken's conduct in terms of either the statutory or the common law stand-

32. Since Rieken purchased glue and gave it to Zerby to sniff, the test to be applied is whether the boys "stood in such relationship that the law will impose on [Rieken] a responsibility for the exercise of care toward [Zerby]." Raymond v. Paradise Unified School Dist., Cal. App. 2d 1, 5, 31 Cal. Rptr. 847, 851 (Dist. Ct. App. 1963).


34. The Zerby court specifically held that the sales-abuse statute creates such a standard. Minn. at ___. 210 N.W.2d at 62.

35. A statute will establish tort duty toward a particular person if its purpose is:

   to protect a class of persons which includes the one whose interest is invaded, and to protect the particular interest which is invaded, and to protect that interest against the kind of harm which has resulted, and to protect that interest against the particular hazard from which the harm results. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

36. Zerby v. Warren, ___. Minn. ___, ___. 210 N.W.2d 58, 61.

37. See id. at ___, 210 N.W.2d at 62 (analysis of negligence per se).

38. Id. at ___, 210 N.W.2d at 64.

39. In fact, the court said, "[I]t should not be forgotten... that Rieken... was also a member of a limited class of persons that the legislature intended to protect from their inexperience, lack of judgment, and tendency toward negligence." Id. at ___, 210 N.W.2d at 64.

40. MINN. STAT. § 145.39, subd. 1 (1971).

41. Id. § 145.39, subd. 2.

42. RESTATEMENT (SECOND) OF TORTS § 283A (1965) adopts this standard in preference to the older and more formalistic age classification system wherein a minor aged 7 to 14 was presumed incapable of negligence. Most courts are in agreement. PROSSER § 32, at 156. See Eckhardt v. Hanson, 196 Minn. 270, 264 N.W. 776 (1936); Kuhns v. Brugger, 390 Pa. 331, 135
ard, and there appears to be no valid reason for assuming that Rieken did not have the legal capacity for negligent conduct.

That Randy Rieken’s conduct constituted an actual cause of Stephen Zerby’s death seems equally apparent. Rieken bought the glue and gave it to Steven Zerby for the express purpose of inhaling its fumes to become intoxicated.43 Zerby did so, suffered nervous system damage, and drowned. The rule pioneered by the Minnesota Supreme Court,44 and emulated elsewhere,45 lays actual causation of the event at the feet of him whose conduct is a substantial factor in bringing it about.46 Rieken’s conduct in the progression of events ending in Zerby’s death was a sine qua non of the final result: had Zerby not sniffed the glue, he would not have suffered injury to his central nervous system and drowned, and had Rieken not purchased the glue and given it to Zerby, he could not have sniffed it. Thus, the substantiality of Rieken’s conduct is apparent, and, although the causality of Warren’s sale be conceded, Rieken, too, “caused” Steven Zerby’s death.

Whether the supreme court reached these conclusions concerning duty, negligence per se, and actual cause is a mystery. Without explanation, the court concluded that Rieken’s conduct was not “a direct concurrent or superseding cause of decedent’s death,”47 but instead, “was merely a reaction to the original wrongful act of [Warren] and therefore not a proximate cause.”48 As the court thus deems proximate or legal cause the decisive factor in denying contribution, it is necessary to define the Minnesota test of legal cause and analyze the Zerby court’s “original act-reaction” formulation in light of the authorities on concurrent and intervening causation.49

In legal cause the law has created a chimeric monster of multiple identities. A variety of “tests” are applied by various courts and writers,50 but in its

A.2d 395 (1957).
43. ___ Minn. at ___. 210 N.W.2d at 61.
46. The actor will not be relieved of liability merely because his causation coincides with that of a third party to contribute to the same injury. Olson v. Buskey, 220 Minn. 155, 19 N.W.2d 57 (1945); Nees v. Minneapolis St. Ry., 218 Minn. 532, 16 N.W.2d 758 (1944).
47. ___ Minn. at ___. 210 N.W.2d at 63.
48. Id. at ___. 210 N.W.2d at 64.
49. See PROSSER §§ 41, 44; RESTATEMENT (SECOND) OF TORTS §§ 430, 432, 433, 441, 442. 468. See also authorities cited note 50 infra.
broad sense proximate cause is a plethora of loosely related problems of causation in fact, apportionment of negligence, foreseeability and unforeseen consequences, intervening causes, shifting duties, and policy determinations. The policy component of legal causation appears to have been controlling in Zerby, and as a result, the outcome bears little relationship to any of the applicable legal "tests." To some extent this blending of law and policy is unavoidable and even desirable. Application of any "test" necessarily depends on the facts of the particular case, and "upon mixed considerations of logic, common sense, justice, policy and precedent." Nevertheless, by failing to focus on policy qua policy, but, instead, adopting without explanation or discussion the new "action-reaction" test, the Zerby court merely added to the confusion surrounding legal causation.

The court endorses use of the test "consistently adhered to in Minnesota," the so-called direct consequences or unbroken sequence test of proximate causation articulated in Christianson v. St. Paul, M. & O. Ry.

A literal application of that test, however, would compel the conclusion that Rieken's conduct was a legal as well as an actual cause of Zerby's death. The "unbroken sequence" test, fraught with many difficulties, is composed of two elements: first, it must be determined whether some injury was foreseeable by a reasonable person in the actor's position; second, the events in the "unbroken sequence" must be defined to limit the actor's liability. Thus, it is necessary to determine whether a reasonable teenager in Randy Rieken's position could have foreseen that some injury would result if he gave his friend a toxic glue to inhale, and whether the injury that did in fact result followed in unbroken sequence from Rieken's conduct.

Certainly, the reasonable person, dimly aware of the hazards of abuse of chemical substances, will avoid sniffing glue or giving glue to another to

---

52. 1 T. Street, Foundations of Legal Liability 110 (1906).
53. --- Minn. at ---, 210 N.W.2d at 60 (quoting from the trial court opinion).
54. 67 Minn. 94, 69 N.W. 640 (1896).
55. The terms "unbroken sequence," "natural," and "efficient" are, it is submitted, as defiant of definition as "proximate cause." Further, use of this test often leads to ridiculous conclusions. E.g., In re Polemis & Furness, Withy & Co. [1921] 3 K.B. 560 (C.A.); see Goodhart, The Unforeseeable Consequences of a Negligent Act, 39 Yale L.J. 449 (1930). It will be observed that the Christianson test is also unduly chronological in that it tends to lead to liability of the first actor, regardless of degree of negligence; insofar as this is true, it ignores concurrence of separate negligent acts.
56. See language quoted note 54 supra.
sniff. Common knowledge, gleaned from tragic experience of the past, puts even the reasonable 13-year-old on notice of the danger of toxic glue. Further, the only possible intervention between Rieken’s negligence and Zerby’s death was Zerby’s own volition; since the court specifically rejected a finding of contributory negligence,57 the direct consequences test appears to have been met.

Nevertheless, the Zerby court found, for two reasons, that Rieken’s action was not a proximate cause of Zerby’s death. First, the court assessed Rieken’s actions not independently, but in the shadow of Warren’s, focusing on “action-reaction” and intervening cause. Second, and more important, the court was loath to subvert the legislative policy enunciated in the glue sale-abuse statute by allowing the seller to shift part of his burden to one whom the statute was designed to protect. Each of these reasons deserves separate consideration.

A. The “Action-Reaction” Test of Causation

In characterizing Warren’s sale of glue to Rieken as “the original wrongful act,” and Rieken’s conduct as mere “reaction” thereto, the court not only creates a new and undefined standard of legal causation, it also begs the question. Nothing in the court’s decision or the briefs of the parties indicates that Rieken was anything but a “normal” and “reasonable” child of 13, possessed of his faculties and capable of making decisions. Granting, then, that Warren’s sale was wrongful, it does not automatically follow that Rieken’s conduct was mere “reaction.” Though the court does not define the term, it connotes a mere predetermined “knee jerk” response to a stimulus. The free will and independence of a human being should be entitled to greater regard.

Possibly Rieken’s membership in that class of people defined by the Legislature58 as unable to protect themselves59 precludes his actions from being anything more than reaction. That categorization is made in cases like Dart v. Pure Oil Co.,60 however, for purposes of defining a duty toward the minor, not for judging the minor’s duty toward another.61 Further, that conclusion would have the grave result of prohibiting any liability for contribution by those in other similar “protected” classes. Because laws have been passed prohibiting the sale of guns to minors, can one assume that a minor successfully buying a gun is relieved of liability ab initio?62 And because there are statutes for the protection of inebriates, the violation of which creates absolute liability,63 is the drunk free of the onerous consequences of his

57. __ Minn. at __, 210 N.W.2d at 62-63.
58. Id. at __, 210 N.W.2d at 61.
59. Id. at __, 210 N.W.2d at 62.
60. 223 Minn. 526, 27 N.W.2d 555 (1947).
61. Id. at 535-36, 27 N.W.2d at 560.
What of the 18-year-old, "protected" by the glue-abuse statutes who wants to set up a market for his illicit drug trade and so buys and gives an 8-year-old a pint of glue with instruction on its abuse and a promise of "more where that came from"? Can it be posited that this "pusher" should be free of liability just because the Legislature has endeavored to protect him? This is the logical extension of the court's labeling of acts by protected minors as "reaction," and thus summarily dismissing any possibility of wrongdoing by the minor.

The conclusory and pre-dispositive legal effect of the undefined term "reaction" is perhaps a more fundamental objection to the "action-reaction" test than is its tendency to beg the relevant factual questions. Liability is determined by merely labeling the sale as "original" and then applying the Christianson formula: "Consequences which follow in unbroken sequence... from the original negligent act are natural and proximate; and for such consequences the original wrongdoer is responsible. . . ."65 This formula seems to place an inordinate emphasis on the relative times of negligent actions, imposing liability upon the one who acts first, unless one realizes that in Christianson there was no question of concurring negligence, but rather a single negligent act.66

The Zerby court might have applied the test twice, once to each defendant, but instead, it assessed the conduct of both in a single application, yielding inevitable results. Relying upon Purcell v. St. Paul City Ry.,67 the court concluded that Rieken's conduct did not constitute an "intervening" cause,68 because it "was not independent of the original wrongful sale."69 Though the court quotes language from Purcell which seems on its face to be equally applicable to Zerby,70 the two cases are clearly distinguishable, both on the law and on the facts. The plaintiff in Purcell suffered a miscarriage when the streetcar in which she was a passenger nearly collided with another streetcar.71 The intervening force claimed by the defendant streetcar company to relieve it of all liability for plaintiff's injury was her own "condition of mind" caused by her physical condition.72 In Purcell, an intervening cause was claimed to supersede the original cause and to relieve the defendant of all liability, while in

64. See Prosser § 32 at 154.
65. 67 Minn. at 97, 69 N.W. at 641.
66. Id. at 94-95, 69 N.W. at 640.
67. 48 Minn. 134, 50 N.W. 1034 (1892).
68. Id. at 134-35, 50 N.W. at 1034.
69. Id.
70. There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Id.
71. 48 Minn. at 134-35, 50 N.W. at 1034.
72. "The defendant suggested that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences." Id. at 139, 50 N.W. at 1035.
Zerby, Warren admitted his own causal fault and merely asked that damages be apportioned. In Purcell, the force was a "condition of mind," fear, to which no negligence was assigned, while in Zerby the force was the causal negligence of a third person. Purcell held that plaintiff's fear was not an "independent, intervening cause," but was "produced by the wrongful act." It can hardly be said that causing the fear which in turn causes plaintiff's injuries is logically or legally equivalent to giving a negligent third party the means by which to effectuate his breach of a duty owed to the plaintiff.

Intervening cause was simply not at issue in Zerby. The focal point of an intervention question is not causation, but "the defendant's original obligation" to recognize risk to the plaintiff and prevent harm from ensuing. An intervening cause is one that comes into active operation after the original negligent act, and ordinarily, if it was reasonably foreseeable at the time of the original act, the actor will be held liable for the result.

Intervention is irrelevant to Warren's claim for contribution. He conceded his own legal causation, his own "original obligation," and claimed that Rieken's conduct was a concurrent cause, not a superseding one. Unlike intervention, where a defendant questions only his "original obligation," the focus of concurrence must rest on two separate acts of negligence. Thus, instead of examining the facts for intervention, the court might have searched Rieken's actions for concurrence. Such a search would have proved fruitful, as Rieken, like Warren, actually and legally caused Zerby's death. It follows that both Warren and Rieken should have been held liable, as "it has always been the law of this state that parties whose negligence concurs to cause an injury are jointly and severally liable although not acting in concert."

B. The Role of Public Policy

The second reason given by the Minnesota court for its failure to grant contribution in Zerby was its fear that in so doing, it would defeat the "legislative purpose" of the glue sales-abuse statute. Thus, although Rieken's conduct was apparently a proximate cause of Zerby's death, the court, grappling with the policy aspects of legal causation, concluded that one who has been held

73. PROSSER § 44 at 270.
74. See Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164 (1964); Davidson v. Otter Tail Power Co., 150 Minn. 446, 185 N.W. 644 (1921).
76. Id.
77. 1 T. SHEARMAN & A. REDFIELD, NEGLIGENCE § 122 (rev. ed. 1941). See notes 28 to 31 supra and accompanying text.
78. See notes 43 to 46 supra and accompanying text.
79. See notes 50 to 57 supra and accompanying text.
81. __________ Minn. at __________, 210 N.W.2d at 61.
CONTRIBUTION & INDEMNITY

absolutely liable because of his statutory violation should not be allowed to recover contribution from one who, though he is also a violator of the statute, was intended to come within the scope of the statute's protection.

The more general issue, whether contribution is available to one whose tort liability is not based upon ordinary negligence, is a familiar one. The precedents range from denying contribution in all cases to granting it to all but the most willful tortfeasors. Although there were certainly contribution cases before it, the 1799 decision of Merryweather v. Nixan first disallowed contribution among intentional joint tortfeasors. Initially, courts followed Merryweather, not deigning to give relief to one guilty of an intentional wrong, but allowed contribution to merely negligent primary defendants.

Gradually, and particularly after adoption of permissive rules of joinder, the majority of courts permitted apportionment among all multiple tortfeasors.

Since Ankeny v. Moffett, the Minnesota court has followed the minority rule, denying contribution "where the person seeking contribution was guilty of an intentional wrong, or, at least, where he must be presumed to have known that he was doing an illegal act." In two more recent cases, the court has reaffirmed the Ankeny principle, holding that contribution was to be allowed unless the traffic law violations of the primary defendants were found to be willful and committed with recognition of the peril involved.

The decision in Farmers Insurance Exchange v. Village of Hewitt collects the Minnesota cases in point and also contains some important dicta relevant to the contribution issue in Zerby. In that case, bars owned by the villages of Hewitt and Long Prairie violated the Civil Damage Act by serving liquor to one Wallace while he was obviously intoxicated. He then negligently caused an automobile accident. Before trial, appellant, Wallace's insurer, paid...
19,000 dollars to plaintiff, while the villages settled for a substantially smaller sum. Appellant’s action for contribution was met by summary judgment in favor of respondent villages for failure to state a claim on which relief could be granted. The Civil Damage Act does not give the inebriate a cause of action for his own injuries, but allows any third party injured by him to recover from the violating liquor vendor. The novel issue presented in Hewitt, then, was whether the inebriate or his subrogee might recover contribution from the vendor who illegally sold the liquor.

The Hewitt court held first that, “the parties having a common liability to the injured persons, it is no bar to contribution that their liability rests on different grounds,” and second, that driving while intoxicated is not, of itself, sufficient to show willfulness. Citing the cases discussed above, the court held that only if Wallace’s operation of his car constituted willful misconduct would he or his insurer be denied contribution.

Although in neither Hewitt nor Zerby was there a showing of willful or intentional misconduct by the primary defendant, and although violation of the statutes involved in both cases gives rise to absolute liability, the two cases may be distinguishable. In Zerby, an unprotected party, who had violated the statute and was held liable in damages to a third party, sought contribution from a party protected by the statute. In Hewitt, on the other hand, one of those protected, held liable in damages to a third party for his common law negligence, sought contribution from unprotected violators of the statute. Remaining unanswered is the question of whether the usual rules that only willful misconduct, and not liability resting on different grounds, bars contribution, will apply where a violator of an absolute liability statute seeks contribution from a defendant who has been negligent under the common law test. If contribution does lie in such a case, then surely the violator of an absolute liability statute should also be entitled to contribution from another whose violation of a similar statute also gives rise to absolute liability.

Though Hewitt offers no conclusive answer, analogous cases in Minnesota and elsewhere seem to support the claim for contribution. At one point the Hewitt court indicates that it makes little difference who sues whom when two parties are liable to the same injured person; if the victim is entitled to recover from each defendant, it follows that the defendants should be liable for contribution to each other. Thus, if Rieken’s violation of the statutory

91. Empire Fire & Marine Ins. Co. v. Williams, 265 Minn. 333, 121 N.W.2d 580 (1963); Randall v. Village of Excelsior, 258 Minn. 81, 103 N.W.2d 131 (1960); Cavin v. Smith, 228 Minn. 322, 37 N.W.2d 368 (1949); Sworski v. Colman, 204 Minn. 474, 283 N.W. 778 (1939).
92. 274 Minn. at 253, 143 N.W.2d at 235.
93. Id. at 258, 143 N.W.2d at 239.
94. Id. at 254-56, 143 N.W.2d at 236-37.
95. See Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W.2d 555 (1947).
96. Here it would seem that there is no question that the driver of the automobile and the vendor making the illegal sale of intoxicating liquor are jointly liable to the injured parties. It is true that liability rests on different legal grounds. One rests on common-law negligence and the other on the Civil Damage Act. But the liability of
CONTRIBUTION & INDEMNITY

duty of care did constitute a proximate cause of Zerby’s death, Rieken could certainly have been sued and forced to bear full liability. It would surely allow a triumph of form over substance to deny the co-actor, Warren, fortuitously burdened with the direct liability, relief by means of contribution.

Some conflicting dicta in Hewitt notes, however, that, according to Dart v. Pure Oil Co., certain statutory violations bar the defense of contributory negligence. Further, “[t]he rationale of the rules barring contributory negligence and barring right of contribution against a wrongdoer is the same. Both are based on the unwillingness of the courts to aid one who is guilty of an intentional wrong. . . . ” It would apparently follow that, since the violator of the Civil Damage Act is barred from a contributory negligence defense, he is also denied contribution. Since Warren violated a similar statute, “prohibiting sale of dangerous articles to minors,” his contribution claim would be extinguished by the very first holding of the Zerby court.

An analysis of Dart, however, reveals the flaw in equating a bar to contributory negligence with a bar to contribution. Contribution has been denied where intentional tortfeasors were involved because courts believed that the law should not stoop to aid them and thus risk encouraging them. The defense of contributory negligence, on the other hand, is barred in the case of those “exceptional” statute violations solely because the legislative purpose of protecting persons adjudged incapable of exercising due care for their own safety could not be fulfilled if the defense were recognized. Thus, Warren’s inability to assert Zerby’s contributory negligence as a defense should bear little relationship to the issue of his separate contribution claim against Rieken.

Cases allowing contribution to one held strictly liable support this distinction. For example, the Minnesota Supreme Court in Skaja v. Andrews Hotel Co., allowed contribution between two violators of the Minnesota Civil Damage Act. In that case, the liquor vendors illegally sold liquor to a minor who shot and killed plaintiff’s husband. Mere violation of a strict liability statute, said the court, does not raise a presumption of willfulness, both is common to the injured party. Action for recovery against one does not bar action against the other. . . . If it is true that one full recovery sets the limit against both tortfeasors, the question naturally arises—why should they not each be liable for their fair share inter se, whether they are sued in the same action or separately. . . .

274 Minn. at 251, 143 N.W.2d at 234.

97. This is not to say that had Zerby sued Rieken directly without joining Warren the court’s decision and rationale would have been different.
98. 274 Minn. at 258, 143 N.W.2d at 238-39.
99. Id.
101. ____ Minn. at ___, 210 N.W.2d at 62.
102. See id.
103. PROSSER § 65, at 426.
104. 281 Minn. 417, 161 N.W.2d 657 (1968).
and absent a showing that the party seeking contribution "was conscious of doing a wrong or committing a violation of statute," relief should be granted.\textsuperscript{105} There are, however, obvious distinctions between \textit{Skaja} and \textit{Zerby}. Not only does the latter involve contribution between two statute violators, but also the policy considerations supporting contribution in the Civil Damage Act case are absent in \textit{Zerby}.\textsuperscript{106} Yet, the general rule of law established in \textit{Skaja} appears equally applicable to \textit{Zerby}. Warren was not "conscious of doing a wrong or committing a violation of statute."\textsuperscript{107} Moreover, the policy rationale are at least evenly divided in \textit{Zerby}.

Dram shop and products liability decisions from other jurisdictions, which have allowed contribution to one held strictly liable from one in a protected class, lend further support for contribution in \textit{Zerby}. In two recent Illinois cases,\textsuperscript{108} indemnity was granted to dram-shop owners held liable to injured plaintiffs. In one case, the Illinois court said the "active" participant, the drinker who assaulted the plaintiff, should indemnify the bar owner if the latter was only "passively" negligent.\textsuperscript{109} In the other, the court held in more general terms that the purposes of the Civil Damage Act would not be impaired if the minor drinker were required to indemnify the liquor vendor for damages it paid to an injured third party.\textsuperscript{110} In a significant departure from prior case law, the New York appellate division recently reversed the dismissal of a cross-claim brought by liquor vendors for contribution from the vendee-defendant who injured the plaintiff.\textsuperscript{111} The court announced "new guidelines" to determine the right to contribution: "shared responsibility in apportioning liability among parties involved together in causing damage by negligence."\textsuperscript{112}

On balance, the fact that the party from whom contribution is sought is a member of the class protected by the statute violated by the contributee should be legally irrelevant. Further, the source of liability, whether statutory or common law negligence, should be equally irrelevant. So long as both parties have contributed to an injury by their negligence they should be liable \textit{inter se}. The dram shop cases seem to be on all fours with \textit{Zerby}. A statute creates

\textsuperscript{105} \textit{Id.} at 421, 161 N.W.2d at 660.
\textsuperscript{106} The \textit{Skaja} court makes it clear that the paramount purpose of the Civil Damage Act, social insurance through liability of the one who profits by sales, weighs heavily in its decision. \textit{Id.} at 422, 161 N.W.2d at 661. Since Rieken is obviously not a co-seller, the \textit{Skaja} policy rationales are probably inapplicable.
\textsuperscript{107} \textit{Id.} at 421, 161 N.W.2d at 660.
\textsuperscript{109} Walker v. Service Liquor Store, 120 Ill. App. 2d 112, 255 N.W.2d 613 (1970). One might well question the wisdom of allowing indemnity to nullify the dram shop owner's statutory liability. Further, the active-passive rationale is irrelevant in Minnesota.
\textsuperscript{112} \textit{Id.} at 534, 330 N.Y.S.2d at 924.
liability for the contributee where none existed before; the contributee by illegal sale raises "strict liability;" the contributor as a direct result of his purchase injures a third party; and for that injury both vendor and purchaser are liable in damages.

Identical elements are present in two recent products liability cases. Chamberlain v. Carborundum Co. presented the issue of whether a manufacturer held strictly liable for damages resulting from sale of a defective machine could receive contribution from the purchaser of the product who negligently set it up for use by his employees. In the wrongful-death action brought by the employee's spouse the court held that Pennsylvania law would permit contribution from the negligent employer-purchaser regardless of the separate sources of liability, provided the parties were in pari delicto.

Noting that strict liability was adopted to afford maximum protection of the consumer who is unable to protect himself, and to enforce the seller's implied assurance of the safety of his product, another federal court, applying Pennsylvania law, reached a similar conclusion. It permitted contribution in favor of a strictly liable manufacturer of a defective product against a third party whose negligence contributed to plaintiff's injury on the theory that the tortfeasor should not be permitted to take advantage of the protection designed for the user or consumer of the product and held that only intentional wrongdoers should be denied contribution.

Assuming that Rieken tortiously caused Zerby's injury, giving rise to common liability, no policy reason appears to require the denial of contribution in Zerby v. Warren. The Minnesota cases, all stand for the principle that

114. 485 F.2d 31 (3d Cir. 1973).
115. Id. at 34.
117. Id.
118. Id.
119. Id. at 1002. The Walters court held in accordance with § 1(c) of the 1955 Revised Uniform Contribution Among Joint Tortfeasors Act that only intentional (willful and wanton) tortfeasors should be denied contribution. The court, noting that the underlying policy of Restatement (Second) of Torts § 402A (1965) is not defeated by contribution, went on to say that contribution was allowable before the strict liability of § 402A and nothing in that section would seem to abandon it.
120. 356 F. Supp. at 1002.
contribution is allowed unless the primary defendant’s conduct is willful or wanton. Moreover, were their positions reversed, Rieken would surely have been entitled to recover contribution from Warren.\textsuperscript{122}

Negligent purchasers who cause injuries to others are not protected by strict products liability, though the injured third parties certainly are. Not drinkers but their victims, whether they are survivors of or parties injured by the drinker, are protected by the statutory liability of the Civil Damage Act. Similarly, not negligent, supplying minors, but injured minors should be protected by the glue sale-abuse statute. Review of \textit{Dart v. Pure Oil Co.}, the leading case in Minnesota on “exceptional statutes” raising strict liability, reveals the sole purpose of such liability is protection of a member of a limited class from his own inability to protect himself.\textsuperscript{123} It is difficult to imagine how the injured party might be better protected by disallowing contribution to the strictly liable defendant. The plaintiff will receive compensation in either event and, in fact, may be assured of a more complete recovery if a greater number of defendants is involved. Moreover, why should a negligent party be excused from liability just because he has acted concurrently with a statute violator?\textsuperscript{124}

In its effort to further the purpose of the glue sales-abuse statute the court seems to have forgotten about the glue-possession-abuse statute.\textsuperscript{125} It, too, was intended to protect minors from glue abuse.\textsuperscript{126} The \textit{Zerby} decision undermines the viability of this possession statute. One who sells glue to the minor reaps absolute civil liability, while one who merely gives glue to the minor, if he is himself a minor, goes free.

The central issue pleaded by Warren and ignored by the \textit{Zerby} decision, and from which all of the results herein reviewed stem, is the concurring causal fault of Rieken in buying, possessing, and giving the glue to Zerby. Once recognized, Rieken’s liability forcefully impels investigation of legal

\textsuperscript{122} See notes 96 & 97 \textit{supra} and accompanying text.

\textsuperscript{123} 223 Minn. at 535, 27 N.W.2d at 560.

\textsuperscript{124} More general policy arguments \textit{against} contribution might be posited: a) because of the moral obloquy of his actions Warren should bear the full financial consequences of his negligence instead of a mere fine, b) requiring Warren to bear the loss will deter future similar illegal sales, c) Warren has the “deepest pocket” and the means to spread the loss, and d) because Rieken is one of those in the class protected by \textbf{MINN. STAT.} § 145.38 (1971), it would be incongruous to make him pay for a breach of duty owed to him.

However, the legislative purpose, protection of minors, is effected by the only means it has specifically endorsed, criminal penalty. It is beyond the power of a civil court to create penalties; restitution, and not punishment, is the function of the court. Second, deterrence is achieved by the statute and its enforcement by the proper officials. Warren’s liability for even part of the damage would achieve the same result as denial of contribution. Next, Warren’s “deep pocket” is questionable, and, as the next section shows, the court has specifically denied his right to “spread” his loss by insurance. Fourth, Rieken’s liability would pay not for the breach of duty toward him, but for his breach toward Zerby.

\textsuperscript{125} \textbf{MINN. STAT.} § 145.39 (1971).

\textsuperscript{126} \textit{Zerby v. Warren.} _____ Minn. _____, 210 N.W.2d 58, 61 (1973).
causation, concurrence, and the policy basis of the contribution action. Without such analysis one must search in vain for the implications of Zerby.

III. REFUSAL TO ENFORCE THE CONTRACT OF INDEMNITY

Not only did the Minnesota court impose absolute liability upon defendant Warren, refusing to grant him contribution from another whose fault had concurred with Warren’s to cause the plaintiff’s injury, it also denied Warren the right to spread the loss resulting from this absolute liability through insurance. United States Plywood, manufacturer of Weldwood glue, expressly agreed to “protect, defend, hold harmless and indemnify” the retailer “from and against any, and all liability, cost and expense arising from the death or injuries to any persons” resulting from “the handling, display, sale, and use, consumption or distribution” of its glue. It also agreed to secure, and did in fact secure, insurance against such damages. The trial court construed the contract to apply only to legal sales, thereby nullifying it for purposes of the case at hand.

On appeal, Warren argued that the indemnity provision was clear on its face, and as, “it is only where ambiguity exists that courts are required to resort to construction,” indemnity should be allowed. Further, Warren noted that indemnity is usually allowed in Minnesota “where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.” He claimed that the contract should be enforced where the commission of the tort has been only an “undesired possibility” and was not part of the contract’s consideration. Appellee, United States Plywood, claimed that the second sentence of the indemnity provision was modified by the first, so that only damages caused by unmerchantable or defective glue should raise its liability. Further, it

---

127. The contract on the Coast-to-Coast order form, signed by United States Plywood, reads in relevant part:

Seller hereby expressly warrants that the merchandise is merchantable as defined in the UCC Section 2-314 (2) and free from latent defects and that such warranties shall run to Buyer's customers and to customers of Buyer's customers. Seller agrees to protect, defend, hold harmless and indemnify Buyer and its customers from and against any, and all liability, cost and expenses arising from death or injuries to any persons or damage to property alleged to have resulted from the handling, display, sale and use, consumption or distribution of Seller's products... Brief for Appellant at A-85, Zerby v. Warren, Minn. , 210 N.W.2d 58 (1973).

128. Id. at 7.
129. Id. at 8.
130. Id. at 40. RESTATEMENT OF CONTRACTS § 572 (1932) reads: “A bargain to indemnify another against the consequences of committing a tortious act is illegal unless the performance of the tortious act is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act.” See also Independent School Dist. No. 877 v. Loberg Plumbing & Heating Co., 266 Minn. 426, 123 N.W.2d 793 (1963); Northern Pac. Ry. v. Thornton Bros., 206 Minn. 193, 288 N.W. 226 (1939).
argued that indemnity would be inequitable since it had no control over the sale.\footnote{133}

In light of the strong arguments and wealth of authority on both sides of this question, the court's summary disposition of indemnity is disconcerting. The court relied on the dicta in three Minnesota cases, each of which held an indemnity provision valid,\footnote{134} to say that "if the contract relieves a person from negligence in the discharge of an absolute duty imposed by law for the protection of others, it is void."\footnote{135}

Because of the court's exclusive dependence upon public policy, it is fruitless to review in detail the authorities enforcing and refusing to enforce contracts of indemnity.\footnote{136} Public policy, more than any other legal doctrine, depends on the particular facts of the case. Suffice it to say that both Professor Williston\footnote{137} and the Restatement,\footnote{138} adopt the rule that the appropriate inquiry is whether the contract will induce or promote the tortious act. If part of the consideration of the contract is the commission of a tort, then it is certainly unenforceable.\footnote{139} If the tort is willful and intentional the courts will often imply either that the indemnity induced it, or that, at least, existence of the indemnity contract, by eliminating financial liability, reduced the tortfeasor's compunction and forbearance. On the other hand, if the tort is only an

\footnote{133} Id. at 9.

\footnote{134} Speltz Grain & Coal Co. v. Rush, 236 Minn. 1, 51 N.W.2d 641 (1952); Pettit Grain & Potato Co. v. Northern Pac. Ry., 227 Minn. 225, 35 N.W.2d 127 (1948); Northern Pac. Ry. v. Thornton Bros., 206 Minn. 193, 288 N.W. 226 (1939). In Pettit, for example, the plaintiff was granted the validity of its contractual indemnity though it relieved it of the financial consequences of its own statutory duty, when plaintiff's train emitted sparks and caused a fire.

\footnote{135} Id. at 9.


With respect to such contractual indemnity, Professor Williston states:

There is no reason for denying a contract operation according to its terms, unless its tendency is to provide immunity for future conduct that is tortious or opposed to public policy. And if future tortious conduct does not involve serious moral obliquity and there is no reason to suppose that the contract will induce such conduct, a contract for freedom from liability for it is not invalid. 15 S. WILLISTON, CONTRACTS § 1750 (3d ed. W. Jaeger 1972).

He continues, "An attempted exemption from liability for a future intentional tort or for a future willful act or one of gross negligence is void." \textit{Id.} at § 1750A.

The general rule has been summarized as follows:

It is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence [citing Thornton, among other authorities]. ... Some courts have reached this result on the basis of an analogy between such contracts and insurance policies, while others reach the same result independently, as by simply stating that such contracts do not violate public policy. However, such contracts are invalid if it can be shown that they tend to promote a breach of duty to the public: 41 AM. JUR. 2d Indemnity § 9 (1969).


\footnote{138} 

\footnote{139}
undesired possibility, and not induced by the contract, indemnity is usually enforced. As in the decisions where indemnity agreements have been enforced, there is nothing in Zerby to indicate that the contract induced the intentional infliction of injury upon another. That the sale of the glue itself was an intentional act is insufficient to support the conclusion that the enforcement of the contract would be contrary to public policy. In a rather extreme case, for example, the Georgia Supreme Court held an insurer to the terms of its policy when the insured incurred liability by willfully racing his automobile on the highway. The court was careful to distinguish between intentional misconduct, of which the insured was surely guilty, and the intentional infliction of injuries, in which he had no part. Only the latter is uninsurable, as the Massachusetts court has recently agreed.

More in point here are three cases in which the insurer of a vendor of a dangerous product was required to indemnify the vendor despite the fact that all of the sales in question were negligent and two of them were actually illegal. A pharmacist in Atkins v. Hartford Accident & Indemnity Co. paid for broad liability coverage similar to Warren's: "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of bodily injury, sickness or disease including death at any time resulting therefrom, sustained by any person and caused by accident." The pharmacist, in violation of a statute, sold amobarbital pills to a customer. When the customer brought an action for damages arising out of his consequent addiction and resulting mental and physical injuries, the insurer balked. Although enforcement of the insurance policy would "relieve a person from [the financial consequences of] negligence in the discharge of an absolute duty imposed by law for the protection of others," the court granted the pharmacist summary judgment.

In a similar situation another Michigan decision enforced a liability insurance policy covering accidents arising out of business operations. The insured sold what he claimed to be a butane or liquid petroleum heater but that was, in reality, suited only for natural gas. When connected by the purchaser to a butane supply, the heater asphyxiated two persons. The insurance company refused to defend the suit on the grounds of a "products liability—completed operations" exclusion. In Brant, however, the court held that
there were really two “accidents,” one, the wrongful sale, and the other, the installation. Therefore, the policy required the company’s defense of the action against the insured.

More closely analogous to Zerby is the recent Illinois case of Cobbins v. General Accident Fire & Life Insurance Corp. An insured store owner sold fireworks to the 11-year-old plaintiff in violation of a statute prohibiting sales to children under 12. The plaintiff’s shirt caught fire after he ignited the fireworks, and he suffered permanent injuries from the resulting burns. Plaintiff brought a declaratory judgment action to force the insurance company to defend the suit and pay any damages. Again, the insurer was forced to indemnify, notwithstanding an exclusion similar to the one in Brant.

In each of the three cases discussed, and in Zerby v. Warren, a retailer contracted for indemnity. The retailers then negligently, and in all cases but Brant, illegally, sold products which, because of their negligence, brought injury. The retailers sought enforcement of their indemnity contracts. None of the injuries was said to be intentionally, willfully, or wantonly inflicted, though doubtless the sales, themselves, were intentional. In none of the cases was it claimed that the insurance contract induced the illegal sale, and so was against public policy. Yet, in Zerby, the Minnesota Supreme Court, unlike the three other courts, concluded that a contract of indemnity relieving “a person of negligence in the discharge of an absolute duty imposed by law for the protection of others” is void.

Neither in the three cases from foreign jurisdictions nor in Zerby v. Warren, is public policy of contractual indemnity discussed. One is, therefore, left at a loss to explain when such contracts will be enforced and what public policy

150. 4 Mich. App. at 603, 145 N.W.2d at 414. Note that the three cases reviewed here, Atkins, Brant, and Cobbins hold contrary to a line of Minnesota insurance decisions with analogous facts, in each of which insurer liability is denied. Hagen Supply Corp. v. Iowa Nat’l Mut. Ins. Co., 331 F.2d 199 (8th Cir. 1964) (applying Minnesota law); Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494, 289 N.W. 40 (1939); Hutchinson Gas Co. v. Phoenix Indem. Co., 206 Minn. 257, 288 N.W. 847 (1939); Hultquist v. Novak, 202 Minn. 352, 278 N.W. 524 (1938).

The Minnesota decisions would be determinative of the present case in favor of United States Plywood but for the distinctions between the policies of insurance at issue in those cases and the broad indemnity agreement here. Whereas, the above-cited cases construe specific insurance policy exclusions, the United States Plywood agreement was expansive and free of exclusion. See note 127 supra and accompanying text. It also must be noted that public policy, relied upon so heavily in the Zerby decision, was not held to be a factor in the earlier Minnesota cases. Atkins, Brant, and Hutchinson involved “products hazards” exclusions: Hultquist, Hagen, and Lyman concerned “premises-operation” clauses. Other courts circumvent such exclusions, as with the dual “accident” theory mentioned above; the Minnesota court interprets the same clauses restrictively. Nevertheless, there is nothing in the cited cases to indicate that it does so on the theory that insurance coverage would be contrary to public policy.

151. 4 Mich. App. at 603, 145 N.W.2d at 414.
152. 2 Ill. App. 3d 379, 279 N.E.2d 443 (1972).
153. Id. at 387, 279 N.E.2d at 443, 448.
154. ___ Minn. at ___, 210 N.W.2d at 64.
implications should be considered. However, the general rule of Zerby precludes indemnity against the consequences of negligent violations of "an absolute duty imposed by law for the protection of others,"\(^{155}\) despite the fact that "it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him of liability for, his own future acts of negligence."\(^{156}\) The only public policy consideration discussed in the authorities cited\(^{157}\) is the possible inducement or promotion of a breach of duty to the public. Since no other reason is given in Zerby, it may be assumed that the court disallowed indemnification, and will in similar cases in the future, to avoid inducement.

The weight of three arguments must be placed in the indemnity-inducement balance. First, was Warren induced by his contract with United States Plywood to make a negligent and illegal sale to Rieken? There is certainly no evidence in the decision or the parties' briefs to so indicate. It seems fanciful to imagine that Warren even considered insurance coverage when he sold glue.\(^{158}\) Second, there are substantial conceptual difficulties involved in inducement of negligence generally.\(^{159}\) Third, the enormous implications of disallowance of indemnification against negligent violations of "absolute duties" must be considered. Not only pharmacists and hardware store owners attempt to protect themselves through contracts of indemnity. Motorists insure themselves against consequences of their violations of traffic safety laws, and tavern owners indemnify themselves against negligent and illegal sales of liquor, often to "protected" minors.

Such insurance "relieves a person from negligence in the discharge of an absolute duty imposed by law for the protection of others"\(^{160}\) in much the same way Warren's contract did. Yet, it helps spread loss, takes from the "deep pocket," and assures plaintiffs of compensation.\(^{161}\) Such public policy considerations are entitled to substantial weight, though they were not mentioned in Zerby.

IV. Conclusion

The Minnesota Supreme Court's creation of an implied statutory tort liability so absolute as to preclude contribution or contractual indemnity as a matter of law appears unprecedented. This is particularly troublesome in light of the fact that the Zerby court did not indicate that it was faced with a

\(^{155}\) Id.
\(^{157}\) See authorities cited notes 130, 134 & 136 supra.
\(^{158}\) See ___ Minn. at ___, 210 N.W.2d at 61. This statement is supported by the fact that the actual sale was made by Warren's sales clerk.
\(^{159}\) Negligence, if it can be described as lack of due care under the circumstances, follows upon the actor's failure to consider the various ramifications of his actions. Without prior weighing of his actions and consequences, how can the negligent actor be induced to so act?
\(^{160}\) Zerby v. Warren, ___ Minn. ___, 210 N.W.2d 58, 64 (1973).
case of first impression or that it was making new law. On its face, the decision appears to apply established law rather than to break new ground.

Thus, it is not the supreme court's answers, so much as its failure to ask important questions which puzzles the reader of Zerby v. Warren. Did Randy Rieken actually cause Zerby’s death? Was his conduct negligent, or did his age make negligence impossible? What legislative purpose justifies denial of contribution? Is any minor giving toxic glue to another minor really to be free of contribution liability as the court implies? What policy considerations dictate denial of contractual indemnity for negligence?

The issues raised and left unanswered by Zerby reach far beyond the facts of that particular case. The conclusory nature of both the court's legal formulations and its public policy judgments give one little basis on which to predict the outcome of similar cases in the future. The broader implications of the law made here, the possible effects it might have upon other types of statutory liability and upon the theoretical basis as well as the underwriting practices of liability insurance, remain unknown and unknowable.