HB

368

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	10-25-85	10:00 AM
" "	2-18-86	1:30 PM
" "	4-8-86	1:30 pm
" "	4-25-86	8:00 AM

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : HB 368
Title : An Act Adopting Uniform Comparative Fault Act
Sponsor : Gruenberg & Pignalberi
Requestor : _____
Date of Request : _____

FISCAL DETAIL

Agency Affected : Alaska Court System
BRU : Trial Courts
Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

No Fiscal Impact

Prepared by : Robert G. Fisher
Division : Alaska Court System
Phone : 204-8215
Date : 2/3/86

Approved by Commissioner : Arthur H. Snowden, II
Agency : Alaska Court System
Date : 2/3/86

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M October 4, 1985

SUBJECT: Uniform Comparative Fault Act - HB 368

TO: Representative M.M. Miller
House Judiciary Committee

FROM: Michael F. Ford M.F.
Legislative Counsel

The above referenced bill adds a new chapter to title 9, known as the Uniform Comparative Fault Act. The Uniform Act establishes by statute that form of comparative fault which has already been established by judicial decision in Alaska. See Katz v. State, 540 P2d 1037 (Alaska 1975). This form is known as "pure" comparative fault, in that in recovering damages for injury or death, contributory fault of the claimant diminishes recovery proportionately but does not bar recovery. This is in contrast to some other states that have adopted a modified comparative fault rule, in which contributory fault of the claimant may bar recovery of damages. The Uniform Act is designed to replace AS 09.16, the Contribution Among Joint Tortfeasors Act. The Uniform Act changes the existing system of pro rata allocation of fault among defendants, to one of allocation by percentage of fault. This system has been acknowledged as more compatible with the concept of comparative fault. See Artic Structures, Inc. v. Wedmore, 605 P2d 426 (Alaska 1979).

The following is an analysis of each section of the legislation:

Section 1 - 09.17.010 - This states the general principle, that a claimant's contributory fault does not bar recovery but rather apportions damages according to the proportionate fault of the parties.

09.17.020 - Requires the jury to apportion the damages each claimant is entitled to recover. The concept of fault raises several implications that this section is intended to resolve. The jury, or the court, is required to make

findings allocating a percentage of the total fault to each party. The common law rule of joint and several liability for each party is maintained. Contributory fault, if any, of the claimant is disregarded. The court also determines equitable shares for purposes of contribution. As a part of the judgment, this makes the information available to the parties thereby avoiding need for further court order. If a party has an uncollectable judgment, then reallocation of the equitable shares takes place, among all parties at fault.

09.17.030 - Allows resolution of a claim and counterclaim by set-off. Unless agreed to by the parties, set-off occurs only if a claim is likely to be uncollectable. In cases of multiple defendants, set-off issues are treated separately for each defendant.

09.17.040 - This section changes the existing test for measuring contribution from one based on pro rata shares, to one based on proportionate fault. This is consistent with the concept of comparative fault. A plaintiff who is contributorily at fault also shares in the proportionate responsibility. The rule of joint and several liability of each defendant is unchanged. Between defendants themselves, contribution is determined by equitable share according to 09.17.020.

09.17.050 - Establishes the rules by which a party paying more than his equitable share can recover judgment for contribution. Recovery can be by motion or by separate action. Also establishes time limits within which an action must be brought.

09.17.060 - Continues the statutory provision that release of one person does not discharge others unless provided for in the release. This section changes the existing law concerning contribution of a defendant against another defendant who obtains a release from liability. Under existing law, if a defendant settles, this discharges him from liability for contribution to other defendants. Under this section, a plaintiff's total claim is reduced by the proportionate share of the defendant who settles.

09.17.070 - Uniform application and construction section.

09.17.080 - Definition of "fault", that includes both conduct of a plaintiff as well as a defendant. The term

includes assumption of risk, and misuse of product, but limits their scope.

09.17.090 - Only actions accruing after the effective date of the chapter are subject to this Act.

09.17.100 - Citation of Act.

Section 2 - Repeals the Uniform Contribution among Tortfeasors Act.

Section 3 - Amends Rule of Civil Procedure 7 to require that a motion be filed within one year under 09.17.020(d).

Section 4 - Amends Rule of Civil Procedure 49 to require special interrogatories be answered by the jury.

Section 5 - Amends Rule of Civil Procedure 52 to require the court to make specific findings regarding damages and percentage of fault.

Section 6 - Amends Rule of Civil Procedure 58 to require the court to include specific fault determination in its judgment.

MFF:mkr
M1:027

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BERNARD P. KELLY
PAUL COSSMAN

February 21, 1986

House Judiciary Committee
Room 124, Capitol
Juneau, Alaska 99811

ATT: M. Mike Miller, Chairman
Max Gruenberg and other members

Gentlemen:

I promised to write a letter reciting some of my views upon House Bill 368 entitled "An Act Adopting the Uniform Comparative Fault Act."

As you know, Av Gross talked about this bill at the time of the hearing on February 18, 1986, and recited our general views. Av's speech as terminated left the impression that perhaps innocent accident victims, who themselves contributed no fault to the cause of the accident, would always recover under that bill. However, by virtue of the release provisions of that bill, if the release could be renegotiated after a settlement was made between one of the tortfeasors and the plaintiff, the plaintiff stands to lose by having the money he received from the releasor readjusted and he would have money deducted from his share dependent upon greater fault being found against the releasor. In my judgment, this would completely be unjust and negate possible settlements.

It seems to me that a release should never be able to be set aside, absence a showing of fraud, and if we could get the Court's approval upon a release and settlement during the course of the litigation, this should be conclusive against a claim of fraud.

As I pointed out, a release entered into should be valid under almost every circumstance. It would encourage other defendants to be looking for settlements as well. It will reduce litigation; it will achieve those very things that the tort reformers claim they want to achieve. Conversely, not

allowing settlements and requiring litigation because of one's fear and uncertainty about a release being set aside, would foster litigation and increase insurance expense. Therefore, I don't believe that passage of the above legislation in its present form would be in the public interest.

Robin Taylor asked a question about what about the effect of a Mary Carter agreement. That was a good question and I don't think Av knew what Robin meant when he said Mary Carter agreement. My understanding is this is talking to such arrangements as a covenant not to execute but staying in the litigation. These kinds of arrangements are always a little bit difficult it seems to me for a plaintiff because they should be revealed to the Court. There is always a danger of a claim of fraud and deceit entering into them. I point this out because I don't think that that necessarily makes the arrangement invalid and there may be good and just reasons for entering into the arrangement. I think the same general rules that apply to releases generally should apply that would only be on a showing of fraud and deceit that they could be set aside.

The reason that the innocent person's rights can be affected by the release are shown by page four, lines 19 through 22 of the document speaking about the effect of the release where it says that the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation determined in accordance with the provisions of AS 09.17.020. This would clearly allow in my mind the renegotiation of the innocent person's share downward. In my judgment, because the person getting the release is not present in Court with an attorney defending himself, it almost would be axiomatic that the plaintiff would lose money in such an arrangement, or he would have to fight a vigorous battle, expending money defending the relative, non-involvement of the party giving the release.

I wanted to call your attention also to the language of page two at the top of the bill, lines 3 and 4, where it says, "For this purpose, the Court may determine that two or more persons are to be treated as a single party." The word "may" means that it is discretionary with the Court. I do not believe that a corporate employer, for example, should at the discretion of the Court be treated as a separate entity from his employee. Corporations can only act through their employees, and such a potential result would do violence to the law of respondeat superior and the idea that business should pay for the acts of its agents and actors. This would allow for a way of watering down and affecting seriously the existent law. I also believe that principal, agent, and enterprise li- ability actors under

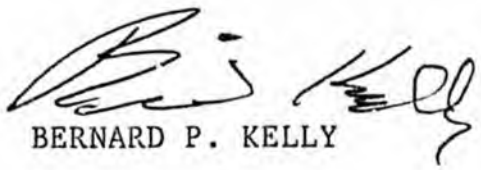
Alaska's enterprise liability law should be treated as a single entity for the purpose of tort law. This could be examples thrown into the bill but leave the Court discretion to apply the same unity of interest determination to other persons who might be treated as a single party.

As we indicated the other day at the hearing, the Alaska Academy, by the majority of its members, is not in disagreement with some sort of equitable allocation where an insolvent or partly insolvent defendant's share is to be made up by others. In that case, we agree that it would not be inequitable to provide that the injured party, himself at fault, share pro rata in the loss of funds due to insolvency of one of the other parties at fault. We do, however, want to make sure that in no case does a completely blameless plaintiff have his right of recovery reduced under any circumstances, including that recited in the Act of giving a release.

There are other possible things that we may see wrong with this bill and our membership would like to continue looking at this bill with the idea of rendering constructive commentary. Thank you for your consideration to this matter.

Sincerely yours,

BERNARD P. KELLY & ASSOCIATES



BERNARD P. KELLY

BPK:amm

cc: Av Gross
2274A

Alaska State Legislature

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CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

M E M O R A N D U M

DATE: January 27, 1986

TO: Representative H.A. "Red" Boucher

FROM: Dave Donley, Attorney at Law

SUBJECT: HB 466 (a bill creating an Alaskan worker employment preference) and the effect of the recent Alaska Supreme Court decision on Alaska Hire (Francis v. Robinson)

GENERAL COMMENTS

Alaskans have been forced to wait almost two years for our Supreme Court to decide the constitutionality of AS 36.10.010 which provided a preference to Alaska residents on 95% of the jobs on public works projects.

Unfortunately, the Supreme Court's decision in Francis v. Robison finding AS 36.10.010 unconstitutional provided almost nothing new in the form of guidance to lawmakers. The court ignored both legislators' request for advice and last year's legislative action (HB 294) without explanation.

SSHB 466 addresses virtually every concern identified by the court's majority decision in Francis.

Nothing in this area of constitutional law is an absolute but these proposals are the best yet and are clearly legally superior to any resident hire law that has ever been tested or for that matter, even adopted, in the nation.

ANALYSIS OF THE IMPACT OF FRANCIS v. ROBISON ON HB 466

I. The Supreme Court accepted without comment the Superior Court's findings of fact.

A. Testimony on HB 294 (1985) and HCR 20 (1985) clearly contridicts these 1984 findings by the Superior Court.

B. The decision ingores existence of HB 294 -- makes no comment at all on its significance and effect or lack of it.

C. HB 294's backup and the recent DOL study appear to provide part of the factual basis the court says is necessary in the Francis decision. Additional findings based on evidence of social ills caused by resident unemployment need to be included in HB 466.

D. Additionally HB 466 adds new findings (page 1, sec. 2) which are designed to assist and guide the Commissioner of Labor and reviewing courts in making future fact findings.

E. Sec. 2 of HB 466 also helps identify the special employment problems of rural Alaska.

II. Resident preference law must have a substantial reason which justifies it.

A. Reason for any state mandated employment preference for residents can not be only to provide an economic advantage for residents over non-residents. Reason must be to correct a social ill or ills that result from resident unemployment.

B. The Francis decision requires "some showing that nonresidents are 'a peculiar source of evil' which state action is meant to remedy," and the Supreme Court finds this evidence lacking in the Superior Court's findings of fact.

C. The Supreme Court used the "clearly erroneous" standard for review of facts established by Superior Court. This very high standard of review prevented modification of these fact findings which, given newly available data, appear very erroneous.

D. HB 466 incorporates the "peculiar source of evil" standard as a threshold finding that must be made by Commissioner of Labor before any preference for residents goes into effect.

E. The new DOL study, HB 294 (1985), new findings of fact in HB 466 (sec.2), together with evidence of resulting social ills from resident unemployment, will create a new constitutional fact basis for the resident employment preference in HB 466.

F. Legislative public hearings are needed to carefully document evidence by testimony of specific examples of non-residents displacing residents and resulting social ills.

III. The means employed by the challenged statute must be closely related to the interests served by the statute.

A. In deciding whether discrimination bears a close or substantial relationship to the state's objective . . . the availability of less restrictive means is relevant.

B. This means the justification for legislation must not be just to give Alaskans jobs before outsiders. The reason for legislation

must be something else other than to benefit residents economically.

C. The U.S. Supreme Court, in it's Camden decision recognized one possible justification for resident employment preference is to stave off grave economic and social ills.

D. High unemployment alone is not enough: HB 466 answers this issue through findings of fact (sec. 2) but possibly needs strenthening to address the strong emphasis on this concern by the court by making clear that the purpose of the legislation is to address articulated economic or social ill(s).

E. "Closely related" means the State needs to limit preference to those Alaskans who really need it.

F. HB 466 limits the preferences by requiring those Alaskans who desire a preference to register as unemployed, underemployed or as recently completing job training. HB 466 also adopts a method to target unemployment preference to those geographical areas and social groups who need it the most: preference for residents of economically distressed areas; and preference for economically disadvantaged minority residents.

IV. Market Regulator vs. Market Participant Distinction

A. More leeway is granted states in their perception of "local evils and in prescribing appropriate cures" when they are acting in a proprietary capacity, where they are merely setting conditions on the expenditures of funds they control.

B. The Alaska Supreme Court in Francis adopts a sliding scale as to amount of deference appropriate to the state as a market participant. Little deference is appropriate when state action (discrimination against non-residents) is far reaching and greater deference is appropriate when state action is narrow in focus.

C. This implies that percentages or the scope of preferences may be important. HB 466 handles this by incorporating Rep. Gruenberg's proposal for a "judical decisions effect" savings clause.

D. This distinction also implies that it is important to separate contracts where the state is a signatory vs. others. HB 466 does this by including separate severable sections to cover expenditures by grantees and subcontractors.

V. Level of Scrutiny: "Low, intermediate and high"

An "intermediate level" of scrutiny is adopted under the facts found by the Superior Court in Francis. At this intermediate level of scrutiny classification/discrimination in favor of residents may be made only for "important" purposes and the

means used to accomplish them must be "fairly and substantially related" to achievement of those purposes.

VI. Miscellaneous

A. Distinguishes the U.S. Supreme Court's Camden decision -- Alaska economy growing while New Jersey's was not.

B. Disagrees with Wyoming's Supreme Court's Antonich decision reasoning which upheld Wyoming's resident preference law.

C. The Court says Alaskan unemployment is a rural and not an urban problem (HB 466 takes this into account in economic distressed area preference and disadvantaged minority preference.)

VII. The Concurring Opinion by Justice Burke

A. Justice Burke's solo concurring opinion cites the Alaska Constitution, Art. I, Sec. 1: "that all persons are equal and entitled to equal rights, opportunities, and protection under the law" as prohibiting a resident employment preference.

B. If necessary an amendment to the Alaskan Constitution can be designed to answer this concern.

CONCLUSIONS

1) The Francis case decision offers some guidance to preparation of a new Alaska Hire law but not directly -- it must be carefully extracted from implication, logic and reasoning.

2) HB 466 already directly addresses almost every fault the court found with the old law. With some careful fine tuning, HB 466 can cover every concern of the court except that raised by the concurring opinion regarding the Alaska Constitution.

3) A careful legislative process is needed to do this form of legislation correctly. Findings of fact must be substantiated on the record by testimony and/or evidence.

4) Additional severable sections may be added to HB 466 to cover jobs on state-owned lands based on the courts reasoning.

UNIFORM COMPARATIVE FAULT ACT

Historical Note

The Uniform Comparative Fault Act was approved by the National Conference of Commissioners on Uniform State Laws in 1977. Section 3 of the Act was amended by the National Conference in 1979.

Commissioners' Prefatory Note

Plaintiff's Fault. The harsh all-or-nothing rule of contributory negligence at common law has not been properly ameliorated by the several exceptions also developed at common law. Whether the general rule or an exception applies, one party or the other is always treated unfairly. This has been widely recognized and, at the present time (1977), the Federal Government and two-thirds of the States (33) have adopted some form of comparative fault. This is usually by statute but also by judicial decision.

The language of the statutes varies considerably, and the form adopted often comes about as a result of a political compromise and without adequate consideration of the practical implications. This Uniform Act has been worked on for five years by a special committee, which has had the benefit of comments from many sources. Careful consideration has been given to all potential problems, and specific provisions are made for most of them. This Act therefore serves two important purposes: (1) it addresses the problems and provides what are regarded as the best solutions for them, and (2) it provides the opportunity for creating a desirable uniformity throughout the country.

A very important question arises in the very beginning: What type of comparative fault should be adopted? The "pure type" is presently followed by the Federal Government, nine states and almost all common law jurisdictions outside the United States. Many states, however, have adopted a modified type, which takes one of two forms, providing that a plaintiff who is at fault can recover diminished damages but that he cannot recover if his negligence either (1) "is equal to," or (2) "is greater than," that of the defendant.

The modified type has several serious logical and practical disadvantages:

1. If both parties have been injured, the modified type forces one party to bear all of his own loss, together with the greater part of the other party's loss, in addition. This result is therefore worse than that of the common law contributory negligence rule. A slight alleviation under the not-greater-than form, which allows recovery when the parties are each 50% at fault, forces a cognizant jury always to find for 50% negligence if it wants to reach a fair result.

2. If there are several defendants at fault, the modified type produces a confused jumble. The plaintiff's fault may be less than that of some defendants and greater than that of others. If defendants having to pay seek contribution from those not under obligation to the plaintiff, the answer is uncertain; and when counterclaims arise, no solution seems available. The problem is avoided in some modified-type states by providing that the plaintiff's negligence bars recovery only if it is greater than the combined negligence of all the defendants. Although this is a helpful provision, it is essentially adopting the pure form in this situation.

3. If the plaintiff's fault is greater than that of the defendant, he cannot recover under the modified type. Yet, if, as a result of this, the statute leaves him under the common law, including its exceptions (such as last clear chance, or ordinary contributory negligence in an action based on strict liability) he can nevertheless recover full damages, if he comes within an exception. The anomaly therefore arises that he may be better off if his negligence is found to be greater than that of the defendant and he thus recovers full damages, than if his negligence is found to be less than that of the defendant and his damages are diminished.

4. A difference of a single point in the percentage of fault allocated to the claimant may determine whether he can recover anything at all—not just how much. It is quite unrealistic to expect a jury to reach a decision this precise and then require the whole issue of liability to depend upon it. An arbitrary decision of this nature is very conducive to appeals and the development of highly technical distinctions by the appellate court.

The single disadvantage urged against the pure type is that it fails to prevent the bringing of "nuisance suits." Yet the cure of the modified form is [illegible]

tinctly an overcure, and therefore worse than the disease. How many more times is the plaintiff's negligence likely to be from 51% to 99% of the total than it is to be 90 to 100% of the total? And when it approximates 100%—the true nuisance claim—the trial court may be expected to control the matter.

The innate fairness of the pure type contrasts with the nondiscriminating rough justice of the modified type, which casts out many justified claims in order to be sure to eliminate a few unjustified ones, and impels the decision for the pure form. It is significant that when the courts, as distinguished from the legislatures have adopted a form of comparative fault, the great majority of them have selected the pure type, and that England, Ireland, the Canadian provinces and Australian states have all adopted the pure form.

Contribution. The original common law rule was that there is no contribution among joint tortfeasors, no matter what the nature of the tort. Some states, however, have judicially modified this rule, especially in the case of negligence. Many more states have passed statutes of various kinds providing for contribution, with the result that a substantial majority of the states now have contribution in some form and the Restatement (Second) of Torts § 886A, now provides for it.

The NCCUSL has promulgated two uniform contribution Acts—the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.

It has therefore been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave that Act for possible use by states not adopting the principle of comparative fault. Instead, the present Act contains appropriate sections covering the rights existing between the parties who are jointly and severally liable in tort. The 1955 Act should be replaced by this Act in any state that adopts the comparative fault principle, and would be eventually replaced.

UNIFORM COMPARATIVE FAULT ACT

Law Review Commentaries

Assumption of risk and misuse in strict tort liability; prelude to comparative fault. James H. Sales. 11 Texas Tech L.Rev. 729 (1980).

Comparative contribution. 14 John Marshall L.Rev. 173 (1980).

Comparative negligence collides with strict liability. 19 Washburn L.J. 76 (1979).

Comparative negligence: Development in the United States and status in Louisiana. John W. Wade. 40 La.L.Rev. 299 (1980).

Contribution among antitrust violators. 29 Catholic U.L.Rev. 669 (1980).

Extending fairness principle of Li and American motorcycle: Adoption of the Uniform Comparative Fault Act. H. Anthony Miller. 14 Pacific L.J. 835 (1983).

Judicial adoption of comparative fault in South Carolina. Jerry J. Phillips. 32 S.C.L.Rev. 295 (1980).

Uniform Comparative Fault Act: What should it provide? John W. Wade. 10 U.Mich.J.L.Ref. 220 (1977).

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes 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. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable

express consent, misuse of a p
be liable, and unreasonable fa
Legal requirements of causal
liability and to contributory

Com

This Section states the gener
ciple, that a plaintiff's cont
fault does not bar his recov
instead apportions damages a
to the proportionate fault of t
ties.

Harms Covered. The specif
cation of that principle, as
for in this Act, is confined to
harm to person or property,
necessarily includes consequent
ages deriving from the physic
such as doctor's bills, loss o
or costs of repair or repla
property. It does not include
like economic loss resulting
tort such as negligent misrep
tion, or interference with con
relations or injurious falseh
harm to reputation resultin
defamation. But failure to
these harms specifically in th
not intended to preclude appli
the general principle to the
court determines that the com
of the state would make the
tion.

Conduct Covered. (a) Def
Conduct. The Act applies
or omissions that are in any
negligent or reckless toward
son or property . . . of
This includes the traditional a
negligence but covers all negli
duct, whether it comes within
ditional negligence action or
includes negligence as a matter
arising from court decision
inal statute. "In any measure
tended to cover all degrees
of negligent conduct without
of listing them specifically.

In some states reckless cond
by a different name, such as
or wanton misconduct. The
must be made in the particul
whether the language used i
ciently broad for the purpos
additional language is needed.

Although strict liability is so
called absolute liability or
without fault, it is still includ
liability for both abnormally
ous activities and for products
strong similarity to negligen
matter of law (negligence for
the factfinder should have
difficulty in setting percent
fault. Putting out a product

express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Commissioners' Comment

This Section states the general principle, that a plaintiff's contributory fault does not bar his recovery but instead apportions damages according to the proportionate fault of the parties.

Harms Covered. The specific application of that principle as provided for in this Act, is confined to physical harm to person or property. But it necessarily includes consequential damages deriving from the physical harm, such as doctor's bills, loss of wages or costs of repair or replacement of property. It does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation. But failure to include these harms specifically in the Act is not intended to preclude application of the general principle to them if a court determines that the common law of the state would make the application.

Conduct Covered. (a) Defendant's Conduct. The Act applies to "acts or omissions that are in any measure negligent or reckless toward the person or property . . . of others." This includes the traditional action for negligence but covers all negligent conduct, whether it comes within the traditional negligence action or not. It includes negligence as a matter of law, arising from court decision or criminal statute. "In any measure" is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically.

In some states reckless conduct goes by a different name, such as willful or wanton misconduct. The decision must be made in the particular state whether the language used is sufficiently broad for the purpose or if additional language is needed.

Although strict liability is sometimes called absolute liability or liability without fault, it is still included. Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se), and the factfinder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence.

An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that the general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.

For certain types of torts, such as nuisance, the defendant's conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in a case in which the defendant intentionally inflicts the injury on the plaintiff.

A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.

(b) Plaintiff's Conduct. "Fault," as defined in Subsection (b), includes conduct of the plaintiff or other claimant, as well as a defendant.

"Contributory fault chargeable to the claimant" includes legally imputed fault as in the cases of principal and agent and of an action for loss of services of a spouse. It also covers a situation in which fault is not imputed but would still have barred recovery prior to passage of the Act—as, for example, a wrongful-death action in which the decedent's contributory negligence would have barred recovery even though it was not imputed to the person bringing the action.

Contributory fault diminishes recovery whether it was previously a bar

or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability or recklessness. Last clear chance is expressly included with its variations.

"Assumption of risk" is a term with a number of different meanings—only one of which is "fault" within the meaning of this Act. This is the case of unreasonable assumption of risk, which might be likened to deliberate contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger. As used in this Act, the term does not include the meanings (1) of a valid and enforceable consent (which is treated like other contracts), (2) of a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises), or (3) of a reasonable assumption of risk (which is not fault and should not have the effect of barring recovery).

"Misuse of a product" is a term also with several meanings. The meaning in this Section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded against. The Act does not apply to a misuse giving rise to a danger that could not reasonably have been anticipated and guarded against by the manufacturer, so that the product was therefore not defective or unreasonably dangerous.

The doctrine of avoidable consequences is expressly included in the coverage.

Causation. For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat-belt restraint played a part, and not, for example, to the damage to the car. A similar rule applies to a defendant's fault: a physician, for example, negligently setting a broken arm, is not liable for other injuries received in an automobile accident.

1979 Addition to Comment: *Adaptation of the Act to Modified Form of Comparative Negligence.* If a state now using the modified form of comparative negligence should decide that in the light of its experience it is wedded to that form and not willing to change to the pure form, the Act may be adapted for this purpose, as indicated below, by adding the words in italics:

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant, *if not greater than the combined fault of all other parties to the claim, including third-party defendants and persons released under Section 6,* diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) *Whenever both parties to a claim and counterclaim have sustained damage caused by fault or both, each party can recover from the other in proportion to their relative fault in accordance with Section 3, regardless of whose fault is the greater.*

(c) "Fault" includes 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. The term also includes breach of warranty, unreasonable assumption of risk not constituting and enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Law Review Commentaries

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 179.

Library References

Negligence ⇐97 to 101. C.J.S. Negligence §§ 131, 169 et seq.

Section 2. [Apportionment

(a) In all actions involv
including third-party defer
Section 6, the court, unless
jury to answer special in
findings, indicating:

(1) the amount of
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(2) the percentage
claim that is allocated
and person who has b
this purpose the court
treated as a single part

(b) In determining the pe
both the nature of the con
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(c) The court shall deter
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(d) Upo motion made not
the court shall determine wi
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sued, or whether the statute of
tions will run on him, etc.
tempt to settle these matter
suit to which he is not a party
nor be binding on him. Both p
and defendants will have
incentive for joining available
ants who may be liable. Th
parties joined whose fault con
to the injury, the smaller the
age of fault allocated to ea
other parties, whether plaintiff
fendant.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Commissioners' Comment

Parties. It is assumed that the state procedure provides for bringing in third-party defendants as parties. If not, the procedural statutes or rules may need to be amended to permit it, at least for purposes of contribution.

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

In situations such as that of principal and agent, driver and owner of a car, or manufacturer and retailer of a product, the court may under appropriate circumstances find that the two persons should be treated as a single party for purposes of allocating fault.

Percentages of fault. In comparing the fault of the several parties for the purpose of obtaining percentages there are a number of implications arising from the concept of fault. The conduct of the claimant or of any defendant may be more or less at fault, depending upon all the circumstances including such matters as (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury, (3) the significance of what the actor was seeking to attain by his conduct, (4) the actor's superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

A rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) or that no negligence is required (as in the case of conducting blasting operations in an urban area) is important in determining whether he is liable at all. If the liability has been established, however, the rule itself does not play a part in determining the relative proportion of fault of this party in comparison with the others. But the policy behind the rule may be quite important. An error in driving on the part of a bus driver with a load of passengers may properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center; and an automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault than another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.

In determining the relative fault of the parties, the fact-finder will also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position has been followed under statutes making no specific provision for it.

Joint and Several Liability and Equitable Shares of the Obligation. The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

Control by the court. The total of the several percentages of fault for the plaintiff and all defendants, as found in the special interrogatories, should add up to 100%. Whether the court will inform the jury of this will depend upon the local practice.

The court should be able to exercise any usual powers under existing law of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

Illustration No. 1. (Simple 2-party situation).

A sues B. A's damages are $10,000.
A is found 40% at fault.
B is found 60% at fault.
A recovers judgment for $6,000.

Illustration No. 2. (Multiple-party situation).

A sues B, C and D. A's damages are $10,000.
A is found 40% at fault.
B is found 30% at fault.
C is found 30% at fault.
D is found 0% at fault.

A is awarded judgment jointly and severally against B & C for $6,000. The court also states in the judgment the equitable share of the obligation of each party:

A's equitable share is $4,000 (40% of $10,000).

B's equitable share is $3,000 (30% of $10,000).

C's equitable share is $3,000 (30% of $10,000).

Illustration No. 3. (Reallocation computation under Subsection (d)).

Same facts as in Illustration No. 2.

On proper motion to the court, C shows that B's share is uncollectible.

The court orders that B's share be reallocated between A's equitable share is increased $1,714 (4/7 of $3,000).

Law

Apportionment of losses under comparative fault laws. Richardson. 10 La.L.Rev. 343 (1950).

Complexities of Oklahoma's tionate several liability doctrine parative negligence—is products next? William J. McNichols. L.Rev. 195 (1992).

Negligence ⇨97.

Section 3. [Set-off]

A claim and counterclaim s agreement of both parties. O obligation of either party is parties make payment into co the funds received and declar court by either party had bee bution of those funds back to to him by the other party.

Section amended in 1979. As ly approved in 1977, section read "A claim and counterclaim set off, and only the difference them is recoverable in the However, if either or both of the are covered by liability insura an insurance carrier's liability u policy is reduced by reason of

Com

A set-off involves a single cl counterclaim. If there are mult fendants, separate set-off issu aris between a claimant and several defendants, but each would be a separate issue, dete independently of the others. Th principle applies in case of a claim subject to a counterclaim.

Whether the rule is for or set-off, if it should be applie gorically to all situations it wou duce unfair results in some of In attaining a fair application to ticular factual situation, consid needs to be given to the circum of whether each party is able to obligation and whether the m comes from his own pocket or fr bility insurance covering him. Th visions of this Section provide solution to each situation, as illu below.

Illustration No. 1. (Parties fu ered by liability insurance.) A s B counterclaims. Each is fou have suffered $100,000 in d Each is fully covered by liability

The court orders that B's equitable share be reallocated between A and C. A's equitable share is increased by $1,714 (⅓ of $3,000). C's equitable share is increased by $1,286 (⅓ of $3,000).

Law Review Commentaries

Apportionment of losses under comparative fault laws. Richard N. Pearson. 40 La.L.Rev. 343 (1980).

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Extending fairness principle of Li and American motorcycle: Adoption of the Uniform Comparative Fault Act. H. Anthony Miller. 14 Pacific L.J. 835 (1983).

Library References

Negligence ⇨97. C.J.S. Negligence §§ 169, 170.

Section 3. [Set-off]

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

Amendments

Section amended in 1979. As originally approved in 1977, section read:

"A claim and counterclaim shall be set off, and only the difference between them is recoverable in the judgment. However, if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For purposes of uninsured-motorist and similar coverages, the amounts so recovered shall be treated as payment of those amounts to the insured by the party liable."

Commissioners' Comment

A set-off involves a single claim and counterclaim. If there are multiple defendants, separate set-off issues may arise between a claimant and each of several defendants, but each set-off would be a separate issue, determined independently of the others. The same principle applies in case of a cross-claim subject to a counterclaim.

Whether the rule is for or against set-off, if it should be applied categorically to all situations it would produce unfair results in some of them. In attaining a fair application to a particular factual situation, consideration needs to be given to the circumstances of whether each party is able to pay his obligation and whether the payment comes from his own pocket or from liability insurance covering him. The provisions of this Section provide a fair solution to each situation, as illustrated below.

Illustration No. 4. (Parties fully covered by liability insurance.) A sues B. B counterclaims. Each is found to have suffered $100,000 in damage. Each is fully covered by liability insurance. A is found 30% at fault. B is found 70% at fault. Under the statutory provision there is no set-off except by agreement of the parties, and it would not be in their best interests here to agree to a set-off. A recovers $70,000 from B, and B recovers $30,000 from A.

Illustration No. 5. (No insurance but both parties able to pay judgments.) The same facts as in Illustration 4, but there is no liability insurance. Each is able to pay the judgment against him. If the parties do not agree to a set-off, A receives $70,000 from B, and B receives $30,000 from A. For their own convenience they may find it simpler to agree on a set-off, with A receiving $40,000 from B.

Illustration No. 6. (No insurance; B is able to pay and A is not.) As in Illustration 4, each party has $100,000 damages, A is 30% at fault and B is 70% at fault. Neither party has liability insurance coverage. B moves the court to require both parties to make payment into court for distribution. Finding it likely that A's obligation will

be uncollectible the court issues the order. B pays into court $70,000; A can pay nothing. The court distributes $40,000 to A and $30,000 back to B. This is treated as if B had directly paid A $70,000 and A had directly paid B $30,000 and the obligations of both parties are extinguished.

Illustration No. 7. (A has insurance; B does not and is unable to pay.) The same facts as in Illustration 6, but B has no insurance and cannot pay, while A has full liability insurance. A's motion that both parties pay into court is granted. A's insurance company pays $30,000. A pays nothing. The court distributes the $30,000 to A. This extinguishes the liability of A and his insurance company under the liability coverage, and B's liability to A reduced from $70,000 to $40,000. For application of any uninsured-motorist coverage contained in A's insurance policy, the court's delivery of the $30,000 to A is treated as a direct payment by B to A.

Illustration No. 8. (Both parties have inadequate insurance coverage and no other available funds.)

A is 30% negligent, has damages of $70,000 and carries liability insurance of $20,000. B is 70% negligent, has damages of $100,000 and carries liability insurance of $30,000.

A therefore owes B $30,000 and has a claim against B of $35,000; and B owes A $35,000 and has a claim against A of $30,000.

On granting of a motion to pay into court, A's carrier pays $20,000 which is initially allocated to B as payment to him of $20,000 and reduces A's debt to B to $10,000 and

B's carrier pays $30,000, which is initially allocated to A as payment to him of $30,000 and reduces B's debt to A to $5,000.

The court now reallocates to B $10,000 from A's initial allocation of $30,000, leaving $20,000 for A. It also reallocates to A $5,000 from B's initial allocation of $20,000, leaving $15,000 for B.

A is thus entitled to the $20,000 remaining in the initial allocation, plus $5,000 from the subsequent allocation, making a total of $25,000; and

B is entitled to the $15,000 remaining in the initial allocation, plus $10,000 from the subsequent allocation, making a total of $25,000.

Of the $50,000 paid in, A receives $25,000 and B receives $25,000. All obligations are discharged.

For a complex illustration like No. 8, the process of tracking literally the language of the Section is somewhat laborious and difficult to work out. Fortunately, it is possible to reach exactly the same result much more simply and easily by using the formula, D=C−O+P to determine the amount each claimant is entitled to receive. D signifies the amount to be distributed to the particular claimant from the funds paid into court; C signifies the amount of his claim after it has been reduced by the court because of his own negligence; O signifies the amount that he is found by the court to owe to the other party; and P signifies the amount that he has paid into court.

Use of this formula in each of Illustrations above will reach exactly the same result as that which is stated in the Illustration. Thus, in Illustration 8, the formula D=C−O+P operates like this: For A: $35,000−$30,000+$20,000 = $25,000. For B: $30,000−$35,000+ $30,000 = $25,000.

Observe that if use of the formula produces a negative number for one of the two parties, it corresponds with a number larger by that figure than the amount of deposit with the court and indicates that the party with the negative figure continues to owe that amount to the other party. This occurs, for example, in Illustration No. 7.

The system for distributing the funds outlined by the section is not the only one that could be utilized but it appears to be the fairest and most equitable. It gives due consideration to the relative amounts owed by each party and the relative amounts paid by each; and their relative fault is of course already taken into consideration in determining the amounts of their enforceable claims.

Library References

Set-Off and Counterclaim ⇨22 et seq.

C.J.S. Set-Off and Counterclaim § 23 et seq.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally 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, or by a separate action by [illegible] is each person's equitable share of a claimant at fault of Section 2.

(b) Contribution is availal a claimant only (1) if the l is sought has been extingui in settlement was reasonabl

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Sections 4, 5 and 6 are ex replace the Uniform Cor Among Tortfeasors Act (19 state following the principle parative fault. The three however, apply whether the is contributorily at fault or

Section 4 is in general acc the provisions of the 1955 Act, but the test for determi measure of contribution and tablishing the ultimate respons no longer on a pro rata ba stead, it is on a basis of propo fault determined in accordan the provisions of Section 2. tiff who is contributorily at shares in the proportionate bility.

Law

Apportionment of losses and parative fault laws. Richard son. 40 La.L.Rev. 342 (19

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Contribution ⇨5.

Section 5. [Enforcement of C

(a) If the proportionate fau has been established previous party paying more than his may recover judgment for con

(b) If the proportionate fau has not been established by a separate action, whether or not the person seeking contributio being sought.

(c) If a judgment has been commenced within [one year] a ment has been rendered, the either must have (1) discharg the period of the statute of of action against him and c [one year] after payment, or (2 the common liability and, with the liability and commenced an

against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Commissioners' Comment

Sections 4, 5 and 6 are expected to replace the Uniform Contribution Among Tortfeasors Act (1955) in a state following the principle of comparative fault. The three sections, however, apply whether the plaintiff was contributorily at fault or not.

Section 4 is in general accord with the provisions of the 1955 Uniform Act, but the test for determining the measure of contribution and thus establishing the ultimate responsibility is no longer on a pro rata basis. Instead, it is on a basis of proportionate fault determined in accordance with the provisions of Section 2. A plaintiff who is contributorily at fault also shares in the proportionate responsibility.

Joint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the equitable shares of the obligation, as established under Section 2.

If the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis, however, the liability may become several for a particular harm, and contribution is not appropriate. See Restatement (Second) of Torts § 433A (1965).

Law Review Commentaries

Apportionment of losses under comparative fault laws. Richard N. Pearson, 40 La.L.Rev. 343 (1980).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 479.

Library References

Contribution ⇨5. C.J.S. Contribution § 11.

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Commissioners' Comment

Illustration No. 9. (Equitable shares previously established by court).

A sues B and C. His damages are $20,000.

A is found 40% at fault.

B is found 30% at fault.

C is found 30% at fault.

A, with a joint-and-several judgment for $6,000 against B and C, collects the whole amount from B.

On proper motion to the court, B is entitled to contribution from C in the amount of $3,000.

Illustration No. 10. (Equitable shares not established)

A sues B. His damages are $20,000.

A is found 40% at fault.

B is found 60% at fault.

Judgment for A for $12,000 is paid by B.

B then brings a separate action seeking contribution from C, who was not a party to the original action.

C is found to be liable for the same injury, and as between B and C, C is found to be 50% at fault.

Judgment for contribution for $6,000 is awarded to B.

If A had voluntarily joined or been brought in as a party to this second action, proportionate fault would have been determined for all parties, including A and B, and contribution against C would have been awarded on that basis.

Law Review Commentaries

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 479.

Library References

Contribution ⇨5. C.J.S. Contribution § 11.

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Commissioners' Comment

Effect of release on liability of other tortfeasors. The provision that release of one tortfeasor does not release the others unless the release so provides is taken from the Uniform Contribution Among Tortfeasors Act (1955). It is a common statutory provision.

Effect of release on right of contribution. The question of the contribution rights of tortfeasors A and B against tortfeasor C, who settled and obtained a release or covenant not to sue admits of three answers: (1) A and B are still able to obtain contribution against C, despite the release, (2) A and B are not entitled to contribution unless the release was given not in good faith but by way of collusion, and (3) the plaintiff's total claim is reduced by the proportionate share of C. Each of the three solutions has substantial disadvantages, yet each has been adopted in one of the uniform acts. The first solution was adopted by the 1939 Uniform Contribution Act. Its disadvantage is that it discourages settlements: a tortfeasor has no incentive to settle if he remains liable for contribution. The second solution was adopted by the 1955 Contribution Act. While it theoretically encourages settlements, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced settlements may be discouraged.

The third solution is adopted in this Section. Although it may have some tendency to discourage a claimant from entering into a settlement, this solution is fairly based on the proportionate-fault principle.

"*Discharges . . . from all liability for contribution.*" A reallocated share of contribution, as provided in Section 2(d), comes within the meaning of this phrase, and the discharge of the released person under this Section applies to that liability

as well. Since the claim is r
by the amount of the released p
equitable share, the increased
of that share as a result of r
allocation is charged against r
leasing person.

Illustration No. 11. (Effect
lease).

A was injured through the c
rent negligence of B, C and D.
damages are $20,000. A settle
B for $2,000.

The trial produces the follow
sults:

A, 40% at fault (equitable
$8,000)

B, 30% at fault (equitable
$6,000)

C, 20% at fault (equitable
$4,000)

D, 10% at fault (equitable
$2,000)

A's claim is reduced by B's eq
share ($6,000). He is award
judgment against C and D, m
them jointly and severally liabl
$6,000.

Their equitable shares of the o
tion are $4,000 and $2,000 respec

Illustration No. 12. Release r
tortfeasor; another's share is u
lectible).

Same facts as in Illustration N
It is now found that D's sha
$2,000 is uncollectible. Upon p
motion to the court that sha
reallocated as follows:

A's equitable share is increased
(his own proportionate fault), pl
(B's proportionate fault), or $1,5

C's equitable share is increased b
or $444.

Immunities. The problem o
wrongdoer who is entitled to a
immunity could be treated like a
leased tortfeasor in this Section—
him to the action to determine
equitable share of the obligation
subtract it from the amount of
claimant's recovery. But this w
unfairly cast the whole loss on
claimant. This might be adjuste
spreading the immune party's sh

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tionate several liability doctrine of c
parative negligence—is products liab
next? William J. McNichols. 35
L.Rev. 195 (1982).

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Release ⇨20.

Section 7. [Uniformity of Applic

This Act shall be applied and
purpose to make uniform the la
among states enacting it.

as well. Since the claim is reduced by the amount of the released person's equitable share, the increased amount of that share as a result of the reallocation is charged against the releasing person.

Illustration No. 11. (Effect of release).

A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

The trial produces the following results:

A, 40% at fault (equitable share, $8,000)

B, 30% at fault (equitable share, $6,000)

C, 20% at fault (equitable share, $4,000)

D, 10% at fault (equitable share, $2,000)

A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000.

Their equitable shares of the obligation are $4,000 and $2,000 respectively.

Illustration No. 12. Release to one tortfeasor; another's share is uncollectible).

Same facts as in Illustration No. *11*. It is now found that D's share of $2,000 is uncollectible. Upon proper motion to the court that share is reallocated as follows:

A's equitable share is increased by ⅔ (his own proportionate fault), plus ⅗ (B's proportionate fault), or $1,556.

C's equitable share is increased by ⅑, or $444.

Immunities. The problem of a wrongdoer who is entitled to a legal immunity could be treated like a released tortfeasor in this Section—join him to the action to determine his equitable share of the obligation and subtract it from the amount of the claimant's recovery. But this would unfairly cast the whole loss on the claimant. This might be adjusted by spreading the immune party's obligation among all of the parties at fault, including the claimant, as in Subsection 2(d). But this same result is also accomplished by leaving the immune party out of the action altogether: a far easier and simpler solution. This Act therefore makes no provision for immunities. It must be borne in mind, however, that some states treat some immunities as not applying to a suit for contribution. This raises different problems, which can be handled under third-party practice.

Worker's compensation. An injured employee who has received or is entitled to worker's compensation benefits from his employer may ordinarily bring a tort action against a third party, such as the manufacturer of the machine that injured him, and recover for his injury in full. Under the rule in most states, the defendant is not entitled to contribution from the employer, even though the employer was negligent in maintaining the machine or instructing the employee in its use. This casting of the whole loss on the tort defendant may be unfair and greatly in need of legislative adjustment. It is so affected by the policies underlying the worker's compensation systems, however, and these policies vary so substantially in the several states that it was felt inappropriate to include a section on the problem in a uniform act.

Several solutions are possible. Thus, contribution against the employer may be provided for. Or the recovery by the employee may be reduced by the proportionate share of the employer. Or the amount of that proportionate share may be divided evenly between the employer and employee, so that the compensation system bears responsibility for it. Provision also needs to be made for the relation of the tort defendant to the compensation benefits. In any event, contributory negligence on the part of the employee will come within the scope of this Act and will affect the amount of recovery.

Law Review Commentaries

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 179.

Library References

Release ⊂⊃29. C.J.S. Release § 50.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief] [causes of action] accruing after its effective date.

Section 11. [Repeal]

The following acts and parts of acts are repealed:

Commissioners' Comment

A state that has adopted either of the two Uniform Contribution Among Tortfeasors Acts will of course plan to repeal it. This is also true of other statutory provisions on contribution for tortfeasors.

This Act does not necessitate any changes in the statutory language of Article 2 of the Uniform Commercial Code, but it may have the effect of slightly modifying some of the Comments to §§ 2-314 to 2-316 and 2-715 on proximate cause and the effect of contributory fault.

UNIFORM CONFLICT

Table of Jurisdictio

Jurisdiction	Laws
Washington	L.1933, c. 152

The Uniform Conflict of Laws-tations Act was approved by the tional Conference of Commissione Uniform State Laws in 1982. It wa signed to replace the Uniform Stat Limitations on Foreign Claims

Commissi

Traditionally, statutes of limita laws, for conflict of laws purpos the forum state's laws were appli stantive effect of determining whe delay-prone plaintiffs, or by their limitation periods, inevitably occurre

One consequence was that the t tions" to the "general rule." The any limitation period that was "ba death act, that created the cause of ty test" that treated a limitations s cifically to the sort of claim sued ployed. See Grossman, Statutes of ern Analysis, 1980 Ariz.St.L.J. 1.

Another consequence was that a called "borrowing statutes" which f cation of a limitation period other of the cause of action occurred in borrowing statutes are often diffic the source of considerable judicial co

In 1957 the Conference promulgate eign Claims Act which was designed achieved no general adoption, and w difficulty with it was its abrupt bars providing simply that the governing s state "where the claim accrued," sim period—"whichever bars the claim." present committee was set up to du ute." The consensus was that limit character, like other laws that affe serted.

UNIFORM CONFLICT O

Sec.
1. Definitions.
2. Conflict of Laws; Limitation Pe riods.
3. Rules Applicable to Computation Limitation Period.
4. Unfairness.
5. Existing and Future Claims.

§ 1. Definitions

As used in this [Act]:

(1) "Claim" means a right of actio or proceeding and includes a right of

(2) "State" means a state, commo United States, the District of Colum foreign country, or a political subdiv

MEMORANDUM

Memo: November 14, 1985
To: Hayden Kayden
From: Representative Max Gruenberg
Re: David S. Carter's letter on HB 368, the Uniform Comparative Fault Act

Enclosed please find a letter from Anchorage attorney David S. Carter on HB 368, the Uniform Comparative Fault Act. Please place it in the official committee file.

Also enclosed are seven copies of his letter. Please place them in each committee member's file.

Thank you.

State of Alaska

COMMITTEES

HOUSE HEALTH, EDUCATION
AND SOCIAL SERVICES
(Co-Chairman)
HOUSE JUDICIARY
HOUSE COMMUNITY AND
REGIONAL AFFAIRS

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4968

914 CLAY COURT
ANCHORAGE, ALASKA 99503
(907) 276-6844

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

November 5, 1985

David S. Carter
420 East 56th Avenue, A
Anchorage, Alaska 99518

Re: HB 368

Dear David:

Many thanks for your thoughtful and well researched letter of October 30 concerning the Uniform Comparative Fault Act. I very much appreciated your clearing up whether non-parties would have their fault adjudicated.

Your letter definitely sets the issue to rest and is an important addition to the record.

I sent a copy of your October 30 letter to each committee member personally and also have sent the original to the House Judiciary Committee staff counsel, Hayden Kayden, to put with the other official committee file. I have also asked him to put an additional copy of your letter in each committee members' bill file--it is that important. I want to be sure that each committee member understands what you are saying.

Please keep in touch. You probably have received my letter sent to all interested parties after the hearing. I think a lot of work needs to be done on this legislation and am willing to talk with you and other interested attorneys so that we can iron out the kinks and see if there is sufficient interest from a broad-based section of the bar for us to adopt this legislation.

Please get in touch with me at your earliest convenience.

Cordially,

Max F. Gruenberg, Jr.

David S. Carter
420 E. 56th Avenue, A
Anchorage, AK 99518

October 30, 1985

House Judiciary Committee
Attn: Representative Max Gruenberg
1024 W. Sixth Avenue
Anchorage, AK 99501

Dear Representative Gruenberg:

During my testimony before the Judiciary Committee here in Anchorage on October 25, 1985, I indicated to the Committee that I would look into the question of whose fault would be apportioned under House Bill 368, the Uniform Comparative Fault Act. While I spoke with you on the phone after my testimony on the 25th, I wanted to put my comments down in writing for the benefit of other Committee members and the Legislature. It is my hope that you can include this letter in the record so that there will not be any confusion as to whose fault is apportioned under the Uniform Comparative Fault Act.

Pursuant to §09.17.020(a)(2), as contained in House Bill 368, the total fault of all of the parties to each claim is allocated amongst each claimant, defendant, third-party defendant, and persons who have been released from liability under §09.17.060. The National Conference of Commissioners Comment on this section states the following:

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both

> plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

I trust that this language responds to your question as raised during my testimony concerning the allocation of fault under House Bill 368. I appreciate having had the opportunity to speak before the Committee on October 25th and I hope that proposed legislation will be given serious consideration as its enactment is long overdue.

Very truly yours,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

David S. Carter

By:
David S. Carter

DSC:mak

ALASKA BAR ASSOCIATION
P.O. BOX 100279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

DEBORAH O'REGAN, EXECUTIVE DIRECTOR
STEPHEN J. VAN GOOR, DISCIPLINE COUNSEL · TERESA E. WILLIAMS, DISCIPLINE COUNSEL

M E M O R A N D U M

TO: Members, Torts, Tax and Probate Sections

FROM: Deborah O'Regan, Executive Director DOR

RE: Hearings on House Bills in Anchorage

DATE: October 22, 1985

Representative Max Gruenberg has informed us that there will be hearings on Friday, October 25 at the Legislative Information Office, 6th and "K" Streets, at 10:00 a.m. on the following bills:

HB 368 - Uniform Comparative Fault Act

HB 408 - Uniform Simultaneous Death Act

HB 356 - Assignment of Group Life Insurance Policies

HB 358 - Non-Probate Transfers

If you are interested in testifying or would like more information, contact Max Gruenberg at 276-6844 or his legislative assistant, Chris Clark at 276-3240.

CITIZENS COALITION ON TORT REFORM, INC.

One of the gravest problems facing individuals, governments and businesses in Alaska today is the dramatic rise in liability premiums. At the present time the problem is compounded by a variety of factors. While insurance premiums are being increased, many insurance companies are pulling back from servicing policies in Alaska. The risks, especially in the Bush, are too great. Legislative remedies are needed. Following is a summary of proposals from the CITIZENS COALITION ON TORT REFORM INC.

1. CAP NON-ECONOMIC AWARDS

Non-economic awards compensate a victim for pain and suffering, loss of consortium and other intangible losses. A cap will establish consistency and result in predictable insurance programs. We suggest a maximum award of $250,000.

A recent United States Supreme Court decision allowed California to impose a limit of $250,000.

2. MANDATE STRUCTURED SETTLEMENTS

Structured settlements provide future payments to the victim equal to the total award. The future payments are consistent with the victim's loss.

3. DISCLOSE COLLATERAL INCOME SOURCES

Juries currently are not allowed to know when a victim has insurance coverage and has already been compensated. Accordingly that coverage is ignored in jury awards.

4. SET A SLIDING SCALE OF ATTORNEY'S CONTINGENT FEES

A sliding scale will increase the proportion to the victim as the amount of the award increases. Current practice allows an attorney a set percentage irrespective of the amount of the award.

The California sliding scale has been upheld as constitutional.

5. MODIFY JOINT AND SEVERAL LIABILITY

Several liability will apportion responsibility in accordance with degree of fault. Under current practice of Joint and Several liability, anyone at fault may be subject to the total liability.

6. REQUIRE ITEMIZATION OF ALL JURY AWARDS

The jury should make its award for damages with specific amounts. Damages will be itemized so as to reflect the monetary distribution among economic losses, non-economic loss, future losses, past expenses and other losses as applicable.

Similar legislation has been adopted by the State of Illinois in May of 1985.

7. ABOLISH RULE 82

This eliminates an additional expense. Current practice allows juries to make an award for damages which includes attorney's fees. Under Rule 82, the court can add up to 10% of the award for attorney's fees. (An attorney can claim and receive up to 10% of the settlement even if the case does not go to court.)

8. MODIFY PREJUDGEMENT INTEREST

Interest should accrue from the time of award or first offer of settlement. Current practice allows for interest to accrue from time of occurance. This will eliminate an unreasonable expense.

9. REVISE WRONGFUL DEATH STATUTE

A cap on wrongful death awards where here are no legal dependents will eliminate unreasonable expenses. The maximum benefit payable for wrongful death, in instances of no surviving dependents, should be limited to $25,000.

Similar legislation exists in Montana.

10. PUNITIVE DAMAGES

Awards for punitive damages should accrue to the benefit of society as a whole, ie., the State of Alaska.

11. Statute of Limitations

The current statutes of limitation should be modified to insure that they are applicable to a reasonable time certain. Recent interpretations open the individual to liability to an indefinite time future. The result is total unpredictability and unlimited exposure is an uninsurable risk.

12. REQUIRE AN AFFIDAVIT OF MERIT

As a condition of filing a complaint, the plantiff's attorney must certify there is reasonable and meritorious cause of filing the action. The plantiff's attorney must certify that he has consulted and reviewed the facts with a competent authority and has determined there is reasobnable and meritorious cause for filing the action.

Similar action has been adopted by the State of Illinois in May of 1985.

13. SPECIAL DAMAGES IN COUNTERCLAIMS

Eliminate the requirement to show special damages. This will require the plantiff's attorney to be held to the same standard of care principles required of other professionals.

14. EXPERT WITNESSES

Strict guidelines must be established for expert witness standards including current experience, substantial portion of his or her time currently involved in the practice and demonstration of a knowledge of the state of the art. Currently there are some expert witnesses whose sole practice is being an expert witness.

15. UNTRUE ALLEGATIONS

Legislation is needed to permit award of attorney's fees and payment of reasonable expenses from parties making untrue allegations without reasonable cause.

Currently there is no prohibition to plantiffs making allegations which are untrue. Similar legislation has been adopted by the State of Illinois in May of 1985.

16. MANDATORY ARBITRATION

Contracts shall provide for mandatory arbitration. The law should provide for judicial review of the arbitration hearings. In the event the mandatory arbitration is substantially upheld, the party requesting the judicial review shall assume all costs and fees related to the appeal.

OTHER SIGNIFICANT ISSUES

Provision for early dismissal of uninvolved parties by filing an Affidavit of Non-Involvement.

Require release of records prior to the institution of a suit.

Mandate advance notice of at least 60 days prior to the cancellation of insurance and provide for a timely return of unearned premiums.

Require disclosure of settlement information to licensing authority.

Provide reasonable immunity in anti-trust suits, except in the instance of malice and provide penalities for frivolous suits.

Make provision for review of professional activities by professional society.

Require all disciplinary actions by any professional group duly consistituted to be reported to licensing authority.

Limit application of strict liability.

David S. Carter
420 E. 56th Avenue A
Anchorage, AK 99502

February 19, 1985

Representative Max Gruenberg
Pouch V
Juneau, AK 99811

Dear Representative Gruenberg:

You may recall that I spoke with you several months ago regarding the current laws on contribution among joint tortfeasors. In a nutshell, we discussed how the current statutes, which provide for pro rata contribution among joint tortfeasors, are outdated in light of Alaska's judicial adoption of pure comparative negligence in Kaatz v. State, 540 P.2d 1037 (Alaska 1975). During our conversation, you asked me to check to see if there were any updated versions of contribution statutes developed by the National Conference of Commissioners on Uniform State Laws. Enclosed please find a copy of the "Uniform Comparative Fault Act" approved by the National Conference of Commissioners on Uniform State Laws in 1977.

When we last spoke, which was shortly before you left for Juneau, you mentioned that you had been appointed to the Judiciary Committee. Since any legislation to amend Alaska's contribution statutes would necessarily pass through your committee, I would request that you keep a copy of the enclosed materials before, pursuant to general protocol, sending this correspondence to my representative, whom I believe is Representative Boucher. I would be pleased to see you both take an active role in introducing legislation directed towards abolishing the inequity which presently exists due to Alaska's judicial adoption of comparative negligence but its failure to judicially or legislatively adopt contribution statutes patterned for comparative negligence jurisdictions.

Basically I am in favor of adopting the Uniform Comparative Fault Act in its entirety. Naturally, there may well be portions of

the Act which would generate debate. For instance, §2(d) calls for the reallocation of any amount uncollectible from one party among the other parties, including a claimant at fault, according to their respective percentages of fault. I suspect that the plaintiff's bar, and a number of other individuals, will feel that it is inequitable to require an injured plaintiff to share the burden of an insolvent defendant with the other defendants to the action.

Clearly, there is room for disagreement here. My own personal opinion is that the Act's treatment of this situation is the most equitable. If a plaintiff is not at fault, he or she will not be affected by the redistribution of an insolvent joint tortfeasor's obligations. Where a plaintiff has been found to have been contributorily negligent, he or she will only be required to bear the burden of a defendant's insolvency proportionately to the plaintiff's own fault. The same, of course, is true of the remaining solvent defendants. The key word regarding the Uniform Comparative Fault Act is "equity."

In sum, it is my hope that the Legislature will be able to amend Alaska's Contribution statutes to ameliorate the current inequity during this session. The Act is prospective and would not affect causes of action accruing prior to the date of the Act's implementation. I would also like to refer you to the primary case in Alaska which discusses the current situation regarding comparative negligence and pro rata contribution. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979) should be read in its entirety. The court in Arctic Structures deferred to the Legislature the responsibility of adopting contribution statutes consistent with the application of comparative negligence. I would also direct your attention to Chief Justice Boochever's (now Ninth Circuit Judge) dissenting opinion in the Arctic Structures case and the American Motorcycle Association case cited therein.

I wish that I could have provided a more complete briefing for you at this time but my workload has prevented that development. I should note that these materials are not being sent on behalf of my employer, Hughes, Thorsness, Gantz, Powell & Brundin, nor do I purport to represent anyone's opinion other than my own. However, I am clearly not alone in recognizing that our contribution statutes, found at A.S. 09.[illegible].010, et seq., need updating to reflect Alaska's adoption of comparative negligence. If you, or anyone else in the Legislature have any questions regarding this matter, please feel free to call on me. I will do my best to address such inquiries. Once again, I would hope that we can get something passed this session since there is a two-year statute of limitations on tort actions and therefore any Legislation passed this year would not take full effect until 1987, unless of course we look into making the statutory revisions effective sooner.

Thank you for your attention to this matter.

Yours very truly,

David S. Carter

Enclosure

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LYNCH, FARNEY AND CROSBY

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JAMES B. WRIGHT

February 28, 1985

Representative Max Gruenberg
State Capitol, Pouch V
Juneau, AK 99811

Attn: Dave Donley

Dear Max:

Enclosed you will find material on the Uniform Comparative Fault Act. I spoke with Dave regarding this. I am requesting your support for the introduction of this measure in this session of the Legislature.

I am writing you on behalf of a subcommittee of the Alaska Defense Counsel. On several prior occasions, when the Alaska Supreme Court was confronted with the question of the allocation of damages among defendants in a comparative negligence case by using their comparative fault, they referred the matter to the Legislature. This is a situation which is particularly unfair in those circumstances where one of two or more defendants is insolvent. The Uniform Comparative Fault Act would, I believe, correct this situation. While on the one hand it preserves to the plaintiff the right of joint and several liability, i.e. collecting all of his or her judgment from one defendant, it permits reapportionment of the insolvent defendant's portion of the liability as between negligent defendants and comparatively negligent plaintiffs, thereby causing all to bear their fair share.

On behalf of the Alaska Defense counsel, I would like to recommend this Act in its present form as a solution to a very unfair situation. I have enclosed a copy of the Act and some background material.

If it is possible to have this act introduced this year and acted upon in this session, I believe that I can generate sufficient support to speak in favor of it. If necessary, I believe that we can obtain testimony and/or written support from the Commissioners on Uniform Laws.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

LYNCH, FARNEY and CROSBY

Timothy M. Lynch

TML/vmd/7
Enclosures

The Law Firm of
Schaible, Staley, DeLisio & Cook, Inc.

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Charles D. Silvey, Jr.

Of Counsel:
William V. Boggess

May 1, 1985

Representative Max F. Gruenberg, Jr.
State of Alaska
Pouch V
Juneau, AK 99811

Re: Uniform Comparative Fault Act

Dear Representative Gruenberg:

Thank you for your letter of April 18, 1985, along with the enclosed copy of the introduced legislation.

I agree with your observation that the chances of legislation being enacted are better if the bill remains unchanged. On that note, I thought you might be interested in the enclosed editorial from the April 12, 1985 edition of the Los Angeles Times. I believe California has passed the Uniform Comparative Fault Act, but I am not certain. Perhaps one of your aides might wish to obtain a copy of the referenced SB 75. This is only a suggestion, since I know you and your staff are very heavily preoccupied with end of the session matters, and other constituent concerns.

Thank you very much for your attention.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, INC.

By: Michael C. Geraghty

MCG/slb
Encl.

THE CASE FOR JUDICIAL ADOPTION OF COMPARATIVE FAULT IN SOUTH CAROLINA

JERRY J. PHILLIPS*

I. INTRODUCTION

A review of the reasons why a comparative-fault doctrine should be adopted in South Carolina has been ably done elsewhere.[1] The pressing issue in South Carolina is whether this doctrine should be adopted judicially or legislatively. It is clear that the judiciary, as well as the legislature, has the power to adopt a comparative-fault rule.[2] The real question is whether, as a matter of policy, the courts should defer to the legislature in this area. The thesis of this article is that the courts should take the initiative in view of the complexity of the problems associated with such a change in the law. These problems call for the kind of fine-tuning that is more a characteristic of judicial decision making than of legislative enactment.

Moreover, prior holdings of the South Carolina Supreme Court mandate that some action be taken in this area. This court has held that a comparative-fault doctrine that applies to only one class of individuals is unconstitutional as violative of

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* Professor of Law, University of Tennessee School of Law. A.B., Yale University, 1956; J.D., Yale Law College, 1961; M.A., Cambridge University, 1964.

This article is an outgrowth of a CLE speech the author delivered to the bench and bar of South Carolina at Columbia in March of this year under the joint auspices of the South Carolina Bar and University of South Carolina School of Law. The author gratefully acknowledges the helpful suggestions of Professor David G. Owen of the University of South Carolina School of Law.

1. *See generally Symposium: Comparative Negligence in Louisiana*, 40 LA. L. REV. 289 (1980); Commentary, *A Call for the Adoption of Comparative Negligence in South Carolina*, 31 S.C.L. REV. 757 (1980).

2. Several states have adopted judicially a comparative-fault doctrine. *See, e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1974); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). *See generally Comments on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 VAND. L. REV. 889 (1968).

equal protection of the law.[3] Yet, South Carolina has some comparative-fault rules that apply to only a part of the field of torts law. Under the South Carolina court's interpretation of equal protection, these rules either should be struck down as unconstitutional or extended to the entire field of tort law. Since these rules are longstanding and fundamental to tort law, their extension rather than expungement is the desirable alternative.

II. THE SCOPE OF THE DOCTRINE

A. *Forms of the Doctrine*

Numerous decisions must be made about the scope of the comparative-fault doctrine. Among the most important is the appropriate form to adopt, "partial" (or "modified") and "pure" being the usual choices.[4] Under a partial system, a plaintiff may recover only as long as his fault is not as great as—or, some courts say, not greater than—that of the defendant. The pure system allows a plaintiff to recover against a defendant who is proximately at fault to any degree. A minority of jurisdictions, mostly by judicial decision, have adopted the pure form as the most equitable.[5] The majority, however, have adopted one of the partial forms in the belief that it is unfair to allow a plaintiff to recover when he is either equally at fault, or more at fault, than the defendant.[6]

The partial form has some unfortunate attributes. For ex-

3. Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). *See* text accompanying notes 44-46 *infra*.

4. *See* Commentary, *supra* note 1, at 776-77.

In a recent article the proposition is persuasively advanced that, under a state constitutional "intermediate" (as opposed to either a "strict" or a "rational-basis") standard of review, a "modified" comparative-fault system is unconstitutional under the equal protection clause. *See* Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guaranty of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083. The constitutional reasoning is the same as that of the South Carolina Supreme Court in Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978), and indicates that South Carolina is constitutionally required to adopt a "pure" rather than a "modified" form of comparative fault. The article also presents a thorough and well-reasoned analysis of the disadvantages of modified comparative fault and the superior features of a pure system of comparison. *See* Sowle & Conkle, *supra*.

5. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1974); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).

6. *See, e.g.*, Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

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9. Thomas v. Salem Tc
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which it was unaware.

ample, while the doctrine of last clear chance is usually abolished under a system of comparative fault, it would presumably become applicable again under the partial form once the plaintiff's fault equaled or was greater than that of the defendant.[7] This application could result in a plaintiff, barred from partial recovery because of the degree of his fault, nevertheless recovering his entire damages by virtue of the last clear chance doctrine. This doctrine is widely recognized as unsound and merely an intermediate step between the harsh common-law rule of contributory negligence and the more equitable rule of comparative fault.[8]

The better view is that under a partial system the jury should be instructed on the effect of its verdict, *i.e.*, that a finding of 50% fault—or 51% under some systems—of plaintiff will bar his recovery entirely.[9] The need for this practical instruction indicates another deficiency of the partial system: the jury's opportunity to twist or bend its basic factual determinations in order to achieve the result it desires. It seems better to allow the jury to reach its factual determination untrammeled by such considerations. In addition, it is difficult to see why a single degree change in the middle range of fault should have the drastic effect of barring recovery.

B. Areas of Application

Comparative fault reduces rather than precludes recovery when plaintiff is contributorily negligent. Courts also usually apply the doctrine when plaintiff is charged with impliedly assum-

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7. "Of course, when a state has modified comparative negligence a strong argument could be made that last clear chance should still apply when negligence is not compared." V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 7.2, at 139 (1974). Last clear chance may be retained as an exception to comparative fault, but the trend is to abolish it as a general exception. *Id.*

8. *See* James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938). The doctrine does, however, serve the useful purpose of mitigating the harshness of the all-or-nothing rule in a contributory negligence jurisdiction.

9. Thomas v. Salem Township Bd. of Trustees, 224 Kan. 539, 548-52, 582 P.2d 271, 278-80 (1978).

The 51%-49% rule is preferable to a 50%-50% bar if the jury is not instructed on the effect of its verdict, "because a 50-50 apportionment is a very comfortable one for juries." W. PROSSER, J. WADE, & V. SCHWARTZ, TORTS CASES AND MATERIALS 610 (6th ed. 1976). The jury's intent to so apportion would be frustrated by a 50%-50% cutoff rule of which it was unaware.

ing a known risk in a voluntary and unreasonable manner[10] and when plaintiff is charged with foreseeable misuse of a product.[11] There may be some areas when plaintiff's fault will not be used to reduce recovery even under a comparative-fault rule. Traditionally, contributory negligence has been no defense to a charge of willful misconduct[12] and the same rule may apply to comparative fault.[13] Similarly, contributory negligence (and perhaps comparative fault) is inapplicable when defendant has violated a statute enacted to protect the plaintiff against his own fault.[14] If plaintiff were injured because of the failure of defendant to provide a safety device whose purpose is to guard against the very conduct of plaintiff that caused the injury, contributory negligence (and arguably comparative fault) may not be applied.[15] Similarly, contributory negligence (and perhaps comparative fault) may not be applied to workplace injuries when plaintiff is required to work near a dangerous condition created by defendant.[16]

All of these no-contributory-fault rules should probably be eliminated under comparative fault, however, since they are in conflict with the basic policies underlying its adoption. The rules probably originated in part to alleviate the harshness of the contributory negligence rule and, with the adoption of comparative fault, this reason for the rules disappears. Also, leaving arguably arbitrary exceptions to the basic doctrine of comparative fault

10. *See, e.g.*, Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978).

11. *See, e.g.*, Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *Hopkins* has been overruled with respect to its definition of an "unreasonably dangerous" product in strict liability design defect cases. Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). *Hopkins* still stands for the proposition that comparative fault applies in products liability "foreseeable misuse" cases. *See also* Fischer, *Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk*, 43 Mo. L. REV. 431 (1978).

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 426 (4th ed. 1971).

13. *See generally* Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L. REV. 769 (1977).

14. *See* W. PROSSER, *supra* note 12, at 425-26.

15. Bexiga v. Havir Mfg. Co., 60 N.J. 402, 412, 290 A.2d 281, 285 (1972). The defense of contributory negligence is especially weak when defendant has represented his product to be safe and plaintiff relies, perhaps imprudently, on the representation. *See* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 802-04 (1977).

16. D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 242-43 (1974)(charge of assumption of the risk).

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Rptr. 132, 145 (1980).

22. *See* Twerski, *supra*

may well conflict with the South Carolina Supreme Court's conceptual view of equal protection.[17] There is, however, no reason why the policy underlying these various rules may not be taken into consideration as a relevant factor in assessing comparative fault.

A growing number of jurisdictions have applied comparative-fault principles to strict products liability litigation.[18] Some courts have been unwilling to do so because of the conceptual difficulty of comparing fault with no-fault and because of a belief that the policies underlying strict liability militate against considering plaintiff's misconduct as being relevant to liability.[19] The policy argument seems weak. Plaintiff's fault in the form of assumption of the risk and unforeseeable misuse is treated as a bar to recovery in strict liability. If some types of plaintiff misconduct are relevant to strict liability, it is difficult to see why contributory negligence is not also relevant—particularly in view of the fact that the defenses of contributory negligence, assumption of risk, and misuse often overlap.[20]

The doctrinal problem in comparing fault with no-fault is more difficult. Some courts treat the issue as one of comparing degrees of causation[21] rather than of fault, although the results may be very different if a cause rather than fault comparison is used.[22] The Uniform Comparative Fault Act allows considera-

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17. *See* Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). *See* text accompanying notes 45-51 *infra*.

18. *See* Fischer, *supra* note 11, at 431; Case Comment, *Comparative Negligence and Strict Products Liability*, 38 OHIO ST. L.J. 883 (1977). Some courts compare assumption of the risk, but not contributory negligence, in strict products liability actions. *See, e.g.*, Holdsclaw v. Warren & Brewster, ___ Or. App. ___, 607 P.2d 1208 (1980).

19. *See, e.g.*, Kinard v. The Coats Co., 37 Colo. App. 555, 557, 553 P.2d 835, 837 (1976); Seay v. Chrysler Corp., ___ Wash. 2d ___, 609 P.2d 1382 (1980). *But see* Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889 (1980)(suggesting equal division of liability, between or among at-fault and strictly liable cotortfeasors, as the most equitable system).

20. *See* D. NOEL & J. PHILLIPS, *supra* note 16, at 219-22.

21. *See, e.g.*, Murray v. Fairbanks Morse, Beloit Power Syss., Inc., 610 F.2d 149 (3d Cir. 1979). The California Supreme Court recently held that any manufacturer of a "substantial percentage" of the market of the drug DES could be held liable to an injured plaintiff "for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." Sindell v. Abbott Laboratories, ___ Cal. 3d ___, ___, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980).

22. *See* Twerski, *supra* note 15, at 821-22.

tion of both fault and causation in apportioning liability.[23] Others have urged that marketing a defective product may be viewed as blameworthy for purposes of fault comparison even though the defective condition was latent and not reasonably discoverable.[24]

South Carolina has a special problem in judicially adopting comparative fault for strict tort liability since the General Assembly has adopted the Restatement (Second) of Torts Section 402A,[25] including the comment that makes assumption of the risk a complete defense and abolishes contributory negligence as a defense.[26] In order to integrate strict tort liability into comparative fault, certain portions of these enactments would have to be repealed. Alternatively, they may be declared unconstitutional under the equal protection rationale discussed below.[27] In any event, there is no legislation to prevent the South Carolina judiciary from applying comparative fault to all negligence actions and to strict liability actions based on breach of express or implied warranties.[28]

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23. UNIFORM COMPARATIVE FAULT ACT § 2(b), *reprinted in* 40 LA. L. REV. 403, 419 (1980).

24. *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 331 (1977), Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978).

25. *See* S.C. CODE ANN. § 15-73-10 (1976). *See generally* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976).

26. *See* S.C. CODE ANN. § 15-73-20 (codifying the last sentence of RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965)). The legislature has incorporated by reference all comments to § 402A as the legislative intent. *See* S.C. CODE ANN. § 15-73-30 (1976).

27. *See* text accompanying notes 45-47 *infra*.

28. An action for breach of express or implied warranty is a form of strict liability. D. NOEL & J. PHILLIPS, *supra* note 16, at 13. Privity of contract is not required in an action for breach of express or implied warranty in South Carolina. JKT Co. v. Hardwick, ___ S.C. ___, 265 S.E.2d 510 (1980); Gasque v. Eagle Mach. Co., 270 S.C. 499, 502-03, 243 S.E.2d 831, 832 (1978).

The inspection language of U.C.C. § 2-316(3)(b) and the proximate cause language of U.C.C. § 2-715(2)(b) can be read as introducing to some extent a contributory negligence defense into warranty law. *See also* U.C.C. § 2-314, Comment 13; *id.* § 2-715, Comment 5. These Code sections may, however, be glossed to allow application of a comparative fault standard and the comments are not binding on the courts.

C. *Multiple Defendants*

When there is more than one defendant, a number of problems arise in applying comparative fault. Of fundamental importance is the issue of whether the concept of joint and several liability should be retained. A number of jurisdictions retain the concept,[29] while a few provide for apportionment of liability between or among defendants.[30] Under the apportionment approach, if plaintiff were 20% at fault and each of two defendants were 40% at fault, plaintiff could recover only 40% of his damages from any one of the defendants. Under traditional principles of joint and several liability, he could obtain a judgment for 80% of his damages against either or both defendants, although he could only collect the 80% once—in whole from one defendant or in part from each.

Apportioning liability between or among defendants when all parties are at fault seems more sensible than joint and several liability. There is no good reason why one at-fault defendant should be responsible for the fault of another solvent defendant. Let the burden of seeking recovery from the other defendant lie with the culpable plaintiff who invokes the court's aid. If plaintiff is without fault, a culpable defendant should probably bear the loss of another defendant who is unable to pay. If plaintiff is not at fault and all defendants are solvent and before the court, the question of whether or not to apportion seems academic. If a solvent defendant is not before the court, however, the innocent plaintiff probably should have a joint and several judgment and the culpable defendant or defendants should then have the burden of seeking contribution. An innocent plaintiff should not be penalized to the advantage of an at-fault defendant.

When a claim cannot be collected against one of the defendants and plaintiff is partly at fault, the approach of the Uniform Comparative Fault Act is to apportion the uncollectible liability between the at-fault plaintiff and the other defendant or defendants who can pay, on the basis of their relative degrees of

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29. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

30. *See* Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1978); Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713 (Ky. 1979)(permissive several liability).

fault. Thus, if plaintiff *A* is 20% at fault and defendants *B* and *C* are each 40% at fault, but *C* is unable to pay, *A* will bear two-sixths of *C*'s responsibility and *B* the remaining four-sixths. If *A* is without fault, then *B* would bear the entire responsibility for *C*'s fault.[31]

A related problem arises when one defendant settles with the plaintiff, who then sues a cotortfeasor. The cotortfeasor should receive a credit against his liability at least equal to the settlement amount. The approach of the Uniform Act is to grant a credit equal to the full amount for which the settlor would have been liable had the plaintiff taken judgment against him.[32] This approach will tend to discourage settlements, but its virtue is that the remaining defendant is not prejudiced by the conduct of others over whom he has no control. It may be necessary to retain the settlor as a party in the litigation between plaintiff and the nonsettling defendant in order to get a fair determination of the degrees of fault.

A final major issue is how to determine relative degrees of fault when a partial comparative-fault rule is applied. Specifically, should plaintiff's fault be compared with all defendants together or with each defendant separately for purposes of determining the apportionment cutoff point? Plaintiff may be able to recover under the former approach even though he could not under the latter. For example, suppose plaintiff *A* is 30% at fault, defendant *B* is 50% at fault, and defendant *C* is 20% at fault. In a partial comparative-fault jurisdiction, *A* would be un-

31. *See* UNIFORM COMPARATIVE FAULT ACT § 2(d). This Act thus partially dispenses with joint liability when plaintiff is at fault and his claim against another defendant is uncollectable. The author's proposal would go further and place the onus on the culpable plaintiff, rather than on the culpable defendant, to seek contribution from another defendant; if this contribution is not available, that liability should then be shared among the remaining parties at fault as described in the Uniform Act. On the other hand, the burden of establishing the proper apportionment of damages should be placed on the defendants. *See* text accompanying notes 84-86 *infra*. If this burden is not carried, either liability would remain joint and several or the factfinder would be permitted to make a rough apportionment. *See* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 667-68 (1978).

32. UNIFORM COMPARATIVE FAULT ACT § 6. The two possibilities discussed in the text contemplate releasing the settlor from liability for contribution. A third possibility is to allow the nonsettling tortfeasor to seek contribution against the settlor. This was the solution of the 1939 UNIFORM CONTRIBUTION ACT and it has a substantial deterrent effect on settlements. The three methods of treating settlements are discussed in the comment to § 6 of the Uniform Comparative Fault Act.

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able to recover anything against *C* if *A*'s fault is compared solely with *C*'s, since *A*'s fault is greater than that of *C*. If the fault of *B* and *C* are combined for purposes of comparison, *A* can recover against both *B* and *C* (either jointly and severally or 50% and 20% of the damages respectively), since 30% is less than 70%.[33]

The better rule seems to be to combine the defendants' fault for purposes of comparison. To do otherwise may result in a culpable defendant not being liable to plaintiff at all. Moreover, in the event of such nonliability, thorny questions arise concerning how that liability should be allocated between or among plaintiff and the remaining defendant or defendants. If a remaining defendant bears any portion of that liability, further complications arise regarding possible claims for contribution by that defendant against the defendant who is not liable to plaintiff.[34] There is also the undesirable possibility that in the contribution action the degrees of fault would be determined in differing proportions than they were in the original suit.

Combining the defendants' fault for purposes of comparison in a partial comparative-fault system normally will avoid the problems discussed in the preceding paragraph, since either all guilty defendants in a single suit should be liable or none should be.[35] This combining of fault argues for a pure rather than a partial comparative negligence approach, since the combination may result in a plaintiff recovering against a defendant who is less at fault than plaintiff. Under a pure comparative-fault ap-

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33. *Compare* Graci v. Damon, ___ Mass. ___, 383 N.E.2d 842 (1978)(plaintiff's fault measured against all defendants' combined liability) *with* Cartel Capital Corp. v. Fireco, 161 N.J. Super. 301, 391 A.2d 928 (1978)(plaintiff's fault measured against that of each defendant).

34. That one tortfeasor is immune from liability to plaintiff does not mean that he is immune from a claim for contribution by a cotortfeasor. The authorities are divided. *Compare* Chamberlain v. McCleary, 217 F. Supp. 591 (E.D. Tenn. 1963) (no contribution) *with* Nolechek v. Gesaule, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978)(contribution allowed).

35. If several suits are involved, however, there may be conflicting results as to percentages of fault. As Dean Wade observes, "[b]oth plaintiffs and defendants have sufficient incentives to join other negligent persons, since this will have the effect of reducing their percentages of responsibility." Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 311 (1980). Not all parties may be suable in a single jurisdiction, however, if they lack minimal contacts with that jurisdiction. After World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980), the mere occurrence of a tort within a jurisdiction is not a sufficient basis for asserting long-arm jurisdiction over a tortfeasor.

proach, it makes no difference whether the defendants' degrees of fault are combined or not for purposes of relative comparison, since plaintiff's relative degree of fault will not bar recovery as long as any defendant is also at fault in any degree.

D. Setoff

A limited but important problem exists for jurisdictions that adopt either a pure comparative-fault rule or one that allows partial recovery as long as plaintiff's fault is not greater than that of defendant. The problem is whether or not setoff should be allowed when both parties have a claim against each other.[36] Suppose, for example, under a "not-greater-than" rule, that *A* and *B* are both injured in an accident in which each is equally at fault and that each suffers $10,000 damages. Shall each be required to pay the other $10,000 or shall the claims be set off against each other with no actual payment at all?

If either *A* or *B* is insured, the insurer benefits from a setoff to the detriment of the insured or the claimant, probably contrary to the expectations of the insured. If the attorney for *A* or *B* is hired on a contingency fee basis, he or she may also suffer by setoff through diminution of the *res* out of which his or her fee is to be paid. Both of these considerations militate against the use of setoff.

Other considerations arise if one of the claimants is judgment-proof. Suppose *A* is insured and has a claim for $10,000 against *B*, who is judgment-proof and has a claim for $15,000 against *A*. It would seem equitable that *A*'s claim be satisfied out of his own insurance before any payment is made to *B*. Suppose the same facts, except that *A* is solvent but uninsured. In this situation, equitable considerations favor allowing *A* to set off *B*'s liability against *A*'s own liability.[37] These dispositions

36. A claim for set-off can arise only in a pure comparative-fault jurisdiction or in a not-greater-than-partial-fault jurisdiction where each party's fault is the same. In all other situations, one party's fault will be greater than that of the other and he, therefore, will be barred from any recovery.

Some jurisdictions allow setoff. *See* V. SCHWARTZ, *supra* note 7, § 19.3. The Rhode Island comparative-fault statute expressly prohibits setoff. R.I. GEN. LAWS § 9-20-4.1 (Cum. Supp. 1979).

37. The Uniform Comparative Fault Act provides:

> A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the

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E. Contribution

While adoption of comparative fault does not compel adoption of a rule of contribution among cotortfeasors,[38] logic and sound policy suggest that both be adopted. When fault is divided between cotortfeasors on a degree-of-fault basis,[39] no tortfeasor is immune from contribution because his or her fault is less than that of the other; by analogy, a pure comparative fault standard should be used in determining a plaintiff's claim against a defendant. Adoption of this kind of comparative contribution rule may be particularly necessary in South Carolina as a result of the state's crashworthiness doctrine discussed below.[40]

When joint and several liability is not retained with comparative fault, the need for contribution is eliminated, at least when all parties are joined in a single suit. In that situation, a defendant would never be required to pay more than his equita-

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obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment by him to the other party.

UNIFORM COMPARATIVE FAULT ACT § 3.

38. The Washington Supreme Court refused to adopt contribution merely because the state had a rule of comparative fault. Wenatchee Wenoka Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 576 P.2d 288 (1978). The Connecticut Supreme Court found that the legislature's adoption of comparative fault did not evidence a legislative intent to abolish that state's no-contribution rule. Gomeau v. Forrest, 176 Conn. 523, 409 A.2d 1006 (1979).

South Carolina presently does not allow a claim for contribution. Adcox v. American Home Assur. Co., 258 S.C. 331, 188 S.E.2d 785 (1972).

39. While some jurisdictions allow contribution on an equal basis, *see, e.g.*, TENN. CODE ANN. § 23-3102(b) (Supp. 1979), others divide liability based on degree of fault. *See* Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974). The latter approach is the one adopted by the Uniform Comparative Fault Act, §§ 2, 4.

Some jurisdictions allow complete recovery by a "passively" negligent tortfeasor against a cotortfeasor who is "actively" negligent, although this rule has been severely criticized and rejected by other jurisdictions. *See* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978). The actively negligent tortfeasor under this rule, like the more-at-fault plaintiff in a partial comparative-fault jurisdiction, would be barred from seeking contribution.

40. *See* text accompanying notes 80-82 *infra*.

ble share. If all matters are not litigated in a single lawsuit, difficult problems of loss apportionment arise. The litigant's self-interest normally should be a strong incentive to join all likely parties whenever possible.[41]

F. Recapitulation

Thus, there are a number of difficult problems and policy choices connected with the adoption of comparative fault and the previous discussion highlights rather than exhausts the list of such considerations.[42] It seems eminently appropriate for the South Carolina Supreme Court to adopt comparative fault, instead of treating the subject solely as a matter for the legislature. The nature of the problems and policies to be considered are more suitable to judicial analysis than to a legislative resolution made in response to political concerns and special-interest group pressures. Even if a comparative-fault statute were adopted, it is likely that many major issues would be left open for resolution by the courts.[43] If the judiciary is suited to resolve some of these issues, it is suited to resolve them all. There should be little question of legislative opposition to comparative fault, since the General Assembly has already shown its approval of the doctrine in principle by passing comparative-fault statutes of limited application.[44] Moreover, as indicated in the following section, South Carolina may be required under its interpretation of constitutional law either to extend comparative fault throughout the law of torts, or to strike down those limited comparative-fault doctrines that already exist in the state.

III. THE CONSTITUTIONAL IMPLICATIONS OF APPLYING COMPARATIVE FAULT ON A LIMITED BASIS

A. Equal Protection Under State Law

In 1974, the South Carolina General Assembly passed a

41. *See* note 35 *supra*.

42. For a more extensive catalog of the issues involved, *see generally* V. SCHWARTZ, *supra* note 7; Wade, *supra* note 35.

43. For example, South Carolina's automobile comparative-fault statute seems to address only the issue of partial comparative fault vis-à-vis a single plaintiff and a single defendant. See S.C. CODE ANN. § 15-1-300 (1976).

44. These comparative-fault statutes are the railroad employee statutes, S.C. CODE ANN. §§ 58-17-3730, -3740 (1976) and the automobile statute, *id.* § 15-1-300.

statute providing for the application of comparative fault to automobile accident litigation.[45] The supreme court, in *Marley v. Kirby*,[46] struck down this statute under the equal protection clauses of the state and federal constitutions. While recognizing "the validity of comparative negligence statutes of general application," the court saw "no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."[47] In reaching this result, the *Marley* court relied upon its earlier decision of *Broome v. Truluck*,[48] which struck down as unconstitutional a special tort statute of repose, or outer-cutoff statute of limitations, for architects, engineers, and contractors. There, the court stated as the rationale for its holding: " '[A]rchitects, engineers, and contractors are not the only persons whose negligence in the improvement of real property may cause damage or injury to others.' "[49]

In all probability these decisions are not compelled by federal constitutional law.[50] They are, however, based on state constitutional standards and nothing in federal law prohibits states from imposing a stricter standard of equal protection than that required by the federal constitution.[51] The decisions represent a clear statement of a quite restrictive constitutional review of state statutes on equal protection grounds and, therefore, directly apply to any comparative-fault rules presently in effect in South Carolina.

The Federal Employers' Liability Act, 45 U.S.C. §53 (1976),

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45. 1974 S.C. Acts 2718, No. 1177 (presently codified at S.C. CODE ANN. § 15-1-300 (1976)) provided:

> In any motor vehicle accident, contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such contributory negligence was equal to or less than the negligence which must be established in order to recover from the party against whom recovery is sought.

46. 271 S.C. 122, 245 S.E.2d 604 (1978).

47. *Id.* at 124-25, 245 S.E.2d at 606.

48. 270 S.C. 227, 241 S.E.2d 739 (1978).

49. 271 S.C. at 125, 245 S.E.2d at 606 (quoting 270 S.C. at 230-31, 241 S.E.2d at 740).

50. *See* Silver v. Silver, 280 U.S. 117 (1929)(upholding guest statute against constitutional attack). "Contrary to the position of those courts which hold that the repose statutes for architects and builders are based on irrational classifications, a legislature would seem entitled to make such a judgment." 5 Research Group, Inc., Final Report of the Legal Study 10-11 (1977)(prepared for Interagency Task Force on Product Liability).

51. *See* Sowle & Conkle, *supra* note 4, at 1102.

establishes a pure comparative-fault rule for tort claims brought under that Act. That statute cannot be invalidated on state constitutional grounds because of the federal supremacy clause, Article VI of the United States Constitution, and the statute is in all probability constitutional under the relatively lax standards of federal constitutional review. Thus, the FELA comparative-fault rule must be applied in South Carolina, and accordingly that rule must be extended to all areas of tort law in this state in order to comply with the constitutional mandate of *Broome* and *Truluck*.

It is possible that the state supreme court would not consider the *Broome-Truluck* doctrine binding in a situation where the application of that doctrine is triggered by a mandatory federal, as opposed to a state, standard. Avoidance of the state doctrine, however, because of its relation to federal law would seem unduly insular and not logically defensible.

There are other areas of tort law in South Carolina, discussed hereafter, where in reality a comparative-fault rule is now being applied as a matter of state law. In these areas, the supreme court of the state has a choice. It can either strike down the application of a comparative-fault rule in such limited areas, or else it can extend that rule to the entire field of tort law, to comply with the constitutional demands of *Broome* and *Truluck*.

B. The Present Status of Comparative Fault in South Carolina

1. The Railroad Statute.—The South Carolina Code provides that contributory negligence and assumption of the risk are not defenses in a suit by railroad employees against a railroad for injuries which result from a statutory violation; in all other such suits not alleging statutory violation, recovery is apportioned according to the degree of fault of the employee.[52]

52. *See* S.C. CODE ANN. § 58-17-3730 (1976), which provides:

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this article to recover damages for personal injuries to any employee or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. But no such employee who may be injured or killed shall be held to have been

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54. *Id.* at 187-88.

This is a pure comparative-fault statute, limited to suits by railroad employees against their employers. It would seem inevitable that the statute be struck down if challenged on the authority of the *Marley* and *Broome* decisions.

2. The Avoidable Consequences Doctrine.—Professor Dobbs states the avoidable consequences doctrine in its traditional form:

> The plaintiff who is injured by actionable conduct of the defendant, is ordinarily denied recovery for any item of special damages he could have avoided by reasonable acts, including reasonable expenditures, after the actionable conduct takes place. . . .
>
> . . . .
>
> The affirmative side of the rule is that the plaintiff is entitled to recover for expenditures reasonably made in an effort to avoid or minimize damages caused by the defendant's conduct.
>
> The avoidable consequences rule in its negative form is not the same as the contributory negligence defense. For one thing, the contributory negligence defense looks to the plaintiff's pre-tort conduct, while the avoidable consequences defense looks to his post-tort conduct.[53]

Other differences between contributory negligence and avoidable consequences suggested by Professor Dobbs are: (1) the former applies only to negligence actions, while the latter applies to contract cases as well; (2) there is no duty of reasonable care to avoid damages if defendant's conduct is reckless or intentional; (3) avoidable consequences, like comparative fault, merely reduces damages, while contributory negligence bars recovery entirely; and (4) the contributory negligence standard "may be an objective one," while the "avoidable consequences rule probably takes the individual problems of the plaintiff into account somewhat more readily, though it is hard to be very sure about this."[54]

Most, if not all, of these asserted differences between the contributory negligence and avoidable consequences doctrines

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guilty of contributory negligence when the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

53. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 186-87 (1973).

54. *Id.* at 187-88.

disappear on closer analysis. Contributory negligence has been held in some jurisdictions to bar warranty claims that are contractual in nature.[55] The defense of contributory negligence is no bar if defendant's conduct is reckless or willful.[56] To state that unreasonable failure to avoid consequences reduces recovery, while contributory negligence bars recovery entirely, is only to assert a legal conclusion about the differences between the two doctrines without offering any reason why that difference should exist. There is no basis for concluding that one doctrine is any more or any less objective or subjective in its application than the other.[57]

The "affirmative side," as labeled by Professor Dobbs, of the avoidable-consequences rule has its counterpart in the contributory-negligence doctrine. If a claimant is injured in a reasonable attempt to avoid the occurrence of defendant's tort, he may recover for those injuries.[58] Rarely does the claimant incur out-of-pocket expenses to avoid a tort, but if he did so reasonably, these expenses should be recoverable. If *A* paid *B* a reasonable sum of money to induce *B* to help *A* out of the path of *C*'s tortiously approaching instrumentality, *A* should be able to recover this sum from *C*.

The one remaining difference between contributory negligence and unreasonable failure to avoid consequences is that of the timing of the claimant's conduct. As Professor Dobbs says, contributory negligence occurs prior to defendant's commission of the tort, while unreasonable failure to avoid consequences occurs after commission of the tort. This temporal distinction is often cited as the primary reason for the difference between the

55. *See* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 111-14 (1972).

56. *See* W. PROSSER, *supra* note 12.

57. In explanation of the supposed subjective standard for determining avoidable consequences, Professor Dobbs notes that "some courts have recognized that the bank balance of the individual plaintiff should govern on the question what expenditures might reasonably be expected of him in minimizing his damages." D. DOBBS, *supra* note 53, at 188. This distinction seems no different from the general negligence rule which "must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act." W. PROSSER, *supra* note 12, § 32, at 150.

58. *See, e.g.*, Rossman v. La Grega, 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971).

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two doctrines.[59] Yet, the following close examination of the cases, including those in South Carolina, shows that the purported distinction is not, and cannot, always be maintained. Moreover, even if the distinction could be drawn clearly in all cases, it nevertheless seems to be one without a difference. Under any analysis, contributory negligence and avoidable consequences cannot be distinguished in logic or in policy. The result is that one part of contributory negligence (avoidable consequences) is being compared with defendant's negligence, while the remaining portion of contributory negligence is not being compared, even though there is no rational basis under *Marley* and *Broome* for drawing this distinction. The constitutional requirement of rational classification applies to court decisions as well as to statutes.[60] Thus, either the avoidable consequences doctrine under the constitutional compulsion of these decisions must be expunged from the law of South Carolina—a result neither likely nor desirable—or sound reason and policy demand that the doctrine be extended to establish a comprehensive doctrine of comparative fault in the state.

The traditional distinction between the two doctrines is stated in *Seay v. Southern Railway-Carolina Division*[61] and *Sullivan v. City of Anderson.*[62] In *Seay*, the court described contributory negligence as follows:

> " '[W]hen the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might, by ordinary care, have discovered the failure of the former to use such care in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of the injury.' "[63]

In *Sullivan*, the court stated the traditional avoidable consequences rule: "The rule is well established that it is the duty of

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59. *See* W. PROSSER, *supra* note 12, at 423.

60. The equal protection clause of the federal constitution applies to judicial decisions as well as to legislative enactments, since both constitute state action. Virginia v. Rives, 100 U.S. 313, 318 (1880).

61. 205 S.C. 162, 31 S.E.2d 133 (1944).

62. 81 S.C. 478, 62 S.E. 862 (1908).

63. 205 S.C. at 174, 31 S.E.2d at 138 (quoting Bodie v. Charleston & W.C. Ry., 61 S.C. 468, 486, 39 S.E. 715, 721 (1901)) (quoting 7 ENCY. LAW 383-85 (2d ed.)).

the owner of property, injured by the negligence of another, to use all reasonable effort to minimize the damage."[64] As the following examination indicates, however, the distinction is not maintained in the cases, primarily because of the confusion created by continuing torts.

An early telegraph case illustrates the problem. In *Willis v. Western Union Telegraph Co.*,[65] plaintiff claimed damages for mental distress suffered as the result of the alleged negligent delay of defendant in transmitting a reply to plaintiff's inquiry regarding his mother's health. Damages were recoverable from the time when plaintiff should have received the telegram to the time when he received positive information regarding his mother's health. The delay was obviously a continuing tortious failure of defendant to act, not a completed act. Yet the court held that "the jury might consider in mitigation of damages the failure of plaintiff to use other means of communication within his reach during that period of time."[66] The mitigation of damages or avoidable consequences rule should have been applied however, only if the tortious act had been completed.

The clearest case of ongoing tort is the repeated or continuing nuisance. In these situations a duty reasonably to avoid consequences has been imposed, even though the tort has not been completed.[67]

A bizarre train case illustrates the court's uncertainty in distinguishing avoidable consequences from contributory negligence. In *Currie v. Davis*,[68] plaintiff bought a train ticket, but was forcefully prevented from entering the train by the railroad's gatekeeper. Repeated attempts to enter resulted in repeated gatekeeper rejections accompanied by abusive language. Plaintiff left the gate to complain to the ticket agent, who suggested that plaintiff try to enter the train by a nonpassenger entrance. Plaintiff then returned to the passenger gate and was again forcefully and abusively rejected by the gatekeeper. No explanation is given in the opinion for the gatekeeper's actions or for the ticket agent's failure to intervene. Plaintiff claimed dam-

64. 81 S.C. at 480, 62 S.E. at 863.
65. 69 S.C. 531, 48 S.E. 538 (1904).
66. *Id.* at 539, 48 S.E. at 541.
67. *See* Fewell v. Catawba Power Co., 102 S.C. 452, 86 S.E. 947 (1915).
68. 130 S.C. 408, 126 S.E. 119 (1923), *appeal dismissed*, 266 U.S. 182 (1924).

ages for loss of business from the four-day delay in reaching his destination and for mental anguish. A judgment for plaintiff was upheld on appeal. Defendant railroad contended on appeal that

> under the facts of this case the law imposed upon the plaintiff the duty to minimize his damages, in so far as they were due to humiliation resulting from the gatekeeper's first rejection, by not thereafter subjecting himself to affront by repeatedly approaching the Cerberus at the gate, or by accepting the ticket agent's kindly suggestion that he try a flanking movement. We think the law applicable in that aspect of the case was the rule of contributory negligence or willfulness rather than the principle as to mitigation or reduction of damages. But, if the latter principle were applicable, the avoidable consequential damages which the defendant was entitled to have eliminated from the consideration of the jury were only such as could have been avoided by the injured party in the exercise of proper care.[69]

The temporal distinction between contributory negligence and unreasonable failure to avoid consequences is so ephemeral and unjustified that the courts occasionally have rejected it. In *Lipman v. Atlantic Coast Line Railroad*,[70] for example, plaintiff sued defendant for mental anguish caused by the abusive language of defendant's conductor. Defendant's defense was that the conductor's actions were provoked by plaintiff's wrongful conduct in tendering cash instead of a ticket—conduct clearly preceding defendant's actions and, therefore, traditionally described as contributory negligence. The court stated: "If that be true [defendant's claim of provocation], it is a matter of defense, and in mitigation of damages, even if [plaintiff's] technical rights as a passenger were violated."[71]

In *Gardner v. Q.H.S., Inc.*,[72] fire damage to plaintiff's premises allegedly resulted from defendant-product supplier's failure to provide an adequate warning. The Court of Appeals for the Fourth Circuit stated that the "contributory negligence of

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69. 130 S.C. at 422, 126 S.E. at 124.

70. 108 S.C. 151, 93 S.E. 714 (1917).

71. *Id.* at 154, 93 S.E. at 715.

If defendant's misconduct were willful and plaintiff's merely negligent, plaintiff's misconduct should be irrelevant whether it be deemed contributory negligence or unreasonable failure to mitigate damages. *See* note 56 and accompanying text *supra*.

72. 448 F.2d 238 (4th Cir. 1971)(applying South Carolina law).

[plaintiff's] employees . . . in failing to respond promptly"[73] when they discovered the fire might be a defense if, on remand, the trial court found that "contributory negligence is a defense in a suit for breach of implied warranty . . . ."[74] The employees' conduct here, characterized as "contributory negligence," clearly followed defendant's commission of the tort.

In *Spier v. Barker*,[75] the New York Court of Appeals recognized that plaintiff's failure to wear a seat belt is conduct that precedes an automobile accident and that "[t]raditionally" the doctrine of avoidable consequences has been applied "only to postaccident conduct."[76] The court nevertheless chose to treat plaintiff's failure to wear her seat belt as an unreasonable failure to avoid consequences, apparently in order to avoid the harsh consequences of the all-or-nothing contributory negligence rule.[77]

Dean Prosser candidly admits that "the doctrines of contributory negligence and avoidable consequences are in reality the same . . . ."[78] The Uniform Comparative Fault Act includes within the definition of comparative fault the failure to avoid or mitigate damages.[79]

Thus, both case law and commentators make clear that the doctrines of contributory negligence and unreasonable failure to avoid consequences cannot be distinguished effectively. South Carolina, therefore, already has a limited rule of comparative fault in its avoidable consequences doctrine, which is not rationally distinguishable from contributory negligence. The only question is whether the courts will acknowledge this fact and take appropriate steps to extend the avoidable consequences principle of comparative fault and to eliminate the defense of

73. *Id.* at 245.

74. *Id. See* note 55 and accompanying text *supra*.

75. 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

76. *Id.* at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921.

77. In *Jones v. Dague*, the court rejected "the view that the mere failure to use a seat belt constitutes negligence or a failure to minimize damages" because defendant failed to prove what portion of plaintiff's injuries were due to her failure to use a seat belt. 252 S.C. 261, 271, 166 S.E.2d 99, 103-04 (1969). *See* TENN. CODE ANN. § 59-930 (1980), which provides: "[I]n no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belt be considered in mitigation of damages on the trial of any civil action."

78. W. PROSSER, *supra* note 12, at 424.

79. UNIFORM COMPARATIVE FAULT ACT § 1(b).

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contributory negligence. The alternative is to bar recovery entirely for unreasonable failure to avoid consequences so as to conform this principle to the present rule of contributory negligence in South Carolina for equal protection purposes. This alternative would be unfair to a plaintiff who unreasonably fails to avoid consequences and it demonstrates the basic unfairness of the contributory negligence rule.

3. Crashworthiness.—The South Carolina Supreme Court, in *Mickle v. Blackmon,*[80] apportioned a judgment between cotortfeasors, a construction company and an automobile manufacturer, for injuries plaintiff received when she was impaled on an allegedly defectively designed stick shift lever. The accident was caused by the construction company's negligent removal of road signs and the injuries were aggravated by Ford's defective design.

Cases of this type are often described as second-collision or crashworthiness cases.[81] The distinguishing feature is considered to be that the conduct of one of the defendants does not cause the accident, but only increases the injuries. This distinction is not maintained consistently in the cases, however. For example, if plaintiff is negligently injured by the operator of a lawn mower and the injury could have been prevented had the manufacturer of the mower installed an inexpensive safety guard or shield, the operator and manufacturer are both generally held to be the cause of the entire injury. But for the negligent operation of the mower, the injury would never have happened. Yet, had the mower been "crashworthy" (had it been equipped with an adequate guard), the injury likewise would not have occurred. Nevertheless, in *Harrison v. McDonough Power Equipment, Inc.,*[82] this factual situation was treated as a crashworthiness case.

That the injuries caused by each defendant often occur at slightly different times, rather than simultaneously, seems to be immaterial. The use of this temporal difference for the purpose of differentiating these cases from other cotortfeasor cases in

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80. 252 S.C. 202, 166 S.E.2d 173 (1969).

81. *See* D. NOEL & J. PHILLIPS, CASES AND MATERIALS ON PRODUCTS LIABILITY 417-45 (1976).

82. 381 F. Supp. 926 (S.D. Fla. 1974). *Compare id. with* the theoretically comparable case of Carpini v. Pittsburgh and Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954)(defendants apparently were held jointly and severally liable).

which joint and several liability is imposed, resembles the use of the artificial distinction traditionally employed to distinguish contributory negligence from avoidable consequences.[83]

In the *Mickle* situation, the construction company usually should be liable for the entire damages if the aggravating conduct is reasonably foreseeable.[84] Some courts place the burden of making any required apportionment on the plaintiff.[85] The better rule is to place this burden on the defendant, as is done with contributory negligence, avoidable consequences, and comparative fault.[86]

The *Mickle* apportionment rule embodies a doctrine of comparative contribution between or among cotortfeasors with no joint and several liability to the plaintiff. If the rule cannot be logically restricted to successive, as opposed to concurrent, injuries—as it cannot be—the same compulsion that dictates extension of the avoidable consequences damages reduction approach to include contributory negligence also dictates extension of the crashworthiness damages reduction approach to establish a broad principle of comparative contribution in South Carolina.

IV. CONCLUSION

Justice Holmes once said that "[t]he life of the law has not been logic. It has been experience."[87] There is, however, no necessary conflict between logic and experience. Indeed, the one should lend support to the other. The essence of good judicial decision-making is reasoned analysis and when such analysis commands a particular course courts should not hesitate to proceed.

The South Carolina Supreme Court has imposed a heavy

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83. *See* W. PROSSER, *supra* note 12, at 423-24 (aggravation of damages by plaintiff); Phillips, *In Tribute: Arno Cumming Becht*, 1979 WASH. U.L.Q. 661, 664-65 (aggravation of damages by defendant).

84. Thus, when a treating doctor foreseeably aggravates injuries caused by a tortfeasor, the latter is liable for all damages. *See, e.g.*, Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

85. *E.g.*, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

86. *See* Zimmerman v. Ausland, 266 Or. 427, 513 P.2d 1167 (1973)(avoidable consequences); Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978)(crashworthiness); W. PROSSER, *supra* note 12, at 416 (contributory negligence); V. SCHWARTZ, *supra* note 7, § 17.2 (comparative fault).

87. O. HOLMES, THE COMMON LAW 1 (1881).

duty on the state's lawmaking bodies, both legislative and judicial, to justify their actions on especially strict constitutional principles of rational classification and equal protection. That duty fairly demands that the court deal with its avoidable consequences and crashworthiness doctrines either by their elimination or by their logical extension to the full-blown doctrines of comparative fault and comparative contribution. Moreover, the federally required application in South Carolina of a pure comparative-fault rule under the Federal Employers' Liability Act mandates the extension of that rule to all areas of tort law in this state, in order to comply with the state constitutional requirements of rational classification and equal protection.

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March 18, 1985

Senator Joe P. Josephson
Alaska State Legislature
Pouch V (MS 3100)
Juneau, AK 99811

Re: Uniform Comparative Fault Act

Dear Senator Josephson:

I enjoyed meeting you at the Juneau airport with Dan Gerety a couple of weeks ago. If you recall, I mentioned that the Defense Counsel of Alaska were attempting to have introduced the above referenced legislation in lieu of our presently existing Uniform Contribution Among Joint Tortfeasors Act, A.S. 09.16 et. seq. I was not anticipating meeting you, and I am afraid that what little I did get to say about the legislation may have been inartful. In any event, we were interrupted by the arrival of our luggage, and the conversation did not progress very far. I am taking this opportunity to send you a copy of the proposed legislation for your consideration.

Specifically, I am enclosing a copy of the Uniform Comparative Fault Act, along with the comments of the drafters, and a law review article by H. Anthony Miller entitled "Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act" 14 Pac. Law J. 835, which analyzes the evolution of the law in this area, and concludes by endorsing the passage of the subject legislation.

I recall that you asked me specifically how many states have passed the Uniform Act; I am afraid I cannot find a quick answer to that, though I would note that in the Prefatory Note, the commissioners observed that "the Federal government and two-thirds of the states (33) have adopted some sort of comparative fault. This is usually by statute but also by

judicial decision." On page 36 of the Uniform Act, they note the National Conference of Commissioners on Uniform State Laws have promulgated two Uniform Contribution Acts, one of which we have here in Alaska. "Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but it is inappropriate in a comparative fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved. . . . and the 1955 Act should be replaced by this Act in any state that adopts a comparative fault principle. . . ."

This would also seem to be the view of our own Supreme Court:

> The Act provides that in determining the pro rata shares of tortfeasors "their relative degrees of fault shall not be considered." A.S. 09.16.020(1). We question whether the rule "distribute[s] the responsibility equitably among those who are jointly liable." Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430 n. 8 (Alaska 1979). . . . While the question of whether the Act should be amended is a matter committed to the judgment of the legislature, it is our view that where one joint tortfeasor seeks contribution from another, the tortfeasor's "pro rata share" should mean a share proportionate to his comparative fault. We add that such a rule would not undermine the rule of joint and several liability announced in Arctic Structures, Inc. v. Wedmore. We invite legislative consideration of this aspect of the Act.

Criterion Insurance Co. v. Laitala, 658 P.2d 112, 118, n. 11 (Alaska 1983) (J. Rabinowitz concurring).

I think it is important to emphasis that the above referenced proposed in legislation retains joint and several liability. In the case of an insolvent defendant, the proposed Act does reallocate the uncollectable amount among all of the parties, including a claimant at fault. See Section 2 [Apportionment of Damages] (d). This particular aspect may be of some concern to the plaintiffs bar. There may be others as well. We think it is important, however, that the proposed Act see the

legislative light of day, where it can be scrutinized and discussed in committee hearings and so on. Towards that end, I would respectfully request that you consider introducing the legislation, either by yourself or in conjunction with other co-sponsors. We are attempting to contact various key members of the legislature besides yourself in this regard.

Thank you for your attention. If I can answer any questions, or be of any further assistance in this matter, please do not hesitate to have yourself or your staff contact me.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, INC.

By: Michael C. Geraghty

MCG/slb
cc: David Thorsness, Esq.
Representative John Sund
Representative Robin Taylor
Representattive Don Clocksin
Representative Max Gruenberg, Jr.
Representative Fritz Pettyjohn
Senator Patrick Rodey
Senator Robert H. Ziegler, Sr.

Extending the Fairness Principle of *Li* and *American Motorcycle*: Adoption of the Uniform Comparative Fault Act

H. ANTHONY MILLER*

INTRODUCTION

The trend in California has been to make the tort system conform to the basic principle of fairness enunciated in *Li v. Yellow Cab Company*;[1] "liability for damages must be borne by those whose negligence caused it in direct proportion to their respective fault."[2] However, at present because of the traditional doctrine of joint and several liability[3] one tortfeasor may have to bear a disproportionate share of plaintiff's loss when another tortfeasor is insolvent or has settled for an amount

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1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

3. The original meaning for a "joint tort" was the concept of vicarious liability for concerted action. All parties who acted in concert to commit a tort, in pursuance of a common plan or design, were held liable for the entire result. Each party was liable for the sum of the entire damage done, although his part in the plan may have only contributed to a fraction of the loss sustained. Under the modern liberal American Rule as to joinder, defendants whose negligence has concurred to produce a single loss to the plaintiff have been joined to one action, and under a standard which Dean Prosser refers to as a "careless usage," have been called joint tort-feasors. Once labeled as joint tort-feasors, each defendant is held jointly and severally liable for the entire loss. W. PROSSER, THE LAW OF TORTS §§46-47 (4th Ed. 1971). *See infra* notes 19-36 and accompanying text.

less than his proportional share. Prior to *Li*, fairness was not the prime concern in determining liability. A plaintiff who was found to be contributorily negligent could not recover from the defendant even if the defendant was overwhelmingly more negligent than the pl... ...ff.[4] The plaintiff was forced to bear the burden of the defendant's wrongful conduct. There were other areas in which it was necessary for one party to bear the burden of another's wrongful conduct. Assumption of risk was also a complete bar to recovery.[5] By statute, contribution among tortfeasors was on a pro rata basis regardless of the proportion of the damages which could be attributed to each defendant.[6] Equitable indemnity was awarded on an all-or-nothing basis; the tortfeasor who was found to be primarily liable would have to bear the burden of the entire loss in spite of a significant contribution by the secondary tortfeasor to the plaintiff's injuries.[7]

Because of *Li* and the cases which have followed it, these inequities have been resolved and the principle of fairness is firmly entrenched in the California tort system. *Li*, of course, established comparative negligence abolishing the all-or-nothing contributory negligence.[8] *Li* merged that form of assumption of risk which is also negligence into the comparative negligence doctrine.[9] *American Motorcycle Association v. Superior Court* circumvented the contribution statute and established what might be called comparative partial indemnity which apportions the payment of damages among the defendants.[10]

4. Baltimore & P.R. Co. v. Jones, 95 U.S. 439 (1877); Buckley v. Chadwick, 45 Cal. 2d 183, 288 P.2d 12 (1955). The rule was rooted in the long-standing principle that one should not recover from another for damages brought upon oneself. *See generally* RESTATEMENT (SECOND) OF TORTS §467 (1977).

5. The theory behind the defense was that the defendant's conduct involves certain dangers or risks, which the plaintiff voluntarily accepts. *See* Morton v. California Sports Car Club, 163 Cal. App. 2d 685, 329 P.2d 967 (1958); RESTATEMENT (SECOND) OF TORTS §496A (1977).

6. Contribution was "limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment." CAL. CIV. PROC. CODE §875(c). The pro rata share of each defendant was determined by "dividing the entire judgment equally among all of them." *Id.* §876(a); *see* Rollins v. California, 14 Cal. App. 3d 160, 92 Cal. Rptr. 251 (1971).

7. The rationale underlying the principle of indemnity was that "everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

8. In abolishing contributory negligence, the court noted that "this reexamination leads us to the conclusion that the 'all-or-nothing' rule of contributory negligence can be and ought to be superseded by a rule which assesses liability in proportion to fault." *Li*, 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862 (the court went on to adopt "pure" comparative negligence as the law to be applied in California).

9. "[T]he defense of assumption of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; [and is] to be subsumed under the general process of assessing liability in proportion to negligence." 13 Cal. 3d at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875; Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

10. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The court held that the common law doctrine should be modified to permit partial indemnity among concurrent tort-feasors on a

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16. *Id.*

17. *Id.* at 438-39 (unpublished o

The only vestige of the pre-*Li* period is the doctrine of joint and several liability and the effect that doctrine has upon situations involving multiple defendants. The doctrine requires that a solvent tortfeasor pay the entire judgment even though his proportional share of the fault was far less than that of an insolvent defendant or one who had settled earlier with the plaintiff. Contribution and indemnity, which normally protect one tortfeasor from bearing the burden of another's liability, do not work against an insolvent tortfeasor or against a solvent one who has settled with plaintiff and is therefore protected by the laws governing release. The solvent tortfeasor is required to bear the burden of the insolvent or settling tortfeasor even if the plaintiff has contributed to his own injuries in a greater proportion than the solvent tortfeasor.[11]

The inequity of the law as it stands is shown in a recent case which reached the appellate court level.[12] Although this case was subsequently "unpublished" by the California Supreme Court,[13] the facts are still significant. Following a somewhat routine automobile "fender bender," plaintiff settled with defendant A for $4000 and continued to prosecute his suit against B who in turn cross-complained against A for contribution and indemnity. At trial, the jury by special verdict set defendant A's share of the fault at eighty percent and defendant B's share at twenty percent. The total amount of damages was found to be $19,700.[14] The trial court continued to hear the case without the jury. The court found the settlement between plaintiff and A to have been made in good faith, and so the court deducted the amount of the settlement from plaintiff's damages[15] and ordered B to pay the remaining amount of $15,700.[16] Because Code of Civil Procedure section 877(b) bars contribution from a settling tortfeasor, defendant B had to bear the burden of the entire judgment less the amount of settlement.[17] Thus a defendant who was twenty percent liable had to pay eighty percent of the damages. The inequity of the result was amplified in this particular case because defendant A was the wife of the plaintiff and would share in his recovery against defendant B. However, the unfair-

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comparative fault basis. *See, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974); Gomes J. Brodhurst, 344 F.2d 465 (3rd Cir. 1967); *cf.* Lindenberg v. Issen, 318 So. 2d 386 (Fla. 1975).

11. *See infra* note 173.

12. Baget v. Shepard, 128 Cal. App. 3d 433 (1982) Reporter of Decisions directed not to publish this opinion in the Official Reports, by the authority of the CAL. CONST. art. VI, §14; CAL. R. CT. Div. III Rule 976. The opinion of such a case shall not be cited by a court or a party to an action or preceding, except in very limited circumstances. *See* CAL. R. CT. DIV. III Rule 977.

13. *See supra* note 12.

14. 128 Cal. App. 3d at 436 (unpublished opinion).

15. *Id.* at 438 (unpublished opinion).

16. *Id.*

17. *Id.* at 438-39 (unpublished opinion).

ness in this situation does not rest upon the quirk of fate that plaintiff and defendant A were married; rather there is an inherent injustice in one defendant having to pay damages far in excess of his proportional liability.

In one sense, the injustice is even greater in situations involving insolvent defendants. For if defendant A, who is insolvent, is eighty percent at fault and defendant B is twenty percent at fault, defendant B, under the present rule of joint and several liability, will have to pay one hundred percent of the damages despite having been found liable for 1/5 that amount. The unfairness created by joint and several liability takes other forms as well. Two examples, the second more unfair than the first, involving an insolvent defendant, are appropriate here. In the first, plaintiff is ten percent at fault, defendant A, who is insolvent, seventy percent, and defendant B twenty percent. Defendant B pays ninety percent of the damages. In the second, plaintiff is twenty percent at fault, defendant A, who is again insolvent, seventy percent, and defendant B ten percent. Defendant B is liable for eighty percent of the damages. Although in these two hypotheticals the solvent defendant will pay less out of pocket than he would if plaintiff were not liable, the injustice still seems greater than when plaintiff is not at fault. It can at least be said that between an innocent plaintiff and a culpable defendant, the defendant should bear the risk of an insolvent co-defendant.[18] But when plaintiff is also at fault, and especially when plaintiff is more at fault than the solvent defendant, this rationale loses all meaning. A defendant should not have to bear the entire risk of an insolvent co-defendant when plaintiff is also culpable.

The thesis of the present article is that the harsh and unfair effect of the doctrine of joint and several liability should be judicially or legislatively modified by the adoption of the Uniform Comparative Fault Act. The sections which follow will examine: (1) the nature and origins of the present law; (2) the fairness principle of *Li* and *American Motorcycle* and why it dictates modification; (3) the arguments raised in *American Motorcycle* for not abolishing the doctrine to the point of showing that these arguments should not govern the issue of modification; (4) the case law and legislation of other jurisdictions; and (5) the ways in which modification can be made.

18. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongful defendant.
20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188.

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22. 20 Cal. 3d at 590, 578 P.2d
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I. BACKGROUND

In order to resolve the problems created by the continuing existence of the doctrine of joint and several liability, it will be necessary to examine not only the doctrine itself but also the laws which govern contribution and release. Indeed, as will be discussed later, one of the ways to ameliorate the unfair effect of joint and several liability is to modify the law governing contribution.

A. *Joint and Several Liability*

Perhaps a better name for the doctrine of joint and several liability is "entire liability" because under the doctrine each tortfeasor is "liable for the entire loss sustained by the plaintiff."[19] In multi-defendant cases, the practical effect of this rule is that if one tortfeasor is insolvent or cannot be levied upon, or even if the plaintiff merely chooses not to execute a judgment against one defendant, another tortfeasor can be called upon to satisfy the entire judgment.[20] If one tortfeasor has settled, another may be called upon to pay the entire judgment less the amount of settlement.[21] The solvent or non-settling tortfeasor is liable without regard to the proportional share of the injury which he caused.[22]

Originally the rule of entire liability was applied only to those tortfeasors who had acted in concert, true joint tortfeasors.[23] But over the centuries, it has come to be applied to tortfeasors who possessed a common duty to the plaintiff; to tortfeasors who have a relationship which causes one of them to be vicariously liable for the other's conduct; and to tortfeasors who act concurrently to cause a single, indivisi-

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19. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418 (1937); 1 F. HARPER & F. JAMES, LAW OF TORTS § 10.1, at 692 (1956); Browne v. McDonnell Douglas Corp., 504 F. Supp. 514 (N.D. Cal. 1980).

20. *American Motorcycle Ass'n.*, 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189. The court stated that

> one of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability.

Id.

21. Wouldridge v. Zimmerman, 21 Cal. App. 3d 656, 98 Cal. Rptr. 778 (1971) ("[t]he purpose of the rule requiring such reduction is to avoid double recovery and unjust enrichment which a plaintiff would enjoy if he were able to collect part of his total claim from one, and all from another . . ."); CAL. CIV. PROC. CODE §877 (release of one tortfeasor "shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claim against others . . . in the amount of the consideration paid for it. . . .").

22. 20 Cal. 3d at 590, 578 P.2d at 906-07, 146 Cal. Rptr. at 189-90.

23. Prosser, *supra* note 19, at 418; HARPER AND JAMES, *supra* note 19, at 692; Alexander v. Hammarberg, 103 Cal. App. 2d 872, 230 P.2d 399 (1951). The former belief was that, to constitute joint tort-feasors, there must be a concert of action, a unity of purpose or design, and two or more defendants working separately but to a common purpose; each acting with the other's knowledge and consent.

ble injury.[24]

Tortfeasors are said to act in concert when they "act in pursuance of a common plan or design."[25] It is not necessary for both tortfeasors to actually commit the act that directly injures the plaintiff.[26] Prosser stated that concerted action includes all those who "actively participate in the wrongful act, by cooperation or request, or who lend aid, encouragement or countenance to a wrongdoer, or approval to the acts for their benefit . . . ."[27] The rationale for entire liability in this situation has always been that, when defendants act in concert, the act of one will be considered the act of all.[28] Tortfeasors who do not act out a common plan may still be considered joint if they have a common duty toward the plaintiff imposed upon them by law. Most cases in this category involve co-owners of property who negligently maintain some aspect of the property—e.g., a building,[29] a party wall,[30] or even a flowerpot.[31]

Joint and several liability is also imposed upon multiple-tortfeasors when an agent or principal is held vicariously liable for the acts of a

24. Harper and James point out that these last two categories are not joint torts within the true meaning of the words.

> Strictly speaking, the words 'joint-tort' should be used only where the behavior of two or more tort-feasors is such as to make it proper to treat the conduct of each as the conduct of the others as well. In effect this requires the existence of a concert of action or the breach of a joint duty.

HARPER AND JAMES, *supra* note 19, at 692. Prosser divides the joint torts into several more categories which are also encompassed in Harper and James' four: (1) concert of action; (2) vicarious liability; (3) common duty; (4) concurrent causation of a single, indivisible result, which would have caused alone; (5) successive injuries; (6) damages of the same kind, which it is difficult to apportion; (7) acts innocent in themselves which together cause damage; and (8) alternate liability. Prosser, *supra* note 19, at 429-43; *see* Southland Mechanical Constructors Corp. v. Nixen, 119 Cal. App. 3d 417, 173 Cal. Rptr. 917 (1981) (multiple parties under a common duty).

25. HARPER AND JAMES, *supra* note 19, at 698 (1956); *see* Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911) (newspaper proprietor gave his subordinates carte blanche to do anything to make the paper a success); *see also* RESTATEMENT (SECOND) OF TORTS §876 (1977).

26. HARPER AND JAMES, *supra* note 19, at 698; RESTATEMENT (SECOND) OF TORTS §876(a) (1977); Tide Water Associated Oil Co. v. Superior Court of Los Angeles County, 43 Cal. 2d 815, 279 P.2d 35 (1955); *see also* Wetherton v. Growers Farm Labor Ass'n., 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969). The court, in distinguishing tort and criminal conspiracy, stated that in tort

> the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.

Id. at 176, 79 Cal. Rptr. at 548.

27. "Express agreement is not necessary; all that is required is that there shall be a common design or understanding." Prosser, *supra* note 19, at 429-30; *cf.* Schaefer v. Berinstein, 140 Cal. App. 2d 278, 295 P.2d 113 (1956) (each participant in the wrongful act is responsible for all damages ensuing from the wrong regardless of the degree of his activity).

28. HARPER AND JAMES, *supra* note 19, at 692; Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613) ("[w]ith all coming to do an unlawful act, and of one party, the act of one is the act of all . . . ."). The origins of this view appear to be the same as those of the rationale for modern criminal conspiracy. *See* Smithson v. Garth, 3 Lev. 324, 83 Eng. Rep. 711 (1691); *see also* Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302 (1927).

29. Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

30. Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891).

31. World v. Grozalsky, 277 N.Y. 364, 14 N.E.2d 437 (1938).

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35. 20 Cal. 3d at 586, 578

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servant or agent. Strictly speaking vicarious liability stems from the agency doctrine of respondeat superior. However, although the agent and principal have not committed a joint tort,[32] both can be joined in the same suit and both are subject to entire liability. Of course the practical effect is that the master or principal usually must pay for the full amount of the damages.[33]

In terms of the thesis of this article, the most important application of joint and several liability is to tortfeasors who concurrently cause an indivisible injury to the plaintiff.[34] The rationale for applying entire liability to concurrent tortfeasors is largely a matter of causation. The court stated in *American Motorcycle*, "the principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is the proximate cause has commonly been expressed in terms of joint and several liability."[35] Concurrent tortfeasors are especially susceptible to unequal apportionment of responsibility. It is possible that one tortfeasor's act alone would not have caused any harm to the plaintiff, or that alone it might have caused the entire injury, or that it would have caused a lesser injury.[36]

For most of the time that joint and several liability was developing, the law was far more defendant oriented than it is today. Contributory negligence and assumption of risk were absolute. There were no long arm statutes to aid plaintiff in gaining jurisdiction. The practical problems related to slower communication and transportation could also work to protect defendants. Although the doctrine did not mitigate the harsh effects of contributory negligence and assumption of the risk, it did help plaintiff when he or she could not gain jurisdiction or when other practical problems prevented him or her from recovering from one tortfeasor. The doctrine, of course, helped the plaintiff when one defendant was insolvent. It should also be noted that during the development of joint and several liability all plaintiffs who received a judgment in their favor were entirely innocent in the eyes of the law. Moreover, the concept of apportioning liability according to fault was

32. HARPER AND JAMES, *supra* note 19, at 700 (1956). *See generally* W. SEAVEY, STUDIES IN AGENCY 65-105, 129-53, 220-79 (1949).

33. HARPER AND JAMES, *supra* note 19, at 700. Obviously the servant or agent is not liable for the tortious acts of the master or principal, unless other principles of joint tort liability would make him so. The failure to impose any liability where the tort is the master's alone indicates that the liability relationships are not truly joint torts.

34. There may have been a safety valve in the English system. Since under English law there was no joinder of defendants unless there was concerted action, concurrent tortfeasors were tried separately. Thus, the jury could apportion the damages to the portion of the injury the defendant caused. More liberal American rules allowed joinder of concurrent tortfeasors, and this meant that "a verdict for one sum [was] returned against all those found liable, without regard to the fact that the juries in separate actions would not be so bound." *Prosser*, *supra* note 19, at 420.

35. 20 Cal. 3d at 586, 578 P.2d at 904, 146 Cal. Rptr. at 187.

36. HARPER AND JAMES, *supra* note 19, at 702.

non-existent or at least unaccepted. When judges were confronted with the issue of who should bear the burden of the damages caused by an insolvent tortfeasor, they had no means to apportion the loss. Therefore, if the choice was between the totally innocent plaintiff and the culpable solvent defendant, the answer was easy: the culpable defendant should bear the burden and pay the whole judgment. This view is expressed in a leading California case supporting the doctrine:

> Even though persons are not acting in concert, if the result(s) produced by their acts are indivisible, each person is held liable for the whole . . . . The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.[37]

B. *Contribution*

Contribution is a method of allocating the loss among concurrent tortfeasors. Since the doctrine of joint and several liability will make each of them liable for the entire judgment, the one who satisfies the entire judgment or a disproportionate share may seek contribution against the others. It is often stated that there was no common law right to contribution.[38] However, this statement is not historically accurate. The original rule against contribution was stated in a conversion case,[39] and the rationale was that "plaintiff's claim rested upon what was, in the eyes of the law, entirely his own deliberate wrong."[40] Following this case, contribution was sometimes applied in negligence cases in both England and the United States on the grounds that the rule against contribution applied only to intentional torts. It was not until "the door was thrown open to joinder" that the American courts began to apply widely the rule against contribution.[41] Yet, according to Prosser, eight states still allowed contribution in negligence cases without the aid of a statute.[42]

Despite this common law authority for contribution, most states have

37. Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950).

38. "Although early common law decisions established the broad rule that a tortfeasor was never entitled to contribution. . . ." American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 592, 578 P.2d 899, 908, 146 Cal. Rptr. 182, 191 (1978). "At common law there is no right of contribution between persons jointly or severally liable in tort. . . ." 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2344 (8th ed. 1979).

39. Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799).

40. PROSSER, *supra* note 3, at 305.

41. *Id.* at 306.

42. *Id.*; *see* Knell v. Feltman, 85 App. D.C. 22, 174 F.2d 662 (1949); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Quatray v. Wicker, 178 La. 289 (1933); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); Davis v. Broad St. Garage, 19 Tenn. 320, 232 S.W.2d 355 (1950); Ellis v. Chicago and N.W.R. Co., 167 N.W. 1048 (1918).

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established contribution by statute.[43] One of the strongest forces in bringing about statutory change was the Uniform Contribution Acts of 1939[44] and 1955.[45] Both of the Acts recommended a pro rata division of the loss: each defendant's share is determined by dividing the number of defendants who have been found liable into the amount of the judgment.[46] Thus each defendant's share was equal, and no attempt was made to apportion liability according to fault. California adopted a contribution statute allowing for pro rata shares,[47] and it was this statute that the court circumvented in *American Motorcycle* by establishing comparative partial indemnity, which allowed the courts to apportion the contribution share according to the fault.[48] If the statute had not stood as a road block, the Supreme Court would not have had to use the common law doctrine of indemnity, which traditionally did not allow any sharing of the liability among tortfeasors, as a vehicle to apportion liability among tortfeasors.[49]

C. *Release*

Release is simply the "surrender of a cause of action, which may be gratuitous or for inadequate consideration."[50] A problem developed early on because release was confused with satisfaction, which is the

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43. Prosser stated that there were 23 states which had adopted a contribution statute in 1971. PROSSER, *supra* note 3, at 307.

44. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939).

45. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version).

46. One of the major differences between the two uniform acts is the manner in which they treat the settling tortfeasor. Under the 1939 act there was no release granted to the settling tortfeasor who would still be liable for contribution. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §2 (1939). *See infra* note 144. This provision, because it discouraged settlement, was unpopular and lead to the enactment of the 1955 act which allowed for the full release of the settling tortfeasor as a means of encouraging settlement. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT 4b, 12 U.L.A. 99 (1975).

47. CAL. CIV. PROC. CODE §877(a).

48. American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 912, 146 Cal. Rptr. 182, 196 (1978).

> In order to attain such a system, in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor 'indirect proportion to [his] respective fault,' we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.

Id. The Supreme Court held that the contribution statute did not prevent modification of the common law doctrine of equitable indemnity because "in enacting the 1957 contribution legislation the Legislature did not intend to prevent the judiciary from expanding the common law equitable indemnity doctrine. . . ." *Id.* at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

49. A suit for contribution is brought for the recovery of a proportionate part of the sum paid by the plaintiff, on the ground that the parties were both equally guilty of negligence and should share the cost. . . . A suit for indemnity is brought to recover the total amount of the payment by the plaintiff, on the ground that the plaintiff's conduct was not as blameworthy as the defendant's. . . .

RESTATEMENT (SECOND) OF TORT, §886b comment a.

50. PROSSER, *supra* note 3, at 301.

"acceptance of full compensation for the injury."[51] Courts held that the release of one tortfeasor was the release of all.[52] This problem was circumvented with the development of the "covenant not to sue" which by definition released only the tortfeasor who was a party to the covenant.[53] Ultimately the most sensible approach prevailed: a release of one tortfeasor would not discharge any other tortfeasors. This position was adopted by the Uniform Contribution Act of 1955,[54] by California in 1957[55] and by the Second Restatement.[56]

It is important to note the effect of release on contribution. If a settlement is made in return for a release, the general view is that the released party is free from any further contribution and the amount of the settlement is deducted from the amount of the judgment which the remaining tortfeasors must pay.[57] The Uniform Contribution Among Tortfeasors Act of 1939 took the opposite view, that the released tortfeasor could still be liable for contribution in the amount that his pro rata share exceeds his settlement.[58] Although at least five states accepted this view at one time,[59] it is now widely disfavored. However, as will be discussed below, this position may provide one solution to the problem this article addresses.[60]

II. The Fairness Doctrine: The Case for Modification

The fundamental reason for the modification of joint and several liability is that the present system unfairly favors plaintiffs over defend-

51. *Id.*

52. "Until quite recent years, most of the courts have continued to hold that a release to one of two concurrent tortfeasors is a complete surrender of any cause of action against the other, and a bar to any suit against him, without regard to the sufficiency of the compensation actually received." In California the rule was well settled that the release of one joint tortfeasor discharged them all. *E.g.*, Markwell v. Swift & Co., 126 Cal. App. 2d 245, 272 P.2d 47 (1954); Flynn v. Manson, 19 Cal. App. 400, 126 P. 181 (1912). There were cases which applied this rule to concurrent tortfeasors. *E.g.*, Hadden v. Moran, 104 Cal. App. 2d 777, 232 P.2d 544 (1951). Hawber v. Raley, 92 Cal. App. 701, 268 P. 943 (1928). However, the California cases use the joint liability so loosely ("making no distinction between strict joint tortfeasors and other jointly and se erally liable") that one commentator has stated the the Supreme Court had still left "open the question as to concurrent tortfeasors." 4 Witkin, *supra* note 38, at 2336.

53. Holtz v. United Plumbing Co., 49 Cal. 2d 501, 319 P.2d 617 (1957); Kincheloe v. Retail Credit Co., 4 Cal. 2d 21, 46 P.2d 971 (1935); Beck v. Bel Air Properties, 134 Cal. App. 2d 834, 286 P.2d 503 (1955); Abbott v. Goodyear Rubber Co., 116 Cal. App. 665, 3 P.2d 56 (1931).

54. Unif. Contribution Among Tortfeasors Act §4(a), 12 U.L.A. 98 (1975).

55. Cal. Civ. Proc. Code §877(a).

56. Restatement (Second) of Torts §886A.

57. If it is clear that the satisfaction received was understood to be only partial, it should not discharge the claim against a second tortfeasor. All courts are agreed, however, that it must be credited pro tanto to diminish the amount of damages recoverable against him. . . .

Prosser, *supra* note 3, at 304-05; accord. Cal. Civ. Proc. Code §877(a).

58. Unif. Contribution Among Tortfeasors Act §2 (1939).

59. Delaware, Maryland, New Mexico, Pennsylvania, and Rhode Island. Adams, *Settlements After Li: But Is It Fair*, 10 Pac. L.J. 729, 744, n.104.

60. *See infra* text accompanying notes 147-174.

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2 Harper and James, *supra* n
119 Cal. Rptr. at 862-63.

64. 13 Cal. 3d at 811, 532

65. *Id.* at 812, 532 P.2d a

66. *Id.* at 812-13, 532 P.2

ants. The fairness principle requires that loss should be apportioned according to the percentage of fault.[61] However, because of joint and several liability, a defendant's liability may be based not on proportional fault but rather on the solvency of codefendants[62] or on the willingness of the plaintiff to settle with another defendant. *Li*, *American Motorcycle*, and the cases which follow them firmly establish the fairness principle in California tort law. Although none of these cases, except *American Motorcycle* which refused to abolish the doctrine, have discussed changing the law to negate the harsh effect of joint and several liability, these cases form the foundation for the argument that this change must be made.

A. Li v. Yellow Cab Co.

The concept of fairness is the guiding principle of *Li*: fairness is the foundation for comparative negligence, and it plays an important role in the resolution of other issues. When the California Supreme Court established comparative negligence, it used strong language. The court was critical of contributory negligence because "the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault."[63] The court noted that juries often try to correct the unfairness of contributory negligence in the jury room[64] and that this unfairness undermines confidence in the legal system.[65] The court's actual holding is couched in terms of fundamental fairness:

> We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence as a complete bar to recovery—and that it should be replaced *in this state by a system under which liability for damages will be borne by those whose negligence caused it in direct proportion to their respective fault*.[66]

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61. *See infra* notes 36-42 and accompanying text.

62. *See* Adler, *Allocation of Responsibility After* American Motorcycle Association v. Superior Court, 6 PEPPERDINE L. REV. 1 (1978).

63. 13 Cal. 3d at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862. Dean Prosser states the kernel of critical comment in these terms: "It [the rule] places upon one party the entire burden of a loss for which two are, by hypothesis, responsible." PROSSER, *supra* note 3, §67, at 433. Harper and James express the same basic idea:

> [T]here is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule.

2 HARPER AND JAMES, *supra* note 19, §22.3 at 1207; 13 Cal. 3d at 810-11 n.3, 532 P.2d at 1230-31, 119 Cal. Rptr. at 862-63.

64. 13 Cal. 3d at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

65. *Id.* at 812, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

66. *Id.* at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864 (emphasis added).

The court's view that fairness should govern the tort system was so strong that it ignored a century-old interpretation of Civil Code section 1714 which established contributory negligence in California.[67] Moreover, the court chose the pure form of comparative negligence which "apportioned liability in direct proportion to fault in all cases"[68] because the other form "also distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their faults contribute to the injurious results."[69] The court even allows a limited form of retroactivity because of "considerations of fairness. . . ."[70]

B. American Motorcycle

Although the Supreme Court in *American Motorcycle Association v. Superior Court* refused to abolish the doctrine of joint and several liability, this case is a major application of the fairness principle.[71] Because *Li* involved only one plaintiff and one defendant, the court reserved the issue of the application of comparative negligence to cases involving multiple tortfeasors until such a case was actually before the court.[72] *American Motorcycle Association* presented the facts which allowed the court to resolve the issues connected with multiple parties.[73] In *American Motorcycle* a minor received serious injury in a motorcycle race sponsored by the Association. The minor sued the Association which filed an answer and sought to file a cross-complaint against the minor's parents.[74] The Association argued that it should only be responsible for its proportional share of the damages on two grounds: first, that joint and several liability should be abolished and, second, that there should be contribution or indemnity in proportion to fault.[75] Although the Supreme Court refused to abrogate joint and several liability, the Court, in order to further establish the system of tort liability envisioned in *Li* in which liability is allocated in direct proportion to fault,[76] modified its traditional, all-or-nothing aspect of equitable in-

67. California Civil Code section 1714 states in part that:
Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

68. 13 Cal. 3d at 827, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

69. *Id.* at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

70. *Id.* at 830, 532 P.2d at 1244, 119 Cal. Rptr. 876.

71. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

72. Justice Sullivan noted that "[p]roblems of contribution and indemnity among joint tortfeasors lurk in the background." 13 Cal. 3d at 823, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

73. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182

74. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

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76. *Li*, 13 Cal. 3d at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

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84. *Id.* at §875(b) (quo
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demnity and established what might be called comparative partial indemnity allowing "a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis."[77]

The Supreme Court made it clear that the reason for establishing comparative partial indemnity was the fairness principle. The Court noted that the courts in general have abandoned traditional grounds for the application of equitable indemnity,[78] basing further applications of the doctrine on the grounds of equity and good conscience.[79] The language of the court leaves no doubt that the principle of fairness is the basis for the court's action:

> [T]he all-or-nothing aspect of the doctrine has precluded courts from reaching a just solution in the great majority of cases in which equity and fairness call for apportionment of loss between wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor.[80]

The Court not only established comparative partial indemnity, it also circumvented the legislatively mandated contribution statute[81] which limits contribution to those against whom there is a joint judgment[82] and which requires that contribution be made on a pro rata basis.[83] Evidently the court felt comfortable in circumventing this legislation because the statute itself states that "the right of contribution shall be administered in accordance with principles of equity."[84] The Court in-

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77. 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

78. *Id.* at 591-98, 578 P.2d at 907-12, 146 Cal. Rptr. 190-95. The formulations for determining the proper applications of equitable indemnity were vague. Some authorities characterized the negligence on the part of the indemnitor as "active," "primary," or "positive," and the negligence of the indemnitee as "passive," "secondary," or "negative." These formulations were criticized as artificial and "lacking the objective criteria desirable for predictability in the law." *Id.* at 594, 578 P.2d at 909, 146 Cal. Rptr. at 192; *see* Atchison T. & S.F. Ry. Co. v. LanCranco, 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660, 664 (1968).

79. Some courts have abandoned the welter of inconsistent standards and have turned to equity:

> The duty to indemnify may arise, and indemnity may be allowed in those fact situations *where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought.* The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case.

20 Cal. 3d at 595, 578 P.2d at 909-10, 146 Cal. Rptr. at 192-93 (quoting from Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

80. 20 Cal. 3d at 595, 578 P.2d at 910, 146 Cal. Rptr. at 193.

81. CAL. CIV. PROC. CODE §§875-79.

82. *Id.* §875(c). The section provides in part that liability "shall be limited to the excess paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment." *Id.*

83. "Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof." CAL. CIV. PROC. CODE §875(c).

84. *Id.* at §875(b) (quoted in *American Motorcycle*, 20 Cal. 3d at 602, 578 P.2d at 915, 146 Cal. Rptr. at 198).

terpreted this provision to mean that the legislature intended the courts to elaborate on these principles.[85] By this interpretation the Court is placing the principles of equity and fairness in almost a supreme position: not only do these principles justify comparative partial indemnity but they show that the legislature also seeks to embody these principles in the ultimate tort system which results after judicial interpretation.

C. *Cases following* Li *and* American Motorcycle

The importance attached to the fairness principle by the Supreme Court of California and the courts of appeal, can be seen in the expansion of comparative partial indemnity to situations not discussed in *American Motorcycle*. The first step in this expansion occurred several months after *American Motorcycle*. In *Safeway Stores v. Nest-Kart*,[86] the Supreme Court held that comparative partial indemnity justified the apportionment of damages between a negligent tortfeasor and one who was strictly liable. The court used language which makes clear the reason for applying comparative partial indemnity to this situation: "even when an injury was in part caused by a defective product, fairness and good social policy . . . dictated a sharing or apportionment of liability."[87]

Perhaps the most important expansion of *American Motorcycle* is the application of comparative partial indemnity to a settling tortfeasor. In *Sears, Roebuck, and Co. v. International Harvester Co.*,[88] the court of appeal held that a settling tortfeasor could seek indemnification for a portion of the settlement from a cross-defendant. Comparative indemnity has also been applied to governmental entities,[89] to employees in

85. 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198.

86. 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

87. *Id.* at 329, 579 P.2d at 444, 146 Cal. Rptr. at 553 (emphasis added). The court proceeded to quote from Ford Motor Co. v. Robert J. Poeschl, Inc., 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971), in which the court expressed discontent with traditional equitable indemnity doctrines which would permit the dealer and leasing agency to escape any liability whatsoever surrounding an accident relating to a defective automobile. The *Poeschl* court noted:

> The dealer and the leasing agency shared Ford's ability to reach the customer before the accident occurred . . . on the assumption that they did nothing, their escape from financial responsibility is troublesome. Judicially favored objective of deterrence and accident prevention would be promoted by imposing some liability on a dealer who knew of a danger and did nothing. To shift the entire loss to him would not serve these objectives, for then the manufacturer would escape scot-free. *A wise rule of law—one designed to stimulate responsible conduct throughout the merchandising chain—would require both parties to share the loss. . . . 'e of . . . partial indemnification would permit that result.*

21 Cal. 3d at 330, 579 P.2d at 445, 14 Cal. Rptr. at 554.

88. 82 Cal. App. 3d 492, 147 C. Rptr. 262 (1978).

89. Wagner v. State of Californ a. 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978) (holding a governmental entity liable for injur caused by a dangerous condition of its property). The court allowed a cross complaint by a defendant against the state seeking contribution in proportion to the state's fault.

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94. Fleming, *Report to the the Problems Associated with A* 1464, 1484 (1979).

95. 65 Cal. App. 3d 694, 1

96. 20 Cal. 3d 578, 578 P.2

97. 65 Cal. App. 3d 694, 1

workers' compensation cases,[90] and to contractual indemnity.[91]

III. The Concerns of *American Motorcycle Association*

In *American Motorcycle*, the California Supreme Court upheld the doctrine of joint and several liability.[92] The court is forthright and unequivocal on this matter, and indeed, the fact that the court chose to "unpublish" the appellate court decision in *Baget v. Shepard*[93] shows that the court is firm in its resolve to maintain the doctrine. However, the court limits its discussion to the subject of abrogation of the doctrine; no mention is made of the possibility that joint and several liability could be modified to remove the inequity which presently exists. The reasons which justify the court's refusal to abolish joint and several liability are not entirely satisfactory. As one commentator has noted, the court "got lost in a maze of conceptualism. . . ."[94] Even if the court's rationale for not abrogating joint and several liability are valid, they do not justify a refusal to modify the inequitable effect of the doctrine.

This failure to discuss modification can, of course, be attributed to the failure of counsel to seek modification. However, a more plausible explanation is that the court of appeal chose to abolish the doctrine,[95] and the Supreme Court seems to be reacting to the appellate court. Therefore the appellate court decision in *American Motorcycle* is important background for understanding the view of the Supreme Court and the need for further action on this issue.

A. The Appellate Court Decision

Although the Supreme Court overruled[96] the court of appeal,[97] the goals of the two courts were similar. Both sought to mitigate the harsh effects on defendants imposed by the "limited" forms of contribution

90. Associated Const. & Eng'r Co. v. Workers' Compensation, 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978) (held that a concurrently negligent employer was entitled to a credit against workers' compensation obligations to the extent which exceeds the proportional liability that the employer would incur for indemnification of a third party tort-feasor under a comparative system of tort responsibility allocated among multiple wrongdoers); *accord* Aceves v. Regal Pale Brew. Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979).

91. Kramer v. Cedu Foundation, Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979) (indemnity may arise by virtue of express contractural language and such a right may also be found in equitable considerations brought into play by constructual language not expressly dealing with indemnification or by the equities involved in a particular case).

92. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

93. Baget v. Shepard, 128 Cal. App. 3d 433 (1982) (unpublished opinion, *see supra* note 12).

94. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 Hast. L.J. 1464, 1484 (1979).

95. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977).

96. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182.

97. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497.

B The Supreme Court

The Supreme Court's emphatic refusal to abrogate the doctrine of joint and several liability can perhaps be attributed to its reaction to the approach of the court of appeal. The Supreme Court succeeds in partially providing a solution to the inequity suffered by defendants. By establishing comparative partial indemnity, the Court has modified the system so that many defendants will only be liable in proportion to fault.[105] However, this solution, without modification of joint and several liability, still requires the defendant to bear the burden of an insolvent or settling tortfeasor alone.

The Court presented three arguments in support of its refusal to abolish joint and several liability. First, the plaintiff's injury is indivisible; second, the plaintiff's conduct is not as tortious as defendant's; and third, the present law allows injured persons to receive full recovery.

1. The Indivisibility of the Injury

The first argument is that the injury by the plaintiff is indivisible, therefore, each defendant should potentially bear the burden of the entire loss: "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant does not in anyway suggest that each defendant's negligence is not the proximate cause of the entire indivisible injury."[106]

This argument is, of course, contrary to *Li*. As Justice Clark pointed out in his dissent, "plaintiff's negligence is also the proximate cause of the entire indivisible injury,"[107] but this did not prevent the *Li* court from repudiating the all-or-nothing solution. Indeed, it is only because the injury is indivisible that liability can be apportioned between plaintiff and defendant as required in *Li*. If the injury were divisible, the only sensible way to apportion damages would be according to who caused each portion of the injury.

The better view would be that since the injury is truly indivisible, a culpable plaintiff and defendant should share the burden of plaintiff's injury. After all, the plaintiff is also the proximate cause of a single indivisible injury.

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would still be better off financially than he would have been prior to *Li*. The plaintiff will still recover something, the only variable would be the proportion of the total damages.

105. 20 Cal. 3d at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. After a lengthy analysis of the 1957 contribution statute the court determined that it was intended to lessen the harshness of the former common law no-contribution rule. Finding nothing in the legislative history of the statute indicating an attempt to foreclose future judicial development of the statute's purpose, the court held that the common law equitable indemnity doctrine should be modified to permit partial indemnity among concurrent tortfeasors on a comparative fault basis. *Id.*

106. 20 Cal. 3d at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.

107. *Id.* at 611, 578 P.2d at 920, 146 Cal. Rptr. at 203.

Although this argument is used to support the continued existence of joint and several liability, it is a better argument for modification of the doctrine. If the indivisibility of the injury allows apportionment of the loss between the culpable plaintiff and defendant, then the portion of the loss which is unsatisfied because of the settlement or insolvency of one tortfeasor should also be apportioned. The indivisibility of the injury should not be used for plaintiffs in *Li* and against defendants when it comes to the subject of modifying joint and several liability.

2. *The Culpability of Plaintiff*

As Justice Clark noted in his dissent, the second justification for joint and several liability offered by the majority is really a two-fold argument dealing with the culpability of the plaintiff.[108] The first part of this argument is that, although *Li* stated that parties should be liable in proportion to fault, not all plaintiffs are culpable. While it is undoubtedly true that not all plaintiffs will be found to be culpable, this argument serves only to justify the rule of entire liability when applied to situations involving a completely innocent plaintiff. However, since it is of course possible to have one rule for innocent plaintiff and one rule for culpable plaintiff, this argument actually favors modification of the current law which allows both culpable and innocent plaintiffs alike to use joint and several liability to the detriment of defendants.

In order to justify applying joint and several liability when the *plaintiff* is also at fault, the Supreme Court makes a second argument based on the *plaintiff*'s conduct. The Court states that the culpability of the plaintiff is not "equivalent to that of a defendant."[109] The degree of plaintiff's culpability is less because plaintiff has only violated a duty to protect himself, whereas defendant has violated a duty to prevent harm to others. The Court argues that since the degree of culpability is less, the rule of entire liability should be maintained.

There are several things wrong with this point of view. To begin quite often a plaintiff in injuring himself will have created a tremendous risk of harm to others. Moreover, the scope of plaintiff's duty is irrelevant. The Supreme Court itself in *American Motorcycle* pointed out that the guiding principle is that "a tortfeasor is liable for any injury of which his negligence is a proximate cause."[110] It makes no dif-

108. *Id.* at 611, 578 P.2d at 920-21, 146 Cal. Rptr. at 203.

109. *Id.* at 589, 578 P.2d at 906, 146 Cal. Rptr. at 189. Reduced to its simplest terms, the argument is that the conduct of the defendant is tortious, while the plaintiff's is not. *See* PROSSER, *supra* note 3, §65, at 418.

110. 20 Cal. 3d at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187.

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111. *Id.* at 589-90, 578 P.2d
112. Fleming, *supra* note 94.
113. 20 Cal. 3d at 590, 578 P.2

ference if plaintiff had a duty only to himself; it is enough that the breach of the duty to himself caused this injury.

Finally, the language of the court makes it sound as if the court holds the view that tort liability is based on the moral wrongfulness of defendant's conduct. The court goes so far as to say that "the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious."[111] The only reason the conduct is not tortious is that plaintiff has not "wronged" anyone else. However, a more acceptable view of tort law is that liability exists, not because of moral wrong, but because someone's conduct is such that this person should pay for the damages the conduct causes. In *Li*, the Supreme Court held that plaintiff, in effect, did have to pay for injuries which he caused to himself. Regarding the injury which plaintiff has caused himself, the plaintiff is not culpable to a lesser degree or order, his culpability is exactly the same as defendant's.[112]

3. *Full Recovery for the Plaintiff*

The Court's final justification for joint and several liability is that "it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability."[113] This position is laudable; our tort system must take care of those who are injured. However, fairness will often be violated in such a system which may make a tortfeasor of relatively incidental fault pay the damages to a plaintiff who is significantly at fault. Even with the laudable motive of taking care of the injured, such a result is blatantly pro-plaintiff and only tenable because it is assumed that defendant has insurance or in some other way may be considered to have deep pockets. Does it seem proper for a private individual to bankrupt himself or herself to cover injuries for which the plaintiff was more responsible?

To some degree the court must reach this harsh result because its discussion is limited to the subject of abrogation; it does not examine the possibility of modifying the inequitable effect of joint and several liability. However, there are other ways for society to fairly shift the burden of loss. While it is true that the total abolition of joint and several liability would shift the entire burden of an insolvent defendant to the plaintiff, there are methods by which the risk can be apportioned

111. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.
112. Fleming, *supra* note 94.
113. 27 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

between plaintiff and solvent defendant fairly.[114]

4. The Unstated Reason

Perhaps the real reason for the court's decision is unstated, for there is another justification for the court's refusal to abolish joint and several liability. This reason is succinctly stated by Professor Fleming:

> That rule is justified not by a one-sided preference for plaintiffs, but by the very principle of evenhandedness between plaintiffs and defendants enunciated in *Li*. It should therefore appeal to plaintiffs' and defendants' bar alike on the grounds of fairness: the "several" rule of the court of appeal in *American Motorcycle* is unfairly skewed against plaintiffs, whereas the supreme court's opinion carries the seeds of unfairness for defendants.[115]

The Supreme Court was confronted by a dilemma in determining the fate of joint and several liability. The real issue was who should bear the burden of the damages which are unsatisfied because one tortfeasor was insolvent or had settled for an amount less than his portion of the fault would justify his paying. If the court upheld joint and several liability, the defendant would bear the burden exclusively. If the court abrogated the doctrine, the plaintiff would bear the burden. As between plaintiff and defendant, the court chose the defendant, who at least, is always culpable to bear the burden. Therefore, joint and several liability was upheld.

The dilemma can be avoided entirely if the choice is not between the continued existence or abrogation of joint and several liability. If the issue is whether or not the doctrine should be modified so that plaintiff and defendant equally bear the burden of the unsatisfied damages, the answer is plain. The fairness principle of *Li* dictates modification.

IV. Other States

Although the Supreme Court chose not to abolish joint and several liability for the reasons stated above, the court seemed to take heart from the inability of the American Motorcycle Association to cite authority in support of abrogation of the doctrine: "AMA has not cited a single j .dicial author to support its contention that the advent of comparative negligence rationally compels the demise of the joint and several liability rule."[116] The Court also points out that the "over-

114. *See infra* note 173.

115. Fleming, *supra* note 94.

116. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189 (accordingly the court held that a concurrent tortfeasor remained liable for the total amount of damages diminished only proportionally to the degree of negligence attributable to the person recovering).

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119. *See supra* note 11

120. 31 N.Y.2d 25, 28 E.2d

121. 30 N.Y.2d 143, 282 N.E.2
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whelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine"[117] and cites a number of cases which refuse to abolish joint and several liability.[118]

While the court is certainly correct in its view that the great weight of case authority is against the abrogation of the doctrine, the same cannot be said regarding the subject of modification. None of the cases cited by the Supreme Court fully deal with modification; only one mentions it. These cases, therefore, have dubious precedential value regarding modification. Moreover, a number of states have legislated either modification or abrogation.

A. The Cases Against the Abrogation of Joint and Several Liability

1. Those Cited by the Supreme Court

The Supreme Court in *American Motorcycle* cited five cases to illustrate the proposition that all courts which have considered the matter have refused to abrogate joint and several liability.[119] The court's use of these cases makes an interesting study in its own right. One of these strongly upholds the doctrine but does not discuss the subject of abrogation with anything near the thoroughness of the court in *American Motorcycle*. One of them indirectly upholds the doctrine against a challenge based upon comparative negligence. Another upholds joint and several liability but no mention is made of comparative negligence. And two of them, while upholding the doctrine of joint and several liability, actually modify it.

Kelly v. Long Island Lighting Co.[120] is the only case which lends strong support for the position of the Supreme Court in *American Motorcycle*. *Kelly* followed *Dole v. Dow Chemical Co.*, the New York case which allowed the apportionment of damages among contributing tortfeasors according to proportional fault.[121] In *Kelly*, the New York Court of Appeal stated:

> It should, of course, be understood that this refinement of the rule of contribution does not apply to or change the plaintiff's right to re-

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117. *Id.*

118. Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940); Saucier v. Walker, 203 So. 2d (Miss. 1967); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d (1972); Chille v. Howell, 34 Wis. 2d 491, 149 N.W.2d 600 (1967); Walker v. Kroger Grocery & king Co., 214 Wis. 519, 252 N.W. 721 (1934).

119. *See supra* note 118.

120. 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851.

121. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Damages were apportioned among the joint or concurrent tortfeasors regardless of the degree or nature of the concurring fault. The court in *Kelly* stated that "[w]e believe the new rule of apportionment to be pragmatically sound, as well as realistically fair." 31 N.Y.2d at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854.

> cover against any joint tort-feasor in a separate or common action the total amount of his damages suffered and not compensated. We are only concerned here with the right of contribution between two or more joint or concurrent tort-feasors.[122]

This statement is all that is said in *Kelly* regarding joint liability, and even it seems to be made in passing. It is almost as if the court of appeal is not responding to arguments of counsel but rather merely clearing up a question which might occur in the minds of future readers.

Gazaway v. Nicholson, a Georgia case, also stands for the proposition that adoption of the comparative negligence doctrine does not require the abrogation of the rule which requires a joint verdict against jointly negligent tortfeasors.[123] However, in *Gazaway*, the primary concern of the court was the application of comparative negligence to multi-defendant cases.[124] As to joint and several liability, the Georgia Supreme Court added that "the mere fact that the same formula might produce results which vary to some extent as to the individual defendants [depending on whether defendants were sued jointly or separately] would not within itself authorize the conclusion that the comparative-negligence rule operated to change the common law rule as to joint verdicts."[125] This ruling upholds joint and several liability in the sense that there can be no joint and several liability unless there is a joint verdict.

While *Saucier v. Walker*[126] does stand for the principle that "there must be one verdict and that must be in one amount and against all the joint tort-feasors found liable,"[127] there is no mention of the existence of comparative negligence as the basis for a challenge to joint and several liability. It is true that comparative negligence was the law of Mississippi at the time *Saucier* was decided, and this case does include the following quotation: "It is the settled law of this state that there can be

122. 31 N.Y.2d at 30, 286 N.E.2d at 243, 334 N.Y.S.2d at 855.

123. 150 Ga. 345, 9 S.E.2d 154. An action was brought on the behalf of a seven year old boy, who was struck by an automobile after exiting a school bus, against the driver of the automobile which hit him, the driver of the school bus, and the owner of the bus. The defendants were sued as joint tortfeasors.

124. It may be true that in such case the rule as to comparative negligence cannot in every instance be applied in favor of each separate defendant to the same extent as if one party only had been sued, the argument here being that in the former case the plaintiff's negligence must be compared with the combined negligence of all the defendants considered as a unit, whereas in the latter case, only the one and sole defendant can be treated as the unit of comparison.

190 Ga. at 348, 9 S.E.2d at 156.

125. 190 Ga. at 348, 9 S.E.2d at 156.

126. 203 So. 2d 299 (Miss. 1967).

127. *Id.* at 302-03.

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130. 214 Wis. 519, 252 N.W. 721 (

131. 34 Wis. 2d 491, 149 N.W.2d 6

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133. WIS. STAT. §331.045 (1931) pr
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person recovering." *Id.*

134. 214 Wis. at 536, 252 N.W. at

135. 34 Wis. 2d at 500, 149 N.W.2

136. 318 So. 2d 386 (Fla. 1975).

137. 280 So. 2d 431 (Fla. 1973).

no apportionment of damages against a joint tort-feasor. . . ."[128] Yet, this quotation is merely used as grounds to construe an ambiguous jury verdict.[129]

The last two cases cited in *American Motorcycle*, *Walker v. Kroger*[130] and *Chille v. Howell*,[131] are related in that *Chille* follows *Walker*. They both stand for the proposition that the comparative negligence doctrine does not require the demise of joint and several liability.[132] However, the practical effect of the form of comparative negligence which existed in Wisconsin at that time was to modify joint and several liability. Wisconsin followed the form of comparative negligence which bars the plaintiff from recovery where his negligence was "as great as" the defendant's.[133] Therefore, if the plaintiff's negligence was greater than one tortfeasor's, then there was no recovery whatsoever from that tortfeasor: "If such contributory negligence was as great as the negligence of one of the tort-feasors against whom recovery is sought, then as to that particular tort-feasor there still is no right to recover."[134] This position, established in *Walker*, was later reaffirmed in *Chille*,[135] and it solves one of the injustices which results from joint and several liability. A defendant who is less liable than the plaintiff should not have to pay the damages caused by all the defendants.

2. *Cases Not Cited in* American Motorcycle

There are additional cases which refuse to abolish the doctrine of joint and several liability despite the existence of comparative negligence. *Lincenberg v. Issen*[136] is the Florida equivalent of *American Motorcycle*: the Florida Supreme Court had adopted comparative negligence in *Hoffman v. Jones*,[137] and *Lincenberg* was the court's first opportunity to apply the comparative approach to multiple tortfeasors.

128. *Id.* (citing Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 850, 50 So. 2d 572, 577 (1951)).

129. In *Sawyer*, the jury returned a verdict which was unclear as to whether three defendants were to pay $5,000 each, for a total of $15,000, or $5,000 together. The court used the quotation above as a basis for holding that the verdict was for $5,000 against all three defendants as joint tortfeasors.

130. 214 Wis. 519, 252 N.W. 721 (1934).

131. 34 Wis. 2d 491, 149 N.W.2d 600 (1967).

132. This holding was reaffirmed in Fitzgerald v. Badger State Mutual Casualty Co., 67 Wis. 2d 321, 227 N.W.2d 444 (1975).

133. WIS. STAT. §331.045 (1931) provided in part that, in connection with contributory negligence, the negligence of the plaintiff would not bar recovery "if such negligence was not as great as the negligence of the person against whom recovery is sought" and that "any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering." *Id.*

134. 214 Wis. at 536, 252 N.W. at 727-28.

135. 34 Wis. 2d at 500, 149 N.W.2d at 604.

136. 318 So. 2d 386 (Fla. 1975).

137. 280 So. 2d 431 (Fla. 1973).

The court held that it was bound by the legislature's recent adoption of the Uniform Contribution Among Joint Tortfeasors Act.[13] The court held that the will of the legislature should prevail; since the statute act expressly provided for the continued existence of joint and several liability, that this doctrine should continue to be the law of Florida. It should be noted that the court also declined to apportion contribution among tortfeasors according to fault because the statute expressly provides for pro rata contribution.[139]

In Colorado, one appellate court has held with little discussion that the Colorado rule of joint and several liability and the rule of no contribution among tortfeasors should continue to be the law. Although the court noted the existence of *American Motorcycle*, there was little discussion of it: the court simply noted that such a change "is not within the province of this court."[140] However, there is a vigorous dissent supporting both contribution based upon proportional fault[141] and the abrogation of joint and several liability.[142]

In *Arctic Structures, Inc. v. Wedmore*, the Supreme Court of Alaska refused to abandon the doctrine despite recognizing that it places the entire burden of an insolvent defendant on those defendants who can pay.[143] The court reasoned that even the Uniform Comparative Fault Act only suggested modification of the doctrine[144] and that the two

138. During the pendency of the appeal, the Florida Legislature passed FLA. STAT. §768.31 (1975), which was signed into law by the governor on June 13, 1975. The Florida statute was an adoption of the UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version).

139. 318 So. 2d at 394. "The negligence attributed to the defendants will then be apportioned on a pro rata basis without considering relative degrees of fault although the multi-party defendants will remain jointly and severally liable for the entire amount." *Id.*

140. Stefanich v. Martinez, 570 P.2d 554 (Colo. App. 1977).

141. 570 P.2d at 555.

142. *Id.* at 555-57.

143. 605 P.2d 430, 432 (Alaska 1979).

144. UNIF. COMPARATIVE FAULT ACT §2, 12 U.L.A. 33, 38 (Supp. 1982) (Commissioners' Comment: *Joint and Several Liability and Equitable Shares of the Obligation*). The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

Reallocation. Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.

Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant." *Id.* The suggested modification of the Act is discussed *infra* note 173 and accompanying text.

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145. 605 P.2d at 432-35.

146. 605 P.2d at 435.

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147. 20 Cal. 3d at 590, 578 P.2d at

148. *See supra* note 116 and accom

other important jurisdictions—Florida in *Lincenberg* and California in *American Motorcycle*—which had considered this issue rejected any change in the doctrine.[145] The court concludes that the doctrine should not be "modified."[146] Although the term "modified" is used and there is mention of the suggested approach of the Uniform Comparative Fault Act, the bulk of the court's discussion deals with the subject of abrogation.

Although most of the cases discussed above—both those cited in *American Motorcycle* and those which are not—have some precedential value in support of the continued existence of joint and several liability, none of them, except *Arctic Structures*, even mention modification. None of them fully discuss the possibility of modification, much less attempt to come to grips with the problem of the settling or insolvent tortfeasor. Even *Walker* and *Chille* which do in effect modify the doctrine of joint and several liability, merely state a conclusion without real discussion. Failure to abolish a law does not mean it should not be modified; indeed, when someone is arguing abolition and the courts are resisting, perhaps modification is the moderate step which should be taken.

B. States Abolishing or Modifying Joint and Several Liability

Although the thrust of this article is not to advocate the abolition of joint and several liability, it should be noted that several jurisdictions have abolished the doctrine as being incompatible with comparative negligence. The court in *American Motorcycle* implies that it knew of these cases when it stated that "the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine."[147] However, the tone of the court is such that it seems to be saying that no rational mind which has considered this issue has ever found any contradiction between the doctrine of joint and several liability and the fairness principle which lies behind comparative negligence.[148]

Three states—Vermont, Kansas, and New Hampshire—have abolished joint and several liability using similar statutory language:

> Where recovery is allowed against more than one defendant each

145. 605 P.2d at 432-35.

146. 605 P.2d at 435.

> In light of Alaska's existing pro rata legislative scheme for apportionment or damages among joint tortfeasors and the public policies implemented by the legislation, we hold that the common law rule of joint and several liability should not be judicially modified.

Id. [footnotes omitted]; *see* State v. Guinn, 555 P.2d 530, 547 n.42 (Alaska 1976) (recognizing that judicial adoption of the doctrine of comparative negligence will require legislative amendment).

147. 20 Cal. 3d at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

148. *See supra* note 116 and accompanying text.

> defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributable to all the defendants against whom recovery is allowed.[149]

In Kansas, this language was challenged on the grounds that, since the term "joint and several liability" was not mentioned, the statute did not really abolish the doctrine. The Supreme Court of Kansas met this challenge with the unequivocal statement that

> [U]nder the provisions of K.S.A. 60-258a the concept of joint and several liability between joint tort-feasors previously existing in this state no longer applies in comparative negligence actions. The individual liability of each defendant for payment of damages will be based on proportionate fault, and among joint judgment debtors is no longer required in such cases.[150]

Several states have modified the doctrine of joint and several liability. Texas has limited the doctrine by a statute which states that a defendant who is less liable than the plaintiff will only be liable for his proportional share.[151] This modification has been held by the courts to apply only to situations in which the defendants have all been negligent and not to situations in which one defendant was strictly liable.[152] Nevada has adopted an approach similar to that of Texas,[153] although it is interesting to note that prior to 1979 the Nevada comparative negligence statute took an even stronger position, holding that multiple defendants were severally liable.[154] Finally, Minnesota has adopted the Uniform Comparative Fault Act with its provisions for sharing the burdens of the settling or insolvent tortfeasor between culpable plaintiff and the other defendants.[155]

149. VT. STAT. ANN. tit. 12, §1036 (1973); N.H. REV. STAT. ANN. §507:7-a (1977); KAN. STAT. ANN. §60-258b (1976) (substantially identical to the quoted language).

150. Brown v. Keill, 224 Kan. 195, 204, 580 P.2d 867, 875 (1978); *accord*, Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1978).

151. TEX. REV. CIV. STAT. ANN. art. 2212a, §2(c) (Vernon 1982-83) provides that:
> Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of the negligence attributable to him.

152. Lubbock Mfg. Co. v. Perez, 591 S.W.2d 907 (Tex. Civ. App. 1979) Pyramid Derrick and Equip. Co. v. Mason, 617 S.W.2d 727 (Tex. Civ. App. 1981).

153. NEV. REV. STAT. §41.141.

154. 1979 NEV. STAT. c. 629, § 6, at 1356-57 stated in part that:
> Where recovery is allowed against more than one defendant in such an action:
> (a) The defendants are severally liable to the plaintiff.
> (b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.

155. MINN. STAT. ANN. §604.02(a) provides in part that:
> Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fau
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V. The Methods of Modification: The Uniform Comparative Fault Act

The fairness principle requires that loss should be apportioned according to the percentage of fault.[156] Because of the changes which have been made in the law in *Li* and *American Motorcycle*, this principal is very much embodied in California tort law.[157] However, because of the existence of joint and several liability, the embodiment of this is not complete. Defendants still unfairly bear the burden of that portion of the loss attributable to settling tortfeasors beyond the amount of their settlements or to insolvent tortfeasors.

Those arguments which were used in *American Motorcycle* to justify the continued existence of the doctrine of joint and several liability do not negate the argument that the inequitable effects of the doctrine should be modified. Indeed, some of the reasons given in *American Motorcycle* against abolition actually favor modification. Moreover, as demonstrated in the previous section, a number of jurisdictions have seen fit to change the law in this area because of the fairness principle. And, in this section which deals primarily with the form that modification should take, it will be apparent that there is additional persuasive authority in support of modification.

Whatever new form the law takes, it must fairly apportion the burden of the unsatisfied portion of the loss between the defendants and the culpable plaintiff. If this is not entirely possible, the law must find other trade-offs which help to balance any inequity which remains. Fortunately, suggestions for new approaches which more fully embody the fairness principle have been made, and if the Supreme Court of California was unimpressed by the persuasive authority in favor of abolishing joint and several liability, the reverse should be true here. These suggestions have been made by the commissioners of the National Conference of Commissioners on Uniform Laws and notable

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ties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

156. *See supra* note 66 and accompanying text.

157. The current status of the law of comparative fault in California may be summarized as follows: (1) the doctrine of comparative fault will be applied to a single plaintiff-single defendant situation, including products liability cases; (2) comparative fault principles will be utilized to ascertain percentages of fault in situations involving multiple tortfeasors; (3) equitable indemnity will in fact provide proportionate contribution between or among multiple defendants; (4) named defendants may file a cross-complaint against unnamed potential defendants for partial indemnity; (5) the concept of joint and several liability has been retained; and (6) good faith settlements will be given *pro tanto* or dollar-for-dollar effect. It is unfortunate that some of these rules fail to carry out the "fairness" principle of *Li*.
Adams, *Settlements After Li: But Is It "Fair"?* 10 Pac. L.J. 729, 742-43 (1979).

scholars[158] in the form of the Uniform Comparative Fault Act[159] which proposed changes in the tort system resolving the problems of both the insolvent and the settling tortfeasors.

A. *The Problem of the Insolvent Tortfeasor*

The Uniform Comparative Fault Act corrects the problem of insolvency by having the culpable plaintiff and the solvent tortfeasors share the burden of the damages which would be apportioned to the insolvent tortfeasor. Section 2(d) of the Uniform Comparative Fault Act states as follows:

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to claimant on the judgment.[160]

In practice, the statute would work something like this. Assume there is a judgment of $100,000 and the relative fault of the parties is as follows:

Plaintiff =20%
Defendant A=20%
Defendant B=[illegible]%
Defendant C=40%

If defendant A was insolvent, any of the other defendants could move for a reallocation of the judgment among the two remaining defendants *and plaintiff*. The liability of A would be apportioned according to the relative fault of the remaining parties. Plaintiff would have to absorb ¼, defendant B ¼, and defendant C ½ of the $20,000 liability of A. $5,000 will be allocated to plaintiff, $5,000 to B, and $10,000 to C. Plaintiff's total recovery will be $75,000. Each one of the defendants may be subject to pay the entire judgment under the doctrine of joint and several liability, but each may seek contribution from the other. There has been an equitable apportionment of the burden of the insolvent tortfeasor.

Since the jury will determine the proportional fault of all the parties, the motion for reallocation can be made at the time of the trial if the insolvency of a defendant is known then or when this insolvency comes

158. *See* Adams, *supra* note 157; Fleming, *supra* note 94.
159. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1983).
160. *Id.* §2(d), at 37 (Supp. 1982).

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The rationale for the plaintiff and defendants t an insolvent tortfeasor. I Fault Act, the Commissio cation . . . avoids the unf and-several liability, whic upon the solvent defenda liability which would cas claimant."[162]

Moreover, as pointed o *Motorcycle*, any other ap fact finding process. Ot known at the trial; this de or, because of insolvency system plaintiff will seek t to the insolvent defendant fendant will be responsib vent one. If joint and s would be true: defendant attributable to the insolver sible. Reallocation would no incentive to inflate the

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161. This concept of reallocation jurisdictions. Professor John G. Fl DISTRIBUTION IN NEGLIGENCE ACT two common law jurisdictions whic Liability Act of 1961, 1961 Acts of th Damages Act of 1956, ch. 2, § 8(ii) (*supra* note 94, at 1492.
162. UNIF. COMPARATIVE FAUL ment to section 2).
163. *American Motorcycle*, 20 C dissenting).
164. In establishing the reallocat

to light but not later than one year after the judgment is entered.[161]

The rationale for the reallocation is simple: reallocation requires plaintiff and defendants to share the burden of the loss attributable to an insolvent tortfeasor. In the Comment to the Uniform Comparative Fault Act, the Commissioners make the following statement: "Reallocation . . . avoids the unfairness both of the common law rule at joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and a rule abolishing joint-and-several liability which would cast the total risk of uncollectibility upon the claimant."[162]

Moreover, as pointed out by Justice Clark in his dissent in *American Motorcycle*, any other approach besides reallocation will distort the fact finding process. Often the insolvency of one defendant will be known at the trial; this defendant may be absent from the suit entirely or, because of insolvency, unrepresented at trial. Under the present system plaintiff will seek to increase the portion of liability apportioned to the insolvent defendant because plaintiff knows that the solvent defendant will be responsible for the damages attributable to the insolvent one. If joint and several liability was abolished, the opposite would be true: defendant would seek to enlarge the portion of fault attributable to the insolvent defendant knowing plaintiff will be responsible. Reallocation would put an end to this process. There would be no incentive to inflate the liability of the insolvent defendant.[163]

The rule of reallocation may not appeal to members of the plaintiffs' bar because at present plaintiffs can always recover the full amount of the judgment as long as there is one solvent judgment debtor. However, this solution would provide the Supreme Court of California an opportunity to further embue the personal injury system with the fairness principle. In *American Motorcycle*, the court significantly advanced the fairness principle, however, it stopped short when further change meant shifting the entire burden of the uncollectible judgment to the plaintiff. Reallocation is a moderate solution, and it completely embodies the fairness principle.[164]

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161. This concept of reallocation is not new; indeed it has been adopted in some common law jurisdictions. Professor John G. Fleming credits Gregory in C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 77-79 (1936), as the originator of reallocation and cites two common law jurisdictions which use some form of reallocation. Republic of Ireland's Civil Liability Act of 1961, 1961 Acts of the Oireachtas, ch. 41 §38; *cf.* South Africa's Apportionment of Damages Act of 1956, ch. 2, § 8(ii) (redistribution between solvent joint wrongdoers). Flemming, *supra* note 94, at 1492.

162. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 35, 40 (Supp. 1983) (commissioners' comment to section 2).

163. *American Motorcycle*, 20 Cal. 3d at 614, 578 P.2d at 923, 146 Cal. Rptr. at 206 (Clark, J., dissenting).

164. In establishing the reallocation principle of the Uniform Act it would be possible to ex-

B. The Settling Tortfeasor

At present a non-settling tortfeasor must bear the burden of that portion of loss attributable to a settling tortfeasor which exceeds the amount of the settlement. A release given in return for a settlement will bar any further recovery from the settler. Only the amount of a good faith settlement is deducted from the judgment regardless of the settler's proportional fault.[165] The doctrine of joint and several liability requires that the non-settling defendants pay the entire remainder of the judgment. A plaintiff who settles risks nothing as long as there is another solvent defendant.

The fairness principle requires that liability be apportioned according to fault. There are a number of ways the fairness principle could be applied to remove this burden from the exclusive responsibility of non-settling defendants. However, in this situation, the fairness principle must be balanced against the policy which favors settlement between the parties as the most efficient way to resolve disputes.

1. Shifting Burden to Settler

One possible way to implement the fairness principle is to shift the burden to the settling tortfeasor. The Uniform Contribution Among Tortfeasors Act of 1939[166] took this approach: a settling tortfeasor "remained liable for contribution in the amount by which his share exceeded the dollar value of the settlement."[167]

Although the 1939 Act did not contemplate a comparative fault system, its approach would work, and indeed this approach would best embody the fairness principle. For example, if the judgment was for $100,000 and defendant A, who had settled for $20,000, was 40 percent at fault, defendant B who had satisfied $80,000 of the judgment ($100,000 less the $20,000 settlement) could receive a $20,000 contribution from A. Ultimately both would be liable for the loss in proportion to their fault. If such a system were established today, there would be no injustice created by joint and several liability. A non-settling defendant who had to satisfy the entire judgment would have an action

empt from reallocation those situations in which one defendant would be vicariously liable for the damage caused by another under agency principles. The policies which make a master responsible for the conduct of the servant do not conflict with the fairness principle. The fairness principle is most applicable to situations in which defendants and plaintiffs are all the concurrent cause of plaintiff's injury.

165. 20 Cal. 3d at 602-04, 578 P.2d at 914-16, 146 Cal. Rptr. at 197-99.

166. UNIF. CONTRIBUTION AMONG TORT FEASORS ACT (1939).

167. Fleming, *supra* note 94, at 1494. Three states presently follow this approach: Arkansas, Hawaii, and South Dakota. However, five other states adopted this approach at one time: Delaware, Maryland, New Mexico, Pennsylvania, and Rhode Island. Adams, *supra* note 157, at 744 n.104.

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169. UNIF. CONTRIBUTION A
CAL. CIV. CODE §877(a).

170. UNIF. CONTRIBUTION A
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against the settler for the amount of the settler's liability exceeding the settlement.

The problem with this approach is that it discourages settlement. Why should any defendant settle if there is nothing to prevent him from being responsible for the full amount of the judgment that he would have to pay if he did not settle?[168] It would seem that the need to encourage settlements is as great today, especially in terms of overcrowded court calendars, as it was in 1955 when the Commissioner of the Uniform Laws rejected this approach in favor of the present system which provides for complete discharge of the settling tortfeasor and reduces plaintiff's recovery against other defendants by the amount of the settlement.[169]

2. *Shifting the Burden to Plaintiff*

The approach of the Uniform Comparative Fault Act is to shift the burden of the outstanding portion of the settling tortfeasor's liability to the plaintiff. The Act uses its provisions governing release to shift the burden:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. *However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.*[170]

If a $100,000 judgment is apportioned with plaintiff 25% at fault, with defendant A, (who had settled for $5,000) 25% at fault, and with defendant B 50% at fault, plaintiff may recover only $50,000 from B. A is completely discharged, and his or her equitable share of the liability, $25,000, is subtracted from the total amount, $75,000, which plaintiff can recover.

Beyond the fact that this approach is supported by the Commissioners, the rationale for the Uniform Act is appealing even though it does not completely embody the fairness principle. Plaintiff is the master of his or her fate free to settle or not depending upon the value he or she places on the suit. Joint and several liability will still be available to

168. One small benefit might be that the settling defendant would not be jointly liable for the other defendant's share; however, this would hardly provide the encouragement that is now given defendants who know they will suffer no liability beyond the amount of the settlement.

169. UNIF. CONTRIBUTION AMONG TORT FEASORS ACT §4(b), 12 U.L.A. 63, 98 (1975). *See* CAL. CIV. CODE §877(a).

170. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT §6, 12 U.L.A. 35, 44 (Supp. 1983) (emphasis added).

assist plaintiff to recover the loss, and the tortfeasor who is "entirely liable" can seek contribution on a comparative basis against anyone but the settling tortfeasor. Moreover, there is no reason for a collusive settlement. As Professor Fleming has noted, "this self-regulatory incentive is clearly more effective than the requirement of 'good faith' under the current California statute and the Uniform Contribution Act."[171]

However, this form of apportionment does not fulfill the requirements of the fairness doctrine that liability should be apportioned according to fault. Plaintiff will bear a disproportionate share of the loss, and indeed, an innocent plaintiff may have to bear a portion of the loss where now he would not bear any loss. While it is true that plaintiff "has bought his peace,"[172] this approach seems harsh, especially on the innocent plaintiff since it is the innocent plaintiff who is least able to protect against loss.

Plaintiff, knowing that he or she will have no opportunity to recover the entire amount of loss after settlement, will certainly be more reluctant to settle. However, the disincentive to settle is somewhat mitigated under the Uniform Comparative Fault Act since plaintiff will be able to keep any portion of the settlement which is above the actual liability of the settler. Yet, the possibility that plaintiff may lose a portion of damages will insure the opposition of the plaintiffs' bar to any legislated change in the law.

However, taking into account all the policies that are relevant to this subject, the approach of the Uniform Act is better than either the present system or a regression to the 1939 version of the Uniform Contribution Among Tortfeasors Act. The present system encourages settlement, but it flys in the face of the fairness principle. The position of the 1939 Act, if used in a comparative system, would completely embody the fairness principle; however, it would strongly discourage settlement. The Uniform Act balances the two positions in that it maintains the incentive for defendant to settle and it embodies the fairness principle at least to the degree that plaintiff does not have to swallow any more of his own loss than he bargained for.[173]

171. Fleming, *supra* note 94, at 1496.

172. *Id.* at 1498.

173. It is also possible to modify the present system so that it can embody the fairness principle even more than under the Uniform Comparative Fault Act yet not reduce plaintiff's incentive to settle. the approach would be very similar to that used by the Uniform Act to apportion the liability of an insolvent tortfeasor except there would be no need of the one year waiting period. Since the amount of any settlement is known at the time the judgment is pronounced, the portion of the settling defendants' liability which exceeds the settlement could be apportioned among all parties who are at fault including plaintiff.

For example, assume the proportionate liability was as follows:

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VI. Conclusion

After *Li* and *American Motorcycle Association*, the California tort system has embodied the principle that plaintiff's loss should be apportioned among all parties, including a culpable plaintiff. However, because of the doctrine of joint and several liability upheld in *American Motorcycle*, the fairness principle does not control situations involving settling or insolvent tortfeasors. In those situations defendants are presently required to satisfy any portion of plaintiff's loss which are outstanding because of insolvency or settlement. The present system can be easily modified so that any unsatisfied loss can be apportioned between a culpable plaintiff and defendants.

Plaintiff = 20%
Defendant A = 40%
Defendant B = 40%

If the judgment was $100,000, defendant A's proportional share would be $40,000. However, if A had settled for $25,000, there would be $15,000 which would fall upon the shoulders of one of the other parties. Because of the doctrine of joint and several liability under present California law, B could be required to pay both his $40,000 and the $15,000 which A avoided by settlement. Under the approach of the Uniform Contribution Act of 1939, B, he satisfied the entire $55,000, could seek contribution from A for $15,000. In contrast, the Uniform Comparative Fault Act would require plaintiff to bear this burden. A would be discharged from all further liability and B would be liable only for his own $40,000.

But the most equitable method of resolving this situation is for the $15,000 to be apportioned between the plaintiff and defendant B. The ratio of B's liability to plaintiff's is two to one. Therefore, defendant B would have to pay for two-thirds of A's proportional liability—$10,000. Defendant B's liability would total $50,000. Plaintiff would have to absorb $5,000 of the loss as the price of settlement. As noted above, this apportionment could be made at trial, since the amount of the settlement is known then.

Of all the methods of solving the problem of the settling tortfeasor this one best embodies the fairness principle while still encouraging settlement. Joint and several liability still exists to assist the plaintiff in recovering judgment, but the inequity created by the doctrine will be greatly lessened. All culpable parties except the settling defendant are liable in proportion to fault. It is possible to establish a system in which a settling defendant would also have to share in the division of the portion of his liability which exceeds the settlement. In the hypo discussed above defendant A would be responsible for 2/5 of the outstanding $15,000 or $6,000, defendant B would also be responsible for 2/5 or $6,000. Plaintiff's share would be 1/5 or $3,000. The disadvantage of this method is that it would discourage settlement. Defendants settle not only to avoid greater liability but also to avoid the costs of defense. If the settling defendant may still be liable for some damages, both plaintiff and the remaining defendant will attempt to increase the settler's liability, and they may be successful since the settler will not be present to defend himself. In this situation a defendant may not want to be absent from trial. The settling defendant is completely discharged only to preserve the incentive to settle.

Both plaintiffs and defendants will be encouraged to settle under this system. Although plaintiffs will not benefit as much as they do under the present system, they will know that they will not be responsible for the entire amount of damages which exceeds the amount of the settlement. Since in most cases plaintiff will be less culpable than remaining defendants, the plaintiff's share will be small. Defendants will want to settle because of the complete discharge which results. Moreover, as each defendant settles, the pressure will be on the remaining defendants to settle since they will be partially responsible for the outstanding portion of the settler's share. Also, the Supreme Court in *American Motorcycle* established that it valued the rationale of favoring the innocent plaintiff over the culpable defendant, 20 Cal. 3d at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189, the form of apportionment suggested here embodies this rationale since the innocent plaintiff will not have to bear any portion of the loss attributable to a settling defendant.

Adopted AK 1970 (19 other states have adopted)
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AK act does vary significantly

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

An Act Concerning Contribution Among Tortfeasors, Release of Tortfeasors, Procedure Enabling Recovery of Contribution, and Making Uniform the Law with Reference Thereto.

1955 REVISED ACT

Sec.

Be it enacted .....

§ 1. [Right to Contribution]

(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

Subsection (c). Intentional, wilful and wanton. The substance of this provision is found in a few of the existing statutes, usually in rather vague language. Kentucky and Virginia, for example, provide that there must be no "moral turpitude." The 1939 Act was silent on the matter. The policy here followed is that of the original rule as to contribution, that the court will not aid an intentional wrongdoer in a cause of action which is founded on his own wrong. In cases of concerted battery, for example, there appears to be little reason to shift any part of the liability to another.

Two valid reasons exist for extending the exclusion to wilful and wanton acts causing or contributing to the injury.

In the first place wilful and wanton acts seem naturally to belong in the same class with intentional wrongs and to imply moral turpitude on the part of the wrongdoer. The policy of the section as drafted adopts the law of those states which do not recognize classification of negligence into degrees. It is intended to convey the idea that there is a difference between negligence and wilful or wanton misconduct. (See Srajer v. Schwartzman, 164 Kan. 1, c. 248.)

In the second place, by excluding wilful and wanton actors from the right to contribution, we eliminate most of the arguments urged for a rule allocating the shares of liability on the basis of relative degrees of fault. (See Sec. 2.)

In many states "gross and wanton negligence" in guest statutes is construed to mean wilful and wanton conduct. This is the rule which should be applied in determining the right of contribution under this act.

Brackets have been placed around the words "wilfully or wantonly" so that they may be omitted in those states where by definition of the terms they mean something less than they imply and where by including them the bar of the remedy would be too broad.

In contribution from a joint tortfeasor guilty of intentional, wilful or wanton conduct the share of liability would be determined under Section 2 as in any other case. Any liability for the whole claim as between tortfeasors or beyond "pro rata share" would depend on the law of indemnity.

Subsection (d). This is the same as Section 2(3) of the 1939 Uniform Act. The policy of the Act is to encourage rather than discourage settlements. The tortfeasor who settles removes himself entirely from the case so far as contribution is concerned if he is able and chooses to buy his peace for less than the entire liability. If he discharges the entire obligation it is only fair to give him contribution from those whose liability he has discharged. Since the settlement must be reasonable it follows that the question of total liability to the injured party may be litigated in the contribution action.

Subsection (e). Insurers. This provision is not in the 1939 Act.

In the absence of a statute, Minnesota and Wisconsin have subrogated the insurer to the right of contribution. Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Frankfort General Ins. Co. v. Milwaukee Electric Ry. & Light Co., 169 Wis. 533, 173 N.W. 307 (1919). On the other hand some of the statutes have been construed to give only the tortfeasor himself the right to contribution, and not to cover the insurer. See for example, Lumbermen's Mutual Cas. Co. v. United States Fidelity & Guaranty Co., 211 N.C. 13, 188 S.E. 634 (1936).

The argument against subrogation is that the insurer has been paid full consideration for carrying the risk of liability, and contribution is a windfall to him. This ignores the fact that the contribution experience will inevitably be reflected in the insurance rates. The best analogy appears to be that of the workmen's compensation acts, which subrogate the insurer to the claim against third parties.

Subsection (f). Indemnity. The first part of this provision is retained from Section 6 of the 1939 Act, which apparently left it uncertain whether there could be contribution in any indemnity situation. There have been reports of one or two cases in which a trial court allowed it under the Act. It seems clear that there should be no contribution. Where a master is vicariously liable for the tort of his servant, the servant has no possible claim to contribution from the master; and the master does not need contribution from the servant and will not seek it, since he is entitled to full indemnity. The master, of course, may recover contribution from any third tortfeasor against whom he has no right of indemnity.

Subsection (g). The meaning is clear. It is not intended that the act should extend to liabilities arising out of breaches of fiduciary relationships.

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. In subsec. (c), omits bracketed material.

In subsec. (g), substitutes "does not" for "shall not".

Massachusetts. Section reads:

"(a) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.

"(b) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.

"(c) A tortfeasor who enters into a settlement with a claimant shall not be entitled to recover contribution from another tortfeasor in respect to any amount paid in a settlement which is in excess of what was reasonable.

"(d) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, shall be subrogated to the tortfeasor's right of contribution to the extent of the amount it

has paid in excess of the tortfeasor's pro rata share of the common liability. This provision shall not limit or impair any right of subrogation arising from any other relationship.

"(e) This chapter shall not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee shall be for indemnity and not contribution, and the indemnity obligor shall not be entitled to contribution from the obligee for any portion of his indemnity obligation."

Nevada. In subsec. (e), omits bracketed material.

North Carolina. In subsec. (e), omits bracketed material.

In subsec. (d), substitutes "has not been extinguished" for "is not extinguished by the settlement".

In subsec. (e), substitutes "succeeds to" for "is subrogated to".

Tennessee. In subsec. (a), adds "but no right of contribution shall exist where, by virtue of intrafamily immunity, immunity under the workmen's compensation laws of the state of Tennessee, or like immunity, a claimant is barred from maintaining a tort action for injury or wrongful death against the party from whom contribution is sought" at the end thereof.

In subsec. (c), omits bracketed material.

Subsec. (e) reads: "A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, may be subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation or assignment arising from any other relationship and causes of action for contribution or indemnity are fully assignable and transferable."

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§ 1 CONTRIBUTION AMONG TORTFEASORS

Note 1

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C.J.S. Insurance § 1209 et seq.

Notes of Decisions

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1. Purpose

Purpose of this Act is to provide for proportionate allocation of burden among tort-feasors who are liable. Alder v. Garcia, C.A.N.M.1963, 324 F.2d 483.

The preliminary purpose of the Uniform Contribution Among Tortfeasors Act was to create a right of contribution among joint tort-feasors, a right which did not exist at common law, and to establish a procedure whereby that right of contribution might be made effective in practice. Albert v. Dietz, D.C.Hawaii 1968, 283 F.Supp. 854.

It was intended by the Uniform Contribution Among Tortfeasors Act that equity should prevail over the manifest injustice of the common-law rule under which there was no right of contribution among joint tort-feasors. Id.

One of primary purposes of Uniform Contribution Among Joint Tortfeasors Act was to create a right of contribution among joint tort-fensors which did not exist at common law. Rowe v. John C. Motter Printing Press Co., D.C.R.I.1967, 273 F.Supp. 303.

This Act was designed to reverse two well established rules of law, namely, that there was no contribution among joint tort feasors and that the discharge of one joint tort feasor either by satisfaction of a judgment or by its equivalent, a release, discharged all other joint tort feasors. Hackett v. Hyson, 1946, 48 A.2d 353, 72 R.I. 132, 166 A.L.R. 1096.

The primary purpose of this Act is to create a right of contribution among joint tortfeasors, which did not exist at common law, and to establish a procedure whereby that right might be made effective in practice. Baltimore Transit Co. v. State, to Use of Schriefer, 1944, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

Purpose of this Act is to insure that a case involving joint tort feasors may be fully heard on the merits, without regard to the position of any of the parties as original defendants or otherwise. Brotman v. McNamara, 1943, 29 A.2d 264, 181 Md. 224.

One purpose of Uniform Contribution Among Tort-feasors Act was to provide proportionate allocation of burden among tort-feasors, in abrogation of common-law rule that there can be no contribution among joint tort-feasors. Rio Grande Gas Co. v. Stahmann Farms, Inc., 1969, 457 P.2d 364, 80 N.M. 432.

Purpose of this section providing that right of tort-feaser to secure money judgment for contribution does not accrue until he has either discharged common liability of joint tort-feasors by payment or has paid more than his prorata share thereof is to prevent injured person from . . lieving one joint tort-feasor of obligation of contribution except where he has also released other tort-feasors from prorata share of common liability. Garrison v. Navajo Freight Lines, Inc., 1964, 392 P.2d 580, 74 N. M. 238.

One primary purpose of this Act is to prevent multiplicity of suits. Kapp v. Bob Sullivan Chevrolet Co., 1962, 353 S.W.2d 5, 234 Ark. 395.

The intent of this Act is to permit finders of fact to decide relative responsibility of each tort-feasor and to hold him responsible in that proportion only, and the act does not presume that full recovery can be defeated because one or more of the defendants may be execution proof. Little v. Miles, 1948, 212 S.W.2d 935, 213 Ark. 725.

2. Retroactive effect

This Act affects substantive rights and cannot be construed retroactively. Distefano v. Lamborn, Del.1951, 81 A.2d 675, 7 Terry 195, opinion adhered to on reargument 82 A.2d 300, 7 Terry 195.

The Uniform Contribution Among Tortfeasers Act and Rules of Civil Procedure governing joinder of parties and causes were inapplicable to action commenced in 1967. Robertson v. Bankers & Tel. Emp. Ins. Co., 1968, 160 S.E.2d 115, 1 N.C.App. 122.

Uniform Contribution Among Tort-Feasors Act, in changing general rule that there is no contribution among joint tort-feasors, made substantive change in the law, resulting in deprivation of valuable common-law right to those who might be affected by such sweeping change, and would not and could not constitutionally, be given retroactive application. Massey v. Sullivan County, 1971, 464 S.W.2d 548, 225 Tenn. 132.

This Act is not retroactive and is not applicable to a transaction occurring prior to its enactment. Commercial Cas. Ins. Co. v. Leonard, 1940, 196 S.W.2d 919, 210 Ark. 575.

3. Construction

In absence of some reason expressed or necessarily implied to the contrary in this Act, court would construe the legislative language so as to give it meaning. Hackett v. Hyson, 1940, 48 A.2d 353, 72 R.I. 132, 166 A.L.R. 1096.

The rule that adoption of statutes from other states carries with it construction thereof by courts of such states, unless contrary to adopting state's settled policy, applies by analogy in construction of this Act. Shultz v. Young, 1943, 169 S.W.2d 648, 205 Ark. 533.

The interpretation of this Act by Commissioners on Uniform State Laws is not binding on State Supreme Court in construing state act concerning such contribution, but should be adopted, unless court is clearly convinced that such interpretation is erroneous or contrary to state's settled policy as declared in Supreme Court's opinions. Id.

4. Prior law

Prior to effective date of this Act in New Jersey, there could be no contribution or indemnification between joint tort-feasors and a joint tort-feasor was not liable to defendant and could not be joined as a third-party defendant. Douglas v. Sheridan, 1953, 98 A.2d 632, 26 N.J.Super. 544.

Prior to enactment of this Act in Delaware, no right of contribution existed between joint tort-feasors whether negligence charged was deliberate or willful or passive. Distefano v. Lamborn, Del.1951, 81 A.2d 675, 7 Terry 195, opinion adhered to on reargument 82 A.2d 300, 7 Terry 195.

Note 5

5. Law governing

In diversity actions which were brought in federal district court in Pennsylvania and which arose out of Pennsylvania automobile accident that resulted in injuries to plaintiffs, husband and wife, who were domiciliaries of New Jersey, New Jersey had most significant interest in issue of intraspousal contribution, raised by husband's motion to be dismissed as third-party defendant, and its law must be applied, although, to extent that threat of liability deters carelessness, Pennsylvania arguably had interest in intraspousal contribution. Zurzola v. General Motors Corp., D.C.Pa.1972, 341 F.Supp. 767, affirmed 481 F.2d 1398, 1399, 1400.

Subsequent or secondary action by defendant to obtain contribution or indemnification from third party in Pennsylvania court for loss sustained by judgment depends upon law of Pennsylvania as of date of filing or commencement of the secondary or independent suit. Spry v. Eastern Gas & Fuel Associates, D.C.Pa.1964, 234 F.Supp. 580.

Where action by airlines against airplane manufacturer seeking recovery by way of indemnity of sum representing amounts paid by airlines in settlement of claims for deaths of passengers in airplane crash or for contribution of one-half the total settlement figures based right of recovery on manufacturer's alleged negligence and not upon alleged breach of warranty, and airplane crash occurred in Wisconsin, the law of Wisconsin determined existence, nature and extent of rights, if any, of airlines and corresponding liability of manufacturer, since right of indemnity or contribution is governed by law of place of the tort. Northwest Airlines, Inc. v. Glenn L. Martin Co., D.C.Md.1958, 161 F.Supp. 452.

In action brought in New York, and transferred to Pennsylvania by husband and wife, New York domiciliaries, against defendant Pennsylvania motorists and their automobile liability insurer, a company doing business in Pennsylvania, for personal injuries sustained by the plaintiff wife in collision in Pennsylvania between husband's automobile and defendants' automobile, the law of Pennsylvania would be applied under New York choice of law rules and defendants would be entitled to interplead the husband for purposes of contribution. Ryer v. Harrisburg Kohl Bros., Inc., D.C.Pa.1971, 53 F.R.D. 404.

Contribution is classified in Delaware as a matter of remedy, and hence Delaware law, which does not permit a defendant to assert a claim for contribution against spouse or parent of plaintiff, applied to claim of a Pennsylvania defendant who sought to bring in as a third-party defendant the wife of one plaintiff and the mother of the other plaintiff notwithstanding that Pennsylvania law permits a defendant to assert a claim for contribution against spouse or parent of a plaintiff. Perez v. Short Line Inc. of Pa., Del.Sup.1967, 231 A.2d 642, affirmed 238 A.2d 341.

In action for injuries sustained in an automobile collision occurring in New Jersey, New Jersey law applied and controlled all matters of substance, including the extent of liability and the right to, and measure of, contribution between the defendants. Steger v. Egyud, 1959, 149 A.2d 762, 219 Md. 331.

6. Definitions

Phrase "liable in tort" in Uniform Contribution Among Tortfeasors Act does not require present liability to whoever might be particular plaintiff. New Amsterdam Cas. Co. v. Holmes, C.A.R.I.1970, 435 F.2d 1232.

Phrase "same injury" in Uniform Contribution Among Tortfeasors Act refers to initial injury occasioned by jointly negligent parties and not to something definable in terms of who brings the suit. Id.

Term "liable in tort" as used in definition of joint tort-feasors means any person or persons who have negligently contributed to another's injury and term refers to culpability. Zarrella v. Miller, 1968, 217 A.2d 673, 100 R.I. 545.

Definition of "joint tort-feasors" embraces successive wrongdoers lia-

ble for same harm though one may be also liable for additional damages. Trieschman v. Eaton, 1960, 166 A.2d 892, 224 Md. 111.

Word "liable" in Uniform Contribution Among Tortfeasors Act means "subject to suit" or "liable in court of law or equity." Tamashiro v. De Gama, 1969, 450 P.2d 998, 51 Hawaii 74.

7. Common law

Under common law of Mississippi, there was no contribution between joint tort-feasors. Standard Oil Co. of Ky. v. Illinois Cent. R. Co., C.A. Miss.1969, 421 F.2d 201.

Under common law, where two persons, acting independently or jointly, negligently injure third person or his property and both become liable in tort for such injury, one tort-feasor, making expenditures in discharge of such liability, is not entitled to contribution from other tort-feasor. Baltimore & O. R. Co. v. Alpha Portland Cement Co., C.A.Pa.1955, 218 F. 2d 207.

Under common law, there was no right of contribution between joint tort-feasors. Cage v. New York Cent. R. Co., D.C.Pa.1967, 276 F.Supp. 778, affirmed 380 F.2d 998.

Where relationship between owner of building abutting on sidewalk, on which pedestrian was injured in fall due to accumulation of ice and snow, and borough was one of primary and secondary liability and not one of joint and several liability, this Act did not apply, and common-law principle that release of tort-feasor discharges another tort-feasor who has committed a concurrent or successive tort applied. George v. Brehm, D.C. Pa.1965, 246 F.Supp. 242.

Common law rule against contribution among tortfeasors was in part superseded by adoption of this Act, and those facets of principle established by courts and not covered by Legislature are still obligations of courts to reexamine, repeal or reaffirm. Tino v. Stout, 1967, 229 A.2d 793, 49 N.J. 289.

Where plaintiff injured by truck brought action against truck driver, truck owner, and contractor for which truck was being operated at time of accident, at common law, truck owner and contractor, who were not guilty of wilful or active negligence but liable, if at all, on doctrine of respondeat superior, were joint tort-feasors, each entitled potentially to contribution if driver was the servant of each at the time of accident. Keitz v. National Paving & Contracting Co., 1957, 130 A.2d 229, 214 Md. 479.

At common law and until adoption of this Act, no right of contribution existed among joint tort-feasors. Burmeister v. Youngstrom, 1965, 139 N.W.2d 226, 81 S.D. 578.

Rule of equal contribution between tort-feasors was not a part of common law in existence at time of American Revolution and adopted in territory of Wisconsin; and legislation was not required to alter such rule, which was adopted through judicial process in 1918. Bielski v. Schulze, 1962, 114 N.W.2d 105, 16 Wis.2d 1.

8. Generally

Under Pennsylvania law, contribution among joint tort-feasors in negligence actions is permitted. Duckworth v. Ford Motor Co., C.A.Pa. 1963, 320 F.2d 130, 97 A.L.R.2d 806.

Under Delaware law there is a right to contribution among joint tort-feasors. ICI America, Inc. v. Martin-Marietta Corp., D.C.Del.1974, 368 F.Supp. 1148.

Under Maryland law, right of contribution exists among joint tort-feasors. State of Md. for Use of Gliedman v. Capital Airlines, Inc., D.C. Md.1967, 267 F.Supp. 298.

Pennsylvania law permits contribution among joint tort-feasors. Frankel v. Bu[illegible]'s Excavating Inc., D.C. Pa.1963, 22[illegible] F.Supp. 945.

Generally, right to contribution can arise only against joint tort-feasor who is himself directly liable to the injured party. LaChance v. Service Trucking Co., D.C.Md.1963, 215 F. Supp. 162.

Note 8

Under Pennsylvania law, contribution is permitted between joint tort-feasors even when the injured party has no cause of action against one of them on the theory that as between two tort-feasors contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done. Panichella v. Pennsylvania R. Co., D.C.Pa.1958, 167 F.Supp. 345, reversed on other grounds 268 F.2d 72, certiorari denied 80 S.Ct. 370, 361 U.S. 932, 4 L.Ed.2d 353.

The right of contribution accorded by the Pennsylvania statute to one joint tort-feasor against the other creates a cause of action of a different nature from tort action which is the subject of the original suit. Martin v. U. S., D.C.Pa.1958, 162 F. Supp. 441.

Contribution is permitted between joint tort-feasors under 12 P.S. § 2083. Keller Crescent Printing & Engraving Co. v. Rosen, D.C.Pa.1955, 135 F.Supp. 22.

Where there is no negligence, there can be no right of contribution. Standhardt v. Flintkote Co., 1973, 508 P.2d 1283, 84 N.M. 796.

9. Nature of right

Contribution does not create direct liability in tort, each toward the other, between two tort-feasors; rather it is a right based on equitable fairness and that right, to have the other tort-feasor contribute to his outlay, arises in whichever tort-feasor satisfies the loss. Newport Air Park, Inc. v. U. S., C.A.R.I.1969, 419 F.2d 342.

Under law of Arkansas, contribution is founded on principles of equity and such relief will be granted only where equities are equal. U. S. Fidelity & Guaranty Co. v. Aetna Cas. & Sur. Co., C.A.Ark.1969, 418 F. 2d 953.

"Contribution" does not arise out of contract but is an obligation imposed by law, and rests on the principle that when the parties stand in aequali jure, the law requires equality, which is equity, and that all should contribute equally to the discharge of the common liability. Thomas v. Malco Refineries, C.A.N. M.1954, 214 F.2d 884.

Uniform Contribution Among Joint Tort-feasors Act rests on equitable principles and does not contemplate the sharing of responsibility among persons not in pari delicto and presupposes that the joint tort-feasors it deals with are in aequali juri. Rhoads v. Ford Motor Co., D.C.Pa. 1974, 374 F.Supp. 1317.

The right to contribution accorded by Pennsylvania statutes to one joint tort-feasor against the other creates a cause of action of a different nature from the tort action which was the subject of the original suit or claim; the right of contribution in Pennsylvania is a dual one: a right sounding in equity and a right at law sounding in quasi contract. W. D. Rubright Co. v. International Harvester Co., D.C.Pa.1973, 358 F. Supp. 1388.

The right of contribution arises from the application of equitable rules in that where one joint tort-feasor pays more than his just share he has an equitable right to proceed against the other joint tort-feasor for contribution. Albert v. Dietz, D.C. Hawaii 1968, 283 F.Supp. 854.

While the right of contribution by joint tort-feasors does arise at time of concurring independent acts, nevertheless until one of those joint tort-feasors pays more than his proportionate share of the underlying claim, the right remains contingent and inchoate and it is not until a tort-feasor pays more than his proportionate share that the right ripens into a cause of action. Id.

Under Uniform Contribution Among Joint Tortfeasors Act, right of contribution is a derivative right and not a new cause of action. Rowe v. John C. Motter Printing Press Company, D.C.R.I.1967, 273 F. Supp. 363.

Right to contribution is statutory creation resting on principle that, when parties stand in aequali jure, the law requires all to contribute

equally to discharge of the common liability. Southern Maryland Oil Co. v. Texas Co., D.C.Md.1962, 203 F. Supp. 449.

Right of contribution is a derivative right and not a new cause of action. Cacchillo v. H. Leach Machinery Co., 1973, 305 A.2d 541, —— R.I. ——.

Joint Tortfeasor Contribution Act was intended to relieve tortfeasors of injustice as among themselves and was not designed to prevent full recovery by plaintiff or intended to deny plaintiff full and complete satisfaction; Act gives contribution rights to defendant only after he has paid more than his pro rata share and does not require plaintiff to pursue each defendant only for his pro rata share, and plaintiff may still sue either defendant separately for entire amount of claim or sue defendants jointly and levy execution of entire amount against either alone or secure fractions thereof against both. Tino v. Stout, 1967, 229 A.2d 793, 49 N.J. 289.

Application of doctrine of contribution involves procedural or remedial law. Lutz v. Boas, 1962, 176 A.2d 853, 40 Del.Ch. 130.

Right to contribution is an equitable right based on a common liability to plaintiff. Brown v. Dickey, 1959, 155 A.2d 836, 397 Pa. 454.

Right to contribution remains a separate right of person asserting it, no matter how dependent it may be on other liability. Brown v. Eakin, 1957, 137 A.2d 385, 11 Terry 574.

Doctrine of contribution is equitable doctrine, based on natural justice, and was well-recognized in suretyship and other areas of law before it was adapted to negligence. Bielski v. Schulze, 1962, 114 N.W.2d 105, 16 Wis.2d 1.

There is no right to contribution among joint tort-feasors, in absence of statute. Brown v. Murdy, 1960, 102 N.W.2d 664, 78 S.D. 367.

Right to contribution by a primary wrongdoer against a primary wrongdoer granted by Pennsylvania statute is a substantive legal right which is unaffected by purely procedural statute or rule enacted or promulgated for convenience and to avoid multiplicity of suits. Murphy v. Barron, 1965, 258 N.Y.S.2d 139, 45 Misc.2d 905.

A defendant's right pursuant to Ark.Stats., § 34–1007, to seek contribution from a joint tort-feasor by making him a party is permissive and does not exclude right to seek contribution in a separate suit. Rudolph v. Mundy, 1956, 288 S.W.2d 602, 226 Ark. 95.

10. Common liability

Under South Dakota law the right to contribution is determined by whether there is joint or several liability, rather than by the presence of joint or concurring negligence, so that there can be no right to contribution unless the injured party has a possible remedy against both tort-feasors. Highway Const. Co. v. Moses, C.A.S.D.1973, 483 F.2d 812.

Indispensible to joint tort-feasor relationship is a common liability, either joint or several, that two or more parties have to the person injured and without this dual liability no right of contribution can exist under applicable Delaware law. ICI America, Inc. v. Martin-Marietta Corp., D.C.Del.1974, 368 F.Supp. 1148.

Under Delaware law, there can be no contribution unless there is common liability to injured person and unless injured person has possible remedy against two or more persons. Walker v. Patterson, D.C.Del.1971, 325 F.Supp. 1024.

Defendant in personal injury case could not proceed for contribution against operator of automobile in which plaintiff passenger rode at time of accident where plaintiff and third-party defendant were coemployees, inasmuch as plaintiff could not under Delaware statute bring direct negligence against coemployee, notwithstanding that plaintiff had not applied for or received workmen's compensation. Id.

Provisions of Uniform Contribution Among Joint Tortfeasors Act are

only applicable where there is a common liability to an injured person, and this common liability may be either joint or several, but there can be no contribution unless the injured person has a right of action in tort against both the parties seeking contribution and the party from whom contribution is sought. Rowe v. John C. Motter Printing Press Company D.C.R.I.1967, 273 F.Supp. 363.

In view of definition of "joint tortfeasors", before there can be any kind of contribution it must appear that at least originally the person seeking contribution and person from whom contribution is sought must have been under a common legal liability to injured party, so that there can be no contribution where injured party had no cause of action originally against party sought to be charged. Cox v. Maddux, D.C.Ark. 1960, 255 F.Supp. 517, reversed on other grounds 382 F.2d 119.

This Act is only applicable where there is a common liability to an injured person in tort, which liability may be joint or several, but there can be no contribution where injured person has no right of action against the third party defendant; the right of contribution being a derivative right and not a new cause of action. Oahu Ry. & Land Co. v. U. S., D.C. Hawaii 1947, 73 F.Supp. 707.

Under Delaware law, issue of contribution is contingent on a determination of whether defendants share a common liability to plaintiffs arising out of a single injury, and are, therefore, joint tort-feasors. Hood v. McConemy, D.C.Del.1971, 53 F.R.D. 435.

Under statute establishing right of contribution among joint tort-feasors, liability must be common to warrant contribution. Carchillo v. H. Leach Machinery Co., 1973, 305 A.2d 541, — R.I. —.

There can be no contribution unless injured party has a right of action in tort against both parties seeking contribution and party from whom contribution is sought. Id.

Action for contribution under Joint Tortfeasors Act will lie only when proposed contributor shares with defendant a common liability to plaintiff. Mumford v. Robinson, Del.1967, 231 A.2d 477.

Motorist sued by passenger in other automobile could not recover against host driver for contribution as joint tort-feasor unless host driver was liable to passenger. Id.

This Act is applicable only to a situation where there is a common liability to an injured person in tort, and there can be no contribution where the injured person has no right of action against the third-party defendant. Eanis v. Donovan, 1960, 161 A.2d 698, 222 Md. 536.

One tort-feasor may recover contribution even if, for one reason or another, plaintiff who has obtained judgment against both is precluded from enforcing liability thereunder against the other. Puller v. Puller, 1954, 110 A.2d 175, 380 Pa. 219.

This Act has no application unless there is a common liability to the injured party which liability may be joint or several and there is no right to contribution unless the injured person has a possible remedy against two or more persons. Ferguson v. Davis, 1954, 102 A.2d 707, 9 Terry 299.

Joint or several liability, rather than joint or concurring negligence determines right to contribution under this Act entitling joint tort-feasor to money judgment for contribution after he has by payment, discharged "common liability," or has paid more than his pro rata share thereof. Lutz v. Boltz, 1954, 100 A. 2d 647, 9 Terry 197.

Under this Act a joint judgment is not a necessary requisite to the right to contribution. Douglas v. Sheridan, 1953, 98 A.2d 632, 26 N.J.Super. 544.

Right to contribution under this Act depends upon existence of joint or several liability and not upon joint or concurrent negligence and there is no right to contribution unless injured party has a possible remedy against two or more persons.

Burmeister v. Youngstrom, 1965, 139 N.W.2d 226, 81 S.D. 578.

This Act is applicable only where joint tort-feasors share a common liability. Beal by Boutwright v. Southern Union Gas Co., 1956, 304 P.2d 566, 62 N.M. 38.

Tort-feasors, acting independently, are jointly liable to a plaintiff, and liable to each other in contribution, only when the independent acts of each cause or contribute to the same injury obtained by plaintiff. Applegate v. Riggall, 1958, 318 S.W.2d 596, 229 Ark. 773.

This Act contemplates right of contribution only where there is a common liability to an injured person in tort or to persons who are liable in tort for same injury to person or property. C & L Rural Elec. Coop. v. Kincaid, 1953, 256 S.W.2d 337, 221 Ark. 450.

11. Accrual of right

12 P.S. § 2082 et seq., gives substantive rights when it grants right of contribution among tortfeasors and when it makes payment of more than the pro rata share of the common liability a condition precedent to the accrual of the right to a money judgment for contribution. Smith v. Whitmore, C.A.Pa.1959, 270 F.2d 741.

While the right of contribution by joint tort-feasors does arise at time of concurring independent acts, nevertheless until one of those joint tort-feasors pays more than his proportionate share of the underlying claim, the right remains contingent and inchoate, and it is not until a tort-feasor pays more than his proportionate share that the right ripens into a cause of action. Albert v. Dietz, D.C.Hawaii 1968, 283 F.Supp. 854.

Under Maryland law, right both to indemnification and to contribution, whether based on contract or tort, accrue at time of payment, not before. Southern Maryland Oil Co. v. Texas Co., D.C.Md.1962, 203 F.Supp. 449.

Contribution claimant must show compliance with statutory requirements of Joint Tortfeasors Contribution Act. Miraglia v. Miraglia, 1969, 255 A.2d 762, 106 N.J.Super. 266.

Prerequisite to contribution is demonstration that person seeking to enforce contribution and one from whom contribution is sought are joint tort-feasors, and right of contribution accrues when injured third person has brought action and recovers judgment against one or more of joint tort-feasors and latter has paid judgment in whole or in part. Id.

Ordinarily, a right to contribution does not accrue before payment. Associated Transport v. Bonoumo, 1948, 62 A.2d 281, 191 Md. 442.

Under Pennsylvania law, substantive right to sue third-party defendant for contribution accrues when complaint in principal action is served upon defendants. Murphy v. Barron, 1965, 258 N.Y.S.2d 139, 45 Misc.2d 905.

12. Wanton or willful negligence

The equitable principle of contribution should not be used to transfer part of the obligation to pay compensation from a party that has acted quasi-intentionally so as to do a wanton and wilful act, to a party that was merely negligent. W. D. Rubright Co. v. International Harvester Co., D.C.Pa.1973, 358 F.Supp. 1388.

Under Pennsylvania law, railroad which was found guilty of wanton and willful negligence in automobile-train collision could not enforce right of contribution against administrator of driver of automobile who was found to have been contributorily negligent. Cage v. New York Cent. R. Co., D.C.Pa.1967, 276 F.Supp. 778, affirmed 386 F.2d 998.

Under Pennsylvania law, a tort-feasor found guilty of wanton and willful misconduct cannot enforce right of contribution against one specifically found not guilty of wanton and willful misconduct in same accident. Id.

Host driver's apparently mistaken and confused act of driving wrong way on one-way street during snowstorm was not gross negligence and, therefore, host driver was not liable

Note 12

to guest for injuries sustained in collision and owner and driver of truck involved in collision were not entitled to contribution from the host driver. O'Mara v. H. P. Hood & Sons, Inc., 1971, 268 N.E.2d 685, 359 Mass. 235.

Owner and driver of truck being sued for wrongful death of gratuitous guest passenger in automobile which collided with truck could not recover on third-party complaint against driver of automobile all or any part of damages awarded for wrongful death, notwithstanding this Act, in absence of either allegation or proof that automobile driver was guilty of wilful and wanton misconduct within automobile guest statute. Burmeister v. Youngstrom, 1965, 139 N.W.2d 226, 81 S.D. 578.

Primary purpose of R.L.H.1955, § 246–10 et seq., is that most culpable party should sustain that share of loss which is commensurate with his degree of fault and inequity of equal contribution among joint tort-feasors has been removed in cases where gross negligence and foolhardiness of one party has joined with act of negligence of second party to produce injuries complained of. Mitchell v. Branch, 1961, 363 P.2d 969, 45 Hawaii 128.

13. Insurers

The Uniform Contribution Among Tortfeasors Act in no way affects right of successful plaintiff to recover entire amount of verdict, interest and costs from any one of joint tortfeasors, and accordingly the liability insurer of only one of them was required to pay the compensable costs in full. Hafer v. Schauer, 1968, 239 A.2d 785, 429 Pa. 289.

Uniform Contribution Among Tort-Feasors Act applies to joint tort-feasors who are joint adventurers; accordingly appellant, as an excess liability insurer, was entitled to contribution from appellee, another excess insurer, in proportion to the relative degrees of fault of their respective insureds. U. S. Fire Ins. Co. v. State Farm Fire & Cas. Co., 1960, 441 S.W.2d 787, 246 Ark. 1269.

Prior to enactment of this Act in 1941, insurer paid judgment against insured was not entitled to contribution from joint tort-feasor against whom judgment was jointly rendered, notwithstanding that joint tort-feasor was not a purposeful tort-feasor. Commercial Cas. Ins. Co. v. Leonard, 1946, 196 S.W.2d 919, 210 Ark. 575.

14. Injured person, rights of

Under Pennsylvania law, strict products liability is assigned to the field of torts so that consideration of contributory negligence on part of injured user as a bar to recovery and his concurrent negligence as a basis of liability under Uniform Contribution Among Joint Tortfeasors Act is required. Rhoads v. Ford Motor Co., D.C.Pa.1974, 374 F.Supp. 1317.

This Act was intended to relieve tortfeasors of injustice as among themselves and was not designed to prevent full recovery by plaintiff or intended to deny plaintiff full and complete satisfaction; Act gives contribution rights to defendant only after he has paid more than his pro rata share and does not require plaintiff to pursue each defendant only for his pro rata share, and plaintiff may still sue either defendant separately for entire amount of claim or sue defendants jointly and levy execution of entire amount against either alone or secure fractions thereof against both. Tino v. Stout, 1967, 229 A.2d 793, 49 N.J.Super. 289.

Where plaintiffs, who had recovered judgment against joint defendants, gave first defendant warrant of partial satisfaction upon receipt of more than half of judgment, without full release, and gave second defendants warrant of partial satisfaction, upon partial payment of balance, which was in full satisfaction as to second defendants but which expressly operated only to reduce judgment as against first defendant, first defendant was entitled only to pro tanto rather than pro rata reduction, plaintiffs could pursue first defendant for balance, and first defendant would have contribution rights against second defendant. Id.

In action against two persons for assault, plaintiff's recovery was not limited to amount of smallest of two separate verdicts, returned by jury against each defendant, as jury had power to apportion damages between defendants. Shultz v. Young, 1943, 160 S.W.2d 648, 205 Ark. 533.

15. Co-conspirators

Under this Act, co-conspirators are liable to one another for contribution as joint tort-feasors. Webster Motor Car Co. v. Zell Motor Car Co., C.A. Md.1957, 234 F.2d 616.

16. Joint obligors

One joint obligor on note may claim contribution from another such obligor for having discharged their mutual obligation. Jackson v. Cupples, 1965, 212 A.2d 273, 239 Md. 637.

Where there are joint obligors and one of the obligors discharges debt, that obligor has right in equity to proceed against other obligors to enforce their proportionate share of contribution. Goldberg v. Altman, 1950, 154 A.2d 279, 190 Pa.Super. 495.

17. Employer and employee relationship

Where under Rhode Island Workmen's Compensation Act plaintiff as personal representative of employee had no right of action in tort for damages for death against former employer, employer was not "joint tort-feasor" within Uniform Contribution Among Joint Tort-feasors Act, and hence employer could not be liable for contribution to a third-person tort-feasor although employer's negligence may have concurred in causing the death. Rowe v. John C. Motter Printing Press Company, D.C.R.I. 1967, 273 F.Supp. 363.

If employee does not have a right of action against employer, employer is not a joint tort-feasor against whom contribution can be claimed under Contribution Among Joint Tort-Feasors Act. Cacchillo v. H. Leach Machinery Co., 1973, 305 A.2d 541, — R.I. —.

A master, who owned motor vehicle which caused injuries when negligently operated by servant, and servant were "joint tort-feasors" within this Act. Smith v. Raparot, 1967, 225 A.2d 666, 101 R.I. 565.

Generally, employer whose concurring negligence contributes to his employee's injury cannot be held liable for contribution as a joint tort-feasor, the statutory remedy being exclusive. Jack Morgan Const. Co., Inc. v. Larkan, 1973, 496 S.W.2d 431, 254 Ark. 838.

18. Marital relationship

Under Pennsylvania law, third party who is sued by one spouse for personal injuries may recover contribution or indemnity against other spouse, even though latter is immune from direct suit by plaintiff spouse. Fisher v. U. S., D.C.Pa.1969, 299 F. Supp. 1.

Intrafamily immunity doctrine would prevent husband and minor children from obtaining a judgment against wife, but she would nevertheless remain liable for contribution if she were to be found a joint tort-feasor. Restifo v. McDonald, 1967, 230 A.2d 199, 426 Pa. 5, 34 A.L.R.3d 1365.

Husband, sued by automobile owner for contribution as joint tortfeasor in action wherein wife, as passenger in husband's automobile, recovered from automobile owner for injuries sustained as result of collision, was joint tortfeasor within meaning of this Act and was liable in action for contribution although he was immune from liability to his wife in any action by her as result of automobile collision. Zarrella v. Miller, 1966, 217 A.2d 673, 100 R.I. 545.

Defendant, who had only a derivative right, if any, in actions commenced against him by husband as administrator of his wife's estate, could not maintain third-party claims against husband, who was driving automobile in which decedent was riding at time it collided with defendant's automobile, on theory that husband was or might have been liable to defendant for all or part of such claims, in view of fact that at time of alleged tortious act of husband he and decedent were married, and

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therefore decedent could not have maintained an action against her husband on account of his alleged negligent operation of his automobile. Ennis v. Donovan, 1960, 161 A.2d 698, 222 Md. 536.

Where automobile driver's wife and daughter recovered verdicts against him and railroad company as joint tort-feasors, and railroad company paid verdicts in full, it could not recover from automobile driver half amount it had paid to his wife and daughter. Puller v. Puller, 1954, 110 A.2d 175, 380 Pa. 219.

Contribution cannot be obtained from a wife's husband, as a joint tort-feasor, under 1953 Comp. § 24–11 et seq. Rodgers v. Galindo, 1960, 360 P.2d 400, 68 N.M. 215.

Defendant could not obtain contribution from plaintiff's husband, who was operating automobile in which plaintiff was riding, as a joint tort-feasor, in wife's action for injuries sustained in collision with defendant's automobile. Id.

Where wife-owner recovered for automobile damage and husband-driver recovered for personal injuries in action in which jury found husband guilty of 45 per cent of negligence and defendants' driver guilty of 55 per cent, defendants, upon discharging judgment in favor of wife-owner would be entitled to file motion for judgment for contribution from husband-motorist under Ark.Stats. § 34–1002. Wymer v. Dedman, 1961, 350 S.W.2d 160, 233 Ark. 854.

19. Motor vehicle accidents

In order for tractor-trailer owner, being sued by automobile passenger, to obtain contribution from automobile driver, it had to appear not only that tractor-trailer owner and automobile driver were concurrently negligent, but that the negligence of each was proximate cause of collision between automobile and tractor-trailer. Stanchis v. Hess Oil & Chemical Co., D.C.Pa.1967, 292 F. Supp. 22, affirmed 403 F.2d 24.

Although both driver of naval truck and preceding motorist whose automobile was struck by truck, were negligent, government would not be liable to automobile driver by way of contribution for any damages he might have to pay to injured occupant of naval truck. Maddux v. Cox, C.A.Ark.1967, 382 F.2d 119.

A manufacturer of automobile was liable for injuries to purchaser because of defective steering assembly, was not entitled to contribution from dealer for amount of judgment rendered against manufacturer on theory that jam nut which caused the defect was properly secured when automobile left manufacturer's factory, and that dealer loosened the jam nut either in course of making automobile ready for delivery to purchaser or while attempting to make adjustment during course of 1,000 mile inspection under evidence. Duckworth v. Ford Motor Co., D.C.Pa. 1962, 211 F.Supp. 888, affirmed in part, remanded, reversed in part on other grounds 320 F.2d 130, 97 A.L.R. 806.

Where automobile and tractor-trailer collided on Arkansas highway and each driver was negligent to extent of 50 per cent of total negligence, the driver of automobile and the owner of the tractor-trailer and its driver, who was acting in scope of his employment at time of collision, were jointly liable to owner of parked tractor which was struck by tractor-trailer, and were jointly liable to absent owner of automobile, and on payment by driver and owner of tractor-trailer of the entire judgment in favor of the owner of the parked tractor and owner of automobile, the driver and owner of the tractor-trailer would be entitled to contribution from driver of automobile under Ark.Stats. § 34–1007(3). Sunday v. Burk, D.C.Ark.1959, 172 F.Supp. 722.

Under 12 P.S. §§ 2082-2089, the United States was entitled to contribution from tractor-trailer driver and owners of tractor and trailer for half of amount of damages awarded plaintiffs by judgment against United States in action under Federal Tort

Claims Act, 28 U.S.C.A. § 2671 et seq., for damages to plaintiffs' personalty in leased house rammed into by tractor-trailer after colliding with post office bus and swerving from road. Russell v. U. S., D.C.Pa.1953, 113 F.Supp. 353.

Under 12 P.S. §§ 2082-2089, the United States is entitled to contribution from tractor-trailer driver and owners of tractor and trailer for half of amount of damages awarded plaintiffs in action under Federal Tort Claims Act, 28 U.S.C.A. § 2671 et seq., for damage to plaintiffs' house as result of being struck by tractor-trailer when it swerved from road after colliding with post office bus as a proximate result of such driver's negligence concurring with that of bus driver. Showers v. U. S., D.C. Pa.1953, 113 F.Supp. 350.

Jury finding that both host driver and other driver in automobile collision were negligent was binding and governed other driver's right to contribution from host driver; and thus court erred when, viewing directed verdict at close of passenger's case for host driver as relieving him of any further participation in the case or defense to claims, it denied motion of other driver for contribution. Holloway v. Wright, 1974, 320 A.2d 572, 21 Md.App. 615.

In absence of any evidence that subcontractor which contracted with bridge contractor to paint bridge did anything which contributed to collision which occurred when eastbound automobile struck westbound automobile which contractor's employees had diverted into eastbound lane without warning eastbound motorist, contractor was not entitled to contribution from subcontractor under Uniform Contribution Among Tortfeasors Act in regard to judgment rendered against contractor in favor of eastbound motorist. Gordon v. Campanella Corp., 1973, 311 A.2d 844, — R.I. —.

Defendant motorist would be entitled to contribution from father of plaintiff minor unemancipated children for injuries sustained by the children in collision between defendant motorist's automobile and father's automobile as the result of the father's alleged negligent operation of automobile. France v. A. P. A. Transport Corp., 1970, 267 A.2d 490, 56 N.J. 500.

Defendant motorist would be entitled to contribution from husband for all sums found to be due to estate of deceased wife in death and survival actions arising out of automobile accident in which wife was killed while riding as passenger in husband's automobile if husband was negligent in operation of automobile. Id.

When jury, in personal injury actions by driver of leased truck against lessor thereof and another defendant which had allegedly directed parking of vehicle into which leased truck crashed, returned verdict against both defendants, defendant truck lessor had right to seek relief under Joint Tortfeasors Contribution Law, and when trial judge subsequently granted other defendant's motion for judgment notwithstanding verdict, truck lessor became aggrieved party with right of appeal. Ettin v. Ava Truck Leasing, Inc., 1969, 251 A.2d 278, 53 N.J. 463.

Defendant motorist who collided with automobile driven by joint tortfeasor resulting in death of passenger in such automobile was not precluded from seeking contribution from joint tort-feasor on ground that defendant's evidence negatived finding that the two could have been jointly negligent, since defendant's action of swerving into left lane, even though blinded by joint tort-feasor's high beams, could be deemed negligence for failure to go into the wide right shoulder of road with which the evidence showed defendant familiar. Harger v. Caputo, 1966, 218 A.2d 108, 420 Pa. 528.

Where automobile collision is result of negligence of both plaintiff and defendant automobile drivers, defendant automobile driver had a right to seek contribution from plaintiff automobile driver as a joint tort feasor in respect to the total damage which plaintiff and her joint owner recover for the injury to their

automobile. Maloney v. Rodgers, 1957, 135 A.2d 88, 184 Pa.Super. 342.

In action for damages sustained in an automobile collision, additional defendants against whom verdict was rendered had the right to make the original defendants share their liability to the plaintiff for his damages if those defendants were in fact also guilty of negligence which helped to cause the accident. Ratcliff v. Myers, 1955, 113 A.2d 558, 382 Pa. 196.

Where guests, injured in automobile collision, and host brought action against alleged tort-feasor, alleged tort-feasor could not under 10 Del.C. § 6302, entitling joint tort-feasor to money judgment for contribution where he has by payment discharged "common liability" or has paid more than his pro rata share thereof, maintain counterclaim for contribution against host on theory that host contributed to guests' injury, in absence of allegation that host's negligent conduct was willful or wanton, in view of automobile guest statute. Lutz v. Boltz, 1954, 100 A.2d 6[illegible] Del. 197, 9 Terry 197.

In action by streetcar company against taxicab owner, as alleged joint tort-feasor, for contribution after company had paid representative and widow of deceased taxicab passenger and other passenger for death and injuries resulting when streetcar struck taxicab which had been stopped on the streetcar tracks, evidence was sufficient to establish negligence on part of owner's driver, which was sufficient to entitle company to contribution. O'Keefe v. Baltimore Transit Co., 1953, 94 A.2d 26, 201 Md. 345.

Where judgments had been obtained against trucking company for damages from accident in which tractor-trailer hit curb of grass plot in center of street, city was liable by way of contribution for half of damages paid by company, if city was guilty of any negligence directly contributing to accident. East Coast Freight Lines v. Mayor and City Council of Baltimore, 1948, 58 A.2d 290, 190 Md. 256, 2 A.L.R.2d 386.

Under statute, proof of host driver's gross negligence was necessary to entitle truck owner and truck driver against whom automobile guest brought action for injuries sustained in collision between automobile and truck to contribution. O'Mara v. H. P. Hood & Sons, Inc., 1971, 268 N.E.2d 685, 359 Mass. 235.

Under theory of left-turning motorist that other motorists were engaged in a joint racing venture, there could have been no liability running from one of the drag racing motorists to the other, and thus from one of the drag racing motorists to the left-turning motorist and drag racing motorist was entitled to directed verdict on left-turning motorist's claim for contribution in action brought by other drag racing motorist. Burrington v. Heine, 1974, 215 N.W.2d 119, — S.D. —.

Where parents sued for injuries sustained in automobile accident between parents' automobile which was driven by their minor unemancipated son and vehicle driven by defendant and defendant joined minor as third-party defendant, minor was liable in tort to his parents, was subject to contribution to his joint tort-feasor, and could be made third-party defendant for that purpose. Tamashiro v. DeGama, 1969, 450 P.2d 998, 57 Hawaii 74.

On record presented, in action for injuries sustained by passenger in following vehicle which swerved off highway to avoid colliding with preceding vehicle engaged in making U-turn, it was not error to hold that preceding motorist's acts had contributed to accident in amount of 65%, and to require contribution accordingly. Mitchell v. Branch, 1961, 363 P.2d 969, 45 Hawaii 128.

That following motorist negligently misjudged his distance when he swerved off highway in effort to avoid collision did not preclude preceding motorist's negligence, in making U-turn, from constituting proximate cause of injuries sustained by passenger in following automobile or absolve preceding motorist from liability to contribute toward satisfac-

tion of claim for injuries sustained by such p ssenger. Id.

Jury finding, in automobile accident case against plaintiff's insureds and defendant from whom insurer sought contribution for one-half of judgment satisfied by insurer, that injuries and damages did not result from any negligence of defendant precluded insurer from obtaining contribution, and jury finding in the automobile accident case on defendant's cross claim against plaintiff's insureds that defendant was guilty of contributory negligence was not tantamount to determination of joint tort liability. Iowa Nat. Mut. Ins. Co. v. Surratt, 1973, 200 S.E.2d 220, 19 N.C.App. 745.

Fact that representatives of deceased motorist and guest prevailed against truck driver and his employer in action against another motorist and truck driver and his employer did not, of itself, entitle the other motorist, who had filed cross complaint for contribution and personal injuries, to favorable verdict on cross complaint. Ellsworth Bros. Truck Lines v. Mayes, 1960, 338 S.W.2d 724, 246 Ark. 441.

Where there was sufficient evidence before jury in action by truck driver for damages of $554.93 against three motorists who forced truck into ditch, to permit jury to appraise the conduct of each motorist and to undertake, as fairly as practicable, to fix the responsibility of each motorist, jury had right to find that two motorists were liable for $200 each and one motorist for $154.93, though there was no instruction authorizing apportionment of damages, and though two of the motorists were allegedly execution proof. Little v. Miles, 1948, 212 S.W.2d 935, 213 Ark. 725.

20. Liability in general

Mississippi statute on contribution between tort-feasors first provides that each defendant is to share equally, and then specifies how to count those defendants who are to share; proviso places ceiling on liability of principal or employer so that he, or his insurer, is not exposed to risk of contributing twice, once for his agent's wrong and once for his own responsibility imposed via respondeat superior. Standard Oil Co. of Ky. v. Illinois Cent. R. Co., C.A.Miss.1970, 421 F.2d 201.

To the extent a shipowner proves that payments made in satisfaction of a maintenance and cure obligation have reduced or eliminated a concurrent claim which a seaman, but for prohibition against double recovery, could assert against another party absent a release, shipowner is entitled to reimbursement from other party in such amount as will cause the ultimate liability to be placed: (1) by means of contribution, equally upon all shipowners with coextensive maintenance and cure obligations; or (2) by means of exoneration, fully upon the party with a primary obligation in damages arising out of negligence, unseaworthiness, or other violation of duty. Gooden v. Sinclair Refining Co., C.A.Pa.1967, 378 F.2d 570.

Where defendants were sued in antitrust actions as theater operations presenting legitimate attractions and controlling legitimate theater business of city, and they were charged with preventing plaintiff's theater from presenting legitimate attractions to injury of plaintiff, and third-party complaint alleged that third-party defendants conspired to see that one of the third-party defendants obtained first-run movies and that plaintiff did not, and that, as a result, third-party defendants were liable in treble damages under 15 U.S.C.A. §§ 1, 2, defendants and third-party defendants were not joint tort-feasors, and defendants were not entitled to contribution from third-party defendants under 12 P.S. § 2082 et seq., and District Court properly granted plaintiff's motion to vacate ex parte order permitting joinder of third-party defendants and properly dismissed third-party complaint. Goldlawr, Inc. v. Shubert, C.A.Pa. 1960, 276 F.2d 614.

In action for injuries received while working on a scaffold as result of negligence of defendant in erecting

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it, where defendant moved to bring in a Rhode Island corporation as a third-party defendant for contribution on ground of negligence of the third-party defendant, refusal to permit the impleaded defendant to be held to answer a contingent claim for contribution on the ground that the third-party plaintiff had not yet discharged any common liability required by Gen.Laws 1956, § 10–6–1 et seq., as condition to claiming contribution was error, where the district court was not being asked to enter a money judgment against the impleaded defendant at that time. D'Onofrio Const. Co. v. Recon Co., C.A.R.I.1958, 255 F.2d 904.

Under allegation of third-party complaint by material supplier against contractor that contractor negligently performed its duties and such negligence was the cause of damage, if any, which building owner sustained would negate any liability on part of material supplier and destroy any basis for claim that material supplier and contractor were jointly or severally liable for the alleged injury to building owner, and on this postulate claim by material supplier for contribution from contractor would not lie under applicable Delaware law. ICI America, Inc. v. Martin-Marietta Corp., D.C.Del.1974, 368 F.Supp. 1148.

Duty which contractor owed to building owner as alleged in material supplier's third-party complaint against contractor did not defeat material supplier's right of contribution but was essential to it, and if both material supplier and contractor each breached duties owed to building owner each became liable to building owner and a right of contribution arose. Id.

Where negligence of "master" of motorboat in permitting plaintiff to ride elsewhere than in the rear seat of the boat was passive while the negligence of the operator of the boat was active, the operator was not entitled to any indemnity or contribution from "master" for jury award to passenger injured in motorboat accident on the Arkansas river. St. Hilaire Moye v. Henderson, D.C.Ark.1973, 364 F.Supp. 1280, affirmed 486 F.2d 973.

The Pennsylvania Uniform Contribution Among Joint Tortfeasors Act permits contribution between joint tort-feasors when one is responsible under strict liability rule in product defect case and the other is responsible for an act of negligence. W. D. Rubright Co. v. International Harvester Co., D.C.Pa.1973, 358 F.Supp. 1388.

There exists a right of contribution in favor of one liable to plaintiff under strict liability theory from party whose liability is based on negligence or want of due care. Walters v. Hiab Hydraulics, Inc., D.C.Pa.1973, 356 F.Supp. 1000.

Under Pennsylvania statute exempting employee from any liability for injury to fellow-employee, unless intentionally inflicted, employee is relieved from liability for contribution, even though employer, whose liability might be vicarious because of master-servant relationship, remains liable for contribution to extent of his liability under the Workmen's Compensation Act. Dodick v. Norfolk & W. Ry. Co., D.C.Pa.1971, 320 F.Supp. 1154.

Where certain riparian landowners were guilty of fault in causing oil to coat a navigable river, and a shipowner was guilty of fault under the Jones Act, 46 U.S.C.A. § 688, in placing a lighted lantern too near to the water, and such conjunction of fault caused the death of one of shipowner's seamen, and resulted in shipowner's liability under the Jones Act for the wrongful death of such seaman, and the shipowner and the landowners were in fact and in legal contemplation total strangers, under such circumstances, there was no right of contribution between the parties, and neither could an indemnitor's liability be imposed on the landowners after shipowner paid damages for the injury caused by the active and concurring wrongs of shipowner and landowners. American Dredging Co. v. Gulf Oil Corp., D.C.Pa.1959, 175 F.Supp. 882, affirmed 282 F.2d 73, certiorari denied 81 S.Ct. 460, 364 U.S. 942, 5 L.Ed.2d 373, rehearing denied 81 S.Ct. 746, 365 U.S. 838, 5 L.Ed.2d 748.

Where third-party action against city was predicated upon an act of negligence subsequent to and wholly separate and distinct from that which was the basis of the original action, in that after describing the act of city policeman, occurring in placing plaintiff in an ambulance, the third-party alleged that damages resulting to the plaintiffs were caused solely by the negligence of third-party defendant's agencies, through the improper treatment of the plaintiff, allegations were insufficient to establish a joint tort authorizing contribution. Martin v. U. S., D.C.Pa.1958, 162 F.Supp. 441.

There is no right of contribution between a party whose liability is imposed under strict liability of manufacturer or seller of product which at time of sale contains a dangerous defect and a party whose liability is based on negligence or want of due care. Fenton v. McCrory Corp., D.C. Pa.1969, 47 F.R.D. 260.

Telephone company whose employee was electrocuted while installing cable at university was not liable to university for contribution, as joint tort-feasor, for any amount recovered against university in action brought by widow of deceased employee in that, in order to enforce contribution, joint tort-feasors must be liable to same person asserting the claim. Diamond State Tel. Co. v. University of Del., Del.1970, 269 A.2d 52.

Deed provision making conveyance subject to rights of adjoining owners in party walls gave purchaser constructive, if not actual, notice of existence of wall; and vendors who had not created alleged dangerous condition or nuisance would not be liable for contribution or indemnity, even if purchaser was held liable for injuries to infant playing on or near wall when it collapsed almost four years after sale. Hut v. Antonio, N. J.Super.L.1967, 229 A.2d 823, 95 N.J. Super. 62.

Nonaffiliated director of mutual fund who was held jointly and severally liable along with broker for management fees paid by mutual fund to investment advisory company was entitled to contribution from broker, which was held solely liable to fund for brokerage profits which amounted to less than management fees, and agreement between mutual fund and broker to first apply settlement money to broker's individual liability was ineffectual. Lutz v. Boas, 1962, 176 A.2d 853, 40 Del.Ch. 130.

10 Del.C. § 6301 et seq., was applicable in determining right of mutual fund to recover brokerage fees and management fees from broker and nonaffiliated director and in determining rights of contribution between nonaffiliated director and broker. Id.

Where city acquired property by treasurer's sale for unpaid taxes and legal title was taken in name of city alone but county and school district also had tax claims against property, county and school district were liable along with the city for injuries sustained by pedestrian in a fall on sidewalk adjacent to such property for alleged negligence in maintenance of sidewalk although city acted as trustee for county and school district, and county and school district were obligated to contribute their share of judgment recovered by pedestrian in accordance with their interest in property at time of acquisition of property by city. Osborne v. City of Pittsburgh, 1960, 161 A.2d 636, 192 Pa.Super. 387.

Potential right of contribution that each joint tort-feasor has against the other constitutes him an indemnitee pro tanto and entitles him to have other joint tort-feasors, if he calls upon them to do so, to participate in defense of lawsuit by claimant or be subject to outcome of the action just as if they had participated. Keitz v. National Paving & Contracting Co., 1957, 130 A.2d 229, 214 Md. 479.

If both petroleum transportation company and bulk gasoline station operator were currently negligent in causing fire consuming adjacent owner's property, neither could recover damages from the other. Chicago, M., St. P. & P. R. Co. v. Johnston's

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Fuel Liners, Inc., N.D.1963, 122 N.W. 2d 140, appeal after remand 130 N.W. 2d 154.

Where waterproofing compound was not inherently dangerous and manufacturer of compound did not have duty to warn architect of its use, compound would have been adequate if plans and specifications originally submitted by architect had been used and architect was negligent in changing plans without consulting manufacturer, in preparing faulty plans and in failing to adequately supervise application of waterproofing compound, manufacturer was not joint tort-feasor and was not responsible for architect's negligent acts and was not required to contribute to judgment obtained against architect for damage to building caused by faulty waterproofing. Standhardt v. Flintkote Co., 1973, 508 P.2d 1283, 84 N.M. 796.

It is not true that relationship between public officials serving as commissioners in any governmental organization establishes vicarious liability for negligence or misfeasance, malfeasance or nonfeasance of other commissioners so as to support an order for contribution per se; while each commissioner might be found liable to third parties who sustain losses as result of negligent action or inaction of board of commissioners, as between commissioners themselves in suit for contribution, rules applicable to joint tort-feasors apply. Butler v. Trentham, 1970, 458 S.W.2d 13, 224 Tenn. 528.

Where there was no evidence, in negligence action against manufacturer, supplier, and owner of swinging-stage scaffold from which plaintiff's decedent fell nine stories to his death when defective eye loop end of support cable gave way, that scaffold cable was ever returned to supplier for replacement or repair work or that manufacturer had purchased its cable from manufacturer shown to have manufactured cable with defective eye loop, scaffold owner was not entitled to contribution against supplier or manufacturer. W. E. Clark & Sons, Inc. v. Elliott, 1972, 475 S.W.2d 514, 251 Ark. 853.

Jury's finding that appellant-defendant was 9% responsible for plaintiff's damages and appellee-defendant 91% responsible included appellee's liability for both breach of warranty and negligence, but appellant's liability for negligence only; thus, appellant was entitled to only 91% contribution from appellee even though jury also found that 30% of appellee's negligence was attributable to its negligence in design of equipment which caused plaintiff's injuries for which appellant could not be held liable. Burks Motors, Inc. v. International Harvester Co., 1971, 466 S.W.2d 907, 250 Ark. 29, rehearing denied 466 S.W.2d 943, 250 Ark. 641.

21. Settlement

See, also, annotations under section 4 of this Act, infra.

Where settlement occurs before injured plaintiff has proven his original case at trial, settling tort-feasor cannot enforce his right to contribution unless in a separate proceeding he proves that the settlement figure was reasonable and that the parties from whom he seeks contribution were in fact joint tort-feasors. W. D. Rubright Co. v. International Harvester Co., D.C.Pa.1973, 358 F. Supp. 1388.

After a settlement contribution should be litigated in same action. Harger v. Caputo, 1966, 218 A.2d 108, 420 Pa. 528.

One joint tortfeasor who has made settlement and secured complete release of all participants may secure contribution from others. Mong v. Hershberger, 1962, 186 A.2d 427, 200 Pa.Super. 68.

Joint tortfeasor, who obtained from injured parties instruments which released him from all liability and provided that claims against other tortfeasor were reduced to the extent of released tortfeasor's pro rata share, but who paid for those releases more than total amount of subsequent verdicts, had right of contribution of fifty per cent of verdict against non-settling joint tortfeasor who had been credited on his pro rata share of verdict for everything

settling tortfeasor had paid in excess of his share. Id.

In absence of allegation or proof that release given to owner, which had settled claim of subcontractor's employee for injuries, accomplished release of contractor or subcontractor, owner acquired no right of contribution against either. Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc., 1961, 171 A.2d 185, 404 Pa. 53.

Under 12 P.S. § 2082 et seq., plaintiff who had obtained release of all claims of third party against both plaintiff and defendant as alleged joint tort-feasors, could enforce contribution against defendant for proportional amount of settlement without suit or judgment having been entered by third party. Swartz v. Sunderland, 1961, 169 A.2d 289, 403 Pa. 222.

Purpose of amendment to 10 Del.C. § 6302, providing that right of contribution provided by the act shall be enforceable only with respect to judgments entered against one or more joint tortfeasors subsequent to May 27, 1949, was to fix an effective date for application of act to judgments, and did not take away right of contribution to a joint tortfeasor who discharged common liability by settlement and release. Halifax Chick Exp., Inc. v. Young, 1957, 137 A.2d 743, 50 Del. 596, 11 Terry 596.

Where one of two joint tortfeasors made payment to plaintiffs for injuries in automobile accident and took releases, which provided that damages recoverable against other tortfeasor were reduced to extent of pro rata share of tortfeasor who made payment, and plaintiffs subsequently obtained verdicts against the joint tortfeasors, plaintiffs could recover from tortfeasor who did not obtain releases only one half of the amount of the verdicts less amount that they received from other tortfeasor in consideration for their releases, as against plaintiffs' contention that they were entitled to recover one half of each of the verdicts wholly irrespective of amounts of the settlement with other tortfeasor. Daugherty v. Hershberger, 1956, 126 A.2d 730, 386 Pa. 367.

Where streetcar company had, without consent or participation of taxicab owner, who allegedly was joint tort-feasor with the company, settled, out of court and before judgment was entered, death and personal injury action pending against both company and owner and obtained releases of liability of both the company and owner, company could, while the action still remained pending, institute an independent action for contribution against the owner. O'Keefe v. Baltimore Transit Co., 1953, 94 A. 2d 26, 201 Md. 345.

Under Code Supp.1947, Art. 50, § 22, a joint tort-feasor is, in the eyes of the law, a wrongdoer whose basic obligation to make contribution springs from the tort he jointly committed, but ultimately he is called upon to contribute his share only after his joint tort-feasor has discharged the joint liability under a settlement. Hodges v. U. S. Fidelity & Guaranty Co., D.C.Mun.App.1952, 91 A.2d 473, 34 A.L.R.2d 1101.

In action under Code Supp.1947, Art. 50, § 21 et seq., joint tort-feasor who had negotiated settlement with injured persons and had obtained release discharging its fellow wrongdoer in consideration for $100 was properly allowed to show that three days thereafter he paid $2,400 to injured persons by check, the endorsement of which purported to release only the joint tort-feasor, and that the amount to which fellow wrongdoer was obligated to contribute was the total amount. Id.

In view of fact that, under Code Supp.1947, Art. 50, § 27, permitting one joint tort-feasor to file third-party complaint against another in tort action against the first is merely permissive, and contribution proceedings may be instituted after judgment in the tort action is taken, the third party practice allowed by said section, does not impliedly require that a joint tort-feasor give notice to other joint tort-feasors before negotiating settlement pursuant to such section. Id.

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Individual third-party defendants who, before commencement of trial, together with defendant and all but one of other third-party defendants paid plaintiff $118,000 in return for release which ran to all defendants, including the nonsettling third-party defendant, were not persons jointly or severally liable in tort for same injury to person or property and were thus not joint tort-feasors, within meaning of statute defining joint tort-feasors, and not entitled to recover from nonsettling third-party defendant on theory of contribution. Alamida v. Wilson, 1972, 495 P.2d 585, 53 Hawaii 308.

A party who settles prior to suit on a tort claim and is later found not negligent in an action for contribution is not a joint tort-feasor within meaning of statute defining joint tort-feasors and is therefore not entitled to contribution. Id.

22. Indemnity

"Indemnity" applies only where the one held liable is without personal fault, in contrast to the rules of "contribution," where the burden of liability is shared in proportion to the degree of fault. Highway Const. Co. v. Moses, C.A.S.D.1973, 483 F.2d 812.

Under Pennsylvania law, contribution is authorized among joint tort-feasors, but in absence of contract, right to indemnity is not recognized among them; whereas the right to indemnity is recognized as between a tort-feasor secondarily and one primarily liable, but not a right to contribution. Globe Indem. Co. v. Agway, Inc., C.A.Pa.1972, 456 F.2d 472.

Contribution and indemnity are alternative remedies and are in no sense cumulative. Id.

In the case of concurrent or joint tortfeasors having no legal relation to one another, no right of indemnity exists on behalf of either against the other. Panichella v. Pennsylvania R. Co., D.C.Pa.1957, 150 F.Supp. 79, cause remanded on other grounds 252 F.2d 452.

Remedies of contribution and indemnity are mutually exclusive. Hut v. Antonio, 1967, 229 A.2d 823, 95 N.J.Super. 62.

Where joint tort-feasors are in pari delicto, that is, where each is chargeable with active or affirmative negligence contributing to the injury, neither is entitled to indemnity from the other although contribution may be available. Degen v. Bayman, 1972, 200 N.W.2d 134, 86 S.D. 598.

Contribution is appropriate where there is common liability among the parties, whereas indemnity is proper where one party has a greater liability or duty which justly requires him to bear the whole of the burden as between the parties. Id.

Although similar in nature and having a common basis in equitable principles, contribution and indemnity differ in the kind and measure of relief provided; contribution requires the parties to share the liability or burden, whereas indemnity requires one party to reimburse the other entirely. Id.

"Indemnity" is concerned with obligation of primary tort-feasor to respond for all damages recovered against secondary tort-feasor, as compared with "contribution," which is obligation of one joint tort-feasor to contribute his share to discharge of common liability. Rio Grande Gas Co. v. Stahmann Farms, Inc., 1969, 457 P.2d 364, 80 N.M. 432.

23. Conditional judgment

Although a joint tort-feasor may not obtain a money judgment against his cotort-feasor, under 12 P.S. § 2082 et seq., until he has paid more than his prorata share of any judgment obtained by plaintiff, a conditional judgment may be entered for contribution. Falciani v. Philadelphia Transp. Co., D.C.Pa.1960, 189 F.Supp. 203.

§ 2. [Pro Rata Shares]

In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

Commissioners' Comment

This section in positive terms resolves several difficult questions of policy.

First, it recognizes and registers the lack of need for a comparative negligence or degree of fault rule in contribution cases. As stated in the comments on subsection 1(c) the exclusion of intentional, wilful and wanton actors from the right to contribution eliminates the better arguments for a relative degree of fault rule. Only Arkansas, Delaware, Hawaii and South Dakota apply such a rule in contribution cases.

Second, it invokes the rule of equity which requires class liability, including the common liability arising from vicarious relationships, to be treated as a single share. For instance the liability of a master and servant for the wrong of the servant should in fairness be treated as a single share. Other examples are those situations involving co-owners of property, members of an unincorporated association, those engaged in a joint enterprise and the like; where the problem is the allocation of liability between such a group on the one hand and a tortfeasor having no connection with the group. It adopts the equitable principle involved in the case of Wold v. Grozalsky, 277 N.W. 364, 14 N.E.2d 437 (1938), where the plaintiff was injured by the collapse of a party wall between two buildings. One building was owned by A, the other jointly by B and C. It was held that B and C were liable each for only one-fourth of the entire liability, rather than one-third. Another case is Walsh v. Phillips, New York Supreme Court, Niagara County, July 3, 1952, where one contributor was an unincorporated association, and its numerous members were held liable in the aggregate only for a single share.

Third, it makes it clear that except as limited by the section, principles of equity shall control. The common situation with which the courts would be concerned here is that involving insolvency of a potential contributor. Suppose that the plaintiff is injured by the negligence of A, B, and C. A pays a judgment, and C is wholly insolvent. Should A's right to contribution from B amount to one-third of the judgment, or one-half? It has been pointed out that there are difficulties of proof of insolvency, and that the situation requires at least three tortfeasors and will seldom arise. It has also been argued that it is better to let A recover only one-third from B and take his chances

on C's insolvency, rather than litigate that issue between A and B, with further suits against C to follow if he turns out later to have any money. The courts in contract contribution cases have dealt satisfactorily with such situations and it is not only difficult but unwise to try to state an express rule dealing with all the equitable situations which may arise.

Law Review Commentaries

Abrogation of common law doctrine. 43 Boston U.L.Rev. 417 (1963).

Apportionment of damages under comparative negligence. Philip W. Bouchard. 55 Mass.L.Q. 125 (1970).

Apportionment of damages under comparative negligence statute: A rejoinder. James W. Smith. 55 Mass.L.Q. 249 (1970).

Aspects of right of contribution among tort-feasors. 33 Temple L.Q. 432 (Summer 1960).

Contribution among joint tort-feasors. Edward F. Hennessey. 47 Mass.L.Q. (1962); James W. Smith. 9 Annual Survey of Mass.Law, Boston College, p. 44 (1962).

Contributions among joint tort-feasors, proposed uniform act. 31 Mass.L.Q. 34 (1946).

Contribution among tortfeasors. 1960 Wis.L.Rev. 478 (May).

Contributions in impleader. 51 Mass.L.Q. 51, 59 (1966).

Determination of pro rata shares. 43 Boston U.L.Rev. 422 (1963).

General liability insurance. J. Albert Burgoyne and George E. Donovan. 12 Annual Survey of Mass. Law, Boston College, p. 243 (1965).

Medical malpractice. Robert J. Sherer. 10 Annual Survey of Mass. Law, Boston College, p. 42 (1963).

Procedural aspects of securing tort contribution in injured plaintiff's action. 47 Harvard L.Rev. 209 (1933).

Substantive base for impleader. 51 Mass.L.Q. 51, 56 (1966).

Library References

Contribution ⇐7. C.J.S. Contribution § 6.

§ 3. [Enforcement]

(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

Commissioners' Comment

Subsection (a). Enforcement by Separate Action. This simply announces the rather obvious proposition that the remedy of contribution may always be enforced in a separate action and need not be enforced in the action establishing liability for the tort, even where the case has gone to judgment.

Subsection (b). Post-Judgment Procedure. This is based on the New York statute. It appears to have worked well and no serious objection to it has developed. It seems consistent with good practice to authorize contribution problems to be tried out, after adjudication of the plaintiff's claim, among the defendants over whom the court has acquired jurisdiction in the original action. The requirement of notice to all of the parties makes it necessary to give notice to the plaintiff as well as to joint tortfeasor defendants. This may on first impression seem unnecessary but it is done to give a plaintiff who may have been only partially paid, some protection against the exhausting of the assets to satisfy a contribution claim before the plaintiff (judgment creditor) has collected the balance on his judgment.

No provision for impleading and cross-complaints among joint tortfeasors in the original action prior to trial on plaintiff's claims are included. This is left to the established procedure in the several states.

Subsection (c). Statute of Limitations After Judgment. The statute of limitations offers one of the real difficulties in contribution, to which no entirely satisfactory solution can be found.

The 1939 Act was silent on it, apparently leaving the contribution suit to the general statute of limitations. One of the chief criticisms of the Act, which has even led to efforts to repeal it in some of the states where it has been adopted, has been that this unduly extends the liability of the second tortfeasor. Where there is a short statute of limitations, as in most malpractice cases and in some states as to all personal injuries, this extension defeats the whole purpose of the short statute, by adding the time necessary to bring the first suit to judgment, and an additional period for the contribution suit.

Unless contribution is to be limited to joint judgments, there is no way to avoid some extension of the time within which the second tortfeasor may be sued. The extension should obviously be as short as possible; particularly in view of the fact that the tortfeasor seeking contribution nearly always has had legal advice. The great difficulty arises from the fact that no cause of action for contribution exists unless the first tortfeasor has paid. If the extension is a short one, such as six months, it will restrict the right to contribution to those who can raise the money to pay off the judgment immediately.

Various suggestions have been made along the lines of a suit for a declaratory judgment or an interlocutory order determining the right to contribution, but permitting judgment for it only after the first tortfeasor has paid. Other suggestions have involved a notice of an intent to claim contribution. Such procedures are entirely unfamiliar in a good many states, and there is serious doubt whether legislatures would accept them.

Some compromise apparently must be made between a reasonable time to pay the judgment and unduly extended liability for contribution. One year seems about the right compromise.

Subsection (d). Bar of Claim by Laches. The comments on Subsection (c) are in principle applicable here. Clause (1) applies to situations where the entire liability to the injured party has been settled without action being filed. Clause (2) applies to settlements of the entire liability while action is pending and before judgment. The provision is so worded as to prevent the long delay in the assertion of a contribution claim resulting from installment payments made while the action is kept alive. Under both clauses the party seeking contribution must discharge the obligation by actual payment within the prescribed time or lose his right to contribution.

Subsection (e). Judgment Against One Tortfeasor. This was Section 3 of the 1939 Act. It simply states the well established rule that the injured party in obtaining judgment against one joint tortfeasor does not thereby discharge the others, although there may, of course, be but one satisfaction of the claim.

Subsection (f). Res Adjudicata. This seems necessary in view of the position some courts have taken that adjudication of liability to the plaintiff of several defendants is not necessarily res adjudicata of the liability for de-

termination of contribution claims. Obviously the defendants should be bound as among themselves by the adjudication of their liability to the claimant.

Action in Adopting Jurisdictions

Variations from Official Text:

Massachusetts. Omits "or wrongful death" wherever appearing.

North Carolina. In subsec. (c), substitutes "after final judgment is entered in the trial court in conformity with the decisions of the appellate court" for "after appellate review."

In subsec. (d), adds clause (3) which reads: "or (3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution."

Subsec. (e) reads: "The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution. Provided, however, that a consent judgment in a civil action brought on behalf of a minor, or other person under disability, for the sole purpose of obtaining court approval of a settlement between the injured minor or other person under disability and one of two or more tort-feasors, shall not be deemed to be a judgment as that term is used herein, but shall be treated as a release or covenant not to sue as those terms are used in G.S. 1B–4."

Tennessee. In subsec. (a), adds "in the circuit or chancery courts to be tried according to the forms of chancery" at end thereof.

In subsec. (b), adds "provided that any issue as to indemnity may be determined at the hearing of such motion" at end thereof.

In subsec. (c), substitutes "after satisfaction of the judgment" for "after the judgment has become final by lapse of time for appeal or after appellate review."

In subsec. (d), adds "within one (1) year of payment" at end thereof.

In subsec. (f), inserts "after trial on the merits" following "wrongful death", and adds "or indemnity, except where a claimant commenced an action for injury or wrongful death prior to the effective date of this chapter" at the end thereof.

Law Review Commentaries

Contributions in impleader. 51 Mass.L.Q. 51, 59 (1966).

Enforcement of contribution—Procedure. 43 Boston U.L.Rev. 423 (1963).

Library References

Contribution ⇐9(1) et seq.

C.J.S. Contribution § 13.

Notes of Decisions

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1. Generally

The right to contribution accorded by Pennsylvania statutes to one joint

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tort-feasor against the other creates a cause of action of a different nature from the tort action which was the subject of the original suit or claim; the right of contribution in Pennsylvania is a dual one: a right sounding in equity and a right at law sounding in quasi contract. W. D. Rubright Co. v. International Harvester Co., D.C.Pa.1973, 358 F. Supp. 1388.

Where original defendant driver of other automobile, appealed from award against him in favor of minor plaintiff expressly limiting scope of appeal to his behalf only, the liability of additional defendant, the minor's father and driver of automobile in which minor was riding, was not affected by the appeal and original defendant did not risk his right to contribution established by award of arbitrators by making his expressly-limited appeal. Romanovich v. Hilferty, 1968, 245 A.2d 701, 212 Pa.Super. 570.

Maryland Court Rule, No. 315, setting forth the procedure and remedies for enforcement of the substantive right to contribution conferred by Code 1957, art. 50, § 17, does not purport to grant substantive rights. Ennis v. Donovan, 1960, 161 A.2d 698, 222 Md. 536.

Where original defendants, in wrongful death action, impleaded additional defendants and filed against them a claim for contribution, and plaintiffs amended their declaration to join impleaded defendants as defendants, it was error to direct verdicts in favor of impleaded defendants at conclusion of plaintiffs' case and thus deprive original defendants of opportunity to present evidence against them on contribution claim. Stem v. Nello L. Teer Co., 1957, 130 A.2d 769, 213 Md. 132.

Defendant against which, along with [illegible] defendant, joint and several judgment had been entered could not be subjected to a money judgment against codefendant under any set of circumstances until defendant had either paid the judgment or discharged more than its pro rata share. Burks Motors, Inc. v. International Harvester Co., 1971, 466 S.W.2d 943, 250 Ark. 641.

2. Separate action

Rule providing that where defendant claims that person not a party is or may be liable to defendant for all or part of plaintiff's claim defendant may cause service of summons and third-party claim upon the person did not preclude company and individual from which $25,000 and costs had been recovered in automobile accident case wherein corporation had not been joined from maintaining separate action against the corporation for contribution on joint tort-feasor theory. Maloney Concrete Co. v. D. C. Transit System, Inc., 1966, 216 A. 2d 895, 241 Md. 420.

Contribution may be enforced in independent action, or joint tort-feasor who pays plaintiff's judgment may have it marked for his use so as to allow his recovery as subrogee. Puller v. Puller, 1954, 110 A.2d 175, 380 Pa. 219.

Defendants under Pennsylvania law have choice of enforcing their right to contribution by third-party action or by separate suit. Murphy v. Barron, 1965, 258 N.Y.S.2d 139, 45 Misc.2d 905.

Repossessor of automobile sued by automobile owner for conversion of property and invasion of privacy had right to sue bank which authorized repossessor to contact automobile owner to collect charges for contribution and indemnity in lieu of bringing cross-claim against bank. Sanford v. Stoll, 1974, 518 P.2d 1210, 86 N.M.App. 6.

3. Cross claims

In action by administrator for death of automobile occupant as result of collision of automobile with bus, cross claim by bus owner against automobile driver for indemnity or contribution was not premature, notwithstanding fact that under 12 P.S. § 2082 et seq., a joint tort-feasor may not obtain a money judgment against his cotort-feasor until he has paid more than his prorata share of any judgment obtained by plaintiff. Fal-

ciani v. Philadelphia Transp. Co., D.C.Pa.1960, 189 F.Supp. 203.

Rules governing cross claim against coparty and third-party practice permit determination of cross claim or third-party complaint for recovery of either indemnity or contribution, although money judgment for indemnity must be subject to cross claimant's actual loss, and money judgment for contribution would be subject to conditions of statute governing accrual of right of contribution. Board of Ed., School Dist. 16, Artesia, Eddy County v. Standhardt, 1969, 458 P.2d 795, 80 N.M. 543.

Under Ark.Stats. § 34-1007(3), a party may state as a cross claim against a coparty any claim of contribution that he may have. Northwest Motors, Inc. v. Creekmore, 1958, 318 S.W.2d 614, 229 Ark. 755.

4. Third party practice

Dismissal of defendant's motion to join driver of vehicle in which plaintiffs were passengers at time of collision with defendant's vehicle would not prevent defendant from instituting third-party complaint for contribution. Lebel v. Reagan, 1963, 192 A.2d 28, 159 Me. 300.

In automobile collision case, wherein defendant, who had been sued by passenger in his automobile, impleaded other driver as third party defendant for contribution, defendant had right to have third party defendant, who had secured from passenger a release which denied liability and provided for reduction of passenger's damages to extent paid, remain in action, since, even though defendant could not recover contribution from third party defendant, defendant's liability would be halved if he could establish that third party defendant was joint tort-feasor, and trial court's grant of summary judgment for third party defendant was error. Swigert v. Welk, 1957, 133 A.2d 428, 213 Md. 613.

Phrase "party to the action" in Superior Court Rule providing that defendant may move for leave as third-party plaintiff to serve process and complaint on person not a "party to the action" who is or may be liable to him for all or part of plaintiff's claim against him, means party to the original action only and therefore first decedent could implead, as third-party defendants, partners, who had already been impleaded as third-party defendants by second defendant. Novak v. Tigani, 1954, 110 A.2d 298, 49 Del. 106, 10 Terry 106.

Where complaint charged that defendant negligently drove her automobile into an automobile owned by plaintiff wife and operated by her husband, defendant was not entitled to file a third-party complaint against the husband seeking contribution from him as a joint tort-feasor, since to permit the third-party proceeding would be to render the husband liable indirectly upon a claim to the wife for which he could not be held liable directly. Ferguson v. Davis, 1954, 102 A.2d 707, 9 Terry 299.

Where owner and driver of first automobile executed release discharging driver of second automobile from liability arising out of collision of two automobiles, and passenger in second automobile brought action against owner and driver of first automobile to recover for injuries sustained in the collision, release was a bar to joinder by owner and driver of first automobile of driver of second automobile as an additional defendant. Killian v. Catanese, 1954, 101 A.2d 379, 375 Pa. 593.

Where employee's dependents were awarded workmen's compensation and brought an action against third party for employee's death, third party was not entitled to join employer as a party defendant, particularly where third party alleged that employer was solely responsible for employee's injury, notwithstanding the fact that the employer would be entitled to repayment of compensation award. Baltimore Transit Co. v. State, to Use of Schriefer, 1944, 39 A.2d 858, 183 Md. 674, 156 A.L.R. 460.

Where injured plaintiff has no right of action against third party, there can be no contribution entitling

defendant to join third party as defendant under Code 1951, art. 50, §§ 20-29, notwithstanding liability under said Act may be joint or several, since right of contribution is a derivative right and not a new cause of action. Id.

Payment by one defendant on judgment may be condition to judgment against other defendant on cross claim, but absence of payment is not ground for dismissal of cross claim or third-party complaint for recovery of either indemnity or contribution. Board of Ed., School Dist. 16, Artesia, Eddy County v. Standhardt, 1969, 458 P.2d 795, 80 N.M. 543.

In action against owner and driver of automobile which collided with plaintiff's automobile, contribution was not involved, and joinder of defendant driver's employer was not authorized by SDC 33.04A01 et seq. Mellchar v. Frank, 1959, 98 N.W.2d 345, 78 S.D. 58.

Where garage which installed rebuilt brake assembly in automobile was sued by motorist for property damage and injury sustained in accident when brakes failed, and garage filed third-party complaint against its supplier which filed third-party complaint for indemnity from rebuilder which filed cross action against garage, rebuilder's cross action was properly a part of the law suit, as against garage's contention that if rebuilder were held liable for indemnity to supplier, rebuilder could not be entitled to indemnity or contribution from garage. Wilson v. Rob Robinson's Auto Service, 1973, 200 S.E.2d 393, 20 N.C.App. 47.

Where owner of automobile and employee were domiciled in Sebastian county and employee went to Logan county to demonstrate a car to decedent who was killed in a collision with a truck owned by a resident of Logan county, and owner and its employee filed suits in Sebastian county against truck owner and obtained service of process and decedent's administrator brought suit in Logan county against owner of car and employee, administrator of decedent was entitled to file a third-party complaint against the car owner asking for contribution in the event that the administrator should be held liable to the truck owner on the latter's cross complaint. Northwest Motors, Inc. v. Creekmore, 1958, 318 S.W.2d 614, 229 Ark. 755.

Corporation which sold chemical dust for use of spraying rice crops from airplanes, knowing that such chemical dust was inherently dangerous to broad leaved plants, was subject to strict liability for damage to cotton crop from use of chemical dust by owner of rice crop in spraying rice crop, and was properly joined as a defendant by owner of rice crop in action against it by owner of cotton crop for damage to cotton crop. Chapman Chemical Co. v. Taylor, for Use and Benefit of Wilson, 1949, 222 S.W.2d 820, 215 Ark. 630.

In death action against contractors and independent contractor to recover for death of an implied invitee of contractors, contractors had right to make independent contractor a third party defendant even after plaintiff had dismissed as to independent contractor under a covenant not to sue. Glem v. Williams, 1949, 222 S.W.2d 800, 215 Ark. 705.

5. Counterclaims

Where guests, injured in automobile collision, and host brought action against alleged tort-feasor, alleged tort-feasor could not under 10 Del.C. §§ 6301-6308, entitling joint tort-feasor to money judgment for contribution where he has by payment discharged "common liability" or has paid more than his pro rata share thereof, maintain counterclaim for contribution against host on theory that host contributed to guests' injury, in absence of allegation that host's negligent conduct was willful or wanton, in view of 21 Del.C. § 21. Lutz v. Boltz, 1953, 100 A.2d 647, 48 Del. 197, 9 Terry 197.

Where minor child's parents joined as coplaintiffs in action by child against city and county alleging city's negligence as proximate cause of child's personal injuries, city's coun-

terclaim against parents for contribution, alleging that parents' negligence was sole or contributing cause of child's injuries, should have been allowed. Petersen v. City and County of Honolulu, 1969, 462 P.2d 1007, 51 Hawaii 484.

6. Defenses in general

Third-party defendant may avail himself of guest statutes in defending a claim for contribution. Troutman v. Modlin, C.A.Ark.1965, 353 F. 2d 382.

Where railroad employee, injured in train derailment which occurred when train was entering a private crossing of steel company, recovered for injuries from railroad in an action under Federal Employers' Liability Act, and railroad sought contribution or indemnity from steel company in third-party action on theory that steel company's negligence in maintaining crossing had caused derailment, recovery by railroad depended upon state law regarding effect of employee's contributory negligence, so that if there were no express agreement as to indemnity between railroad and steel company, and employee were found to be contributorily negligent, steel company could plead his contributory negligence as a bar to any recovery over by railroad. Kennedy v. Pennsylvania R. Co., C.A.Pa.1960, 282 F.2d 705.

Although both driver of naval truck and preceding motorist whose automobile was struck by truck, were negligent, government would not be liable to automobile driver by way of contribution for any damages he might have to pay to injured occupant of naval truck. Maddux v. Cox, C.A. Ark.1967, 382 F.2d 119.

In action under the Federal Employers' Liability Act for negligence of railroad in requiring employee to walk along a dangerous route while in a fatigued condition and after a snowstorm, where the employee was injured when he fell on the premises of a third-party defendant, employee's inability to recover from a third-party tort-feasor because of his contributory negligence would as a matter of law deny the railroad's claim against the third-party tort-feasor for contribution. Panichella v. Pennsylvania R. Co., D.C.Pa.1958, 167 F.Supp. 345, reversed on other grounds 268 F.2d 72, certiorari denied 80 S.Ct. 370, 361 U.S. 932, 4 L.Ed.2d 353.

Defendant motorist who settled actions for death resulting from collision between his automobile and automobile driven by joint tort-feasor was not precluded from maintaining action for contribution on ground that defendant was a volunteer since he had available defense of contributory negligence against decedent imputed from joint tort-feasor's alleged negligence, since this Act permits a suit over where party suing for contribution obtained a release of parties by way of settlement. Harger v. Caputo, 1966, 218 A.2d 108, 420 Pa. 528.

Unfairness or fraud may be asserted by a joint tort-feasor against whom contribution is sought by another joint tort-feasor who negotiated settlement with the injured party. Hodges v. U. S. Fidelity & Guaranty Co., D.C.Mun.App.1952, 91 A.2d 473, 34 A.L.R.2d 1101.

In action by state of Maryland for use of surviving parents of automobile driver and surviving parents of passenger and by administrator, with limited letters, of estate of automobile driver to recover damages for wrongful death of driver, as result of collision between automobile and tractor-trailer owned by defendant, defendant was not entitled to set up claim against administrator for contribution to satisfy any judgment that might be entered against defendant, since neither state of Maryland nor administrator represented deceased driver. In re State of Md. for use of D'Agostino, 1955, 139 N.Y.S.2d 746, 285 App.Div. 1078.

Litigant could not escape liability to cross complainant for contribution

on ground that litigant was not served with a summons upon the cross complaint, where litigant participated actively in trial and cross-examined cross complainant. Walton v. Tull, 1962, 356 S.W.2d 20, 234 Ark. 882, 8 A.L.R.3d 708.

7. Limitations

Date of defendant's performance of any act or failure to act was irrelevant in determining whether suit against defendant for contribution or indemnity was barred by Tennessee statute requiring a separate action to enforce contribution for injury or wrongful death to be commenced within one year after satisfaction of judgment. DeVore Brokerage Co. v. Goodyear Tire & Rubber Co., D.C. Tenn.1969, 308 F.Supp. 270.

Presentation of claim against county within six-month statutory limit from date of plaintiff's injuries was not a condition precedent to maintaining a third-party action against county for contribution under Hawaii's Uniform Contribution Among Tortfeasors Act since no right of contribution against county was enforceable until third-party plaintiff had paid more than his proportionate share of underlying claim. Albert v. Dietz, D.C.Hawaii 1958, 283 F.Supp. 854.

8. Questions for jury

This Act as enacted in Arkansas reverses common-law rule against contribution among joint tort-feasors and makes allocation of pro rata share of damages as among joint tort-feasors a jury question although all tort-feasors remain jointly and severally liable for total amount of damages in so far as injured party is concerned. Paclawski v. Bristol Laboratories, Inc., Okl.1967, 425 P.2d 452.

9. Instructions

In action against building owner for death of corporate painting contractor's employee who fell from roof, wherein owner brought in contractor as third-party defendant, charging that if jury found that contractor and its president were not negligent jury should find for the owner was error since if owner was not negligent contractor was not liable and case would then be ended, and if owner was found negligent, its recourse against contractor was by way of contribution and jury should have been instructed as to what standard of care was imposed on a landlord with respect to employee of independent contractor. Moushey v. U. S. Steel Corp., C.A.Pa.1967, 374 F. 2d 561.

10. Recovery of judgment

Under 12 P.S. § 2084, providing that the "recovery of a judgment" by the injured person against one joint tort-feasor does not discharge the other joint tort-feasor, the quoted phrase does not include the satisfaction of judgment. Hilbert v. Roth, 1959, 149 A.2d 648, 395 Pa. 270.

The words "recovery of a judgment", as used in this section, do not discharge the other joint tortfeasors, must be construed broadly to mean actual recovery of a judgment, and not merely rendition of the judgment. Hackett v. Hyson, 1946, 48 A.2d 353, 72 R.I. 132, 166 A.L.R. 1096.

11. Entry of judgment

Entry of judgment against only two or four joint obligors would not affect such joint obligors' right of contribution against others. Goldberg v. Altman, 1959, 154 A.2d 279, 190 Pa.Super. 495.

12. Recitals in judgment

Under 12 P.S. § 2082 et seq., judgment should be directed to the liability of the defendant and to existence of right of contribution from third-party defendant who had not been joined by plaintiff as a party defendant and should state that judgment was entered in favor of plaintiff and against defendant and that defendant and third-party defendant were joint tortfeasors and that right of contribution existed in favor of defendant

and against third-party defendant and that defendant "may hereafter have judgment" against third-party defendant for amount which the defendant proves he has paid to plaintiff in excess of the designated amount which third-party defendant must contribute. Smith v. Whitmore, C.A.Pa.1959, 270 F.2d 741.

13. Satisfaction of judgment

An injured party is entitled to only one satisfaction for any injury. Bittner v. Little, C.A.Pa.1959, 270 F. 2d 286.

Since plaintiff motorist had already received from one of joint tort-feasors the sum of $5,000 in return for execution of a joint tort-feasors' release, defendant joint tort-feasor was entitled to have judgment marked satisfied under this Act where verdict was for only $1,650. Weinstein v. Stryker, D.C.Pa.1967, 267 F.Supp. 34.

Where automobile passenger injured in accident occurring in Pennsylvania brought action against host only in New York where she recovered judgment which was satisfied, her voluntary satisfaction of judgment barred action in United States District Court in Pennsylvania against driver of other vehicle. Raleigh v. Peterson, D.C.Pa.1959, 165 F.Supp. 47.

Satisfaction of judgment entered against one or more joint tort-feasors releases all of them. Grantham v. Board of County Com'rs for Prince George's County, 1968, 246 A.2d 548, 251 Md. 28.

Where one joint tort-feasor was released on a fully satisfied judgment, the other tort-feasor was also released and the results would have been no different had they been concurrent or plural tort-feasors. Id.

Statute providing that recovery against one joint tort-feasor does not discharge the other joint tort-feasor does not alter common-law rule that satisfaction of judgment against one tort-feasor bars further action against other tort-feasors. Id.

An unsatisfied or partially satisfied judgment against one tort-feasor will not discharge another. Id.

In action for injuries sustained in an automobile accident against two defendants where plaintiff's verdict against the first defendant resulted in judgment which was satisfied on record by that defendant, plaintiff was not entitled thereafter to proceed against the second defendant. Hilbert v. Roth, 1959, 149 A.2d 648, 395 Pa. 270.

Rule that plaintiffs are entitled to only one satisfaction for a tort, even though two or more parties might have contributed to causing their loss, is not changed by Code 1951, Art. 50, § 23, relating to contributions among joint tort-feasors. Maryland Lumber Co. v. White, 1954, 107 A.2d 73, 205 Md. 180.

Under this section, defendant was not discharged by satisfaction of plaintiffs' judgments against defendant's joint tort-feasor, but such judgments could only be applied in reduction of the amount of any judgment which might be recovered against the defendant. Hackett v. Hyson, 1946, 48 A.2d 353, 72 R.I. 132, 166 A.L.R. 1096.

Plaintiff may have but one satisfaction for his injuries from joint tort-feasors; accordingly, amount paid for covenant by one of them reduces liability of others by that amount. Whittlesea v. Farmer, 1970, 469 P.2d 57, 86 Nev. 347.

Uniform Contribution Among Tort-feasors Act was intended to reverse common-law rule that satisfaction of judgment by one joint tort-feasor discharged the other joint tort-feasors. Rio Grande Gas Co. v. Stahmann Farms, Inc., 1969, 457 P.2d 364, 80 N.M. 432.

Where judgment of $137,000 was entered against one defendant in original trial of both defendants and judgment of $150,000 was entered on retrial of second defendant, satisfaction of either judgment would entitle tort-feasor against whom it was had to contribution from the other, although it would not discharge other

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tort-feasor from liability as to plaintiff, but plaintiff's first satisfaction must be credited to any subsequent satisfaction which he sought. Woodward v. Blythe, 1971, 462 S.W.2d 205, 249 Ark. 793.

14. Interest on judgment

Joint tort-feasor was liable for contribution with regard to interest paid by other joint tort-feasor's insurer on judgment against such tort-feasor where no interest between date of payment and date of money judgment was allowed and no more than legal rate of interest was paid. International Harvester Co. v. Burks Motors, Inc., 1972, 481 S.W.2d 351, 252 Ark. 816.

15. Summary judgment

Where judgment against one tort-feasor was fully satisfied, the order granting motion of other tort-feasor for summary judgment should not have been disturbed. Grantham v. Board of County Com'rs for Prince George's County, 1968, 246 A.2d 548, 251 Md. 28.

Where plaintiff sued joint tort-feasors and obtained joint verdict against them but released one, he could not be permitted to attack the granting of summary judgment for the other on theory that there was no proof that they were joint tort-feasors. Id.

16. Res judicata

Section 1 of this Act authorizing contribution from joint tort-feasor and subsec. (f) of this section providing that judgment determining liability of several defendants to claimant shall be binding among such defendants in determining their right to contribution or indemnity, except where a claimant commenced an action for injury or wrongful death prior to the effective date of the statute, were not unrelated, and adjudication of liability in suit commenced prior to effective date of statute was not res judicata as to liability of the defendants in joint tort-feasor's suit against another joint tort-feasor for contribution. Watts v. Memphis Transit Management Co., 1971, 462 S.W.2d 495, 224 Tenn. 721.

§ 4. [Release or Covenant Not to Sue]

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Commissioners' Comment

Subsection (a). Other Tortfeasors Not Discharged. This is retained from Section 4 of the 1939 Act, which dealt only with the release. The covenant not to sue or not to levy execution has been added because it should obviously have the same effect. There

seems to have been little difficulty with the 1939 provision. It changes the technical rule as to the effect of a release in many states, but in most of them it will make no significant change in practice, since any plaintiff wishing to hold other joint tortfeasors insists on a covenant not to sue instead of a release. The advantage to both plaintiff and the settling tortfeasor of being permitted to make an independent settlement is sufficiently obvious.

Subsection (b). Effect on Contribution. The 1939 Act provided, in Section 5, that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction "to the extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption.

The requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive, and if so there is no discharge.

The idea underlying the 1939 provision was that the plaintiff should not be permitted to release one tortfeasor from his fair share of liability and mulct another instead, from motives of sympathy or spite, or because it might be easier to collect from one than from the other; and that the release from contribution affords too much opportunity for collusion between the plaintiff and the released tortfeasor against the one not released. Reports from the state where the Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three-party cases two parties join hands against the third, and this occurs even when the case goes to trial against both defendants. "Gentlemen's agreements" are still made among lawyers, and the formal release is not at all essential to them. If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so.

The effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing the damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up. The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors. In many cases their chief reason for settling with one rather than another is that they hope to get more from the party with whom they do not settle. A provision for reduction in a fixed amount will not protect the settling tortfeasor from contribution. No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far as

to say that the 1939 Act has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say that they can no longer settle cases with one tortfeasor. Such reports have reached other states, and have been responsible for a considerable part of the opposition to the 1939 Act. The New York Law Revision Commission has introduced a number of bills for contribution acts, and this objection has been the chief factor in defeating them.

It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution. This is consistent with Section 1(d) above, which provides that the settling tortfeasor has himself no right of contribution against another unless he has assumed the full responsibility to the claimant.

Action in Adopting Jurisdictions

Variations from Official Text:

Massachusetts. Omits references to "wrongful death", wherever appearing.

Tennessee. Adds subsection as follows: "No evidence of a release or covenant not to sue received by another tort-feasor or payment therefor may be introduced by a defendant t the trial of an action by a claimant for injury or wrongful death, but may be introduced upon motion after judgment to reduce a judgment by the amount stipulated by the release or the covenant or by the amount of the consideration paid for it, whichever is greater."

Law Review Commentaries

Effect of release of claim for tort occurring in Massachusetts. Francis J. Nicholson. 15 Annual Survey of Mass.Law, Boston College, p. 126 (1968).

Effect of release or covenant not to sue. 43 Boston U.L.Rev. 426 (1963).

General release of one tortfeasor releases all under this Act. 60 Mich.L.Rev. 668 (1962).

Meaning and significance of this section. Robert H. Griffith. 31 Pa. B.A.Q. 322 (1960).

Library References

Contribution ⇐8.
Release ⇐29(2).

C.J.S. Contribution §§ 7, 12.
C.J.S. Release § 50.

Notes of Decisions

1. Purpose

The purpose of this section is to encourage settlements without prejudice to the parties. Cartmel v. Williams, 1965, 215 A.2d 282, 207 Pa.Super. 144.

2. Retroactive effect

Release, given to one of three alleged joint tort-feasors 11 months after effective date of 12 P.S. § 2082 et seq., was governed as to its effect by such Act, notwithstanding accident which gave rise to cause of action against the three took place 13 months prior to Act's effective date, and hence release to the one tort-feasor did not preclude action against the others. Smith v. Fenner, 1960, 161 A.2d 150, 399 Pa. 633.

This section of Uniform Contribution Among Tort-Feasors Act providing that when release or covenant not to sue is given in good faith to one of two or more persons liable in tort for same injury, it does not discharge any of other tort-feasors from liability for injury unless its terms so provide, but it reduces claim against others to extent of any amount stipulated by release or covenant, or in amount of consideration paid for it, whichever is greater, alters substantive rights and is not applicable retroactively. Miller v. Sohns, 1971, 464 S.W.2d 824, 225 Tenn. 158.

3. Common law

Where relationship between owner of building abutting on sidewalk, on which pedestrian was injured in fall due to accumulation of ice and snow, and borough was one of primary and secondary liability and not one of joint and several liability, this Act did not apply, and common-law principle that release of tort-feasor discharges another tort-feasor who has committed a concurrent or successive tort applied. George v. Brehm, D.C. Pa.1965, 246 F.Supp. 242.

At common law an injured party could have for same injury but one satisfaction, and receipt of such satisfaction, as consideration for a release executed by him, from a person liable for such injury, necessarily worked a release of all others liable for same injury even though it was intended, or the release expressly stipulated that the other wrongdoer should not thereby be released. Daugherty v. Hershberger, 1958, 126 A.2d 730, 386 Pa. 367.

Under common law, a release of one joint tort-feasor is a release of all. Wilbert v. Pittsburgh Consolidation Coal Co., 1956, 122 A.2d 406, 385 Pa. 149. See, also, Swigert v. Welk, 1957, 133 A.2d 428, 213 Md. 613.

An injured party may have but one satisfaction and the receipt of such satisfaction, either as payment of a judgment recovered or as consideration for a release executed by injured person, from a person liable for such injury, necessarily works a release of all others liable for the same injury and prevents further proceedings against them, regardless of whether the wrongdoers involved committed a joint tort or concurrent or successive torts. Girard Trust Corn Exchange Bank v. Reliable Motors, 1954, 106 A.2d 670, 176 Pa.Super. 300.

4. Generally

Where administrator instituted action under 28 U.S.C.A. § 1346 subd. (b), based on death resulting from gas explosion in housing project, and United States was made defendant upon administrator's successfully contending that housing authority involved was, for purposes of suit, a federal agency so that its employees were employees of the government within 28 U.S.C.A. § 1346 subd. (b), administrator could not successfully contend that a release executed by administrator to the housing authority did not inure to benefit of United States on ground that release to agent would not necessarily release principal or on ground that United States and authority were joint tort-feasors. Schetter v. U. S., D.C.Pa. 1956, 136 F.Supp. 931.

The words of a release should not be construed to extend beyond express consideration mentioned so as to make release for parties which they never intended or contemplated.

Furtek v. West Deer Tp., 1959, 156 A.2d 581, 191 Pa.Super. 405.

A person who accepts money from a person against whom he has or may have a claim has it within his power to write into release what he pleases and, in absence of accident, fraud or mistake he is bound by what he writes. Kent v. Fair, 1958, 140 A.2d 445, 392 Pa. 272.

A release in full can only be a release of what is described in text of release. Id.

Under 12 P.S. § 2086 providing that release of one joint tort-feasor does not relieve him from liability for contribution unless release provides for reduction to extent of pro rata share of released tort-feasor of injured person's damages recoverable against all other tort-feasors, tort-feasor who had given general release to lady driver who had also taken releases from her passengers had right to require her to remain in action brought by passengers against him, since, even though he could not recover contribution from her, his liabilility would be halved if he could establish that she was joint tort-feasor. Davis v. Miller, 1956, 123 A.2d 422, 385 Pa. 348.

A contract not to sue is in effect a release, and is therefore a present discharge. Caplan v. City of Pittsburgh, 1953, 100 A.2d 380, 375 Pa. 268.

Fact that brakeman who alighted from train after collision with truck and injured leg while attempting to cross ditch may have had cause of action against owner of truck, and that railroad's settlement with brakeman was purely voluntary, would not within itself justify withdrawing railroad's claim against driver of truck for amount paid brakeman on theory of contribution between joint tort-feasors. Missouri Pac. R. Co. v. Ellison, 1971, 465 S.W.2d 85, 250 Ark. 160.

5. Discharge of other tortfeasor—Generally

Where total damages in excess of two million dollars was sought from the United States for injuries sustained by children when bazooka shell exploded, negotiation of $350,000 settlement by government by way of release which failed to mention specifically the person who had removed the abandoned shell from government property did not extinguish that person's potential tort liability. United States v. Reilly, C.A.N.M.1967, 385 F.2d 225.

Under Pennsylvania law, a release of one of joint tort-feasors releases the others. Bittner v. Little, C.A.Pa. 1959, 270 F.2d 286.

If one joint tort-feasor settles a case with an injured plaintiff, and in the process extinguishes the liability of the other joint tort-feasors, the law implies a quasi contractual obligation or an equitable one on the part of those other tort-feasors to reimburse the settling tort-feasor for their pro rata shares of the settlement fee. W. D. Rubright Co. v. International Harvester Co., D.C.Pa. 1973, 358 F.Supp. 1388.

Under Delaware law, defendants who took joint tort-feasors' release forfeited their claims for contribution. Gentry v. Wilmington Trust Co., D.C.Del.1970, 321 F.Supp. 1370.

Under both Pennsylvania and West Virginia law, release which was executed by passengers in connection with settlement of claim against host driver and which released all other persons precluded action by passengers against driver of other vehicle involved in collision. Bonar v. Hopkins, D.C.Pa.1969, 311 F.Supp. 130, affirmed 423 F.2d 1361.

The giving of a covenant not to sue one joint tort-feasor does not discharge the liability of the other joint tort-feasor. Hayden v. Ford Motor Co., D.C.Mass.1967, 278 F.Supp. 267.

Under the Pennsylvania law, the unqualified release of one tort-feasor releases all others who are liable for the wrong. Solar Elec. Corp. v. General Elec. Co., D.C.Pa.1957, 156 F. Supp. 51.

In the case of independent concurring torts, the release of one wrongdoer does not release the other. Pan-

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ichella v. Pennsylvania R. Co., D.C. Pa.1957, 150 F.Supp. 79, cause remanded on other grounds 252 F.2d 452.

Where plaintiff sued joint tort-feasors and obtained joint verdict against them but released one, he could not be permitted to attack the granting of summary judgment for the other on theory that there was no proof that they were joint tort-feasors. Grantham v. Board of County Com'rs for Prince George's County, 1968, 246 A.2d 548, 251 Md. 28.

Release of one who is not legally liable for injury to another does not operate to release culpable tort-feasor. Eckels v. Klieger, 1965, 210 A. 2d 899, 205 Pa.Super. 526.

Under this Act, release by injured party to one jointly liable does not release others also liable, unless release expressly so provides. Brown v. City of Pittsburgh, 1962, 186 A.2d 399, 409 Pa. 357.

Giving of release and covenant not to sue seller of allegedly defective tractor for injuries received when buyer's employee fell off did not release buyer from liability for the injuries. Levi v. Montgomery, N.D. 1963, 120 N.W.2d 383.

Where gas company settled judgment secured against it by reason of gas explosion and secured from persons injured in the explosion a release, which did not purport to release any claims against landowner on whose property pipe was located but was stated to be without prejudice to gas company's right to pursue claim for contribution, and where gas company did not give notice to landowner of its intention to settle, settlement did not operate as a discharge of landowner's liability. Rio Grande Gas Co. v. Stahmann Farms, Inc., 1969, 457 P.2d 364, 80 N.M. 432.

Release of one joint tort-feasor did not operate as release of all other joint tort-feasors where release was executed in compliance with this Act. Garrison v. Navajo Freight Lines, Inc., 1964, 392 P.2d 580, 74 N.M. 238.

6. —— Terms and scope of release or covenant

Instrument which was in form a release, although not absolute and unconditional, which was given in return for settlement of injury action brought in Rhode Island by occupants of automobile against operator of truck on theory that their injuries resulting from truck's collision with rear of automobile in Massachusetts were caused by negligence in operation of truck and against lessor of truck for negligence in leasing truck with defective braking mechanism, and which disclosed intention of releasors to preserve their rights against manufacturer of truck did not bar releasors' diversity action in Massachusetts against manufacturer for same injuries, but manufacturer would not be precluded from showing by evidence at trial that releasors accepted settlement in full compensation for injuries and that instrument was in fact a release of manufacturer. Hayden v. Ford Motor Co., D.C. Mass.1967, 278 F.Supp. 267.

Release given by automobile passenger to automobile driver releasing driver and any and all other persons of any and every claim or cause of action arising out of automobile-truck collision effectuated a release not only of automobile driver but also of truck owner. Hasselrode v. Gnagey, 1961, 172 A.2d 764, 404 Pa. 549.

Where release commenced with the words "from all, and all manner of" and then stated the date and place of the automobile accident and was followed by "and especially the liability arising out of the aforesaid accident" and no attempt was made to limit the scope of the release to the claims and demands of the original defendant, the release released the husband of plaintiff driving the automobile at the time of the accident from liability for contribution to defendant for injuries sustained by the plaintiff wife. Mayer v. Knopf, 1959, 152 A. 2d 482, 396 Pa. 312.

Under 12 P.S. § 2085, providing that a release by injured person of one joint tort-feasor does not dis-

Note 6

charge the other unless the release so provides but reduces the claim in the amount of consideration paid, a release is not a discharge of other tort-feasors unless it specifically so states. Hilbert v. Roth, 1959, 149 A. 2d 648, 395 Pa. 270.

Under Code Supp.1947, Art. 50, § 24, a release by the injured person of a joint tort-feasor who has made settlement may provide for the discharge of other tort-feasors without naming them. Hodges v. U. S. Fidelity & Guaranty Co., D.C.Mun.App. 1953, 91 A.2d 473, 34 A.L.R.2d 1101.

7. Reduction of claim against other tortfeasor

Under Pennsylvania Act, amount paid by hospital for its release from claim for death of patron who was administered wrong type of blood during operation was not deductible from verdict recovered against the surgeon in charge of operation, where hospital was not a party to action against surgeon and there was no judicial judgment of negligence against hospital. Mazer v. Lipshutz, C.A.Pa.1966, 360 F.2d 275, certiorari denied 87 S.Ct. 72, 385 U.S. 833, 17 L.Ed.2d 68.

Under Pennsylvania law, if a plaintiff settles with a person and a joint tort-feasor's release is given, that person may not be sued by any other person for contribution; however, if a second person is sued by plaintiff, the settling party may be brought on the record for purposes of having trier of fact determine whether the settler was in fact a joint tort-feasor; and unless the settler is found to be a joint tort-feasor by a competent trier of fact in a proceeding to which he is a party before the entry of a judgment against the nonsettling party, the settler is not taken to be a joint tort-feasor, and the party against whom judgment is entered has no right to have the judgment reduced as result of the release, nor can he then sue the settling party for contribution. Griffin v. U. S., D.C.Pa.1973, 353 F.Supp. 324.

Where release given by plaintiff to one of drivers involved in automobile collision provided that it operated as satisfaction of plaintiff's claim against other parties to extent of pro rata share of parties released, damages payable by driver who was not given release would be cut in half if drivers were joint tortfeasors. Harding v. Evans, D.C.Pa.1962, 207 F. Supp. 852.

Where negligence of two parties combined to injure a third party and third party settles with one of the negligent parties, under 12 P.S. § 2085, amount of verdict against the one tort-feasor is reduced by amount injured party received from other tort-feasor in settlement. Pilosky v. Dougherty, D.C.Pa.1959, 179 F.Supp. 148.

Where jury found that legal cause of accident was joint negligence of three defendants, but one of such defendants had been given release by plaintiff, which release was given before right of other defendants to secure money judgment for contribution had accrued and provided for a reduction, to extent of prorata share of released defendant, of plaintiff's damages recoverable against all other defendants, plaintiff could recover from unreleased defendants their joint prorata share of the verdict and costs, and neither of such unreleased defendants had any right of contribution against defendant whose liability had been settled by the release. Smith v. Fenner, 1960, 161 A. 2d 150, 399 Pa. 633.

Where one of two joint tortfeasors made payment to plaintiffs for injuries in automobile accident and took releases, which provided that damages recoverable against other tortfeasor were reduced to extent of pro rata share of tortfeasor who made payment, and plaintiffs subsequently obtained verdicts against the joint tortfeasors, plaintiffs could recover from tortfeasor who did not obtain releases only one half of the amount of the verdicts less amount that they received from other tortfeasor in consideration for their releases, as against plaintiffs' contention that they were entitled to recover one half of each of the verdicts wholly

irrespective of amounts of the settlement with other tortfeasor. Daugherty v. Hershberger, 1956, 126 A.2d 730, 386 Pa. 367.

In suit against lumber company for conversion of carload of lumber and plywood, in which plaintiffs joined railroad as a defendant and charged it with conversion by misdelivery, order of satisfaction in favor of the railroad operated as a release, and claim against other tort-feasor was required to be reduced by amount of consideration paid for order of satisfaction. Maryland Lumber Co. v. White, 1954, 107 A.2d 73, 205 Md. 180.

Where bus company and its driver were released from all claims and demands of passenger resulting from collision between bus and railroad locomotive, instrument did not specifically name railroad as a party released, but provided that the release should reduce to extent of pro rata share of bus company or its driver, any damages recoverable by passenger against the railroad, railroad was not released, but passenger's claim against railroad was reduced by amount paid by bus company and its driver. Raughley v. Delaware Coach Co., Del.Super.1952, 91 A.2d 245, 8 Terry 343.

Under 47 Del.Laws, c. 151, § 4, a release of one joint tortfeasor will not discharge a tortfeasor not named therein, but will reduce injured person's claim against tortfeasor not named in amount as great as consideration paid for the release, or a greater figure if release so provides. Id.

Release which recited that plaintiff reduced his claims for damage to extent of prorata share of liability of released tort-feasors for plaintiff's injuries and resulting damages recoverable against all other tort-feasors sufficiently complied with statute establishing conditions under which injured person's release relieves joint tort-feasor from liability for contribution. Garrison v. Navajo Freight Lines, Inc., 1964, 392 P.2d 580, 74 N.M. 238.

Where action against general contractors and independent contractor to recover for death of an implied invitee of general contractors was dismissed against independent contractor under a covenant not to sue, and contractors placed covenant in evidence, thereby disclosing to jury the amount which plaintiff had received from independent contractor, contractors had benefit of this section, providing that a release of one joint tort-feasor reduces claim against others in amount of consideration paid for release, and were not entitled to have the court, after verdict, make the allowance again. Glem v. Williams, 1949, 222 S.W.2d 860, 215 Ark. 705.

8. Discharge of tortfeasor given release or covenant

Where defendant in a personal injury action arising out of collision of his automobile with automobile in which plaintiffs were riding released and discharged host driver from all claims and demands arising out of the accident, such release constituted a general release and a complete bar to all claims and demands of any kind which defendant had or might in the future have had against host driver, including right of contribution from host driver. Follett v. Peterson, D.C.Pa.1959, 171 F.Supp. 631.

Where administrator of estate of deceased killed in automobile collision involving two automobiles executed to one driver a release which provided that damages recoverable against any other person should be reduced to extent of pro rata share of responsibility for such damages of party released, effect of release under 1939 Act was to extinguish any claim of administrator against released driver and to relieve released driver of obligation to make contribution to other driver or any other joint tort-feasor, and when other driver subsequently executed release to first driver, other driver had no claim for contribution. M. F. A. Mut. Ins. Co. v. Mullin, D.C.Ark.1957, 156 F.Supp. 445.

Whether a third party defendant was solely, severally, or jointly liable to railroad employee, along with railroad, employee's release of third par-

ty defendant extinguished such liability, and therefore no right existed on part of railroad to secure contribution from third party defendant since, as between railroad and third party defendant, no cause of action remained in employee except against railroad. Panichella v. Pennsylvania R. Co., D.C.Pa.1957, 150 F.Supp. 79, cause remanded on other grounds 252 F.2d 452.

Homeowners' release of independent plumbing contractor hired by remodeling contractor from liability for fire damage allegedly caused by negligence of both contractors or their employees did not deprive remodeling contractor of right of contribution from subcontractor for general contractor's liability, in absence of provision for pro rata reduction in remodeling contractor's liability. Blanchard v. Wilt, 1963, 188 A.2d 722, 410 Pa. 356.

Where first motorist and his wife in consideration of $951.10 paid by second motorist and his wife executed a release which was headed "Release in Full of All Claims" and which provided that it released second motorist from claims which were made or might be made by first motorist and his wife because of "any damage, loss or injury, which heretofore have been or which hereafter may be sustained by us in consequence" of automobile accident, release did not discharge second motorist from liability to passenger in his automobile for injuries sustained in same accident, and hence did not bar first motorist who was sued by passenger for such injuries from joining second motorist as an additional defendant in such action. Kent v. Fair, 1958, 140 A.2d 445, 392 Pa. 272.

One who executed a general release after receiving payment for his own damages is precluded from bringing third-party action for contribution under 10 Del.C. § 6301 et seq., against joint tort-feasor to whom he addressed release. Brown v. Eakin, Del.Super.1957, 137 A.2d 385, 11 Terry 574.

Release and covenant not to sue discharges defendant given the covenant from any possible liability for tort of which defendant possibly might have been guilty, and discharges him from all liability or contribution to any of the other tort-feasors. Levi v. Montgomery, N.D.1963, 120 N.W.2d 383.

9. Discontinuance of action

Where a plaintiff in action against alleged joint tort-feasors arrived at terms of settlement of action against one defendant in accordance with provisions of 12 P.S. § 2082 et seq., which declares joint tort-feasors to have right of contribution, and plaintiff included such release in record, and release complied with requirements of such sections, plaintiff was entitled, over remaining defendant's objection, to discontinue action against such defendant with prejudice and preserve only action against remaining defendant. Fleck v. Marzano, D.C.Pa.1953, 108 F.Supp. 556.

§ 5. [Uniformity of Interpretation]

This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

Library References

Contribution ⇐5. C.J.S. Contribution § 11.

§ 6. [Short Title]

This Act may be cited as the Uniform Contribution Among Tortfeasors Act.

§ 7. [Severability]

If any provision of this Act or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

Library References

Statutes ⇐64(7). C.J.S. Statutes § 112.

§ 8. [Repeal]

All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

§ 9. [Time of Taking Effect]

This Act shall take effect _____.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Alaska	1970, c. 80	4-20-1970	AS 09.16.010 to 09.16.060.
Arkansas	1941, Act 315	3-26-1941 *	Ark.Stats. §§ 34-1001 to 34-1009.
Colorado	1977, c. 195	7-1-1977	C.R.S. 13-50.5-101 to 13-50.5-106.
Delaware	1949, c. 151	5-27-1949 *	10 Del.C. §§ 6301 to 6308.
Florida	1975, c. 75-38	6-12-1975	West's F.S.A. § 768.31.
Hawaii	1941, Act 24	4-14-1941 *	HRS §§ 663-11 to 663-17.
Maryland	1941, c. 344	6-1-1941	Code 1957, art. 50, §§ 16 to 24.
Massachusetts	1962, c. 730	1-1-1963	M.G.L.A. c. 231B, §§ 1 to 4.
Mississippi	1952, c. 250	4-15-1952	Code 1972, § 85-5-5.
Nevada	1973, c. 693	7-1-1973	N.R.S. 17.225 to 17.305.
New Jersey	1952, c. 335	5-22-1952	N.J.S.A. 2A:53A-1 to 2A:53A-5.
New Mexico	1947, c. 121	3-19-1947 *	NMSA 1978, §§ 41-3-1 to 41-3-8.
North Carolina	1967, c. 847	1-1-1968	G.S. §§ 1B-1 to 1B-6.
North Dakota	1957, c. 223	3-11-1957 *	NDCC 32-38-01 to 32-38-04.
Ohio	1976, H.B. 531	10-1-1976	R.C. §§ 2307.31, 2307.32.
Pennsylvania	1951, p. 1130	7-19-1951 *	42 Pa.C.S.A. §§ 8321 to 8327.
Rhode Island	1940, c. 940	7-1-1940	Gen.Laws 1956, §§ 10-6-1 to 10-6-11.
South Dakota	1945, c. 167	2-24-1945 *	SDCL 15-8-11 to 15-8-22.
Tennessee	1968, c. 575	4-3-1968	T.C.A. §§ 29-11-101 to 29-11-106.
Wyoming	1977, c. 188	1-1-1978	W.S.1977, §§ 1-1-110 to 1-1-113.

* Date of approval.

General Statutory Notes

Pennsylvania. The Pennsylvania act, formerly contained in 12 P.S. §§ 2082 to 2089, was reenacted as part of the Judicial Code (42 Pa.C.S.A. §§ 8321 to 8327) by L.1976, P.L. 586, No. 142, effective June 27, 1978.

UNIFORM CONTRIBUTIONS AMONG TORTFEASORS ACT

Law Review Commentaries

Contribution among antitrust violators. 29 Catholic U.L.Rev. 669 (1980).

§ 1. [Right to Contribution]

Action in Adopting Jurisdictions

Variations from Official Text:

Nevada. In subsec. (b), substitutes "equitable share" for "pro rata share" wherever appearing.

In subsec. (e), substitutes "equitable share" for "pro rata share".

North Carolina. Adds subsections as follows:

"(h) The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act.

"(i) The provisions of this Article shall apply to the injury or death of an employee of any common carrier by rail which is subject to the provisions of Chapter 2 of Title 45 of the United States Code (45 U.S.C. §§ 51, et seq.) or G.S. 62-242 where such injury or death is caused by the joint or concurring negligence of such common carrier by rail and any other person or persons. In any such instance, the following will apply:

"(1) where liability is imposed or sought to be imposed only on such common carrier by rail, the railroad is entitled to contribution from any other such person or persons;

"(2) where liability is imposed or sought to be imposed only on a person or persons other than a common carrier by rail, such other person or persons are entitled to contribution from the railroad;

"(3) where liability is imposed or sought to be imposed on both a common carrier by rail and any other person or persons, damages shall be determined as provided in Chapter 2 of Title 45 of the United States Code (45 U.S.C. §§ 51, et seq.) or G.S. 62-242 whichever controls the claim."

Ohio. Substitutes "proportionate" for "pro rata," wherever appearing.

In subsec. (c), substitutes "intentionally caused or intentionally contributed" for "[wilfully or wantonly] caused or contributed".

Wyoming. In subsec. (e), inserts "insured" preceding references to tortfeasors, wherever appearing.

Adds a subsection (h), which reads: "W.S. 1-1-110 through 1-1-113 do not affect the common law liability of the several joint tortfeasors to have judgments recovered and payment made from them individually by the injured person for the whole injury. The recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasors, from liability to the injured party."

Law Review Commentaries

Comparative contribution. 14 John Marshall L.Rev. 173 (1980).

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols, 35 Okl.L. Rev. 195 (1982).

Contribution among joint tortfeasors in Oklahoma. K. David Roberts. 50 Okl.B.J. 2193 (1979).

Contribution in Missouri. 44 Mo.L. Rev. 691 (1979).

Contributions among tortfeasors: Effects of statutes of limitations and other time limitations. Peter B. Kutner, 33 Okl.L.Rev. 203 (1980).

North Dakota equity for tortfeasors. Larry Kraft. 56 N.D.L.Rev. 67 (1980).

Notes of Decisions

Supplementary Index to Notes

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1. Purpose

Judicial purpose to encourage settlements implicitly undergirded enactment of Uniform Contribution Among Tort-Feasors Act. Lahocki v. Contee Sand & Gravel Co., Inc., 1979, 398 A.2d 490, 41 Md.App. 579, reversed on other grounds 410 A.2d 1039, 286 Md. 579.

Uniform Contribution Among Tortfeasors Act making persons jointly or severally liable in tort for same injury to person or property was intended to have full breadth and was not intended to be limited by meaning given prior usage. Clark v. Brooks, Del.Super.1977, 377 A.2d 365, affirmed 391 A.2d 747.

Joint Tortfeasors Contribution Law is intended to prevent plaintiffs, by their unilateral actions, from electing where to place the burden of a common fault. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J.Super. 192.

Statute affording a right of contribution in those instances where two or more persons become jointly liable in tort for same injury to person or property remedies unfairness of allowing a disproportionate share of plaintiff's recovery to be borne by one of several joint tort-feasors and accomplishes object of achieving a more equitable distribution of burden among those liable in tort for same injury. Hayon v. Coca Cola Bottling Co. of New England, 1978, 378 N.E.2d 442, 375 Mass. 644.

Goal of Uniform Contribution Among Tortfeasor's Act is equity among tortfeasors. Bartlett v. New Mexico Welding Supply, Inc., App.1982, 646 P.2d 579, 98 N.M. 152, certiorari denied 648 P.2d 794, 98 N.M. 336.

Uniform Contribution Among Tortfeasors Act was intended to apply where two or more parties inadvertently become joint tort-feasors. City and Borough of Juneau v. Alaska Elec. Light & Power Co., Alaska 1981, 622 P.2d 954.

The principles of equity which apply through the Uniform Contribution Among Tortfeasors Act were intended to govern contribution when one defendant is found to be insolvent, and were not intended to affect requirement that relative degrees of fault are not to be considered as factor in apportionment. Arctic Structures, Inc. v. Wedmore, Alaska 1979, 605 P.2d 426.

2. Retroactive effect

Inasmuch as cause of action for contribution arose in favor of insurer on January 20, 1979, when insurer paid judgment entered against its insured, one of joint tort-feasors, application of statute specifically enacted to compel contribution between joint tort-feasors, which became law on October 1, 1976, did not violate section of Ohio Constitution prohibiting passage of retroactive laws, notwithstanding fact that mishap occurred prior to effective date of contribution statute. Nationwide Mut. Ins. Co. v. Marcinko, 1980, 436 N.E.2d 551, — Ohio Com.Pl. —.

The Contribution Among Tort-Feasors Act has been amended as a result of the enactment of the comparative negligence act; the effective date of the comparative negligence act, July 1, 1973, was the date upon which the amendments became effective, and such amendments applied to litigants in action which was based upon facts which took place subsequent to July 1, 1973. Bartels v. City of Williston, N.D.1979, 276 N.W.2d 113.

Uniform Contribution Among Tort feasors Act did not apply to a case in which final judgment was entered prior to July 1, 1977. Hillman v. Bray Lines, Inc., 1978, 591 P.2d 1332, 41 Colo.App. 493.

Defendant driver, who settled with plaintiff in wrongful death action aris-

ing out of automobile collision, could not prevail against third-party defendant, Department of Highways, under a theory of contribution, where settlement took place before July 1, 1977, effective date of Uniform Contribution Among Joint Tortfeasors Act, and hence case was governed by common law of Colorado under which contribution between joint tortfeasors was not permitted. Hillenson v. Department of Highways, 1978, 590 P.2d 979, 41 Colo.App. 460.

Uniform Contribution Among Tortfeasors Act applied to August 1977 settlement of tort action even though alleged tortious conduct occurred before July 1, 1977, the effective date of Act. Summey v. Lacy, 1978, 588 P.2d 892, 42 Colo.App. 1.

Gondola operator which entered into settlement after effective date of Uniform Contribution Among Tortfeasors Act with parties injured as result of gondola crash occurring prior to effective date of Act could seek contribution from parties charged as joint tort-feasors. Coniaris v. Vail Associates, Inc., 1978, 586 P.2d 224, 196 Colo. 392.

Uniform Contribution Among Tortfeasors Act does not affect any vested rights of tort-feasors or create any new obligations in respect to their tort liability and thus can constitutionally be applied to pending cases even though actions giving rise to tort liability predate passage of Act. Village of El Portal v. City of Miami Shores, Fla.1978, 362 So.2d 275.

3a. Construction with other laws

Pennsylvania's comparative negligence statute was not applicable in measuring contribution among joint tort-feasors, though settlement with plaintiff and execution of general release occurred after the statute was in effect, where the underlying tort occurred before the statute's effective date. Slaughter v. Pennsylvania X-Ray Corp., C.A.Pa.1981, 638 F.2d 639.

New Jersey Joint Tortfeasors Contribution Law allowing contribution in regard to a "wrongful act" does not bar an action for contribution based on a liability arising without fault under statute making a bank which pays an instrument on a forged endorsement absolutely liable for conversion. Tormo v. Yormark, D.C.N.J.1975, 398 F.Supp. 1159.

The Tort Claims Act is not incompatible with and, hence, should be read together with the Joint Tortfeasors Contribution Law. Ezzi v. DeLaurentis, 1980, 412 A.2d 1342, 172 N.J.Super. 592.

Tort Claims Act must be read in pari materia with Joint Tortfeasors Contribution Law to the extent not inconsistent. Polyard v. Terry, 1977, 372 A.2d 378, 148 N.J.Super. 202, reversed on other grounds 390 A.2d 653, 160 N.J.Super. 497, affirmed 401 A.2d 532, 79 N.J. 547.

Workmen's Compensation Act and Joint Tortfeasors Contribution Act must be read in pari materia. Schweizer v. Elox Division of Colt Industries, 1975, 336 A.2d 73, 133 N.J.Super. 297, affirmed 359 A.2d 857, 70 N.J. 280.

Nothing in either the text, history or policy of the New Jersey Tort Claims Act mandates the abrogation or limitation of the right of contribution as legislatively established and judicially construed. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J.Super. 192.

In reconciling provisions of Contribution Among Tort-Feasors Act and the comparative negligence act, Supreme Court would avoid a construction which would permit imposition of greater liability on nonreleased tort-feasor with a right of contribution in multiple-party tort-feasor situation; such construction would not be in accordance with basic concepts of justice. Bartels v. City of Williston, 1979, 276 N.W.2d 113.

In action for negligence arising under comparative negligence act, when determining right of tort-feasor to contribution, the prorata shares of common liability are to be determined in proportion to the percentage of negligence attributable to each tort-feasor under the comparative negligence act. Id.

Electric utility employing lineman injured in fall from pole was immune, under Workers' Compensation Act, from claim for indemnity made by lineman's belt manufacturer found to have been negligent in causing lineman's fall. W. M. Bashlin Co. v. Smith, 1982, 643 S.W. 2d 526, 277 Ark. 406.

Alleged negligent premises owner's claim for contribution against hospital whose alleged negligence aggravated injuries which occurred on the premises was a medical malpractice claim that could not be raised in personal injury action without being first presented to medical liability mediation panel in accordance with statute providing that person or representative claiming damages by reason of injury, death or monetary loss on account of alleged malpractice by health maintenance organization shall submit claim to appropriate medical liability mediation panel before claim may be filed in state court. Walt Disney World Co. v. Memorial Hospital, Fla.App.1978, 363 So.2d 598.

5. Law governing

Though the time when entitlement to contribution comes into being is when the common liability of the tort-feasors to the claimant is extinguished, it is the law in effect at the moment of the injury that determines the responsibilities of the tort-feasors among themselves. Slaughter v. Pennsylvania X-Ray Corp., C.A.Pa.1981, 638 F.2d 639.

Governmental interest of Pennsylvania in demanding accountability of its corporations was paramount to interest of New Jersey in granting charitable immunity to defendant university in respect to claim that injuries sustained by plaintiff while participating in cooperative education program were caused by negligence of university in failing to adequately inspect and supervise area where plaintiff was required to work inasmuch as defendant was incorporated in Pennsylvania and it was inappropriate under circumstances for New Jersey as situs of injury to deny right given claimants under Pennsylvania Law to sue nonprofit corporations. Wuerffel v. Westinghouse Corp., 1977, 372 A.2d 659, 148 N.J.Super. 327.

6. Definitions

For purposes of Uniform Contribution Among Tortfeasors Act, plaintiff's suit for breach of implied warranty brought against supermarket arising from injury to plaintiff's tooth allegedly caused by substance in a meat product sold by supermarket could be a "claim in tort" which would allow plaintiff to claim the role of an injured person under Act. Loh v. Safeway Stores, Inc., 1980, 422 A.2d 16, 47 Md.App. 110.

Under the Joint Tortfeasor's Contribution Act, a defendant whose responsibility arises out of strict liability and

another defendant whose responsibility is due to negligence may be joint tortfeasors. Cartel Capital Corp. v. Fireco of New Jersey, 1980, 410 A.2d 674, 81 N. J. 548, 19 A.L.R.4th 310.

County, whose negligence was less than plaintiff's negligence and less than that of gas company whose negligence exceeded plaintiff's negligence, was not a "joint tortfeasor" for purposes of Joint Tortfeasors Contribution Law; thus, gas company was not entitled to contribution from county but was required to pay entire judgment minus deduction for plaintiff's contributory negligence. Nora v. Livingston Tp., 1980, 410 A.2d 278, 171 N.J.Super. 579.

Trial court could properly determine that where defendant was directly liable to injured plaintiff it was a joint tortfeasor and could be ordered to pay contribution to one codefendant as well as to indemnify another codefendant. Jennett v. Colorado Fuel & Iron Corp., 1980, 398 N.E.2d 755, 9 Mass.App. 823.

Term "liable in tort," as used in statute affording a right to contribution in those instances where two or more persons become jointly liable in tort for same injury to person or property, is broad in scope and not suitable language for implying a narrow or restricted range of application within framework of potential tort defendants. Hayon v. Coca Cola Bottling Co. of New England, 1978, 378 N.E.2d 442, 375 Mass. 644.

7. Common law

Absent any contractual right, business would have no right of contribution or indemnification against independent contractor as joint tort-feasor under Mississippi law: if both actually contributed to accident, neither has common-law right of contribution against the other. Ramsey v. Georgia-Pacific Corp., C.A.Miss.1979, 597 F.2d 890, on remand 518 F.Supp. 393.

Third-party defendant, an engineering firm, in complaint seeking contribution on theory that firm negligently supervised, tested, inspected and examined construction work performed by contractor, which was defendant in suit for damages for injuries arising from gas explosion, was protected at common law without agreement if its liability were purely vicarious. Shea v. Bay State Gas Co., 1981, 418 N.E.2d 597, 383 Mass. 218.

8. Generally

Under Pennsylvania law, right to contribution in tort action arises only among joint tort-feasors. Tesch v. U. S., D.C.Pa.1982, 546 F.Supp. 526.

Mississippi joint tort-feasor contributions statute provides for contribution only among judgment debtors. Ramsey v. Georgia-Pacific Corp., C.A.Miss.1979, 597 F.2d 890, on remand 518 F.Supp. 393.

Contribution will not arise from distinct causes of action, regardless of how similar the events may have been or how close in time they may have occurred. Klotz v. Superior Elec. Products Corp., D.C.Pa.1980, 498 F.Supp. 1099.

Except as provided by statute, there is no right of contribution in Mississippi where the parties are joint tort-feasors. Hartford Acc. & Indem. Co. v. Mitchell Buick-Pontiac and Equipment Co., D. C.Miss.1979, 479 F.Supp. 345.

Under law of Mississippi, there is no apportionment or contribution between one or more or all of parties guilty of tortious conduct. Hood v. Dealers Transport Co., D.C.Miss.1979, 472 F. Supp. 250.

In Rhode Island, contribution is generally available between joint tortfeasors for negligent acts that are the concurring causes of plaintiff's injury. Testa v. Winquist, D.C.R.I.1978, 451 F. Supp. 388.

Tennessee's adoption of Uniform Contribution Among Tort-Feasors Act is interpreted as having changed substantive law of contribution of Tennessee. Pinzer v. Wood, D.C.Tenn.1979, 82 F.R. D. 607.

One who is statutorily liable may nonetheless recover contribution from another tort-feasor pursuant to Joint Tortfeasors Contribution Act. Petersen v. Tolstow, 1982, 445 A.2d 84, 184 N.J. Super. 84.

There are two prerequisites to right of contribution among negligent parties: common liability because of such negligence and party claiming contribution paid more than its share of common liability. Nora v. Livingston Tp., 1980, 410 A.2d 278, 171 N.J.Super. 579.

Only requirement for eligibility under Uniform Contribution Among Tortfeasors Act is that persons jointly or severally be liable in tort for same injury to person or property. Clark v. Brooks, Del.Super.1977, 377 A.2d 365, affirmed 391 A.2d 747.

Relationship among themselves of those liable to injured party or a common basis of liability is not a factor in determining eligibility under Uniform Contribution Among Tortfeasors Act. Id.

In the absence of a clear legislative mandate to the contrary, the interest of the State both in obtaining repose and in having a timely opportunity for the investigation of claims against it must yield to the overriding equities which underpin the contribution laws. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J. Super. 192.

Essential elements for contribution in tort action are common liability of joint tort-feasors to an injured party and payment by one of tort-feasors of more than his share of that liability. Nationwide Mut. Ins. Co. v. Marcinko, 1980, 436 N.E.2d 551, — Ohio Com.Pl. —.

Basis for contribution lies in the relationship between tort-feasors themselves, not on their common liability to the injured party. Id.

Joint tort-feasor, who pays more than his proportionate share of common liability after effective date of Contribution Among Joint Tortfeasors Act as result of injury which was suffered prior to effective date of Act, may assert claim to recover amount which he paid in excess of his proportionate share of common liability. National Mut. Ins. Co. v. Whitmer, 1982, 435 N.E.2d 1121, 70 Ohio St.2d 149, 24 O.O.3d 248.

Language of statute providing that when two or more persons become jointly liable in tort for same injury to person or property, there shall be right of contribution among them requires that potential contributor be directly liable to plaintiff. Liberty Mut. Ins. Co. v. Westerlind, 1978, 373 N.E.2d 987, 374 Mass. 524.

Right of contribution is of statutory origin in South Dakota. Dehn v. Prouty, S.D.1982, 321 N.W.2d 534.

Each joint tort-feasor is responsible for wrong and they may be sued jointly or severally, subject however, to right of contribution among them, which right may be exercised by defending

party in principal action. Whiting v. Hoffine, 1980, 294 N.W.2d 921, — S.D. —.

Comparative negligence statute does not affect action for contribution between two joint tort-feasors under Uniform Contribution Among Joint Tortfeasors Act. Liberty Mut. Ins. Co. v. General Motors Corp., 1982, 653 P.2d 96, — Hawaii —.

Where both negligence and strict products liability sounded in tort, question of contribution between defendant tort-feasors was properly decided under the Uniform Contribution Among Tortfeasors Act as adopted in New Mexico. Sanchez v. City of Espanola, App.1980, 615 P.2d 993, 94 N.M. 993.

In case which involves injury that is not divisible, apportionment cannot rationally be applied. Chrysler Corp. v. Todorovich, Wyo.1978, 580 P.2d 1123.

Jurisdiction in matters concerning contribution is concurrently in courts of law and courts of equity. Celotex Corp. v. Campbell Roofing and Metal Works, Inc., Miss.1977, 352 So.2d 1316.

9. Nature of right

Recovery under the Pennsylvania Uniform Contribution Among Tortfeasors Act is a recovery in assumpsit or contract rather than in tort. Matter of Reading Co., D.C.Pa.1975, 404 F.Supp. 1249.

Contribution, indemnity and apportionment are each procedures to approximate an equitable division of responsibility between defendants who are jointly liable to plaintiff and, as such, equitable principles are applied. Embroy v. Borough of West Mifflin, 1978, 390 A.2d 765, 257 Pa.Super. 168.

Claim for contribution is action separate and distinct from underlying tort; rights and obligations of tort-feasors flow, not from tort, but from judgment or settlement itself. Coniaris v. Vail Associates, Inc., 1978, 586 P.2d 224, 196 Colo. 392.

Suit for contribution is, whether in equity or at law, not ex delicto in nature. Security Fire Protection Co., Inc. v. City of Ripley, Tenn.App.1980, 608 S.W.2d 874.

10. Common liability

Right of contribution must arise from the duty each of the wrongdoers owes to the injured party and not from any obligations of the wrongdoers among themselves. Fischbach & Moore Intern. Corp. v. Crane Barg R-14, C.A.Md.1980, 632 F.2d 1123.

Where outcome of claim of defendant United States against third-party defendant was not derivative of or determined by outcome of plaintiff's claim against United States, there was allegation of separate and not joint torts, and, under Pennsylvania law, contribution was not appropriate. Tesch v. U. S., D.C.Pa.1982, 546 F.Supp. 526.

Under Pennsylvania law, two persons are not acting jointly for purposes of committing joint tort if acts of original wrongdoer and joint tort-feasor are severable as to time, neither having opportunity to guard against other's acts and each breaching different duty owed to plaintiff. Id.

In principle, right of contribution rests upon common liability of wrongdoers for loss notwithstanding fact that liability of each wrongdoer may rest on different ground; however, any entitlement to contribution which a concurrent wrongdoer may have from another culpable party arises from duty each of wrongdoers owes to injured party, as opposed to obligation running among themselves. Fischbach & Moore Intern. Corp. v. Crane Barge R 14, D.C.Md.1979, 476 F.Supp. 282, affirmed 632 F.2d 1123.

Mississippi statute governing apportionment or contribution is applicable only in an action for damages where judgment is rendered against two or more defendants jointly and severally as joint tort-feasors and is inapplicable in situation where defendant is sued alone as a tort-feasor. Hood v. Dealers Transport Co., D.C.Miss.1979, 472 F. Supp. 250.

Under South Dakota law, contribution is device through which portion of liability can be shifted, but party is entitled to contribution only when there is joint or several liability, and the mere fact of concurrent negligence or fault does not give rise to right of contribution. Parker v. Stetson-Ross Mach. Co., Inc., D.C.S.D.1977, 427 F.Supp. 249.

Retailer was entitled to contribution under Joint Tortfeasor's Contribution Act, where it had negligently serviced fire-extinguishing system and had sold defective system manufactured by defendant, since damages resulted from wrongful act, neglect or default of both retailer and manufacturer. Cartel Capital Corp. v. Fireco of New Jersey, 1980, 410 A.2d 674, 81 N.J. 548, 19 A.L.R.4th 310.

Tort-feasor originally causing injury and physician who subsequently aggravates or causes new injury are not joint tort-feasors. Lasprogata v. Qualls, 1979, 397 A.2d 803, — Pa.Super. —.

In order to recover on claim for contribution it is necessary to establish that defendant was jointly or severally liable in tort. Stone & Webster Engineering Corp. v. Heyl & Patterson, Inc., 1978, 395 A.2d 1359, — Pa.Super. —.

In order for tort-feasor to be entitled to contribution from another tort-feasor whose negligence has concurred in producing injury to third person, such third person must have an enforceable cause of action not only against tort-feasor seeking contribution but also against one from whom contribution is sought. Rigsby v. Tyre, Del.Super.1977, 380 A.2d 1371.

Where house vendors and real estate brokers were joint tort-feasors with exterminator in causing the same injury or damage to house purchasers, although liability of exterminator arose by virtue of statute and liability of the vendors and brokers arose out of common-law principles, all parties were within purview of Joint Tortfeasors Contribution Law. Neveroski v. Blair, 1976, 358 A.2d 473, 141 N.J.Super. 365.

True test for contribution is joint liability, not joint, common or concurrent wrongs. Id.

It is common liability at the time of the accrual of plaintiff's cause of action which is the sine qua non of defendant's contribution right; if there is common liability to plaintiff at that time, that is, common liability as a matter of fact even though then unadjudicated, defendant cannot be deprived of his inchoate right by reason of plaintiff's loss thereafter of his own right of direct action against the joint tortfeasor. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J. Super. 192.

Contribution is appropriate between persons who are liable jointly in tort for the same injuries, even if they are lia-

ble on different theories of tort liability; thus, a negligent defendant may obtain contribution from a person who was jointly liable on theory of strict liability, and the converse is also true. Wolfe v. Ford Motor Co., 1982, 434 N.E.2d 1008, 386 Mass. 95.

Contribution requires the parties to share the liability or burden and is appropriate where there is a common liability among the parties. Dehn v. Prouty, S.D.1982, 321 N.W.2d 534.

The obligation of the Uniform Contribution Among Tortfeasors Act to contribute toward a payment of a judgment is predicated on joint or several liability. Sanchez v. City of Espanola, App. 1980, 615 P.2d 993, 94 N.M. 993.

When multiple parties are responsible for the same injury, and all are found liable, each and every one of them is a joint tort-feasor and is required by the Uniform Contribution Among Tortfeasors Act to contribute his pro rata share of judgment against them all. Id.

Common liability for contributi n purposes is determinable as of the date of accrual of plaintiff's claim. Id.

Evidence sustained finding that none of the defendants acted as agents in connection with purchase of land and that none of plaintiffs were joint tortfeasors with any of the defendants with respect to the transaction, so that plaintiffs were not entitled to indemnity or contribution from defendants. Shahan v. Stryker, 1976, 560 P.2d 540, 90 N.M. 119.

Supplier of fertilizer spreader was not entitled to contribution from manufacturers where those parties were not joint tort-feasors and did not share common liability. Larson Mach., Inc. v. Wallace, 1980, 600 S.W.2d 1, — Ark. —.

11. Accrual of right

Orders severing for trial asbestos-related personal injury claims against those defendant manufacturers who had not filed for bankruptcy were not final for purpose of appeal notwithstanding contention that severance would preclude nonbankrupt defendants from recovering contribution from the bankrupt defendants or maintaining action for contribution and apportioned damages or would preclude claims that those defendants who filed bankruptcy were wholly or partially responsible for the injuries and notwithstanding prospect of bankruptcy court orders of discharge. Matthews v. Johns-Manville Corp., 1982, 453 A.2d 362, — Pa.Super. —.

Right to contribution or indemnity does not accrue until after judgment is entered against a defendant. Cola v. Packer, 1978, 383 A.2d 460, 156 N.J.Super. 77.

A defendant's right to contribution from a joint tort-feasor is an inchoate right which does not ripen into a cause of action until he has paid more than his pro rata portion of the judgment obtained against him by plaintiff; it is at that point that his cause of action for contribution accrues. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J.Super. 192.

Even though equity for contribution arises at time of creation of relationship between parties, right to sue therefore accrues when party has paid more than his share of joint obligation. National Mut. Ins. Co. v. Whitmer, 1982, 435 N.E.2d 1121, 70 Ohio St.2d 149, 24 O.O.3d 248.

No cause of action for contribution accrues to joint tort-feasor until there has been judgment against him or settlement of claim. Coniaris v. Vail Associates, Inc., 1978, 586 P.2d 224, 196 Colo. 392.

12. Wanton or willful negligence

An active tort-feasor does not have a right to indemnification for lawful damages he has paid to an injured third party from a joint tort-feasor guilty of wanton or willful misconduct which contributed to the injuries where the third-party tort-feasor was an "employer" under the Workmen's Compensation Act. Seaboard Coast Line R. Co. v. Smith, Fla.1978, 359 So.2d 427.

13. Insurers

Under Maryland law, where one party was entitled to indemnity from another, the right to indemnity was not defeated by the fact that the loss to be indemnified for was actually paid by an insurance company. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., C.A.Md. 1978, 580 F.2d 1222.

Owners of adjoining property and contractor, against whom the claims of owners of building for damage resulting from fire spreading from the adjoining property to building and resulting from contractor's demolition of the adjoining property were released after the claims were settled, were not "joint tort-feasors" with insurance agent against whom property owners sought to recover for a breach of promise to secure fire insurance. Huff v. Harbaugh, 1981, 435 A.2d 108, 49 Md.App. 661.

Absent statutory prohibition, provisions of automobile liability policy excluding from coverage members of insured's family or household are valid and relieve insurer from payment of judgment against its insured recovered by way of contribution by a joint tort feasor when that judgment is based on injury to insured's spouse; Uniform Contribution Among Joint Tortfeasors Act does not prohibit family exclusion clauses in such situation. Florida Farm Bureau Ins. Co. v. Government Emp. Ins. Co., Fla.1980, 387 So.2d 932.

Policy exclusion for resident family members in automobile liability policy is not applicable in contribution cases. Jones v. Barwick, Fla.App.1980, 386 So. 2d 7.

17. Employer and employee relationship

Uniform Contribution Among Tortfeasors Act was applicable to situation where both employer hospital and physician employee were severally liable for same injury to patient. Blackshear v. Clark, Del.1978, 391 A.2d 747.

Where sole basis of liability of an employer is negligence of employee, if employer is required to compensate injured person, employer can ordinarily require employee to reimburse employer for amount paid to injured person, but employer cannot be held liable unless employee is shown to be held liable; hence, if absence of culpability on part of employee to injured person has been established by litigation, employer cannot be held liable to injured person. Clark v. Brooks, Del.Super.1977, 377 A. 2d 365, affirmed 391 A.2d 747.

Employee's liability for his own negligence is not dependent on negligence of employer nor is employee entitled to reimbursement by employer. Id.

Employee and employer are both liable in tort under Uniform Contribution Among Tortfeasors Act for same injury to person or property. Id.

Under Uniform Contribution Among Tortfeasors Act, it is not sine qua non that suit be brought against either or

party in principal action. Whiting v. Hoffine, 1980, 294 N.W.2d 921, — S.D. —.

Comparative negligence statute does not affect action for contribution between two joint tort-feasors under Uniform Contribution Among Joint Tortfeasors Act. Liberty Mut. Ins. Co. v. General Motors Corp., 1982, 652 P.2d 96, — Hawaii —.

Where both negligence and strict products liability sounded in tort, question of contribution between defendant tort-feasors was properly decided under the Uniform Contribution Among Tortfeasors Act as adopted in New Mexico. Sanchez v. City of Espanola, App.1980, 615 P.2d 993, 94 N.M. 993.

In case which involves injury that is not divisible, apportionment cannot rationally be applied. Chrysler Corp. v. Todorovich, Wyo.1978, 580 P.2d 1123.

Jurisdiction in matters concerning contribution is concurrently in courts of law and courts of equity. Celotex Corp. v. Campbell Roofing and Metal Works, Inc., Miss.1977, 352 So.2d 1316.

9. Nature of right

Recovery under the Pennsylvania Uniform Contribution Among Tortfeasors Act is a recovery in assumpsit or contract rather than in tort. Matter of Reading Co., D.C.Pa.1975, 404 F.Supp. 1249.

Contribution, indemnity and apportionment are each procedures to approximate an equitable division of responsibility between defendants who are jointly liable to plaintiff and, as such, equitable principles are applied. Embrey v. Borough of West Mifflin, 1978, 390 A.2d 765, 257 Pa.Super. 168.

Claim for contribution is action separate and distinct from underlying tort; rights and obligations of tort-feasors flow, not from tort, but from judgment or settlement itself. Coniaris v. Vail Associates, Inc., 1978, 586 P.2d 224, 196 Colo. 392.

Suit for contribution is, whether in equity or at law, not ex delicto in nature. Security Fire Protection Co., Inc. v. City of Ripley, Tenn.App.1980, 608 S.W.2d 874.

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Right of contribution must arise from the duty each of the wrongdoers owes to the injured party and not from any obligations of the wrongdoers among themselves. Fischbach & Moore Intern. Corp. v. Crane Barg R-14, C.A.Md.1980, 632 F.2d 1123.

Where outcome of claim of defendant United States against third-party defendant was not derivative of or determined by outcome of plaintiff's claim against United States, there was allegation of separate and not joint torts, and, under Pennsylvania law, contribution was not appropriate. Tesch v. U. S., D.C.Pa.1982, 546 F.Supp. 526.

Under Pennsylvania law, two persons are not acting jointly for purposes of committing joint tort if acts of original wrongdoer and joint tort-feasor are severable as to time, neither having opportunity to guard against other's acts and each breaching different duty owed to plaintiff. Id.

In principle, right of contribution rests upon common liability of wrongdoers for loss notwithstanding fact that liability of each wrongdoer may rest on different ground; however, any entitlement to contribution which a concurrent wrongdoer may have from another culpable party arises from duty each of wrongdoers owes to injured party, as opposed to obligation running among themselves. Fischbach & Moore Intern. Corp. v. Crane Barge R 14, D.C.Md.1979, 476 F.Supp. 282, affirmed 632 F.2d 1123.

Mississippi statute governing apportionment or contribution is applicable only in an action for damages where judgment is rendered against two or more defendants jointly and severally as joint tort-feasors and is inapplicable in situation where defendant is sued alone as a tort-feasor. Hood v. Dealers Transport Co., D.C.Miss.1979, 472 F. Supp. 250.

Under South Dakota law, contribution is device through which portion of liability can be shifted, but party is entitled to contribution only when there is joint or several liability, and the mere fact of concurrent negligence or fault does not give rise to right of contribution. Parker v. Stetson-Ross Mach. Co., Inc., D.C.S.D.1977, 427 F.Supp. 249.

Retailer was entitled to contribution under Joint Tortfeasor's Contribution Act, where it had negligently serviced fire-extinguishing system and had sold defective system manufactured by defendant, since damages resulted from wrongful act, neglect or default of both retailer and manufacturer. Cartel Capital Corp. v. Fireco of New Jersey, 1980, 410 A.2d 674, 81 N.J. 548, 19 A.L.R.4th 310.

Tort-feasor originally causing injury and physician who subsequently aggravates or causes new injury are not joint tort-feasors. Lasprogata v. Qualls, 1979, 397 A.2d 803, — Pa.Super. —.

In order to recover on claim for contribution it is necessary to establish that defendant was jointly or severally liable in tort. Stone & Webster Engineering Corp. v. Heyl & Patterson, Inc., 1978, 395 A.2d 1359, — Pa.Super. —.

In order for tort-feasor to be entitled to contribution from another tort-feasor whose negligence has concurred in producing injury to third person, such third person must have an enforceable cause of action not only against tort-feasor seeking contribution but also against one from whom contribution is sought. Rigsby v. Tyre, Del.Super.1977, 380 A.2d 1371.

Where house vendors and real estate brokers were joint tort-feasors with exterminator in causing the same injury or damage to house purchasers, although liability of exterminator arose by virtue of statute and liability of the vendors and brokers arose out of common-law principles, all parties were within purview of Joint Tortfeasors Contribution Law. Neveroski v. Blair, 1976, 358 A.2d 473, 141 N.J.Super. 365.

True test for contribution is joint liability, not joint, common or concurrent wrongs. Id.

It is common liability at the time of the accrual of plaintiff's cause of action which is the sine qua non of defendant's contribution right; if there is common liability to plaintiff at that time, that is, common liability as a matter of fact even though then unadjudicated, defendant cannot be deprived of his inchoate right by reason of plaintiff's loss thereafter of his own right of direct action against the joint tortfeasor. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J. Super. 192.

Contribution is appropriate between persons who are liable jointly in tort for the same injuries, even if they are lia-

both employer and employee in order for suit to be brought against one of them. Id.

After trial court imputed default judgment from defendant employee to codefendant employer, it should have allowed the employer the right to litigate its claims for contribution against the other alleged joint tort-feasors; the default judgment imputation of negligence did not prevent the employer from proving that other parties stood in pari delicto. Dehn v. Prouty, S.D.1982, 321 N.W.2d 634.

Where respondeat superior form of vicarious liability was imposed upon one party through legal fiction, parties were not joint tortfeasors; therefore, Uniform Contribution Among Joint Tortfeasors Act did not apply. Kinetics, Inc. v. El Paso Products Co., App.1982, 563 P.2d 522, 99 N.M. 22.

Defendant, against whom recovery was sought for injuries allegedly sustained by plaintiff in automobile accident, could not recover contribution from plaintiff's employer and coemployee on theory that their negligence contributed to plaintiff's injuries and that it would be unjust for defendant to bear full responsibility to plaintiff. Kellen v. Second Judicial Dist. Court, In and For Washoe County, Dept. No. 1, 1982, 642 P.2d 600, — Nev. —.

Nurse, as the primary wrongdoer, had no claim for contribution from supervising doctor on the basis of respondeat superior. Dessauer v. Memorial General Hospital, 1981, 628 P.2d 337, 96 N.M.App. 93.

In view of commitment to allow contribution as matter of policy under common law, and fact that motor carrier's negligence, concerning injury to third person when its truck, operated by mechanic employed by defendant truck stop operator, struck injured third person, was based on a rebuttable presumption and could not compare in any degree with negligence of truck stop operator, motor carrier which had settled case against it by injured third person was entitled to recover from truck stop operator on a theory of contribution, notwithstanding assertion that liability of both motor carrier and truck stop operator was based upon respondeat superior so that their negligence was equal. Terminal Transport Co., Inc. v. Cliffside Leasing Corp., Tenn.1979, 577 S.W.2d 455.

Under rule concerning contribution which allows consideration of quality of negligence of parties, in vicarious negligence cases the quality of negligence depends upon who is the real master of the servant. Id.

Workmen's compensation statute, providing that liability of employer shall be exclusive and in place of all other liability to any third-party tort-feasor and to employee is constitutional. Seaboard Coast Line R. Co. v. Smith, Fla. 1978, 359 So.2d 427.

17a. Borrowed servant

Question of how loss caused by borrowed servant should be distributed as between lending and borrowing masters should be determined in accordance with principles of contribution and indemnity; abandoning Reader v. Ghemm Co., 490 P.2d 1200. Kastner v. Toombs, Alaska 1980, 611 P.2d 62.

18. Marital relationship

Under Maryland law, no contribution could be had from husband, as third-party defendant, for injuries which wife, as passenger, sustained in collision between automobile operated by husband and defendants' vehicle. Krick v. Carter, D.C.Pa.1979, 477 F.Supp. 152.

Maryland's prohibition against the right of contribution against a spouse by an original defendant is founded on fundamentally different policy considerations than preserving domestic tranquility. Id.

Under Pennsylvania law, husband, as driver, would not be immune from liability for contribution to defendants for any judgment recovered against them by wife passenger for injuries sustained in automobile collision. Id.

While some matters or proceedings between husband and wife within privacy of bedroom may remain within protection of interspousal immunity, where husband and wife lifted veil of secrecy and placed squarely in issue all facts surrounding their use or misuse of alleged defective contraceptive device which caused impregnation and resultant damages, husband's actions were not cloaked with interspousal immunity and could be basis for claim for contribution based upon his alleged negligence. J. P. M. v. Schmid Laboratories, Inc., 1981, 428 A.2d 515, 178 N.J.Super. 122.

Doctrine of interspousal immunity barred third party claim for indemnification and/or contribution against third-party defendant where third-party defendant was spouse of plaintiff. Moler v. Quality Chevrolet, Inc., 1981, 440 N.E.2d 127, 2 Ohio App.3d 120, 2 O.B.R. 134.

Common-law doctrine of interspousal immunity did not protect husband as host driver from liability to his wife as passenger for injuries sustained in collision and, hence, did not preclude owner and operator of other vehicle, named as defendants in main action by wife, from seeking to recover in third-party action against husband for contribution as a joint tort-feasor. Hayon v. Coca Cola Bottling Co. of New England, 1978, 378 N.E.2d 442, 375 Mass. 644.

Statute affording a right of contribution in those instances when two or more persons become jointly liable in tort for same injury to person or property applied to third-party action wherein owner and operator of vehicle, named as defendants in main action by wife, sought to recover against husband as host driver of wife's vehicle for contribution as a joint tort-feasor. Id.

Common-law doctrine of interspousal immunity does not control over Uniform Contribution Among Tortfeasors Act to prevent one tort-feasor from seeking contribution from another tort-feasor when other tort-feasor is spouse of injured person who received damages from first tort-feasor. Florida Farm Bureau Ins. Co. v. Government Emp. Ins. Co., Fla.App.1979, 371 So.2d 166, quashed in part 387 So.2d 932.

18a. Parent-child

If father, who was standing with infant child at curb of street, released child's hand after observing traffic in the roadway and told child to cross the street where she was struck by vehicle, parent-child immunity doctrine would not bar vehicle driver, who was sued for child's injuries, from seeking contribution and/or indemnification from father, but recovery could not be based on theory of negligent supervision. Carey v. Davison, 1981, 437 A.2d 338, 181 N.J.Super. 283.

Note 19

19. Motor vehicle accidents

Finding, in third-party action against estate for contribution arising out of head-on collision of automobiles, that decedent was guilty of negligence contributing to accident, was binding on estate in its claim against third-party plaintiff for wrongful death, since parties were identical. Gerrard v. Larsen, C.A.N.D.1975, 517 F.2d 1127.

Under Mississippi law, where alleged design defect in automobile did not cause or contribute to collision which occurred when the automobile was rear-ended while waiting to make a left turn, tort-feasor's insurer which paid substantial judgment to survivors of victim who was burned to death in the automobile was barred by the second accident doctrine from recovering contribution from manufacturer and seller of the automobile. Hartford Acc. & Indem. Co. v. Mitchell Buick-Pontiac and Equipment Co., D.C.Miss.1979, 479 F. Supp. 345.

Under Mississippi law, where neither manufacturer nor seller of allegedly defective automobile was a party to suit which arose out of rear-end collision at intersection, tort-feasor's insurer could not recover contribution from the manufacturer or seller for amount which insurer paid to survivors of victim who was burned to death when the allegedly defective automobile exploded. Id.

Defendant driver of vehicle which struck vehicle in which plaintiff's decedent was riding was not entitled to obtain contribution from plaintiff under law of Mississippi on theory that negligence on part of plaintiff's driver contributed to collision where defendant was sued alone as a tort-feasor and, hence, judgment would not be rendered against two or more defendants jointly and severally as joint tort-feasors and, in any event, decedent could not, under Mississippi law, have sued plaintiff, his father, for damages on account of his injuries had death not ensued. Hood v. Dealers Transport Co., D.C.Miss.1979, 472 F.Supp. 250.

Since host driver was not liable to her guest passengers for injuries arising out of accident in absence of allegation and proof of intentional and wanton conduct on her part, host driver could not be held liable for contribution on counterclaim of defendant driver of other vehicle alleging that negligence on the part of host driver was a cause of injuries. Rigsby v. Tyre, Del.Super.1977, 380 A.2d 1371.

Defendant, found liable for injuries sustained when police cruiser in which plaintiff was a passenger collided with a motor vehicle operated by defendant, could derivatively enforce liability to plaintiff of driver of police cruiser by alleging in third-party claim for contribution that plaintiff's injuries were caused by driver's negligence. Foley v. Kilbrick, 1981, 425 N.E.2d 376, 12 Mass. App. 382.

If recovery is denied because of guest statute, operator cannot be "liable in tort" for injury to guest and defendants cannot receive contribution from such operator; if, however, occupant is found to be a passenger rather than a guest, a breach of the same duty of ordinary care can make operator "liable in tort" and allow contribution to defendants. Olesen v. Snyder, 1976, 249 N.W.2d 266, 90 S.D. 107.

Defendant, in personal injury action arising from automobile accident was not entitled to contribution or reduction in his liability to plaintiff passenger on basis of contention that driver of vehicle in which plaintiff was riding was jointly negligent since, through operation of South Dakota guest statute, such driver was not liable for plaintiff's injuries; right to contribution is determined by whether there is joint or several liability rather than presence of joint or concurring negligence. Beck v. Wessel, 1976, 237 N.W.2d 905, — S.D. —.

Automobile manufacturer and driver of second automobile which collided with plaintiff's automobile were "joint tortfeasors" within meaning of statute under which relative degrees of fault of joint tort-feasors may bear upon rights of contribution, since evidence disclosed negligent conduct on part of each defendant constituting legal cause of harm to plaintiff because it was substantial factor in bringing about harm; thus, instruction permitting jury to find manufacturer liable if they found that alleged manufacture defect was one of the causes of plaintiff's injury, even though they might also believe that negligence of second automobile driver was contributing factor in causing accident, was correct. Chrysler Corp. v. Todorovich, Wyo.1978, 580 P.2d 1123.

Where injuries sustained in rear-end collision by automobile driver, who brought personal injury action against automobile manufacturer and driver of second automobile which struck plaintiff's automobile, were incapable of any logical, reasonable, or practical division, and defendants, since respective conduct of each constituted legal cause of plaintiff's injuries, stood jointly and severally liable for full extent of injuries, right of automobile manufacturer to claim against driver of second automobile was to be resolved under contribution statutes rather than doctrine of apportionment, and thus dismissal of manufacturer's cross claim against second driver was harmless error, since manufacturer could still pursue any right to contribution from second driver by independent action. Id.

Under guest statute, automobile passenger had no claim for damages against driver of car in which he was riding and therefore Joint Tortfeasors Act protected driver from third-party complaint for contribution. Baldonado v. Navajo Freight Lines, Inc., 1977, 562 P.2d 1138, 90 N.M.App. 284.

Where injury to occupant of automobile was caused by negligence of truck driver who at that time was under joint supervision of service station and truck owner, the two supervisors should equally share the loss and truck owner which settled with occupant was entitled to only 50% contribution from station. Terminal Transport Co., Inc. v. Cliffside Co., Inc., Tenn.App.1980, 608 S.W.2d 860.

In action arising out of accident in which truck driven by truck driver collided with rear of parked automobile occupied by family, brought against truck driver's certifying physician by truck driver's employer for physician's alleged negligent failure to discern truck driver's physical disabilities, if actual determination of jury was that truck driver's physical disabilities were proximate cause of accident, that truck driver's employer was guilty of negligence in failing to discover truck driver's physical disabilities, and that physician was also guilty of negligence, then truck driver's employer would be entitled to

contribution from physician under Uniform Contribution Among Tort Feasors Act. Wharton Transport Corp. v. Bridges, Tenn.1980, 606 S.W.2d 521.

In action in which injured minor pedestrian obtained judgment against motorist and in which it was in effect determined that minor's mother's negligent supervision of minor contributed to his injury, contribution was available against mother, but only to extent of existing liability insurance coverage for her tort against minor. Joseph v. Quest, Fla.1982, 414 So.2d 1063.

There is no right of contribution against a joint tort-feasor who is parent of injured minor if parent is without liability insurance or if policy contains an exclusion clause for household or family members. Woods v. Withrow, Fla.1982, 413 So.2d 1179.

In action brought by passenger and driver of automobile involved in accident against contractor, which filed third-party claim against subcontractor, subcontractor's claim against driver for contribution would be allowed so that in the event that driver and passenger were not found to be joint venturers at time of accident and if jury found that driver was partially at fault as a joint tort-feasor, proper distribution of liability with respect to passenger would be insured. Florida Rock & Sand Co. v. Cox, Fla.App.1977, 344 So.2d 1296.

19a. Banking transactions

Under New Jersey law, attorney's alleged liability to clients for failing properly to supervise out-of-state attorney to whom he transferred clients' personal injury case, and who subsequently embezzled clients' funds, was not of sort which would entitle attorney to indemnity from bank, which was guilty of negligence in handling of attorney's deposit, if referring attorney were held liable for clients' loss; and thus bank was not barred from seeking contribution. Tormo v. Yormark, D.C.N.J.1975, 398 F.Supp. 1159.

19b. Fiduciary relationships

Tennessee Uniform Contribution Among Tort-feasors Act did not apply to suit seeking recovery from accounting firm which allegedly aided and abetted executor in actions which breached fiduciary relationship and suit could not be maintained against accounting firm by beneficiary who had settled with executor. Buchbinder v. Register, C.A. Tenn.1980, 634 F.2d 327.

Uniform Contribution Among Joint Tortfeasors Act does not apply to breaches of trust or other fiduciary obligations. Eason v. Lau, Fla.App.1978, 369 So.2d 600, certiorari denied 368 So.2d 1365.

20. Liability in general

Third parties seeking contribution for damages arising from incident in which transformers were damaged while being loaded on vessel did not establish that transformer manufacturer failed to exercise reasonable care, where evidence indicated that manufacturer upon being notified that stencilled weights of the transformers were erroneous, rechecked the accuracy of the stencilled figures and notified buyer of discrepancies. Fischbach & Moore Intern. Corp. v. Crane Barge R-14, C.A.Md.1980, 632 F.2d 1123.

Testimony that, even though building remained under building owner's control, contractor had ultimate responsibility for barricading elevators and having elevators shut down when barricades were not in place and evidence that subcontractor's employee was injured when he fell into open elevator shaft sustained finding that both the building owner and the contractor were negligent so that building owner was entitled to contribution from contractor, for certain amounts recovered from building owner by injured sub-subcontractor's employee and his wife. Hattersley v. Bolit, C.A.Pa.1975, 512 F.2d 209.

Under South Dakota law, where jury specifically found that particular defendant was not negligent in any manner and was not liable for injuries to plaintiff, no right of contribution existed against such defendant. Bartak v. Bell-Gallyardt & Wells, Inc., D.C.S.D. 1979, 473 F.Supp. 737, reversed on other grounds 629 F.2d 523.

In New Jersey indemnity will be allowed to a joint tort-feasor only if his liability is merely "constructive" or "vicarious," that is, liability which is imputed by law without regard to actual fault. Tormo v. Yormark, D.C.N.J.1975, 398 F.Supp. 1159.

Television set manufacturer, sued by tenant for wrongful death under Pennsylvania law because of fire caused by allegedly defective set had no cause of action for contribution or indemnity arising out of alleged third-party defendant landlord's negligence, where there was no question of primary or secondary liability and no question of vicarious liability since liability, if any, of landlord for contribution must arise out of tort law governing liability of landlord to tenant because of negligence and there had to be proof of some direct omission by landlord of performance of a duty he owed to tenant. Groover v. Magnavox Co., D.C.Pa.1976, 71 F.R.D. 638.

In regard to incident in which injuries were allegedly sustained when explosion and flash fire occurred in telephone utility's manhole, utility was not precluded from relying upon distinction between "active" and "passive" negligence with respect to original defendant's claim for contribution, and such concepts were relevant and there were sufficient facts to support submission of the issue to trier of fact. Chesapeake Utilities Corp. v. Chesapeake and Potomac Tel. Co. of Maryland, Del.Super. 1980, 415 A.2d 486.

Inasmuch as surety on performance bond issued in connection with approval of subdivision development map was not alleged to be one of the tort-feasors and was not a party to negligence action by grantors of easement for storm sewer required in connection with the development, township which had paid entire judgment obtained by grantors against township and developer did not have right to contribution from surety. Wyckoff Tp. v. Sarna, 1975, 347 A.2d 16, 136 N.J.Super. 512.

Hold harmless clause in franchise agreement between city and power company governed apportionment of liability between city and power company in negligence action rather than the Uniform Contribution Among Tortfeasors Act, in that parties, apparently at arm's length, agreed on the standard for measuring liability, provision was not unconscionable, and agreement was not at odds with the remedial purposes of the statute. City and Borough of Juneau v. Alaska Elec. Light & Power Co., Alaska 1981, 622 P.2d 954.

Note 20

Right to contribution exists among joint tort-feasors under the Uniform Contribution Among Tortfeasors Act regardless of the fact that they have been found liable under different theories, such as negligence and strict products liability. Sanchez v. City of Espanola, App.1980, 615 P.2d 993, 94 N.M. 993.

Where liability of defendant city for injuries sustained by minor plaintiff when a volleyball standard fell and severely injured her foot was predicated on negligence in that standard was being used in a recreation center under supervision of city when accident occurred, and liability of defendant manufacturer was predicated on a theory of strict products liability under section 402A of the Restatement (Second) of Torts, as was the liability of the defendant sporting goods store for having sold a defective product which eventually injured a user of the product, there were three tort-feasors which were each directly liable to the plaintiff for her injuries, and each tort-feasor had a right to contribution when it had paid more than its pro rata share of the judgment, or one-third. Id.

In a case for contribution, the real inquiry is which of the two parties is primarily responsible for the injuries. Terminal Transport Co., Inc. v. Cliffside Leasing Corp., Tenn.1979, 577 S.W.2d 455.

Uniform Contribution Among Tortfeasors Act creates a substantive right to contribution from a codefendant whose negligence contributes to plaintiff's injury. Carey v. Jones, Tenn.App. 1976, 546 S.W.2d 814.

20a. Strict liability

Liability for contribution and indemnity under the principle of strict liability as codified by section 402A of the Restatement (Second) of Torts depends, not on the means of marketing, but on the fact of marketing, whether by sale, lease or bailment, for use and consumption by the public. Hoffman v. Loos & Dilworth, Inc., 1982, 452 A.2d 1349, — Pa.Super. —.

Role of the defendant as a sales agent for the manufacturer of the boiled linseed oil which caused the fire giving rise to the wrongful death and survival claims in the trespass action provided a predicate upon which the defendant could be held liable for contribution and indemnity under the principle of strict liability as codified by section 402A of the Restatement (Second) of Torts in that the defendant intended that the product reach the market and was directly involved in supplying the chattel, not merely offering the use of money. Id.

21. Settlement

Under Pennsylvania law, settlement of claim with one tort-feasor bars subsequent suit against another joint tort-feasor only where prior proceedings can reasonably be construed to have resulted in full satisfaction of plaintiff's claim. Frank v. Volkswagenwerk, A.G. of West Germany, C.A.Pa.1975, 522 F.2d 321.

Under Pennsylvania law, where minor settled claim arising out of automobile accident because her parents and attorney concluded that the most they could recover from driver of automobile was maximum coverage under his insurance policy and not because amount of settlement fully satisfied claim, settlement did not bar action against another alleged joint tort-feasor. Id.

Defendants in death action were prevented from initiating action for contribution against other defendant after entering into settlement in death action where all parties were parties to death action. Stone & Webster Engineering Corp. v. Heyl & Patterson, Inc., 1978, 395 A.2d 1359, 261 Pa.Super. 150.

Under Tort Claims Act, plaintiffs could recover full amount of jury verdict from state to extent that Act allowed, less pro tanto reductions for two settlements from joint tort-feasors. Polyard v. Terry, 1977, 372 A.2d 378, 148 N.J.Super. 202, reversed on other grounds 390 A.2d 653, 160 N.J.Super. 497, affirmed 401 A.2d 532, 79 N.J. 547.

Tort-feasor, having agreed to entry of judgment pursuant to stipulation for dismissal, had no substantive right thereafter to require other tort-feasor to make contribution especially where other tort-feasor denied liability and did not otherwise agree to any contribution. Grace v. Buckley, 1982, 435 N.E.2d 655, 13 Mass.App. 1081.

To recover contribution, plaintiffs were required to show that they were legally liable as joint tort-feasors and that defendants were jointly liable, and plaintiffs could recover only to extent that settlement was reasonable. Robertson v. McCarte, 1982, 433 N.E.2d 1262, 13 Mass.App. 441.

Under Uniform Contribution Among Joint Tortfeasors Act, where, among multiple tort-feasors, one has settled in good faith and another has not settled, the claim against the latter is reduced by the settlement, the former being protected against further liability. Boston Edison Co. v. Tritsch, 1976, 346 N.E.2d 901, 370 Mass. 260.

Where plaintiff had settled with joint tort-feasor before judgment, settlement payment received from joint tort-feasor in April, 1974, should have been applied to reduce balance outstanding on judgment against second defendant on that date, and thus it was improper to treat settlement payment as if it had been received at time of the writ and second defendant was not thereby unfairly burdened, with respect to resultant interest calculations, on theory that it was to be credited with the settlement payment as if it had made the payment itself. Id.

Where defendants who settled their liability in iron worker's action for personal injuries sustained in fall at construction site for $130,000 were later found to be 92% liable, another defendant, who settled for $20,000, was found not to be liable, and settlement agreement with the defendant found not to be liable provided that any damages recovered against any other parties shall be reduced in the sum of twenty thousand dollars or in such sum as shall be the extent of the pro rata share of settling defendants' liability whichever sum shall be the larger, liability of architects, who did not settle, had to be reduced by $20,000 even though total verdict was $215,000, and even though such reduction of the award against the architects, who were found to be liable for 7.5% of the $215,000, eliminated their monetary liability. Duncan v. Pennington County Housing Authority, 1979, 283 N.W.2d 546, — S.D. —.

Where defendant entered into settlement agreement with plaintiff in which defendant agreed to pay plaintiff $45,000 but such defendant did not pay what would have been necessary to obtain extinguishment of other defendant's liability, defendant which had settled could

not bring claim for contribution against defendant which had not settled under Uniform Contribution Among Tortfeasors Act, even though judgment was entered in favor of plaintiff and against both defendants for $45,000, so that party which had settled and which had absolutely limited its liability to $45,000 ended up paying disproportionate share of judgment. Best Sanitary Dis. Co. v. Little Food Town, Inc., Fla.1976, 339 So.2d 222.

22. Indemnity

Under Arkansas law, right of indemnity may arise from express contract of indemnity or from special relationship between third party and employer which would give rise to the right; however, in absence of contract for indemnity running in favor of third party, negligent third-party tort-feasor is not entitled to either indemnity or contribution from a negligent employer where their concurrent negligence has produced injury or death of employee. Dulin v. Circle F Industries, Inc., C.A.Ark.1977, 558 F.2d 456.

Even assuming that painter's employer was guilty of causal negligence in connection with painter's accidental death by electrocution, employer and female conductor manufacturer, which had been found by jury to be negligent, were simply joint tort-feasors and thus manufacturer was not entitled to indemnity from employer under Arkansas law. Id.

Contribution and indemnity are mutually exclusive remedies; contribution contributes the loss among tort-feasors by requiring each to pay his proportionate share, while indemnity shifts entire loss from one tort-feasor who has been compelled to pay it to the shoulders of another who should bear it instead. Missouri Pac. R. Co. v. Star City Gravel Co., Inc., D.C.Ark.1978, 452 F.Supp. 480, affirmed 592 F.2d 455.

There is important distinction between contribution, which distributes the loss among the tort-feasors by requiring each to pay his proportionate share, and indemnity, which shifts entire loss from one tort-feasor who has been compelled to pay it to another who should bear it instead; the simplest basis for indemnity is a contract which provides for it; however, right to indemnity may arise without agreement and by operation of law to prevent a result which is regarded as unjust or unsatisfactory. Aetna Cas. and Sur. Co. v. L. K. Comstock & Co., Inc., D.C.Nev.1980, 488 F.Supp. 732.

When indemnitor expressly agreed to indemnify indemnitee except in certain specified instances in which accident was proximately caused by intervening negligence of indemnitee or third persons and it was determined that exceptions did not pertain, indemnitor was obligated to indemnify. Allen v. Standard Oil Co., 1982, 443 N.E.2d 497, 2 Ohio St.3d 122, 2 O.B.R. 671.

Indemnification between tortfeasors is allowed only when there is a preexisting legal relationship between them or a duty imposed by law upon one of the tort-feasors to hold the other harmless for the injuries. Public Service Co. of Colorado v. District Court In and For City and County of Denver, 1981, 638 P.2d 772. — Colo. —.

Issue of indemnity is not concerned with tort-feasor's liability to plaintiff; it is remedy solely concerned with equities existing among tort-feasors. Stock v. ADCO General Corp., 1981, 632 P.2d 1182, 96 N.M.App. 944.

County was not required, under indemnity provisions of contract between county and Department of Transportation for resurfacing and shoulder repairs on portion of rural road, to defend and indemnify employee of state Department of Transportation, with respect to lawsuit filed by motorist who was severely injured when his vehicle left roadway after striking an unmarked dip therein caused by county construction work, for state employee's alleged negligence in ordering and allowing county to do roadwork under his supervision that it was ill-equipped and incapable of properly performing, because there was no intent, express or implied, in indemnity provisions to indemnify state or its employees against their acts of negligence. Wajtasiak v. Morgan County, Tenn.App.1982, 633 S.W.2d 488.

In the case of joint tort-feasors, one is not entitled to indemnification; the remedy in cases involving joint tort-feasors is restitution by way of contribution. Terminal Transport Co., Inc. v. Cliffside Leasing Corp., Tenn.1979, 577 S.W.2d 455.

Where right of full indemnity exists between persons liable in tort, no right of contribution exists. Craven v. Lawson, Tenn.1976, 534 S.W.2d 653.

Defendant in action involving controversy over rights to condominium parking space was not entitled to attorney fees from vendor of parking space under claim for indemnity where defendant was not liable to plaintiffs, in that vendor's alleged obligation to indemnify never arose and defendant did not establish an independent basis for indemnification. Mauss v. Christensen, Fla.App.4 Dist.1982, 414 So.2d 255.

Purported indemnitor was not bound as a matter of law by insured's judgment against purported indemnitee since indemnitor had not been given timely notice or opportunity to appear and defend the action. Hull & Co., Inc. v. McGetrick, Fla.App. 3 Dist.1982, 414 So.2d 243.

A judgment rendered against an indemnitee is conclusive for res judicata or estoppel by judgment purposes against a purported indemnitor, but only upon condition that indemnitor has been given timely notice and an opportunity to appear and defend the action. Id.

When there is no notice to a purported indemnitor of action against purported indemnitee who subsequently seeks indemnity from indemnitor, indemnitee must, ab initio and irrespective of the prior action, establish facts which support right to indemnification, and indemnitor is free to contest those facts. Id.

Indemnitors were properly held liable on their indemnification agreement, which provided that they would indemnify indemnitee against any and all manner of claims, whether matured or unmatured, in connection with indemnitee's business dealings with indemnitors. Viyella v. Pina, Fla.App. 3 Dist. 1982, 414 So.2d 5.

Enforcement of agreement to indemnify parties against their own wrongful acts will be denied in absence of clear

and unequivocal contractual expression of such an intent; without such an expression, a contractual indemnitor's obligation is negated by any fault of indemnitee which was legal cause of its own loss. Jones v. Holiday Ins., Inc., Fla.App.1981, 407 So.2d 1032, review denied 417 So.2d 329.

Where indemnity clause of license agreement between hotel owner and operators did not clearly and unequivocally call for owner's indemnification for judgments based upon its own negligence, where it was unclear whether general verdict against owner in suit by hotel employee was based upon owner's affirmative negligence or upon owner's vicarious liability for operators' conduct, and where punitive damage award demonstrated that jury found that owner was at least partially at fault for employee's injury, owner was not entitled to contractual indemnification based on license agreement. Id.

Obligation to indemnify arises from express or implied contractual relationship between tort-feasors. First Church of Christ Scientist v. City of St. Petersburg, Fla.App.1977, 344 So.2d 1302.

22a. Pleadings

Where there has been no other clear determination as to whether two parties are joint tort-feasors, plaintiff's pleadings should control. Degen v. Bayman, 1976, 241 N.W.2d 703, 90 S.D. 400.

Third-party complaint which alleged that city had contracted with church to provide bus and operator to transport persons to church, that injuries of passenger sustained when she was struck by automobile after she exited bus were directly and proximately caused by city's failure to perform its contractual duty and which alleged that city's negligence was active or primary and that negligence, if any, of church was passive or secondary, stated cause of action for indemnity against city and also stated cause of action under Uniform Contribution Among Tortfeasors Act should trier of fact find church and city be joint tort-feasors. First Church of Christ Scientist v. City of St. Petersburg, Fla.App.1977, 344 So.2d 1302.

22b. Warranty of merchantability

Statute granting right of contribution among joint tort-feasors should be read to include tort-like liability for breach of implied warranty of merchantability. Wolfe v. Ford Motor Co., 1982, 434 N.E. 2d 1008, 386 Mass. 95.

Assembler of truck camper who was liable for breach of implied warranty of merchantability and required to pay judgment for injuries sustained in accident involving the vehicle was "jointly liable in tort" with manufacturer of truck used in construction of the vehicle within meaning of statute granting right of contribution among joint tort-feasors. Id.

If party breaching implied warranty of merchantability could not demonstrate that he was only liable vicariously for motor vehicle accident, he would not be entitled to use indemnity as a bar to contribution by codefendant. Id.

24. Compensatory damages

Compensatory damages may not be apportioned among joint tort-feasors. Cheek v. J. B. G. Properties, Inc., 1975, 344 A.2d 180, 28 Md.App. 29.

Where all three defendants were liable for same injury but insofar as defendant exterminator was concerned the judgment against it consisted of $5,000 for compensatory damages and $10,000 for penalty provided by Consumer Fraud Act, liability of the other two parties, the broker and house vendors was limited to compensatory damages for their common-law wrong, and only the compensatory portion of the exterminator judgments should be considered in computation of contribution rights among tort-feasors. Neveroski v. Blair, 1976, 358 A.2d 473, 141 N.J.Super. 365.

25. Punitive damages

Punitive damages may be apportioned among joint tort-feasors. Cheek v. J. B. G. Properties, Inc., 1975, 344 A.2d 180, 28 Md.App. 29.

Rule that where consideration paid by one joint tort-feasor for release represents full compensation for the injury the other tort-feasor is discharged does not apply to an award of punitive damages since theory behind punitive damages would best be served by adoption of rule that allows apportionment of such damages among several wrongdoers according to degree of culpability or according to existence or nonexistence of requisite state of mind for such damages in defendants. Id.

26. Review, right to appeal

Since one defendant has a right of contribution if codefendant is also found liable, judgment defendant is entitled to appeal decision dismissing the codefendant. Carey v. Jones, Tenn.App. 1976, 546 S.W.2d 814.

Prior decisions holding that one defendant may not appeal from grant of directed verdict in favor of a codefendant are no longer controlling since the enactment of the Uniform Contribution Among Tortfeasors Act. Id.

Uniform Contribution Among Tortfeasors Act changed substantive law, giving defendant the right to contribution from codefendant whose negligence contributed to plaintiff's injuries; having the right to contribution from codefendant who is joint tort-feasor, defendant's liability would be affected by dismissal of charges against his codefendant, and defendant therefore qualifies as an aggrieved party having the right to appeal dismissal of charges against codefendant. Cole v. Arnold, Tenn.1977, 545 S.W.2d 95.

Defendant was aggrieved party and had right to appeal from decision exonerating codefendant from liability in negligence action, in view of fact that defendant would have right of contribution from codefendant if codefendant were found to be a joint tort-feasor, and defendant was therefore affected by dismissal of charges against codefendant. Id.

27. Questions of fact

Issue of proximately causative negligence for purposes of determining whether general contractor was entitled to contribution from subcontractor was question for jury in action for injuries sustained by two workmen in fall of concrete floor planks where general contractor had assumed some obligation to inspect jobsite for safety violations, employed safety consultant, and had full-time employee on jobsite, notwithstanding that subcontractor was erecting beams and laying planks involved in accident. Sweetman v. Strescon Industries, Inc., Del.Super.1978, 389 A.2d 1319.

§ 2. [Pro Rata Shares]

Action in Adopting Jurisdictions

Variations from Official Text:

Colorado. Section reads: "When there is a disproportion of fault among joint tortfeasors, the relative degrees of fault of the joint tortfeasors shall be used in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law."

Florida. In clause (a), substitutes "be the basis for allocation of liability" for "not be considered".

Nevada. Section reads:

"In determining the equitable shares of tortfeasors in the entire liability:

"1. If equity requires, the collective liability of some as a group constitutes a single share; and

"2. Principles of equity applicable to contribution generally apply."

Ohio. Section reads: "In determining the proportionate shares of tortfeasors in the entire liability their relative degrees of fault shall be considered. If equity requires the collective liability of some as a group, the group shall constitute a single share, and principles of equity applicable to contribution generally shall apply."

Wyoming. Section reads:

"(a) In determining the pro rata shares of tortfeasors in the entire liability:

"(i) The relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law;

"(ii) If equity requires, the collective liability of some as a group shall constitute a single share;

"(iii) A final verdict in favor of an alleged joint tortfeasor as against the injured party shall be a conclusive determination that such successful party is not liable to make any contribution to any other tortfeasor."

Law Review Commentaries

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl. L.Rev. 195 (1982).

Notes of Decisions

1. Generally

Railroad, which had paid settlement to injured employee, was entitled to contribution from truck driver and truck owner in the amount of five percent of settlement figure, the amount which jury found defendants' negligence in parking truck on railroad tracks to have proximately contributed to injuries. Missouri Pac. R. Co. v. Star City Gravel Co., Inc., D.C.Ark.1978, 452 F. Supp. 480, affirmed 592 F.2d 455.

Where dog-bitten child's grandparents, whose liability to child was predicated upon common-law negligence, and dog owners, whose liability was predicated upon "Dog Bite Statute," were found to be proximate and concurrent causes of child's injuries, under Joint Tortfeasors Contribution Act owners were responsible only for their pro rata share of damages recovered, amounting to 50% of total judgment, apportioned one half of such 50% to each as co-owners of dog; in addition, under Comparative Negligence Act, and because grandparents were each found 50% negligent, they were responsible for one half of remaining half of child's damages. Petersen v. Tolstow, 1982, 445 A.2d 84, 184 N.J.Super. 84.

Term "pro rata share" as used in Uniform Contribution Among Tort-Feasors Act section providing for reduction, to extent of "pro rata share" of released tort-feasor, of injured person's damages recoverable against all other tort-feasors does, and will continue to, mean that which judicial decision exemplified it to be, i. e., in numerical shares or proportions based on number of tort-feasors. Lahocki v. Contee Sand & Gravel Co., Inc., 1979, 398 A.2d 490, 41 Md.App. 579, reversed on other grounds 410 A.2d 1039, 286 Md. 679.

Whenever two actions are brought for separately identifiable acts of negligence on the part of original wrongdoer and treating physician, apportionment of damages between the two causes should take place. Lasprogata v. Qualls, 1979, 397 A.2d 803, — Pa.Super. —.

In language of 1969 comparative negligence statute providing that contributory negligence does not bar recovery in a negligence action "if such negligence was not as great as the negligence of the person against whom recovery is sought . . . ", term "person" is construed to mean "persons" so as to allow all plaintiffs in actions arising from and after effective date of 1969 statute to be treated more nearly equally and to make it unnecessary for courts to deal with separate procedures under 1969 statute and 1973 statute; negligence of plaintiff is to be compared with total negligence of all defendants, all of whom are liable to plaintiff, with contribution among joint tort-feasors on pro rata basis. Grace v. Damon, 1978, 374 N.E.2d 311, 6 Mass.App. 160.

Neither fact that legislature had not enacted a bill adopting doctrine of comparative negligence after having considered such issue several times nor fact that legislature had enacted statutes designed to make the judge-made rule of contributory negligence work or to ameliorate its harshness barred judiciary from reconsidering whether such rule should be replaced by doctrine of comparative negligence. Scott v. Rizzo, 1981, 634 P.2d 1234, 96 N.M. 682.

Alaska

The principles of equity which apply through the Uniform Contribution Among Tortfeasors Act were intended to govern contribution when one defendant is found to be insolvent, and

were not intended to affect requirement that relative degrees of fault are not to be considered as factor in apportionment. Arctic Structures, Inc. v. Wedmore, Alaska 1979, 605 P.2d 426.

Under section of Uniform Contribution Among Tortfeasors Act, a "pro rata share" means "equal shares" when applied to right of contribution between tenants in common. Commercial Union Assur. Companies v. Western Farm Bureau Ins. Companies, 1979, 601 P.2d 1203, 93 N.M. 507.

Apportionment of liability effected by contribution is on the basis that equality is equity, which means that each tort-feasor is required ultimately to pay his pro rata share, arrived at by dividing the damages by the number of tort-feasors; tort-feasors stand in the same relationship to one another and are all equally liable for breach of their duty. Id.

Under contribution statutes, trial court, before submitting to jury question of joint tort-feasors' pro rata shares of liability, must make determination as a matter of law that there was such a disproportion of fault between joint tort-feasors as to render inequitable an equal distribution among them of their common liability by contribution; if trial court should conclude as a matter of law that there were requisite disproportion of fault, relative degree of fault of each joint tort-feasor should be considered by jury. Chrysler Corp. v. Todorovich, Wyo.1978, 580 P.2d 1123.

Unless inequitable, pro rata share of each jointly and severally liable defendant is determined by dividing amount of judgment by number of persons against whom it has been obtained. Great West Cas. Co. v. Fletcher, 1982, 287 S.E.2d 429, 56 N.C.App. 247.

Contribution between joint and several judgment debtors would be pro rata based upon number of defendants rather than based upon percentage of liability attributable to seriousness of conduct of each of them. Celotex Corp. v. Campbell Roofing and Metal Works, Inc. Miss.1977, 352 So.2d 1316.

§ 3. [Enforcement]

Action in Adopting Jurisdictions

Variations from Official Text:

Ohio. In subsec. (b), substitutes "judgment debtors" for "judgment defendants".

Subsec. (f) reads: "Valid answers to interrogatories by a jury or findings by a court sitting without a jury in determining the liability of the several defendants for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution."

Wyoming. In subsec. (c), substitutes "or the decision on appeal has become final" for "or after appellate review".

Notes of Decisions

Supplementary Index to Notes

½. Construction with other laws

Statute authorizing action for contribution could not be read in isolation but was to be read in context with other sections of chapter and considered in connection with cause of enactment, mischief to be remedied and main object to be accomplished, to end that purpose might be effectuated. Robertson v. McCarte, 1982, 433 N.E.2d 1262, 13 Mass.App. 441.

1. Generally

A right to contribution may be enforced either at law or in equity. Michigan Millers Mut. Ins. Co. v. U.S. Fidelity and Guar. Corp., 1982, 452 A.2d 16, — Pa.Super. —.

1a. Parties in general

In regard to accident in which sand truck driver was killed when truck crashed through a house as it was being moved across bridge, even if it would have been permissible to reduce house movers' liability by driver's employer's proportional share of total fault up to the amount of workers' compensation benefits paid, it would not have been feasible to do so where employer was not a party, no effort was made to join employer as a party and there was no basis for a finding as to employer's proportionate share of the total fault. Blocker v. Wynn, Fla.App. 1 Dist.1983, 425 So.2d 166.

2. Separate action

Insurer of a tort-feasor found liable in a prior action may not recover contribution from a nonparty to the prior action. National Farmers Union Property and Cas. Co. v. Frackelton, 1981, 650 P.2d 571, — Colo.App. —.

Tort-feasor found liable in a prior action may not recover contribution in a separate action from a nonparty to the prior action. National Farmers Union Property and Cas Co. v. Frackelton, 1981, 645 P.2d 1321, — Colo.App. —.

2a. Complaint

Where pleadings show separate torts, as properly defined, rather than joint tort, dismissal of third-party action for contribution is appropriate. Tesch v. U. S., D.C.Pa.1982, 546 F.Supp. 526.

Insured's complaint requesting that "all sums that may be adjudged" or entire burden of liability it may have to insurer be assessed against insurance agent failed to state cause of action for contribution or indemnification. American Ins. Co. v. Material Transit, Inc., Del.Super.1982, 446 A.2d 1101.

Pleading rule did not relieve indemnitor of duty to indemnify where parties predicated release from duty to indemnify not on whether complaint alleged negligence but on whether indemnitee or third persons were in fact negligent and inasmuch as neither indemnitee nor third persons were negligent, indemnitee was entitled to be indemnified. Allen v. Standard Oil Co., 1982, 443 N.E.2d 497, 2 Ohio St.3d 122, 2 O.B.R. 671.

Complaint sounding in negligence requires allegations of duty, breach and proximate cause, while a complaint for contribution requires allegations of payment and payment in excess of one's

share, and thus claim for contribution is distinguishable from liability tort case and is not compulsory counterclaim. Harvey v. Huddle, Fla.App. 4 Dist.1982, 416 So.2d 1248.

4. Third party practice

Federal immunity, which barred plaintiff mail carrier from pursuing a tort action against United States Post Office Department, also barred a third-party action against the Department for contribution in action for alleged injuries sustained by carrier on property under defendant's general supervision. Wilson v. Knoxville Community Development Corp., D.C.Tenn.1978, 451 F. Supp. 1168.

Defendant county park commission had right to implead and seek contribution from borough under joint tortfeasor contribution law. Dambro v. Union County Park Commission, 1974, 327 A.2d 466, 130 N.J.Super. 450.

A[illegible]rtion by codefendants in a negli[illegible]ger[illegible] action of a right of contribution inter sese and the right of a defendant to implead a joint tort-feasor by a third-party complaint before plaintiff's cause of action has been reduced to a judgment are merely devices of procedural convenience afforded by the rules of practice. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J.Super. 192.

Although a defendant is not necessarily bound to proceed against joint tort-feasors in the same action in which plaintiff seeks to establish his liability, he will, nevertheless, ordinarily do so since a single action is the most orderly and logical manner in which proof of common liability can be established, and it is, as a course, common liability which is the substantive basis of a right of contribution. Id.

Where third-party defendant in negligence action arising out of automobile accident stood in loco parentis to plaintiff in action, trial court's ruling that third-party complaint did not state cause of action for contributions from third-party defendant for injuries sustained by plaintiff was not erroneous on grounds that there was no legal obligation on behalf of third-party defendant toward plaintiff and, therefore, third-party defendant should not enjoy benefit of parental immunity. Barry v. Schorling, 1982, 440 N.E.2d 1216, 2 Ohio App.3d 110, 2 O.B.R. 123

Trial court properly entered judgments in third-party actions ordering contribution in the absence of a motion and a hearing. Jennett v. Colorado Fuel & Iron Corp., 1980, 398 N.E.2d 755, 9 Mass.App. 823.

In action for damages sustained when plaintiffs were thrown from lifting beam because of a failure in one of the upper legs of a steel cable sling included in a stop log structure which was being constructed, it was properly within trial court's discretion to allow third-party motion by supplier of stop log structure to implead manufacturer of steel cable sling. Id.

An original defendant may bring in a third-party defendant for contribution to the original defendant for a part of his liability to the plaintiff and, if the original defendant is not liable to the original plaintiff, the third-party defendant may not be held liable to the original defendant. Jones v. Collins, 1982, 294 S.E.2d 384, 58 N.C.App. 753.

Where plaintiff amended complaint to include defendant and defendant filed third-party complaint seeking indemnity and contribution under Uniform Contribution Among Joint Tortfeasors Act and third-party defendant filed answer all within three years of alleged date of injury, three-year statute of limitation ceased to run at least as early as third-party defendant's answer and plaintiff's cause of action against third-party defendant was not barred even though plaintiff's complaint against third-party defendant was not filed until more than four years and four months after alleged date of injury. Larson Mach., Inc. v. Wallace, 1980, 600 S.W.2d 1, — Ark. —.

When third-party complaint alleges direct liability of third-party defendant to plaintiff on claim set out in plaintiff's complaint, third party shall make his defenses to complaint and no amendment to complaint is necessary or required, and parties are at issue as to their rights respecting claim without amendment of complaint by plaintiff. Id.

Fact that contribution may not actually be obtained until original defendant has been cast in judgment and has paid does not prevent impleader, but impleader judgment may be so fashioned as to protect rights of other tort-feasors, so that defendant's judgment against them may not be enforced until defendant has paid plaintiff's judgment, or more than his proportionate share whatever law may require. Velsicol Chemical Corp. v. Rowe, Tenn.1976, 543 S.W.2d 337.

Rules of Civil Procedure authorized third-party complaint based upon claim of one tort-feasor for indemnity or contribution from other alleged joint tort-feasors. Id.

Where, in medical malpractice action, defendant physician's third-party complaint seeking indemnification stated cause of action for contribution, third-party complaint should have been allowed to stand and trier of fact allowed to determine extent of liability, if any, as between two doctors. Lindsey v. Austin, Fla.App.1976, 336 So.2d 486.

4a. Motion for contribution

Trial court, in making order providing for entry of judgment, did not have power to assert parties' rights to contribution when there had been no motion filed or claim made by any party to effectuate such right. Kaiser v. 191 Presidential Corp., 1982, 454 A.2d 141, — Pa.Super. —.

Where no objections, reservations or claims are filed to assert right of contribution, it is not for trial court to take upon itself task of rearranging plaintiff's recovery to conform to what eventual recovery will be if all rights are, in fact, exercised; it is responsibility of parties in case to exercise such rights. Id.

Under Uniform Contribution Among Tortfeasors Act, defendant could properly assert its claim for contribution against other defendant by way of motion despite fact that it had voluntarily dismissed its claim against that defendant during trial. Best Sanitary Dis. Co. v. Little Food Town, Inc., Fla.1976, 339 So.2d 222.

7. Limitations

If liability insurer for distributor of swather had right to contribution from distributors of replacement drive chain subsequently installed on swather by its owner, with respect to amount paid by

it in settlement of claim against its insured for injuries sustained by swather owner when replacement chain broke and struck and shattered his eyeglasses, claim was barred by one-year statute of limitations, since more than one year had elapsed since time of payment. Hartford Acc. & Indem. Co. v. R. Herschel Mfg. Co., D.C.N.D.1978, 453 F. Supp. 1375.

If plaintiff is barred from pursuing his cause of action against one of two joint tort-feasors because the statute of limitations has run in respect to his own claim, the inchoate contribution right of the tort-feasor who has been sued prior to the running of the statute nevertheless remains viable and does not accrue until he has paid more than his pro rata share of the judgment; hence, the defendant has the right to implead the unjoined tort-feasor in plaintiff's action for the purpose of proving their common liability even after the statute of limitations on plaintiff's claim has run. Markey v. Skog, 1974, 322 A.2d 513, 129 N.J. Super. 192.

Action for contribution against alleged joint tort-feasor was time barred. Aetna Cas. & Sur. Co. v. Volkswagen of America, Inc., Fla.App. 3 Dist.1982, 419 So.2d 418.

Alleged tort-feasor may not seek contribution from estate of joint tort-feasor without complying with requirement of nonclaim statute that claim be filed in estate within three months from first publication to creditors. Koschmeder v. Griffin, Fla.App.1980, 386 So.2d 625.

8. Questions for jury

In action for contribution against a joint tort-feasor, evidence on issue presented by defendant third-party plaintiff's case against third-party defendant was sufficient for jury. Lotspeich Co. v. Neogard Corp., Fla.App. 3 Dist.1982, 416 So.2d 1163.

9. Instructions

In regard to accident in which sand truck driver was killed when, while employed by an employer immune from tort liability due to workers' compensation coverage, the truck crashed through a house as it was being moved across bridge, refusal to instruct that jury could apportion negligence of nonparty employer, and, thus, reduce defendant house movers' liability by proportionate amount of fault attributable to employer was proper. Hlocker v. Wynn, Fla.App. 1 Dist.1983, 425 So.2d 166.

10. Recovery of judgment

Under Pennsylvania law, plaintiff may recover as many judgments against as many tort-feasors as he wishes, but upon satisfaction of one judgment, he may not sue or execute against another joint tort-feasor. Frank v. Volkswagenwerk, A. G. of West Germany, C.A. Pa.1975, 522 F.2d 321.

13. Satisfaction of judgment

Satisfaction of judgment against one alleged joint tort-feasor terminates claimant's cause of action against another joint tort-feasor. Christiani v. Popovich, Fla.App.1978, 363 So.2d 2, certiorari denied 389 So.2d 1179.

§ 4. [Release or Covenant Not to Sue]

Law Review Commentaries

Complexities of Oklahoma's proportionate several liability doctrine of comparative negligence—is products liability next? William J. McNichols. 35 Okl.L.Rev. 135 (1982).

Contribution among tort-feasors in Washington: 1981 Tort Reform Act. 57 Wn. L.R. 479.

Meaning and significance of this section. Robert H. Griffith. (1960) 31 Pa. B.A.Q. 322.

Notes of Decisions

Supplementary Index to Notes

1. Purpose

Purpose of statute finding that a release discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor is to avoid having one of two or more joint tort-feasors bear a disproportionate share of plaintiff's recovery and it does no violence to that objective to allow tort-feasors, among themselves, to release one of their number. Sword & Shield Restaurant, Inc. v. Amoco Oil Co., 1981, 420 N.E.2d 32, 380 Mass.App. 285.

Statute providing that when release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury, it shall discharge tort-feasor to whom it is given from all liability for contribution to any other tort-feasor was drafted to encourage settlements in multiparty tort actions by clearly delineating effect settlement would have on collateral rights and liabilities in future litigation. Bishop v. Klein, 1980, 402 N.E.2d 1365, — Mass. —.

3a. Construction

Phrase "unless its terms otherwise provide" as used in statute governing scope of a release should be narrowly construed to require a degree of specificity, and allowing a discharge based on general language which does not name or identify a tort-feasor perpetuates the common-law rule, which was changed by statute, and is contrary to the statute. Beck v. Cianchetti, 1982, 439 N.E.2d 417, 1 Ohio St.3d 231, 1 O.B.R. 253.

Phrase "unless its terms otherwise provide" as used in statute governing scope of a release requires a release to expressly designate by name or to otherwise specifically describe or identify any tort-feasor to be discharged. Id.

4. Generally

Uniform Contribution Among Tort-feasors Act abrogated common-law rule that a release of one joint tort-feasor released all. Loh v. Safeway Stores, Inc., 1980, 422 A.2d 16, 47 Md. 110.

Statute, which abrogates common-law rule that release of joint tort-feasor dis-

charges all tort-feasors liable for same tort, was not repealed by Uniform Contribution Among Joint Tortfeasors Act. Eason v. Lau, Fla.App.1978, 369 So.2d 600, certiorari denied 368 So.2d 1365.

5. Discharge of other tortfeasor—Generally

Although, under Pennsylvania Uniform Contribution Among Tortfeasors Act, release in favor of one joint tortfeasor does not discharge another tortfeasor unless release so provides, plaintiff must establish that nonreleased party is joint tort-feasor in order to recover remaining portion of claim from any other party. Sochanski v. Sears, Roebuck and Co., C.A.Pa.1982, 689 F.2d 45.

Outside purview of Uniform Contribution Among Tort-Feasors Act, where it can be established that there is more than one wrong at issue, involving independent parties, the release of one wrongful party would not serve to release any other. Huff v. Harbaugh, 1981, 435 A.2d 108, 19 Md.App. 661.

By virtue of statute, release or covenant not to sue, given in good faith to one of number of joint tort-feasors, does not release those not named in release or covenant, though under common law release to only one tort-feasor would discharge all other tort-feasors from liability. Robertson v. McCarte, 1982, 433 N.E.2d 1262, 13 Mass.App. 441.

Phrase "one of two or more persons liable in tort for the same injury," within statute providing that a release or covenant not to sue or not to enforce judgment, if given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death, does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide, includes a party who is vicariously liable. Alaska Airlines, Inc. v. Sweat, Alaska 1977, 568 P.2d 916.

Defendant air carrier was "one of two or more persons liable in tort for the same injury" and, hence, was liable in tort, despite release of air taxi service with which it had contracted, for injuries sustained by plaintiff passenger due to negligence in operation of scheduled route even though defendant was not technically a tort-feasor. Id.

Plaintiffs' release of defendant driver did not operate to release defendant owner passenger for negligent entrustment of automobile by owner passenger to an incompetent driver. Mathis v. Stacy, Tenn.App.1980, 606 S.W.2d 290.

Under Uniform Contributions Among Tort Feasors Act, provision that covenant not to sue discharges covenantee from contribution and does not discharge any other tort-feasor had no application to master-servant, principal-agent relationship where liability was solely derivative. Craven v. Lawson, Tenn.1976, 534 S.W.2d 653.

Release given one joint tort-feasor, stating that it releases all firms, corporations and individuals, does release all joint tort-feasors, despite the Uniform Contribution Among Joint Tortfeasors Act since wording of Act excludes releases which so state. Newsome v. Finch, Fla.App.1979, 375 So.2d 1144.

6. —— Terms and scope of release or covenant

A general release discharging "all other persons" was sufficient under the Arkansas Uniform Contribution Among Tortfeasors Act to release joint tortfeasors who were not parties to release. Douglas v. U. S. Tobacco Co., C.A.Ark. 1982, 670 F.2d 791.

Language of release discharging "all other persons, firms, corporations" satisfied language of the Uniform Contribution Among Tortfeasors Act. Id.

Under Pennsylvania law in settling claim against one joint tort-feasor, plaintiff's failure to sign release specifically reserving her right to proceed against other joint tort-feasors did not bar her from maintaining action against other joint tort-feasors. Frank v. Volkswagenwerk, A. G. of West Germany, C.A.Pa.1975, 522 F.2d 321.

That release signed by plaintiff in connection with settlement of his personal injury claim with employer hospital was in full settlement and satisfaction of damages attributable to employer hospital was not such as to require same result as to employee doctor where employer hospital was only "releasee" named in release and, hence, employer doctor was not included in release. Clark v. Brooks, Del.Super.1977, 377 A.2d 365, affirmed 391 A.2d 747.

Language which was contained in release which was assigned in connection with settlement of his personal injury claim with employer hospital and which provided "any other such persons" would be released "from all claims which the releasors might otherwise have based upon or arising from the pro rata share of the damages or injuries of the releases caused by or attributable to the releasee" did not operate to release employee doctor so as to preclude plaintiff from seeking recovery from employee doctor for additional damages which plaintiff may have suffered in excess of amount received in settlement with employer hospital. Id.

Where alleged fact of wrongdoing was that of doctor employee, viewed from standpoint of relative liability of employer hospital and doctor employee, there was no injury which was "caused by or attributable to" employer and, hence, there was no basis under release with employer hospital to bar plaintiff from seeking recovery from employee doctor for additional damages which plaintiff may have suffered in excess of amount received in settlement with employer hospital. Id.

Release, which provided in effect that insurer of joint owners of car would pay policy limits of $15,000 to motorcycle passenger and which stated that passenger acknowledged full settlement and satisfaction of all claims of whatever kind or character arising out of collision between motorcycle and car, released all tort-feasors from claims resulting from the collision, including motorcyclist and his insurer, though release was not entered into until after default was entered against motorcyclist. Battle v. Clanton, 1975, 220 S.E.2d 97, 27 N.C.App. 616.

6a. —— Employer-employee relationship

Amendatory provision of Uniform Contribution Among Tortfeasors Act prohibiting discharge of a tort-feasor when a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for same injury or same wrongful death is inapplicable to an employer-employee relationship. Clark v. Brooks, Del.Super.1977, 377 A.2d 365, affirmed 391 A.2d 747.

There is no principle of unity of employer and employee which extends to

employee release by an employer u[illegible] employed by release.

7. Reduction against other tortfeasor

Where contract for release of one tort-feasor agreed to reduction of subsequent judgment to extent of "statutory" prorata share, question for decision was not legislative intent in using "pro rata share" phrase but rather what was understanding of the parties, and though their intent was to comply with statutory requirements, their understanding was that cost of settlement would be what judicial decision indicated, i. e., reduction of subsequent judgment proportioned among tort-feasors according to their number. Lahocki v. Contee Sand & Gravel Co., Inc., 1979, 398 A.2d 490, 41 Md.App. 579, reversed on other grounds 410 A.2d 1039, 286 Md. 579.

While release signed by plaintiff in connection with settlement of his personal injury claim against employer hospital failed to contain beneficial language found in Uniform Contribution Among Tortfeasors Act, under accepted principles that proscribed unjust enrichment, employee doctor was entitled to benefit of amount received by plaintiff as consideration for release. Clark v. Brooks, Del.Super.1977, 377 A.2d 365, affirmed 391 A.2d 747.

Under Tort Claims Act, plaintiffs could recover full amount of jury verdict from state to extent that Act allowed, less pro tanto reductions for two settlements from joint tort-feasors. Polvard v. Terry, 1977, 372 A.2d 378, 148 N.J.Super. 202, reversed on other grounds 390 A.2d 653, 160 N.J.Super. 497, affirmed 401 A.2d 532, 79 N.J. 547.

In action to recover for injuries sustained when boat manufactured by defendant backed over plaintiff and struck his legs with its propeller, trial court did not err in deducting from jury verdict amount of settlement plaintiff received from previous codefendant operator of boat, in view of fact that plaintiff's pleadings alleged that operator of boat and defendant manufacturer were joint tort-feasors, and in view of fact that Supreme Court, on review of evidence in first trial brought against operator and manufacturer, stated that operator's negligence was more than passive or vicarious. Degen v. Bayman, 1976, 241 N.W.2d 703, 90 S.D. 409.

In action to recover for injuries sustained when boat manufactured by defendant backed over plaintiff son and struck his legs with its propeller in which plaintiff father also sought recovery for medical expenses incurred before son reached age of majority, trial court did not err in deducting from jury verdict in favor of father amount of settlement received from previous codefendant operator of boat, rather than deducting pro rata credit of one-half jury verdict, in view of fact that there was never a jury determination as to proportionate liability of operator of boat and defendant manufacturer, and thus defendant manufacturer could not assert that each tort-feasor was 50% responsible for son's injury. Id.

Under statute providing that a release or covenant not to sue given to one of two or more persons liable in tort for the same injury reduces the claim by the stipulated amount there is no requirement that there be an activating relationship in tort between those liable, such as a joint tort-feasorship. Yett v. Smoky Mountain Aviation, Inc., Tenn. App.1977, 555 S.W.2d 867.

Where codefendant and plaintiff entered into limitation-of-liability agreement after jury retired, defendants were entitled to have amount of verdict rendered against them reduced by amount codefendant paid plaintiff pursuant to agreement. Atlantic Ambulance & Convalescent Service, Inc. v. Asbury, Fla. App.1976, 330 So.2d 477.

7a. Settlement agreements

Settlement agreement entered into by railroad and decedent's widow, which required widow to surrender a great measure of control over settlement negotiations with other defendants, which prohibited widow from settling with any single defendant for less than specified amount without railroad's approval and which prohibited widow from settling for more than such amount unless settling defendant was willing to assume one half of responsibility of guaranteed provision under which widow was entitled to recover a total sum of $100,000 if she pursued to final judgment her claims against railroad and one or more of the defendants, did not satisfy good-faith requirement of Uniform Contribution Among Tort-Feasors Act; thus, settlement agreement did not discharge railroad from its obligation of contribution under Tennessee law to other defendants in action commenced by widow, whose husband was killed when tank car containing liquid petroleum gas ruptured following a derailment within city limits. In re Waverly Acc. of Feb. 22-24, 1978, D.C.Tenn.1979, 502 F.Supp. 1.

Settlement between injured minor passenger of mother's automobile, and the defendants, the driver, owner and insurer of second automobile, did not release the mother, as joint tort feasor, from contributory negligence liability for daughter's injuries under defendants' counterclaim, and therefore, under statute governing right to contribution among joint tort feasors, defendants were not entitled to contribution from mother. Woods v. Withrow, Fla.1982, 413 So.2d 1179.

8. Discharge of tortfeasor given release or covenant

A tort claimant has it within his power to give a release from liability to one of several joint tort-feasors, and such a release, if given in good faith and before judgment, will preclude a claim for contribution against the released tort-feasor; the right of a joint tort-feasor not so released is merely to have the value of any consideration given for such a release subtracted from the total of the damages found to have been suffered by the victim. Grace v. Buckley, 1982, 435 N.E.2d 655, 13 Mass.App. 1081.

Statute providing that release discharges those joint tort-feasors to whom it is given from liability for contribution to those not covered under it does not apply to situation where both parties are named in same release. Robertson v. McCarte, 1982, 433 N.E.2d 1262, 13 Mass.App. 441.

Statute providing that when release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury, it shall discharge tort-feasor to whom it is given from all liability for contribution to any other tort-feasor did not extinguish right of defendant to recover contribution from

third-party defendant where judgment establishing joint and several liability had already been entered against them. Bishop v. Klein, 1980, 402 N.E.2d 1365, 380 Mass. 285.

Joint tort-feasor retains his right of contribution, regardless of success or failure of a subsequent levy of execution; thus finding that one joint tort-feasor possessed no assets beyond insurance policy was irrelevant to application of statute providing that, when release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury, it shall discharge tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. Id.

General release given to motorist constituted a general release for all of his liabilities present and future, including contributions either specifically or by construction, and as a settling tort-feasor, motorist was excluded as a party from any future actions against any of the remaining nonsettling tort-feasors; plaintiff's recovery from nonsettling tort-feasors was limited to percentage of negligence attributable to the remaining nonsettling tort-feasors as determined by the court or jury. Bartels v. City of Williston, N.D.1979, 276 N.W. 2d 113.

In action for negligence arising under comparative negligence act, a release given in good faith to one of two or more persons liable in tort for same injury discharges tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. Id.

Since host driver and his insurer tendered their policy limits to injured passenger and obtained a release therefor, contribution claim of owner of other vehicle and his insurer was barred. Schreier v. Parker, Fla.App. 3 Dist.1982, 415 So.2d 794.

10. Limitation of liability agreement

"Limitation-of-liability agreement," strictly speaking, is not a release or covenant not to sue, but it does have all aspects of a covenant not to enforce judgment. Atlantic Ambulance & Convalescent Service, Inc. v. Asbury, Fla. App.1976, 330 So.2d 477.

"Limitation-of-liability agreement" entered into by codefendant and plaintiff after retirement of jury, although not "Mary Carter" agreement, was nevertheless some form of "arrangement" resulting in payment of an amount received by party as compensation for his injuries subject to setoff. Id.

11. Prejudgment order of satisfaction

Order of satifaction prior to judgment is equivalent of a "release" under Uniform Contribution Among Tortfeasors Act. Loh v. Safeway Stores, Inc., 1980, 422 A.2d 16, — Md.App. —.

TORT LOSS ALLOCATION AMONG JOINT TORTFEASORS IN ALASKA: A CALL FOR COMPARATIVE CONTRIBUTION

I. INTRODUCTION

Legal doctrines providing for the allocation of tort loss among tortfeasors have been slow to develop in Alaska. The first major development occurred in 1970 when the legislature enacted the Alaska Uniform Contribution Among Tortfeasors Act (Contribution Act),[1] which reversed the common law rule that barred courts from enforcing contribution, or loss sharing, among joint tortfeasors.[2] In 1975, the Alaska Supreme Court adopted comparative negligence,[3] allowing tort victims who were themselves negligent to recover damages from concurrently negligent tortfeasors.[4] Comparative negligence requires the apportionment of fault between plaintiffs and defendants and holds the defendants as a group liable for the percentage of the damage for which they are responsible.[5] The enactment of the Contribution Act and the adoption of comparative negligence were intended to provide a system that attempts to match each tortfeasor's liability with his relative degree of fault.

Nonetheless, there is a fundamental inconsistency in the Alaska system. In adopting the Contribution Act, Alaska's legislature

1. ALASKA STAT. §§ 09.16.010-.060 (1983).
2. *See infra* notes 32-39 and accompanying text.
3. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975).
4. The old contributory negligence rule prohibited negligent plaintiffs from recovering from negligent defendants. *See id.* at 1047; RESTATEMENT (SECOND) OF TORTS §§ 463, 467 (1965); *see, e.g.*, Bertram v. Harris, 423 P.2d 909, 914 & n.9 (Alaska 1967) (using the definition of contributory negligence found in RESTATEMENT (SECOND) OF TORTS § 463 (1965)); Odgen v. State, 395 P.2d 371, 372 (Alaska 1964) (contributory negligence barred recovery by negligent plaintiff).

The origin of contributory negligence is generally attributed to the case of Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). *See Kaatz*, 540 P.2d at 1047. For a good discussion of the common law development of contributory negligence in Alaska, see Note, *Comparative Negligence: A Time for Change in Alaska*, 3 UCLA-ALASKA L. REV. 103, 105-09 (1973). The author discusses the inequities inherent in the contributory negligence rule and the judicial exceptions created to ease its harsh application. *Id.* at 108-09; *see also* RESTATEMENT (SECOND) OF TORTS § 886A comment a (1979).

5. Under "pure" comparative negligence, as adopted in Alaska, a negligent plaintiff may collect damages reduced in proportion to his fault regardless of his relative degree of fault. *Kaatz*, 540 P.2d at 1047.

followed many other states by requiring contribution on a pro rata basis.[6] Each tortfeasor is required to pay an equal share of the damages, regardless of his degree of fault. The share is determined by dividing the amount of damages by the number of tortfeasors.[7] The pro rata method was adopted partly because courts and juries were believed to be unwilling or incompetent to apportion fault among wrongdoers.[8] The Alaska Supreme Court rejected this rationale, however, when it adopted comparative negligence in 1975. The court found that the state courts were capable of apportioning fault among wrongdoers.[9] Since that time, the court has repeatedly noted the need for the legislature to amend the Contribution Act to permit the courts to apportion damages among tortfeasors according to their relative fault, as they do between negligent plaintiffs and defendants under comparative negligence.[10]

While urging legislative action on this issue, the court declined two opportunities to circumvent the pro rata apportionment mechanism established by the Contribution Act. In each case, the court was asked to expand the doctrine of implied indemnity — a remedy that allows one party to shift an entire damage award to another — to permit negligent tortfeasors to use the doctrine. In *Arctic Structures, Inc. v. Wedmore*,[11] decided in 1979, the court refused to adopt implied *partial* indemnity which allows courts to grant indemnity on a proportionate fault basis.[12] The court did not discuss the doctrine in its opinion, but noted that in order to bring the contribution system in line with comparative negligence, the legislature, not the court, must replace the pro rata contribution system with a comparative contribution system.[13] In 1983, the court in *Vertecs Corp. v. Reichhold Chemicals, Inc.*[14] considered, but ultimately rejected, the argument that the doctrine of implied indemnity should apply in cases of concurrent negligence.

This note focuses on these recent decisions which demonstrate the Alaska Supreme Court's hostility toward further judicial modification

6. ALASKA STAT. §§ 09.16.010-.060 (1983); *see* Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964 (1959).
7. *See* ALASKA STAT. § 09.16.020 (1983).
8. *See Kaatz*, 540 P.2d at 1048.
9. *See id.*
10. *See, e.g.*, [illegible]terion Ins. Co. v. Laitala, 658 P.2d 112, 118 n.11 (Alaska 1983); State Mechanical [illegible]c. v. Liquid Air, Inc., 665 P.2d 15, 17 n.2 (Alaska 1983) (noting that judicial expans[illegible]n of the indemnity doctrine would abrogate existing contribution statute); Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 435 n.29 (Alaska 1979); State v. Guinn, 555 P.2d 530, 547 n.42 (Alaska 1976).
11. 605 P.2d 426 (Alaska 1979).
12. *Id.* at 435 n.27.
13. *Id.* at 435 n.29.
14. 661 P.2d 619 (Alaska 1983).

of the tort loss allocation system. First, the note traces the historical development of the loss allocation system and summarizes the current st[illegible] the law. Second, the note identifies some of the current issues [illegible]solved problems in the field. Third, it analyzes alternative approaches to resolving the problems in light of the current law, and offers a proposal for legislative reform by amendment of the Contribution Act. The proposed legislative amendment is modeled after the 1983 Uniform Comparative Fault Act, which is designed for jurisdictions that have adopted comparative negligence.[15] The amendment would replace the current pro rata contribution system with a system that allocates contribution among joint tortfeasors on the basis of relative fault. Full indemnity would be reserved for cases of vicarious liability or prior contract.

II. HISTORICAL DEVELOPMENT OF LOSS ALLOCATION LAW

A. Early Development of Joint and Several Liability in England and the United States

Historically, a great deal of confusion surrounded the development of rules governing loss allocation among multiple tortfeasors.[16] The confusion was largely attributable to the failure of both courts and legislatures to define terms and doctrines carefully and to their failure to respond promptly and consistently to changes in the law.[17] For example, the meaning of the basic term "joint tortfeasors" has been uncertain and inconsistent over the years.[18] Joint tortfeasors under the early common law were parties who acted intentionally or in concert, with a common purpose to carry out a joint enterprise.[19] The plaintiff was permitted to sue any or all of the joint tortfeasors, who could then be held jointly and severally liable for the entire loss.[20] Under the strict joinder rules, the plaintiff could join only those defendants who had acted in concert.[21] Where defendants acted independently, even though their acts combined to cause a single injury to the plaintiff, the plaintiff was required to maintain a separate suit against each defendant.[22] As a result, separate trials produced verdicts against each defendant for an amount presumably corresponding

15. *See infra* note 178 and accompanying text.
16. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS §§ 46-51 (W. Keeton ed. 5th ed. 1984) [hereinafter referred to as PROSSER].
17. *See id.*
18. *Id.* § 46, at 322.
19. *Id.*; *see* Sir John Heydon's Case, 11 Co. Rep. 5a, 77 Eng. Rep. 1150 (1613).
20. RESTATEMENT (SECOND) OF TORTS § 875 (1979); PROSSER, *supra* note 16, § 46, at 322-23.
21. PROSSER, *supra* note 16, § 47, at 325.
22. *Id.* at 324-25.

to his degree of fault.[23] Thus, the system of assigning tort liability was consistent with the system of procedural joinder.

The early American courts tended to follow the English rule of joint and several liability among joint tortfeasors, although they gradually permitted more flexible joinder rules.[24] The enactment of the New York Field Code of Procedure in 1848, followed by similar legislation in most other states, substantially liberalized procedural rules. The liberalized rules permitted the joinder of all parties necessary for a complete resolution of the plaintiff's case, thus permitting the joinder of concurrently negligent tortfeasors in a single action.[25] Moreover, *joined* tortfeasors were treated carelessly as *joint* tortfeasors, and were held jointly and severally liable for the entire loss, even though they had not acted in concert.[26] This liberal classification of joint tortfeasors blurred the distinction between the procedural rule of permissive joinder of parties and the substantive doctrine of joint and several liability of concurrently negligent tortfeasors for damages.[27] Originally, when party joinder was permitted as a matter of convenience, each defendant remained responsible only for his portion of the damages based on his degree of fault.[28] Over time, the courts came to use the term "joint tortfeasor" to refer to all tortfeasors whose negligence combined to produce a single injury, and each defendant was held liable for the entire damage.[29]

The confusion surrounding permissive joinder and joint liability was intensified because American courts also required one verdict when defendants were joined in a single action.[30] The rationale for the one-verdict rule was that, because joint tortfeasors had acted in concert, the act of one was considered the act of all; therefore, the jury was not permitted to apportion damages because the injury was necessarily single and indivisible.[31] This rationale, however, was no longer viable once the new procedural rules allowed joinder of defendants without concerted action. Thus, the expansion of party joinder rules,

23. *See id.* at 328-29. This is essentially the definition of concurrent negligence. *See infra* note 25.

24. PROSSER, *supra* note 16, § 47, at 325-26.

25. *Id.* Concurrently negligent tortfeasors are parties whose separate or unrelated negligent acts combine to cause a single and indivisible injury to another party. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 149 (1973).

26. PROSSER, *supra* note 16, § 47, at 328-29.

27. *Id.* The purpose behind the joinder statutes was to provide convenience and expediency, and to avoid multiplicity of suits, not to affect the substantive liability of the parties. *Id.* at 327.

28. *See id.* at 329.

29. *Id.* at 328-29; *see* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 252 (1974).

30. PROSSER, *supra* note 16, § 47, at 329.

31. *Id.* § 46, at 322-23, 325; *see* Sir John Heydon's Case, 11 Co. Rep. 5a, 77 Eng. Rep. 1150 (1613).

the careless application of the term "joint tortfeasor" to refer to all concurrently negligent tortfeasors, and the courts' adherence to strict rules against dividing damages among defendants — all combined to alter the substantive law of loss allocation.

B. Contribution

1. *Early Development.* Like the development of joint and several liability, the early development of the contribution doctrine was impeded by the application of traditional rules after their original rationales no longer applied. For example, courts continued to apply the common law rule that barred contribution among joint tortfeasors[32] after the definition of "tort" was broadened to include negligent acts.[33] At the time the rule denying contribution among "tortfeasors" developed, the meaning of "tort" was limited to willful or intentional wrongs.[34] The rule against contribution emerged as an exception to the general rule that contribution was permitted among negligent wrongdoers.[35] The rationale for the rule against contribution was that although courts would allow negligent parties to sue for contribution, courts would not assist deliberate wrongdoers in settling their disputes.[36] Although the original rationale for denying contribution was "lost to sight,"[37] most American courts continued to deny contribution among concurrently negligent tortfeasors until the mid-1950's, even though English courts permitted contribution in cases of vicarious liability, accident, mistake, or *mere negligence.*[38] Thus, the judiciary's failure to evaluate clearly the meanings of "tort" and "joint tortfeasor," as they were understood when the rule against contribution was developed, led many American courts to apply the rule inappropriately to cases of concurrently negligent tortfeasor.[39]

32. *See, e.g.*, Vertecs Corp. v. Reichhold Chem., Inc., 661 P.2d 619, 621 (Alaska 1983); *see* Comment, *A Criticism of Judicially Adopted Comparative Partial Indemnity as a Means of Circumventing Pro Rata Contribution Statutes,* 47 J. AIR. L. & COM. 117, 119 & n.6 (1981); *see also* PROSSER, *supra* note 16, § 50, at 336-37.

33. PROSSER, *supra* note 16, § 50, at 337.

34. *See* Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan,* 12 HARV. L. REV. 176, 178 (1898).

35. *See id.* at 177, 182-83. The original rule permitting contribution is generally attributed to *Battersey's Case,* Winch's Rep. 48 (C.D. 1623). "The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution and the [Merryweather v. Nixan] exception is that no assumpsit, either express or implied, will be enforced among wilful tort-feasors or wrongdoers." Reath, *supra* note 34, at 177.

36. Reath, *supra* note 34, at 186-87 (quoting Bailey v. Bussing, 28 Conn. 455 (1859) (Ellsworth, J.)).

37. *Id.*; RESTATEMENT (SECOND) OF TORTS § 886A comment a.

38. PROSSER, *supra* note 16, § 50, at 337.

39. *See id.*

Nevertheless, the rule denying contribution was consistent with the doctrine of contributory negligence.[40] The doctrine of contributory negligence prohibited a plaintiff from recovering damages if his negligence contributed to his own injury.[41] The parallel between contributory negligence and the rule against contribution is clear: just as negligent plaintiffs could not recover against negligent defendants, negligent defendants could not recover against other negligent defendants.[42] Together, the two doctrines barred negligent parties from recovering against other parties.

In practice, the rule against contribution permitted faultless plaintiffs to determine who would bear the loss for their injuries because defendants could not compel other tortfeasors to share the burden. Persistent criticism of the rule against contribution and recognition of its "obvious lack of sense and justice" led many state legislatures and courts to provide for contribution among joint tortfeasors.[43] Most of the reforms were statutory enactments based on

40. The endurance of contributory negligence is discussed in Note, *supra* note 4, at 108. The lengthy history of the rule against contribution is discussed in RESTATEMENT (SECOND) OF TORTS § 886A comment a.

41. Kaatz v. State, 540 P.2d 1037, 1046-47 (Alaska 1975).

42. The similarity of rationale and operation between the rule against contribution and contributory negligence is discussed in Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 132 (1932).

43. PROSSER, *supra* note 16, § 50, at 337. The persistent criticisms of contributory negligence by legal scholars and the judiciary are summarized in Note, *supra* note 4, at 103-04 & nn.5-12. The author suggests that "early acceptance of the rule was undoubtedly [influenced by] the desire to protect developing industry, particularly the hazardous yet essential railroads, from unlimited liability in the tort field." *Id.* at 107. The long retention of contributory negligence "may ultimately be attributed to the principle of stare decisis or to legislative neglect." *Id.* at 108 (footnote omitted); *see also* Williams & Davidson, *Kaatz v. State: The Rule of Comparative Negligence Afloat Upon Uncharted Alaskan Waters,* 6 UCLA-ALASKA L. REV. 175, 175-76 (1977) (noting the opposition of the insurance industry to adopting comparative negligence).

The status of contribution rules in American jurisdictions as of 1959 is summarized in Note, *supra* note 6, at 981-82 app. *See, e.g.,* ALASKA STAT. §§ 09.16.010-.060 (1983); CAL. CIV. PROC. CODE §§ 875-77 (1980); MASS. ANN. LAWS ch. 231B, §§ 1-4 (Michie/Law Co-op 1974); N.C. GEN. STAT. §§ 1B-1 to -6 (1983); N.D. CENT. CODE §§ 32-38-01 to -04 (1976); TENN. CODE ANN. §§ 29-11-101 to -106 (1980). These statutes, except California's, were modeled after the 1955 version of the Uniform Contribution Among Tortfeasors Act and provide for pro rata contribution. 12 U.L.A. 63 (1975).

The 1939 version of the Uniform Contribution Among Tortfeasors Act requires contribution according to each tortfeasor's relative degree of fault. 9 U.L.A. 230 (1957). Many states have adopted relative fault statutes. *See, e.g.,* ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE ANN. tit. 10, § 6302(d) (1975); FLA. STAT. ANN. § 768.31(3)(a) (West Supp. 1984); HAWAII REV. STAT. § 663-12 (1976); S.D. COMP. LAWS ANN. § 15-8-15 (1984); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon Supp. 1985); UTAH CODE ANN. § 78-27-40(2) (1977). Several other states' comparative contribution statutes are listed in Comment, *Comparative Contribution:*

the Uniform Contribution Among Joint Tortfeasors Act.[44]

2. *Alaska's Uniform Contribution Among Tortfeasors Act.* Alaska's Contribution Act[45] was passed in 1970 to "avoid the injustice often resulting under the common law."[46] At that time, the doctrine of contributory negligence was still recognized in Alaska;[47] courts and juries were considered by many to be incompetent to apportion damages accurately or efficiently among wrongdoers.[48] Therefore, Alaska's Contribution Act, like most contribution acts,[49] limited contribution to pro rata shares.[50] Alaska's Act creates a right of contribution in favor of one tortfeasor who has paid more than his pro rata share[51] and does not permit consideration of the relative fault of the tortfeasors in determining the appropriate loss allocation.[52]

The drafters of Alaska's Contribution Act avoided several procedural restrictions that created problems in other states.[53] Alaska's statute does not require that a joint judgment be rendered against

The Legislative Enactment of the Skinner *Doctrine,* 14 J. MAR. L. REV. 173, 183 n.61 (1980).

44. The original Uniform Contribution Among Tortfeasors Act was approved in 1939 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. 9 U.L.A. 230 (1957). Few states adopted it, and those that did amended it extensively. The lack of uniformity prompted the withdrawal of the old Act and its replacement in 1955 with a new one designed to avoid many of the procedural issues that had created problems in many states. 12 U.L.A. 57, 59-60 (1975); PROSSER, *supra* note 16, § 50, at 338 n.20.

45. ALASKA STAT. §§ 09.16.010-.060 (1983).

46. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430 n.8 (Alaska 1979) (quoting the House Judiciary Committee Report, 1970 House Journal 437).

47. *Arctic Structures,* 605 P.2d at 430.

48. *See Kaatz,* 540 P.2d at 1048.

49. *See generally* Note, *supra* note 6.

50. *See* ALASKA STAT. § 09.16.020 (1983). The legislature did consider apportioning contribution according to relative degrees of fault when it considered the Contribution Act in 1970. The Judiciary Committee of the Alaska House of Representatives reported that:

> The Judiciary Committee amendment would require each tortfeasor's share of the liability to be based on his relative degree of fault. After a review of the official comments accompanying the uniform Act and of the relevant pages of the transcript of the meeting of the national conference's committee which wrote this Act, the Judiciary Committee is unconvinced of the need to prohibit the degrees of fault from being considered (as is done in the original version).

Arctic Structures, 605 P.2d at 430 n.13. Without explanation, and despite the recommendation of the House Judiciary Committee, the legislature enacted the pro rata mechanism.

51. ALASKA STAT. § 09.16.010(b) (1983).

52. *Id.* § 09.16.020(2).

53. *See generally* Fischer, *The New Settlement Statute: Its History and Effect,* 40 J. MO. B. 13 (1984).

multiple tortfeasors before the right to contribution arises.[54] Thus, if a plaintiff is unable or unwilling to sue some of the individuals who are allegedly responsible for his injuries, the named defendant may join other tortfeasors or sue them separately for contribution. The Contribution Act also permits a tortfeasor to bring a claim for contribution even without satisfying the entire judgment, as long as the claimant has paid, or may have to pay, more than his pro rata share.[55]

In addition, Alaska's Contribution Act creates an incentive for settlement. A tortfeasor who settles with the plaintiff in good faith is released from further liability for contribution to non-settling tortfeasors.[56] If a settling party negotiates a release for other tortfeasors, the settlement reduces the amount of the plaintiff's claim against non-settling, non-released tortfeasors by the amount of the settlement or by any amount stipulated in the release, whichever is greater. The settling party may then sue the released tortfeasors for contribution.[57]

Significantly, Alaska's Contribution Act "does not impair any right [of] indemnity under existing law."[58] As discussed more fully below, the traditional form of indemnity is the common law equitable doctrine that shifts the entire burden of tort loss from one defendant to another. Alaska's Contribution Act makes it clear that contribution and indemnity are mutually exclusive remedies, yet it does not attempt to define or limit the law of indemnity in Alaska.[59] The Contribution Act also does not indicate when courts should apply indemnity instead of contribution, apparently leaving that determination to the courts.

C. Indemnity

1. *Early Development.* In multiple tortfeasor cases, damages may be allocated among the tortfeasors by way of either contribution or indemnity. The right to indemnity was recognized at early common

54. ALASKA STAT. § 09.16.030(a) (1983).

55. *See id.* § 09.16.010(a).

56. *Id.* § 09.16.040(2); *see* Vertecs Corp. v. Fiberchem, Inc., 669 P.2d 958, 960-61 (Alaska 1983) (a settlement prompted by desire to avoid liability for contribution not necessarily in bad faith; settlement upheld).

57. ALASKA STAT. § 09.16.040(1) (1983). *But see infra* note 154, discussing Criterion Ins. Co. v. Laitala, 658 P.2d 112 (Alaska 1983).

58. *Id.* § 09.16.010(f).

59. Even though "one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation." *Id.* In Industrial Risk Insurers v. Creole Prod. Servs., Inc., 568 F. Supp. 1323, 1328 (D. Alaska 1983), the federal district court noted that the Alaska Supreme Court has never "expressly identified the elements of a claim for implied indemnity."

law.[60] In its traditional form, indemnity allows a party to shift the entire liability for an injury from one tortfeasor to another.[61] In contrast, contribution permits one tortfeasor to compel another to share the liability, either on an equal or on a percentage basis. The right to indemnity may arise in several ways. For example, it may arise contractually, either expressly or by implication.[62] Indemnity may also arise "by operation of law to prevent a result which is regarded as unjust or unsatisfactory."[63] This is called implied or equitable indemnity. While the enforcement of contractual indemnity is justified by the express or implied agreement of the parties,[64] the enforcement of implied indemnity is based upon "a legal fiction founded not upon the parties' intent, express or implied, but upon justice, equity and the doctrine of unjust enrichment."[65] The remainder of this note focuses on implied, rather than contractual, indemnity.

Under early common law, the right to implied indemnity was narrowly defined.[66] Generally, courts implied an obligation to indemnify a tortfeasor only when there was a pre-existing relationship between the parties.[67] For example, an employer held vicariously liable for the tort of a servant or an independent contractor was entitled to indemnity from the "active tortfeasor" — the party who directly caused the injury.[68] Similarly, the right to implied indemnity was recognized for "an innocent partner or carrier held liable for the acts of another, or the owner of an automobile for the conduct of the driver."[69] Generally, the courts required an indemnitee to be innocent of any wrongdoing and exposed to liability only through the indemnitor's acts; in other words, the indemnitor was treated as having breached "his obligation not to expose the indemnitee to liability."[70]

60. RESTATEMENT (SECOND) OF TORTS § 886B comment a (1979).

61. *See* PROSSER, *supra* note 16, § 51, at 341.

62. *Id.*

63. *Id.* Common law equitable or implied indemnity is a specific remedy available to a party who has paid or may have to pay an obligation for which another party was primarily liable. D. DOBBS, *supra* note 25, at 135.

64. *See* Ferrini, *The Evolution from Indemnity to Contribution — A Question of the Future, If Any, of Indemnity*, 59 CHI. B. REC. 254, 255 (1978). This note is concerned primarily with implied indemnity; the law governing express and implied-in-fact indemnity contracts is discussed occasionally by way of contrast.

65. *Id.* The primary rationale for the doctrine of implied indemnity is said to be the aversion to unjust enrichment. "[O]ne who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good conscience should be paid by another can secure reimbursement from that other." Leflar, *supra* note 42, at 147.

66. Ferrini, *supra* note 64, at 254.

67. *Id.* at 255.

68. PROSSER, *supra* note 16, § 51, at 341-42.

69. *Id.*

70. Ferrini, *supra* note 64, at 255.

Over time, many courts expanded the doctrine of implied indemnity beyond its traditional limits. In response to the unavailability of contribution, even a *negligent* defendant was held to be entitled to indemnity, as long as the claimant was the less negligent party.[71] In the process, the courts developed various tests to determine whether the entire loss should be shifted from the passive or secondary tortfeasor to the active or primary tortfeasor.[72] For example, a passive tortfeasor might be a retailer who relies on a manufacturer's duty to guard against product defects, or a municipality that relies on a construction company to repair and maintain its streets.[73] The original significance of the active-passive distinction faded as courts expanded the doctrine to allow indemnity in favor of the less culpable of two or more negligent parties.[74] Because each court based its decision on equitable principles, the limits of implied indemnity became elusive and unpredictable.[75] As a result, it became "extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not."[76]

71. *See Vertecs*, 661 P.2d at 621; Leflar, *supra* note 42, at 154-58. Professor Leflar, after summarizing the three areas of tort (non-contractual) indemnity already well-rooted in the common law when he wrote in 1932, described an additional body of cases using the active-passive negligence test to allow indemnity where the parties were not *in pari delicto*. *Id.* at 155. He criticized this approach for its uncertainty and lack of standards. He also described the cases in this field as granting indemnity only "to one whose only negligence was a failure to discover and remedy a dangerous condition formerly created by the misconduct of the one against whom indemnity is given." *Id.* at 156.

Since 1932, the courts using the active-passive and other tests have broadened the field to include any fact pattern where, for example, "there was a qualitative distinction between [the] relative culpability [of the parties]." Ferrini, *supra* note 64, at 257 (discussing Illinois law). Ferrini suggests that, incredible as it may seem, one "who is 49 percent negligent may obtain full indemnification from one who is 51 percent negligent. . . . Yet this was the natural and perhaps unavoidable consequence of the prohibition against contribution." *Id.*

72. The three primary tests have been described as (1) the active-passive test; (2) the primary-secondary test; and (3) the duty-no duty test. Other tests include misfeasance-nonfeasance and omission-commission tests, serving "basically the same function — to distinguish grades of fault." Comment, *Indemnity and Third-Party Tort Actions in South Dakota*, 21 S.D.L. REV. 393, 400-401 (1976) (citations omitted); *see generally* Annot., 28 A.L.R.3d 943, 950-89 (1969 & Supp. 1984) (listing states applying the active-passive and other tests in various factual settings).

73. PROSSER, *supra* note 16, § 51, at 342-43.

74. Ferrini, *supra* note 64, at 256 (quoting Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DEPAUL L. REV. 287, 296 (1976)).

75. *See* Ferrini, *supra* note 64, at 256; *see generally* Leflar, *supra* note 42, at 154-58 (discussing the vagueness already apparent by 1932).

76. PROSSER, *supra* note 16, § 51, at 343.

2. *Implied Indemnity in Alaska.* In addition to recognizing contractual indemnity,[77] the Alaska Supreme Court has occasionally discussed implied indemnity, and has allowed it in its traditional form as a means of shifting liability from a party who "is sued vicariously for the negligence of the indemnitor . . . ."[78] In 1981, the Alaska Supreme Court implied in dicta[79] that it might go beyond this traditional limit. The implication was that in addition to recognizing implied indemnity for vicarious liability, implied indemnity among concurrently negligent tortfeasors might be recognized in Alaska:

> Three broad possible fact patterns can arise in the indemnity setting: (1) the indemnitee is sued vicariously for the negligence of

77. For examples of contractual indemnity cases in Alaska, see City of Juneau v. Alaska Elec. Light & Power Co., 622 P.2d 954 (Alaska 1981); Amoco Prod. Co. v. W.C. Church Welding & Contracting Inc., 580 P.2d 697 (Alaska 1978); Manson-Osberg Co. v. State, 552 P.2d 654 (Alaska 1976).

The importance of carefully drafting contractual indemnity clauses is likely to increase after *Vertecs*, discussed *infra* in text accompanying notes 101-26. A good example of a potential problem is an indemnity provision that serves to hold another party harmless for injuries for which the indemnitor is to some degree at fault. In Industrial Risk Insurers v. Creole Prod. Servs., Inc., 568 F. Supp. 1323, 1329-30 (D. Alaska 1983), Creole had contracted with the Alyeska Pipeline Company to be in charge of starting up Alyeska's pump stations, and their contract included a provision whereby Creole would indemnify Alyeska for harm caused, in any degree, by Creole's negligence. Fluor Engineers and Constructors, Inc. had designed the pump stations. Alyeska sued Creole for indemnity under their contract after Alyeska had paid for injuries incurred in pipeline construction. Creole and Alyeska settled, but because Fluor was not released by the settlement agreement, Creole could not obtain contribution from Fluor.

The federal district court held that although the Alaska Supreme Court had never ruled on the issue, its previous decisions restricting implied indemnity in *Arctic Structures* and *Vertecs* demonstrated that the Alaska court would probably require Creole to prove its actual liability to Alyeska in order to prove that Fluor was under a legal obligation to indemnify Creole. Thus, in order to prove its liability to Alyeska, Creole had to prove its own negligence. The federal court noted the irony of the result but held that, under *Vertecs*, Creole would have to prove itself out of court — it it were negligent in any degree, implied indemnity would be unavailable.

78. *See, e.g.*, Austin v. Fulton Ins. Co., 498 P.2d 702, 705 (Alaska 1972) (insurer held vicariously liable for negligence of its agent); Kastner v. Toombs, 611 P.2d 62, 65 (Alaska 1980) (rules of indemnity apply where a master is held liable for his borrowed servant). The Alaska Supreme Court has neither adopted the definition of common law indemnity set out in the Restatement of Restitution, Section 76, nor expressly identified the standards it will apply. *Creole Production Services*, 568 F. Supp. at 1328. The federal district court in *Creole Production Services* assumed that the Alaska appellate courts would recognize the "essential elements of common law indemnity":

> The indemnity claimant must plead and prove that (1) he has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation ought to be discharged by the latter.

Id.

79. *Alaska Elec. Light & Power Co.*, 622 P.2d at 957.

> the indemnitor, (2) *the indemnitee and indemnitor are concurrently negligent, but, because there exists a joint and several liability, only one party is sued,* or (3) the indemnitee is *solely* negligent and the indemnitor is, by agreement, liable.[80]

The Alaska Supreme Court did not rule on the second fact pattern, however, because the case involved contractual indemnity.[81] Two years later, all doubts were resolved against implied indemnity among concurrently negligent tortfeasors when the court held in *Vertecs Corp. v. Reichhold Chemicals, Inc.*, that "public policy dictates that Alaska should not adopt implied indemnity between concurrently negligent tortfeasors."[82]

The following discussion analyzes two recent cases in which the Alaska Supreme Court rejected opportunities to modernize Alaska's tort loss allocation system. This analysis is necessary to understand the current issues and problems in this area.

a. Arctic Structures, Inc. v. Wedmore: No Implied Partial Indemnity Among Concurrently Negligent Tortfeasors. Implied partial indemnity is a judicial doctrine that some courts use to allow partial loss shifting despite the traditional rule that indemnity is a *total* loss shifting mechanism.[83] In 1979, the Alaska Supreme Court, without discussion, declined the opportunity to adopt the partial indemnity doctrine in *Arctic Structures, Inc. v. Wedmore.*[84] The petitioners in *Arctic Structures* argued that, because the court had rejected all the reasons for avoiding judicial apportionment of damages between plaintiff and defendant according to relative fault when it adopted comparative negligence, judicial apportionment of damages among multiple defendants according to relative fault should be permitted.[85] The petitioners contended that the rule of joint and several liability should be modified to assign percentages of fault among the defendants; this would be in harmony with the changed approach to tort loss allocation indicated by the new comparative negligence rule. In addition, the modification would further the Contribution Act's fundamental

80. *Id.* (emphasis added). The argument that the court had recognized implied indemnity among concurrently negligent tortfeasors in *Alaska Elec. Light & Power Co.* was raised in *Vertecs*. *See Vertecs*, 661 P.2d at 622.

81. *Alaska Elec. Light & Power Co.*, 622 P.2d at 957.

82. 661 P.2d 619, 626 (Alaska 1983). The court in *Vertecs* expressly noted that its comment in *Alaska Elec. Light & Power Co.* merely described fact patterns and in no way recognized implied indemnity among concurrently negligent tortfeasors. *Id.* at 622.

83. *See, e.g.*, American Motorcycle Ass'n, Inc. v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (discussing and applying the doctrine).

84. 605 P.2d 426, 435 n.27 (Alaska 1979).

85. *Id.* at 429, 431.

purpose of equitable loss apportionment.[86] The court refused to contravene the language of the Contribution Act and apportion fault among concurrently negligent tortfeasors.[87]

The Alaska Supreme Court rejected petitioners' arguments primarily because the court believed it would have to abolish joint and several liability and therefore "cast the total risk of uncollectability upon the injured plaintiff."[88] In reaching its decision, the court relied heavily on the language of the Contribution Act, the limited legislative history of the statute, and the comments of the Commissioners on Uniform State Laws regarding the Uniform Contribution Among Tortfeasors Act — the model for Alaska's Act.[89] According to the court, the statute's direction that "principles of equity applicable to contribution generally shall apply" in determining tortfeasors' pro rata shares was intended "to govern contribution when one defendant is found to be insolvent, and [not] . . . to affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment."[90] The court also noted that the rule of joint and several liability had been retained in the Uniform Comparative Fault Act[91] and in both California[92] and Florida,[93] where comparative negligence and pro rata contribution coexisted.

The California Supreme Court, however, retained joint and several liability even though it had adopted the doctrine of implied partial indemnity.[94] In other words, although California courts may ignore the state's pro rata contribution statute for purposes of assigning percentages of fault, each tortfeasor remains jointly liable for the entire amount of the damages. California's method of using both joint and several liability and implied partial indemnity was designed partly to accommodate the same concern voiced by the Alaska Supreme Court: to protect plaintiffs from bearing the entire risk of uncollectability.[95] Nevertheless, in *Arctic Structures* the Alaska Supreme Court rejected the doctrine of implied partial indemnity without discussing its merits or viability.[96]

As Justice Boochever pointed out in his dissenting opinion in *Arctic Structures*, joint and several liability can coexist with relative-fault

86. *Id.* at 431.

87. *Id.* at 430-32.

88. *Id.* at 431.

89. *Id.* at 430-32.

90. *Id.* at 430-31.

91. *Id.* at 431-32.

92. *Id.* at 433-35 (discussing primarily *American Motorcycle Ass'n*).

93. *Id.* at 432-33 (discussing Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973)).

94. *See American Motorcycle Ass'n*, 20 Cal. 3d at 590, 578 P.2d at 907, 146 Cal. Rptr. at 188-89.

95. *See id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 188.

96. 605 P.2d at 435 n.27.

contribution or indemnity. He argued that joint and several liability should be retained, *and* losses among defendants should be allocated in accordance with their relative degrees of fault.[97] Justice Boochever reasoned that such a scheme would be consistent both with earlier precedent in Alaska[98] and with the Contribution Act's purpose and language.[99] Thus, he asserted, despite the pro rata language of the Contribution Act, "the reason for dividing liability equally no longer exists."[100]

b Vertecs Corp. v. Reichhold Chemicals, Inc.: No Implied Indemnity Among Concurrently Negligent Tortfeasors. The most recent development in Alaska's loss allocation system was the decision in *Vertecs Corp. v. Reichhold Chemicals, Inc.*[101] In *Vertecs*, the Alaska Supreme Court held that the right to implied indemnity does not exist among concurrently negligent tortfeasors.[102] The following analysis of the *Vertecs* decision introduces some of the issues and problems presented by legislative inactivity in this field of law.

In 1970, Vertecs Corporation (Vertecs) was hired to install polyurethane foam insulation in a cold storage plant under construction for the City of Yakutat. Reichhold Chemicals, Inc. (Reichhold) supplied some of the foam that Vertecs used to insulate the building.[103] In 1977, a fire destroyed the cold storage plant, and the foam insulation supplied by Reichhold allegedly aggravated the fire damage. The City of Yakutat and the plant's former tenant brought an action against Vertecs and Reichhold,[104] alleging liability under eight theories including negligence. Reichhold settled with both plaintiffs in March 1981 and obtained a release. Subsequently, the action against Reichhold was dismissed with prejudice.[105]

In March 1981, Vertecs filed a cross-claim against Reichhold for either contribution or indemnity, alleging that any negligence on its part was merely "passive," whereas Reichhold's negligence was "active."[106] The superior court ruled that "Alaska law did not provide

97. *Id.* at 440-41.
98. *Id.*
99. *Id.* at 441.
100. *Id.*
101. 661 P.2d 619 (Alaska 1983).
102. *Id.* at 626.
103. *Id.* at 620.
104. On May 11, 1979, the plaintiffs brought actions against fifteen parties, including Vertecs and Reichhold, in their amended complaint. *Id.*
105. *Id.*
106. *Id.* The superior court granted summary judgment to Reichhold on the contribution claim "since Reichhold had settled in good faith with the plaintiffs." *Id.* at 621.

for indemnity between concurrently negligent tortfeasors. Since only fault-based claims had been alleged against Vertecs . . . it could not obtain indemnity . . . ."[107]

On appeal, the *Vertecs* case gave the Alaska Supreme Court the opportunity to adopt or reject the implied indemnity doctrine for concurrently negligent tortfeasors. The court reviewed the historic development of contribution and indemnity[108] and considered several aspects of the implied indemnity doctrine advanced by Vertecs.[109] The court concluded that public policy required denial of implied indemnity for tortfeasors who are negligent in any degree.[110]

The court identified three advantages that might result from allowing implied indemnity in favor of tortfeasors whose relative fault is slight.[111] The first was stated by the court as follows:

> The most fundamental argument in favor of indemnity between two concurrently negligent tortfeasors is that of fairness. Even if two tortfeasors are held jointly and severally liable, often one will pay the entire judgment. If that tortfeasor bears only a minor degree of fault, it is indeed grating to contemplate that it may well shoulder the entire loss while the tortfeasor bearing a large degree of fault suffers none.[112]

The second advantage mentioned by the court in support of implied indemnity was that it would more accurately match the liability of each tortfeasor with his degree of fault. The court noted, however, that under the traditional doctrine of implied indemnity, the *entire* loss shifts to the more blameworthy tortfeasor, which is not in complete accord with the underlying tort principle of relative fault.[113] The third advantage noted by the court was that "loss-shifting via indemnity may well serve the modern tort goal of shifting losses in a socially desirable fashion so that the loss is most efficiently spread throughout society."[114]

107. *Id.* at 620.
108. *See id.* at 621.
109. *See id.* at 623-26.
110. *Id.* at 626.
111. *See id.* at 623-24.
112. *Id.* (footnote omitted).
113. *Id.* at 624. The court did not discuss the doctrine of implied partial indemnity which it had previously rejected in a footnote in *Arctic Structures*, 605 P.2d at 435 n.27.
114. *Vertecs*, 661 P.2d at 624. The court suggested that if the indemnitor were insured, or were "a governmental entity, then the loss may be diffused among the large population of policy-holders, customers, or taxpayers." *Id.* (citation omitted). Nevertheless, local retailers may not be good loss-bearers, even for a pro rata share, because they may be underinsured and thus forced to pass their loss directly on to retail customers.

Despite the court's recognition of the advantages of allowing implied indemnity, the countervailing arguments persuaded the court that the doctrine should not be available to negligent parties.[115] The court was understandably concerned with the vagueness of the doctrine.[116] It would be difficult to determine which cases of concurrent negligence would justify implied indemnity in favor of one party.[117] Vague and confusing judicial standards would result.[118] A proliferation of indemnity actions in multiparty lawsuits would burden trial courts with "a bewildering array of issues."[119] Furthermore, adopting the implied indemnity doctrine would disrupt the current scheme of incentives. In some cases, the deterrent of potential liability would be sacrificed,[120] and the incentive for potential indemnitors to settle would be lost because there would be no guarantee of a complete release from liability as long as another tortfeasor might sue for implied indemnity.[121] Finally, the court was strongly influenced by the existence of Alaska's Contribution Act, which demonstrated the legislature's "considered policy judgment . . . that concurrently negligent tortfeasors should share equally in the loss caused by their tortious acts."[122] In sum, the court believed that implied indemnity among

115. *See id.* at 624-26.

116. *Id.* at 624.

117. *Id.*

118. *Id.*

119. *Id.* at 624 (quoting Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367 (Minn. 1977)).

120. *Id.* at 625. The deterrence argument is weak for at least two reasons. First, many tort cases based on fault involve no moral culpability, and second, where the tortfeasor is insured, the only deterrent is the indirect cost of higher insurance premiums. *Cf.* D. DOBBS, *supra* note 25, at 586-87 (discussing deterrence in a different context).

121. *See* ALASKA STAT. § 09.16.020 (1983); *see also Vertecs*, 661 P.2d at 625. The court explained that while a tortfeasor who settles with the injured party would be discharged from liability for contribution under Alaska Statutes section 09.16.040(2), the tortfeasor would still be liable for indemnity under Alaska Statutes section 09.16.010(f). *Vertecs*, 661 P.2d at 625.

122. *Vertecs*, 661 P.2d at 625 (footnote omitted). The court in *Vertecs* also stated that "two distinguished commentators have concluded that once a state adopts contribution, that should be the sole method of non-contractual loss-shifting among concurrently negligent tortfeasors." *Id.* (footnote omitted). One of these commentators, Dean Keeton, acknowledged that his view was not consistent with the majority of scholars at that time. "Contrary to the views of most of my legal education colleagues, I have never believed that it was practical or feasible to compare faults other than in a general way, such as through the recklessness and negligence concepts." Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. COUNS. J. 630, 633 (1960). The other commentator, Professor Leflar, wrote in 1932 that "[i]ndemnity between tortfeasors serves a good purpose when as between them substantially the whole of the fault was in the one against whom indemnity was given. Roughly, that is the area within which it is now permitted." Leflar, *supra* note 42, at 159.

It is arguable that contribution should be the sole remedy [illegible]

concurrently negligent tortfeasors should not be recognized.[123]

The breadth of the *Vertecs* rule is demonstrated by the subsequent disposition of Vertecs's indemnity claims that were not based on negligence.[124] On remand, the superior court relied on the Supreme Court's earlier decision in *Vertecs*, which broadly declared that any degree of negligence by a tortfeasor barred implied indemnity.[125] The superior court held that if the claimant were negligent in any degree, even nonnegligence claims labeled "breach of warranty" or "strict liability" would be barred as merely restated, and impermissible, indemnity claims.[126]

upon the more blameworthy tortfeasor, and the need for implied indemnity would be greatly reduced. The court in *Vertecs* noted that the Alaska legislature chose the pro rata scheme over a relative fault amendment proposed by the House Judiciary Committee. 661 P.2d at 625. The court recognized the shortcomings of the pro rata method, but felt that the legislature had already decided the issue against comparative loss shifting among tortfeasors. This left two wooden alternatives: pro rata contribution and total loss shifting under implied indemnity. The court concluded that, given pro rata contribution, no modern function remained for implied indemnity among concurrently negligent tortfeasors, despite the unfairness of pro rata contribution in some cases. *Id.* at 626.

123. *Id.* at 625-26. Two months after *Vertecs*, the court clarified its postion on this issue. "To the extent that an expansion of the common law of indemnity would overlap into and judicially abrogate portions of the contribution act, we are reluctant to create such an expansion." State Mechanical, Inc. v. Liquid Air, Inc., 665 P.2d 15, 17 n.2 (Alaska 1983). In *State Mechanical*, the court applied the *Vertecs* rule "that no claim for non-contractual implied indemnity [lies] between concurrently negligent tortfeasors" to affirm a superior court decision precluding an indemnity claim by a negligent contractor against a manufacturer of a defective product. *State Mechanical*, 665 P.2d at 17.

124. *See Vertecs*, 671 P.2d at 1275 (outlining the complex series of procedural events in the Vertecs litigation). Vertecs had filed breach of express and implied warranty and strict liability counter-claims against Reichhold in July 1982. Reichhold challenged Vertecs's right to amend its answer on the theory that res judicata barred Vertecs's nonnegligence indemnity claims. The superior court dismissed Vertecs's cross-claims and third party claims, but the Alaska Supreme Court reversed and remanded to the superior court to decide the merits of the nonnegligence theories. *Id.* at 1275, 1277. In May 1984, the superior court granted summary judgment in favor of Reichhold against Vertecs' nonnegligence indemnity claims. *See* City of Yakutat v. Witco Chem. Corp., No. 3AN-79-1134 Civ. (Alaska Super. Ct., May 24, 1984).

125. *Witco Chem. Corp.* at 11, 13-14.

126. *Id.* at 15-18. The Alaska Supreme Court had previously held that attorney's fees, costs, and interest could not be recovered in an indemnity action unless the claimant were free of personal fault. *See* D.G. Shelter Prod. Co. v. Modulite Indus., Inc., 684 P.2d 839, 841 n.5 (Alaska 1984).

III. Current Issues and Problems in Alaska's Pro Rata Allocation System

A. Alaska's Contribution Act and Legislative Intent

In evaluating the degree of reliance the Alaska Supreme Court has placed on the policy decisions embodied in the Contribution Act, it is helpful to examine the legislative intent underlying the statute. The Alaska legislature passed the Contribution Act to relieve the harshness of the common law doctrine that barred contribution among joint tortfeasors.[127] The Act was passed to ensure that each joint tortfeasor would pay his fair share of the damages rather than have one tortfeasor bear the entire loss.[128] At the time the Contribution Act was passed, loss allocation on a comparative fault basis was considered judicially and administratively unworkable and inaccurate.[129]

The pro rata Contribution Act represented a great improvement over the common law rule barring all contribution. Nevertheless, whether the Alaska legislature intended the Contribution Act to preclude the future development of implied indemnity remains unclear. The language of the Contribution Act arguably demonstrates an intent to leave the development of the doctrine of indemnity to the judiciary by providing in part:

> This chapter does not impair any right [of] indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.[130]

On one hand, the troublesome phrase "under existing law" supports the proposition that the legislature intended to preclude judicial expansion of implied indemnity to include negligent tortfeasors because

127. *See* Criterion Ins. Co. v. Laitala, 658 P.2d 112, 115-16 (Alaska 1983) (quoting House Judiciary Comm. Report, House Journal of 1970, at 437); *see also* City of Juneau v. Alaska Elec. Light & Power Co., 622 P.2d 954, 959 (Alaska 1981); Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430 n.8 (Alaska 1979) (quoting at length the report in 1970 House Journal 437). The court in *Alaska Elec. Light & Power Co.* noted that the House Judiciary Committee Report on the bill stated that one purpose of the proposed legislation was to "avoid the injustice often resulting under the common law," due to the no contribution rule. 622 P.2d at 959 n.15 (quoting House Judiciary Comm. Report, House Journal of 1970, at 437).

128. *Laitala*, 658 P.2d at 115. The court in *Laitala* discussed the purpose of the Contribution Act when it determined whether a post-judgment settlement agreement satisfied the judgment so as to extinguish all the tortfeasors' liability to the plaintiff, and, if so, whether a right of contribution existed among the tortfeasors under Alaska Statutes sections 09.16.010(a),(d) and .030(e) (1983). 658 P.2d at 115; *see supra* note 154.

129. *See* Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975).

130. Alaska Stat. § 09.16.010(f) (1983).

this form of implied indemnity did not exist in Alaska when the statute was drafted.[131] On the other hand, perhaps the phrase indicates that the legislature wanted to give the courts the freedom to provide common law indemnity and to expand or contract the common law equitable doctrine as fairness and justice might require.[132]

If the Alaska legislature did not intend to freeze judicial development of implied indemnity, how far can or should the courts expand the doctrine? The Contribution Act does not specify acceptable forms of indemnity. As noted above,[133] other states have allowed implied indemnity in favor of tortfeasors who are only slightly at fault against those who are greatly at fault because it is more equitable than enforcing the statutory remedy — a fifty percent split. Nonetheless, the Alaska Supreme Court apparently concluded that the legislature intended the Contribution Act to preclude implied indemnity even for tortfeasors whose relative fault was only slight.[134]

The California Supreme Court interpreted a similar statute, which preserved indemnity "under existing law," to permit the expansion of California's implied indemnity doctrine to encompass implied partial indemnity.[135] The California court reasoned that the legislature could not have foreseen that equitable considerations would justify judicial creation of the doctrine.[136] The California legislature

131. *But cf. Alaska Elec. Light & Power Co.*, 622 P.2d at 959 n.17 (Contribution Act does not impair parties' right to agree, in good faith, on an alternative loss allocation formula).

132. The argument against interpreting the legislative intent behind the passage of a contribution statute as to provide contribution as "the sole permissible remedy" is made in O'Donnell, *Implied Indemnity in Modern Tort Litigation: The Case for a Public Policy Analysis*, 6 Seton Hall L. Rev. 268, 284 n.40 (1974-75). *See also* Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517, 518 n.9 (1952).

133. *See supra* text accompanying notes 71-76.

134. *See Vertecs*, 661 P.2d at 621.

135. American Motorcycle Ass'n, Inc. v. Superior Court, 20 Cal. 3d 578, 602, 578 P.2d 899, 914-15, 146 Cal. Rptr. 182, 197 (1978). In *American Motorcycle Ass'n*, the California Supreme Court relied upon the decision in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), in which the New York Court of Appeals created a right of implied partial indemnity despite the existence of a pro rata contribution statute. "In authorizing equally shared contribution among tortfeasors jointly found liable, this statute [CPLR § 1401, repealed in 1974] did not contemplate an apportionment already made in the judgment, and the joint responsibility described was not one of indemnity." *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391. California's contribution statute, Cal. Civ. Proc. Code § 876(a) (West 1980), provides that "the pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them."

136. *American Motorcycle Ass'n*, 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197.

"had no intention of completely withdrawing the allocation of loss issue from judicial purview."[137]

In contrast, the Alaska Supreme Court in *Vertecs* found that the Alaska Contribution Act

> represents the legislature's considered policy judgment that concurrently negligent tortfeasors should share equally in the loss caused by their tortious acts. . . . Although pro rata contribution may not in all cases be the most fair method of loss-shifting, it seems more fair than the "blunt instrument" of indemnity where all tortfeasors are to some degree at fault.[138]

It is now up to the legislature to determine whether its intent has been accurately construed and whether its 1970 policy judgments are still valid.

B. Balancing Fairness and Efficiency in *Vertecs*

In the *Vertecs* decision, the Alaska Supreme Court balanced public policy considerations for and against the implied indemnity doctrine. By balancing various concerns, the court implicitly recognized that neither contribution nor implied indemnity, standing alone, guarantees the fairest outcome in many cases. Nevertheless, the court did not focus on whether or how the two doctrines might coexist.

In order to analyze the merits of implied indemnity and contribution, it is important to recognize that the fairness of implied indemnity is crucially affected by the availability of contribution as an alternative loss-shifting remedy. The relative fairness of contribution and implied indemnity also varies as the relative fault percentages change. These interrelationships are best illustrated by considering how the remedies would affect two tortfeasors, A and B, under two scenarios. First, consider the case where A's share of the fault for an injury is 5% and

137. *Id.* at 602, 578 P.2d at 915, 146 Cal. Rptr. at 198. The California Supreme Court also discussed the provision in its contribution act "which explicitly mandates that the 'right of contribution shall be administered in accordance with the principles of equity.'" *Id.* (citing CAL. CIV. PROC. CODE § 875(b)). The court concluded that "this provision demonstrates that the Legislature did not conceive of its contribution legislation as a complete and inflexible system for the allocation of loss between multiple tortfeasors." *Id.* at 602-03, 578 P.2d at 915, 146 Cal. Rptr. at 198 (citations omitted). Without deciding whether this provision would permit judicial alteration of the pro rata contribution formula, the court stated that the provision "refutes the argument that the Legislature intended to curtail judicial discretion in apportioning damages among multiple tortfeasors." *Id.*

The Alaska Supreme Court, however, interpreted this provision in the Alaska Statute (ALASKA STAT. § 09.16.020(3) (1983)) as intended to apply only when one defendant is insolvent; it was not intended, according to the court, to "affect the requirement that relative degrees of fault are not to be considered as a factor in the apportionment." *Arctic Structures*, 605 P.2d at 430-31 (footnote omitted) (relying on the commissioners' comments interpreting the Uniform Contribution Among Tortfeasors Act).

138. *Vertecs*, 661 P.2d at 625-26.

B's is 95%.[139] Implied indemnity would allow A to shift all of the damages to B. Pro rata contribution would force each to tfeasor to bear 50% of the loss. Clearly, implied indemnity would provide a better match of liability with fault. A second scenario demonstrates that implied indemnity becomes less fair as relative percentages of fault became more equal: if A's share of the fault is 40% and B's is 60%, the pro rata, 50%-50% split is preferable to 0%-100% indemnity.

The expansion of the implied indemnity doctrine has been criticized for creating "confusion and unfairness."[140] The expansion occurred, however, during a period when contribution was unavailable. It is arguable that because contribution is now available, the standard for implied indemnity can be considerably more restrictive and concrete, allowing courts to apply the doctrine in narrowly defined types of cases.[141] Moreover, if the focus is on fairness, the role for implied indemnity among concurrently negligent tortfeasors is even more important where pro rata contribution is the only alternative than where comparative contribution is available.

A standard which could accommodate both contribution and implied indemnity might be achieved by allowing implied indemnity instead of pro rata contribution only when the results otherwise would

139. This may occur, for example, where A, a retailer, fails to discover a defect in a product manufactured by B.

140. *See* Comment, *supra* note 72, at 400-02.

141. *See generally* Ferrini, *supra* note 64, at 268. Ferrini found a meaningful role for implied indemnity in Illinois, a state in which comparative contribution had been *judicially* adopted. He argued that while a tortfeasor who was 1% at fault had a right to contribution from a tortfeasor who was 99% at fault, indemnity should be permitted when one party's culpability exceeds 99%:

> That point is found where the indemnitee is held liable by operation of law — where the indemnitor owed the indemnitee a duty of care not to expose the [indemnitee] to liability to a third party and, as a consequence of the indemnitor's breach of that duty, the indemnitee had been held liable on a technical basis only.

Id. This standard is essentially the standard for vicarious liability. Ferrini suggests that once comparative contribution is adopted, implied indemnity should be limited to cases of vicarious liability, respondeat superior, or similar cases involving pre-tort relationships. *Id.* In rejecting implied indemnity, the court in *Vertecs* relied in part on Comment, *supra* note 72, at 422, which urged a greater emphasis on contribution than on active-passive indemnity because South Dakota's contribution statute, based on relative degrees of fault, is consistent with the tort philosophy of comparative negligence in South Dakota.

The *Vertecs* court also cited Davis, *supra* note 132, at 560, which concluded that "there are legitimate rights of indemnity among negligent concurrent tortfeasors in a variety of factual situations." Davis proposed that the test for implied indemnity should be a "disproportionate duty" test. *Id.* at 546-53. Davis concluded that, "[i]n order to have a mature, well-rounded law governing relations between negligent tortfeasors, contribution should be allowed between them in proportion to their relative fault in cases where indemnity is not proper." *Id.* at 560.

be extremely harsh and unfair. A mere claim by one tortfeasor that he was less at fault than his co-tortfeasors would not suffice. Instead, implied indemnity could be restricted to specific types of cases in which the imbalance of fault is severe, for example, "where one tortfeasor, by his active conduct, has created a danger to the plaintiff, and the other has merely failed to discover or to remedy it."[142] Just as Alaska recognizes a right of implied indemnity in cases of respondeat superior,[143] the courts also could recognize the right in favor of a retailer, whose negligence in failing to detect a product defect was only slight, against the manufacturer who created the dangerous condition. If the facts of a case were this simple, there would be a clear disparity in the degree of fault attributable to the retailer and the manufacturer. Total loss shifting in this case would not be difficult to justify and arguably would be preferable to pro rata contribution.[144]

142. PROSSER, *supra* note 16, § 51, at 343. This approach — contribution plus a limited right to implied indemnity — was proposed at the Illinois Judicial Conference Study Committee on Indemnity, Third Party Actions, and Equitable Contributions:

> 5(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law except that the right to indemnification of one personally at fault shall be limited to those circumstances where he merely fails to discover the dangerous condition created by another.

Ferrini, *supra* note 64, at 269 (quoting Report of the Study Committee on Indemnity, Third Party Actions and Equitable Contributions, SR 21, SR 27, SR 28). The committee's comments explained that this language was intended to limit indemnity "to its common law uses once [comparative] contribution is accepted as the law . . . ." *Id.* The purpose was to avoid "the results of creative expansion of indemnity by Illinois courts, which the committee believes have developed only in response to the absence of contribution." *Id.* The rule could also be applied, as Prosser explains,

> against a supplier of goods when a retailer or user of the goods incurs liability by reason of negligent reliance upon the supplier's proper care. The same is true where the owner of a building negligently relies upon a contractor who makes improvements or repairs. Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where a municipal corporation, held liable for failure to keep its streets in safe condition, seeks recovery from the person who has created the condition, or a property owner who has permitted it; or an owner of land held liable for injury received upon it sues the wrongdoer who created the hazard.

PROSSER, *supra* note 16, § 51, at 342-43 (footnotes omitted).

143. *See* Austin v. Fulton Ins. Co., 498 P.2d 702, 705 (Alaska 1972).

144. *See generally* O'Donnell, *supra* note 132, at 287-88. The author contends that the issues involved in determining an indemnity claim will be argued, for example as defenses, in the plaintiff's case anyway. O'Donnell concludes that even if indemnity would add a slight burden to the judge or jury it is justified. "[The] sacrifice of fairness to [an] individual litigant would be a high price for what would often be a slight saving of judicial time." *Id.* at 287; *see also* Ferrini, *supra* note 64, at 268 (urging the continued vitality of indemnity, at least in its traditional form (applying in cases of pre-tort relationship) as part of a flexible and equitable system of comparative contribution and implied indemnity).

Other cases in which denying indemnity may be extremely harsh and unfair are

Unfortunately, the over-simplified example of the retailer is misleading. Defining clear standards for implied indemnity has proven extremely difficult and has resulted in a variety of vague formulations.[145] The Alaska Supreme Court's rejection of the implied indemnity doctrine in *Vertecs* was motivated in part by the difficulties it saw in determining the boundaries of a narrow category of slightly negligent tortfeasors.[146] Furthermore, the case by case development of the doctrine would be slow in producing a body of predictable authority. Numerous cross-claims and third party claims could be expected, and the volume and cost of litigation based on implied indemnity theories would increase.[147]

In addition, as the *Vertecs* court noted,[148] adoption of implied indemnity could discourage settlements. When pro rata contribution affords the sole method of loss allocation, a good-faith settlement ends the litigation for the settling party by barring later contribution claims against him.[149] Indemnity rights, however, are unaffected by settlement under the statute.[150] Thus, if implied indemnity were available, settlement would not guarantee a discharge from liability for a settling party in all cases; a slightly negligent tortfeasor could not sue for contribution, but may sue for implied indemnity. This might reduce the attractiveness of settlement as a strategy.[151] Nevertheless, it is the greatly blameworthy tortfeasor — the potential indemnitor — whose settlement is discouraged by the availability of implied indemnity, because a slightly blameworthy tortfeasor would not be sued for indemnity.

where the statute of limitations has run on the contribution claim, *see* ALASKA STAT. § 09.16.030(d) (1983), or culpable parties are not subject to service of process, forcing one tortfeasor to bear the entire loss.

145. *See Vertecs*, 661 P.2d at 624.

146. *See supra* notes 115-19 and accompanying text.

147. The projected increase in the volume of litigation may be viewed as a consequence of discouraging settlement.

148. *See supra* note 121 and accompanying text.

149. ALASKA STAT. § 09.16.040(2) (1983).

150. *See* ALASKA STAT. § 09.16.010(f) (1983).

151. This uncertainty could be avoided by discharging a settling tortfeasor from liability for implied indemnity as well as contribution. This approach was recently adopted by statute in Missouri:

> When an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith. . . . [it] shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor. The term "non-contractual indemnity" as used in this section refers to indemnity between joint tortfeasors culpably negligent, having no legal relationship to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability.

MO. ANN. STAT. § 537.060 (Vernon Supp. 1984). *See generally* Fischer, *supra* note 53.

The dynamics of the settlement process are illustrated, albeit simplistically, in the following hypothetical case. Assume that P sues D1 and D2 for negligence, seeking $100,000 in damages. Assume further that D1 is 90% at fault for manufacturing a defective product, and D2 is 10% at fault for failing to discover the defect. Implied indemnity, if permitted, would allow D2 to shift his entire loss to D1 for breach of implied warranty. This creates a disincentive for D1 to settle because, although the settlement would discharge his potential liability to D2 for pro rata contribution,[152] it would not discharge his potential liability for indemnity to D2, if D2 had to pay P.[153]

The same case comes out differently when indemnity is unavailable pursuant to the *Vertecs* rule. D1 is able to offer P a settlement without the risk of subsequent liability to D2. If settlement were achieved between D1 and P, and D2 were not involved in the settlement, D2 would be liable either for contribution to D1 (if D1 paid the entire damages and obtained a release of D2),[154] or for damages to P for the unrecovered amount of P's loss. Moreover, D1 has some incentive to avoid litigation with D2, because if D1 merely obtained a release for D2, D2 could raise a defense of nonnegligence. Such a defense might be attractive to a sympathetic jury whose only other option would be forcing D2, who was only 10% at fault, to bear 50% of the loss.[155] Thus, the pro rata system might induce a highly culpable party to offer to pay more than a pro rata share of the damages in order to bring a slightly culpable party into the settlement process.

In sum, it is difficult to balance fairness and efficiency in Alaska's current tort loss allocation system. If the supreme court had adopted implied indemnity among joint tortfeasors, the resulting system would still strike only a rough balance. Therefore, other approaches should be considered.

IV. An Alternative Approach to Tort Loss Allocation Among Concurrently Negligent Tortfeasors: Matching Liability with Fault

A. Matching Liability with Relative Fault

The Alaska Supreme Court has considered several alternative systems of tort loss allocation. The system approved in *Vertecs* forces concurrently negligent tortfeasors to share the loss equally.[156] The *Vertecs* court rejected an alternative system that would split

152. Alaska Stat. § 09.16.040(2) (1983).

153. *Id.* § 09.16.010(f).

154. *Id.* § 09.16.010(b),(d). In Criterion Ins. Co. v. Laitala, 658 P.2d 112, 116-17 (Alaska 1983) (distinguishing Young v. State, 455 P.2d 889, 893 (Alaska 1969)), the court held that a post-judgment settlement between a tortfeasor's insurer (Criterion) and an injured party discharged another tortfeasor (Laitala) from liability to the injured party even though Laitala was not specifically named in the release. The court reasoned that because the statute of limitations had run on any claims by the injured party against Laitala, the general release in effect discharged Laitala under Alaska Statutes section 09.16.010 (d) (barring a settling tortfeasor's contribution action unless the settlement extinguishes the non-settling tortfeasor's liability), and Laitala was liable for contribution to Criterion. *Id.*

In a concurring opinion, Justice Rabinowitz argued that precisely because the statute of limitations had run on the plaintiff's claims against Laitala, the release could not have discharged Laitala in any real sense. *Id.* at 118. Justice Rabinowitz noted that section 09.16.010 (d) "was intended only to protect a non-discharged tortfeasor . . . from being sued by both the settling tortfeasor and the injured party." *Id.* (footnote omitted). Thus, that section does not apply where the non-discharged tortfeasor is protected by the statute of limitations. *Id.* Nevertheless, even Justice Rabinowitz agreed that Laitala was liable for contribution because Criterion's contribution action was timely. *Id.* at 114 n.3, 118.

Justice Rabinowitz suggested that the plaintiff and Criterion probably did not consider Laitala when they settled because Laitala was protected by the statute of limitations. *Id.* at 118 n.1. However, the statute of limitations did not protect Laitala from a contribution action by Criterion; thus, in settling, Criterion may have contemplated a later suit against Laitala for contribution. Although a full discussion of the ramifications of *Laitala* is beyond the scope of this note, it is important to note that the supreme court will treat a tortfeasor as discharged with respect to the plaintiff under section 09.16.010 (d), for purposes of contribution liability, if the statute of limitations has run on the plaintiff's claims against him.

155. D2, only 10% negligent, may be in a good position to appeal to the jury's sense of fairness if the jury understands that under the pro rata system D2 will pay either 50% of the damages, if D2 is found to be negligent, or none, if D2 is found not to be negligent. Jury confusion over this issue is demonstrated in *In re* Barrow Air Crash, No. 3AN-81-2321 Civ. (Alaska filed Oct 13, 1978). The plaintiff and each of two defendants were negligent in causing plaintiff's injuries. In accordance with the rule of comparative negligence, the jury instructions and verdict form required the jury to determine the relative percentages of fault between the plaintiff on one line and the defendants, as a group, on another line. The jury sent a note to the judge asking whether there should be three lines for percentages of fault, one each for the plaintiff, the first defendant, and the second defendant. After being instructed that they should simply subtract the plaintiff's percentage from 100% to find the defendants' percentage, the jury sent another note to the judge:

> Are you saying we may *not* assign separate percentages to [defendant] Ehredt and [defendant] DeHavilland? We want to assign each party, *i.e.*, [plaintiff] Walters, Ehredt, and DeHavilland, the % we feel applies to each specific party.

(Transcript 3002-03). The judge refused to explain to the jury that relative fault among defendants was irrelevant and that no relative fault apportionment would occur. He sent a verdict to the jury with separate lines for percentages of fault for each of the three parties. The jury found the plaintiff 10% at fault, the first defendant 75% at fault, and the second defendant 15% at fault. The jurors later learned that the defendants would split the liability equally. Several jurors expressed their disappointment to the judge and indicated that the verdict might have come out differently had they known how the pro rata contribution system worked. Appellant's Opening Brief at 11-17, *In re* Barrow Air Crash.

156. The system of tort loss allocation in Alaska after *Vertecs* is pro rata contribution and no implied indemnity among currently negligent tortfeasors. *See* Vertecs Corp. v. Reichhold Chem. Corp., Inc., 661 P.2d 619, 625-26 (Alaska 1983).

tortfeasors into two categories — those who should share equally in the loss and those whose minimal degree of negligence entitles them to shift the loss entirely.[157] Another alternative, which was not seriously considered by the court in *Vertecs* or in *Arctic Structures*, is a system of partial indemnity in which each tortfeasor's share of the loss is proportionate to his degree of fault.[158]

This last alternative — matching liability with relative fault — is the tort loss allocation system most consistent with the comparative negligence system employed in Alaska.[159] Under comparative negligence, juries may consider the relative fault of the plaintiff and defendant in determining the plaintiff's maximum recovery. Consider a hypothetical case in which plaintiff (P) is found to be 10% at fault and the defendants 90% at fault in causing a $100,000 loss to P. The old contributory negligence rule would have barred P's suit altogether. The comparative negligence rule permits P to recover $90,000 from the defendants. As the Alaska Supreme Court noted: "The basic objection to [contributory negligence] — grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability — remains irresistible to reason and all intelligent notions of fairness."[160]

The fundamental principle of fairness that supports the comparative negligence system also strongly supports the adoption of implied partial indemnity or comparative contribution for fault-based loss allocation among concurrently negligent *defendants*.[161] For example,

157. A system dividing tortfeasors into two categories would result where pro rata contribution applies to all concurrently negligent tortfeasors except those determined to be non-participating, passive, or secondary. These tortfeasors would be entitled to indemnity.

158. Partial indemnity and comparative contribution are identical in outcome. Implied partial indemnity is used by some courts to accomplish apportionment based on relative fault where no statutory scheme accomplishes this. *See generally* Comment, *supra* note 32, at 130-44.

159. Both implied partial indemnity and comparative negligence apportion loss among defendant tortfeasors according to their relative degrees of fault. Apportionment by fault parallels the notion of comparative negligence and should be adopted in comparative negligence jurisdictions. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39, 40 commissioners' prefatory note (1985). Once a jury has apportioned fault in a plaintiff's action under the comparative negligence rule, it is intuitively unfair to require pro rata contribution among defendants. *See supra* note 155.

160. Kaatz v. State, 540 P.2d 1037, 1048 (quoting Li v. Yellow Cab Co., 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230-31, 119 Cal. Rptr. 858, 862 (1975) (footnotes omitted)). The court also quoted the following strong language from *Li*: "The essence of that criticism [of contributory negligence] has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task." *Id.*

161. *Cf.* Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guarantee of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083, 1124-33 (presenting a constitutional argument that there is no legally significant difference between a negligent plaintiff and a negligent defendant, each seeking to share a tort loss; there is no legitimate and meaningful government interest in treating the two categories differently; and the plaintiff-defendant allocation rules should match the defendant-defendant allocation rules).

under the current rule of pro rata contribution, if D1 and D2 were concurrently negligent defendants, they each would be liable under pro rata contribution for 50% of the judgment. Under a relative fault system, if a jury found D1 to be 90% at fault and D2 10% at fault, D1 would be liable for 90% and D2 for 10% of the damages awarded to the plaintiff. In deciding whether to settle, the defendants would estimate relative degrees of fault. Their estimates and presumably their settlements would more closely reflect actual culpability if litigation were expected to result in apportionment according to fault.

A recent trend toward more equitable treatment of concurrent tortfeasors is evident.[162] The first step toward embracing this trend in

162. *See Kaatz*, 540 P.2d at 1049. Apportioning loss among wrongdoers based upon relative fault appears to represent the modern wisdom in this area of jurisprudence. PROSSER, *supra* note 16, § 51, at 344-45. The Prosser treatise recognizes that changes in the law of contribution and relative fault will make courts reconsider indemnity rules. Now that the choice is no longer between the two stiff alternatives of pro rata contribution and total loss-shifting indemnity, comparative fault modifications have begun and can be expected to continue. Confusion over labels should not discourage attempts to modify the law. *Id.* at 344; *see Kaatz*, 540 P.2d at 1047 (recognizing trend in the majority of American jurisdictions toward comparative fault systems); UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39 commissioners' prefatory note (1985); Ferrini, *supra* note 64, at 258, 260. *See generally* Comment, *supra* note 43; Williams & Davidson, *supra* note 43, at 175-76.

In *Vertecs* the Alaska Supreme Court relied in part on American Motorcycle Ass'n, Inc. v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), for its statement that the doctrine of implied indemnity has left indemnity jurisprudence in disarray. *See Vertecs*, 661 P.2d at 624 n.12. In *American Motorcycle Ass'n*, the California court avoided potential problems resulting from vague standards for "active-passive" indemnity by permitting implied *partial* indemnity. *See American Motorcycle Ass'n*, 20 Cal. 3d at 595, 608, 578 P.2d at 910, 918, 146 Cal. Rptr. at 191, 199. The development of implied partial indemnity in California demonstrates two important points. First, the new doctrine highlights the current movement toward the development of equitable loss-shifting among wrongdoers. *See, e.g.*, ILL. ANN. STAT. ch. 70, §§ 301-05 (Smith-Hurd Supp. 1983) (codifying comparative contribution — shifting loss according to relative degrees of fault — two years after the Illinois Supreme Court judicially created that right in Skinner v. Reed-Prentice Div. Packing Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 439 (1977), *modified*, 70 Ill. 2d 16, *cert. denied*, 436 U.S. 946 (1978)); Comment, *supra* note 43, at 173.

Initially, indemnity jurisprudence was expanded to promote the goal of requiring each tortfeasor to bear the burden of the loss commensurate with his culpability. Later, courts and legislatures softened the harsh effects of all-or-nothing loss shifting by adopting comparative negligence. Comparative contribution is the next logical link in the evolution of these remedies. The Alaska Supreme Court joined this movement by judicially creating comparative negligence and noting that it requires amendment

Alaska was perhaps the supreme court's statement in *Kaatz* that it is willing to accept jury verdicts apportioning fault, even though not "precisely scientific," in order to avoid the harshness of contributory negligence.[163] The judicial efficiency and vagueness arguments advanced by opponents of comparative negligence were rejected by the court in *Kaatz:*

> Judicial administration of the [comparative negligence] rule has not presented insuperable difficulties in those jurisdictions which have long employed it. Experience has not borne out the argument that comparative negligence is difficult for courts and juries to apply.
>
> Similarly, careful studies tend to show that settlement of cases can be achieved as readily under the comparative negligence system as under the contributory negligence rule.[164]

The supreme court has indicated the importance of altering the unfair rule of statutory pro rata contribution in Alaska.[165] In *State v. Guinn,*[166] decided one year after the court adopted comparative negligence, the court said in a footnote: "We are cognizant that this court's adoption of the doctrine of comparative negligence in *Kaatz v. State* will require amendment of Alaska's Uniform Contribution Among Tortfeasors Act."[167] Similarly, in *Vertecs,* the Alaska Supreme Court recognized that "pro rata contribution may not in all cases be the most fair method of loss-shifting . . . ."[168]

The Alaska Supreme Court could have taken the initiative and adopted implied partial indemnity.[169] Judicial action in the face of legislative silence or indecision in the field of loss allocation is not new

of Alaska's Contribution Act. *See* State v. Guinn, 555 P.2d 530, 547 n.42 (Alaska 1976).

The second point highlighted by the development of implied partial indemnity is the crucial role the judiciary has played in the development of equitable loss shifting. In New York, for example, the judicial adoption of the implied partial indemnity doctrine was followed by legislative enactment of a comparative contribution statute two years later. *See* N.Y. CIV. PRAC. LAW §§ 1401-04 (McKinney 1976). The same process occurred in Illinois. *See* Comment, *supra* note 43, at 173. The Alaska Supreme Court has performed an equally significant role in the field of loss allocation. Alaska is one of a few states where the old contributory negligence rule was replaced by the judiciary with comparative negligence. The *Kaatz* decision was a judicial response to nine years of legislative indecision. *See infra* note 170 and accompanying text.

163. *Kaatz,* 540 P.2d at 1048. Juries may naturally want to apportion damages in cases of great disparity of fault. *See supra* note 155.

164. *Kaatz,* 540 P.2d at 1048 (footnote omitted).

165. *Guinn,* 555 P.2d at 547 n.42; *see also Arctic Structures,* 605 P.2d at 435 n.29.

166. 555 P.2d 530 (Alaska 1976).

167. *Id.* at 547 n.42 (citations omitted).

168. *Vertecs,* 661 P.2d at 625.

169. It has been noted recently that courts have more flexibility to modify common law indemnity than they do to modify statutory pro rata contribution; nevertheless, the respective role of the legislature should be considered. *See* PROSSER, *supra* note

in Alaska. The judicial adoption of comparative negligence in *Kaatz* occurred nine years after the legislature first considered, but failed to enact, a bill to adopt comparative negligence.[170] At the time *Kaatz* was decided, at least twenty-six states had enacted comparative negligence statutes, but only three states, including Alaska, had judicially adopted the doctrine.[171] In contrast, the Alaska Supreme Court took a passive role in 1979 when it "considered and reject[ed] judicial creation of a partial indemnity rule of law," without ever discussing the doctrine in its opinion.[172] Similarly, the decision in *Vertecs* demonstrates that the Alaska Supreme Court is reluctant to intrude on the legislative role.

Clearly, the court believes that adopting implied indemnity would offend the policies of the Contribution Act. Thus, the court would almost certainly believe that adopting implied *partial* indemnity would be a far greater intrusion on the statutory pro rata mechanism, because implied partial indemnity would *replace* statutory contribution rather than supplement it in certain cases. Therefore, it is unlikely that the court will reconsider its rejection of implied partial indemnity in light of the decision in *Vertecs.*

B. Suggested Legislative Amendments to the Contribution Act to Permit Comparative Contribution

It is time for the Alaska legislature to replace its rigid pro rata contribution rule with the comparative fault provision proposed by the House Judiciary Committee in 1970.[173] States that have adopted a comparative fault system for plaintiffs, as Alaska did in *Kaatz,* should also adopt a comparative fault system for defendants.[174] The Alaska legislature could accept the judicial invitations and enact comparative contribution by simply amending the Contribution Act provision that provides: "in determining the pro rata shares of tortfeasors in the en-

16, § 51, at 344; *see also id.* § 3, at 20 (at least one current commentator believes courts should be more active in re-examining outmoded statutes).

170. For a brief recount of the unsuccessful attempts to pass comparative negligence legislation in Alaska, see Williams & Davidson, *supra* note 43, at 175 n.5.

171. *See id.* at 175 & nn.2-4.

172. *Arctic Structures,* 605 P.2d at 435 n.27.

173. *See* Heft, *Spreading the Burden: The Better Way to Accomplish Contribution Is by Comparative Negligence,* 22 FED. INS. COUNSEL Q. 37 (Summer 1972) (urging the adoption of comparative contribution and offering practical suggestions for attorneys who may later work with the doctrine); Note, *Reconciling Comparative Negligence, Contribution, and Joint and Several Liability,* 34 WASH. & LEE L. REV. 1159 (1977) (urging the adoption of comparative contribution); *see also supra* note 50.

174. *See* UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. Supp. 39, 40 commissioners' prefatory note (1985) (suggesting the enactment of a comparative contribution statute).

tire liability . . . their relative degrees of fault shall not be considered."[175] The amendment should allow consideration of relative fault. For clarity, the statute should also be amended by replacing the phrase "pro rata share" with "equitable share" wherever it appears in the Contribution Act.

In 1983, the Alaska Supreme Court recommended an amendment along these lines:

> We question whether the rule [prohibiting consideration of relative fault] "distribute[s] the responsibility equitably among those who are jointly liable." . . . While the question of whether the Act should be amended is a matter committed to the judgment of the legislature, it is our view that where one joint tortfeasor seeks contribution from another, the tortfeasor's "pro rata share" should mean a share proportionate to his comparative fault. We add that such a rule would not undermine the rule of joint and several liability announced in *Arctic Structures, Inc. v. Wedmore*. We invite legislative consideration of this aspect of the Act.[176]

The Uniform Comparative Fault Act (UCFA) would provide guidance to those drafting an amendment to the Contribution Act.[177] The UCFA is the most recent product of the National Conference of Commissioners on Uniform State Laws, approved in 1977, and is expressly intended to replace the 1955 pro rata Uniform Contribution Among Tortfeasors Act in those states that have adopted comparative negligence.[178] The UCFA requires that percentages of fault be established for each party in an action, including a plaintiff who is contributorily at fault.[179] The basis for contribution is each party's established equitable share, determined by considering relative degrees of fault in light of the nature of the conduct and its causal relationship to the damages.[180] Joint and several liability is retained, but reallocation of uncollectible shares occurs among all negligent parties, including negligent plaintiffs.[181]

V. CONCLUSION

The doctrines of implied indemnity and contribution were developed to remove common law obstacles to the fair allocation of tort loss. Alaska's tort loss allocation system is gradually advancing toward the goal of fairness, paralleling the increasing confidence in the judicial system's ability to apportion fault accurately and efficiently.

175. ALASKA STAT. § 09.16.020 (1983).

176. Criterion Ins. Co. v. Laitala, 658 P.2d 112, 118 n.11 (Alaska 1983) (citation omitted).

177. *See* 12 U.L.A. Supp. 39 (1985).

178. *Id.* at 40 commissioners' prefatory note.

179. *Id.* § 2(a), at 43.

180. *Id.* § 2(b); *see id.* at 43-44 commissioners' comment (listing circumstances relevant to determining relative fault).

The Alaska Supreme Court has participated in this development, most notably by adopting comparative negligence. Nonetheless, the court has clearly signalled its view that further improvement in this field requires the combined effort of the judiciary and the legislature.

The Alaska Supreme Court made it clear that, in light of the fact that the legislature chose and has left intact an equal sharing mechanism, the court will not impose on the legislature the court's view that contribution should be apportioned according to fault. As matters now stand, therefore, Alaska's tort loss allocation system forces joint tortfeasors to share losses equally regardless of their relative degrees of fault. Given the court's adherence to the statutory rule of pro rata contribution, its conclusion in *Vertecs* that adopting implied indemnity would create more uncertainty than it would resolve was correct. Rather than add a vague doctrine, Alaska should modernize its current rules to accomplish their intended result. The tradeoff between fairness and efficiency is unnecessary. The conflict should be resolved by amending the Contribution Act to permit comparative contribution. This legislative action would implement a tort loss allocation system that matches each party's liability with the percentage of damage for which he is responsible.

David Edward Mills

The Attack on Joint and Several Liability

By James Granelli

• In Los Angeles a driver high on drugs went through a stop sign and was broadsided by another motorist. A 16-year-old passenger in his car was crippled and brain-damaged in the 1979 crash. Last March a jury returned a verdict of $2.16 million against the driver—and the City of Los Angeles. The city had failed to trim bushes that partly obstructed the view of the driver and was found to be 22 percent liable. But unless the award is overturned on appeal, the city will pay nearly all of it. The negligent driver has no money and three co-defendants settled for their insurance policy limits—a total of $200,000. (*Sills v. City of Los Angeles*, C-333504, San Fernando Superior Court.)

• In New York City 12 persons were killed and scores injured in a 1970 gas explosion caused by a restaurant owner who turned on a partly installed gas main that had been inspected by the city. A jury found the city 4 percent negligent, but the verdict exposed the city to millions of dollars in damages because the defendants most at fault were bankrupt. But the city was lucky; the verdict was reversed on other grounds in 1983. (*O' Connor v. City of New York*, 447 N.E.2d 33.)

• In San Diego a university soccer player was a passenger in a car on the scenic Torrey Pines Road when a speeding drunk driver crossed the center line on a curve and smashed into the car, killing two of his teammates and rendering him quadriplegic. The drunk driver offered his insurance policy limits of $25,000. The city also was named as a defendant on a claim for faulty road design. Rather than risk a jury trial, the city settled in 1983—for $1.6 million. (*Duggan v. City of San Diego*, Civ. 484152, San Diego Superior Court.)

Across the nation these judgments and settlements have become more common, especially in catastrophic injury cases. Public entities, often dragged into cases as defendants with scant liability exposure, find themselves the target defendants forced to pay off the entire judgment when codefendants can't pay. The real villain, public officials say, is the doctrine of joint and several liability.

Changing the ancient doctrine

Fourteen states have limited or abolished the doctrine in recent years. Municipal officials and some lawmakers want the doctrine changed, and pending legislation in California and New York —home of the nation's largest personal injury verdicts—would doom the joint-and-several rule, if enacted.

Developed over centuries by English and American courts, the rule dictates that when a person is injured by the joint acts of several people, liability is indivisible. That means, in practical terms, a plaintiff can collect an award from the defendants most able to pay—those with "deep pockets."

The rationale is basic fairness. "Who should suffer, the innocent victim or one of the wrongdoers who can afford to pay?" said James Frayne, executive director of the California Trial Lawyers Association. He and CTLA president Robert B. Steinberg of Los Angeles also contend that the joint-and-several rule acts as a deterrent—forcing cities, for instance, to trim trees that could obscure a motorist's vision and lead to an accident—and keeps a penniless victim from going on welfare.

"These cases are not that easy to win," Steinberg said. "So when the city is included, the jury has got to be pretty darned convinced the city was at least partially liable."

"The nature of the beast is such that it's the single greatest problem that cities face in liability issues," said California State Assemblyman Alister McAlister, who is supporting a colleague's proposal to limit the liability of public bodies. And Jay Biggins, consultant to New York City's Office of Management and Budget, complained, "The entire public treasury is considered available to each and every plaintiff. They're treating government as the ultimate insurer."

The League of California Cities has compiled figures from 134 cities statewide on cases involving joint and several liability. It found that those cities paid more than $15.5 million in settlements and judgments during the fiscal year ending in June 1984. Two years earlier the same cities paid out $4.5 million. That kind of a hike has forced insurance carriers either to raise premiums drastically—300 percent to 450 percent for one group of California cities—or to stop writing liability policies for public entities.

It is the hand of the insurance industry that the plaintiffs' trial bar sees behind the current efforts to abolish or modify the rule.

"Insurance companies have sold public entities a bill of goods that would save them millions and millions of dollars if they could have the joint-and-several rule changed," said Frayne. Although his group killed four bills to limit the rule in the last five years, Frayne admits the fight this year will be the toughest ever. Not only is the League of California Cities better organized, he said, but more legislators are sensitive to the needs of local governments because they once served on those bodies.

Even if no state changes the rule this year, lobbyists for public entities believe that change is inevitable. "We're very confident that, at some time, we will succeed because the joint-and-several

Illustrations by Chuck Slack

problem becomes more severe every year," said Kenneth Emanuels, who heads the lobbying team for the California league. State Sen. John F. Foran, who introduced one of those previous bills and reintroduced it this session, said, "I've never seen a bill as controversial as this one pass in the first or second session."

A new generation of lawsuits

One reason joint and several liability has become more of a problem for public entities is that more plaintiffs are going to court. It used to be that injured persons whose own negligence, no matter how minor, contributed to their injuries could not sue anyone else. Contributory negligence is still the rule in five states, but the rest of the nation has adopted comparative negligence statutes, which allow partly negligent plaintiffs to recover damages—minus the percentage of their own fault—from others who caused their injuries. Most of the "comparative" states bar recovery if the plaintiff is 50 or 51 percent negligent.

As comparative negligence opened courtroom doors to a new generation of lawsuits in the 1970s, public officials began questioning whether the rationale for joint and several liability used for non-negligent plaintiffs ought to apply in cases brought by partly negligent plaintiffs. Fairness, they claim, also dictates that plaintiffs bear more of the responsibility for their own negligence.

"If you give more people the opportunity to recover damages, you also should give them the risk of assuming an unrecoverable judgment," said David Lyons, legal counsel to the legislative service bureau in Iowa, one of nine states that have modified the rule. Five other states have abolished it.

But it is the innocent plaintiff, the one who would not be barred by any contributory negligence law, who forms the biggest obstacle to those seeking to change the rule. "If we go to the legislature with all potential allies on our side and we don't have an answer for how we can take care of innocent victims, we'll have a hard road ahead," said San Diego City Attorney John W. Witt.

The Iowa rule

Iowa thinks it has at least one answer. After the Iowa Supreme Court adopted pure comparative negligence in December 1982 and retained joint and several liability in a case a year later, the legislature went into action, Lyons said, with an idea of preventing "someone who's more at fault" from benefiting in a lawsuit. First, the legislature adopted a modified 50 percent comparative fault law; then it altered the joint-and-several rule.

Under the Iowa law, joint and several liability remains in effect against defendants who are more at fault than the plaintiff. But a defendant less negligent than a plaintiff pays only the percent of the award for which he is liable. So if a plaintiff is 20 percent negligent, one defendant is 10 percent negligent and another defendant is 70 percent negligent, the plaintiff can collect only 10 percent of any award from the first defendant but could collect either 70 percent or the full 80 percent of the award from the second defendant.

In Minnesota the same facts would present a different outcome under that state's modified joint-and-several rule, said Michael K. Steenson, a tort law professor at William Mitchell College of Law in St. Paul. The state retains the rule except in cases with a judgment-proof defendant. In those cases the share of damages from that defendant is reallocated to all others, including a partly negligent plaintiff.

In some states that have abolished joint and several liability, court decisions have reimposed it in limited situations. In New Hampshire, for instance, the rule is revived when, because of immunities or procedural bars, the plaintiff can collect from only one defendant. Kansas, New Mexico, Ohio and Vermont also have abolished the rule.

No more deep pockets

Foran's California bill provides that all defendants would pay for pain and suffering losses "based on their fault rather than on the size of their pocketbooks," he says. In other words, if a city is 20 percent liable, it would only pay 20 percent of any award for pain and suffering, the noneconomic damages that provide plaintiffs with most of the money against public entities. The bill would not limit the amount of money defendants would have to pay for such damages as medical expenses or lost wages. An identical bill, introduced in February 1983, was amended to apply only when a defendant was less than 40 percent liable. The amended version died in committee.

"There must be comparable degrees of fault," Foran maintains. "Equity de-

States abolishing joint and several liability

New Hampshire and Vermont

Abolished the rule in favor of several liability in 1981. N.H. Rev.Stat.Ann. Sec. 507:7-a; Vt. Stat.Ann. Tit. 12, Sec. 1036.

Kansas

Abolished the rule in 1978 case that interpreted a 1976 comparative negligence statute. *Brown v. Keill*, 580 P.2d 867, held that the rule does not apply in comparative negligence cases but that several liability does.

Ohio

Abolished the rule in favor of several liability in 1980. Ohio Rev.Code Sec. 2315.19(A)(2).

New Mexico

Abolished the rule in favor of several liability through state supreme court decisions that adopted comparative negligence. *Scott v. Rizzo*, 634 P.2d 1234 (1981); *Bartlett v. New Mexico Welding Supply Inc.*, 646 P.2d 579 (1982).

States with limitations on joint and several liability

Nevada, Texas, Indiana, Louisiana, Oregon, Pennsylvania

Limited the rule so that it applies only when plaintiff's negligence is less than defendant's. Otherwise, several liability applies when plaintiff's negligence is greater than defendant's. Nev. Rev.Stat. Sec. 41.141(3) (1975); Tex. Rev.Civ.Stat.Ann. Art. 2212(a) (Vernon's Supp. 1982, 83, 85); Indiana SB-287 (1985); La. Civ. Code Ann. Art. 2324 (1982); Or. Rev.Stat. Sec. 18.485 (1983); 42 Pa. C.S. Secs. 7102(b), 8322 et seq; *General State Authority v. Sutter Corp.*, 452 A.2d 75 (1982).

Iowa

Limited the rule so it would not apply to defendants found to bear less than 50 percent of total fault assigned to all parties, leaving them liable for their several amount. Iowa 1984 Act, Secs. 668.1-668.3, 619.17.

Minnesota

Limited the rule only to point at which the share of an uncollectible defendant's damages would be reallocated among all others, including partially negligent plaintiff. Minn. Stat.Ann. Sec. 604.01(1).

Oklahoma

Limited the rule to cases where damages cannot be apportioned or when plaintiff is not at fault. *Lawbach v. Morgan*, 588 P.2d 1071 (1978); *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (1980).

Sources: City of New York Law Department; Michael K. Steenson, William Mitchell School of Law, St. Paul, Minn; Ohio Municipal League.

mands that a defendant found 10 percent at fault pay only 10 percent of the verdict. One injustice shouldn't provoke another injustice. As more flagrant cases come to the forefront, people will come to realize this isn't free money. It's taxpayers' money. And if we don't do something, we'll have to curtail other services."

But California Assemblyman Elihu Harris, who chairs the judiciary committee that killed Foran's previous bill, is troubled by the proposal. First, he said, potential "deep pocket" defendants—manufacturers, hospitals and insurance companies—are better able to handle the burden of paying damages than the injured victims are.

Harris also believes that statistics are misleading. "I want hard examples," he said. "Statistics on cases settled could mean defense lawyers are lazy. There are not many cases, and those cases that exist are decided by jurors who will have to pay the verdicts in taxes."

Limiting liability

Arguments to abolish or modify the joint-and-several rule may have more merit, he said, if they are limited to the public sector and to cases in which liability is only incidental or passive, such as an accident caused by a speeding drunk driver on a road others have used safely. But a 1982 bill abolishing joint and several liability for only California public entities was defeated when other target defendants sided with the trial lawyers to urge its defeat.

New York City officials, however, think a bill limited to local governments will pass the state legislature. "We think public entities are distinguishable from other defendants because they're looking out for the public welfare," said city consultant Biggins. "The indications are that other target defendants—doctors, hospitals and so forth—won't go over to the trial lawyers' side to fight this bill." To ensure support, the city sent management and budget liaison McGrath to cities throughout the state on a year-long mission to explain the effects of joint and several liability on small cities as well as larger ones.

Ceilings on awards

New York City's proposal goes further than just abolishing the joint-and-several rule for public entities. Besides allowing public entities to pay only their proportionate share of liability, the bill would put a ceiling of $150,000 per individual and $450,000 per occurrence on any award and would force plaintiffs to prove they had incurred at least $2,500 in medical expenses before they could collect damages for pain and suffering. The last provision, Biggins said, is "an attempt to establish objective standards" for pain and suffering. "We're not saying people shouldn't be compensated, we're just saying the numbers are not foreordained in heaven," he said.

In California and New York officials and attorneys for local governments believe the joint-and-several rule is creating a crisis. In California, especially, the tax-limiting initiative known as Proposition 13 has made it difficult for public bodies to raise funds. Some local leaders bemoan what they see as an impending spiral: By paying accident victims, cities have to shift funds from other budgets such as street repairs, leaving potholes or untrimmed bushes that might contribute to accidents and lead to more victims suing the cities.

But other states also are feeling squeezed by the rule. Colorado, Florida and Michigan, for instance, have legislative bills pending or planned for this year. "We see the rule as a major potential problem," said Tami A. Tanoue, staff attorney for the Colorado Municipal League, which is supporting a current bill in the state legislature. In Florida last year, the Florida Medical Association supported a ballot initiative to abolish joint and several liability, but the state Supreme Court struck it from the ballot because it improperly included other issues.

In Michigan settlements and judgments against the state transportation department alone last year hit some $14 million, said State Sen. Alan Cropsey, who noted that payments have been rising dramatically in the last five years. An April 1982 state appellate court decision helped to spur awards against the department by rejecting the state's claim for contribution and letting the joint-and-several rule force the state to pay nearly three times the amount of its liability, said Assistant State Attorney General Carl Carlsen.

In that 1982 case a trucking firm had settled a personal injury suit for $150,000. In a later trial against the codefendant state, the plaintiff won $1,299,400 but was found to be 60 percent negligent. The state, which was 10 percent negligent, had argued that the trucking firm should contribute to the award by paying another $239,820 for its 30 percent share of the blame. But the court ruled that the amount of the settlement was the only setoff the state was entitled to. Carlsen said that with several liability the state would have had to pay only $129,940, instead of $369,760. *Bacon v. Michigan Department of Transportation*, 115 N.W. 2d. 382.

Cropsey said such cases have forced the state to settle more lawsuits to avoid the possibility of higher jury verdicts. As Los Angeles Deputy County Counsel Charles V. Tackett put it: "Many situations are extremely dangerous financially, and if we can work out a deal where we have a sure loss rather than the potential for an extraordinary loss, we take it."

—*Journal*

James R. Granelli is a reporter for the Los Angeles Times.

HB 368

AS 09.16.010
AS 09.16.020(3)
AS 23.30.055

THE QUESTION OF THE LIABILITY OF PARTIES FOR CONTRIBUTION TO A COMMON JUDGMENT IS EXAMINED.

The Supreme Court of Alaska held that an employer obliged under the law to obtain workers' compensation insurance who fails to obtain it is not relieved from the obligation to contribute to a common judgment against a joint tort feasor; the Court agreed that when an employer secures compensation insurance, a third party's cross-claim under AS 09.16.010 for contribution to the common judgment is barred by the exclusivity provisions of AS 23.30.055. State v. Wien Air Alaska, 619 P.2d 719 (Alaska 1980). In this situation, the Court concluded that the employer should not receive the protection of the exclusivity provision when it has failed to secure the payment of compensation; "The exclusivity provision is an incentive for compliance, not a reward for noncompliance." A defendant found to have a lesser degree of fault urged the Court to consider the relative degrees of fault as found by the jury in determining the amount of contribution in order to avoid injustice. The Court indicated that it considered itself bound by the prohibition in AS 09.16.020(1) against considering the relative degrees of fault. That law makes the question of the fair division of contribution a "question for the legislature," citing Criterion Insurance v. Laitala, 658 P.2d 112, 118 n. 11 (Alaska 1983). "We refuse to avoid the clear language of subparagraph (1) prohibiting contribution according to relative fault by relying

on our statutory power to avoid injustice found in subparagraph (3)." Ehredt v. DeHavilland Aircraft Co. of Canada, 705 P.2d 913.

The section in question (and, in fact, the entire chapter) has created problems since the Court's decision on "comparative negligence" in Kaatz v. State, 540 P.2d 1037 (Alaska 1975). The Court has invited legislative review of the chapter a number of times. Review is recommended.

Contract providing for indemnity liability not precluded. — A contract executed in good faith, providing for a measure of indemnity liability, is not precluded by this section. City of Juneau v. Alaska Elec. Light & Power Co., Sup. Ct. Op. No. 2265 (File No. 4795), 622 P.2d 954 (1981).

Cited in Kastner v. Toombs, Sup. Ct. Op. No. 2087 (File No. 4119), 611 P.2d 62 (1980).

Collateral references. — 18 Am. Jur. 2d, Contribution, §§ 33-57; 74 Am Jur. 2d, Torts, §§ 78, 85.

18 C.J.S., Contribution, §§ 2, 6, 8, 11-13.

Manufacturer and dealer or distributor as joint or concurrent tortfeasors, 97 ALR2d 811.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Voluntary payment into court of judgment against one joint tortfeasor as release of others, 40 ALR3d 1181.

What statute of limitations applies to action for contribution against joint tortfeasor, 57 ALR3d 927.

Sec. 09.16.010. Right to contribution. (a) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's pro rata share of the common liability, and the total recovery of that tortfeasor is limited to the amount paid in excess of the pro rata share. No tortfeasor is compelled to make contribution beyond the tortfeasor's pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This chapter does not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution,

and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation.

(g) This chapter does not apply to breaches of trust or of other fiduciary obligation. (§ 1 ch 80 SLA 1970; am § 13 ch 59 SLA 1982)

Effect of amendments. — The 1982 amendment substituted "of" for "or" in the first sentence of subsection (f).

Legislative history reports. — For report on ch. 80, SLA 1970 (SSSB 245 [FCC]), see 1970 House Journal, p. 437.

NOTES TO DECISIONS

Contract providing for indemnity liability not precluded. — See note under heading "Contract providing for indemnity liability not precluded" following chapter analysis. City of Juneau v. Alaska Elec. Light & Power Co., Sup. Ct. Op. No. 2265 (File No. 4795), 622 P.2d 954 (1981).

Amendment of section required. — The supreme court's adoption of the doctrine of comparative negligence in Kaatz v. State, Sup. Ct. Op. No. 1187 (File Nos. 2259, 2291), 540 P.2d 1037 (1975), aff'd in part, rev'd in part on other grounds, Sup. Ct. Op. No. 1536, 572 P.2d 775 (1977), will require amendment of this section. State v. Guinn, Sup. Ct. Op. No. 1315 (File No. 2451), 555 P.2d 530 (1976).

Rule of joint and several liability not abrogated. — This chapter introduced the concept of pro rata contribution among tort-feasors but it did not abrogate the doctrine of joint and several liability which ultimately makes each concurrently negligent defendant liable for the whole of the plaintiff's loss where the co-defendants turn out to be insolvent. Arctic Structures, Inc. v. Wedmore, Sup. Ct. Op. No. 1993 (File Nos. 3633, 3654), 605 P.2d 426 (1979).

Or judicially modified. — In light of Alaska's existing pro rata legislative scheme for apportionment of damages among joint tort-feasors and the public policies implemented by the legislation, the common law rule of joint and several liability should not be judicially modified. Arctic Structures, Inc. v. Wedmore, Sup. Ct. Op. No. 1993 (File Nos. 3633, 3654), 605 P.2d 426 (1979).

Implied indemnity between concurrently negligent tortfeasors. — Public policy dictates that Alaska should not adopt implied indemnity between concurrently negligen tortfeasors. Vertecs Corp. v. Reichhold Chems., Inc., Sup. Ct. Op. No. 2647 (File No. 6566), P.2d (1983); State Mechanical, Inc. v. Liquid Air, Inc., Sup. Ct. Op. No. 2684 (File Nos. 6145, 6172), P.2d (1983).

When post-judgment agreement establishes right to contribution. — The main requirement for a post-judgment agreement to be considered a satisfaction establishing a right to pro rata contribution is that it terminate the litigation. Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Challenge to reasonableness of post-judgment settlement. — The right to challenge the reasonableness of the post-judgment settlement pursuant to subsection (d) of this section was limited, under the facts of the case, to only a determination of whether the amount was reasonable in light of the plaintiff's injuries and the likelihood of the jury award being upheld on appeal. Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Reduction of settlement by amount of prior settlement. — Neither this section, AS 09.16.040 nor common sense requires that one settlement be reduced by the amount of a prior settlement. Continental Ins. Co. v. Bayless & Roberts, Inc., Sup. Ct. Op. No. 2032 (File Nos. 2922, 2923), 608 P.2d 281 (1980).

Applied in Alaska Airlines v. Sweat, Sup. Ct. Op. No. 1464 (File Nos. 2912, 3103), 568 P.2d 916 (1977).

Quoted in Insurance Co. of N. Am. v. State Farm Mut. Auto. Ins. Co., Sup. Ct. Op. No. 2675 (File No. 5700), P.2d (1983).

Cited in Howey v. United States, 481 F.2d 1187 (9th Cir. 1973); Macey v. United States, 454 F. Supp. 684 (D. Alaska 1978).

Collateral references. — Liability of several persons guilty of acts one of which alone caused injury, in absence of showing as to whose act was the cause, 5 ALR2d 98.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 20 ALR2d 1044.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 ALR2d 1122.

Insured's release of tortfeasor before settlement by insurer as releasing insurer from liability, 38 ALR2d 1095.

Manner of crediting one tortfeasor with amount paid by another for release or covenant not to sue, 94 ALR2d 352.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 ALR3d 639.

Tortfeasor's general release of cotortfeasor as affecting former's right of contribution against cotortfeasor, 34 ALR3d 1374.

Validity and effect of agreement with one cotortfeasor setting aside his maximum liability and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 65 ALR3d 602.

Legal malpractice: defendant's right to contribution or indemnity from original tortfeasor, 20 ALR4th 338.

Sec. 09.16.020. Pro rata shares. In determining the pro rata shares of tortfeasors in the entire liability

(1) their relative degrees of fault shall not be considered;

(2) if equity requires, the collective liability of some as a group constitutes a single share; and

(3) principles of equity applicable to contribution generally shall apply. (§ 1 ch 80 SLA 1970)

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Stated in Macey v. United States, 454 F. Supp. 684 (D. Alaska 1978); Criterion Ins. Co. v. Laitala, Sup. Ct. Op. No. 2599 (File No. 6014), 658 P.2d 112 (1983).

Cited in State Mechanical, Inc. v. Liquid Air, Inc., Sup. Ct. Op. No. 2684 (File Nos. 6145, 6172), P.2d (1983).

Collateral references. — 82 Am. Jur. 2d, Workmen's Compensation, §§ 407-425.

101 C.J.S., Workmen's Compensation, §§ 918-935.

General or special employer's liability for compensation to injured employee. 3 ALR 1181; 34 ALR 768; 58 ALR 1467; 152 ALR 816.

Concurrent or joint employment by several employers. 30 ALR 1000; 58 ALR 1395.

Specific grounds for commutation of payments under workmen's compensation act. 69 ALR 547.

Duty of receiver of self-insured employer to continue payments under workmen's compensation award made prior to receivership. 94 ALR 863.

Fraud or mistake respecting amount of compensation to which employee was entitled as ground for release from settlement or compromise of claim. 121 ALR 1270.

Insurance carrier's liability for part of employer's liability attributable to violation of law or other misconduct on his part. 1 ALR2d 407.

Sec. 23.30.050. Employer's liability despite negligence of a third party. The liability of an employer for medical treatment is not affected by the fact that the employee was injured through the fault or negligence of a third party not in the same employ, until notice of election to sue has been given as required by AS 23.30.015(a) or suit has been brought against the third party without giving notice. The employer has, however, a cause of action against the third party to recover any amounts paid by the employer for the medical treatment in like manner as provided in AS 23.30.015(b). (§ 6(4) ch 193 SLA 1959)

NOTES TO DECISIONS

"Recover" means payment. — The employer is subrogated to the right to "recover," and the word "recover" means to get damages or compensation; not a judgment but the benefits of a judgment. It means payment. Andersen v. Pacific S.S. Co., 8 Alaska 291 (1931), decided under former law.

Employer is necessary party in action against third party. — By reason of the fact that the act gives to the employer the right to recover of a negligent third party the amount he has paid the employee, the employer is a necessary party to the action, which involves and should bind all parties upon the questions of defendant's negligence and the damages sustained by the plaintiff. Andersen v. Pacific S.S. Co., 8 Alaska 291 (1931), decided under former law.

Cited in Matanuska Elec. Ass'n v. Johnson, Sup. Ct. Op. No. 173 (File No. 278), 386 P.2d 698 (1963).

Collateral references. — 81, 82 Am. Jur. 2d, Workmen's Compensation, §§ 65-72, 403, 429-440.

101 C.J.S., Workmen's Compensation, §§ 992-1011.

Sec. 23.30.055. Exclusiveness of liability. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the

employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. (§ 4 ch 193 SLA 1959; am § 1 ch 42 SLA 1962)

Opinions of attorney general. — While it is true that under the Alaska Workmen's Compensation Act, employers, including the state (AS 23.30.265), are excluded from admiralty liability, this exclusive liability provision cannot act as a limitation on suits against the state under the federal maritime law once the state has unqualifiedly waived its immunity for negligent torts. 1963 Op. Att'y Gen., No. 28.

So much of this section as limits the liability of employers in admiralty must be considered an invalid infringement on the federal jurisdiction. 1963 Op. Att'y Gen., No. 28.

All employees on the Alaska ferry system who meet the classification of seamen or members of the crew within the scope of the Jones Act, 46 U.S.C. § 688, have an exclusive federal remedy within the terms of the Jones Act to the exclusion of the Alaska Workmen's Compensation Act, except as to those injuries that occur in a situation of only local concern or fall within the "twilight zone" between local and federal jurisdiction. 1963 Op. Att'y Gen., No. 28.

The "twilight zone" between local and federal jurisdiction encompasses all those employments for which a reasonable argument can be made both for and against the application of a state workmen's compensation law. 1963 Op. Att'y Gen., No. 28.

Seamen who come within the federal maritime jurisdiction for tort claims under the Jones Act, 46 U.S.C. § 688, can waive the federal remedy and elect to proceed under the Workmen's Compensation Act. 1963 Op. Att'y Gen., No. 28.

State ferry employees, who would be classified by their shore duties as longshoremen or harbor workers, are not subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. 1963 Op. Att'y Gen., No. 28.

NOTES TO DECISIONS

Constitutionality. — There is sufficient justification for the workmen's compensation scheme, including the "exclusive liability" provision, for it to pass muster as having a rational basis — even under the "less speculative, less deferential, more intensified means-to-end" application of that test. Wright v. Action Vending Co., Sup. Ct. Op. No. 1224 (File No. 2325), 544 P.2d 82 (1975).

The only classification in this section is that separating work-related and nonwork-related injuries. There is nothing inherently "suspect" about this classification, nor is appellant's right to sue for loss of consortium so "fundamental" as to require a "compelling state interest" to uphold statutory interference. Wright v. Action Vending Co., Sup. Ct. Op. No. 1224 (File No. 2325), 544 P.2d 82 (1975).

This section does not discriminate against women. Wright v. Action Vending Co., Sup. Ct. Op. No. 1224 (File No. 2325), 544 P.2d 82 (1975).

The exclusive liability provision of this chapter does not violate substantive due process since it has a reasonable relationship to a legitimate governmental

Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court

By John G. Fleming

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Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*

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List of Recommendations

Recommendation I (§ 8): (1) Statutory confirmation of "pure" comparative negligence, and
(2) Adoption of the modified set-off formula in Section 3 of the Uniform Comparative Fault Act.

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* This Article was prepared under the auspices of the California Legislature Joint Committee on Tort Liability, and is published here with the permission of the Committee. The Joint Committee on Tort Liability is a legislative study committee composed of six Assemblymen and six Senators. The Chairman is Assemblyman John T. Knox (D-Richmond) and the Vice Chairman is Senator Robert G. Beverly (R-Manhattan Beach).

The Committee was formed in response to complaints regarding the high cost of liability insurance, and the reply of insurers that the uncertainty of the tort liability system allowed more frequent and higher recoveries for liability claims. The recommended solution was a study and revision of the tort system to bring greater certainty to the law. The Committee's scope of inquiry is the injury producing activities of society, the methods available for resolving conflict, and the determination of fair injury compensation and loss allocation. It is also charged with the responsibility of examining the liability insurance mechanism to see what changes, if any, could assist in reduction of premiums.

Because of the controversy aroused by American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the Committee requested Professor Fleming to identify and analyze those areas which are properly the subject of legislative action and which remain unresolved in the opinion. These areas include, but are not limited to, the necessary modification of Code of Civil Procedure §§ 875 and following relative to contribution, settlement procedures, and what constitutes a good faith settlement, set-offs and cross claims, and intrafamilial immunities. Letter from William C. George, Committee Counsel (on file with *The Hastings Law Journal*).

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Recommendation 2 (§ 19): (1) Apply "comparative negligence" to claims based on strict liability, and
(2) include "recklessness" and "willful misconduct," short of intentional injury, among the kind of fault capable of reducing, but no longer necessarily barring recovery.

Recommendation 3 (§ 26): Retention of the "joint and several" liability rule even where the plaintiff contributed to his injury through his own fault.

Recommendation 4 (§ 30): Statutory enactment of contribution by shares proportioned to fault in lieu of the existing system of contribution "pro rata" (equal shares.)

Recommendation 5 (§ 37): Abolition of the "joint judgment" requirement for contribution.

Recommendation 6 (§ 42): The share of any insolvent or absent tortfeasor shall be distributed among the remaining defendants and the plaintiff (if at fault) in proportion to their respective shares of responsibility.

Recommendation 7 (§ 49): A release entered into by the plaintiff and a tortfeasor shall discharge the latter from all liability for contribution, but the plaintiff's claim against the remaining tortfeasors shall be reduced by the amount of the released tortfeasor's share of the loss.

Recommendation 8 (§ 67): (1) In the case of a work injury caused by the concurrent negligence of the worker's employer and a third party,
(a) the employer should be allowed to recover from the third party any part of his compensation liability that exceeds his notional share of the tort damages, and
(b) the third party should be allowed to claim contribution to the extent of the employer's share of fault or the employer's workmen's compensation liability *whichever is the smaller* (§65).
(2) If the employee's negligence concurred with that of the third party, his negligence should be imputed to the employer so as to reduce his claim to reimbursement (§ 70).
(3) *Alternatively*, the employer's right of reimbursement should be abolished, regardless of whether he was negligent or not, but the third party's tort liability should be reduced by the amount of workmen's compensation paid or payable to the employee (§ 67).

I. Comparative Negligence

1. In *Li v. Yellow Cab Co.*[1] the Supreme Court of California abandoned the all-or-nothing common law doctrine of contributory negligence in favor of comparative negligence, so that a contributorily negligent claimant was no longer necessarily completely barred from recovery but merely suffered a reduction of damages in proportion to his own share of negligence for his injury. By this decision, California joined a spectacular trend in recent years which to date has brought thirty-two jurisdictions in the United States to adopt some version of comparative negligence.[2] The introduction of comparative negligence has encountered an overall favorable response, ranging from enthusiasm to, at least, acquiescence. While the *Li* decision has been criticized on the ground that the reform was an essentially legislative task,[3] it is now obviously too late to assert a legislative priority. It would be desir-

1. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

2. *See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974 & 1978 Supp.) [hereinafter cited as SCHWARTZ]; H. WOODS, COMPARATIVE FAULT (1978) [hereinafter cited as WOODS].

3. *E.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 832-34, 532 P.2d 1226, 1246-47, 119 Cal. Rptr. 858, 878-79 (1975) (Clark, J., dissenting). See my vindication in *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 273-83 (1976) [hereinafter cited as *Foreword*]. For a critical view of the court's handling of California Civil Code § 1417, see Ingland, *Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code*, 65 CALIF. L. REV. 4 (1977). Besides California, Alaska, Florida, and Michigan adopted comparative negligence judicially, in all cases after a lengthy justification for judicial activism. See Kaatz v. State, 540 P.2d 1037 (Alas. 1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977).

able however to include a statutory statement of comparative negligence in a comprehensive statute recommended in this Study.

2. *"Pure" Comparative Negligence.* The only really controversial aspect of the *Li* decision was the court's choice of the "pure" form of comparative negligence in preference to the "Wisconsin rule" which enjoys overwhelming following among the statutes in other states[4] and the qualified recommendation of the defense lobby.[5] Under the "pure" version, a plaintiff may recover some damages however great his proportion of fault compared with the defendant's; whereas under the Wisconsin rule a plaintiff can recover only if his negligence is *less than* the defendant's or, under a more favorable variant, is *no greater than* the defendant's[6]—in the first case his share must not exceed 49%, in the latter 50%. The "Wisconsin" 49% rule is especially prejudicial to plaintiffs because it will continue to bar recovery by either party in the great number of automobile collisions where fault is found to be equal in the absence of any "finer tuning." This likelihood is compounded by the practice rule in some states requiring that the jury be kept in ignorance as to the legal consequence of a finding of 50% liability.[7] Its harshness is further increased by the rule in some states requiring a comparison between the plaintiff's fault and each defendant's separately, so that if the plaintiff's share is less than the defendants' aggregate but more than that of each defendant separately, he still fails to recover.[8] The other variant—the "50% rule"—which was pioneered by New Hampshire in 1969 and gained attention especially after Wisconsin switched to it in 1971, disqualifies only plaintiffs whose fault was greater than the defendant's so that, at least in the common case of equal fault, both parties can still recover an aliquot share from each other.

3. Proponents of the "49%" and the "50%" rule invoke the moral argument that it is unjust to permit a party who is more at fault to recover anything from another less culpable. This becomes the more plausible when the party with greater fault also happens to suffer the greater injury. Suppose the fault ratio in a collision between A and B was 25%:75%, while A's damage totalled $1,000 and B's $5,000. Is it fair

4 *See* SCHWARTZ, *supra* note 2, § 3.5; WOODS, *supra* note 2, § 4.3.

5 *See* the Defense Research Institute's position papers, endorsed by the International Association of Insurance Counsel (IAIC), the Federation of Insurance Counsel (FIC) and the Association of Insurance Attorneys (AIA), RESPONSIBLE REFORM 23 (1969) and its successor RESPONSIBLE REFORM: AN UPDATE 15 (1972).

6 Pioneered in New Hampshire, this version gained increased attention as the result of its adoption by Wisconsin in 1971. It has since been adopted in Connecticut, Montana, Nevada, New Jersey and Texas.

7 *See Forward, supra* note 3, at 245 n.26.

8 This rule originated in Wisconsin. *See* SCHWARTZ, *supra* note 2, at 78-80, 286-91.

that B should be able to claim $1,250 from A, when A could only recover $750 from B—in other words, that the guiltier of the two should recover more than the other?

There are two answers to this rhetorical question. First, the degree of a defendant's fault and the extent of the plaintiff's damage are typically quite unrelated: slight negligence can cause a great deal of damage, while gross negligence may result in only little damage. Nor does the law attempt to modify that random relationship: a barely negligent defendant will have to pay for the whole of a large loss limited only by rules of "proximate cause." There is no reason for adopting a different principle in cases of contributory negligence. Comparative negligence merely requires a sharing (in accordance with the parties' fault) of each party's separate loss, but is indifferent to the size of their respective losses.

Secondly, the argument assumes that both parties will be paying for their liability out of their own pockets, whereas in all likelihood the losses will be borne by insurance carriers. Arguments appealing for fairness may carry some measure of plausibility in their application to individuals, but not to insurers whose function it is to spread the cost of accidents and levy premiums on a broad base.

4. A more pragmatic reason for the defense lobby's preference for the Wisconsin rule is that it reduces substantially the cost for defendants and their insurers. Not only does it disqualify all claims by a party more than 49% [or 50%] at fault, it also arms the defendant's insurance adjuster or attorney with a powerful negotiating weapon in beating down the demands of plaintiffs, under the risk that litigation may ultimately deny them any recovery whatever. The rule therefore has the tendency not only to disqualify many victims, but to depress the damages recovered by most others. Plaintiffs resisting such tactics would be driven to litigate. By the same token "pure" comparative negligence would tend to promote settlements, since defendants and their insurers would be more inclined to compromise when the stakes are so considerably reduced.

Significantly, all judicial adoptions of comparative negligence opted for the "pure" version,[9] while most statutory adoptions chose the "Wisconsin" rule promoted by the defense bar.[10] The judicial choice, I would suggest, was less likely the result of plaintiff-bias than of the conviction that the *Li* principle of loss sharing proportionate to fault should be applied to all cases of multiple responsibility rather than ad-

9 *See* cases cited note 3 *supra*.

10 A list updated to 1977 is found in *Forward, supra* note 3, at 239-41 nn.1, 3 & 4.

mitted only by way of exception to some cases while the remainder continued under the contributory negligence bar. Retention of the "pure" version is therefore here recommended.

5. *Set-Off.* A more technical problem with "pure" comparative negligence is how to adjust counterclaims. Under the "Wisconsin" 49% rule counterclaims for losses arising out of the same accident are of course impossible, but under "pure" comparative negligence and the "50%" rule such counterclaims are quite frequent especially in cases of automobile collisions. Suppose that A and B each suffer $100,000 of damage and that their fault is apportioned in the ratio of 30:70. A may therefore claim $70,000 from B and B counterclaim $30,000 from A.

Under modern procedure claim and counterclaim would ordinarily be set-off against each other,[11] with the result that A recovers $40,000 from B and B nil from A. If both parties are uninsured, this result is entirely unexceptionable, indeed desirable, especially if B were judgment-proof so as to prevent him from pocketing $30,000 from A while defaulting on his own larger debt to A.

6. The equities are, however, radically different where both parties carry liability insurance. The purpose of liability insurance is not only to protect the insured against the adverse impact of liability but to assure that the victim be actually compensated for his tort loss instead of having merely an empty claim against a judgment-proof defendant.[12] But to allow set-off between A's and B's liability insurers would thwart the latter function and confer an undeserved windfall on the insurers. To revert to the preceding example, instead of a total of $100,000 ($70,000 to A + 30,000 to B) flowing to the accident victims, only $40,000 will; by the same token, the insurance carriers will together save $60,000 at the expense of those they were meant, and paid, to benefit.

7. Two procedures are available to avoid this undesirable result. One is to prohibit set-off whenever one or all parties are insured against liability.[13] The other would attain the same result whenever both parties are fully insured or solvent but deal more fairly with the not uncommon situation where one or the other party does not carry adequate cover. This procedure was adopted by the Uniform Comparative Fault Act § 3 and is here recommended.[14]

11. *Cf.* Adams v. Cerritos Trucking Co., 79 Cal. App. 3d 957, 145 Cal. Rptr. 310 (1978) (claim by tortfeasor A against joint tortfeasor B for A's damage conditioned on A discharging her share of joint liability to plaintiff).

12. *See, e.g.*, Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 675, 79 Cal. Rptr. 106 (1969).

13. *E.g.*, Civil Liability Act of 1961, 1961 Acts of the Oireachtas, ch. 41, § 38 (Ire.).

14. Unlike California State Bar draft § 4 and S.B. 1959 (1978) (proposed Cal. Code

Its formula is as follows: there shall be set-off; but "if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of . . . set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits."[15] The underlying principle of this formula is that the insurance carrier would be enriched by the set-off and must disgorge that benefit to its own insured. If, in the preceding example, both parties were fully insured, A's carrier would pay nothing to B because of set-off. The set-off reduced its policy liability of $30,000 and it must pay that amount to A. B's carrier must pay the net judgment of $40,000 to A. Its own policy liability has been reduced by $30,000 and it must pay that amount to B. In this instance, the end result is the same as if there had been no set-off. It is different, however, if we assume that A's and B's coverage is only $30,000. In that event, A receives $30,000 from his own insurer as in the previous example, but B's carrier pays $30,000 to A and pays nothing to B; B remaining liable to A for $10,000. Under a rule of "no set-off," A (who was entitled to greater damages) would have fared considerably worse, B better,[16] thus "penalizing the party who can pay his obligation, if the other party is unable to pay."[17] Instead, the suggested formula creates an incentive to carry adequate coverage, which would be desirable from everybody's point of view (including insurers').

8. *RECOMMENDATION 1: (1) Statutory confirmation of "pure" comparative negligence and (2) adoption of the modified set-off formula in Section 3 of the Uniform Comparative Fault Act.*

9. *Fault.* Your committee specifically solicited my comments on the question of what kinds of fault were susceptible to comparison under a comparative fault regime.[18] At one end of the spectrum, one party may have been grossly negligent or even reckless; at the other end of the

CIV. PROC. § 878) which would specifically enact set-off in all situations. This proposal was of course opposed by the California Trial Lawyers Association (CTLA) in the committee hearings.

15. The Ingalls bill, A.B. 3643 (1978), contained alternative wording: "provided, that any party whose liability for damages is covered by a policy of insurance shall be compensated by the insurer to the extent that the party's damages otherwise recoverable have been used to reduce the insurer's liability." Both formulas appear to derive from the Republic of Ireland's Civil Liability Act of 1961, 1961 Acts of the Oireachtas, ch. 41, § 36(5).

16. A would have recovered only $30,000 from B's insurer, nothing from his own, and thus been $40,000 short (4/7 of his loss, $30,000, from A's insurance).

17. UNIFORM COMPARATIVE FAULT ACT § 3, Comment.

18. Letter from Denise Jarman, legal intern, to John Fleming (July 7, 1978).

spectrum his liability may be strict (no fault); how can one compare either one with ordinary negligence? Even where both parties are negligent, their negligence may be related to entirely different spheres, like the negligent producer of a defective automobile and an inattentive driver. Justice Clark has been foremost in focussing criticism on the perplexity of comparing "apples and oranges."[19] The problem has been considered in several contexts by California courts:

10. *Strict Liability.* Most important was the decision in *Daly v. General Motors Corp.*[20] that a plaintiff's contributory negligence would, since *Li*, reduce his damages against the manufacturer of a car, strictly liable for a defectively designed latch. Prior to *Li*, contributory negligence other than continued use of the product after becoming aware of the defect (assumption of risk) or actual misuse was not a defense to a claim based on strict liability, although it involved the Quixotic result that a negligent manufacturer was treated less harshly than one sued on a no-fault theory of strict liability. The problem in *Daly* was therefore whether to retain that rule or henceforth to admit a limited defense of comparative negligence. The latter alternative would itself entail the somewhat paradoxical result of worsening the position of plaintiffs pursuant to a decision (*Li*) whose objective and effect had been to improve it. On the other hand, the widespread exclusion of the defense of contributory negligence from claims for strict liability was largely motivated by the harshness of the all-or-nothing rule as well as by a desire not to impede the loss-distributive function of products liability. Since Professor Schwartz is submitting a detailed analysis of the specific problem of products liability to your committee, the following comments are addressed primarily to the "apples and oranges" argument and to *general* policy considerations.

Justice Richardson, speaking for the majority in *Daly*, admitted "the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence"[21] but questioned the "insistence on fixed and precise definitional treatment of legal concepts."[22] For one thing, there had been "much conceptualistic overlapping and interweaving"[23] in this area; for another, contributory "negligence" was itself a misnomer since it did not connote breach of a

19. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 616-17, 578 P.2d 899, 923-24, 146 Cal. Rptr. 182, 206-07 (1978) (Clark, J., dissenting); Daly v. General Motors Corp., 20 Cal. 3d 725, 748-50, 575 P.2d 1162, 1175-77, 144 Cal. Rptr. 380, 393-95 (1978) (Clark, J., concurring).

20. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

21. *Id.* at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

22. *Id.*

23. *Id.* at 735, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

duty to another and was therefore different anyway from "actionable negligence" by a defendant. Comparative "fault" would therefore have been a better term; or, better still, "equitable apportionment or allocation of loss."[24] Hence, instead of "matching linguistic labels," it was more useful to "examine the foundational reasons underlying the creation of strict products liability in California to ascertain whether the purposes of the doctrine would be defeated or diluted by adoption of comparative principles."[25] Justice Richardson's opinion concluded that these goals would not be frustrated, inasmuch as the plaintiff would continue to be relieved of proving the defendant's negligence, "defenseless" plaintiffs would still be protected except for a reduction of damages proportionate to their own fault, and the cost would still be spread among society.

After dismissing the contention that the admission of comparative negligence would lessen the manufacturers' incentive to produce safe products, the court addressed the claim that, "as a practical matter, triers of fact, particularly jurors, cannot assess, measure, or compare plaintiff's negligence with defendant's strict liability."[26] Pointing to the federal experience under the maritime doctrine of unseaworthiness, Richardson J. concluded that jurors were quite capable of undertaking a fair apportionment of liability. This view is evidently shared by a preponderant number of courts in other states,[27] by many scholars[28] and by the draftsmen of the Uniform Comparative Fault Act which defines fault as including "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 liability*."[29]

11. The contrary viewpoint was forcibly put in *Daly* by the dissenting opinions of Jefferson, J. and Mosk, J.[30] The former stressed the difficulty faced by jurors in comparing negligence with strict liability and

24. *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. It is notable that the American usage of "*comparative* negligence" stands alone; in England and the Commonwealth it is called "apportionment."

25. *Id.*

26. *Id.* at 738, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

27. *Id.* at 739-40, 575 P.2d at 1170-71, 144 Cal. Rptr. at 388-89. This view is also shared by most foreign countries with substantial experience of this problem. *See* Honoré, *Causation and Remoteness of Damage*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 173 (1972) [hereinafter cited as Honoré].

28. 20 Cal. 3d at 740-41, 575 P.2d at 1171, 144 Cal. Rptr. at 389.

29. UNIFORM COMPARATIVE FAULT ACT § 1(b). *See also* California State Bar draft § 1 (S.B. 775) which applies comparative fault to "all tort . . . actions." The accompanying comment specifically argues for inclusion of strict liability.

30. 20 Cal. 3d at 750-57, 575 P.2d at 1177-81, 144 Cal. Rptr. at 395-99 (Jefferson, J., concurring in part, dissenting in part); *id.* at 757-64, 575 P.2d at 1181-86, 144 Cal. Rptr. at 399-404 (Mosk, J., dissenting).

the resulting unpredictability and inconsistency of verdicts; the latter predicted substantial prejudice to plaintiffs because the majority decision handed a powerful and "boilerplate" negotiating ploy to defendants and thus undermined the protective function of strict products liability.

12. Clearly, the issue is one of policy, not semantics. If one views strict liability as an exceptional deviant from a central principle of liability based on fault, the plaintiff's fault not only seems relevant but may invite the conclusion that it should actually exclude *all* liability of the tortfeasor. Thus it is the preponderant view that a tortfeasor liable without fault is entitled to a full indemnity from a negligent tortfeasor,[31] but it is of course notable that the issue in that context does not affect the victim and therefore does not impinge as directly on any protective purpose of the strict liability rule. Hence where the issue is not between joint tortfeasors *inter se*, but between defendant and victim, the real choice is between the "risk" and the "insurance" theory of liability.[32]

Under the risk theory, the plaintiff's negligence would be taken into account when the basis of the tortfeasor's strict liability is the risk created by his activity. That risk is of course all too obvious in the case of *defective* products, so obvious indeed that the liability is frequently distinguished from "absolute" liability and some courts have even likened it to "fault" liability, sufficient on any account for comparing fault.[33] This theory has its strongest proponent in Germany. Some of the German statutes creating strict liability specifically provided for the defense of comparative negligence, but the principle has long since become one of general "common law" application.[34] Weighed on the side of strict liability is the "enterprise risk" (*Betriebsgefahr*), *e.g.* the risk posed by driving an automobile, truck or train, flying an airplane, or transmitting gas or electricity. This is counted against plaintiffs no less than defendants,[35] so that in an automobile collision even an "innocent" driver ordinarily suffers a reduction in his claim against another negligent driver. Even the "conceptual" problem has been eased because, according to the official theory, what is being compared is not fault but causative effect. Thus the reduction or extinction of liability

31. *See* Kissel, *Contribution and Indemnification Among Strictly Liable Defendants*, in 16 FOR THE DEFENSE 133 (1975); *Foreword*, *supra* note 3, at 270 n.118.

32. *See* Honore, *supra* note 27.

33. Powers v. Hunt-Wesson Foods, 64 Wis. 2d 532, 219 N.W.2d 393 (1974). The Wisconsin statute authorizes comparative negligence only with respect to "claims based on negligence."

34. Honore, *supra* note 27.

35. O. ESSER, 2 SCHULDRECHT III 496 (3d ed. 1969).

depends on the injured party's contribution to the harm, and even gross negligence does not wholly exclude liability.

The competing "insurance" theory stresses the protective purpose of the strict liability rule which arguably should not be impaired by the threat of reduction for the injured party's fault. This view appears to have the largest following in the United States where traditionally the plaintiff's contributory negligence has been regarded as irrelevant to claims based on strict liability.[36] But as already pointed out, the chief motivation in the past appears to have been to escape the drastic effect of the all-or-nothing rule rather than any philosophical commitment. Moreover, the case law was sparse and unimpressive until strict liability received its mighty boost in its application to defective products. The problem is therefore essentially novel in the United States.

13. Unfortunately, the debate in *Daly* did not yield an adequate justification of the opposing views. Only Mosk, J. put the "insurance" theorem clearly into the forefront of his dissent; Jefferson, J. alluded to it[37] but only to explain briefly why he preferred to allow the plaintiff to recover in full rather than bar him completely, his main point being to continue the all-or-nothing rule for want of any practical method of comparison. On the other hand, the majority was bent only on defending the practicality of comparison and the negative proposition that it would not impair the efficacy of strict products liability. It assumed as an incontrovertible premise that the *Li* rationale was otherwise applicable to strict liability. It thus failed to propose a sound theoretical foundation for making the required comparision and floundered amidst such terms as "comparative *fault*" and "equitable apportionment" as better alternatives to "comparative negligence."

The risk theory would have furnished such a needed foundation, as would perhaps a nod toward causation as an auxiliary criterion for comparison. Notably, the English legislation avoided this impasse by employing the more open terminology that the damages "shall be reduced to an extent as the court thinks *just and equitable* having regard to the claimant's share in the *responsibility* of the damage."[38] Moreover, the same legislation defines fault as consisting in "negligence, breach of duty or other act or omission which gives rise to liability in tort."[39] This has enabled courts to have regard not only to the parties' fault in the conventional sense, but also to the causative potency of

36. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n.

37. 20 Cal. 3d at 756-57, 575 P.2d at 1181, 144 Cal. Rptr. at 399 (Jefferson, J., concurring in part, dissenting in part).

38. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c.28, § 1.

39. *Id.* § 4.

their conduct, the fact that the impact of reduction on the plaintiff is quite different from that on a defendant (who is insured) and other considerations relevant to fair loss distribution. As already pointed out, the Uniform Comparative Fault Act specifically includes strict liability in its definition of fault.[40]

14. Oddly enough, neither side in the *Daly* debate took issue over whether reduction on account of contributory fault would advance the cause of accident prevention. The argument that it would has been a staple of the new school of lawyer-economists who seek liability rules that would promote the most "efficient" accident preventive responses by potential plaintiffs and defendants.[41] Their argument typically assumes rational responses by the affected parties to given choices, such as that users of a product will exercise greater care in self-protection under the threat of reduced damages. Professor G. Schwartz recently explored but convincingly demolished this utilitaian argument as an unrealistic foundation for the defense of contributory negligence in any of its forms.[42] This does not, of course, preclude other justifications, such as a sense of fairness that one who claims compensation from another for having created an unreasonable or excessive risk should not expect the law to ignore completely his own contribution in foolishly bringing about his own injury.

15. Strict liability may raise a problem in the context not only of contributory negligence but also of contribution. A strictly liable defendant may seek contribution from a negligent joint tortfeasor, and vice versa. Pre-*Li* law was largely distorted by distinctions between "primary and secondary" or "active and passive" negligence, and by the all-or-nothing dilemma where contribution was not available. It was this very confusion which prompted the New York and California courts in *Dole* and *American Motorcycle* to make a new start under the banner of "partial indemnity." The California Supreme Court in *American Motorcycle*[43] specifically stressed the need for a new start after commenting at length on the unsatisfactory prior decisions dealing with products liability defendants.[44] These decisions can therefore no longer provide any guidance for the future.

40. See note 29 & accompanying text *supra*.

41. *E.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 123-24 (2d ed. 1977); Demsetz, *When Does the Rule of Liability Matter?*, in 1 J. LEGAL STUD. 13, 27 (1972).

42. Schwartz, *Contributory and Comparative Negligence*, 87 YALE L.J. 697 (1978).

43. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591-99, 578 P.2d 899, 907-12, 146 Cal. Rptr. 182, 190-95 (1978). See especially its analysis of Ford Motor Co. v. Poeschl, 21 Cal. App. 3d 694, 98 Cal. Rptr. 702 (1971). *See also* Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

In accordance with the preceding discussion, therefore, there is no longer any good reason why a strictly-liable defendant should necessarily either have to bear the whole or none of the loss concurrently caused by his defective product and the negligent conduct of another tortfeasor. In particular, not even the "insurance" theory of strict liability would militate against contribution since it is not within the protective purpose of the strict liability rule to protect anyone other than the victim, least of all anyone whose negligence contributed to the injury. This view was recently adopted by the Supreme Court of Illinois in *Skinner v. Reed-Prentice Division Package Machinery Co.*,[45] allowing contribution to the manufacturer of defective machinery against a negligent employer.[45] As that court saw it, "the public policy considerations which motivated the adoption of strict liability were that the economic loss suffered by the user should be imposed on the one who created the risk and reaped the profit. When the economic loss of the user has been imposed on a defendant in a strict liability action the policy considerations are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied."[46]

On the facts of *Skinner*, contribution rather than indemnity appeared the proper solution. Significantly, the court regarded causation as the criterion for apportioning the loss.[47]

16. *Willful Misconduct.* So far there has been little judicial clarification of the converse situation, namely, the effect of grosser forms of fault by the plaintiff. One problem area concerns the supply of liquor to a person who is obviously intoxicated, in violation of Business & Professions Code § 25602 (since partially repealed).[48] In *Kindt v. Kauffman*[49] the court of appeal upheld a demurrer to a claim for personal injuries sustained in an automobile accident by a bar patron who was obviously intoxicated when supplied with liquor by the defendant bartender. The court held that no duty was owed to such a patron and that an adult bar customer who voluntarily becomes intoxicated is

44. 374 N.E.2d 437 (Ill. 1977).

45. How to reconcile contribution or indemnity with the employer's immunity under the workmen's compensation statute rais[es] another issue discussed in Section VIII of this Study. See notes 138-86 & accompanying text *infra*.

46. 374 N.E.2d at 443 (citations omitted).

47. "[T]he governing equitable principle 'require that ultimate liability be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused [the injuries].'" 374 N.E.2d at 442.

48. *See* 1978 Cal. Legis. Serv. ch. 929, at 3243 (West) (amending CAL. BUS. & PROF. CODE § 25602; CAL. CIV. CODE § 1714); *id.* ch. 930, at 3245 (to be codified as CAL. BUS. & PROF. CODE §§ 25602.1-.3).

49. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

guilty, as a matter of law, not of mere negligence but of willful misconduct. Even after *Li*, such conduct remained an absolute bar to recovery, whether the defendant was himself guilty merely of negligence or also of willful misconduct; in short, there was no rule of comparative willful misconduct. However, in *Ewing v. Cloverleaf Bowl*[50] the supreme court disapproved of two propositions in *Kindt*: it held (1) that bartenders did owe a duty to their patrons no less than to third-parties endangered by their patrons,[51] and (2) that a patron does not necessarily, as a matter of law, commit willful misconduct in consuming liquor even when bent on deliberately becoming drunk.[52] In consequence, if the jury concluded that the patron's conduct was merely negligent but the bartender's amounted to willful misconduct, such willful misconduct would remove the bar of contributory negligence in accordance with pre-*Li* law. The court did not venture any comment on the likely outcome of such a case under the *Li* rule.

The Uniform Comparative Fault Act applies the "comparative fault" regime to all "acts or omissions that are in any measure negligent *or reckless* toward the person or property of the actor or others."[53] It is doubtful whether "reckless" was not intended to include also "willful misconduct"; at any rate there is no policy reason why it should not: only intended injury or self-injury should be excluded. But for the sake of clarity, it would be advisable to include in any adoption of the Uniform Act in California a specific reference to "willful misconduct," a term less familiar in other states.

17. The application of "comparative negligence" to forms of aggravated fault may occur in three different situations. First, the defendant may be reckless, but the plaintiff merely negligent. The pre-*Li* rule which allowed the plaintiff to recover in full was dominated by the all-or-nothing dilemma. Since this compunction has now disappeared, it is possible to combine reduced recovery for the plaintiff with liability for the defendant. To say that recklessness or willful misconduct is fault of a different kind rather than degree was merely a rhetorical device which is no longer necessary to do justice in this situation.

The second situation is the converse: the plaintiff being reckless but the defendant merely negligent. Under pre-*Li* law, the plaintiff could not recover if merely negligent, *a fortiori* if reckless. Under the comparative negligence formula, it will now be possible to allow him to recover albeit substantially reduced damages. Aggravated fault is still fault that can and should be brought into comparison with lesser fault, regardless of its label. Significantly, a recent Swedish reform allows reduction of damages no longer for ordinary negligence at all but only for gross negligence and the like.[54] This distinction is based on the view that the impact of reduced recovery for a plaintiff who is typically not covered by insurance is too punitive to be justified except in case of grosser forms of misconduct. In the United States where social security benefits are far less available to accident victims than in Sweden, this reasoning has, if anything, added force.

The third situation is one where both parties are guilty of recklessness or willful misconduct, as is likely to be the case of the bartender and intoxicated patron. Here two solutions are possible: either to compare the two equal types of fault or to deny all recovery. The latter alternative, as already related, appealed to the court of appeal in *Kindt v. Kauffman*.[55] It likened the situation to persons who engaged in a joint illegal enterprise, such as speeding and prize fights, where the traditional rule has been to dismiss all claims on the maxim *ex turpi causa non oritur actio*. To allow recovery, even reduced recovery, would not only offend morality, but tend to encourage patrons to excessive consumption of liquor. Nor would liability provide a deterrent to tavern owners who would simply pay higher insurance premiums and pass the cost on to the public. The dissenting judge, Friedman, J., on the other hand, believed that, while Business & Professions Code § 25602 was ineffective as a criminal or licensing provision, a civil sanction would stimulate the tavern owner's responsibility in conjunction with the comparative negligence rule. Clearly, the issue is one of policy which might well be left to the courts to work out on an *ad hoc* basis. A specific provision to deal with joint illegal enterprises involving "willful misconduct" is not therefore recommended.

18. I do not propose to discuss the relation between contributory negligence and voluntary assumption of risk. This topic has been extensively debated by courts and commentators.[56] I am in full agreement with the proposal of the Uniform Comparative Fault Act to include in the definition of fault in Section 1(b): "unreasonable assumption of risk not constituting an enforceable express consent."

50. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).
51. *Id.* at 401, 572 P.2d at 1161, 143 Cal. Rptr. at 19.
52. *Id.* at 404, 572 P.2d at 1163, 143 Cal. Rptr. at 21.
53. UNIFORM COMPARATIVE FAULT ACT § 1(b). The same conclusion could be inferred, but less clearly from the California State Bar draft's open-ended definition of fault as "any act or omission . . . which constitutes breach of any duty . . . ." § 2. (The comment to § 2 does not advert to the problem.)

54. Tort Liability Act, ch. 6, § 1 (1975).
55. 67 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).
56. *E.g.*, SCHWARTZ, *supra* note 2, §§ 9.1-.5 at 153-73 & Supp. 53-61; WOZENCRAFT, *supra* note 2, at §§ 6.1-11; *Townsend*, *supra* note 3, at 260-67.

19. *RECOMMENDATION 2: (1) Apply "comparative negligence" to claims based on strict liability and (2) include "recklessness" and "willful misconduct," short of intentional injury, among the kind of fault capable of reducing, but no longer necessarily barring recovery.*

II. American Motorcycle

20. The *Li* court deliberately refrained from addressing itself to the several problems raised by the introduction of comparative negligence in multi-party situations. It noted that such problems "lurk in the background" but directed the lower courts to apply the *Li* rationale to unsettled questions in a practical manner.[57] A weighty argument in favor of legislative rather than judicial introduction of comparative negligence has been precisely the need to deal with the whole complex of incidental issues in one blow instead of countenancing a protracted period of legal uncertainty. This pessimistic prognosis revealed itself as only too true: hundreds of cases came to clog trial courts in the next two years in anticipation of an authoritative resolution of issues that were hopelessly dividing intermediate courts of appeal.[58] Nothing whatever was gained by this postponement, since the issues were from the start unlikely to be clarified by protracted reflection or practical experience. It was none too soon when the supreme court in *American Motorcycle Association v. Superior Court*[59] at last had an opportunity of addressing these tardy issues.

21. In *American Motorcycle* the plaintiff, a teenage boy, sought to recover damages for serious injuries he incurred as participant in a cross-country motorcycle race for novices. He sued the sponsoring organizations who (besides denying negligence and alleging contributory negligence) sought leave to file a cross-complaint against the plaintiff's parents for negligent failure of supervision. The trial court denied the motion on the ground that the California Contribution Act, Code of Civil Procedure § 875, allowed contribution only among tortfeasors held liable in a joint judgment and, since the plaintiff himself had not

57. 13 Cal. 3d 804, 823-27, 532 P.2d 1226, 1240-42, 119 Cal. Rptr. 858, 872-74 (1975).

58. American Motorcycle Ass'n v. Superior Court, 135 Cal. Rptr. 497 (Cal. App. 1977), *vacated on writ of rec. hite*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Stam-baugh v. Sup[illegible]ourt, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); Safeway Stores v. Nest-Kart, [illegible] Cal. App. 3d 934, 134 Cal. Rptr. 159 (1976), *rev'd and vacated*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

59. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

(for obvious reasons) made his parents co-defendants, the defendant had no cause of action against them for contribution.[60] The court of appeal reversed, holding that the rationale of *Li* required the abrogation of joint and several liability for concurrent tortfeasors:[61] first, because any individual defendant's liability should no longer exceed his own share of fault any more than a plaintiff's; secondly, because a plaintiff guilty of contributory negligence did not have the same equity as a totally innocent victim in claiming to recover his full damages from any one of several co-tortfeasors. For this reason, the court's solution was expressly limited to situations where a plaintiff was himself at fault.

Eventually the supreme court, though affirming the writ of mandate, differed radically from either of the courts below regarding the resolution of the problems raised.[62] In an opinion by Tobriner, J., the court held that (1) the *Li* rationale did not warrant abolition of the joint and several liability of concurrent tortfeasors, regardless of whether the plaintiff was himself at fault;[63] (2) a defendant could claim "partial indemnity" from a concurrent tortfeasor for his apportioned share of fault,[64] notwithstanding the direction of Code of Civil Procedure §§ 875-876 that contribution be allocated "pro rata" (i.e. according to the number of defendants) and not in accordance with their individual shares of fault;[65] (3) such "partial indemnity" can be claimed from a co-tortfeasor even though he has not been made a party-defendant by the plaintiff, notwithstanding the requirement of Code of Civil Procedure § 875 that contribution is limited to tortfeasors who have been held liable in a joint judgment;[66] (4) a good faith settlement with one tortfeasor released him from all liability to share with co-tortfeasors but reduced the plaintiff's claim against such co-tortfeasors only by the amount of the settlement, not by the settlor's share of fault: in both respects adopting for "partial indemnity" the policy laid down for contribution by Code of Civil Procedure § 877;[67] (5) the plaintiff's share of fault must be determined by weighing his negligence against the combined total of all causative negligence, not

60. *See* Thornton v. Luce, 209 Cal. App. 2d 542, 25 Cal. Rptr. 393 (1962).

61. 135 Cal. Rptr. 497, 503, 505 (Cal. App. 1977). The court granted mandate to allow the joinder on the ground that it was desirable to fix the share of the cross-defendant.

62. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

63. *Id.* at 586-91, 578 P.2d at 903-07, 146 Cal. Rptr. at 186-90.

64. *Id.* at 591-99, 578 P.2d at 907-12, 146 Cal. Rptr. at 190-95.

65. *Id.* at 599-605, 578 P.2d at 912-16, 146 Cal. Rptr. at 195-99.

66. *Id.* at 605-07, 578 P.2d at 916-18, 146 Cal. Rptr. at 199-201.

67. *Id.* at 603-04, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99.

only that of co-defendants but including even absent tortfeasors.[67]

The following discussion will analyze each of these points in turn.

III. Joint and Several Liability

22. The court reaffirmed the traditional "joint and several" judgment rule[68] in its application, after *Li*, as much to plaintiffs who are guilty of contributory fault as to those who are completely innocent. It thereby differed from the court below which would have allowed contributorily negligent plaintiffs to recover from any one defendant only his apportioned share of liability.[69] The court advanced three arguments: First, it rejected the contentions that since *Li* there was now a basis for dividing damages, namely on a comparative negligence basis, in contrast to the prior all-or-nothing philosophy. The joint and several liability rule, the court said, was long ago extended from "joint tortfeasors," in the strictest sense of tortfeasors acting in concert, to all concurrent tortfeasors who, though acting independently, cause an indivisible injury. (The term "joint tortfeasors" is hereafter used in this Study in the more comprehensive second sense). Since the negligence of each was a proximate cause of an entire and indivisible injury, there was no equitable claim vis-à-vis an injured plaintiff to be relieved from liability for the whole of that injury. "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury."[70]

But as Clark, J. pointed out in his dissent,[71] this argument by the majority proves too much: plaintiff's negligence is also a proximate cause of the entire indivisible injury, but this did not prevent the *Li* court from repudiating the all-or-nothing solution.

23. The court's second argument consists of two parts: first,[72] it points to the incontestable fact that even after *Li* some plaintiffs will continue to be wholly free of contributory negligence. But while these no doubt continue to deserve the benefits of the "joint and several" liability rule,

68. *Id.* at 590 n.2, 578 P.2d at 906, 146 Cal. Rptr. at 189.

69. This terminology has become customary in the United States, by and large superseding "*habitat in solidum*" or "solidary liability."

70. That decision, 135 Cal. Rptr. 497 (Cal. App. 1977), had been influenced by the desire to conform to the *Li* rationale without violating Code of Civil Procedure § 875. Since the supreme court found another way around Cal. Code Civ. Proc. § 875, it was under no similar constraint regarding the issue of "joint and several" liability.

71. 20 Cal. 3d at 592, 578 P.2d at 908, 146 Cal. Rptr. at 188.

72. *Id.* at 611, 578 P.2d at 920, 146 Cal. Rptr. at 201.

73. *Id.* at 589, 578 P.2d at 905, 146 Cal. Rptr. at 188.

this does not prove that those guilty of contributory negligence should be treated the same. All one can say is that, *if* there is to be the same rule for *all* plaintiffs, the hardship of depriving innocent plaintiffs of the "joint and several" liability rule arguably outweighs the hardship for defendants in being so answerable even to negligent plaintiffs.

24. The second part of this argument in favor of "joint and several" liability[74] is that a plaintiff's culpability is not equivalent to a defendant's because the first consists merely in lack of self-care ("self-directed negligence") whereas the second connotes danger to others.[75] This distinction ought, of course, to be heeded in apportioning shares of fault,[76] but does not seem to justify treating the shares, once ascertained, differently under the focus of the *Li* principle (viz. that liability should not exceed an individual's share of fault). Indeed, the argument comes close to challenging the *Li* principle itself insofar as it suggests that plaintiff's and defendant's culpability are of a different order.[77] The court itself recognized the double-edged nature of its own argument by weakly suggesting that, although it did not preclude comparative negligence, "the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious."[78] At this point the argument collapses.

25. However, the court's third rationale touched a firmer base. The cutting edge of the "joint and several" liability rule is that it imposes the risk of a co-tortfeasor's inability to pay his share on the remaining defendants, whereas limiting a co-tortfeasor's liability to his own share alone would place that risk on the plaintiff. As already pointed out, the former solution is universally regarded as the fairer where the plaintiff is entirely innocent. On the other hand, it is not self-evidently also the fairer (as the court thought it was) where the plaintiff was himself at fault. One's doubt increases the greater the proportion of the plaintiff's fault compared with the defendant's: suppose that P(laintiff)'s fault was 60%, D(efendant)$_1$'s is 10% and D$_2$'s 30%. Why should D$_1$, who is far less at fault than P(1:6), "guarantee" also D$_2$'s share, when P's negligence, no less than D$_1$'s, was a proximate cause of his injury and his fault greater to boot?[79] Surely, the only fair solution compatible with

74. Its link with the first part is obscure, it looks more like an independent rationale.

75. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

76. *See* J. FLEMING, THE LAW OF TORTS 257 (5th ed. 1977).

77. 20 Cal. 3d at 612, 578 P.2d at 921, 146 Cal. Rptr. at 201 (Clark, J. dissenting) ("But the differences warrant departure from the *Li* principle in toto or not at all.")

78. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

79. Justice Clark, in dissent, thought it more plausible for a jurisdiction like Wisconsin to adhere to "joint and several" liability because a plaintiff whose share was greater than the defendant's would still be debarred from recovering against any of them. *Id.* at 613, 578

the *Li* rationale of limiting each participant's liability to his own share of causative fault, is to impose the risk of D_2's insolvency neither wholly on P nor wholly on D_1 but to distribute it among P and D_1 in proportion to their respective shares of fault. The best way to accomplish this result is to retain the "joint and several" liability rule, subject however (as will be pointed out below) to a later redistribution of D_2's unsatisfied share.

An additional practical reason is that a rule of "several" liability would inject substantial complications into tort litigation and settlement, and thereby place a new burden on the disposition of tort claims. It would necessitate a verdict on the responsibility of all conceivable parties to the litigation even where there is no question of the plaintiff's contributory negligence and might even tempt the plaintiff into the embarrassing position of arguing that an insolvent defendant was *not* negligent in order to avoid reduction of his verdict against the remaining defendants.

26. In sum, the majority opinion in *American Motorcycle* did not make the strongest case on behalf of a sound result. It got lost in the maze of conceptualism instead of facing up to the practical aspects of jettisoning the "joint and several" liability rule. That rule is justified, not by a one-sided preference for plaintiffs, but by the very principle of evenhandedness between plaintiffs and defendants enunciated in *Li*. It should therefore appeal to the plaintiffs' and defendants' bar alike on grounds of fairness: the "several" liability rule of the court of appeal in *American Motorcycle* is unfairly skewed against plaintiffs, whereas the supreme court's opinion carries the seeds of unfairness for defendants.

In a small number of jurisdictions the "joint and several" liability rule has been abandoned in its application to c[illegible]ibutorily negligent plaintiffs.[80] But the overwhelming majority has [illegible]'ed the rule to such plaintiffs, either by express legislation or by [illegible]icial decision.[81] Such an extension is also contained in the Uniform Comparative Fault Act and the California State Bar draft (S.B. 1959), and was recommended in Professor G. Schwartz's Report to your Committee[82] in opposition to the proposal of the California Citizens' Commission Report.[83] Since such an extension was not precluded by legislation in

P.2d at 922, 146 Cal. Rptr. at 205. But the problem differs only in degree, not kind, according to the plaintiff's share being more or less than the defendant.

80. *E.g.*, under the Kansas, Nevada, New Hampshire and Vermont statutes.

81. See the state-by-state tabulation, with citation to the relevant statutes or decisions, in the Appendix to American Motorcycle Ass'n v. Superior Court, 135 Cal. Rptr. 497, 506-12 (Cal. App. 1977).

82. Recommendation 4D.

83. Report 114-23.

California, no objection could be raised to the court's decision to so extend it in working out the implications of its own *Li* precedent.[84] It may nonetheless be preferable to give statutory sanction to the rule in the context of the more general statutory revision recommended by this Study.

RECOMMENDATION 3: Retention of the "joint and several" liability rule even where the plaintiff contributed to his injury through his own fault.

IV. Comparative Contribution

27. The second major ruling of the court in *American Motorcycle* was to sanction comparative contribution among tortfeasors under the new label of "partial indemnity."[85] Contribution among tortfeasors has in the main been a creature of statute in derogation of the common law which, as in the parallel situation of contributory negligence, countenanced only an all-or-nothing solution. In a few but ill-defined situations, the common law permitted a shifting of the *whole* liability from one tortfeasor to another (principally from one who was liable merely for faultless causation, *e.g.*, in cases of vicarious liability); otherwise it denied all relief on the puritannical ground that it would not assist a wrongdoer (*in pari delicto potior est conditio defendentis*). In no event could there be sharing.

In a majority of U.S. jurisdictions contribution was introduced by adoption, or at least under the inspiration, of the Uniform Contribution Among Tortfeasors Act. This model, in both its versions (1939 and 1955), opted for "pro rata" contribution, *i.e.*, by equal shares among the tortfeasors, rather than for "comparative" contribution, *i.e.*, in proportion to their shares of fault. This choice has been defended on the following grounds: first, that (contribution being an equitable doctrine) "equity is equality." Secondly, since the negligence of each tortfeasor must have been a proximate cause of the injury, its causative effect could not be assessed otherwise than by giving it equal weight with that of the others. More persuasive than these *a priori* arguments are two practical considerations: first is the simplicity of pro rata division. It dispenses with the need for, and costs of, any protracted inquiry into shares of fault and aids settlements because the formula is categorically fixed by law. Secondly, its advocates contend that the formula pro-

84. Justice Clark's insistence that this was a legislative task, 20 Cal. 3d at 612-13, 578 P.2d at 921, 146 Cal. Rptr. at 204, must be viewed in the light of [illegible] same objection against the *Li* decision. See note 3 and accompanying text *supra*.

85. 20 Cal. 3d at 599, 578 P.2d at 912, 146 Cal. Rptr. at 198. Applied to strict liability in Safeway Stores v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).

motes settlements in yet another way: insofar as a defendant with a low percentage of fault will settle rather than risk being found liable at a trial and incurring pro rata liability. This argument, however, seeks to make a virtue out of its potential for serious abuse, namely, as a means not for encouraging but for extorting settlements from slightly negligent defendants. As the Wisconsin court observed, after labelling it "a convenient blackjack," "the end does not justify [such] means."[86]

28. Pro rata contribution is, however, incompatible with the *Li* rationale of apportioning liability in accordance with shares of fault. That rationale clearly has as much relevance between several defendants as it has between plaintiff and defendant(s). Obviously, its appeal increases the larger the disparity of fault: no wonder that it was in a case of 5:95 that the Wisconsin court felt impelled to abandon the pro rata rule.[87] Moreover, in cases where a contributorily negligent plaintiff is facing several negligent defendants, the pro rata rule would, since *Li*, lead to strikingly odd results: suppose, *e.g.*, that P is adjudged 25% at fault, D_1 25% and D_2 50%. If P chose to collect 75% of his loss of $100,000 from D_1, as he is entitled to do under the "joint and several" liability rule, it would run counter to the *Li* rationale to limit D_1's claim for contribution to $37,500 (50% of $75,000) instead of $50,000 ($D_2$'s fault-proportioned share). Such a rule would make the ultimate allocation of liability contingent on a random factor, namely, the amount which the plaintiff chose to collect from D_1. Hence whatever the justification for the "pro rata" rule at the time when contributory negligence was a complete defense, it became incongruous with the introduction of comparative negligence. An increasing number of jurisdictions have therefore adopted "comparative contribution" either by legislation[88] or judicial decision.[89]

29. The only obstacle to the California court following this trend was California's contribution statute of 1957 (Code of Civil Procedure § 876) which followed the 1955 Uniform Act in prescribing the "pro rata" rule.[90] The same obstacle had been faced down by the New York

86. Bielski v. Schulze, 16 Wis. 2d 1, 12, 114 N.W.2d 105, 111 (1962).

87. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

88. *E.g.*, MINN. STAT. ANN. § 604.01 (West Supp. 1978); 1973 Nev. Stats. ch. 787 § 1(3)(b); N.H. REV. STAT. ANN. § 507: 7-a (Supp. 1977); N.J. STAT. ANN. §§ 2A: 15-5.1-3 (West Supp. 1977); N.Y. CIV. PRAC. § 1401 (McKinney 1976); N.D. CENT. CODE § 9-10.07 (1975); OR. REV. STAT. § 18.485 (1977); TEX. REV. CIV. STAT. ANN. art. 2212a § 2(b) (Vernon Supp. 1978); UTAH CODE ANN. § 78-27-40(2) (1977); VT. STAT. ANN. tit. 12 § 1036 (1973).

89. Packard v. Whitten, 274 A.2d 169 (Me. 1971); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

90. The statute was sponsored by the State Bar of California which provided an explanation of its purposes to the Senate Judiciary Committee. 1 SEN. J. APP. 130 (Reg. Sess. 1957).

Court of Appeals five years earlier in *Dole v. Dow Chemical Co.*[91] Following this precedent, the supreme court argued that its version of sharing among tortfeasors in accordance with fault was a development of "equitable partial indemnity" which had not been foreclosed by the statutory scheme of "contribution" enacted by Code of Civil Procedure §§ 875-877. This argument was entirely result-oriented and might well be criticized as a usurpation of the legislative function.[92] As previously explained, indemnity has always meant a shifting of the *complete* liability, while contribution signifies a sharing of liability. Thus for the court to invent the label of "partial indemnity" for a new judicial regime of loss sharing was merely a semantic maneuver to sidestep the parameters of the legislative regime of "contribution."[93] In effect, the court read Code of Civil Procedure §§ 875-877 out of the statute book by freeing "partial indemnity" from two unwelcome limitations: (1) the requirement of a joint judgment and (2) the "pro rata" allocation of shares.

The New York legislature, prodded by its own court's decision in *Dole v. Dow Chemical Co.*, two years later amended its Contribution Act by enacting contribution in proportion to fault.[94] Faced with exactly the same situation, the California legislature should do likewise. Such also is the proposal of the Uniform Comparative Fault Act and the California State Bar draft (S.B. 1959).

30. *RECOMMENDATION 4: Statutory enactment of contribution by shares proportioned to fault in lieu of the existing system of contribution "pro rata" (equal shares).*

V. The "Joint Judgment" Rule

31. In enacting its contribution statute in 1957, Code of Civil Procedure § 875, California deviated from its model, the Uniform Contribution Among Tortfeasors Act of 1955, by limiting contribution to tortfeasors against whom "a money judgment has been rendered jointly." It has since been held that no cross-complaint for contribution can be filed against a tortfeasor not sued by the plaintiff so as to make

91. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

92. See my criticism of *Dole v. Dow Chemical* in *Foreword*, *supra* note 3, at 255-56.

93. "The court also attempted to reinforce its position by finding statutory encouragement in the statute itself for a continued development of 'equitable indemnity.'" 20 Cal. 3d at 599-605, 578 P.2d at 912 to 146 Cal. Rptr. at 195-99. It would serve no purpose in this Study to counter this dissenting argument point for point.

94. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

him a party defendant in the plaintiff's action and thus set the stage for an eventual joint judgment.[95] "The result is a circular series of contingencies that cannot be satisfied. The defendant has no right of contribution unless he obtains a joint judgment, he cannot obtain a joint judgment unless he states a cause of action, and he cannot state a cause of action unless he has a right of contribution."[96]

32. Several arguments account for this position. One is that it avoids such complications as inconsistent verdicts, disputes over the amount of the plaintiff's loss, what effect to attach to a prior settlement, lapse of time and so forth. Another is that it promotes administrative efficiency by deterring multiple litigation. But both objectives can be attained without prohibiting cross-complaints. Thus Michigan, prior to abandoning the joint judgment requirement altogether in 1974, specifically permitted cross-complaints for contribution to satisfy the joint judgment requirement.[97]

Less tractable are two policy arguments. Foremost is the plea that the plaintiff should be free to select his adversaries without possible prejudice from having defendants foisted on him at the trial who might evoke special sympathy, leading to lower verdicts. This is an argument against cross-complaints but not, of course, against separate actions for contribution.

The preceding argument may be reinforced on the ground that a plaintiff's decision not to sue a particular co-tortfeasor will often be based on the conviction that he is less well equipped to bear any part of the loss than the other(s). Denial of contribution may thus serve sound notions of loss allocation by preventing a "strong" tortfeasor from shifting part of the accident cost to a substantially weaker tortfeasor; the most obvious illustration being a liability insurer seeking contribution from an uninsured tortfeasor. The very facts of the *American Motorcycle* case reveal just such a situation: namely, two presumably insured corporate defendants claiming contribution from the teenage victim's parents who were almost certainly uninsured against claims for negligent lack of supervision. Although this policy argument has been raised categorically against any form of contribution among tortfeasors,[98] it might be implemented at least—so the argument

95. General Elec. Co. v. State Dep't of Pub. Works, 32 Cal. App. 3d 918, 928-29, 108 Cal. Rptr. 543, 547-48 (1973); Thornton v. Luce, 209 Cal. App. 2d 542, 551-52, 26 Cal. Rptr. 393, 398-99 (1962); *see* Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors*, 8 U.W.L.A. L. REV. 23, 43-54 (1976) [hereinafter cited as Goldenberg & Nicholas].

96. Goldenberg & Nicholas, *supra* note 95, at 45.

97. MICH. COMP. LAWS ANN. § 600.2925 (West Supp. 1974).

98. *See* James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941), which elicited a rebuttal from Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941). Recently, Weir in 9 JURIS'S U.S. CYCL. COMPARATIVE LAW ch. 12, at 78, sided with James by advocating abolition of contribution, if not altogether, at least by insurers and other "excellent loss-spreaders."

runs—where the plaintiff himself considered contribution undesirable.[99]

33. The argument to the contrary, however, strikes most observers as the stronger on balance. It is simply that a plaintiff should not have the unrestricted power unilaterally to decide how the loss should be allocated among several tortfeasors and thus to prevent, if he so wishes, any distribution among them. In truth, the "joint judgment" rule perpetuates the worst feature of the old common law principle of no-contribution by giving this enormous, uncontrolled power to plaintiffs. If indeed, there are situations in which contribution would be against public policy, that determination ought to be made by the law, not the plaintiff, granting a specific immunity or prohibiting contribution.

Besides, the "joint judgment" rule may tend to discourage settlements, since a settlor is disqualified from claiming contribution. The risk he takes of settling for more than his due share is indeed somewhat increased under comparative contribution since he would have to guess right not only the total amount of the damages but also his own relative share of fault. That the prejudicial effect on settlements is not a figment of the imagination is documented by the special legislative waiver of the requirement that it was felt necessary to pass in order to facilitate speedy settlements after the Baldwin Hills Dam disaster in 1963.[100]

The trend has therefore been decisively against perpetuation of the "joint judgment" rule. Michigan long ago first mitigated it, as already pointed out, by authorizing joinder and later abolished the requirement altogether.[101] New York also abolished it, in train with introducing comparative negligence for plaintiffs[102] and comparative contribution among tortfeasors.[103] Legislation in California should follow the same course.

99. It is all the more remarkable that the court's opinion in *American Motorcycle* barely adverted to this aspect, merely guarding itself against any implication that it endorsed final claims of this suit. 20 Cal. 3d at 607, 578 P.2d at 918, 146 Cal. Rptr. at 201.

100. 1965 Cal. Stats. 1st Ex. Sess., ch. 1, at 103 (held constitutional in City of Los Angeles v. Standard Oil Co., 262 Cal. App. 2d 118, 68 Cal. Rptr. 512, *appeal dismissed*, 393 U.S. 267 (1968)). An illustration of a settling tortfeasor's claim for "partial indemnity" since *American Motorcycle* is Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

101. MICH. COMP. LAWS ANN. § 600.2925 (West Supp. 1974).

102. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

103. *Id.*

34. Abandoning the "joint judgment" rule opens the possibility of increased multiple litigation which would not only increase legal costs and impose an unnecessary burden on judicial administration but also raise the prospect of inconsistent verdicts. A tortfeasor sued in the second action would not be bound by the verdict in the first with respect either to liability or shares of fault.[104] Since the responsibility of all participants in the accident must in any event be assessed in order to fix the shares of fault of any one of them, it is all the more desirable to have all of them before the court in order to take advantage of their conceivably conflicting testimony and fix their shares of responsibility once and for all.

However, I do not consider it necessary to impose either incentives or penalties in order to promote joinder. For if the plaintiff chooses not to join a particular tortfeasor himself, it will in most cases be in the defendant's interest to do so. So long as the latter may freely implead any other person for the purpose of asserting a claim for contribution or indemnity—and such procedure is readily available[105]—there is thus already a sufficient incentive based on self-interest which needs no reinforcement. Given the ample authority of California's long-arm statute,[106] nonresidence will rarely be a reason for the plaintiff's failure to join a particular tortfeasor, but in any event such an obstacle could no more be overcome by the defendant than the plaintiff.

35. If, contrary to the preceding recommendation, sanctions for *compelling* joinder were deemed desirable, two alternatives are available. One would debar a defendant from later claiming contribution in a separate action, at least if he had no reasonable cause for failing to cross-claim.[107] This would be analogous to the existing compulsory cross-claim provision regarding any "related cause of action . . . [a defendant] has against the plaintiff."[108]

The other alternative would be to put pressure on the plaintiff by

104. Goldenberg & Nicholas, *supra* note 95, at 49-50, add: "Any inconsistency of verdicts between the two actions could result either in unjust enrichment to the prior defendant (*i.e.*, if in the later verdict the plaintiff's damages are found to be greater or the defendant's proportionate fault found to be less), or in the defendant being short-changed (*i.e.*, if the latter verdict found plaintiff's damages or proportion of fault smaller or the defendant's degree of culpability greater)."

105. CAL. CIV. PROC. CODE § 428.10(b) (West 1973). This procedure was hitherto precluded by the "joint judgment" rule.

106. CAL. CIV. PROC. CODE § 410.10 (West 1973).

107. Goldenberg & Nicholas, *supra* note 95, at 50-53. Such a provision is contained in the Proposed Statute of the State Bar (§ 61) and S.B. 1959 (proposed Code of Civil Procedure § 881). It was adopted by the Ontario Court of Appeal in Cohen v. S. McCord & Co., [1944] 4 D.L.R. 785, and Rickwood v. Aylmer, 8 D.L.R. 2d 702 (1957).

108. CAL. CIV. PROC. CODE § 426.30(a) (West 1973).

limiting his claim to each defendant's individual share only, in case of unjustifiable non-joinder of others. Admittedly, this method would in one respect be less drastic than the former, since it would not preclude the plaintiff from later bringing a separate action against those he originally omitted to sue. But in most situations in which he wished to spare a particular tortfeasor, *e.g.*, because (as in *American Motorcycle*) he was a close relative, his reason for doing so would also preclude him from suing later. In any event, we are accustomed to respect a plaintiff's unwillingness to take the initiative in joining a particular party for whatever reason; and so long as the defendant he does sue has the opportunity of joining him as a co-defendant, there can be no great opportunity for abuse. Thus the plaintiff's decision against joinder should not be at the defendant's expense since the latter has always the means to defuse it.

36. Yet another ground for objecting to a plaintiff proceeding separately against different defendants is the abusive practice of verdict-shopping, *i.e.*, testing his luck before several juries in the expectation of eventually collecting up to the highest verdict.[109] Under the English legislation which has been widely followed in the British Commonwealth this practice was discouraged at the time of introducing contribution among tortfeasors by limiting plaintiff's recovery in subsequent actions to the amount awarded in the first and depriving him of his legal costs unless the court is of the opinion that there is a reasonable ground for bringing the subsequent action.[110] Verdict-shopping, however, is not widespread because the contingent fee system discourages it and because it is generally in the defendant's interest to join all other tortfeasors for contribution. No legislative change in this regard is therefore recommended.

37. *RECOMMENDATION 5: Abolition of the "joint judgment" requirement for contribution.*

VI. The Insolvent or Absent Joint Tortfeasor

38. If one or more of several joint tortfeasors is unable to pay his full share of the damages, who should bear the burden of the shortfall? Three solutions are possible: (1) the plaintiff, (2) the solvent defendant(s) or (3) to distribute the shortfall among the solvent defendant(s) and any contributorily negligent plaintiff in proportion to their shares of fault. Alternative (1) is accomplished by limiting the liability of each

109. *See* Note, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 HARV. L. REV. 697, 700-02 (1955).

110. Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c.30, § 6(1)(b); *see* J. FLEMING, THE LAW OF TORTS 242-43 (5th ed. 1977).

tortfeasor to his own share only, in lieu of "joint and several" liability. In section III of this Study that solution was rejected even in its application to plaintiffs guilty of contributory negligence, as incompatible with the *Li* rationale of distributing the accident cost proportionately to fault. The solvent defendant has no greater equity than the plaintiff to escape his share of the shortfall.

The flaw of solution 2 lies in the fact that it makes no allowance for the plaintiff's contributory negligence, if any. For there is no reason, compatible with the *Li* rationale, why a defendant should bear a share disproportionately larger to his fault than a contributorily negligent plaintiff merely because a co-defendant is unable to pay his own full share.[111] In sum, to place the shortfall wholly on the solvent defendant would be as unfair to him as placing it wholly on the plaintiff would be to the latter. Neither solution is compatible with the principle of proportionate loss allocation.

39. The only sound solution compatible with *Li* is therefore to distribute the shortfall among the solvent parties, plaintiff as well as defendant(s), in the proportion of their respective shares of fault. Thus if the ratio between P, D_1 and D_2 was 25:50:25 and D_2 was insolvent, P's share would be increased by 1/3 and D_1's by 2/3 of the deficiency. This solution has been widely advocated by scholars,[112] enacted in several common law jurisdictions,[113] and recently adopted by the Uniform Comparative Fault Act.[114] It was also approvingly commented on by Clark, J. in the *American Motorcycle* case.[115]

40. How would that principle be translated into practice? As pointed out in Section III of this Study, the "joint and several" liability rule is the first but not necessarily the final step in the adjustment between plaintiff and defendant(s). If, to continue with the preceding example, D_2's insolvency is already known at the time of the trial, his share can, and should, be immediately redistributed between P and D_1 in the ratio of 1/3 and 2/3, as is indeed contemplated already under the existing

111. The State Bar draft § 6(c) and S.B. 1959 proposed Code of Civil Procedure § 880(c)) incorporates solution (2) but without stating any reason for excluding plaintiffs at fault. That that proposal passed without objection from the plaintiff's bar (CTLA) is hardly surprising.

112. The originator was C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 77-79 (1936). For others, see G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 48 (1951). *Foreword, supra* note 3, at 251-52.

113. *E.g.*, Republic of Ireland's Civil Liability Act of 1961, 1961 Acts of the Oireachtas, ch. 41, § 34; South Africa's Apportionment of Damages Act of 1956, ch. 2, § 5(1) (relative contribution between solvent joint wrongdoers).

114. UNIFORM COMPARATIVE FAULT ACT § 2(d).

115. 20 Cal. 3d 578, 634, 578 P.2d 899, 922, 146 Cal. Rptr. 182, 205 (1978) (Clark, J. dissenting).

statutory direction, Code of Civil Procedure § 875(b), to administer contribution "in accordance with the principles of equity."[116]

There is of course no reason for applying a different principle if the insolvency becomes known only later. But in that event a supplementary judicial order would be needed to reallocate the insolvent's share. This raises no serious administrative problem since D_2's share would already have been fixed by the jury's verdict: the matter can therefore be expeditiously dealt with by motion. Section 2(d) of the Uniform Comparative Fault Act properly suggests a time limit for such a motion, such as one year after judgment in the original action, and specifically provides that the party whose share is reallocated remains "subject to contribution and to any continuing liability to the claimant on the judgment."

41. A related problem is how to deal with *absent* tortfeasors. The California Supreme Court in *American Motorcycle* expressly approved the revised Book of Approved Jury Instructions (BAJI) instruction (No. 14.90) that juries assess shares of responsibility among all responsible participants of the accident, whether or not joined as parties to the litigation.[117] It would seem proper that, rather than adding the absent tortfeasor's share to the remaining defendants alone, that share be distributed proportionately among them and any contributorily negligent.[118] The absent defendant would of course remain liable to contribution, though free to relitigate his liability since he is obviously not bound by *res judicata* or issue estoppel. If the claim for contribution is successful, the latter's share would be redistributed among the plaintiff and the defendants in the original action who had provisionally absorbed it. Since the plaintiff is directly interested in such a contribution claim, he should have a right to initiate it and/or become a party co-plaintiff.

An alternative approach, espoused by the Uniform Comparative Fault Act, is to limit the allocation of shares to the litigating parties. Ignoring "absent tortfeasors" is defended on the ground that "it cannot

116. CAL. CIV. PROC. CODE § 875(b) (West Supp. 1978). That this provision has the purpose of determining "pro rata" shares by first excluding insolvent tortfeasors is expressly mentioned in the Comment to the Uniform Contribution Among Tortfeasors Act § 2 (1955). The procedure is illustrated by the English case of Fisher v. C.H.T. Ltd., [1966] 2 Q.B. 475, 480-81 (C.A.).

117. 20 Cal. 3d at 590 n.2, 578 P.2d at 906, 146 Cal. Rptr. at 189.

118. The State Bar draft § 6(c) and S.B. 1959 (proposed Code of Civil Procedure § 880(c)) would distribute the absentee shares only among the remaining "judgment debtors" (*i.e.*, defendants). *See also* State Bar draft § 3, Comment A. As already pointed out in relation to the same proposal for uncollectible shares of part defendants, see note 111 *supra*, this does not hold the scales evenly between faulty defendants and plaintiffs.

be told with certainty whether [such a] person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued."[119] The effect of this proposal, it will be noted, is in practice identical with the first-mentioned proposal of distributing the share of the absentee among the remaining defendants *and* any plaintiff at fault.[120]

42. *RECOMMENDATION 6:* *The share of any insolvent or absent tortfeasor shall be distributed among the remaining defendants and the plaintiff (if at fault) in proportion to their respective shares of responsibility.*

VII. The Settling Joint Tortfeasor

43. Settlement with one of several joint tortfeasors raises two principal issues: (1) the finality of the settlement vis-à-vis the remaining tortfeasors, and (2) the amount the plaintiff can recover from those other tortfeasors. Varying answers, reflecting continuing shifts in assessing this situation, have been forthcoming.[121]

The original version of the Uniform Contribution Among Tortfeasors Act (1939) espoused the principle of equality among tortfeasors by providing that the settling tortfeasor (S) remained liable for contribution in the amount by which his share exceeded the dollar value of the settlement. The settlement could be made final only by stipulating for a reduction of the remaining tortfeasors' liability by the amount of S's pro rata share.[122] Only three states adopted this version of the Act, a common explanation being that it discouraged settlements by providing little incentive to either S or P to settle.

44. Under Dean Prosser's direction, the second version of the Uniform Act (1955) therefore abandoned this approach and provided for (1) finality of a good faith settlement vis-a-vis any other tortfeasor (D) as well as P, and (2) reduction of D's liability only by the amount stipulated in such settlement or actually paid, whichever was the larger. This version was adopted by a greater number of states, including California,[123] but it is far from clear whether it was this feature rather than an increasing disenchantment with the common law rule of no-contribution which was the primary motive. The plaintiffs' bar has been the principal advocate of this solution, because an under-value settlement in good faith does not prejudice the plaintiff. On the other hand, it is clearly incompatible with the *Li* principle of each party bearing his own proportionate share of the loss and thereby unfairly disadvantages the nonsettling tortfeasors by a transaction to which they are not a party and in which they have no voice. Besides, while there is an undoubted public benefit in settlement, that benefit accrues only where *all* claims relating to the loss are included. Such, however, is not accomplished by the 1955 version because P is free to litigate with the remaining tortfeasors. The saving of "transaction costs" (principally legal and court expenses) in settling merely with one joint tortfeasor is too marginal and speculative to justify the rule in face of the *Li* principle.

45. Accordingly, there has been a swing of the pendulum to the more moderate view that, while the settlor (S) should be free from claims for contribution, the plaintiff's recovery from the other tortfeasors should be reduced by S's full share of fault. This formula, long advocated by scholars,[124] has by now acquired a large following in legislation[125] as well as independent judicial decisions,[126] it has also been adopted by the Uniform Comparative Fault Act (1977) but not by drafts bills endorsed by the plaintiffs' bar.[127] It is clearly more compatible with the *Li* rationale than the "pro tanto" reduction rule in that it limits the nonsettling tortfeasors' liability to their own proportionate shares, unaffected by the settlement to which they were not privy and in which they had no voice.[128] Surprisingly, however, the California Supreme

119. UNIFORM COMPARATIVE FAULT ACT § 2, Comment. It is also—rightly—pointed out that "both plaintiff and defendants will have significant incentive for joining available defendants who may be liable." *Id.*

120. A difference would arise only if under the first-mentioned proposal the absentee's share were distributed only among the defendants, excluding any plaintiff at fault.

121. *See generally* Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966). Compare Weir in 9 INTERNAT'L ENCYCLOPEDIA COMPARATIVE LAW §§ 100-101, 125-126.

122. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1939). Adopted by Arkansas, Hawaii and South Dakota. See also Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962), in which as an alternative to "pro rata" reduction, reduction by the plaintiff's share of fault was alternatively countenanced.

123. CAL. CIV. PROC. CODE § 877 (West Supp. 1978).

124. C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 78 (1936); G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 416 (1951); *Foreword*, *supra* note 3, at 257-58; Goldenberg & Nicholas, *supra* note 95, at 53; Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264 (1977).

125. Arkansas, Hawaii, New York, Rhode Island, South Dakota, Texas, Utah, Wyoming.

126. *E.g.*, Gomes v. Brodhurst, 394 F.2d 465 (3d Cir.1967); Theobald v. Angelos, 44 [illegible] 228, 208 A.2d 129 (1965); Pietringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106, 110-12 (1963).

127. The State Bar draft § 10(a) and S.B. 1959 (proposed Code of Civil Procedure § 884(a)) are identical with the current version of CAL. CIV. PROC. CODE § 877(West Supp. 1978). The comment in the State Bar draft does not even alert the reader to alternatives!

128. For the same reason it is also preferable to "pro rata" reduction, which had been the first choice of the Uniform Contribution Among Tortfeasors Act (1939). See Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967) (applying Virgin Is. law without statutory guidance.

Court in *American Motorcycle*[129] broke with the *Li* rationale a second time[130] by adopting the Contribution Act formula of "pro tanto" reduction also for "partial indemnity." It did so *obiter*, without the benefit of briefing or argument[131] and without any extended discussion beyond invoking the pro-settlement argument which, as already pointed out, does not really support its weight.

46. The alternative solution of reducing the plaintiff's recovery by the full amount of the settlor's full share does, however, raise the question why the plaintiff should in this instance bear the whole burden of any deficiency (regardless indeed of whether he was himself contributorily negligent), when in situations not involving a settlement the burden would either be shared with the remaining defendants[132] or placed entirely on the latter (depending on whether the plaintiff was contributorily negligent or not).

There are several reasons for drawing this distinction. The plaintiff remains of course the sole arbiter whether to settle and, if so, for how much. If he does not wish to assume the risk that the settlement is subsequently determined to be under-value, he need not settle at all. On the other hand, he is given a strong incentive to drive the hardest bargain with the settlor and not to prejudice the remaining tortfeasors by a settlement that is either collusive, deliberately discriminatory or unintentionally inadequate. This self-regulatory incentive is clearly more effective than the requirement of "good faith" under the current California statute and the Uniform Contribution Act from which it is derived.

47. Actually, there has been little occasion for clarifying the meaning of "good faith" in this context.[133] Clearly the burden of proving lack of good faith is in practice a heavy one as long as courts are persuaded that settlements should be encouraged in pursuit of the statutory policy

which specifically preferred "fault" to "pro rata" reduction and argued that its effect on settlements was the same.

129. 20 Cal. 3d 578, 603-04, 578 P.2d 899, 915-16, 146 Cal. Rptr. 182, 195-99 (1978).

130. As pointed out by Clark, J., dissenting who preferred the view recommended in the present Study. *Id.* at 613-15, 578 P.2d at 922-23, 146 Cal. Rptr. at 205-06.

131. *Id.* at 609 n.1, 578 P.2d at 919, 146 Cal. Rptr. at 202 (Clark, J., dissenting). Lemos v. Bichel, 83 Cal. App. 3d 110, 147 Cal. Rptr. 603 (1978), held that reduction for plaintiff's fault is made prior to reduction of settlement amount. This is clearly correct though less advantageous to plaintiffs.

132. According to the recommendation in Section [illegible] of this Study *supra*.

133. The *Uniform Laws Annotated* contains no case citations whatever to this phrase. In California, it has been explored only in River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) and Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

underlying the "pro tanto" rule.[134] If the consideration for the settlement approximates the plaintiff's best estimate of the settlor's share of liability, the requirement is obviously satisfied. But it seems also to be common ground that a settlement up to the settlor's insurance cover will pass muster, even though it falls far short of the settlor's share.[135] Why should a plaintiff bear the whole deficiency in such a case, when he would only have to bear a proportionate share if he declined to settle? Evidently, a plaintiff who did so must have reason for thinking that it would still be advantageous for him to do so; perhaps because it guarantees him a partial recovery and cushions him against the risk of loss from an unfavorable judgment in subsequent litigation; perhaps because he thinks it worth his while to eliminate prejudicial testimony or even to induce the settlor to give testimony slanted in the plaintiff's favor against the remaining defendants.[136] Most important, however, is that the plaintiff is under no pressure whatever to enter such an under-value settlement, if he does not wish to assume the financial risk of the deficiency.

48. Finally, the plaintiff should be rewarded by being allowed to keep the whole of any *over*-value settlement even if he would in the end thereby receive more than a simple satisfaction of his loss.[137] Any other rule would create a no-win situation which would tend to diminish his incentive to settle. Nor does the windfall aspect present a serious argument to the contrary. The purpose of the one-satisfaction rule . . . is to prevent the plaintiff from unjustly enriching himself at the expense

134. Clark, J., dissenting in *American Motorcycle*, argued that the good faith requirement in practice tends to discourage settlements and thus defeats the rationale of the "pro tanto" rule. 20 Cal. 3d at 610 n.2, 578 P.2d at 931, 146 Cal. Rptr. at 203. Sanctions for lack of good faith are explored by Friedman, J., in *River Garden Farms, Inc. v. Superior Court*, and depend on whether the plaintiff and the settlor, or either of them alone was implicated. 26 Cal. App. 3d 986, 999-1003, 103 Cal. Rptr. 498, 507-10 (1972). It should be noted that, as to California's "joint judgment" rule, a settlor still cannot be sued for contribution even if the settlement is set aside.

135. *See* Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 238-39, 132 Cal. Rptr. 843, 848 (1976): "But we opine that it would be a rare case indeed, where, as here, a joint tortfeasor who was the immediate causative agent of the claimant's injuries, *who settles for the full amount of his insurance coverage*, may reasonably be charged with lack of good faith under section 877." (emphasis added)

136. So-called "Mary Carter" or "sliding scale recovery agreements" have indeed prompted judicial or even legislative protection for the remaining defendants. *See* Cal. Civ. Proc. Code § 877.5 (West Supp. 1978). See Professor G. Schwartz's Report to your Committee (at 110-13) on the California Citizens' Committee recommendation 4B-2 to "prohibit Mary Carter" agreements. If anything, the recommended rule will tend to discourage such collusive arrangements far more than the present rule.

137. Theobald v. Angelos, 44 N.J. 228, 239, 208 A.2d 129, 135 (1965); *see* Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 Calif. L. Rev. 1264, 1277-79 (1977).

of the defendants, but here that principle is not violated: The non-settling defendants will still not be required to pay any more than their apportioned shares and the settlor has bought his peace.

49. *RECOMMENDATION 7: A release entered into by the plaintiff and a tortfeasor shall discharge the latter from all liability for contribution, but the plaintiff's claim against the remaining tortfeasors shall be reduced by the amount of the released tortfeasor's share of the loss.*

This exhausts those aspects of comparative fault specifically raised by *American Motorcycle*. There remain, however, a few other multiple party problems in the wake of the *Li* decision which it would be proper to deal with in the course of comprehensive legislation in this area.

VIII. Immunities and Workers' Compensation

50. A right of contribution exists only among parties who are jointly liable for the same injury. This condition is not satisfied if the party from whom contribution is sought is not liable to the tort victim on account of an immunity. Common examples are when that party is the spouse, parent or child of the victim.[138] In a few jurisdictions the view has been taken that such immunities may not defeat contribution if their rationale is linked exclusively to direct claims by the victim, *e.g.*, fear of collusion between spouses at the cost of the defendant's liability insurer,[139] a concern which would not extend with the same force, or at all, to contribution claims; most jurisdictions however apply the immunity to both claims. Hitherto the problem has not been faced in California because, prior to *American Motorcycle*, contribution was permitted only among parties held liable in a joint judgment. Besides, the problem is now of lesser dimension than it would have been 20 years earlier because most of the more common immunities figuring in tort litigation have in the meantime been abolished in California, *e.g.*, the family immunities, charitable immunity, the guest statute and some aspects of sovereign immunity.[140]

138. *See* W. PROSSER, LAW OF TORTS 309 (4th ed. 1971).

139. *Id.* at n.75.

140. Remember that in *American Motorcycle*, the claim for contribution was made against the victim's parents. Such a claim would have foundered prior to Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), on the ground of family immunity. A number of courts have decided to retain parental immunity from claims for negligent supervision, principally in order to block claims for contribution by other insured defendants. *See, e.g.*, Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

51. Several solutions are possible.[141] One is to hold immunities on principle inapplicable to claims for contribution. Such was apparently the decision of the New York Court of Appeals when in *Dole v. Dow Chemical Co.* it allowed a claim for "partial equitable indemnity" against the plaintiff employer notwithstanding the latter's tort immunity under the workmen's compensation act.[142] Most courts, however, refuse to permit contribution (as distinct from indemnity) from the plaintiff's employer or workmen's compensation insurer on the ground that contribution would erode the employer's statutory protection for which he bargained as a trade-off in return for no-fault benefits to his employees.[143] As against this, however, the third-party defendant has to bear a larger share of the tort liability through the fortuity that the other culpable actor happened to be entitled to a personal immunity vis-à-vis the tort victim.

52. There are several ways in which the third-party's predicament, can be eased without infringing the other's immunity. But all of these are at the expense of the tort victim. First, the immune party could be treated like a released tortfeasor in accordance with the recommendation of section VI of this Study, *i.e.* by reducing the plaintiff's recovery from the third-party by the former's share of fault. This solution is not only unduly prejudicial to the tort victim but also based on an improper analogy: the underlying rationale regarding a settling tortfeasor's share is to protect the other defendants against collusive releases, whereas the immunities here considered exist entirely independently of the plaintiff's voluntary choice. There is no more reason to deny a faultless plaintiff full compensation from a tortfeasor when the other culprit has an immunity than when the other is insolvent.

A less prejudicial alternative would be to adopt the same formula as recommended in § 42 of this Study for dealing with the share of an insolvent tortfeasor, *i.e.*, to distribute that share ratably among the remaining liable parties, including a contributorily negligent plaintiff. This could be accomplished by simply disregarding, from the outset, the share of the immune party in fixing the liability of the other defendants (and a contributorily negligent plaintiff), though to do so would deviate from the usual procedure of requiring the jury to assess the shares of all culpable actors, whether they are party defendants or not.

141. Compare Weir in 9 INTERNATIONAL ENCYCLOPEDIA COMPARATIVE LAW §§ 87-104.

142. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

143. *See* 2A A. LARSON, LAW OF WORKMEN'S COMPENSATION § 76.00 (1966) [hereinafter cited as LARSON]; W. PROSSER, LAW OF TORTS 309 (4th ed. 1971).

Workers' Compensation

53. The problem is most acute in the context of worker's compensation. This is so not only because the employer's immunity is far and away the most common in modern accident litigation: it is aggravated by the fact that the accident victim becomes entitled to compensation benefits from his employer as well as to tort damages from the third party. How are these two, basically incompatible systems (workmen's compensation and tort) to be harmonized?[143] This question calls for consideration when the employer or the employee or both negligently contributed with the third party in causing the employee's injury.

54. Prior to *Li*, the position in California was as follows:[145] An employee's contributory negligence, while not affecting his right to compensation from his employer, barred any tort recovery from a culpable third party. On the other hand, an employee free from fault could recover tort damages from a third-party tortfeasor, reduced only by the workmen's compensation benefits previously received.

If the employer was at fault, whether on account of managerial negligence or vicarious liability for the negligence of his agents or servants, he was not—as already mentioned—liable for contribution, but in *Witt v. Jackson*[146] he also lost his right to recoup from the third party the compensation benefits paid to the injured employee. Thus, the negligent employer and the third-party shared the loss although by no means in proportion to their shares of fault or even equally; on the other hand, the employee did not "double-recover" because, whether his employer was negligent or not, he (the employee) had to give credit against the tort damages for compensation benefits received. In sum, the employer's negligence enured solely to the third-party's advantage by reducing his total liability by the amount of the compensation benefits paid.

The situation worked out differently where compensation benefits were claimed after the third-party's liability was finalized. In that event, California Labor Code § 3861 allows the employer or his insurance carrier a *credit* against the damages recovered from the third party. However, in *Roe v. Workmen's Compensation Appeals Board*[147]

143. A comparative conspectus of the treatment of these problems in different countries is found in Fleming, *Tort Liability for Work Injury*, in 15 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW §§ 56-71 (1975).

145. *See* Note, *Third Party and Employer Liability After Ngo Li v. Yellow Cab Company for Injuries to Employees Covered by Workers' Compensation*, 50 S. CAL. L. REV. 1029 (1977) [hereinafter cited as *Third Party*]; Note, *Worker's Compensation, Third Party Lawsuits*, 11 U.S.F. L. REV. 541 (1977) [hereinafter cited as *Worker's Compensation*].

146. 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

147. 12 Cal. 3d 888, 528 P.2d 771, 117 Cal. Rptr. 683 (1974).

the supreme court (shortly before *Li*) held that, if the employer's negligence concurred with the third-party's, it was preferable to deny the employer his statutory credit rather than deny the employee double-recovery. In this instance, therefore, the employer's negligence enured to the benefit of the employee, since (at least in the absence of statutory authority) the benefit of the later compensation could not be passed on to the third-party like the benefit of compensation received prior to judgment or settlement with him.

55. I propose first to consider the effect of *Li* on the liability of a negligent employer and third-party in cases where the employee was not also contributorily negligent.[148]

The *Li* rationale might well suggest that the third-party's liability should no longer exceed his own share of negligence. That could be accomplished either by allowing the third-party contribution from the employer or limiting the employee's tort claim to the third-party's share only. Either solution has been firmly rejected by different courts of appeal.[149]

56. Contribution from the employer has been opposed both on doctrinal and policy grounds. As for the first, contribution assumes joint liability, not just joint negligence; and the employer happens to be immune from tort liability.[150] Besides, to subject the employer to contribution would entail the ridiculous result that if the employer is the only negligent party, he need only pay his workers' compensation; but if a negligent third-party contributed to the injury, the employer must pay his share of the jury verdict.[151] As for the second, contribution would undermine the employer's immunity in violation of a basic tenet of workers' compensation. The "trade-off" for the employer's no-fault liability for compensation benefits to his employees was, and is, his immunity from any tort claim with respect to the injury. To expose him to contribution from the third-party would taint worker's compensation with tort law. It would increase the risk and cost to the employer and require him to carry additional insurance. Some jurisdictions, it is true, have condoned violation of the employer's immunity by allowing in-

148. Various alternatives were systemically and first discussed by Peyrat, *Comparative Negligence in Third Party Cases*, in [1975] 3 CAL. WORKERS' COMP. REP. 99; *see Third Party*, *supra* note 145; Worker's Compensation, *supra* note 145.

149. Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978) (joint and several liability); Christensen v. Kaiser Alum. & Chem. Corp., 69 Cal. App. 3d 922, 138 Cal. Rptr. 426 (1977) (hearing denied by Sup. Ct. with order against publication of opinion); E.B. Wills Co. v. Superior Court, 56 Cal. App. 3d 650, 128 Cal. Rptr. 541 (1976) (no contribution).

150. CAL. LAB. CODE § 3601 (West Supp. 1978).

151. Brown v. Dickey, 397 Pa. 484, 489-90, 155 A.2d 836, 839 (1959).

demnity claims based on a contractual relationship between the employer and the third-party,[152] but California emphatically repudiated this trend in 1959 by specifically legislating against indemnity claims except when based on an express written contract.[153] This prohibition would cover also claims for "partial indemnity" within the meaning of *American Motorcycle*.[154] In sum, the reason for hitherto denying contribution (and indemnity) against the employer was not the all-or-nothing rule discarded by *Li* but an independent policy of limiting the employer's liability for work injuries.[155] Contribution, under whatever label, is not therefore acceptable.[156]

57. Another alternative for limiting the third-party's liability to his own share of fault would be to abandon the "joint and several" liability rule and reduce the employee's tort recovery from the third party by his employer's share of negligence. While contribution would promote the *Li* rationale at the cost of the employer, this formula would do so at the cost of the employee. The only argument for it is that this is not an unfair price to exact in return for the employee's assured compensation benefits; in other words that the price consists in giving up all tort claims whatever with respect to his employer's negligence and absorbing that share himself for all purposes.[157] It will be recalled that this formula is actually recommended in § 49 of this Study for dealing with a settling tortfeasor's share, but, as already pointed out,[158] the two situations are hardly analogous: the plaintiff has a free choice whether to

152. *See* Larsons, *supra* note 143, at §§ 76.30-53; Larson, *Workmen's Compensation Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351 (1970). In California, see Baugh v. Rogers, 24 Cal. 2d 200, 148 P.2d 633 (1944) (bailor-bailee). The United States Supreme Court led: kudos to this theory in allowing indemnity to an unseaworthy ship against the longshoreman's employer notwithstanding the immunity provision of the Longshoremen's and Harbor Workers' Compensation Act § 5. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1955). The doctrine was nullified by amendment of the Act in 1972. A product manufacturer's claim to an "implied right of indemnity" from a purchasing employer was recently negatived in Olch v. Pacific Press & Shear Co., 19 Wash. App. 89, 573 P.2d 1355 (1978).

153. Cal. Lab. Code § 3864 (West 1971). This section was enacted to nullify the rationale of San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

154. Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal. App. 3d 500, 507, 145 Cal. Rptr. 608, 613 (1978).

155. E.B. Wills Co. v. Superior Court, 56 Cal. App. 3d 650, 128 Cal. Rptr. 541 (1976).

156. *But see* Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

157. *See Third Party*, *supra* note 145, at 1042. This view has been adopted in the Ontario Workmen's Compensation Act, Ont. Rev. Stat. ch. 505 § 8(11) (1970), and the British Columbia Workmen's Compensation Act, B.C. Rev. Stat. ch. 413, § 11(6) (1960).

158. See text accompanying notes 150-56 *supra*.

settle with any one of the tortfeasors and for how much; it is therefore not unfair to hold him to that bargain. In contrast, the particular employee has no choice whatever in dealing with his negligent employer; the latter's immunity is imposed by law and bargained for only in a purely theoretical-historical sense.[159] A closer analogy is that of a co-tortfeasor's insolvency, the risk of which is and should remain (as recommended in section III of this Study) with the solvent tortfeasor(s), at any rate where the plaintiff is free from fault himself. Why should a tortfeasor be better off because someone else contributed to the injury than if he had been solely responsible? Finally, it may be urged that the object of the *Li* reform was to improve the position of plaintiffs, not to worsen it.[160] Accordingly, no change in the existing rule of unreduced tort liability by the third-party[161] is here recommended.

58. If the *Li* rationale of each negligent actor bearing no more than his own share of responsibility cannot be implemented exactly in this context without violence to other competing policies, does it not at least call for some other modification(s) of the prior system of rules? Two possible modifications must here be considered. The first concerns the *Witt* rule which used to disqualify a negligent employer from claiming any indemnity from the third-party for compensation benefits paid. The BAJI Committee promptly amended the relevant jury instructions to reflect its view that a negligent employer could henceforth claim reimbursement from the third-party for compensation benefits paid, reduced only by his own apportioned share of negligence.[162] This modification of the *Witt* rule has been criticized on the ground that it operates to reduce excessively a negligent employer's already limited statutory liability at the expense of a concurrently negligent third party whose liability is not so limited.[163] Suppose an employee is killed in an industrial accident caused in equal degrees by the negligence of his employer and a third-party. A wrongful death action results in an award of $250,000 in favor of the survivors. Under *Witt*, the employer would have borne the whole of the compensation award, maximally $55,000;

159. *Contra*, Murray v. United States, 405 F.2d 1361, 1365-66 (D.C. Cir. 1968) (applied the settlement analogy to the instant situation).

160. Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal. App. 3d 500, 507, 145 Cal. Rptr. 609, 614 (1978).

161. Christensen v. Kaiser Alum. & Chem. Corp., 69 Cal. App. 3d 922, 138 Cal. Rptr. 426 (1977) (hearing denied by supreme court with order against publication of opinion). The reason for the supreme court's order against publishing the opinion of the court of appeal was most probably that this issue was being dealt with in *American Motorcycle*. A year later, in *Arbaugh v. Procter & Gamble Mfg. Co.*, the court considered itself bound by *American Motorcycle*.

162. BAJI 15.14 (6th ed. 1977). See especially *id.*, Use Note at 672-77.

163. *Worker's Compensation*, *supra* note 145, at 577.

the remaining $195,000 would have been borne by the third-party. Under the BAJI formula, the employer could have recovered $27,500 from the third-party, with the result that the third-party's share is now increased to $222,500. But not only would this formula result in excessively increasing the disparity between the shares of the parties; it is also wrong in principle: for the *Li* rationale calls for the application of the fault ratio to the total amount of the damages rather than the amount of the employer's lien upon that amount—in other words, to the shares in which torts damages, not worker's compensation, should be borne.

59. Accordingly, the correct method of applying *Li* is to require the third-party to reimburse the employer only to the extent that the compensation benefits have exceeded the proportionate share of the damages attributable to the employer's negligence. Thus in the preceding hypothetical, the employer would have been entitled to no reimbursement at all, since the benefits paid ($55,000) fell far short of his 50% share of the damages ($125,000). This formula has now been repeatedly endorsed by courts of appeal in preference to the BAJI proposal.[164] It is preferable to the *Witt* rule because, in cases where the employer's negligence is slight but his compensation payments are relatively high, he may now force the third-party to bear a share of the tort damages proportionate to his own, larger share of fault. Suppose that the tort damages amount to $20,000 and the benefits to $8,000, the fault ratio being 10:90: Under *Witt*, the employer would have borne $8,000 and the third-party $12,000; under the new formula, the employer will be entitled to reimbursement of $6,000. Not that this formula necessarily assures sharing in exact proportion to fault, as it does in the preceding example. For if the fault ratio were reversed, the employer would recover nothing but the third-party—failing contribution—would still be left with $12,000 or 60% of the loss.

The recommended formula presents no practical problem in application, if the third-party claim was actually litigated: the verdict will fix both the plaintiff's total damages and the shares of fault. But a settlement would fix neither.[165] The employer might therefore be forced to take the matter to court. But even the *Witt* rule was contingent on a finding of negligence by the employer, and the *Li* rule applied to the lien (rather than the tort damages) would also require a finding of the parties' shares of fault. An additional finding of the total damages does not therefore substantially add to the administrative burden of the recommended formula.

60. The second modification suggested by *Li* concerns the employer's credit where the injured employee delays his claim for permanent disability under workers' compensation until after the civil liability of the third-party has been disposed of. It will be recalled[166] that under the prior law as decided in *Roe* shortly prior to *Li*, a negligent employer was disqualified from all credit for such later benefits against the prior civil recovery, on the ground that it was preferable to condone double recovery by the employee rather than permit the employer to profit from his wrong. Application of the preceding reimbursement formula to the *Roe* credit would tend to minimize the employee's double recovery. It is true that it would neither completely eradicate double recovery (to the extent that credit was still denied up to the employer's share of fault) nor that the benefit of the modification would enure to the third-party rather than the employer. But it is at least a step in implementing the *Li* mandate.

The plaintiffs' bar is opposed to any modification of *Roe*, its main argument being that it merely transfers a portion of the windfall from the pocket of the employee to that of the employer, and that the innocent employee is more deserving than the negligent employer.[167] For it will have been noticed that, while the formula applied to reimbursement will not affect the employee's recovery, the formula applied to credit will. But the likely impact is much smaller than imagined by its opponents who assume reduction of the credit in accordance with the employer's fault, while, as previously pointed out, the correct formula would allow reduction only to the extent that the compensation benefits exceed the employer's share of the tort damages. In any event, the critics (are forced to) concede that the best solution would be to transfer the "windfall" to the third-party, although its effect on employees would of course be the same.

61. To accomplish that result, a simple reform would be to introduce a legislative provision, analogous to the employer's reimbursement provision, allowing the third-party to assert a claim against any future compensation award.[168] Besides eliminating double recovery, it would

164. Arbaugh v. Procter & Gamble Mfg. Co., 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978); Christensen v. Kaiser Alum. & Chem. Corp., 69 Cal. App. 3d 922, 138 Cal. Rptr. 426 (1977) (hearing denied by supreme court with order against publication of opinion). It is also the rule in France and Germany. *See* Fleming, *Torts: Liability for Work Injury*, in 15 INTERNATIONAL ENCYCLOPEDIA § 29 (1975).

165. It cannot even be assumed that the settlement represents a good faith estimate of the plaintiff's total loss instead of the third-party's share of fault, with or without a deduction of the compensation benefits.

166. See text accompanying notes 162-63 *supra*.

167. *E.g.*, Steinberg, *The Argument on Associated Constr. & Engin. Co. v. WCAB*, ADVOCATE, No. 7, at 1 (1977).

168. *Cf.* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 584, 578 P.2d

also dispose of the vexing jurisdictional problem raised by the employer's negligence. For, already in *Roe*, the court suggested a legislative amendment to relieve the Workers' Compensation Appeals Board from having to decide whether the employer was negligent and thus forfeited his claim to credit.[169] The problem would be aggravated if the Board also had to apportion shares of negligence.[170] By permitting the third-party to raise these issues and have them disposed during the civil trial, issues of fault need no longer be injected into the adjudication of workers' compensation.

62. Another formula which would achieve the same result is to authorize contribution against a negligent employer but not exceeding the latter's workmen's compensation liability. This would in effect subrogate the third-party to the employee's compensation benefits paid *and payable* by the employer, just as under workmen's compensation acts in many states the employer's right of reimbursement is defined as a right of subrogation to the employee's rights against the third-party.[171] A right of contribution so limited would respect the traditional policy of limiting the employer's liability to the workmen's compensation benefits, but make sure that the employer does not escape with paying less merely because the employee has not yet exercised his full rights against him by the time the civil claim is settled.

Such a limited right of contribution has long been practiced in Pennsylvania,[172] was recently adopted in Minnesota,[173] and has had some following among federal courts in application to federal workmen's compensation statutes.[174] As Larson points out, "it postulates an optimum result" and probably represents "the fairest available com-

899, 902, 146 Cal. Rptr. 182, 185 (1978). The idea was originally aired in Comment, in [1976] 4 CAL. WORKERS' COMP. REP. 63. A somewhat analogous proposal to prorate workmen's compensation and tort damages (instead of basing the division on fault) was made in Note, *Workmen's Compensation and Third Party Suits*, 21 HASTINGS L.J. 661 (1969).

169. Roe v. WCAB, 12 Cal. 3d 884, 892, 528 P.2d 771, 777, 117 Cal. Rptr. 683, 689 (1974).

170. If the third-party claim was settled, the Board would also have to make a finding of the plaintiff's total damages, since it cannot be assumed that the settlement represented a good faith estimate of the *total* loss. This has been employed as an additional argument for retaining *Roe*, but loses much of its force if the recommended amendment were adopted.

171. Even in California, it has been described as "'merely a legislative recognition of the equitable doctrine of subrogation.'" De Cruz v. Reid, 69 Cal. 2d 217, 222, 444 P.2d 342, 345, 70 Cal. Rptr. 550, 553 (1968) (quoting Western States Gas & Electric Co. v. Bayside Lumber Co., 182 Cal. 140, 148, 187 P. 735, 738 (1920)).

172. Matoy v. Tahs, 359 Pa. 180, 14 A.2d 105 (1940).

173. Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 688-89 (1977).

174. This goes back to the Third Circuit's opinion in Baccellieri v. Halcyon Lines, 187 F.2d 910 (3rd Cir. 1951), *rev'd on another ground sub nom.* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). The cases are discussed at length in Larson, *supra* note 143, § 76.22.

promise in the light of all the conflicting policy interests."[175]

63. A much more radical reform in the way of coordinating workers' compensation with tort liability is the proposal of the American Insurance Association[176] which takes a middle ground between the extremes of, on the one hand, abolishing all third-party claims[177] and, on the other, making the employer liable in contribution for the full amount of any tort judgment. The AIA proposes that all tort defendants (or at least all third-party product liability defendants)[178] be entitled to credit for the amount of workmen's compensation liability paid or payable to the injured employee, regardless of the negligence or other fault of the employer. The employer's right of reimbursement would be abolished, as would all claims for contribution or indemnity other than those provided for by contract.

This proposal has two great attractions: it dispenses with all consideration of fault on the part of the employer and eliminates all cross-claims, thereby simplifying the compensation procedure and reducing "transaction costs." California has hitherto stood pretty nearly alone in its apparent lack of concern over the complications resulting from injection of negligence into the workmen's compensation system, as evidenced by the *Witt* and *Roe* decisions.[179] By contrast, most other states have refused to deny a workmen's compensation lien to a negligent employer, not from motives of complacency with negligence, but so as to not burden the disposition of industrial accident injuries with investigations into fault. In other words, the clear majority view is that the cost of such investigations outbalances any deterrent or other salutory effect that a denial of the lien might conceivably have. The AIA proposal carries forward this important policy, though by denying a lien even to completely faultless employers. Anyway, complete faultlessness (managerial or vicarious) on the part of employers is rather rare, so that it is not inequitable to require all employers to bear a portion of the accident cost. The AIA proposal, by also denying the third-party any contribution, thus eliminates all consideration of fault on the part of

175. Larson, *supra* note 143, at 14-311.

176. *See* Epstein, *Coordination of Workers' Compensation Benefits with Tort Damage Awards*, 13 FORUM 464 (1978) (address to American Bar Association Section of Insurance, Negligence, and Compensation Law, Aug., 1977).

177. Such a proposal is outlined in Weisgall, *Product Liability in the Workplace*, 1977 WIS. L. REV. 1035.

178. Both the AIA proposal and Weisgall's focus on the product liability third-party. So does U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT ch. VII, at 1-257 (1978). The major reason for isolating this problem is the relatively high incidence of these cases: 11% of all product liability accidents account for 42% of the total insurance premiums. *Id.* at 85.

179. *See* Larson, *supra* note 143, § 75.22.

the employer or the third-party[180] and dispenses with all cross-claims. It therefore differs fundamentally from the proposals previously here considered which, instead of ejecting fault notions from workers' compensation, sought to harmonize two systems. Since the employer and the third-party are both likely to be insured and good loss distributors, the refinements of fault exact costs which many observers regard as unwarranted by any competing benefit. Your Committee should seriously ponder whether this is not a propitious time to undertake such a more fundamental reform rather than a mere implementation of the *Li* rationale.

64. We must now consider the added complications of the employee's contributory negligence. First as to his rights against the third-party. Whereas prior to *Li* any such claim would have been totally barred, it is now merely reduced by his own share of negligence. If he has received workmen's compensation, that amount must also be set-off against his damages. It seems to be generally assumed that the benefits must first be set-off before the remainder is reduced by the appropriate ratio of fault, rather than vice versa. Suppose the verdict is $50,000, the compensation benefits $10,000 and the employee was 10% negligent. If compensation is set-off first, he will be entitled to $36,000 (50,000-10,000-4,000); if set-off last, he could only recover $35,000 (50,000-5,000-10,000).[181] The former order of deduction ought to be confirmed by statute.

65. What would be the effect of the injured employee's contributory negligence on the employer's claim for reimbursement of compensation benefits? It will be recalled that, according to current case law commended in this Study,[182] a negligent employer is entitled to reimbursement to the extent that his compensation payments exceeded his notional share of the total damages. His negligence may of course be either managerial ("personal") or vicarious. No cases, however, have so far explored the question whether the injured employee's contributory negligence should be imputed to the employer just like that of any other employee so as to effect his right of reimbursement or credit.

The BAJI Committee assumed such imputation.[183] Thus in the preceding example (§ 62) [where compensation amounted to $10,000, the verdict to $50,000 and the employee was 10% negligent], the employer would on that basis be entitled to $5,000, i.e., the difference between the benefits paid and the 10% share of the total damages.[184]

66. Alternatively, it may be argued that the third-party is already credited with the 10% share of the injured employee so as to reduce his total liability from $50,000 to $46,000 (*supra* § 69). Why should he get a double credit by imputing that share also to the employer so as to reduce the latter's right of reimbursement?[185] Without imputation, the employer would—in the previous hypothetical—be entitled to recover all of his payments ($10,000). This would make no difference to the injured employee, but it would change the respective shares of employer and third party from $5,000:41,000 to 0:46,000.

There are two possible arguments against this solution. The first is that traditionally an employee's negligence has been imputed to the employer so as to impair the latter's right of recovery from third parties. There is no reason why the *Li* principle should change that policy except that the employer's claim is no longer barred but merely reduced. But this assumes that the employer has suffered an injury of his own, whereas in our context it is the employee who has suffered the injury and his negligence is already debited against the third-party's liability. In other words, this is an entirely novel situation to which the doctrine of imputed negligence could never have been applied before, and it would be merely mechanical to extend that doctrine to the present situation.[186]

The second argument is that, by reducing the third-party's share, the formula tends to mitigate a little the gross inequity which the employer's immunity tends to inflict on third-parties. This argument would, however, be stronger if, as BAJI had assumed, the percentage reduction were applied only to the employer's lien rather than to the total damages.

On balance, the arguments for imputing the injured worker's negligence to his employer for the purpose of reimbursement are perhaps the stronger. Thus, however diffidently, adoption of this alternative is recommended.

67. *RECOMMENDATION 8:* (1) *In the case of a work injury caused by the concurrent negli-*

180. But the victim's contributory negligence could still be considered in relation to his tort claim against the third party.

181. *See* BAJI, Use Note at 673, 673n (6th ed. 1977).

182. See text accompanying note 132 *supra*.

183. *See* BAJI, Use Note at 674 (B) and example 4 (6th ed. 1977).

184. BAJI example 4 would allow reimbursement of $9,000, based on the assumption, since refuted, that the percentage reduction is made on the lien rather than the total damages.

185. *See* Peytal, *Comparative Negligence in Third Party Cases* [1978] 3 CAL. WORKERS' COMP. REP. 99, 100 ("Situation III").

186. Remember Emerson's dictum, "A foolish consistency is the hobgoblin of little minds . . . ." R.W. EMERSON, *Self-Reliance*, in ESSAYS 58 (n.p. 1863).

gence of the worker's employer and a third party

(a) *the employer should be allowed to recover from the third party any part of his compensation liability that exceeds his notional share of the tort damages, and*

(b) *the third party should be allowed to claim contribution to the extent of the employer's share of fault or the employer's workmen's compensation liability whichever is the smaller (§ 65).*

(2) *If the employee's negligence concurred with that of the third party, his negligence should be imputed to the employer so as to reduce his claim to reimbursement (§ 70).*

(3) *Alternatively, the employer's right of reimbursement should be abolished, regardless of whether he was negligent or not, but the third party's tort liability should be reduced by the amount of workmen's compensation paid or payable to the employee (§ 67).*

IX. The Uniform Comparative Fault Act

68. Most of the recommendations of this Study are embodied in the draft of the Uniform Comparative Fault Act, promulgated by the National Conference of Commissioners on Uniform State Laws in August 1977. There are two good reasons for adopting that draft in its essentials rather than embarking on an original drafting effort: first, the Uniform Act is the result of careful preparatory work and draftsmanship which it would be uneconomical to duplicate; second, uniformity

entails obvious benefits by making available the combined interpretative experience of other States and eliminating conflicts problems.

69. The Act covers both comparative negligence and contribution among tortfeasors. If adopted in California, it would therefore put both matters on a statutory basis, a solution preferable to a mosaic of judicial decisions and statutory amendments. It would also require the repeal of the current version of Code of Civil Procedure §§ 875-77, dealing with contribution among tortfeasors and releases.

70. (1) § 1(a) of the Uniform Act enacts the principle of "pure" comparative negligence and § 1(b) defines the scope of its application in an embracing definition of "fault." Notably, that definition includes strict tort liability, including breach of warranty, as well as reckless conduct in accordance with the recommendations of Section I of this Study. The inclusion of "unreasonable failure to avoid an injury or to mitigate damages" would apply comparative negligence to situations like failure to use protective devices, like safety belts or helmets, if considered "unreasonable." Because conduct formerly classified as assumption of risk might now be deemed comparative negligence it might be desirable to insert in the definition of fault in line 4 of § 1(b) "violation of statute," following "breach of warranty."[187]

(2) § 2(a) of the Act lays down a procedure of special interrogatories for the jury regarding the allocation of shares of responsibility between the parties, both for purposes of comparative negligence and contribution among tortfeasors.

§ 2(b) prescribes as the two criteria for such allocation (1) the "fault" of each party, and (2) the "extent of [its] causal relation" to the damages claimed; the second criterion provides a possible solution to the "apples and oranges" dilemma of comparing fault and strict liability.[188]

§ 2(c), *inter alia*, confirms the rule of joint and several liability.

§ 2(d) enacts a procedure for reallocating the uncollectible share of an insolvent party among the other parties, as recommended in Section IV of this Study.

(3) § 3 deals with the problem of set-off, between parties who are either insured or uninsured, along lines set out at length and recommended in Section VII of this Study.

(4) § 4(a) of the Act creates a right of contribution, enforceable either in the original action or in a separate action. It therefore rejects the requirement of a joint judgment. § 4(b) specifically authorizes con-

187. *See Fleming, supra* note 3, at 261-67.

188. See text accompanying notes 20-29 *supra*.

tribution claims by settling tortfeasors. In both respects, it would change the law of Code of Civil Procedure § 875 in accordance with recommendations of Section IV of this Study.

(5) § 5 deals with the enforcement of contribution, including the period of limitation.

(6) § 6, prescribing the effect of releases, corresponds to Code of Civil Procedure § 877, except that the plaintiff's claim against other defendants is to be reduced by the released tortfeasor's equitable share in accordance with the recommendation in Section VII of this Study rather than by the amount of the settlement.

(7) § 9 on severability may be omitted. § 11 would repeal Code of Civil Procedure §§ 875-877.

71. The Uniform Act does not deal specifically with the problem of immunities or the workmen's compensation syndrome, except in a comment to § 6 which briefly canvasses several possible solutions. Section VIII of this Study also suggested alternative solutions; if one of these were ultimately enacted, it would more appropriately be placed in the Labor Code, Division 4, which deals specifically with the interaction of workmen's compensation and tort liability rather than in the Code of Civil Procedure as part of the general comparative fault legislation.

X. State Bar Draft and S.B. 1959 (Zenovich)

72. An alternative bill drafted by a Committee of the California State Bar was introduced by Senator Zenovich (March 28, 1978) as S.B. 1959.[189] Like the Uniform Act, it proposes a codification of comparative negligence, contribution among tortfeasors and releases. It is however more detailed than the former, especially in its prescription of procedures, and dovetailed into the California Code of Civil Procedure of which it would become part as Title II of Part 2, §§ 875-885.

I propose to draw attention to its most salient features, some of which are explained and emphasized in the comments accompanying the State Bar draft, while others only emerge by contrast with the Uniform Act.

73. (1) § 1 (S.B. § 875) is clearly limited to tort (and nuisance) actions, whereas the Uniform Act applies to all claims "based on fault" for "personal injury or death to person or harm to property." Thus,

189. *Proposed Statute re Comparative Negligence and Contribution*, recommended by the State Bar Standing Committee on Administration of Justice, August, 1977. (The draft remains under consideration by that Committee). S.B. 1959 died in the Rules Committee at the end of the 1978 legislative session.

unlike the latter, the California draft may be applicable to claims for economic loss (e.g. from misrepresentation) but would presumably exclude actions for breach of contract, including warranty. (Breach of warranty is specifically included in the Uniform Act's definition of fault: § 1(b)). But like the Uniform Act, it does apply comparative negligence to claims based on strict liability.

The exclusion of contract actions applies not only to the issue of comparative negligence but also to contribution. It therefore disqualifies claims for contribution between one liable in contract and another liable in tort (and, of course, between persons liable only in contract). This creates a serious gap which has recently been closed in England by the Civil Liability (Contribution) Act 1978.[190]

(2) § 2 (S.B. § 876) defines fault to include breach of any duty of [a] person to himself or others." This is, to say least, infelicitous since one cannot owe a duty to oneself.[191]

(3) § 3 (S.B. § 877) prescribes the special verdict procedure, comparable to § 2 of the Uniform Act. One notable difference is that the California draft requires a comparison of fault between all "tortfeasors" (following *American Motorcycle*), while the Uniform Act deliberately confines comparision to the litigating "parties" alone. The significance of this difference is revealed in § 6 which deals with the distribution of the "absent" share. The result runs counter to the recommendation of this Study.[192]

(4) § 4 (S.B. § 878) requires set-off without qualification and without so much as a word of explanation for ignoring the near-universal disapproval of set-off between insured parties. Although the draft is in several other respects tilted in favor of plaintiffs, this section has incurred the hostility of CTLA, and should be rejected.

(5) § 5 (S.B. § 879) enacts a right to contribution, affirms the joint-and-several-liability rule and preserves jury trial.

(6) § 6 (S.B. § 880) deviates from the Uniform Act by reallocating the uncollectible share of a tortfeasor (insolvent as well as "absent") proportionately among the remaining "judgment debtors" but apparently not including a plaintiff at fault. This solution does not hold the scales evenly between negligent plaintiffs and defendants and runs counter to the recommendation of Section V of this Study.

(7) § 7 (S.B. § 881) authorizes cross-complaints or a later sepa-

190. *See also* LAW COMMISSION, REPORT No. 79 (1977).

191. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 735, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380, 385-86 (1978).

192. See text accompanying notes 74-78 *supra*.

rate action for contribution subject to certain conditions.[193] It also provides for a right of intervention by anyone who may be called upon to make contribution (Sub.-§(d)).

(8) § 8 (S.B. § 882) lays down that each party's equitable share be based on fault.

(9) § 9 (S.B. § 883) provides for a problem omitted by the Uniform Act:[194] can a non-party relitigate the extent of the plaintiff's award? Answering yes, how is the reduction, if any, to be redistributed?

(10) § 10 (S.B. § 884) reenacts in substance the existing rules of Code of Civil Procedure § 877 on releases. In particular it adheres to the rule that any non-settling defendant's liability is reduced only by the amount of the settlement, subject only to the control that such settlement was in good faith. This solution obviously favors plaintiffs and is therefore supported by CTLA. By contrast, the Uniform Act proposes to reduce the remaining defendant's liability by the settling tortfeasor's equitable share, if greater than the amount of the settlement. For reasons previously stated, this Study prefers the latter solution.[194]

(11) § 11 (S.B. § 885) is an uncontroversial definition section.

193. See text accompanying notes 88-108 *supra*.
194. See text accompanying note 111-20 *supra*.

Interstate Libel and Choice of Law: Proposals for the Future

By LAURENCE M. ROSE*

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[1]

By those words, the United States Supreme Court in 1974 instructed the states that "any standard save strict liability"[2] could be devised to determine the fault of a media libel defendant. Since that time each state has struggled to determine the fault standard it should apply, and many states have adopted different fault standards with separate methods of determining what acts violate those standards.[3] Many litigants and courts have failed to see the possibility of a choice of law question, namely, which state's fault standard should apply to an allegedly libelous statement which was investigated, written, edited, or published in another state.[4]

While some commentators have noted the existence of this choice of law question,[5] no one has discussed the matter in any depth.[6] This issue has recently become most important, primarily due to the variety

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1. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).
2. *Id.* at 348 n.10.
3. See notes 87-126 & accompanying text *infra*.
4. *See, e.g.*, Lake Havasu Estates, Inc. v. Reader's Digest Ass'n, 441 F. Supp. 489, 492 (S.D.N.Y. 1977). In that case, however, the judge recognized the issue but did not decide it. *See also* Lambert v. Providence Journal Co., 508 F.2d 656, 658 n.6 (1st Cir. 1975).
5. *See* Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEX. L. REV. 271, 275-76 n.19 (1976); Note, *The Gertz Case: Unbalancing Media Rights and Reputational Interests*, 2 W. ST. U.L. REV. 227, 234 & n.57 (1975); Recent Development, *State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 VAND. L. REV. 1331, 1446 (1976).
6. A hypothetical fact pattern was proposed in Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, 41 LAW & CONTEMP. PROB. 85, 91 (1977), which assumed that