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Reconciling Comparative Negligence, Contribution, And Joint And Several Liability

RECONCILING COMPARATIVE NEGLIGENCE, CONTRIBUTION, AND JOINT AND SEVERAL LIABILITY

At common law, a plaintiff who failed to meet the standard of care necessary for his own protection and whose conduct was a legally contributing cause, in conjunction with the negligence of the defendant, of his own harm was considered contributorily negligent.[1] The contributory negligence of the plaintiff was an absolute bar to any compensatory recovery by the plaintiff for the injury.[2] Despite widespread acceptance in the United States during the early nineteenth century, the application of the doctrine has met with an increasing amount of criticism in recent years.[3] The doctrine's critics have attacked the inequality of the rule's application since it results in the entire burden of loss being borne by one party despite the fact that two or more persons are legally responsible.[4] Moved by the harshness of the rule precluding any recovery by a negligent plaintiff, several jurisdictions have rejected the doctrine of contributory negligence by

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[1] The doctrine of contributory negligence is of judicial origin and is generally attributed to Lord Ellenbourough who outlined the doctrine in Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). The doctrine's modern version is substantially the same. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

[2] RESTATEMENT (SECOND) OF TORTS §467 (1965). The absolute bar to recovery is applicable regardless of the extent to which the plaintiff's negligent conduct contributed as a legal cause to the injury. Smith v. Smith, 19 Mass. (2 Pick.) 621, 623-24 (1824); Tazewell Supply Co. v. Turner, 213 Va. 93, 96, 189 S.E.2d 347, 350 (1972). Thus a plaintiff could contribute only 5% of the total negligence involved in causing his injury and still be barred from recovering any compensation from a defendant who is 95% negligent.

The doctrine of contributory negligence has been supported by four arguments. The doctrine's proponents assert that fault cannot be measured by scientific methods and thus cannot be quantified realistically by a jury, that any system of apportioning degrees of fault among parties to an accident would be difficult to administer, that the doctrine encourages settlement, and that the absolute bar of recovery deters careless conduct thus preventing accidents. Kaatz v. Alaska, 540 P.2d 1037, 1048 (Alas. 1975); *see* Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 243 (1976) [hereinafter cited as Fleming].

[3] W. PROSSER, LAW OF TORTS §67, at 433 (4th ed. 1971) [hereinafter cited as PROSSER].

[4] *Id.* Dean Prosser asserts that the doctrine of contributory negligence actually places the burden of loss on the party least able to bear the loss since the plaintiff is the person who has suffered the injury. *Id.* In Li v. Yellow Cab Co., the California Supreme Court maintained that its basic objection with the doctrine was that it failed to distribute responsibility in proportion to fault in a legal system which determined liability on the basis of fault. 13 Cal.3d 804, 811, 532 P.2d 1226, 1230-31, 119 Cal. Rptr. 858, 863 (1975).

either making the plaintiff's negligence irrelevant[5] or adopting a system of comparative negligence.[6] Courts and commentators contend that a system of comparative negligence which apportions liability in proportion to the fault of the parties encourages people to exercise caution[7] and results in a more realistic distribution of fault than imposing the entire loss on the plaintiff as occurs under a contributory negligence system.[8]

In a comparative negligence system, damages resulting from the tort are assessed in proportion to the degree of fault which can be attributed to persons[9] negligently causing the injury.[10] The money

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[5] The doctrine of contributory negligence has been rejected since 1908 in federal workman's compensation under the Federal Employers' Liability Act, 45 U.S.C. §53 (1970), and since 1920 in admiralty law under the Jones Act, 46 U.S.C. §688 (1970), and the Death on the High Seas Act, *id.* at §766 (1970). The plaintiff's fault is also irrelevant in most states for tort actions under strict product liability and in state workman's compensation claims. Fleming, *supra* note 2, at 242.

[6] The doctrine of contributory negligence was replaced in England by a system of comparative negligence in the Law Reform Act, 1945, 8 & 9 Geo. 6, c. 28. Comparative negligence is currently recognized in Austria, Canada, France, Germany, the Philippines, Portugal, and Spain. V. SCHWARTZ, COMPARATIVE NEGLIGENCE §1.3 (1974); *see generally,* J. FLEMING, LAW OF TORTS 219 (4th ed. 1971)(rejection of contributory negligence in the British Commonwealth); Turk, *Comparative Negligence On The March,* 28 CHI.-KENT L. REV. 189 (1950)(rejection of contributory negligence in civil law countries).

Twenty-seven states have adopted some form of comparative negligence by statute. ARK. STAT. ANN. §§27-1763 to -1765 (Supp. 1975); COLO. REV. STAT. §13-21-111 (1973); CONN. GEN. STAT. ANN. §52-572h (West Supp. 1977); HAW. REV. STAT. §663-31 (Supp. 1975); IDAHO CODE §6-801 (Supp. 1976); KAN. STAT. §60-258a (1976); ME. REV. STAT. tit. 14, §156 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 231, §85 (West Supp. 1976); MINN. STAT. ANN. §604.01 (West Supp. 1977); MISS. CODE ANN. §11-7-15 (1972); MONT. REV. CODES ANN. § 58.607.1 (Supp. 1975); NEB. REV. STAT. ch. 25-1151 (1975 reissue); NEV. REV. STAT. ch. 41.141 (1975); N.H. REV. STAT. ANN. §507-7a (Supp. 1975); N.J. STAT. ANN. §2A: 15-5.1 (West Supp. 1976); N. Y. CIV. PRAC. LAW §1411 (McKinney 1976); N. D. CENT. CODE §9-10-07 (1975); OKLA. STAT. ANN. tit. 23, §11 (West Supp. 1976); OR. REV. STAT. §18.470 (1975); PA. STAT. ANN. tit. 17, §2101 (Purdon Supp. 1977); R.I. GEN. LAWS §9-20-4 (Supp. 1976); S.D. COMPILED LAWS ANN. §20-9-2 (1967); TEX. REV. CIV. STAT. ANN. art. 2212a, §1 (Vernon Supp. 1976); UTAH CODE ANN. §78-27-37 (Supp. 1975); VT. STAT. ANN. tit. 12, §1036 (1973); WASH. REV. CODE ANN. §4.22.010 (Supp. 1975); WIS. STAT. ANN. §895.045 (West Supp. 1976); WYO. STAT. §1-7.2 (Supp. 1975). Three states have adopted comparative negligence by judicial decree. Kaatz v. Alaska, 540 P.2d 1037 (Alas. 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. 1973).

[7] *See* Kaatz v. Alaska, 540 P.2d 1037, 1048 (Alas. 1975); Fleming, *supra* note 2, at 243; Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 468 (1953).

[8] *E.g.,* Kaatz v. Alaska, 540 P.2d 1037, 1048 (Alas. 1975).

[9] The courts have consistently used the term "parties" in opinions which have judicially adopted comparative negligence. Kaatz v. Alaska, 540 P.2d 1037, 1047 (Alas.

damages assessed to the tortfeasor depend upon the amount of damage he caused and not upon the damages he suffered.[11] The comparative negligence doctrine currently exists in two major forms in the United States. The pure form, adopted in a minority of jurisdictions,[12] allows an injured party to recover compensation in spite of his being equally or more at fault in causing the accident than the other tortfeasors.[13] Under the alternative 50% system of comparative negligence however, a party is only allowed to recover if his share of the fault is equal to or less than the negligence of the other tortfeasors.[14] If the party's share of the negligence is greater than 50%, a suit against the other tortfeasors for the injuries is barred.[15] The jurisdic-

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1975); Li v. Yellow Cab Co., 13 Cal.3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975). The choice of "parties" or "persons" in defining the individuals whose fault must be considered will result in a significantly different apportionment of damages. *See* text accompanying notes 71-74 *infra*.

[10] Kaatz v. Alaska, 540 P.2d 1037, 1047 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal.3d 804, 808, 532 P.2d 1226, 1229, 110 Cal. Rptr. 858, 861 (1975). The cases and statutes generally call for a comparison of either fault or negligence. Kaatz v. Alaska, 540 P.2d at 1047; Li v. Yellow Cab Co., 13 Cal.3d at 808, 532 P.2d at 129, 119 Cal. Rptr. at 861; *see* statutes cited in note 6 *supra*. *But see* ME. REV. STAT. tit. 14, §156 (Supp. 1976)(comparison of "claimant's share in the responsibility for damages . . . ."), *discussed in* Fleming, *supra* note 2, at 249 n.45. Professor Fleming asserts that the wording of the Maine statute avoids the difficulty which arises under a statute which compares fault where one of the tortfeasors is strictly liable. *Id.*

[11] Hoffman v. Jones, 280 So.2d 431, 439 (Fla. 1973).

[12] Pure comparative negligence has been adopted by statute in Mississippi, New York, Rhode Island, and Washington. *See* statutes cited in note 6 *supra*. Alaska, California, and Florida adopted pure comparitive negligence by judicial decision. Kaatz v. Alaska, 540 P.2d 1037, 1049 (Alas. 1975); Li v. Yellow Cab Co., 13 Cal.3d 804, 808, 532 P.2d 1226, 1229, 119 Cal. Rptr. 858, 861 (1975); Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1973). The courts that have judicially adopted a pure comparative negligence system have asserted that the pure system is simpler to administer and better calculated to do justice among the parties. Kaatz v. Alaska, 540 P.2d at 1049. The pure system prevails throughout the British Commonwealth. A Honoré, *Causation and Remoteness of Damage*, in XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 7 (1972).

[13] Li v. Yellow Cab Co., 13 Cal.3d 804, 808, 532 P.2d 1226, 1229, 119 Cal. Rptr. 858, 861 (1975).

[14] The New Hampshire 50% rule "disqualifies only plaintiffs whose fault [is] greater than the defendant's" thus allowing a plaintiff who is equally at fault with the defendant to recover. Fleming, *supra* note 2, at 246. The New Hampshire 50% rule has been adopted in Connecticut, Montana, Nevada, New Hampshire, New Jersey, Texas, and Wisconsin. *See* statutes cited in note 6 *supra*. An alternative approach, adopted in the remaining statutory comparative negligence states, only allows a plaintiff to recover if his fault is less than the defendant's negligence. *E.g.*, ARK. STAT. ANN. §27-1763 (Supp. 1975). For an application of the 50% rule to multi-party accidents, see text accompanying notes 26-28 *infra*.

[15] *E.g.*, Holzem v. Mueller, 54 Wis.2d 388, 195 N.W.2d 635 (1972).

tions which have considered the adoption of a comparative negligence system and chosen the 50% model have asserted that it is unjust to allow a plaintiff who is more at fault in an accident to recover from another person who is less at fault.[16] Nevertheless, courts adopting comparative negligence in its pure form have argued that the 50% system distorts the very principle upon which the doctrine is based; that is, "persons are responsible for their acts to the extent their fault contributes to an injurious result."[17] The adoption of either comparative negligence system results in significant, though surmountable, problems for a legal system. The apportionment of damages in multiparty accidents and the reconciliation of the comparative negligence doctrine with the principles of contribution and joint and several liability are two of the broad issues which must be confronted.

Application of the comparative negligence doctrine is easiest when an accident involves only two persons, *P* and *D*, who are the only parties before the court for settlement of their conflicting claims. Assume that *P* has suffered $30,000 damage in the accident and that *D* has suffered $5,000 damage. When the case comes to trial, the trier of fact will be charged with the responsibility of determining the percentage of liability that *P* and *D* will be required to bear. This determination of each person's liability will be achieved through a consideration of each person's actions which contributed to causing the accident. The assignment of liability by percentages will not be based on a consideration of pure physical causation, but rather on a consideration of the degree of fault or culpability of *P* and *D* which proximately caused the accident and resulting damage.[18] Thus, under both a pure and a 50% system of comparative negligence, the trier of fact would assign a percentage of negligence to the persons involved.

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[16] Fleming, *supra* note 2, at 246.

[17] Li v. Yellow Cab Co., 13 Cal.3d 804, 824, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).

[18] *Id.* at 828, 532 P.2d at 1243, 119 Cal. Rptr. at 875 ("in direct proportion to the amount of negligence of each of the parties"); Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L. J. 747, 748 (1976) [hereinafter cited as Schwartz]. Physical causation may be distinguished from causation based on fault by the following hypothetical suggested by Professor Schwartz. *P*, an intoxicated motorcyclist, loses control of his motorcycle while going 25 miles per hour over the speed limit and is hit by a large truck traveling 10 miles per hour over the speed limit. *P* is killed and his motorcycle destroyed. If judged from the perspective of physical causation, the truck provided approximately 95% of the force killing *P*; however, the truck driver was not responsible for 95% of the negligence which caused the accident. *Id.* at 748 n.12.

In assessing a percentage of negligence, most commentators recommend the use of special verdicts in jury cases.[19] Special verdicts are favored because they direct the jury's attention to the central issues in the case,[20] control jury bias, reveal any jury confusion in applying the doctrine, and provide an opportunity to determine if the jury erred.[21] If the trier of fact determined that *P* was 10% negligent and *D* was 90% negligent, *P* would recover $27,000 ($30,000 x .9) from *D* while *D* would recover $500 ($5,000 x .1) from *P* under a pure system of comparative negligence.[22] *D* could assert a right of set-off on the basis of his counterclaim thus reducing *P's* recovery to $26,500.[23] In a

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[19] Fleming, *supra* note 2, at 250; Schwartz, *supra* note 18, at 761. In Li v. Yellow Cab Co., the court noted the problems present in administering comparative negligence. The court stated, "The assigning of a specific percentage factor to the amount of negligence attributable to a particular party, while in theory a matter of little difficulty, can become a matter of perplexity in the face of hard facts." 13 Cal.3d 804, 823, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975). The *Li* court recommended the use of special verdicts or jury interrogatories. *Id.*

[20] In apportioning damages, the trier of fact must determine the percentage of fault attributable to each party and the damage suffered by each party. Schwartz, *supra* note 18, at 761.

[21] *Id.* While most states either require the use of special verdicts or allow the trial judge to use special verdicts at his discretion, Maine, New Hampshire, and Vermont require the use of general verdicts. Fleming, *supra* note 2, at 250 n.49; *e.g.*, ME. REV. STAT. tit. 14, § 146 (Supp. 1976) provides in part:

> [T]he court shall instruct the jury to find and record the total damages which would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable . . . .

Thus, in jurisdictions which do not use the special verdict, the jury finds for one party, awards a certain amount which has been diminished from the total possible damages by the plaintiff's negligence, and makes no specific findings of percentage of fault attributable to each party. *See* Shea v. Peter Glenn Shops, Inc., 132 Vt. 317, 319, 318 A.2d 177, 178 (1974); *see generally* Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293 (1970).

[22] In Hoffman v. Jones, the court stated that the "amount of [the plaintiff's] recovery may be only such proportion of the entire damage the plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant." 280 So.2d 431, 438 (Fla. 1973). *D* recovers as a counterclaimant and is treated as a plaintiff for the purpose of determining the damages he suffered.

[23] *See* Schwartz, *supra* note 18, at 750. Professor Fleming argues against the allowance of the right of set-off in a pure system based on a concern with the factual situation where *P* is less negligent than *D* and also suffers less damage. Fleming, *supra* note 2, at 247. For example, if *P* were 25% negligent and suffered $500 damage while *D* were 75% negligent and suffered $1500 damage, allowing a right of set-off would result in neither party recovering from the other since each is entitled to $375 in

50% system, *D* as a counterclaim plaintiff would be barred from recovering any damages from *P* since his negligence (90%) is greater than *P's* (10%).[24] Thus in a 50% system, *P* would recover $27,000.

The issues confronting a court become considerably more complex when a larger number of parties are involved in the accident. First, the court must apportion damages among more parties. Assuming there are three parties, *P*, D_1, and D_2, in a pure system the trier of fact merely determines their individual degrees of negligence, their individual damages, and then apportions damages among the parties.[25] In contrast, under a 50% system the court will have more difficulty in reaching an equitable result depending upon the degree of negligence of each of the three parties. If *P* is found to be 30% negligent, D_1 50% negligent, and D_2 20% negligent, the court must decide

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damages. (*P* = $500 x .75 = $375; *D* = $1500 x .25 = $375). Thus, in the pure system with a right to set-off, all damages may go uncompensated. In a 50% system where *D* is barred from asserting a claim, *P* would recover $375 leaving only $1625 uncompensated or to be borne by the accident victims. *Id. Cf.* Calumet Cheese Co. v. Chas. Pfizer & Co., 25 Wis.2d 55, 66, 130 N.W.2d 290, 296 (1964) (defendant who is 90% negligent unable to recover from third-party defendant who is 10% negligent). In recommending the proscription of the set-off right in a pure system, Professor Fleming would allow each party to recover the damages allowed, $375, from the other party's insurer. This result, however, distorts the purpose of the comparative negligence doctrine which is to distribute the loss resulting from an accident according to the relative negligence of the persons involved. The equities of Professor Fleming's hypothetical would tend to support a right of set-off. Since *P* is responsible for 25% of the fault which led to the accident, he should bear 25% of the total damages. No equity can be asserted to justify the shifting of *P's* responsibility to society through allowing recovery from insurers. As of this time, only Rhode Island has proscribed the right of set-off. R. I. GEN. LAWS §9-20-4.1 (Supp. 1976).

Despite the fact that *D* might have a right to set-off, minimal negligence on the part of one party may prove to be an effective argument for barring a set-off by the other party. *Cf.* Kaatz v. Alaska, 540 P.2d 1037, 1050 n.32 (Alas. 1975); Schwartz, *supra* note 18, at 749. The *Kaatz* court, although abolishing the last clear chance doctrine, asserted that a party could attempt to persuade the trier of fact that the other party "should bear a greater proportion of the liability for an accident by reason of the factual pattern adduced, including a consideration of the helplessness or inattentiveness which may have led to a plaintiff's predicament. . . ." 540 P.2d at 1050 n.32. Where *D* is considerably more at fault than *P*, *P* has a strong argument that *D* was the sole proximate cause. Schwartz, *supra* note 18, at 749. Obviously either party may assert that he could not have avoided or prevented the accident by the exercise of due care. Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1973).

[24] Fleming, *supra* note 2, at 247. *Cf.* Calumet Cheese Co. v. Chas. Pfizer & Co., 25 Wis.2d 55, 66, 130 N.W.2d 290, 296 (1964)(defendant who is 90% negligent barred from recovery from third-party defendant who is 10% negligent). *See* text accompanying note 16 *supra* for the rationale for this result.

[25] This analysis assumes that all tortfeasors are before the court. For a discussion of the impact of an absent tortfeasor, see text accompanying notes 61-78 *infra*.

whether it will compare P's negligence with the combined total of D_1's and D_2's negligence for the apportionment of damages or with their negligence separately.[26] If the court in a 50% system chooses to compare P's negligence with D_1 and D_2 separately, P would be barred from recovering a judgment against D_2 since P is more negligent. Then the court is faced with the difficult question of how to apportion between P and D_1 the share of damages attributable to D_2's negligence. The court could apportion the liability which would have been borne by the excused tortfeasor D_2 entirely to P, entirely to D_1, or proportionately between P and D_1. If P must shoulder D_2's share, he would bear his own share (30%) plus D_2's share (20%) ultimately bearing 50% of the liability. If D_1 must shoulder D_2's share, he bears his own share (50%) plus D_2's share (20%), totaling 70%. This latter result would be consistent with the philosophy of assuring the plaintiff's compensation which underlies the doctrine of joint and several liability.[27] However, dividing the excused tortfeasor's share of responsibility proportionately among the remaining parties, P and D_1, appears most equitable and is consistent with the comparative negligence philosophy of apportioning damages according to relative fault. Under this alternative, the court would spread D_2's 20% liability proportionately between P and D_1 according to their share of the remaining fault. Thus, P would bear 3/8 of D_2's share and and D_1 would bear 5/8 of D_2's share.[28]

A court applying a comparative negligence system in a multiparty action must also contend with the jurisdiction's position on contribution. Currently, about half of the states retain the common law rule against contribution among tortfeasors.[29] Contribution was denied at common law because courts were unwilling "to make relative value

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[26] *Compare* Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, 727-28 (1934) (comparison of P with D_1 and D_2 separately) *with* Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973) (comparison of P with combined negligence of D_1 and D_2).

[27] *See* text accompanying notes 33-36 and 52-60 *infra*.

[28] The numerator in each fraction is the party's degree of negligence and the denominator represents the combined negligence of P and D_1. Fleming, *supra* note 2, at 252 n.55; Comment, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, 24 ME. L. REV. 243, 246-48 (1972).

[29] Fleming, *supra* note 2, at 252; *e.g.*, Denneler v. Aubel Ditching Serv., Inc., 203 Kan. 117, 120, 453 P.2d 88, 91 (1969); National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238, 240 (Okla. 1967). The common law rule was first pronounced in Merryweather v. Nixan, 101 Eng. Rep. 1337 (K. B. 1799), *discussed in* Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

judgments of degrees of culpability among wrongdoers"[30] and the courts reasoned that no individual should be allowed to utilize the courts in order to make his misconduct the basis of an action in his favor.[31] The denial of a right to contribution necessarily results in a defendant either avoiding liability of bearing the full burden of a judgment despite the fact that another person might also be responsible for the injuries.[32] This inequitable result is the natural consequence of the doctrine of joint and several liability.[33] If a party was a joint tortfeasor,[34] then he was legally responsible for the entire damage suffered by the plaintiff either individually or together with the other joint tortfeasors.[35]

The common law denial of contribution and the doctrine of joint and several liability have been challenged in recent years.[36] Those states that allow contribution among tortfeasors have generally altered the common law by statute.[37] These states have been motivated by the injustice of placing the entire burden of damages on one tortfeasor merely at the whim of the plaintiff.[38] The doctrine of contribution allocates liability among those who are "participatively responsible" and is generally designed to distribute the plaintiff's loss equi-

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[30] Dole v. Dow Chemical Co., 30 N.Y.2d 143, 147, 382 N.E.2d 288, 291, 331 N.Y.S. 2d 383, 386 (1972)(dictum); *e.g.*, Fidelity & Cas. Co. v. Chapman, 167 Ore. 661, 665, 120 P.2d 223, 225 (1941); Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 68, 132 S.E.2d 172, 175 (1963).

[31] *E.g.*, Hobbs v. Hurley, 117 Me. 449, 451, 104 A. 815, 816 (1918); Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799); *see* Comment, *The Case for Comparative Contribution in Florida*, 30 U. MIAMI L. REV. 713, 717 n.19 (1976).

[32] *See* Braun, *Contribution: A Fresh Look*, 50 CAL. ST. B. J. 166, 167 (1975) [hereinafter cited as Braun].

[33] The common law rule of joint and several liability is derived from Smithson v. Garth, 83 Eng. Rep. 711 (K.B. 1601). *See* PROSSER, *supra* note 3, at §46, at 291-92; text accompanying notes 34-36 and 52-60 *infra*.

[34] Joint tortfeasors are either two or more persons who combine expressly or impliedly and then act together to injury another person, or two or more persons "whose independent acts of negligence are a substantial cause of an indivisible injury to another." Schwartz, *supra* note 18, at 763; *e.g.*, Drake v. Keeling, 230 Iowa 1038, 299 N.W. 919 (1941); Garrett v. Garrett, 288 N.C. 530, 45 S.E.2d 302 (1948).

[35] Schwartz, *supra* note 18, at 763; *see* Fleming, *supra* note 2, at 251; Comment, *Comparative Negligence in California: Multiple Party Litigation*, 7 PAC. L.J. 770, 775-76 (1976) [hereinafter cited as *Litigation*].

[36] *See* text accompanying notes 37-44 and 52-57 *infra*.

[37] *E.g.*, N.C. GEN. STAT. §1B-1 (1969 Repl. Vol.); VA. CODE §8-627 (1957 Repl. Vol.).

[38] PROSSER, *supra* note 3, at §50, at 307. Nevertheless, if the defendant has a right to implead other tortfeasors for contribution or join them because of a cause of action which he possesses arising out of the same factual circumstances, the defendant may avoid bearing the entire burden. *See* text accompanying notes 64-70 *infra*.

tably among the joint tortfeasors.[39] Contribution grew out of the law of contracts[40] and was subsequently applied to cases based on negligence.[41] Most states that have adopted contribution by statute, however, have placed procedural limitations on its use. First, the right to contribution does not arise unless a joint judgment has been rendered against all tortfeasors from whom contribution is sought.[42] Second, the tortfeasor seeking contribution must have already discharged the entire judgment debt or more than his pro rata share before he can assert his right to contribution.[43] The effect of these limitations is that a tortfeasor generally cannot assert his right to contribution in the action initiated by the injured party since these two prerequisites have not been satisfied. Instead, the right of contribution is usually asserted in a subsequent action between the responsible tortfeasors.[44]

Those states which allow a right of contribution can be classified in two groups. The majority of states which have allowed contribution

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[39] Braun, *supra* note 32, at 170 n.25. Contribution should be distinguished from indemnity which seeks to completely shift the entire liability for damages from one tortfeasor to another on the basis of the different types of legal obligations owed by the tortfeasors to the plaintiff. *Id. But see* note 50 *infra.*

[40] Braun, *supra* note 32, at 169. Where several persons contracted, they were presumed to benefit equally and thus logic required that any burdens or obligations arising from their contractual relationship likewise be shared equally. This sharing would naturally include injuries resulting from their joint ventures. *See, e.g.,* Hobbs v. Hurley, 117 Me. 449, 451, 104 A. 815, 816 (1918); Appleford v. Snake River Mining, Milling, & Smelting Co., 122 Wash. 11, 15, 210 P. 26, 28 (1922). Consequently, where one of the contractual parties was required to pay more than his proportionate share, he was entitled to contribution. *Id.*; *see* Braun, *supra* note 32, at 169-70.

[41] *E.g.,* Bielski v. Schulze, 16 Wis.2d 1, 7, 114 N.E.2d 105, 108 (1962). Arguably, the logic present in the contract cases does not carry over to negligence cases since in the latter the duties owed to the injured party by each tortfeasor are most likely different. Braun, *supra* note 32, at 170.

[42] *See* Dole v. Dow Chemical Co., 30 N.Y.2d 143, 148, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972); Braun, *supra* note 32, at 167; Fleming, *supra* note 2, at 257; *e.g.,* CAL. CIV. PROC. CODE §875 (West Supp. 1977). Where this requirement is imposed, the practical result apparently would be to prevent an absent tortfeasor from being forced to contribute since there would be no joint judgment against him and the tortfeasor seeking contribution. This result would be avoided only if the absent tortfeasor could be joined under third-party practice. *See* text accompanying notes 64-70 *infra.*

[43] *E.g.,* CAL. CIV. PROC. CODE §875 (West Supp. 1977); N. C. GEN. STAT. §1B-1 (1969 Repl. Vol).

[44] *E.g.,* E.B. Wills Co. v. Superior Ct., 56 Cal. App.3d 650, 128 Cal. Rptr. 541 (Ct. App. 1976); Nationwide Mut. Ins. Co. v. Jewel Tea Co., 202 Va. 527, 532, 118 S.E.2d 646, 649 (1961). *But see* text accompanying notes 64-70 *infra.*

adopt the rule that equity is equality.[45] To determine each party's pro rata share under this rule, the court divides the total judgment (e.g. $8,000) by the number of responsible tortfeasors (e.g. 4) who are subject to the judgment.[46] Thus, if there are four responsible tortfeasors, each will be charged with 1/4 of the total debt or $2,000 each. If one tortfeasor pays the entire $8,000, he will have a right of contribution against the other three tortfeasors assuming that all previously stated requirements are met.[47] Nevertheless, the equality rule of contribution conflicts with the underlying purpose of the comparative negligence system. The purpose of a comparative negligence system is to apportion liability for damages according to the degree of negligence attributable to each person involved in the accident. Under the equality rule of contribution however, this purpose is not achieved. For example, if P has suffered $20,000 damage and is adjudicated to be 10% negligent and D_1 and D_2 are declared to be 30% and 60% negligent respectively, P may recover $18,000 ($20,000 less $2,000 attributable to his negligence) from either D_1 or D_2 or both under the principle of joint and several liability. Under an equitable rule of contribution, if P recovers the entire $18,000 from D_1 and subsequently D_1 seeks contribution from D_2, D_1 may only recover 50% or $9,000 instead of the $12,000 for which D_2 is responsible under a comparative negligence theory. D_2 has thus received a windfall of $3,000 and D_1 has been forced to bear more than his equitable share of damages.

Despite criticism of the equality rule of contribution,[48] only nine states have adopted the better reasoned rule of comparative contribution.[49] Comparative contribution distributes the pro rata share of

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[45] The statutes which apportion damages equally among tortfeasors are patterned after the 1955 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT drafted by the American Law Institute (ALI). 12 UNIF. LAWS ANN. 63 (1975). The ALI reports that Alaska, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Tennessee have adopted the 1955 version. 12 UNIF. LAWS ANN. Supp. 22 (1977); *see* PROSSER, *supra* note 3, at 310. Additional states have adopted the equality rule of contribution though not adopting the language used in the 1955 Act. *E.g.*, CAL. CIV. PROC. CODE §§875-80 (West Supp. 1977).

[46] *See, e.g.*, Baltimore County v. Stitzel, 26 Md. App. 175, 187, 337 A.2d 721, 728 (Ct. Spec. App. 1975); Hutcherson v. Slate, 105 W. Va. 184, 188, 142 S.E. 444, 446 (1928).

[47] *See* text accompanying notes 42-43 *supra*.

[48] *E.g.*, Dole v. Dow Chemical Co., 30 N.Y.2d 143, 148-52, 282 N.E.2d 288, 293-95, 331 N.Y.S.2d 382, 387-90 (1972); Bielski v. Schulze, 16 Wis.2d 1, 6, 114 N.W.2d 105, 107 (1962); Braun, *supra* note 32, at 169; Fleming, *supra* note 2, at 252.

[49] ARK. STAT. ANN. §34-1002(4) (1962 Repl. Vol.); DEL. CODE tit. 10, §6302 (1974); FLA. STAT. ANN. §768.31(3)(a) (West Supp. 1977); HAW. REV. STAT. §663-12 (Supp.

each tortfeasor subject to the judgment according to their relative degrees of fault; however, the injured party may still recover the total amount of damage to which he is entitled from any one tortfeasor.[50] Comparative contribution is a logical policy to accompany the adoption of a comparative negligence system. The adoption of the two doctrines carries the principle of equitable sharing of fault throughout the judicial system's involvement in the process of apportioning damages. Thus, in the previous hypothetical where P was 10% negligent, D_1 was 30% negligent, and D_2 was 60% negligent and total damages amounted to $20,000, if P recovered $18,000 from D_1 ($20,000 less $2,000 attributable to P's negligence), under a comparative contribution system D_1 could recover $12,000 from D_2 (6/9 × $18,000), the same amount that D_2 was responsible for to P.[51] This result

1975); N.Y. CIV. PRAC. LAW §1402 (McKinney 1976); S. D. COMPILED LAWS ANN. §15-8-15 (1967); UTAH CODE ANN. §78-27-40(2) (Supp. 1975). The majority of these statutes were patterned after the 1939 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT *found in* 9 UNIF. LAWS ANN. 230 (1957) which requires contribution in accordance with the relative degrees of fault of the tortfeasors. Delaware is the only jurisdiction to have adopted comparative contribution without adopting comparative negligence. *See* note 6 *supra*. Maine and Wisconsin have adopted comparative contribution by judicial decision. Packard v. Whitten, 274 A.2d 169 (Me. 1971); Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

[50] Bielski v. Schulze, 16 Wis.2d 1, 6, 114 N.W.2d 105, 107 (1962). The *Bielski* court also held that a tortfeasor is not barred from seeking contribution although his negligence is equal to or greater than the negligence of his co-tortfeasor. 16 Wis.2d at 6, 114 N.W.2d at 108. Thus, under *Bielski*, there is apparently no distinction between the operation of comparative contribution in a pure comparative negligence system and in a 50% system.

In addition, a doctrine of partial indemnity has been developed by the New York Court of Appeals in Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). In *Dole*, the court held that where the right to contribution could not be asserted because of the lack of a joint judgment against the defendant seeking contribution and the third party from whom contribution is sought and "where a third party is found to have been responsible for a part, but not all, of the negligence for which the defendant" has been found liable, the defendant may recover compensation from the third party on a theory of partial indemnity. *Id.* at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. This right may be asserted in a separate action. *Id.* The compensation to which the defendant is entitled depends upon the third party's relative responsibility. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391. In practical effect, partial indemnity may be an effective argument for defendants in states which either do not recognize comparative contribution or place procedural limitations on the right to contribution.

[51] This analysis assumes that all procedural limitations are satisfied, *see* text accompanying notes 42-43 *supra*, and that D_1 is not judgment proof. If D_1 is judgment proof, D *1* would still be required to pay P the entire $18,000 under the doctrine of joint and several liability unless that doctrine was modified. *See* text accompanying note 58 *infra*.

appears more equitable than granting D_2 a $3,000 windfall and overburdening D_1 by $3,000, as would occur under the equality rule of contribution.

The application of the doctrine of comparative negligence is also complicated by each jurisdiction's position on joint and several liability. At common law, joint tortfeasors were liable either individually or together for the entire damage caused to the injured party.[52] In multiparty actions, the co-tortfeasors have usually caused indivisible injury to the plaintiff through their separate acts and are therefore joint tortfeasors.[53] Historically, the doctrine of joint and several liability had several justifications. First the courts were primarily concerned with insuring a complete recovery for the injured party.[54] This justification loses force however when the plaintiff is no longer free from fault, because his equities are no greater than the tortfeasors he sues and his right to compensation is diminished automatically to the extent of the plaintiff's negligence under the doctrine of comparative negligence.[55] Second, the courts were concerned that the trier of fact would not be able to effectively apportion liability among the tortfeasors.[56] This second justification is untenable after the adoption of a comparative negligence system since the very foundation of that system assumes that the trier of fact is capable of apportioning liability and assigning a percentage of responsibility for each person's negligence.[57] There is considerable appeal to the proposition that a tortfeasor should only be held liable for the amount of damage attributable to his negligence. If the solvent or available defendant is held liable for only his share of the damages, as a natural consequence, the plaintiff must assume the damages attributable to the insolvent or unavailable defendant. Nevertheless, the plaintiff who is partially at fault should not be made to bear the entire burden of damages for which he was not responsible. Therefore, the better view would ap-

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[52] *See* text accompanying notes 33-35 *supra*.

[53] For example, assume P is driving a car down the highway when two cars traveling side-by-side in the opposite direction come over the crest of a hill at a high rate of speed slamming into P. The damage done by each driver cannot be separated. Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968).

[54] *Litigation*, *supra* note 35, at 776; *see* Nees v. Minneapolis St. Ry. Co., 218 Minn. 532, 16 N.W.2d 758, 763-64 (1944).

[55] Fleming, *supra* note 2, at 251.

[56] *See, e.g.*, Cleveland C. C. & St. L. Ry. Co. v. Hilligross, 171 Ind. 417, 86 N.E. 485, 487 (1908); Arnst v. Estes, 136 Me. 272, 8 A.2d 201 (1939); Nees v. Minneapolis St. Ry. Co., 218 Minn. 532, 16 N.W.2d 758, 763-64 (1944); *see* PROSSER, *supra* note 3, §52, at 315-16; *Litigation*, *supra* note 35, at 776.

[57] Schwartz, *supra* note 18, at 763.

pear to be to abandon the joint and several liability doctrine in favor of a compromise. Where an injured plaintiff who is partially at fault is either procedurally unable to bring a tortfeasor before the court or unable to recover a judgment against an insolvent tortfeasor and where there are other tortfeasors also responsible for the injury, the share of liability attributable to the unavailable or insolvent tortfeasor should be divided proportionately between the plaintiff and the remaining tortfeasors. These parties will then possess a right of contribution against the unavailable or insolvent tortfeasor.[58] In addition, the plaintiff would still have a cause of action against the absent or insolvent tortfeasor.[59] Thus, where P is 10% negligent, D_1 is 30% negligent, and D_2 is 60% negligent with total damages of P equaling $20,000 and D_2 is either unavailable or insolvent, D_2's 60% liability totaling $12,000 would be assumed proportionately by P and D_1 with P shouldering 25% (1/4) or $3,000 of D_2's share and D_1 bearing 75% (3/4) or $9,000 of D_2's share. By dividing D_2's share proportionately between P and D_1 according to their relative degrees of fault, P is not left totally uncompensated for the missing D_2's share and D_1 is not required to shoulder the entire damage attributable to the negligence of D_2. Rather, this compromise formulation of the doctrine of joint and several liability fosters the underlying policy in a comparative negligence system of apportioning damages in proportion to an individual's share of the negligence contributing to the accident. In addition, the modification requires the remaining persons to bear the absent or insolvent tortfeasor's share proportionately since neither is responsible for his being judgment proof or unavailable and both are responsible to some extent for occurrence of the accident. Unfortunately, most jurisdictions have retained the joint and several liability doctrine, thus neutralizing the equitable goals of the comparative negligence doctrine where a tortfeasor is absent or insolvent.[60]

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[58] *See* text accompanying notes 61-79 *infra* for a discussion of absent or insolvent tortfeasors. Obviously, the right of contribution possessed by the remaining tortfeasors is of limited practical value since the unavailable tortfeasor must be located before the right can be asserted and the insolvent tortfeasor is judgment-proof unless he subsequently acquires funds against which the right to contribution may be asserted.

[59] *See* text accompanying notes 72-76 *infra.*

[60] *E.g.,* Gazaway v. Nicholson, 190 Ga. 345, 348, 9 S.E.2d 154, 156 (1940); Saucier v. Walker, 203 So.2d 299, 302-03 (Miss. 1967); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1973); Caldwell v. Piggly-Wiggly Madison Co., 32 Wis.2d 447, 460, 145 N.W.2d 745, 752-53 (1966). *Contra,* KAN. STAT. ANN. §60-258a(d) (1976). The courts may have retained the joint and several liability rule because of the policy of fully compensating the injured party and the fact

In addition to the problems presented by the conflict between contribution statutes, the doctrine of joint and several liability, and comparative negligence, jurisdictions adopting comparative negligence will ultimately have to confront several administrative problems in apportioning damages. First, the courts must deal with the difficulties presented where all responsible parties are not before the court. A tortfeasor may be absent either because he is not subject to the court's jurisdiction or because he was not sued by the injured party. An absent tortfeasor will make the jury's job of evaluating relative negligence more difficult and any evaluation rendered would not be res judicata in a subsequent action against the absent tortfeasor.[61] Nevertheless, the injured party's right to be compensated should not be made to depend on the defendant's ability to decrease his liability by proving that some absent person was also significantly responsible in causing the injury.[62] The party defendant's rights may be protected by allowing him either to attempt to join the absent tortfeasor or to recover in a subsequent action against the absent tortfeasor for the absent tortfeasor's share of the liability which he was required to pay.[63] Frequently in multiparty accidents, P, D_1, and D_2 will all suffer personal and property damage. If P initiates the suit and sues only D_1, not only may D_1 have a right to counterclaim against P but D_1 may have a right to implead or join D_2.

The right of D_1 to implead D_2 depends upon D_1's ability to locate and bring D_2 within the court's jurisdiction for the purpose of service

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that the tortfeasor's actions were a substantial factor in causing the injury. *Litigation, supra* note 35, at 777.

If joint and several liability was the prevailing doctrine in the hypothetical jurisdiction, D_1 would be required to shoulder 90% of the liability though he was only responsible for 30%, clearly an inequitable result. Where P is not negligent, P would not be required to assume any of D_2's share and would be totally compensated even under the proposed modification of the joint and several liability doctrine.

[61] Li v. Yellow Cab Co., 13 Cal.3d 804, 823, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975)(dictum).

[62] *Litigation, supra* note 35, at 787. Whether the adoption of a comparative negligence system results in undermining the plaintiff's ability to collect his total judgment from one tortfeasor is debatable. Braun, supra note 32, at 166. Where the doctrine of joint and several liability is retained, the plaintiff would still be able to recover because the defendants are individually liable for that portion of the plaintiff's damages not attributable to the plaintiff's negligence. However, if that doctrine is modified, *see* text accompanying note 58 *supra,* plaintiff's ability is undermined only in proportion to his negligence since the amount of liability attributable to the absent or insolvent tortfeasor which the plaintiff is required to bear is determined by his share of the total negligence.

[63] *Litigation, supra* note 35, at 787-88.

of process.[64] In addition, D_1 may have difficulty in demonstrating a right to implead D_2,[65] since impleader would be based on D_1's right to contribution from D_2. However, this right does not exist in most jurisdictions until a joint judgment has been entered against D_1 and D_2 and until D_1 has paid more than his pro rata share.[66] At the early stage in the litigation when impleader is normally sought, neither of these requirements has been met and in jurisdictions where both of these requirements are imposed, federal and state courts have not granted impleader.[67] However, little justification exists for the continuation of these requirements. If D_1 can allege facts sufficient to indicate that if D_1 is found negligent, D_2 would be a joint tortfeasor and that P has a valid claim against D_2, D_1 should be allowed to implead D_2 especially when viewed from the perspective of reducing the number of lawsuits arising out of a single transaction or occurrence. Where the jurisdiction does not impose a requirement of joint judgment against D_1 and D_2 but only requires evidence of status as joint tortfeasors, the federal and state courts have granted impleader under rules of court similar to Federal Rule of Civil Procedure 14.[68] Still, the failure to implead D_2 should not limit P's

[64] FED. R. CIV. PROC. 14(a) provides for the impleader of a third party "who is or may be liable" to the defendant for all or part of the plaintiff's claim against the defendant. Whether the third party is or may be liable will be determined under local law since it is under that law that the right to contribution arises. *See* note 65 *infra*. A person could not be impleaded unless the defendant could use the court's power to serve process on the third party. Some states have also adopted provisions for impleader similar to the federal rule. *E.g.*, VA. S. CT. R. 3:10 (Supp. 1976).

[65] Impleader does not create a substantive right but is only a procedural device. F. JAMES, CIVIL PROCEDURE §10.20, at 505 (1965) [hereinafter cited as JAMES]; C. WRIGHT, LAW OF FEDRERAL COURTS §76, at 376 (3d ed. 1976) [hereinafter cited as WRIGHT]. Contribution is a substantive right. JAMES, *supra* at 507. *Contra* Roth v. Greyhound Corp., 149 F. Supp. 454, 455 (E.D. Pa. 1957)(contribution not part of substantive law in Indiana).

[66] *See Litigation, supra* note 35, at 787; text accompanying notes 42-43 *supra*.

[67] *E.g.*, McPherson v. Hoffman, 275 F.2d 466, 469 (6th Cir. 1960); Lewis v. City of Bluefield, 48 F.R.D. 435, 437-38 (S.D.W. Va. 1969); Fox v. Western N.Y. Motor Lines, 257 N.Y. 305, 178 N.E. 289 (1931).

[68] Impleader has been granted in federal court where state law required an independent action to gain the right to contribution. *E.g.*, D'Onofrio Const. Co. v. Recon Co., 255 F.2d 904, 906-07 (1st Cir. 1958). In addition, where the liability is only contingent, impleader will be allowed. Liability is contingent because when the defendant seeks to implead the third party, the defendant has not satisfied the procedural requirement of paying more than his pro rata share. The judgment granted will be shaped to allow relief only after the requirement of paying more than a pro rata share has been met. *E.g.*, Huggins v. Graves, 210 F. Supp. 98, 104-05 (E.D. Tenn. 1962), *aff'd*, 337 F.2d 486 (6th Cir. 1964); Kapp v. Bob Sullivan Chevrolet Co., 353 S.W.2d

right to proceed against D_1 since D_1's actions were a substantial cause of P's injury. Joinder of D_1 and D_2 might be based on a statute similar to Federal Rule of Civil Procedure 20 which allows joinder of a third-party where a party has a cause of action against the third party which arises out of the same transaction or occurrence.[69] The absent tortfeasor situation arguably will not be a frequent occurrence since either the injured party will sue all possible tortfeasors or one tortfeasor will bring in other tortfeasors through third-party proceedings.[70]

If neither P nor D_1 bring D_2 into the litigation, the court will be faced with an even more difficult task of apportioning damages among parties to the action. Courts constantly define the class to be considered in the apportionment of liability as the "parties."[71] Failure to consider the actions of D_2, the absent tortfeasor, in the litigation between P and D_1 will result in an inequitable and unrealistic result. Neither burdening D_1 with both his own and D_2's share of the liability nor leaving P partially uncompensated for D_2's actions is equitable. Therefore, the only acceptable class whose actions should be considered in apportioning damages would be all "persons" involved in the accident. On the other hand, any assignment of negligence to D_2 would not be binding on him in a subsequent action since his negligence was determined without affording him a full and fair opportunity to litigate that issue.[72] The better practice would be to

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5, 9 (Ark. 1962); Ball v. Causley, 51 Mich. App. 673, 676, 216 N.W.2d 490, 492 (Ct. App. 1974)(discretion of trial judge).

[69] State procedure varies widely; however, some jurisdictions allow joinder where the claim arises out of the same transaction or occurrence. *E.g.*, CAL. CIV. PROC. CODE §428.10(b) (West 1973); N.Y. CIV. PRAC. LAW §1002 (McKinney 1976); *see* Schwartz, *supra* note 18, at 257.

[70] Fleming, *supra* note 2, at 256-57. Another policy consideration that must be confronted is the asserted privilege of the plaintiff to control his lawsuit. JAMES, *supra* note 65, §10.20, at 509-10; WRIGHT, *supra* note 65, §76, at 375. Presumably, the objection here is that the addition of parties will prejudice the plaintiff by potentially confusing the issues and delaying the progress of the lawsuit. JAMES, *supra* note 65, §10.20, at 510. Nevertheless, the very adoption of impleader and joinder statutes arguably indicates a legislative judgment that routine delay is tolerable in the interest of fairness to all parties to the action. *See* JAMES, *supra* note 65, §10.20, at 510. In addition, a strong preference exists for avoiding circuity of actions and obtaining consistent results which must be balanced against the plaintiff's right to control his lawsuit. Somprotex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 439 n.6 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); WRIGHT, *supra* note 65, §76, at 375.

[71] *See* cases cited in note 9 *supra*.

[72] RESTATEMENT (SECOND) OF JUDGMENTS §88 (Tent. Draft No. 2, 1975). P and D_1 would be collaterally estopped in subsequent actions as to the total damages and their shares of responsibility since they were afforded an opportunity to litigate these issues.

consider the actions of all persons involved in the accident in assigning responsibility for the damages. While the court could not enter judgment against D_2 since he was not a party to the action, it could consider his actions in distributing the fault for the accident. Where P is not negligent, he would be totally compensated for his damages by D_1 regardless of whether the jurisdiction operates under the doctrine of joint and several liability or the proposed modification of that doctrine.[73] Where P is 10% negligent, D_1 is 30% negligent, and D_2 is adjudged 60% negligent with P's damages totaling $20,000, P would remain uncompensated for $2,000 as a result of his own negligence and would receive $6,000 from D_1 attributable to D_1's negligence. As to D_2's share, neither charging it all to P or to D_1 appears equitable, therefore D_2's share should be divided between P and D_1 proportionally with P assuming 25% (1/4) or $3,000 and D_1 assuming 75% (3/4) or $9,000.[74] P's judgment against D_1 should not merge his claim against D_2 since there is an independent claim against D_2 which was not completely satisfied.[75] P was required to assume $3,000 in

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Id; *see* Fleming, *supra* note 2, at 258 n.77. Arguably, the judgment in the trial between P and D_1 should be admissible in subsequent actions against D_2 to establish those facts necessarily determined in the first action. Despite the fact that D_2 is not present in the P-D_2 action leading to the judgment, the trial procedure provides adequate assurance of reliability sufficient to justify the admission of the prior judgment as evidence, though not conclusive evidence, within the official written statements exception to the hearsay rule. MCCORMICK, LAW OF EVIDENCE §318, at 739 (2d ed. E. Cleary 1972). The practice, however, has been to deny admissibility to prior judgments unless the requirements of res judicata have been met. *Id.*; 5 WIGMORE, EVIDENCE §1671a (Chadbourn rev. 1974); *e.g.*, Masters v. Dunstan, 256 N.C. 520, 526, 124 S.E.2d 574, 578 (1962); James v. Unknown Trustees, Etc., 203 Okla. 312, 314, 220 P.2d 831, 833-34 (1950). The denial of admissibility is based on the fear that the jury will grant too much weight to the findings of the prior judgment. MCCORMICK, *supra*.

[73] *See* text accompanying notes 58-60 *supra*. *But see* Fleming, *supra* note 2, at 257.

[74] *See* Fleming, *supra* note 2, at 258.

[75] The judgment in the P-D_1 action should not prevent P from subsequently suing D_2 since the later action does not proceed on the basis of the claim which was the subject of the former action. *See* JAMES, *supra* note 65, §11.9, at 550. Merger occurs only when the plaintiff prevails in an action and subsequently sues on the same cause of action. Where merger occurs, the previous judgment extinguishes the entire claim, merges it into the judgment, and prevents the subsequent litigation based on the same claim. *Id.* In the hypothetical case, P has not received complete satisfaction since he has recovered only $15,000 of a maximum award of $18,000. P Sued D_1 on the basis of the negligent acts of D_1 and D_2 which resulted in his injury. Under the doctrine of joint and several liability, D_1 would be liable for the entire damages or $18,000 and P would have received complete satisfaction leaving D_1 to locate a solvent D_2 and equalize their common burden. However, if the doctrine of joint and several liability is modified, *see* text accompanying note 58 *supra*, P is not fully compensated but rather P and D_1 share the burden of D_2's unavailability which is not attributable to

damages which were attributable to D_2 and should still have a claim for this amount.[76] Additionally, if no joint judgment is required,[77] D_1 would have a claim for contribution from D_2 since he paid more than his pro rata share under either a comparative contribution system or an equality contribution system.[78] Where one of the tortfeasors is insolvent but before the court, apportionment of damages could occur in the same way as in the case of the absent tortfeasor, allowing the negligent plaintiff and the solvent tortfeasor to bear the insolvent tortfeasor's liability proportionately according to their ratios of comparative fault.[78]

Finally, the courts must confront the apportionment problem when one tortfeasor has previously settled with the injured party and is not a party to the litigation. The Wisconsin Supreme Court has

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either P or D_1. P has then been forced to involuntarily assume $3,000 of D_2's liability and if he can subsequently locate D_2, he should be allowed to recover compensation from D_2 against a defense of merger since the claim has not been exhausted.

At common law, joint tortfeasors were jointly and severally liable for the entire damage suffered by the plaintiff, *see* text accompanying notes 33-35 and 52-60 *supra*, however the plaintiff could only recover one judgment because the plaintiff had one cause of action against the several parties. *E.g.*, Mitchell v. Tarbutt, 101 Eng. Rep. 362 (K.B. 1794); *see* PROSSER, *supra* note 3, §47, at 293. With the adoption of comparative negligence and the modification of the doctrine of joint and several liability, each tortfeasor is ultimately responsible for the amount of damages attributable to his share of the negligence and therefore the injured party should have a separate cause of action to recover compensation from each tortfeasor who bears a share of the responsibility. Thus, even though the plaintiff leaves the P-D_1 action with $3,000 of uncompensated injuries, he should possess a cause of action against D_2 for the amount of liability he is required to assume. An argument analogous to a right to partial indemnity may be asserted by P since D_2 is responsible for part, but not all, of the liability incurred by P. *See* note 50 *supra*.

D_2 may assert the P-D_1 judgment against P by collateral estoppel to bind P to the the total amount of damages and his share of the negligence which were determined in that judgment. *See* note 72 *supra*. The increase in the number of lawsuits from one, P-D_1 action, to three, P v. D_1, P v. D_2, and D_1 v. D_2 (seeking contribution), is justified because the damages and the risks of unavailability are distributed among the parties in proportion to their negligence resulting in a more equitable tort system. In addition, the increase in the number of lawsuits will be minimal since arguably the number of cases involving an absent tortfeasor will be reduced by the plaintiff's desire to sue all possible tortfeasors or by one tortfeasor bringing in other tortfeasors by third-party proceedings. *See* text accompanying note 70 *supra*.

[76] *See* Fleming, *supra* note 2, at 258; note 75 *supra*.

[77] *See* text accompanying notes 42 and 64-68 *supra*.

[78] *See* Fleming, *supra* note 2, at 258; text accompanying notes 37-51 *supra*. Allowing P and D_1 to subsequently sue D_2 in separate suits increases the number of lawsuits but also assures the equitable apportionment of the damages resulting from the accident.

developed a practical rule to govern this situation.[80] By settling with a tortfeasor, the injured party has satisfied a portion of his cause of action and thus releases the non-settling tortfeasor as to that portion.[81] Thus, if P and D_1 settle before trial, D_1 will no longer be a party to the action and will not be subject to a claim for contribution from a tortfeasor who is subsequently adjudged liable to P.[82] At trial, the jury will first determine the total damages (e.g. $20,000) and individual degrees of negligence; for example, P—10% negligent, D_1—30% negligent, and D_2—60% negligent.[83] Since P has settled with D_1, P's cause of action as to $6,000 has been satisfied regardless of the fact that D_1 may have only paid P $3,000 in settlement.[84] P can only recover 60% of the total damages from D_2 or $12,000.[85]

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[79] Fleming, *supra* note 2, at 251; Note, *Contribution Act Construed—Should Joint & Several Liability Have Been Considered First*, 30 U. MIAMI L. REV. 747, 754 (1976); *see* text accompanying notes 57-58 and 75 *supra*. *Cf.* RESTATEMENT OF RESTITUTION §85, comment h (1937)(where one of several co-obligors is insolvent, his share is to be divided proportionately). The adoption of this position significantly alters the doctrine of joint and several liability by modifying the solvent tortfeasor's duty to pay the entire damages. However, it does not abolish the doctrine since the solvent tortfeasor is still responsible for more liability than is attributable to his negligence. A second alternative for apportioning damages where an insolvent tortfeasor is present is to limit the injured party's recovery from the solvent tortfeasor to his share of responsibility, thus requiring the injured party to assume the full burden of the insolvent party's negligence. This latter result appears to be mandated by statute in Kansas, New Hampshire, and Vermont. Fleming, *supra* note 2, at 251-52; *see* statutes cited in note 6 *supra*. This theory would necessarily result in the abrogation of the joint and several liability doctrine.

[80] Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963).

[81] *Id.* at 189, 124 N.W.2d at 110. The settling tortfeasor would not be released from liability not related to the terms of the release. For example, where P settles out of court and releases or covenants not to sue D_1 only as to personal injury damage and subsequently discovers property damage arising from the same accident, P could still sue D_1 on the property claim.

[82] *Id.*; CAL. CIV. PROC. CODE §877 (West Supp. 1977). The only limitation that should be placed on P's ability to settle with and release D_1 is that their actions be in good faith. If given in bad faith, the release is an illegal contract and ineffective as against the non-settling tortfeasor, D_2. *See* River Garden Farms, Inc. v. Superior Ct., 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (Ct. App. 1972).

[83] The actions of D_1 necessarily would have to be considered in apportioning negligence; however, this would not necessitate making D_1 a party for the apportionment of damages. D_2 could argue that D_1 should bear a greater degree of responsibility if the actions of D_1 which are presented to the jury justify such a determination.

[84] Thus P would be prevented from settling with D_1, an unemployed truck driver, for $1,000 and then attempting to collect $17,000 from D_2, a large construction company with considerable assets.

[85] Pierringer v. Hoger, 21 Wis.2d 182, 191-92, 124 N.W.2d 106, 111-12 (1963). An alternative approach might be to apportion the entire damages to D_2 and then deduct

In administering a comparative negligence system, courts must be mindful of the ultimate purpose of that system, the equitable apportionment of damages according to the degrees of negligence attributable to each person involved in the accident. The doctrine of contribution, the limitations on when contribution may be asserted, and the doctrine of joint and several liability must be molded to advance this purpose while maintaining fairness among the parties and compensating the plaintiff. In all jurisdictions, regardless of whether comparative negligence has been adopted or is currently under consideration, legislatures should give serious consideraton to adopting comparative contribution,[86] abolishing limitations on the assertion of the right to contribution in the original litigation,[87] and modifying the doctrine of joint and several liability[88] so as to allow the apportionment of damages in proportion to fault while equitably affording adequate compensation to the injured party where a tortfeasor is absent or insolvent.

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P's share of the responsibility and the amount received by *P* in settlement from D_1. This approach would encourage settlement and thus require D_2 to assume the burden of not settling. Fleming, *supra* note 2, at 258-59.

[86] *See* text accompanying notes 48-51 *supra.*

[87] *See* text accompanying notes 67-68 *supra.*

[88] *See* text accompanying notes 52-60 *supra.*