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COMPARATIVE NEGLIGENCE—ITS DEVELOPMENT IN THE UNITED STATES AND ITS PRESENT STATUS IN LOUISIANA

*John W. Wade**

THE DEVELOPMENT OF COMPARATIVE NEGLIGENCE IN THE UNITED STATES

The common law doctrine of contributory negligence—that plaintiff's negligence bars his recovery completely—is of fairly recent origin. By consensus, its origin has been traced to *Butterfield v. Forrester*,¹ an 1809 King's Bench decision, in which a plaintiff, who was riding rapidly at dusk down a road in the town of Derby, fell and was hurt when his horse tripped over an obstruction that the defendant left protruding into the road. "Two things," said Lord Ellenborough, "must concur to support this action, an obstruction in the road by the fault of the defendant, and no want or care to avoid it on the part of the plaintiff."²

The explanation for the matter-of-fact adoption of the doctrine lies, I believe, in two pervasive policies of the common law that were usually not spelled out but still regarded as fundamental at the time. The first was the puritanical view that the courts should give no assistance to a wrongdoer who suffered an injury or a loss as the result of his wrongdoing. The courts let the loss lie where it fell. Aside from contributory negligence there are numerous examples of this attitude: no contribution between joint tortfeasors, no restitution to a party to an illegal contract, no relief to a "volunteer" who conferred a benefit on the defendant.

The second policy was a passion for a simple issue that could be answered categorically yes or no. The whole purpose of common law pleading was to reduce a legal dispute to issues of this nature. There are numerous other illustrations of this common law policy of shunning the compromise of an issue and limiting the possible responses to yes or no, all or nothing. Take, for example, contribution and indemnity between joint tortfeasors. If one of two joint tortfeasors had paid the whole of the claim and sought contribution, the answer was no (nothing), because he was seeking partial relief.

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1. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

2. *Id.* at 61, 103 Eng. Rep. at 927.

There were situations, however, in which he might successfully seek indemnity and thus obtain an answer of yes (all).³

A remarkably similar result soon developed with the doctrine of contributory negligence. It was a harsh, arbitrary rule. And, as always happens with rules of this nature, exceptions developed, to be used in especially appealing cases. The two principal exceptions were last clear chance and defendant's misconduct of a different nature than plaintiff's contributory negligence (intentional tort, willful and wanton misconduct, strict liability). Under these exceptions the plaintiff received all, rather than nothing.⁴ The common law simply did not consider the possibility of granting the plaintiff damages reduced in proportion to the measure of his negligence. That would be entirely beneath the dignity of the court.⁵

These two English common law policies were imported into this country. Thus, the contributory negligence doctrine promptly crossed the Atlantic and was adopted without question or dissent. Solidly established, it was nourished and strengthened by the coming of the Industrial Revolution and a recognized need to protect the growth of the nascent railroads as a means of binding the country together.⁶

The doctrine held almost undisputed sway in the United States and in the other common law countries during the nineteenth century. During the early part of the second half of the century, there were, however, some murmurs of discontent. Two midwestern states—Illinois and Kansas—did experience what was generally regarded as an aberration in condemning the fairness of the doctrine and developing a slight-gross doctrine—that a plaintiff might recover if his negligence was slight in comparison with that of the defendant. This was not what is today called comparative negligence; it was merely another exception to the contributory negligence rule, allowing the plaintiff to recover full damages. This "exception" was very conducive to appellate litigation and it soon faded away.⁷

3. See generally Wade, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence*, 21 VAND. L. REV. 938, 940-41 (1968).

4. It has sometimes been argued that with these exceptions, the differences averaged out and thus produced a fair result. But the averages benefited no individual. In each single case, one party or the other was treated unfairly.

5. Equity would have been ready to reach a compromise, and tort law might have been quite different if negligence cases had been tried in courts of equity instead of common law courts.

6. See generally Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

7. See Prosser, *Comparative Negligence*, in SELECTED TOPICS OF THE LAW OF TORTS 1, 30-33 (1954); Malone, *supra* note 6; Turk, *Comparative Negligence on the March* (pt. 2), 28 CHI-KENT L. REV. 304, 305-13, 317-18 (1950).

Two southern states—Georgia and Tennessee—went much further. They both creatively interpreted a railroad precautions statute as if it had expressly provided that when the statute was violated a plaintiff's contributory negligence would not bar his action but would have the effect of mitigating his damages.⁸ These seem to be the first instances in a common law jurisdiction of what we now call comparative negligence. The Georgia interpretation subsequently was expressly incorporated into the statute and exists today.⁹ The Tennessee statute was amended to eliminate the interpretation in 1959.¹⁰ Both states have had other developments, too. Georgia extended the doctrine of the railroad cases to other cases through judicially imaginative use of another statute, and the state is generally classified today as a comparative negligence state, following the modified system. Through a series of cases beginning in 1858, Tennessee developed, independent of statutes, a unique doctrine of "remote contributory negligence," which does not bar a recovery but has the effect of mitigating damages. The Tennessee court has repeatedly denied that this is comparative negligence and has explained that it is based on a causation principle.¹¹ While the doctrine still exists, the exact meaning and scope of remote contributory negligence have never been really clarified, and most commentators have hesitated to classify Tennessee as a comparative negligence state.¹²

The next significant event came in the current century. In 1908, Congress passed the Federal Employers Liability Act (FELA),¹³ providing that in actions for injuries to railroad employees engaged in interstate commerce, the employee's "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."¹⁴ This is comparative negligence of the "pure" type. Congress later used the same provision in the Jones Act¹⁵ and in the Death on the High Seas Act.¹⁶ The American admiralty rule had always recognized a form of comparative negligence, dividing the

8. On Georgia, see Hilkey, *Comparative Negligence in Georgia*, 8 GA. B.J. 51 (1945); Turk, *supra* note 7, at 326-33. On Tennessee, see Turk, *supra* note 7, at 313-17; Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 430-44 (1974).

9. GA. CODE ANN. § 105-603 (1979).

10. TENN. CODE ANN. § 65-1209 (1976).

11. See Wade, Crawford & Ryder, *supra* note 8, at 430-44.

12. *Id.* See also Turk, *supra* note 7, at 316.

13. 45 U.S.C. §§ 51-60 (1976).

14. 45 U.S.C. § 53 (1976).

15. 46 U.S.C. § 688 (1976).

16. 46 U.S.C. § 766 (1976).

damages evenly, or pro rata.¹⁷ In 1975, the Supreme Court, in *United States v. Reliable Transfer Co.*,¹⁸ judicially changed this rule to adopt the pure form, diminishing the damages in proportion to the relative percentages of fault. The federal government is thus fully committed to the pure form of comparative negligence.

In 1910, two years after passage of the FELA, Mississippi passed a similar statute applying to all types of negligence actions,¹⁹ thus becoming the first state with a comprehensive statute on the subject. Influenced by the FELA, over a dozen states passed similar statutes confined to railroad employees engaged in intrastate activities or to some other limited group of plaintiffs.

In 1913, Nebraska adopted a slight-gross system,²⁰ allowing a plaintiff to recover diminished damages if his negligence was slight in comparison with the defendant's. There was a gap until 1931, when Wisconsin adopted a statute modeled on the FELA, but following a modified system (plaintiff can recover diminished damages if his negligence was less than the defendant's).²¹ South Dakota followed with a Nebraska slight-gross type of statute in 1941.²² Arkansas enacted a pure-form statute in 1955, but in 1957 amended it to adopt the modified form.²³ And Maine adopted a modified form in 1965.²⁴

Thus, by the latter 1960's, only seven states (plus the federal government) had abandoned contributory negligence and substituted some form of comparative negligence. They offered scattered approaches and there was no reason to anticipate any significant changes in the future.

In the meantime, England, where contributory negligence originated, had adopted a comparative negligence statute in 1945,²⁵ and most of the common law countries had followed the example.²⁶ It

17. *E.g.*, *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855).

18. 421 U.S. 397 (1975).

19. MISS. CODE ANN. § 11-7-15 (1978).

20. NEB. REV. STAT. § 25-1151 (1975).

21. WIS. STAT. § 895.045 (1913). The statute has since been amended to provide that the plaintiff can recover if his negligence was "not greater than" the defendant's. WIS. STAT. § 895.045 (West 1979).

22. S.D. COMPILED LAWS ANN. § 20-9-2 (1978).

23. ARK. STAT. ANN. § 27-1730.1-2 (1957) (now appearing as ARK. STAT. ANN. §§ 27-1763 to 1765 (1977)).

24. ME. REV. STAT. ANN. tit. 14, § 156 (1978).

25. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28.

26. *See* J. FLEMING, TORTS 255-60 (5th ed. 1977). *See also* UNIVERSITY OF ALBERTA INSTITUTE OF LAW RESEARCH AND REFORM, CONTRIBUTORY NEGLIGENCE AND CONCURRENT WRONGDOERS (Report No. 31, 1979).

was said that the United States was "the last stronghold" of contributory negligence.²⁷

Also in the meantime something else, more important in this connection, was occurring. The idea of no-fault insurance, or motor vehicle accident reparations, had been conceived on the basis of the usual medical-payments clause of the automobile liability policies, had taken concrete form in a model act, and was being vigorously pushed. Keeton and O'Connell's *Basic Protection for the Traffic Victim* was published in 1965, and other books and articles were stirring up widespread public interest. The principal basis of the legislative campaign was an attack on the common law tort system for designated weaknesses. And the foremost target was the contributory negligence rule. There was no way to defend its obvious unfairness and the legal profession knew it.²⁸ The common law negligence system might be more effectively defended against the onslaught if this critically weak portion of the system was straightened out. So members of the legal profession—plaintiff's attorneys and defendant's attorneys alike—began to support statutes adopting some form of comparative negligence.²⁹

The result was a tidal wave of new statutes. Four states passed statutes in 1969,³⁰ one in 1970,³¹ and four in 1971.³² 1973 was a banner year: nine statutes were passed³³ and the Florida Supreme Court judicially adopted the pure form of comparative negligence in the landmark case of *Hoffman v. Jones*.³⁴ With these additions, the number of states totaled twenty-six in 1973; thus, a majority of the states had now abandoned contributory negligence.

The no-fault drive had begun to bog down by this time, and the fear of a federal no-fault statute was diminishing. Only Kansas passed a comparative negligence statute in 1974. By 1975, the movement had picked up again, but by now it was motivated not so much by fear of

27. Prosser, *supra* note 7, at 3.

28. The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one, the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one has succeeded in justifying that as a policy, and no one ever will.

Id. at 7.

29. See, e.g., Special Committee on Automobile Accident Reparations, *Report*, 94 A.B.A. REP. 559, 609-11, 675-79 (1969).

30. Hawaii, Massachusetts, Minnesota, and New Hampshire. Citations are given in note 35, *infra*.

31. Vermont.

32. Colorado, Idaho, Oregon, and Rhode Island.

33. Connecticut, Nevada, New Jersey, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.

34. 280 So. 2d 431 (Fla. 1973).

no-fault as by a desire to produce a better system, one that would be as fair as possible to all parties. The supreme courts of California and Alaska judicially adopted comparative negligence, and, following the lead of Florida, determined that the pure form was the fairest. New York, which already had a no-fault statute and was not acting for the purpose of averting one, also opted for the pure form. Montana was the fourth state in 1975. Pennsylvania was the only state in 1976.

There were no new developments until 1979. In this year the supreme courts of Michigan and West Virginia judicially adopted comparative negligence and Louisiana enacted statutory provisions to this effect. Louisiana and Michigan chose the pure form and West Virginia a modified form.

There is thus a present total of thirty-five states that are properly classified as comparative negligence states.³⁵ This is 70% of the states, well over two-thirds. Also to be mentioned are Puerto Rico³⁶ and the Canal Zone,³⁷ and several additional states with statutes covering more limited factual situations.³⁸

A breakdown of the types of comparative negligence adopted by the individual states is as follows:

(1) States adopting the pure form of comparative negligence (nine): Alaska, California, Florida, Louisiana, Michigan, Mississippi,

35. See *Kaatz v. Alaska*, 540 P.2d 1037 (Alas. 1975); ARK. STAT. ANN. §§ 27-1763 to -1765 (1977); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); COLO. REV. STAT. ANN. § 13-21-111 (1978); CONN. GEN. STAT. ANN. § 52-57(h) (West 1979) (general); 1979 Conn. Legis. Serv., Pub. Act No. 79-483, § 4 (West 1979) (products liability); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); GA. CODE ANN. §§ 66-402, 94-703, 105-603 (1979); HAW. REV. STAT. § 663-31 (1976); IDAHO CODE §§ 6-801 to -806 (1979); KAN. STAT. ANN. §§ 60-258a to -258b (1976); 1979 La. Acts, No. 431; ME. REV. STAT. ANN. tit. 14, § 156 (1978); MASS. GEN. LAWS ANN. ch. 231, § 85 (Law. Co-op. 1978); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); MINN. STAT. ANN. § 604.02 (West 1978); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 27-1-702 (1979); NEB. REV. STAT. § 25-1151 (1975); NEV. REV. STAT. § 41-141 (1977); N.H. REV. STAT. ANN. § 507:7-a (1977); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West 1978); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OKLA. STAT. ANN. tit. 23, §§ 11-12 (West 1979); OR. REV. STAT. § 18-470 (1977); PA. CONS. STAT. ANN. tit. 42, § 7102 (1979); R.I. GEN. LAWS §§ 9-20-4 to -4.1 (1978); S.D. COMPILED LAWS ANN. § 20-9-2 (1978); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1978); Utah CODE ANN. §§ 78-27-37 to -43 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. § 4.22.010 (1979); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); WIS. STAT. ANN. § 895.045 (West 1979); WYO. STAT. ANN. § 1-1-109 (1977). See also *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (admiralty); 45 U.S.C. § 53 (1976) (FELA); 46 U.S.C. § 688 (1976) (Jones Act); 46 U.S.C. § 766 (1976) (Death on High Seas Act).

36. P.R. LAWS ANN. tit. 31, § 5141 (1976).

37. C.Z. CODE tit. 4, § 1357 (1963).

38. See notes 47-51, *infra*.

New York, Rhode Island, and Washington. In addition, the federal statutes adopt the pure form, as do Puerto Rico and the Canal Zone. The North Dakota statute is worded as adopting a modified form (plaintiff's negligence "not as great as" that of defendant), but the state supreme court has construed it as having "in effect adopted the pure comparative negligence concept at least in instances involving more than one tortfeasor."³⁹ In addition to its general statute, Connecticut has enacted a special statute applying the pure form to cases involving products liability.⁴⁰ There are numerous states with statutes using the pure form for more limited fact situations, such as railroad employees in intrastate employment. Finally, it should be noted that England and all of the other common law countries shifting to comparative negligence have taken the pure form.

(2) States adopting the modified form allowing recovery if the plaintiff's fault is "not greater than" that of the defendant (thirteen): Connecticut, Hawaii, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Texas, Vermont, and Wisconsin.⁴¹

(3) States adopting the modified form and requiring that the plaintiff's fault be "not as great as" that of the defendant (eleven): Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota,⁴² Oklahoma, Utah, West Virginia, and Wyoming.

(4) States adopting the slight-gross system (two): Nebraska and South Dakota.

This makes a total of thirty-five states.

(5) States that may be generally classed as continuing to follow the common law rule of contributory negligence (fifteen): Alabama, Arizona, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, and Virginia. There are questions as to whether some of these states belong in this list or will remain in it long. For example, Tennessee has its unique doctrine of remote contributory negligence, which is a sort of comparative negligence based on causation; and the state supreme court has recently declined to rule on whether it should judicially equate this with comparative negligence, on the ground that the issue was not properly raised in the court below.⁴³ Missouri has its own unique doctrinal approach—the

39. *Bartels v. City of Williston*, 276 N.W.2d 113, 121 (N.D. 1979).

40. 1979 Conn. Legis. Serv., Pub. Act No. 79-483, § 4 (West 1979).

41. Several states in this group had previously been in group three, but recently amended their statutes.

42. See text at note 39, *supra*.

43. *Street v. Calvert*, 541 S.W.2d 576 (Tenn. 1976). See notes 8-12, *supra*, and accompanying text.

"humanitarian doctrine"—and its supreme court has recently declined to pass on the judicial adoption of comparative negligence "for the present" and in a case in which the issue was not properly raised below.⁴⁴ The Illinois Supreme Court has recently held that contribution will be enforced between joint tortfeasors in proportion to the relative fault of the parties;⁴⁵ and members of the court and subsequent commentators have openly speculated that this is a prelude to judicial adoption of comparative negligence.⁴⁶

In addition, seven of these contributory negligence states have statutes applying comparative negligence in a limited area. Thus, the states of Iowa, Kentucky, North Carolina, and Ohio have "state FELA acts," applying to intrastate railroad employees.⁴⁷ Arizona has a similar employment statute covering certain hazardous occupations.⁴⁸ Virginia has a statute applying to railroad-crossing accidents.⁴⁹ And South Carolina had a statute covering automobile accidents,⁵⁰ but it has just been declared in violation of the equal protection clause because of its limited coverage.⁵¹

This leaves only five states—Alabama, Delaware, Indiana, Maryland, and New Mexico—untouched by some aspect of comparative negligence. This contrasts ironically with the situation only twenty-five years ago, when there were only five states that recognized comparative negligence.

A further comment on the national situation is warranted. The contemporary trend is an accelerating one toward the pure form. Of the last eight states to turn to comparative negligence, five have selected the pure form. To these should be added the 1979 statute in Connecticut applying the pure form to products liability cases and the 1979 North Dakota decision construing its statute to apply the pure form "at least in instances involving more than one tortfeasor."⁵²

Another development should be mentioned here. This is the drafting and promulgation of the Uniform Comparative Fault Act. In

44. *Epple v. Western Auto Supply Co.*, 548 S.W.2d 535, *on re-argument*, 557 S.W.2d 253 (Mo. 1977).

45. *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437, (1978).

46. See Zaremski & Berns, *Skinner v. Reed-Prentice: Genesis of Comparative Fault in Illinois?*, 67 ILL. B.J. 334 (1979).

47. IOWA CODE ANN. § 479.124 (West 1949); KY. REV. STAT. ANN. § 277.320 (Baldwin 1971); N.C. GEN. STAT. § 62.242 (1975); OHIO REV. CODE ANN. § 4973.09 (Page 1973).

48. ARIZ. REV. STAT. ANN. § 23-806 (1971).

49. VA. CODE § 56-416 (1978).

50. S.C. CODE § 15-1-300 (1976).

51. *Markey v. Kirby*, 245 S.E.2d 604 (S.C. 1978).

52. See notes 39-40, *supra*, and accompanying text.

1973, the National Conference of Commissioners on Uniform States Laws (NCCUSL) decided that the time was ripe and the circumstances appropriate for the Conference to undertake to draft a uniform act in the field. The states were adopting statutes hastily, without due consideration of many problems involved and, therefore, without adequate treatment of them. Legislative decisions were often affected by political considerations rather than by a fair and objective evaluation of the competing interests. The hodge-podge of provisions and basic approaches and the inevitable need for a continuous stream of decisions filling in gaps and details by statutory construction or judicial improvisation all pointed to the need for a careful and complete study of the problem. The NCCUSL Committee worked on the task for five years. It received suggestions and criticisms on interim drafts of the Act from many persons and groups. Following its adoption by the Conference in 1979, the Act was not presented to the American Bar Association for approval because of some objections raised to some of its provisions by the Section on Insurance, Negligence, and Compensation Law. Negotiation has worked out the major conflicts, and section 3 of the Act was amended by the NCCUSL in 1979. It is now expected that the Act will be submitted to the House of Delegates of the ABA for approval, and it is hoped that, following, that the Act will be pressed before the state legislatures for widespread adoption.

The Act, in its revised form, is reproduced in an appendix at the end of this symposium.⁵³ In discussing the new Louisiana statutory provisions in the latter half of this article, I have occasion to compare them with the provisions of the Uniform Act.

EVALUATION OF THE NEW LOUISIANA PROVISIONS— SOME PROBLEMS AND SUGGESTIONS

The new Louisiana provisions on comparative negligence and contribution between joint tortfeasors have recently been passed, to take effect in August of 1980.⁵⁴

As one who has for many years been a diligent student of the proper legal effect of plaintiff's fault in tort and restitution actions and who has tried to maintain a balanced and objective viewpoint on

53. In a breakfast talk at the 1978 ABA Convention, I described the Act and discussed the basis of some of the decisions made in drafting it. See Wade, *The Uniform Comparative Fault Act*, 14 FORUM 379 (1979). For a concise summary of what the Act does, see *id.* at 381-83. See also Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 374-75 (1978) [hereinafter cited as *Products Liability*].

54. See 1979 La. Acts, No. 431, §§ 1 & 2. For the text of this Act, see pages 289-92, *supra*.

the matter, I have undertaken to study these provisions with a view toward evaluating their soundness and efficacy and perhaps offering a few constructive suggestions.

Interpretation of the Louisiana Provisions

As I read the Louisiana statute, it seeks to allocate to each party to an action his proportionate responsibility for the injury depending upon his percentage of the total fault as determined by the trier of fact.

This goal is praiseworthy from a theoretical standpoint and is highly desirable if it can be attained from a practical standpoint, and especially if it has indeed been actually attained by the provisions of the statute.

To accomplish this the statute provides for:

(1) contribution between joint tortfeasors on the basis of proportionate fault of the parties;

(2) reduction of a negligent plaintiff's recovery in proportion to his percentage of fault;

(3) bringing in of third-party defendants; and

(4) submission to the jury of appropriate questions to determine the amount of a claimant's damages and the percentages of fault of the relevant parties, so that the judge can allocate the ultimate responsibility of each person.⁵⁵

A few simple fact situations will serve to illustrate the operation of the statute.

Case One. A sues B. B joins C as a third-party defendant. The jury finds A's damages at \$10,000, A not negligent, B 60% negligent, and C 40% negligent. Outcome: A collects \$6,000 from B and \$4,000 from C.

Case Two. A sues B and C. The jury finds \$10,000 damages, A 20% negligent, B and C each 40% negligent. Outcome: A collects \$4,000 from both B and C and suffers \$2,000 loss himself.

This is fine! It produces a result that is entirely reasonable and perfectly fair to each party concerned. It is much better than most of the statutory provisions. Thus, it avoids the mix-up of joining together a reduction of the claimant's recovery by a percentage based on his fault with an apportionment among the defendants on a basis of pro rata (virile) portions. It rejects the crude and arbitrary rule of both of the modified systems of comparative negligence and thus

55. This is called the "equitable share of the obligation" in the Uniform Act. UNIFORM COMPARATIVE FAULT ACT § 2(c). For the text of the Uniform Act, see the appendix to this symposium, *infra* p. 419.

avoids all of their serious drawbacks.⁵⁶ Its use of special interrogatories eliminates the uncertainties involved in the general verdicts under the FELA and the Mississippi statute and affords the trial judge a reasonable basis for proper control of the jury.

All of this is entirely to the good. The vital part of the new Louisiana statutory provisions is quite satisfactory and applies without trouble in the basic situations. But as the situations become complicated, solutions become oblique or uncertain because of some of the new language or because of the absence of any clear provision on point.

Method of Allocation of Ultimate Responsibilities

Consider the problem of liability in solido and the dividing of the obligation between the obligors as set forth in Civil Code article 2103. As I read this it means that each tortfeasor liable in solido with others is liable to the claimant for the full amount but that the right of contribution (together with third-party practice) permits a determination of what the ultimate responsibility of each tortfeasor will be. This seems quite workable and is similar to the arrangement in the Uniform Act, which speaks of joint and several liability and the "equitable share of the obligation."⁵⁷

The whole matter is thrown into some doubt, however, by the amendment added as a second paragraph to article 2324. It provides:

Persons whose concurring fault has caused injury, death or loss to another are also answerable, in solido, provided, however, when the amount of recovery has been reduced in accordance with the preceding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of negligence has been attributed, reserving to all parties their respective rights of indemnity and contribution.⁵⁸

56. For an exposition of the disadvantages of the modified systems, see Wade, *The Uniform Comparative Fault Act*, 14 FORUM 379, 384-86 (1979). For elaboration of the Uniform Act, see Wade, *A Uniform Comparative Fault Act—What Should it Provide?*, 10 U. MICH. J.L. REF. 220, 223-26 (1972); UNIFORM COMPARATIVE FAULT ACT Prefatory Note. See also Sowle & Conkle, *Comparative Negligence vs. The Constitutional Guarantee of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083. The Uniform Act adopts the pure system.

57. UNIFORM COMPARATIVE FAULT ACT § 2(c).

58. 1979 La. Acts, No. 431, § 1, amending LA. CIV. CODE art. 2324. The clause imposing in solido liability may present a problem in that the language may be a little too broad. If the injury is divisible or there are separate losses so that there are separate harms, then each tortfeasor is liable only for the harm that he caused. See RESTATEMENT (SECOND) OF TORTS § 433A (1965) (apportionment of harm to causes). To prevent an impairment of this recognized rule, it may be desirable to insert a word like "single" or "indivisible" before the word "injury" in the clause.

What does this mean? The following example may be helpful:

Case Three. *A* sues *B*, *C*, *D*, and *E*. The jury finds \$10,000 damages, *A* 20% negligent, *B* 40% negligent, *C* 20% negligent, *D* and *E* each 10% negligent. *A*'s damages are reduced 20% (or to \$8,000) because of his contributory negligence. *B* is liable in solido for the full \$8,000 but can obtain contribution from the others to reduce his ultimate responsibility to \$4,000. *A* does not have attributed to him a "greater degree of negligence" than *C*, who is therefore also liable in solido for the full amount but can obtain contribution from the others to reduce his ultimate responsibility to \$2,000. Since *A* does have a greater degree of negligence attributed to him than do *D* and *E*, he cannot recover from them in solido and their liability to him is only \$1,000 each. Why the distinction is drawn is not clear, assuming they would have been entitled to contribution too, if held liable for more than their share.

As I analyze it, the complicating feature is a hidden factor not mentioned in the statutory provisions and therefore left entirely unsettled. That is the question of who bears the loss when one of the tortfeasors is insolvent and thus not able to pay his share of the obligation.

There are several possible solutions: (1) Let the claimant bear the loss if he is contributorily negligent. Some of the state statutes reach this result by construing their statutes to abolish joint and several liability and imposing liability on each joint tortfeasor for his share alone. This is unfair to the injured party. (2) Let the tortfeasors bear the loss by either, (a) leaving it on the tortfeasor required to pay the full amount of the obligation or (b) spreading it among the solvent tortfeasors. This is unfair to one or more of the tortfeasors. (3) Spread the loss among all the parties at fault, including a negligent claimant. The last is the fair solution and the one adopted in section 2(d) of the Uniform Act. In the case above, for example, assume that *C* is unable to pay. His \$2,000 is spread among the other parties thus, 2/8 to *A*, 4/8 to *B*, 1/8 to *D* and *E* each; these obligations would then be the same as if *C* had never been joined as a party.

Take another illustration:

Case Four. *A* sues *B* and *C*. The jury finds \$10,000 damages, *A* 40% negligent, *B* 30% negligent, and *C* 30% negligent. *B*'s obligation (\$3,000) is uncollectible.

Under the new article 2323, *A* can collect only \$3,000 from *C* and he must bear alone the loss of the \$3,000 that was to be paid by *B*. The Uniform Act, on the other hand, would divide that \$3,000 so that *A* would bear 4/7 of it and *C* would bear 3/7 of it. As between *A*

and C, the proportion of the loss remains exactly the same as the jury had originally set it.

I submit that this is the fairest solution and therefore suggest that it replace the provision found in the second paragraph of the new article 2323.

Proportion of fault for parties and non-parties

New articles 2323 and 1811 speak of the fault of "another person or persons" and indicate that their proportion of fault is to be determined. It is not clear whether the "person" must be a party to the action or may be any person whose fault contributed to the harm. The decision should be that the determination of fault proportions is confined to persons who have been made parties to the action. If it extends to others, the court's ruling on their proportions is not binding upon them and cannot be collected from them, and the whole question of what is to be done about their shares of the responsibility is left unresolved. Both plaintiffs and defendants have sufficient incentives to join other negligent persons, since this will have the effect of reducing their percentages of responsibility.

Matters Not Treated by the Louisiana Provisions

There are a number of important matters that are not treated in the new Louisiana provisions. While some of them may possibly be worked out by the courts, others are better treated by legislation; and it seems best to handle them in one comprehensive act. The Uniform Act attempts to do this. I list some of these matters.

Set-off. Suppose that both parties to an accident were negligent and both were injured. This is more complicated than it appears at first sight. There are several types of situations calling for different results. For example: If both parties are able to pay from their own assets, set-off is appropriate. If both parties have full insurance coverage, set-off would confer its benefit on the insurance carriers rather than the parties and this seems inappropriate. If one party can pay and the other cannot, set-off protects the first party. If one party has insurance and the other has not and cannot pay, neither set-off nor the lack of set-off fully takes care of the problem. The current set-off provision in the Uniform Act is an amendment adopted in 1979 and has the approval of plaintiff's attorneys and defendant's attorneys alike. It seeks to cover all of these situations and 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 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.⁵⁹

Effect of release of one tortfeasor on the contribution rights of the others. While it is clear that an injured party can release one of several tortfeasors who are liable in solido without releasing the others,⁶⁰ the question remains of what rights of contribution the others should have against the released tortfeasor. There are three possible solutions to this problem, and each of them is subject to objections. The first—to allow contribution—discourages settlements, since a defendant (or his insurance carrier) will not be inclined to settle if he remains subject to additional liability to the other tortfeasors. The second—to refuse to allow contribution—is conducive to collusion between the plaintiff and the settling tortfeasor and may be quite unfair to the other tortfeasors. The third solution is to provide that the injured party's claim to damages is reduced by the proportionate part of the claim that should have been paid by the settling tortfeasor. While this has some tendency to discourage the injured party from settling with a single tortfeasor, it seems the least objectionable of the three solutions and is the one adopted in section 6 of the Uniform Act. It also appears to be the position now followed in Louisiana.⁶¹ But it may be well to check to see that a statutory provision is not needed to insure that the released tortfeasor can be joined as a third-party defendant for the purpose not of obtaining a judgment against him but of determining his fault-proportion of the total obligation.⁶²

What kind of conduct by defendants is covered by the new Louisiana provisions? The answer to this question is not entirely clear. Article 2103, providing for dividing the obligation among the defendants according to their fault, refers to an offense or a quasi-offense.

59. UNIFORM COMPARATIVE FAULT ACT § 3 (as revised in 1979).

60. Article 2203 of the Civil Code provides that rights against the others may be "expressly reserved."

61. For exposition of the Louisiana law, see *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975); F. STONE, *TORT DOCTRINE* § 112(1), in 12 *LOUISIANA CIVIL LAW TREATISE* 153-54 (1977). Both of these are speaking of contribution on the basis of virile portions. But there is no reason to anticipate that the same position would not be taken under the new provision putting contribution on the basis of proportionate fault.

62. Some change for the purpose may be needed in Civil Code article 2103, or in article 1111 of the Louisiana Code of Civil Procedure or in a new provision. Of course, no provision was needed when contribution was on the basis of virile portions, since the parties could determine for themselves what the released tortfeasor's share was. For handling in the Uniform Act, see UNIFORM COMPARATIVE FAULT ACT § 2(a).

But article 2323, referring to plaintiff's fault, speaks only of contributory negligence. Does this apply to such conduct as that imposing liability for strict liability (for products or abnormally dangerous activities), nuisance, intentional torts, or breach of warranty? The Uniform Act refers in section 1(a) to "an action based on fault seeking to recover damages for injury or death to person or harm to property" and provides that the conduct "includes acts or omissions that are in any measure negligent or reckless toward the person or property . . . of others or that subject a person to strict tort liability [and] . . . includes breach of warranty." There may be reason to clarify the Louisiana provisions.

What kind of conduct on the part of the plaintiff is covered by the Louisiana provision? The Louisiana provision clearly covers contributory negligence. Under all conditions? Suppose that under the previous case law contributory negligence did not bar plaintiff's recovery in the particular situation—such as, for example, suit on the basis of defendant's strict liability or recklessness or in a last-clear-chance situation. Fairness would seem to indicate that the statute should apply here, too. The case law developed under the old all-or-nothing principle. The reduced recovery under comparative negligence should now replace both "all" and "nothing." The language of article 2323 states the "effect" of contributory negligence "when [it] is applicable to a claim for damages." This might be construed as meaning that the article applies only when contributory negligence would previously have barred recovery, which would be unfortunate. In any event, it is desirable that the statutory provisions indicate a definite answer to this question. The Uniform Act provides in section 1(a) that its "rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under legal doctrines such as last clear chance." I strongly recommend a provision to this general effect.

What about other forms of plaintiff's fault, such as assumption of risk, misuse of a product, or avoidable consequences? These concepts raise difficult problems of verbalization since the terms cover various meanings in different situations, such as plaintiff's fault, consent to the conduct, lack of duty or breach of duty on the part of the defendant, or lack of proximate cause. Reduction of damages for comparative fault should be confined to the meaning of those terms involving plaintiff's fault and should not apply to the others. The problem is how to say this clearly. The Louisiana provisions resolve the problem by ignoring it and leaving it for the courts to solve without direction. The Uniform Act meets the problem by saying in section 1(b) that the Act covers and includes "unreasonable assumption of risk not constituting an 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." The language may perhaps be improved upon, but it at least gives the court useful guidance. Failure to make provision has given some other states considerable trouble and the Louisiana legislature should seriously consider the matter.

What should be the standard for the trier of fact to use in determining percentages of fault? This is a difficult question, ignored in most statutes and not treated in the Louisiana provisions. Obviously, there is no precise test. This has been one of the criticisms offered by opponents of comparative negligence. But just as obviously, any reasonable apportionment, though it may be somewhat crude, is far superior to that ultimate crudity—the all-or-nothing position of the English common law. In England, where the jury is no longer used in personal-injury cases, the innate imprecision is frankly recognized in the English statute, which gives the judge authority to reduce the damages "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."⁶³ This would probably be more confusing than helpful to a jury. In any event, consideration needs to be given not only to the measure of culpability but also to the relative closeness of the causal relation between the actor's conduct and the injury. Several courts have construed statutes to this effect and others have dealt in terms of comparative causation, especially in cases of products liability.⁶⁴ The doctrine of last clear chance should also be absorbed into comparative fault. Section 2(b) of the Uniform Act provides that 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 relations between the conduct and the damages claimed." The comment to the section explains this further and may offer assistance to the judge in instructing the jury.

How are parties to be treated when one party's fault is imputed to another or would have barred another's cause of action under contributory negligence? Some examples: (1) The plaintiff is injured by negligence of an employee and the employer is not independently negligent. They are normally treated as a single party for the purpose of determining the percentage of fault. (2) One spouse is injured by the negligence of a tortfeasor. The other spouse seeks to

63. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28. Maine's statute allows damages to be "reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage." ME. REV. STAT. ANN. tit. 14, § 156 (1978).

64. See *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968); *Lovesee v. Allied Dev. Co.*, 45 Wis. 2d 340, 173 N.W.2d 196 (1970). For discussion of the "comparative-causation cases" in products liability, see *Products Liability*, *supra* note 53, at 378-79.

recover for loss of services. Contributory negligence of the injured spouse is usually charged against the deprived spouse. (3) A person is killed by the joint negligence of himself and the defendant. In a wrongful death action the deceased's negligence is usually charged against his statutory beneficiaries. (4) A manufacturer puts out a dangerously defective product but it is packaged and the retailer sells it without any negligence in failing to discover its defective condition. The retailer would probably be entitled to indemnity from the manufacturer, and the two may well be treated as a single person in allocating percentages of fault.

What should the comparative negligence statutes do about all of this? The only pertinent reference in the Louisiana provisions is in article 2323 providing that a claim for damages when there is contributory negligence "shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss." This language may not cover some of the examples above. The Uniform Act has three relevant phrases. It speaks in section 1(a) of "contributory fault chargeable to the claimant" and of "an injury attributable to the claimant's contributory fault," and provides in section 2(a)(2) that for the purpose of allocating fault "the court may determine that two or more persons are to be treated as a single party." Any language used will have to be general in scope, leaving much to the discretion of the trial court.

There is one problem in this connection, however, that should be carefully considered in Louisiana. This is the application of the new statutory provisions to a liability insurance carrier under the Louisiana direct-action practice.⁶⁵ Can this properly be left to the trial courts, or is a legislative determination desirable?

What should be done about a tortfeasor who has an immunity to tort liability? Neither the Louisiana provisions nor the Uniform Act makes any reference to this problem. This seems wise. Immune tortfeasors should not be made parties to the action or have their percentages of fault determined. The case should proceed without them, once it is clear that the immunity to the tort liability exists and will also apply to rights of contribution.

But there may be some situations in which the position may be taken that rights of contribution should not be barred. One situation involves an immunity that is not categorical but is confined only to claims by certain people. An example is an intra-family immunity. Several states, including Louisiana, hold that this immunity is essentially procedural, since its purpose is solely to prevent the maintenance of an action brought by another member of the same family

65. LA. R.S. 22:655 (Supp. 1962). F. STONE, *supra* note 61, at §§ 112(4) & 114.

and, therefore, does not bar a claim for contribution brought by a third party.⁶⁶ In this situation it may be well to make sure that the family member can be joined as a party defendant for the sole purpose of determining his fault-proportion of the total obligation, so that his amount may be subtracted from the plaintiff's claim.

The second situation involves an employer's immunity to tort liability under the worker's compensation statutes and the rights and liabilities of third parties. In the original trade-off when worker's compensation was initially adopted the employer's undertaking to pay compensation even though not negligent was balanced against the relieving him of the common law tort liability. This trade-off has worked satisfactorily between the parties to the system, but it may unfairly discriminate against a third-party defendant on whom the employment system rests the total responsibility without any compensating benefit. Assume that a manufacturer produces a machine that has a minor defect—a screw was not fully tightened. The employer who purchased the machine and uses it in his plant provides no maintenance for it and fails to instruct the employee on how to use it safely. Six years later the screw drops out (though indications that it was loose had been present for some time) and the employee is hurt. Suit is brought against the manufacturer, who is held liable for the total injury. Although some states allow contribution against the employer on the basis of proportionate fault,⁶⁷ the majority, including Louisiana,⁶⁸ do not. I suggest that this is not consistent with the striving toward equal justice that the

66. See *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965). *Accord*, *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Zarella v. Miller*, 100 R.I. 545, 217 A.2d 673 (1966). The majority rule is otherwise. *E.g.*, *Yellow Cab Co. v. Dreslin*, 181 F.2d 626 (D.C. Cir. 1950); *Norfolk So. R. Co. v. Gretakis*, 162 Va. 597, 174 S.E. 841 (1934).

67. *E.g.*, *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1979); *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

68. In *LeJeune v. Highlands Insurance Co.*, 287 So. 2d 531 (La. App. 3d Cir. 1973), the court held that Revised Statutes 23:1032 was controlling and prevented an action for contribution, and then said:

It cannot be logically denied that negligent third parties have been cast in an unenviable position and have gained nothing in return for their loss of the right of contribution. To correct this inequity at the expense of disrupting the reasoning behind the compensation principle, however, is not a proper alternative for this court. This is a situation which addresses itself to the legislative prerogative, rather than to judicial review.

Id. at 533. Revised Statutes 23:1032 was subsequently amended to remove another perceived inequity but not this one. 1976 La. Acts, No. 147 § 1, *amending* LA. R.S. 23:1032 (1950).

See generally 2A A. LARSON, *WORKMEN'S COMPENSATION LAW* § 76 (1976 & Supp. 1979); Davis, *Third Party Tortfeasor's Rights Where Compensation-Covered Employers are Negligent*, 4 HOFSTRA L. REV. 571 (1976).

new Louisiana provisions portray and that it is one of the occasions on which manufacturers have a legitimate complaint regarding the working of product liability law.

The Uniform Act has no provisions on this problem because it was conceived to be primarily a concern of the individual state's policy regarding worker's compensation and therefore inappropriate in a Uniform Act.⁶⁹ The subject warrants careful consideration by the Louisiana legislature.

There are a number of other problems deriving from the incidental effects of a comparative fault system, but these are the major problems deserving conscious attention and decision.

CONCLUSION

At the time when Louisiana overlooked her civil law tradition and adopted the English common law doctrine of contributory negligence, that doctrine was unanimously followed in the United States. But since that time the federal government and more than two-thirds of the states have repudiated contributory negligence and adopted some form of comparative fault. In now discarding contributory negligence and abandoning the small group of slightly more than a dozen die-hard states, Louisiana now finds that by adopting a form of comparative fault, she has come to be in accord with what must currently be recognized as the true common law rule,⁷⁰ not

69. The NCCUSL Committee drafting the Uniform Comparative Fault Act prepared a section for the Act but decided to drop it. This action was not based on the merits of the section but on the ground that it belonged in the worker's compensation act rather than this one. It provided:

[Section xx. Action by Employee Against Third-Party Defendant.]

(a) If an employee who has claimed or is entitled to claim against the employer benefits under [the worker's compensation act] brings a tort action against another person to recover additional damages for the injury, the employer may be joined by the defendant as a party for the purpose of determining the percentage of fault allocable in accordance with Section 2 to the employer in comparison with the combined fault of all of the parties, including the claimant.

(b) On the basis of those findings the court shall determine the award to the claimant by subtracting from the amount of the damages half of the amount that, except for the [worker's compensation act], would have been allocated as the primary responsibility of the employer; and it shall render judgment in accordance with the provisions of Section 2. After paying the judgment, the defendant may recover from the employer the other half of the amount that would have been allocated to the employer.

70. Contribution between joint tortfeasors has set a pattern for this. The original common law rule was that there was no contribution. A few states judicially changed the rule because of its unfairness. Many more have done this by statute. Now the Torts Restatement expressly provides that the common law rule is that "there is a right of contribution." RESTATEMENT (SECOND) OF TORTS § 886A (1979). If Chapter 17 (§§ 463-96) of the Restatement were being published today instead of in 1965, it would certainly be very different.

only in this country but in England itself and in all other so-called common law countries. By way of serendipity, she is by the same action, both reclaiming her "forgotten heritage"⁷¹ and joining the "march of comparative negligence"⁷² that is now becoming a stampede. There is good reason for the legal profession in Louisiana to congratulate itself on the accomplishment.

According to my evaluation, the central basis of the Louisiana provisions should be regarded as excellent. Some refinements may be useful and these I have discussed. If they should be found to be commendable, their enactment would not interfere with the central basis as incorporated in the current provisions.

Welcome aboard, Louisiana! We common law states are happy to have you join the great majority of us. We hope our experience has been and will continue to be of assistance to you, and we believe that your ideas and their implementation will be useful to us. Together, we are moving toward a position that will justify the assertion that the doctrine of comparative fault is the common law of the United States.

71. Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).

72. Turk, *Comparative Negligence on the March* (pts. 1-2), 28 CHI.-KENT L. REV. 189, 304 (1950).