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Where Is the Principle of Fairness in Joint and Several Liability--Missouri Stops Short of a Comprehensive Comparative Fault System

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COMMENTS

WHERE IS THE PRINCIPLE OF FAIRNESS IN JOINT AND SEVERAL LIABILITY—MISSOURI STOPS SHORT OF A COMPREHENSIVE COMPARATIVE FAULT SYSTEM ?

I. INTRODUCTION

One of the important issues states must face in developing a tort system based on comparative fault is, in a multi-defendant case, who should bear the burden of the damages that are unsatisfied because of an insolvent defendant. Recently, in *Gustafson v. Benda*,[1] the Missouri Supreme Court enlarged its commitment to comparative fault principles when it implemented "insofar as possible" the Uniform Comparative Fault Act, a comprehensive system of comparative fault.[2] The Missouri Supreme Court maintains that a comprehen-

1. 661 S.W.2d 11 (Mo. 1983) (en banc).

2. 661 S.W.2d 11, 15 (Mo. 1983) (en banc); UNIF. COMPARATIVE FAULT ACT §§ 1-6, 12 U.L.A. 35-45 (Supp. 1984) [hereinafter cited as UCFA]. The Uniform Act chooses pure comparative negligence over one of the modified plans. *Id.*, § 1 at 36; *see infra* note 58. The Uniform Act also provides for contribution among tortfeasors based on relative fault. *Id.*, §§ 4 at 42, 5 at 43. In addition it approaches set-off and settlement based on relative fault. *Id.*, §§ 3 at 41, 6 at 45. Although it retains joint and several liability, *id.*, § 2(c), it tempers the harshness of the doctrine by allowing for reallocation of the uncollectible portion of the judgment between all culpable parties,

sive system of comparative fault is compelled by the principle of fairness, which calls for the distribution of tort liability on the basis of relative fault.[3] Yet, in *Gustafson*, the court also reaffirmed its commitment to the traditional common law doctrine of joint and several liability, which places the burden of the unsatisfied portion of the judgment on the solvent defendants, without regard to relative fault.[4] In retaining joint and several liability, the court apparently rejected the modifications proposed by the Uniform Act that distribute responsibility for any uncollectible portion of a loss between all remaining parties, including a culpable plaintiff, based on their relative fault.[5] Joint and several liability is not true to the principle of fairness upon which the system of comparative fault is built, and thus, the better method of distributing the uncollectible portion of a loss is that proposed by the Uniform Act.

II. METHODS OF DISTRIBUTING THE UNCOLLECTIBLE PORTION OF A LOSS

There are three methods of distributing the uncollectible portion of a loss caused by a defendant's insolvency. First, joint and several liability shifts the risk of insolvency to the defendants. Second, several liability leaves the risk of insolvency with the plaintiff. Finally, there is a compromise position that distributes the risk between plaintiff and defendants based on their relative fault.

Joint and several liability imposes liability upon each responsible defendant for the entire loss sustained by the plaintiff.[6] It is most commonly applied

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including the plaintiff. *Id.*, § 2(d) and Commissioners' comment. *See infra* notes 105-11 and accompanying text. *See generally* H. WOODS, COMPARATIVE FAULT § 22-1 *et seq.* (1978 and Supp. 1984); Miller, *Extending the Fairness Principle of* Li *and* American Motorcycle*: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835 (1983); Wade, *Uniform Comparative Fault Act: What Should It Provide?*, 10 U. MICH. J.L. REF. 220 (1977).

The court in *Gustafson* adopted the Uniform Act only "insofar as is possible." 661 S.W.2d at 15. Because the legislature had recently passed a statute in conflict with § 6 of the Act, concerning releases, the court pointed out that it was bound to follow the new statute. *Id.* at 15 n.10. *Compare* MO. ANN. STAT. § 537.060 (Vernon 1984) (release reduces claim by amount of consideration paid) *with* UCFA, § 6, 12 U.L.A. 35, 44 (Supp. 1984) (release reduces claim by amount of the released person's equitable share of the obligation).

3. *See* Gustafson v. Benda, 661 S.W.2d 11, 15 (Mo. 1983) (en banc) (experience with the application of "comparative fault fully demonstrates that fairness and justice can best be achieved through a broader application of that doctrine"); Missouri Pac. R.R. v. Whitehead & Kales, 566 S.W.2d 466, 474 (Mo. 1978) (en banc).

4. *Gustafson*, 661 S.W.2d at 16 ("By this opinion we do not intend to impair the existing right of a claimant to recover the total amount of his judgment against any defendant who is liable.").

5. *See* UCFA § 2(d) and Commissioners' comment, 12 U.L.A. at 39-40 (Supp. 1984). *See generally* Comment, *Abrogation of Joint and Several Liability: Should Missouri Be Next in Line?*, 52 UMKC L. REV. 72 (1983); *see also*, H. WOODS, COMPARATIVE FAULT 368 (Supp. 1984) ("The Missouri Supreme Court made it clear that it did not intend to abrogate joint and several liability.").

6. *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 291-323 (4th ed. 1971); Jackson,

where two or more persons proximately cause the same indivisible injury to

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Joint Torts and Several Liability, 17 TEX. L. REV. 399 (1939); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

"Joint and several liability" is also referred to as "entire liability." *See* Jackson, *supra*; Prosser, *supra*. This is more accurate terminology since each tortfeasor is liable for the entire loss. Whichever term is used, the principle is a substantive rule of law referring to the legal consequence of a joint or concurrent tort and should not be confused with the procedural consequence of joinder associated with multiple defendant cases. That two or more defendants may be joined in the same action does not necessarily mean that they are jointly and severally liable. Joinder is merely a device for convenience and expedience and has little in common with the substantive liability of two or more defendants for the same result. Prosser, *supra*, at 413. Early American courts, experimenting with new liberalized joinder rules, however, often confused the two concepts. *See, e.g.*, Floun v. Birger, 233 Mo. App. 919, 296 S.W. 203 (St. L. 1927) (if defendants are joined they must be entirely liable). The resulting confusion helped shape the development of the doctrine of joint and several liability in America. *See* F. HARPER & F. JAMES, *supra*, at 695-97; Jackson, *supra*, at 404; Prosser, *supra*, at 413-21.

English common law recognized three general situations in which joint and several liability was to be imposed: (1) where the actors act in concert, i.e., where the actors knowingly join in the performance of a tortious act, sometimes referred to as a joint enterprise; (2) where the actors fail to perform a common duty owed to plaintiff, such as liability to joint tenants stemming from a failure to maintain their property in a safe condition; and (3) where there is a special relationship between the parties such that one is vicariously liable for the acts of the other, e.g., master and servant. F. HARPER & F. JAMES, *supra*, at 692-93. The wrong under any of these situations is referred to as a "joint tort." Joint and several liability in the first two situations is justified by the notion that "the act of one is the act of all." Sir John Heydon's Case, 77 Eng. Rep. 1150, 1151 (1613); *see* F. HARPER & F. JAMES, *supra*, at 694 (liability in the third situation rests on notions of agency).

American courts, amidst the confusion of the new joinder rules, added a fourth general category. They uniformly imposed joint and several liability "where a single indivisible harm is sustained as a result of the independent, separate, but concurring tortious acts of two or more persons." *Id.* at 693. Technically this latter category is not a joint tort since it would not be fair under these circumstances to treat the act of one as the act of all. The correct and better terminology for the wrong is a "concurrent tort," and for the actors "concurrent tortfeasors." As a result of the liberal American rules as to joinder as well as by "careless usage," American courts often refer to defendants whose negligence concurred to produce a single result as "joint tortfeasors." Prosser, *supra*, at 420. Today, when the term "joint tortfeasor" is used it usually means that the defendants will be jointly and severally liable, but one must be careful since the term is also used to refer to defendants who may be joined in the same action. *See* F. HARPER & F. JAMES, *supra*, at 693-94; *see also* Prosser, *supra*, at 413 (" 'joint tortfeasor' means radically different things to different courts, and often to the same court").

Unlike a true joint tort, the touchstone of a concurrent tort is that the harm must be of "an indivisible nature which is not practicably apportionable." F. HARPER & F. JAMES, *supra*, at 694. Where there is any reasonable means of apportioning the damages, courts will not hold tortfeasors jointly and severally liable. *Id.* at 694; *see, e.g.*, DeDonato v. Morrison, 160 Mo. 581, 61 S.W. 641 (1901) ("fact that it is difficult to separate the injury done by each from the others furnishes no reason for holding one tort feasor [sic] liable for the acts of others with whom he is not acting in concert"); Miller v. Prough, 203 Mo. App. 413, 221 S.W.159 (K.C. 1920) (liability in proportion

the plaintiff.[7] In such a case, a plaintiff may collect his entire judgment from any of the responsible defendants he chooses. For example, suppose as a result of a three-car accident, the jury finds the plaintiff 30% negligent, defendant *A* 10% negligent, and defendant *B* 60% negligent. Under the doctrine of joint and several liability in a comparative negligence setting, the plaintiff may seek to recover 70% of his damages from either defendant *A* or defendant *B*. It then would be up to the defendant who has paid more than his proportionate share to seek contribution from the defendant who has paid nothing.

When joint and several liability is rejected, each defendant's liability is limited to the proportionate share of fault attributable to him. The result is commonly referred to as several liability.[8] Thus, in our hypothetical, the plaintiff may collect no more than 10% of his damages from defendant *A* and must collect the other 60% from defendant *B*. An action for contribution is not necessary to apportion the damages among the responsible parties.

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that the number of dogs owned by defendant bore to total number doing the damage). Thus, the absence of any logical basis for apportioning damages was the principal justification for imposing joint and several liability on concurrent tort feasors. *See* F. HARPER & F. JAMES, *supra*, at 694; Jackson, *supra*, 405-06, 408; Prosser, *supra*, at 442-43; Wigmore, *Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458, 459 (1923). The other commonly mentioned justification for imposing joint and several liability on concurrent tort feasors was more theoretical than practical. The reasoning was that since the acts of each tortfeasor were a proximate cause of the entire injury it is not unfair to hold each tortfeasor liable for the entire amount of the plaintiff's loss. *See* RESTATEMENT OF TORTS § 874 (1968) ("each of two or more persons whose tortious conduct is a legal cause of a harm to another is liable to the other for the entire harm"); Prosser, *supra*, at 432.

7. These persons are called concurrent tortfeasors. *See supra* note 6. Concurrent torts may be subdivided into three general classes: (1) where each act alone would not have resulted in a tort, but where all acts combine to result in a tort, the most common example being an auto collision; (2) where concurrent wrongdoers commit similar acts, each act being sufficient in itself to cause the entire harm, but which all unite to produce one injury, a good example being where two persons independently of one another start fires which combine to destroy plaintiff's property; (3) where each act is sufficient by itself to produce some of the damage that was actually sustained, but all combining to produce the total injury, an example being several companies polluting a stream or causing a stench. Jackson, *supra* note 6, at 407-16; *see also* Prosser, *supra* note 6, at 430-41 (listing nine circumstances under which joint and several liability may be imposed).

For simplicity, this Comment focuses on fact situations from the first general class mentioned above, and more specifically automobile accidents. The arguments made in this Comment in favor of modifying joint and several liability are limited to situations involving concurrent tortfeasors, in any of the above classes, but do not extend to situations involving true joint tortfeasors, *see supra* note 6, or those involving successive tortfeasors. Damages by successive tortfeasors are severable in point of time and thus courts generally refuse to impose joint and several liability. Jackson, *supra* note 6, at 419; Prosser, *supra* note 6, at 434-35.

8. *See* Note, *Ohio's Comparative Negligence Statute: The Effect on Joint and Several Liability, Absent Defendants, and Joinder*, 50 U. CIN. L. REV. 342, 346 (1981). *See generally* Jackson, *supra* note 6; Prosser, *supra* note 6.

As long as all parties are solvent, liability in either instance is ultimately borne by the parties in direct proportion to their relative fault, either through contribution or severally. But if any party is insolvent, the question of who must bear the burden of the uncollectible portion of the damages turns on whether the culpable party is plaintiff or defendant.[9] Joint and several liability thrusts the burden onto the solvent defendant, while several liability leaves it with the plaintiff. Fault is irrelevant in apportioning the uncollectible portion of the damages.

To illustrate, return to our hypothetical three-car accident, but now assume that defendant *B* has no insurance and no assets. Joint and several liability would permit the plaintiff to collect 70% of his damages from defendant *A*, who is only 10% at fault. Because defendant *B* is financially irresponsible, defendant *A* will be unsuccessful in an action for contribution since the insolvent defendant has nothing to contribute. Thus, due to insolvency and without regard to fault, defendant *A* alone must pay for defendant *B*'s fair share of liability. The result is reversed under several liability. Regardless of his relative degree of fault, the plaintiff alone remains responsible for the insolvent defendant's proportionate share since the plaintiff can collect only 10% of his damages from defendant *A* and insolvency prevents him from collecting from defendant *B*.

A compromise position that splits the unsatisfied portion of the loss between plaintiff and defendant is possible. Commentators for some time have espoused a scheme of apportioning damages that would reallocate responsibility for an uncollectible portion on the basis of relative fault,[10] thereby eliminating the all-or-nothing aspect of both joint and several liability and several liability. For example, if in our three-car hypothetical the total damages were $100,000, then $60,000 of the total loss would be uncollectible (the proportion of fault attributable to defendant *B*. Because the plaintiff in our hypothetical is three times as much at fault as the solvent defendant (30% vs. 10%), he will bear three times as much of the uncollectible portion of the loss as the solvent defendant. Consequently, plaintiff will be responsible for $45,000 and defendant *A* for $15,000 of the uncollectible loss. Thus, plaintiff ultimately recovers $25,000 from defendant *A*. Similarly, the Uniform Comparative Fault Act distributes responsibility for the uncollectible amount on the basis of relative

9. *See* McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1, 12 (1979); Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of* American Motorcycle Ass'n v. Superior Court, 14 LOY. L.A.L. REV. 775, 777 (1981).

10. The idea was first suggested by Professor Gregory. C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 77-79 (1936). For proponents, *see* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Ass'n v. Superior Court, 30 HASTINGS L.J. 1465 (1979); McNichols, *supra* note 9; Miller, *supra* note 2; Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 364 (1980); Zavos, *supra* note 9.

fault.[11] The provision achieving this result, however, appears to have been discarded by the Missouri Supreme Court in *Gustafson* when it reaffirmed the applicability of joint and several liability.[12]

III. The Approach in Other States for Distributing the Uncollectible Loss

Only Minnesota has adopted as part of their comparative fault system a provision splitting the risk of an insolvent defendant between all culpable parties.[13] Most states have retained joint and several liability in the face of comparative fault; however, their case law generally is silent as to the reallocation alternative suggested by the Uniform Comparative Fault Act.

In *American Motorcycle Association v. Superior Court*,[14] the California Supreme Court concluded that comparative fault did not require the elimination of joint and several liability.[15] The court, however, limited its discussion to a choice between joint and several liability and several liability; no mention was made of a compromise that apportions the uncollectible loss on the basis of relative fault.[16] The decision reversed a well-reasoned court of appeals opinion that had chosen to abolish joint and several liability.[17] The California Court of Appeals concluded that comparative fault had eliminated the founda-

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11. UCFA § 2(d), at 39. The Uniform Act achieves this distribution through a provision for reallocation. *See supra* notes 109-11 and accompanying text.

12. 661 S.W.2d at 16.

13. Minn. Stat. Ann. § 605.01, subd. 5 (West Supp. 1983) (identical to UCFA § 2(d) pertaining to reallocation). *But see* Ruberg v. Skelly Oil Co., 297 N.W.2d 746 (Minn. 1980) (reaffirming joint and several liability).

14. 20 Cal. 3d 578, 579 P.2d 899, 146 Cal. Rptr. 182 (1978).

15. *Id.* at 582-84, 578 P.2d at 909-10, 146 Cal. Rptr. at 184-85. In *American Motorcycle*, the plaintiff, a minor, sued several defendants in connection with injuries suffered in a motorcycle accident. Defendant American Motorcycle Association (AMA) answered, denying plaintiff's allegations and raising certain affirmative defenses, including a claim that plaintiff's own negligence was a proximate cause of his injuries. AMA also sought to file a cross-complaint against plaintiff's parents. AMA argued that it should only be responsible for its proportional share of the damages on two grounds: (1) that joint and several liability should be abolished and; (2) that there should be contribution or indemnity in proportion to fault. *Id.* at 585, 578 P.2d at 911, 146 Cal. Rptr. at 186.

The court presented three arguments in support of joint and several liability: (1) the plaintiff's injury is indivisible; (2) the plaintiff's conduct is not as tortious as defendant's; and (3), present law allows injured persons to receive full recovery. *See infra* notes 78-96 and accompanying text.

16. Justice Clark, in an extensive dissent in *American Motorcycle*, advocates a modification of joint and several liability similar to that provided by the UCFA. "The loss attributable to the inability of one defendant to respond in damages should be apportioned between the negligent plaintiff and the solvent negligent defendant in relation to their fault." *Id.* at 613, 578 P.2d at 922, 146 Cal. Rptr. at 205 (Clark, J. dissenting).

17. American Motorcycle Ass'n v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977); *see* Miller, *supra* note 2, at 849.

tion for joint and several liability.[18] The California Supreme Court substituted contribution based on relative fault in place of several liability as the solution to the inequity suffered by defendants in multi-party litigation.[19] The court ignored the fact that this solution still saddles a solvent defendant alone with the risk of an insolvent defendant.

In *Lincenberg v. Issen*,[20] Florida's equivalent of *American Motorcycle*, the Florida Supreme Court also ignored the possibility of any modification of joint and several liability. Instead, the court held that it was bound by the legislature's recent adoption of the Uniform Contribution Among Joint Tortfeasors Act.[21] Since the act expressly provided for retention of joint and several liability, the court reasoned that the doctrine should continue to be the law of Florida.[22]

In *Artic Structures, Inc. v. Wedmore*,[23] the Supreme Court of Alaska also refused to abandon or modify joint and several liability.[24] Although the court mentions the reallocation provision of the Uniform Comparative Fault Act, its discussion centers on a choice between joint and several liability and several liability.[25] To justify its decision, the court points to California and Florida as two important jurisdictions that had considered the issue and rejected any modification of joint and several liability.[26]

In 1983, the Illinois Supreme Court confronted the issue in *Coney v.*

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18. 65 Cal. App. 3d at 702, 135 Cal. Rptr. at 501 ("In a system where the liability of several defendants concurrently causing an injury is based upon fault, the conclusion is equally irresistible that the extent of the fault of each should govern the extent of liability of each."). The court also argued for the elimination of joint and several liability based on the social costs of retaining it. *Id.* at 703, 135 Cal. Rptr. at 502; *see infra* notes 97-99 and accompanying text.

19. 20 Cal. 3d at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99. California's system of contribution based on relative fault is called "comparative partial indemnity" and is similar to the system of contribution that is in place in Missouri. *Compare id. with* Missouri Pac. R.R. v. Whitehead & Kales, 566 S.W.2d 466 (Mo. 1978) (en banc).

20. 318 So. 2d 386 (Fla. 1975).

21. FLA. STAT. § 768.31 (1975). The Florida statute was an adoption of the UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975) (1955 version).

22. 318 So. 2d at 393-94. It should be noted that the court also declined to apportion contribution among tortfeasors according to fault because the statute expressly provided for pro rata contribution. *Id.* at 394. The statute was subsequently amended to provide for contribution based on relative fault. § 768.31 1976 Fla. Laws ch. 76-186 ***.

23. 605 P.2d 426 (Alaska 1979).

24. *Id.* at 435.

25. "Though the common law rule of joint and several liability does impose the risk of uncollectibility upon the solvent defendants, we are not convinced that as a general rule the alternative, which would cast the total risk of uncollectibility upon the injured plaintiff, is an improvement." *Id.* at 431.

26. *Id.* at 432-35. The decision is also based on "Alaska's pro rata legislative scheme for apportionment of damages among joint tortfeasors and the public policies implemented by the legislation." *Id.* at 435.

J.L.G. Industries[27] and likewise held that comparative fault need not eliminate joint and several liability.[28] The court's decision is based principally upon precedent from other jurisdictions.[29] In addition, the court relied on the Illinois contribution statute.[30] But like the courts of California and Florida, the Illinois court limited its discussion to a choice between retaining and eliminating joint and several liability.[31]

Thus, while most jurisdictions have retained the rule of joint and several liability, no court has discussed the possibility of modifying it. Instead, these courts generally rely on the fact that other courts have retained the traditional rule of joint and several liability despite the adoption of comparative fault.[32]

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27. 97 Ill. 2d 104, 454 N.E.2d 197 (1983). The court also held: (1) that comparative fault should be applied in a strict liability products case; and (2) that retention of joint and several liability within the context of comparative fault did not violate the equal protection clause of the United States and Illinois Constitutions. *Id.* at 126, 454 N.E.2d at 207. For a discussion of the case, see Gillan, *Strict Liability/Comparative Fault*, 72 ILL. B.J. 543 (1984) (advocating the approach taken by the UCFA); *see also* Cornell v. Langland, 109 Ill. App. 3d 472, 440 N.E.2d 985, (1982) (where the defendant was found 82.5% negligent and 17.5% of the total negligence was assessed against the "other person," the defendant tortfeasor is responsible for the total damages assessed by the jury).

28. 97 Ill. 2d at 124, 454 N.E.2d at 206 (1983).

29. *Id.* at 121, 454 N.E.2d at 204-05.

30. *Id.* at 123, 454 N.E.2d at 205-06; ILL. REV. STAT. ch. 70, § 302 (1979).

31.

> Were we to eliminate joint and several liability as the defendant advocates, the burden of the insolvent or immune defendant would fall on the plaintiff; in that circumstance, plaintiff's damages would be reduced beyond the percentage of fault *attributable to him.* We do not believe the doctrine of comparative negligence requires this further reduction. Nor do we believe this burden is the price plaintiffs must pay for being relieved of the contributory negligence bar.

97 Ill. 2d at 123, 454 N.E.2d at 205.

32. In Colorado, one appellate court held, with little discussion, that the Colorado rule of joint and several liability and the rule of no contribution among tortfeasors should continue to be the law; the court simply noted that such a change "is not within the province of this court." Stefanich v. Martinez, 39 Colo. App. 500, 570 P.2d 554 (1977), *aff'd*, 195 Colo. 341, 577 P.2d 1099 (1978). However, there is a vigorous dissent supporting both contribution based on relative fault and the elimination of joint and several liability. *Id.* at 555-57 (Van Cise, J., dissenting) (the underlying policy of comparative fault is contrary to joint and several liability).

Other jurisdictions retaining joint and several liability in comparative fault systems include: Arkansas, ARK. STAT. ANN. §§ 34-1001 to 34-1009 (1981); Connecticut, CONN. GEN. STAT. ANN. § 52-572 (West Supp. 1982); Georgia, Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940); Idaho, Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979) (*overruled on other grounds*, Runcorn v. Shearer Lumber Products, 107 Idaho 389, 690 P.2d 324 (1984)); Maine, ME. REV. STAT. ANN. tit. 14, § 156 (1965); Michigan, Ferdig v. Melitta, Inc., 115 Mich. App. 340, 320 N.W.2d 369 (1982); Montana, Montana Jury Instruction Guides, Instruction No. 41.03; Nebraska, Royal Indemnity Co. v. Aetna Casualty & Surety Co., 193 Neb. 752, 229 N.W.2d 183 (1975); New Jersey, N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1982); New York, Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851

Several states have abolished or limited the application of joint and several liability. Most of these states have done so by statute.[33] Vermont, New Hampshire, Pennsylvania, and Kansas all impose several liability on multiple defendants using similar statutory language:

> Where recovery is allowed against more than one defendant each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributable to all the defendants against whom recovery is allowed.[34]

Ohio[35] and Indiana[36] have also statutorily eliminated joint and several liability, but by a little different language. Statutes in Texas,[37] Nevada,[38] and Ore-

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(1972); North Dakota, N.D. CENT. CODE § 9-10-07 (1973); Oregon, OR. REV. STAT. § 18.485 (Supp. 1984); Washington, WASH. REV. CODE ANN. § 4.22.030 (Supp. 1982); West Virginia, Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979); Wisconsin, Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis. 2d 314, 291 N.W.2d 825 (1980). *But see* Soeldner v. White Metal Rolling & Stamping Corp., 473 F. Supp. 753 (E.D. Wis. 1979) (manufacturer-defendant responsible only for own causal negligence; holding limited to instances in which plaintiff has separate remedy against his employer); Utah, UTAH CODE ANN. § 78-27-41(1) (1953).

Federal courts agree that the elimination of joint and several liability is not a necessary consequence of adopting comparative negligence. McPike v. Die Casters Equip. Corp., 504 F. Supp. 1056 (W.D. Mich. 1980).

While Iowa has followed the rule of joint and several liability, Drake v. Keeling, 230 Iowa 1038, 299 N.W. 919 (1941), the Supreme Court of Iowa adopted comparative negligence in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), and refused "to decide in advance collateral issues which eventually may be raised." *See generally* Humphrey, Haas, & Gritzner, *Comparative Negligence in Iowa—The Time Has Come For The Iowa Supreme Court to Put Its House in Order*, 31 DRAKE L. REV. 709 (1981-82).

33. *See* Woods, *supra* note 2, at 226.

34. KAN. STAT. ANN. § 60-258a(d) (Supp. 1984); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1984); PA. STAT. ANN. tit. 42, § 7102(b) (Purdon Supp. 1984); VT. STAT. ANN. tit. 12, § 1036 (1979).

This language was challenged in Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978), on the basis that the absence of the term "joint and several liability" meant that the statute did not intend to eliminate the doctrine. The Supreme Court of Kansas rejected the argument, unequivocally stating that "under the provisions of K.S.A. 60-258a the concept of joint and several liability between joint tortfeasors previously existing in this state no longer applies in comparative negligence actions." *Id.* at 204, 580 P.2d at 875; *accord* Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974).

New Hampshire courts impose joint and several liability when the plaintiff can only recover from one defendant because of immunities or other procedural bars. Simonsen v. Barlo Plastics Co., 551 F.2d 469 (1st Cir. 1977).

35. OHIO REV. CODE ANN. § 2315.19(A)(2) (Page 1981). *See generally* Note, *Ohio's Comparative Negligence Statute: The Effect on Joint and Several Liability, Absent Defendants and Joinder*, 50 U. CIN. L. REV. 342 (1981).

36. IND. CODE ANN. § 34-4-33-5 (West 1985). *See* Coca-Cola Bottling Co.-Goshen v. Vendo Co., 455 N.E.2d 370 (Ind. App. 1983).

37. TEX. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1984) provides:

> Each defendant is jointly and severally liable for the entire amount of the

gon[39] limit joint and several liability to those situations where the plaintiff is less at fault than the defendant.

Two states, Oklahoma and New Mexico, have judicially eliminated joint and several liability. In *Laubach v. Morgan*,[40] the Oklahoma Supreme Court substituted a rule of "proportionate several liability" for the traditional common law doctrine of joint and several liability.[41] The court noted that the basic purpose of a comparative fault system is to attach "liability in direct proportion to the respective fault of each person whose negligence caused the damage."[42] Consequently, it concluded that this purpose was inconsistent with joint and several liability where one defendant may pay the entire amount of a plaintiff's damages even though the jury may have determined that he only caused 10% of those damages.[43] The court considered both the California Supreme Court's and the California Court of Appeals' decision in *American Motorcycle*.[44] The Oklahoma Supreme Court rejected the reasoning of the California Supreme Court but found the California Court of Appeals' decision to be "very persuasive."[45] In *Boyles v. Oklahoma Natural Gas Co.*,[46] the Oklahoma Supreme Court limited the *Laubach* decision to cases where the plaintiff is a negligent party, thus establishing a dual standard for apportioning damages for indivisible injuries in multiple tortfeasor situations.[47]

New Mexico has eliminated joint and several liability in all cases, even

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judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

38. NEV. REV. STAT. § 41.141(3) (Supp. 1984). This statute previously provided for several liability in all instances. *See* 1973 Nev. Stat. 787, NEV. REV. STAT. § 41.141(3) (1973).

39. OR. REV. STAT. § 18.485 (1981).

40. 588 P.2d 1071 (Okla. 1978).

41. *Id.* at 1074. *Laubach* involved a three-car collision in which the plaintiff was found to be 30% negligent, defendant #1 50% negligent, and defendant #2 20% negligent.

42. *Id.* at 1075. It should be noted that Oklahoma did not allow contribution between tortfeasors. *Id.* at 1074.

43. *Id.* at 1075.

44. *Id.* at 1075; *see supra* notes 14-19 and accompanying text.

45. 588 P.2d at 1075.

46. 619 P.2d 613 (Okla. 1980).

47. *See generally* McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence—Is Products Liability Next?*, 35 OKLA. L. REV. 195 (1982); McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1 (1979). Professor McNichols prefers adopting contribution and retaining joint and several liability to either proportionate several liability or the risk splitting scheme envisioned by the UCFA. McNichols, 35 OKLA. L. REV. at 200; McNichols, 32 OKLA. L. REV. at 16-17; *see also* Paul v. N.L. Indus., 624 P.2d 68 (Okla. 1980) (negligence of nonparties will be considered in apportioning damages).

those involving a nonculpable plaintiff.[48] In *Bartlett v. New Mexico Welding Supply*,[49] a New Mexico court of appeals agreed with the Supreme Court of Oklahoma's decision in *Laubach* and the California Court of Appeals' decision in *American Motorcycle*.[50] The court held that joint and several liability was "obsolete" in a comparative fault setting.[51] The case involved the negligence of the defendant and that of an unknown driver, and the court concluded that the right to contribution between the defendant and the unknown driver does not answer the question of apportioning damages.[52] While *Bartlett* paid lip service to the Uniform Comparative Fault Act,[53] neither the *Bartlett* nor *Laubach* decision, like those decisions retaining joint and several liability, discussed anything akin to the Uniform Act's provision that reallocates the uncollectible portion of the damages as a viable option to the choice between joint and several liability and several liability.[54]

IV. THE MISSOURI APPROACH

The Missouri Supreme Court began implementing comparative fault principles into Missouri's system of tort liability in 1978 in *Missouri Pacific Railroad Co. v. Whitehead & Kales*.[55] In *Whitehead & Kales*, the court adopted contribution based on relative fault.[56] More recently, in *Gustafson v.*

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48. Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1982) (holding that a truck owner, whose negligence was found to have contributed 30% to the accident, was not liable for the entire damage caused by such owner and by an unknown driver whose negligence was found to have contributed to extent of 70%), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

49. *Id.*

50. *Id.* at 156, 646 P.2d at 583. The court also examined and rejected the California Supreme Court's decision in *American Motorcycle*, *id.* at 158, 646 P.2d at 584-85, Florida's decision in *Lincenberg*, *id.* at 154, 646 P.2d at 581, and Alaska's decision in *Artic Structures*, *id.* at 155, 646 P.2d at 582-83. *See supra* notes 14-27 and accompanying text discussing these decisions.

51. 98 N.M. at 158, 646 P.2d at 585.

52. *Id.* at 155, 646 P.2d at 582.

53. *Id.* at 157, 646 P.2d at 584. The court merely noted that the UCFA retained joint and several liability, but was silent with respect to the reallocation provision of the Act.

54. *See* Laubach v. Morgan, 588 P.2d 1071, 1075 ("There is no solution that would not work an inequity on either the plaintiff or a defendant in some conceivable situation where one wrongdoer is insolvent."). The court stated that it "must make one of two decisions:" either allow comparative contribution with joint and several liability or do away with joint and several liability and "provide that multiple tortfeasors are severally liable only." *Id.* at 1074.

55. 566 S.W.2d 466 (Mo. 1978) (en banc); *see also* Anderson v. Cahill, 528 S.W.2d 742, 749 (Mo. 1975) (en banc) (indicating that the court had the inherent power to adopt comparative negligence, but deferring the matter to the legislature); Epple v. Western Auto Supply Co., 557 S.W.2d 253, 256 (Mo. 1977) (en banc) (same).

56. 566 S.W.2d 466 (Mo. 1978) (en banc).

Benda,[57] the court took a significant step toward constructing a comprehensive comparative fault system of tort liability when it eliminated the absolute defense of contributory negligence in favor of comparative negligence.[58] Moreover, in *Gustafson*, the court announced that "insofar as possible" future cases should follow the Uniform Comparative Fault Act, a comprehensive system of comparative fault.[59]

The Missouri Supreme Court's embrace of comparative fault has been influenced by the philosopher John Rawls and his theory of justice.[60] The court, in *Whitehead & Kales*, indicated their guiding principle by quoting John Rawls as follows: "In exchange for the opportunity of some undertaking, we each promise all others that we will be liable for the damage which our own negligence in the undertaking has caused."[61] This is the principle of fairness upon which the court has built Missouri's system of comparative fault.[62]

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57. 661 S.W.2d 11 (Mo. 1983) (en banc).

58. *Id.* at 16. Traditionally, in negligence actions, any contributory negligence by the plaintiff was an absolute defense which barred recovery. Comparative negligence is a method of dividing damages when the plaintiff has been contributorily negligent. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953). States adopting comparative negligence can be divided into two general classes: those adopting a pure form of comparative negligence, and those adopting a modified form of comparative negligence. Under a pure form of comparative negligence, the plaintiff's contributory negligence is never a bar to recovery, but merely diminishes such recovery in proportion to the percentage of negligence attributable to the plaintiff. Missouri adopted the pure form in *Gustafson*, 661 S.W.2d 11 (Mo. 1983) (en banc). *See supra* note 2. It is the favorite of most commentators. *See, e.g.*, Leflar, *Comments on* Maki v. Frelik, 21 VAND. L. REV. 889, 918 (1968); UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 34-45 (Supp. 1984); Prosser, *supra*; V. SCHWARTZ, COMPARATIVE NEGLIGENCE 349 (1974). Moreover, the four most populous states have adopted pure comparative negligence. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); N.Y. LAWS § 1411 (McKinney Supp. 1984).

Under modified forms of comparative negligence, plaintiff's contributory negligence, if great enough, will bar recovery, otherwise plaintiff's recovery is reduced by his proportionate share of fault. Most modified plans are legislatively adopted. There are three variations. Plaintiff recovers if his negligence is "not as great as" defendant's, *see e.g.*, KAN. STAT. ANN. § 60-258a (Supp. 1984); plaintiff recovers if his negligence is "not greater than" defendant's, *see, e.g.*, OKLA. STAT. ANN. tit. 23, §§ 11, 12 (West Supp. 1984); plaintiff recovers if his negligence is "slight" and the negligence of the defendant was "gross in comparison," *see* NEB. REV. STAT. § 25-1151 (1975). *See generally* V. SCHWARTZ, *supra* at 43-83 (1974); H. WOODS, COMPARATIVE FAULT 77-90 (1978).

59. 661 S.W.2d at 15; UCFA §§ 1-6, 12 U.L.A. 35-45 (Supp. 1984); *see supra* note 2.

60. *See* J. RAWLS, A THEORY OF JUSTICE (1971).

61. 566 S.W.2d at 469 n.4 (quoting J. RAWLS, A THEORY OF JUSTICE 348 (1971)).

62. *See Gustafson*, 661 S.W.2d 11, 15 (Mo. 1983) (en banc) ("comparative fault fully demonstrates that fairness and justice can best be achieved through a broader application of that doctrine"); Safeway Stores v. City of Raytown, 633 S.W.2d 727, 732 (Mo. 1982) (en banc) (right to separate cause of action for apportioning

Despite the fact that the arguments for modifying joint and several liability rest on the same principle of fairness used by the Missouri Supreme Court to justify contribution based on relative fault and comparative negligence, the seminal decisions of *Whitehead & Kales* and *Gustafson* made it clear that the court would retain the common law rule of joint and several liability.[63] In *Gustafson*, the court stated: "By this opinion we no not intend to impair the existing right of a claimant to recover the total amount of his judgment against any defendant who is liable."[64]

The plain language of *Gustafson* leaves little room for arguing that the court did not intend to reject the provision of the Uniform Act that calls for reallocating the uncollectible loss between all culpable parties, even a plaintiff, based on their relative fault.[65] Certainly, the reallocation feature would "impair" a claimant's right to recover his entire judgment from any responsible defendant. In effect, reallocation would nullify this right by requiring a culpable plaintiff to return to the responsible defendants his proportionate share of the uncollectible loss.

Bolstered by the principle of fairness, one possible argument against the plain language in *Gustafson* is that the language was included to protect only the right of an innocent plaintiff. Prior to *Gustafson*, the "existing right" of a claimant to recover the total amount of his judgment against any defendant resided only in an innocent plaintiff. Contributory negligence barred a culpable plaintiff from any recovery at all. Thus, decisions prior to *Gustafson* advocating joint and several liability are inapposite since they are set against a backdrop of contributory negligence and involved only innocent plaintiffs. More significantly, a reading of *Gustafson* that limits the right of joint and several liability to an innocent plaintiff is entirely consistent with the Uniform Act and the principle of fairness. Under the Uniform Act, the right of an

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damages among tortfeasors not party to original action is based on principle of fairness); *Whitehead & Kales*, 566 S.W.2d 466, 474 (Mo. 1978) (en banc); *see also* Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176, 183 (Mo. 1982) (en banc) (Welliver, J., concurring in part and dissenting in part) (principle of fairness deserves more than mere lip service); Parks v. Union Carbide Corp., 602 S.W.2d 188, 191 (Mo. 1980) (en banc) (Welliver, J., dissenting) (must extend principle of fairness to achieve consistency in tort liability) ("the converse of this principle, that one is not liable for damage which he did not wrongfully cause, is the true basis of our relative fault system"). *Accord* Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975) ("liability for damages must be borne by those whose negligence caused it in direct proportion to their respective fault").

63. 566 S.W.2d at 474 ("Plaintiff continues free to sue one or more concurrent tortfeasors as he sees fit and nothing that transpires between them as to their relative responsibility can reduce or take away from plaintiff any part of his judgment."); *see also*, Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176, 181 (Mo. 1982) (Bardgett, J., concurring) (*Whitehead & Kales* explicitly retained joint and several liability). *See generally* Comment, *Abrogation of Joint and Several Liability: Should Missouri Be Next in Line?*, 52 UMKC L. REV. 72 (1983).

64. 661 S.W.2d at 16.

65. UCFA § 2(d), 12 U.L.A. 39, 43 (Supp. 1985).

innocent plaintiff to recover his entire judgment remains unimpaired.[66] The principle of fairness requires only that a culpable party share in the tort liability.[67]

Nevertheless, it appears that joint and several liability remains the rule in Missouri. Joint and several liability has long been the rule in Missouri.[68] The rule has been applied to joint and concurrent tortfeasors in multiple defendant cases to make each defendant liable to the plaintiff for the entire amount of the loss.[69] The rule with respect to concurrent tortfeasors in Missouri is often stated:

> where the concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury.[70]

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66. *See* UCFA § 2(d) and Commissioners' comment, 12 U.L.A. 39, 43 (Supp. 1985).

67. *See* Park v. Union Carbide Corp., 602 S.W.2d 188, 201 (Mo. 1980) (en banc) (Welliver, J., dissenting) (joint and several liability should be retained only for a faultless plaintiff); Steinman v. Strobel, 589 S.W.2d 293, 297 (Mo. 1979) (en banc) (Donnelly, J., dissenting) (in the usual comparative negligence situation, tortfeasors should be liable only severally and not jointly).

68. *See* State *ex rel.* Hall v. Cook, 400 S.W.2d 39, 40 (Mo. 1966) (en banc); Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 328 Mo. 782, 791, 41 S.W.2d 1049, 1052 (1931); State *ex rel.* Blythe v. Trimble, 302 Mo. 699, 706-10, 258 S.W. 1013, 1015-16 (1924); Applegate v. Quincy, O. & K.C. Ry. Co., 252 Mo. 173, 198, 158 S.W. 376, 383 (1913); Berry v. St. Louis, M. & S. Ry. Co., 214 Mo. 593, 598, 114 S.W. 27, 29 (1908); Bragg v. Metropolitan Street Ry. Co., 192 Mo. 331, 359, 91 S.W. 527, 535-36 (1905); Newcomb v. New York Central & H.R. Ry. Co., 169 Mo. 409, 422-27, 69 S.W. 348, 352-53 (1902); Murphy v. Wilson, 44 Mo. 313, 322 (1869); *see also* Shafir v. Sieben, 233 S.W. 419, 424 (Mo. 1921) ("no principle of law has a deeper foundation or is more firmly established in this state than that every tortfeasor whose wrongful act concurs in inflicting the injury is liable for the resulting damage").

69. "Joint tortfeasor" and "concurrent tortfeasor" have been used interchangeably by Missouri courts to describe four species of conduct for which wrongdoers will be held joint and severally liable: (1) concert of action, (2) breach of a common duty, (3) vicarious liability, and (4) independent, separate, but concurring tortious acts of two or more persons causing a single indivisible injury. *See* Sall v. Ellfeldt, 662 S.W.2d 517, 525 n.4 (Mo. App., W.D. 1983); Stephenson v. McClure, 606 S.W.2d 208, 211 n.5 (Mo. App., S.D. 1980) (the term "joint tortfeasors" includes tortfeasors whose separate but concurrent negligent acts caused the injury in question); Carr v. St. Louis Auto Supply, 293 Mo. 562, 239 S.W. 827 (1922) (distinguishing joint from concurrent); *see also supra* note 6.

70. Glick v. Ballentine Produce, 396 S.W.2d 609, 612-13 (Mo. 1965), *appeal dismissed*, 385 U.S. 5 (1965); *accord* Barlow v. Thornhill, 537 S.W.2d 412, 418 (Mo. 1976) (en banc); Sall v. Ellfeldt, 662 S.W.2d 517, 525 (Mo. App., W.D. 1983); State *ex rel.* Retherford v. Corcoran, 643 S.W.2d 844 (Mo. App., W.D. 1982); Brantley v. Couch, 383 S.W.2d 307, 310 (Mo. App., St. L. 1964). The rule is especially applicable to cases involving automobile collisions. *See, e.g.*, McFarland v. St. Louis Cab Co., 282 S.W.2d 861 (Mo. App., St. L. 1955); Hensley v. Dorr, 202 S.W.2d 553 (Mo. App., St.

The rationale, as is apparent from the rule, is two-fold: first, that each person whose negligence is a proximate cause of the entire injury should be liable for the entire injury,[71] and second, that there is no logical basis for apportioning the damages among the negligent defendants.[72]

During their efforts to construct a comprehensive system of comparative fault for Missouri, Judge Donnelly and Judge Welliver of the Missouri Supreme Court have penned dissents advocating a change in the traditional rule of joint and several liability wherein they argue that the principle of fairness embodied in comparative fault provides the necessary, logical basis for apportioning damages.[73] In *Steinman v. Stobel*,[74] Judge Donnelly in dissent presented his system of apportioning damages in a pure comparative fault setting.[75] Under his approach each party would be responsible only for his apportioned share of the total damages.[76] While Judge Donnelly would borrow freely from the Uniform Comparative Fault Act, he also noted that *in the usual comparative fault situation*, tortfeasors should be liable only severally, and not jointly.[77] Otherwise, he reasoned, "one defendant could, in derogation of the stated purposes of pure comparative fault, be apportioned a responsibility for satisfying damages greater than his own proportionate share of fault."[78]

L. 1947); Ritz v. Cousins Lumber Co., 227 Mo. App. 1167, 59 S.W.2d 1072 (K.C. 1933); Gay v. Samples, 227 Mo. App. 771, 57 S.W.2d 768 (K.C. 1933); Mitchell v. Brown, 190 S.W. 354 (Mo. App., Spr. 1916).

71. *See* Shafir v. Sieben, 233 S.W. 419, 424 (Mo. 1921); *supra* note 6.

72. *See* Daniels v. Smith, 471 S.W.2d 508, 512 (Mo. App., Spr. 1971); Daniels v. Dillinger, 445 S.W.2d 410, 413 (Mo. App., Spr. 1968); Berryman v. People's Motorbus Co. of St. Louis, 228 Mo. App. 1031, 1035, 54 S.W.2d 747, 750 (St. L. 1931) ("[u]nless the damage caused by each is clearly separable, permitting the distinct assignment to each, each is liable for the entire damage. The degree of culpability is immaterial."); Newcomb v. New York Central & H.R. Ry. Co., 169 Mo. 409, 426, 69 S.W. 348, 353 (1902). Where there is some reasonable means of apportioning damages, Missouri courts will not hold tortfeasors joint and severally liable. *See* Miller v. Prough, 203 Mo. App. 413, 221 S.W. 159 (K.C. 1920) (liability imposed in the proportion that the number of dogs owned by one defendant bore to the total number of dogs doing the damage).

73. Steinman v. Stobel, 589 S.W.2d 293, 297 (Mo. 1979) (en banc) (Donnelly, J., dissenting); State *ex rel.* Maryland Heights Concrete Contractors v. Ferriss, 588 S.W.2d 489, 492 (Mo. 1979) (Donnelly, J., dissenting); Parks v. Union Carbide Corp., 602 S.W.2d 188, 200 (Mo. 1980) (Welliver, J., dissenting).

74. 589 S.W.2d 293 (Mo. 1979) (en banc).

75. *Id.* at 296-97 (Donnelly, J., dissenting). Judge Seiler concurred with Judge Donnelly's separate dissenting opinion.

76. *Id.* (Donnelly, J., dissenting). Donnelly's scheme would consider the fault of absent tortfeasors for the purpose of allocating fault upon a 100% basis.

77. *Id.* at 297 (Donnelly, J., dissenting). Judge Bardgett, also in a separate dissenting opinion in *Steinman*, called for the adoption of pure comparative negligence, but his system would retain joint and several liability. *Id.* at 295 (Bardgett, J., dissenting).

78. *Id.* (citing Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737, 778 (1974)). For illustrations on how Donnelly's system would work where one party has been released

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Judge Welliver, in his dissent in *Parks v. Union Carbide Corp.*,[79] stated that the rule of joint and several liability could no longer be justified by the impracticability of apportioning damages among multiple tortfeasors.[80] "This reason for the rule was completely eradicated by *Whitehead & Kales*, in which the Court stated that instructing a jury to apportion the respective fault of concurrent tortfeasors 'would present no insurmountable problem to the jury.'"[81] Judge Welliver stated that the principle of fairness the court had articulated in *Whitehead & Kales* compelled an apportionment of the damages based on the relative fault of the parties.[82] He concluded that the rule of joint and several liability should be retained only in those cases involving a faultless plaintiff since it is only to that extent that the rule of joint and several liability is compatible with a system of relative fault.[83] Thus, the dissenting opinions of both Judge Donnelly and Judge Welliver rest upon the principle that liability for damage should be borne by those whose negligence caused it in direct proportion to their respective fault. Although the rule of joint and several liability seems directly at odds with this principle, Missouri follows the majority of states by refusing to pare the rule from its system of comparative fault.

V. JOINT AND SEVERAL LIABILITY CANNOT BE JUSTIFIED IN A SYSTEM OF COMPARATIVE FAULT

Courts generally have advanced four arguments for retaining the rule of joint and several liability. First, most other courts that have addressed the issue have retained the rule despite comparative fault. Second, the injury is indivisible and thus no logical basis exists for apportioning damages. Third, a defendant's's wrongful conduct is more culpable than a plaintiff's. And fourth, the law favors full compensation for an injured plaintiff.[84]

None of these reasons, however, justify retaining the rule unchanged.

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or paid workers' compensation, see State *ex rel.* Maryland Heights Concrete Contractors v. Ferriss, 588 S.W.2d 489, 492 (Mo. 1979) (Donnelly, J., dissenting).

79. 602 S.W.2d 188 (Mo. 1980) (en banc***).

80. *Id.* at 200 (Welliver, J., dissenting).

81. *Id.* (quoting *Whitehead & Kales*, 566 S.W.2d at 472). In addition to cases involving comparative negligence or contribution, Missouri juries are instructed that they may find punitive damages against several defendants in differing amounts, depending upon differing degrees of culpability. *See* State *ex rel.* Hall v. Cook, 400 S.W.2d 39, 42 (Mo. 1966) (en banc); MAI 10.03; MAI 36.12. Juries also apportion damages in Missouri in Federal Employer's Liability cases. MAI 32.07.

82. 602 S.W.2d at 200 (Welliver, J., dissenting).

83. *Id.* at 201 (Welliver, J., dissenting). As he had with Judge Donnelly's dissent in *Steinman*, Judge Seiler concurred with Judge Welliver's dissent in *Parks*.

84. *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Coney v. J.L.G. Indus., 97 Ill. 2d 104, 454 N.E.2d 197, (1983); Artic Structures v. Wedmore, 605 P.2d 426 (Alaska 1979); Seattle First National Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978); Parks v. Union Carbide Corp., 602 S.W.2d 188, 191 (Mo. 1980) (en banc) (Welliver, J., dissenting).

Stare decisis, while persuasive, never justifies retaining a rule where the reason for the rule has vanished.[85] Precedent is only a starting point. A rule should be frequently examined, or, as Mr. Justice Douglas warned, we let men long dead and unaware of the problems of the age in which we live do our thinking for us.[86] Unfortunately, Mr. Justice Douglas's warning often has fallen on deaf ears; most courts retain joint and several liability with little or no discussion, instead resting their decision on precedent. Moreover, as previously pointed out, those courts that have addressed the issue, have done so without seriously discussing the option of splitting the risk of insolvency between all the culpable parties. Instead, these courts have framed the issue as a choice between retaining and eliminating the rule.[87] Re-examination of the rule in a comparative fault setting reveals weakened justifications for its retention without change.

Joint and several liability can no longer be justified by the argument that the plaintiff's injury is indivisible.[88] That a plaintiff's injury is "indivisible" is simply a matter of semantics and merely restates a conclusion.[89] An injury is indivisible only because there is no logical or equitable basis for apportioning damages among the defendants. But this is not true in a comparative fault setting.

Apportioning damages is what comparative fault systems are all about.[90] Nearly all tort claims are reduced to money judgments. The amount of damages is expressed in dollars and cents. Thus, the damage is divisible. The problem is finding a fair method of division. In instances of comparative negligence, the jury determines the percentage of fault attributable to the plaintiff and the percentage of fault attributable to the defendant, and apportions the loss accordingly. Likewise, in suits for contribution, the jury determines the relative fault of the parties and then apportions damages based on this determination. It follows that if the jury's determination of relative fault provides a logical basis of apportioning damages for an indivisible injury between a plaintiff and a defendant and among defendants, it provides a logical basis for apportioning damages between a plaintiff and multiple defendants.

The indivisibility argument rests on the notion that each defendant's negligence was a proximate cause of the entire injury.[91] But the justification ig-

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85. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). *See Parks*, 602 S.W.2d at 199 (Welliver, J. dissenting) (quoting Holmes).

86. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); *see Parks*, 602 S.W.2d at 199 (Welliver, J., dissenting) (quoting Douglas).

87. *See supra*, notes 14-32 and accompanying text.

88. *See Parks*, 602 S.W.2d at 198 (Welliver, J., dissenting) ("No reason appears for characterizing tortious injuries as 'indivisible' except to rationalize continuing the rule of joint and several liability.").

89. *See* Prosser, *supra* note 6, at 430, 442; 1 HARPER & JAMES, *supra* note 6, at 700-02; *supra* note 72.

90. *See* Zavos, *supra* note 9, at 788-89. *But see American Motorcycle*, 20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188 (the court drew a distinction between apportioning fault and apportioning injury).

91. *See American Motorcycle*, 20 Cal. 3d at 589, 578 P.2d at 905, 146 Cal.

nores the fact that the plaintiff's negligence was also a proximate cause of the entire injury. Plaintiff's negligence no longer bars plaintiff's recovery. The indivisibility argument should not be used to allow a plaintiff to recover damages of which his negligence was a proximate cause and against defendants to deny modification of joint and several liability. If comparative fault is the logical and equitable way of eliminating the all-or-nothing aspect of contributory negligence, it should also justify eliminating the all-or-nothing aspect of joint and several liability. Thus, a more consistent approach would treat plaintiffs and defendants evenhandedly, distributing the risk of an unsatisfied judgment between them.

The third argument for retaining joint and several liability also rests on an unevenhanded treatment of plaintiffs and defendants. For this reason, the argument that a plaintiff's misconduct is somehow less culpable than a defendant's is unsound. The degree of plaintiff's culpability is less, it is argued, because the plaintiff has only violated a duty to protect himself, whereas a defendant has violated a duty to prevent harm to others.[92] But often a plaintiff in injuring himself will have created a tremendous risk of harm to others. To illustrate, assume that *A*, *B*, and *C* all reach an open intersection at about the same time, each is speeding and none is keeping a careful lookout. Assume further that *B* and *C* are able to swerve and avoid injury, but *A* swerves into a ditch and his car is badly damaged. Because *B* and *C* were lucky enough to avoid injury, they may only be defendants in an action arising out of the concurring conduct of all three. Under the rule of joint and several liability, *A*, because he will wear the label "plaintiff," is shielded from the risk that either *B* or *C* is insolvent; *B* or *C* as "defendants" would have to bear the unsatisfied portion of the damages caused by the others' insolvency. Yet there is no qualitative difference between the conduct of *A* and that of *B* and *C*; *A* certainly created as great a risk of harm as *B* or *C*. The difference is that the risk created by *B* and *C* was realized in the damage to *A*'s car, while the risk created by *A* was not realized except in *A*'s own damages. Thus, the question of who will bear the risk of an insolvent defendant turns on fortuitous circumstance rather than on any qualitative difference in the culpability of the parties' conduct.[93] An approach that apportions damages according to who is la-

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Rptr. at 188 ("the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant does not in any way suggest that each defendant's negligence is not the proximate cause of the entire indivisible injury"); *see also* Comment, *supra* note 5, at 88-89 (arguing that eliminating joint and several liability would eliminate the law of causation and be contrary to other fundamental tort principles). The author argues that causation and culpability are poor measures of fault, but never explains why these measures of fault justify comparative negligence and contribution on the one hand, but not modification of joint and several liability on the other. *Id.*

92. *See id.* § 65, at 418; RESTATEMENT (SECOND) OF TORTS § 463, comment b, § 464, comment f (1977) (negligent conduct creates an unreasonable risk of harm to others while contributory negligence creates an unreasonable risk of harm to the actor).

93. *See* Miller, *supra* note 2, at 852-53; Zavos, *supra* note 9, at 803-09 (offer-

beled "plaintiff" and who is labeled "defendant," where the labels are fortuitously attached, is neither logical nor equitable.

Perhaps the best justification for retaining joint and several liability is a desire to make the plaintiff whole. This argument appeals to our sense of justice. A tort system must take care of those who are injured. This sense of justice diminishes dramatically, however, where the plaintiff has contributed significantly to cause his own injury and a defendant is only incidentally inculpated. This diminished sense of justice is recognized in the rule of comparative negligence by reducing a plaintiff's recovery by the proportion of fault attributable to him. Likewise, it would not seem unfair to have a culpable plaintiff share the risk of an insolvent defendant. Moreover, it is clear that a defendant is also injured and uncompensated when he must bear the entire burden of his insolvent codefendant, beyond his proportionate share of fault.[94] While compensation is a noble policy, it must be tempered by a sense of fairness and logic, the cornerstones of a system of comparative fault. One person should not be unfairly burdened to compensate another. Furthermore, compensation is merely the flip side of liability and logically should be based on fault.

Obviously, a modification of joint and several liability that considers the relative fault of all the parties would not deprive an *innocent* plaintiff of full compensation.[95] Before the trend toward comparative negligence it was easier to justify joint and several liability. Joint and several liability grew out of a system of contributory negligence, where a plaintiff had to be innocent to recover anything at all. Therefore, courts were faced with shifting the loss occasioned by an insolvent defendant either to an innocent plaintiff or a wrongdoing defendant. Under these circumstances, the choice was easy.[96] Joint and several liability permitted an innocent party full compensation. But in cases of comparative negligence, the plaintiff is not innocent. Consequently, the principle of fairness is the strongest argument for not retaining the traditional common law rule of joint and several liability.[97] The rule favors a culpable plaintiff over a defendant, or one wrongdoer over another. A principle of loss apportionment that insulates a defendant from liability to the plaintiff for loss due to the plaintiff's negligence should serve likewise to insulate a defendant from liability for loss to the plaintiff attributable to the negligence of another defendant.[98] One commentator has gone so far as to suggest that to hold otherwise would violate the due process and equal protection clauses of the

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ing several excellent examples to illustrate the point).

94. *See id.* at 800-01.

95. Concerning the relation of the policy favoring compensation of the innocent plaintiff to the rule of joint and several liability, see Comment, *Reconciling Comparative Negligence, Contribution, and Joint and Several Liability*, 34 WASH. & LEE L. REV. 1159, 1170 (1977).

96. *See* Miller, *supra* note 2, at 838 n.18, 842 (the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant).

97. *See Parks*, 602 S.W.2d at 200 (Welliver, J., dissenting); Miller, *supra* note 2, at 844-45.

98. *See* Pearson, *supra* note 10, at 362.

United States Constitution.[99]

VI. Several Liability Provides No Better Solution

Proponents of eliminating joint and several liability in favor of several liability purport to rest their arguments on the principle of fairness. They argue that in a comparative fault system a defendant should be liable only for the damages representing his proportionate share of fault. That is, a person's share of negligence should not only determine the extent of his liability, but the limit as well.[100] This argument, however, suffers from the same inherent weakness as the arguments advanced by proponents of joint and several liability,[101] only in reverse. While joint and several liability shifts the uncollectible loss occasioned by an insolvent defendant onto the shoulders of solvent codefendants, several liability leaves the entire loss on the shoulders of the plaintiff.[102] Like joint and several liability, several liability apportions the loss without regard to fault, only several liability unfairly favors a defendant over a plaintiff, even an innocent plaintiff.

Advocates of several liability also point to the cost of redistributing loss through joint and several liability.[103] The California Court of Appeals in *American Motorcycle* argued that shifting the loss of a negligent plaintiff to the solvent defendant taxed an already overburdened "social fund."[104] Ultimately, the burden of the insolvent defendant is borne by taxpayers and pur-

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99. Adler, *Allocation of Responsibility After* American Motorcycle Ass'n v. Superior Court, 6 PEPPERDINE L. REV. 1, 19 (1978).

100. *See Parks*, 602 S.W.2d at 197-201 (Welliver, J., dissenting); Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978); Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982). The court in *Laubach* offered the following additional reasons for a rule of several liability: (1) it would eliminate the need for additional litigation of contribution suits, 588 P.2d at 1074; (2) it would simplify the trial in comparative negligence suits, *id.* at 1075; (3) comparative negligence adequately accomplishes the purpose of joint and several liability, *id.*; and (4) Dean Prosser favored several liability, *id.* at 1075 n.17.

101. *See supra* notes 84-99 and accompanying text.

102. *But see* Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980) (limiting several liability to cases involving a culpable plaintiff); *Parks*, 602 S.W.2d at 201 (joint and several liability should only be applied to a faultless plaintiff). Statutes in Texas, Nevada, and Oregon allow several liability only where the defendant is less at fault than the plaintiff. *See supra* notes 37-39.

103. *Deep Pocket Getting Deeper in California*, For the Defense, 6 July 1984 (joint and several liability claims accounting for an ever increasing portion of overall claims costs).

104. 65 Cal. App. 3d at 702, 136 Cal. Rptr. at 502 (1977). The court first pointed out that the rule of comparative negligence shifted a portion of the loss formerly borne by the negligent plaintiff to the social fund. The court concluded that it would be a small trade-off from the plaintiff's standpoint that he rather than the societal fund bear that portion of his misfortune attributable to the insolvency of one of several tortfeasors where the fund rather than the plaintiff now bears a part of the cost of the damage to which the plaintiff's negligence contributed. *Id.*

chasers of insurance, diverting resources from education, the disadvantaged, and crime prevention.[105] The court noted that the fixed costs of shifting losses to the "social fund" is between two and three dollars for each dollar distributed.[106]

There are two rebuttals to the cost argument. First, when the cost is spread out among taxpayers and purchasers of insurance, it represents only a minuscule amount. Second, even if the cost amounts to a serious drain on the "social fund," it is merely a policy judgment as to whether the resources are diverted from needs more socially desirable than compensating plaintiffs for their innocent damages.[107]

VII. Splitting the Risk Between All Culpable Parties

If joint and several liability unfairly favors a plaintiff and several liability unfairly favors a defendant, there is no apparent reason why both plaintiff and defendant should not share the risk of uncollectibility according to their relative degrees of fault.[108] Such an approach rests on the principle of fairness embodied in a comparative fault system.[109] Moreover, Justice Clark, in his dissent in *American Motorcycle*, argued that any other approach also distorts the fact-finding process.[110] Often the insolvency of one of the tortfeasors is known at trial, and thus this tortfeasor is not joined or is unrepresented at trial because of his insolvency. When joint and several liability is the rule, the plaintiff will seek to increase the insolvent tortfeasor's share of fault since the plaintiff knows that the solvent defendant will be responsible for his share of the damages. On the other hand, when several liability is the rule, the opposite is true: the defendant will seek to increase the insolvent defendant's share of fault knowing the plaintiff will be responsible. If the uncollectible loss were split between the responsible parties, this inflation of liability would stop.[111] It follows that such a system would also encourage joinder of all the culpable parties.

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105. *Id.*

106. *Id.* (citing R. Keeton, J. O'Connel and J. McCord, Crisis in Car Insurance 90 (1968); State of New York Insurance Department, Automobile Insurance 34-36 (1977)).

107. *See* Zavos, *supra* note 9, at 781-82.

108. While commentators generally favor a rule that divides the uncollectible loss between the negligent plaintiff and the remaining defendants, only Minnesota has adopted such an approach, *see supra*, note 13. *See, e.g.*, Miller, *supra* note 2; Zavos, *supra* note 9; Flemming, *supra* note 10; Adler, *supra* note 91.

109. *See* Miller, *supra* note 2, at 861; Zavos, *supra* note 9, at 781-82; UCFA, 12 U.L.A. 35, 40 (Supp. 1984) (commissioner's comment to § 2) (splitting the risk between all culpable parties avoids the unfairness of both joint and several liability, which casts the total risk of uncollectibility upon the solvent defendants, and several liability, which casts the total risk of uncollectibility upon the plaintiff).

110. 20 Cal. 3d at 614, 578 P.2d at 923, 146 Cal. Rptr. at 206 (Clark, J., dissenting).

111. *Id.*

The Uniform Comparative Fault Act achieves a splitting of the loss according to relative fault by: (1) ignoring the negligence of parties not before the court;[112] (2) retaining joint and several liability as to persons before the court;[113] (3) providing for contribution among tortfeasors based on their relative fault;[114] and (4) calling for a reallocation of any uncollectible loss among the culpable plaintiff and solvent defendants.[115] The reallocation provision is the unique feature of the Uniform Act, but unfortunately it is also the provision that the Missouri Supreme Court apparently rejected when it adopted the Uniform Act and reaffirmed the principle of joint and several liability.[116] Section 2(d) of the Act provides:

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to claimant on the judgment.[117]

To illustrate how reallocation would work, recall our three-car collision hypothetical. Assume again that the plaintiff is adjudged 30% at fault, defendant *A* 10%, and defendant *B* 60%. Since joint and several liability continues to apply under the Uniform Act either defendant would be liable for 70% of the plaintiff's damages with a right of contribution against the other. But if contribution fails because of insolvency, the defendant paying more than his fair share may upon a motion made within a year of the judgment recover from the plaintiff an amount that represents the plaintiff's proportionate share of the uncollectible loss. Thus if defendant *A* paid $70,000 of a $100,000 judgment, he could recover from the plaintiff $45,000, since plaintiff was three times as much at fault as defendant *A* and the uncollectible amount of the judgment due to the insolvency of defendant *B* was $60,000.[118] The end result logically and equitably apportions the burden of the insolvent defendant.

Clearly, the Uniform Act's reallocation scheme is objectionable to the plaintiff's bar in a state like Missouri that follows joint and several liability since plaintiffs can recover the full amount of their judgment as long as there

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112. UCFA § 2(a)(2) and commissioner's comment, 12 U.L.A. 39, 43 (Supp. 1985).

113. UCFA § 2(c), *id.*

114. UCFA § 4, *id.* at 42.

115. UCFA § 2(d), *id.* at 39.

116. *See Gustafson*, 661 S.W.2d at 16.

117. UCFA § 2(d), U.L.A. 35, 39 (Supp. 1984). It should be noted that since the jury will determine the proportionate fault of all the parties, the motion for reallocation can be made at the time of the trial if the insolvency of a defendant is known then or when this insolvency becomes known, but not later than a year after the judgment is entered.

118. For more examples on how reallocation works, see commissioner's comments to § 2(d), *id.* at 40.

is a solvent defendant. But certain aspects of the scheme may also be objectionable to the defendant's bar. For example, the reallocation provision applies only where the defendant is insolvent; it does not address the immune or unavailable defendant. In addition, the burden of pursuing the non-paying party is on the defendant. A defendant also faces the risk that the plaintiff will have spent his judgment, be insolvent, and thus be unable to compensate the defendant for his share of the reallocated loss. The risk would not be as great if it were initially placed on the plaintiff. Usually a defendant is financially responsible due to liability insurance. Thus, when a plaintiff finds that a defendant is insolvent even a year later, a fund still would be available for reallocation of the loss. A plaintiff will not have insurance for reallocation. A more palatable scheme for the defendant's bar would make defendants initially only severally liable and allow plaintiff the right of reallocation.[119] In either event, the reallocation provision provides an equitable and reasoned means of reallocating the uncollectible loss caused by a defendant's insolvency.

VIII. CONCLUSION

Unfortunately, the Missouri Supreme Court in *Gustafson* declined to adopt the reallocation provision of the Uniform Act. The reallocation provision corrects the harshness of joint and several liability by treating plaintiffs and defendants evenhandedly. It provides a more equitable solution than eliminating joint and several liability in favor of several liability. The principle of fairness, upon which the court rests its decisions to adopt contribution based on relative fault and comparative negligence, compels the modification of joint and several liability that is provided for by the Uniform Act. Missouri will not have a comprehensive comparative fault system until the courts or the legislature modify the all-or-nothing aspect of joint and several liability.

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119. *See* Pearson, *supra* note 10, at 364-65.