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Volume 24 | Issue 3

Article 4

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1979

## Contribution, Indemnity, Settlements, and Releases: What the Pennsylvania Comparative Negligence Statute Did Not Say

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### Recommended Citation

James L. Griffith, Michael C. Hemsley & Charles B. Burr, *Contribution, Indemnity, Settlements, and Releases: What the Pennsylvania Comparative Negligence Statute Did Not Say*, 24 Vill. L. Rev. 494 (1979). Available at: <https://digitalcommons.law.villanova.edu/vlr/vol24/iss3/4>

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CONTRIBUTION, INDEMNITY, SETTLEMENTS,  
AND RELEASES: WHAT THE  
PENNSYLVANIA COMPARATIVE NEGLIGENCE  
STATUTE DID NOT SAY

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I. INTRODUCTION

THERE IS NO MORE PERPLEXING ASPECT of the Pennsylvania Comparative Negligence Act<sup>1</sup> than the question of its effect on the multiple defendant. As of September 7, 1976,<sup>2</sup> counsel for a defendant in a negligence<sup>3</sup> action must closely examine this statute to minimize any apportionment of negligence attributable to his client with respect to the plaintiff and other potential defendants. The deceptively simplistic language of the Act, however, leaves the most fundamental issues unresolved. The most practical considerations which arise in the process of litigation concerning contribution, indemnity, settlements, and releases are not addressed in any meaningful fashion.

This article is designed to explore the fundamental issues affecting the multiple defendant and to propose some approaches to the issues of contribution and indemnity. Additionally, consideration will be given to the manner in which settlements and releases might be negotiated and structured under the Act.

At the outset it must be noted that the bench and bar have been provided very little guidance in construing the General Assembly's intent regarding this statute. As is unfortunately the case with most legislation in Pennsylvania, there is little legislative history available

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1. For purposes of this symposium, references to and quotations from the Pennsylvania Comparative Negligence Act will be made without citation. For the text of the Act, *see* Spina, *Introduction, Symposium: Comparative Negligence in Pennsylvania*. 24 VILL. L. REV. 419, 419 (1979).

2. The comparative negligence statute is not to be applied to any cases in which the cause of action arose prior to September 7, 1976, the effective date of the Act. *Costa v. Lair*, 241 Pa. Super. Ct. 517, 363 A.2d 1313 (1976).

3. By the terms of § (a), the Act is limited in application to "actions brought to recover damages for negligence resulting in death or injury to person or property."

to assist the courts in interpreting the Act.<sup>4</sup> There is, however, some merit to the position that the Pennsylvania approach to comparative negligence will be modeled upon the Wisconsin comparative negligence statute.<sup>5</sup> Although the principal sponsor of the Pennsylvania Act, Senator Henry G. Hager, indicated in debate on the Senate floor that the Pennsylvania legislation was based on the Wisconsin statute,<sup>6</sup> this statement will not be binding upon a court in construing this Act.<sup>7</sup> A comparison of the Wisconsin statute and the Pennsylvania Act indicates that the Wisconsin statute is even more abbreviated than Pennsylvania's.<sup>8</sup> Moreover, with respect to the issues of contribution and indemnity, the Wisconsin courts have been obligated to assume a legislative role in making fundamental policy decisions as to the meaning of the Wisconsin statute.<sup>9</sup> A vast number of jurisdictions have enacted comparative negligence statutes that provide various schemes to guide the development of the doctrine in Pennsylvania.<sup>10</sup> This development, which ideally should have been performed by the General Assembly, will now be left to the courts.

## II. BASIC CONSIDERATIONS

Before one can determine the Act's effect on multiple defendants, two issues must be addressed involving the nature of the comparison of the negligence of the litigants. First, one must decide against

4. See 1 PA. LEG. J. 1701-08 (Senate 1976).

5. WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979). See Timby, *Comparative Negligence*, 48 PA. B.A.Q. 219, 221 (1977).

6. 1 PA. LEG. J. 1707 (Senate 1976) (remarks of Sen. Hager).

7. See PA. STAT. ANN. tit. 1, § 1921(c) (Purdon Supp. 1978-1979). This provision provides that when construing a statute, courts shall consider:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

*Id.*

8. The Wisconsin comparative negligence statute provides:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979).

9. See note 16 *infra*.

10. See Timby & Plevyak, *The Effect of Pennsylvania's Comparative Negligence Statute on Traditional Tort Concepts and Doctrines*, Symposium: *Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 453, 453n.3 (1979).

whom the plaintiff's negligence is to be adjudged or compared. The second issue involves whether the negligence of a settled or otherwise absent tortfeasor is to be presented to the jury. The resolution of these issues will have an important impact on the fundamental fairness of the legislative scheme as well as provide the basis for the application of the statutory provision on contribution.

Three things are clear in the Pennsylvania statute. First, the Pennsylvania scheme is a modified comparative negligence system.<sup>11</sup> Second, section (b) of the Act provides for the joint and several liability of "any defendant against whom the plaintiff is not barred from recovery." Lastly, section (b) provides for pure comparative contribution among defendants who have been determined to have been negligent.<sup>12</sup> Besides these three points, all other issues are subject to considerable debate.

#### A. *Against Whom is the Plaintiff's Negligence Compared?*

Section (a) of the Act in principle enacts a system of modified comparative negligence that enables the claimant to recover so long as his comparative or proportional contribution to the total negligence causing his injury is not greater than that "of the defendant or defendants against whom recovery is sought." If the plaintiff's proportional contribution to the total negligence causing his injury is greater than 50%, he is barred from any recovery. If the plaintiff's proportional contribution is not greater than 50%, he may recover a verdict but the amount will be reduced by the same proportional contribution to the total negligence.<sup>13</sup>

PLAINTIFF'S PROPORTIONAL CONTRIBUTION	RECOVERY
52%	None
50%	Recovery but verdict reduced by 50%
35%	Verdict reduced by 35%

The crucial issue for all parties in a multiple defendant action is whether the plaintiff's negligence is to be compared against each defendant or against the combined negligence of all of the defendants found to have been causally negligent. At least three jurisdictions

11. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 3.5, at 73-82 (1974).

12. It might also be questioned whether the legislature intended any distinction between "defendants against whom recovery is allowed" in § (a) and "defendant against whom the plaintiff is not barred from recovery" in § (b) of the Act.

13. See V. SCHWARTZ, *supra* note 11, § 3.5, at 73-82.

have taken the position that the claimant's negligence must be compared with that of each defendant individually and not with the combined negligence of all the defendants.<sup>14</sup> The rationale employed in these jurisdictions to support this result is that it is against the spirit of modified comparative negligence to allow a claimant to recover from one whose causative negligence was less than or equal to that of the claimant.<sup>15</sup> The resolution of this issue is especially significant under a modified comparative negligence system. For example, if plaintiff's negligence is apportioned at 30% and the negligence of three defendants is apportioned at 25%, 25%, and 20%, respectively, then a plaintiff could not recover from anyone under such an interpretation. On the other hand, if plaintiff's negligence were to be compared with the aggregate negligence of all the tortfeasors, he would be entitled to recover 70% of his verdict.

If the plaintiff's negligence is to be compared to each defendant individually, a further question arises under the Act. Section (b) provides for pure comparative contribution among defendants where any defendant is compelled to pay more than his percentage share of the judgment. If the Act were interpreted to prohibit combining negligence, such a provision<sup>16</sup> would be limited in its application to those defendants who were found to have been more negligent than the plaintiff. Not only would recovery be permitted against those individual defendants found to have been more negligent vis-à-vis the plaintiff, but there would also be no right of contribution among the negligent defendants against a lesser negligent defendant. This result could appear to be inconsistent with the intent of the Pennsylvania legislature.

Another reading of the Act has led to the interpretation that if both defendants are less negligent than the plaintiff, the plaintiff's recovery from either would be limited to that defendant's apportioned share of responsibility for the loss.<sup>17</sup> Under this analysis, if the neg-

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14. *Mishoe v. Davis*, 64 Ga. App. 700, 14 S.E.2d 187 (1941); *Rawson v. Lohsen*, 145 N.J. Super. 71, 366 A.2d 1022 (Law Div. 1976); *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934). See also V. SCHWARTZ, *supra* note 11, § 16.6, at 256-60.

15. See V. SCHWARTZ, *supra* note 11, § 16.6, at 257.

16. For example, the Wisconsin statute has no provision comparable to that found in the Pennsylvania Act establishing comparative contribution among joint tortfeasors. For the text of the Wisconsin statute, see note 8 *supra*. The doctrine of comparative contribution was judicially created in *Bielski v. Schulze*, 16 Wis. 2d 1, 6, 114 N.W.2d 105, 107 (1962).

17. See L. DETWEILER, ANALYSIS OF COMPARATIVE NEGLIGENCE ACT AND ITS EFFECTS ON EXISTING TORT LAW. This unpublished article was prepared for the Supreme Court of Pennsylvania Proposed Standard Jury Instructions Committee, Civil Jury Instructions Subcommittee. Although there is no authority cited for this interpretation, it is as justified as nearly any other given the ambiguous expression of legislative intent in the Act.

ligence of one of the defendants were equal to or greater than that of the plaintiff, the plaintiff could recover all of his recoverable damages from that defendant, and the latter could seek such contribution from the other defendant only to the extent of the lesser defendant's liability. On the other hand, if the negligence of each defendant is equal to or greater than that of the plaintiff, the plaintiff may recover all his damages from either defendant.

Construing a statute similar to the Pennsylvania Act,<sup>18</sup> the Supreme Court of Arkansas has concluded that a comparison is to be made between the plaintiff's negligence and the combined negligence of all the defendants, even though they may not have shared a joint duty.<sup>19</sup> The Arkansas court determined that this construction comported with the legislative purpose to distribute the cost of an accident among those who are at fault and have caused it.<sup>20</sup> Professor Schwartz, a leading authority on comparative negligence, endorses the Arkansas approach, but emphasizes the importance of allowing contribution among joint tortfeasors to partially alleviate the unfairness to the slightly negligent defendant.<sup>21</sup>

If the Pennsylvania Act is construed to require a comparison of the plaintiff's negligence with the combined negligence of all the defendants, some provision must be made to eliminate the joint and several liability of the lesser negligent defendants. If, on the other hand, the plaintiff's negligence is compared with the individual defendant's negligence, joint and several liability would not appear to be as harsh as under the aggregate comparison approach. It is submitted that a fair reading of the Act reveals that the plaintiff's negligence should be compared to the combined negligence of all defendants and that joint and several liability should be eliminated.<sup>22</sup>

18. See ARK. STAT. ANN. §§ 27-1730.1 to -1730.2 (1962) (repealed 1973) (current version at ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977)).

19. *Riddell v. Little*, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972); *Walton v. Tull*, 234 Ark. 882, 891-95, 356 S.W.2d, 20, 25-27 (1962).

20. *Riddell v. Little*, 253 Ark. 686, 689, 488 S.W.2d 34, 36 (1972); *Walton v. Tull*, 234 Ark. 882, 893-95, 356 S.W.2d 20, 26-27 (1962).

21. See V. SCHWARTZ, *supra* note 11, § 16.6, at 259.

22. On this issue, the Act contains language similar to that found in the Texas comparative negligence statute. See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979). The Texas statute is perhaps the most comprehensive and clearly drafted comparative negligence statute. See *id.* Attempting to avoid the unfairness of the aggregate approach in comparing negligence to a lesser negligent tortfeasor, the Texas legislature has modified its concept of joint and several liability by providing that a tortfeasor whose percentage of negligence is less than that of the claimant is liable to the claimant only for his proportionate share of the damages. *Id.* § 2(c). Joint and several liability remains for those tortfeasors whose negligence is equal to or greater than that of the claimant. *Id.*

This interpretation of the provision comports with the familiar concepts of intervening and superseding negligence and more closely parallels the course of previous negligence litigation. The rule against combining negligence is artificial and results in a comparison of the claimant's negligence to that of each defendant in a vacuum. The apportionment of liability should be considered in the context of the activity of all the negligent participants in the events giving rise to the action. Further discussion in this article will be premised upon such a reading of the Act.

### B. Comparison of Negligence Among Tortfeasors

Under the Act, the jury will compare the negligence of all potentially responsible persons in arriving at its verdict. If, for any reason, all potential joint tortfeasors are not joined in one action, courts and commentators differ as to whether the jury should consider the negligence of the absent tortfeasors in making its comparison.<sup>23</sup> The determination of this issue will have an effect on the decision as to whether or not the plaintiff can recover at all<sup>24</sup> and will circumscribe the joint and several liability of the defendants.

The Act provides that the plaintiff's negligence will be compared to the "causal negligence of the defendant or defendants against whom recovery is sought." This language apparently indicates that the plaintiff's contributory negligence will be compared only to the negligence of those defendants against whom he has brought his action or who are subsequently joined. The Supreme Court of Wisconsin, however, has interpreted similar language in the Wisconsin statute to include absent tortfeasors.<sup>25</sup> The rationale for such a comparison is that it produces a more accurate allocation of comparative fault among all tortfeasors in a single suit.<sup>26</sup>

For example, in *Walker v. Kroger Grocery & Baking Co.*,<sup>27</sup> the plaintiff-passenger's driver was effectively absent from the action be-

23. For a discussion of this issue, see Beasley & Tunstall, *Jury Instructions Concerning Multiple Defendants and Strict Liability After the Pennsylvania Comparative Negligence Act, Symposium: Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 518, 553-56 (1979).

24. Where an absent or settled tortfeasor's negligence is not compared with those nonsettling tortfeasors, the plaintiff may, depending upon with which defendant he settles, be barred from recovery regardless of whether or not the plaintiff's negligence is compared with each defendant's negligence or with the combined negligence of all the defendants.

25. *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934). See also *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963); *Ross v. Koberstein*, 220 Wis. 73, 264 N.W. 642 (1936). For the text of the Wisconsin statute, see note 8 *supra*.

26. *Pierringer v. Hoyer*, 21 Wis. 2d 182, 191-92, 124 N.W.2d 106, 111-12 (1963).

27. 214 Wis. 519, 252 N.W. 721 (1934).

cause plaintiff's claim against him was barred by the then extant Wisconsin doctrine of assumption of the risk.<sup>28</sup> In the passenger's action against the driver of another vehicle, the trial court instructed the jury to compare the passenger's negligence with the combined negligence of the two drivers.<sup>29</sup> The court held that this was proper even though the host driver was protected by the assumption of the risk defense from liability for contribution.<sup>30</sup> The *Walker* court viewed this result as merely an application of the Wisconsin doctrine of joint and several liability of each tortfeasor for all damages recoverable by plaintiff.<sup>31</sup>

In a subsequent Wisconsin case, the trial court instructed the jury to compare the plaintiff's negligence only with that of the in court defendant.<sup>32</sup> Although concluding on appeal that a consideration of an absent tortfeasor's negligence should be made, the Supreme Court of Wisconsin indicated that there would be no prejudice to the joint tortfeasor when this was not done because of the rule of joint and several liability.<sup>33</sup> In a state which has abandoned the rule of joint and several liability, however, the joint tortfeasor would be seriously prejudiced if the apportionment were made without a consideration of the absent joint tortfeasor's contribution to the claimant's loss.<sup>34</sup> It should be noted that Pennsylvania has retained the concept of joint and several liability in section (b) of the Act. The same prejudice may nonetheless result to defendants held jointly and severally liable in that the availability of contribution as against the absent tortfeasor would be limited since 100% of the liability is apportioned.<sup>35</sup>

In the landmark case of *Pierringer v. Hoger*,<sup>36</sup> the Supreme Court of Wisconsin considered whether the jury should determine the percentage of negligence attributable to nonparty tortfeasors.<sup>37</sup> While noting that the only relevant issue was the amount of negligence of the defendant,<sup>38</sup> the court concluded that this could be

28. *Id.* at 530-31, 252 N.W. at 725.

29. *Id.* at 533, 252 N.W. at 727.

30. *Id.* at 534, 252 N.W. at 727.

31. *Id.* at 536, 252 N.W. at 728.

32. *Ross v. Koberstein*, 220 Wis. 73, 74, 264 N.W. 642, 642 (1936).

33. *Id.*

34. *See* V. SCHWARTZ, *supra* note 11, § 16.5, at 255.

35. There are substantial questions regarding the effect of the comparative contribution provision of § (b) upon a co-tortfeasor's right to contribution against an absent tortfeasor. *See* notes 61-79 and accompanying text *infra*.

36. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

37. *Id.* at 191-93, 124 N.W.2d at 111-12. The nonparty tortfeasors had entered into written releases with the plaintiff prior to trial. *Id.* at 183, 124 N.W.2d at 107.

38. *Id.* at 192, 124 N.W.2d at 112. The court reasoned that the settling defendants had bought a total "peace" with the plaintiff. *Id.*



properly determined only by reference to the negligence of all the tortfeasors.<sup>39</sup> Other states have made specific statutory provision for a procedure to be followed in cases involving settlements,<sup>40</sup> the most comprehensive of which is found in Texas.<sup>41</sup>

Where the plaintiff's negligence is compared to the combined negligence of all the defendants, one would expect the defendants to ensure the joinder of all other potential tortfeasors over whom the court would have jurisdiction. The failure to ensure that the jury consider the negligence of absent tortfeasors can affect the propriety of joint and several liability in the comparative negligence scheme and raise serious collateral estoppel issues.<sup>42</sup>

The impact of the absent tortfeasor problem on the concepts of joint and several liability and collateral estoppel takes on a new dimension under a comparative negligence statute and illustrates the value of the joinder of all potential litigants in an action under the comparative negligence statute. In a comparative negligence system, the concept of joint and several liability is essentially unchanged, but as a necessary corollary to the apportionment of liability, many statutes limit the defendants' obligation to contribute to no more than their apportioned or percentage share of the liability to the satisfaction of the judgment.<sup>43</sup> Some states have simply abandoned the concept of joint and several liability by finding the rationale for this concept to have been obviated by the rationale for comparative negligence.<sup>44</sup> Although Pennsylvania has specifically retained joint and several liability, section (b) of the Act ameliorates the harshness of joint and several liability by providing for comparative contribution among joint tortfeasors. This provision permits the apportionment of damages among defendants in proportion to their percentage of liability by means of contribution. The risk of an impecunious defendant is nonetheless placed upon defendants rather than upon the plaintiff. A plaintiff who is 45% negligent could thus recover 55% of the verdict amount against tortfeasors A, B, C, and D. If the jury finds A, B, C,

39. *Id.* at 191-92, 124 N.W.2d at 111-12. The supreme court explained that the defendant could be held liable only for that percentage of causal negligence which was attributable to him. *Id.*, 124 N.W.2d at 112.

40. IDAHO CODE §§ 6-801 to -806 (Supp. 1978); MINN. STAT. ANN. § 604.01 (West Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2 (Vernon Supp. 1978-1979); UTAH CODE ANN. §§ 78-27-37 to -43 (1973).

41. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2 (Vernon Supp. 1978-1979). For a further discussion of this statute, see notes 111-13 and accompanying text *infra*.

42. See generally F. JAMES, CIVIL PROCEDURE § 10.8, at 459 (1965); W. PROSSER, LAW OF TORTS § 47, at 293-99 (4th ed. 1971).

43. See, e.g., MINN. STAT. ANN. § 604.01 (West Supp. 1979); WYO. STAT. § 1-1-110 (1977).

44. KAN. STAT. ANN. § 60-258a (1976); NEV. REV. STAT. § 41.141 (1977).

and *D* to have been 2%, 3%, 20%, and 30% negligent, respectively, and *B*, *C*, and *D* were judgment proof, then in Pennsylvania the plaintiff could collect the entire recoverable amount from *A* and leave *A*, the least negligent of all of the parties, with the worthless right to recover from *B*, *C*, and *D*. This result indicates that the fairness of joint and several liability has been severely eroded in a comparative negligence system.

This resolution has been praised as a more equitable apportionment as among all of the negligent parties than the harsh bar under contributory negligence and the equally severe rule of pro rata joint and several liability among the defendants. In the area of workmen's compensation, however, Pennsylvania law precludes the joinder of an employer on the record to determine the employer's negligence, because the Pennsylvania Workmen's Compensation Act<sup>45</sup> is a complete substitute for an employee's common law tort rights.<sup>46</sup> An employer is accordingly granted immunity from suit and is precluded from being joined as an additional defendant.<sup>47</sup> In *Tsarnas v. Jones & Laughlin Steel Corp.*,<sup>48</sup> the superior court noted that a defendant can nonetheless raise as a defense the theory that the employer's negligence was the sole cause of the injury.<sup>49</sup> It is submitted, however, that such a defense is meaningless when the jury attempts to apportion damages unless the employer is actually a participant in the litigation. It is suggested that the Workmen's Compensation Act would be more consistent with the Comparative Negligence Act if it permitted an employer to be an additional defendant but limited his liability.<sup>50</sup>

The implementation of comparative negligence does not change the rule of collateral estoppel that an absent tortfeasor is not bound by determinations made in the initial action. On the other hand, the questions of whether and the extent to which a claimant in a second

45. PA. STAT. ANN. tit. 77, § 481 (Purdon Supp. 1978-1979).

46. *Hefferin v. Stempkowski*, 247 Pa. Super. Ct. 366, 369, 372 A.2d 869, 871 (1977).

47. *Id.* at 370, 372 A.2d at 871. The dissent maintained that although the Workmen's Compensation Act relieved the employer from any other liability, it did not preclude his joinder by the defendant to establish that only the employee had been negligent. *Id.* at 371-73, 372 A.2d at 872-73 (Price, J., dissenting), citing *Burke v. Duquesne Light Co.*, 231 Pa. Super. Ct. 412, 332 A.2d 544 (1974). See *Arnold v. Borbonus*, \_\_\_ Pa. Super. Ct. \_\_\_, 390 A.2d 271 (1978).

48. \_\_\_ Pa. Super. Ct. \_\_\_, 396 A.2d 1241 (1978).

49. *Id.* at \_\_\_, 396 A.2d at 1244.

50. It is interesting to note that prior to 1974, a third-party tortfeasor had a right of contribution from a negligent employer for an amount which did not exceed the employer's liability under the Workmen's Compensation Act. *Hattersley v. Bolt*, 512 F.2d 209, 220-21 (3d Cir. 1975) (applying Pennsylvania law). The provision of the Workmen's Compensation Act which changed this was enacted in 1974. Act of Dec. 5, 1974, No. 263, § 303, 1974 Pa. Laws 782.

suit against a tortfeasor who was not joined in the first suit may be bound by a determination made in the prior proceeding are debatable.<sup>51</sup> In states where a tortfeasor is liable to a successful plaintiff only in proportion to the amount of negligence attributable to him, a significant question arises as to whether the claimant retains any right of action against an absent party whose negligence had not been considered, because the jury in the initial action had apportioned total liability for the claimant's damages only among the parties actually present. Where the absent party's negligence had been considered in the first trial, irrespective of whether joint and several liability has been abolished, the absent party cannot be bound by the percentage allocated to him, but may be entitled to assert that the claimant is bound. Moreover, no case has determined the rights to contribution or indemnity that would arise in favor of the initially sued defendants who had satisfied judgments against them prior to the subsequent apportionment of negligence in the second trial.

### III. CONTRIBUTION AMONG TORTFEASORS UNDER THE PENNSYLVANIA COMPARATIVE NEGLIGENCE ACT— COMPARATIVE CONTRIBUTION

Section (b) of the Act provides for contribution in a single sentence: "Any defendant who is so compelled to pay more than his percentage share may seek contribution." This provision modifies present Pennsylvania law, the Uniform Contribution Among Tortfeasors Act (Uniform Contribution Act),<sup>52</sup> which provides for a pro rata right of contribution among joint tortfeasors.<sup>53</sup> Section (b) of the Act modifies the Uniform Contribution Act to the extent that contribution will now be based on each tortfeasor's percentage share of negligence.<sup>54</sup>

Professor Schwartz has noted that there are at least three possible bases for the apportionment of damages among joint tortfeasors under comparative negligence.<sup>55</sup> The Act requires the apportion-

51. See Thode, *Comparative Negligence, Contribution Among Tort-Feasors, and the Effect of a Release—A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406.

52. 42 PA. CONS. STAT. §§ 8321-8327 (1978).

53. *Id.* § 8324.

54. The Act may also affect the Uniform Contribution Act in a second manner. The determination of a "joint tortfeasor" for purposes of the Uniform Contribution Act may be limited if it is decided that under the Act the plaintiff's negligence is to be compared with the negligence of each individual defendant. See notes 13-22 and accompanying text *supra*.

55. See V. SCHWARTZ, *supra* note 11, § 16.8, at 268. Professor Schwartz lists the following bases: 1) equal division among tortfeasors without considering relative fault; 2) "pure comparative negligence," in which "[e]ach tortfeasor contributes in proportion to his fault, and any

ment of liability on the basis of pure comparative negligence.<sup>56</sup> Although Wisconsin, the state to which the Pennsylvania legislature is said to have examined in drafting the Act,<sup>57</sup> has opted for the approach judicially,<sup>58</sup> there is little Wisconsin precedent available in this area.

It has been suggested that where comparative negligence has been adopted and joint and several liability has been retained, it is incongruous to adhere to any rule which does not provide for the apportionment of joint liability according to fault.<sup>59</sup> Although the authors submit that the retention of joint and several liability is not in accordance with the spirit of comparative negligence,<sup>60</sup> it is fortunate that the Pennsylvania legislature has provided for pure comparative contribution among tortfeasors in order to ameliorate the harshness of joint and several liability upon a defendant whose degree of negligence and, therefore, liability to the plaintiff for any verdict returned, is specifically established by the jury.

Generally, when all tortfeasors have been joined in one action, the apportionment of negligence by the jury for the purpose of determining the claimant's right to recover will also be used to determine the defendants' rights to contribution *inter se*. In those cases in which all tortfeasors have not been joined in one action, a joined tortfeasor seeking contribution may be able to establish the absent party's liability to the claimant and the proper percentage allocation where contribution is on a comparative basis. Where the negligence of absent tortfeasors is not presented to the jury or where a tortfeasor is insolvent, however, all parties are faced with what has been called a "secondary loss."<sup>61</sup> Unlike the primary loss caused by the accident, secondary loss results from the inability of a court to impose

tortfeasor who has paid more than his share may enforce contribution from any who has paid less than his share;" and 3) "modified comparative negligence," in which "[l]iability is apportioned according to fault, but no tortfeasor may enforce contribution from another whose fault was less than his own." *Id.* For a discussion of the substantial complexities and problems inherent in the application of modified comparative negligence principles to contribution among joint tortfeasors, see *id.* at 270-71.

56. For the definition of modified comparative negligence in this context, see note 55 *supra*. Modified comparative negligence provisions have been enacted in at least seven other states. MINN. STAT. ANN. § 604.02(1) (West Supp. 1979); NEV. REV. STAT. § 41.141 (1977); N.D. CENT. CODE § 9-10-07 (1975); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977); N.J. STAT. ANN. §§ 2A: 15-5.1 to -5.3 (West Supp. 1978-1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1978-1979); VT. STAT. ANN. tit. 12, § 1036 (1973).

57. See notes 5-9 and accompanying text *supra*.

58. *Bielski v. Schulze*, 16 Wis. 2d 1, 6, 114 N.W.2d 105, 107 (1962). See also *Packard v. Whitten*, 274 A.2d 169, 181 (Me. 1971).

59. V. SCHWARTZ, *supra* note 11, § 16.7, at 261.

60. See text accompanying notes 42-44 *supra*.

61. Berg, *Comparative Contribution and Its Alternatives: The Equitable Distribution of Accident Losses*, 43 INS. COUNSEL J. 577, 586 (1976).

upon one or more tortfeasors that share of the loss proportional to their negligence.<sup>62</sup> The method by which this secondary loss will be distributed among these parties is an unresolved issue.

The retention of joint and several liability under the Pennsylvania comparative negligence scheme indicates that negligent defendants, rather than the plaintiff, will bear the risk of an impecunious co-tortfeasor. It is submitted, however, that this policy is not necessarily valid under comparative negligence because the retention of the joint and several judgment rule precludes a causally negligent plaintiff from bearing any risk. A somewhat novel but recommended approach to this secondary loss problem would be to treat the secondary loss just as the primary loss would have been treated. The loss would then be apportioned among the remaining tortfeasors, *including the plaintiff*, in proportion to their relative fault.<sup>63</sup> This result is far more consistent with the concept of comparative negligence, rendering it less biased in favor of the plaintiffs.

A fundamental question that arises concerning the application of the comparative contribution provision of the Act is from whom a tortfeasor can recover contribution when he pays more than his percentage share of a judgment. Traditionally, such a tortfeasor could look to all other tortfeasors for contribution in amounts up to their pro rata responsibility for the judgment. The result under the Act, however, is unclear. For example, assume the plaintiff is found 10% negligent and the defendants, A, B, and C, are found negligent in amounts of 30%, 40%, and 20%, respectively. Assume further that defendant B is impecunious. If A has paid 70% of the total judgment and C has paid his 20% contribution to the satisfaction of the judgment, it is necessary to ask whether A must look only to B for his excess contribution in the amount of 40% or whether A may sue C to recover 20% of that excess contribution. The authors have no answer to this question, but suggest that a court will not hold C liable for any

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62. *Id.* Berg discusses three possibilities: 1) placing the burden or risk of a co-tortfeasor's impecuniosity on his fellow tortfeasors under the joint and several liability rule; 2) a rule of several judgments whereby the plaintiff would risk this secondary loss; and 3) an apportionment of the secondary loss among all the remaining negligent parties. *Id.*

63. *Id.* at 587. Berg explains the operation of this method of apportioning the secondary loss with the following hypothetical example:

[A]ssume that A, B, and C are tortfeasors. Their concurrent actions caused A to sustain a \$10,000 loss. The tortfeasors are 20%, 30% and 50% negligent, respectively. C is insolvent. The primary loss would be apportioned among them in accordance with their culpability, i.e., \$2,000 to A, (borne by himself as plaintiff), \$3,000 to B, and \$5,000 to C. However, inasmuch as C is insolvent, there is a secondary loss of \$5,000. This loss would be apportioned between A and B in the ratio of 20 to 30. The net result would be that A bears 40% of the loss (\$4,000), while B bears 60% (\$6,000).

*Id.*

more than 20% of the judgment, his percentage of liability, so long as the plaintiff has had his judgment completely satisfied. Treating the secondary loss in the same manner as the primary loss, the secondary loss would be shared by the plaintiff and defendants A and C in the proportion that their respective negligence bears to the whole of B's share.

One state has attempted to address some of these issues involving contribution. The Texas Comparative Negligence Act (Texas Act)<sup>64</sup> is similar to the Act in that it is a modified comparative negligence system with the 51% bar rule.<sup>65</sup> Section 2 of the Texas Act<sup>66</sup> is an extensive provision covering six primary areas: 1) comparative negligence among defendants providing for contribution in proportion to degree of fault;<sup>67</sup> 2) joint and several liability among several defendants;<sup>68</sup> 3) credit to defendants for out of court settlements by the claimant and alleged joint tortfeasors;<sup>69</sup> 4) procedures for in court settlements by the claimant and defendants who are ultimately found to be joint tortfeasors;<sup>70</sup> 5) set-off provisions in certain instances;<sup>71</sup> and 6) the determination of contribution claims in the primary suit in certain situations,<sup>72</sup> thereby preventing multiplicity of suits and potential inequalities in the distribution of responsibility.

In particular, section 2(c) of the Texas Act<sup>73</sup> provides for a modified concept of joint and several liability:

Each defendant is jointly and severally liable for the entire amount of the 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.<sup>74</sup>

A claimant who is entitled to recover may still look to any or all defendants who are negligent for the satisfaction of his judgment, except when the claimant who is entitled to recover has been found to have a greater degree of negligence than a particular defendant

64. TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (Vernon Supp. 1978-1979). For a discussion of the Texas statute, see generally Abraham & Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411 (1973).

65. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979).

66. *Id.* § 2.

67. *Id.* § 2(b).

68. *Id.* § 2(c).

69. *Id.* § 2(d).

70. *Id.* § 2(e).

71. *Id.* § 2(f).

72. *Id.* § 2(g).

73. *Id.* § 2(c).

74. *Id.*

against whom he is entitled to recover. Such a defendant would be liable to the claimant only for an amount equal to the defendant's percentage of negligence multiplied by the total damages.<sup>75</sup> This provision also reflects a reasonable division of the risks of "secondary loss."<sup>76</sup>

An amendment to the Pennsylvania Act adopting a provision similar to the Texas provision would do no injustice to injured claimants. Under the aggregate comparison approach, the plaintiff would be entitled to recover against any defendant whose negligence contributed to his injury. There is, however, no objective reason for placing such a defendant at risk of bearing the entire judgment where his degree of negligence has been judicially determined. The Texas modified joint tortfeasor provision does equity to all parties.

Section 2(g) of the Texas Act<sup>77</sup> provides that "[a]ll claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant."<sup>78</sup> This provision represents an attempt by the Texas legislature to effect an adjudication of all claims for primary damages and contribution arising out of a particular incident in one lawsuit. Accordingly, a defendant may not, after the primary suit has been concluded, institute suit for primary damages or contribution against anyone except a defendant who was not made a party to the primary suit and who had never entered into a settlement with a claimant in the primary suit.<sup>79</sup> Although this is a mildly prohibitive section, there is nothing in the Pennsylvania statute even comparable to this provision. It is suggested that a provision similar to section 2 of the Texas Act should be considered by the Pennsylvania legislature to effectuate greater efficiency in the litigation of all claims arising out of a particular incident.

#### IV. INDEMNITY UNDER COMPARATIVE NEGLIGENCE

Although the Act provides in section (b) for a right of contribution among causally negligent defendants, the Act does not address the question of indemnity. The concept of indemnity rests upon a fundamentally different basis than does contribution. In *Builders Supply*

75. Abraham & Riddle, *supra* note 64, at 416.

76. For a discussion of secondary loss, see notes 61-63 and accompanying text *supra*.

77. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978-1979).

78. *Id.*

79. See Abraham & Riddle, *supra* note 64, at 420.

*Co. v. McCabe*,<sup>80</sup> the Supreme Court of Pennsylvania explained that the right of contribution exists between joint tortfeasors who have each contributed actively in some way to the plaintiff's injury,<sup>81</sup> and who have "no legal relation to one another."<sup>82</sup> A right to indemnification, however, arises from a legal relationship between the tortfeasor who caused the plaintiff's injury and another person held legally responsible for the negligence of the tortfeasor.<sup>83</sup> The *McCabe* court framed the distinction in the indemnity relationship in terms of "primary and secondary liability."<sup>84</sup> The court stated that indemnity

is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence . . . . It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person.<sup>85</sup>

Indemnity and contribution are therefore alternate remedies.<sup>86</sup> The major distinction for purposes of this discussion is that unlike contribution, the right to indemnity is not apportioned between the parties.<sup>87</sup>

It is submitted that the Act will have no impact on indemnity in Pennsylvania. In Wisconsin, full indemnification has been permitted where a tortfeasor's negligence was passive rather than active.<sup>88</sup> The Supreme Court of Wisconsin had no difficulty in applying comparative negligence to this situation since such an all-or-nothing result would be contrary to imposing liability only in proportion to the causal negligence attributable to each defendant.<sup>89</sup> Pennsylvania, however, has not adopted the active/passive negligence approach to

80. 366 Pa. 322, 77 A.2d 368 (1951).

81. *Id.* at 328, 77 A.2d at 371. *See also* 42 PA. CONS. STAT. § 8324(a) (1978).

82. 366 Pa. at 328, 77 A.2d at 371.

83. *Id.* at 325, 77 A.2d at 370.

84. *Id.*

85. *Id.* at 325-26, 77 A.2d at 370 (emphasis in original) (citations omitted). The *McCabe* court listed many situations where a secondarily liable party would have a right to indemnity against an actively liable party. *Id.* at 326-27, 77 A.2d at 370-71. A simple illustration is where an employer is held vicariously liable for torts committed by an employee. *Id.* at 326, 77 A.2d at 370.

86. *See id.* at 325, 334-35, 77 A.2d at 370, 374.

87. *Id.* at 325-26, 77 A.2d at 370.

88. *See Pachowitz v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 383, 387-88, 202 N.W.2d 268, 271-72 (1972).

89. *Id.* at 389-90, 202 N.W.2d at 272-73.



indemnity. Accordingly, since negligence does not enter into indemnification,<sup>90</sup> the Act will not affect the law of indemnity in Pennsylvania.

### V. STRICT LIABILITY

Another area of tort law in which the applicability of the Pennsylvania Comparative Negligence Act is uncertain is that of strict liability under section 402A of the Restatement (Second) of Torts (Restatement).<sup>91</sup> Since other contributors to this symposium have discussed this issue at length,<sup>92</sup> only passing reference to it and its effect on multiple defendants will be made in this article.

Since the Act is limited to "actions brought to recover damages for negligence resulting in death or injury to person or property," it can fairly be stated that the comparative negligence doctrine is inapplicable to actions brought under strict tort liability by the very language of the statute. As has been pointed out by another commentator,<sup>93</sup> not only does the language of the statute explicitly limit the applicability of the statute to actions for negligence, but the Supreme Court of Pennsylvania has also held that contributory negligence is not a defense to strict liability actions which are based upon section 402A.<sup>94</sup>

Although the authors would support the application of comparative negligence to actions based on strict liability under the Restatement, it is submitted that this would be best effectuated by the legislature rather than by the courts. A review of the decisions in other jurisdictions which have actually applied or suggested the application of their comparative negligence statutes to strict liability actions re-

90. See notes 80-85 and accompanying text *supra*. In addition, the *McCabe* court specifically rejected the notion that indemnity was a type of comparative negligence. 366 Pa. at 325, 77 A.2d at 370.

91. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

92. See Beasley & Tunstall, *supra* note 23, at 534-46.

93. Timby, *supra* note 5, at 225.

94. *McCown v. International Harvester Co.*, 463 Pa. 13, 342 A.2d 381 (1975).

flects a fairly unsound course of reasoning in arriving at the desired result.<sup>95</sup> The difficulty in applying comparative negligence to strict liability will be a function of the exact language of the comparative negligence statute involved, and the resolution of this issue will ultimately depend upon the theoretical basis of the doctrine of strict liability in tort as applied in products cases in each particular jurisdiction. The courts will be forced to balance the competing considerations of affording the claimant the maximum opportunity to recover in a products case and of avoiding the situation where a manufacturer or seller is forced to bear the burden for loss due substantially to the negligence of the claimant or a third party.

Contribution and indemnity are permissible between joint tortfeasors when one is responsible for a product defect under strict liability rules and the other is responsible for an act of negligence.<sup>96</sup> Apportionment of liability according to fault would nonetheless be desirable and is possible. In cases involving a negligent defendant and a strictly liable defendant, a court faces the grave task of instructing a jury on the various theories of liability, the defenses available to each party, and the single recovery of damages against those found to be responsible. It is submitted that this problem can be solved only by placing all of the parties, plaintiffs as well as defendants, into the 100% negligence/causation scheme and instructing the jury to make the allocation of fault among them.

Addressing this problem, the Supreme Court of Wisconsin in *Dippel v. Sciano*<sup>97</sup> construed the doctrine of strict liability in tort as a judicially established standard of care and reasoned that proof of its elements would result in negligence per se.<sup>98</sup> This construction allowed the court to make the action subject to Wisconsin's comparative negligence statute, which by its terms applied only to actions based on negligence.<sup>99</sup>

The authors anticipate that the application of comparative negligence to the field of strict liability will be an issue of considerable debate in both the legislature and the courts. Although the legislature has provided a substantial obstacle by limiting the Act to actions for

95. See Beasley & Tunstall, *supra* note 23, at 534-46. See also Timby, *supra* note 5, at 225-26.

96. *W.D. Rubright Co. v. International Harvester Co.*, 358 F. Supp. 1388, 1400 (W.D. Pa. 1973). See also *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978) (applying comparative indemnity between a strictly liable tortfeasor and a negligent tortfeasor). California has judicially adopted a pure comparative negligence system. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

97. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

98. *Id.* at 461-62, 155 N.W.2d at 64-65.

99. *Id.*, *construing*. WIS. STAT. ANN. § 895.045 (West Supp. 1978-1979). For the text of the Wisconsin statute, see note 8 *supra*.

negligence, there appears to be no reason for not applying the doctrine of comparative negligence to strict liability cases.

## VI. SETTLEMENTS AND RELEASES UNDER THE ACT

The existence of joint and several liability and pure comparative contribution under section (b) of the Act mandates that a settling tortfeasor's percentage of causal negligence be determined by the jury so that the nonsettling tortfeasors are properly credited with the settlement. In this regard, the Pennsylvania comparative negligence system conflicts with the Uniform Contribution Among Tortfeasors Act, which provides that the release of one joint tortfeasor does not release or

discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.<sup>100</sup>

Such a release does not relieve the settled tortfeasor from liability for contribution.<sup>101</sup> In order to avoid future liability for contribution, most carefully drafted releases contain two provisions similar to the following:

In the event that other tortfeasors are responsible to me/us for damages as a result of this accident, the execution of this release shall operate as a satisfaction of my/our claim against such other parties to the extent of the relative pro rata share of common liability of the Payer herein released.

If it should appear or be adjudicated in any suit, action or proceeding, however, that said Payer and others were guilty of joint negligence which caused my/our injuries, losses or damages, in order to save said Payer harmless, I/we, as further consideration for said payment will satisfy any decree, judgment, or award in which there is such finding or adjudication involving said Payer on

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100. 42 PA. CONS. STAT. § 8326 (1978). Under common law, a release of one joint tortfeasor was deemed to be a release of all, even though the release by its terms purported to release only the first tortfeasor. *Frank v. Volkswagenwerk A.G. of West Germany*, 522 F.2d 321 (3d Cir. 1975).

101. 42 PA. CONS. STAT. § 8327 (1978). Section 8327 provides that a release by the injured person of one joint tortfeasor does not relieve the released tortfeasor from liability for contribution to another tortfeasor, unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and it provides for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person's damages recoverable against all the other tortfeasors. *Id.*

their behalf and to the extent of their liability for contribution, if it is held there is any liability for contribution; also, I/we will indemnify and save forever harmless said Payer against loss or damage because of any and all further claims, demands, or actions made by others on account of or in any manner resulting from said injuries, losses, and damages.

The foregoing pro rata share reduction is essential to avoid claims for contribution. For example, assume a \$100,000 verdict on which four defendants are found to have been equally negligent. If defendant A executed a joint tortfeasor release for \$10,000 and did not provide for a pro rata extinguishment of the claim, A could face a claim by the other tortfeasors for contribution as to the \$15,000 deficit in his pro rata share. In most cases a settling tortfeasor would not be able to avoid litigation upon settlement. Nonsettling tortfeasors have the right to have the settling party brought in on the record for purposes of having the trier of fact determine whether the settled tortfeasor is a joint tortfeasor and, if so, whether the nonsettling tortfeasor can have any judgment entered against him, reduced by the consideration paid for the release.<sup>102</sup> It is submitted that there is little impediment in Pennsylvania to the apportionment of a settled tortfeasor's negligence with that of the nonsettling tortfeasor by a jury.

In light of the exposure of a settling tortfeasor to claims for contribution under comparative negligence, a device is required that protects the settling party from payment of a claim for contribution as well as eliminates the procedural possibility of a suit by nonsettling parties on such a claim. A release must therefore be drafted which will release the claimant's cause of action, not only to the extent of the amount received in the settlement, but also to the extent of the settling party's ultimate proportion of the total liability. In effect, this type of a settlement results in the release of a claimant's right to recover against nonsettling tortfeasors by the greater of either the amount paid in settlement or the settling party's proportionate share of liability as determined by suit. Pennsylvania courts can look to Wisconsin, which recognized a comparable contribution model in *Pierringer v. Hoger*.<sup>103</sup> In that case, the Supreme Court of Wisconsin held that under its judicially adopted rule of comparative contribution,<sup>104</sup> the proportion of the cause of action released by any

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102. *Davis v. Miller*, 385 Pa. 348, 352, 123 A.2d 422, 424 (1956).

103. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

104. See note 58 *supra*.

such device should be determined by the percentage of negligence attributed to the settling party by the jury at trial.<sup>105</sup> This approach, which can substantially affect a plaintiff's recovery,<sup>106</sup> will require greater care by a plaintiff in determining with whom and the consideration for which he will settle. In a jurisdiction such as Wisconsin, where the plaintiff's negligence will be compared with the negligence of each defendant,<sup>107</sup> the result can be even more inconsistent if a nonsettling tortfeasor is determined at trial to have been less negligent than the plaintiff.

The pro tanto rule reduces the judgment against the defendants by the dollar amount of the settlement, thus permitting the defendants' liability to fluctuate in proportion to the amount of the settlement rather than the relative degree of fault of the defendants. Where joint and several liability is retained, it is the nonsettling defendant who is in jeopardy of being compelled to pay more than his proportionate share of the damages if the settled tortfeasor is determined to be responsible for a much larger portion of the damages than reflected in the settlement figure.

Conversely, under a proportionate reduction rule, all defendants would be protected from the fluctuations in liability that result under the pro tanto rule. Unless settlements closely approximate the anticipated proportional liability of the particular defendants, however, the incentives of all parties to settle are diminished.<sup>108</sup>

A number of states have chosen to deal specifically with the problem of settlements in releases within the context of their comparative negligence statutes.<sup>109</sup> Perhaps the most explicit of these statutes is the Texas Act,<sup>110</sup> which provides that where the alleged joint tortfeasor has settled with the plaintiff and his negligence is not

105. 21 Wis. 2d at 191-92, 124 N.W.2d at 111-12.

106. For example, where a settlement is reached at an unrealistically low figure, the plaintiff can sustain a loss. Suppose that the plaintiff is injured and sues defendants A and B. The plaintiff and A settle for \$4,000, placing a value on the claim of approximately \$10,000. The jury subsequently determines that A is 70% negligent and B is only 30% negligent. Under the pro tanto rule, the plaintiff will still receive \$6,000 from B, a \$10,000 verdict less the \$4,000 settlement. Under the proportional reduction rule, the plaintiff would recover only \$3,000 from B, since B would receive credit for the \$7,000 attributable by the jury's attribution of 70% negligence to A. See Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CAL. L. REV. 1264, 1277 (1977). If, however, a settlement is attained at an unrealistically high figure, unless the settling tortfeasor can seek contribution for the excess of his payment over his percentage negligence, the codefendant will receive a windfall.

107. See note 14 and accompanying text *supra*.

108. See Comment, *supra* note 106, at 1277.

109. See, e.g., IDAHO CODE § 6-806 (Supp. 1978); MINN. STAT. ANN. § 604.01(5) (West Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 2(d), 2(e) (Vernon Supp. 1978-1979); UTAH CODE ANN. § 78-27-40 (1977).

110. TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 2(d), 2(e) (Vernon Supp. 1978-1979).

submitted to the jury, a defendant may reduce his liability to the plaintiff by a percentage of the amount of the settlement.<sup>111</sup> The reduction is then determined by reference to the ratio of the defendant's negligence to the total negligence of all the defendants.<sup>112</sup> The Texas Act does not require that the tortfeasor with whom plaintiff settled be ultimately adjudged a tortfeasor. On the other hand, where a tortfeasor has settled with the plaintiff, but his causal negligence is nonetheless submitted to and determined by the jury, the settlement is deemed to be a complete release of the portion of the judgment attributable to the percentage of negligence linked to that particular tortfeasor.<sup>113</sup> This is in effect a proportionate reduction rule.

A second problem that arises regarding settlements and releases under the comparative negligence statute is the situation of a settling tortfeasor who has paid more than his proportionate share of the total liability. In *W.D. Rubright Co. v. International Harvester Co.*,<sup>114</sup> the United States District Court for the Western District of Pennsylvania held that a joint tortfeasor who enters into a settlement may recover contribution from another joint tortfeasor whose liability to the claimant has been extinguished by the settlement.<sup>115</sup> Where contribution is on a pro rata basis, the amount to which the settling party is entitled in contribution may be determined by simply subtracting, from the amount paid in settlement, that portion of the total judgment which represents the settling party's equal share of the liability.<sup>116</sup> Under comparative contribution concepts, however, the settling tortfeasor's negligence must be submitted to the jury with those non-settling tortfeasors so that apportionment can be made and contribu-

111. *Id.* § 2(d). Section 2(d) of the Texas Act provides:

If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

*Id.*

112. *Id.*

113. *Id.* § 2(e). Section 2(e) of the Texas Act provides:

If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

*Id.*

114. 358 F. Supp. 1388 (W.D. Pa. 1973).

115. *Id.* at 1392.

116. *See id.*

tion based on that apportionment can be computed. The Pennsylvania Act would not seem to prohibit such contribution.

It has been stated that one of the benefits of comparative negligence is that it encourages settlements.<sup>117</sup> Until the law becomes settled, however, settlements will not be favored since uncertainty gives rise to caution. When confronted with the unresolved nature of a comparative negligence action, the easiest and safest thing for an inherently cautious lawyer to do is nothing. It is therefore critical to the speedy disposition of the cases already commenced that these questions be resolved as soon as possible.

In the interim, the multiple defendant will require releases that provide basic protection from his nonsettling codefendants and preserve his rights of contribution if it is subsequently determined that the settling tortfeasor settled in excess of the amount for which he would otherwise have been liable based upon his portion of negligence. In order for a plaintiff to execute a release with such protection to the settling tortfeasor, it is submitted that the plaintiff must agree to satisfy the percentage of the judgment attributable to the settling tortfeasor's causal negligence. In addition to appropriate language for this purpose, it is suggested that such a release also include protections for a reservation of the plaintiff's rights against nonsettling tortfeasors and an indemnification or hold harmless agreement for the benefit of the settling tortfeasor against any amounts in excess of the settlement which the tortfeasor may ultimately be required to pay.

The following is suggested language for inclusion in a release and indemnification agreement to effectuate these basic safeguards:

In the event that releasee is found to be a joint tortfeasor with any person(s) in causing injury to the releasor, the releasor hereby releases that portion or share of the cause of action which the releasor has against the releasee and discharges any and all damages attributable to the releasee in such cause of action, without in any way discharging or releasing the portion of the cause of action attributable to the nonsettling tortfeasors who have caused injury to the releasor herein. The releasor does hereby credit and satisfy that portion of the total amount of damages to the releasor which has been caused by the negligence, if any, of the releasee as hereinafter may be determined in future trial and releasor does hereby release and discharge that fraction, portion and percentage of his/her total cause of action and claim for damages against the releasee which shall hereinafter, by future trial be determined to

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117. See C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 4.200, at 8 (1978).

be the sum of the portion, fraction or percentage of causal negligence for which the releasee is found to be liable.

It is understood that the party herein released and the undersigned releasor do hereby reserve all claims against all persons, firms, and corporations not party to this release for all damages and rights to contribution, if any, as may be determined in the future.

In further consideration the aforesaid payment to the releasor by the releasee for damages, injuries and claims of the releasor the releasor agrees to satisfy any claim or judgment ultimately recovered by the releasor or by any person, firm or corporation against any party herein released for contribution or otherwise by satisfying such percentage of any claim or judgment against the party herein released as the negligence of the party herein released bears to all the causal negligence of all tortfeasors having liability by reason of this occurrence, and to that end the releasor agrees to indemnify and save harmless the releasee herein from all liability, damage, cost and expense of every kind in nature from further liability to the undersigned releasor or any person, firm, or corporation having a claim for contribution or otherwise.<sup>118</sup>

In those jurisdictions which have abolished joint and several liability, releases must include language which will permit the settling tortfeasor to recover the difference between the settlement figure and the proportionate liability of the tortfeasor upon determination by the jury. Any such language, however, will not be favored by a claimant since it permits the settling tortfeasor to recover the excess but exposes the plaintiff to potential loss.

Another approach would be to have a settling joint tortfeasor condition his payment upon an estimate of either his proportional share or the anticipated total verdict. A contingency could then be incorporated so that in the event the settling joint tortfeasor is found either to be not liable at all or liable for a share substantially less than that contemplated at the time of the release, or alternatively if a verdict is returned greatly in excess of that contemplated in the release, the settling joint tortfeasor would receive a refund. For example, assume four potential joint tortfeasors. Defendant A in discussions with counsel for the plaintiff takes the position that each of the four defendants will be held equally at fault. The defendant and counsel for the plaintiff postulate that the value of the case is \$100,000. They then enter into an agreement which recites that the settlement is based

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118. These provisions are substantially similar to those contained in the release at issue in *Pierringer v. Hoyer*, 21 Wis. 2d 182, 184-85, 124 N.W.2d 106, 108 (1963). See C.R. HEFT & C.J. HEFT, *supra* note 117, App. III, at 5.



upon an assumed liability of A for 25% of an anticipated verdict of \$100,000, and thus the consideration for the release is \$25,000. The release provides that in the event the settling tortfeasor is found not liable, he will receive back some portion of the \$25,000. The release further provides that if A is a joint tortfeasor the releasor will indicate as satisfied his actual proportionate share of the liability as determined by the jury. This method would provide the proportional reduction benefit to the other tortfeasors and provide a method by which the party who did settle does not lose the entire \$25,000.

The release might also provide that in the event that the verdict exceeds the \$100,000, the settling tortfeasor will receive not only the extinguishment on his proportional liability, but also a refund pursuant to a fixed schedule, depending upon the dollar value of the actual verdict. If A paid \$25,000 and the agreement provided for a refund of \$5,000 for each \$50,000 segment of the actual verdict over \$100,000, then if the verdict were \$400,000, the settling tortfeasor would have received all of his \$25,000 back, the other nonsettling joint tortfeasors would get credit for his 25% reduction of the verdict, and the plaintiff would still recover \$300,000.

In comparative negligence situations where proportionate joint and several liability rules will be applicable, this type of an agreement would encourage defendants to settle cases since it would leave open an opportunity to recover in the event they were able to prove that their percentage of contribution to the total negligence was substantially below the level at which the settlement was predicated.

## VII. CONCLUSION

The Pennsylvania comparative negligence statute reflects the failure of the legislature to address itself to many complex problems. The fault with the statute rests not with what it says, but with what it fails to say. The lack of guidance has exposed critical issues of the daily practice of law under this statute to conjecture on the part of counsel. Substantial issues such as contribution, indemnification, and releases must be resolved expeditiously if the business of the courts is to progress in an orderly, defined, and predictable manner. Certainly, aware counsel having reflected upon the issues presented in this article and in this symposium will at least be prepared to structure such arrangements so as to afford maximum protection to his or her client in this interim period, which will continue until the questions which have been raised have been judicially answered.