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Comparative Negligence in West Virginia: Beyond Bradley to Pure Comparative Fault

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COMPARATIVE NEGLIGENCE IN WEST VIRGINIA: BEYOND *BRADLEY* TO PURE COMPARATIVE FAULT

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I. INTRODUCTION

West Virginia's "system" of comparative negligence is ripe for legislative reform. As Mr. James Stoneking notes in a recent Article,[1] West Virginia is the only comparative negligence jurisdiction that has no statutory system governing contribution among joint tortfeasors. Of the forty-two states that have adopted systems of "comparative negligence,"[2] West Virginia is one of only ten to have done so by judicial decision.[3] Moreover, West Virginia is the only state whose judiciary adopted a "modified" rule of comparative negligence,

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[1] Stoneking, *Beyond Bradley: A Critique of Comparative Contribution in West Virginia and Proposals for Legislative Reform,* 89 W. VA. L. REV. 167 (1986).

[2] V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986); H. WOODS, COMPARATIVE FAULT (1979 & Supp. 1986); Sobelsohn, *"Pure" vs. Modified Comparative Negligence: Notes on the Debate,* 34 EMORY L.J. 65 (1985). Alabama, Maryland, North Carolina, South Carolina, Virginia, and the District of Columbia retain the contributory negligence defense in its traditional form. Nebraska and South Dakota retain the contributory negligence defense except when the plaintiff's negligence is "slight" and the defendant's is "gross." Tennessee retains the defense except when the plaintiff's negligence is "remote" and thus not truly the proximate cause.

[3] The ten states that have adopted comparative negligence by judicial decision are: Alaska, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); California, Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); Florida, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Illinois, Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981); Iowa, Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982)(superseded by statute, IOWA CODE ANN. § 668 (1984)); Kentucky, Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984); Michigan, Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977), Placek v. City of Sterling Heights, 405 Mich. 607, 275 N.W.2d 511 (1979); Missouri, Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); New Mexico, Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); and West Virginia, Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979). Among the ten states with judicially-adopted systems of comparative negligence, seven already had statutory provisions governing contribution, and two others subsequently enacted provisions governing contribution. Stoneking, *supra* note 1, at 167-68 nn.7-9.

under which the plaintiff is denied recovery if his share of the applicable fault is fifty percent or more.[4]

Mr. Stoneking's Article ably summarizes the development of West Virginia's law of comparative negligence subsequent to its adoption by the West Virginia Supreme Court of Appeals in *Bradley v. Appalachian Power Co.*[5] He concludes by recommending legislative adoption of five particular proposals governing comparative contribution.[6] Although Mr. Stoneking's analysis is commendable, his proposals in some respects do not go far enough, while in others they go too far. In part, the shortcomings may reflect the author's perspective as a member of the defense bar.[7] In more important respects, however, Mr. Stoneking's analysis falls short because he fails to follow his premises through to their logical conclusions. In particular, Mr. Stoneking recognizes that the modern rule of comparative fault is based on the principle of "loss allocation."[8] Consistent pursuit of loss allocation would require two substantial modifications of the law as it has developed in West Virginia.

First, among defendants, West Virginia law currently denies contribution to defendants who are guilty of aggravated misconduct, *i.e., intentional,* willful,

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[4] *Bradley*, 163 W. Va. 332, 256 S.E.2d 879. The other nine state courts, as well as seven state legislatures, have adopted the "pure" form of comparative negligence, under which the plaintiff's recovery is reduced in proportion to his share of the total negligence of the parties. There are two forms of modified comparative negligence. West Virginia has adopted the "Wisconsin rule," under which the plaintiff's recovery is diminished in proportion to his negligence if his share of the total negligence is "less than" that of the defendants; recovery is completely barred if the plaintiff's negligence is greater than or equal to that of the defendants. The more common form of modified comparative negligence, known as the "New Hampshire rule," allows the plaintiff to recover proportionately diminished damages if his share of the total negligence is "not greater than" the defendants; recovery is completely barred only if his negligence is greater than that of the defendants.

[5] *Bradley*, 163 W. Va. 332, 256 S.E.2d 879.

[6] His recommendations are as follows:

(1) To define broadly the class of parties who may assert contribution, so as to include all but intentional tortfeasors;

(2) To establish "absence of collusion" as the standard by which to measure the enforceability of a settlement agreement in multi-party litigation;

(3) To provide that a settlement obtained in the absence of collusion extinguishes all claims for contribution by or against a settling party;

(4) To provide that where fewer than all defendants settle, a verdict rendered against the non-settling defendants will be reduced by the greater of: (a) the amount of the settlement, or (b) the proportionate share of the settling party;

(5) To allow any offset for compensation benefits to inure to the benefit of all defendants, and otherwise to treat a *Mandolidis* defendant in like manner as any other defendant.

Stoneking, *supra* note 1, at 189-90.

[7] At the time he wrote this Article, Mr. Stoneking was an associate of the Charleston, West Virginia firm of Jackson, Kelly, Holt & O'Farrell.

[8] *See infra* discussion at notes 20-25 and accompanying text.

wanton, or reckless behavior.[9] This rule conflicts with the fairness and efficiency criteria underlying loss allocation, which require that *all* wrongdoers bear their proportionate share of the plaintiff's damages. Accordingly, contribution should be made available among all joint tortfeasors, including those guilty of aggravated misconduct.[10]

Second, as to victims, West Virginia's modified rule of comparative negligence denies all compensation to plaintiffs whose own negligence represents fifty percent or more of the fault that proximately caused their damages. The denial of all compensation to plaintiffs who are fifty percent or more "at fault"[11] conflicts with the goal of proportionate loss allocation, and also is inconsistent with the current West Virginia rule of pure comparative contribution among defendants.[12] Fair and efficient loss allocation would best be promoted by a rule of pure comparative negligence.

Part II of this Article explores the meaning of the goal of "loss allocation" that underlies modern systems of comparative fault. This discussion of the justice and efficiency aspects of loss allocation serves as a foundation for the analysis in parts III and IV.

Part III analyzes the rules governing contribution among tortfeasors, including the effect of a settlement by one of several tortfeasors and the availability of contribution to tortfeasors guilty of aggravated misconduct. Mr. Stoneking's proposals are criticized, and alternative proposals are advanced, based primarily on the Uniform Comparative Fault Act.[13]

Part IV compares the rules of pure and modified comparative negligence with respect to the fairness and efficiency criteria embodied in the goal of loss allocation. The author concludes that pure comparative fault is more just and more efficient, advocating adoption of the pure comparative fault system represented by the UCFA.

II. Loss Allocation Under Comparative Fault

Tort law serves a variety of purposes. It compensates victims, imposes the cost of compensation on wrongdoers, punishes misconduct, deters future mis-

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[9] *E.g.*, Buskirk v. Sanders, 70 W. Va. 363, 370, 73 S.E. 937, 940 (1912); Hutcherson v. Slate, 105 W. Va. 184, 190, 142 S.E. 444, 447 (1928).

[10] Mr. Stoneking advocates that contribution be available to defendants guilty of reckless, willful, or wanton misconduct, but not to intentional tortfeasors.

[11] The phrase "x% at fault" will hereinafter be used as shorthand for the concept that the party's causal negligence (or other wrongful behavior embodied in the term "fault") represented x% of the total fault that contributed to the plaintiff's injuries.

[12] Sitzes v. Anchor Motor Freight, Inc., 169 W. Va. 698, 289 S.E.2d 679 (1982)(discussed *infra* note 65, at 108-11 and accompanying text).

[13] Unif. Comparative Fault Act (1977)(amended 1979), 12 U.L.A. 38-63 (Supp. 1987) (UCFA). The text of the UCFA is reprinted in the Appendix to this Article.

conduct, and reinforces codes of social behavior. Modern approaches to tort law have emphasized two often-conflicting goals: corrective justice and economic efficiency.[14] Corrective justice comprises two subsidiary principles: the "compensation principle" that a victim should receive compensation for injuries inflicted by others, and the "apportionment principle" that a wrongdoer should pay for damages caused by his misconduct.[15] Advocates of corrective justice consider in moral terms whether the plaintiff "deserves" compensation and whether this compensation "ought" to be paid by the defendant.[16] Proponents of economic efficiency seek to maximize the value of social resources.[17] They analyze the impact of legal rules on the incentives of the parties to engage in efficient behavior[18] and on the efficiency of resource allocation among various activities.[19]

The comparative fault system reflects considerations of both justice and efficiency. These twin pillars of modern American tort law are united within the broader concept of "loss allocation."[20] Comparative fault involves "loss allocation" in a corrective justice sense in that it purports to distribute the losses in proportion to the wrongdoing of the parties.[21]

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[14] *See* Englard, *The System Builders: A Critical Appraisal of Modern Tort Theory,* 9 J. LEGAL STUD. 27 (1980).

[15] *See* Note, *Comparative Negligence,* 81 COLUM. L. REV. 1668 (1981).

[16] Englard, *supra* note 14, at 27, 57-68. *See, e.g.,* Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537 (1972); Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability,* 3 J. LEGAL STUD. 165 (1974). *Cf.* Robertson v. LeMaster, 301 S.E.2d 563, 567 (W. Va. 1983) (quoting Blaine v. Chesapeake & O.R.R. Co., 9 W. Va. 252 (1876) (Syl. pt. 8)): "The liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injur [sic] another."

[17] Efficiency has various meanings in different contexts and to different authors. *See* Lewin, *Compensated Injunctions and the Evolution of Nuisance Law,* 71 IOWA L. REV. 775 n.5 (1986). Most commonly the term is used synonymously with "Kaldor-Hicks efficiency" or "wealth maximization." *See, e.g.,* R. POSNER, ECONOMIC ANALYSIS OF LAW 12 (3d ed. 1986) ("efficiency. . .denote[s] that allocation of resources in which value is maximized"); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1983)("efficiency corresponds to 'the size of the pie'").

[18] Englard, *supra* note 14, at 32-56. *See generally, e.g.,* G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961) [hereinafter cited as *Some Thoughts];* R. POSNER, *supra* note 17, at 147-199; A. M. POLINSKY, *supra* note 17, at 37-49, 95-104. The effect of legal rules on incentives is discussed in greater detail *infra* in Part IV.B.1.

[19] *See generally, e.g., Some Thoughts, supra* note 18; R. POSNER, *supra* note 17; A.M. POLINSKY, *supra* note 17. The effect of legal rules on resource allocation is discussed in greater detail *infra* in Parts III.B., III.C., and IV.B.2.

[20] The term "loss allocation" was suggested to me by Mr. Stoneking's statements that the purpose of our modern tort system is "to allocate loss." *See* Stoneking, *supra* note 1, at 178, 179. The content of the term derives from Calabresi's discussion of the related term "risk distribution." *See Some Thoughts, supra* note 18. Other authors refer variously to risk allocation or loss distribution. The term loss allocation seems to best capture the full range of concepts underlying comparative fault.

[21] *See* Note, *supra* note 15, at 1670.

The allocation of loss through comparative fault also promotes economic efficiency. By imposing a portion of the losses on each wrongdoer, all parties have an incentive to exercise due care.[22] Comparative fault further promotes efficiency by "internalizing" a portion of the damages to each of the responsible parties, so that each party considers the damages it causes as a cost of its activity. In the absence of such cost internalization, damaging activities, in effect, would be subsidized, resulting in an excess level of damaging behavior.[23] Loss allocation may also be efficient to the extent it minimizes the personal and economic dislocations that might otherwise result if a single party were required to bear the entire loss.[24]

Stoneking recognizes that the purpose of comparative fault is "to allocate loss."[25] He does not, however, explore the justice and efficiency concerns which underlie this deceptively simple concept. More importantly, he does not consider the implications of loss allocation for the overall structure of the comparative fault system.

The next two sections apply the goal of loss allocation to the two main structural components of the comparative fault system: the rules governing contribution among tortfeasors, and the choice between pure and modified comparative fault.

III. Rules Governing Contribution Among Tortfeasors

At common law, the remedy of contribution was not available to tortfeasors. The policy of Anglo-American law was to deny assistance to tortfeasors because they were wrongdoers and not worthy of the court's assistance.[26] A related rationale for this rule was the notion that the injured person was the "lord of his action" and could place the loss where he saw fit.[27]

The common law rule against contribution among tortfeasors gradually eroded with statutory and judicial adoption of contribution in a number of states. In 1939, the National Conference of Commissioners on Uniform State

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[22] *See* Haddock & Curran, *An Economic Theory of Comparative Negligence,* 14 J. Legal Stud. 49 (1985).

[23] *See* A. M. Polinsky, *supra* note 18, at 500-03, discussing the "allocation of resources justification" for imposing the costs of an activity on the enterprise generating those costs, even in the absence of fault.

[24] *See Some Thoughts, supra* note 18, at 517-27, discussing the "spreading of losses justification" for imposing enterprise liability in the absence of fault.

[25] Stoneking, *supra* note 1, at 178-79.

[26] Restatement (Second) of Torts § 886A comment a; Commissioners' Prefatory Note to 1939 Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 60 (1975) (Commissioners' Prefatory Note). This same policy had served as the basis for the rule of contributory negligence which barred any damage action by a wrongdoing plaintiff.

[27] Commissioners' Prefatory Note, 12 U.L.A. 60.

Laws (hereinafter the "Commissioners") approved the Uniform Contribution Among Tortfeasors Act,[28] which provided that a joint tortfeasor was entitled to contribution if he "paid more than his pro rata share" of a common liability.[29] Although eight states adopted the 1939 UCATA, most of them made important changes in the Act.[30] The 1939 UCATA was withdrawn,[31] and in 1955 the Commissioners approved a substantially revised version of the Act.[32] The 1955 UCATA changed the rules governing the effect of a settlement with one of two or more joint tortfeasors, but it continued to provide a right of contribution "in favor of a tortfeasor who has paid more than his pro rata share of the common liability."[33]

The provision for "pro rata" contribution in both the 1939 and 1955 UCATA meant that damages would be apportioned among the defendants on a per capita basis. When there were two wrongdoers, each would pay fifty percent; when there were five, each would pay twenty percent. The 1955 UCATA expressly provided that in determining the tortfeasors' pro rata shares, "their relative degrees of fault shall not be considered."[34]

The rule of pro rata contribution among defendants under the UCATA was inconsistent with the emerging rules of comparative negligence under which liability was apportioned on the basis of relative fault. The Commissioners were aware of this inconsistency. Accordingly, after two-thirds of the states had adopted comparative negligence, the Commissioners in 1977 enacted the Uniform Comparative Fault Act.[35] The UCFA expressly was intended to replace the 1955 UCATA in states adopting systems of comparative fault.[36] Under the

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[28] UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939), U.L.A. 57-59 (1975) (1939 UCATA). The 1939 UCATA was revised in 1955 (1955 UCATA).

[29] 1939 UCATA, § 2, 12 U.L.A. at 57.

[30] 1955 UCATA, Commissioners' Prefatory Note, 12 U.L.A. 59.

[31] *Id.*

[32] 1955 UCATA, 12 U.L.A. 63-107.

[33] *Id.* at § 1, 12 U.L.A. at 63.

[34] *Id.* at § 2, 12 U.L.A. at 87. The 1955 UCATA also eliminated an optional provision in the 1939 UCATA which had authorized consideration of relative degrees of fault "[w]hen there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them." 1939 UCATA § 2(4), 12 U.L.A. at 57.

[35] UCFA, 12 U.L.A. at 39 (Supp. 1987).

[36] The Prefatory Note to the UCFA states:

> The NCCUSL has promulgated two uniform contribution Acts—the first in 1939, superseded by a revised act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved.
>
> It has therefore been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave that Act for possible use by states not adopting the principle of comparative fault. Instead, the present Act contains appropriate sections covering the rights

UCFA, the "basis for contribution is each person's equitable share of the obligation," the equitable share being based on the person's proportionate degree of fault.[37] As will be demonstrated in the discussion which follows, the provisions of the UCFA provide an appropriate solution to the various issues of contribution among defendants under a system of comparative fault.

A. *Effect of Settlement by One of Several Tortfeasors*

Among the most difficult issues raised by multi-party litigation is the problem of settlement by the plaintiff with less than all of the defendants.[38] The 1939 UCATA provided that in the event of a settlement, a plaintiff's claim would be reduced by the amount of consideration paid for the release,[39] but a settling tortfeasor would not be relieved of liability for contribution to co-defendants.[40] Without protection against claims for contribution, individual defendants generally were unwilling to settle.[41] As a result of the complaints about this disincentive to settlement,[42] the revised 1955 UCATA provided that a release discharged a settling party from all liability for contribution to any

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existing between the parties who are jointly and severally liable in tort. The 1955 Act should be replaced by this Act in any state that adopts the comparative fault principle, and would be eventually replaced.

12 U.L.A. 39 (Supp. 1987). *See also id.* § 4 (comment), at 45.

[37] UCFA, §§ 2, 4, 12 U.L.A. 41-42, 45 (Supp. 1987).

[38] *See, e.g.,* Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives,* 40 LA. L. REV. 343, 369-71 (1980); Wade, *A Uniform Comparative Fault Act—What Should It Provide?,* 10 U. MICH. J.L. REF. 220, 232, 234 (1977); Note, *The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act,* 36 U. FLA. L. REV. 288, 307-09 (1984).

[39] 1939 UCATA, § 4, 12 U.L.A. at 57.

§ 4. Release; Effect on Injured Person's Claim.—A release by the injured person of one joint tortfeasor, whether before or after judgment, does not 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.

[40] *Id.* at § 5, 12 U.L.A. at 58.

§ 5. Release; Effect on Right of Contribution.—A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and 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.

[41] 1955 UCATA, § 4(b)(comment), 12 U.L.A. at 99-100. Under the 1939 UCFA, a settling defendant would only be relieved of liability for contribution if the release provided for reduction of the plaintiff's claim against non-settling tortfeasors to the extent of the pro rata share of the settling defendant. 1939 UCATA, § 5, 12 U.L.A. at 58. Plaintiffs' attorneys were unwilling to give such releases because of the uncertainty as to what they would be giving up. 1955 UCATA, § 4(b) (comment), 12 U.L.A. at 99. *See also* Pearson, *supra* note 38, at 370.

[42] *See* 1955 UCATA, § 4 (comment), 12 U.L.A. at 99-100.

other tortfeasor, while continuing to provide that a release would reduce the claim of the plaintiff by the amount of consideration paid for that release.[43]

To illustrate, suppose that A sustained damages of $100,000 as a result of the negligence of B and C. In the absence of a settlement, each would contribute $50,000 to the satisfaction of A's judgment according to the "pro rata" provisions of the Act. But, if A settled with B for $10,000, his remaining claim against C would be reduced to $90,000. Under the 1939 UCATA, C could then obtain $40,000 in contribution from B, so that each would pay a total of $50,000. B would gain nothing from the settlement, and C would not be prejudiced. Under the 1955 UCATA, however, B would be discharged from liability for contribution to C, so that B's net payment would be $10,000, and C's net payment would be $90,000. A low settlement by one tortfeasor under the 1955 UCATA could substantially increase the potential liability of nonsettling tortfeasors. The 1955 revision thus greatly increased the risk of collusively low settlements between the plaintiff and one or more of the defendants.[44]

The contribution provisions of the 1955 UCATA were inconsistent with comparative fault because they provided for apportionment of contribution on a pro rata basis without regard to the parties' relative degrees of fault. Even if the contribution provisions of the 1955 UCATA had been amended appropriately, however, the provisions governing the effect of settlement by one of the tortfeasors would still have been incompatible with comparative fault.

In particular, the problem of collusive settlements would have been exacerbated if the settlement and release provisions of the 1955 UCATA were applied in a system of comparative negligence and comparative contribution. Suppose, in the above example, that B was seventy percent at fault and C was thirty percent at fault in causing damages of $100,000 to A. In the absence of

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[43] *Id.* at § 4, 12 U.L.A. at 98:

§ 4. [Release or Covenant Not to Sue]

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

[44] *See* Pearson, *supra* note 38, at 370; Note, *supra* note 38, at 307-08. The primary protection against collusion was the requirement in section 4 of the 1955 UCATA that the release had been "given in good faith." It is doubtful whether this provision gave meaningful protection against collusive settlements. Given the uncertainties of litigation, it would be quite difficult to establish that a release was given in bad faith, even if the consideration were very low in relation to the amount of the plaintiff's damages. *Id.*

a settlement, and with comparative contribution, B would pay $70,000 and C would pay $30,000. But if A settled with B for $10,000, application of the settlement provisions of the 1955 UCATA would leave C liable for the remaining $90,000. Thus, if the settlement provisions of the UCATA were applied in a system of comparative contribution, the tortfeasor whose fault was greater would have even more to gain from a collusively low settlement, while the tortfeasor less at fault would suffer considerable prejudice.

The Commissioners recognized that the contribution, settlement, and release provisions of the 1955 UCATA were inconsistent with principles of comparative negligence.[45] Accordingly, when they adopted the UCFA they included separate contribution, settlement, and release provisions for comparative negligence states.[46] Under the UCFA, a settlement with one of several joint tortfeasors discharges the released tortfeasor from liability and reduces the claim of the plaintiff against the remaining defendants "by the amount of the released person's equitable share of the obligation."[47] This provision eliminates the incentive for the plaintiff to enter into a collusively low settlement with one defendant, and it fully protects the nonsettling defendants from being prejudiced by such a settlement.

To illustrate, consider again the foregoing example in which B was seventy percent at fault and C was thirty percent at fault for the plaintiff's damages of $100,000. With comparative contribution under the UCFA, and in the absence of a settlement, B would pay $70,000 toward A's judgment, and C would pay $30,000. Under the settlement and release provisions of the UCFA, however, any settlement between A and B would reduce A's claim against C by seventy percent, to $30,000. The result would be the same irrespective of whether A settled with B for $10,000, $40,000, or $80,000. Regardless of the amount paid in settlement by B, C would be liable only for his thirty percent equitable proportionate share of the judgment. A would have no incentive to enter into a collusively low settlement with B, since A's claim against C would be reduced by seventy percent regardless of the consideration paid by B. On the other hand, C could not be prejudiced if A settled with B for $10,000, or even $10, since C would be liable for only thirty percent of the judgment in any event. The settlement and release provisions of the UCFA thus effectively eliminate the problem of collusive settlements.[48]

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[45] *See supra* note 36.

[46] *Id. See* UCFA, §§ 4, 5, 6, 12 U.L.A. at 45-47 (Supp. 1987) (reprinted *infra* in Appendix).

[47] UCFA § 6, 12 U.L.A. 47 (Supp. 1987) (reprinted *infra* in Appendix).

[48] The simple proportionate reduction of the plaintiff's claim would not have been an appropriate solution to the problem of collusive settlements in the absence of comparative contribution. In a system of per capita pro rata contribution, proportionate reduction would have deterred plaintiffs from settling with precisely those defendants against whom their claims were weakest. For example, suppose A had a weak case against B and a strong case against C. In the absence of comparative fault, A would

Stoneking follows the UCFA in his recommendation that a settling tortfeasor should be discharged from liability for contribution to other tortfeasors,[49] but he then rejects the UCFA's provision for proportionate reduction of the plaintiff's claim against the nonsettling tortfeasors. Instead, he recommends adoption of a New York statute which provides that a settlement reduces the plaintiff's claim against nonsettling tortfeasors by the *greater* of: (1) the amount of the consideration paid for the release, or (2) the proportionate share of the settling defendant.[50] Applying the New York approach to the above example, a settlement by A with B for $10,000 would reduce A's claim against C by $70,000 (the greater of $10,000 and seventy percent of $100,000), to $30,000. If A settled with B for $85,000, A's claim against C would be reduced by $85,000 (the greater of $85,000 and seventy percent of $100,000), to $15,000.

The New York rule represents a controversial solution to the problem of collusive settlements.[51] Within a system of comparative fault, the New York approach is both unnecessary and inappropriate. It is unnecessary because the problem of collusive settlements can be eliminated by the simple proportionate

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anticipate either a recovery of 100% from C or 50% each from B and C. Thus, if settlement produced a per capita reduction of plaintiff's claim against nonsettling defendants, any settlement with B could reduce A's claim against C by 50% if the jury found both B and C to be liable. Unless A were confident that B would be exonerated from liability at trial, A would be reluctant to settle with B for an amount substantially less than 50% of the amount of the expected judgment, discounted by the possibility of recovering nothing at trial.

A would not confront such a risk under comparative fault because, by hypothesis, the case against B was relatively weak, so B's proportionate share of fault and the corresponding reduction of the plaintiff's claim against C would be relatively low, perhaps 10% or 20%. With the risk of only a 10% or 20% reduction in the claim against C, it would be reasonable for A to accept a correspondingly low settlement offer from B.

[49] Stoneking, *supra* note 1, at 179-81.

[50] *Id.* at 184-87. N.Y. Gen. Oblig. Law § 15-108 (McKinney 1978) provides:

> When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

Pennsylvania has a similar statute, 42 PA. C.S. § 8326. *But see* Charles v. Giant Eagle Mkts., No. J-156-1986 (Pa. Super Ct. Feb. 20, 1987), holding that when the consideration paid for the settlement exceeded the proportionate share of the settling defendant, but the release expressly provided that the recovery against the nonsettling defendant would be reduced to the extent of the settling defendant's pro rata share, the plaintiff's recovery would only be reduced by the settling defendant's proportionate share notwithstanding the statutory mandate that the recovery be reduced by the amount of consideration paid for the release when it exceeded that proportionate share.

[51] *See* Comment, *Repealing New York's Post-Settlement Equitable Share Reduction Scheme: An Idea Whose Time Has Come,* 49 ALBANY L. REV. 856 (1985).

reduction of the plaintiff's claim by a percentage equal to the share of the settling tortfeasor.[52] It is inappropriate because, as explained below, it would unfairly reduce the recovery by plaintiffs, interfere with loss allocation, and impede the settlement process.

Stoneking's proposal reflects only a partial understanding of the foregoing historical development. He correctly recognizes the inappropriateness, under a system of comparative fault, of the 1955 UCATA's reduction of the plaintiff's claim against other defendants by the dollar amount of the consideration received for the release.[53] Yet his argument against the UCFA approach and in favor of the New York approach is unconvincing.

Stoneking's rationale for rejecting the simple proportionate reduction of a plaintiff's claim is that "[t]he possibility of either under- or over-compensation of the plaintiff is too great [because]. . .the only time a plaintiff will receive the amount fixed as damages by the jury is when the proportionate share of the settling defendant is equal to the settlement amount."[54] While his factual premise obviously is true, Stoneking does not explain why this presents more of a problem here than in the case of a plaintiff who settles with a single defendant in a typical lawsuit. In either case, the plaintiff agrees to accept less

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[52] Fear of collusion between the plaintiff and one of the joint tortfeasors had been a persistent concern among both commentators and practitioners. The 1939 UCATA contained no standard limiting enforceability of settlements because the Act was drafted to prevent a release of one party from prejudicing the other defendants. The 1955 UCATA, however, allowed a settlement to operate as a complete discharge of the released party, thereby opening the door for collusion. That Act provided that a release only operates as a discharge if it "is given in good faith." 1955 UCATA, § 4, 12 U.L.A. at 98. *See supra* note 44 and accompanying text.

The UCFA, however, imposes no such limitation on the effectiveness of releases. Although the comments are a bit vague on this point, it is apparent that the concern about collusion simply does not exist under the UCFA. The risk of collusively low settlements was eliminated by having the settlement reduce the plaintiff's claim against the remaining defendants in proportion to the fault of the settling defendant, rather than by the dollar amount of the settlement. *See supra* notes 45-48 and accompanying text.

Curiously, Stoneking devotes substantial attention to the problem of collusion and the associated issue of the standard for enforceability of settlement agreements. *See* Stoneking, *supra* note 1, at 181. He is misled into doing so by two mistakes. First, he bases much of his analysis on the 1955 UCATA, which is inappropriate in comparative negligence jurisdictions. See *id.* at 182-83 nn.96, 97, 104. Second, he considers the standard of enforceability prior to his consideration of the consequences of a settlement and release. Thus, his discussion of the problem of collusion fails to reflect that any nonsettling defendants would be protected through the resulting reduction of the plaintiff's claim by at least the proportionate share of the settling tortfeasor.

Although I have no quarrel with Stoneking's suggestion that settlement agreements should be enforceable in the absence of collusion, collusion is simply not a problem under either the UCFA or Stoneking's alternative proposal. There is thus no need to add an "absence of collusion" standard to any legislative revision of the rules governing comparative contribution.

[53] *Id.* at 185.

[54] *Id.* at 185-86.

than the expected value of the lawsuit in return for the elimination of the cost, delay, risk, and uncertainty of litigation.[55]

Stoneking concedes that pure proportionate reduction would allow the plaintiff a fair gamble, but he complains that this "elevates risk taking to the level of a goal which the system encourages. . .[whereas] the primary goal should be to fairly compensate the plaintiff for the loss."[56] Stoneking does not explain, however, how the New York approach would advance the goal of fair compensation. In fact, the New York approach virtually assures that the plaintiff will be *undercompensated.*

Let us once again consider the hypothetical in which a jury would eventually find that A sustained $100,000 in damages due to the negligence of B and C, who were seventy percent and thirty percent at fault, respectively. Under Stoneking's proposal, if A settled with B for any amount less than $70,000, A would retain only a $30,000 claim against C, so that A's total recovery would be less than $100,000. To be sure, if A settled with B for $70,000, A's claim against C would be reduced to $30,000, and A would recover exactly $100,000. And if A settled with B for an amount greater than $70,000, say $85,000, A's claim against C would be reduced to $15,000, so that his total recovery would again be $100,000.

But how likely is it that B would offer in settlement an amount greater than or equal to its expected share of the judgment? Typically, a defendant offers *less* than its expected share of the judgment, anticipating that the plaintiff will settle for less in order to avoid litigation. Under Stoneking's proposal, A would only recover the full amount of the court-awarded damages in cases in which the settling defendant was completely exonerated or in those rare cases in which the consideration for the settlement exceeded the settling defendant's proportionate share. In the vast majority of disputes, however, A would accept in settlement an amount less than B's actual proportionate share of the damages, in which case A's total recovery would be less than the amount awarded by the jury. Consequently, Stoneking would convert an essentially fair gamble into a game in which the odds favor the defendant: the plaintiff can at best break even and usually receives less than the amount awarded in damages by the jury. The net result of Stoneking's proposal would be to reduce the damages recovered by settling plaintiffs and ultimately to deter plaintiffs from settling.[57]

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[55] *See* R. POSNER, *supra* note 17, at 522-28; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950, 966-77 (1979).

[56] Stoneking, *supra* note 1, at 186. Stoneking might be less concerned about overcompensation if he viewed any excess payment by a settling defendant as though it were a payment by a collateral source. But, being a member of the defense bar, he is not overly sympathetic to the collateral source rule. See *infra* notes 87-91 and accompanying text.

[57] *See* Comment, *supra* note 51, at 858-66.

In conclusion, Mr. Stoneking's proposal to follow the New York approach of reducing a settling plaintiff's claim by the greater of the proportionate share of the released party or the dollar amount of consideration paid for the release would be unfair to plaintiffs and contrary to the goal of judicial economy. A rule of equitable proportionate reduction was enacted as part of the UCFA and has the support of many prominent scholars.[58] There is simply no reason to depart from this sensible and fair approach to the issue of verdict reduction under comparative contribution.

B. *Contribution and Aggravated Misconduct*

With the rejection of the rule against contribution among tortfeasors, it first appeared that all tortfeasors might be entitled to seek contribution, regardless of the degree of their wrongdoing. The 1939 UCATA was silent on the question of contribution for tortfeasors guilty of aggravated misconduct. An optional provision of the 1939 UCATA authorized consideration of the relative degrees of fault in determining the pro rata shares of joint tortfeasors when "there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them,"[59] but it did not indicate that the more serious wrongdoers would be barred from contribution. The 1955 UCATA, however, expressly denied any right of contribution to tortfeasors whose conduct was intentional, willful, or wanton.[60] It also eliminated the provision regarding disproportionate fault, providing instead that "[the defendants'] relative degrees of fault shall not be considered."[61] The Commissioners conceded that the denial of contribution to tortfeasors guilty of aggravated misconduct was based on the same policy as the traditional rule barring all contribution among tortfeasors, simply narrowing the scope of the bar from "all wrongdoers" to "wrongdoers guilty of moral turpitude."[62]

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[58] Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court,* 30 HASTINGS L.J. 1465, 1485-87 (1979); Wade, *supra* note 38, at 234; Note, *supra* note 15, at 1695-96. It also is deemed appropriate by one member of West Virginia's defense bar. *See* Emch, Comparative Negligence in West Virginia: A Defense Overview, 82 W. VA. L. REV. 493, 511-15 (1980).

[59] 1939 UCATA § 2(4), 12 U.L.A. at 57.

[60] 1955 UCATA § 1(c), 12 U.L.A. at 63. The comment to this subsection states that the words "wilfully or wantonly" are optional and may be omitted in states where "they mean something less than they imply and where by including them the bar of the remedy would be too broad." *Id.* (comment), 12 U.L.A. at 65.

[61] *Id.* at § 2, 12 U.L.A. at 87.

[62] The Commissioners explained:

> The substance of this provision is found in a few of the existing statutes, usually in rather vague language. Kentucky and Virginia, for example, provide that there must be no "moral turpitude." The 1939 Act was silent on the matter. The policy here followed is that of the original rule as to contribution, that the court will not aid an intentional wrongdoer

Stoneking correctly perceives that loss allocation requires the availability of contribution for defendants guilty of aggravated misconduct. He asserts, without further explanation, that if they were barred from contribution, "the policy of allocating loss would be sacrificed."[63] Yet it is not self-evident that barring contribution claims by tortfeasors guilty of aggravated misconduct is inconsistent with loss allocation. Leaving the entire loss to bear on serious wrongdoers appears superficially to be consistent with principles of corrective justice and with the efficiency-oriented goal of deterrence.

Denial of contribution for aggravated misconduct *is* inconsistent with loss allocation, however, insofar as it focuses entirely on punishment of the worst wrongdoer and fails to force other tortfeasors to pay in proportion to their fault. The noncontributing tortfeasors do not pay what they "ought" in fairness to pay.[64] They are relieved from liability by the fortuitous circumstance that their co-defendant is guilty of aggravated misconduct.

In *Sitzes v. Anchor Motor Freight, Inc.*,[65] the West Virginia Supreme Court of Appeals adopted a rule of pure comparative contribution, holding that a party who was seventy percent at fault could seek contribution from a party who was only thirty percent at fault. Under *Sitzes,* a tortfeasor who was only thirty percent or ten percent or even one percent at fault is liable to pay that share of the plaintiff's damages to the tortfeasor who was seventy percent or ninety percent or ninety-nine percent at fault. Applying *Sitzes* to the hypothetical in which the negligence of B and C contributed to A's injuries, B could obtain contribution from C regardless of whether B's share of fault was seventy, ninety, or even ninety-nine percent, provided that both parties were merely "negligent." If B's conduct crossed the line from gross negligence to recklessness, however, then B's claim for contribution would be barred, and C would be free from liability for the plaintiff's injuries.

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in a cause of action which is founded on his own wrong. In cases of concerted battery, for example, there appears to be little reason to shift any part of the liability to another.

Two valid reasons exist for extending the exclusion to wilful and wanton acts causing or contributing to the injury.

In the first place wilful and wanton acts seem naturally to belong in the same class with intentional wrongs and to imply moral turpitude on the part of the wrongdoer. The policy of the section as drafted adopts the law of those states which do not recognize classification of negligence into degrees. It is intended to convey the idea that there is a difference between negligence and wilful or wanton misconduct. (See Srajer v. Schwartzman, 164 Kan. 1, c. 248)

In the second place, by excluding wilful and wanton actors from the right to contribution, we eliminate most of the arguments urged for a rule allocating the shares of liability on the basis of relative degrees of fault. (See Sec. 2.)

Id. at § 1(c) (comment), 12 U.L.A. at 65.

[63] Stoneking, *supra* note 1, at 178. *See generally id.* at 176-179.

[64] *See* Southern Pacific Transp. Co. v. State, 115 Cal. App. 3d 116, 171 Cal. Rptr. 187 (1981).

[65] *Sitzes*, 169 W. Va. 698, 289 S.E.2d 679.

The unfairness of the rule denying contribution for aggravated misconduct is exacerbated by the arbitrariness of the dividing line. Courts and commentators have struggled in vain to articulate a distinction between reckless misconduct, for which punitive damages may be awarded, and simple or gross negligence, for which punitive damages generally are not warranted.[66] It would be even more unfair if liability for *compensatory damages* were to turn on this fine distinction.

The arbitrariness of the rule denying contribution to tortfeasors guilty of aggravated misconduct is further compounded by the fact that A has the option of proceeding against either B or C for satisfaction of the judgment. If A obtained satisfaction from C, the less serious wrongdoer, C would then be able to seek contribution from B. But if A instead sought satisfaction from B, who was guilty of aggravated misconduct, B would be barred from seeking contribution, and C would escape liability completely.

Denial of contribution for aggravated misconduct is inefficient as well as unfair. To the extent that certain tortfeasors do not pay their proportionate share of the plaintiff's damages, they do not bear an appropriate share of the economic costs generated by their activities, while others pay more than their appropriate share. Tortfeasors guilty of aggravated misconduct bear a disproportionate share of the damages and suffer unduly reduced profits, thereby subsidizing their potential co-defendants who obtain artificially enhanced profits by virtue of their immunity from contribution claims. The difference in profitability would result, in the long run, in an inefficient allocation of resources, with too few resources invested in the activities that are barred from contribution and too many resources in the activities that benefit from the rule against contribution.[67]

Allocative inefficiency would not be a problem in the absence of a systematic tendency for certain activities to benefit or suffer from the rule against contribution for aggravated misconduct. If the gains and losses could be expected to offset each other in the long run, then the rule would not lead to inefficient resource allocation. Unfortunately, however, application of the tra-

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[66] *See* Lewin, *The Tail Wags the Dog: Judicial Misinterpretation of the Punitive Damages Ban in the Federal Tort Claims Act,* 27 WM. & MARY L. REV. 245, 266 (1986); Note, *Comparative Fault and Intentional Torts,* 12 Loyola L.A. L. REV. 179, 189-90 (1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 9-10 (4th ed. 1971); Turk, *Comparative Negligence on the March,* 28 CHI.[-]KENT L. REV. (pt.1) 189, 203-04 (1950); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 280-82 (1935); 25 C.J.S. *Damages* § 123(8) (1966); 17 C.J. *Damages* § 284 (1919). *Cf.* Cline v. Joy Mfg. Co., 310 S.E.2d 835 (W. Va. 1983) (reversing jury verdict in *Mandolidis* action due to insufficient evidence as to willful, wanton, or reckless misconduct). Moreover, in a minority of jurisdictions gross negligence is a sufficient basis for the award of punitive damages. *E.g.,* Pedernales Elec. Coop., Inc. v. Schulz, 583 S.W.2d 882 (Tex. Civ. App. 1979).

[67] *Cf.* A.M. POLINSKY, *supra* note 17, at 44-48; *Some Thoughts, supra* note 18, at 502-03.

ditional rule in *Mandolidis* actions now systematically tends to harm West Virginia employers who are barred from seeking contribution, while benefiting out-of-state manufacturers who escape their proportionate share of liability whenever the plaintiff proceeds against the employer to satisfy the judgment. The traditional rule also impedes the "loss spreading" function of comparative fault by placing a disproportionate share of the burden from industrial accidents on employers, who may not be able to absorb these costs without cutbacks and layoffs, instead of spreading the loss to other tortfeasors. For these reasons, economic efficiency requires the availability of contribution for all defendants, even those guilty of aggravated misconduct.

To the extent that punishment of serious wrongdoers remains a goal of the tort system, that purpose can be fully accomplished under the rules of comparative fault, complemented by the existing remedy of punitive damages. Insofar as aggravated misconduct represents more serious wrongdoing, we can rely on the jury to apportion fault accordingly and to place an appropriate share of the cost on the tortfeasor guilty of aggravated misconduct.[68] In addition, punitive damages may be awarded against a defendant in cases of intentional, willful, wanton, or reckless misconduct for the purposes of punishing the defendant and deterring similar misconduct by the defendant and others.[69] Punitive damages are awarded individually as to each defendant guilty of aggravated misconduct, and should not be subject to contribution.[70] Thus, to the extent that retribution is an appropriate consideration in a particular case,[71] that purpose can be satisfied by an award of punitive damages without undermining the loss allocation function of comparative contribution.

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[68] *See* Note, *supra* note 15, at 1694. As Stoneking aptly states: "The theme which runs throughout the case law is a willingness to rely upon the ability of jurors to apply common sense in assessing damages and assigning fault among the parties." Stoneking, *supra* note 1, at 175. *Cf. infra* note 183. *But see* Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 475, 508 (1953) (expressing distrust of juries in apportioning fault).

[69] *See* Perry v. Melton, 299 S.E.2d 8, 11-12 (W. Va. 1982); Wells v. Smith, 297 S.E.2d 872, 876-77 (W. Va. 1982). Hensley v. Erie Ins. Co., 168 W. Va. 172, 283 S.E.2d 227 (1981); Spencer v. Steinbrecher, 152 W. Va. 490, 164 S.E.2d 710 (1968); Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58 (1895); BLACK'S LAW DICTIONARY 352 (5th ed. 1979); RESTATEMENT (SECOND) OF TORTS § 908 and comments a, b (1977); Lewin, *supra* note 66, at 249, n.16, 17. West Virginia recognizes that punitive damages also serve to compensate plaintiffs for the infliction of egregious misconduct and to substitute for personal revenge. *Perry,* 299 S.E.2d 8; *Hensley,* 168 W. Va. 172, 283 S.E.2d 227.

[70] *See* State v. Cook, 400 S.W.2d 38, 42 (Mo. 1966) (en banc); Note, *supra note* 15, at 1694-95. *Cf. Perry,* 299 S.E.2d at 11 (reversing refusal of punitive damage instruction against one defendant but affirming refusal of such instruction against the other defendant as to whom evidence did not support a finding of aggravated misconduct).

[71] The *Mandolidis* amendments provided that an employer would not be liable for punitive damages when it intentionally exposed an employee to specific unsafe conditions but without any deliberate intention to produce injury. W. VA. CODE § 23-4-2(c)(2) (1985). If the legislature has determined that the employer in such a case should not be punished with an award of punitive damages, it would seem inappropriate to apply retributive principles to bar that employer's claim for contribution.

Stoneking recognizes that loss allocation is promoted by the availability of contribution for defendants guilty of aggravated misconduct, but he draws the line at intentional acts, recommending against contribution for intentional tortfeasors.[72] His conclusion is curious since he claims to have rejected retribution in favor of loss allocation,[73] and he even notes that the exclusion of intentional torts from the UCFA was not based on any theoretical or principled objection.[74]

Under the UCFA, contribution is available to tortfeasors whose conduct is "negligent or reckless" or "subject . . . to strict tort liability."[75] Yet the Act's omission of intentional conduct was based solely on the absence of precedent from other jurisdictions, and the Commissioners indicated that the Act would not preclude a court from extending comparative fault to intentional torts under common law principles.[76]

Stoneking advances two possible reasons for denying contribution to intentional tortfeasors. First, he notes that such a rule reflects what is probably the correct interpretation of *Merryweather v. Nixan,*[77] the English decision from which the American rule against contribution among tortfeasors was derived.[78] He does not explain, however, why this old case should be resurrected as a barrier to loss allocation in a comprehensive reform of the modern comparative fault system.

Second, Stoneking claims that the legislature implicitly endorsed a distinction between intentional and other aggravated misconduct when it enacted the *Mandolidis* amendments.[79] But those amendments simply extended liability to employers in certain situations without proof of deliberate intention to produce injury. The creation of liability for a less-than-deliberate act does not imply anything about the legislature's attitude towards deliberate wrongdoers, whose liability under the pre-Mandolidis version of the statute remained unchanged in the post-Mandolidis amendments.

Moreover, it is simply not true, as Stoneking asserts, that the nature of the misconduct defined in the statutory *Mandolidis* provisions "is no different

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[72] Stoneking, *supra* note 1, at 178-79, 189.

[73] *Malum in se* harkens back to a day in which judges, like God, searched the hearts of men.

. . .

The focus in the field of contribution is not on the alleged evil of the wrongful acts themselves. The true goal of the system is to weigh fault and to allocate loss.

Id. at 178-79.

[74] *Id.* at 178.

[75] UCFA § 1(b), 12 U.L.A. at 38.

[76] UCFA § 1 (comment), 12 U.L.A. at 39.

[77] Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799).

[78] Stoneking, *supra* note 1, at 171, 178.

[79] W. VA. CODE § 23-4-2 (1985).

from any other type of aggravated wrongdoing" or that it "is expressly distinguished from intentional wrongdoing."[80] To the contrary, statutory *Mandolidis* liability is based upon an intentional act: "expos[ing] an employee to such specific unsafe working condition *intentionally.*"[81] Concededly, liability under subsection (c)(2)(ii) does not require malice—"a consciously, subjectively and deliberately formed intention to produce. . .injury"[82]—as does liability under subsection (c)(2)(i). Nevertheless, the legislature expressly stated that its standard in subsection (c)(2)(ii) was "of more narrow application and contain[ed] more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct."[83] It is therefore apparent that in subsection (c)(2)(ii) the legislature was distinguishing between two forms of intentional wrongdoing, and not between intentional and nonintentional acts.[84] Ironically, a denial of contribution for intentional tortfeasors probably would preclude any claim for contribution by employers in *Mandolidis* actions, a result directly contrary to the goal of Stoneking's proposal. Contribution should be made available even to intentional tortfeasors for several reasons. First, as indicated above, the goal of loss allocation provides no basis for distinguishing between intentional and unintentional tortfeasors with respect to contribution. Both the corrective justice and economic efficiency aspects of loss allocation support comparative contribution among all joint tortfeasors. Second, insofar as retribution remains a pertinent consideration, juries can be depended upon to allocate an appropriate share of fault to intentional wrongdoers and to award substantial punitive damages.

Finally, any attempt to draw a line between intentional and unintentional tortfeasors would necessarily promote uncertainty among the litigants. With "recklessness" defined as the willful disregard of a known risk, the line between intentional and unintentional conduct is difficult to draw. The disagreement between Mr. Stoneking and this author as to whether employer liability for intentionally exposing an employee to specific unsafe working conditions constitutes an intentional tort is typical of the controversies which undoubtedly would arise in litigation. Such uncertainty would make settlement more difficult,[85] resulting in additional administrative costs for the parties and for the legal system.

In sum, Mr. Stoneking is correct in suggesting that contribution should be available to tortfeasors guilty of aggravated misconduct. Consistent application

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[80] Stoneking, *supra* note 1, at 178.

[81] W. VA. CODE § 23-4-2(c)(2)(ii)(D) (1985) (emphasis added).

[82] *Id.* at § 23-4-2(c)(2)(i).

[83] *Id.* at § 23-4-2(c)(1).

[84] It is unclear why Stoneking misperceives this distinction. Perhaps his analysis was influenced by the hope that his interpretation could influence the outcome of litigation for employers/clients seeking contribution in *Mandolidis* actions under current law.

[85] *See* Lewin, *supra* note 17, at 822. *Cf. infra* notes 141-44 and accompanying text.

of the principle of loss allocation requires that contribution be available to all joint tortfeasors, however, including intentional wrongdoers. A modern reformulation of our contribution rules could accomplish this result without any sacrifice of the punitive and deterrent purposes of our tort law. It simply requires adoption of the UCFA, with an amendment adding "willful, wanton, and intentional" conduct to the definition of fault.[86]

C. *Workers' Compensation and Verdict Reduction*

The statutory liability of an employer for injuries to an employee raises special problems of contribution. When a plaintiff's injury is caused by the employer and a third party, the liability of the employer differs from that of its co-defendant in two respects. First, the employer necessarily will be liable for aggravated misconduct, either deliberate infliction of injury or intentional exposure of the employee to specific known risks, whereas the third party's liability may be based on simple negligence or on strict liability for injuries caused by a defective product. Second, while a third party may be liable for the full amount of a plaintiff's injuries, the employer is only liable for the excess of a plaintiff's damages above the amount receivable under the workers' compensation statute.[87]

The conceptual distinctions among the legal standards of liability should not cause any substantial problems with respect to comparative contribution. In the field of product liability, for example, West Virginia and a majority of the comparative negligence jurisdictions allow juries to compare the contributory negligence of consumers with the strict liability of manufacturers.[88] Similarly, there is no reason why juries cannot compare the fault of the manufacturer

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[86] Section 1(b) of the UCFA could be amended by adding the underlined language so that it would read in pertinent part: "'Fault' includes acts or omissions that are in any measure negligent or reckless *or willful or wanton or intentionally injurious* toward the person or property of the actor or others, or that subject a person to strict tort liability."

It should be noted that such an amendment also would apply between plaintiffs and defendants, permitting a defendant guilty of aggravated misconduct to raise the plaintiff's comparative negligence as a defense, thereby reducing the damages in proportion to the plaintiff's own negligence. Although it is apparent that the goal of loss allocation applies with no less force to the issue of liability between plaintiffs and defendants than it does to the issue of contribution among defendants, the issue merits independent consideration. *See* Part IV.C., *infra,* for an extended discussion of the rationale for apportioning damages between a plaintiff guilty of simple negligence and a defendant guilty of aggravated misconduct.

[87] When the employer has deliberately injured the employee, the cause of action expressly is limited to the excess of damages beyond the amount payable under the workers' compensation statute. W. Va. Code § 23-4-2(b). Likewise, when the employer intentionally has exposed the employee to an unsafe condition, recovery is limited to the excess above the amount of statutory compensation.

[88] *See, e.g.,* Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982); Annot., 9 A.L.R. 4th 633 (1981 & Supp. 1986).

of a defective product based on negligence or strict liability with the fault of an employer liable for aggravated misconduct in altering or misusing that product.[89] In general, juries are entirely capable of comparing the negligence of one tortfeasor with the aggravated misconduct of another tortfeasor.[90]

The more difficult issue in statutory *Mandolidis* actions is whether third party defendants should share in the setoff received by the employer for amounts payable to the plaintiff under the workers' compensation statute. If the employee were to sue the employer and the third party in separate actions, the workers' compensation benefits would be subtracted from the damages owed by the employer, but they would not be subtracted from the damages owed by the third party defendant because of the "collateral source rule."[91]

If the employer and the third party are parties to a single action, with a cross-claim for contribution, how should the setoff for compensation benefits be reflected? Under current law, the setoff for compensation benefits would be limited to the employer, so that the plaintiff would obtain judgments in different amounts against the two defendants. The question would then arise as to computation of the amount of contribution.

Suppose that the plaintiff received a judgment against a third party for $100,000, but that because of workers' compensation benefits totalling $20,000, the judgment against the employer was for $80,000. Suppose further that the employer was seventy percent at fault and the third party thirty percent at fault. If the employee first recovered $100,000 from the third party, the third party could then obtain contribution of seventy percent, or $70,000, from the employer. On the other hand, the employee might first recover $80,000 from the employer and then recover the other $20,000 from the third party. Under current law, the employer could not seek contribution from the third party because the employer was guilty of aggravated misconduct. But if, as is recommended in this Article, the employer were permitted to seek contribution, it could recover from the third party thirty percent of its $80,000 payment, or $24,000.

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[89] *Cf.* Sydenstricker v. Unipunch Prods., Inc., 169 W. Va. 440, 288 S.E.2d 511 (1982). In answer to certified questions, the court in *Sydenstricker* held that a third-party defendant was entitled to seek contribution from an employer guilty of aggravated misconduct. Although the court in that case did not discuss how contribution was to be apportioned, two weeks later the court issued the *Sitzes* decision in which it adopted the method of comparative contribution. It is therefore quite likely that the court had comparative contribution in mind when it decided *Sydenstricker.*

[90] *Cf. infra,* notes 166-72 concerning apportionment of fault between plaintiffs guilty of simple negligence and defendants guilty of aggravated misconduct.

[91] Jones v. Laird Found., Inc., 156 W. Va. 479, 195 S.E.2d 821 (1973). *See* Ilosky v. Michelin Tire Corp., 307 S.E.2d 603, 614-15 (W. Va. 1985); National Fruit Prod. Co. v. Baltimore & O.R.R. Co., 329 S.E.2d 125, 132 (W. Va. 1985).

Note that in either case the plaintiff would recover the entire $100,000, in addition to his compensation benefits, but the consequences for the third party and the employer would depend upon which party was seeking contribution. If the employee proceeded first against the third party, who then obtained contribution from the employer, the net payments would be $30,000 by the third party and $70,000 by the employer. If the employee proceeded first against the employer, with the third party then paying the balance of the judgment to the plaintiff as well as contribution to the employer, the net payments would be $44,000 by the third party and $56,000 by the employer.

There is a relatively simple solution to the foregoing anomaly: limit the plaintiff to satisfaction in an amount equal to the weighted average of the two judgments, each judgment being "weighted" by the proportionate share of fault attributable to that party. Although this solution sounds complex, the computation is really quite easy. In the above example, plaintiff's total recovery would be thirty percent of the $100,000 judgment against the third party, or $30,000, and seventy percent of the $80,000 judgment against the employer, or $56,000, for a total of $86,000. Regardless of which party the plaintiff proceeded against first, each of the defendants would pay its proportionate share, and the plaintiff would suffer a proportionate but not a total offset on account of the workers' compensation benefits.[92]

Another possible solution, which Stoneking recommends, is to extend the setoff for workers' compensation benefits to the third-party defendant, so that the resulting judgment against both parties would be for the same reduced amount. In the above example, the plaintiff would be limited to a judgment for $80,000. Regardless of which defendant the plaintiff proceeded against first, the net outlays would be $24,000 by the third party and $56,000 by the employer.

While Stoneking's solution has the advantage of simplicity, it creates the incongruous result that the plaintiff would fare substantially *worse* in a suit against the third party if the employer were guilty of aggravated misconduct than if the employer were entirely innocent of wrongdoing. In the absence of the employer as a defendant, the employee could recover the full amount of the damages from the third party due to the collateral source rule, without any setoff for workers' compensation benefits. But if the employer were a party and were liable for aggravated misconduct, the damages received by the plaintiff would be reduced by the amount of workers' compensation benefits.

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[92] Under joint and several liability, the plaintiff could either recover the entire $86,000 from the third party, or else recover $80,000 from the employer and then $6,000 from the third party. In either case, the defendants could then obtain contribution as to payments in excess of their equitable shares, resulting in net payments of $30,000 by the third party and $56,000 by the employer.

Stoneking's argument in favor of his proposed solution is cleverly deceptive. He begins with the proposition that workers' compensation benefits are not really paid by the employer to the employee but come from "a state-imposed and operated system. . .outside of the tort system."[93] His second proposition is that, within the tort system, the employer "should be treated like any other tortfeasor."[94] From this he concludes that if the employer is entitled to a credit for workers' compensation benefits, so too should any third-party defendants.

The fallacy in this logic is Stoneking's implicit rejection of the collateral source rule. The employer is *not* like other tortfeasors with respect to workers' compensation benefits because these benefits are from a collateral source relative to other tortfeasors but *not* as to the employer who contributes towards those benefits. Since the employer differs from other tortfeasors in this respect, it is entirely appropriate for the employer to be treated differently, receiving a setoff for workers' compensation benefits that is not extended to other tortfeasors.

Stoneking tries to smooth over this difference by his initial proposition, which suggests that the workers' compensation system is no more connected to the employer than it is to third parties. But if workers' compensation benefits truly were independent of the employer, then they would be from a collateral source relative to the employer, and it would follow that *neither* the employer nor the third-party defendant should be entitled to any setoff.

Stoneking's discussion of the "one satisfaction" rule masks what is in effect an assault on the collateral source rule itself. Stoneking is attempting to bootstrap the third-party defendant into the shoes of the employer without directly addressing the fact that his proposal would in effect eliminate the collateral source rule in the field of workers' compensation.[95]

The impact of Stoneking's proposal could extend far beyond the workers' compensation system, however. It would apply whenever one of the defendants in multi-party litigation could claim a setoff from a collateral source with respect to the other defendants, or when some but not all of the defendants were subject to a special measure of damage liability.[96] It remains to be seen whether

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[93] Stoneking, *supra* note 1, at 188.

[94] *Id.*

[95] In a related context, the court in *National Fruit Prod. Co.*, 329 S.E.2d 125, held that the employer was not entitled to bring an action against a negligent third party to recover for workers' compensation benefits. The court said that to uphold such a cause of action would require reconsideration of established doctrine, including the mitigation of damages rule and the collateral source rule, and that the rights of employers, employees, and third parties were "so intertwined" that a resolution of the issue was best addressed by the legislature through the passage of a subrogation statute. *Id.* at 132.

[96] For example, under the Federal Tort Claims Act, the state measures of damages for wrongful death in Massachusetts, Alabama, and Georgia are deemed to be punitive and do not apply to claims

there is any justification for extending the setoff to all of the defendants, in effect limiting the collateral source rule to payments from sources collateral to *all* of the defendants who may be jointly and severally liable to the plaintiff, such as a plaintiff's own accident, health, or disability insurance.

Since Mr. Stoneking does not address the issue directly, he does not suggest any policy reasons that might warrant such a limitation on the collateral source rule. Although his proposal has the advantage of simplicity, this alone would not seem to be a sufficient reason for adopting it, since the alternative of a weighted average of the two resulting judgments could be readily computed by the court without any additional factfinding. In the absence of a policy reason for departing from the collateral source rule in the case of joint tortfeasors generally, there is no apparent basis for extending the credit for workers' compensation benefits to any defendants other than the employer.[97] In sum, the employer and third-party defendants in *Mandolidis* actions should be treated the same as defendants in all other actions with respect to setoffs for payments from one of the co-defendants.

IV. Pure Comparative Fault

The discussion thus far has applied the principle of loss allocation to analyze issues involving comparative contribution among defendants. The principle of loss allocation also has a direct bearing, however, on the comparative negligence rules for apportioning liability between plaintiffs and defendants. To be blunt, only a rule of pure comparative negligence is consistent with the goal of loss allocation. West Virginia's system of modified comparative negligence undermines the justice and efficiency concerns that underlie the goal of loss allocation. Moreover, decisions of the West Virginia Supreme Court of Appeals

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against federal defendants because of the FTCA's ban on an award of punitive damages against the government. Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956) (Massachusetts); Hartz v. United States, 415 F.2d 259 (5th Cir. 1969) (Georgia); Hoyt v. United States, 286 F.2d 356 (5th Cir. 1961) (Alabama). Several other courts of appeals have misinterpreted the FTCA's ban on punitive damages as requiring departure from various aspects of a state's regular measure of damage computation in actions against federal defendants. *E.g.,* Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984) (loss of enjoyment of life and offset for taxes); Hollinger v. United States, 651 F.2d 636 (9th Cir. 1981)(offset for tax liability and discounting to present value); D'Ambra v. United States, 481 F.2d 14 (1st Cir.), *cert. denied,* 414 U.S. 1075 (1973) (value of life of child). As a result of the disparity between the regular state measure of damages and the rule applied to federal defendants in these circuits, trial courts must make separate damage computations as to federal and nonfederal co-defendants. *See, e.g.,* Macey v. United States, 454 F. Supp. 684 (D. Alaska 1978). *See generally* Lewin, *supra* note 66.

[97] Rather than extend a credit for workers' compensation benefits to third-party defendants, a better solution might be the enactment of a comprehensive subrogation statute under which the employer could obtain contribution from third parties whose conduct gave rise to liability for compensation benefits. *Cf. National Fruit Prod. Co.,* 329 S.E.2d 125; *supra* note 95.

subsequent to *Bradley* have departed from the premise that served as the rationale for adoption of modified comparative negligence in that case.

A. *Justice and Comparative Negligence*

1. Corrective Justice and Pure Comparative Negligence

The considerations of corrective justice that underlie loss allocation are more fully realized under pure comparative negligence than under modified comparative negligence. The corrective justice aspect of loss allocation includes both the "compensation principle"—that claimants should be compensated for damage done by others—and the "apportionment principle"—that a wrongdoer should be liable for resulting damages.[98] Pure comparative fault, which involves pure comparative negligence between plaintiffs and defendants and pure comparative contribution among defendants, completely embodies both of these principles. A party who is ten percent at fault pays ten percent of the losses caused to others and recovers ninety percent of his own losses; a party who is seventy percent at fault pays seventy percent of the losses caused to others and recovers thirty percent of his own losses.

Modified comparative negligence is inconsistent with these equitable principles. The compensation principle is violated when a plaintiff who is only fifty percent at fault receives no compensation. The apportionment principle is violated when a defendant who is fifty percent at fault pays nothing.

Proponents of modified comparative negligence argue that the denial of compensation to a plaintiff who is fifty percent at fault is warranted by application of another equitable principle: that plaintiffs who are "substantially responsible" for their own injuries are not entitled to compensation.[99] In *Bradley,* the court expressly relied upon this principle, stating: "[W]e are not willing to abandon the concept that where a party substantially contributes to his own damages, he should not be permitted to recover for any part of them."[100]

A second principle, which is less frequently associated with systems of modified comparative negligence, focuses upon the duty of the defendants to pay

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[98] Note, *supra* note 15.

[99] *See* Sobelsohn, *supra* note 2, at 86. The "New Hampshire rule" or "50% rule" allows recovery when the plaintiff's negligence is "less than or equal to" the combined negligence of the defendants: a plaintiff who is 50% at fault will recover 50% of the damages. The "Wisconsin rule," adopted by the West Virginia court in *Bradley,* allows recovery only when the plaintiff's negligence is "less" than the defendant's; a plaintiff who is 50% at fault recovers nothing. Both of these rules reflect the premise that a plaintiff who is primarily responsible for his own injuries is not deserving of compensation. They differ only in their definition of the threshold. *See supra* note 4.

[100] *Bradley,* 163 W. Va. at 341, 256 S.E.2d at 885.

rather than upon the right of the plaintiffs to receive compensation. Also rooted in notions of corrective justice, this principle holds that a negligent defendant should not be compelled to pay compensation if the defendant is less at fault than the plaintiff.[101] This principle provides the basis for the rule in a handful of jurisdictions which allows a plaintiff to recover only against those defendants whose degree of fault is greater than (or greater than or equal to) the plaintiff's degree of fault.[102] The West Virginia court has rejected this rule, however, stating that the fault of the plaintiff is to be compared with all of the defendants as a unit and not with each of the defendants individually.[103] Thus, modified comparative negligence in West Virginia derives not from any concern about unfairness to the individual defendants, but solely from the supposed unfairness of allowing recovery for injuries primarily of the plaintiff's own making.

The premise that a person should not recover for injuries substantially of his own making does not, however, support the existing rule of modified comparative negligence which draws the line at fifty percent. A plaintiff who is forty-five percent at fault is also "substantially" responsible for his own injuries. So too is a plaintiff who is twenty-five percent at fault. A plaintiff who is forty-nine percent at fault is nearly as responsible for his injuries as one who is fifty percent at fault, yet under modified comparative negligence the former recovers fifty-one percent of his damages while the latter recovers nothing. In this respect, modified comparative negligence is just as arbitrary as the rule of contributory negligence which it replaced. It simply shifts the threshhold at which a claim will be barred by the plaintiff's own negligence from one percent of the fault to fifty percent of the fault.[104]

The principle that a person should be denied compensation for his own wrongdoing is best satisfied by a rule of pure comparative negligence. Under

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[101] *See* Sobelsohn, *supra* note 2, at 86-87.

[102] This is known as the "Georgia rule," based on Mishoe v. Davis, 64 Ga. App. 700, 14 S.E.2d 187 (1941). *See also* Rawson v. Lohsen, 145 N.J. Super. 71, 366 A.2d 1022 (1976); Marier v. Memorial Rescue Serv., Inc., 296 Minn. 242, 207 N.W.2d 706 (1973). Under this rule, if P is 30% at fault, D1 is 45% at fault and D2 is 25% at fault, P may recover from D1 but not from D2. The majority of states, however, follow the "Arkansas rule," advanced in Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962), under which the negligence of the plaintiff is compared with that of all the defendants collectively. *See* Note, *supra* note 15, at 1673-74 and nn. 32, 33.

[103] *See Sitzes,* 169 W. Va. at 712 and n.19, 289 S.E.2d at 687-88 and n.19. Cf. Bowman v. Barnes, 168 W. Va. 111, 282 S.E.2d 613 (1981).

[104] Courts and commentators are virtually unanimous in their condemnation of modified comparative fault as arbitrary. *See, e.g., Alvis,* 85 Ill. 2d 1, 27, 421 N.E.2d 886, 898; *Placek,* 405 Mich. 638, 660-62, 275 N.W.2d 511, 519, *Kirby,* 400 Mich. 585, 256 N.W.2d 400, 428; *Scott,* 96 N.M. 682, 634 P.2d 1234, 1242; *Li,* 13 Cal. 3d 804, 828, 119 Cal. Rptr. 858, 874, 532 P.2d 1226, 1242 (modified rule "simply shifts the lottery aspect of the contributory negligence rule to a different ground"); Vincent v. Pabst Brewing Co., 47 Wis.2d 120, 177 N.W.2d 513, 520 (Hallows, C.J., dissenting); R. Keeton, *Comments on Maki v. Frelk--Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 906, 911 (1968).

pure comparative negligence, a wrongdoer is totally denied compensation to the extent of his own fault: the recovery of a plaintiff who is forty percent at fault is reduced by forty percent; the recovery of a plaintiff who is seventy percent at fault is reduced by seventy percent. It is for this reason that the overwhelming majority of jurists[105] and scholars[106] deem pure comparative negligence to be the fairer rule. The modified rule that denies all compensation to a plaintiff fifty percent or more at fault is not based on fairness but on retribution.[107]

Moreover, the premise underlying modified comparative negligence—that a person should not receive compensation for losses primarily of his own making—has recently been rejected by the West Virginia Supreme Court of Appeals. In *Sitzes v. Anchor Motor Freight, Inc.*,[108] the court held that a defendant whose share of fault was seventy percent could obtain contribution from a co-defendant whose share of fault was only thirty percent. The court found that the defendant who was seventy percent at fault would be entitled to contribution based on "equitable principles" because he had "paid more than his *pro tanto* share."[109] Although the opinion in *Sitzes* declared that "[n]othing in *Bradley* bears on the right of contribution,"[110] the adoption in *Sitzes* of "pure" equitable contribution is entirely inconsistent with *Bradley*.[111]

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[105] In addition to the judicial decisions cited *supra* at note 3, *see* Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984) (applying pure comparative fault to products liability cases); *Vincent*, 47 Wis.2d at 124, 177 N.W.2d at 518 (1970) (Hallows, C.J., dissenting). *Cf.* United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975) (adopting pure comparative negligence for apportioning property damages in admiralty, in lieu of former divided damages rule). *But see* Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 550 (1984), *rev'd on procedural grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) (adopting "not greater than" version of modified rule).

[106] *See, e.g.*, V. SCHWARTZ, *supra* note 2, at 363; Cady, *Alas and Alack, Modified Comparative Negligence Comes to West Virginia*, 82 W. VA. L. REV. 473 (1980); Campbell, *Recent Developments of the Law of Negligence in Wisconsin—Part II*, 1956 WIS. L. REV. 4; Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases*, 10 IND. L. REV. 831 (1977); Fleming, *supra* note 58, at 1468-70; Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Jeunger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae, Parsonson v. Construction Equipment Co.*, 18 WAYNE L. REV. 3 (1972); P. Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L. J. 1, 9 (1974); R. Keeton, *supra* note 104, at 916; Prosser, *supra* note 68, at 508; Turk, *supra* note 66, at 344-45; Wade, *supra* note 38, at 224-25. *But see* C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL (J. Palmer & S. Flanagan rev. ed. 1985); Sobelsohn, *supra* note 2. Among state legislatures, modified comparative negligence is clearly preferred. Of the 33 legislatures which have adopted comparative negligence, only 6 chose the pure form: Arizona, Louisiana, Mississippi, New York, Rhode Island, and Washington. *See* V. SCHWARTZ, *supra* note 2, at § 3.2; H. WOODS, *supra* note 2, at § 4.2.

[107] *See Scott*, 624 P.2d at 1241-42. *See also* Sobelsohn, *supra* note 2, at 90: modified comparative fault "serves as a tool of corrective—or even retributive—justice." *Cf.* Stoneking, *supra* note 1, at 177-78 (discussing denial of contribution to tortfeasors whose wrongful acts were *malum in se).*

[108] *Sitzes*, 169 W. Va. 698, 289 S.E.2d 279.

[109] *Id.* at 715, 289 S.E.2d at 689.

[110] *Id.*, 289 S.E.2d at 689.

[111] Stoneking states that the rule adopted in *Sitzes* "may be referred to as 'pure' comparative

To illustrate, consider the following variation on an earlier hypothetical: suppose A was a passenger in a car driven by B that collided with a car driven by C; A sued B for his own damages; B sued C both for his own damages and for contribution as to A's damages; the jury determined that B was seventy percent at fault and C was thirty percent at fault. Under *Bradley,* B would be barred from recovering against C for his own damages, but under *Sitzes* B would be permitted to seek contribution from C as to A's damages. Is there any reason why B should be denied compensation as a plaintiff for his own property damage and personal injuries while being allowed to seek contribution as a third-party plaintiff on a cross- claim for his financial losses arising out of the same accident?

Bradley and *Sitzes* are irreconcilable under any principled anaylsis. There is no logical or practical distinction between a suit by B against C for his own damages and a suit by B against C for contribution toward damages B owes to A. Either B should be able to sue C both for contribution and for his own damages, or B should be barred from recovering entirely. The equitable principles underlying the court's decision in *Sitzes* suggest that the correct result is to allow recovery in both cases under a system of pure comparative fault.

2. Distributive Justice and Pure Comparative Negligence

In adopting a system of modified comparative negligence, the court in *Bradley* said that a pure system "favors the party who has incurred the most damages regardless of his amount of fault or negligence."[112] The court posed the hypothetical of a plaintiff who was ten percent at fault and suffered $20,000 in damages in an accident with a defendant who was ninety percent at fault and suffered $800,000 in damages. The court correctly pointed out that under a pure system of comparative negligence, the plaintiff would recover $18,000 of his damages while the defendant would recover $80,000 of his damages. From these facts, the court incorrectly concluded that a pure system would "favor" the defendant in such a case.

The fallacy in the court's analysis was its focus on the amount of the judgment, rather than on the parties' *net losses.* Although it is true that the defendant in this hypothetical recovers the larger judgment, it is also true that each party bears exactly its proportionate share of the total losses from the accident. Of the $820,000 in total damages, the plaintiff bears ten percent, or

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[111] Stoneking states that the rule adopted in *Sitzes* "may be referred to as 'pure' comparative contribution." Stoneking, *supra* note 1, at 175. He does not consider the inconsistency between pure comparative contribution and modified comparative negligence.

[112] *Bradley,* 165 W. Va. at 338, 256 S.E.2d at 883.

$82,000, and the defendant bears ninety percent, or $738,000.[113] As long as one assumes that the accident would not have occurred absent the fault of both parties, the rule of pure comparative negligence produces a reasonable and fair loss allocation.

By contrast, application of modified comparative negligence to the above hypothetical yields entirely unsatisfactory results. The plaintiff receives compensation for ninety percent of his own injuries, while paying nothing whatsoever for the large losses incurred by the defendant for which the plaintiff was partially responsible. It is for this reason that most courts and commentators have concluded that the disproportionate counterclaim hypothetical provides an argument *against* modified comparative negligence and in favor of pure comparative negligence.[114]

One commentator has suggested that the foregoing hypothetical illustrates the tendency of pure comparative negligence to favor the wealthy at the expense of the poor because the wealthy, having more property and greater income, tend to suffer greater accident losses and would reap a greater share of the judgments awarded to plaintiffs under pure comparative negligence.[115] The underlying premise that the rich, on the average, do suffer greater damages is probably true, but the argument proves too much. If the rich tend to suffer more damages than the poor from automobile accidents, does it follow that the damages suffered in all automobile accidents should fall where they may, without compensation? If one were to reject every legal rule that tended to protect the "haves" to a greater extent than the "have-nots," one would be forced to abandon virtually every rule of tort, contract, and property law, since all civil law tends to protect and perpetuate the existing distribution of resources.

Even if one were to accept the argument that any rule that facilitates compensation for damages tends to favor the "haves" at the expense of the "have-

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[113] The plaintiff's net loss is $20,000 in actual damages, less $18,000 recovered from the defendant, plus $80,000 paid to the defendant, for a total of $82,000. The defendant's net loss is $800,000 in actual damages, plus $18,000 paid to the plaintiff, minus $80,000 recovered from the plaintiff, for a total of $738,000.

[114] *Reliable Transfer Co.*, 421 U.S. at 406; *Alvis*, 85 Ill. 2d 1, 421 N.E.2d at 897; *Scott*, 96 N.M. 682, 634 P.2d at 1241-42; *Hoffman*, 280 So. 2d at 439. *See* V. SCHWARTZ, *supra* note 2, at 360-61; Cady, *supra* note 106, at 483-86 (1980); Wade, *Uniform Comparative Fault Act*, 14 FORUM 379, 385-86 (1979); R. Keeton, *supra* note 104, at 911; Oliver, *Let Us be Frank About Comparative Negligence*, 28 L.A.B. BULL. 119, 144-45 (1953); Note, *supra* note 15, at 1671. *But see Bradley*, 163 W. Va. at 338, 256 S.E.2d at 883; C.R. Heft & C.J. Heft, *supra* note 106, at § 1.50.

[115] Sobelsohn, *supra* note 2, at 88 n.123:

> This argument perhaps looms larger when one realizes that the size of a damages award depends in part on the accident victim's income and medical expenses, both of which, in turn, reflect an accident victim's overall wealth. Thus, pure comparative fault may aggravate the tort system's already existing bias in favor of wealthy individuals.

nots," it does not follow that the poor benefit from a rule of modified comparative negligence that results in a greater number of uncompensated losses. The hypothetical involving the disproportionate counterclaim is misleading in several respects, and it obscures the tendency of modified comparative negligence to affect the poor more severely than it affects the well-to-do.

First, the hypothetical creates a distorted picture of the overall impact of comparative negligence. The hypothetical assumes that the poorer party, who suffered the lesser amount of damages, would also be the party less at fault. Unless one believes that the poor tend to be more careful than the rich, however, it is equally likely that the poor plaintiff who suffered $20,000 in damages would be ninety percent at fault, and the defendant who suffered $800,000 in damages would be ten percent at fault. The hypothetical also involves an extreme situation in which both the relative fault and the relative damages of the two parties were entirely disproportionate. A more complete analysis, considering cases in which the fault was apportioned forty/sixty or fifty/fifty, and cases in which the damages of both parties were on the same order of magnitude, would create a more balanced picture.

Second, it is not necessarily true that the poorer litigant will always have suffered less damages. In automobile accidents, the rich may incur greater damages on the average, but there will be many collisions in which the poorer driver suffers greater losses.[116]

Third, and perhaps most importantly, even assuming that on the average rich plaintiffs suffer greater damages than poor plaintiffs, it does not follow that the rich would reap more of the benefit from a switch to pure comparative negligence. The argument that pure comparative negligence favors the rich is premised on the further incorrect assumption that plaintiffs, as a class, are as wealthy as defendants, as a class. In this respect, the automobile collision paradigm is misleading, for it represents a special case in which plaintiffs and defendants are equally wealthy because both are members of the same class—drivers. In a collision between a poor driver and a rich driver, the poor person has an equal chance of being either a plaintiff or a defendant, so that, on the average, plaintiffs and defendants should tend to be equally wealthy. In the unique circumstances of the collision paradigm, in which plaintiffs and defendants are interchangeable, it is true that under pure comparative negligence the gains of substantially negligent rich drivers as plaintiffs, on the average, would exceed the losses of rich drivers as defendants when sued by substantially negligent poor plaintiffs.

The result is entirely different, however, in situations in which the plaintiffs as a class tend to be less well off than the defendants as a class. When applied

[116] To the extent that wealthier persons drive safer cars, it may not even be true that on the average the rich incur greater damages.

to cases in which the plaintiffs are poorer than the defendants, the rule of modified comparative fault, which denies compensation to substantially negligent plaintiffs, systematically tends to redistribute resources away from the poor.

There are several important paradigmatic situations in which the plaintiffs systematically tend to be poorer than the defendants. One example is product liability. Although there may be occasional exceptions, consumers and other parties injured by defective products tend to have fewer resources than the manufacturers of those products.[117] The same is true of tort claims by tenants against landlords. For any category of cases in which plaintiffs tend to be poorer than defendants, adoption of pure comparative negligence would tend to redistribute resources from the rich to the poor. There are many such cases in which plaintiffs tend to be poorer than defendants, but few in which plaintiffs tend to be wealthier than defendants. Accordingly, when one considers the total dollar value of uncompensated damages suffered by plaintiffs under modified comparative negligence that would be recovered from defendants under pure comparative negligence, it is doubtful whether adoption of pure comparative negligence would tend to favor the rich.

Finally, even if it were true that a switch to pure comparative negligence would result in a net transfer of resources from the poor to the rich, it does not follow that the current rule of modified comparative negligence favors the poor. Typically, the rich tend to have greater resources with which to absorb their losses, and they tend to be more fully insured. Thus, the wealthy individual who suffers uncompensated losses of $800,000 probably has other resources, including ample medical and disability insurance, to reduce the net impact of the accident. For the poor person who suffers a loss of $20,000, on the other hand, there may be no reserves to cushion the financial blow, and he is less likely to have complete medical and disability coverage. Thus, the rule of modified comparative negligence, which in some cases leaves plaintiffs' losses totally uncompensated, tends to affect the poor more severely than the rich.

Once it is recognized that many poor and middle income individuals suffer substantial damages in accidents in which they are fifty percent or more at fault, it is apparent that the criterion of distributive justice weighs against the current rule of modified comparative negligence. In sum, considerations of both distributive and corrective justice support adoption of pure comparative negligence.

B. *Efficiency and Comparative Fault*

Although the controversy between advocates of pure and modified comparative negligence has focused on the criteria of justice and fairness, many

[117] While the "consumer" is usually an individual, there will be cases in which the consumer of industrial equipment is a corporation having even more resources than the manufacturer.

of the secondary arguments have dealt with issues of economic efficiency. The most frequently discussed issues have involved the relative administrative costs of the two approaches in terms of the number of lawsuits, the ease of settlement, and the cost of litigation.[118] Relatively less attention has been paid to the more important issues of incentives, allocative efficiency, and loss spreading.[119]

In analyzing the relative efficiency of pure and modified comparative negligence, insufficient attention has been paid to the two dissimilar paradigmatic situations in which comparative negligence is likely to be applied to personal injury litigation—automobile accidents and product liability. The key difference between these two situations is that in the former there is no distinction between the class of plaintiffs and the class of defendants, whereas in the latter, the classes of plaintiffs and defendants are almost entirely separate. The driver of an automobile does not know whether, if there is an accident, he will be a plaintiff or a defendant; given the likelihood of counterclaims, he probably will be both. With regard to product liability litigation, however, most individual consumers can expect to be plaintiffs, whereas most manufacturers can expect to be defendants.[120] The distinctiveness of the identity of the parties has a direct bearing on the question of relative incentives and allocative efficiency. The relevance of this distinction will be emphasized in the following analysis.

1. Efficient Incentives.

It has been suggested that pure comparative negligence reduces the incentive to act prudently because it allows even the substantially negligent plaintiff to obtain compensation.[121] With respect to product liability litigation, it is true

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[118] *See, e.g.,* R. POSNER, *supra* note 17, at 157; Sobelsohn, *supra* note 2, at 81-83 and the sources therein cited.

[119] *But see,* Haddock & Curran, *supra* note 22 and the sources cited therein.

[120] The distinction is not universal. The "consumer" of industrial equipment may be the employer of an injured employee, in which case the consumer would be a defendant in a *Mandolidis* suit by the employee, or it could be a third-party defendant in an action for contribution by the manufacturer as third-party plaintiff.

[121] Brown, *Toward an Economic Theory of Liability,* 2 J. LEGAL STUD. 323 (1973). On the other hand, Richard Posner at one time suggested that comparative negligence was inefficient because it created *too much incentive* to take care by inducing both parties to take care in situations when it would have been more efficient for only one of the parties to do so. R. POSNER, ECONOMIC ANALYSIS OF LAW 124 (2d ed. 1977). A recent article criticizes Posner's approach and mathematically demonstrates that, in theory, pure and modified comparative negligence should result in equivalent incentives to take care. Haddock & Curran, *supra* note 22. Their conclusions are premised on the assumption that the potential plaintiffs will rationally expect all or most potential defendants to be acting efficiently and non-negligently, in which case plaintiffs would expect to bear the entire cost of all accidents. *See also* Veljanovski, *The Economic Theory of Tort Liability—Toward a Corrective Justice Approach,* in THE ECONOMIC APPROACH TO LAW 142-43, (P. Burrows & C. Veljanovski, eds. 1981) asserting that victims would have appropriate incentives to take care in his proposed regime of strict liability with a defense of comparative negligence.

that pure comparative negligence may tend at the margin to cause consumers to be less careful. On the other hand, it is also true that under modified comparative negligence manufacturers may exercise too little care to the extent that they escape liability entirely whenever the consumer is fifty percent or more at fault.[122] Pure comparative negligence would impose upon manufacturers the full proportionate cost of damages caused by their defective products, thereby inducing a corresponding increase in the level of the care adopted by manufacturers. Since it would appear that overall product safety is more sensitive to the care exercised by manufacturers to the care exercised by consumers, it follows that a rule of pure comparative negligence would tend to create better incentives than modified comparative negligence.

Moreover, it is uncertain whether consumers truly would exercise less care simply because of a change in the rules of liability. Unlike a manufacturer, which makes an economic decision weighing the costs and benefits of product safety, the consumer's exercise or lack of due care may reflect entirely noneconomic factors such as mood, state of mind, or random distractions.[123] Even insofar as consumers consciously decide whether to exercise due care, their actions are based on their subjective fear of injury rather than on their evaluation of the likelihood of receiving compensation. The prospect of litigation is too remote to affect the day-to-day decisions of the average consumer.[124] Even a consumer who anticipated receiving an award of full compensation for the injuries resulting from an accident could be expected to exercise due care solely out of fear of the immediate painful consequences,[125] especially if those consequences included the prospect of death.[126] In short, those who believe that the prospect of damage awards for substantially negligent plaintiffs in product liability litigation under pure comparative fault would significantly influence consumer behavior have spent too much time in academia. Thus, with regard to product liability litigation, when plaintiffs and defendants come from distinct subsets of the population, pure comparative fault would tend to improve the

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[122] Under a rule of modified comparative fault, manufacturers would only invest in an efficient level of safety precautions if they anticipated that all consumers would be less than 50% at fault. *Cf.* A. M. Polinksy, *supra note* 17, at 43, asserting that a rule of strict liability with a contributory negligence defense results in an efficient level of care because potential injurers *assume* that their victims will be exercising due care.

[123] *See* Schwartz, *Contributory and Comparative Negligence: A Reappraisal,* 87 YALE L.J. 697, 713-21 (1978), asserting that most accidents result from inadvertant, mindless, or irrational acts.

[124] The term "average consumer" would not include persons who have attended law school and have been uniquely trained to perceive ordinary activities in terms of their potential for litigation. *See id.* at 710-11.

[125] How many successful tort plaintiffs would refuse an "offer" to be restored to their pre-accident condition in return for relinquishment of their court-awarded damages, especially when those damages were net of attorney fees and expenses? *See id.* at 711.

[126] *See id.* at 712. Would anyone seriously argue that the prospect of an award of wrongful death damages to survivors would induce a nonsuicidal consumer to subject himself to the risk of death?

incentives for defendants to adopt efficient safety precautions without substantially lowering the standard of care among plaintiffs.

The analysis is more complex in the case of automobile accidents, both because plaintiffs and defendants are members of the same subgroup (drivers) and because of the prevalence of liability insurance. To the extent that pure comparative negligence increased the compensation for the more negligent plaintiffs, it also would increase the cost of liability for the less negligent defendants. On balance, in the absence of insurance, any increase in the amount recovered by negligent plaintiff drivers would be exactly offset by increased amounts paid by negligent defendant drivers. The net impact on incentives would be zero.

The fact that most drivers carry liability insurance only slightly alters the foregoing analysis. To the extent that drivers have liability insurance, they have relatively less incentive to exercise due care regardless of the applicable legal rule.[127] Because of liability insurance, the disincentive effects from an increase in recoveries by negligent plaintiffs under pure comparative negligence would not be directly offset by increased damage liability of defendants insofar as their increased liability was absorbed by the liability insurance companies.

On the other hand, to the extent that insurance costs are affected by accident records, at least part of the increased liability from pure comparative negligence would be passed on to negligent drivers. More importantly, because of the "moral hazard" problem, insurance companies do not fully cover all risks, but instead provide for deductibles and coinsurance, with the insured party paying a portion of any accident liability. The existence of deductibles and coinsurance, coupled with the prospect of increasing insurance rates following an accident, should tend to offset most of the diminished incentives resulting from the existence of insurance. The net impact on incentives should be slight.

Finally, and most importantly, any expectation of increased compensation to plaintiffs through litigation or insurance under pure comparative fault would not significantly reduce the primary incentive to drive safely—the fear of injury to self and others. The economic arguments about incentives for safe driving tend to ignore human nature and assume that in determining how safely to drive, individuals primarily consider their own economic losses and the possibility of economic liability for injuries to others.[128] Most people who reflect on the question would not consider the monetary damages recoverable in a lawsuit as sufficient compensation for their pain and suffering. Moreover, re-

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[127] The reduction of incentives to exercise care among insured parties is known as "moral hazard." *See* A. M. POLINSKY, *supra* note 17, at 54.

[128] *See, e.g.*, R. POSNER, *supra* note 17; Haddock & Curran, *supra* note 22; Brown, *supra* note 121. *Compare* Schwartz, *supra* note 123, at 713-21.

gardless of the existence of insurance, most people who reflect on the question would be horrified at the prospect of causing substantial injury to another human being. Thus, as was the case with consumers in the field of product liability, the impact of comparative fault on the incentives of most drivers would be minimal.

On balance, the criterion of efficient incentives to exercise due care weighs in favor of pure comparative negligence. Due to the reciprocal nature of the risks from careless driving, pure comparative negligence would have at most a minimal negative impact on the incentives of drivers. The pure rule, however, would create significantly better incentives in fields such as product liability, in which the risks are nonreciprocal, because the modified rule now shields injuring parties from bearing their proportionate share of liability for the damages they cause.

2. Allocative Efficiency

As was the case with incentives to exercise care, evaluation of the relative allocative efficiency of pure and modified comparative negligence requires separate analysis of automobile accident and product liability litigation. In automobile accident litigation, the choice between pure and modified comparative negligence should have little or no impact on the allocation of resources. Regardless whether the plaintiff or the defendant absorbs the cost of an accident, those costs remain internal to the activity of driving.

If there is any difference between the two rules, it would tend to favor pure over modified comparative negligence. The reason is that accident costs paid by a defendant's liability insurer under pure comparative negligence remain a cost of driving, whereas accident costs paid by the plaintiff's health, accident, and disability insurance under modified comparative negligence are not treated as a cost of driving. To the extent that the costs of accidents are subsidized by nondrivers under modified comparative negligence, it would appear that pure comparative negligence is slightly better in terms of allocative efficiency.

The preference for pure comparative negligence is far stronger with respect to product liability. Under pure comparative fault, manufacturers must pay their proportionate share of all damages caused by their products. Under modified comparative fault, however, certain negligent consumers injured by defective products are barred from recovery, and the manufacturers do not bear their proportionate share of the resulting damages.

The failure of these plaintiffs to recover would not cause any allocational problems if consumers could accurately assess the risk of an unsafe product. Armed with this knowledge, they could deduct the dollar value of this risk from the price they are willing to pay for the product, thereby causing the cost

of these damages to be reflected in the price and output of the product.[129] Unfortunately, consumers do not possess sufficient acumen or information to evaluate the risks from defective products, and there is little incentive for manufacturers to inform consumers of these risks.[130] Also, much of the risk from defective products is borne by third parties who are not purchasers and cannot possibly affect the price or output of the product.[131] To the extent that manufacturers are relieved of liability for injuries caused by defective products under a rule of modified comparative fault, the price does not reflect the full cost of their products. As a result, profitability of these manufacturers is artificially enhanced, and too many resources are invested in industries that produce defective products.[132] Society would profit if those resources were invested elsewhere, as they would be under a system of pure comparative fault in which all activities paid the proportionate share of the damages they caused.

Thus, in terms of allocative efficiency, the rule of pure comparative negligence is preferable because it "internalizes" more of the costs, imposing the costs on participants in the damaging activity. The pure rule is only slightly superior to the modified rule in activities in which the risks are reciprocal, such as driving, because only a small percentage of the uncompensated losses are shifted to nonparticipants in the damaging activity. The pure rule is far superior in fields such as product liability, in which the risks are nonreciprocal and are often borne by third parties, since most of the uncompensated losses under the modified rule will not be reflected as costs of the damaging activity, resulting in an inefficiently high commitment of resources to that activity.

3. Loss Spreading, Risk Spreading, and Insurance

The related goals of loss spreading and risk spreading unequivocally weigh in favor of pure comparative fault. The spreading of *losses* to persons other than the victim is efficient insofar as it reduces the economic and personal dislocations which result from imposition of substantial losses on a single individual or entity.[133] The spreading of *risk* through insurance is efficient in that it eliminates the subjective sense of displeasure experienced by persons who face the risk of a substantial uncompensated loss.[134] Customers are willing to

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[129] *See* A. M. POLINSKY, *supra* note 17, at 96-97; R. POSNER, *supra* note 17, at 134-35; *Some Thoughts, supra* note 18, at 505.

[130] *See* R. POSNER, *supra* note 17, at 166; R. POSNER, ECONOMIC ANALYSIS OF LAW 136 (2d ed. 1977); A. M. POLINSKY, *supra* note 17, at 97-99.

[131] A. M. POLINSKY, *supra* note 17, at 103.

[132] *See id.* at 97-99. *Cf. Some Thoughts, supra* note 18, at 503-14.

[133] *Some Thoughts, supra* note 18, at 517-19.

[134] To the extent that it exceeds the actual "expected value" of the anticipated loss, this subjective displeasure at the prospect of such a loss is called "risk bearing cost." *See* GOETZ, LAW AND ECONOMICS 123-27 (1984); A. M. POLINSKY, *supra* note 17, at 53-55.

pay more than the "expected value" of their risks in order to eliminate these subjective risk-bearing costs. The differential enables the insurance companies who pool these risks to cover their operating costs and to generate substantial profits. Their profitability reflects the value to society of risk reduction through insurance.

Since modified comparative fault causes certain plaintiffs to bear all of their own damages, it is less effective than pure comparative fault at both loss spreading and risk spreading. Pure comparative fault is superior at spreading losses insofar as a substantially negligent plaintiff can still obtain some compensation from a defendant. The loss is spread to at least two parties, instead of being borne entirely by the plaintiff.

More importantly, because defendants tend to be more fully covered by insurance, pure comparative fault achieves better loss spreading as well as better risk spreading. While defendants can obtain virtually complete liability coverage (except to the extent of deductibles or coinsurance), many of the losses sustained by plaintiffs will not be covered by insurance and cannot be spread to third parties. Plaintiffs may have first-party coverage for medical care and lost wages, but the deductibles, coinsurance, and waiting periods tend to result in less complete coverage than defendants receive under liability policies.

Most significantly, the plaintiff is unlikely to have any insurance coverage for the intangible aspects of personal injuries—pain and suffering, emotional distress, and loss of enjoyment of life—whereas these items of damage would be covered under the defendant's liability insurance policy. Under modified comparative negligence, the intangible losses suffered by a substantially negligent plaintiff, as well as any other uninsured losses, are borne by the plaintiff alone. Under pure comparative negligence, however, these costs are shared with the defendant, and secondarily with the defendant's insurer. The net result is better loss spreading, as well as a reduction in the subjective risk costs experienced by the parties.

4. Administrative Costs

In comparison with the foregoing analysis of incentives, allocative efficiency, and loss and risk spreading, the evaluation of the administrative costs of pure and modified comparative negligence is relatively straightforward. But while the process may be simpler, the results are more equivocal.

Proponents of modified comparative fault correctly argue that adoption of a rule of pure comparative negligence would lead to an increasing number of claims and lawsuits.[135] A plaintiff who was substantially at greater fault than

[135] *See* Sobelsohn, *supra* note 2, at 81-83 and sources cited therein.

the defendant, one whose share of fault was seventy, ninety, or ninety-nine percent, probably would not bother filing suit under modified comparative negligence, but might under pure comparative negligence.

Proponents of modified comparative fault argue further that a pure system would lead to an increasing number of nuisance suits by plaintiffs tempted by the prospect of a one percent or five percent recovery.[136] They also argue that litigation costs would be greater because defendants would be unable to obtain summary judgment, whereas under a modified rule there would be cases in which summary judgment could be granted in the absence of dispute that the plaintiff was more at fault than the defendant.[137] These two arguments are without merit, for they beg the question by presuming that these are lawsuits that should not have been filed. To the contrary, if the premises of pure comparative fault are accepted, then even a suit by a plaintiff who is ninety-nine percent at fault would not be a nuisance suit, and the defendant in such a case should not be able to obtain summary judgment. Nevertheless, the fact remains that pure comparative fault can be expected to generate a greater number of claims.

On the other hand, proponents of pure comparative negligence argue that litigation under this rule would be simpler and less expensive. The administrative simplicity of pure comparative fault is often expressed in conclusory terms, without explanation or analysis.[138] Nevertheless, there are several reasons why litigation under pure comparative negligence can be expected to be less costly than under modified comparative negligence. Because modified comparative negligence retains a bright-line cutoff, it requires greater precision in instructing the jury, especially as to the significance of a finding that the plaintiff's fault is equal to that of the defendant.[139] A related point is that modified comparative fault may encourage appeals on the question of whether the jury could have found that the plaintiff's negligence was less than or greater than that of the defendant.[140]

Most importantly, the pure rule reduces litigation costs by promoting settlement of disputes. In theory, settlement should result whenever the gap between each party's evaluation of its expected outcome at trial is less than the

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[136] *Id.*

[137] *Id.* at 82 n.94.

[138] *E.g., Kaatz,* 540 P.2d at 1049; *Goetzman,* 327 N.W.2d at 754.

[139] *See* Sobelsohn, *supra* note 2, at 78.

[140] *Hilen,* 673 S.W.2d at 719. *See, e.g.,* McClanahan v. Putnam County Comm'n, 327 S.E.2d 458 (W. Va. 1985) (affirming appeal concerning instructions by a plaintiff found 51% at fault); Chaves v. Blue Ridge Acres, Inc., 324 S.E.2d 361 (W. Va. 1984) (appeal by plaintiff found 50% at fault affirmed on merits but reversed as to award of costs). *Cf.* Prosser, supra note 68, at 484-89 (noting excessive appeals in jurisdictions employing the rule that plaintiff's contributory negligence is not a bar if it is "slight" and the defendant's negligence is "gross").

total of their respective litigation costs.[141] Settlement is easier under the pure rule because the expectations of the plaintiff and defendant tend to be more similar, facilitating achievement of a mutually acceptable compromise.[142]

To illustrate, consider a case in which the plaintiff's damages were $10,000 and the fault of the plaintiff and the defendant were approximately equal. Given human nature, each participant would evaluate the facts in the light most favorable to himself.[143] Thus, the plaintiff might believe that the defendant was at least sixty percent at fault, whereas the defendant might believe that the plaintiff was at least sixty percent at fault. Under a pure rule, the plaintiff would anticipate receiving a judgment for $6,000 and the defendant would anticipate paying $4,000. Under a modified rule, however, the plaintiff would still anticipate recovery of $6,000, but the defendant would anticipate escaping liability entirely. The parties would then be $6,000 apart instead of $2,000, so settlement would be less likely under a modified rule.[144]

It remains to be seen whether the anticipated higher settlement rate under the pure rule, coupled with the savings from its greater simplicity, would offset the added administrative costs incurred because of the greater number of claims filed under the pure rule. There is little empirical data on this subject.[145] In any event, it does not appear that the administrative costs of a pure rule would be so great as to cancel the significant efficiency gains derived from improved incentives, better resource allocation, and greater loss spreading and risk

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[141] *See* R. POSNER, *supra* note 17, at 522-25; Mnookin & Kornhauser, *supra note* 55, at 966-77. Virtually all suits by plaintiffs who could expect to be found 90%-99% at fault should settle prior to trial, since the anticipated recovery would exceed the cost of litigation. *Cf.* Sobelsohn, supra note 2, at 82; Prosser, *supra* note 68, at 494.

[142] Oliver, *supra* note 114, at 140-41.

[143] *See* Mnookin & Kornhauser, *supra* note 55, at 975:

> The exact odds for any given outcome in court are unknown, and it has been suggested that litigants typically overestimate their chances of winning. To the extent that one or both of the parties typically overestimate their chances of winning, more cases will be litigated than in a world in which the outcome is uncertain but the odds are known.

Id.

[144] *See id.*

[145] V. SCHWARTZ, *supra* note 2, at 362. A frequently cited survey conducted during Arkansas' one-year experiment with pure comparative fault found that pure comparative fault did not substantially alter judicial costs as compared with the traditional contributory negligence rule:

> The new rule did not affect the preference for jury trials in personal injury cases; did not appreciably affect the length of trials; increased potential litigation; promoted before-trial settlements; and made damages harder to determine. But the net tendency was not to tip the balance markedly in either direction.

Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey,* 13 ARK. L. REV. 89 (1959). A second survey, conducted after Arkansas switched from pure to modified comparative negligence, reported an increased tendency toward settlement, but *no* change in the volume of litigation, and no apparent impact on the length of trial or the preference for jury trials. Note, *Comparative Negligence–A Survey of the Arkansas Experience,* 22 Ark. L. Rev. 692 (1969).

spreading. On balance, it appears that the pure rule would be more efficient as well as more fair than the modified rule of comparative negligence.

C. *Purification of Pure Comparative Fault*

West Virginia already has a rule of pure comparative contribution, and adoption of pure comparative negligence would be a major step toward a system of pure comparative fault. But a truly "pure" system of comparative fault would extend loss allocation and the principle of proportionate responsibility to all parties in all tort actions, regardless of the legal theories and regardless of the nature of the parties' misconduct.

The West Virginia Supreme Court of Appeals has taken several significant steps in that direction, but it has not yet extended the defense of comparative fault to defendants guilty of aggravated misconduct. Nor has it indicated whether principles of comparative fault would apply to plaintiffs guilty of aggravated misconduct, which may remain an absolute bar to recovery even under comparative negligence.[146]

Prior to the advent of comparative negligence, any contributory negligence by the plaintiff, "however slight,"[147] provided an absolute defense. To ameliorate this harsh rule, the common law developed numerous exceptions, including the rules that a plaintiff's contributory negligence would not be a bar when a defendant had the "last clear chance,"[148] when a defendant was subject to strict liability,[149] or when a defendant's negligence was willful and wanton.[150]

These doctrines are no longer necessary under comparative negligence, and their continued existence would conflict with the goal of loss allocation in a system of comparative fault. When both parties are at fault, corrective justice requires that each bear a fair share of the losses. Yet under the various exceptions to the contributory negligence rule, the fault of the plaintiff is disregarded and the entire loss is borne by the defendant. Now that the plaintiff's negligence is not an absolute bar but simply reduces the recovery proportionately, there is no need for exceptions that would completely bar consideration

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[146] *See, e.g.,* Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976).

[147] *See, e.g.,* Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961); Morton v. Baber, 118 W. Va. 457, 190 S.E. 767 (1937).

[148] *See* Ratlief v. Yokum, 280 S.E.2d 584, 588 (W. Va. 1981) (overruling the doctrine); *Bradley,* 163 W. Va. at 335, 256 S.E.2d at 882 (1979) (dictum); Barr v. Curry, 137 W. Va. 364, 71 S.E.2d 313 (1952); Donley, Observations on Last Clear Chance in West Virginia, 37 W. VA. L.Q. 362 (1931); Donley, *Last Clear Chance—Some Further Observations,* 49 W. VA. L.Q. 51 (1942).

[149] *See Bradley,* 163 W. Va. at 336, 256 S.E.2d at 882 (dictum).

[150] *Id.,* 256 S.E.2d at 882 (dictum); Korzun v. Shahan, 151 W. Va. 243, 151 S.E.2d 287 (1966); *Barr,* 137 W. Va. 364, 71 S.E.2d 313; Stone v. Rudolph, 127 W. Va. 335, 32 S.E.2d 742 (1944).

of the plaintiff's negligence and place the entire loss on the defendant.[151] The jury can reach a just result in all cases by comparing the fault of the plaintiff with the fault of the defendant, so each party bears its appropriate share of the losses.

Considerations of efficiency also require that each wrongdoer bear its proportionate share of the damages it causes. Although it is debatable whether legal rules have a substantial influence on incentives to take care among potential plaintiffs, a rule that allowed negligent plaintiffs to recover one hundred percent of their damages would at least marginally tend toward an inefficient reduction in safety precautions.[152] More importantly, allocative efficiency requires that damaging activities bear the costs of the damages they cause. To the extent that plaintiffs' damages are not reduced in proportion to their fault in causing or contributing to an accident, their damage-causing activities receive an implicit subsidy at the expense of the defendants' activities, distorting the overall allocation of resources.

Complete apportionment of damages also would promote loss spreading and risk spreading. The losses would be shared by the plaintiff and the defendant, rather than falling entirely on the defendant. This primary loss spreading between the parties is especially important with respect to intentional torts, because many insurance policies do not cover liability for intentional torts,[153] leaving defendants to bear these losses themselves.

In *Bradley,* the court initially stated that its decision would not alter the rules barring consideration of the plaintiff's negligence when the defendant had the last clear chance, was subject to strict liability, or was guilty of willful or wanton misconduct.[154] Nevertheless, two years later the court eliminated the last clear chance rule, stating that "the historical reason for the doctrine of last clear chance no longer exists since our adoption of comparative negligence."[155] The following year, the court held that comparative negligence could be raised as a defense in actions based on strict liability.[156] It is unclear, however, whether the court will so easily reject the rule barring the defendant from

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[151] Davis v. United States, 716 F.2d 418, 429 (7th Cir. 1983); Plyler v. Wheaton Van Lines, 640 F.2d 1091, 1093 (9th Cir. 1981); Sorensen v. Allred, 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441, 446 (1980).

[152] In American Cyanamid Co. v. Roy, 466 So.2d 1079, 1085 (Fla. Dist. Ct. App. 1984), the court said: "We think that as an incentive for care on the part of potential tort claim plaintiffs, the comparatively negligent plaintiff should bear his fair share of the loss even where the defendant tortfeasor's conduct has been egregious."

[153] McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?,* 37 OKLA. L. REV. 641, 683 (1984).

[154] *Bradley,* 163 W. Va. at 335-36, 345-46, 256 S.E.2d at 882, 887.

[155] *Ratlief,* 280 S.E.2d 584, 589.

[156] *Star Furniture Co.,* 297 S.E.2d 854.

asserting the plaintiff's simple negligence as a defense when the defendant is guilty of aggravated misconduct.

In other comparative negligence jurisdictions, there is a diversity of opinion as to which forms of aggravated misconduct by a defendant, if any, are subject to comparison with the plaintiff's negligence. At one end of the spectrum, there is general agreement that apportionment should be permitted when the defendant is guilty only of "gross negligence."[157] At the other end of the spectrum, there is virtual unanimity in the case law that comparative negligence is no defense when the defendant's conduct is intentional.[158] In between, the courts are fairly evenly split on the question of whether defendants guilty of "reckless, willful, or wanton" misconduct may raise a comparative negligence defense.[159]

The apparent split of authority on the applicability of comparative negligence when the defendant is guilty of reckless, willful, or wanton misconduct is misleading. Most of the decisions refusing to apply the defense involve an interpretation of the particular state's comparative negligence statute: they hold only that the legislature did not intend the statutory term "negligence" to encompass reckless, willful, or wanton misconduct.[160] When the language of the state statute is broader, referring to "culpable conduct" or "fault," defendants guilty of aggravated misconduct generally are permitted to raise a comparative negligence defense.[161] Likewise, in jurisdictions where comparative negligence was adopted by the judiciary, the courts have more readily extended principles of comparative fault to cases in which defendants were guilty of aggravated

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[157] Annot., 10 A.L.R. 4th 946, 952-55 (1981). *E.g., Pedernales Elec. Coop., Inc.,* 583 S.W.2d 882; Tampa Elec. Co. v. Stone & Webster Eng'g Corp., 367 F. Supp. 27 (M.D. Fla. 1973) (Fla. law).

[158] V. SCHWARTZ, *supra* note 2, at § 5.2; H. WOODS, *supra* note 2, at § 7.1. *But see* Comeau v. Lucas, 90 A.D.2d 674, 455 N.Y.S.2d 871 (1982) (apportioning damages in a battery case in which the plaintiff was involved in a drunken brawl with one of the defendants); Lomonte v. A & P Food Stores, 107 Misc. 2d 88, 438 N.Y.S.2d 54 (N.Y. Sup. Ct. 1981) (plaintiff 75% at fault in provoking battery). Dictum supporting a comparative negligence defense to intentional torts is also found in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank, 774 F.2d 909, 913 (8th Cir. 1985) (discussing Arkansas law).

[159] V. SCHWARTZ, *supra* note 2, at § 5.3; H. WOODS, *supra* note 2, at § 7.2; Annot., 10 A.L.R. 4th 946 (1981 & Supp. 1986).

[160] *See e.g.,* Davies v. Butler, 95 Nev. 763, 602 P.2d 605 (1979); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979); Ryan v. Foster & Marshall, Inc., 556 F.2d 460 (9th Cir. 1977)(Ore. law); *Draney,* 138 N.J. Super. 503, 351 A.2d 409. On the other hand, several courts have held that the reckless, willful, or wanton misconduct constituted "negligence" within the meaning of the state statute. Stockman v. Marlowe, 271 S.C. 334, 247 S.E.2d 340 (1978); Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966) (Ark. law); Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268 (W.D. Okla. 1980) (Okla. law). *See generally* V. SCHWARTZ, *supra* note 2, at §§ 5.1-5.4.

[161] *E.g., Comeau,* 90 A.D.2d 674, 455 N.Y.S.2d 871 ("culpable" conduct in statute includes battery); Wing v. Morse, 300 A.2d 491 (Me. 1973) ("fault" in statute may range from trivial inadvertance to the grossest recklessness); Johnson v. Tilden, 278 Or. 11, 562 P.2d 1188 (1977) (comparative "fault" statute applied to plaintiff's claim involving gross negligence of defendant under guest statute).

misconduct.[162] The commentators also seem to favor the availability of a comparative negligence defense for defendants guilty of willful, wanton, or reckless misconduct.[163]

Surprisingly, however, these authorities draw the line at intentional misconduct. Most of the commentators who have addressed the relationship between comparative fault and intentional torts either reject apportionment entirely[164] or else favor apportionment only in cases in which the defendant's conduct is technically "intentional" but not truly deliberate.[165] Yet virtually all of the arguments for and against allowing defendants guilty of aggravated misconduct to raise a comparative negligence defense are fully applicable to intentional torts. Accordingly, to simplify the following analysis, all of the arguments against allowing defendants guilty of aggravated misconduct to raise a comparative negligence defense will be summarized and refuted together, without separate consideration of intentional tortfeasors.

Apart from the language of particular statutes, the first obstacle to comparing the plaintiff's negligence to the fault of a defendant guilty of aggravated misconduct is the assertion that the misconduct of the defendant is "different in kind" and therefore not subject to comparison.[166] This argument is a holdover from the era of contributory negligence, when it served as the rationale for the rule that a plaintiff's contributory negligence would not bar recovery when the defendant was guilty of aggravated misconduct.[167] The various categories of fault—strict liability, negligence, recklessness, willfulness, wantonness, and intentionality—are not different in kind. Rather, they represent a

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[162] *E.g., American Cyanamid Co.*, 466 So.2d at 1085; *Davis*, 716 F.2d 418 (Ill. law); *Plyler*, 640 F.2d 1091 (Calif. law); *Sorensen*, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (defense allowed concerning willful and wanton misconduct). *But see* Munoz v. Olin, 76 Cal. App. 3d 85, 142 Cal. Rptr. 667 (1977), *vacated*, 24 Cal. 3d 629, 156 Cal. Rptr. 729 (1979) (comparative negligence inapplicable to claim of battery and defense of privilege).

[163] V. SCHWARTZ, *supra* note 2, at 106; Note, *supra* note 15, at 1681-82.

[164] *Id.*

[165] Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984) (proposing extension of comparative fault principles to non-self-help torts such as nuisance, but not to battery or other self-help torts); McNichols, *supra* note 153 (proposing comparative responsibility when plaintiff's fault exceeds defendant's, when plaintiff would not be entitled to punitive damages, when defendant's conduct is intentionally tortious in a technical sense but is essentially negligent, or when the defendant raises issues of privilege that turn on the reasonableness of defendant's conduct). *But see* Note, *supra* note 66, at 191 (recommending extension of comparative fault to all intentional torts).

[166] Cases making this argument with respect to willful and wanton misconduct include *Davies*, 95 Nev. at 771-72, 602 P.2d at 610; *Danculovich*, 593 P.2d at 193. The cases that make this argument with respect to intentional torts are discussed and criticized in McNichols, *supra* note 153, at 659, 679; Dear & Zipperstein, *supra* note 165, at 11-18; Note, *supra* note 66, at 185-86.

[167] McNichols, *supra* note 153, at 654; Dear & Zipperstein, *supra* note 165, at 9-18.

continuum, involving varying degrees of culpability,[168] and the courts have not even been capable of drawing clear distinctions among them.[169] These nominal distinctions are not in any sense a barrier to comparisons of fault. Juries are already apportioning fault between negligent consumers and strictly liable manufacturers,[170] as well as between strictly liable manufacturers and employers guilty of aggravated misconduct,[171] so they are perfectly capable of apportioning fault between intentional wrongdoers and their negligent victims.[172]

A second line of argument invokes principles of corrective justice, asserting that apportionment would conflict with the goal of compensating plaintiffs,[173] or that serious wrongdoers do not "deserve" a reduction in their damages based on the negligence of the plaintiff.[174] The simple answer is that regardless of the degree of the defendants' misconduct, plaintiffs do not deserve compensation to the extent that they are at fault, and justice does not require defendants to pay more than their proportionate share of the losses caused by the fault of both parties.[175] Moreover, if apportionment is not permitted for certain categories of aggravated misconduct, the imprecision of the dividing line can be expected to produce a substantial number of arbitrary and unfair decisions.

Third, it is suggested that apportionment would undercut the deterrent[176] and punitive[177] impact of damages for intentional or other aggravated misconduct, or that it would appear to sanction or condone conduct offensive to social norms.[178] Yet it is debatable whether the prospect of tort liability is a significant deterrent to serious wrongdoers,[179] and in any event it is doubtful whether the deterrent effect of existing tort law would be substantially reduced by the prospect of diminished damage liability in cases in which the plaintiff was partially at fault.

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[168] Dear & Zipperstein, *supra* note 165, at 11-18; *Sorensen,* 112 Cal. App. 3d at 725, 169 Cal. Rptr. at 445 ("we are not here comparing apples and oranges. . .but rather two varieties of oranges. . .or at worst oranges and lemons"); *Wing,* 300 A.2d 491.

[169] Dear & Zipperstein, *supra* note 165, at 16-18. *See* discussion *supra* notes 66 and accompanying text.

[170] *E.g., Star Furniture Co.,* 297 S.E.2d 854.

[171] *E.g., Sydenstricker,* 169 W. Va. 440, 288 S.E.2d 511.

[172] *Cf.* the discussion *supra* notes 88-90 and accompanying text concerning comparative contribution among defendants guilty of aggravated misconduct.

[173] McNichols, *supra* note 153, at 684-85.

[174] *Davies,* 95 Nev. at 772-73, 602 P.2d at 611; *Draney,* 138 N.J. Super. at 506-07, 351 A.2d at 411.

[175] *American Cyanamid Co.,* 466 So. 2d at 1085.

[176] V. SCHWARTZ, *supra* note 2, at 106; McNichols, *supra* note 153, at 679-80; Note, *supra* note 15, at 1681.

[177] Note, *supra* note 15, at 1681.

[178] McNichols, *supra* note 153, at 681; Dear & Zipperstein, *supra* note 165, at 19.

[179] Dear & Zipperstein, *supra* note 165, at 18-19 and n.85; Note, *supra* note 66, at 186.

More importantly, to the extent that apportionment reduces the deterrent impact of a judgment against the defendant, deterrence can be supplemented through an award of punitive damages against serious wrongdoers.[180] Likewise, to the extent that retribution remains a goal of the system, it can be accomplished through an award of punitive damages.[181] These punitive damages would be based entirely on the conduct and resources of the defendant, and should not be subject to apportionment based on the plaintiff's negligence.[182]

It is also not true that an apportionment of the compensatory damages would sanction or condone intentional or other aggravated misconduct. Juries can be expected to allocate an appropriately large share of fault to defendants guilty of outrageous misconduct[183] and to supplement their verdicts with punitive damages. On the other hand, the absence of apportionment could create the impression that potential victims need not exercise care for their own safety. Although individuals probably do not take additional risks in reliance on the prospect of recovery in litigation, societal attitudes toward risk taking may be subtly influenced by the general rules governing tort liability. Apportionment of damages under pure comparative fault would send a better message to potential plaintiffs without undermining the educational function of the tort system with respect to serious misconduct by defendants.

Finally, those who oppose comparative fault for intentional torts assert that it would raise additional issues in tort litigation, thereby increasing administrative costs.[184] They further argue that as a practical matter the actual amount of mitigation would be slight, so that the difference would not be worth the added administrative burden.[185] Yet application of comparative fault to intentional torts would decrease rather than increase administrative costs. Allowing

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[180] *See* discussion *supra* at notes 69-71 and accompanying text.

[181] *Id. See also American Cynamid Co.*, 466 So. 2d at 1085; Dear & Zipperstein, *supra* note 165, at 18-19; Note, *supra* note 66, at 187.

[182] A majority of the reported cases hold that apportionment applies only to compensatory damages and not to punitive damages. Annot., 27 A.L.R. 4th 318 (1984 & Supp. 1986). *See also* Annot., 10 A.L.R. 4th 946, 955-56 (1981). The rationale for not apportioning the punitive damages based on the plaintiff's negligence is that since the purpose of these damages is to punish the defendant and not to compensate the plaintiff, the award bears no relationship to the plaintiff's conduct. *Tampa Elec. Co.*, 367 F. Supp. 27 (Fla. law); Shahrokhfar v. State Farm Mutual Auto. Ins. Co., 634 P.2d 653 (Mont. 1981); *Amoco Pipeline Co.*, 487 F. Supp. 1268 (Okla. law). In West Virginia, however, the recognized purposes of punitive damages include compensating the plaintiff for infliction of egregious misconduct and substitution for personal revenge. *Perry*, 299 S.E.2d at 11-12; *Hensley, 168* W. Va. 172, 283 S.E.2d 227. Insofar as compensation is a purpose of punitive damages in West Virginia, it may be appropriate to reduce those damages to the extent of the plaintiff's own fault.

[183] *See Tampa Elec. Co.*, 367 F. Supp. 27; Emch, *supra* note 58, at 506; Note, *supra* note 15, at 1682. *Cf.* discussion *supra* at note 68 and accompanying text concerning comparative contribution among defendants guilty of aggravated misconduct.

[184] McNichols, *supra* note 153, at 681; Note, *supra* note 15, at 1681.

[185] *Id.*

serious tortfeasors to raise a partial defense of comparative fault would insert an additional issue in certain cases, but it would also simplify a larger number of cases by eliminating the need to determine whether the defendant's conduct was intentional rather than willful, or willful rather than reckless.[186] As long as there was a limited category of cases in which comparative negligence did not apply, plaintiffs would plead and attempt to prove that the defendant's conduct fell within that category, and a great deal of additional discovery and trial effort would be spent litigating that single issue.[187] Moreover, the boundaries of any such categories would be imprecise, increasing the uncertainty for the parties and impeding settlement negotiations.[188] A pure system of comparative fault would allow juries to consider the relative fault of all parties in every case, dispensing with the need for case-by-case determinations of whether apportionment applied.

Even if extension of comparative fault as a defense to intentional torts were to raise, rather than reduce, the costs of litigation, the added administrative costs would be justified by the resulting improvement in loss allocation. Contrary to the assertion that the degree of apportionment would rarely be significant, in two reported battery cases the plaintiff's damages were diminished by twenty-five percent[189] and seventy-five percent.[190] Significant apportionment also could be expected in nuisance litigation and in other cases in which defendants could assert that their conduct was reasonable or privileged.[191]

In sum, there are no persuasive arguments against the extension of comparative fault to defendants guilty of aggravated misconduct, including intentional misconduct. A pure system of comparative fault would apportion losses in accordance with the goal of loss allocation. Considerations of corrective justice and efficiency require that each party at fault bear its share of the losses. Pure comparative fault would preserve appropriate incentives for all parties, and it would be simpler to administer than any rule that denied apportionment to a particular category of wrongdoers.

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[186] Determination of whether the defendant's misconduct exceeded a particular threshhold would remain an issue, however, whenever the plaintiff sought punitive damages. V. SCHWARTZ, *supra* note 2 at 106.

[187] *See* Note, *supra* note 66, at 189. It is ironic for McNichols to suggest that "comparative responsibility would unduly complicate intentional tort litigation," *supra* note 153, at 681, while entirely overlooking the significant administrative costs associated with his various proposals for a limited extension of comparative fault to intentional torts.

[188] *See* discussion *supra* notes 85, 141-44 and accompanying text, concerning claims for comparative contribution by defendants guilty of aggravated misconduct.

[189] *Comeau,* 90 A.D.2d 674, 455 N.Y.S.2d 871.

[190] *Lomonte,* 107 Misc. 2d 88, 438 N.Y.S.2d 54.

[191] Even those commentators who oppose a general extension of comparative negligence to intentional torts nevertheless concede that the defense would perform a valuable function for these particular categories of intentional torts. *See* McNichols, *supra* note 153, at 689-97; Dear & Zipperstein, *supra note* 165, at 32-38.

From what has already been said, it should be equally apparent that a pure system of comparative fault also should apply when the *plaintiff* is guilty of aggravated misconduct. Those courts that allow apportionment when the defendant is guilty of aggravated misconduct also permit apportionment when the plaintiff is guilty of aggravated misconduct.[192]

V. CONCLUSION

All systems of comparative negligence and comparative contribution derive at least in part from the considerations of fairness and efficiency embodied in the phrase "loss allocation." The goal of loss allocation in turn serves as a unifying principle, facilitating evaluation of the various alternative rules of comparative negligence and comparative contribution. This Article has demonstrated that corrective justice and economic efficiency are best promoted by a system of pure comparative fault, including pure comparative negligence and pure comparative contribution.

The West Virginia Supreme Court of Appeals took an important first step toward loss allocation in *Bradley,* rejecting the traditional rule of contributory negligence in favor of a modified rule of comparative negligence. It took a major step forward in *Sitzes* when it adopted a rule of pure comparative contribution among tortfeasors. It would require only a small step beyond *Sitzes* for the court to extend a right of contribution to tortfeasors guilty of reckless or wanton misconduct, and another small step to allow contribution even to tortfeasors guilty of intentional misconduct. The next major step, consistent with *Sitzes* and with the general goal of loss allocation, would be the adoption of pure comparative negligence. The final step would be the elimination of the last vestiges of the contributory negligence rule by allowing the plaintiff's negligence to be compared with the fault of all defendants, including those guilty of reckless, willful, wanton, or even intentional misconduct.[193]

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[192] *Davis,* 716 F.2d 418 (parties guilty of willful and wanton misconduct); *Comeau,* 90 A.D.2d 674, 455 N.Y.S.2d 871 (mutual battery); Zavala v. Regents of Univ. of Cal., 125 Cal. App. 3d 646, 178 Cal. Rptr. 185 (1981)(defendant negligent, plaintiff guilty of willful misconduct and 80% at fault); Stockman, 271 S.C. 334, 247 S.E.2d 340 (parties guilty of willful and wanton misconduct). *Cf. Draney,* 138 N.J. Super. 503, 351 A.2d 409 (holding that comparative negligence does not apply to aggravated misconduct; when only the defendant is guilty of aggravated misconduct, the plaintiff recovers 100%, and when both parties are guilty of aggravated misconduct, the plaintiff is barred from recovery).

[193] The court may already have taken this step in Brammer v. Taylor, 338 S.E.2d 207 (W. Va. 1985), holding that the jury should have been instructed to apply comparative negligence in a tort action based on the defendant's failure to execute the codicil to a will. The plaintiffs had proceeded under two legal theories: (1) the negligence of defendants in handling the execution of the purported codicil, and (2) defendant's unauthorized practice of law. The plaintiffs had emphasized the second theory, which could arguably be characterized as an intentional tort, and the court held that comparative negligence would apply under either theory. Dictum in the case stated that comparative negligence would apply in any tort action based on "negligence or fault".

While it is conceivable that the West Virginia court could take each of these steps, one formidable barrier blocks the path to judicial adoption of pure comparative fault in West Virginia—stare decisis. *Bradley* is only eight years old, and the court may be reluctant to so quickly overrule its own pathbreaking decision. On the other hand, the court has emphasized its willingness to reject prior precedent in the field of tort law,[194] and all of its decisions since *Bradley* have moved in the direction of pure comparative fault.[195] Thus, it is possible that the court could adopt pure comparative fault in piecemeal fashion over the next few years.

The legislature, by contrast, can readily achieve a system of pure comparative fault almost overnight simply by adopting the Uniform Comparative Fault Act. In its existing form, the UCFA provides for pure comparative negligence between the plaintiff and the defendants and pure comparative contribution among defendants. But the definition of fault in the UCFA is limited to parties whose conduct is negligent, reckless, or subject to strict liability. This Article further recommends an amendment to the language of section 1 of the UCFA that would extend the system of pure comparative fault to all plaintiffs and defendants, including those whose conduct was willful, wanton, or intentional. Adoption of the UCFA, as thus amended, would not only resolve the issues discussed by Mr. Stoneking in his Article, it would represent significant progress in the direction of efficiency and justice in West Virginia's tort law system.

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[194] *Sitzes,* 169 W. Va. 698, 289 S.E.2d 679; *Bradley,* 163 W. Va. at 350, 256 S.E.2d at 889; Morningstar v. Black & Decker Mfg. Co., 162 W. Va. 857, 863-74, 253 S.E.2d 666, 670-76 (1979).

[195] *See Ratlief,* 280 S.E.2d 584 (abolishing doctrine of last clear chance in favor of comparative negligence); *Sydenstricker,* 169 W. Va. 440, 288 S.E.2d 511 (allowing contribution between defendants liable under different legal theories); *Sitzes,* 169 W. Va. 698, 289 S.E.2d 679 (mandating pure comparative contribution among defendants, regardless of relative share of fault); *Star Furniture Co.,* 297 S.E.2d 854 (applying comparative negligence to plaintiffs in product liability actions); *Brammer,* 338 S.E.2d at 214 n.8 (applying comparative negligence to a plaintiff in a tort action based on codicil to will; dictum stating comparative negligence applicable to all actions based on fault).

APPENDIX

Uniform Comparative Fault Act

Section 1. [Effect of Contributory Fault]

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

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Section 2. [Apportionment of Damages]

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

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

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

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

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

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

Section 3. [Set-off]

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

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

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

Section 5. [Enforcement of Contribution]

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

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought. (c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judg-

ment has been rendered, the person bringing the action for contribution either (1) must have discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Section 6. [Effect of Release]

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

Section 7. [Uniformity of Application and Construction]

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

Section 8. [Short Title]

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

Section 9. [Severability]

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

Section 10. [Prospective Effect of Act]

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

Section 11. [Repeal]

The following acts and parts of acts are repealed:. . . .

Uniform Comparative Fault Act, 12 U.L.A. 39-48 (Supp. 1987).