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Kentucky Law Survey: Remedies: Contribution and Apportionment Among "Joint Tortfeasors"

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Remedies: Contribution and Apportionment Among "Joint Tortfeasors"[1]

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I. INTRODUCTION

In *Nix v. Jordan*,[2] the plaintiff, an automobile passenger, was injured in a two-car crash. She filed suit against the driver and the owner[3] of the other car, but did not sue her husband, who was the driver of the car in which she had been riding. However, the two defendants impleaded the plaintiff's husband as a third-party defendant, seeking "contribution in the amount of one-half of any judgment which may be rendered in favor of the Plaintiff against these Defendants and Third Party Plaintiffs."[4] The case proceeded to trial, and pursuant to an instruction addressing the "joint and concurrent negligence"[5]

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[1] For related articles on recent Kentucky cases involving joint tortfeasors, *see* Germain, *Kentucky Law Survey—Remedies* ("The Effect of Releasing One of a Number of 'Joint' Tort-Feasors"), 64 KY. L.J. 233, 243-52 (1975) [hereinafter cited as Germain, *Releasing "Joint" Tort-Feasors], commenting upon* Sanderson v. Hughes, 526 S.W.2d 308 (Ky. 1975); Germain, *Kentucky Law Survey—Remedies* ("Wrongful Death Recovery Where a Joint Tortfeasor is a Statutory Beneficiary"), 63 KY. L.J. 777-82 (1975) [hereinafter cited as Germain, *Wrongful Death Recovery], commenting upon* Cox v. Cooper, 510 S.W.2d 530 (Ky. 1974).

[2] 532 S.W.2d 762 (Ky. 1975). For clarity, it should be noted that Jordan was the plaintiff at the trial court level.

[3] The family-purpose doctrine was relied upon without contest. *Id.* Note that as between the two *named* defendants neither "contribution" nor "apportionment" would be appropriate because of the vicarious liability relationship *inter sese. See* Daniel v. Patrick, 333 S.W.2d 504, 507 (Ky. 1960). Indemnity, however, would be possible. *See* discussion in text accompanying notes 15-25 *infra.*

[4] 532 S.W.2d at 762, apparently quoting from the third-party complaint.

[5] The phrase "joint and concurrent negligence" represents an improper amalgamation of concepts:

> The term "joint tort-feasor" really should be reserved for situations involving concerted action or conspiracy between or among more than one tort-feasor, whereas the term "*concurrent* tort-feasor" is aptly applied to situations involving two or more tort-feasors whose wholly independent acts concurrently caused an indivisible injury. Because true concurrent tort-feasors are often "joined" as defendants in modern lawsuits, the term "*joint* tort-feasors" has been used generally by courts, albeit somewhat incorrectly, in reference to both types of tort-feasors.

Germain, *Releasing "Joint" Tort-Feasors, supra* note 1, at 244 n.61 (emphasis in the original). For purposes of this article the clearer term "co-tortfeasor" will be used.

of the two drivers, the jury came in with a verdict of $7,000 against the two party defendants; the court entered judgment for the plaintiff against them. Thereafter the court awarded the defendants contribution against the third-party defendant (the plaintiff's husband) for one-half of the judgment and costs pursuant to Kentucky's contribution statute, which provides that "[c]ontribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."[6]

The defendants appealed, arguing that the trial judge had improperly refused to instruct the jury of its right to apportion liability between the defendants and the third-party defendant if both drivers were viewed as negligent.[7] The Kentucky Supreme Court rejected this contention and affirmed the judgment of the trial court. In the opinion, Justice Palmore reasoned:

> Though it might otherwise make good sense to apply the principle of apportionment among joint tortfeasors without exception, the authority for *Orr* . . . derives from a statute (KRS 454.040) which cannot fairly be construed that liberally. Literally, the statute permits apportionment only

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[6] KY. REV. STAT. § 412.030 (1970) [hereinafter cited as KRS].

[7] The Court of Appeals observed that the defendants had, in effect, sought to amend the third-party complaint for this purpose. 532 S.W.2d at 762 n.*. This raised an issue recognized in an earlier case but specifically "reserved" for later discussion.

> We reserve for a future time the question, not raised by the parties to this case, whether on a claim for contribution (in a situation in which the plaintiff has not sued both tortfeasors in one action) a jury should be allowed to determine that the liability of the tortfeasors, as between themselves, is several and unequal so as to preclude contribution.

Parker v. Redden, 421 S.W.2d 586, 596 n.1 (Ky. 1967).

Such apportionment was arguably authorized by the Court of Appeals' decision in *Orr v. Coleman*, 455 S.W.2d 59 (Ky. 1970), which construed Kentucky's apportionment statute. This statute, KRS § 454.040 provides:

> In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs.

It should be noted that "this statute is probably the only one of its kind in the United States . . . in the rest of the states it is assumed that 'no rational division can be made' regarding the responsibility of joint tortfeasors." W. PROSSER, LAW OF TORTS § 52, at 316 n. 39 (4th ed. 1971) [hereinafter cited as PROSSER]; Germain, *Wrongful Death Recovery, supra* note 1, at 778 n.4.

> against "defendants," which necessarily means joint defendants.[8]

The opinion went on to explain that since the plaintiff's husband was a defendant only with respect to the third-party complaint, the apportionment statute was inapplicable to him, and thus an apportioned several verdict was not authorized. Justice Palmore further explained that although in *Orr v. Coleman*[9] there was only one party defendant at trial, apportionment had been sanctioned because of a pretrial settlement with the other co-tortfeasor. He harmonized the cases in this fashion:

> [In *Orr*] the public policy of encouraging settlements justified our construing KRS 454.040 to include as "defendants" joint tortfeasors who probably would have been defendants but for the fact that they had bought their peace. Certainly the settlement itself attests the active assertion of a claim, whereas in this case, by contrast, it is obvious that the plaintiff had not asserted any claim against her husband, the third party defendant.[10]

Thus, in *Nix,* "apportionment" under Kentucky Revised Statutes § 454.040 [hereinafter cited as KRS] was held improper, and the defendants were left with "contribution" under KRS § 412.030.

The direct upshot of *Nix* is to allow KRS § 454.040 to be sidestepped by any plaintiff who chooses to avoid the possibility of several, apportioned verdicts against co-tortfeasors in order to protect against uncollectibility of part of the total judgment due to insolvency,[11] or to insulate co-tortfeasors who are relatives or friends of the plaintiff from bearing more than a pro rata share[12] of the total judgment.[13] Of course, this can

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[8] Nix v. Jordan, 532 S.W.2d 762, 763 (Ky. 1975).

[9] 455 S.W.2d 58 (Ky. 1970). See *supra* note 6.

[10] *Id.*

[11] For example, a plaintiff, by refraining from suing an insolvent co-tortfeasor, can avoid the possibility that the jury, under a KRS § 454.040 instruction, would render "several" verdicts thereby unwittingly depriving the plaintiff of part of his total damages. *Cf.* Germain, *Wrongful Death Recovery, supra* note 1, at 781.

[12] For example, a wife who suspects that a jury might decide that her uninsured husband, one of two co-tortfeasors, was 80 percent causally negligent, would choose to sue only the other co-tortfeasor, thereby completely avoiding the anticipated disproportionate result, and insulating her husband from having to pay more than 50 percent of the total judgment by "contribution" under KRS § 412.030.

[13] The term "total judgment" is meant to include the taxable court costs, since

be rationalized as furthering the generally accepted policy of allowing plaintiffs to choose whom to sue and from whom to seek payment.[14]

II. CLARIFICATION OF TERMS AND CONCEPTS

The *Nix* case provides a convenient opportunity to re-examine the basic and important terms "indemnity," "contribution," and "apportionment." This is advisable because of the rather complex interaction of these frequently used terms, especially in light of the peculiar Kentucky apportionment statute.

A. *Indemnity*

Brown Hotel Co. v. Pittsburgh Fuel Co.,[15] an oft-cited indemnity case, expressed the gist of the indemnity concept:

> Where one of two parties does an act or creates a hazard and the other, while not concurrently joining in the act, is, nevertheless, thereby exposed to liability to the person injured, or was only technically or constructively at fault, as from the failure to perform some legal duty of inspection and remedying the hazard, the party who was the *active wrongdoer or primarily negligent* can be compelled to make good to the other any loss he sustained.[16]

In determining that indemnity was appropriate in that case, the Court explained that the fuel company employee's "primary, efficient and direct" negligence in failing to replace a manhole cover was responsible for the hotel company's exposure to liability. It emphasized that there was a difference in degree and kind of negligence:

> Both were in fault but not the same fault toward the party injured. The employees of the two companies were not acting

these are subject to contribution under KRS § 412.030. *See* Cox v. Cooper, 510 S.W.2d 530, 536-37 (Ky. 1974). Indeed, such costs are assessed "jointly" even where otherwise "several" verdicts are rendered in KRS § 454.040 cases, since that statute specifically calls for "a joint judgment for the costs."

[14] *See* PROSSER § 47 at 296-97.

[15] 224 S.W.2d 165 (Ky. 1949).

[16] *Id.* at 167 (emphasis added).

> jointly or concurrently or contributorily in committing the tort. They were not in pari delicto.[17]

Later in the opinion it was pointed out that although indemnity and contribution both were based upon the "idea of equalization of burden," indemnity was a common law concept to be applied where the parties were not in pari delicto, whereas contribution was allowable only as a statutory matter and applicable even where the parties were in pari delicto.[18] The references to in pari delicto, which is ordinarily thought of as meaning "of equal fault,"[19] were fairly apt in distinguishing indemnity situations from contribution situations. However, that term may be quite inappropriate when the concept of apportionment is considered.[20]

The precepts of *Brown Hotel* with regard to indemnity have continued into recent cases,[21] including one in which it was stated that contribution—as opposed to indemnity—applies where the parties are "in pari delicto, that is, one equally at fault from the standpoint of concurrent negligence of *substantially the same character.*"[22] Indeed, it has even been held that indemnity is a jural right which could not constitutionally be foreclosed.[23]

In accordance with Kentucky's view of the indemnity-contribution dichotomy is a recent law review article, wherein the author, having referred to the quasi-contractual nature of indemnity in the pure tort[24] context and to the primary-

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[17] *Id.*

[18] *Id.* at 168. Indeed, the very reason that contribution had to be statutorily authorized was the legal maxim, *"In pari delicto, potior est conditio defendentis"* (In equal guilt, the position of the defendant is stronger), *i.e.*, in a suit for contribution the defendant would prevail. RESTATEMENT (SECOND) OF TORTS § 886B, comment *a* (Tent. Draft No. 18, 1972).

[19] BLACK'S LAW DICTIONARY 898 (4th ed. 1957) defines it as "In equal fault; equally culpable . . . in a case of equal fault or guilt."

[20] *See* text accompanying notes 32-51 *infra.*

[21] *See, e.g.*, Cassidy v. Sullivan & Cozart, Inc., 468 S.W.2d 260, 261-62 (Ky. 1971); Adams v. Combs, 465 S.W.2d 288, 290 (Ky. 1971); Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp., 438 S.W.2d 788, 790 (Ky. 1968).

[22] Lexington Country Club v. Stevenson, 390 S.W.2d 137, 143 (Ky. 1965) (emphasis added).

[23] Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp., 438 S.W.2d 788, 790 (Ky. 1968), *relying upon* KY. CONST. § 54 (1891).

[24] Indemnity can also be a result of contractual agreement.

secondary distinction, emphasized the *qualitative* aspect of the indemnity concept:

> There must be a difference in the *quality* of fault, however; it is not enough that there is a gross disparity in the *quantity* of each party's negligence.[25]

Thus understood, indemnity should not conflict with the terms of contribution and apportionment.

B. *Contribution*

Contribution is an old concept, which, in Kentucky,[26] as elsewhere, was not accepted as part of the common law partially because of the in pari delicto maxim and the related unclean hands doctrine.[27] Relief eventually came, generally in statutory form. Kentucky's contribution statute, KRS § 412.030,[28] expressly authorizes contribution, and has been interpreted to require contribution on a pro rata basis. Thus, each co-tortfeasor ideally should be held responsible for the same share of the damages as every other co-tortfeasor.[29] The policy behind contribution has been clearly stated:

> Basic principles of fairness demand that all the parties liable for a tort contribute to the compensation of the injured party. Contribution permits the loss to be equitably distributed among all persons responsible for the injury, so it does not rest on one alone.[30]

Therefore contribution is appropriate where the parties *are* in pari delicto—at least in the *qualitative* sense.

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[25] Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203, 210 (1975) (emphasis added) [hereinafter referred to as *Contribution Among Tortfeasors*]. *Accord*, United Air Lines v. Wiener, 355 F.2d 379, 402 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964); PROSSER § 51 at 313. This all fits comfortably with the RESTATEMENT (SECOND) OF TORTS § 886B (Tent. Draft No. 18, 1972), which, after setting out the basic indemnity rule in terms of unjust enrichment of the indemnitor, provides six specified types of situations, each of which could be explained in terms of a "primary-secondary" distinction or a similar rationale.

[26] *See* Brown Hotel Co. v. Pittsburgh Fuel Co., 224 S.W.2d 165, 166 (Ky. 1949).

[27] *See Contribution Among Tortfeasors, supra* note 25, at 213.

[28] Quoted in text accompanying note 7 *supra*.

[29] *See* Lexington Country Club v. Stevenson, 390 S.W.2d 137, 143 (Ky. 1965); *accord*, RESTATEMENT (SECOND) OF TORTS § 886A(1)-(2)(Tent. Draft No. 16, 1970); *Contribution Among Tortfeasors, supra* note 25, at 232.

[30] *Contribution Among Tortfeasors, supra* note 25, at 204.

In sum, it has been stated quite clearly that under Kentucky law there is a distinct difference between contribution and indemnity:

> Indemnity, in essence, is shifting the entire loss from one tort feasor who has been compelled to pay it to the shoulders of another who should bear it instead. Contribution, on the other hand, distributes the loss among the tort feasors by requiring each to pay a share of the injured party's loss.[31]

C. *Apportionment*

Apportionment, as applied to "indivisible"[32] injuries, is a strange creature conceived by the Kentucky legislature. The apportionment statute, KRS § 454.040, was originally enacted in 1839, thereby antedating the contribution statute by nearly a century.[33] In modern times it has been the subject of many somewhat confusing judicial opinions.[34] As elsewhere suggested,[35] and emphasized herein, this statute is of great significance.

It is important to note how the apportionment statute basically functions. First, although it expressly applies to actions of trespass, "[f]rom time immemorial it has been held applicable to personal injury actions based on negligence."[36]

Second, apparently only a *jury* may enforce the provisions of the section.[37] Although this is perfectly in keeping with a

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[31] V.V. Cooke Chevrolet, Inc. v. Metropolitan Trust Co., 451 S.W.2d 428, 430 (Ky. 1970).

[32] The word "indivisible" is set in quotation marks because it represents a contradiction in terms: if the injury is originally viewed as "indivisible" in that joint liability is justifiably imposed upon two or more *concurrent* tortfeasors, it appears anomolous to turn around and apportion liability.

[33] *Compare* KRS § 454.040, (earlier codified as Carroll's Code § 12, originally enacted as Ky. Acts ch. 1214, § 2, at 166 (1839)) *with* KRS § 412.030, (earlier codified as Carroll's Code § 484a, originally enacted as Ky. Acts ch. 190, § 1, at 877 (1926)).

[34] *See, e.g.*, Nix v. Jordan, 532 S.W.2d 762 (Ky. 1975); Cox v. Cooper, 510 S.W.2d 530 (Ky. 1974); Orr v. Coleman, 455 S.W.2d 59 (Ky. 1970).

[35] *See* Germain, *Wrongful Death Recovery, supra* note 1, at 778-82; Park, *Comparative Negligence is Here Now*, 39 KY. BENCH & BAR 19 (1975) [hereinafter cited as Park, *Comparative Negligence*].

[36] Orr v. Coleman, 455 S.W.2d 59, 61 (Ky. 1970).

[37] Malone v. Wright, 364 F.2d 818, 820 (6th Cir. 1966):

> It is . . . Kentucky's rule that whether the damages shall be in gross or separate is left to the jury . . . . In this case, the District Judge sitting without a jury committed no error in assessing the damages against the

literal interpretation of the statute, it tends to add another tactical consideration in deciding whether to demand a jury trial.

Third, the statute authorizes[38] the jury to "assess joint or several damages," but provides no standard for guidance. Curiously, none of the reported cases suggest any standard for jury use. Instead, the instructions, either oral[39] or written,[40] merely inform the jury of its option[41] without ever indicating the functional consequences. Perhaps this lapse can be attributed to the courts' tacit beliefs that juries will not choose to issue several verdicts except where the co-tortfeasors should be held responsible for unequal amounts. In fact, one court has indicated that the very "purpose of the statute is to permit the jury to assess different amounts against each defendant," thereby concluding that the apportionment statute was not applicable where the co-tortfeasors were equally responsible.[42] However,

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defendants jointly.

Cf. Parker v. Redden, 421 S.W.2d 586, 596 n.1 (Ky. 1976).

[38] The statute uses the word "may," which is statutorily defined as being discretionary: "As used in the statute laws of this state, unless the context requires otherwise: . . . 'May' is permissive." KRS § 446.010(10) (Supp. 1976).

[39] *See, e.g.*, the relevant instruction from S.W. Corum Hauling, Inc. v. Tilford, 511 S.W.2d 220 (Ky. 1974), directing that if more than one of the defendants were found liable to the plaintiff:

> you may find in one lump sum against * * * (them) or any combination of them, or you may state in your verdict what percentage of the cause of the accident was attributable to each of said parties you may find against.

Id. at 222 (quoting the trial judge).

[40] *See, e.g.*, the "form of verdict" submitted to the jury in Douglas v. Pottinger, 365 S.W.2d 725, 726 (Ky. 1962), wherein the jury had already been directed to find in favor of the plaintiff:

> We, the Jury, find for Rose Pottinger against
> (a) Claude Douglas in the sum of $____, or
> (b) Against Charles Fritts in the sum of $____, or
> (c) Against Douglas and Fritts in the sum of $____, or
> (d) Against Douglas in the sum of $____, and against Fritts in the sum of $____.
>
> _____
> Foreman

Notice that alternatives (c) and (d) are not carefully differentiated.

[41] "[T]he proper instruction should authorize recovery against the defendants either jointly in a single sum or separately in sums of different amounts." Daniel v. Patrick, 333 S.W.2d 504, 507 (Ky. 1960).

[42] Miller v. Hammary Furniture Co., 299 F. Supp. 238, 240 (E.D. Ky. 1969) (Swinford, J.), which relied somewhat dubiously upon Daniel v. Patrick, 333 S.W.2d 504,

these hypothesized beliefs are betrayed in cases in which juries have returned several verdicts indicating *equal* responsibility on the parts of the co-tortfeasors.[43] In these cases the question arises why a jury chose several rather than joint liability, and whether it is fundamentally fair for a jury to make this choice without any judicial standard, since the several verdict could very well be prejudicial to the plaintiff[44]—completely unbeknownst to the jury.[45] Nevertheless, this seems to be the state of affairs.[46]

Fourth, whenever a jury does apportion damages, it must do so according to the amounts of causation attributable to the various co-tortfeasors.[47] Jury instructions may be in terms of percentages or specific dollar amounts.[48] Costs, however, remain subject to joint judgment only, in accordance with the express terms of the apportionment statute.[49]

Finally, as pointed out by the Court of Appeals, apportionment under KRS § 454.050 "constitutes a recognition of comparative negligence."[50] However, as Judge James Park

507 (Ky. 1960) and more soundly upon Murphy v. Taxicabs of Louisville, Inc., 330 S.W.2d 395, 398 (Ky. 1959) and Central Passenger Ry. v. Kuhn, 6 S.W. 411, 447 (Ky. 1888).

[43] *See, e.g.*, Cox v. Cooper, 510 S.W.2d 530, 536 (Ky. 1974); Brown Hotel Co. v. Pittsburgh Fuel Co., 224 S.W.2d 165, 166 (Ky. 1949). *Cf.* Park, *Comparative Negligence, supra* note 35, at 19: "Not only may the jury assess damages severally under KRS § 454.040, but the jury is not required to assess damages between joint tortfeasors on a 50-50 basis."

[44] "Several" verdicts are always inferior to "joint" verdicts from a plaintiff's viewpoint, since, *at the least*, the plaintiff must demand payment from more than one defendant. Moreover, the plaintiff is exposed to the risk of a defendant's insolvency or other cause of uncollectibility (*e.g.*, disappearance of a defendant and his assets). To dramatize: Case 1: *P* obtains a joint verdict for $50,000 against *D1* and *D2*. Case 2: *P* obtains several verdicts of $25,000 each against *D1* and *D2*. *D1* becomes insolvent or absconds with all of his property. In Case 1, *P* can recover the total judgment of $50,000 from *D2* (who is left with a valueless contribution claim against *D1);* in Case 2, *P* can only recover $25,000 from *D2*, and therefore loses half of his judgment.

Cf. Germain, *Wrongful Death Recovery, supra* note 1, at 781; Park, *Comparative Negligence, supra* note 35, at 19.

[45] In the reported decisions, there is no indication that the jury is ever told about the difference in impact of joint as opposed to several verdicts.

[46] The absence of a standard for jury guidance might even lead some attorneys to claim a constitutional deprivation of due process or denial of equal protection.

[47] Cox v. Cooper, 510 S.W.2d 530, 536 n.3 (Ky. 1974), *discussed in relevant part in* Germain, *Wrongful Death Recovery, supra* note 1, at 779-81.

[48] *See* S.W. Corum Hauling, Inc. v. Tilford, 511 S.W.2d 220, 223 (Ky. 1974).

[49] Cox v. Cooper, 510 S.W.2d 530, 537 (Ky. 1974).

[50] Lexington Country Club v. Stevenson, 390 S.W.2d 137, 143 n.4 (Ky. 1965).

later explained in a very insightful article, the comparative negligence doctrine is now applicable only to the liability of joint tortfeasors as defendants, since the usual type of comparative negligence, which allows a plaintiff's negligence to be balanced against a defendant's, has not yet arrived in Kentucky.[51]

III. NIX'S IMPACT UPON THE INTERACTION OF KENTUCKY'S CONTRIBUTION AND APPORTIONMENT STATUTES

Since *Nix* did not involve any issue of indemnity, its impact is limited to the interaction of the other two relevant systems affecting co-tortfeasors—contribution and apportionment. Where a plaintiff joins *all* co-tortfeasors as defendants in the basic lawsuit, the pre-*Nix* rules apply. The jury has discretion to render either apportioned several verdicts or an unapportioned joint verdict,[52] in accordance with proper in-

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[51] Park, *Comparative Negligence, supra* note 35, at 21. Judge Park's article contains citations to the significant New York cases of Dole v. Dow Chemical Co., 282 N.E.2d 288 (N.Y. 1972) and Kelly v. Long Island Lighting Co., 286 N.E.2d 241 (N.Y. 1972). In *Dole,* the New York Court of Appeals adopted a comparative negligence approach among co-tortfeasors even though New York law does not recognize comparative negligence as between plaintiffs and defendants. In *Kelly,* that same court explained that the apportionment mandated by *Dole* was to be effected on the basis of the co-tortfeasors' allocable concurring fault or causal negligence. Later lower court decisions of interest are Michelucci v. Bennett, 335 N.Y.S.2d 967 (Sup. Ct. 1972) and 341 N.Y.S.2d 837 (Sup. Ct. 1973); Liebman v. County of Westchester, 337 N.Y.S.2d 164 (Sup. Ct. 1972). Many case comments were published on the *Dole* case, *e.g., Recent Development,* 58 CORNELL L. REV. 602 (1973).

Another state which has had substantial experience with comparative negligence among co-tortfeasors is Wisconsin, which for some time has used comparative negligence principles between plaintiffs and defendants as a result of express statutory provisions overriding the contributory negligence rules of the common law. More recently, in Bielski v. Schutze, 114 N.W.2d 105 (Wis. 1962), the Wisconsin Supreme Court adopted a comparative negligence rule for co-tortfeasors. A later case of importance is Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963).

As regards the eventual acceptance of plaintiff-defendant comparative negligence in Kentucky, Judge Park concluded:

> Should the evolving rules with respect to apportioning liability between joint tortfeasors prove to be workable, it appears likely that there will be increased pressure for legislative enactment of a plaintiff's comparative negligence law.

Park, *Comparative Negligence, supra* note 35, at 21. Moreover, in this regard the New York experience, even though not complicated by an unusual statute like KRS § 454.040, may be worth watching.

[52] Under Cox v. Cooper, 510 S.W.2d 530, 536-37 (Ky. 1974), when a jury apportions a verdict it thereby automatically renders it "severally." *See* note 61 and text accompanying notes 60-61 *infra.*

structions under KRS § 454.040. Moreover, in the event of a joint verdict under these conditions, the normal rules of KRS § 412.030 also apply, thereby equitably distributing the damages among the various co-tortfeasors pro rata.[53] However, if a plaintiff sues less than all of the co-tortfeasors, then *Nix* comes into play. *Nix* involved the simplest possible situation where there were but two co-tortfeasors, only one of whom was sued by the plaintiff.[54] The resulting apportionment was found inappropriate, but contribution was deemed allowable. As noted above, this allows an unsued co-tortfeasor who was more than 50 percent causally negligent to bear only 50 percent of the plaintiff's damage recovery; it also insulates a plaintiff from a several verdict against an insolvent party. Thus, the rule has both pros and cons from a policy viewpoint, although from a technical viewpoint it is probably correct. These views certainly find support in Judge Park's article:

> By its terms, KRS 454.040 appears to apply only to a situation in which P has sued both X and Y [co-tortfeasors]. Obviously, the jury could not assess "joint * * * damages against the defendants" if P had sued only X and not Y. Nevertheless, there are some who have argued that KRS 454.040 applies even though P has sued only X, not Y . . . . This result [P's recovering judgment against X only for that portion of the damages caused by X's negligence] strikes this writer as being *unfair,* since P may have a valid reason for not suing Y. Y may be P's husband, and there may be a household exclusion in their policy [citation omitted]. It appears *fairer* to permit P to sue X for the entire injury, and then put the burden on X to file a third-party complaint for contribution.[55]

These views are susceptible to the criticism that Judge Park and the *Nix* Court may have overemphasized the concept of "fairness" in favor of the plaintiff, at least where the sued co-tortfeasor's causal negligence was substantially less than the unsued co-tortfeasor's. Furthermore, one may question the pol-

[53] "[T]he right of contribution provided under KRS § 412.030 will be involved even if P sues both X and Y, if the jury should elect to assess joint damages." Park, *Comparative Negligence, supra* note 35, at 19.

[54] For an apt discussion of some more complex possibilities, *see id.* at 21.

[55] *Id.* at 19 (emphasis added).

icy that allows matters such as the uninsured status and familial relationship to the unsued co-tortfeasor to affect the sued co-tortfeasor adversely. Indeed, Judge Park, in discussing the more complex cases in which the plaintiff has obtained a settlement with one or more of the co-tortfeasors, seemed to realize that the *Nix* Court's interpretation of KRS §§ 454.040 and 412.030 left something to be desired:

> [T]his writer suggests that the jury should be required to determine and apportion the percentage of causation in *every* case in which the jury has determined that a plaintiff is entitled to recover as a result of joint negligence. If both tortfeasors have been sued by the plaintiff, then such a finding as to percentage of causation is a prerequisite to any assessment of several damages pursuant to KRS 454.040—on the other hand, if the jury should determine to return a joint judgment or there should be any question of contribution, a determination by the jury as to percentage of causation will be, at worst, only surplusage which could be ignored without affecting the underlying verdict. However, it appears likely that the Court of Appeals will expressly hold that any right of contribution should be based upon the jury's apportionment of causation on a percentage basis.[56]

It is clear from the Court's decision in *Nix* that it preferred not to follow Judge Park's suggestion that "contribution should be based upon . . . apportionment."[57] This, of course, was to be expected, as the contribution statute, which codified the equitable rule of pro rata adjustment, has had a settled interpretation for its entire existence of 50 years. Additionally, Judge Park's suggestion that the jury should apportion causation in every case in which a plaintiff was injured by the negligence of co-tortfeasors was unlikely to be followed for a few other reasons. One problem was involved in the *Nix* case itself, namely, where there is only one named defendant, KRS § 454.040 does

[56] *Id.* (emphasis in original). Judge Park placed some reliance for his last statement upon Donegan v. Denny, 457 S.W.2d 953, 958 (Ky. 1970), which, in what he properly characterized as "an isolated statement," seemed to suggest that contribution could be based on apportioned causation. *Id.* However, Judge Park overlooked a diametrically opposed statement in Lexington Country Club v. Stevenson, 390 S.W.2d 137, 143 n.4 (Ky. 1965): "[I]n a claim for contribution . . . [apportionment] apparently is not authorized."

[57] Park, *Comparative Negligence, supra* note 35, at 21.

not literally apply. Second, and more significantly, Judge Park's assertion that a finding of causal percentages where the jury rendered a joint verdict "will be, at worst, only surplusage which could be ignored *without affecting the underlying verdict*"[58] falls far short of the mark. Requiring a jury to think and act in terms of an apportioned verdict would surely influence that jury toward returning several verdicts, clearly a substantial detriment to the plaintiff.[59] Indeed, one of the holdings of *Cox v. Cooper*[60] makes it virtually impossible for a jury to apportion its verdict without rendering a several verdict:

> [T]here can be little doubt that when the jury chooses to apportion its award between or among joint tortfeasors *their respective liabilities become fixed and finally settled, as to the plaintiff or plaintiffs* . . . .[61]

One final matter about *Nix* that deserves attention is whether the Supreme Court was justified in distinguishing *Nix*, where the plaintiff voluntarily pressed her claim against less than all of the co-tortfeasors, from *Orr v. Coleman*,[62] in which

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[58] *Id.* (emphasis added).

[59] Oddly enough, the Court of Appeals has shown a peculiar preference toward several verdicts under KRS § 454.040. *See, e.g.*, S.W. Corum Hauling, Inc. v. Tilford, 511 S.W.2d 220, 223 (Ky. 1974), in which the Court was very lenient in handling an objection to a rather unclear verdict form.

[60] 510 S.W.2d 530 (Ky. 1974).

[61] *Id.* at 536-37 (emphasis added). Moreover, in S.W. Corum Hauling, Inc. v. Tilford, 511 S.W.2d 220 (Ky. 1974), where the claim was made that the instructions were insufficient to apprise the jury that the percentages included in the verdict would be used to apportion the award, the Court concluded:

> We do not think the jury was required to be so informed. The instructions formulated in *Orr* did not so inform the jury. We believe it is reasonable to consider that jurors, as ordinary intelligent people, would understand that the percentages of causation fixed by them would be determinative of apportionment of damage liability.

Id. at 223-24.

It is true, however, that Orr v. Coleman, 455 S.W.2d 59, 61 (Ky. 1970), held that a jury should be *required* to fix proportionate causation, but that case involved a situation in which there was only one defendant-co-tortfeasor in the lawsuit since the other co-tortfeasor had entered into a *settlement* with the plaintiff. Thus, neither the defendant nor the plaintiff had reason to complain. *Accord,* House v. Kellerman, 519 S.W.2d 380, 384 (Ky. 1974). Note, however, that if there are two or more defendants remaining after one or more have settled with the plaintiff, the situation is more complex. For Judge Park's views on this type of situation, *see* Park, *Comparative Negligence, supra* note 35, at 21.

[62] 455 S.W.2d 59 (Ky. 1970).

the plaintiff had reached a settlement with and given a "release" to one of the co-tortfeasors. In *Nix* the Court defended its use of KRS § 454.040 in *Orr* despite its refusal to apply it to the facts of *Nix* on the ground that the general public policy favoring settlements "justified our construing KRS § 454.040 to include as 'defendants' joint tortfeasors who probably would have been defendants but for the fact that they had bought their peace."[63] Thus, in two decisions explained in terms of a principle of "literal" statutory construction,[64] radically different results were reached. Moreover, it could be contended that a literal view of KRS § 454.040, which first refers to "joint or several damages against *the defendants*," then refers to a several judgment "against *each defendant*," and concludes with a direct reference to "a *joint judgment* for the costs," clearly contemplates that there be at least two defendants in the lawsuit at the time that the case goes to the jury. Under this analysis, *Orr* would be incorrectly decided upon this point, but *Nix* would remain intact.[65]

Perhaps an adequate explanation for the "literal" confusion emanating from *Orr* and *Nix* can be gleaned from the Court's indications that *Orr* deserved different treatment because settlements should be encouraged. Clearly, in the *Orr* situation it makes some sense to use an apportionment approach,[66] since this provides an effective way of determining how much is to be charged against a plaintiff who has settled

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[63] Nix v. Jordan, 532 S.W.2d 762, 763 (Ky. 1975).

[64] *Compare* Justice Palmore's explanation of *Orr* in Cox v. Cooper, 510 S.W.2d 530, 536 (Ky. 1974) ("From a *literal* construction of KRS § 454.040 . . . .") (emphasis added), *with* his pivotal phrase from Nix v. Jordan, 532 S.W.2d 762, 763 (Ky. 1975) ("*Literally*, the statute permits apportionment only against 'defendants,' which necessarily means joint defendants")(emphasis added).

[65] Although *Orr* was a case in which more than one co-tortfeasor had actually been sued by the plaintiff, who then, before the trial, settled and released one such co-tortfeasor, there is no suggestion in *Orr* or in later cases that the *Orr* rule would not apply similarly to cases in which a co-tortfeasor settled and obtained a release prior to having actually been sued as a joint defendant.

[66] Although this may be the best approach—assuming that it does not abuse applicable related legal principles—it is certainly not the only approach. For example, the jury could be asked to assess the plaintiff's total damages and the judge could then enter judgment against the sued co-tortfeasor for that amount *less* any amount already received by the plaintiff in partial settlement, provided that amount was arrived at in good faith and was reasonable. *See generally Contribution Among Tortfeasors, supra* note 25, at 236-45.

with the other co-tortfeasor, thereby obviating any demand for contribution.[67] However, the same could be said for the *Nix* situation, thus affording the sued co-tortfeasor the same treatment. The trial logistics would be the same since the jury would be required to assess causal negligence as in the *Orr* situation. The shortcoming under this approach is that the plaintiff comes away with less than a full loaf, but that is only because he *chose* to forego suit against a responsible party. The benefit of this approach is in disallowing the plaintiff from using a tactical maneuver to treat a co-tortfeasor unfairly.

Ultimately, there may be no better solution than to reiterate[68] that there are major policy shortcomings embodied in KRS § 454.040, justifying—alas, crying for—corrective *legislative* action.

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[67] According to *Orr:*

> That objective [*i.e.*, apportionment of liability] is not achieved when the amount of the nonsettling tortfeasor's liability is made to depend on the amount for which the other has settled, and over which the nonsettling tortfeasor may or may not have exercised any control. In such a case the claimant gives up nothing by settling with the one, since he gets the balance from the other. And if the nonsettling tortfeasor may then enforce contribution from the one who has settled, the purpose of the settlement is defeated. Should we hold that to be the case there simply would be no more partial settlements. The *practical answer* is that the jury should be required to assess the total amount of the claimant's damages and fix the proportionate share of the nonsettling tortfeasor's liability . . . . The trial court may then compute the amount of the judgment to be entered against the nonsettling tortfeasor, thus fixing his ultimate liability (and incidentally obviating any question of or necessity for contribution).

Orr v. Coleman, 455 S.W.2d 59, 61 (Ky. 1970) (emphasis added). Accordingly, under *Orr*:

> [If] the jury assesses the percentage of causation on a basis of 80% to X and 20% to Y, [and] Y has previously settled with P for $10,000, [and] . . . the jury finds that P's damages were $100,000 the judgment would be entered against X for $80,000.

Park, *Comparative Negligence, supra* note 35, at 20. It should be noted that the plaintiff in this example would get the $80,000 from X in addition to the amount he received from Y in settlement.

[68] *Cf.* Germain, *Wrongful Death Recovery, supra* note 1, at 781.