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COMPARATIVE NEGLIGENCE—THE OKLAHOMA VERSION

Page Keeton*

The 34th Legislature of Oklahoma in the first regular session enacted a statute, based on an existing Arkansas statute, providing for a "modified" comparative negligence compensation system when a claimant seeks recovery of damages against a defendant or defendants if (1) the basis for the claimant's recovery is negligence and (2) the negligence resulted in death or harm to person or property. No attempt was made by the legislature to answer many new issues that the adoption of comparative negligence will raise and that will have to be answered by judicial decision. The statute simply provides:

Section 1. Comparative negligence:

Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of lesser degree than the negligence of any person, firm, or corporation causing such damage.

In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of lesser degree than any negligence of the person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence.

Section 2. Defense of contributory negligence or assumption of risk as question of fact:

The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of

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fact, and shall at all times be left to the jury, unless a jury is waived by the parties.¹

Thus, Oklahoma, almost simultaneously with its neighbor Texas² follows a number of other states in abolishing by legislation the common law doctrine established in England in 1809³ which was based primarily on the notion that where both an injured victim and another are at fault in causing a damaging event, the courts should leave the

1. S.B. No. 138, Okla. Laws 1973 ch. 30.

2. H.B. No. 88, 1 Tex. Laws 1973 at 41. The Texas statute is as follows:

Modified comparative negligence

Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

Contribution among joint tort-feasors

Section 2(2) In this section:

(1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.

(2) "Defendant" includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

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

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

(f) In the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

3. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809).

parties as they are in the spirit of the equitable doctrine of unclean hands.⁴

The Texas statute, unlike that in Oklahoma, attempts to answer a variety of issues in addition to establishing a basic policy, and it will be interesting to observe the course of development of comparative negligence under the two kinds of statutes—the general and the specific. There is much to be said for the more general Oklahoma type leaving much discretion to the supreme court to fill in the details. Details of the law related to a general policy position are generally resolved with greater success through the judicial rather than the legislative process *but* at the outset the general statute will result in more uncertainty and will be productive of more litigation. Harmful side effects will be the consequence of getting a more just disposition of personal injury claims through comparative negligence. There will be greater complexity in the handling of litigation and the settlement of claims, at least for several years. The more decisional points involved in litigation and the more complex the trial of a law suit becomes, the more judicial time it takes to resolve controversies and the more likely it is that errors will be made producing reversals and retrials. Moreover, there is a substantial likelihood that settlements of disputes will be discouraged rather than encouraged because of the greater difficulties in evaluating the worth of a claim without litigation.

In the preparation of these observations, an effort has been made (1) to make a comparison between the Texas and Oklahoma versions of comparative negligence and (2) to identify and comment on issues that are not answered by the Oklahoma legislature but which will have to be judicially resolved.

Firstly, comparative negligence has been adopted only when negligence is the basis for recovery and when personal injury, death or physical damage to property results. The Oklahoma statute could hardly be construed otherwise because of the initial sentence of the second paragraph of Section 1, which begins as follows: "In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property . . ." Therefore, no change in existing law, whatever it is, has been made with respect to claims based on a theory of strict liability such as is the case when suit is brought against the manufacturer or other seller in the marketing chain on the

4. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 22.2, at 1202 (1956); Hague, *Comparative Negligence: A Reform Long Overdue*, 49 ORE L. REV. 38 (1969).

ground that a product was defective and unreasonably dangerous. Moreover, no change is made in existing law with respect to intangible economic losses resulting from negligence in the absence of physical harm, such as when an accountant negligently certifies to false facts regarding the financial condition of a corporation. This is not to imply or suggest that the adoption by the legislature of comparative negligence with respect to claims based on negligence resulting in physical harm should not be relevant as to the proper solution by the Supreme Court of Oklahoma of the effect of a claimant's negligence in these non-included areas. The fact that the legislature chose to restrict the coverage of the statute does not mean that the legislature intended to prevent the court from doing so.

Secondly, it is said that contributory negligence shall not prevent a recovery where any negligence of the claimant is of lesser degree than any negligence of the person, firm or corporation causing such damage. Thus, of the two principal variants of comparative negligence, Oklahoma has adopted the "modified" form rather than the "pure" form.⁵ Contributory negligence remains a complete bar to recovery, if the claimant's negligence is equal to or greater than the negligence of the defendant or defendants. The pure form would allow plaintiff to recover something regardless of the degree of his fault, such as now exists as to claims made pursuant to the Federal Employer's Liability Act. Under the pure form recovery according to fault is extended to its logical limits.⁶ State legislatures in providing for comparative negligence have generally adopted a modified version, but I must say that the objections that have been made to the pure form are largely based on a distrust of the jury and a feeling that claimant

5. There are two general categories of comparative negligence systems. The first is the pure form which has been provided for in Mississippi by statute, in Florida by judicial decision, under the Federal Employers' Liability Act, under the Jones Act and in England. See *Mitchell v. Croft*, 211 So. 2d 509 (Miss. 1968); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); Federal Employers' Liability Act, 45 U.S.C. § 51 (1958); The Jones Act, 46 U.S.C. § 861 (1958); Death on the High Seas Act, 46 U.S.C. § 766 (1958); Contributory Negligence Act of 1945, 8 & 9 Geo. 6, c.28, § 221.

The record or modified version takes two forms. The rule in Arkansas, Georgia and now Oklahoma is that contributory negligence is not a bar if the contributor's negligence is less than that of defendant. *Whatley v. Henry*, 16 S.E.2d 214 (Ga. Ct. App. 1941); *Riddell v. Little*, 488 S.W.2d 34 (Ark. 1972).

The other modified version provides that contributory negligence is not a bar if such negligence is not greater than that of defendant. This is the rule in Wisconsin and Texas. These lists are not intended to be all inclusive. WIS. STAT. ANN. § 895-045 (1971).

6. See *Bissen v. Fujii*, — Haw. —, 466 P.2d 429 (1970) (Levinson, J., dissenting).

under a pure form will nearly always recover something. These objections are hardly persuasive.

There is a third alternative that could have been made to the doctrine that contributory negligence is a complete bar to recovery. The simplest and oldest method for dealing with contributory negligence is to divide the damages equally between the negligent parties. It was developed in England around 1700 by the English Admiralty Courts. It is still followed by the American courts of admiralty in collision cases.⁷ This is the method that has been commonly provided for in legislation that has been passed in most states providing for contribution among joint tortfeasors.⁸ At common law, contribution was not available as between joint tortfeasors, the policy behind that being the same as that applicable to the rule that contributory negligence was a complete bar to recovery and only a few states have provided for contribution without legislation.⁹ Contribution between joint tortfeasors is not available in Oklahoma,¹⁰ and this creates a serious problem with respect to the proper administration of a comparative negligence system about which more will be said later. The division of damages equally between the negligent parties will ultimately be found to be the simplest and best solution both when the claimant was one of the negligent parties as well as when he is not. It could have been the solution arrived at long ago by judicial decision.¹¹ The dis-

7. For a discussion of the history and development of this in Admiralty, see Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465-75 (1953). See also Derby, *Divided Damages in Maritime Cases*, 33 VA. L. REV. 289 (1947).

8. About half of the states have passed statutes providing for contribution among joint tortfeasors and some nine states have provided for contribution by judicial decision. W. PROSSER, *LAW OF TORTS* § 50 (4th ed. 1971). See also UNIFORM CONTRIBUTION AMONG TORT-FEASORS ACT (adopted in 1955 by the Commissioners on Uniform State Laws).

9. *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949); *Best v. Yerkes*, 77 N.W.2d 23 (Iowa 1956); *Underwriters at Lloyds of Minneapolis v. Smith*, 208 N.W. 13 (Minn. 1926).

10. Oklahoma's contribution statute is set forth in OKLA. STAT. tit. 12, § 831 (1971). It has been construed as not applicable to joint tortfeasors or wrongdoers. *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, 434 P.2d 238 (Okla. 1967); *Fakes v. Price*, 18 Okla. 413, 89 P. 1123 (1907); *Home Indemnity Co. v. Thompson*, 434 P.2d 250 (Okla. 1967). In the first cited case the court said: "Despite the claim that defendant's conduct was unconscionable, the settled law in Oklahoma does not afford a right of contribution. . . ." 434 P.2d at 241. Unless by legislation an unconscionable result is required, it is submitted that the court has the power and the duty to avoid unconscionable results. Some authors have said that the courts have misinterpreted the statute. Merrill, *Oklahoma and the Uniform State Law Program*, 38 OKLA. B. ASS'N J. 643 (1967); Holder, *An Application of the Oklahoma Contribution Statute to Joint Tortfeasors*, 5 TULSA L.J. 62 (1968).

11. Nine states have done so; see note 8 *supra*.

inction between a situation where *A* and *B* through their negligence jointly injure *A* and a situation where *A* and *B* jointly injure *C* is difficult for me to grasp as regards the proper apportionment of damages between the wrongdoers.

Thirdly, Oklahoma has adopted that modified form of comparative negligence that bars a claimant from recovery when he and the defendant are equally at fault. Thus, if each is found to be 50 percent negligent, then neither can recover against the other if injured. The decision on this situation is, it seems to me, quite important because the most frequently recurring result will probably be that result, or if not, it should be. Often, a fair-minded jury will not be able to identify a difference in the degree of negligence of the parties to the litigation and the attempt to fix different percentages of negligence for the parties will not be realistic. My conclusion on this may, however, be the result of bias in favor of not making an attempt to do so but rather dividing damages equally between those responsible for a damaging event as is done with respect to collisions in maritime cases. Texas adopted a contrary result by stating that contributory negligence will not bar recovery if such negligence is not greater than the negligence of the defendant or defendants.¹² I very much favor the allowance of recovery when claimant and defendant are equally at fault. Apparently in Wisconsin, as a result of a recent amendment, and in New Hampshire, a claimant can recover if he and the defendant are equally to blame,¹³ whereas a plaintiff cannot do so in Arkansas,¹⁴ the language of the Arkansas statute being that which was adopted by Oklahoma. No doubt the states that have adopted the position that a plaintiff who was equally to blame for a damaging event recovers nothing were actuated by the idea that when the claimant is in equal fault with the defendant there should be no recovery. If a comparative negligence system of any kind is adopted, it is submitted that the pure form is better and that next would be the modified form with recovery allowed when the parties are equally to blame, so on this point I am critical of the Oklahoma statute.

The modified form in either version, that of Texas or Oklahoma, will often result in greater hardship to a negligent party and victim than he suffered when contributory negligence was a complete bar.

12. See note 2 *supra*.

13. WIS. STAT. ANN. § 895.045 (1971); 4A N.H. REV. STAT. ANN. § 507:7a (1969).

14. 3A ARK. STAT. § 27-1730.1 (1961).

Let us assume a traffic accident with both drivers injured and jury findings as follows:

	<u>Negligence</u>	<u>Damages</u>
Driver <i>A</i>	40%	\$ 50,000
Driver <i>B</i>	60%	100,000

In this illustration *B*, who was 60 percent negligent will bear all of his injuries without recourse against anyone except for whatever first-party insurance he holds, and in addition will be liable to *A* for 60 percent of *A*'s damages for a total of \$130,000, or 86 percent of the damages. Yet the likelihood is that there was little, if any, perceptible difference in the degree of fault of the respective parties. In providing *A* with some recovery, *B* has been grossly overburdened.

A third point about the Oklahoma statute, as is of course true of the Arkansas counterpart, is its ambiguity with reference to a situation involving multiple parties. The Texas statute provides that "in a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded shall be in proportion to the percentage of negligence attributable to each defendant."¹⁵ Thus in Texas the legislature has expressly provided that multiple defendants are to be treated as a unit for the purpose of deciding the basic issue of whether or not a claimant committed less or greater negligence than the defendants. This same result has been achieved in Arkansas by interpretation in the interesting case of *Walton v. Tull*,¹⁶ although there was a strong dissent by the chief justice. This case involved two accidents at night, the first occurring when a station wagon driven by Walton was involved in a minor collision with the car driven by Bingham as Walton was trying to pass and Bingham was turning left. These vehicles came to rest on the left side of the highway with the lights on. Tull, the claimant, was painfully and seriously injured when he was struck by Glenn, a drunk driver, as Tull was getting out of the station wagon. The jury findings as to the negligence of the parties were as follows: Glenn—60%; Walton—20%; Bingham—10%; and Tull, the claimant—10%. Glenn was insolvent. It was held that Tull could recover all but 10% of his damages against Bingham, even though Bingham was as much at fault as the plaintiff was. Moreover, under

15. This is § 2b of the statute as set forth in full in note 2 *supra*.

16. 356 S.W.2d 20 (Ark. 1962). See also *Riddell v. Little*, 488 S.W.2d 34 (Ark. 1972).

the decision the claimant could recover all of his damages against a defendant who was not even as negligent as the claimant. Thus, if it is assumed that Tull was 15% negligent and Bingham was 5% negligent, Bingham could be held for 85% of claimant's damages. The dissenting chief justice made the following observation:

I agree thoroughly with that position taken by Mr. Dobbs in his Legislative Note to the effect that the legislature did not intend a recovery against any defendant whose negligence was not greater than that of the plaintiff. In fact, I have found no case to the contrary. It appears to me that the position taken by the Majority may well work an undue hardship on a defendant who may have had but little to do with injuries sustained by a plaintiff. For example, let us say "A" sues "B" and "C" as joint tortfeasors, and the jury finds defendant "B" guilty of 74% negligence, defendant "C" guilty of 1% negligence, and plaintiff "A" guilty of 25% negligence. "A's" damages are fixed at \$40,000. "B" is insolvent. Under the Majority holding, plaintiff "A", *though 24% more negligent than defendant "C", can collect 75% of his damages from "C"* (his own 25% negligence being deducted). This results in "C" having to satisfy "A's" judgment to the extent of \$30,000, though his own negligence was at the very minimum.¹⁷

The primary difficulty, therefore, about treating defendants as a unit is that it allows a claimant who was guilty of as much or greater negligence than a particular defendant to recover his entire damages diminished only by his own negligence against that defendant.

In Wisconsin, pursuant to a similar statute declaring that contributory negligence is not a bar to recovery "if such negligence was not as great as the negligence of the person against whom recovery is sought,"¹⁸ the supreme court has held that each defendant must be treated individually on the issue of whether or not the claimant is guilty of lesser negligence. The term "any person" as is used in the Oklahoma and Arkansas statutes is somewhat easier to construe as including the plural than "the person" can be. Arguably, of course, the Oklahoma statute should be construed as the Arkansas court construed its statute since that construction had been made before the adoption by the Oklahoma legislature of comparative negligence, but this assumes that in passing the statute the Oklahoma legislators

17. 356 S.W.2d at 27.

18. WIS. STAT. ANN. § 895.045 (1971).

adverted to this problem and were aware of the construction that had been placed on the Arkansas statute with reference to it.

Historically, if the negligence of two or more tortfeasors proximately causes a single and indivisible injury each defendant is subject to liability for the entire damages recoverable by plaintiff. This has been virtually a universally accepted proposition when either the plaintiff was not contributorily negligent or, if negligent, an exception to the rule barring recovery such as last clear chance was applicable. Each caused the entire damage and the risk of insolvency of one of the tortfeasors was not placed on the innocent victim but rather on the other wrongdoer.¹⁹ There would be few to question the soundness of that result. But this principle of entire liability of each of the negligent defendants is of questionable soundness when plaintiff was also negligent in causing his injury. It is the entire liability principle that produces the unfair results that the chief justice of the Arkansas Supreme Court was concerned about. The Texas statute provides that each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant *except* that a defendant whose negligence is less than that of the claimant is liable for only that portion of the judgment which represents the percentage of negligence attributable to him. This alleviates the problem but does not completely eliminate the unfairness.

But the unfairness resulting to a particular defendant by treating the defendants as a unit in ascertaining whether or not the claimant is guilty of equal or greater negligence is magnified when, as in Oklahoma, contribution is not available. Thus in Oklahoma, unless contribution is made available as between joint tortfeasors by statute or judicial decision, a tortfeasor who was only slightly negligent and less so than claimant could be held liable for claimant's entire damages, diminished only by claimant's negligence, even though there was another solvent tortfeasor who was guilty of much greater negligence than the defendant. It should be observed, however, that even with con-

19. The typical case is of course that of two vehicles colliding, but there are a variety of situations where the negligence of two or more defendants are each a "but for" and a proximate cause of a damaging event out of which a single and indivisible injury arises. See *Arnst v. Estes*, 8 A.2d 201 (Me. 1939); *Johnson v. Chapman*, 28 S.E. 744 (W. Va. 1897); RESTATEMENT (SECOND) OF TORTS § 433A (1964). Under this section damages for harm are to be apportioned among two or more causes only where there are distinct harms or there is a reasonable basis for determining the contribution of each cause to a single harm. I think the *Restatement* section is ambiguous and even inaccurate.

tribution an undue burden can be imposed on a particular tortfeasor or the plaintiff in regarding each person individually. Thus if a victim is found to be 30% negligent, he could recover 70% of his damages only if some defendant was guilty of greater negligence and that defendant would have no recourse against anyone.

	<u>Plaintiff</u>	<u>Defendant</u>	<u>B</u>	<u>C</u>
Negligence	30%	40%	20%	10%
Damages	\$100,000			

Plaintiff recovers \$70,000 against defendant.

The Supreme Court of Oklahoma has the judicial power to provide for contribution. Whereas restraint in providing for contribution judicially has heretofore been justifiable, such judicial restraint in the face of the incongruous result that would be produced by the comparative negligence statute, if interpreted as Arkansas has done, should not be expected. Contribution, it seems to me, must be provided for in Oklahoma, either by statute or judicially if comparative negligence is to work fairly and effectively.

Multiple Parties and Joinder. Heretofore, liability of joint tortfeasors has been joint and several in the sense that a claimant could proceed jointly or separately against the parties to a damaging event.²⁰ If a claimant proceeded separately against one of the parties to a damaging event, but failed to recover or did not get full satisfaction of a judgment rendered in his behalf, he could file a separate suit thereafter against another. Moreover, a person who was proceeded against separately was not required to implead another person in order to obtain contribution.²¹ The complications resulting from a modified comparative negligence system, especially the type where all persons proceeded against are treated as a unit in deciding whether or not plaintiff committed the greater negligence, seem to be enormous if this practice is allowed in the future. Since contribution has not been available in Oklahoma,²² I will simply say that it is a problem if contribution is made available and if not made available comparative negligence will not work satisfactorily. Arguably, a plaintiff who proceeds to judg-

20. *Hassier Stone Co. v. McCain*, 133 Ind. 231, 31 N.E. 956 (1892); *Kennedy v. Camp*, 14 N.J. 390, 102 A.2d 595 (1954); *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, 434 P.2d 238 (Okla. 1967); *Fakes v. Price*, 18 Okla. 413, 89 P. 1123 (1907).

21. Of course, contribution is not available in Oklahoma. See *Calihan Interests, Inc. v. Duffield*, 385 S.W.2d 586 (Tex. Civ. App. 1965).

22. Note 10 *supra*,

ment and was found to be negligent should not be able to file a separate law suit relitigating issues related to the percentage that his negligence bore to the total negligence of all parties to the event. He should be estopped from asserting the negligence of others if they could have been brought into the initial law suit.

Off-set. Many traffic accidents as well as other types of damaging events bring about multiple deaths and injuries to those who were negligently responsible for such events. Often, therefore, persons involved in subsequent litigation will be both claimants and defendants. An important question has to do with whether a claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other pursuant to whatever rules of comparative negligence apply. The rule of entire liability of each of two or more joint tortfeasors, the rule that defendants will be treated as a unit in deciding whether or not a claimant is guilty of the lesser negligence and a situation involving multiple claims by the negligent parties combine to complicate the fixing of the recovery, especially when provision is made for off-set. The Texas statute specifically provides for off-set with the stipulation that "the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant."²³ In some states, however, off-set is not allowable. The policy with reference to off-set is not important under the Oklahoma version if only two parties are involved since only one will ever be able to recover anything. It is important in a jurisdiction that would allow recovery when each are equally at fault. It is of considerable importance when there are three or more parties all of whom suffered injuries. It is my position that off-set is an objectionable feature of a comparative negligence system because of (1) the complication resulting from it, (2) the greater difficulty that will be encountered in evaluating claims and making settlements and (3) the unfairness that is produced. Each claimant should have judgment against the other for his damages diminished in proportion to the amount of his negligence without off-set. An example will serve to illustrate the difficulties and the consequences of a policy permitting off-set as contrasted with that of not allowing an off-set:

	<u>A</u>	<u>B</u>	<u>C</u>
Negligence	30%	40%	30%
Damages	\$80,000	\$100,000	\$60,000

23. This is § 2(f) of the statute which is set forth in note 2 *supra*.

Recovery without Off-set	56,000	60,000	42,000
	[B=32,000(C-J*)] [C=24,000(B-J*)]	[A=30,000(C-J*)] [C=30,000(A-J*)]	[A=18,000(B-J*)] [B=24,000(A-J*)]
Recovery with Off-set	8,000	6,000	
	[B=2,000(C-J*)] [C=6,000(B-J*)]	[C=6,000]	

*J means joint liability.

Since much of the impetus for the passage of comparative negligence statutes has been to overcome some of the arguments made in behalf of those who have proposed no-fault schemes as a means for compensating victims who have heretofore received no compensation at all, the off-set provision tends to defeat the objective.

Settlements. The effect of settlements varies from state to state.²⁴ It appears that in Oklahoma, there being no contribution statute and therefore no problem about protecting the settling tort-feasor from contribution, the plaintiff is only required to account for the amount paid for the settlement.²⁵ If, therefore, Oklahoma retains both the non-contribution rule and the rule of entire liability of joint tortfeasors, one solution would be to disregard altogether any liability that might have existed on the part of the settling tortfeasor and compute as the total negligence only the negligence of the claimant and the defendant or defendants against whom recovery is sought. There would then simply be a deduction from the liability of the defendant or defendants in the amount of the settlement.

If, on the other hand, provision is made for contribution between tortfeasors, then a different result would seem to be dictated. The Texas statute provides for a distinction between two situations: When the alleged settling tortfeasor is not made a party to the suit and when

24. See UNIFORM CONTRIBUTION AMONG TORT-FEASORS ACT § 4. As adopted in 1955, this section provides as follows:

[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 tort-feasors 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 tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

25. *National Trailer Convoy, Inc. v. Oklahoma Turnpike Authority*, 434 P.2d 238 (Okla. 1967).

he is.²⁶ This distinction was based on the notion that if a settlement was made with a person who was not a party to the suit, that settlement would preclude, or should preclude, submitting to the jury the existence and the amount of his negligence. Failure to join an alleged settling tortfeasor neither precludes nor, arguably, should it preclude the submission of the existence or amount of his negligence. The determination of the existence or amount of his negligence is in no way dependent on his being a party, and I see no value in making him a formal party to the litigation except for procedural and tactical reasons on the part of claimant or defendants. These reasons do not justify making this distinction. The method provided for apportioning the damages when the person settled with is made a party seems the appropriate one for both situations, i.e., the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tortfeasor. Under the statute, when the settling tortfeasor is not made a party, each defendant deducts from the amount for which he would otherwise be held liable a percentage of the settlement based on the relationship the defendant's negligence bears to the total negligence of all defendants; when the settling tortfeasor is made a party, the settlement is a complete release of the portion of the judgment attributable to his negligence. The determination of these matters for making a decision about the rights of the parties to the suit is in no way dependent on the presence of the settler, and the distinction should be between a settlement made with one who was not legally liable and one who was.

Unresolved Issues. The adoption of comparative negligence should and will inevitably bring about a reexamination and no doubt alteration of several other doctrines that have developed in the context of a compensation system in which contributory negligence was either an absolute bar to recovery or no bar at all because of some exception to the rule. This is not intended as a complete list but is simply meant to identify some of the more important and obvious ones.

Last Clear Chance or Discovered Peril. The *Restatement of Torts* recognizes two exceptions to the rule that contributory negligence is a bar to recovery. These are commonly called "Last Clear Chance" and "Discovered Peril." The first applies under the *Restatement* when the defendant is found to have been negligent after he saw or should

26. §§ 2(d) and (e) of the statute which is set forth in note 2 *supra* contain the provisions on this subject.

have seen the plaintiff in a helpless condition.²⁷ The second applies under the *Restatement* when the defendant is found to have been negligent after actual discovery of the plaintiff in peril who was either helpless or inattentive.²⁸ Both are recognized in one form or another in many states and one or the other in some fashion in nearly all states.²⁹ Without trying to describe precisely the Oklahoma position, it appears that last clear chance is recognized when defendant is negligent after actual discovery of plaintiff in a helpless condition, or perhaps inattentive position.³⁰ Both are based on the premise that the defendant is, under the circumstances, guilty of the greater fault or is more to blame for the damaging event out of which plaintiff's injury arises than the plaintiff. These doctrines would never have been created under a system that would have allowed plaintiff recovery if not guilty of as much or less fault than the defendant. They were judge-made comparative negligence rules. These doctrines place the entire loss due to the fault of both parties on the defendant and inflict obvious injustice on the defendant just as when obvious injustice is inflicted on plaintiff when they are not applicable. They constituted a rough way to compare fault pursuant to a judicial process that was incapable of working out a more rational plan. They have no place under a comparative negligence system. The Florida Supreme Court last year, rejecting the position that the court was powerless to change a rule that was court-made in the first place, provided for "pure" comparative negligence and quite correctly also held that under such a system last clear chance has no applicability.³¹ Conceivably a distinction could be drawn between a "pure" and a "modified" system from the standpoint of the applicability of last clear chance. It could have the effect of granting a complete recovery when otherwise only partial or no recovery at all would be available but this would be to contradict in effect the jury findings that part of the damages should be apportioned to the plaintiff.

27. RESTATEMENT (SECOND) OF TORTS § 479 (1965).

28. RESTATEMENT (SECOND) OF TORTS § 480 (1965).

29. W. PROSSER, LAW OF TORTS § 66 (4th ed. 1971); F. HARPER & F. JAMES, THE LAW OF TORTS § 22.12 (1956).

30. *Jester v. St. Louis & S.F.R.R.*, 413 P.2d 539 (Okla. 1965); *Kurn v. Casey*, 193 Okla. 192, 141 P.2d 1001 (1943). In the last case, the court said that in order for plaintiff to recover under the Last Clear Chance Doctrine he must show that he was in a place of danger, that he was *seen* by the defendant and that there was a failure thereafter to use ordinary care to avoid the injury. The court said that the doctrine does not apply where the defendant did not discover the injured person's exposure to danger in time to prevent the injury.

31. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

Voluntary Assumption of the Risk. It has been the rule generally that a claimant who fully understands a risk of harm to himself or his things caused by defendant's conduct or by the condition of the defendant's land or chattels and who nevertheless voluntarily chooses to encounter it manifests his willingness to accept it and cannot recover.³² I have vigorously criticized this doctrine,³³ and there is a growing dissatisfaction with it.³⁴ Many courts have confused this subject by treating assumption of the risk as a kind of contributory negligence. The doctrine when applied as stated above means that a claimant is barred of recovery even when he was reasonable in encountering the danger since the bar to recovery is based not on fault of the plaintiff but on a kind of manifestation of consent to accept the risk. As a doctrine separate from contributory negligence, it has clearly been recognized in Oklahoma when invitees encounter known dangerous conditions on land.³⁵ It has been recognized in many states as applicable when a passenger sues his own driver and appreciated that the driver was temporarily incapacitated such as drunk or sleepy and voluntarily chose to ride with him.³⁶ Normally, contributory negligence can be found but there are circumstances where a passenger could be reasonable in remaining in the car with knowledge and appreciation of the risk. Since the basis for the assumed risk defense is the willingness of the plaintiff to take a chance under circumstances where he was fully informed and free not to do so, this defense is not necessarily abolished by the adoption of comparative negligence. A plaintiff should never be denied recovery when the defendant's negligent conduct forced the plaintiff into the dilemma of having to forego a legitimate purpose or to face the negligently created hazard without recourse. This being the case, the adoption of comparative negligence affords the courts an opportunity to abolish the defense.

32. RESTATEMENT (SECOND) OF TORTS § 496C (1965); Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 PA. L. REV. 629 (1952).

33. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961).

34. *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962) (a comparative negligence jurisdiction). This case involved a passenger suing his driver and the court said there may be circumstances where a guest's willingness to proceed in the face of a known hazard for which the host is responsible is not unreasonable and his willingness to ride in the face of a known hazard is no longer a defense. See also *Siragusa v. Swedish Hosp.*, 373 P.2d 767 (Wash. 1962), where the court said that to bar recovery when the employee is acting reasonably in exposing himself is to indulge in the unrealistic and rigid presumption that in so exposing himself, the employee "assents" to relieve his employer from responsibility.

35. The defense is discussed in *Davis v. Whitsett*, 435 P.2d 592 (Okla. 1967) and in *S.H. Kress & Co. v. Maddox*, 201 Okla. 190, 203 P.2d 706 (1949).

36. W. PROSSER, LAW OF TORTS § 68 at 446 (4th ed. 1971).

Imputed Contributory Negligence. Imputed contributory negligence is a doctrine that is based on the theory that a relationship sometimes exists between an injured person and another which renders it inequitable or unfair to permit the injured person to recover from a negligent third person, if the injury results in part from the negligence of the other party to the relationship.³⁷ The negligence of a servant has been imputed to the master to bar the master's recovery and the negligence of a driver has often been imputed to a passenger to bar the passenger's recovery against another driver when the passenger and his driver were on a joint enterprise. These rules have been adopted in Oklahoma.³⁸ The thought has been that in those situations where a person is vicariously liable for the negligence of another he should in like manner be charged with his negligence if an attempt is made to recover against another. There is a fallacy here. When a passenger-joint enterpriser is held vicariously liable to a non-negligent person in another car, the litigation is between two persons who are blameless, and it is thought to be better social policy to shift the loss to the innocent enterpriser, leaving him with the risk of insolvency of the negligent actor, rather than place this risk on the victim. But when a blameless enterpriser is suing a wrongdoer, the choice is not between two innocent persons. In a comparative negligence system it would seem obvious that the existence or not of a joint enterprise between a passenger and a driver should not affect the apportionment of damages between those who are wrongdoers. Let us assume the following: passenger-enterpriser—20% negligent; driver-enterpriser—40% negligent; driver A—40% negligent. Arguably, if imputed contributory negligence is retained as a doctrine, then a passenger could not recover against Driver A in this illustration because his negligence would be combined with that of his driver to make him guilty of the greater negligence. But this is not what the statute says shall be done and arguably a proper construction of the statute would be that the doctrine has been legislatively abolished. Even if the negligence of the driver is imputable to the passenger, the maximum quantum of negligence should be that of the driver if the passenger's negligence is simply that of failing to control the conduct of the driver. In other

37. Keeton, *Imputed Contributory Negligence*, 13 Tex. L. Rev. 161 (1935).

38. *Wagner v. McKernan*, 198 Okla. 425, 177 P.2d 511 (1947). (The owner of the car was riding as passenger). Imputed contributory negligence has not, however, been favored by the Oklahoma Supreme Court. *Danner v. Chandler*, 204 Okla. 693, 233 P.2d 953 (1951); *St. Louis & S.F.R.R. v. Bell*, 58 Okla. 84, 159 P. 336 (1916).

words, the most their combined negligence could be is the amount of the primary negligence—the conduct of the driver.

Conclusion

As stated heretofore, no effort has been made to identify all of the issues that comparative negligence raises or to answer in any definitive way those that have been discussed. While the Oklahoma statute is a step in the right direction toward providing a more just compensation system for victims of all kinds of damaging events unintentionally produced, there are many unresolved issues that will require legislative or judicial action to resolve.