

April 2018

The Unsettling Effect of Maine Law on Settlement in Cases Involving Multiple Tortfeasors

Arlyn H. Weeks
University of Maine School of Law

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Recommended Citation

Arlyn H. Weeks, *The Unsettling Effect of Maine Law on Settlement in Cases Involving Multiple Tortfeasors*, 48 Me. L. Rev. 77 (2018).

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THE UNSETTLING EFFECT OF MAINE
LAW ON SETTLEMENT IN CASES
INVOLVING MULTIPLE TORTFEASORS

Arlyn H. Weeks

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THE UNSETTLING EFFECT OF MAINE LAW ON SETTLEMENT IN CASES INVOLVING MULTIPLE TORTFEASORS

Arlyn H. Weeks*

INTRODUCTION

When more than one person or entity causes injury to another, the multiple tortfeasors are jointly and severally liable to the injured party under Maine law.¹ Maine has also provided since 1965 for comparison of the negligence of plaintiffs and defendants² so that a plaintiff may not recover if his causative negligence is found to have equaled or exceeded that of the defendant.³ In addition, title 14, section 156 of the Maine Revised Statutes gives to each defendant the right to request that the jury allocate percentages of fault "contributed by each defendant."⁴ Finally, title 14, section 163 of the Maine Revised Statutes has provided, since 1969, that the amount paid in settlement before conclusion of trial by "one or more persons causing the injury" shall be deducted from the jury's damage award.⁵ Two dissenting members of the Maine Supreme Judicial Court, sitting as the Law Court, referred to this provision as a statutory embodiment of the "one recovery rule" in *Thurston v. 3K Kamper Ko., Inc.*⁶

* Solo Practitioner; A.B., 1971, Vassar College; M.P.A., 1973, University of Massachusetts; J.D., 1981, University of Maine School of Law.

1. ME. REV. STAT. ANN. tit. 14, § 156 (West 1980 & Supp. 1994-1995).

2. *Id.*

3. Neither statute nor case law in Maine has yet determined whether the causative negligence of the plaintiff, if any, in cases with more than one defendant, is to be compared to the causative negligence of each defendant individually or with the total negligence of all defendants found to be negligent. For a discussion of the issues raised by each possibility, see Karen P. O'Sullivan, Comment, *Comparative Negligence: The Multiple Defendant Dilemma*, 36 ME. L. REV. 345 (1984).

4. Title 14, § 156. The statute does not mention parties that are no longer, or never were, defendants. See *infra* text accompanying notes 158-65.

5. Title 14, § 163. The additional provision of section 163 barring evidence of settlements or releases from admission at trial against nonsettling defendants is not at issue in this Article.

6. 482 A.2d 837, 843 (Me. 1984) (Roberts, J., dissenting). The "one recovery" or "one satisfaction" rule provides that an injured plaintiff may not recover more than the value of his injuries, as determined by a court or jury. *E.g.*, *Eberle v. Brenner*, 505 N.E.2d 691, 693 (Ill. 1987). The rule appears as early as *Welby v. Drake*, 171 Eng. Rep. 1315 (1825). The *Thurston* dissenters cite no authority for their assertion that this rule is "well established" in Maine law. It is inconsistent with the collateral source rule, recently set forth by the Law Court as follows: "We have previously held that under the collateral source rule, a plaintiff who has been compensated in whole or in part for his damages by a source independent of the tortfeasor is nevertheless entitled to a full recovery against the tortfeasor." *Potvin v. Seven Elms, Inc.*,

In 1982, a Comment published in the *Maine Law Review* pointed out potential conflicts between sections 156 and 163 of title 14 of the Maine Revised Statutes and proposed statutory reform.⁷ No such reform has been forthcoming, and with its decision in *Hewitt v. Bahmueller*⁸ the Law Court has exacerbated the problem. The policy favoring settlement has received strong support in Maine common law.⁹ The considerations supporting this policy are apparently so basic that the Law Court has not felt the need to express them. The considerations include bringing an end to litigation, with a saving of time and expense for the parties and the courts; avoiding uncertainty; fostering peaceful relationships between parties; and improving judicial administration.¹⁰ Indeed, the Law Court has recently implemented a trial program of mandatory alternative dispute resolution for civil actions in four Maine counties to encourage resolution of disputes short of trial.¹¹

However, Maine law as it now stands discourages settlement and places undue power in the hands of tort defendants who refuse to settle. This situation arises primarily from the Law Court's interpretation of the statutory language. The Law Court has allowed a nonsettling defendant to choose which settling defendants, if any, will be presented to the jury for allocation of fault at trial. The nonsettling defendant has been guaranteed a credit against the jury verdict for the amount paid by any settling defendant whom he chooses not to present to the jury. The Law Court has required plaintiffs to accept a settlement payment lower than a subsequent jury award against the settling defendant but has refused to balance the burden by allowing the plaintiff to retain the benefit of a settlement that is higher than a subsequent jury award. In addition, nonsettling defendants in these circumstances are allowed to pay less than their allocated share of liability. The Law Court also allows a nonsettling defendant to seek contribution from a settling defendant. All of these factors encourage a defendant not to settle.

In addition, the statutes conflict in allowing both proportional allocation of fault and dollar-for-dollar verdict reduction for settle-

628 A.2d 115, 116 (Me. 1993). The premise underlying this rule is that "either the injured party or the tortfeasor will receive a windfall if part of a loss is paid by an independent source, and, as between the injured party and the tortfeasor, the injured party should reap the benefit of the windfall." *Id.* See *infra* part III.D.

7. Barry A. Bachrach, Comment, *Damage Apportionment in Maine: A Proposal for Reform*, 34 ME. L. REV. 367 (1982).

8. 584 A.2d 664 (Me. 1991).

9. *E.g.*, *Dodge v. United Servs. Auto. Ass'n*, 417 A.2d 969 (Me. 1980); *Norton v. Benjamin*, 220 A.2d 248 (Me. 1966); *Wiggin v. Sanborn*, 161 Me. 175, 210 A.2d 38 (1965); *Benner v. Lunt*, 126 Me. 167, 136 A. 814 (1927).

10. See generally Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992).

11. Administrative Order to Establish Alternative Dispute Resolution Pilot Project, Docket No. SJC-319 (Me. May 25, 1995).

ment payments, a situation which also creates confusion and undue complexity for the trial court. Neither result could have been intended by the Maine Legislatures that enacted sections 156 and 163, nor is it likely that these results were intended by the Law Court. Revision of case law, the statutes, or both, is necessary.

II. HISTORY AND BACKGROUND

A. *Basic Concepts*

Historically, Maine law provided that two or more individuals whose negligence caused a single injury were jointly liable to the victim for all of the damages caused.¹² Juries were not allowed to apportion damage awards among defendants; "degrees of guilt"¹³ were not recognized. Another historical rule of common law followed in Maine was that release of one tortfeasor by the injured party barred an action to recover from any other tortfeasor for that injury.¹⁴

Maine law also initially recognized a rule of absolute contributory negligence; when an injured party was found to have contributed in any causative way to his own injury, he was barred from recovering damages from others who also contributed to the injury.¹⁵ This harsh rule was modified by the Legislature in 1965, when it adopted a standard of comparative negligence.¹⁶ Until the effective date of title 14, section 156 of the Maine Revised Statutes, Maine law required a tort plaintiff to prove that she was not causally negligent.¹⁷

12. *Currier v. Swan*, 63 Me. 323 (1873); *Atherton v. Crandlemire*, 140 Me. 28, 33 A.2d 303 (1943).

13. *Currier v. Swan*, 63 Me. at 326.

14. *Gilpatrick v. Hunter*, 24 Me. 18 (1844).

15. *Herson v. Charlton*, 151 Me. 161, 116 A.2d 632 (1955); *Crocker v. Coombs*, 328 A.2d 389 (Me. 1974).

16. P.L. 1965, ch. 424, § 156.

Comparative negligence.

Where any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Where damages are recoverable by any person by virtue of this section subject to such reduction as is mentioned, the jury shall find and record the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.

If such claimant is found by the jury to be equally at fault, the claimant shall not recover.

Id.

17. *Scammon v. City of Saco*, 247 A.2d 108, 110 (Me. 1968).

Section 156 provides that a claimant found to be "equally at fault" may not recover for her injury; that is, allocation of 50% or more of the total fault to a plaintiff bars recovery.¹⁸ The Law Court has not yet determined whether the negligence of a plaintiff is to be compared with the negligence of each tortfeasor in a multi-defendant case, so that a plaintiff may recover only against those defendants whose negligence is greater than a plaintiff's negligence, or to the sum of the negligence of all negligent defendants, so that a plaintiff may recover so long as his fault is not 50% or greater for his injuries as a whole.¹⁹ The burden is on the defendants to show that apportionment of fault is feasible.²⁰

In 1969, joint and several liability, which already existed at common law,²¹ was added to section 156, as well as a right for any defendant to seek allocation of fault from the jury.²² In practice, defendants have apparently also been allowed to request this alloca-

18. This is a "modified" comparative negligence system. In a "pure" comparative negligence system, the percentage of fault allocated to the plaintiff, however large it might be in comparison to the defendant's percentage of fault, is simply applied to the total amount of damages awarded, and a corresponding reduction is made before judgment is entered. Under the "pure" system, a plaintiff allocated 90% of the fault for her injury recovers 10% of the damages award from the defendant found 10% at fault. *E.g.*, *Shelby v. Action Scaffolding, Inc.*, 827 P.2d 462 (Ariz. 1992); *Burton v. Barnett*, 615 So. 2d 580 (Miss. 1993).

19. *Otis Elevator Co. v. F.W. Cunningham & Sons*, 454 A.2d 335, 336 n.3 (Me. 1983) (issue specifically reserved). See O'Sullivan, *supra* note 3, at 345, for a full discussion of this issue. The author recommends the second alternative.

20. *Paine v. Spottiswoode*, 612 A.2d 235, 240 (Me. 1992).

21. *Cleveland v. City of Bangor*, 87 Me. 259, 32 A. 892 (1895).

22. P.L. 1969, ch. 399, §§ 1, 2. The enacting legislation provides:

Sec. 1. R. S., T. 14, § 156, amended. The 2nd paragraph of section 156 of Title 14 of the Revised Statutes, as enacted by chapter 424 of the public laws of 1965, is repealed and the following enacted in place thereof:

Where damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages which would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

The trial judge shall read the foregoing 2 paragraphs to the jury in their entirety.

Sec. 2. R. S., T. 14, § 156, amended. Section 156 of Title 14 of the Revised Statutes, as enacted by chapter 424 of the public laws of 1965, is amended by adding at the end the following new paragraph:

In a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant shall have the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant.

tion from the court in a jury-waived trial.²³ When liability is joint and several, the plaintiff may recover all of her damages from any of the tortfeasors. This policy favoring full recovery by the plaintiff is mitigated by the availability of contribution. A tortfeasor who has paid all of the claimant's damages may seek contribution from other tortfeasors.²⁴

Section 156 currently provides in full:

Where any person suffers death or damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that death or damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the jury thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Where damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages which would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant's share in the responsibility for the damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

Fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defense of contributory negligence.

If such claimant is found by the jury to be equally at fault, the claimant shall not recover.

In a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant shall have the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant.²⁵

23. Evidence on this point is anecdotal; no such case has been reported by the Law Court. However, in *Tenney v. Taylor*, 392 A.2d 1092 (Me. 1978), the comparison of the plaintiff's negligence with that of the defendant was made by the trial judge, despite language in the first paragraph of section 156, similar to that governing allocation of fault among defendants, which appears to assign this comparison exclusively to the jury. By analogy, judges in jury-waived trials should be able to perform the allocation as well. *But see Lyman v. Bourque*, 374 A.2d 588, 590 (Me. 1977) ("[I]t is the sole prerogative of the jury to determine the comparative degrees of fault of each of the parties to a negligence action.").

24. *Hobbs v. Hurley*, 117 Me. 449, 104 A. 815 (1918).

25. Title 14, § 156. The first sentence of the last paragraph of section 156 appears to create joint and several liability whenever there is more than one defendant re-

One conflict inherent in section 156 is obvious on its face. The provision for percentage allocation of fault by the jury at the request of a defendant is inconsistent with the provision for jury reduction of the damages award "by dollars and cents, and not by percentage" to reflect a claimant's negligence, at least in those cases where a jury finds some causative negligence by the plaintiff and two or more defendants. The allocation provision is limited to "the percentage of fault contributed by *each defendant*."²⁶ While the comparative negligence language of section 156 seems to compel some percentage allocation of fault to the plaintiff, the damage reduction language forbids it.

In 1969, the Maine Legislature enacted title 14, section 163 of the Maine Revised Statutes, allowing a claimant who has settled with or released one or more tortfeasors to continue to seek damages for the same injury from other tortfeasors.²⁷ This statute also provides that the amount of any verdict against nonsettling tortfeasors shall be reduced by the amount paid by any settling tortfeasors. Section 163 currently provides in full:

Whenever a person seeks recovery for a personal injury or property damage caused by 2 or more persons, the settlement with or release of one or more of the persons causing the injury shall not be a bar to a subsequent action against the other person or persons also causing the injury.

Evidence of settlement with a release of one or more persons causing the injury shall not be admissible at a subsequent trial against the other person or persons also causing the injury. After the jury has returned its verdict, the trial judge shall inquire of the attorneys for the parties whether such a settlement or release has occurred. If such settlement or release has occurred, the trial judge shall reduce the verdict by an amount equal to the settlement with or the consideration for the release of the other persons.²⁸

Contribution among joint tortfeasors has been recognized as an equitable right in Maine common law since 1918.²⁹ Contribution at common law was based on equal shares; if there were three defendants found liable to a plaintiff in tort, for example, each was liable to the others for contribution so that no one defendant paid more than one-third of the plaintiff's total damages.³⁰ This type of contribu-

ardless of circumstances. The problems created by this construction are beyond the scope of this Article. See DONALD N. ZILMAN ET AL., MAINE TORT LAW § 16.01, at 16-4 n.12 (1995).

26. Title 14, § 156 (emphasis added).

27. P.L. 1969, ch. 19. The language of this enactment is identical to the language of section 163; see *infra* text accompanying note 28.

28. Title 14, § 163.

29. *Hobbs v. Hurley*, 117 Me. 449, 104 A. 815 (1918).

30. See *Scammon v. City of Saco*, 247 A.2d 108, 112 (Me. 1968).

tion is sometimes classified as "pro rata."³¹ The equitable principle of contribution is limited; if one of the joint tortfeasors is an employer subject to the statutory program of workers' compensation, for example, contribution from that tortfeasor is unavailable.³²

In 1963, the Law Court rejected the doctrine of common liability,³³ which states that a joint tortfeasor has no right of contribution against another who cannot be sued by the victim due to some legal immunity, because the two tortfeasors do not have a common liability to the injured person.³⁴ In *Bedell v. Reagan*,³⁵ Maine common law was held to allow a third party action for contribution against the spouse of the plaintiff, whom the plaintiff could not sue due to the doctrine of spousal immunity.³⁶ "The equities clearly preponderate in favor of just contribution for the third party rather than of undeserved immunity for the joint tort-feasor husband."³⁷

Despite the long-standing common law policy favoring settlement, the Law Court has allowed nonsettling tortfeasors to seek contribution from a settling tortfeasor, an issue not addressed by Maine statutes.³⁸ Obviously, settlement is not encouraged if a settling tortfeasor may nonetheless be kept in a case for purposes of contribution to a nonsettling tortfeasor. This disincentive may be mitigated by the plaintiff's contractual assumption of any of the settling tortfeasor's liability for contribution, but the settlor must still remain in the case through trial, with all of the attendant expenses. A

31. There are three basic approaches to accounting for settlement by fewer than all joint tortfeasors. The "pro rata" or "per capita" method reduces the verdict by the ratio of the number of settling defendants to the total number of defendants. The "pro tanto" method reduces the verdict by the amount of the settlement. Under the "equitable" or "comparative causation" method, the verdict is reduced by the percentage of causation attributed to the settling defendants. Traditionally, under each of these approaches, "the nonsettling defendant(s)' right to contribution from the settling defendant(s) is extinguished and replaced by the verdict reduction." *Reager v. Anderson*, 371 S.E.2d 619, 631 n.9 (W. Va. 1988) (citing RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1977); UNIF. COMPARATIVE FAULT ACT § 6 cmt., 12 U.L.A. 47 (Supp. 1987)). The Maine system is a hybrid of the pro tanto and equitable methods, without extinguishment of the right of contribution.

32. Title 39-A, § 104 (West Supp. 1994-1995); *Roberts v. American Chain & Cable Co.*, 259 A.2d 43 (Me. 1969).

33. *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963).

34. See generally Andrea G. Nadel, Annotation, *Right of Tortfeasor to Contribution from Joint Tortfeasor Who is Spouse or Otherwise in Close Familial Relationship to Injured Party*, 25 A.L.R. 4th 1120 (1983 & Supp. 1995); R.D. Hursch, Annotation, *Contribution Between Negligent Tortfeasors at Common Law*, 60 A.L.R. 2d 1384-88 (1958 & Supp. 1994). A thorough analysis of the policy underlying the doctrine is presented in Michael T. Hertz, *The Tort Triangle: Contribution from Defendants Whom Plaintiffs Cannot Sue*, 32 ME. L. REV. 83 (1980).

35. 159 Me. 292, 192 A.2d 24 (1963).

36. This immunity was abrogated in *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980).

37. *Bedell v. Reagan*, 159 Me. at 300, 192 A.2d at 28.

38. *Lavoie v. Celotex Corp.*, 505 A.2d 481 (Me. 1986).

plaintiff may also assume responsibility for those costs, but will most likely seek a higher settlement to compensate. That higher settlement is then fully deductible from any damage award by virtue of section 163. There is little advantage to a plaintiff in settling under these circumstances.³⁹

There is also an incentive to nonsettling defendants under these circumstances. They are encouraged to let the settling defendant out before trial, in order to be sure to obtain the reduction of any verdict by the amount of the settlement, and then to sue the settling defendant in a subsequent contribution action if the jury verdict warrants. Of course, any such action will require a new allocation of fault by a new jury, with a second trial of the facts.

The best-known attempt to deal with the problem of the continuing availability of contribution as a disincentive to settlement is found in *Pierringer v. Hoger*.⁴⁰ In that case, Wisconsin adopted a system which provides that a properly executed release between a plaintiff and one defendant releases that defendant's percentage of fault and allows the court to dismiss any claims for contribution against that defendant by other defendants. In such a release, the plaintiff agrees to satisfy any claims for contribution against that defendant from other defendants. Since contribution is allowed only for a tortfeasor's payment to a plaintiff in excess of his own degree of fault, the practical effect of such a system is that each nonsettling defendant will pay no more than his proportionate share of the damages. In Wisconsin, this result is reached by allocation at trial of each tortfeasor's share of liability even though the settling tortfeasors are not parties to the action.⁴¹

39. A release of "all causes of action" includes a release of the right of contribution under Maine law. *Butters v. Kane*, 347 A.2d 602 (Me. 1975); *Norton v. Benjamin*, 220 A.2d 248 (Me. 1966). These cases, however, did not deal with an asserted right of contribution by a settling tortfeasor against a tortfeasor not a party to the release and settlement.

40. 124 N.W.2d 106 (Wis. 1963).

41. *Id.* at 112. See generally George F. Burns, *In Praise of Pierringer: The Legislature Should Codify Pierringer Settlements*, 11 ME. B.J. 42 (1996). Another type of release relevant to this discussion is known as a "Mary Carter" agreement, after *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967), the case in which it first appeared. A Mary Carter agreement has four essential features: (1) the agreeing defendant remains in the action as a defendant; (2) the agreeing defendant guarantees the plaintiff a certain monetary recovery regardless of the outcome of the action; (3) the agreeing defendant's liability decreases in direct proportion to the increase in other defendants' liability; and (4) the agreement is kept secret from the jury. *Id.* at 10. Florida has subsequently rejected Mary Carter agreements, as have other jurisdictions that have addressed the issue. *Dosdourian v. Carsten*, 624 So. 2d 241 (Fla. 1993). See also *Cox v. Kelsey-Hayes Co.*, 594 P.2d 354 (Okla. 1978); *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992). Maine law has not addressed this question.

B. *Maine Case Law Before Hewitt v. Bahmueller*

After the enactment of sections 156 and 163, the first reported case involving claims for contribution is *Packard v. Whitten*.⁴² In that case, the precipitating automobile accident predated the enactment of section 163 and the final paragraph of section 156, which provides for joint and several liability and allocation of fault among defendants.⁴³ The Law Court nonetheless relied upon the 1969 addition of the final paragraph of section 156. In *Packard*, there were three defendants, and the trial court sought an advisory allocation of fault from the jury. All three defendants cross-claimed for contribution. The jury allocated 75% of the fault to one defendant and 25% to another. The Law Court held that "any contribution by joint tortfeasors shall be in proportion to the contributions of each one to the damages suffered by the Plaintiff."⁴⁴ *Packard* has been cited most frequently for the following language: "We see no reason why in logic or in justice the law should expect that the joint tort-feasor should ultimately be required to contribute more—or less—than a share of the total damages proportionate to his causal fault."⁴⁵ Per capita contribution by joint tortfeasors, which had been a feature of Maine law since 1918, was replaced by proportional contribution, which is the logical result of the final sentence of section 156.

In 1979, the Law Court reiterated the general rule, also in effect since 1918,⁴⁶ that contribution is not available to a joint tortfeasor in cases of intentional tort and "is permitted only where liability is imposed for conduct that is not morally blameworthy."⁴⁷ The next relevant reported case is *Dongo v. Banks*,⁴⁸ a products liability action in which the manufacturer remained as a defendant at trial after the other defendants had settled. Cross-claims were filed among the defendants. The jury reduced its award of damages by \$27,000 (16.7%) for the plaintiffs' negligence and assigned 60% of fault to the settling defendants and 40% to the manufacturer "as between" the defendants.⁴⁹ The trial court entered judgment against all defendants in the amount of the reduced verdict minus the settlement amount and on the contribution claims for 60% and 40% of the judgment.⁵⁰ The Law Court held that the percentage allocation

42. 274 A.2d 169 (Me. 1971).

43. The statutory language was enacted in 1969. See *supra* text accompanying notes 25, 28. The accident occurred on August 3, 1967. *Packard v. Whitten*, 274 A.2d at 171.

44. *Id.* at 181.

45. *Id.* at 180.

46. *Hobbs v. Hurley*, 117 Me. 449, 104 A. 815 (1918).

47. *Bedard v. Greene*, 409 A.2d 676, 677 (Me. 1979) (citing *Hobbs v. Hurley*, 117 Me. at 449, 104 A. at 815).

48. 448 A.2d 885 (Me. 1982).

49. *Id.* at 888.

50. *Id.* at 894.

should be applied to the judgment before any reduction for the settlement, because the manufacturer would otherwise receive "the benefit of a settlement that it did not pay."⁵¹ Since the amount of the settlement was less than the settling defendants' liability for 60% of the damages, and the plaintiffs had agreed to indemnify the settling defendants for any further payment they might be compelled to make arising out of the tort, the plaintiffs lost the difference between 60% of the judgment and the amount of the settlement. This "bad bargain" cost the plaintiffs \$66,000;⁵² under the trial court's approach, the plaintiffs would have lost an additional \$6,000.⁵³ The Law Court refused to interpret section 163 to bestow such a windfall on the nonsettling defendant.⁵⁴

In 1983, the Law Court concluded that cross-claims among joint tortfeasors are not compulsory; claims for contribution may be raised separately, after liability has been established.⁵⁵ The court also observed that it is more unfair to require a tortfeasor to pay more than his proportionate share of the damages than to require a tortfeasor not directly liable to contribute his proportionate share of the damages.⁵⁶ The Law Court addressed another claim for contribution between joint tortfeasors in *Emery Waterhouse Co. v. Lea*.⁵⁷ All three defendants cross-claimed for contribution. The jury awarded damages against two defendants, allocating no fault to the plaintiff, 25% to the first defendant and 75% to the second defendant.⁵⁸ The first defendant claimed a release in the amount paid to the plaintiff by the plaintiff's own insurer, under the terms of its lease agreement with the plaintiff. This claim was upheld, and the second defendant claimed on appeal that it was entitled to an equal discharge of liability.⁵⁹

The Law Court disagreed. It held that the two defendants were liable to each other in contribution for their allocated percentages of the entire amount of the judgment, rather than of the remainder of the judgment after subtraction of the insurance payment. It also held that the second defendant "was in no way involved in that release arrangement and should not benefit from it in any way. Fair-

51. *Id.*

52. *Id.* at 892 n.5.

53. *Id.* at 894 n.9.

54. This result is consistent with the majority of jurisdictions that have decided this issue. See Jeffrey F. Ghent, Annotation, *Comparative Fault: Calculation of Net Recovery by Applying Percentage of Plaintiff's Fault Before or After Subtracting Amount of Settlement by Less Than All Joint Tortfeasors*, 71 A.L.R. 4th 1108 (1989 & Supp. 1995); see also *Rittenhouse v. Erhart*, 380 N.W.2d 440 (Mich. 1985) (statutory provision for reduction of verdict identical to § 163).

55. *Otis Elevator Co. v. F.W. Cunningham & Sons*, 454 A.2d 335, 340 (Me. 1983).

56. *Id.*

57. 467 A.2d 986 (Me. 1983).

58. *Id.* at 989.

59. *Id.* at 995.

ness, however, dictates that he should also be kept immune from any adverse effect as a result of that contract."⁶⁰ The Law Court amended the trial court's judgment to provide such immunity.⁶¹

The next major step took place in 1981. In *Thurston v. 3K Kamper Ko., Inc.*,⁶² the Law Court was presented with a situation in which the plaintiffs had settled and executed Pierringer releases with four of five defendants before trial. The trial court granted the released defendants' motions for summary judgment on all cross-claims for contribution against them, including those raised by the remaining nonsettling defendant. The order granting summary judgment, drafted by counsel for the nonsettling defendant, provided that the jury would be asked to allocate fault among all five defendants. The jury found no negligence on the part of the plaintiffs and allocated 100% of liability to the nonsettling defendant. The trial court refused to deduct the total value of the settlements from the verdict before entering judgment for the plaintiffs. The Law Court agreed, holding that "the language of section 163 contemplates that a verdict not be reduced by the amount of settlements with parties who the verdict declares are without causative fault," and noting that "had the jury apportioned fault in such a way that [the nonsettling defendant] were any less than 100% liable, section 163 would have mandated a reduction in the jury award."⁶³

The Law Court revisited this field briefly in 1985, holding that there is no offset under section 163 for a settlement with one joint tortfeasor against a subsequent settlement with another; the statute only applies after adjudication.⁶⁴ The United States District Court for the District of Maine, however, took significant action in this field in 1985. In *Stacey v. Bangor Punta Corp.*,⁶⁵ Judge Carter, a former member of the Law Court, reviewed Maine case law and sections 156 and 163. In that case, the plaintiff had settled a state court action against the third party defendant in its federal court products liability action. The third party defendant sought summary judgment on the claim for contribution on the basis of his Pierringer release with the plaintiff. Judge Carter interpreted the opinion in *Thurston* as follows:

The holding in part three of *Thurston* . . . is that participation by a defendant in submitting a case to the jury so as to seek a precise adjudication of the respective levels of causal fault attributable to parties who are alleged to be joint tortfeasors waives any entitlement to have the amount of the verdict reduced, under the final sentence of 14 M.R.S.A. § 163, by the

60. *Id.* at 996.

61. *Id.* at 998.

62. 482 A.2d 837 (Me. 1984).

63. *Id.* at 842.

64. *Fuller v. State*, 490 A.2d 1200, 1203 (Me. 1985).

65. 108 F.R.D. 72 (D. Me. 1985).

amount of settlement between the plaintiff and party defendants.⁶⁶

Judge Carter noted that both section 156 and section 163 appeared to apply to the situation before him.

On this legal matrix the nonsettling joint tortfeasor against whom a verdict is entered possesses two distinct statutorily-based adjudicative options in respect to his contribution right: (1) the right to have the court precisely adjudicate the respective levels of the causative fault of all joint tortfeasors causing the plaintiff's entire damage under 14 M.R.S.A. § 156; or (2) the right to have any verdict rendered against him reduced by the amount of the plaintiff's settlement with other joint tortfeasors under 14 M.R.S.A. § 163. Each right is granted by a freestanding statutory enactment.⁶⁷

Thus, when a nonsettling defendant exercises his statutory option to seek an allocation of fault among all defendants,

to the extent that the verdict establishes the percentage of a nonsettling defendant's causative fault at a level which, when applied to the total verdict against the nonsettling defendant, yields a lesser amount in reduction of the verdict than the amount of the proceeds of that joint tortfeasor's settlement with the plaintiff, the nonsettling defendant must take the lesser of the two amounts, he having sought under section 156 a precise adjudication *by verdict* of the value of his right of contribution against that joint tortfeasor.⁶⁸

Judge Carter also held that a nonsettling defendant cannot be deprived of the prerogative of electing one of these two courses of action without his consent.⁶⁹

The Law Court lost little time in agreeing with Judge Carter on one point. In *Lavoie v. Celotex Corp.*,⁷⁰ it held that a nonsettling defendant must agree in order for its cross-claim against a settling defendant to be dismissed, thereby rejecting one of the key elements of a Pierringer release. However, the Law Court also noted in dicta that it declined to adopt Judge Carter's analysis in *Stacey* of the interaction of sections 156 and 163.⁷¹

In *Clockedile v. Town of Yarmouth*,⁷² the next opportunity for the Law Court to address the effect of settlement by a joint tortfeasor, there were no cross-claims for contribution. The plaintiffs executed a Pierringer release with one defendant in exchange for a payment of \$100,000. Over the objection of the defendant town, the trial

66. *Id.* at 74.

67. *Id.* at 75.

68. *Id.* at 76.

69. *Id.*

70. 505 A.2d 481 (Me. 1986).

71. *Id.* at 483 n.2.

72. 520 A.2d 1075 (Me. 1987).

court granted the joint motion of the plaintiffs and the released defendant for summary judgment in the released defendant's favor. The jury verdict allocated fault at 70% to a defaulted defendant, 20% to the town, and 10% to the settling defendant on a damage award of \$300,000. The trial court entered judgment against the defaulted defendant in the amount of \$140,000 and against the town in the amount of \$60,000.⁷³ The plaintiffs appealed, seeking the full \$200,000 from the town under section 156 (joint and several liability). The Law Court upheld the allocation to the town of 20% of the unreduced verdict. It also held that the summary judgment had eliminated joint liability between the nonsettling defendants by enforcing the agreement between the plaintiffs and the settling defendant to discharge the settling defendant's portion of the cause of action attributable to its fault.⁷⁴ The court also suggested that a plaintiff, as well as a nonsettling defendant, may have a right to consent to fault allocation.⁷⁵

The final effort in this field before *Hewitt v. Bahmueller*⁷⁶ was that of the United States Court of Appeals for the First Circuit, which discussed Maine law in *Austin v. Raymark Industries*.⁷⁷ There, the plaintiff had settled with twelve of sixteen defendants before trial. During trial, the plaintiff settled with an additional defendant, and one defendant entered bankruptcy proceedings. The jury apportioned liability to four defendants: 9% and 22% to each of two settling defendants, 9% to the nonsettling defendant, and 60% to the bankrupt defendant. The trial court deducted the total of payments by all settling defendants from the jury's award of damages, leaving the plaintiff with a judgment of \$0.00.⁷⁸ The First Circuit held that the language of the settlement agreements, which expressly disavowed reliance on Maine law, required that the verdict be reduced by "an amount equivalent to the proportionate liability only of those defendants found at trial to be causally responsible"⁷⁹ The First Circuit thus reduced the verdict by the percentage allocated to the settling defendants found liable, reallocated the share of the bankrupt defendant proportionately among the other three lia-

73. *Id.* at 1077.

74. *Id.* at 1078. Thus, the full benefit of the "overpayment" by the settling defendant went to the defaulting defendant. See ZILLMAN ET AL., *supra* note 25, § 16.13, at 16-50 n.233. This result is inconsistent with *Dongo v. Banks*, 448 A.2d 885 (Me. 1982) (benefit of settlement goes to settling defendant over nonsettling defendant), and *Thurston v. 3K Kamper Ko., Inc.*, 482 A.2d 837 (Me. 1984) (benefit of settlement goes to plaintiff as against defendant 100% at fault). ZILLMAN ET AL., *supra* note 25, § 16.13, at 16-51 n.237.

75. *Clockedile v. Town of Yarmouth*, 520 A.2d at 1078.

76. 584 A.2d 664 (Me. 1991).

77. 841 F.2d 1184 (1st Cir. 1988).

78. *Id.* at 1186-87. The plaintiff actually was left with a negative verdict of \$102,722.38, which the court adjusted to \$0.00. *Id.* at 1187.

79. *Id.* at 1187-88.

ble defendants, and ordered the nonsettling defendant to pay 22.5% of the verdict.⁸⁰ The plaintiff thus received a total payment approximately \$30,000 in excess of the jury's damage award.

In summary, Maine case law in 1990 on this issue, while hardly a model of clarity and precision, provided that: contribution among joint tortfeasors must be in proportion to the contribution of each to the plaintiff's damages, although the preferred or required means of proportional allocation was not established; percentage allocation of fault among joint tortfeasors is to be applied to the judgment before any reduction for settlement under section 163; claims for contribution need not be brought as cross-claims in the initial tort proceeding; tortfeasors not party to a release between the plaintiff and another tortfeasor may not suffer any adverse effects nor reap any benefits from that release; no reduction is to be made under section 163 for settlement with a defendant subsequently found to be without liability to the plaintiff; a nonsettling defendant's cross-claim against a settling defendant may not be dismissed without the former's consent; and entry of summary judgment against a settling tortfeasor eliminates joint liability. There are conflicts inherent in some of these holdings when applied in a single case, as discussed below. However, the Law Court's next step exacerbated the conflict.

C. *Hewitt v. Bahmueller and Subsequent Case Law*

In 1991, the Law Court set forth its view on the interaction of sections 156 and 163 when one or more tortfeasors settle before completion of trial. In *Hewitt v. Bahmueller*,⁸¹ the plaintiff, a minor, was injured in the explosion of propane gas in a camper designed to be mounted on a pickup truck.⁸² She sued five defendants for negligence and included products liability claims against the manufacturer defendant. The manufacturer and the owner of the camper settled before trial. Two of the nonsettling defendants, who were the owners of the home where the accident occurred, were supervising the plaintiff and the plaintiff's friend, the remaining nonsettling defendant.⁸³ The nonsettling defendants were represented by a single attorney and, on the first day of trial, chose to dismiss their cross-claim against the manufacturer, which settled prior to trial with the victim for \$97,000.⁸⁴ The nonsettling defendants chose to have the jury allocate fault among themselves and the settling owner of the camper. The jury verdict, awarding damages of \$180,000, al-

80. *Id.* at 1196.

81. 584 A.2d 664 (Me. 1991).

82. Brief for Plaintiff-Appellant at 1, *Hewitt v. Bahmueller*, 584 A.2d 664 (Me. 1991) (No. SAG-90-86).

83. *Id.*

84. *Id.* at 3.

located 60% of the fault to the settling defendant, who had settled prior to trial for \$193,000; 25% to the third defendant; 15% to the fourth defendant; and 0% to the fifth defendant. Because the value of the settlements exceeded the \$180,000 verdict, the trial court entered judgment for the plaintiff against the third and fourth defendants for \$0.00. The Law Court held that both settlements should be deducted from the jury award.⁸⁵

Because [the manufacturer] was not before the jury for allocation of fault (the cross-claims of the nonsettling defendants against it had been dismissed) and [the other settling defendant] was apportioned 60% of fault by the jury, the verdict did not declare either of the nonsettling [sic] defendants to be without causative fault. By the terms of section 163, the court was required to reduce the verdict against the nonsettling defendants by the amount of the settlements with [the settling defendants].⁸⁶

The Law Court also specifically rejected the federal district court's analysis in *Stacey* of sections 156 and 163 as providing options to a nonsettling defendant.

Because we discern no statutory intent in sections 156 and 163 that the decision of the nonsettling defendants to have the jury determine the fault of [one settling defendant] pursuant to section 156 prevents the subsequent application of section 163 to reduce the verdict by the full amount of the settlement, we decline to do so.⁸⁷

Finally, the Law Court stated that the offset provided by section 163 is available whenever recovery is sought for a single injury, regardless of the different causes of action that might have been brought against different tortfeasors causing the injury.⁸⁸

Since *Hewitt*, the Law Court has made minor refinements to its interpretation of sections 156 and 163. In *Mockus v. Melanson*,⁸⁹ the Law Court upheld a trial court's reduction of a damage award by the amount of a settlement. Even though settlement was requested, after judgment had been entered, the court noted in dicta that the trial court could have ordered set-off without a request from either party. "Set-off is required by law pursuant to 14 M.R.S.A. § 163 (1980), not merely available on request."⁹⁰ Essentially the same result was reached in *Foley v. Adam*,⁹¹ where the

85. *Hewitt v. Bahmueller*, 584 A.2d at 665-66.

86. *Id.* at 666 (footnote omitted).

87. *Id.* at 666 n.4.

88. *Id.* at 666-67. See *infra* notes 172-73 for a discussion of the problems raised by the holding when statutory damage caps are applicable to claims against fewer than all tortfeasors liable for a single injury.

89. 615 A.2d 245 (Me. 1992).

90. *Id.* at 248 (citations omitted).

91. 638 A.2d 718 (Me. 1994).

Law Court held that a default judgment obtained against three defendants must be reduced as to the appealing defendant by the amount of the plaintiff's settlement with other defendants.⁹² Thus, section 163 applies even when there is no allocation of fault.

Most recently, in *Baker v. Jandreau*,⁹³ the Law Court overturned an award of damages by the trial court. The jury found that the plaintiffs were not negligent and the only defendant before the jury was 10% negligent.⁹⁴ The trial court entered judgment against the defendant for 10% of the total damage award. The Law Court remanded with instructions to enter judgment for the full award.⁹⁵ "[The defendant] was the only party found negligent by the jury. Although the jury verdict suggests that an unidentified person contributed to causing the accident, [the defendant] was at least partly at fault, and has joint and several liability for the full amount of plaintiffs' damages."⁹⁶

A recent case, tried to a jury in the United States District Court for the District of Maine, may add to common law in this field if the defendant found liable proceeds with his appeal as currently planned.⁹⁷ Judge Carter denied the motion of the nonsettling defendant to admit into evidence the agreement reached by the plaintiff and the settling defendant, or, in the alternative, to dismiss the settling defendant. The agreement was reached a week before trial and bound the plaintiff not to seek to collect on any judgment that might be entered against the settling defendant, in return for payment of a sum certain. The agreement states that it is not a release and that the parties expect the settling defendant to be dismissed with prejudice before the entry of judgment, if that dismissal will not jeopardize the case against the nonsettling defendant.⁹⁸ The agreement includes indemnification for contribution claims. After a trial in which both defendants participated, the jury found only the nonsettling defendant to be liable.

92. *Id.* at 720.

93. 642 A.2d 1354 (Me. 1994).

94. *Id.* at 1355. The Law Court considered the allocation of less than 100% of fault to the only defendants before the jury not to be obvious error, based on the failure of the plaintiff to object at trial to jury instructions and a verdict form that allegedly stated that the combined negligence of the parties could total less than 100%.

95. *Id.*

96. *Id.* (citing title 14, § 156).

97. *Hart v. Verrill & Dana*, No. 94-303-P-C (D. Me. filed Oct. 13, 1995). Counsel for the nonsettling defendant has stated his intent to file an appeal concerning, *inter alia*, the issue of admissibility of an agreement reached by the plaintiff and the settling defendant. Interview with Counsel for Nonsettling Defendant, in Portland, Me. (Dec. 7, 1995).

98. Settlement Agreement, *Hart v. Verrill & Dana*, No. 94-303-P-C (D. Me. filed Oct. 13, 1995).

D. *Effect of Settlement in Other Jurisdictions*

The Uniform Contribution Among Tortfeasors Act (UCATA) was first published in 1939. That version, currently in effect in eight states,⁹⁹ provides that a dollar-for-dollar reduction will be made in any claim against a nonsettling tortfeasor for a settlement with a tortfeasor and that any tortfeasor who has paid more than his equitable share of the obligation has a claim for contribution against all other tortfeasors. The 1955 revision of the UCATA, adopted by ten states,¹⁰⁰ provides that a settlement payment extinguishes all liability to the injured party and for contribution to any other tortfeasor.¹⁰¹ The 1955 version also includes a requirement of good faith in the settlement, to prevent collusion between the plaintiff and the settling tortfeasor. Maine law is closer to the 1939 version of the UCATA.

In Pennsylvania, a state operating under the 1939 UCATA, a plaintiff sued a single defendant alleging negligence.¹⁰² The defendant brought in a third party defendant on a claim of strict liability. The jury allocated 70% of liability to the first defendant and 30% to the strict liability defendant. The first defendant argued that allocation is only available where both tortfeasors are negligent. The appeals court held that the first defendant was correct under common law but that the UCATA requires contribution, and thus allocation.¹⁰³

99. The states are Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island, and South Dakota. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955), 12 U.L.A. 82 (Pamph. 1995). Section 4 of the 1939 Act is identical in substance to section 4(a) of the 1955 Act. *See infra* note 100.

100. The states are Arizona, Colorado, Florida, Massachusetts, Nevada, North Carolina, North Dakota, Ohio, South Carolina, and Tennessee. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955), 12 U.L.A. 82 (Pamph. 1995). Section 4 of the 1955 Act provides:

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.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955), 12 U.L.A. 98 (1975).

101. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(d) (1955), 12 U.L.A. 63 (1975).

102. *McMeekin v. Harry M. Stevens, Inc.*, 530 A.2d 462 (Pa. Super. 1987) (citing PA. STAT. ANN. tit. 42, §§ 8321-8327 (1982 & Supp. 1995)).

103. *Id.* at 469. In Maine, "fault" as defined in section 156 includes strict liability. *Austin v. Raybestors-Manhattan, Inc.*, 471 A.2d 280, 283 (Me. 1984) (construing title 14, §§ 156, 221 (West 1978)).

Pennsylvania has subsequently given weight to the language of settlement agreements and releases in determining whether a non-settling defendant must pay its proportionate share of the damages.¹⁰⁴ Pennsylvania also provides that there will be no deduction for settlement with a party not determined by the court or the language of a release to be a joint tortfeasor,¹⁰⁵ and that acquiescing in the absence of a settling tortfeasor from trial is a waiver of the benefits of that settlement.¹⁰⁶

The UCATA is based on pro rata contribution, which is "inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of the parties involved."¹⁰⁷ The Uniform Comparative Fault Act (UCFA) was published in 1977 by the National Conference of Commissioners on Uniform State Laws to address comparative fault statutory schemes, but only two states have adopted it. Under the UCFA, a settlement payment extinguishes the plaintiff's claims against the nonsettling tortfeasors by the amount of the settling party's equitable share of the total damages.¹⁰⁸ This alternative discourages settlement when the tortfeasor seeking settlement is judgment-proof or can only offer an amount below his likely equitable share of the total damages. The Iowa Supreme Court has held that no allocation of fault to non-parties is allowed under the Act.¹⁰⁹

104. *Moran v. G. & W.H. Corson, Inc.*, 586 A.2d 416, 421-22 (Pa. Super. 1991).

105. *Rocco v. Johns-Manville Corp.*, 754 F.2d 110, 115 (3d Cir. 1985) (citing *Davis v. Miller*, 123 A.2d 422, 424 (1956)).

106. *Id.*

107. UNIF. COMPARATIVE FAULT ACT (1977), 12 U.L.A. 44 (Pamph. 1995).

108. *Id.* § 6, at 58.

109. *Selchert v. State*, 420 N.W.2d 816, 819 (Iowa 1988) (interpreting IOWA CODE ANN. §§ 668.2, 668.3(2)(b) (West 1987)). Section 2 of the UCFA provides:

§ 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

Where there is joint and several liability, as well as a pro tanto set-off rule, settlement is discouraged.¹¹⁰ Nevertheless, some states have made an effort to resolve this inherent conflict. For example, Colorado operates under the 1955 version of the UCATA and is a comparative negligence state. The Colorado Supreme Court has held that joint and several liability applies only when all defendants are liable for all damages and that the invocation of the comparative negligence law results in independent liabilities for each defendant.¹¹¹ The court stated:

[A party] cannot escape its joint and several liability for the entire damages here by claiming that the liability may be properly apportioned between the plaintiff and itself, and at the same time claim that the independent portion of liability attributable to [it] remains a "joint and several liability" for purposes of contribution.¹¹²

Oklahoma, also a 1955 UCATA state, deals with the conflict in part by holding that its comparative negligence statute only applies if the plaintiff is found to be at fault.¹¹³ In Hawaii, a 1939 UCATA state, a settlement agreement establishes the settling defendant's status as a tortfeasor even if the jury finds her 0% negligent.¹¹⁴ Iowa, which has adopted the UCFA, does not allow defendants who are immune from liability to be included in the allocation or apportionment of fault.¹¹⁵ This avoids the "orphan share" problem.

States that have not adopted any of the uniform laws demonstrate a wide variety of means of dealing with settlement in the context of multiple tortfeasors. In general, methods of accounting for settle-

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.

UNIF. COMPARATIVE FAULT ACT § 2 (1977), 12 U.L.A. 50-51 (Pamph. 1995).

110. Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427 (1993). The authors provide an economic analysis of both versions of the UCATA and the UCFA.

111. *Kussman v. City and County of Denver*, 706 P.2d 776, 780 (Colo. 1985).

112. *Id.*

113. *Price v. Southwestern Bell Tel. Co.*, 812 P.2d 1355, 1359 (Okla. 1991).

114. *Velazquez v. National Presto Indus.*, 884 F.2d 492, 496-97 (9th Cir. 1989) (interpreting HAW. REV. STAT. § 663-12 (1985)). See also *St. Louis v. Beekles*, 566 A.2d 787 (Md. App. 1989).

115. *Pepper v. Star Equip., Ltd.*, 484 N.W.2d 156, 158 (Iowa 1992). The only other state that has adopted the UCFA is Washington. WASH. REV. CODE ANN. §§ 4.22.005-.925 (West 1988 & Supp. 1995).

ments that encourage obstinate defendants and discourage further settlements are not favored.¹¹⁶ At least one jurisdiction requires the nonsettling defendant to choose either a credit for the amount of another defendant's settlement or jury allocation of fault; the two alternatives are mutually exclusive.¹¹⁷ Another provides that liability is only several once damages have been apportioned.¹¹⁸ Some do not allow settling parties to be brought before the jury for fault allocation.¹¹⁹ Alaska statutes require allocation of fault among plaintiffs, settling defendants, and nonsettling defendants, and therefore do not provide for contribution.¹²⁰ In Illinois, a statute provides that a nonsettling defendant's liability will be reduced by the amount of any settlement.¹²¹ This statute was applied in a 1990 case to require a nonsettling defendant found 7% liable for a verdict of \$10 million to pay, as a jointly and severally liable defendant, over \$6.5 million after the defendant found 93% liable had settled for \$3.5 million.¹²² The nonsettling defendant had waived its right to contribution by failing to file a cross-claim.¹²³

While there is a notable lack of unity among the states in the choice of means to deal with settlements by fewer than all defendants in a tort case, most appear to have attempted to avoid giving the type of advantage to nonsettling defendants that is available in Maine.

E. *The Position of the Supreme Court*

Tort law remains, for the time being at least, the province of the states. However, in dealing with admiralty law and 28 U.S.C. § 1331,¹²⁴ the United States Supreme Court recently made some observations of value for the issue at hand. In *McDermott, Inc. v. AmClyde Ltd.*¹²⁵ the plaintiff sued five defendants. Three settled before trial for a total of \$1 million. The jury awarded damages of \$2.1

116. See, e.g., *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1251 (5th Cir. 1979) ("We refuse to adopt an approach which would reward a defendant for refusing to settle."); *Jensen v. ARA Servs.*, 736 S.W.2d 374, 378 (Mo. 1987) (en banc).

117. E.g., *Carroll v. Kilbourne*, 525 So. 2d 284, 287 (La. App. 1988).

118. See, e.g., *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 720 (Ky. Ct. App. 1979).

119. See, e.g., *Rittenhouse v. Erhart*, 380 N.W.2d 440, 446 (Mich. 1985); *Kuhnke v. Fisher*, 740 P.2d 625, 630 (Mont. 1987).

120. Laurence Keyes, *Alaska's Apportionment of Damages Statute: Problems for Litigants*, 9 ALASKA L. REV. 1, 4 (1992) (discussing ALASKA STAT. § 09.17.080(d) (1986) (amended 1989)) (footnote omitted).

121. ILL. REV. STAT. ch. 70, para. 302(c) (1987).

122. *Henry v. St. John's Hosp.*, 563 N.E.2d 410 (Ill. 1990).

123. *Id.*

124. Section 1331 provides in full: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1993).

125. 114 S. Ct. 1461 (1994).

million, allocating 32% of liability to Defendant Four, 38% to Defendant Five, and 30% to the plaintiff and the three settling defendants. Judgment was entered against Defendant Four for 32% of \$2.1 million and against Defendant Five for 38% of \$2.1 million.¹²⁶

On appeal, Defendants Four and Five argued for a *pro tanto* credit¹²⁷ for the settlement. The Supreme Court held that the "one satisfaction rule" does not require reduction of the plaintiff's recovery against the nonsettling defendants.¹²⁸ The court explained:

It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss. In fact, one of the virtues of the proportionate share rule is that, unlike the *pro tanto* rule, it does not make a litigating defendant's liability dependent on the amount of a settlement negotiated by others without regard to its interests.¹²⁹

Writing for a unanimous Court, Justice Stevens specifically addressed section 886A of the *Restatement (Second) of Torts*¹³⁰ and the two versions of the UCATA.¹³¹ He identified three paramount considerations: a proportionate fault approach mandated by applicable law, promotion of settlement, and judicial economy.¹³² He found the 1939 UCATA "clearly inferior . . . because it discourages settlement and leads to unnecessary ancillary litigation."¹³³ He found the 1955 UCATA "likely to lead to inequitable apportionments of liability . . ."¹³⁴

126. *Id.* at 1464.

127. See *supra* note 31 for a definition of this term and other types of settlement credit.

128. *McDermott, Inc. v. AmClyde Ltd.*, 114 S. Ct. at 1463.

129. *Id.* at 1471.

130. RESTATEMENT (SECOND) OF TORTS § 886A (1977). Section 886A reads in full:

Contribution Among Tortfeasors

(1) Except as stated in Subsections (2), (3) and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.

(3) There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.

(4) When one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other.

131. See *supra* part II.D.

132. *McDermott, Inc. v. AmClyde Ltd.*, 114 S. Ct. at 1466-67.

133. *Id.* at 1467.

134. *Id.* at 1468.

The rule encourages settlements by giving the defendant that settles first an opportunity to pay less than its fair share of the damages, thereby threatening the non-settling defendant with the prospect of paying more than its fair share of the loss. By disadvantaging the party that spurns settlement offers, the *pro tanto* rule puts pressure on all defendants to settle. While public policy wisely encourages settlements, such additional pressure to settle is unnecessary. The parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships is sufficient to ensure nontrial dispositions in the vast majority of cases. Under the proportionate share approach, such factors should ensure a similarly high settlement rate. The additional incentive to settlement provided by the *pro tanto* rule comes at too high a price in unfairness.¹³⁵

Noting that joint and several liability is compatible with a proportionate share approach to settlements, Justice Stevens pointed out that it can result in a defendant paying more than its apportioned share "when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency."¹³⁶ He concludes:

[T]he proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement. Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement, so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one.¹³⁷

Thus, *Hewitt* differs from *McDermott* in every important respect. It adopts an approach specifically rejected by the Supreme Court; it rejects the approach found by the Supreme Court to be fairest to all parties; and it allows a windfall to nonsettling defendants. While the Supreme Court's opinion in *McDermott* may not be binding on the Law Court, its analysis is certainly applicable.

III. PROBLEMS RAISED BY *HEWITT V. BAHMUELLER* AND THE STATUTES¹³⁸

The decision in *Hewitt* is inconsistent with several long-held tenets of Maine common law and statutory construction. It raises the pos-

135. *Id.* at 1468-69 (footnotes omitted).

136. *Id.* at 1471.

137. *Id.* at 1471-72 (citation omitted).

138. This discussion does not apply to situations in which one of the tortfeasors is a server of alcoholic beverages to another tortfeasor. Under Maine's Liquor

sibility that a nonsettling defendant will contribute less than his proportionate share of the total damages, contrary to the holding in *Packard*, and contrary to the spirit of section 156. It discourages settlement by plaintiffs in multi-defendant tort cases, and by any defendant after the first defendant settles. It fails to deal with situations in which all potentially liable parties have not been made defendants. It elevates the "one satisfaction" rule to an undue degree of importance, imposing by implication on the settling plaintiff the burden of a "bad bargain" settlement while refusing to allow the plaintiff the benefit of a "good bargain" settlement. It ignores the potential role of the language of the settlement agreement, which is, or should be, an enforceable contract.¹³⁹

In addition, there are problems inherent in the language of sections 156 and 163, both internally and as they have been applied by the Law Court. Finally, the absence of provisions for mandatory joinder of parties under the Maine Rules of Civil Procedure also contributes to the current difficulties. Each of these problems will be considered subsequently in this Article. While some of the problems discussed may not directly affect the willingness of parties to settle, each deserves consideration in the course of any attempt to make Maine law in this area more rational, predictable, and equitable.

A. *The Nonsettling Defendant's Share*

The homeowner defendants in *Hewitt*, to whom the jury allocated 40% of the liability for the plaintiff's damages, paid nothing because the value of the plaintiff's settlements exceeded the jury's damage award.¹⁴⁰ These defendants, and any nonsettling defendant under similar circumstances, benefit from a settlement to which they were

Liability Act, title 28-A, §§ 2501-2519 (West 1988 & Supp. 1994-1995), a victim who wishes to recover damages from a server may do so only by bringing a single action in which both the server and the minor or intoxicated tortfeasor are named as defendants. *Id.* § 2512(1). In addition, liability in such actions is several, not joint, and damages are capped, except for medical costs, at \$250,000 per occurrence regardless of the number of victims. *Id.* §§ 2509(1), 2512(2). Finally, in order to recover from the server, the victim may not settle with the minor or intoxicated defendant "until the litigation is concluded by trial or settlement." *Id.* § 2512(1); *Swan v. Sohio Oil Co.*, 618 A.2d 214 (Me. 1992). Thus, the plaintiff injured as a result of negligent service of alcohol to a minor or intoxicated tortfeasor not only is limited in the amount of damages that he or she may recover, but also must wait longer than other injured persons to recover those damages. The Liquor Liability Act requires allocation of liability and raises additional issues beyond the scope of this Article. Title 28-A, § 2512(2). Factual situations that may be subject to the Act are therefore not addressed herein.

139. See *Moscone v. Andrews*, 600 A.2d 107 (Me. 1991); *Phillips v. Fuller*, 541 A.2d 629 (Me. 1988).

140. *Hewitt v. Bahmueller*, 584 A.2d 664, 666 (Me. 1991).

not parties. This result is inconsistent with the rule of *Packard*¹⁴¹ and with the principle underlying the doctrine of contribution.

Contribution is an equitable device available to mitigate the potentially harsh results of joint and several liability and to limit the freedom of the injured plaintiff to choose to sue fewer than all joint tortfeasors. The concept of continuation is not entirely consistent with jury allocation of fault, which was designed to implement it.¹⁴² While the second settling defendant in *Hewitt*, to whom the jury allocated 60% of fault, may theoretically seek contribution from the nonsettling defendants for 40% of the amount of the verdict, thus recouping part of his "overpayment," as a practical matter a settling defendant almost always dismisses its cross-claims for contribution as part of the settlement process.¹⁴³ In addition, the manufacturer defendant in *Hewitt* may have no contribution claim against the nonsettling defendants for two reasons. First, the nonsettling defendants chose not to present the manufacturer to the jury for fault allocation.¹⁴⁴ Second, the manufacturer defendant agreed to dismissal of its cross-claims with prejudice as a term of the settlement agreement with the plaintiff.

In all cases in which the jury's damage award¹⁴⁵ is less than the value of pretrial settlements, *Hewitt* allows the nonsettling defendant to pay nothing despite a jury finding of liability. If both logic and justice require a tortfeasor to contribute no less "than a share of the total damages proportionate to his causal fault,"¹⁴⁶ *Hewitt* is inconsistent with logic and justice, as well as with *Packard*.

Of course, the settling defendant retains the ability to seek contribution from the nonsettling defendant who pays either nothing or

141. See *supra* text accompanying notes 42-45.

142. At least one state court has held explicitly that "[t]he equitable need for contribution vanishes when one tortfeasor has the statutory right to bring other tortfeasors into the action as defendants and have fault (and liability) proportionally determined." *Teepak, Inc. v. Learned*, 699 P.2d 35, 40 (Kan. 1985).

143. Under *Lavoie v. Celotex Corp.*, 505 A.2d 481 (Me. 1986), the wise settling defendant should reserve its cross-claims upon settling before trial, because the nonsettling defendant retains the option to keep the settling defendant in the case for jury allocation of fault. Of course, this is an additional disincentive to settlement, as the settling defendant may not thereby bring an end to his involvement in the litigation and its attendant costs.

144. An interpretation of section 156 which allows this result may be erroneous as a matter of statutory construction, in addition to the inequities caused by its application. The statute appears to make all defendants jointly and severally liable. Perhaps the *Hewitt* manufacturer should sue the nonsettling defendants for contribution and get yet another allocation of liability.

145. The language of section 156 seems to provide for allocation of fault exclusively by a jury. In practice, allocation has been performed by judges in jury-waived trials. Since the nonsettling defendant has the exclusive right to seek allocation under section 156, and also has a right to jury trial, ME. CONST. art. I, § 20, the ostensible limitation of section 156 to jury trials may have no practical effect.

146. *Packard v. Whitten*, 274 A.2d 169, 180 (Me. 1971).

less than his allocated share. Ideally, under existing Maine law, a separate contribution action would result in all tortfeasors paying only their respective shares of the damages established by a jury, with the plaintiff receiving the full damage amount, but no more. However, Maine law makes this outcome unlikely at best. When a settling defendant has paid less than his allocated share, the nonsettling defendant who requested the allocation does not make up the difference; the plaintiff does not receive the full amount of damages. When a settling defendant has not been presented to the jury for allocation, a situation encouraged by current Maine case law,¹⁴⁷ the contribution action will require a duplicative trial in order to establish a new allocation. The plaintiff and the settling defendant must go through precisely the time, effort, expense, and inconvenience that settlement is supposed to avoid. Unless the amount of money involved is substantial, practical considerations are likely to prevail over equitable concerns.

In cases in which the value of pretrial settlements is less than the jury's damage award, but greater than the value of the share of liability allocated to the settling defendants by the jury, *Hewitt* also creates problems of implementation.¹⁴⁸ In cases in which the value of pretrial settlements is less than the value of the share of liability allocated to the settling defendants by the jury, it is clear that the plaintiff bears the loss represented by the difference between these figures.¹⁴⁹

Finally, the advantage to the nonsettling defendant is increased in cases in which a statutory cap on damages is applicable.¹⁵⁰ If the cap applies to all defendants, the nonsettling defendant assures himself of full credit for the value of the settlements against any verdict that may be returned against him by choosing not to present the settling defendants to the jury for fault allocation. If the settling defendants pay enough to meet the cap, the nonsettling defendant may not even have to go to trial. If the statutory cap applies to fewer than all defendants, additional practical problems are created. The resulting uncertainty may be enough to discourage settlement once a single defendant has settled, as the nonsettling defendant seeks the maximum possible advantage from that payment.

147. See, e.g., *Hoitt v. Hall*, 661 A.2d 669 (Me. 1995).

148. See *infra* part III.F.

149. E.g., *Emery Waterhouse Co. v. Lea*, 467 A.2d 986 (Me. 1983); *Dongo v. Banks*, 448 A.2d 885 (Me. 1982). For discussion of the reasons why this outcome is inconsistent with the concept of joint and several liability, see *Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 805 n.10 (W.Va. 1990). This Article does not address the justification for retaining the concept of joint and several liability. See *Bachrach, supra* note 7, at 367.

150. E.g., title 28-A, §§ 2501-2519 (West 1988 & Supp. 1994-1995); title 14, §§ 8105, 8242 (West 1980 & Supp. 1994-1995).

B. Discouraging Settlement

Hewitt rewards the defendant who refuses to settle and creates an incentive to go to trial. The Law Court has noted frequently the strong policy favoring settlements in Maine law.¹⁵¹ Yet *Hewitt* offers the defendants in a multi-defendant tort case little incentive to settle after one defendant has settled. The nonsettling defendant has several significant advantages. He can choose which settling defendants to keep in the case for allocation of fault by the jury,¹⁵² secure in the knowledge that the amount paid in settlement by those settling defendants whom he chooses to dismiss will be deducted from any verdict against him because those settling defendants cannot be determined by the jury to be without causative fault. So long as any settling defendant whom the nonsettling defendant chooses to keep before the jury for allocation is assigned at least 1% of the fault, the nonsettling defendant receives a deduction from any verdict against him for the full amount of that settlement as well.

In addition, if the settlement agreement between the plaintiff and the settling defendant includes the usual language of indemnity, as is likely, *Clockedile v. Town of Yarmouth*¹⁵³ establishes that the nonsettling defendant no longer has joint liability.¹⁵⁴ If the amount of the verdict remaining after these deductions still exceeds the value of the nonsettling defendant's allocated share, then the nonsettling defendant pays only his allocated share. Contrary to *Emery Waterhouse Co. v. Lea*,¹⁵⁵ the nonsettling defendant does benefit from an agreement to which he was not a party. Once there is a settlement between one defendant and the plaintiff, any remaining defendant will not pay more than his allocated share of a jury verdict; he will not need to resort to contribution. Under *Hewitt*, it is possible and likely that he will pay less than his allocated share. Thus, it is in the nonsettling defendant's interest to go to trial, in order to minimize the amount he will pay if found liable.

The power of this disincentive might be decreased if the plaintiff as well as the nonsettling defendant had the power to consent to the dismissal of settling defendants. This possibility is suggested in dicta in *Clockedile*:

151. *E.g.*, *A.L. Brown Constr. Co. v. McGuire*, 495 A.2d 794, 797 (Me. 1985); *Dodge v. United Servs. Auto. Ass'n*, 417 A.2d 969, 976 (Me. 1980).

152. The plaintiff is also prejudiced if nonsettling defendants are allowed to adopt a trial strategy that places the blame for the plaintiff's injury on settling defendants. *Dalton v. Alson & Bird*, 741 F. Supp. 157, 160 (S.D. Ill. 1990). Thus, section 156, as interpreted in *Lavoie* and *Hewitt*, is also a disincentive to plaintiffs for settlement.

153. 520 A.2d 1075 (Me. 1987); *see supra* text accompanying notes 72-75.

154. *See Stratton v. Parker*, 793 S.W.2d 817 (Ky. 1990) (damages assessed severally under an apportionment instruction cannot be enforced jointly against joint tortfeasors).

155. 467 A.2d 986 (Me. 1983); *see supra* text accompanying notes 57-61.

In *Lavoie*, we concluded that the procedural order regulating the matters of proof going to fault allocation could not be imposed on an unwilling party because of the possible effect such an arrangement might have on his adversarial position. Plaintiffs in this case are unable to claim any lack of consent.¹⁵⁶

After *Hewitt*, it clearly would be in the plaintiff's best interest to keep settling defendants before the jury for fault allocation. Only then could a defendant possibly be found to be without causative fault and its settlement payment therefore not deducted from the verdict under section 163. Of course, assuming that the settling defendant would consent to this procedure, the plaintiff would then be placed in the anomalous position of attempting to prove that the defendant from whom she accepted a settlement payment was not liable for her injuries.

There is no support in the language of section 156, however, that provides a plaintiff with the right to consent to allocations; the right is specifically given to "any defendant." Giving a veto power to the plaintiff would make the statutory language meaningless. In any event, even this interpretation has a negative impact on the likelihood of settlement because any settling defendant would still be required to be present through trial. Additionally, this approach would not eliminate the possible effect on the trial of the presence of a less than fully interested party, a problem noted by the Law Court in other contexts.¹⁵⁷

C. Tortfeasors Not Parties

The Law Court has not yet been faced with a case in which a plaintiff has exercised his right to bring a separate action against some of the tortfeasors who caused his injury, requiring a second allocation of fault and damages.¹⁵⁸ If not all liable tortfeasors are present in the initial action, it is clear that the tortfeasor against

156. *Clockedile v. Town of Yarmouth*, 520 A.2d at 1078.

157. *E.g.*, *Douglass v. Kenyon Oil Co.*, 618 A.2d 220 (Me. 1992). This situation is frequently cited as a reason for rejection of Mary Carter agreements. *See, e.g.*, *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992).

158. The United States District Court for the District of Maine has been presented with a case in which plaintiffs exercised their statutory right to bring a separate action against a second tortfeasor for the same injuries, arising out of the same incident, for which they had recovered against another tortfeasor. *Boise Cascade Corp. v. Colt Indus.*, 762 F. Supp. 1515 (D. Me. 1991). The plaintiffs conceded that they were not entitled to relitigate the total amount of their damages as found by the jury in the first action under *Kathis v. General Motors Corp.*, 862 F.2d 944 (1st Cir. 1988). Because the jury in the first action had reduced the verdict for comparative fault, and because the type of comparative fault relevant to the strict liability claim against the new defendant had not been litigated in the first case, the District Court allowed the second action to proceed. *Boise Cascade Corp. v. Colt Indus.*, 762 F. Supp. at 1517. The available recovery was limited to the amount of the deduction from the verdict in the first action. *Id.*

whom judgment has been entered may proceed against the additional tortfeasors for contribution.¹⁵⁹ However, if the plaintiff brings an action against those parties, the effect of section 156 is unclear. Do the "new" defendants have the right to present the "old" defendants to the jury for fault allocation? Section 156 uses the term "defendants" rather than "liable defendants" or "persons causing the injury." Yet an "old" defendant found not to have any causative fault should be able to assert *res judicata* or a similar bar to being subjected to a contribution claim from a "new" defendant, even if the "new" defendant had no opportunity to litigate the issue of the "old" defendant's liability.¹⁶⁰

Must the jury in the second case assign some liability to any defendant found liable in the first case? If not, the amount of the judgment in the first case paid by the defendant found not liable in the second case should not be deducted from the verdict in the second case. Indeed, section 163 refers only to settlements or releases; it does not deal with previous judgments concerning the same injury.

What about a settlement paid by a possible tortfeasor who never became a defendant in either action? In an action for contribution brought by a tortfeasor found liable by a jury against a tortfeasor not a party to the initial lawsuit, a new trial on liability is required. The jury allocation in the trial to which the new defendant was not a party cannot be binding on the non-party, even if section 156 were interpreted to allow jury allocation of fault to non-parties. What is the effect of the non-party's settlement payment after he has been found liable in the second action?

Kansas deals with these problems by requiring the defendant tortfeasor to bring all others from whom he seeks contribution into the initial action and to have the fault of all potential tortfeasors determined in that action.¹⁶¹ If a defendant does not do so, no reduction will be made in the verdict. No contribution is allowed after an allocation of fault has been made.¹⁶² Maine has no mandatory joinder rule, but the Kansas procedure would not be inconsistent with section 156. Modification of section 163 would be required, so that reduction of a verdict by the value of a settlement with a person causing the injury would not always be necessary.

If a tortfeasor is not an indispensable or necessary party under Maine law because liability is joint and several, as the Law Court has stated,¹⁶³ then perhaps he becomes such once the plaintiff and one defendant settle and seek summary judgment based on that set-

159. *Otis Elevator Co. v. F.W. Cunningham & Sons*, 454 A.2d 335 (Me. 1983).

160. *See Petit v. Key Bancshares of Maine, Inc.*, 635 A.2d 956 (Me. 1993); *Currier v. Cyr*, 570 A.2d 1205 (Me. 1990).

161. KAN. STAT. ANN. § 60-258a(c) (1987).

162. *Glenn v. Fleming*, 732 P.2d 750, 752 (Kan. 1987).

163. *Lebel v. Reagan*, 159 Me. 300, 192 A.2d 28 (1963).

tlement, thus voiding joint liability for the remaining defendants under *Clockedile*. Does joint liability still exist for tortfeasors not yet brought into the lawsuit? If not, since settlement often occurs long after suit has been filed, this possibility raises serious procedural problems. Perhaps the plaintiff who settles with one defendant then must bring in all potential tortfeasors, having made them indispensable parties. It is thus possible that a plaintiff who settles under these circumstances loses the right to proceed at all against other potential tortfeasors, in spite of the statutory right to sue at her discretion.¹⁶⁴

If internal consistency in Maine's comparative fault processes is to be maintained, and equitable results are to be achieved, comparative determinations must be made only once. The accuracy of this single determination can be assured only when the possible negligence of all parties to the occurrence is considered. This requires their effective representation as parties to the action.¹⁶⁵

The Law Court held in *Douglass v. Kenyon Oil Co.*¹⁶⁶ that a party that has settled cannot be a real party in interest, because it has no financial stake in the litigation, and its status thus renders its continuing presence in the litigation insufficient to protect the rights or interests of other parties. Given that holding, it is less than clear that the continuing presence of a settling defendant at trial, by the choice of a nonsettling defendant, is sufficient to protect the rights or interests of the plaintiff or the additional nonsettling defendant who might have chosen to dismiss the settling defendant to ensure the receipt of credit for the settlement against any jury verdict. The Law Court in *Lavoie v. Celotex Corp.*¹⁶⁷ and *Hewitt* expressed no concern over this possibility. *Douglass*, the more recent case, raises some doubt about the holdings in both earlier cases.

All of the preceding questions await resolution by the Law Court. To the extent that resolution can be achieved in advance, however, through statutory enactment or rule-making, time and expense can and should be saved.

D. The "One Recovery" Rule

If it is a "well established" rule of Maine law that a plaintiff may recover no more in total for her injury than the damages awarded by a jury, there is little overt evidence of such a "one recovery" rule in

164. Title 14, § 163. See also *St. Louis v. Hartley's Oldsmobile-GMC, Inc.*, 570 A.2d 1213, 1216 (Me. 1990).

165. Comment, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, 24 ME. L. REV. 243, 261 (1972).

166. 618 A.2d 220 (Me. 1992).

167. 505 A.2d 481 (Me. 1986); see *supra* text accompanying notes 70-71.

Maine case law.¹⁶⁸ Giving full credit to a nonsettling defendant for settlements obtained from other defendants without allowing allocation by the jury has been held to be consistent with the one recovery rule.¹⁶⁹ Maine law allows both full credit and allocation.¹⁷⁰ Under either scenario, the one recovery rule is often inconsistent with the basic principle that each tortfeasor should pay his share of the injured person's damages. When applied so as to allow a tortfeasor to escape payment for his liability, the rule is also inconsistent with the concept of deterrence, which is one of the purposes of awarding money damages.¹⁷¹ The Law Court has lost sight of the other half of the *Packard* principle: that a tortfeasor should pay no less than an amount equal to his degree of fault.¹⁷² "In order for deterrence to function properly, each tortfeasor must pay for the proportional share of damage caused."¹⁷³ "The one-compensation rule, grounded in unjust enrichment, is not to be applied in such a way as to generate unjust enrichment to the only litigating defendant."¹⁷⁴ Yet the Law Court has allowed some tortfeasors to escape payment for their proportional shares, thereby unjustly enriching them.

Ultimately, the one recovery rule is inconsistent with the goal of deterrence.

[C]omparative fault actually separates a joint tort into independent multiple torts. There is no reason that a settlement with one tortfeasor should affect the judgment against another tortfeasor. If, in fact, the settlement was more generous to the plaintiff than a trial with that joint tortfeasor would have been, all that indicates is that the plaintiff got a good deal. There certainly is no reason why a nonsettling tortfeasor should claim the benefit of the plaintiff's bargain with the settling tortfeasors. Fairness demands that the benefits of the bargain remain where the bargaining parties place them, and that nonsettling tortfeasors pay damages in proportion to their fault.¹⁷⁵

Fairness is also the concern behind the Maine statute. Section 163, imposing a mandatory reduction of the verdict by the amount

168. The *Thurston* dissenters may have had in mind dicta from *Pearson v. Hanna*, 145 Me. 379, 380, 70 A.2d 247, 247 (1950), in which the court said: "In actions of this nature there can be but one recovery. The jury's award of damages is in full for all injuries proximately caused by the accident, be they past, present or future."

169. *In re Jiffy Lube Sec. Litig.*, 772 F. Supp. 890, 892 (D. Md. 1991).

170. Title 14, §§ 156, 163.

171. See *Cooper v. Springfield Terminal Ry. Co.*, 635 A.2d 952 (Me. 1993); *Farrell v. Kramer*, 159 Me. 387, 193 A.2d 560 (1963).

172. See *Stratton v. Parker*, 793 S.W.2d 817, 820 (Ky. 1990).

173. *Dobson v. Camden*, 705 F.2d 759, 770 (5th Cir. 1983).

174. *Rose v. Associated Anesthesiologists*, 501 F.2d 806, 809 (D.C. Cir. 1974). *But see Eberle v. Brenner*, 505 N.E.2d 691, 693 (Ill. App. Ct. 1987) ("[A] plaintiff who has recovered for his damages should have no basis to complain because a defendant benefitted from a setoff.").

175. *Dobson v. Camden*, 705 F.2d at 769.

of settlement with a person causing the injury,¹⁷⁶ is obviously intended to avoid the situation in which a plaintiff sues multiple tortfeasors seriatim, recovering the "full" value of his injuries each time, at least until stopped by the applicable statute of limitations. However, any tortfeasor can prevent this scenario by bringing other tortfeasors into the action. In addition, the Law Court has effectively removed the element of section 163 which limits the offset to settlements with persons causing the injury by requiring that settlements be offset unless the factfinder finds the settling party to be *without* fault. The statute requires the opposite result: that no offset be allowed unless the settling party is found to *have* causative fault.¹⁷⁷ Fairness also requires this approach, so long as the nonsettling defendant is endowed with the exclusive power to dictate whether such a determination will be made.

The dissent in *Thurston* cites section 885 of the *Restatement (Second) of Torts* as support for the one recovery rule, and for a dollar for dollar reduction in the verdict for all settlement payments.¹⁷⁸ However, comment *a* to section 885 makes it clear that the section is not meant to apply when a number of tortfeasors are liable only for proportionate shares of the harm.¹⁷⁹ Indeed, the authors of the *Restatement* seem to take both positions on the question whether a settlement payment diminishes only the payor's allocated proportion of the total claim, or may also satisfy all other defendants' proportionate shares as well.¹⁸⁰ The American Law Institute is

176. Title 14, § 163.

177. *Id.*

178. *Thurston v. 3K Kamper Ko., Inc.*, 482 A.2d 837, 843 (Me. 1984) (Roberts, J., concurring in part and dissenting in part).

179. Comment *a* provides:

The rules stated in this Section apply only when all the parties are liable for the entire harm. When a number of tortfeasors are liable only for proportionate shares of a harm (see § 881), the rule does not apply. Nor does the rule apply when the claims against two persons are based not upon the harm done, but on the extent of the wrongdoing of each. Thus when a death statute provides that the claim against the tortfeasor is proportioned to his fault, a discharge of one of several tortfeasors does not discharge the liability of the others; nor does a payment by one diminish the liability of the other unless the statute limits the total amount that can be received on account of the death.

When one of several defendants is liable only for a portion of a harm for the whole of which the others are liable, as when he aggravated the harm caused by the others, his discharge from liability (and also the payment of money by him) merely reduces the amount of recovery against the others.

RESTATEMENT (SECOND) OF TORTS § 885 cmt. a (1977).

180. *Id.* cmt. e. Comment *e* provides:

Payments made by one of the tortfeasors on account of the tort either before or after judgment, diminish the claim of an injured person against all others responsible for the same harm. This is true although it was agreed between the payor and the injured person that the payment was to have no effect upon the claims against the other. If the payment is made as

currently considering a *Restatement (Third) of Torts*.¹⁸¹ Its preliminary materials on apportionment of liability note that the second Restatement was issued before the doctrine of comparative negligence was widely adopted by the states, and therefore does not address that doctrine at all. While the Institute has taken no position yet on the issue of the preferred type of reduction for settlements when joint and several liability is retained by state law, the materials note that the states are roughly evenly divided between dollar-for-dollar credit and percentage reduction.¹⁸² It is clear from the preliminary materials that the second Restatement does not support a dollar-for-dollar credit for all settlement payments as the preferred method.¹⁸³

The collateral source rule prohibits a defendant from informing a jury that a plaintiff has already received some payment for her injuries from a source other than the defendant, and from arguing that the plaintiff's damages should be reduced by that amount. In upholding the rule, the Law Court has said that it is more just that the injured party receive a "windfall" than that the wrongdoer receive one.¹⁸⁴ Apparently, this outcome is only more just when the source of payment is someone other than a person causing the injury, by the terms of section 163. Since the only non-party payors likely to exist are employers, who are protected from contribution under the workers' compensation statutes, insurers, and the state, through the unemployment compensation system and the free medical care pro-

full satisfaction for a specified item of damage, the claim against the others is terminated with respect to that item. If it is agreed that the payment is to satisfy the payor's proportion of the total claim, the claim against the others is diminished in that proportion, if this is greater than the amount paid; if the proportion is less than the amount paid, the claim against the others is diminished by the amount paid, irrespective of the agreement. In a number of states the rule is that the payment has the effect of satisfying the payor's proportion of the total claim, regardless of whether there was a specific agreement to this effect. The Institute has taken no position on whether this is the better rule.

Id.; see also RESTATEMENT (SECOND) OF TORTS § 886A caveat, cmt. m (1977). The caveat provides: "The Institute takes no position on the effect of a release of one tortfeasor from liability for the harm or a covenant not to sue him for it upon the right of other tortfeasors to contribution from him." *Id.* caveat. Comment *m* provides in relevant part:

Release. There are three possible solutions for the situation in which one tortfeasor pays a sum to the injured party and takes a release or covenant not to sue that does not purport to be a full satisfaction of the claim. Each has its drawbacks and no one is satisfactory.

Id. cmt. m.

181. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (Preliminary Materials June 2, 1994).

182. *Id.* at 51.

183. *Id.*

184. See, e.g., *Werner v. Lane*, 393 A.2d 1329, 1336 (Me. 1978).

vided in *Werner v. Lane*,¹⁸⁵ *Hewitt* appears to have rendered the concern for justice expressed in earlier cases largely meaningless. Injured tort victims may keep reimbursement obtained from tortfeasors for services provided to them by others gratuitously, but may not keep any "overpayment" by a settling tortfeasor. This outcome violates more judicial policies—including those favoring settlement, judicial economy, and prompt recovery for injury—than the sole policy it serves: the "one recovery" rule.

In the abstract, the "one recovery" rule has a logical appeal. So long as all tortfeasors will ultimately pay for their respective shares of liability through contribution, there is no reason why the plaintiff should recover more than the value of his injuries as determined by a jury, in the absence of a pretrial settlement. As soon as a jurisdiction also commits itself to encourage settlement, however, the "one recovery" rule cannot be rigidly applied. If settlement is to be encouraged, defendants must be allowed to rely on their payments as the most they will pay. Therefore, plaintiffs must bear the loss if they accept a settlement which ultimately proves to be less than the settling defendant's allocated share of the damages awarded. If settlement is to be encouraged, plaintiffs must also have the countervailing potential to retain a settlement which ultimately proves to be overly generous. The value of an early settlement may include a discount for the chance of loss at trial, for the costs of going to trial, and for the value of cash in hand at an earlier time, although the latter value is diminished by the availability of pre-judgment interest.¹⁸⁶ However, if the plaintiff takes the risk that the settling defendant will pay too little without any possibility of retaining the "excess" value of the settlement if the settling defendant pays too much, the incentive to settle is reduced. The plaintiff gets his "one recovery" or less, if he settles, but never more. Since he will get his "one recovery" if he goes to trial against all defendants, the only

185. 393 A.2d 1329 (Me. 1978). Many of these third-party payors have subrogation rights by statute or contract, so that there is no "windfall" to the plaintiff by virtue of those recoverable payments. *E.g.*, title 39-A, § 107 (West 1994). However, the case law also includes totally gratuitous payments or services as collateral sources, as well as "free" medical care for which no reimbursement will be sought. *E.g.*, *Werner v. Lane*, 393 A.2d at 1329.

186. Title 14, § 1602 (West 1994). This statute provides in pertinent part:

In all civil actions, except those actions involving a contract or note which contains a provision relating to interest, prejudgment interest shall be assessed at a rate: A. For actions in which the damages claimed or awarded do not exceed the jurisdictional limit of the District Court set forth in Title 4, section 152, subsection 2, of 8% per year; and B. For other actions, equal to the coupon issue yield equivalent, as determined by the United States Secretary of the Treasury, of the average accepted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date from which the interest is calculated under section 1602-A, plus 1%.

incentive to settle is to avoid the costs of trial. If this is the policy of Maine law regarding settlement, the limited nature of the encouragement should be made explicit.

E. Settlement Language

Settlements are enforceable contracts.¹⁸⁷ Most settlement documents include an agreement that the paying party does not admit liability. Many also specify that the agreement may not be used as evidence of liability.¹⁸⁸ Section 163 provides for a reduction of the verdict only for settlements with persons "causing the injury." The Law Court's decision in *Hewitt* directs Maine courts to assume that all settling parties caused the injury, because all settlements are to be deducted unless the jury finds that the settling party had no liability. In order to enforce the settlement contract language and to give meaning to the statutory language, the opposite presumption should prevail. If the nonsettling defendant chooses not to present the settling defendant to the jury for allocation of fault, the settling defendant should be presumed not to have caused the injury, and no deduction should be made. This logically consistent assumption requires no change to statutory language. It would not prohibit a nonsettling defendant from seeking contribution in a separate action from a settling party whom the nonsettling defendant chose not to bring before the jury. Overall fairness would still be maintained.

In addition, *Hewitt* renders unenforceable any settlement agreement's term that provides that the amount paid shall be applied only to the settling party's liability and not to the liability of third parties.¹⁸⁹

187. See *supra* note 139. See also *Austin v. Raymark Indus.*, 841 F.2d 1184, 1191 (1st Cir. 1988) ("If the parties understood the scope and effect of a *Pierringer* release and intended that they be bound by it, there can be no question that only the amount equivalent to the settling defendants' proportionate liability should have been deducted from the verdict.").

188. In light of *Clockedile*, plaintiffs presumably will seek dismissal of their claims against settling defendants rather than summary judgment, in the hope of maintaining joint liability among nonsettling defendants. If dismissal of these claims with prejudice is held to have the same result as summary judgment, then fairness to plaintiffs can only be accomplished if the remaining severally liable defendants do not receive credit for the settlement. Otherwise, the plaintiff bears the entire risk that a defendant will be immune, unavailable, or judgment proof simply because he settled with one defendant. This would appear to be a substantial disincentive to plaintiffs to settle with fewer than all defendants, at the very least.

189. The importance of enforceable language in a settlement agreement is illustrated by a Maryland case in which the settlement agreement between the plaintiffs and the settling defendant referred to the settling defendant as a joint tortfeasor. The jury subsequently assigned 100% of liability to the nonsettling defendant, who was nonetheless allowed credit against the verdict for the amount of the settlement, because the agreement established the settling defendant's status as a joint tortfeasor. *St. Louis v. Beekles*, 566 A.2d 787 (Md. App. 1989).

F. Practical Problems

No attempt will be made to list here all of the potential problems facing Maine litigants and judges as *Hewitt* and sections 156 and 163 are brought to bear in the future, but a few possibilities will be addressed for illustrative purposes. Several problems of application have already been mentioned in this Article and will not be repeated here.¹⁹⁰

If a plaintiff has two separate claims against a settling defendant, for breach of contract as well as tort, for example, and the settling parties do not identify portions of the settlement payment to each claim, the court faced with the mandatory reduction language of section 163 has no basis upon which to determine how much of that settlement must be deducted from the verdict returned against non-settling joint tortfeasors. There are two different injuries involved in the settlement, and the tortfeasors should not receive credit for the payment for the breach of contract.¹⁹¹ If they do, there is very little incentive for a plaintiff to settle. If the court assigns a value to the breach, it must do so without guidelines under current Maine law.

If more than one nonsettling defendant remains at trial, each has the right under section 156 to request allocation from the jury. If the defendants disagree about which settling defendants to keep before the jury, an additional problem is presented for the court. Does the nonsettling defendant who wanted to dismiss a settling defendant receive an automatic credit for that settlement, even if the jury finds that settling defendant to be 0% liable? May two nonsettling defendants in the same trial be treated differently as to damages? If not, the exercise by one nonsettling defendant of his right under section 156 could cost another unwilling defendant a lot of money. This situation will be further exacerbated if one or more nonsettling defendants are subject to a statutory damages cap, while others are not. Assume a \$1 million verdict in a case involving three defendants. The jury allocates liability equally to three defendants. Defendant One paid \$400,000 in settlement before trial. Defendant Two is subject to a \$250,000 cap on damages. If liability is still joint and several, does Defendant Three pay \$333,333 less a \$50,000 credit for the settlement plus the \$23,333 not recoverable from Defendant Two? If liability is not joint and several, does Defendant Three get credit for the full "overpayment" by Defendant One?¹⁹²

190. Several such problems were discussed in Comment, *Comparative Negligence and Comparative Contribution in Maine: The Need for Guidelines*, *supra* note 165, at 243.

191. *E.g.*, *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 749 F.2d 1451 (10th Cir. 1984); *McKinley v. Willow Constr. Co.*, 693 P.2d 1023 (Colo. App. 1984).

192. Under *Dongo v. Banks*, 448 A.2d 885 (Me. 1982), it is clear that the value of Defendant One's settlement is not to be deducted from the verdict before the allocated percentages of liability are applied.

If all defendants are jointly and severally liable, and a nonsettling defendant chooses to take the guaranteed credit by not bringing a settling defendant before the jury for allocation, how is the settling defendant's liability to be determined for purposes of contribution? If one nonsettling defendant is judgment-proof, for example, how is the trial court supposed to allocate that share to the settling defendant? Interpreting section 156 to allow the nonsettling defendant to choose which defendants to present for allocation increases the likelihood that such situations will arise.

When a settlement occurs before suit is brought, the settling party never becomes a defendant. Thus, he should not be available for jury allocation of fault under section 156, which refers only to defendants. As some jurisdictions have noted,¹⁹³ allocation of fault to individuals who are not parties to the litigation raises issues of fairness and reliability of the verdict, among others. Yet it may also be unfair to the nonsettling defendant to allow a joint tortfeasor to "escape" by settling with the plaintiff before an action is filed, particularly if the plaintiff has not provided that defendant with a similar opportunity to settle.

A settling defendant kept in the trial by a nonsettling defendant must be represented by counsel other than the plaintiff's counsel. A settling defendant no longer has much interest in the outcome of that trial, and it will be interested in minimizing costs. A less than vigorous presentation of the settling defendant's pre-settlement position may have an untoward effect on the trial. It would be difficult for the trial court to attempt to deal with this situation in jury instructions without revealing the fact of settlement, in violation of section 163.

G. Statutory Language

Statutes in derogation of the common law must be strictly construed.¹⁹⁴ To the extent that sections 156 and 163 differ from the common law at the time of their enactment, they must be strictly construed. Thus, the language creating comparative fault and allocation of fault in section 156 must be strictly construed, as must all of section 163.

The purpose of statutory construction is to discern legislative intent.¹⁹⁵ Statutory construction must avoid results which are absurd, inconsistent, unreasonable, or illogical.¹⁹⁶ A statute must be construed in light of the purpose of the legislation.¹⁹⁷ If the statute was

193. *E.g.*, *Selchert v. State*, 420 N.W.2d 816 (Iowa 1988).

194. *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 996 (Me. 1983); *Churchill v. School Admin. Dist. Number 49 Teachers Ass'n*, 380 A.2d 186, 192 (Me. 1977).

195. *Bakala v. Town of Stonington*, 647 A.2d 85, 87 (Me. 1994).

196. *Dubois v. City of Saco*, 645 A.2d 1125, 1128 (Me. 1994).

197. *Eagle Rental, Inc. v. City of Waterville*, 632 A.2d 130, 131 (Me. 1993).

enacted to address an existing problem, it should be construed so as to promote the policy consideration which brought about the legislative action, and the construction which best cures that problem should be adopted.¹⁹⁸

As previously noted, section 156 contains an internal inconsistency.¹⁹⁹ It directs a reduction in the "total damages" found by the jury "to such extent as the jury thinks just and equitable" to reflect any causative fault of the plaintiff "by dollars and cents, and not by percentage."²⁰⁰ Yet any defendant in "a case involving multi-party defendants" has the right "to request of the jury the percentage of fault contributed by each defendant."²⁰¹ As a practical matter, trial courts have instructed juries to make the "dollars and cents" reduction for a plaintiff's comparative negligence and then, in the event that the plaintiff is not "found by the jury to be equally at fault," to allocate fault among the liable defendants so that a total of 100% is achieved as between or among those defendants.

This solution is fine so long as there are no further complications. However, the statute provides no guidance when one of the liable defendants is judgment-proof. Given the joint and several liability also established by section 156, the "orphan share" must be redistributed. By a strict construction of section 156, no portion of that share should be allocated to the plaintiff, because the full monetary reduction representing his negligence has already been made. If one of the liable defendants has settled, his respective portion of the orphan share should be charged against him, rather than allocated to the other liable defendants. However, under *Hewitt*, if the payment by the settling defendant exceeds both its proportionate share and the orphan share, the other liable defendants are relieved of their joint liability.

If the settling defendant has not been brought before the jury for allocation, however, there is no basis to hold that the settling defendant bears any fault, which is the basis for application of section 156. Strict construction of "fault" should not allow a court to ignore language of the settlement contract and infer fault from the fact of payment. The implications of such an inference for the settling party are enough to preclude settlement.²⁰²

The literal meaning of statutory language may be ignored, if necessary, in favor of an interpretation consistent with legislative in-

198. *Waddell v. Briggs*, 381 A.2d 1132, 1135 (Me. 1978).

199. *See supra* text accompanying notes 25-26.

200. Title 14, § 156.

201. *Id.*

202. For example, if a settlement with one plaintiff is evidence of fault, then any other potential plaintiff with a similar injury or injured in the same incident is entitled to recover from the settling defendant. If the tort also constitutes a statutory violation, the settlement agreement would be an admission for purposes of enforcement actions.

tent.²⁰³ This is necessary in construing the first sentence of the final paragraph of section 156: "In a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages."²⁰⁴ Strictly construed, this sentence would make defendants found not to have caused the injury nevertheless jointly liable with those who are found to be at fault, and it could also make all defendants liable for the unreduced verdict ("full amount") in spite of a jury reduction for the plaintiff's negligence. Neither result is consistent with legislative intent. No other language in section 156 appears to require a similar disregard, however.

The final sentence of section 156 gives any defendant the right to request jury determination of the degree of fault of each defendant. Contrary to the practice approved by the Law Court in *Lavoie* and *Hewitt*, strict construction of this language does not allow a nonsettling defendant to pick and choose which settling defendants he will keep before the jury for allocation. If the settling defendant is a named defendant, its percentage of fault must be requested if any percentages are to be requested. The defendant is presented with an all-or-nothing choice. This interpretation is consistent with legislative intent and avoids giving the nonsettling defendant the power to choose which settlements he will automatically have credited against any verdict under section 163, because by eliminating those defendants from jury allocation he insures that they will not be found to be without causative fault. There is no discernible legislative intent in section 156 to insulate nonsettling defendants to such a degree. The state refers to "each" defendant, not "any" defendant. Each defendant must go before the jury for allocation, if any do.

Section 163 also requires that settlements, to be deducted from the verdict, must be with those individuals causing the injury. If the settling party was not found by a jury to be liable, there is no basis to assume that the settling party caused the injury, other than the payment itself. Again, if the law assumes liability from the fact of payment, settlement is not going to occur. To assume, as the Law Court has done, that a settling defendant has caused the injury, unless a jury finds that he has not, is to assume liability from the mere fact of payment. Even without strict construction, section 163 does not allow, much less require, that inference.

203. *Maine Beer & Wine Wholesalers Ass'n v. State*, 619 A.2d 94, 97 (Me. 1993).

204. Title 14, § 156.

H. Rule 14 of the Maine Rules of Civil Procedure

Maine law does not provide for mandatory joinder of parties to an action.²⁰⁵ Rule 14(a) of the Maine Rules of Civil Procedure allows a defendant to bring third-party defendants into the action. When a third-party defendant is brought into the action, the plaintiff must assert any claims against that third-party defendant "arising out of the transaction or occurrence that is the subject matter of the plaintiff's complaint against the third-party plaintiff."²⁰⁶ This voluntary

205. The Maine Rules of Civil Procedure do provide for compulsory counterclaims. ME. R. Civ. P. 13(a). Cross-claims are not compulsory. *Id.* 13(g). These portions of Rule 13 provide:

(a) Compulsory Counterclaims.

(1) *Pleadings.* Unless otherwise specifically provided by statute or unless the relief demanded in the opposing party's claim is for damages arising out of the ownership, maintenance or control of a motor vehicle by the pleader, a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (A) at the time the action was commenced the claim was the subject of another pending action, or (B) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

....

(g) *Cross-Claim Against Co-party.* A pleading may state as a cross-claim any claim by one party against a co-party that is within the subject-matter jurisdiction of the court and arises out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Id. 13(a)(g).

206. *Id.* 14(a). Rule 14(a) provides in full:

At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The person so served, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim within the subject-matter jurisdiction of the court against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim within the subject-matter jurisdiction of the court against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-

procedure, if it results in the presence of all potential tortfeasors in one action, solves many of the procedural problems that arise when multiple parties, settlement, and sections 156 and 163 are all involved. However, the procedure may also conflict with the plaintiff's statutory right under section 163 to bring separate actions against multiple tortfeasors.

Maine's Rule 14 has not been amended since it was first promulgated in 1959. Its provision requiring a plaintiff to bring claims against a third-party defendant is intended to "require the plaintiff to clean up in a single action the entire controversy arising out of a single transaction or occurrence,"²⁰⁷ thereby avoiding an unfair burden on third-party defendants. This provision is not present in Rule 14 of the Federal Rules of Civil Procedure, which is otherwise quite similar to the Maine Rule. Maine's Rule 14 does not allow a defendant to bring into the action a party who may be liable to the plaintiff but is not liable to that defendant "for all or part of the plaintiff's claim against" that defendant.²⁰⁸

Like the federal version of the rule, Maine's Rule 14 is intended to promote judicial efficiency, eliminate duplication, and increase the likelihood of consistent results for multiple claims.²⁰⁹ While both rules may be for contribution claims, there is no requirement that they be so used. A nonsettling defendant, faced with the advantages offered by *Lavoie* and *Hewitt* after one defendant has settled, has little to gain by bringing potential tortfeasors not yet sued by the plaintiff into the pending action. If he may finish trial without having to pay his allocated share of the plaintiff's damages, there is no need to incur the additional cost of bringing an additional party or parties into the action for contribution. He can always sue separately, if necessary, after his obligation to the plaintiff is established. This choice to delay would be equally attractive to a

party plaintiff, and the plaintiff's failure to do so shall have the effect of the failure to state a claim in a pleading under Rule 13(a). The third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13 and in the District Court may remove the action to the Superior Court as provided in Rule 76C. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim above in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

Id.

207. Reporter's Notes (12/1/59), reported at 1 RICHARD H. FIELD ET AL., MAINE CIVIL PRACTICE 287 (1970).

208. *S.H. Nevers Corp. v. Husky Hydraulics*, 408 A.2d 676, 678 n.1 (Me. 1979) (quoting ME. R. CIV. P. 14(a)) (emphasis omitted).

209. 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1442 (2d ed. 1990); FIELD ET AL., *supra* note 207, § 14.1.

nonsettling defendant's insurer, if there were coverage for some or all of the tort claims against him.

There is very little case law concerning Rule 14 in Maine.²¹⁰ It may be time to reconsider the role of Rule 14 in tort cases, so long as no procedural advantage is granted to either plaintiffs or defendants. Some mandatory element, with an exception for unknown tortfeasors who cannot be reasonably identified at the time of filing, might serve the ends of Rule 14 to a far greater degree, as well as reduce the intricacies surrounding multi-tortfeasor situations in which at least some parties wish to settle and move on.

IV. A FEW MODEST PROPOSALS

Maine's system, which provides an absolute dollar-for-dollar reduction in the verdict against a nonsettling defendant for all settlements with any party not found to be not liable by the jury, goes beyond the 1939 UCATA, because the Law Court has read the requirement that the credited settlement be made with a person "causing the injury" out of section 163. Such a system, according to the Supreme Court, is "clearly inferior" to a system in which each tortfeasor pays his or her own proportionate share of the damages caused, no less, and more only when it is necessary to cover the share of a judgment-proof tortfeasor. Maine also has a proportionate system of allocation, totally controlled by the nonsettling defendant and applied, according to the Law Court, only after all deductions are made for settlements. As the Supreme Court suggested in *McDermott*, the two systems that coexist in Maine are not compatible. In Maine, the inferior absolute deduction system of section 163 prevails. Proportionate allocation is useful in Maine only for contribution claims, and then only if all settling defendants have been presented to the jury for allocation by the nonsettling defendant.

In Maine, the nonsettling tortfeasor in a multi-defendant case now almost never pays more than his or her allocated share of the plaintiff's damages.²¹¹ Whenever there has been a settlement with one actual or potential defendant, he or she will often pay less. If "defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement,"²¹² this inequity must be addressed.

210. See *S.H. Nevers Corp. v. Husky Hydraulics*, 408 A.2d at 676. This case appears to contain the only substantive discussion of Maine Rule 14 in reported Maine case law.

211. The exception is the circumstance in which no defendant settles before trial and one or more liable defendants is judgment-proof.

212. *McDermott, Inc. v. AmClyde Ltd.*, 114 S. Ct. 1461, 1472 (1994); *accord Shantz v. Richview, Inc.*, 311 N.W.2d 155, 156 (Minn. 1980); *Chemtex Ltd. v. Dube*, 578 S.W.2d 813, 814 (Tx. Civ. App. 1979).

Some steps toward this goal can be taken without legislative action. First, nonsettling defendants must not be allowed to pick and choose among settling defendants for allocation of fault; if section 156 is applied as it is written, a nonsettling defendant may choose only to request allocation for all defendants, including all who have settled, or not to request allocation. If this change in interpretation of section 156 is not made, a settling defendant may not be presumed to have caused the injury. If a settling defendant is not presented to the jury for allocation of fault, there can be no reduction of the verdict for that settlement, because that defendant cannot be found to have caused the injury.

Next, a defendant who brings third-party defendants into a tort action under Rule 14 can be required to bring in all known or reasonably identifiable potential joint tortfeasors. Existing provisions of the rule will then require the plaintiff to bring all related claims into the action.

Further, for the reasons set forth by Judge Carter in *Stacey v. Bangor Punta Corp.*,²¹³ a nonsettling defendant who requests allocation should not also benefit from the reduction of the verdict for the value of other defendants' settlements. The plaintiff must be allowed to keep the benefit of a "good bargain" settlement, just as he continues to bear the burden of a "bad bargain" settlement. "[A]ll that should concern the non-settling defendant is that he not be required to pay more than his percentage share of the total damages which the jury determines the plaintiff sustained."²¹⁴

In addition, the "one recovery" rule, if it is the law in Maine, and if the Supreme Court's analysis of that concept is to be rejected, must be modified to allow for the costs incurred by the plaintiff forced to go to trial by the nonsettling defendant found by a jury to be liable. To ignore these additional costs is to reward defendants who resist settlement, contrary to the well-documented public policy in Maine favoring settlement. If the "one recovery" rule is the policy in Maine, a statutory change is also necessary. A settling defendant who pays more than her allocated share of the damages may bring a contribution action against the nonsettling defendant who paid less than his share. The nonsettling defendant in such an action must be bound by collateral estoppel, or some other means, to the allocation of fault already determined, and must pay the attorneys' fees incurred by the settling defendant in the contribution action.²¹⁵

Several statutory changes are also recommended. Section 163 should be modified to provide that reduction is made only when all

213. 108 F.R.D. 72 (D. Me. 1985).

214. *Shantz v. Richview, Inc.*, 311 N.W.2d at 156.

215. The Author is indebted to Charles Harvey, Esq., for this suggestion. Mr. Harvey graciously reviewed an earlier draft of this Article and made significant contributions to its improvement.

defendants are jointly and severally liable and only when fault has not been allocated among defendants. Repeal of the reduction provision in favor of a true allocation of fault system would be preferable in terms of fairness and ease of application. Section 163 could also be modified to serve the purposes of the "one recovery" rule in a fairer manner, to provide that a plaintiff may bring separate actions against multiple tortfeasors only until he has actually recovered through court action (exclusive of settlements) the total damages set by the first jury to consider that issue. Plaintiffs would be encouraged to settle by such language, but could also continue to seek recovery if the initial defendant proved to be immune or judgment-proof. The exception for settlements would not allow plaintiffs to recover vast amounts in excess of jury verdicts because other defendants will be aware of the fact that settlements have occurred and act accordingly. A defendant who chooses not to settle takes the risk that she will pay more as a result.

Section 156 should be amended, in any event, to correct the imprecise language of its final paragraph. It also should be amended to provide that liability after allocation of fault is several, with joint liability only for the allocated share that is otherwise uncollectible. If all parties are before the court, contribution then becomes unnecessary. It would be preferable not to amend the first paragraph of section 156, requiring reduction in dollars rather than percentage for a plaintiff's comparative negligence, as long as it is made clear by the courts that no further reduction is to be charged to the plaintiff for any orphan share of the defendants' allocated liability.

V. CONCLUSION

Current Maine law concerning the effect of settlement by fewer than all potential tortfeasors serves as a disincentive to settle for both plaintiffs and defendants, although for different reasons. In addition, the current state of this law presents litigants with confusion, potential inequity in its application, and lack of predictability. Reasonable steps are available to bring this area of the law back to the assistance of litigants, with fairness and efficiency, and to once again truly serve the goal of encouraging settlement, a goal now more often confounded than advanced.

The student writer in 1982 suggested allocation of liability to all potential tortfeasors, whether or not they are parties to the action; revision of section 156 to provide for percentage allocation of the plaintiff's comparative negligence and to force joinder of all potentially liable parties; limitation of the right to seek contribution to claims against insolvent or unknown parties; allocation of a portion of orphan shares to the plaintiff found comparatively negligent; repeal of section 163; and replacement of statutory joint and several liability with a new statutory scheme including a discharge from lia-

bility for contribution by virtue of settlement.²¹⁶ The Maine Legislature and the Maine courts apparently found such extensive change to be unacceptable. Therefore, a somewhat more modest approach, or series of approaches, is suggested here.

The intervening years have demonstrated that some action is required. The Law Court has interpreted sections 156 and 163 in a manner that frustrates its own endorsement of the "wise public policy" of encouraging settlement and requires disregard of certain terms of section 163, in violation of basic canons of statutory construction. At the very least, these inconsistencies in Maine law must be remedied, so that fairness to all litigants may again be provided.

216. Bachrach, *supra* note 7, at 392-93, 396-97.

