

Louisiana Law Review

Volume 40 | Number 2

Symposium: Comparative Negligence in Louisiana

Winter 1980

Apportionment of Losses Under Comparative Fault Laws - An Analysis of the Alternatives

Richard N. Pearson

Repository Citation

Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws - An Analysis of the Alternatives*, 40 La. L. Rev. (1980)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol40/iss2/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

APPORTIONMENT OF LOSSES UNDER COMPARATIVE FAULT LAWS—AN ANALYSIS OF THE ALTERNATIVES

Richard N. Pearson*

When the Louisiana legislature, toward the close of its last session, enacted a comparative negligence statute of general applicability,¹ it fell into line with a majority of the states.² Comparative negligence does seem to be an idea whose time has come, and there is little serious debate today as to the superiority of comparative negligence over the doctrine of contributory negligence that it replaces.³ Contributory negligence has few defenders.

But comparative negligence is not a unitary concept. In fact, there are about as many different comparative negligence schemes as there are jurisdictions that have adopted comparative negligence.⁴ Thus, a number of choices are available with respect to how losses can be apportioned among the parties in addition to the method presented in the Louisiana statute just enacted. At the same time the statute was passed, the legislature adopted a concurrent resolution authorizing a thoroughgoing study of comparative negligence⁵ and, to that end, postponed the effective date of the

*Professor of Law, Boston University School of Law.

1. 1979 La. Acts, No. 431.

2. Thirty-five states now have comparative negligence laws of general applicability. Six of these states, Alaska, California, Florida, Michigan, Tennessee, and West Virginia, have judicially created their laws. See *Kaatz v. Alaska*, 540 P.2d 1037 (Alas. 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869 (1919); *Chandler v. Nolen*, 50 Tenn. App. 49, 359 S.W.2d 591 (1961); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

3. For a good review of the arguments, see Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

4. It is too early to tell whether the recently completed Uniform Comparative Fault Act will provide the impetus toward uniformity. I suspect not. In the first place, it provides for pure comparative negligence, when the clear preference by legislatures so far is for modified comparative negligence. See text at notes 34-37, *infra*. Secondly, it is unlikely that many legislatures that have already enacted comparative negligence laws will reconsider them with a view toward enacting the Uniform Act. And finally, the Uniform Act resolves many issues as to which there is likely to be considerable disagreement, even if agreement could be reached on the pure form of comparative negligence proposed by the Act. In an area in which state-to-state uniformity is not likely to be perceived by legislatures as particularly important, some variation among the states as to peripheral matters can be expected. For the text of the Uniform Comparative Fault Act, see the appendix to this symposium, *infra* p. 419.

5. La. H.R. Con. Res. No. 266, 5th Reg. Sess. (1979).

comparative negligence law to August 1, 1980.⁶ This indicates a legislative willingness to consider afresh the full gamut of issues presented by the comparative negligence concept. It will be helpful, then, to discuss methods of apportioning losses other than those embodied in the present Louisiana legislation.

The basic purpose of comparative negligence⁷ laws is to ameliorate the all-or-nothing harshness of the contributory negligence doctrine. Thus, comparative negligence serves as a system of apportioning losses between plaintiff and defendant when both are negligent. The two basic systems of apportioning losses are pure comparative negligence and modified comparative negligence. Cutting across both of these are problems of set-off and of derivative actions—those for loss of consortium and wrongful death. The principle upon which apportionment of losses between plaintiff and defendant is based—that liability should be proportioned to negligence—has implications not only for loss apportionment between plaintiff and defendant, but among defendants as well. The traditional doctrines that are affected are those of joint and several liability and of contribution. The comparative negligence principle can also affect the rules relating to settlements. But before turning to an analysis of the various approaches to loss apportionment under comparative negligence, two important collateral issues must be discussed: (1) what is it that is to be compared—negligence or causation, and (2) how the shares of negligence are to be calculated.

From the legislators' point of view, transcending all of these issues is how much detail should go into a comparative negligence statute. Statutes and proposals vary widely in their specificity. The

6. 1979 La. Acts, No. 431, § 7.

7. The Louisiana statute, for reasons that are not clear to me, refers to the "negligence" of the plaintiff, but to the "fault" of the defendant. This may be due to the fact that the Louisiana Supreme Court has interpreted "fault" as used in article 2315 of the Louisiana Civil Code as embracing strict liability—or at least liability without negligence—in some cases. See, e.g., *Loescher v. Parr*, 324 So. 2d 441 (La. 1976). It thus might have been the intent of the Louisiana legislature (1) to apply the comparative negligence principle to cases in which the defendant's liability under article 2315 is *strict* as well as *negligence*; and (2) to distinguish between negligence and such "strict liability" fault when the conduct of the plaintiff is being judged, with the plaintiff's recovery being reduced only by his negligence, and not by his "strict liability" fault, if any. If so, this would produce a rather bizarre result in cases in which both parties suffer loss, and the basis of liability of one is strict. The "strict liability" fault of that party would be used in calculating the other party's recovery, but not in reducing his recovery. In any event, in this article the word "negligence" will be used to avoid confusion with the broader concept of fault. But since in other jurisdictions, fault and negligence are used interchangeably, some of the material quoted may use "fault" in the narrower sense. For a discussion of the applicability of comparative negligence to strict liability cases, see Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980).

New Hampshire law as originally passed, for example, was contained in a single paragraph of twelve-and-a-half lines.⁸ The proposed Uniform Comparative Fault Act, on the other hand, comes with six sections of substantive provisions, some of them rather lengthy. If the legislature is to act at all, some basic choices of course must be made; the choice between pure and modified comparative negligence cannot be left to later adjudication. But the more detailed a proposal, the longer the legislative process will take and the more difficult it will be to enact the proposal. Conversely, the simpler the proposal the less need there is for agreement on specifics and the easier the legislative process is likely to become. But this would involve reliance upon the uncertainties of later adjudication to fill in the details. In any event, the discussion of a particular problem is not meant to suggest that the legislature should address and resolve that problem—silence on some points raised in this article, and others beyond its scope, may be the wisest legislative choice.

GENERAL PROBLEMS

This section will address two matters of a general nature that are relevant to the apportionment of losses among the parties and that arise regardless of which system of comparative negligence is adopted.

What is to be Compared—Negligence or Causation

The problem of what is to be compared, negligence or causation, may be more a problem of semantics than substance,⁹ but it deserves brief mention here. The commentators are divided upon the issue. Dean Prosser asserted that "once causation is found, the ap-

8. N.H. REV. STAT. ANN. § 507:7-a (1969). A shorter paragraph was added in 1971 to deal with the effect of releases. N.H. REV. STAT. ANN. § 507:7-b (1971).

9. The negligence or causation debate may take on more meaning when the basis of the defendant's liability is strict, and there is no negligence on his part against which the negligence of the plaintiff can be compared. The non-comparability of negligence and strict liability has led some courts to reject comparative negligence in strict liability cases, at least in the absence of statutory directives to the contrary. *See, e.g.,* Kinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). Other courts, either under comparative negligence statutes or apart from them, have developed notions of "comparative causation" in strict liability cases. *See, e.g.,* Skinner v. Reed Prentice Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978); Thibault v. Sears, Roebuck & Co., 395 A.2d 849 (N.H. 1978); General Motors v. Hopkins, 548 S.W.2d 344 (Tex. 1977). Philosophically, of course, it makes no more sense to speak of comparative causation in strict liability cases than it does in negligence cases—causation is not a matter of degree. *See* text at notes 11-13, *infra*. This does not mean that reducing the plaintiff's recovery in strict liability cases is an anomaly, rather that it cannot be done on the basis of comparing causation as such.

portionment must be on the basis of comparative fault, rather than on the basis of comparative contribution."¹⁰ Taking the other side, Professor Twerski suggests that "comparative negligence is less a strict comparison of fault than it is a kind of homespun judgment that the plaintiff should have his verdict reduced by what the jury considers to be an amount reflecting his participation in the injury."¹¹ The reality is that both causation and negligence are relevant to liability, but what is to be compared is negligence and not causation. Causation is not a relative concept; it exists or it does not, and if it does exist one does not speak of "degrees" of causation.¹² On the other hand, it is not the "moral blameworthiness" of

10. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 481 (1953). See also *Pan-Alaskan Fisheries, Inc. v. Marine Constr. and Design Co.*, 402 F. Supp. 1187, 1188 (W.D. Wash. 1975) ("Culpability, not causation, is the standard by which damages are assessed in comparative negligence cases.").

11. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 326 (1977). Section 2(b) of the Uniform Comparative Fault Act also seems to suggest that causation can be compared by making "the extent of the causal relation between the conduct and the damages" relevant to determining the "percentages of fault."

12. Dean Prosser has stated:

Causation is a fact. It is a matter of what has in fact occurred. A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them would not have occurred

[A]n act or an omission is not regarded as a cause of an event if the particular event would have occurred without it.

W. PROSSER, *LAW OF TORTS* 237-38 (4th ed. 1971). This quotation, and the discussion in the text, refer to "cause-in-fact," which is only one of a number of concepts that carry the label "cause." See Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71-73 (1975).

Often, commentators who suggest that cause-in-fact can be compared speak of causation in a different context than referred to above. Thus, when Hart and Honore speak of "degrees of causation," it is clear that they refer to cases in which effects are separable. They use as an example the assertion, "The main . . . cause of . . . his success as a miler was his assiduous training." H. HART & A. HONORE, *CAUSATION IN THE LAW* 214 (1959). Assiduous training does not enable one to run a mile—anyone who is otherwise able can do that. The training does enable one to run a mile faster than otherwise. When effects are separable, the law does divide liability upon the basis of cause. For example, a plaintiff who is injured in an automobile accident may not be able to recover for the increment in harm attributable to his failure to wear seat belts. See *Yocco v. Barris*, 16 Ill. App. 3d 113, 305 N.E.2d 584 (1973); *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164 (1974).

In another context, Professor Twerski has observed that "as a statement of fact and pure logic, it is clear that cause-in-fact is not subject to apportionment." Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413 (1978). He then suggests that in cases in which the causal connection is uncertain, juries, in assessing damages, could consider "the likelihood at a percentage basis that a party's activities caused harm." *Id.* This is quite different, of course, from saying that loss can be apportioned between two or more actual causes of harm.

the parties that is to be assessed,¹³ nor even the parties' negligence in the abstract, but rather the negligence that contributes to the accident. The plaintiff, or the defendant, may be negligent in the creation of risks that do not result in harm; if that happens, that negligence is not taken into account.¹⁴ If the negligence has contributed to the accident—that is, has caused it—then it is that negligence which is to be compared, and none other.

This may call for some precision in identifying the negligent acts which are to be compared. For example, if the plaintiff is intoxicated while driving his automobile, he certainly would be negligent—indeed perhaps *very* negligent. But that negligence as such will be irrelevant to his recovery if he is otherwise lawfully proceeding through an intersection and is struck by the defendant who is speeding and running a stop sign. The plaintiff's intoxication did not cause the accident. Even if it could be argued that the plaintiff could have avoided the accident by maintaining a reasonable lookout, it is the failure to maintain that lookout and not the intoxication that is the relevant act of negligence that must be compared.¹⁵

The Louisiana statute calls for a reduction in damages based upon the "negligence attributable" to the plaintiff,¹⁶ which is the phraseology used in most statutes.¹⁷ While this manner of expression is suitably vague, it is not inconsistent with the above analysis.

How the Shares of Negligence are to be Calculated

The difficulties inherent in comparing negligence have led one judge to lament that comparative negligence "not only invites but demands arbitrary determinations by judges and juries, turning them free to allocate loss as their sympathies direct."¹⁸ One need not

At a more philosophical level, see the debate between Professors Epstein and Borgo in Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 179-80 (1974), and Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 448-52 (1979).

13. See Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239, 249 (1976).

14. This is the traditional rule of proximate cause. If the negligence has not factually contributed to the harm, it is not a basis for imposing liability upon the defendant or for barring the plaintiff. See RESTATEMENT (SECOND) OF TORTS § 432 (1965).

15. This view is supported, in somewhat different terms, by Fleming, *supra* note 13, at 241; James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207, 217 (1973-74).

16. 1979 La. Acts, No. 431, § 1, amending LA. CIV. CODE art. 2323.

17. See H. WOODS, *THE NEGLIGENCE CASE—COMPARATIVE FAULT* app. (1978) (state-by-state summary of comparative fault laws).

18. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 616, 146 Cal. Rptr. 182, 206-07, 578 P.2d 899, 924 (1978) (Clark, J., dissenting).

share this despair entirely to agree that the calculation of the shares of negligence is no easy and clean-cut task. One way to handle the problem is to accept the imponderable nature of share calculation and to submit the issue to the jury under very general instructions with the hope that the jury will get the basic idea of what to do. This appears to have been the choice of the New Hampshire legislature in expressly providing that damages are to be awarded by general verdict.¹⁹ Indeed, one of the sponsors of the New Hampshire statute confessed as much in print:

Entrusting the entire process of dollar damages apportionment to the jury under general verdict procedures will strike some as an act of faith bordering on irresponsibility. [But as the bill worked its way through the legislative process] the realization grew that the rough and basic justice of unfettered jury deliberation was probably preferable (at least worth a good try) as an alternative to the horrendous mathematical processes described by opponents of the legislation as necessarily a part of the jury's function under special verdict statutes. Most of those involved in the jury trial process, it is submitted, would agree on reflection that New Hampshire juries are populated in the main by neither misers nor spendthrifts. Others, with much in the way of research and experience to draw from, agree on the fundamental fairness and good sense of the average juror.²⁰

Even when a special verdict is used the jury may receive little useful guidance. For example, the Louisiana comparative negligence statute instructs judges sitting with juries to use special verdicts, in which juries are to determine, as to each person involved, the "degree of fault, expressed as a percentage."²¹ This, of course, tells juries very little as to what is the intellectual process of calculating the degree of fault.²²

One method of conceptualizing the share of the negligence attributable to each party is to imagine a "fault line," with the absence of fault at one end having a value of zero and deliberate wrongdoing at the other having a value of ten. The fact finder would then estab-

19. N.H. REV. STAT. ANN. § 507:7-a (1977).

20. Nixon, *The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute*, 12 N.H.B.J. 17, 30 (1969).

21. 1979 La. Acts, No. 431, § 2, *amending* LA. CODE CIV. P. art. 1811. "Fault" is the word used in reference to the conduct of those whose conduct caused the plaintiff's harm. "Negligence" is the word used with reference to the plaintiff's conduct. See note 7, *supra*.

22. Even the Uniform Comparative Fault Act is very general. Section 2 simply provides that the trier of fact is to calculate the "percentage of the total fault of all of the parties."

lish where on this line the conduct of each party falls. As an example, assume a three person case, with each negligent to some degree. The jury might find the negligence of one person to fall at seven on the ten point scale, the second at two, and the third at four. The share of the negligence of the first would be 7/13 or 54%, of the second 2/13 or 15%, and of the third 4/13 or 31%. This analysis suggests a precision that probably would not be supportable by the evidence in many cases,²³ and it is not suggested that the "fault line" method either be incorporated into a statute or precisely in this form into the jury instructions. But it does provide a means of visualizing the fact finder's task, which perhaps could be put into a useful form.²⁴ In any event, the nature of the fact finder's task could be defined more particularly than it is in the Louisiana statute,²⁵ although this is one matter that might safely be left to the deliberation of the courts.

METHODS OF LOSS APPORTIONMENT

The following discussion presents an analysis of the methods of apportioning losses between plaintiff and defendant, as well as among defendants. As will become readily apparent, the central theme of the instant analysis is what this writer perceives to be the central theme of comparative negligence: liability should be based upon the shares of negligence attributable to those causing harm. Although this characterization of the central theme of comparative

23. *But see* *Kampman v. Dunham*, 560 P.2d 91 (Colo. 1977). In *Kampman*, the jury was able to detect a 1% share of the negligence attributable to one of the defendants.

24. An approach of this sort was suggested in *Wing v. Morse*, 300 A.2d 491, 500 (Me. 1973), when the court stated:

[A]pportionment is on the basis of fault or blame. This involves a comparison of the culpability of the parties, meaning by culpability not moral blame but the degree of departure from the standard of a reasonable man Comparison is invited between degrees of fault which may range from trivial inadvertence to the grossest recklessness In judging the conduct of an actor it should be considered complete carefulness is at one end, a deliberate intention to bring about the result is at the other. Negligence ranges from the least blameworthy type, namely, inadvertence and negligent errors of judgment up to a state where knowledge or more complete knowledge supervenes and the negligence of obstinacy, self-righteousness or reckless is reached. The factfinder must be told then [sic] under our statute, it should give consideration to the relative blame-worthiness of the causative fault of the claimant and of the defendant.

25. Judge Clark's characterization of comparative negligence as a "non-law system," *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d at 616, 146 Cal. Rptr. at 207, 578 P.2d at 924 (Clark, J., dissenting), is probably the overreaction of a judge hostile to comparative negligence in general and judicially-adopted comparative negligence in particular. But surely his criticism warrants thoughtful consideration if some method short of simple reliance upon the "fundamental fairness and good sense of the average juror," Nixon, *supra* note 20, at 30, is to be attained.

negligence would provoke little controversy, how the theme should serve to guide the choices among the alternative methods of loss apportionment, and even the rigor with which it should be adhered to, are matters as to which there is much disagreement.

Loss Apportionment Between Plaintiff and Defendant

The principal systems of comparative negligence with respect to loss apportionment between plaintiff and defendant are pure comparative negligence and modified comparative negligence. Under pure comparative negligence, the plaintiff's recovery is reduced, but not eliminated, by the share of negligence attributable to him,²⁶ until that point has been reached at which the causal negligence is determined to be entirely allocable to the plaintiff, and none allocable to the defendant. With this system, which is the one incorporated into the Louisiana statute,²⁷ a plaintiff whose share of the negligence is 99% can recover 1% of his damages. Under modified comparative negligence, the plaintiff will be barred from recovering in some instances in which less than all of the negligence is allocated to him. Within this modified form of comparative negligence, there are two sub-methods: one which bars the plaintiff's recovery when his negligence is 50% or more of the total, and the other when his negligence is 51% or more.²⁸ Up to those percentages, modified comparative negligence functions in the same way as the pure form in that the plaintiff's damages are reduced by that portion of the negligence attributable to him.

Before turning to a more detailed account of how these various methods work, a word on the nature of the debate involved in the choice between pure and modified comparative negligence systems is in order. One argument that has often been advanced in favor of

26. In describing here the operation of comparative negligence to reduce the plaintiff's recovery, it is assumed that only the plaintiff has suffered loss. If both plaintiff and defendant suffer loss, the recovery of each will be reduced, if set-off is required, by the amount of the recovery of the other as well as by his own negligence. As to set-off, see text at notes 62-68, *infra*.

27. 1979 La. Acts, No. 431, § 1, *amending* LA. CIV. CODE art. 2323.

28. Other forms of modified comparative negligence include that of Nebraska and South Dakota. The Nebraska statute calls for reduction of the plaintiff's damages by the amount of negligence attributable to him when his "negligence is slight and the negligence of the defendant was gross in comparison." NEB. REV. STAT. § 25-1151 (1975). South Dakota's statute is similar, calling for reduction of the damages when the plaintiff's negligence is slight when compared to that of the defendant, whether the latter's negligence is gross or not. S.D. COMPILED LAWS ANN. § 20-9-2 (1967). Tennessee has an even more unusual rule, under which the plaintiff's "remote" contributory negligence reduces but does not eliminate his recovery. *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869 (1919); *Chandler v. Nolen*, 50 Tenn. App. 49, 359 S.W.2d 591 (1961). These methods are enough out of the mainstream to warrant only this passing reference.

pure comparative negligence is its logical connection with the basic idea of comparative negligence: the plaintiff should not be barred from recovery by his own negligence; rather, his negligence should serve only to reduce his recovery.²⁹ Any rule which in some cases totally precludes the plaintiff from recovering when his negligence is less than 100%—even if it is more than that of others who have caused his harm—is inconsistent with that idea. Another argument emphasizes what is thought to be the basic fairness of pure comparative negligence, and is well stated by then Professor, now United States District Judge, Robert Keeton:

The "pure" form of comparative negligence seems the superior rule of apportionment. It is difficult to justify discriminating between the case in which the plaintiff is a little more negligent than the defendant, and the case in which the defendant is a little more negligent than the plaintiff. Apportionment seems a fairer solution in both cases than making one party bear all his own loss. Moreover, in one sense, the more limited form of comparative negligence would only aggravate this unfair discrimination if it really worked according to its theory, because the party a little more negligent would bear all his own loss plus a little more than half the loss flowing from the injury to the other.³⁰

Proponents of the modified comparative negligence system provide testimony as to the hardness of the fault concept. A committee of the American Bar Association was able to resolve the debate with the brief observation that pure comparative negligence goes "too far in abolishing fault as the basis for recovery."³¹ A sponsor of the New Hampshire modified system, while recognizing the "logic" of pure comparative negligence, asserted that his "'sandlot instinct' rebels against the 'fairness' of a rule which would . . . permit any recovery to the party found to be more at fault."³²

Dean Prosser dismissed modified systems as

more or less obvious compromises between contesting groups in the legislature which go part of the way along the road to apportionment but endeavor to stop short at some point where the distrust of the jury becomes acute, or where agreement can be reached. They are, in other words, political in character, and like

29. See Fleming, *supra* note 13, at 246-47.

30. Keeton, *Comment on Maki v. Frelk*, 21 VAND. L. REV. 906, 911 (1968).

31. REPORT OF THE A.B.A. SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATION 77 (1969).

32. Nixon, *supra* note 20, at 24-25.

most political compromises, they are remarkable neither for soundness in principle nor success in operation.³³

These remarks no doubt understate the extent to which there is support in principle for modified comparative negligence, as distinct from opposition to pure comparative negligence. However, it is interesting that courts, which are not so subject to short run political pressures as are legislatures, have, when they have felt free to act at all, by and large opted for the pure system.³⁴ Indeed, courts on occasion have been critical of their own legislatively adopted modified systems,³⁵ to the point that at least one judge was prepared judicially to adopt pure comparative negligence in spite of a modified comparative negligence statute.³⁶ Modified comparative negligence, on the other hand, is the clear preference of state legislatures.³⁷

In analyzing how the two systems work, the simple case of a two person accident, with one plaintiff and one defendant, provides the most helpful example. But difficulties not present in the basic two-party case may develop when there is more than one defendant. Additionally, when more than one party has suffered loss, a special problem arises, that of set-off. Finally, the circumstance in which the plaintiff suffers harm because another person has been injured or killed raises the possibility of "derivative" actions.

The Basic Two-Party Case

a) Under Pure Comparative Negligence

No particular problem is presented in apportioning the loss between the plaintiff and the defendant under pure comparative negligence. Under the Louisiana statute, for example, the plaintiff's recovery is reduced by the "degree or percentage of negligence attributable" to him.³⁸ Thus, if a plaintiff were to have provable damages of \$10,000 and were determined to be responsible for 30%

33. Prosser, *supra* note 10, at 484.

34. The cases from Alaska, California, Florida, and Michigan are cited in note 2, *supra*. The only judicially adopted modified comparative negligence laws are those of West Virginia and Tennessee.

35. See, e.g., *Howard v. Spafford*, 132 Vt. 434, 321 A.2d 74 (1974).

36. See the dissenting opinions of Chief Justice Hallows in *Lupie v. Hartzheim*, 54 Wis. 2d 415, 418, 195 N.W.2d 461, 462 (1972), and *Vincent v. Pabst Brewing Co.*, 47 Wis. 2d 120, 131, 177 N.W.2d 513, 518 (1970).

37. Connecticut, CONN. GEN. STAT. ANN. § 52-572h (1973); Mississippi, MISS. CODE ANN. § 11-7-15 (1972); New York, N.Y. CIV. PRAC. LAW §§ 1411-13 (McKinney 1975); Rhode Island, R.I. GEN. LAWS § 9-20-4 (1972); Washington, WASH. REV. CODE ANN. § 4.22.010 (1979); and now Louisiana are the only states to have legislatively adopted pure comparative negligence.

38. 1979 La. Acts, No. 431, § 1, *amending* LA. CIV. CODE art. 2323.

of the total negligence, with 70% attributable to the defendant, the judge would enter a judgment of \$7,000 for the plaintiff³⁹ (\$10,000 less 30% of \$10,000). If the shares of negligence were reversed, with the plaintiff allocated 70% of the negligence and the defendant 30%, the plaintiff's recovery would be \$3,000. The same method of computation is used if both parties have suffered loss—each recovers from the other his total damages reduced by his share of the negligence.⁴⁰

b) *Under Modified Comparative Negligence*

There are two main forms of modified comparative negligence, and like pure comparative negligence, neither presents difficulties in the basic two-party case. The older form, originally adopted by Wisconsin⁴¹ and followed by a number of states,⁴² provides that the contributory negligence of the plaintiff shall not be a bar to recovery if his negligence is not as great as that of the defendant. Under this form, a plaintiff whose negligence is less than 50% of the total can recover his loss reduced by his share of the negligence, but if his negligence is 50% or more of the total, he cannot recover anything. This is called the "50 percent bar." Under the more recent form of modified comparative negligence, pioneered by New Hampshire⁴³ and now followed by Wisconsin⁴⁴ and other states,⁴⁵ the plaintiff can recover so long as his negligence was not greater than that of the defendant. Under this form, the plaintiff cannot recover only when his negligence reaches 51% of the total; this is known as the "51 percent bar."⁴⁶ Theoretically, increasing the plaintiff's share of disabling negligence from 50% to 51% hardly represents a major change in philosophy. But it may have a greater practical impact

39. Under the Louisiana special verdict procedure, the jury, if there is one, determines the allocation of negligence, with the judge doing actual computation of the reduction. See 1979 La. Acts, No. 431, § 2, amending LA. CODE CIV. P. art. 1811.

40. When both parties suffer loss, there will be a problem of set-off. See text at notes 62-68, *infra*.

41. WIS. STAT. § 242 (1931).

42. For a list of the states adopting the original Wisconsin form of modified comparative negligence, see H. WOODS, *supra* note 17, at 82-83.

43. N.H. REV. STAT. ANN. § 507:7-a (1977).

44. WIS. STAT. ANN. § 895.045 (1979).

45. *E.g.*, Colorado, COLO. REV. STAT. § 13-21-111 (1973); Hawaii, HAWAII REV. STAT. § 663-31 (1974); Massachusetts, MASS. GEN. LAWS ch. 231, § 85 (1978); Oregon, OR. REV. STAT. §§ 18.470 to .490 (1975).

46. Using the highest percentages at which plaintiffs can recover, rather than the lowest at which they can be barred from recovery, Professor Fleming has referred to the two modified comparative negligence approaches as the "49 percent rule" and the "50 percent rule." Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HAST. L. REV. 1465, 1468 (1979).

than theory would suggest, if, as they are likely to do, juries in close cases divide the negligence down the middle.

Both forms of modified comparative negligence operate like pure comparative negligence up to the cutoff percentage. Thus, the plaintiff who suffered \$10,000 in damages and to whom 30% of the negligence is attributable could recover \$7,000, the same amount as that recovered under pure comparative negligence. But, unlike pure comparative negligence, there is a limit upon the plaintiff's right to recover short of the point at which 100% of the negligence is attributable to him. If both parties suffer loss, under the "50 percent bar" only the party less negligent can recover. If the negligence is divided equally between them, neither can recover. Under the "51 percent bar," each can recover up to the point that the negligence is divided evenly between them.

Multi-Defendant Cases

a) Under Pure Comparative Negligence

When there is more than one defendant, the problem of calculating the percentage of negligence attributable to each party may be more difficult for the jury, but once these shares are determined the mathematics of reducing the plaintiff's recovery is no more difficult than it is in the basic two-party case. Thus, if the plaintiff with \$10,000 in damages is responsible for 30% of the negligence, and one defendant responsible for 30% and another for 40%, the plaintiff is entitled to \$7,000, the same recovery as in the basic two-party case. And the same mechanics for reduction of damages are used when more than two parties suffer loss—the recovery of each party is reduced by the share of the total negligence attributable to him.

Beyond whatever practical difficulties there are in measuring the plaintiff's share of the negligence in multi-defendant cases, there is the more significant problem of whether that share is to be calculated with or without reference to the negligence of persons not before the court. The problem of what effect should be given to the negligence of an absent person is discussed in some detail in the later sections of this article dealing with joint and several liability and contribution.⁴⁷ For the reasons explained there, the preferable rule is one which does not take into account the negligence of those not parties to the action. This divides the burden of pursuing absent persons and the risk of their insolvency between the plaintiff and the defendants, a result that seems most consistent with the basic concept of comparative negligence. However, pure comparative

47. See text at notes 77-101, *infra*.

negligence statutes,⁴⁸ including that of Louisiana,⁴⁹ are uniform in using the negligence of all persons whose negligence has caused the plaintiff's harm in determining the share of the negligence attributable to the plaintiff.

b) *Under Modified Comparative Negligence*

Modified comparative negligence plans present the same policy problems as do pure systems with respect to the issue of whether the share of the plaintiff's negligence is to be determined with or without reference to the negligence of absent persons. Some modified comparative negligence statutes operate in the same way as do the pure and include the negligence of all persons whose negligence contributed to the plaintiff's harm, whether or not all are before the court.⁵⁰ Other statutes expressly provide that the plaintiff's share is to be calculated only with reference "to the total negligence of all persons against whom recovery is sought."⁵¹ The differences between modified comparative negligence and pure do not suggest that the two systems should differ with respect to this issue. As already stated,⁵² ignoring the negligence of absent persons is the preferable rule.

A problem that is unique to modified comparative negligence is whether a plaintiff can, in any event, recover against a defendant less negligent than he. The pure comparative negligence concept is built upon the acceptability of a plaintiff being able to recover from a defendant much less negligent than the plaintiff. But implicit in modified comparative negligence is the notion that at some point the plaintiff's share of the negligence, when compared to that of others whose negligence contributed to his harm, becomes large enough so that the plaintiff cannot recover at all. When there is only one defendant, that cutoff point is reached when, depending upon the form used, the plaintiff's share of the negligence reaches 50% or 51%. But if there is more than one defendant, the plaintiff's share of the negligence may equal or exceed that of one or more of the defendants, but still not reach 50% or more of the total. What should be the result, for example, if the plaintiff's share of the total negligence

48. See note 37, *supra*.

49. Act 431 makes it clear that the negligence of absent persons counts—a series of questions relating to the negligence of absent persons must be put to the jury. 1979 La. Acts, No. 431, § 2, *amending* LA. CODE CIV. P. art. 1811. ~

50. See COLO. REV. STAT. § 13-21-111 (1973); IDAHO CODE §§ 6-801 to -806 (1971); N.H. REV. STAT. ANN. 507:7a (1977).

51. MASS. GEN. LAWS ch. 231, § 85 (1973). See also HAWAII REV. STAT. § 663-31 (1975); OR. REV. STAT. §§ 18.470 to .490 (1975).

52. See text at note 48, *supra*.

is 40% and the share of each of two defendants is 30%? Focusing upon the mechanics of reducing the plaintiff's recovery discussed above, he should be able to recover 60% of his damages—but from whom? Some legislatures have concluded that permitting a plaintiff to recover from a less negligent defendant would conflict with the rationale of modified comparative negligence. The New Hampshire statute, for example, precludes recovery by a plaintiff in such circumstances.⁵³

The Massachusetts statute, on the other hand, permits recovery when the negligence of the plaintiff does not exceed that of all persons against whom he seeks recovery.⁵⁴ Thus, in the preceding hypothetical in which the plaintiff is allocated 40% of the negligence and the two defendants are allocated 30% each, the plaintiff could recover damages from both, even though his negligence exceeded that of each. But he could recover only by joining both; if he is able to sue only one of them, his negligence would exceed that of "all persons against whom recovery is sought." This result puts pressure upon plaintiffs under such a statute to bring suit in a forum in which all defendants can be sued and to sue defendants who are clearly judgment proof or even who are immune from liability.⁵⁵ Interestingly, none of the modified comparative negligence statutes permits recovery when the negligence of the plaintiff exceeds that of all other persons before the court, but is less than the total of all persons causing harm.

Once modified comparative negligence is accepted as preferable to the pure form, policy does not clearly preponderate in favor of

53. N.H. REV. STAT. ANN. 507:7a (1977). Other statutes operating in the same way are those of Colorado, COLO. REV. STAT. § 13-21-111 (1973); Hawaii, HAWAII REV. STAT. § 663-31 (1975); Idaho, IDAHO CODE §§ 6-801 to -806 (1971); Oregon, OR. REV. STAT. §§ 18.470 to .490 (1975).

54. MASS. GEN. LAWS ch. 231, § 85 (1973). Other statutes operating in the same way are those of Connecticut, CONN. GEN. STAT. ANN. § 52-572h (1973); and Minnesota, MINN. STAT. ANN. § 604.01 (1977).

55. Under statutes such as that of Massachusetts, which prohibit the plaintiff from recovering at all when his negligence exceeds that of "all persons against whom recovery is sought," an interesting dilemma is posed when one of the persons whose negligence has contributed to the plaintiff's harm is immune from liability to the plaintiff. According to these statutes, it is the negligence of the persons "against whom recovery is sought" that counts, not that as to whom recovery is *allowed*. Thus, if the negligence of an immune person is needed to make the negligence of all persons from whom the plaintiff seeks recovery exceed that of the plaintiff, the plaintiff will have to bring suit against the immune person even if there is no hope of recovery. Would such a suit violate Disciplinary Rule 7-102(A)(2) of the Code of Professional Responsibility, which prohibits "knowingly [advancing] a claim . . . that is unwarranted under existing law," or subject the plaintiff to an action by the immune defendant for malicious prosecution?

either the New Hampshire or Massachusetts approach. New Hampshire has obviously adopted its view of the "sandlot" equities between the plaintiff and each individual defendant.⁵⁶ On the other hand, when the focus is more generally on the impact upon the plaintiff who is less than 50% negligent, observers are apt to approve the Massachusetts approach of permitting recovery so long as the plaintiff's share of the negligence is less than the cutoff point of nonrecovery.⁵⁷

When a negligent defendant is not liable to the plaintiff because his negligence is less than that of the plaintiff, there is the additional problem of determining who should absorb the loss represented by that defendant's share. For example, assume that the plaintiff's share of the negligence is 20%, that of D_1 10%, of D_2 30%, and of D_3 40%. Under the New Hampshire statute, D_1 , because the plaintiff's negligence exceeds his, is not liable. However, the loss attributable to his share of the negligence must be borne by someone. It could be allocated in any of three ways: entirely to D_2 and D_3 , entirely to the plaintiff, or divided among all of them. There is certainly no reason to require D_2 and D_3 to entirely absorb the loss; such a result is inconsistent with the comparative negligence principle that the share of negligence determines the share of loss.⁵⁸ For the same reason, the loss probably ought not to be assessed entirely against the plaintiff, although the argument in logic for the plaintiff is not quite so strong as it is for the defendants. Modified comparative negligence carries with it a limitation upon the principle that liability is proportioned to negligence; the plaintiff whose negligence equals or exceeds (depending upon the statute) that of all others whose negligence caused his harm cannot recover at all. A further limitation upon the comparative negligence principle appears in those statutes, like New Hampshire's, that bar a plaintiff from recovering from a less negligent defendant. Thus, while modified comparative negligence embodies the principle that the *defendant's*

56. See Nixon, *supra* note 20, at 24-25 & 32-34.

57. See, e.g., *May v. Skelly Oil Co.*, 83 Wis. 2d 30, 264 N.W.2d 574 (1978). In *May*, the court, in dictum, observed:

The majority of this court has become convinced that comparing the negligence of the individual plaintiff to that of each individual tortfeasor—rather than comparing the negligence of the individual plaintiff to that of the combined negligence of the several tortfeasors who have collectively contributed to plaintiff's injuries—leads to harsh and unfair results; the majority has further concluded that this rule of comparative negligence, a court made doctrine, can be changed by court decision.

Id. at 38, 264 N.W.2d at 578.

58. This policy is further elaborated in connection with the problem of joint and several liability. See subsection entitled "Liability to the Plaintiff—Joint and Several Liability," *infra*.

liability should be proportioned to his negligence, it does not adhere fully to that principle when it comes to measuring the impact of the *plaintiff's* negligence. Thus, the plaintiff's claim not to bear the entire share of the loss attributable to a less negligent defendant is weaker than that of the remaining defendants. But probably the fairest solution is to divide that share of the loss among all remaining parties, plaintiff and defendants, according to their shares of the negligence.⁵⁹ Oddly enough, by a statute that is otherwise heavily defendant oriented,⁶⁰ the New Hampshire statute imposes the full loss upon the defendants, and none of it upon the plaintiff.⁶¹ This is added to the benefit afforded to the plaintiff under that statute from measuring the amount of the reduction in his damages by reference to *all* persons, including those not before the court, whose negligence caused his harm. Thus, in New Hampshire, defendants, who are ultimately charged with liability, are liable not only for the share of the harm caused by any defendant less negligent than the plaintiff, but for the shares attributable to absent defendants as well.

The Problem of Set-off

If both the plaintiff and the defendant have suffered harm and are entitled to recover, the problem of whether to require set-off arises.⁶² Assume a case in which the jury has allocated 50% of the total negligence to *A* and 50% to *B*, in an accident causing \$2,000 of damages to *A* and \$1,000 to *B*. Should the amount of the judgment to which *A* is entitled be computed by reducing his damages by 50% and subtracting the amount that *B* would otherwise be entitled to recover, to reach a net judgment of \$500? Applying the normal rules of set-off, this would be the result. However, if both *A* and *B* are covered by liability insurance, setting off judgments in this fashion would benefit the insurance companies at the expense of their insureds. Thus, of the \$1,000 to which *A* would otherwise be entitled to compensate him for his loss, he would receive only \$500. And *B's*

59. This method of dividing the loss is consistent with what this writer believes to be generally the fairest way to handle the loss attributable to the negligence of persons who for one reason or another are not liable.

60. The New Hampshire statute embodies modified, not pure, comparative negligence and has abrogated joint and several liability as to persons before the court. N.H. REV. STAT. ANN. § 507:7-a (1977).

61. N.H. REV. STAT. ANN. § 507:7-a (1977).

62. Under modified comparative negligence, set-off problems could only arise (1) when the negligence is divided evenly among the parties and the law permits recovery in such cases, and (2) when the negligence of at least two parties is less than 50% each and the law permits them to recover against persons less negligent. Under pure comparative negligence, set-off problems arise no matter how the negligence is divided.

insurer would get the total benefit of *B*'s verdict against *A*. There is no public policy that suggests that insurers should benefit in this way from comparative negligence laws.

One way to avoid this result would be to prohibit set-off in comparative negligence actions, as was done in the Rhode Island⁶³ and Oregon⁶⁴ statutes. But this broad prohibition goes further than necessary, since it would apply in cases in which neither party has insurance and would work unfairness in cases in which one party is insolvent. Thus, in the above hypothetical if neither *A* nor *B* were insured and *A* were insolvent, *B* would have to pay *A* \$1,000, but *B* would have to get in line with *A*'s other creditors to recover his \$500.⁶⁵

Both of these effects can be avoided by requiring set-off except to the extent that an insurer would benefit from it,⁶⁶ or by requiring set-off in all cases but establishing a procedure whereby an insurer must reimburse its own insured in such a way as to prevent the insurer from benefiting from the set-off. In the absence of specific resolutions of the problem, some courts have applied set-off statutes when they are mandatory.⁶⁷ Other courts, however, have been willing to ignore set-off statutes, at least when comparative negligence was judicially adopted.⁶⁸

*Calculating the Plaintiff's Share of the Negligence
in "Derivative" Actions*

Under the Louisiana comparative negligence statute, the person whose negligence is counted for the purpose of reducing recovery is the person "suffering the injury, death or loss."⁶⁹ In the discussion thus far in this article, it has been tacitly assumed that that person

63. R.I. GEN. LAWS § 9-20-4.1 (1979).

64. OR. REV. STAT. § 18.490 (1978).

65. Although the Uniform Comparative Fault Act prohibits set-off, it supplies a procedure whereby the hypothetical result indicated in the text can be avoided. Section 3 of the Act provides:

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

66. This is the suggestion of Professor James, *supra* note 15, at 222.

67. *Jess v. Hermann*, 79 Cal. App. 3d 140, 144 Cal. Rptr. 804 (1978); *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959); *Willingham v. Hagerty*, 553 S.W.2d 137 (Tex. Civ. App. 1977).

68. *See Datta v. Staab*, 173 Cal. App. 2d 613, 343 P.2d 977 (1959).

69. 1979 La. Acts, No. 431, § 1, amending LA. CIV. CODE art. 2323.

and the plaintiff are identical. This need not be true. There are instances in which the plaintiff's action is "derivative" in that he is not suing for direct physical harm to himself but rather because of such harm to some other person. Actions for wrongful death and loss of consortium⁷⁰ are derivative in this sense. Where the plaintiff's own negligence has caused harm to the other person, he would be barred from recovery under a contributory negligence system,⁷¹ and his recovery should be reduced proportionately under comparative negligence. But should the negligence of that other person be taken into account to reduce the plaintiff's recovery? Under the pre-comparative negligence law in Louisiana⁷² and generally elsewhere,⁷³ the negligence of a decedent did bar an action by the non-negligent wrongful death beneficiaries. Read literally, the comparative negligence statute would appear to change this, since the negligence of the decedent is not that of the plaintiff. But the derivative nature of wrongful death actions was confirmed in *Callais v. Allstate Insurance Co.*,⁷⁴ and a clearer expression of intent to alter this view than that presently in the Louisiana statute is likely to be required.

Loss Apportionment Among Defendants

Comparative negligence laws developed in response to the felt injustice of the all-or-nothing effect of contributory negligence.⁷⁵ But

70. Louisiana does not recognize actions for loss of consortium. See *Kelly v. United States Fid. & Guar. Co.*, 353 So. 2d 349 (La. App. 1st Cir. 1977), *cert. dismissed*, 357 So. 2d 1141 (La. 1978).

The rule in most states is that the action for loss of consortium is a derivative action and thus, the contributory negligence of the physically injured spouse bars action by the other spouse. See W. PROSSER, *supra* note 12, at 892-93. Prosser criticizes the rule, however, and argues that the action for loss of consortium is independent and that recovery should not depend on whether the physically injured spouse was not negligent. In New Hampshire, the action is viewed as independent, see *Reid v. Spadone Mach. Co.*, 400 A.2d 54 (N.H. 1979), and thus presumably the injured spouse's negligence would not serve to reduce the plaintiff's recovery. The Washington comparative negligence statute specifically provides that the negligence of the spouse who is the primary victim shall not be imputed to the other spouse in an action by the latter for the death of, or injury to, the former. See WASH. REV. CODE ANN. § 4.22.010 (1979).

71. See W. PROSSER, *supra* note 12, at 913.

72. See *Ritter v. Southern Farm Bureau Cas. Ins. Co.*, 321 So. 2d 46 (La. App. 3d Cir. 1975), *cert. denied*, 325 So. 2d 586 (La. 1976).

73. See, e.g., *Colorado & S.R. Co. v. Thomas*, 33 Colo. 517, 81 P. 801 (1905); *Clark v. Foster*, 87 Idaho 134, 391 P.2d 853 (1964); *Callais v. Allstate Ins. Co.*, 334 So. 2d 692 (La. 1976); W. PROSSER, *supra* note 12, at 910-11.

74. 334 So. 2d 692 (La. 1976).

75. The attack upon contributory negligence has been founded upon the obvious injustice of a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and

when the plaintiff's harm has been caused by the negligence of two or more other persons, the principle of comparative negligence that loss should be apportioned by shares of negligence has an obvious applicability to the apportionment of the plaintiff's recovery among those persons. The traditional doctrines of loss apportionment among defendants that could be affected by comparative negligence laws are those of joint and several liability and of contribution among joint tortfeasors. The first of these doctrines determines how the recovery is to be apportioned among the defendants vis-à-vis the plaintiff, and the second determines the apportionment among the defendants vis-à-vis each other. Comparative negligence also has implications for the effect that ought to be given to settlements.⁷⁶

Liability to the Plaintiff—Joint and Several Liability

Joint and several liability is the ordinary rule of liability when two or more persons negligently act either in concert or independently to cause indivisible harm.⁷⁷ In a system under which the defendant pays for the harm his negligence causes, except to a plaintiff whose own negligence has contributed to the harm, this rule is a logical one. As indicated in the discussion relating to the problem of what is to be compared under comparative negligence, negligence or causation, causation is an either/or proposition.⁷⁸ There are no degrees of causation. Thus, under the negligence/contributory negligence system, there is no logical basis upon which to apportion the liability to the plaintiff among the several defendants—if they all caused the harm, they each ought to be liable to the plaintiff for the whole of it.

But the principle of comparative negligence does provide a basis for apportioning the plaintiff's recovery among defendants, and the rules of joint and several liability ought to be rethought in light of that principle. In the following analysis of how comparative negligence ought to affect joint and several liability, a distinction is made between cases in which the plaintiff is free of negligence and those in which he is not.

quite possibly much less at fault than the defendant who goes scot free. No one ever has succeeded in justifying that as a policy, and no one ever will.

Prosser, *supra* note 10, at 469.

76. The problems referred to are dealt with in more detail, and with more of a Louisiana outlook, elsewhere in this symposium. See Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 LA. L. REV. 373 (1980). Thus the present treatment of these topics is sketchy and is designed simply to make a few points which are interrelated with the preceding analysis.

77. See W. PROSSER, *supra* note 12, at 297 & 314-17.

78. See note 12, *supra*, and accompanying text.

When the plaintiff himself has been negligent, the logical support for joint and several liability evaporates. That is, the law, by recognizing that loss which is jointly caused by the negligence of the plaintiff and the defendants can, and should be, apportioned according to the shares of negligence, provides a logical basis for apportioning the plaintiff's recovery among the defendants. Comparative negligence does not make the plaintiff's negligence irrelevant to recovery; rather, the defendants do not have to pay the plaintiff for that portion of the latter's loss attributable to his own negligence. The principle of loss apportionment by shares of negligence that insulates a defendant from liability to the plaintiff for loss due to plaintiff's negligence also should serve to insulate a defendant from liability for loss to the plaintiff attributable to the negligence of another defendant. There is nothing in logic that suggests that the negligence of the plaintiff and the negligence of other defendants ought to be treated differently in this respect.

If all those whose negligence contributed to the plaintiff's harm are before the court and solvent, abrogation of joint and several liability would cause no hardship to plaintiffs, beyond preventing them from determining, for purely personal reasons, who as an initial matter must satisfy the recovery. Certainly, relieving the plaintiff of the burden of pursuing all defendants until his judgment is satisfied would not seem to be a valid reason for transferring the burden of pursuit to one or more defendants.

But if one or more of the persons whose negligence caused the plaintiff's harm is not before the court⁷⁹ or is insolvent, the decision of whether or not to abrogate joint and several liability can have an important impact upon the parties. For the reasons set out above, joint and several liability is inconsistent with the loss apportionment idea inherent in comparative negligence, and for that reason, it should not be retained.⁸⁰ If joint and several liability is abolished, there are two alternatives as to how the loss of the non-paying person can be allocated; it can be allocated entirely to the plaintiff, or it

79. A potential defendant is likely to be absent only if he is not subject to the jurisdiction of the court. If the plaintiff prefers, for some reason, not to bring suit against an otherwise suable person, the named defendants are likely to bring such a person in and have him joined as a defendant. Joinder can be compelled in such cases in Louisiana, see *State Dep't of Hwys. v. Lamar Adv. Co. of La., Inc.*, 279 So. 2d 671 (La. 1973), but not in all states. See, e.g., *Mihoy v. Proulx*, 113 N.H. 698, 313 A.2d 723 (1973).

80. A rather unpersuasive argument for retaining joint and several liability is made in *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978). The court, in its single-minded concern for compensating the injured plaintiff, simply did not indicate why it is fairer for a defendant to suffer loss out of proportion to his negligence than it is for the negligent plaintiff to do so.

can be apportioned among all those whose negligence caused the harm, plaintiff and remaining defendants, according to the ratio that their respective shares of the negligence bear to each other.

On one view, the most logical rule is the allocation of the non-paying person's share to the negligent plaintiff. Comparative negligence is premised not only upon the ability but upon the desirability of apportioning loss according to the shares of negligence attributable to the parties.⁸¹ At a minimum this means: (1) a person causing loss to himself by his own negligence cannot recover that portion of his loss that equals his share of the negligence; and (2) a person causing loss to another by his negligence is liable according to his share of the negligence. These principles suggest a third: a person's share of the negligence should not only determine the extent of his liability, but the limit as well. As previously observed, a defendant is not liable to the negligent plaintiff for the loss allocated to the plaintiff, and this is true whether or not the plaintiff can, without major economic dislocation, bear the loss himself. There is no logical reason why the rule should be different when the plaintiff urges that one defendant should pay for the unsatisfiable share of another defendant.⁸²

This result is consistent with the general legal attitude toward plaintiffs who are faced with an absent or insolvent defendant; the law does not guarantee to every plaintiff a defendant who has neither of these characteristics.⁸³ Perhaps the closest analogy to allocation by shares of negligence is allocation by causation. If two persons act independently to cause discrete and divisible increments of harm to the plaintiff, neither person is liable for the unsatisfied loss caused by the other;⁸⁴ liability is several, not joint. And if a person is not liable for harm caused by another, neither should he be liable for harm attributable to the other based upon the division of the negligence.

81. Although modified comparative negligence systems do not embody this principle fully, the present discussion applies as much to such systems as it does to pure comparative negligence.

82. This argument carries, of course, implications for contribution among tortfeasors. See text at notes 99-101, *infra*.

83. This does not mean that the law is indifferent to problems caused by absent or insolvent persons. "Long arm" statutes and compulsory automobile liability insurance, for example, are designed to smooth the plaintiff's way to recovery. But even these, of course, do not furnish complete protection against loss attributable to absent and insolvent persons.

84. This is also true when the other person is the plaintiff himself. If the plaintiff causes harm to himself, by failing unreasonably to "mitigate" his damages, he, and not the defendant, must absorb the loss attributable to such failure. See W. PROSSER, *supra* note 12, at 422-24. See also the discussion in note 12, *supra*, with respect to the "seat belt" cases.

On the other hand, there does seem to be something unfair—something inconsistent with our “sandlot instincts,” to use the New Hampshire terminology⁸⁵—with imposing all of the loss attributable to the non-responsible person upon the negligent plaintiff. There are those, for example, who reject the foregoing analogy to liability based upon causation.⁸⁶ In any event, rejecting the rule which would impose the loss entirely upon the defendant would not mean acceptance of joint and several liability. A compromise approach in which the parties divide the uncollectible loss among themselves according to the ratio that their shares of negligence bear to each other is possible. The Uniform Comparative Fault Act achieves the splitting of such loss by: (1) ignoring the negligence of parties not before the court;⁸⁷ (2) retaining joint and several liability as to persons before the court;⁸⁸ (3) providing for contribution among tortfeasors proportioned to their negligence;⁸⁹ and (4) calling for redistribution, a year after the initial judgment, among the remaining parties, including the plaintiff, of any loss then uncollectible.⁹⁰ While this approach does achieve the goal of dividing uncollectible losses among the parties to the action, it imposes upon a defendant who has paid more than his share of the loss to the plaintiff both the initial burden of pursuing the non-paying party and the risk that, in the event of a redistribution proceeding, the plaintiff will be insolvent and unable to compensate the defendant for his share of the redistributed loss. As already observed, there is no policy reason for transferring from the plaintiff to one of the defendants the burden of securing satisfaction of a judgment from the other defendants.⁹¹ Nor should the defendant be required to underwrite the risk that the plaintiff will be unable to meet his share of the redistributed loss. Of course, were the plaintiff to have to wait a year before recovering what turns out to be an otherwise uncollectible loss from a defendant, there is some risk that such defendant would be unable to pay to the plaintiff his share of the redistributed loss. But this risk is less than that of the plaintiff's inability to pay. In most cases, the defendant who would be called upon to pay more than his share is likely to have liability insurance, a source which would be available to the

85. Nixon, *supra* note 20.

86. See Berg, *Comparative Contribution and Its Alternatives: The Equitable Distribution of Accident Losses*, 43 INS. COUNSEL J. 577, 587 (1976).

87. UNIFORM COMPARATIVE FAULT ACT § 2(a)(2). The Act also calls for the inclusion of the share of the negligence of any person who has settled with the plaintiff and has been released from liability under section 6 of the Act.

88. UNIFORM COMPARATIVE FAULT ACT § 2(c).

89. UNIFORM COMPARATIVE FAULT ACT § 4.

90. UNIFORM COMPARATIVE FAULT ACT § 2(d).

91. See text at notes 78-80, *supra*.

plaintiff at any time. The negligent plaintiff's redistribution liability, on the other hand, will not be backed by insurance. Thus, the fairer system for dividing uncollectible losses would be to adopt the Uniform Act approach, but to abrogate, rather than to retain, joint and several liability as to those before the court. This would put the burden upon the plaintiff of pursuing all defendants for the purpose of satisfying the judgment and would avoid the very real risk to the overpaying defendant that the plaintiff will be unable to reimburse him for the plaintiff's redistributed share of the uncollectible loss.⁹²

While the commentators favor a rule which divides the uncollectible loss between the negligent plaintiff and the remaining defendants,⁹³ thus far no American jurisdiction has adopted the approach of the Uniform Act of redistributing the uncollectible loss. However, this does not mean that joint and several liability has been fully retained in all states. While some states have retained it, others have totally or partially abrogated it.⁹⁴

The preceding discussion of joint and several liability was premised upon the situation in which the plaintiff himself was negligent.

92. This method would require a plaintiff in such cases to wait up to a year to fully recover what he is entitled to recover, and perhaps plaintiffs as a class can less afford to wait for recovery than can defendants, or their insurers, as a class. That this is a valid reason for making defendants rather than plaintiffs initially absorb loss out of proportion to their negligence is doubtful. It is even less persuasive as a reason when the risk of the plaintiff's inability to pay is added to the defendant's burden, or to that of his insurer.

93. See, e.g., Fleming, *supra* note 46, at 1491-94.

94. Under comparative negligence, joint and several liability is fully retained by calculating the shares of negligence with reference to all persons, including those not before the court, whose negligence caused the plaintiff's harm and imposing upon each defendant liability for the full amount that the plaintiff is entitled to recover—limiting the plaintiff to one full recovery, of course. This is the law of California, see *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978); Idaho, see IDAHO CODE §§ 6-803 to -804 (1971); and Utah, see UTAH CODE ANN. §§ 78-27-37 & -41 (1973). Joint and several liability is fully abrogated by calculating the shares of negligence in the same way, but by imposing upon each defendant liability only for his share of the plaintiff's recovery. Statutes embodying this approach are those of Kansas, see KAN. STAT. ANN. § 60-258(a)(d) (1976); and Nevada, see NEV. REV. STAT. § 41.141(3)(a) & (b) (1973).

Joint and several liability is partially abrogated either by calculating the share of negligence with reference only to those before the court or by making each defendant liable only for his share, regardless of whether or not the negligence of non-parties is used to determine the shares of negligence. States partially abrogating joint and several liability are Massachusetts, see MASS. GEN. LAWS ANN. ch. 231, § 85 (1973); New Hampshire, see N.H. REV. STAT. ANN. § 507:7-a (1977); and North Dakota, see N.D. CENT. CODE ANN. § 9-10-07 (1973).

The Louisiana statute retains joint and several liability except that "a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of negligence has been attributed . . ." 1979 La. Acts, No. 431, § 1, amending LA. CIV. CODE art. 2324.

Although rigorous application of the loss apportionment principle of comparative negligence might suggest that the non-negligent plaintiff be treated the same as the negligent plaintiff, on balance this writer concludes that joint and several liability should be fully retained when the plaintiff is not negligent. To abrogate joint and several liability in the case of the non-negligent plaintiff would be to make such persons worse off under comparative negligence than they were under contributory negligence. And it seems incongruous to take the benefits given by comparative negligence to negligent plaintiffs out of the hides, so to speak, of non-negligent plaintiffs. Furthermore, to speak of the abrogation or retention of joint and several liability with respect to the negligent plaintiff as a technical matter makes no sense; that doctrine had no applicability to the negligent plaintiff under contributory negligence because he had no recovery.

But treating negligent and non-negligent plaintiffs differently with respect to joint and several liability also creates incongruities. Is there that much difference, for example, between a totally non-negligent plaintiff and one who is only 1% negligent? And even with the non-negligent plaintiff, is it fair to impose the full liability for the plaintiff's recovery upon a defendant who is only 1% negligent when the defendant who is 99% negligent is insolvent? These questions suggest that both logical consistency and fairness probably are not obtainable. What is called for, then, is a compromise that makes the least inroads into both values. That compromise is one under which joint and several liability applies when the plaintiff is not negligent, but does not apply when the plaintiff is negligent. Cases in which the plaintiff is 1% negligent will be rarer than those in which the plaintiff is free of negligence. Shares of negligence are not calculated by computers but by people whose ability to discern small increments of negligence is obviously limited. Thus, as a practical matter, whatever incongruity there is in theory in treating the non-negligent plaintiff differently than the very slightly negligent plaintiff is fairly insignificant. There are also likely to be very few cases in which the negligence of the defendants is divided 99 to 1. Thus, the greatest fidelity to the ideals of loss apportionment of comparative negligence and the protection of the negligent-free plaintiff is achieved by adhering to joint and several liability for the non-negligent plaintiff, but not for the negligent plaintiff.⁹⁵

95. At least one court has ruled that the comparative negligence statute does not apply at all when the plaintiff is not guilty of negligence. *See Kampman v. Dunham*, 560 P.2d 91 (Colo. 1977). While this is consistent with a literal reading of most comparative negligence statutes, other courts faced with the issue have held otherwise. *See Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978); *Mihoy v. Proulx*, 113 N.H. 698, 313 A.2d 723 (1973).

A special problem with respect to who should bear the loss attributable to the negligence of non-responsible persons arises when the non-responsibility results from immunity. Under the negligence/contributory negligence system, if the negligence of two persons, one of whom is immune to liability, combines to cause indivisible harm to the plaintiff, the non-immune person is liable in full for the plaintiff's damages.⁹⁶ This is not, of course, an instance of joint and several liability, since the immune person is not liable to the plaintiff at all. But liability would seem to be supported by the underlying theory of joint and several liability that each person should be fully liable for the harm he negligently causes, even if some other person has also acted to cause the harm.

The problem is one of how that portion of the plaintiff's loss attributable to the immune person should be distributed among the remaining parties. The answer to this question should depend upon the nature of the immunity. If the immunity is total—that is, if it extends to all other persons involved in the case, such as governmental immunity—then it would seem appropriate to treat such an immune person as if he were insolvent. Thus, if the plaintiff were negligent, the immune person's share of the loss should be distributed among the remaining parties, including the plaintiff. This would be achieved by ignoring the immune person's negligence in calculating the total pool of negligence to be divided among the others. If the plaintiff were not negligent, then the immune person's share of the loss should be imposed upon the remaining defendants.

But if the immunity extends only to the plaintiff, and not to the others involved, as in cases of the family and the workers' compensation immunities, then it would be inappropriate to impose any of the loss attributable to such immune person upon any person other than the plaintiff, even if the plaintiff is guilty of no negligence. These immunities result not from a broad judgment that the immune person should not be liable at all for certain kinds of negligence, as is the case of governmental immunity, but rather on the narrower ground that because of some special relationship, this plaintiff should not recover from this defendant. There is no reason under comparative negligence to permit the plaintiff to avoid the consequences of that relationship by shifting all or part of the loss to non-immune persons. This result could be accomplished by including the negligence of the immune persons in the determination

96. See *Shonka v. Campbell*, 260 Iowa 1178, 152 N.W.2d 242 (1967); *Rodgers v. Galindo*, 68 N.M. 215, 360 P.2d 400 (1961); *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953).

of the shares of negligence of the others, but then limiting the liability of the other defendants to their shares of the negligence.⁹⁷

*Liability to Each Other—Contribution*⁹⁸

Whether there should be contribution among tortfeasors, and, if so, how it should work, become issues under comparative fault if

97. This was the approach used by the court in *Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1978). While that case involved family immunities, the court wrote as if the plaintiff would absorb the full loss attributed to a person with total immunity. Such a result is consistent with the court's statement that the full loss attributable to an insolvent tortfeasor is also allocated to the plaintiff. Holding that the defendant, rather than the plaintiff, must absorb the loss attributable to a negligent person who is immune to liability to the plaintiff (here the plaintiff's father) is *Dixon v. Royal Cab, Inc.*, 396 A.2d 930 (R.I. 1979). The court in *Dixon* seemed to view the issue as one of imputed negligence and relied on an earlier Rhode Island case in which the court refused to impute the negligence of the plaintiff's mother to the plaintiff. This obviously misconceives the issue; it is not whether the negligence of the immune person should be imputed to the plaintiff. If one does view the issue that way, then the Rhode Island court in *Dixon* imputed the plaintiff's father's negligence to the defendant. The issue is rather how the loss attributable to the negligence of an immune person is to be allocated among the remaining parties.

Problems caused by family immunities are even more complicated than the text would suggest. Some states have abrogated the immunities as such, but prohibit some suits when the act of negligence arises from conduct peculiar in some sense to the family relationship. Thus, the husband-wife tort immunity has been abrogated except as to conduct "involving marital or nuptial privileges, consensual acts and simple, common domestic negligence." *Tevis v. Tevis*, 400 A.2d 1189, 1192 (N.J. 1979). And the parent-child immunity has been abrogated except as to failure to supervise. See *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338 (1974). If, under these rules, one family member cannot sue another, it might be said that there is no negligence with respect to the plaintiff which could be included in the total pool of negligence. And yet the same conduct which causes harm to the family member might also cause harm to one to whom the immunity does not extend, and the torts process stands ready to condemn that conduct as negligent. It would therefore seem appropriate in family immunity cases to assess the negligence of immune persons for the purpose of protecting the non-immune person, even though in theory the immune person did not act negligently toward the plaintiff.

98. A plaintiff's losses are allocated among several persons not only by way of contribution, but also by way of indemnity. The latter differs from the former in that it is not a method of apportioning loss, but is rather a method of imposing the full loss on one person. See W. PROSSER, *supra* note 12, at 310. Apart from contract, a defendant may be entitled to indemnity from another because of qualitative differences in their negligent conduct. Thus, in some states a defendant whose negligence is "passive" may recover in full from another person whose negligence in causing the plaintiff's harm is "active." See, e.g., *Daly v. Bergstedt*, 267 Minn. 244, 126 N.W.2d 242 (1964); *Western Cas. & Surety Co. v. Shell Oil Co.*, 413 S.W.2d 550 (Mo. App. 1967). In such cases, it would seem appropriate to permit contribution proportioned to negligence. The all-or-nothing aspect of indemnity under such circumstances is analogous to last clear chance, which most observers feel has no place in comparative negligence schemes. See, e.g., *Fleming*, *supra* note 13, at 259-60.

However, if the right to indemnity arises out of a relationship between the parties

joint and several liability is totally or partially retained.⁹⁹ Consistency with the concept of comparative negligence requires that contribution among joint tortfeasors in such cases be permitted, and that such contribution be based upon the parties' shares of negligence. The commentators are uniform in their approval of proportionate contribution,¹⁰⁰ and no other approach makes sense under comparative negligence.

If the analysis in the preceding section relating to immune persons is accepted, there is little reason to follow those courts which now permit, at least sometimes,¹⁰¹ contribution against a person who is immune from liability that extends only to the plaintiff. Under the negligence/contributory negligence system, there is no method of allocating to the plaintiff the loss attributable to the immune person, and as between an immune person and a non-immune person, notions of fairness might support dividing the loss between them rather than imposing it all upon the hapless non-immune person. But under comparative negligence, the plaintiff becomes a possible candidate for absorbing the loss attributable to a person who is immune to liability to him. And for the reasons expressed in the preceding section, that is where the loss should be imposed. There is no reason for a back door abrogation of the immunity by permitting contribution against the immune person.

The Effect of Settlement

Comparative negligence laws also present unique problems with respect to settlement. Under the negligence/contributory negligence system, a settlement by the plaintiff with one of several tortfeasors has two effects. As to the plaintiff, it reduces the liability of the other defendants by the dollar amount of the settlement. As to the settling defendant, a settlement made in good faith insulates that

irrespective of fault, then comparative negligence laws should have no effect. Such rights of indemnity occur, for example when a master responds initially in damages for harm caused by a servant, *see, e.g.*, *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966); *Reliance Ins. Co. v. Liberty Mut. Ins. Co.*, 497 S.W.2d 885 (Tenn. 1973), and when a retailer responds initially in damages for a defectively manufactured product, *see, e.g.*, *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d (1970).

99. The mechanics by which joint and several liability can be retained totally or partially are set out in note 94, *supra*.

100. *See Berg, supra* note 86; *Fleming, supra* note 13, at 251; *Griffith, Helmsley & Burr, Contribution, Indemnity, Settlements & Releases, What the Pennsylvania Comparative Negligence Statute Did Not Say*, 24 VILL. L.R. 494, 496 (1979).

101. New York permits contribution in the case of workers' compensation, *see Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972), but not in cases of parent-child immunity, *see Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338 (1974).

defendant from further liability to the plaintiff and, by way of contribution, to the other defendants.¹⁰² Comparative negligence does not suggest that the latter effect should in any way be changed. The settling defendant should continue to be insulated from further liability to the plaintiff and, if there is good faith, to the other defendants. But there remains an important problem of the extent to which the plaintiff's rights against the other defendants should be affected.

Under the negligence/contributory negligence system, each defendant declared liable is, under the rules of joint and several liability, liable for the whole of the plaintiff's harm. Under the early laws of contribution, the plaintiff could not bar any person's right to contribution by settling with another person also liable to the plaintiff for less than the settling person's per capita share of the ultimate judgment.¹⁰³ While this seemed fair to the non-settling persons, it robbed all those who might be liable to the plaintiff of any incentive to settle individually. A compromise between the perceived need to encourage and protect settlements and fairness to the non-settling persons was reached by barring the non-settling person from contribution from one who did settle only if the settlement were made in good faith.¹⁰⁴ While this rule would protect the non-settling persons from the most obvious cases of overreaching, it would leave them helpless in many cases because of the difficulties involved in proving bad faith.¹⁰⁵ Thus, they would end up paying substantial amounts in excess of their per capita share.¹⁰⁶

Under a comparative negligence system, however, these prob-

102. *Hangar Cab Co. v. City of Atlanta*, 122 Ga. App. 661, 178 S.E.2d 292 (1970); *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969).

103. See W. PROSSER, *supra* note 12, at 309.

104. See *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956); *Hobbs v. Hurley*, 117 Me. 449, 104 A. 814 (1918); *Ankeny v. Moffett*, 37 Minn. 190, 33 N.W. 320 (1887); Annot., *Contribution Between Negligent Tortfeasors at Common Law*, 60 A.L.R.2d 1366 (1958).

105. *Openshaw v. Allstate Ins. Co.*, 94 Idaho 192, 484 P.2d 1032 (1971); *State Farm Mut. Auto. Ins. Co. v. White*, 248 Md. 324, 236 A.2d 269 (1967); *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. App. 1976).

106. To some extent, the effect of overpayment by non-settlers as a class could be offset by the underpayment of settlers as a class if there is some overlap between these two classes. The extent of the overlap is hard to gauge, but among those who settle there probably would be a higher percentage of uninsured, non-institutional persons, who pass this way but once or twice, than among those who do not settle. If there were two defendants, one insured and one uninsured, the plaintiff might well settle with the latter for what he could get, regardless of his per capita share, knowing that the insured defendant would be liable for the rest. Of course, if the plaintiff's estimate of what could be extracted from the uninsured defendant was accurate, the insurer has lost nothing. But the presence of insurance removes a substantial incentive for the plaintiff to pursue the non-insured defendant with much vigor. Good faith does not require the plaintiff to subordinate his own interests to that of the insurer.

lems can be avoided by reducing the plaintiff's recovery, and the non-settling defendant's liability, by the shares of the negligence attributable to those who have settled.¹⁰⁷ The advantage of this approach from a process point of view is that it puts pressure upon the plaintiff to make a more realistic assessment of a defendant's ability to pay before settling; the plaintiff, not the other defendants, bears the risk of a bad settlement. It also avoids the need to inquire into the good faith of the plaintiff, a difficult issue at best in all but the clearest of cases.

In theory, too, the reduction of the plaintiff's recovery by the share of the settling defendant's negligence, rather than by the dollar amount of the settlement, is preferable. There is a logical consistency in measuring each defendant's liability by his share of the negligence in instances of settlement as well as in cases in which liability is determined by verdict and judgment. And, if the settlement were undervalued, reduction of the liability of the other defendants only by the dollar amount of the settlement would require each to pay in excess of his share of the negligence, a result inconsistent with the idea of comparative negligence.¹⁰⁸

CONCLUSION

Comparative negligence has considerable appeal. While it retains fault as a basis for liability at a time when we do not appear ready to abandon it as a principal rule of accident loss allocation,¹⁰⁹ it

107. See *Rogers v. Spady*, 147 N.J. Super. 274, 371 A.2d 285 (1977). Implicit in this approach is the inclusion of the negligence of a person who has settled in the pool of negligence which is used to determine the shares of negligence of the parties. In the discussion throughout this article relating to whose negligence is counted for the purpose of share determination, no reference is made to the negligence of settlers, but such negligence should be included.

108. See subsection entitled "Loss Apportionment Between Defendants," *supra*. The settlor who pays an amount in excess of his share of the negligence presents no problem unique to comparative negligence. The usual rule outside of comparative negligence is that a settlor who pays more than his per capita share is entitled to contribution to the extent of the excess from those tortfeasors who have not settled. See, e.g., *Wages v. State Farm Mut. Auto. Ins. Co.*, 132 Ga. App. 79, 208 S.E.2d 1 (1974). The concept of comparative negligence does not suggest a different result although it is arguably more appropriate to permit contribution based on the settling person's share of the negligence, rather than upon the dollar amount of the settlement.

109. No-fault automobile insurance no longer seems a pressing issue; and, while half the states have no-fault legislation, no such statute has been adopted in the past three years. Even in workers' compensation, the no-fault principle is being undercut by permitting recovery by injured workers for negligent machinery design against manufacturers of machinery used on the job, see *Cavazos v. E.W. Bliss Co.*, 394 N.E.2d 438 (Ill. App. 1979); *Reid v. Spadone Mach. Co.*, 404 A.2d 1094 (N.H. 1979), and the availability, in some states, of contribution by third party defendants against otherwise immune employers, see, e.g., *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972).

avoids the seeming harshness of barring all recovery by a negligent plaintiff. However, accepting the concept of comparative negligence is but the first step; what is a relatively simple idea involves a great deal of complexity in translating that concept into a concrete plan for loss apportionment.¹¹⁰ This article surveys the principal methods of apportioning loss through comparative negligence. What this writer views as the central theme of comparative negligence—that loss should be apportioned according to shares of negligence—has applications across a wide range of apportionment issues. These issues relate not only to how the plaintiff's recovery should be affected by his negligence, but also to how that recovery should be distributed among others whose negligence has contributed to the loss. At a number of points in this article, alternatives which seem most consistent with that theme have been suggested. However, practical politics as much as logic will often influence the course of legislation.¹¹¹ And, of course, the existence of conflicting notions of good policy make compromise inevitable. For these reasons, it is not always possible for a legislature to provide answers to all the problems that must, sooner or later, be addressed. But an effective legislative process requires an awareness of these problems so that the most intelligent and acceptable choices can be made. This article should help to focus upon these choices with respect to the methods by which losses can be apportioned under comparative negligence.

110. This complexity has led a number of courts to defer to legislative process for the abrogation of the common law rule of contributory negligence. *See, e.g., Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968); *Syroid v. Albuquerque Gravel Prods. Co.*, 86 N.M. 235, 522 P.2d 570 (1974). Certainly, the amount of litigation that would be required to work out the problems covered in this article on a case-by-case basis would be enormous. Even when courts have acted initially, legislatures may feel the necessity to alter or fill in the courts' schemes. *See Fleming, supra* note 46.

111. This is why many advocates of law reform prefer courts to legislatures: ideological purity is easier to achieve.