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Loss Allocation Under Pennsylvania's Comparative Negligence System: Is it "Fair"?

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I. Introduction and Overview

Ten years ago, Pennsylvania joined the growing ranks of states to adopt a system of comparative negligence by enacting the Pennsylvania Comparative Negligence Act (CNA).[1] The CNA, adopted

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1. 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982 and Supp. 1985). Act of July 9, 1976, P.L. 855, Act No. 152, eff. Sept. 7, 1976.

§ 7102. Comparative Negligence

(a) General rule.—In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(b) Recovery against joint defendant; contribution.—Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

(c) Downhill skiing.—

(1) The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognzied that as in some other sports, there are inherent risks in the sport of downhill skiing.

(2) The doctrine of voluntary assumption of risk as it applies to downhill skiing injuries and damages is not modified by subsections (a) and (b).

(d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Defendant or defendants against whom recovery is sought." Includes impleaded defendants.

"Plaintiff." Includes counterclaimants and cross-claimants.

Alabama, Delaware, Virginia and the District of Columbia are the only jurisdictions that have not adopted comparative negligence as of the time of this writing. H. WOODS, COMPARATIVE FAULT, (1978 and 1985 Supp.). However, both Virginia and the District of Columbia have adopted it in limited situations. One of these is where the plaintiff is an employee of a common carrier. South Dakota and the District of Columbia specify that for the exception to apply the employee's negligence must be "slight" in comparison to the "gross" negligence of the employer/common carrier. *Id.* at 456. The "slight/gross" type of comparative negligence, in which the defense of contributory negligence was no bar if there was a great quantitative difference between the fault of the plaintiff and the fault of the defendant was the first type of

with a minimum of legislative history,[2] was purportedly modeled after the influential Wisconsin Comparative Negligence Act.[3] Yet due to a slight but significant difference in the wording of the two Acts,[4] differences in the statutory and judicial framework for contribution between the two states,[5] and the widely-held belief on the part of Pennsylvania courts and commentators that the state should forge its own interpretative way,[6] Pennsylvania's system of comparative negligence bears its own stamp of individuality. The two state-held policies of fully compensating injured plaintiffs[7] and encouraging out of

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comparative negligence system to gain acceptance in this country. *Id.* § 4.5, at 85-86. In Virginia, comparative negligence only applies in the limited situation where a failure to give statutory railroad signals is a proximate cause of the accident. *Id.* at 578-79. Alabama is still waiting action by the legislature rather than the courts. *Id.* (1985 Supp.), at 257.

2. The legislative history is located at 1 PA. LEGIS. J. 1703-07 (Senate 1976). No extensive review of the various options for a system of comparative negligence seems to have been made during public debate.

3. WIS. STAT. ANN. § 895.045 (West 1983). The Wisconsin Act was originally enacted in 1931.

4. The Wisconsin Act provides that contributory negligence shall not bar recovery if such negligence is "not greater than the negligence of the *person* against whom recovery is sought . . . ." (emphasis added). WIS. STAT. ANN. § 895.045 (West Supp. 1983). Pennsylvania's CNA provides that the plaintiff is allowed to recover where such negligence is "not greater that the causal negligence of the *defendant or defendants* against whom recovery is sought . . . ." 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982) (emphasis added). It is likely due to the difference in wording that negligence of the plaintiff in Wisconsin is compared with that of each defendant individually. Wisconsin initially followed the unit approach in which the plaintiff's negligence is compared with that of each defendant separately, Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934), switched to the aggregate approach in May v. Skelley Oil Co., 83 Wis.2d 30, 264 N.W.2d 574 (1978), and then switched back to the unit approach in Reiter v. Dyken, 95 Wis.2d 461, 290 N.W.2d 510 (1980). *See infra* text and accompanying notes 177-180.

5. Pennsylvania adopted a Contribution Act in 1951 PA. UNIF. CONTRIB. AMONG TORTFEASORS ACT, 42 PA. CONS. STAT. ANN. §§ 8321-27 (Purdon 1982) [hereinafter PaCATA]. Wisconsin decided there was a right of contribution among joint tortfeasors by judicial decision prior to the enactment of its Comparative Negligence Act. (*See* Ellis v. Chicago & N.W. Ry. Co., 167 Wis. 392, 167 N.W. 1048 (1918). In Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962), the Wisconsin Supreme Court held that contribution should be based on proportional shares depending on degree of fault rather than on equal *pro rata* shares. Note that Wisconsin's Comparative Negligence Act adopted in 1931 does not provide for contribution, as does Pennsylvania's CNA. WIS. STAT. ANN. § 895.045. The Pennsylvania CNA also requires that each defendant be liable for that proportion of damages in the ratio of his causal negligence to that of the other defendants, whereas Wisconsin's statute is silent on that point. Another significant difference between the two acts is the provision for joint and several liability in the Pennsylvania Act and Wisconsin's silence as to that point. However, case law has established joint and several liability as the rule in Wisconsin. Bielski v. Schulze, 16 Wis.2d 1, 6, 114 N.W.2d 105, 107 (1962).

6. *See* Timby & Plevyak, *The Effect of Pennsylvania's Comparative Negligence Statute on Traditional Tort Concepts and Doctrines*, 24 VILL. L. REV. 453, 462 (1979) (*Symposium: Comparative Negligence in Pennsylvania*). *See also* Elder v. Orluck, 334 Pa. Super. 329, 351, 483 A.2d 474, 485 (1984) (although Wisconsin's comparative negligence statute is cited by CNA's sponsor, the Pennsylvania legislature could not have intended to follow the Wisconsin "individual" approach).

7. Pennsylvania holds the dual policies of ensuring an injured plaintiff a full tort recovery while not allowing a plaintiff to receive more than his tort recovery. These two values

court settlements[8] also add substantially to the uniqueness of Pennsylvania's comparative negligence system.

The Pennsylvania CNA has two essential elements. First, CNA abolishes the availability of contributory negligence as a complete defense for the negligent tortfeasor, except in cases where the plaintiff's negligence is greater than the total negligence of the defendant or defendants.[9] Second, CNA allocates the negligence of *all the parties* including plaintiffs. CNA also applies to situations in which there are two more more defendants but the plaintiff is absolutely free of fault.[10] In cases where there are multiple defendants, CNA addresses extremely complex issues of liability, contribution, indemnification, subrogation and settlement. Because of the extreme chariness with which the Pennsylvania courts have meted out holdings, and because of its inherent difficulties, CNA-related litigation is an area fraught with perplexing, unanswered questions that can stymie even the most experienced practitioner.

In many major areas of comparative negligence law, the CNA leaves open more questions than it answers. Is the plaintiff's negligence to be compared with each individual defendant's negligence or with that of the defendants as an aggregate group?[11] This question is

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have had a significant impact on Pennsylvania's comparative negligence system as it has evolved in its treatment of "secondary losses." A "secondary" loss is not the loss from the accident itself, but rather the loss that results from the inability of of one or more of the tortfeasors to pay its part of the judgment due to insolvency, or absence from suit. *See* Berg, *Comparative Contribution and Its Alternatives: The Equitable Distribution of Accident Losses*, 43 INS. COUNSEL J. 577, 586 (1976). In addition, Pennsylvania maintains a system of joint and several liability, thus predicating, at least in cases involving multiple tortfeasors, that these secondary losses are born by the defendants rather than being shared by both the plaintiff and the defendants. *See infra* text and accompanying notes 181-197.

8. *See infra* text and accompanying notes 63-70 relating to Pennsylvania's policy favoring out-of-court settlement of law suits and the barriers its system of contributions poses to that goal.

9. *See infra* notes 177-80 and accompanying text.

10. *See, e.g.*, Charles v. Giant Eagle Markets, 330 Pa. Super. 76, 478 A.2d 1359 (1984), *reargument ordered*, 510 A.2d 350 (1986). *See infra* notes 200-05 and accompanying text.

It is important to note that Pennsylvania's system of comparative negligence really served to codify a pre-existing *de facto* judicial effectuation of comparative negligence concepts. Prior to the enactment of CNA it was common practice for juries, as a practical matter, to deliver a compromise verdict so that a partly-at-fault plaintiff would not be completely foreclosed from recovering by the contributory negligence bar but would nonetheless recover, albeit in a reduced amount due to his fault. *See, e.g.*, Karcesky v. Laria, 382 Pa. 227, 234, 114 A.2d 150, 154 (1955); Elza v. Chovan, 396 Pa. 112, 115, 152 A.2d 238, 240 (1959); and Austin v. Harnish, 227 Pa. Super. 199, 204, 323 A.2d 871, 874 (1974).

11. Such a question is a consideration of great relevance in a "modified" system of comparative negligence such as Pennsylvania's where a plaintiff can recover only if his negligence is " . . . *not greater than*" the causal negligence of the defendant or defendants against whom recovery is sought . . . ." 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982) (emphasis added). *See also supra* note 4 and *infra* text and accompanying notes 177-80.

paramount to a partially-at-fault plaintiff suing several tortfeasors, each of whose negligence was less than the plaintiff's, but whose combined negligence is greater than his.[12] Should a jury be informed of the consequences of its apportionment of causal negligence? This question is significant in a modified "not greater than" system such as Pennsylvania's in which a plaintiff can recover if his negligence is "less than" or "as great as" the negligence of the defendant or defendants, but is barred from recovering if his negligence is greater than that of the defendant or defendants.[13]

The CNA also placed precedential interpretations of its Contribution Act in question. Is a joint tortfeasor now required to be present at trial so that a proper allocation of fault according to CNA can be assigned each tortfeasor, even if he had previously settled with the plaintiff, or is his participation in the litigation excused once he has settled?[14] Does the CNA impliedly overrule the *Daugherty v.*

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12. That issue was finally decided seven years after the enactment of the Act in favor of the "aggregate" position under which a plaintiff may recover from a less-negligent defendant as long as the aggregate negligence of all the defendants is not less than his. Elder v. Orluck, 334 Pa. Super. 329, 483 A.2d 474 (1984).

13. A jury ignorant of this legal fact could conceivably allocate 51% negligence to the plaintiff and 49% to the defendants, completely unaware that their finding would result in a total bar to a plaintiff's recovery. Such a "blind" jury has even more impact on an "equal" or "as great as" system where if both the plaintiff and defendant (or defendants) are found equally negligent, plaintiff if foreclosed from recovery. The reason for the greater impact in the "equal" system is the relatively common finding by the jury that plaintiff and defendant are equally negligent, thus triggering a complete bar to plaintiff. The "not as great as," "as great as," and "not greater than" systems are variants of the "hybrid" system of comparative negligence so named because it is a hybrid of a system of no comparative negligence (plaintiff is barred at a certain point in the 50% range) and pure comparative negligence where a faulty plaintiff can recover no matter how much he was at fault, but where his recovery will be reduced by his percentage of negligence. W. PROSSER & W.P. KEETON, TORTS, § 67, at 473 (5th ed. 1984). Under the "pure" form of comparative negligence, where a plaintiff could conceivably recover even if his negligence caused 99% of his injury (albeit with a potential recovery of 1% of the verdict), the consequences of informing the jury of the consequences of its apportionment has no relevance. The Pennsylvania Superior Court has held that a jury should be informed of the consequences of its apportionment in Peair v. Home Ass'n of Enola Legion No. 751, 287 Pa. Super. 400, 430 A.2d 665 (1981).

Very few states have comprehensively answered many of the questions which arise in a system of comparative negligence in their original statutes. Texas' statute goes a long way towards completeness, but still left many substantive areas open. TEX. REV. CIV. STAT. ANN. art. 2212, 2212a, 2212b (Vernon 1985 Supp.). The new Texas comparative negligence statute, Act of 1985, 69th Leg., ch. 959, p. 7105 eff. Sept. 1, 1985 is substantially similar to the repealed version. Utah enacted a contribution statute, a comparative negligence statute, and a reversal of the common law doctrine that a release of one tortfeasor releases all in its enactment of one statute. UTAH CODE ANN. §§ 78-27-37 to -43. *See* Thode, *Comparative Negligence, Contribution Among Tort-Feasors, and the Effect of a Release — A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406. The best and most comprehensively conceived act is the UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1986). *See infra* text and accompanying notes 206-23.

14. *See infra* text and accompanying notes 134-35 and 151-58. CNA does not require releasee to be present for fault apportionment purposes.

Hershberger rule that a plaintiff may only recover from a non-settling joint tortfeasor that amount on a verdict not covered by a settlement with other joint tortfeasors, or does overpayment by a settler under CNA mean that a non-settler is liable for his full proportional share of any judgment rendered, regardless of a possible double recovery by plaintiff?[15]

Other important substantive areas of law affect and are affected by the interpretation of any system of comparative negligence. The interrelationship between these substantive concerns and comparative negligence forces courts to decide significant issues in areas such as product liability and assumption of risk. For example, in a system of comparative negligence, how should the factfinder deal with the fault of a tortfeasor who has placed a defective product on the market? Should the negligence of one actor be compared with the "fault" in strict liability of the product manufacturer? Should the product manufacturer bear the entire loss? Should the negligent consumer carry its own loss?[16]

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15. *See infra* discussion of the *Mong* and *Daugherty* precedents, text and accompanying notes 67-75 and the *Charles* decision under CNA, *infra* notes 200-05 and accompanying text.

16. Although the Pennsylvania Supreme Court has not made a final pronouncement on this subject, several lower federal court decisions have been rendered. In Conti v. Ford Motor Co., 578 F. Supp. 1429 (E.D. Pa. 1983), *rev'd on other grounds*, 743 F.2d 195 (1984), Judge Fullam concluded that the Pennsylvania Supreme Court would not invoke the comparative negligence doctrine in a products liability case. In holding for the plaintiff-wife, the court in *Conti* did so in spite of a finding that the husband's negligence caused 75% of the accident, whereas the defendant manufacturer's fault only produced 25% of the injury. *Id.* at 1432. Because the fault of the party liable in product liability was not "on the same legal plane" as the negligence of the user, the Pennsylvania Contribution Act also did not apply and Ford was forced to bear the entire cost of the judgment. *Accord*, Bike v. American Motors Corp., 101 F.R.D. 77 (E.D. Pa. 1977).

But see Smith v. Kolcraft Products, 107 F.R.D. 767 (M.D. Pa. 1985), in which Judge Caldwell accepted the premise that a manufacturer of an infant care seat could be a "joint tortfeasor" with a negligent driver who fell asleep at the wheel of a car. This was because the two parties united to produce a single injury which could not be apportioned. "It is immaterial to a finding of joint tortfeasor status that Kolcraft may be strictly liable and Smith negligent. Theories of liability do not determine joint tortfeasor status. Kolcraft is entitled to contribution or indemnity from Smith if his negligence is proven." *Id.* at 770.

In a recent decision, the Court of Appeals for the Third Circuit held that the liability of a negligent party and a strictly liable party *should* be compared. The court based its ruling on the Contribution Act rather than CNA. The court there held that Union Carbide, a strictly liable defendant, was entitled to contribution from Columbus Lines, the negligent defendant since Union Carbide had paid more than its *pro rata* share of a common liability. Rabatin v. Columbus Lines, No. 84-4781 (May 2, 1986). Judge Gibbons, writing for the court, criticized the *Bike* and *Conti* holdings, stating that those cases "missed the point." *Id.* at 4, n.1. *See also* Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?* 29 VILL. L. REV. 695 (1984).

Rabatin relies on the scheme of allocation mapped out in Capuano v. Echo Bicycle Co., 27 D.& C.3d 524 (Northamp. Cty. 1982) which held that the Contribution Act applies to determine contribution rights between a strictly liable defendant and negligent defendants *as a group*. Judge Gibbons, then, would not apply the CNA at all, since it controls merely the

Assumption of risk issues have also arisen in CNA-related litigation. CNA raised the question whether assumption of risk was still available as a complete defense in cases arising under the Act.[17] In *Rutter v. Northeastern Beaver City School District*,[18] a 1981 plural-

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rights of negligent defendants *inter se* and there was only one negligent defendant in *Rabatin*. *Id.* Judge Gibbons concluded that since the Contribution Act was applicable, the only remaining question was whether the strictly liable defendant and the negligent defendant were joint tortfeasors, thus coming within the jurisdiction of the Contribution Act. *Id.* at 6. This determination was made in the affirmative since their conduct caused a single harm which could not be viewed independently of one another. Another factor leading to the finding of joint tortfeasorhood was that they both could have "guarded against each others' conduct," *id.* at 7,. and thereby could have prevented Rabatin's injuries: Union Carbide by refraining from making a defective product, and Columbus by taking proper precautions.

Note that under *Capuano*, where a strictly liable party and a group of negligent defendants are involved, the negligent defendants will be treated as one defendant, and a one-half share of the judgment will be allocated to them under the Contribution Act. Likewise, the liability of the strictly liable party under the Contribution Act will amount to the other half of the verdict. 27 D.&C.3d at 532-33. The liability of the negligent defendants *inter se* will then be determined by the proportional liability rules of CNA. *Id.* The effect of this system, apparently, is to give heavy weight to the manufacturer's liability as compared with that of the negligent defendants if it is less than 50% causally responsible for the injury and to give it lighter weight if it is more. Neither *Capuano* nor *Rabatin* reaches the question as to whether CNA should be read into the Contribution Act in this circumstance, so that the *pro rata* share of the strictly liable party should be construed as a proportional share, as case law has already established where only negligent parties are involved. *See* Slaughter v. Pennsylvania X-Ray Corp., 638 F.2d 639 (3d Cir. 1981).

For a legislative response to this area, see S.621, § 8374 (1985) which allocates damages and responsibility proportionally among strictly liable defendants and other negligent parties. *See also* H. 2425 §,8374 (1986) and H. 2426 § 7105(b) (1986) to same effect.

Another wrinkle in the area of comparing product liability with other causal factors was recently considered by the Pennsylvania Superior Court. In Martin v. Johns-Manville Corp., ___ Pa. Super. ___, 502 A.2d 1264 (1985), the Pennsylvania Superior Court, *en banc* unanimously held that an asbestos defendant would have the right for a damage apportionment between harm caused by plaintiff's cigarette smoking and plaintiff's exposure to asbestos.

Dambacher v. Mallis, 336 Pa. Super. 22, 485 A.2d 408 (1984), involved a Pennsylvania state court's attempt to cope with the mixed question of product liability and negligence. The case involved a radial tire which was held defective because it was not embossed with a warning not to mix it with non-radial tires. The negligence was driver fault. Sears, the supplier of the tire, wanted the court to apportion the product liability and negligence according to CNA. Although the superior court apportioned fault among all the parties whether negligent or strictly liable, the case does not have precedential value. This is because in *Dambacher* the issue was the *nature* of the jury instructions and not whether fault should be apportioned between strictly liable and negligent actors. The latter issue was not properly preserved at the trial court for appellate review according to the majority. *Id.* at 29, n.1, 485 A.2d at 412 n.1. As Judge Wieand pointed out in his separate opinion, the majority holding that Sears waived the apportionment issue was questionable. *Id.* at 88, n.6, 485 A.2d at 442, n.6 (Wieand, J., concurring and dissenting). Judge Wieand suggested that CNA was really intended as a comparative fault statute, and cited the Uniform Comparative Fault Act with approval, *id.* at 88, 485 A.2d at 443, therefore he was able to concur with the result reached by the majority.

17. The issue ultimately became whether assumption of risk in the primary sense would be a bar to recovery under CNA. In primary assumption of risk, a plaintiff has given his express consent to release the defendant of a duty to exercise care for his protection. He "takes his chances" as to injury from a "known or possible risk . . . ." RESTATEMENT (SECOND) OF TORTS § 496A comment c (1965).

18. 496 Pa. 590, 612, 437 A.2d 1198, 1209 (1981). *But see* Vargus v. Pitman Mfg. Co., 675 F.2d 73 (3d Cir. 1982) for the proposition that CNA does not preclude the defense of assumption of risk in its primary sense.

ity decision, the Pennsylvania Supreme Court suggested in dicta that the doctrine of assumption of risk should be completely abolished as counterproductive to the aims of the Comparative Negligence Act. Two years later, in *Smith v. Seven Springs Farm, Inc.*,[19] the Third Circuit Court of Appeals concluded that the "Skiers Responsibility Act," appended to CNA in 1980,[20] would become meaningless unless the doctrine, at least in its primary sense, persisted.[21]

Over the past ten years, the Pennsylvania state courts and federal district courts have painstakingly worked their way through these and many other issues raised by the Comparative Negligence Act.[22] Certain questions, however, have not yet been addressed by the courts. Foremost of these is the question of the "phantom" defendant. Should the negligence of a tortfeasor who cannot be made a party to the lawsuit, either because he is not amenable to suit in the jurisdiction or because he cannot be found, be considered in the allocation of fault under the Act? If so, who should bear the loss of this uncollectable amount?[23] A related question concerns the immune

19. 716 F.2d 1002 (1983).

20. 42 PA. CONS. STAT. ANN. § 7102(c) (Purdon 1982).

21. The statement in § 7102(c) that the doctrine of assumption of risk *as it applies to downhill skiing injuries* is not modified by CNA is extremely cryptic since the interpretation of the doctrine prior to the amendment to CNA had been in a state of extreme flux. The *Smith* court, taking pains to inform the public that what it said was *dicta*, read § 7102(c) to preserve the defense of assumption of risk in its primary sense in downhill skiing cases only. Smith v. Seven Springs Farm, Inc., 716 F.2d 1002, 1007, and n.4 (3d Cir. 1983).

It appears that economic factors led to the enactment of the "Skier's Responsibility Act" rather than any need for defining the area of assumption of risk under Pennsylvania law. The "Skier's Responsibility Act" is essentially a statement of several findings (that the sport is practiced in Pennsylvania by many citizens of the Commonwealth, that it also attracts many visitors from other jurisdictions and that there are inherent risks in the sport) followed by what is in essence a veiled warning that skiers voluntarily assume the risk of the sport and will be barred from recovery under CNA.

22. *See, e.g.*, Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983) (host may assert contributory negligence of intoxicated minor guest as a defense to liability); Scattaregia v. Shin Shen Wu, 343 Pa. Super. 452, 495 A.2d 552 (1985) (husband's loss of consortium verdict is derivative, therefore should be reduced by percentage of wife's contributory fault according to CNA); Werner v. Quality Service Oil Co., 337 Pa. Super. 264, 486 A.2d 1009 (1984) (combine percentages of husband's and wife's negligence in tenancy-by-entirety property to determine whether CNA bars recovery); Reilly v. Southeastern Pennsylvania Transp. Auth., 330 Pa. Super. 420, 479 A.2d 973 (1984) (joint and several liability applies to Rule 238 delay damages where more than one defendant is involved); Beary v. Pennsy. Electric Co., 322 Pa. Super. 52, 469 A.2d 176 (1983) (directed verdicts inappropriate in CNA cases); Kaiser v. 191 Presidential Corp., 308 Pa. Super. 301, 454 A.2d 141 (1982) (trial court cannot *sua sponte* rearrange plaintiff's recovery to conform to contribution act); Heller v. Consol. Rail Corp., 576 F. Supp. 6 (E.D. Pa. 1982) (railroad not liable for willful misconduct of trespasser); Altamuro v. Milner Hotel Inc., 540 F. Supp. 870 (E.D. Pa. 1982) (if rescue was "reasonable" then compare negligence of rescuer and the party that created the dangerous situation under CNA).

23. *See infra* notes 159-176 and accompanying text for a full discussion of the "phantom" tortfeasor problem. The issue has never explicitly been decided, but a common practice has evolved, a practice that now has the weight of precedent. According to this practice, the

tortfeasor. If a party is either statutorily immune or enjoys common law immunity, should his theoretic percentage of negligence be taken into account in the fault apportionment process under CNA? And if so, who bears the risk of this secondary loss?[24]

This comment traces the system of loss allocation among tortfeasors in Pennsylvania from the common law, through the adoption of the Pennsylvania Contribution Among Tortfeasors Act and up to its presently evolving form under CNA. It includes a discussion of the interrelation of the Pennsylvania Workers' Compensation Act with CNA and its effect on the relationship between the liability of the employer and a third party tortfeasor. The manner in which Pennsylvania's systems of contribution and comparative negligence interrelate to impact on the environment for out-of-court settlements is also examined. In addition, the comment examines the loss allocation system with an eye towards determining wheher it has maintained a modicum of "fairness" both on an abstract level and according to the values expressed in state-held policies. Finally, this comment discusses and evaluates alternative systems for loss allocation under comparative negligence, both systems which are now in place in various jurisdictions and systems which have been proposed by commentators, jurists and commissioners, including the Uniform Comparative Fault Act.

II. The Rule Against Contribution Among Tortfeasors

In early English common law, only one kind of joint tort existed — the "pure" joint tort, which imposed vicarious liability for concerted action.[25] For example, if two bystanders acting in concert purposely tripped a jogger, at common law each tortfeasor would be liable for the entire injury since each was "guilty" of having caused the injury in the first place.[26] Since the act of one tortfeasor could be

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negligence of the "phantom" tortfeasor does not enter into the loss allocation process. This secondary loss is allocated among all the other defendants. A jury may also in practice proportionally enlarge the percentage of liability of all the parties, including the plaintiff-at-fault to make up for this missing amount.

24. There is no case law as yet facing the issue of common law immunity under CNA. There are, however, many decisions dealing with loss allocation when a statutorily immune workers' compensation employer is involved in an accident in the workplace caused or partially caused by a third party tortfeasor. *See infra* notes 101-50 and accompanying text.

25. W. PROSSER & W. P. KEETON, TORTS § 46, at 322 (5th ed. 1984).

26. The concept of joint torts grew up in the early action of trespass which was an action in criminal law. The common law requirement that each of the tortfeasors is liable to pay the entire amount has persisted up through the present time in Pennsylvania's system of joint and several liability, which applies even where the tort is not a "pure" one involving concerted effort towards a common goal. *See infra* text and accompanying notes 181-97.

Such a theory of recovery now seems unduly harsh. This is because we have become

imputed to another, the plaintiff could sue and recover the entire judgment from either. If a plaintiff were left unsatisfied after proceeding against one tortfeasor, however, he could not sue the other. His action had been "merged" into the judgment and there was no cause of action remaining on which to sue.[27]

Under this often-criticized common law system, the plaintiff had consummate control over whom he wanted to sue. Since each joint tortfeasor was liable for the whole amount, the plaintiff could refuse tender from one tortfeasor in hopes of a larger recovery from another.[28] If, however, the two tortfeasors did not act in concert, there would be two causes of action; and executing against one tortfeasor would not foreclose a cause of action against the other for the remainder of the verdict. This latter type of tort was called a "concurrent" or "procedural tort."[29]

In the United States, under the influence of the *New York Field Code of Procedure*, the harsh rule that foreclosed a plaintiff from executing on "pure" joint tortfeasors until full judgment was obtained was modified.[30] The common law rule in the United States for both the "pure" and "concurrent" tort became joint and several liability until full compensation, or satisfaction, was achieved. Execution was not permitted to go beyond that point so that unjust enrichment on the part of the plaintiff was prevented.[31] Each subsequent partial satisfaction would reduce *pro tanto*[32] the total judgment amount; and when the plaintiff was fully compensated, he was barred from proceeding further.[33]

The question of contribution arose next. At common law, once a

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conditioned by the notion of shared fault. The notion of the culpability of parties still persists in our system of comparative negligence in the areas of subrogation and contribution, which are seen as equitable doctrines. *See* Comment, *Subrogation in Pennsylvania — Competing Interests of Insurers and Insureds in Settlements with Third Party Tortfeasors*, 56 TEMP. L.Q. 667 (1983). At common law, the culpability of a tortfeasor in trespass was akin to criminal culpability and found its way into the theoretic basis for the rule against contributions. *See infra*, text and accompanying notes 34-38.

27. W. PROSSER & W.P. KEETON, *supra* note 25, § 48, at 330.

28. By choosing whom to sue, the tortfeasor could confer what was, in all material aspects, an immunity on the tortfeasor he chose not to sue. Commissioners' Prefatory Note, UNIF. CONTRIB. AMONG TORTFEASORS (1955), 12 U.L.A. at 60-61 (1975).

29. *See* Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937) and Note, *Settlement Devices with Joint Tortfeasors*, 25 U. FLA. L. REV. 762 (1973).

30. The *Field Code* was designed to help foster settlement of all issues in a single court case. *See* Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 818 (1924).

31. W. PROSSER & W.P. KEETON, *supra* note 25, § 48, at 330.

32. From the Latin "for as much as may be; as far as it goes." A payment which decreases a money judgment by the amount of the payment. To be compared with *pro rata*, which means according to a certain rate, percentage or proportion. BLACK'S LAW DICTIONARY 1100 & 1098 (5th ed. 1979).

33. W. PROSSER & W.P. KEETON, *supra* note 25, § 48, at 331.

defendant paid the judgment he had no right to proceed against any of the other joint tortfeasors to obtain contribution from them for their share of the loss.[34] This harsh rule against contribution among joint tortfeasors apparently had its origin in intentional torts. It was believed that since contribution was an equitable concept, the equitable rule of "clean hands" would protect the non-paying tortfeasor from being hauled into court by an intentional tortfeasor who had discharged the common obligation.[35] In England, contribution was denied only in cases where the wrongdoer's act was willful. This allowed for contribution in cases of vicarious liability, negligence, accident, mistake and other unintentional tortious acts.[36] In the United States, the reason behind the "no contribution" rule[37] was lost to sight, and many American jurisdictions proceeded to apply a strict "no contribution" rule monolithically in any case involving multiple tortfeasors, whether an intentional or unintentional tort was involved.[38]

Very few American jurisdictions departed from this unfair common law rule denying the right to contribution among all types of tortfeasors. One of the few jurisdictions that chose not to adopt the harsh "American Rule" was Pennsylvania. Before adopting its Contribution Among Tortfeasors Act (PaCATA) in 1951,[39] Pennsylva-

34. The basis for this rule was an equitable doctrine: that it is not the duty of the courts to come to the aid of a wrongdoer. Contribution distributes the loss among tortfeasors who are jointly or severally liable in tort by requiring each one to share the burden of the loss when it is discharged by one tortfeasor, or when one tortfeasor pays more than his share of the loss. It is an equitable right held by the paying tortfeasor and is considered to be inchoate, ripening only if and when a joint tortfeasor pays more than his share of the common liability. HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL § 4A.10 (rev. ed.). *See also* Greenstone, *Spreading the Loss — Indemnity, Contribution, Comparative Negligence & Subrogation*, 13 FORUM 266 (1977). Each share of joint liability under common law is a *pro rata* share, *see supra* note 32. Under common law, a *pro rata* share does not take into account the relative "blameworthyness" of the negligent actor, but is merely a formula whereby a party's share is calculated by dividing the number of liable defendants by the amount of the liability. Thus, each defendant is liable for an equal share, regardless of his degree of fault. HEFT & HEFT, *supra*, at § 4A.10.

CNA changed the rule of *pro rata* liability insofar as under comparative negligence the *pro rata* shares are calculated in reference to the percentage of causal fault of the defendants. *See*, Slaughter v. Pennsylvania X-Ray Corp., 638 F.2d 639, 644 (3d Cir. 1981).

35. *See* Note, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898); Prosser, *Joint Tortfeasors and Several Liability*, 25 CALIF. L. REV. 413, 425-26 (1937) and Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

36. W. PROSSER & W.P. KEETON, *supra* note 25 § 50, at 337.

37. The reason for the rule was the qualitative distinction between intentional and unintentional torts. *See supra* note 35.

38. W. PROSSER & W.P. KEETON, *supra* note 25 § 50, at 337.

39. PA. CONTRIB. AMONG TORTFEASORS ACT, 42 PA. CONS. STAT. ANN. §§ 8321-27 (Purdon 1982). Pennsylvania was one of the first jurisdictions to adopt the Uniform Act promulgated in 1939.

nia followed the "English" rule permitting contribution except in cases of intentional conduct.[40] The Pennsylvania Contribution Act can therefore be seen as a codification and refinement of an already existent common law right.

III. Release and Settlement — Common Law and the Contribution Act

Release is the surrender of a cause of action. This can be done either gratuitously or for "inadequate" consideration.[41] When the only type of joint tort was the "pure" joint tort, it was logical that release of one co-tortfeasor released all, since theoretically there existed only one cause of action against all wrongdoers, which was surrendered with the release.[42] But this practice of "release of one releases all," like the doctrine of no contribution among tortfeasors[43] and the rule that there be only one execution on a judgment,[44] spread to the "concurrent" or "procedural" tort[45] where there was no theoretical reason to support it.[46] In fact, even when a release instrument expressly stated that it should not have the effect of surrendering a plaintiff's cause of action against any other joint tortfeasor, it might nonetheless have that very effect.[47]

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40. *See, e.g.*., Armstrong County v. Clarion County, 66 Pa. 218 (1870) and Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A.231 (1928). *Goldman* states that there are exceptions to the rule that there is no "contributorship" [sic] between joint tortfeasors. *Id.* at 358, 141 A. at 232. Citing 13 C.J. 829, *Goldman* attempts to define those areas in which a right to contribution does not accrue as situations in which the underlying transaction was illegal or fraudulent. The prime factor is, according to the *Goldman* court, whether the defendant knew his action was wrongful *at the time* of the act. *Id.* at 361, 141 A. at 234.

Two other states, Wisconsin and Minnesota, joined Pennsylvania in relaxing the rule against contribution among joint tortfeasors. *See* Ellis v. Chicago & N.W. Ry. Co., 167 Wis. 392, 167 N.W. 1048 (1918); Underwriters at Lloyds v. Smith, 166 Minn. 388, 208 N.W. 13 (1926). It is interesting to note that aside from being among the progressives states on the contribution issue, Wisconsin and Minnesota were also among the earliest jurisdictions to adopt comparative negligence systems, in 1931 and 1969 respectively. *See* HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL §§ 3.570, and 3.300 (Rev. ed.).

41. If a cause of action (chose in action) is released for adequate compensation and the plaintiff is fully compensated for his injuries, then "satisfaction" rather than "release" has occurred and no litigation against additional defendants can ensue. *See* Note, *Settlement Devises with Joint Tortfeasors*, 25 U. FLA. L. REV. 7621 (1973).

42. W. PROSSER & W.P. KEETON, *supra* note 25, § 49, at 332.

43. *See supra* notes 34-38 and accompanying text.

44. *See supra* notes 27-28 and accompanying text.

45. *See supra* note 29 and accompanying text.

46. W. PROSSER & W.P. KEETON, *supra* note 25, § 49, at 332. *See* Havighurst, *The Effect of a Settlement with One Co-Obligor upon the Obligations of the Others*, 45 CORNELL L. REV. 1, 3-7 (1959).

47. W. PROSSER & W.P. KEETON, *supra* note 25, § 49, at 332. The reason behind this was that the written or oral provision allowing for non-release of remaining defendants was considered "repugnant" to the legal operation of the instrument.

One commentator has summarized and rebutted the four reasons that have traditionally

Enterprising lawyers drafted various instruments in an effort to circumvent the harsh "release of one releases all" rule. One of these was the covenant-not-to-sue, a pre-trial devise whereby the plaintiff agreed not to sue the covenanting tortfeasor. Many courts considered a covenant-not-to-sue a release in any event, and gave it the same effect as a normal release.[48] Another devise designed to circumvent the "release of one releases all" rule was the covenant-not-to-execute. This was an agreement entered into after trial had begun, which effected a release of one party while retaining a cause of action against another. This was accomplished with an agreement by the plaintiff not to execute on the judgment. It had the same effect as a covenant-not-to-sue because the plaintiff could still recover on the judgment from the party not taking the release.[49]

IV. The Pennsylvania Contribution Act

In response to the problems posed by the harsh common law rules relating to releases and contribution rights, in 1939, the National Conference on Uniform State Laws promulgated The Uniform Contribution Among Tortfeasors Act (UCATA). Pennsylvania adopted the UCATA as its Contribution Among Tortfeasors Act

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been advanced for the "release of one releases all" doctrine. The first is that the construction of the release instrument should be against the maker or releaser (the plaintiff). This reason is weakened by the fact that it is the *defendant* who is generally the author of the instrument. Second, it was thought that the claimant should be limited to one recovery. This fear may hold true if the plaintiff settled with many multiple tortfeasors and thereby gained a double recovery. In reality some defendants are normally left in litigation, and various contribution acts will reduce the amount recoverable by a plaintiff *pro tanto*. A third reason for the "release of one releases all" rule was that courts complained about the problems of enforcing rights of contribution after the settlement. It is perplexing that this rationale has been espoused even by jurisdictions which deny contribution rights. *See* Atlantic Coastline R.R. v. Boone, 85 So.2d 834 (Fla. 1956). Finally, the unitary nature of the obligation has been said to justify the rule that the release of one released all. But this unitary nature really exists only in the cases of "pure" joint torts. Note, *supra* note 41, at 767.

48. W. PROSSER & W.P. KEETON, *supra* note 25 § 49, at 334. Courts generally look at the "intent" of the agreeing parties in construing the document. Even in a document entitled "Covenant Not to Sue," a court can find that it is a release. *See, e.g.*, Atlantic Coastline R.R. v. Boone, 85 So.2d 834, 842 (Fla. 1956).

49. *See* Note, *Settlement Devices With Joint Tortfeasors*, 25 U. FLA. L. REV. 762, 771 (1973); Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779, 781-82, nn. 21-22 (1978). Another salvo in the lawyer's battery of release devises is the "Mary Carter Agreement." In that instrument a released defendant agrees to a maximum liability which can fluctuate downward in inverse proportion to the size of plaintiff's recovery against the non-settling defendants. The "Mary Carter Agreement", taking its name from Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. App. 1967), can thus be considered a great-granddaughter of the covenant-not-to-execute. It is considered unlawful in many jurisdictions because of its potency for collusiveness in a trial in which the releasee will be present, in spite of having taken a release. *See* Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 GONZ. L. REV. 266 (1977); Annot., 65 ALR 3d 602 (1975).

(PaCATA) in 1951.[50] Although Pennsylvania was more liberal than most of its sister states in having already allowed for contribution, at least in cases of unintentional torts,[51] until the adoption of PaCATA it still clung to the doctrine that the release of one tortfeasor released all.[52]

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50. PA. CONTRIB. AMONG TORTFEASORS ACT, 42 PA. CONS. STAT. ANN. §§ 8321-27 (Purdon 1982). Substantially a reenaction of July 19, 1951, P.L. 1130, §§ 1-8 (12 P.S. §§ 2082-89). Reenacted 1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. Based on UNIF. CONTRIB. AMONG TORTFEASORS ACT (1939 Version) 12 U.L.A. 57-59 (1975). PaCATA reads as follows:

§ 8321. Short title of subchapter

This subchapter shall be known and may be cited as the "Uniform Contribution Among Tort-feasors Act."

§ 8322. Definition

As used in this subchapter "joint tort-feasors" means two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them.

§ 8323. Scope of subchapter

This subchapter does not impair any right of indemnity under existing law.

§ 8324. Right of contribution

(a) General rule.—The right of contribution exists among joint tort-feasors.

(b) Payment required.—A joint tort-feasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(c) Effect of settlement.—A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.

§ 8325. Effect of judgment

The recovery of a judgment by the injured person against one joint tort-feasor does not discharge the other joint tort-feasor.

§ 8326. Effect of release as to other tort-feasors

A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release or in any amount of the consideration paid for the release or in any amount of proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

§ 8327. Liability to make contribution as affected by release

A release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another tort-feasor to secure a money judgment for contribution has accrued and provides for a reduction to the extent of the pro rata share of the released tort-feasor of the injured person's damages recoverable against all the other tort-feasors.

51. *See supra* text and accompanying note 40. Pennsylvania was one of six jurisdictions that recognized the right of contribution among joint tortfeasors in their caselaw prior to adopting UCATA. The others were the District of Columbia, Minnesota, Tennessee and Wisconsin. In Maine there was right to contribution from one who was vicariously liable, with language which may have possibly indicated a recognition of a general right to contribution. 12 U.L.A. 60 (Commissioners' Prefatory Note 1955 Revision) [hereinafter cited as UCATA COMMISSIONERS' NOTE (1955)]. In addition, a number of states adopted their own contribution acts rather than opting for the 1939 Uniform Contribution Act. Some of these contribution acts predated UCATA, but these were mainly limited to contribution between joint judgment defendants. These states were Michigan, Mississippi, Missouri, New York, North Carolina, Texas, and West Virginia. UCATA COMMISSIONERS' NOTE (1955) at 59.

52. *See, e.g.*, Peterson v. Wiggins, 230 Pa. 631, 79 A. 767 (1911); Koller v. Pennsylva-

Pennsylvania was one of only eight jurisdictions to adopt the 1939 UCATA,[53] and it adopted it essentially verbatim.[54] A close look at the 1939 UCATA surprisingly reveals an optional provision that allows for apportionment of losses according to relative degree of fault, presaging Pennsylvania's Comparative Negligence Act by almost forty years.[55] Pennsylvania declined to take this option and adopted the rule of equal pro rata shares of liability for tortfeasors, even those who possibly exhibited vastly different degrees of negligence. The pro rata system of apportioning loss equally regardless of "fault" persisted in Pennsylvania until the adoption of the CNA in 1976.[56] The basis for equal pro rata shares was the perceived inability of separating one indivisible injury into apportioned parts.[57]

PaCATA defines an interplay between loss sharing, contribu-

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nia Ry. Co., 351 Pa. 60, 40 A.2d 89 (1944).

53. The full roster was Arkansas (1941), Delaware (1949), Hawaii (1941), Maryland (1941), New Mexico (1947), Pennsylvania (1951), Rhode Island (1940), and South Dakota (1945). UCATA COMMISSIONERS' NOTE (1955) at 59.

54. Notwithstanding the Commissioners' comment to the contrary in the 1955 UCATA which states that all adopting states, with the exception of Arkansas, Hawaii, and South Dakota, "made important changes in the Act which have defeated the whole idea of uniformity," *id.* at 59, the only difference between the Pennsylvania version and the 1939 UCATA is that Pennsylvania chose not to include § 7 of the Uniform Act. Section 7 concerns procedure: third party practice, amended complaints, counterclaims and cross-complaints, and motions practice. Pennsylvania's PaCATA also omits various minor provisions such as § 8 "Constitutionality," § 9 "Uniformity of Interpretation," § 10 "Short Title," § 11 "Repeal," and § 12 "Time of Taking Effect." In Pennsylvania at least, the Commissioners' worries in 1955 seem to have been overexaggerated since all the substantive areas of the Contribution Act remained intact, thereby not defeating the essential uniformity of the UCATA.

55. "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares." UCATA § 2(4), 9 U.L.A. 235 (1957) (1939 version). The 1939 Commissioners' Note adds the following:

> The draftsmen of the Act feel that there is a very strong case to be made for apportioning the common liability as among the tortfeasors when the evidence clearly indicates that one or more of the tortfeasors was much more at fault than one or more of the other. At the same time they wish to point out that each tortfeasor is still completely and fully liable toward the injured person. Granted, however, that a contribution statute does effect some measure of justice in distributing the common burden of liability equally among the tortfeasors, it is apparent that some measure of injustice is done when a tortfeasor whose fault was patently greater than another's can nevertheless shift to such other half of the burden imposed on him by the injured person.
>
> The apportionment device is intended to work as follows: If the evidence indicates that there is a disproportion of fault as among the tortfeasors, the court shall instruct the jury that if it finds the tortfeasors to have been negligent, they shall also fix their relative degrees of fault. Thus if the court believes that an apportionment of fault is inappropriate in a particular case none will be made.

1939 UCATA COMMISSIONERS' NOTE, 9 U.L.A. 236-7 (1957).

56. *See* Slaughter v. Pennsylvania X-Ray Corp., 638 F.2d 639, 644 (3d Cir. 1981).

57. When one injury was divisible, however, loss could be apportioned to each tortfeasor on the basis of harm caused. *See* Lasprogata v. Qualls, 263 Pa. Super. 174, 397 A.2d 803 (1979).

tion, releases and settlements. It applies to joint tortfeasors only, defined as two or more persons "jointly or severally" liable in tort for the same injury to persons or property "whether or not judgment has been recovered against all or some of them."[58] The right of indemnity as it exists is not impaired by PaCATA.[59] A right of contribution exists among joint tortfeasors,[60] but that right does not arise until a joint tortfeasor has either entirely discharged the common liability or has at least paid more than his pro rata share of it.[61]

Section 8324(c) is notable because it has caused major interpretative problems, not only in Pennsylvania but in other jurisdictions which have adopted the 1939 version of the UCATA.[62] It provides that a joint tortfeasor who settles with a plaintiff does not have the right to contribution from other joint tortfeasors unless the remaining tortfeasors' liability to the injured party has been extinguished

58. 42 PA. CONS. STAT. ANN. § 8322 (Purdon 1982) (formerly 12 P.S. § 2082). The Act begs the question as to how a joint tortfeasor is defined because to state that a joint tortfeasor is one who is jointly or severally liable in tort is to engage in circular reasoning. Actually, joint tortfeasors are jointly or severally liable in tort *because* they are joint tortfeasors, and not the other way around.

59. 42 PA. CONS. STAT. ANN. § 8323 (Purdon 1982) (formerly 12 P.S. § 2087). The classic differentiation between indemnity and contribution is that indemnity is an order, arising from contract or by operation of law, requiring another to completely reimburse one who has discharged a common or joint liability. Contribution requires a party to pay only a proportionate share of the common liability once the other party has discharged the joint liability. *See* Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368 (1951); Globe Indem. Co. v. Agway, Inc., 456 F.2d 472 (3d Cir. 1972).

Modern systems of comparative negligence have begun to delineate a new doctrine of "comparative indemnity" in order to compare liability in personal injury cases where the characters of the fault are different. *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978); Missouri Pac. R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978); and Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

60. 42 PA. CONS. STAT. ANN. § 8324(a) (Purdon 1982). Section 8324(a), (b) and (c) were formerly 12 P.S. § 2083. The PaCATA leaves open the question of a possibility for contribution even if the tort was an intentional one. The 1955 version of UCATA specifically foreclosed such an application. The 1955 UCATA provides that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death." UCATA § 1(c) (1955).

61. 42 PA. CONS. STAT. ANN. § 8324(b) (Purdon 1982). Prior to such payment the right is inchoate and can only ripen by virtue of a judgment. Note the inherent conflict between that section and § 8324(c) which states that the right to contribution only ripens if a settlement extinguishes the liability of the non-settling tortfeasors. This need for extinguishment is not to be taken literally. *See infra* text and accompanying notes 67-75 for the discussion of the construction of the word "extinguish" in the *Mong* and *Daugherty* precedents.

62. The offending provision occurs in both the 1939 and the 1955 versions; as § 2(3) of the 1939 Act and as § 1(d) of the 1955 Act. *See* Comment, *Another Look At Strict Liability: The Effect on Contribution Among Tortfeasors*, 79 DICK. L. REV. 125 (1974); Note, *Joint Tortfeasors — Alleged Joint Tortfeasor Who Settles With Plaintiff in Return for Joint Tortfeasor's Release Not Entitled to Contribution When all Other Alleged Joint Tortfeasors Settle with Plaintiff*, 50 TEMP. L.Q. 137 (1976).

by the settlement.[63] Although the drafters of the act avowedly tried to encourage settlements,[64] interpreted literally, this provision would actually discourage settlements since a settler would not know that he had actually completely extinguished the remaining liability until after the trial took place and liability was set. A settler could not incorrectly guess his liability to be an amount between what would eventually be determined as his pro rata share and the full judgment owed by all tortfeasors and still have his inchoate right to contribution arise. Under that circumstance, according to the plain language of the section, he could receive no contribution whatsoever from the other tortfeasors whose liabilities are lessened. Only by paying the full judgment or by overestimating the liability and paying more than the full judgment would the settler be entitled to reimbursement for the nonsettler's full pro rata share.

This literal interpretation of section 8324(c) would be absurd since one of the reasons for settlement is to buy peace of mind, and to do so by paying an amount hopefully less than the amount of the judgment.[65] PaCATA thus facially penalizes a settler by not allowing him contribution rights in the very cases in which he would be likely to settle, and taken literally, would have a chilling effect on out-of-court settlements.[66]

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63. 42 PA. CONS. STAT. ANN. § 8324(c) (Purdon 1982).

64. According to the Commissioners' Comment to the 1955 UCATA, both this section (§ 2(3) of the 1939 act), and its counterpart (§ 1(d) of the 1955 Act) reflect a policy of encouraging settlements because they allow a tortfeasor to remove himself from the action by settling and buying his peace for less than the full liability. 12 U.L.A. 65. Viewing the section as a remedy to the common law rule that a release of one party released all, it could be seen as encouraging settlements from a plaintiff's point of view. However, the drafters did not seem to realize the problems it would cause from a defendant's point of view.

65. In fact, one hopefully tries to settle for less than even the settler's own *pro rata* share of the judgment.

66. This researcher has not been able to find a satisfactory explanation for the anomaly posed by the choice of language in § 8324(c). Neither the Commissioners' Notes to the 1939 Act nor the Commissioners' Notes to the 1955 Act shed light on this aberration. The 1955 Commissioners' Comment cites the encouragement of settlements as the policy behind this section (*see supra* discussion at note 64). The 1939 Commissioners' Note indicates that the drafters were concerned with protecting the non-settling tortfeasors from the settler who took a covenant-not-to-sue. In that case the settler could potentially ask for contribution even though he had purchased only his own immunity by taking the covenant-not-to-sue and had done nothing to reduce the liability of his fellow defendants.

> In such a case there is no reason to permit contribution since the settling tortfeasor has removed no burden common to all or more than one of the tortfeasors. Presumably, under this Section, if a tortfeasor, by a settlement, secures the release of one of several tortfeasors other than himself, he may at least request contribution from that tortfeasor.

UCATA § 2, at 236 (1957).

The Commissioners, however, still begged the question of why a tortfeasor who settled and only partially extinguished the remaining tortfeasor's liability had no right to contribution, whereas the tortfeasor who completely extinguished (a rare occurrence which would only hap-

In *Mong v. Hershberger*,[67] the Pennsylvania Superior Court was faced with the very problem posed by the wording of section 8324(c) of PaCATA. Mong, a settler, had paid more than his pro rata share but less than the full amount of the liability. He therefore did not completely "extinguish" the liability of the other tortfeasor, Hershberger. Consequently, it appeared that Mong did not have contribution rights against Hershberger,[68] and in the underlying action, *Daugherty v. Hershberger*,[69] the Pennsylvania Supreme Court reduced the verdicts for each of the multiple plaintiffs by the amount Mong had paid in his settlement so that Hershberger paid much less than his pro rata share of the verdicts.[70]

In *Mong* the Pennsylvania Superior Court had a chance to expound upon the meaning of "extinguish" in section 8324(c). In one linguistic coup, the court declared that "extinguish" really did not mean total and complete elimination. It could also mean to "cause to die out."[71] Thus Mong's contribution rights were not foreclosed.

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pen by mistake) *did* have such a right. Possibly the provision was meant to force a settling defendant to settle at a high enough level to fully compensate the plaintiff. Or perhaps it was meant to encourage the settler to take a general release whereby plaintiff releases all claims against all the non-released defendants. *See* Frank v. Volkswagenwerk, A.G., 522 F.2d 321, 328 (3d Cir. 1975). In Mayle v. Pennsylvania Dept. of Highways, 479 Pa. 384, 388 A.2d 709 (1978) the claim was for serious injury of a plaintiff who had overcome Pennsylvania's long-standing sovereign immunity rule. On remand his case was dismissed because he had taken a general release in return for a $3,000 settlement. Commonwealth v. Mayle, 76 Pa. Commw. 277, 463 A.2d 1239 (1983).

67. 200 Pa. Super. 68, 186 A.2d 427 (1962).

68. Prior to judgment, Mong settled with plaintiffs taking a *pro rata* release which reduced the plaintiffs' claims against the other defendants by Mong's *pro rata* share. Mong's *pro rata* share was 50% since there were a total of two tortfeasors. In the underlying action, Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730 (1956), the judgment against Hershberger had not been completely extinguished by Mong's settlement even though the settlement was, at $13,500, more than the amount of the verdict. This was because many plaintiffs were involved in the accident and the settlement was allocated to each plaintiff separately by name and amount, leaving several victims undercompensated, and several overcompensated. Jury awards left unsatisfied by Mong's settlement totaled $1,839.26.

69. 386 Pa. 367, 126 A.2d 730 (1956).

70. The court did not take into account the extra Mong had paid on some of the verdicts. The plaintiffs in *Daugherty* were asking for a recovery from Hershberger of one-half the entire verdict (Hershberger's *pro rata* share), notwithstanding the settlement with Mong.

Justice Musmanno's dissent to *Daugherty*, *id.* at 375, 126 A.2d at 734 (Musmanno J. dissenting), is one of the most pungent of his opinions. Afficianados of Musmannia will revel in such statements as: "He [Hershberger who now must pay only $1,839.26 of the judgment due to Mong's settlement] wants to travel on a train for which he purchased no ticket, he seeks to mount a horse which he did not feed, he desires to ride on a merry-go-round which, so far as he was concerned, might never have been built." *Id.* at 377, 126 A.2d at 735. But as eloquent and thoughtful as Justice Musmanno was, he was not prescient. He never expected that Mong would be allowed contribution from Hershberger for at least *some* of Mong's overpayment in the subsequent contribution action. *See* Mong v. Hershberger, 200 Pa. Super. 68, 186 A.2d 427 (1962).

71.

Examining the Act of 1951 with these principles in mind, we are led to the

Section 8325 of PaCATA reverses the common law rule that recovering a judgment against one joint tortfeasor releases all the others from judgment.[72] Section 8326 determines the effect of a release on the liability of the other tortfeasors. At common law, the release of one tortfeasor released all others from liability.[73] The PaCATA allows for a release that does not necessarily discharge the other tortfeasors from liability, but rather, reduces the claim against the others by the amount paid for the release or by any amount agreed to in the release if it is greater than the amount paid.[74]

Although Section 8326 is seemingly clear on its face, the *Daugherty* court also struggled to interpret it.[75] The plaintiff, Daugherty, wanted the non-settler, Hershberger, to pay his whole pro rata share of the judgment even though the settler, Mong, had given consideration for the release in an amount much greater than Mong's pro rata share. Daugherty believed that since Mong had signed a pro rata release, the verdict should only be reduced by the pro rata amount, or one half.[76] The plain meaning of the provision of section 8326 prevailed,[77] however, and Daugherty was able to collect only the amounts on each verdict which were not covered by Mong's

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conclusion that to deprive appellant of his right to contribution from appellee would be unreasonable and absurd, as well as contrary to the intent of the Legislature.

Section 2 [§ 8324] and section 4 [§ 8326] recognize the right to contribution when one pays more than his share; and although the third provision of section 2, when given a strict interpretation might lead to the conclusion that in cases of settlement, *unless there is a complete extinguishment* of the claims against the other tortfeasor, the right of contribution does not exist. We do not believe the Legislature intended such a strict meaning. *The verb extinguish does not necessarily mean an abrupt or complete elimination of fire, or in law, of rights or claims. It may also mean a gradual or limited result. It has various meanings: 'to cause to die out'; 'to quench, to wet, moisten'; 'to nullify'; 'to avoid, as by payment, setoff, . . . merger of an interest in a greater one'; 'suppress'.* Webster's New International Dictionary (Unabridged).

Therefore, we have no difficulty in concluding that the releases secured by Mong satisfied the third provision of section 2 [§ 8324(c)] as to all the claims, regardless of whether they were completely or only partially extinguished; and that Mong has the right of contribution from Hershberger.

Mong v. Hershberger, 200 Pa. Super. at 72-73, 186 A.2d at 429 (emphasis added).

72. 42 PA. CONS. STAT. ANN. § 8325 (Purdon 1982) (formerly 12 P.S. § 2084).

73. *See supra* notes 42-47 and accompanying text.

74. 42 PA. CONS. STAT. ANN. § 8326 (Purdon 1982) (formerly 12 P.S. § 2085). *See* Griffith, *The Meaning and Significance of Section 4 of the Uniform Contribution Among Tortfeasors Act*, 31 PA. B.A.Q. 322 (1960); Note, *supra* note 62.

75. Daugherty v. Hershberger, 386 Pa. 367, 126 A.2d 730 (1956).

76. A pro rata release reduced Hershberger's liability by Mong's *pro rata* share. Daugherty's argument entailed the following distribution: he would receive the settlement of $13,500 *plus* one half the verdict of $11,720.99 ($5,860.50) for a total of $19,360.50.

77. Section 8326 provides that if the settlement is greater than the settler's *pro rata* share, the claim is to be reduced by the amount of consideration paid for the release. 42 PA. CONS. STAT. ANN. § 8326 (Purdon 1982).

settlement. With the *Mong* gloss on PaCATA, a settler has a right to contribution against a non-settler if the settler pays more than his pro rata share of the judgment, even if he has not completely extinguished the underlying liability.

Section 8327 of PaCATA is the flip side of *Mong*. It allows a non-settling tortfeasor to retain contribution rights against the settling tortfeasor. There is, however, one very important exception to this rule. If the settling defendant takes a pro rata release, thereby reducing the non-settler's liability by the settler's pro rata share, the settler will be free from any subsequent claim for contribution.[78]

V. Who Is a "Joint Tortfeasor"?

According to section 8321 of PaCATA, a party must be a "joint tortfeasor" for the Act to apply to him.[79] If a party settles before joint tortfeasor status is determined, according to PaCATA his settlement payment may be considered that of a "volunteer," and will not reduce the judgment against the remaining tortfeasors.[80] The question of how to handle the out-of-court settlement within PaCATA thus arises. If a party's fault has not been determined at trial, is he still a "joint tortfeasor" under the Act? Under what conditions should the settlement of such a party reduce the amount of the judgment collectible among any remaining defendants? When should his settlement be considered that of "volunteer?" What if these considerations trigger a double recovery by the plaintiff? Must a settler remain as a party in the lawsuit until his status is determined, or are there other methods that can confer joint tortfeasor status with legal certainty? The answers to these and other related

78. 42 PA. CONS. STAT. ANN. § 8327 (Purdon 1982). Not all releases need be *pro rata* releases. The *pro rata* release can be worse from the point of view of the plaintiff if he has settled "too lightly." For example, A sues B & C. Damages are $100,000. B settles for $20,000 taking a *pro rata* release. A can now only recover $50,000 from C, and according to § 8327, C does not have contribution rights against B. Here, under § 8326, the "proportion by which the release provides that the total claim be released" is 50% or a pro rata share and it is *greater* than the consideration paid ($20,000). Therefore the claim of $100,000 is reduced by $50,000 rather than $20,000.

79. *See, e.g.*, "Short Title," 42 PA. CONS. STAT. ANN. § 8321 (Purdon 1982). "This subchapter shall be known . . . as the 'Uniform Contribution Among Tortfeasors Act;' " *see also*, language in sections 8324, 8325, 8326, 8327.

80. *See* Davis v. Miller, 385 Pa. 348, 123 A.2d 422 (1956); Koller v. Pennsylvania R. Co,. 351 Pa. 60, 63, 40 A.2d 89, 90 (1944). *See also* Slaughter v. Pennsylvania X-Ray Corp., 638 F.2d 639, 642 (3d Cir. 1981); Castillo v. Roger Construction Co., 560 F.2d 1146, 1152 (3d Cir. 1977). Note, *Joint Tortfeasors*, 106 U. PA. L. REV. 311, 313 (1957) states that Pennsylvania is one of a handful of jurisdictions to hold that a payment for a release by a non-joint tortfeasor did not reduce the judgment. Anomalously, however, a putative joint tortfeasor who *fully* settles a claim is not considered a volunteer. Harger v. Caputo, 420 Pa. 528, 532-33, 218 A.2d 108, 111-12 (1966).

questions are found in PaCATA-related case law.

Adjudication of joint tortfeasor status can be accomplished in three ways. The first and most direct way is to have the releasee's status determined in a lawsuit to which he is a party. One reason a party may wish to settle, however, is to avoid the expense and trouble of participating in a lawsuit. In *Davis v. Miller*,[81] the Pennsylvania Supreme Court held that if there is a party who could "benefit" from the presence of the settler at trial, the settler would be required to attend. This rule became known as the "benefit" rule. This situation may arise where a settler has taken a release which does not concede joint tortfeasor status, since the non-settler would then not get the benefit of the payment of the "volunteer".

The second way in which joint tortfeasor status can be determined is by concession. A settling party may concede joint tortfeasor status in the release instrument. For example, in *Griffin v. United States*[82] a settling party took a "joint tortfeasor" release which conceded liability and stated that the judgment would be reduced by its pro rata share of the liability. Since the settler had conceded its joint tortfeasor status, the opposing party would receive no "benefit" from forcing the settler to remain at trial. It was said in *Griffin* that the wording of the release given by plaintiff "waived" the "benefit" rule.[83]

Finally, joint tortfeasor status can be determined by prior litigation or by some other method which confers joint tortfeasor status reliably and clearly from the circumstances under which a prior release was given.[84] One example is where liability is established in a separate contribution suit.[85]

VI. Settlements Under the Contribution Act

According to *Davis*, if a settler is not a joint tortfeasor, his pay-

81. 385 Pa. 348, 123 A.2d 422 (1956). The settling co-defendant in *Davis* had been given a "general" release but nonetheless she was required to be present at trial since it would benefit Miller, the other defendant, to have her joint tortfeasor status adjudicated. If she were determined to have been a joint tortfeasor, the plaintiffs would have been able to recover only Miller's *pro rata* share of the judgment, or one-half.

82. 500 F.2d 1059 (3d Cir. 1974).

83. *Id.* at 1072.

84. Rocco v. Johns-Manville Corp., 754 F.2d 110, 115 (3d Cir. 1985), *citing* Mazer v. Security Insurance Group, 507 F.2d 1338, 1342 (3d Cir. 1975).

85. *See, e.g.*, Swartz v. Sunderland, 403 Pa. 222, 169 A.2d 289 (1961). *Swartz* was an action for contribution by one settling tortfeasor against another. Neither was adjudicated liable to the plaintiff. The Pennsylvania Supreme Court observed that they would still have "their day in court with full opportunity to *defend against liability* . . . ." *Id.* at 226, 169 A.2d at 291 (emphasis in original).

ment does not reduce the plaintiff's judgment against a non-settling tortfeasor.[86] This "volunteer" rule is characterized as plaintiff favoring because it makes it possible for a plaintiff to receive a double recovery. The issue of double recovery was discussed by the United States Court of Appeals for the Third Circuit in *Rocco v. Johns-Manville Corp.*[87] *Rocco* overturned a lower court decision which had allowed a verdict to be reduced by the "volunteer" payment of the settlers in order to prevent unjust enrichment of the plaintiff.[88] In reaching the conclusion that under these circumstances a plaintiff's "unjust enrichment" is legally unavoidable, the *Rocco* court cited the rule of *Davis* and the joint tortfeasor language of the PaCATA as demanding this outcome.[89]

Justice Musmanno's concern in *Daugherty v. Hershberger* that the non-settler would reap the benefit of an overpayment by the settler was unjustified in cases where the settler has conceded his joint tortfeasor status and therefore is not a volunteer.[90] The over-paying settler in *Mong* was subsequently allowed a contribution action against the non-settler.[91] Musmanno's criticisms of the poor settlement environment created by a system in which a plaintiff has no hopes for a possible double recovery are well taken.[92] The *Daugherty/Mong* precedents allowing no double recovery in conjunction with PaCATA have produced a chilling effect on out-of-court settlements. A plaintiff can only stand to lose part of a recovery by settling with a defendant and there is only that slight possibility of double recovery in cases of "volunteer" payments.[93]

Criticism of the 1939 UCATA's prohibitive effects on settlements led to promulgation of the 1955 Uniform Contribution Among Tortfeasors Act (1955 UCATA).[94] The major change in the 1955 version is that any release given in good faith to a tortfeasor reduces

86. Davis v. Miller, 385 Pa. 348, 123 A.2d 422 (1956).

87. 754 F.2d 110 (3d Cir. 1985).

88. *Id.* at 115.

89. "We have read *Davis v. Miller* as establishing the principle that if the settling party is not a tortfeasor, his payment is that of a volunteer and does not support a claim for contribution or pro rata reduction." *Id.* at 115 (citations omitted).

90. 386 Pa. 367, 126 A.2d 730 (1956). " . . . any pipe of peace they smoke may be shattered in their mouths by a court's order as this one has done . . . ." *Id.* at 382, 126 A.2d at 737. (Musmanno, J., dissenting).

91. Mong v. Hershberger, 200 Pa. Super. 68, 186 A.2d 427 (1962).

92. "A plaintiff would use very poor judgment in settling because he cannot possibly get more than what the jury will give him eventually, and takes a chance of getting even less by settling." *Daugherty*, 386 Pa. at 381, 126 A.2d at 737. (Musmanno, J., dissenting).

93. *See supra* text and accompanying notes 79-86.

94. UNIF. CONTRIB. AMONG TORTFEASORS ACT, 12 U.L.A. 57 (1975) (1955 version). Pennsylvania never abandoned its PaCATA which is based on the 1939 UCATA.

the claim against the others by the amount of consideration paid.[95] In addition, it discharges that releasee "*from any liability for contribution to any other tortfeasor.*"[96] In contrast, under the 1939 UCATA and the PaCATA, a party who settled for a "light" amount and did not take a pro rata release was potentially liable to a non-settler who paid for more than his pro rata share.[97]

The 1955 UCATA, then, wildly encourages parties to settle quickly and lightly because once they do settle and "get out," the non-settler cannot enforce contribution rights against them. Under the 1955 Act, slow settlers can be left to bear the burden of most of the verdict.[98]

There has been much litigation over the 1955 UCATA, however, regarding the question as to what constitutes a release made in "good faith."[99] The rule of the 1955 UCATA that prevents non-settling defendants from obtaining contribution from the settler or settlers (the "settlement bar" rule), although first seeming to have the potential for dramatically increasing settlements, began to have a secondary chilling effect. Settlers became afraid they would be forced to return to court to litigate the good faith issue, and they

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95. "[T]o the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it, which ever is the greater." *Id.* at § 4(a); 12 U.L.A. at 98 (1975). This part of the 1955 UCATA is identical to § 8326 (PaCATA).

96. UCATA § 4(b) at 98 (emphasis added).

97. *See* 42 PA. CONS. STAT. ANN. § 8327 (Purdon 1982). A release does not relieve the settler from a liability to make contribution *unless* the release provides for a reduction in the damages recoverable against all the other tortfeasors to the extent of the *pro rata* share of such release. In other words, a non-settler cannot get "stuck" under the 1939 Act as he can under the 1955 Act.

98. In fact, possibly because of the dramatic changes in settlement dynamics, only eleven states to date have adopted the 1955 version. 12 U.L.A. at 57, 62. *Id.* at 64 (West Supp. 1985). *See* Comment, *Comparative Contribution*, 14 J. MAR. 173 (1980); McNichols, *Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence — Is Products Liability Next?*, 35 OKLA. L. REV. 195 (1982); Comment, *Comparative Negligence, Multiple Parties and Settlements*, 65 CALIF. L. REV. 1264 (1977); Kaplan, *From Contribution to Good Faith Settlements: Equity Where Are You?*, 49 JAL 771 (1984).

99. For literature on the subject of "good faith", *see, e.g.*, Kissel, *Developments in Third-Party Practice — Contribution and Indemnity*, 71 ILL. B.J. 654 (1983). Kissel discusses the relevant factors in making the "good faith" determination: "[T]he court could consider the risk of victory or defeat, the risk of a high or low verdict, the unknown strengths or weaknesses of the opponent's case, the inexact appraisal as to the elements of danger, the defendant's solvency and the amount of insurance coverage." *Id.* at 660. California is one of the states that adopted the 1955 UCATA with its "good faith" standard. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). *See also* Dompeling v. Superior Court, 117 Cal. App. 3d 798, 805, 173 Cal. Rptr. 38, 41 (Ct. App. 1981), which states that a settlement may exhibit bad faith if it is unreasonably low. The term "unreasonably cheap settlement" was first used in River Garden Frams, Inc. v. Superior Court, 26 Cal. App.3d 986, 996, 103 Cal. Rptr. 498, 505 (Ct. App. 1972). But if the "unreasonably cheap" settlement shows no sign of tortious bad faith, then the fact that it was "cheap" standing alone will not be fatal. *Dompeling*, 117 Cal. App.3d at 810, 173 Cal. Rptr. at 45. There must be a specific bad-faith intent such as collusion to defeat the release. *Id.* at 805, 173 Cal. Rptr. at 42.

became reluctant to take a release.[100]

VII. Workers' Compensation: The "Immune" Tortfeasor

Many of the cases involving joint tortfeasors have arisen in the context of accidents in the workplace involving the joint fault of the employer and a third party tortfeasor. Pennsylvania's workers' compensation system has effected fundamental changes in common law relationships among such parties and consequently has altered the operation of Pennsylvania's contribution act (PaCATA). Additionally, the Workers' Compensation Act (WCA) was subject to major reinterpretation in its loss allocation scheme two times: with the adoption of the 1974 amendments and with the adoption of the Comparative Negligence Act (CNA) in 1976. This section briefly traces how loss allocation is handled with respect to a statutorily immune employer, a third party tortfeasor and an injured plaintiff.

As originally enacted in 1915, Pennsylvania's workers' compensation system was optional. If both the employer and employee accepted the terms of the Workers' Compensation Act, they could effect a fundamental change in their common law relationship. The employer would relinquish its common law defenses.[101] In return, the WCA would immunize the employer from unlimited tort liability, and the employer would be liable for a statutorily established payment.[102] The system approximates a "no fault" system in that any fault on the part of either the employer or the employee is irrelevant to the availability of compensation.[103]

A difficult situation arises when a third party is responsible for all or part of the worker's workplace injury. Does the third party have any contribution rights against an employer?[104] Does it make a

100. *See* Justice Clark's dissent in American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 610 n. 2, 578 P.2d 899, 920 n. 2, 146 Cal. Rptr. 182, 203 n. 2, (1978) (Clark, J., dissenting) ("slightly negligent" defendant who does not wish to settle can be "held up" under the 1955 UCATA for more than his fair share by a relatively insolvent, highly culpable, but eager-to-settle defendant).

101. *See Ryden v. Johns-Manville Prods.*, 518 F. Supp. 311, 313-14 (W.D. Pa. 1981). The common law defenses were the "unholy trinity" of contributory negligence, assumption of risk and the fellow servant rule. *See* W. PROSSER & W.P. KEETON, *supra* note 25, § 80, at 575-76. The fellow servant rule was a common law doctrine whereby the employer was not liable for a worker's injuries if they were caused solely by the negligence of a co-worker. The rule was designed to help promote safety in the workplace by putting peer pressure on workers to reduce injuries. *See* W. PROSSER & W.P. KEETON, *supra* note 25, § 80, at 571.

102. *See* Ryden v. Johns-Manville Products, 518 F. Supp. 311, 313-14.

103. W. PROSSER & W.P. KEETON, *supra* note 25, § 80, at 573. The authors characterize workers' compensation as a form of strict liability.

104. As stated in Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959), it would be inequitable to impose common law liability in the form of full contribution rights on the part of a third party tortfeasor as against the employer. "To do so would deprive [the employer] of

difference whether or not the employer was free from fault? Does an employer have any contribution rights or statutory lien against a third party tortfeasor for all or part of its statutory payment? Is a statutorily immune employer a "joint tortfeasor" in resolving contribution rights under the PaCATA or a "defendant" under CNA? Answers to these question are found in WCA-related case law.

An influential rule for resolving loss allocation developed in Pennsylvania prior to the adoption of CNA and the 1974 amendments to the WCA. It became known as the "Pennsylvania Rule" throughout the country.[105] This rule allowed a third party tortfeasor to recover contribution from a negligent employer up to the amount of workers' compensation the employer had paid or was liable for.[106] On the other hand, a faultless compensation employer had what amounted to a first lien on any verdict against a third party.[107]

The "Pennsylvania Rule" effected a fair allocation of loss between the negligent parties involved in an accident in the workplace. A third party tortfeasor was allowed "contribution" from the employer whose negligence had contributed to the accident, even though the employer was theoretically not "liable in tort."[108] The

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his property by legislative fiat." *Id.* at 458, 155 A.2d at 838 (1959).

105. *See Pennsylvania Supreme Court Review 1980 — XI Workers' Compensation*, 54 TEMP. L.Q. 718, 727-28 (1980) [hereinafter cited as *Workers' Compensation*]. *See, e.g.*, Lamberton v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 670 (1977), "[O]ld Pennsylvania rule" permitting a limited right of contribution to a third party was hailed as "the solution . . . most consistent with fairness . . . ." *Id.* at 130, 257 N.W.2d at 689 (1977). *See* Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U.L. REV. 351 (1970). Larson, *Third-Party's Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 491 (1982). The "action over" in the titles of these articles is not a misprint; it refers to the liability "over" the workers' compensation payment. *See* Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 518, 412 A.2d 1094, 1096 (1980).

106. Maio v. Fahs, 339 Pa. 180, 192, 14 A.2d 105, 111 (1940). *See also Workers' Compensation, supra* note 105.

107. The blameless employers' rights were labeled subrogation rights rather than contribution rights. The essential nature of these rights was, however, really that of contribution against the third party tortfeasor. They were called "subrogation" rights because the employer, if fault free, could subrogate to the right of the employee's third party tort recovery. In that way it recouped the statutory payment that it made to the employee. A negligent employer was barred from asserting its subrogation rights due to a judicial gloss placed on the WCA prior to the 1974 amendments. *See, e.g.*, Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959); Socha v. Metz, 385 Pa. 632, 123 A.2d 837 (1956); Smith v. Yellow Cab Co., 288 Pa. 85, 135 A. 858 (1927); Conrad v. Aero-Mayflower Transit Co., 152 Pa. Super. 477, 33 A.2d 91 (1943); Stevenson v. Pennsylvania Railroad Co., 73 Pitts. 78, 6 Pa. D. & C. 564 (1924); Myers v. Philadelphia Daily News, 168 Pa. Super. 561, 79 A.2d 787 (1951). The subrogation statute, PA. STAT. ANN. tit. 77, § 671 (Purdon Supp. 1985), reads in pertinent part: "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe . . . ." Since the employer in most cases had already paid benefits to the employee, that right would normally take the form of being subrogated to the employee's tort recovery by the amount of compensation benefits received.

108. In Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959), a third party tortfeasor

non-negligent employer received "contribution" from the third party tortfeasor to the extent of its statutory liability. The plaintiff did not receive the potential double recovery that could result if he received both the workers' compensation payment and the full tort award.[109]

The "Pennsylvania Rule" also had a secondary effect. It created an economic scheme which promoted safety in the workplace. Since the employer's right of subrogation was linked to its lack of fault, it had the financial incentive to take responsible actions to reduce the probability of accidents.[110] Systems which do not condition an employer's right to subrogation on its relative freedom from fault create little incentive to create a safe environment.[111]

In 1972 the Pennsylvania Legislature began a massive overhaul of its workers' compensation law. In 1974, WCA was amended. Section 303(b) of WCA[112] now provides that an employer will not be liable to a third party for "damages, contribution, or indemnity."[113] The new amendment was interpreted as creating a statutory exception to the "general right of contribution among tortfeasors."[114] The amendment had a huge effect on loss allocation in the workers' compensation system. Under the "Pennsylvania Rule" the workers' compensation system co-existed with the PaCATA, allowing for "contribution" between the employer and the third party tortfeasor even

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unsuccessfully argued that the PaCATA gave him a right of contribution beyond the limited right of contribution the *Maio* holding gave him. 397 Pa. at 459-61, 155 A.2d at 838-40. The problem with such a result is that the workers' compensation employer could be compelled into contributing an amount towards a plaintiff's verdict in excess of its statutory obligation merely because a third party's negligence added to its own negligence. *See* Elston v. Industrial Lift Truck Co., 420 Pa. 97, 101-02, 103 n.3, 216 A.2d 318, 320 and 320 n. 3 (1966).

109. *See, e.g.*, Elston v. Industrial Lift Truck Co., 420 Pa. 97, 216 A.2d 318.

110. Davis, *The Interaction of Workers' Compensation and Products Liability*, 15 Trial 31, 32 (1979). *See also Workers' Compensation*, *supra* note 105, at 731-32, n. 81.

111. *See Hearings on the Implications and Proposed Amendments to the Occupational Safety and Health Act of 1970 Before the Select Subcommittee on Labor* (July 1972) [hereinafter cited as *National Commission Report*]. The *National Commission Report* articulated a safety interest as one of five major objectives that should be promoted by any workers' compensation system. *Id.* at 15. It observed that the allocation of costs of work-related injuries on the basis of fault provided an economic incentive for safety purposes. *Id.* at 22-23.

112. Section 303(b), as amended 1974, Dec. 5, P.L. 782, No. 263 § 6, codified at PA. STAT. ANN. tit. 77, § 481(b) (Purdon Supp. 1985).

113. Section 303(b) provides that contribution or indemnity shall *not* be barred if expressly provided for in a written contract between the employer and the third party. But the availability of a possible contract to effectuate contribution or indemnity rights is largely an empty promise, since more often than not the third party and the employer will be strangers to one another. If they are not, there is still the likelihood of unequal bargaining power between them, the statutory employer generally having much more bargaining leverage. *See* Tsarnas v. Jones & Laughlin Steel Corp., 262 Pa. Super. 417, 442, 396 A.2d 1241, 1253 (1978) (Spaeth, J., dissenting).

114. Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. at 518, 412 A.2d at 1096 (1980).

though the employer was technically not a "tortfeasor."[115]

Section 303(b) was drafted in response to the economic strain on the workers' compensation system caused by a dramatic increase in compensation benefits paid to employees.[116] The Pennsylvania Legislature took note of the recommendations promulgated by the National Commission on State Workmen's Compensation Laws addressing the issue of negligence suits against third party tortfeasors. The Commission recommended that workers' compensation benefits be the "exclusive liability" of the employer when a worker is injured.[117] It also recommended that suits by employees against negligent third parties by permitted.[118] Both of these recommendations were consistent with Pennsylvania practice under WCA prior to the 1974 amendments and the "Pennsylvania Rule." After the amendment to section 303(b) was passed, a new series of workers' compensation cases, citing these recommendations as "proof" for their holdings, took away the third party tortfeasor's right to reduce its verdict by the statutory liability of a negligent workers' compensation employer.[119] The equitable era of "limited load sharing" that had formerly taken place under the "Pennsylvania Rule" finally ended.

According to section 303(b) as amended, a third party who is sued may not join the employer as an additional defendant, nor may he seek contribution from the employer, even if the employer is largely responsible for causing the injury.[120] The third party always pays the entire recovery. The subrogation statute of WCA, however, did not significantly change.[121] It still allows an employer to recoup from the third party the benefits paid out for the benefit of the employee. Under the section as amended, however, even if the employer had been negligent, it was entitled to subrogation if a third party

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115. Elston v. Industrial Lift Truck Co., 420 Pa. 97, 101-02, 216 A.2d 318, 320 (1966).

116. The average payment rose from $60 per week to $187 per week. *See* Hefferin v. Stempkowski, 247 Pa. Super. 368, 369, 372 A.2d 869, 870 (1977).

117. *National Commission Report*, *supra* note 111, at Recommendation 2.18.

118. *Id.* at Recommendation 2.19.

119. *See* Tsarnas v. Jones & Laughlin Steel Corp., 262 Pa. Super. at 439 n. 2, 396 A.2d at 1252 n. 2 (Spaeth, J., dissenting). There was no reason based on the text of the *National Commission Report* for the Pennsylvania Legislature to have come up with the harsh result that it did. The Report did not intimate that third party tortfeasors should not have recourse against employers even to the limited extent of having their verdicts lessened by the amount already paid in compensation benefits. The new windfall for the employer goes far beyond the immunities that Recommendations 2.18 and 2.19 suggest.

120. *See, e.g.*, Jones v. Carborundum Co., 515 F. Supp. 559, 562-3 (W.D. Pa. 1981).

121. PA. STAT. ANN. tit. 77, § 671 (Purdon 1985 Supp). *Arnold v. Borbonus*, 257 Pa. Super. 110, 114 n.7, 390 A.2d 271, 273 n.7 (1978). *See also* Hefferin v. Stempkowski, 247 Pa. Super. 366, 372 A.2d 869 (1977), which reaffirmed *Arnold*. *Hefferin* states that the employer still has the right to subrogate. *Id.* at 368-69, 372 A.2d at 871.

tortfeasor was involved.[122] The result was very one-sided and was aptly characterized by one court as "too absolute a victory for the employer."[123] The result seemed so unfair that some members of the judiciary believed that it was too bad of a construction of WCA to be true.[124]

In the supreme court decision *Tsarnas v. Jones & Laughlin Steel Corp.*, section 303(b) of the WCA finally withstood a constitutional challenge.[125] The provision was attacked as denying third parties access to the courts to litigate claims for contribution and indemnity against negligent but statutorily immune employers.[126] Justice Larsen wrote a brief concurrence to *Tsarnas* in which he joined with the majority opinion on the condition that the employer's right to subrogation would be contingent on its freedom from

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122. Farage & McDaid, *Annual Survey of Pennsylvania Legal Developments — Part I: Tort Law*, 49 PA. B. ASS'N Q. 415 (1978). "Surely, this must be the only area of the law wherein a culpable defendant not only is immune from suit . . . but also has the affirmative right via the vehicle of subrogation to be made whole for the loss suffered as a result of his own fault." *Id* at 417.

Section 303(b) is said to have "obliterated" any cause of action against the employer other than an action for compensation benefits. This means any adjudication of liability on the part of the employer is foreclosed. *See* Bell v. Koppers Co., Inc., 481 Pa. 454, 392 A.2d 1380 (1978); Arnold v. Borbonus, 257 Pa. Super. 110, 390 A.2d 271 (1978).

123. Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 523, 412 A.2d 1094, 1099 (1980).

124. *See* Judge Spaeth's opinion in *Tsarnas*, 262 Pa. Super. at 433-443, 396 A.2d at 1249-54. *See also* Spaeth's concurring and dissenting opinion in Arnold v. Borbonus, 257 Pa. Super. 110, 390 A.2d 271. In *Arnold*, Spaeth describes how the new case law affected three possible scenarios. In the first, an employee is injured at the worksite and a third party is totally at fault. In that case the result is just since the party whose fault caused the injury will bear the full burden. In scenario number two, the employer is totally at fault. Again, there is no injustice because the party at fault, the employer in this case, will be liable for the injury. It is scenario three that poses the problem of fairness. Both the employer and third party are equally negligent. Under the case law interpreting section 303(b), the third party bears the entire judgment. Spaeth states that under *Hefferin* the employer may not be joined as an additional defendant, but may still subrogate to the right of the employee's third party tort recovery. *Id.* at 115-17, 390 A.2d at 273-74. "[T]he employer will . . . in the end pay nothing — despite having been at fault." *Id.* at 118, 390 A.2d at 274.

125. Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 412 A.2d 1094 (1980).

126. The third party tortfeasor unsuccessfully argued a violation of Article 3, Section 18 of the Pennsylvania Constitution prohibiting the General Assembly from limiting the amount recoverable for injuries by, in effect, placing a zero limit on the amount a third party can recover from an employer. PA. CONST. art. III, § 18 (Purdon 1969). It also alleged violations of Article 1 Section 11 which guarantees access to court to litigate claims, PA. CONST. art. I, § 11 (Purdon 1969), and attempted an equal protection challenge by claiming "unreasonable and arbitrary" classifications which offend the equal protection clause of the fourteenth amendment. U.S. CONST. amend XIV, § 1. In its opinion, the supreme court relied on analogies to the case law which developed in conjunction with the NO FAULT VEHICLE INSURANCE ACT, 1974 Pa. Laws 489, No. 176, 40 P.S. § 1009.101 *et seq.*, and sustained the constitutionality of § 303(b). *See Tsarnas*, 262 Pa. Super. at 422-24, 396 A.2d at 1243-45. Note that although both *Tsarnas* decisions were decided after the Comparative Negligence Act was passed, the CNA was not implicated since the underlying accident took place prior to its enactment.

fault.[127] Since the *Tsarnas* holding concerned only the constitutionality of section 303(b), the narrow issue of whether the employer's right to subrogate remains unimpaired if it was partially at fault was still open to question.[128]

VIII. Worker's Compensation Act and Comparative Negligence

The next major attack on the loss allocation scheme occurred with the adoption of the Comparative Negligence Act (CNA) in 1976.[129] A threshold argument, made by those who wished to overturn the rule immunizing the workers' compensation employer from liability when a third party tortfeasor was involved, was offered: How could the Comparative Negligence Act be construed as having impliedly overruled the amendments to WCA when the amendments had been adopted by the Pennsylvania General Assembly just slightly more than one year earlier? Was the third party tortfeasor now liable only for that portion of causal negligence attributed to him under CNA or did he still have to absorb the loss caused by the statutorily immune employer? Would the workers' compensation employer now be liable for its entire portion of causal negligence according to CNA? Since under CNA it appears that the plaintiff can collect his full recovery from a third party tortfeasor,[130] does it follow that the third party who is "compelled to pay more than his share" now has contribution rights against the employer?[131]

The argument that the enactment of the CNA impliedly repealed the 1974 amendments to WCA in the space of less than two years predictably failed.[132] After reaffirming that the WCA amendment to section 303(b) had completely "obliterated" a common law cause of action against the employer,[133] the Pennsylvania Superior

127. 488 Pa. at 524, 412 A.2d at 1099 (Larsen, J., concurring).

128. *See* famous footnote 2 of *Tsarnas*: "[W]e leave for another day the issue as to whether the employer's right of subrogation nevertheless remains unimpaired." 488 Pa. at 520, n. 2, 412 A.2d at 1097 n.2.

129. 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982).

130. CNA explicitly retains joint and several liability. *Id.*

131. "Any defendant who is so compelled to pay more than his percentage share may seek contribution." *Id.*

132. A general principle of statutory construction is the presumption against implicit repeal of one law by a later enactment unless the two are irreconcilable. *See generally*, 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 23.10 (4th ed. 1972). Another rule of construction is that the general must yield to the specific. Section 7102(b) was seen as a general statute which had to yield to section 303(b), the more specific, thus preventing recovery of contribution from an employer. Getty v. Ajax Mfg. Corp., 129 PGH. L.J. 54, 57 (1981); Ryden v. Johns-Manville Products, 518 F. Supp. 311, 317-18 (W.D. Pa. 1981).

133. Heckendorn v. Consolidated Rail Corp., 293 Pa. Super. 474, 477, 439 A.2d 674, 675 (1981), (*citing* Bell v. Koppers Co., Inc., 481 Pa. 454, 392 A.2d 1380 (1978)).

Court in *Heckendorn v. Consolidated Rail Corp.*[134] held that the employer could not be joined for any reason, including apportionment of fault under CNA.[135] According to *Heckendorn*, the bar to joinder precluded an assessment of an employers' liability to an employee for negligence and to a third party tortfeasor for indemnification or contribution.[136] This holding was affirmed by the Supreme Court of Pennsylvania when *Heckendorn* was reviewed in 1983.[137]

Joining the statutorily immune employer for the purpose of fault apportionment, however, would have been an empty victory for the third party tortfeasor unless the employer's fault was somehow linked to the employer's right to subrogate the plaintiff's tort recovery, as it was in the former "Pennsylvania Rule." In *Hamme v. Dreis and Krump Mfg. Co.*,[138] a Third Circuit Court of Appeals case decided between the time of the two *Heckendorn* decisions, Judge Rosenn, in an extensive and well reasoned dissent, suggested that the superior court's decision in *Heckendorn* was not mandatory precedent for a court sitting in federal diversity. Rosenn stated that the duty of the district court was to predict how the supreme court of the state would rule on the issue, and he believed the superior court's *Heckendorn* decision would be reversed.[139]

Judge Rosenn's main concern focused, as in *Tsarnas*,[140] on the reasons for allowing a negligent employer an unimpaired right to a

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134. 293 Pa. Super. 474, 439 A.2d 674 (1981).

135. *Id.* at 482, 439 A.2d at 677-78. The appellant, Conrail, argued that Carnation, the employer, should be joined "in order to apportion accurately the liability of all tortfeasors." *Id.* at 478, 439 A.2d at 676.

136. *Heckendorn*, 293 Pa. Super. 474, 482, 439 A.2d 674, 678 (1981).

137. Heckendorn v. Consolidated Rail Corp., 502 Pa. 101, 465 A.2d 609 (1983). *Heckendorn* cites the Restatement (Second) of Torts section 880 as supporting the proposition that one tortfeasor's immunity from liability does not relieve another tortfeasor's full liability. RESTATEMENT (SECOND) OF TORTS § 880 (1979). Until the Pennsylvania Supreme Court's final pronouncement on the issue in *Heckendorn*, the courts in both Pennsylvania and the federal system were split as to whether the employer could be joined as an additional defendant. *See, e.g.*, cases in which joinder was not permitted, Hamme v. Dreis & Krump Mfg. Co., 716 F.2d 152 (3d Cir. 1982); Ryden v. Johns-Manville Products, 518 F. Supp. 311 (W.D. Pa. 1981); Tysenn v. Johns-Manville Corp., 517 F. Supp. 1290 (E.D. Pa. 1981); William Harter & Cleaver Brooks v. Yeagley, 310 Pa. Super. 441, 456 A.2d 1021 (1983); *but see, e.g.*, cases which held an employer could be joined: Schaeffer v. Didde-Glaser, Inc., 504 F. Supp. 613 (M.D. Pa. 1980); Sheldon v. West Bend Equip. Corp., 502 F. Supp. 256 (W.D. Pa. 1980); Yeagley v. Metropolitan Edison Co., 16 D. & C.3d 681 (1980) (employer may be joined for fault apportionment process); Flack v. Calabrace, 15 D. & C.3d 765 (1980).

138. 716 F.2d 152 (3d Cir. 1982).

139. *Id.* at 155 (Rosenn, J., dissenting). The majority, in an extremely terse opinion, believed itself to be bound by the *Heckendorn* superior court precedent. Judge Rosenn's dissent to *Hamme* traces the history of workers' compensation. It offers an extremely extensive presentation of the issues in reconciling the mandate of fault comparison under CNA with the WCA scheme.

140. 488 Pa. 513, 412 A.2d 1094 (1980). *See supra* text and accompanying notes 125-28.

subrogation lien on the employee's third party tort recovery. Rosenn suggested that the appropriate model for apportioning liability might be to treat the employer as a "settled" defendant who has signed a pro rata release.[141] Under that model the third party tortfeasor would be liable only for its proportional share and the plaintiff would get that amount plus the employer's obligatory statutory compensation payment. The problem with this solution, however, is that it is likely that the plaintiff would be undercompensated for his injury, at least where the employer's fault was greater than its workers' compensation obligation.

Treating an employer as a settled defendant who had not taken a pro rata release would have a different impact on loss allocation. The statutory amount would then be the "amount of consideration paid,"[142] which would be reduced from the judgment. The third party tortfeasor would pay the whole judgment minus the workers' compensation payments.[143] Under this scenario the workers' compensation employer would be liable for its full statutory obligation, and the third party tortfeasor might or might not pay more than its share of liability depending on its percentage of fault and the amount of the employer's liability.[144] At least the third party would not end up "holding the whole bag" as occurs in the current system. Moreover, the plaintiff would receive a complete, but not double, recovery.[145]

An intermediate ground between the "settlement" paradigms of load sharing among the parties and the present system where the third party tortfeasor pays the whole tort recovery would involve conditioning the employer's right to subrogation on his freedom or

141. Hamme v. Dreis & Krump Mfg. Co., 716 F.2d 152, 166 n.25 (Rosenn, J., dissenting). Rosenn cites Pulliam, *Comparative Loss Allocation and the Rights and Liabilities of Third Parties Against an Immune Employer: A Modest Proposal*, 31 FED'N INS. COUNS. 80 (1980) [hereinafter cited as Pulliam, *Loss Allocation*].

142. 42 PA.CONS. STAT. ANN. § 8326 (Purdon 1982).

143. But, unlike the PaCATA, the third party would have no contribution rights against the employer if the employer's compensation payments turned out to be less than the employer's *pro rata* (proportional) liability under CNA. This scenario is identical to the one proposed by Epstein, *Coordination of Workers Compensation Benefits with Tort Damage Awards*, 13 FORUM 464, 466 (1978). It would further buttress the rationale for the joinder of the employer in the law suit since a non-settling defendant has the right to require a settling defendant who had *not* signed a *pro rata* release to be present at the trial under the "benefit" rule. *See supra* notes 80-93 and accompanying text.

144. Arguably, this inexact loss allocation is one of the *quid pro quos* of the workers' compensation system.

145. This model has been criticized as providing no safety incentives for the employer since its payment does not vary according to its behavior. Pulliam, *Loss Allocation supra* note 141, at 92. However, Pulliam is not completely accurate since by promoting safety in the workplace the employer would not only exercise a measure of disinterested social benevolence, but would have a money incentive to avoid accidents so that its experience rating would be reduced.

relative freedom from fault. This would be a return to the "Pennsylvania Rule," as established prior to the 1974 amendments to WCA[146] but with a difference: the relative fault of the parties could be taken into account when determining the exact extent of the employer's subrogation right. Judge Larsen's concurring opinion to the Supreme Court *Heckendorn* decision appeared to lean towards this middle route.[147] Judge Larsen noted that subrogation rights are always subject to equitable principles, and suggested that the employer's rights should not be automatic, but rather should depend on the employer's lack or relative lack of fault as adjudicated in some sort of judicial proceeding.[148]

The *Heckendorn* majority stated that the employer's statutory right to subrogation may not be impaired by the fact that the employer may have been partially at fault.[149] This statement can only be considered dicta, however, because the question of the employer's right to subrogation was not the precise question before the *Heckendorn* court.[150] Thus the employer's unqualified right to subrogation has yet to be litigated, and a system where that right would depend on the employer's lack or degree of fault might still be possible under present Pennsylvania law.

IX. Persons Required to Attend Trial Under CNA

As outlined above, Pennsylvania has essentially chosen to ignore considerations of fault allocation in its comparative negligence system when an "immune" workers' compensation employer is involved. The immune employer is not liable for any of the loss involved other

146. *See supra* text accompanying notes 106-15.

147. Heckendorn v. Consolidated Rail Corp., 502 Pa. 101, 109, 465 A.2d 609, 613 (1983) (Larsen, J., concurring).

148. *Id.* Larsen also made the identical point in his concurrence to the majority's opinion in Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 524, 412 A.2d 1094, 1099 (1980) (Larsen, J., concurring).

149. *Heckendorn*, 502 Pa. at 108-9, 465 A.2d at 613.

> If the negligence of a third-party tortfeasor is subsequently determined to have caused the injury 'in whole or in part,' the employee is entitled to recover the full amount of his damages from the tortfeasor, subject to the employer's right to reimbursement from the workers' compensation payments made as a result of the injury. The issue of the employer's negligence is as irrelevant at the subrogation stage of the proceedings as it is at the trial, and as it is in every case of employee injury in which no third-party tortfeasor is involved.

150. *Id.* The issue before the *Heckendorn* court was whether the employer could be joined for the purpose of fault apportionment under CNA. Arguably, the rationale underlying the present system of allocation of losses in the Pennsylvania workers' compensation system is an economic one and not really "legal" at all. It can be viewed as a system which partially "funds" the workers' compensation scheme. It is, moreover, significant that Pennsylvania's present loss allocation system is now in line with that in place in the majority of jurisdictions.

than its workers' compensation benefits. Furthermore, if a third party tortfeasor is present, the employer will be able to recoup its statutory compensation payments and cannot be joined in the lawsuit as an additional party, even for the limited purpose of fault allocation under CNA.

In situations not involving statutorily immune employers, it seemed questionable at first whether, after CNA, a party who had been released could or should be made a party for the purpose of fault apportionment. The main reason for not joining someone whose liability has already been fixed by a release as a co-defendant is that there would be no incentive for him to vigorously defend the issue of his liability.[151] This could lead to an acquiescence of liability by the settler during the trial in the fault allocation process which could unduly burden the remaining defendants. On the other hand, a defense lawyer could try to prove that the settling defendant was the only tortfeasor. This could have a devastating effect on a plaintiff.

The problems of the presence of a settler at trial are potentially magnified under CNA where shares are proportional. Prior to CNA, if the settler took a pro rata release, the non-settler could not shift most of his share by lessening his liability, since if he were liable at all, he would still be liable for his whole pro rata share. This would be true whether he was one percent negligent or ninety-nine percent negligent.[152] After CNA, if a non-settler can reduce his fault allocation to one percent, the settler who took a *pro rata* release would have satisfied the other ninety-nine percent of the liability, no matter what amount the settlement entailed.

The issue of whether the Comparative Negligence Act required a settled co-defendant to be present during a trial for the negligence apportionment process was adjudicated in 1981 in *Young v. Verson Allsteel Press Company*.[153] Verson, one of two tortfeasors, executed

151. *See, e.g.*, Lawless v. Central Engineering Co. 502 F. Supp. 308, 311 and n.3 (1980) (presence of settler at trial derogates from the adversarial nature of lawsuit).

152. Under pre-CNA, a party's *pro rata* share would be one-half if there were two tortfeasors. *See*, Schwarzel v. Philadelphia Gas Works, July Term, 1980, No. 4098 (C.P. Phila. Co. Dec. 24, 1980) (opinion of Judge Forer).

153. 524 F. Supp. 1147 (E.D. Pa. 1981). The federal district court was faced with deciding this issue under the CNA since it had not yet been decided on the state court appellate level. A year later, in Young v. Verson Allsteel Press Co., 539 F. Supp. 193 (E.D. Pa. 1982), the court faced the issue of whether evidence of the release could be placed in evidence at trial pursuant to FED. R. EVID. Rule 408. In holding in the negative, the court erroneously assumed that 42 PA. CONS. STAT. ANN. § 6141(c) (Purdon 1982), the state analog to Rule 408, was enacted contemporaneously and in conjunction with CNA. 42 PA. CONS. STAT. ANN. § 6141(c) was originally enacted in 1968.

a "Griffin" release which conceded liability and provided that the judgment would be reduced by what was ultimately found to be Verson's percentage of fault.[154] After summarizing the pre-CNA cases dealing with the presence of the settler at the trial, the court concluded that CNA did not change the underlying rule that a co-defendant must derive a real "benefit" from the joinder of the settled party to require him to be present at trial.[155] In *Young*, the co-defendant could not derive such a real "benefit" because the type of release given to Verson was a "Griffin" release.[156] The court was concerned with the prejudicial potential of a *pro forma* appearance in which the settler does not have the self-interest to contest his liability.[157]

Pennsylvania's policy of favoring settlements was cited as another reason supporting the non-presence of the settler at trial.[158] Any rule compelling a defendant who has taken a release to attend trial would have a chilling effect on settlements because of the additional time, effort and expense a court appearance would require.

X. The Phantom Tortfeasor

Tortfeasors who are not before the court either because they are not amenable to suit in the jurisdiction or because they are nowhere

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154. 524 F. Supp. at 1148. A "Griffin" release, named after plaintiff in Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974), *see supra* text accompanying notes 82-83, is a release that concedes joint tortfeasor status and provides for a reduction in the judgment by the settler's *pro rata* share. It is identical to a *pro rata* release. *See supra* text and accompanying note 78.

155. *Id.* at 1150-52. This "benefit rule" is summarized in Davis v. Miller, 385 Pa. 348, 123 A.2d 422 (1956). In *Davis*, the co-defendant needed to have a judicial determination of the settler's tortfeasor status. Otherwise her payment would have been that of a "volunteer" and would not have inured the benefit of the non-settler since the settler in *Davis* had not taken a *pro rata* release, nor had she conceded liability. *See supra* text and accompanying notes 80-81.

156. *See supra* note 154. *Young*, 524 F. Supp. at 1151 and n.16.

157. An additional reason cited by *Young* for the rule that settlers who took pro rata or "Griffin" releases did not need to be present at trial under CNA was based on the premise that the CNA effected a change in Pennsylvania law in "cast[ing] the law with a recognizable bias in favor of plaintiffs whom were injured when they had been less than fifty-one percent culpable." *Id.* at 1150. Therefore the decision as to whether the settler should be present should be consistent with this "plaintiff bias" and the courts ". . . should not undercut the legislature's intention." *Id.* at 1050-51. The *Young* court cites Judge Newcomber's opinion in Lawless v. Central Engineering Co., 502 F. Supp. 308 (E.D. Pa. 1980) for the proposition that a present defendant who had settled and was therefore "acquiescent" could likely effect a reduction in a plaintiff's award since he may not resist the non-settler's attempt to shift liability to him. *See supra* text and accompanying notes 151 & 152. The "plaintiff bias" theory is also presented in Goldstein, *The Pennsylvania Comparative Negligence Act: The Fifty-One Percent Solution*, 50 TEMP. L.Q. 352, 355-56 (1977).

158. *Young*, 524 F. Supp. at 1152.

to be found are termed "phantom" tortfeasors.[159] How should the secondary loss attributable to the "phantom" tortfeasor be allocated under CNA? Should the remaining defendants absorb the liability of the "phantom" or should they be liable only for their percentage share under CNA? If the secondary loss is not allowed to fall on the plaintiff, is it somehow to be spread among all the parties to the lawsuit, including the plaintiff; or is it to be absorbed solely among the defendants? If so, in what proportions? Causation problems arise in this context as well. How can a jury determine causation when one of the actors is absent? A severe conceptual problem may result under a comparative negligence system whether it is decided that the fault of the "phantom" must be disregarded or that it must be taken into account in the causation calculation.[160]

Although the Act passed with little legislative history,[161] the legislators who proposed the bill were aware that the language of CNA was nearly identical to the language of the Wisconsin statute after which it is modeled.[162] The Wisconsin statute is interpreted so that fault apportionment includes a fault allocation for absent settled parties and immune parties.[163] Because the doctrine of joint and several liability is well established in Wisconsin,[164] fault apportionment which includes an allocation for the "phantom" has the effect of entirely shifting the secondary loss caused by the "phantom" to the party defendants rather than to the plaintiff. Wisconsin takes the position that it is important to have a completely accurate fault apportionment among all tortfeasors. Such an accurate fault apportionment in a system of joint and several liability isolates a plaintiff from having to absorb more than his share of liability. In interpreting its CNA, Pennsylvania has not considered itself to be bound to follow all of Wisconsin's interpretations of its statute and indeed did not follow the Wisconsin rule providing for a specific fault allocation for "phantom" tortfeasors.[165]

159. An example of a "phantom" is a hit and run driver or an unknown driver who sets off a chain accident on the highway. *See, e.g.*, Souto v. Segal, 302 So.2d 465 (Fla. Dist. Ct. App,. 1974). A related problem to the "phantom" is the insolvent defendant. *See infra* text and accompanying notes 181-97.

160. *See infra* note 168.

161. *See supra* note 2.

162. WIS. STAT. ANN. § 895.045 (West 1983).

163. Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963); Walker v. Kroger Grocery and Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

164. *See, e.g.*, Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp., 96 Wis.2d 314, 291 N.W.2d 825 (1980).

165. Some differences between CNA and the Wisconsin statute are as follows: Wisconsin compares negligence and strict liability under its statute. Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37, *cert. denied* E.R. Squibb & Sons Inc., v. Collins, 53 U.S.L.W.

Unfortunately, a close look at the language of Pennsylvania's CNA does not settle the question of how to allocate the fault of the "phantom" tortfeasor. The Act states that a defendant is liable for his percentage of negligence, and that this percentage should be compared with the negligence of all the defendants "against whom recovery is allowed."[166] But nowhere does the Act state that the total percentage of all negligence must necessarily add up to 100%. Theoretically, if the negligence of the "phantom" were to be calculated in the fault apportionment process, the total percentage of negligence among the parties in the lawsuit could be less than 100%, and such an interpretation would be consistent with the language of the CNA.[167] A direct ruling on this important issue has not been offered by Pennsylvania courts and it has wrongly been assumed by commentators and jurists that the language of the statute can only be interpreted to mean that the negligence of all parties must equal 100% of the negligence involved.[168] Case after case interpreting

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3236, 83 L. Ed.2d 51, 105 S. Ct. 107 (1984). The Wisconsin statute refers to actions by "persons" and negligence of a "person" in the singular rather than "defendant or defendants" of the CNA. For that reason, perhaps, Wisconsin courts came up with a different "aggregate" rule than Pennsylvania. In Wisconsin, a plaintiff cannot recover from any single defendant whose negligence is less than the plaintiff's, even if the combined negligence of *all* the tortfeasors is greater than plaintiff's. *See* Soczka v. Rechner, 73 Wis.2d 157, 164, 242 N.W.2d 910, 914 (1976); *compare* Elder v. Orluck, 334 Pa. Super. 329, 483 A.2d 474 (1984) (plaintiff's recovery barred only when this causal negligence is greater than that of the combined negligence of all defendants). *See infra* text and accompanying notes 177-80.

166. 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982).

167. This holds true unless a "phantom" is interpreted as not being a defendant "against whom recovery is allowed" because of inamenability to suit. Even so, the allocation percentages need not add up to 100%.

168. The only other commentator who believes that this issue has not yet been interpreted in Pennsylvania is McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence — A Puzzling Choice*, 32 OKLA. L. REV. 1, 32 (1979). *See Symposium — Comparative Negligence in Pennsylvania*, 24 VILL. L. REV. 419 (1978-79); Timby & Plevyak, *The Effect of Pennsylvania's Comparative Negligence Statute on Traditional Tort Concepts and Doctrines*, 24 VILL. L. REV. 453, 455, n.6, (1978-79) and Griffith, Hemsley & Burr, *Contribution, Indemnity, Settlements, and Releases; What the Pennsylvania Comparative Negligence Statute Did Not Say*, 24 VILL. L. REV. 494, 499-503 (1978-79). Beasley & Tunstall, *Jury Instructions Concerning Multiple Defendants and Strict Liability After the Pennsylvania Comparative Negligence Act*, 24 VILL. L. REV. 518, (1978-79). The Beasley and Tunstall article discusses standard jury instructions in relation to the Act. Although the authors contended that the "plain language" of the CNA indicated that the fault of the "phantom" should *not* be taken into account, *id.* at 528, the authors admit "it would have been possible to use more precise language." *Id.* at 529.

The material in the Beasley and Tunstall article was adopted virtually verbatim in PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS, Pa. Bar Institute as § 3.03A (Rev. 1984). Question 5 of the instructions reads as follows "*Taking the combined negligence that was a substantial factor in bringing about the plaintiff's harm at 100%*, what percentage of that causal negligence was attributable to the defendant (each of the defendants you have found causally negligent) and what percentage was attributable to the Plaintiff?" (emphasis added). The instruction indicates that this total must add up to 100%. This means that as a result of a *de facto* practice, the fault of the "phantom" is disregarded under CNA.

CNA merely repeats the words of the act believing them to "prove" that the phantom tortfeasor's percentage of liability should not enter into the fault allocation calculus.

The court in *Ryden v. Johns-Manville Products*[169] indirectly addressed this issue. The case involved products liability in a workers' compensation setting. In dicta the court stated that under the language of CNA there was no suggestion that all tortfeasors needed to be brought into court and that an apportionment among all persons responsible for the injury was not a requirement of the Act.[170] Because the statement in *Ryden* is dicta, however, the question of the "phantom" tortfeasor is yet another issue still open to litigation in Pennsylvania.

The *de facto* rule assigning the negligence of the phantom defendant to the other parties to the law suit provides the negligent parties with the incentive to locate the "phantom" tortfeasor to join to the action as an impleaded defendant. In fact, CNA was amended in 1982 to allow for this result, and it now specifically includes impleaded defendants as "defendants against whom recovery is sought."[171] There is a certain justice in the notion that the tortfeasors who caused the injury should bear the burden of finding and joining all available culpable parties. It would seem unfair to give a blameless plaintiff the burden of litigating and proving issues relating to the liability of a non-party.[172] The plaintiff has incentive to find and sue the "phantom," but only to the extent that the defendants already in the action are insolvent or underinsured, or the plaintiff is partly at fault. In such a case he might want the "phan-

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Disregarding the "phantom's" fault could lead to tremendous conceptual problems for a jury, for the jury is under a duty to find that certain causative factors amount to 100% when they in fact do not. What if the "phantom" defendant's negligence caused 98% of the injury? There might be tremendous resistance to allocating all negligence to one or two negligent defendants who are amenable to suit. The jury instructions also completely duck the problem of how to distribute the secondary loss.

The problems juries can experience on this issue are exemplified by the following case. In Model v. Rabinowitz, 313 So.2d 59 (Fla. Dist. Ct. App. 1975), *cert. denied* 327 So.2d 34 (1976), a jury apportioned 14% negligence to a landlord and 28% to a plaintiff in an accident in which a portion of ceiling fell on plaintiff. The district court of appeals reversed this finding. The problem was that the jury simply did not allocate the remaining 58%, believing it to be "an Act of God." The appeals court stated: "In any event, it is improper in comparative negligence situations for the jury to apportion negligence [to] 'phantom' tortfeasors who are not before the court; or even to the Supreme Being." *Id.* at 60 n.1.

169. 518 F. Supp. 311 (W.D. Pa., 1981).

170. *Id.* at 316.

171. 42 PA. CONS. STAT. ANN. § 7102(d) (Purdon Supp. 1985).

172. *See* National Farmers Union Property and Casualty Co. v. Frackelton, 662 P.2d 1056, 1060 (Colo. 1983). *Frackelton* provides an excellent, detailed treatment of this "phantom" tortfeasor problem by directly dealing with it rather than by reaching, as have Pennsylvania courts, by a *de facto* practice supported neither by legislative fiat nor judicial decision.

tom" joined so he will not have to absorb some of the secondary loss caused by the missing defendant.[173] The end result of Pennsylvania's treatment of the "phantom" is a mechanism which encourages as much final adjudication as possible in a single lawsuit.[174]

Certain issues relating to the "phantom" still persist in Pennsylvania. What happens if after trial and judgment the tortfeasors who paid the judgment find and sue the "phantom" in a different forum? Is the "phantom" tortfeasor bound by collateral estoppel by the adjudication of his negligence in the prior lawsuit to which he was not a party? Precedents in other jurisdictions indicate that the "phantom's" liability will have to be relitigated in a new action.[175] On the other hand, the plaintiff may be collaterally estopped to deny issues that were litigated in the former suit.[176] There are problems in this because each tortfeasor's percentage of liability will have to be adjusted in the second suit to allow for a finding of the "phantom's" negligence. And what if the second action is a contribution in which a plaintiff-at-fault is not present? Is a plaintiff now bound to his possibly recalculated percentage of negligence? These considerations support the position that Pennsylvania has taken: the negligence of a "phantom" tortfeasor should not be considered *in absentia.*

XI. The Aggregate Rule

Another major issue left open by CNA was whether the "aggregate" or the "individual" rule should apply in Pennsylvania's "greater than" system of comparative negligence. Should a plaintiff's negligence be compared with the aggregate negligence of all the defendants in determining whether a plaintiff's negligence is "greater than" that of the "defendant or defendants against whom recovery is sought" and therefore barring him from recovery?[177] Or should a plaintiff's negligence be compared with the negligence of each de-

173. This is because CNA retains joint and several liability. 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982).

174. In a system of several rather than joint and several liability, these dynamics would completely change. Under several liability the incentive would be completely on the plaintiff to sue as many liable tortfeasors as possible, since the extent of his recovery would depend on how many solvent tortfeasors were present in the action. In a several system, it is the plaintiff that bears the total risk of this secondary loss. *See* Brown v. Kiell, 224 Kan. 195, 580 P.2d 867 (1978).

175. *See, e.g.*, Young v. Steinberg, 53 N.J. 252, 250 A.2d 13 (1969); Nat'l Farmers Union v. Frackleton, 662 P.2d at 1058; Shanley v. Callanan Industries, Inc., 54 N.Y.2d 52, 444 N.Y.S.2d 585, 492 N.E.2d 104 (1981).

176. *See Frackleton*, 662 P.2d at 1060.

177. 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982).

fendant separately?[178]

A decision to adopt either the "aggregate" rule or the "individual" approach has a tremendous impact on the liability of both plaintiffs and defendants. There are strong arguments on either side of the issue. Proponents of the "individual" approach would posit that the aggregate rule is inconsistent with Pennsylvania's hybrid system of comparative negligence which forecloses a plaintiff from recovering if he is more than fifty percent negligent. The individual system can be seen as a "miniature" of the hybrid system. Another argument for the individual approach is that it is basically unfair for a more negligent plaintiff to be able to recover from a less negligent defendant. Moreover, a defendant whose negligence is much less than plaintiff's may be the only solvent defendant and therefore would have to bear a disproportionate amount of the loss if the aggregate approach were to be adopted. In *Elder v. Orluck*, it was this exact scenario which came before the court. Nonetheless, the Pennsylvania Superior Court held that the "aggregate" approach should prevail.[179]

There are, of course, competing equities supporting the aggregate approach adopted in *Elder*. One rationale is that the aggregate rule more clearly effectuates Pennsylvania's policy for a full recovery by the plaintiff and a sharing of liability among all responsible parties.[180] Load sharing would occur because each defendant under the "aggregate" system is liable for its own share no matter whether its individual percentage of negligence is greater or less than that of the plaintiff as long as the sum of plaintiff's negligence is not greater than fifty percent. In addition, the "individual" approach unreasonably burdens a plaintiff who attempts to recover from many slightly negligent parties. Finally, the "aggregate" approach is consistent with the rule that loss should fall on a wrongdoer and not on an

178. The aggregate rule is also termed the "combined" approach. *See* Elder v. Orluck, 334 Pa. Super. 329, 483 A.2d 474 (1984), *cert. granted*, 508 Pa. 1, 493 A.2d 1346 (1985). It has also been called the "unit" rule. *See* McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence — a Puzzling Choice* 32 OKLA. L. REV. 1, 4 (1979). The antithesis of the aggregate approach is the individual approach in which the negligence of the plaintiff is compared with that of each individual defendant separately.

179. In *Elder*, a slightly negligent public entity, the city of Harrisville, had to absorb most of the loss caused by the defendant Orluck since it had little hope of getting full contribution from him. Elder v. Orluck, 334 Pa. Super. 329, 483 A.2d 474 (1984), *cert. granted*, 508 Pa. 1, 493 A.2d 1346 (1985). This is one of the most complete and well reasoned opinions concerning comparative negligence filed by a Pennsylvania court to date. It gives a good overview of various systems in place in jurisdictions throughout the United States and why they evolved as they did.

180. Although plaintiff's full recovery may be at the expense of a slightly negligent defendant as in the *Elder* scenario. *Id.*

injured party.

XII. Joint and Several Liability

Underlying criticisms of the "aggregate" approach are problems in loss allocation caused by the system of joint and several liability. Joint and several liability is part of the common law of Pennsylvania and was specifically retained by the PaCATA and CNA.[181] This theory allows a plaintiff to recover the full amount of damages from any defendant leaving that defendant both the burden and the right to obtain contribution from the other tortfeasors.[182] A recent flood of commentaries, both in the scholarly law journals and in the mass media of the legal profession, have begun to analyze and criticize the system of joint and several liability in light of present day economic conditions.[183]

Although Pennsylvania has held fast to the doctrine of joint and several liability, several states have begun to explore a middle ground which mitigates some of the harshness the system poses to solvent defendants involved in accidents with largely responsible insolvent defendants. Viewed another way, these statutes redistribute secondary losses so that they do not necessarily fall either solely on the plaintiff, as in a "several" system, or solely on the solvent defendant or defendants, as happens in a system of joint and several liability.

Texas has adopted a unique manner of accommodating the interests and equities involved in loss allocation under a comparative negligence act. In that jurisdiction, the aggregate rule applies so long as a plaintiff's negligence is less than a particular defendant's. If it is greater, the plaintiff may still recover from that defendant, but only

181. 42 PA. CONS. STAT. ANN. § 8322 (Purdon 1982); 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982).

182. Joint and several liability has been called "entire" liability. It is to be distinguished from "several" liability, where the plaintiff can execute on each defendant "severally" for that defendant's portion of liability. *See*, Fleming, *Foreward: Comparative Negligence at Last: By Judicial Choice*, 64 CALIF. L. REV. 239 (1976).

183. *See, e.g.*, Fleming, *Report to the Joint Commission of the California Legislature on Tort Liability on the Problems with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1465 (1979); Adler, *Allocation of Responsibility After American Motor Association v. Superior Court*, 6 PEPPERDINE L. REV. 1 (1978); Adams, *Settlements After Li: But is it "Fair?"*, 10 PRAC. L.J. 729 (1979); and *see e.g.*, literature in the "popular" legal journals: Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. JOURNAL 61, July 1985; Goddard, *Joint and Several Liability Under Attack*," ATLA ADVOCATE 4, June/July 1985. The Goddard article gives a plaintiff's bar view of the virtues of joint and several liability.

The following bills have been presented to the Pennsylvania Legislature. These proposals include provision for the abrogation of joint and several liability, substituting several liability in its stead. *See* H. 2426, § 7105 (1986); S. 621, § 8374 (1985).

on the basis of several liability. Consequently, the more negligent plaintiff bears the risk of the insolvency of the less-negligent defendant but still has a chance to recover for his injuries if the defendant is solvent.[184]

Minnesota takes a slightly different approach. If a joint or concurrent tort is involved, several liability will prevail. If plaintiff has no contributory fault or a pure tort is involved,[185] joint and several liability will apply.[186] Uncollectable damages will be allocated among all the parties to the law suit, including the plaintiff-at-fault.[187] Kansas' system is similar to Minnesota's. Where the plaintiff is not at fault, the rule will be joint and several liability; but if there is any plaintiff fault, then several liability will apply.[188]

Oklahoma has chosen several liability as the basic rule, but retains joint and several liability in cases in which damages cannot be apportioned by a jury or when the plaintiff is not at fault. This system has essentially corrected Oklahoma's previous system for loss apportionment which had been joint and several liability but with no contribution.[189] Other states, among them New Mexico, have come down firmly in favor of several liability.[190] Other "several" states are New Hampshire, Vermont, Ohio and Nevada.[191] In Kentucky the question of whether or not joint and several liability applies is one for the jury. This unique and effective solution allows the trier of fact to balance the equities of the solvent or insolvent parties on a

184. TEX. REV. CIV. STAT. ANN. art. 2212(a) (Vernon's Supp. 1985). The "Texas" approach is also now in effect in four other states: Nevada (NEV. REV. STAT. § 41.141(3) (1985)); Indiana (34 IND. STAT. ANN. § 34-4-33-1 et seq. (Burns Supp. 1986)); Louisiana (LA. CIV. CODE ANN. art. 2324 (West Supp. 1986) and Oregon (OR. REV. STAT. § 18.485 (1983)).

185. *See supra* text and accompanying notes 25-26, 29.

186. MINN. STAT. ANN. § 604.02 subd. 1 (West Supp. 1986); *see* Kowalske v. Armour & Co., 300 Minn. 301, 220 N.W.2d 268 (1974).

187. *See* MINN. STAT. ANN. § 604.01(1). This solution is similar to that of the Uniform Comparative Fault Act, *see infra*, text and accompanying notes 206-23.

188. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (Kn. 1978).

189. *See* Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980). The system in place in Oklahoma is similar to Minnesota's, but the theoretic basis is different, perhaps emanating from the fact that Oklahoma has a contribution statute dealing only with contract and not with tort. OKLA. STAT. tit. 12 § 831 (1971). In this context a system of several liability should be seen as an advance over the inadequacies of a system of joint and several liability with no contribution.

190. Bartlett v. New Mexico Welding Supply Inc., 646 P.2d 579 (N.M. 1982). The *Bartlett* decision provides an excellent survey of this issue in the comparative negligence field. In *Bartlett*, a truck owner whose negligence was 30% was held not to have to bear the secondary loss caused by a "phantom" defendant whose negligence was 70%.

191. New Hampshire (N.H. REV. STAT. ANN. § 507:7-a (1983)), but joint and several is retained if because of procedural bars or immunities, a plaintiff can recover only from one defendant; Vermont (VT. STAT. ANN. tit. 12, § 1036 (1973 and 1985 Supp.)). *See* Howard v. Spafford, 321 A.2d 74 (Vt. 1974); Ohio (OHIO REV. CODE ANN. § 2315.29(a)(2) (Page 1985)) and Nevada (NEV. REV. STAT. § 41.141(3) (1985)).

case-by-case basis.[192]

Certain states justify retention of joint and several liability on the basis of a previously existing contribution statute which serves to allocate uncollectable damages among the defendants. Thus a "legislative" intent to allow a plaintiff to recover from any one tortfeasor is discerned.[193] The California Supreme Court gave three reasons for the retention of joint and several liability in that state. It pointed out that apportioning fault does not make an "indivisible" injury "divisible." It also termed the nature of plaintiff's fault as being on a "different level" than that of the defendant, and it cites California state policy that an injured plaintiff should be able to fully recover for his injuries.[194]

Some commentators believe that a system of joint and several liability is inconsistent with a "pure" system of comparative negligence. The reasoning is that in a pure system a plaintiff is never barred from a certain modicum of recovery. Therefore, it is thought that these plaintiffs who can recover in more cases should bear some of the risk of insolvency of the defendants.[195]

The basic considerations underlying the debate on joint and several liability are economic ones. The no-fault commentators see the common law tort system with its high transactional costs and potential for both over-and under-compensation for plaintiffs as problematic.[196] The popular advent of the comparative negligence system in the 1970's and 1980's itself can be seen as arising from the same source of concerns as the no-fault movement. It was thought that a system of comparative negligence could cure some of the problems of undercompensation for plaintiffs and inequitable load sharing for defendants.[197] But, as we have seen, the comparative negligence system

192. Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713 (Ky. Ct. App. 1979).

193. *See, e.g.*, Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979).

194. Adams, *Settlements After Li: But is it "Fair"*, 10 PAC. L. REV. 729, 739-40 (1979), (*citing* American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 588-90, 578 P.2d 899, 905-06, 146 Cal. Rptr. 182, 188-89 (1978)). *See* Criticism of these factors in Note, *Torts — Liability of Joint Tortfeasors — Apportionment of Damages Between Joint Tortfeasors by Verdict of Jury*, 14 VA. L. REV. 677, 680-81 (1927-8). This hoary source debunks the common law dichotomy between concurrent and pure torts. Also *see* Adler, *Allocation of Responsibility After American Motorcycle Association v. Superior Court*, 6 PEPPERDINE L. REV. 1 (1978), which posits that plaintiffs as a class should have no greater claim on the courts' sympathies than defendants.

195. *See* Justice Clark's dissenting opinion in American Motorcycle Ass'n v. Superior Ct., 20 Cal.3d 578, 613, 578 P.2d 899, 922, 146 Cal. Rptr. 182, 205 (1978) (Clark, J., dissenting).

196. *See, e.g.*, O'CONNELL & HENDERSON, TORT LAW, NO FAULT AND BEYOND, Chapter 2 (1975) and Keeton, *The Case for No-Fault Insurance*, 44 MISS. L.J. 1 (1973).

197. McNichols, *supra* note 168.

has not completely fulfilled its promise to cure the inequities inherent in tort loss allocation. Some of the inequities have been lessened, while others have stubbornly persisted.

XIII. Settlements Under CNA

The system for settlements and contribution in Pennsylvania under the PaCATA in conjunction with the *Mong* and *Daugherty* rulings led to a stagnant settlement environment.[198] Although *Mong* effectuates one of Pennsylvania's important policies, complete but not double recovery for an injured plaintiff, the state-held policy encouraging out-of-court settlements was stymied by the dynamics established by *Mong* and the Contribution Act.[199]

In 1984, an attempt was made to reverse the *Mong* and *Daugherty* precedents in *Charles v. Giant Eagle Markets*,[200] a case arising under CNA. *Charles* was a case factually very similar to *Daugherty*,[201] where a settling tortfeasor "overpaid" his share of liability. The plaintiff sued to recover the entire proportional liability of the non-settler rather than having that liability reduced by the overpayment of the settler.[202] The plaintiff correctly argued that the present system discourages settlement because, by settling, a plaintiff only stands to lose out on full recovery and can never "gain."[203] The ruling in *Charles* hinged on a determination whether the adoption of CNA impliedly overruled PaCATA and the *Mong* and *Daugherty* precedents. The plaintiff in *Charles* pointed to cases in other jurisdictions with similar comparative negligence statutes which hold that a double recovery by plaintiff is tolerable since it furthers the goal

198. *See supra* text accompanying notes 63-71, 75-78 and 90-100.

199. Possibly because of the poor results in encouraging out-of-court settlements, Pennsylvania adopted a system of delay damages in 1978. The rule provides an incentive to settle by penalizing a dilatory plaintiff who does not accept an offer for settlement by a defendant which later proves to be at least 80% of the final verdict. PA.R.C.P. 238.

200. 330 Pa. Super. 76, 478 A.2d 1359 (1984). On September 9, 1985, *Charles* was argued before the supreme court. The case resulted in a split decision and the court has asked for reargument. 510 A.2d 350.

201. *See supra* text accompanying notes 69-70, 75-77.

202. Plaintiff cited the "plain language" of 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982), which states that " . . . each defendant *shall be liable for that proportion* of the total dollar amount awarded as damages . . . ." (emphasis added).

203. A system of "equitable" apportionment of damages like the kind in place in Pennsylvania is antithetical to an environment in which settlements can thrive. A plaintiff can only lose by settling "lightly" (i.e. for an amount which may turn out to be less than the proportional verdict). It is not an evenhanded system since it is a "no-win" situation for a plaintiff, unless the settler is deemed to be a "volunteer." *See* Kaplan, *From Contribution to Good Faith Settlements: Equity Where Are You?* 49 JAL 771, 783 (1984), and *supra* text and accompanying notes 86-91 on the "volunteer."

creating an environment in which settlements can thrive.[204] The Pennsylvania Superior Court disagreed with the plaintiff's analysis. It upheld the *Mong* and *Daugherty* precedents because they created a system in which no party would reap the benefit of an undeserved windfall. In September 1985 *Charles* was argued before the Pennsylvania Supreme Court. The case resulted in a split decision and the court has asked for reargument.[205] Since the court could find for the plaintiff in *Charles* without overturning the other major CNA related decisions, it is possible that the *Charles* plaintiff will be successful.

XIV. The Uniform Comparative Fault Act

Although completely ignored in most jurisdictions,[206] the Uniform Comparative Fault Act (UCFA), promulgated by the National Conference of Commissioners on Uniform Acts, provides overall the best unified treatment for handling the competing interests involved in a loss allocation system under comparative negligence.[207] In one sweeping document, the UCFA settles perplexing and interrelated questions of contribution, risk of insolvency, immunities, and phantom defendants. It also treats the substantive issues of strict liability, breach of warranty, and assumption of risk. In accomplishing all of the above, it is a paradigm of brevity and clarity.

One of the basic features of the UCFA is that it purports to compare fault of all types. For that reason strict liability for product injuries is compared with negligence under the act.[208] It is probably this factor of the UCFA more than any other that has decreased its attractiveness as an alternative to the patchwork of precedents and

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204. *Charles*, 330 Pa. Super. at 82, 478 A.2d at 1361-2; Rogers v. Spady, 147 N.J. Super. 274, 371 A.2d 285 (1977) (dicta); Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979); Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1972). A good argument to support the position of the plaintiff in *Charles* is by way of analogy to contract law. Letting a plaintiff keep an "over" settlement allows him to get the "benefit of his bargain." The nonsettler is not prejudiced since he is liable only for that which is caused by his own fault.

205. 510 A.2d 350 (1986).

206. Only three states have adopted the UFCA: Kentucky, Missouri, Washington. Kentucky and Missouri adopted it by judicial decision. Hillen v. Hays, 673 S.W.2d 713 (Ky. 1984) (adopts UFCA jury instructions); and Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (instructing trial court to follow UCFA §§ 1-6 to provide guidance "insofar as possible" in future cases.) *Id.* at 15.

207. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1986). *See* Wade *Uniform Comparative Fault Act: What Should It Provide?*, 10 U. MICH. J.L. REV. 220 (1977); Comment, *Comparative Contribution*, 14 J. MAR. L. REV. 173 (1980), and Miller, *Extending Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835 (1983).

208. UCFA Commissioner's Comment to § 1 at 40 (Supp. 1986) "Effect of Contributory Fault."

comparative negligence and contribution statutes that exist in most states.[209] There is no reason, however, that a state adopting the UCFA could not amend it to conform with its policy in that area of the law.[210]

Another reason states have been reluctant to adopt the UFCA is that it adopts the "pure" form of comparative negligence,[211] which is favored in only a minority of American jurisdictions. Pennsylvania's CNA utilizes a hybrid approach as do most states' comparative negligence statutes. Aside from its provisions on pure comparative negligence and comparison of strict liability with negligence, the UCFA could benefit Pennsylvania in providing solutions for some of the problems that plague its system of comparative negligence.

The UCFA, like Pennsylvania's CNA, does not assign a percentage of negligence to a "phantom" tortfeasor, but it divides the secondary loss caused by the "phantom" among all the remaining parties to the action, including the claimant-at-fault.[212] The UCFA also puts to rest many of the problems associated with a system of joint and several liability. In a single *coup de grace*, joint and several liability is retained, but with a difference: the percentage fault of each party, including settlers, is to be ascertained and converted into an "equitable share" of the underlying money damages.[213] Judgment is to be entered upon each liable party according to the rules of joint and several liability.[214] If any part of a party's equitable share is uncollectable due to insolvency, immunities, and so forth, a reallocation of the uncollectable amount will occur. The secondary loss will be divided among all other defendants plus the claimant at fault ac-

209. *See supra* note 16 on the Third Circuit's position on whether to compare strict product liability with negligence in its system of comparative negligence. The sentiments on this issue are apparently also very strong in other jurisdictions.

210. This is true, notwithstanding the admonition of UCFA § 7 (Uniformity of Application and Construction).

211. UCFA § 1. "Effect of Contributory Fault." "[A]ny contributory fault . . . diminishes proportionately the amount awarded . . . but does not bar recovery." The 1979 addition to the Commissioners' Comments provides for an alternative for states that want to continue their "hybrid" of "modified" form of comparative negligence. UFCA § 1, at 40. The Commissioners suggest, however, that states should not be "wedded" to the hybrid forms. *Id.* A legitimate argument in *support* of a hybrid system is the issue of causation: if the plaintiff's fault is more than the defendant's, how can one say that the defendant or defendants substantially caused the injury?

212. Commissioners' Comments to UFCA § 2, at 41 (Supp. 1986). This was a "deliberate decision" made to avoid difficulties in fault determination, statute of limitation problems, and issues of collateral estoppel. *See supra* discussion of the "phantom" tortfeasor, text and accompanying notes 159-76.

213. UFCA § 2(a) at 40 (Supp. 1986).

214. *Id.* § 2(c), at 41.

cording to their respective percentages of fault.[215]

The last three sections of the UCFA are intended to replace the Uniform Contribution Among Tortfeasors Act in states following the principle of comparative fault.[216] They bear greater similarity to the 1955 UCATA than to the 1939 version (PaCATA) in that they provide that contribution is available to a settler only to the extent the amount paid in settlement was "reasonable."[217] If a tortfeasor was not a party to the first action, but his equitable share was ascertained in that action and was paid by a co-defendant under the rule of joint and several liability, the paying defendant is entitled to contribution from the party who was absent.[218] If the liability of the missing party was not established in the underlying action, fault may be reallocated either as between the defendants, or there may be a complete reallocation of liability among all parties if the claimant at fault is also either voluntarily joined or brought in as a party.[219]

The release section of the UCFA differs from PaCATA more in theory than in practice. Under UCFA a settlement reduces the claim by the released person's equitable share of the obligation rather than by the amount of consideration paid.[220] This difference, however, is

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215. *Id.* § 2(d), at 43. A party's "new" percentage of fault will be computed without taking into account the insolvent party's percentage as follows: A sues B, C and D. A's damages are $10,000. A is 40% at fault; B is 30% at fault, C is 30% at fault and D is 0% at fault. A's equitable share is $4,000 ($40% of $10,000). B's equitable share is $3,000 (30% of $10,000) and C's equitable share is $3,000 (30% of $10,000). A is awarded judgment jointly and severally against B and C for $6,000 in damages ($10,000 minus $4,000, which is A's equitable share).

If B's share is uncollectable, B's equitable share ($3,000) is reallocated between A and C in proportion to their respective percentages A and C's percentages must add up to 100%. Since the ratio of A's equitable share to B's is 4 to 3, A's equitable share is increased by 4/7 of $3,000 or $1,714 and C's equitable share is increased by 3/7 of $3,000 or $1,286. *See id.* at 44-45 (Comment). The assessment of uncollectable amount must be made not later than one year after judgment. A party whose liability has been reallocated is still subject to a subsequent contribution action. *Id.* § 2(d), at 41.

216. UFCA §§ 4, 5, & 6 (Supp. 1985). See Comment, *id.* at 47.

217. *Id.* § 4(b). Compare with 1955 version of the UCATA. 12 U.L.A. § 1(d). The UCFA still provides for contribution rights only if the liability has been *extinguished* rather than merely lessened. Here, as in both the 1939 and 1955 UCATAs, the Commissioners are mute as to why they wrote the troublesome "extinguish" language into the UCFA. *See supra* text and accompanying notes 62-71 on *Mong*.

218. *Id.* § 5(a), at 45. Neither the Act nor the Commissioners' Comments envision any problems collateral estoppel could pose. [Note that the Commissioners' Illustration No. 8 apparently contains an error: the joint-and-several judgment against B and C should read $12,000 rather than $6,000 and the amount B is entitled to in contribution against C should read $6,000, not $3,000.]

219. *Id.* § 5(b). A distinct difference in fault allocation would result under each of these alternatives. In the first alternative, everyone but the plaintiff would likely have its liability reduced. If the plaintiff joins in the contribution action, he also has the opportunity to have part of his fault reallocated to the new defendant in the contribution action.

220. *Id.* § 6, at 45. *See* PaCATA, 42 PA. CONS. STAT. ANN. § 8326 (Purdon 1982). PaCATA provides for a *pro tanto* reduction unless the percentage share by which the claim is

rendered less significant by the fact that in most cases under PaCATA a settler would have taken a pro rata release, thereby reducing a plaintiff's claim by what is in effect the releasee's "equitable share." The result under UCFA would therefore be identical in practice to the provision for release in the PaCATA.

The UCFA Comment suggests two alternatives in its discussion of immunities. The first is to treat the immune tortfeasor as a "settled" party so that the remaining liability is reduced by its equitable share. However, the Commissioners believe that leaving the secondary loss on the plaintiff is "unfair" and therefore supply a second alternative. This involves treating the equitable share of the immune tortfeasor as an uncollectable share and reallocating that portion to the other parties to the action, including the claimant at fault.[221]

The Commissioners do not take a stand with respect to contribution rights and the statutorily immune workers' compensation employer. They expressly leave that issue as a policy question to be answered by the state legislatures.[222] The Commissioners do, however, point out various possibilities for loss allocation. These range on a continuum from complete contribution rights against the employer for the full amount of the employer's liability by a third party tortfeasor, to the reduction of possible recovery by the plaintiff against a third-party by the employer's full equitable share, regardless of the resulting burden on the injured plaintiff.[223]

Because the present law on loss allocation in workers' compensation in Pennsylvania unfairly impacts third party tortfeasors by making them liable for the entire injury even when only slightly negligent, a modified load sharing as mapped out by the UCFA solution for insolvent parties might be appropriate. A fairer allocation would

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to be reduced by the settlement is greater than the consideration paid.

221. *Id.* § 6, at 45-46. As the Commissioners note, the result of the second allocation could be more simply achieved by viewing the immune party as a "phantom" defendant pursuant to § 2(d) and allocating all the fault among the other parties in the first place. *Id.* at 46 (Comment).

222. *Id.* at 46 (Comment).

223. *Id.* For example, say that A is injured in the workplace. The damages are $100,000. Employer B is 80% negligent and pays $10,000 in statutory compensation benefits. A third party tortfeasor is 20% negligent. The first alternative, unlimited liability for the employer, is simply inconceivable in today's workers' compensation systems. Under the second alternative suggested by the Commissioners, A would recover $10,000 from employer B but only $20,000 (20% x $100,000) from the third party C, for a total recovery of $30,000 for a $100,000 injury. This would placed the risk of loss on the plaintiff.

In Pennsylvania the rule is just as extreme as the second alternative, at least from the third party's point of view: the third party tortfeasor, C, ends up paying the entire judgment because B is subrogated to the rights of the employee as against the third party tortfeasor. The employer, whether partly at fault or not, gets off scot free. *See supra* text and accompanying notes 116-24.

result if the employer's subrogation rights had some relationship to its theoretical "equitable share." If its liability is not as great as its compensation payments, the employer could be subrogated to the rights of the plaintiff for that excess. If its tort liability is greater than its compensation payments, then the excess fault could be absorbed between the third party defendant and the plaintiff in some equitable manner.

Another possibility is that the workers' compensation employer always be held liable to the full extent of its statutory payments. If the employer's "equitable share" is less than its statutory payments, the third party should still make payment for its full equitable share. The third party's overpayment due to the "excess" paid by the employer could be funneled into a special state insurance fund which could help indemnify third parties in cases where the employer's compensation payments do not entirely cover the employer's true liability and plaintiffs in cases where no third party tortfeasor was involved and where a plaintiff's injuries exceeded the statutory workers' compensation payments.

The workers' compensation system as it exists now in Pennsylvania is unfair to third party tortfeasors. Any of these suggestions for change could be adopted by Pennsylvania's courts since the question of the employer's subrogation rights has not as yet been specifically litigated.[224] It is a topic that clearly deserves reconsideration by the Pennsylvania Legislature.

XV. Conclusion

The system of allocation of responsibility among joint tortfeasors as it now exists in Pennsylvania is not a well-conceived vehicle to ensure adequacy in compensating injured plaintiffs and equitable load sharing among all parties. Pennsylvania has held fast to a "first draft" of a loss allocation scheme in adopting its Contribution Act in 1951. By making piecemeal modification of it with various precedents and with the adoption of its Comparative Negligence Act, Pennsylvania no longer finds itself in the progressive forefront of the liability allocation field. Pennsylvania legislators and jurists could well consider the various possibilities now being successfully utilized in other jurisdictions which mitigate the harshness of unilateral and insensate secondary loss allocations. In addition, the courts and legislature could seriously consider some of the best elements of

224. *See supra* notes 128, 149-150 and accompanying text.

the Uniform Comparative Fault Act. Specific modifications in the UCFA or in loss allocation systems in operation in other jurisdictions could easily be made to accommodate some of Pennsylvania's special substantive interests.

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