Maryland Law Review

Volume 41 | Issue 2 Article 6

Comparative Fault in Maryland: the Time Has Come

Edward S. Digges Jr.

Robert Dale Klein

COMPARATIVE FAULT IN MARYLAND: THE TIME HAS COME

EDWARD S. DIGGES, JR.*
AND ROBERT DALE KLEIN**

One would think it axiomatic that Maryland's legal system should not force one to pay for damage that one did not cause, yet for over a century the law of this state has done just that. The exactor of this inequitable penalty goes by the name of "contributory negligence." This article will examine an alternative that Maryland might choose—comparative fault.

I. THE COMPARATIVE FAULT CONCEPT VS. THE CONTRIBUTORY NEGLIGENCE DOCTRINE

Comparative fault rests on the principle that every person should be liable to another to the extent that he is at fault in causing injury or damage to the other.[1] It imposes liability for damages in proportion to the relative fault of each party causing the injury or loss. Comparative fault is the law in thirty-eight American states, Puerto Rico, the Canal Zone, the Virgin Islands, Guam and most other common law and civil law nations.[2] What once was described as the "march" of comparative fault,[3] is now a "stampede".[4]

Unlike comparative fault, the contributory negligence doctrine is an all-or-nothing proposition. It completely bars recovery of damages

---

* B.A. 1968, Princeton University, J.D. 1971, University of Maryland School of Law. Mr. Digges is a partner in the Baltimore law firm of Piper & Marbury. A substantial amount of Mr. Digges' practice is devoted to the defense of manufacturing concerns in product liability actions.

** B.S. 1973, Massachusetts Institute of Technology, J.D. 1976, Columbia University. Mr. Klein is an associate with the Baltimore law firm of Piper & Marbury.

1. C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.10, at 1 (rev. ed. 1978).

2. A useful compendium of the laws of the states adopting comparative fault principles may be found in Victor E. Schwartz's thorough treatise, V. SCHWARTZ, COMPARATIVE NEGLIGENCE, 367 app. A, 369 app. B (1974 & Supp. 1981). For the law elsewhere in the world, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 436 nn. 80 & 81 (4th ed. 1971); V. SCHWARTZ, *supra*, at 31-42; Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 337 (1932); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 238-45 (1950).

3. Turk, *supra* note 2; Woods, *The Quickening March of Comparative Fault*, CASE & COM., July - Aug. 1980, at 35.

4. V. SCHWARTZ, *supra* note 2, at 2 (Supp. 1981).

by a person whose fault contributes to that damage, no matter how slight that fault might be.[5] Maryland is one of the last bastions of contributory negligence, joined only by eleven other states and the District of Columbia.[6] Six of these other jurisdictions have or have had statutes applying comparative fault in limited areas, such as accidents involving intrastate railroad employees,[7] certain hazardous employments,[8] railroad crossings[9] or automobiles.[10] Thus Maryland is one of only seven jurisdictions that have yet to join the comparative fault parade.

II. THE ORIGINS OF CONTRIBUTORY NEGLIGENCE

Although many believe that contributory negligence has been with us since "time immemorial",[11] it is actually a doctrine of fairly recent origin.[12] Its roots may be traced to the 1809 English case of *Butterfield v. Forrester*,[13] in which the plaintiff horseman rode his steed at dusk as fast as it would go through the streets of Derby. The equestrian was injured when his horse tripped over an obstruction left in the road by the defendant. The jury returned a defendant's verdict after being instructed to do so if satisfied that a reasonable person riding with ordinary care could have seen and avoided the obstruction. In the terse *per curiam* affirmance,[14] Lord Ellenborough said "two things must concur to support this action, an obstruction in the road by the fault of the

---

5. *See, e.g.*, Jennings v. United States, 178 F. Supp. 516, 526 (D. Md. 1959), *vacated on other grounds*, 291 F.2d 880 (4th Cir. 1961); Baltimore & O.R.R. v. State *ex rel.* Miller, 29 Md. 252, 262 (1868).

6. In addition to Maryland, the twelve jurisdictions retaining the contributory negligence doctrine are Alabama, Arizona, Delaware, Indiana, Iowa, Kentucky, Missouri, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia. *See* V. SCHWARTZ, *supra* note 2, at 185 app. A, 189 app. B (Supp. 1981).

7. IOWA CODE ANN. § 479.124 (West 1946); KY. REV. STAT. ANN. § 277.320 (Baldwin 1979); N.C. GEN. STAT. § 62.242 (1975).

8. ARIZ. REV. STAT. ANN. § 23-806 (1956).

9. VA. CODE § 56-416 (1981).

10. Section 15-1-300 of the 1976 *South Carolina Code* was a comparative fault statute for autombile accidents, but it was declared void on equal protection grounds because of its limited coverage. Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978).

11. See Pennsylvania R.R. v. Aspell, 23 Pa. 147, 149, (1854), where the Pennsylvania court labelled contributory negligence as a "rule from time immemorial, . . . not likely to be changed in all time to come." By consensus, the first American case to apply the doctrine was Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824). *See generally* F. HARPER & F. JAMES, LAW OF TORTS § 22.1, at 1194 n.6 (1956); W. PROSSER, *supra* note 2, § 65, at 416 n.1; Turk, *supra* note 2, at 198.

12. *See* F. HARPER & F. JAMES, *supra* note 11, § 22.1, at 1194; Wade, *Comparative Negligence - Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 299 (1980).

13. 103 Eng. Rep. 926 (K.B. 1809).

14. Few, if any, decisions of such brevity have had as tremendous and enduring an impact on our judicial system. One writer notes that the opinion "could be wired at night

defendant, and no want of ordinary care to avoid it on the part of the plaintiff."[15]

In a recent article, Professor Wade suggests that two pervasive common law attitudes account for the adoption of the contributory negligence rule: first, a puritanical view that the courts should not assist a wrongdoer to recoup damages sustained as a result of his wrongdoing; and second, a passion for simple issues that could be answered categorically yes or no.[16] The common law courts did not view themselves as agencies of compromise and thus did not consider granting a plaintiff damages reduced in proportion to the measure of his fault.[17] Other legal historians suggest that the doctrine was attractive in the nineteenth century because it served as a judicial curb on overly sympathetic juries during the industrial revolution.[18]

The contributory negligence rule appears to have first surfaced in Maryland in an 1847 case, *Irwin v. Sprigg*.[19] In an apparent reaction to the harshness of this rule, the Court of Appeals adopted the doctrine of last clear chance twelve years later in *Northern Central Railway v. State*.[20] The doctrine of last clear chance permits the contributorily negligent plaintiff to recover his damages if the defendant had the last clear chance to avoid the accident.[21] When the doctrine applies, it nullifies the effect of the plaintiff's contributory negligence.[22]

III. COMPARATIVE FAULT SYSTEMS

Comparative fault,[23] insofar as it reflects the principle that parties

---

letter rate without extra charge." Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151 (1946).

15. 103 Eng. Rep. at 927.

16. Wade, *supra* note 12, at 299-300.

17. *Id.*

18. F. HARPER & F. JAMES, *supra* note 11, at 1197-99. Malone, *supra* note 14, at 155-69; Malone, *Comparative Negligence - Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 139-40 (1945); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 468-69 (1953); Turk, *supra* note 2, at 201.

19. 6 Gill 200, 205 (Md. 1847).

20. 29 Md. 420, 436-37 (1868).

21. For a discussion of the last clear chance doctrine, see W. PROSSER, *supra* note 2, § 66, at 438.

22. *Id.*

23. The terms "comparative fault" and "comparative negligence" frequently are used interchangeably by the Bar in referring to the concept of apportioning damages based on a party's role in causing injury or damage. The term "comparative fault," however, is the more accurate of the two, in that it is not limited to negligent activity but also encompasses other forms of legal responsibility or fault such as strict liability in tort, unreasonable assumption of the risk, product misuse, unreasonable failure to avoid injury or mitigate damages, and breach of warranty resulting in personal injury or property damage. *See infra* notes 54-61 and accompanying text (discussing the UNIFORM COMPARATIVE FAULT ACT).

at fault should share the costs of accidents to which they contribute, is not a new legal concept.[24] For centuries before the 1809 *Butterfield* decision, British courts of admiralty had been apportioning damages among parties at fault on an equal share basis.[25] American admiralty courts also followed this practice until recently.[26] In 1975, the United States Supreme Court adopted true comparative negligence in admiralty cases and began to allocate damages in proportion to the relative percentages of the parties' fault.[27]

The modern comparative fault doctrine has taken a variety of forms, some fashioned by the courts,[28] others drawn by legislatures.[29] Comparative fault systems may be divided into two types, "pure" and "modified."

A. *"Pure" Comparative Fault*

Under this form, it makes no difference whose fault was greater.

---

24. For an excellent history of the comparative fault concept, see Turk, *supra* note 2, at 208-45. *See also* V. SCHWARTZ, *supra* note 2, at 31-42; Mole & Wilson, *supra* note 2, at 337-66.

25. *See* Mole & Wilson, *supra* note 2, at 339-46; Turk, *supra* note 2, at 226-31.

26. Ralston v. The State Rights, 20 F. Cas. 201, 208 (E.D. Pa. 1836) (No. 11, 540), appears to be the first American decision applying the equal division rule. In 1854, the United States Supreme Court had its first opportunity to consider the concept, which it adopted in The Schooner Catherine, 58 U.S. (17 How.) 170 (1854). *See generally* Mole & Wilson, *supra* note 2, at 346-59, Turk, *supra* note 2, at 231-38.

27. United States v. Reliable Transfer, 421 U.S. 397 (1975).

28. Alaska, California, Florida, Illinois, Michigan, New Mexico, and West Virginia are the seven states which have judicially adopted the comparative fault concept. Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Rybar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Scott v. Rizzo, 20 N. M. St. B. Bull. 289 (1981); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

29. *See* ARK. STAT. ANN. §§ 27-1763 to 1765 (1979); C.Z. CODE tit. 4, § 1357 (1963); COLO. REV. STAT. § 13-21-111 (1973); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1980); GA. CODE ANN. § 105-603 (1968); GUAM CIV. CODE § 1714 (1979); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); LA. CIV. CODE ANN. art. 2323 (West Supp. 1980); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1980); MINN. STAT. ANN. § 604.01 (West Supp. 1979); MISS. CODE ANN. § 11-7-15 (1972); MONT. REV. CODES ANN. § 58-607.1 (Supp. 1977); NEB. REV. STAT. § 25-1151 (1975); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:71 (Supp. 1979); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1981); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1980); OR. REV. STAT. § 18.470 (1977); PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1980); P.R. LAWS ANN. tit. 31, § 5141 (1968); R.I. GEN. LAWS § 9-20-4 (Supp. 1980); S.D. COMP. LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1980); UTAH CODE ANN. § 78-27-37 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); V.I. CODE ANN. tit. 5, § 1451 (1979); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1980); WIS. STAT. ANN. § 895.045 (West Supp. 1981); WYO. STAT. § 1-1-109 (1977).

Pure comparative fault permits a plaintiff to recover the portion of his damages caused by the defendant's fault, even though the plaintiff's fault might exceed that of the defendant.

Pure comparative fault enjoys popularity in the United States and abroad. It is the law in eleven states, Puerto Rico, and the Canal Zone.[30] The Uniform Comparative Fault Act adopts the pure form.[31] The United States Supreme Court also adopted this form for the apportionment of property damages in admiralty litigation,[32] and several federal statutes employ this approach.[33] Finally, pure comparative fault is the rule in England, in most political units of Canada and Australia, and in most other common law and civil law nations.[34]

B. *"Modified" Comparative Fault*

Twenty-seven states and the Virgin Islands have taken so-called "modified" approaches to comparative fault.[35] These approaches per-

---

30. Eleven states adopted the pure form in the indicated years:
1910 - Mississippi
1971 - Rhode Island
1973 - Florida and Washington (Washington's was enacted in 1973, effective 1/1/74)
1975 - Alaska, California and New York
1979 - Louisiana and Michigan
1980 - New Mexico
1981 - Illinois
The pure form also has been adopted in the Canal Zone (1963) and Puerto Rico (1975).

31. For a discussion of the Uniform Comparative Fault Act, see *infra* text accompanying notes 54-61.

32. United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

33. The "pure" comparative negligence approach is incorporated in the Federal Employers' Liability Act, 45 U.S.C. § 53 (1976), the Jones Act, 46 U.S.C. § 688 (1976), and the Death on the High Seas Act, 46 U.S.C. § 766 (1976).

34. *See* V. SCHWARTZ, *supra* note 2, at 49 & n.31.

35. The modified form was adopted in twenty-seven states, the Virgin Islands and Guam according to the following chronology:
1860 - Georgia
1913 - Nebraska
1931 - Wisconsin
1941 - South Dakota
1955 - Arkansas
1965 - Maine
1969 - Hawaii, Massachusetts, Minnesota, and New Hampshire
1970 - Vermont
1971 - Colorado, Idaho, and Oregon
1973 - Connecticut, Guam, Nevada, New Jersey, North Dakota, Oklahoma, Texas, Utah, the Virgin Islands, and Wyoming
1974 - Kansas
1975 - Montana
1976 - Pennsylvania
1979 - West Virginia
1980 - Ohio

mit the plaintiff to recover if his fault is relatively small in contrast with the defendant's. If the plaintiff's fault is not sufficiently small, however, his contributory negligence remains a bar to recovery. Modified comparative fault systems may be divided into three types:

1. *"Slight/Gross"*—The plaintiff may recover that portion of his damages caused by the defendant's gross fault, unless the plaintiff's fault is not slight in contrast to the defendant's, in which case the plaintiff recovers nothing. The defendant recovers nothing under this approach, which is followed only in the states of Nebraska[36] and South Dakota.[37]

2. *"Not As Great As"*—Ten states[38] have adopted this modified form, which permits a plaintiff to recover only if his fault is less than that of the defendant.[39] If it is, the plaintiff may recover damages reduced by the percentage of his own fault, and the defendant recovers nothing.

3. *"Not Greater Than"*—This is the most popular of the modified approaches, having been adopted in fifteen states.[40] If the plaintiff's fault is less than or equal to the defendant's fault, the plaintiff may recover damages reduced by the percentage of his own fault, and the defendant ordinarily recovers nothing.[41]

Anomalous situations may arise in jurisdictions that have adopted modified comparative fault and yet retain the doctrine of last clear chance.[42] In such jurisdictions, a plaintiff may actually be better off if his negligence is so great that it bars his recovery under comparative negligence principles. For instance, in a "not as great as" jurisdiction,

---

36. NEB. REV. STAT. § 25-1151 (1979).

37. S.D. COMP. LAWS ANN. § 20-9-2 (1979).

38. The "49%" or "not as great as" form is employed in Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, West Virginia, and Wyoming. Guam also requires that the plaintiff's fault be less than that of the defendant in order to recover. GUAM CIV. CODE § 1714 (1979).

39. When there are two parties to a suit and one is not clearly more negligent than the other, a jury will tend to find that each is 50% at fault. The "not as great as" rule therefore favors defendants, for under that rule, the plaintiff cannot recover unless the defendant is at least 51% at fault. On the other hand, the "not greater than" rule favors plaintiffs, for a plaintiff who is found 50% at fault will still recover.

40. The "50%" or "not greater than" form has been adopted by Connecticut, Hawaii, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Wisconsin, and the Virgin Islands.

41. If the jury determines that the defendant and the plaintiff were each 50% at fault, each can recover 50% of his damages. In this situation, the "not greater than" rule operates exactly as pure comparative negligence would.

42. States with general comparative negligence laws that have retained last clear chance include Georgia, Nebraska, South Dakota, West Virginia and probably New Hampshire. *See* V. SCHWARTZ, *supra* note 2, § 7.2, at 58 (Cum. Supp. 1981).

a contributorily negligent plaintiff will recover a percentage of his damages if he is less than 50% at fault. If he is 50% or more at fault, he ordinarily will recover nothing. However, if the doctrine of last clear chance applies, he can recover 100% of his damages. The doctrine of last clear chance will nullify the effect of his contributory negligence. Thus if the defendant had the last clear chance to avoid the accident, a plaintiff 49% at fault will recover only 51% of his damages, although a plaintiff 50% at fault could recover 100% of his damages.

IV. WHICH FORM SHOULD MARYLAND ADOPT?

The growing trend toward comparative fault suggests that it is only a matter of time before Maryland joins the parade. The pertinent question is no longer whether Maryland should adopt comparative fault, but rather what form of the doctrine Maryland should choose.

Scholars agree that pure comparative fault is the superior version.[43] All but one of the jurisdictions that have judicially adopted comparative fault have chosen the pure approach.[44] Finally, pure comparative fault is the rule in most parts of the Western World.

The modified approaches all suffer the same defects. When a plaintiff is not entitled to recover under a modified comparative system, both parties bear their own losses. In this situation, the modified systems are no better than the contributory negligence system. However, when the plaintiff does recover, these systems impose on one party the burden of bearing all of his damages *plus* a portion of the damages of the person who was at fault to a lesser degree.[45] In this sense, they are worse than the contributory negligence system, in which each of two negligent parties bears only his own losses. Furthermore, the modified

---

43. *See, e.g.*, V. SCHWARTZ, *supra* note 2, at 342-48; Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae*, Parsonson v. Construction Equipment Company, 18 WAYNE L. REV. 3, 49-50 (1972); P. Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L.J. 1, 9 (1974); R. Keeton, *Comments on* Maki v. Frelk - *Comparative v. Contributory Negligence: Should the Court or Legislature Decide*?, 21 VAND. L. REV. 906, 911 (1968); Prosser, *supra* note 18, at 508; Wade, *A Uniform Comparative Fault Act - What Should it Provide*?, 10 U. MICH. J.L. REF. 220, 225 (1977).

44. West Virginia follows a modified approach. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). As might be expected, West Virginia's decision to adopt a modified version ("not as great as") has been both criticized, *see* Cady, *Alas and Alack, Modified Comparative Negligence Comes to West Virginia*, 82 W. VA. L. REV. 473 (1980); Buffa, *The Plaintiff's View of Comparative Negligence,* 82 W. VA. L. REV. 523 (1980), and praised, *see* Emch, *Comparative Negligence in West Virginia: A Defense Overview*, 82 W. VA. L. REV. 493 (1980)).

45. *See* Nat'l Conference of Comm'rs on Uniform State Laws, *Prefatory Note* to UNIFORM COMPARATIVE FAULT ACT, (1977) [hereinafter cited as *Prefatory Note*]; Wade, *Uniform Comparative Fault Act*, 14 F. 385 (1979).

systems may yield particularly inequitable results in jurisdictions that retain the doctrine of last clear chance.[46] Also, cases involving multiple defendants create complex problems in modified comparative fault jurisdictions.[47]

In contrast, critics appear to have expressed only two reservations about pure comparative fault, and neither is substantial. First, some urge that the pure type fails to discourage "nuisance suits."[48] The National Conference of Commissioners on Uniform State Laws (NCCUSL) dismisses this argument as a chimera, stating that it is much more likely that a plaintiff's fault would be less than 90%, that directed verdict concepts usually control nuisance litigation, and that, in any event, the asserted cure of the modified approaches is worse than the disease.[49]

The second objection to pure comparative fault focuses on hypothetical cases in which the less responsible party ends up paying more than the damages he has sustained.[50] For example, assume the following scenario:

	Party's Fault	Party's Damages	Pure Comparative Share of Plaintiff's Damages	Pure Comparative Share of Defendant's Damages
Plaintiff	75%	$10,000	$ 7,500	$ 750
Defendant	25%	1,000	2,500	250
Total	100%	$11,000	$10,000	$1,000

Under the pure approach, the defendant bears not only $250 of his own damages, but also $2,500 of the plaintiff's damages. In contrast, under a modified system, the defendant would be responsible only for $250 of his own damages, and under a contributory negligence system, only for his own $1,000 damages. The plaintiff under these three approaches, would bear $8,250, $10,750 or $10,000, respectively.

---

46. *See Prefatory Note*, *supra* note 45; Wade, *supra* note 45, at 385.

47. The modified forms are criticized for the confusion that can be generated in multiple defendant cases where the plaintiff's fault is less than that of some defendants but more than that of others. Resolution of contribution claims and counterclaims is unclear under the modified approaches, unless they provide that a plaintiff may recover so long as his negligence does not exceed the combined negligence of all defendants. This provision, however, essentially adopts the pure form of comparative negligence. *See Prefatory Note*, *supra* note 45; Cady, *supra* note 44, at 480-86.

48. *See Prefatory Note*, *supra* note 45.

49. *See Prefatory Note*, *supra* note 45; *see also* Wade, *supra* note 45, at 385-86.

50. *See*, *e.g.*, Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979).

These hypotheticals demonstrate that contributory negligence and modified comparative fault systems favor the more innocent party. But they do not demonstrate that these systems achieve more equitable results. The pure comparative fault system is inherently fairer, for under that system each party pays his share of the *total cost* of the tortious occurrence.[51] One commentator suggests that such hypotheticals are classic examples of hard cases making bad law.[52] The Supreme Court of Illinois recently observed, "The 'pure' form of comparative negligence is the only system which truly apportions damages according to the relative fault of the parties and thus achieves total justice. [Any of the modified forms] 'simply shifts the lottery aspect of the contributory negligence rule to a different ground.' "[53]

V. THE UNIFORM COMPARATIVE FAULT ACT

Drafted and approved in 1977 by the NCCUSL, the Uniform Comparative Fault Act adopts the pure comparative fault approach.[54] Applicability of the Act is not restricted to negligence actions and thus the Act speaks not in terms of negligence, but in terms of "fault".[55] The Act governs all cases involving negligent or reckless conduct, strict liability in tort, unreasonable assumption of risk, product misuse, unreasonable failure to avoid injury or to mitigate damages, and any breach of warranty resulting in personal or property damage. It does

---

51. *See* V. SCHWARTZ, *supra* note 2, at 344-45; Cady, *supra* note 44, at 480-86.

52. In Professor Schwartz's example, the plaintiff was 90% at fault:

> On the surface, the result of the hypothetical cases seems hard to justify. Nevertheless, there is a convincing answer in justification. First, making a judgment about an entire comparative negligence system based on an unusual hypothetical case is a classic example of a hard case making bad law. Mississippi has had pure comparative negligence since 1910 in all personal injury actions; yet a search of the pages of annotations to that statute will not reveal any cases in which a 90% at fault plaintiff obtained a substantial recovery from a defendant.
>
> Even judging the hypothetical case as if it were likely to occur, the fault of the plaintiff has not been ignored. He has been made to bear 90% of his costs and 90% of the defendant's costs from an accident for which he was 90% at fault. Why should he bear 100% of all costs? Or even all of his own costs plus 90% of defendant's? This would tax him beyond his culpability.
>
> Finally, any surface unfairness of pure comparative negligence is reduced by the fact that proximate cause rules may bar the claims of plaintiffs when their negligence was the substantial cause of the accident.

V. SCHWARTZ, *supra* note 2, at 345 (footnotes omitted).

53. Alvis v. Rybar, 85 Ill. 2d 1, 17, 421 N.E.2d 886, 898 (1981) (quoting Li v. Yellow Cab Co., 13 Cal. 3d 804, 827, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975)).

54. UNIFORM COMPARATIVE FAULT ACT (Nat'l Conference of Comm'rs on Uniform State Laws 1977) [hereinafter cited as ACT]. A copy of the ACT is reprinted in the appendix of this Article.

55. *See id.* § 1.

not cover mere economic loss resulting from misrepresentation, injurious falsehood, defamation, breach of warranty, or interference with contractual relations.[56]

Under the Act, the factfinder determines at trial the total amount of damages that each claimant has suffered.[57] Next, the factfinder determines the relative percentages of each person's fault in causing the injury-producing event. Then it is incumbent on the court to reduce each claimant's total damages by the percentage of his fault in causing the damage.[58]

When more than one defendant is at fault, the defendants will be jointly and severally liable.[59] In other words, the claimant can recover his entire judgment from any party against whom the judgment is entered. The court determines contribution in accordance with the respective percentages of fault of those liable on the judgment.[60] For example:

1. Motorist P sues motorist D-1, auto mechanic D-2, and seatbelt manufacturer D-3 for P's damages of $10,000.

2. The jury allocates fault as follows:

P: 40%
D-1: 40%
D-2: 15%
D-3: 5%

3. Judgment for P is entered against D-1, D-2, and D-3 for $6,000 (60% of $10,000).

4. The court states in the judgment the equitable share of the obligation of each party:

P's equitable share is $4,000 (40% of $10,000).
D-1's equitable share is $4,000 (40% of $10,000).
D-2's equitable share is $1,500 (15% of $10,000).
D-3's equitable share is $500 (5% of $10,000).

5. Assume that P, with a joint and several judgment for $6,000 against D-1, D-2, and D-3, collects the entire amount from D-3. Upon proper motion to the court, D-3 is entitled to contribution from D-1 in the amount of $4,000 (8/12 of $6,000) and from D-2 in the amount of $1,500 (3/12 of $6,000).

---

56. The ACT, of course, does encompass economic loss consequential to harm to person or property, such as doctors' bills, loss of wages, or costs of repair or replacement of property. *See id.* § 1 Comment.

57. *Id.* § 2.

58. *See id.* § 2(c).

59. *Id.*

60. *Id.* §§ 2(d), 5.

The Act provides for reallocation of the uncollectible equitable share of a judgment debtor. Upon motion made within a specified time (e.g., one year) after judgment is entered, the uncollectible amount will be reallocated among all parties, including the claimant.[61] For example, using the above illustration, assume that D-1's 40% share was uncollectible. Upon proper motion by D-3, the court orders that D-1's equitable share be reallocated among P, D-2 and D-3:

P's equitable share is increased by $2,666.67 (8/12 of $4,000) and P must pay that amount to D-3.

D-2's equitable share is increased by $1,000.00 (3/12 of $4,000) and must pay that amount to D-3 in addition to his original contribution of $1,500.

D-3's equitable share is increased by $333.33 (1/12 of $4,000) which is additional loss that D-3 must bear.

The Uniform Comparative Fault Act has not been adopted in any jurisdiction. However, the Act is new, and it continues to receive legislative and judicial study.

VI. THE STRICT TORT LIABILITY CASE

Comparative negligence principles can be implemented easily in basic negligence or premises liability actions, and even in professional malpractice actions. However, doctrinal problems arise in applying comparative negligence to the strict liability action that is now the theory of choice in products liability.[62]

First, to use the comparative negligence approach, one must characterize the strict liability tort action as a form of negligence.[63] Some argue that this characterization impermissibly mingles "apples and oranges".[64] Others more persuasively argue, however, that doctrinaire positions must yield if the tort system is to achieve balance — especially here, because use of comparative fault in a strict liability tort action actually provides a more understandable and workable mecha-

---

61. *Id.* § 2(d).

62. Phipps v. General Motors Corp., 278 Md. 337, 353, 363 A.2d 955, 963 (1976) (adopting RESTATEMENT (SECOND) OF TORTS § 402A (1965) as the guiding principle for the strict liability in tort cause of action).

63. RESTATEMENT (SECOND) OF TORTS, § 402A, Comment n (1965) notes that the liability with which that section deals is not premised upon the negligence of the seller. *See also* Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958 (1956).

64. It is argued that to compare no fault liability of the product supplier with the fault of the product user is inappropriate. *See* Westra, *Restructuring the Defenses to Strict Products Liabilities - An Alternative to Comparative Negligence*, 19 SANTA CLARA L. REV. 355, 356 n.7 (1979).

nism for the factfinder.[65] In a few jurisdictions the courts have applied comparative negligence statutes in strict product liability cases.

The Wisconsin Supreme Court, a pioneer in the area of comparative negligence principles, characterized strict tort liability as the equivalent of negligence *per se*:

> Strict liability in tort for the sale of a defective product unreasonably dangerous to an intended user or consumer now arises in this state by virtue of a decision of this court. If this same liability were imposed for violation of a statute, it is difficult to perceive why we could not consider it negligence *per se* for the purpose of applying the comparative negligence statute just as we have done so many times in other cases involving the so-called "safety statutes."[66]

Using this perceptive reasoning, the Wisconsin Supreme Court circumvented the conceptual dilemma presented by an attempt to compare the defendant's strict liability with the contributory negligence of the user.[67] Florida and Minnesota recently adopted this approach.[68]

Other courts have offered other justifications for applying comparative negligence statutes to strict liability tort actions. For example, in *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*,[69] the federal court applied the Idaho comparative negligence statute, observing that "the rationale of Idaho's comparative negligence statute extends to a comparison of all legal causes of the plaintiff's injuries and results in a sensible and fair method of loss allocation."[70] Similarly, in *Stueve v. American Honda Motors Co.*,[71] the federal court concluded that it was

---

65. *See* W. PROSSER, *supra*, note 2, § 65, at 418; Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 181 (1974) (Application of comparative fault will eliminate the esoteric and shadowy differentiations in existing defense concepts.).

66. Dippel v. Sciano, 37 Wis. 2d 443, 462, 155 N.W.2d 55, 64-65 (1967) (Plaintiff, a patron in a tavern, was injured as he assisted in relocating a 750-pound pool table. One leg of the pool table collapsed, causing the table to fall and severely injure his foot.).

67. See Twerski, *From Defect to Cause to Comparative Fault - Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977), for a criticism of the Wisconsin characterization approach as nullifying the objectives of § 402A of the RESTATEMENT (SECOND) OF TORTS.

68. West v. Caterpillar, 336 So. 2d 80 (Fla. 1976); Busch v. Busch Constr., Inc., 262 N.W. 2d 377 (Minn. 1977). *Busch* involved a plaintiff who was injured in a single-vehicle overturn while attempting to negotiate a curve at a relatively high rate of speed. *West* concerned a bystander who was struck and fatally injured by a Caterpillar grader that was being backed-up without any audible warning signals.

69. 411 F. Supp. 598 (D. Idaho 1976) (Several individuals were fatally injured in the crash of an aircraft manufactured by the defendant.).

70. *Id.* at 603.

71. 457 F. Supp. 740 (D. Kan. 1978) (Plaintiff was fatally burned when the motorcycle that he was operating collided with an automobile causing the gas tank on the motorcycle to rupture and erupt into flames.).

appropriate to apply a comparative negligence statute in a strict liability tort action because "no social policy . . . should compel defendants to pay more than their fair share of the loss."[72]

In some jurisdictions, the courts adopted comparative fault for strict liability actions even though the jurisdictions had no comparative fault statutes. For example, after reviewing the objectives of the strict liability doctrine and the necessity for a balancing of equities between all parties, the Alaska Supreme Court declared in *Butaud v. Suburban Marine & Sporting Goods, Inc.*:[73]

> We feel that pure comparative negligence can provide a predicate of fairness to products liability cases in which the plaintiff and defendant contribute to the injury. The defendant is strictly liable due to the existence of a defective condition in the product. On the other hand, the plaintiff's liability attaches as a result of his conduct in using the product. It is appropriate, therefore, that the parties' contribution to the injury be apportioned. The defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his injury.[74]

Similarly, in *Daly v. General Motors Corp.*,[75] the California Supreme Court renounced previously recognized tort defenses to a strict liability action in favor of a judicially created comparative fault defense.[76]

> [T]he terms "comparative negligence," "contributory negligence" and "assumption of risk" do not, standing alone, lend themselves to the exact measurement of a micrometer-caliper, or to such precise definition as to divert us from otherwise strong and consistent countervailing policy considerations. Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than

---

72. *Id.* at 751 (quoting Brown v. Keill, 224 Kan. 195, 203, 580 P.2d 867, 874 (1978)).

73. 555 P.2d 42 (Alaska 1976) (plaintiff injured when a pulley guard shattered).

74. *Id.* at 45-46. In Caterpillar Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979), the Alaska Supreme Court clarified the type of conduct encompassed by comparative fault stating: "[A]ny negligence of the plaintiff which contributes to the chain of events leading to his injury may be considered by the jury." *Id.* at 890.

75. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (Plaintiff was operating his vehicle on a freeway at a high rate of speed when he collided with a guardrail dividing the south and northbound lanes of travel, an impact which caused the driver's door to be thrown open and the plaintiff to be ejected onto the pavement.).

76. In essence, the California Supreme Court extended its decision in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), to an action premised on strict tort liability.

doctrinaire.[77]

. . . .

> [I]n this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong considerations of equity and fairness we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.[78]

In *Butaud* and *Daly* the Supreme Courts of Alaska and California extended comparative fault to strict liability actions. Under these decisions, any unreasonable act or omission in using the product reduces recovery to the extent that the user's unreasonable conduct contributed to the injury-producing event.[79]

Strict liability in tort is a judicially sculptured doctrine. It is appropriate, therefore, for courts to modify the doctrine. More important, the social objective of the strict liability doctrine is to compensate users injured by defective products unduly dangerous for their intended and reasonably foreseeable uses, without making the product supplier a guarantor against all harm resulting from use of a product. Comparative fault is consonant with that objective. Although the supplier is still strictly liable for the injury caused by the defect, the plaintiff's recovery

---

77. 20 Cal. 3d at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. The court noted the late Dean Prosser's analysis of contributory negligence:

> It is perhaps unfortunate that contributory negligence is called negligence at all. 'Contributory fault' would be a more descriptive term. Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty, unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of his own negligence.

Id. at 735, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

78. *Id.* at 737, 575 P.2d at 1169, 144 Cal. Rptr. at 387. The court noted that the UNIFORM COMPARATIVE FAULT ACT was a proposal which "[w]hile lacking any legislative sanction . . . points in the direction of a responsible national trend." *Id.* at 741-42, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

79. Two other jurisdictions, hampered somewhat by existing comparative negligence statutes, have followed the *Daly* approach for strict liability actions. Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980); Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). Utah and Montana had statutory modified approaches (the "not as great as" and "not greater than" forms, respectively) applicable to common law tort actions, but courts in those states deviated from the legislative schemes to effect a "pure" approach for product litigation.

will be reduced in accordance with his fault in contributing to the injury.

VII. THE CONTRIBUTION DILEMMA

When Maryland adopts comparative fault, it should modify its contribution system. Contribution becomes an issue when multiple defendants are jointly and severally liable. The doctrine of joint and several liability, which permits a plaintiff to collect his entire judgment from any one of several joint tortfeasors, is the antithesis of an equitable system of fault-apportioned recovery. Indeed, Maryland's contribution statute attempts to remedy the one-sided harshness of the joint and several liability doctrine. The remedy is imperfect, however, because it requires each joint tortfeasor to pay an *equal* share of the judgment. For example, assume that a jury is instructed to apply comparative fault principles and returns the following verdict:

	Plaintiff	D-1	D-2	D-3
Fault %	20%	60%	10%	10%
Damages	$10,000	-0-	-0-	-0-
Recovery	$ 8,000	-0-	-0-	-0-
Assessment	—	$6,000	$1,000	$1,000

Under Maryland's present contribution system, the plaintiff could collect all of his damages ($8,000) from D-3, who in turn could recover contribution only for one-third (1/3) of that amount ($2,666) from D-1, and the same from D-2 ($2,666), even though D-3's fault (10%) is much less than D-1's fault (60%).

To implement the principle that each party should assume liability only to the extent of his fault in causing an injury-producing event, Maryland should adopt the Uniform Comparative Fault Act's approach to contribution.[80] Contribution then would be determined in accordance with the relative fault percentage of each joint tortfeasor. Thus D-3 could recover a $6,000 contribution from D-1 and a $1,000 contribution from D-2.

The existing contribution scheme also is unfair in that it places all risk of a joint tortfeasor's insolvency only on the other tortfeasors. The Uniform Comparative Fault Act uses a more equitable system, which reallocates an insolvent's share of a judgment among *all* parties at fault, including the plaintiff, in accordance with their respective shares of fault.[81]

---

80. *See* ACT, *supra* note 54, § 4.
81. *Id.* § 2(d).

In the preceding example, if D-1 were judgment proof, the $6,000 assessed D-1 would be reapportioned according to the relative fault percentages of plaintiff and defendants 2 and 3 (reallocated percentages and sums to be recovered and paid are in parentheses):

	Plaintiff	D-1	D-2	D-3
Fault %	20% (50%)	60% (0%)	10% (25%)	10% (25%)
Damages	$10,000	-0-	-0-	-0-
Recovery	$ 8,000($5,000)	-0-	-0-	-0-
Assessment	—	$6,000 (insolvent)	$1,000 ($2,500)	$1,000 ($2,500)

Thus, the ratio of the plaintiff's fault to that of each of defendants 2 and 3 would be equitably maintained and the insolvency of D-1 would be absorbed by all other parties in the litigation.

VIII. SETTLEMENTS BY JOINT TORTFEASORS

When Maryland adopts comparative fault, it also must consider how to handle a joint tortfeasor who settles with the plaintiff. The settling tortfeasor may or may not be a party to the action. If he is joined in the litigation, the Uniform Comparative Fault Act provides that the jury should determine his fault percentage along with that of every other party.[82] Non-settling defendants then would pay in accordance with their respective fault percentages (assuming solvency). In other words, the settlement with the plaintiff would act as a complete release of the portion of the judgment attributable to the fault percentage of the settling tortfeasor, without taking into consideration the amount which the settling tortfeasor paid for the release.[83]

Plaintiff, for example, settles for $2,500 with D-3. The jury finds as follows:

	Plaintiff	D-1	D-2	Settling D-3
Fault %	20%	60%	10%	10%
Damages	$10,000	—	—	—
Recovery	$9,500	—	—	—
Assessment	—	$6,000	$1,000	$2,500 (settlement)

The amounts defendants 1 and 2 would pay to the plaintiff would be

82. *See id.* § 2.
83. *See id.* § 6.

unaffected by the amount D-3 paid for a release, but would instead be dictated by the percentages found by the jury. Thus the plaintiff gets the benefit of his advantageous settlement. If, however, the plaintiff has settled for less than the defendant's proportionate share, the plaintiff would bear the loss.

The Uniform Comparative Fault Act does not address the situation in which the settling defendant has not been made a party. The determinative factor in this situation should be the amount paid for the release. The amount of the settlement should be subtracted from the judgment in proportion to the fault percentages attributed to the joined defendants. In other words, each joined tortfeasor would deduct from the amount owed the plaintiff a percentage of the amount paid for a release by the tortfeasor not joined.

	Plaintiff	D-1	D-2	Tortfeasor Not Joined
Fault %	20%	60%	20%	undetermined
Damages	$10,000	—	—	—
Recovery	$8,000	—	—	—
Assessment	—	$4,125	$1,375	$2,500 (settlement)

The combined fault percentages of defendants 1 and 2 total 80%, of which the fault percentage of D-1 represents three-fourths. Thus, D-1 should be able to subtract three-fourths of the amount paid for the release by the tortfeasor not joined ($1,875) from his liability of $6,000 and should be liable to the plaintiff only to the extent of $4,125. A similar analysis for D-2 would reduce his liability to the plaintiff to $1,375.

IX. SETOFFS

When Maryland adopts comparative fault, setoffs will play an important role in the ultimate division of damages. In all cases in which more than one party is at fault and sustains damages, there can be setoff between a claim and counterclaim; thus only the difference between them is recoverable. The following example[84] involves three parties with claims against each other and demonstrates the effect of setoffs:

---

84. *See* H. WOODS, COMPARATIVE FAULT § 17.4, at 360-61 (1978).

	A	B	C
Fault %	30%	40%	30%
Damages	$8,000	$10,000	$6,000
Entitlement before setoff	$5,600 ($3,200 from B & $2,400 from C)	$6,000 ($3,000 from A & $3,000 from C)	$4,200 ($1,900 from A & $2,400 from B)
Recovery after setoff	$800 ($200 from B & $600 from C)	$600 ($600 from C)	0

This system appears fair — it simply nets the amounts owed by the parties.

Inequities may arise, however, if the parties are insured. Insurance companies will argue that the amount owed by each party to the other is the net amount receivable after setoff has been applied, rather than the total amount awarded to each by a jury after comparing relative fault. Insurance then would pay only the net amount, resulting in a windfall to liability insurers. The Uniform Comparative Fault Act addresses this problem:

> [I]f either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For purposes of uninsured-motorists and similar coverages, the amounts so recovered shall be treated as payment of those amounts to the insured by the party liable.

When Maryland adopts comparative fault, it should handle setoffs in a similar fashion.[85]

X. WHO SHALL CHOOSE?

The Maryland General Assembly has considered some form of comparative fault nearly every year since at least 1966. Having ex-

85. ACT, *supra* note 54, § 3.

amined nineteen bills during that time, committees of the General Assembly have reviewed comparative fault in all of its pure and modified forms.[86] Most of the bills were limited to negligence actions only. All died in committee, although two were passed by the House of Delegates before meeting their ends in the Senate.[87]

The comparative fault experience demonstrates that the decision to adopt the doctrine is not necessarily a legislative prerogative. Seven jurisdictions have judicially adopted comparative fault.[88] Furthermore, we should remember that the contributory negligence doctrine it is designed to replace is one of judicial creation. Although courts typically defer to legislative policy-making, legislative inaction warrants no deference.

CONCLUSION

Pure comparative fault is the only form of comparative fault that truly apportions liability for damages in accordance with a party's fault in causing those damages. Unlike the modified comparative fault sys-

---

86. The following bills placed the comparative fault concept in its various forms before the Maryland General Assembly in the indicated years:

YEAR	"PURE" FORM	"NOT AS GREAT AS" FORM	"NOT GREATER THAN" FORM
1966	S.B. 111		
1967	H.B. 277		
1968	H.B. 158		
1969		H.B. 63	
1970	H.B. 452	H.B. 453	
	S.B. 116		
1971		H.B. 546	
1972		H.B. 156	
1973		H.B. 785	
1974	X	X	X
1975		H.B. 405	
1976	H.B. 377		S.B. 106
1977			H.B. 2004
1978	X	X	X
1979	H.B. 1381*		H.B. 1386
1980	H.B. 1484*		H.B. 98
1981		H.B. 633	
1982	S.B. 1007		

* Uniform Comparative Fault Act

87. In 1968, House Bill 158, which applied a "pure" form of comparative fault to negligence actions involving personal injury, death, or property damage, passed the House of Delegates with a 114 to 8 vote. It then was assigned to the Senate Judicial Proceedings Committee from which it never resurfaced. In 1970, a similar fate befell House Bill 453 which applied the "not as great as" formula to such negligence actions. The vote in the House was 105 to 12.

88. *See supra* note 28.

tems and the contributory negligence doctrine, pure comparative fault generates neither windfall nor unfair burden. Only this form ensures the fundamental fairness appropriate and necessary to the adjudication of tort claims in an enlightened society.

Appendix

*Uniform Comparative Fault Act**

SEC.
1. Effect of Contributory Fault
2. Apportionment of Damages
3. Set-off
4. Right of Contribution
5. Enforcement of Contribution
6. Effect of Release
7. Uniformity of Application and Construction
8. Short Title
9. Severability
10. Prospective Effect of Act
11. Repeal

Section 1. [Effect of Contributory Fault]

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Section 2. [Apportionment of Damages]

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all par-

* Drafted by the National Conference of Commissioners on Uniform State Laws (1977).

ties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liaiblity is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Section 3. [Set-off]

A claim and counterclaim shall be set off, and only the difference between them is recoverable in the judgment. However, if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For purposes of uninsured-motorist and similar coverages, the amounts so recovered shall be treated as payment of those amounts to the insured by the party liable.

Section 4. [Right of Contribution]

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible

claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

Section 5. [Enforcement of Contribution]

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by Section 2, a party paying more than his equitable share of the obligation, upon motion, may recover judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the claimant's right of action against him and commenced the action for contribution within [one year] after payment, or (2) agreed while action was pending to discharge the common liability and, within [one year] after the agreement, have paid the liability and commenced an action for contribution.

Section 6. [Effect of Release]

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Section 7. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. [Short Title]

This Act may be cited as the Uniform Comparative Fault Act.

Section 9. [Severability]

If any provision of this Act or application of it to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 10. [Prospective Effect of Act]

This Act applies to all [claims for relief] [causes of action] accruing after its effective date.

Section 11. [Repeal]

The following acts and parts of acts are repealed:*

---

* This section provides a place for states adopting the UNIFORM ACT to repeal conflicting acts or statutes.