

Comparative Negligence in Texas

by

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Article 2212a of the Texas Revised Civil Statutes, the Comparative Negligence and Contribution Among Joint Tortfeasors Act, took effect on September 1, 1973. It made significant changes in the respective rights and liabilities of injured persons and tortfeasors in negligence cases.¹ This paper is principally concerned with multiple tortfeasor cases, and with section 2 of article 2212a, which modified principles concerning joint and several liability, contribution, and settlement. Prior to the enactment of article 2212a, each tortfeasor whose negligent behavior proximately caused an indivisible injury to another was jointly and severally liable to the injured party. This principle has been altered by section 2(c) of article 2212a.² Before the enactment of 2212a, contribution among joint tortfeasors was governed by article 2212 of the Texas Revised Civil Statutes and a substantial body of case law.³ In negligence cases⁴ article 2212a su-

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1. The most obvious and important change is the elimination of the contributory negligence doctrine, whereby any negligence of a claimant that was a proximate cause of the event barred recovery. Several other tort doctrines have been eliminated by court decisions considering the effects of article 2212a. *See, e.g.,* French v. Grigsby, 571 S.W.2d 867 (Tex. 1978)(last clear chance or discovered peril); Davila v. Sanders, 557 S.W.2d 770 (Tex. 1977)(imminent peril); Farley v. M M Cattle Company, 529 S.W.2d 751 (Tex. 1975)(assumption of risk).

2. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978-1979).

3. Obviously any statute of significance to litigation will have a substantial case-law gloss, so that explicit reference to the "substantial body of decisional law" under article 2212 may be superfluous. However, the judicial amendments to this statute have been so very extensive that the emphasis seems advisable.

Article 2212 reads as follows:

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, *except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law* shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, then recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason

persedes article 2212.⁵ Under prior law, the impact of a settlement by one tortfeasor upon the liability of other tortfeasors was controlled by *Palestine Contractors, Inc. v. Perkins*.⁶ In negligence cases, the effects of settlements are now controlled by sections 2(d) and (e) of article 2212a.⁷

The full ramifications of these modifications of Texas negligence law are yet to be determined. One purpose of this article is to explore questions raised by the Texas comparative negligence stat-

of such insolvency (emphasis added).

TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). The emphasized clause needs explanation. There is no common law right to contribution in Texas. *Travelers Ins. Co. v. United States*, 283 F. Supp. 14, 24 (S.D. Tex. 1968). Since passage of the statute, contribution rights have been worked out under it. There did exist a common-law right to indemnity in certain situations at the time of article 2212's enactment. Hence, what the clause means is *contribution is available under this statute unless indemnity is available under the decisional law*. See *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962), and authorities cited therein.

The statute requires that the tortfeasor from whom contribution is sought have been sued by plaintiff in the same action brought against the tortfeasor who is seeking contribution. Yet, it is clear that one tortfeasor may implead another for contribution. TEX. R. CIV. P. 38, 51; see also *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586 (Tex. Civ. App.—Eastland 1964, writ ref'd). One tortfeasor may also bring a separate suit for contribution. *Union Bus Lines v. Byrd*, 142 Tex. 257, 177 S.W.2d 774 (1944); see note 11 *infra*. The statute requires that the tortfeasor who seeks contribution first pay the judgment rendered in plaintiff's favor.

4. Contribution issues in tort cases in which plaintiff seeks recovery on grounds other than negligence continue to be controlled by article 2212. Contribution issues may arise in cases in which a plaintiff achieves recovery against one defendant on the basis of negligence, another on the basis of strict liability. It is not clear what the proper combination of the features of article 2212 and article 2212a should be in such situations. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 861-63 (Tex. 1977), held that article 2212 governed contribution issues in such a case, but the facts on which that decision was based arose before the effective date of article 2212a. The court deplored the difficulties present in such cases and called for legislative assistance.

5. Article 2212a states that section 2 "prevails over Article 2212 . . . and all other laws to the extent of any conflict." TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(h) (Vernon Supp. 1978-1979). Two commentators have suggested that article 2212a may be inapplicable in negligence cases in which plaintiff is found free from negligence. The argument is based on language keying the contribution features of the Act to situations in which plaintiff's "negligence does not exceed the total negligence of all defendants." *Id.* § 2(b); Keeton, *Annual Survey of Texas Law—Torts*, 32 Sw. L.J. 1, 14 (1978); Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 10-11 (1974); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 85 (1978). It would create a great deal of confusion and difficulty should the statute be interpreted that way, as both commentators acknowledge. See Keeton, 28 Sw. L.J., *supra* at 10-11; Comment, 10 ST. MARY'S L.J., *supra* at 85. In at least one reported decision under article 2212a in which plaintiff was found guilty of no negligence, it was assumed without discussion that 2212a controls. *City of Gatesville v. Truelove*, 546 S.W.2d 79, 84 (Tex. Civ. App.—Waco 1976, no writ).

6. 386 S.W.2d 764 (Tex. 1964), noted in 43 TEXAS L. REV. 118 (1964).

7. TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 2(d), 2(e) (Vernon Supp. 1978-1979).

ute in order to clearly identify future problems. Part I of this article will examine the changes made by a few reported decisions, including arguments for and against the debatable interpretations of article 2212a. It incorporates much of the standard interpretation or sets of assumptions contained in the now substantial body of periodical literature discussing Texas comparative negligence.⁸ Part II suggests methods for resolving the statute's interpretation problems. Neither article 2212a nor article 2212 discusses the problem of indemnity among joint tortfeasors. However, the procedural issues involved in indemnity cases are the same as those presented in contribution cases.

I.

The following discussion will treat a series of hypothetical cases under prior law and under article 2212a.⁹ Case 1 is a prior law case. Case 1a is the same situation under 2212a. Case 1b is a slightly different hypothetical case under 2212a in which the plaintiff is negligent to an extent that reduces but does not preclude recovery.¹⁰ In all hypotheticals and variations thereof, the jury will find that \$10,000 is fair and reasonable compensation for plaintiff's indivisible injury. In the 2212a cases in which plaintiff is not negligent, the jury will find: Tortfeasor A's negligence was 50% of the total; B's, 30%; C's, 20%. In the 2212a cases in which plaintiff is negligent, the jury will find: Plaintiff's negligence was 20%; tortfeasor A's, 50%;

8. See Adams, *Special Considerations for the Negligent Plaintiff Under Comparative Negligence: Joinder of Defendants and the Feasibility of 100% Recovery*, 11 TEX. TRIAL LAW. F. 7, 8-9 (1976); Fisher, *Contribution and Indemnity Among Joint Tortfeasors*, 13 TEX. TRIAL LAW. F. 3 (1979); Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 662-66 (1974); see also Abraham & Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411, 418 (1973); Giessel & Giessel, *Texas Comparative Negligence Law*, 8 TEX. TRIAL LAW. F. 14 (1973); Keeton, *Annual Survey of Texas Law—Torts*, 28 SW. L.J. 1, 13-14 (1974); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 83-84, 90 (1978); Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 SW. L.J. 669, 677, 681 (1978).

9. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979).

10. It is clear that a party's negligence is of no significance unless it was a proximate cause of the plaintiff's injuries. See *Ingles v. Cohen*, 543 S.W.2d 455 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); *Howard v. Bachman*, 524 S.W.2d 414 (Tex. Civ. App.—Eastland 1975, no writ).

Hereafter in this article, when we state that a jury found a party negligent or that a jury determined a party's negligence at N%, we mean that party was found guilty of negligence that was a proximate cause of the injuries. We will not reiterate the proximate cause requirement at every juncture, but will assume it is understood as implicit.

B's, 20%; C's, 10%. Using these percentages for the sake of illustration, the basic method of calculating the parties' rights and liabilities is as follows:

P (\$10,000 damages) vs.	A	B	C
20% negligent	50% negligent	20% negligent	10% negligent
P should recover \$8,000 (his full damages less a deduction for his percentage of negligence. Article 2212a, section 1).			

A is jointly and severally liable for the full \$8,000. (Article 2212a, section 2(c)). However, A is entitled to contribution from B and C such that his net liability should not exceed \$5,000, representing his net 50% of the total damages. (Article 2212a, section 2(b)). [We will term the net, post-contribution liability of a defendant as his *contribution share*.]

B is jointly and severally liable for the full \$8,000. (Article 2212a, section 2(c)). B is entitled to contribution from A and C such that his net liability—his *contribution share*—should not exceed \$2,000 representing his 20% of the total damages. (Article 2212a, section 2(b)).

C is *not* liable for the full \$8,000, because his negligence was "less than" plaintiff's. (Article 2212a, section 2(c)). C's liability to plaintiff does not exceed C's *contribution share*, \$1,000 (Article 2212a, sections 2(b), 2(c)).

1. *Contribution rights among named defendants, none of whom has settled.* [P v. A, B, C. All defendants seek contribution in main action.]

Case 1. Prior law. Plaintiff not negligent; each defendant negligent.

Judgment for plaintiff against A, B, and C, jointly and severally, for \$10,000. This means that each of the three tortfeasors is liable, jointly and severally with the other two, for the full amount of the judgment. Plaintiff can obtain only one satisfaction of his judgment, but can enforce the judgment against any of the three tortfeasors in any combination or sequence. Each of the three tortfeasors has a contribution claim against the other two; thus each ultimately should bear no more than 1/3 of the total liability. The tortfeasors probably do not have to assert that right by filing cross-claims against each other.¹¹

11. See TEX. R. CIV. P. 97(e). It has been held that, despite the wording of article 2212, a defendant may bring a separate action for contribution against a putative tortfeasor *not*

Case la. 2212a. P not negligent; A, 50%; B, 30%; C, 20%.

Article 2212a makes two changes. First, the contribution shares of A, B, and C are computed in accordance with the percentage of negligence attributable to each defendant (\$5,000, \$3,000, and \$2,000 respectively) rather than \$3,333.33 for each defendant.¹² Second, cross-claims for contribution are now mandatory.¹³

Case 1b. 2212a. P's negligence, 20%; A's, 50%; B's, 20%; C's, 10%.

Plaintiff's contributory negligence is not an absolute bar to recovery;¹⁴ his recovery is reduced by his percentage of negligence¹⁵ from \$10,000 to \$8,000. Tortfeasors A and B are jointly and severally liable for \$8,000.¹⁶ Tortfeasor C, whose negligence is "less than that of the [plaintiff]"¹⁷ is liable for only that portion of the judgment that represents the percentage of negligence attributable to him, or \$1,000. The contribution shares of A, B, and C are \$5,000, \$2,000, and \$1,000 respectively. Again, cross-claims for contribution are mandatory.

2. *Contribution rights of named defendants against putative tortfeasor not sued by plaintiff; no settlement. [P v. B and C. B and C seek contribution from A.]*

Case 2. Prior law. Plaintiff not negligent. Each defendant negligent. Putative tortfeasor negligent.

Judgment for plaintiff against B and C, jointly and severally, for \$10,000. Each defendant has a contribution right against the other for 1/2 of the judgment. The contribution right may be as-

sued by plaintiff, Union Bus Lines v. Byrd, 142 Tex. 257, 177 S.W.2d 774, 776 (1944), at least when "the unnamed defendant was not known of at the time of the first suit or . . . there was a procedural bar preventing the third party defendant's joinder in the primary suit." Comment, *Comparative Negligence in Texas*, 11 Hous. L. Rev. 101, 113-14 (1973). Compare Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 686 (1978)(subsequent contribution action only in "those instances in which jurisdiction, though not possible at the time of suit, was later obtained and when default judgments had been obtained based on deficient service of process"); see also *Houser v. Harris*, 44 S.W.2d 784 (Tex. Civ. App.—Texarkana 1931, no writ).

12. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1978-1979).

13. Article 2212a, § 2(g), makes it clear that contribution claims among "named defendants" must be asserted in the primary lawsuit. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978-1979).

14. *Id.* § 1.

15. *Id.*

16. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978-1979).

17. *Id.*

serted by filing a cross-claim for contribution.¹⁸ Either B or C could seek contribution from A by joining A as a third-party defendant,¹⁹ assuming no venue problems are encountered.²⁰ In the third-party action, the tortfeasor seeking contribution from A would have to establish that A was a joint tortfeasor—that A would have been liable to plaintiff had plaintiff sued him. A successful third-party action would not make A liable to plaintiff because plaintiff did not sue A, but it would mean that A's liability to B and C for 1/3 of the \$10,000 judgment would be established.

As an alternative, B or C may wait until the conclusion of the action by plaintiff and then seek contribution from A in a separate lawsuit.²¹ Again, the success of the action would depend upon whether A was shown to be a joint tortfeasor. Presumably the damages on which the contribution share of A is based would be the amount fixed by the jury in the contribution suit, but that share would not exceed the amount received in the primary suit.²²

Case 2a. 2212a. P not negligent. Had A been sued, his negligence would have been set at 50%; B's, 30%; C's, 20%.

A, whose negligence has been hypothetically set at 50%, is initially missing from the picture. Forget about A for the moment and assume that the jury in plaintiff's action against B and C considers plaintiff blameless and views the relative blameworthiness of B and C the same way the jury in the three-defendant hypothetical would view it. On those assumptions, the negligence percentage findings would be: P, 0%; B, 60%; C, 40%. Judgment will be rendered for plaintiff against B and C, jointly and severally, for \$10,000. B's and C's contribution shares, which they must assert by filing cross-claims,²³ are \$6,000 and \$4,000, respectively.

Presumably B and C have the right to implead A for contribution, assuming no venue problems are encountered.²⁴ Nothing in

18. See note 11 *supra*.

19. See TEX. R. CIV. P. 38.

20. See discussion of venue problems notes 103-17 *infra* and accompanying text. See *Austin Road Co. v. Pope*, 147 Tex. 430, 216 S.W.2d 563 (1949); *Union Bus Lines v. Byrd*, 142 Tex. 257, 177 S.W.2d 774 (1944); *Safway Scaffold Co. v. Safway Steel Products*, 570 S.W.2d 225 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586 (Tex. Civ. App.—Eastland 1965, writ ref'd).

21. See note 11 *supra*. See also *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586 (Tex. Civ. App.—Eastland 1965, writ ref'd); Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 11 (1974). A payment of more than a party's contribution share is a prerequisite to recovery of judgment against another for contribution in a separate action.

22. See Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 12 (1974).

23. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978-1979).

24. See notes 103-17 *infra* for a full discussion of venue.

2212a negates the right, and section 2(g) supports it by implication.²⁵ However, must an impleaded defendant's percentage of negligence be submitted to the jury by virtue of section 2(b) of article 2212a?²⁶ If not, presumably the jury would consider only whether A was a joint tortfeasor. On an affirmative finding, B and C would be entitled to contribution from A in the amount of 1/3 of the \$10,000 liability, perhaps shared equally,²⁷ or perhaps shared according to B's and C's percentages of negligence.²⁸ If, on the other hand, the impleaded defendant's percentage of negligence was submitted to the jury and fixed at 50%, plaintiff's rights in this case—in which he is free from fault²⁹—would be unaffected, because B and C would remain jointly and severally liable for the full \$10,000.³⁰ But B and C would be entitled to contribution from A in the amount of \$5,000.³¹

In the absence of a third-party action by a named defendant against A, either because one was not attempted or because venue problems could not be avoided, it is unlikely there could be any determination of the percentage of A's negligence in the primary lawsuit.³² Again, however, this would make no difference to plaintiff

25. Article 2212a, § 2(g): "All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant." *Id.* § 2(g).

26. In other words, is a third-party defendant one of the "defendants" referred to in § 2(b)? Under § 2(a)(2) "defendant" includes any party from whom a claimant seeks relief. *Id.* § 2(a)(2). Section 2(a)(1) provides that "[c]laimant means any party seeking relief, whether he is a plaintiff, counter-claimant, or cross-claimant." *Id.* § 2(a)(1). From the standpoint of purity of terminology, the third-party action is not a counterclaim or a cross-claim. See TEX. R. CIV. P. 38, 97. Moreover, § 2(g) appears to draw a distinction between contribution claimed among tortfeasors made parties by plaintiff and contribution claims against persons not parties to the primary suit. One commentator appears to have assumed that the percentage would be submitted and that the third-party defendant would be treated as a defendant sued by plaintiff. Adams, *Special Considerations for the Negligent Plaintiff Under Comparative Negligence: Joinder of Defendants and the Feasibility of 100% Recovery*, 11 TEX. TRIAL LAW. F. 7, 8 (1976). He recognizes, however, that "a careful defense counsel representing a target but not so negligent defendant will not recklessly join additional parties defendant whose negligence in the aggregate is likely to push the total negligence up to or above the fifty percent benchmark of liability." *Id.*

27. If one views the third-party contribution action as governed by article 2212, rather than 2212a, B and C would share equally in the contribution award.

28. Section 2(d) supplies a powerful analogy in support of B and C sharing A's payment in accordance with their percentages of negligence, as opposed to equally.

29. See, e.g., Case 2b *infra*.

30. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978-1979).

31. See note 21 *supra*.

32. Article 2212a contains language in §§ 2(d) and 2(e) (the settlement provisions) that clearly indicates the legislature assumed a non-party's percentage of negligence cannot be

because he is not negligent.

Case 2b. 2212a. P's negligence, 20%. Had A been sued, his negligence would have been set at 50%; B's, 20%; C's, 10%.

Once again, A, whose negligence has been hypothetically set at 50%, initially is missing from the picture. Forget about A for the moment and assume that the jury in plaintiff's action against B and C sees plaintiff's relatively slight negligence as a constant—20% of the total—and views the relative blameworthiness of B and C the same way the jury in the three-defendant hypothetical would view it. On these assumptions, the negligence percentage findings would be: P, 20%; B, 53.33%; C, 26.67%.³³ On these findings, B and C

determined. The law review articles that discuss article 2212a make the same assumption. See, e.g., Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 662-66 (1974); see also Abraham & Riddle, *Comparative Negligence—A New Horizon*, 21 BAYLOR L. REV. 411, 418 (1973). Cases decided prior to 2212a make a similar assumption, see, e.g., *Petco Corp. v. Plummer*, 392 S.W.2d 163 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

On the other hand, Dean Keeton has suggested that "[f]ailure to join an alleged settling tortfeasor neither precludes nor, arguably, should it preclude the submission of the existence or amount of his negligence." Keeton, *Annual Survey of Texas Law—Torts*, 28 SW. L.J. 1, 14 (1974). Does the same idea apply to a non-settling tortfeasor? If so, we would be permitting one defendant to force another defendant on the plaintiff even when a third-party action is unavailable. The reasoning would be that failure to submit the percentage would prejudice the named defendant or defendants by increasing their negligence percentages. See Tex. R. Civ. P. 39(a). This argument makes more sense when we assume that the jury sees plaintiff's negligence as a constant. This reasoning appears to have been rejected by the Wisconsin courts. See *Hardware Mutual Cas. Co. v. Harry Crow & Sons*, 6 Wis. 2d 396, 94 N.W.2d 577 (1959); see also *Pierringer v. Hoyer*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963); *Patterson v. Edgerton Sand & Gravel Co.*, 227 Wis. 11, 277 N.W. 636 (1938). It should be noted that the pre-2212a cases can be distinguished on the basis that the requirement that the settling party be made a party defendant is pure dictum in all of them. See *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

33. What we have done here is redistribute the "missing" A's negligence between the remaining defendants. The three-defendant hypothetical is as follows:

P—20% B—20%

A—50% C—10%

Holding P's 20% as constant and redistributing A's share proportionately between B and C, we get:

P 20%

B 2/3 of 80%, or 53.33%

C 1/3 of 80%, or 26.67%

Obviously, the assumption that the jury would make the same 20% finding for P, whether or not A was a defendant, is arbitrary. An equally sensible assumption would be that A's "missing" negligence would be redistributed among plaintiff, A, and B. On that view, the finding would be:

P 2/5, or 40%

B 2/5, or 40%

C 1/5, or 20%

would be jointly and severally liable to plaintiff for \$8,000;³⁴ B's contribution share would be 53.33% of \$10,000 (2/3 of \$8,000), and C's would be 26.67% of \$10,000 (1/3 of \$8,000).³⁵

However, it is likely that A would be impleaded for contribution.³⁶ Once again, the threshold question is whether A's percentage of negligence should be submitted to the jury.³⁷ If not, presumably the jury would consider only whether A was a joint tortfeasor. On an affirmative finding, B and C would be entitled to contribution from A in the amount of 1/3 of the \$8,000 liability, perhaps shared equally³⁸ and perhaps shared according to B's and C's percentages of negligence.³⁹ If, on the other hand, the impleaded defendant's percentage of negligence was submitted to the jury and fixed at 50%, B and C would be entitled to contribution from A in the amount of \$5,000.⁴⁰ Hence, B would be entitled to 2/3 of the \$5,000, and C to 1/3.

Obviously, it is significant to the named defendants whether the impleaded defendant's percentage of negligence is submitted to the jury. On the assumed percentages in this case, A's contribution share is greater than the 1/3 *pro rata* share A would have owed under prior law as one of three tortfeasors, shared according to B's and C's percentages of negligence.⁴¹ It is important to all the defendants whether the impleaded defendant's percentage of negligence is submitted because only occasionally will the percentage found equal a *pro rata* share. The more elusive fact is that sometimes the plaintiff will be equally concerned about the submission of the impleaded defendant's negligence.

The submission of the impleaded A's negligence to the jury on the present set of assumptions yields these findings: Plaintiff's neg-

34. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978-1979).

35. If the assumption is made that A's "missing" negligence is going to be redistributed proportionately among plaintiff, B, and C (see note 32 *supra*) as opposed to between B and C only, the outcome of the case without A in it would be that plaintiff is entitled to a recovery of \$6,000. B would be jointly and severally liable for the full \$6,000, but C's liability would be for \$2,000 only. B's and C's contribution shares would be \$4,000 and \$2,000, respectively. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978-1979).

36. Once again, venue problems might prevent this. See notes 103-17 *infra* and accompanying text.

37. See note 26 *supra* and accompanying text.

38. See note 27 *supra* and accompanying text.

39. See note 28 *supra* and accompanying text.

40. See note 21 *supra*.

41. In effect, A benefits from non-submission. Of course, if his percentage of negligence is less than the 1/3 *pro rata* share which A would have owed under prior law, non-submission will increase his contribution share.

ligence, 20%; A's, 50%; B's, 20%; C's, 10%. Because plaintiff did not sue A, presumably he is entitled to no recovery from A. His recovery is \$8,000. B is jointly and severally liable for that amount, but C is liable for only \$1,000, because his negligence is "less than" plaintiff's.⁴² Should B be insolvent, plaintiff's recovery has been diminished by the submission of A's negligence percentage—absent that submission P would probably recover more from C because a redistribution of the negligence percentages would certainly result in an increase of C's percentage. Suppose, for instance, that the jury in plaintiff's case against B and C finds plaintiff's negligence at 40%, B's at 40%, and C's at 20%.⁴³ On these findings, with A absent from the picture, plaintiff would recover \$6,000; B would be jointly and severally liable for the full \$6,000, but C's liability would be for \$2,000.⁴⁴ Should B be insolvent, plaintiff is limited to a \$2,000 recovery.⁴⁵

Is the proper solution to submit the impleaded defendant's percentage of negligence to the jury, or is it better to determine only whether the impleaded defendant would have been liable to plaintiff had plaintiff sued him? The latter course amounts to the conclusion that third-party actions for contribution against putative tortfeasors who are not named as defendants by the plaintiff be viewed as separate lawsuits from plaintiff's action and that article 2212, rather than 2212a, controls the contribution action.

The same question arises when B or C brings a separate action for contribution against A. Presumably, B and C continue to have that right.⁴⁶ The provisions of 2212a do not clearly control the suit.⁴⁷ If article 2212a were held to control, B and C (in addition to the requirement of showing that A would have been liable to plaintiff had plaintiff sued A)⁴⁸ would have to obtain a determination of A's

42. See note 30 *supra*.

43. See note 33 *supra*.

44. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978-1979).

45. See note 35 *supra*.

46. See Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 11 (1974). See also TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978-1979).

47. *But see* Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 11-12 (1974) (assuming that article 2212a would control); Comment, *Comparative Negligence in Texas*, 11 HOUS. L. REV. 101, 113 (1973); Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 675-76, 678 (1978); see also Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 84-85 (1978).

48. See cases cited at note 56 *infra*.

percentage of negligence.⁴⁹ On the assumption that the second jury must allocate the total negligence among all parties to the event, including the plaintiff, so that their percentages equal 100%,⁵⁰ a redetermination of B's and C's percentage of negligence would be required. Possibly, the second jury would also redetermine damages; probably the damages in the contribution action would be the lesser of the amount fixed by the jury in the primary suit and the amount found by the second jury.⁵¹

Aside from potential collateral estoppel problems,⁵² it is undesirable to require a second jury to reach a different allocation of the negligence and damages between the tortfeasors.⁵³ The best solution would be to *require* that contribution claims be made by impleader—compulsory impleader. However, the difficulty could be met by holding that article 2212, rather than 2212a, controls the subsequent action and that damages are not to be redetermined in the second suit.⁵⁴ Under 2212, a successful contribution suit against A would result in a judgment against A for 1/3 of the liability B and C incurred in the first lawsuit.

3. *Contribution rights of named defendants against putative tortfeasor who settled with plaintiff and who was not made party to the main lawsuit. [A settles with P. P v. B and C. B and C do not implead A.]*

Case 3. Prior law. Plaintiff not negligent. Each defendant negligent. Settling tortfeasor negligent.

Plaintiff, prior to the institution of any litigation, makes a settlement agreement with A whereby A is released from liability⁵⁵ to

49. See Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 11-12 (1974).

50. For an apparent attack on that notion—which everyone else has taken as a necessary bedrock assumption—see Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 681 n.85 (1978).

51. See Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 11-12 (1974).

52. See *Hardy v. Fleming*, 553 S.W.2d 790 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.); see also *Baker v. Story*, 564 S.W.2d 166 (Tex. Civ. App.—San Antonio 1978, no writ); *Olivarez v. Broadway Hardware, Inc.*, 564 S.W.2d 195 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

53. See Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 678-79 (1978).

54. This is Professor Robertson's view. TEX. REV. STAT. ANN. art 2212a, § 2(d) (Vernon Supp. 1978-1979).

55. Until the decision in *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), this had to be done by a covenant not to sue or similar contrivance, rather than a release as such. *McMillen* holds that only those parties named or otherwise specifically identified in the

plaintiff in exchange for \$1,000. Plaintiff then sues B and C. Neither B nor C brings a third-party action against A;⁵⁶ thus, the existence of A's negligence is not submitted to the jury. However, B and C bring the settlement agreement to the attention of the trial judge and seek a *pro tanto* reduction in their liability to plaintiff. Judgment is rendered for plaintiff against B and C, jointly and severally, for \$9,000. The \$10,000 potential liability is credited with the amount of payment by A.⁵⁷ B's and C's contribution rights between themselves should⁵⁸ be asserted in the main lawsuit, and each ultimately should bear \$4,500 liability. B and C may not sue A in a subsequent lawsuit because by settling with plaintiff, A has bought his peace.⁵⁹ On the assumed facts, B and C lost \$2,333.33 by failing to show that A was a joint tortfeasor. On the other hand, had A settled with plaintiff for \$6,000, the credit awarded B and C would render A's tortfeasor status immaterial because it would have been greater than would have been A's proportionate share of the \$10,000 liability (\$3,333.33).

Case 3a. 2212a. Plaintiff not negligent. Had A been sued, his negligence would have been set at 50%; B's at 30%; C's at 20%.

B and C are liable to plaintiff, jointly and severally, for \$9,000. Their contribution shares between themselves are 3/5 and 2/5, respectively, or \$5,400 and \$3,600. B and C benefit from the \$1,000 deduction resulting from A's settlement in that amount according to their percentages of negligence, rather than equally.⁶⁰ If A settled before any litigation and the existence and percentage of his negli-

release agreement are released from liability. *Id.*; compare *Spradley v. McCracklin*, 505 S.W.2d 955 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

56. The weight of authority requires defendants to implead the settlor and show that he would have been liable to plaintiff if sued in order to get a proportionate reduction in their liability to plaintiff. See *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176, 183 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 82, 89-90 (1978). However, there are one or two countervailing cases that imply that it is not a requirement to the assertion of proportionate-reduction contribution that the settlor be joined. See *Deal v. Madison*, 576 S.W.2d 409, 423 (Tex. Civ. App.—Dallas 1978, no writ); see also *Gill v. United States*, 429 F.2d 1072, 1078-79 (5th Cir. 1970).

57. See *Petco Corp. v. Plummer*, 392 S.W.2d 163 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176, 183 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). But see *Powell v. Brantley Helicopter Corp.*, 396 F. Supp. 646 (E.D. Tex. 1975)(no credit?).

58. See note 11 *supra*.

59. See note 56 *supra*.

60. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1978-1979).

gence are not submitted to the jury,⁶¹ B and C get only a *pro tanto* credit.

Case 3b. 2212a. P's negligence, 20%. Had A been sued, his negligence would have been set at 50%; B's at 20%; C's at 10%.

Continuing with the assumption that the percentage of the negligence of the settling tortfeasor is not submitted to the jury, we must reallocate the percentages of negligence among plaintiff, B, and C. If the same ratios are maintained,⁶² the finding would be: Plaintiff, 40%; B, 40%; and C, 20%. Plaintiff's maximum potential recovery from B and C is \$6,000 minus the \$1,000 settlement proceeds that will be divided between B and C in accordance with their respective percentages of negligence.

If A's percentage of negligence had been submitted and the section 2(e) formula employed, plaintiff's judgment would be reduced not only by his own percentage of negligence but by A's also. Hence, his judgment would be for \$3,000. B would be liable for the full \$3,000. C's liability would be for \$1,000 only.

4. *Contribution rights of named defendants against putative tortfeasor who settled with plaintiff and who was made party to the main lawsuit. [A settles with P. P v. B and C. A either remains in the case as a named defendant or is impleaded by B or C.]*

Case 4. Prior law. Plaintiff not negligent. Settling tortfeasor, B, and C each negligent.

Plaintiff enters into a settlement agreement with A, whereby, in exchange for the payment of \$1,000, A is released from further liability. Plaintiff sues B and C. B and C implead A and seek contribution.⁶³ If the jury finds that A would have been liable to plaintiff had plaintiff sued him, B's and C's contribution right against A is established. That right, however, entitled them to no relief from A directly, because the law wants to encourage settlements and A has bought his peace.⁶⁴ Instead, B's and C's contribution right is effected by diminishing the judgment in plaintiff's favor by 1/3, so that B

61. This assumption is seemingly required by the literal language of § 2(d) of article 2212a. Professor Dorsaneo doubts that the language was meant to be taken literally because section 2(e) may have been intended to give the defendant the option to "implead" the settlor even when settlement precedes litigation. *See also Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

62. Another equally arbitrary assumption is explored in note 33 *supra*.

63. *See note 56 supra*.

64. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964).

and C would be jointly and severally liable to plaintiff in the amount of \$6,666.67.⁶⁵ This would be the result *whether or not* the settlement agreement between plaintiff and A contained an undertaking by plaintiff to indemnify and hold A harmless against any assertion of liability by B or C. B's and C's contribution rights between themselves are such that each should bear 1/2 of the net liability to plaintiff, or \$3,333.33 each.

Suppose that A had settled for \$6,000, rather than \$1,000, so that the credit B and C would have received had they elected not to implead A and seek contribution would have been greater than the proportionate reduction. Can B and C elect the credit, rather than the proportionate reduction? One recent decision has emphasized that the better view is that B and C, on impleading A and showing that A was a joint tortfeasor, are entitled to the *greater* of the proportionate reduction or the credit in the amount of the settlement.⁶⁶

Suppose that B and C impleaded A, seeking proportionate-reduction contribution, but were unable to establish that A was a joint tortfeasor, or in some other respect failed to make a substantive-law case for contribution. In that situation, B and C would not get a proportionate reduction in their liability to plaintiff.⁶⁷ However, there is no reason they should not be entitled to a credit in the amount of the settlement, just as they were when they chose not to implead A and seek contribution. The cases are in conflict; several decisions appear to give no credit at all in this situation.⁶⁸

65. *Id.*

66. *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

67. *Petco Corp. v. Plummer*, 392 S.W.2d 163 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

68. Some of the cases give the credit. *See McMullen v. Coleman*, 135 S.W.2d 776, 778 (Tex. Civ. App.—Waco 1940, no writ); *see also Gill v. United States*, 429 F.2d 1072, 1079 (5th Cir. 1970). *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ), implies that defendants should have the credit, claiming they are entitled in succeeding in showing that the settlor was a joint tortfeasor to deduct the *greater* of the settlement amount or a pro rata reduction. Some apparently do not. *See Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648 (Tex. 1977); *Texaco, Inc. v. Pursley*, 527 S.W.2d 236 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); *see also Powell v. Brantley Helicopter Corp.*, 396 F. Supp. 646 (E.D. Tex. 1975). None of the cases contain useful discussion of the point. It is discussed in Comment, *Settlements in Multiple Tortfeasor Cases—Texas Law*, 10 ST. MARY'S L.J. 75, 82, 90 n.116 (1978). Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 683 (1978), assumes that the cases giving the credit state the correct rule.

Case 4a. 2212a. Plaintiff not negligent. A's negligence, 50%; B's, 30%; C's, 20%.

If it is determined that A, who settled for \$1,000 and who was impleaded by B and C, was a joint tortfeasor, then it is assumed that A's percentage of negligence would also have to be determined. Under section 2(e) of article 2212a, "the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of" the settling tortfeasor. Hence the plaintiff would get a judgment against B and C, jointly and severally, for \$5,000. B's and C's contribution rights between themselves—which must be determined in the main action—are such that B's ultimate share of the liability would be \$3,000 and C's, \$2,000. The commentators assume that B and C have to implead A in order to assert their right to a percentage reduction of their liability to plaintiff. The assumption is that article 2212a perpetuates the ostensible requirement of prior law.⁶⁹

Suppose that A had settled for \$6,000, rather than \$1,000, so that the credit B and C would have received (\$6,000) had they elected not to implead A and seek contribution would have been greater than the percentage reduction (\$5,000). The commentators on article 2212a assume that B and C have the option to implead A and to seek a determination of his percentage of negligence and a corresponding reduction of their liability to plaintiff by that percentage of the total liability under section 2(e), or to refrain from impleading A to seek a credit in the full amount of the settlement under section 2(d).⁷⁰ It is further assumed that B and C must make

69. A number of commentators, while deploring the requirement, assume that article 2212a perpetuates it in the language of §§ 2(d) and 2(e). Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 13-14 (1974); see also Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 684-86 (1978). See *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ), which identifies the requirement as something of a charade that has been codified. *Id.* at 423.

70. See Adams, *Special Considerations for the Negligent Plaintiff Under Comparative Negligence: Joinder of Defendants and the Feasibility of 100% Recovery*, 11 TEX. TRIAL LAW. F. 7, 8-9 (1976); Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 662-66 (1974); see also Abraham & Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411, 418 (1973); Giessel & Giessel, *Texas Comparative Negligence Law*, 8 TEX. TRIAL LAW. F. 14 (1973); Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 13-14 (1974); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 83-84, 90 (1978); Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 677, 681 (1978). See also *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

the choice before submission of the case to the jury.⁷¹ Under this reasoning, once a percentage of negligence has been determined for the settling tortfeasor, the correct reduction of the remaining liability is in that percentage, although the amount of the credit in the settlement may have been greater.⁷²

Suppose that B and C implead A, seeking a percentage reduction of their liability to plaintiff, but are unable to establish that A was a joint tortfeasor, or in some other respect fail to make a substantive-law case for contribution. Probably in that situation, B and C should be entitled to the credit in the amount of the settlement payment.⁷³

Case 4b. 2212a. Plaintiff's negligence, 20%; A's, 50%; B's, 20%; C's, 10%.

Plaintiff's recovery against B and C is reduced by \$2,000, representing his 20% negligence, and \$5,000, representing A's 50% share of the damages, for a total recovery of \$3,000. B is jointly and severally liable for that amount, but C's liability is limited to \$1,000. B's and C's contribution shares are \$2,000 and \$1,000, respectively.

Interim Summary:

In Cases 3 and 4, A has bought his way out of the case, has incurred no further liability to plaintiff, to B, or to C, and has become a party to the action by plaintiff against B and C, if at all, in only a nominal sense. However, it is essential to B's or C's assertion of their contribution right—actually, against plaintiff but in some peculiarly theoretical sense against A—that they implead him as a third-party defendant.⁷⁴ This technicality is foolish.⁷⁵ There is no intrinsic limit on the power of trial courts in Texas such that the question of whether A is a joint tortfeasor—and if so, his percentage of negligence—could not be determined without making him a party to the lawsuit.⁷⁶ A more sensible approach would be to consider

71. See Fisher, *Contribution and Indemnity Among Joint Tortfeasors*, 13 TEX. TRIAL LAW. F. 3, 11 (1979); See also *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

72. See Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 665-66 (1974); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 83 (1978). Compare *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no opinion on that point); Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 SW. L.J. 669, 681 n.83 (1978) (contrary assumption).

73. See notes 67-68 *supra* and accompanying text.

74. See text and notes 59, 64-72 *supra* and accompanying text.

75. See note 69 *supra*.

76. TEX. R. CIV. P. 277 (1978).

settlement by one tortfeasor with the plaintiff as an affirmative defense in the nature of payment.⁷⁷ Under this analysis, if A is shown to have been a joint tortfeasor, the judgment against B and C is diminished. Under article 2212, the diminution is 1/3; under section 2(e) of article 2212a, on a finding that A's negligence was 50% of the total, the diminution is 1/2. On the other hand, if it is determined that A was not a joint tortfeasor, or if B and C do not choose to make that question part of the case, B and C should be entitled to a credit in the amount A paid in settlement. Under 2212, B and C would share equally in that credit. Under 2212a, section 2(d), "each defendant is entitled to deduct from the amount for which he is liable to [plaintiff] a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants." In any case in which the amount paid in settlement exceeded the *pro rata* or percentage reduction allowable if A was a joint tortfeasor, B and C should receive a credit in the amount of the settlement.

5. *Contribution rights of putative tortfeasor who settled with plaintiff. [A settles with plaintiff and then seeks contribution from B and C.]*

Case 5. Prior law. Plaintiff not negligent. Settling tortfeasor, B, and C are negligent.

Plaintiff enters into a settlement agreement with A whereby, in exchange for A's payment of \$6,000, A is released from further liability. A then asserts a contribution right against B and C. Most authorities indicate that A does not have that right; one who settles with plaintiff for less than the full value of the claim has no contribution rights against other putative tortfeasors.⁷⁸

Had A settled for \$10,000, which was the full value of plaintiff's claim,⁷⁹ A would have contribution rights against B and C, which he

77. See note 69 *supra*. See also *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

78. See *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 27-28 n.24 (S.D. Tex. 1968); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 77, 80, 89 (1978). But see *Friedman v. Martini Tile & Terrazzo Co.*, 298 S.W.2d 221, 226-27 (Tex. Civ. App.—Ft. Worth 1957, no writ) (indicating that a partial settlor may sometimes have contribution rights); *William Cameron & Co. v. Thompson*, 175 S.W.2d 307 (Tex. Civ. App.—San Antonio 1957, writ ref'd w.o.m.); Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 679 n.74 (1978).

79. For discussion of the circumstances under which a settlement with one party has

could assert either by bringing a separate contribution suit or by cross-action in the main lawsuit.⁸⁰ The issue in that situation would be whether A merely made a voluntary settlement payment—in which event most cases indicate that no contribution would be available⁸¹—or whether the payment was made pursuant to some arrangement that would qualify as a “judgment” within the language of article 2212.⁸² If A could meet that requirement and could further show that he, B, and C were joint tortfeasors and that the settlement was prudent and reasonable, he would be entitled to contribution of 1/3 each from B and C.

Case 5a. 2212a. Plaintiff not negligent. A's negligence, 50%; B's, 30%; C's, 20%.

Article 2212a has nothing to say about a lawsuit brought by a settling tortfeasor against others seeking contribution. The commentators have assumed that article 2212 continues to govern that situation.⁸³

Case 5b. 2212a. Plaintiff's negligence, 20%; A's, 50%; B's, 20%; C's, 10%.

No difference.

satisfied plaintiff's entire claim, see Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 76-79 (1978).

80. A might be a party to that lawsuit as a named defendant, whom plaintiff did not dismiss after settlement; as a third-party defendant, whom the others had impleaded; or as intervenor. See note 91 *infra*.

81. See *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 25-31 (S.D. Tex. 1968); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 76 n.7 (1978). But see *William Cameron & Co. v. Thompson*, 175 S.W.2d 307, 310 (Tex. Civ. App.—San Antonio 1957, writ ref'd w.o.m.); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 168 (1947); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 332 (1965). The latter three authorities suggest that a putative tortfeasor should be able to make a voluntary settlement payment and then seek contribution, without the necessity of paying under a “judgment.” It has also been suggested that the settling tortfeasor who does not pay under a judgment can pursue the other tortfeasors if he takes an assignment of the victim's cause of action against them. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 84 S.W.2d 703, 704 (1935); *Friedman v. Martini Tile & Terrazzo Co.*, 298 S.W.2d 221, 226 (Tex. Civ. App.—Ft. Worth 1957, no writ).

82. For discussion of what arrangements qualify as “judgments,” see *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 25-31 (S.D. Tex. 1968); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 80 (1978).

83. Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 85 (1978). But see Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 SW. L.J. 669, 679 n.74 (1978).

6. *Indemnity rights of named defendants against putative tortfeasor who settled with plaintiff. [A settles with P. P v. B and C. B and C assert indemnity right against A.]*

Case 6. Prior law.

A settles with plaintiff for \$1,000. Plaintiff sues B and C. B and C implead A asserting a right to indemnity.⁸⁴ The trial court determines that B and C have an indemnity right against A.⁸⁵ The cases are not clear on the appropriate resolution, but there is support for three different propositions.

The first proposition is that B and C are jointly and severally liable to plaintiff for \$9,000, but they are entitled to indemnification from A for that amount.⁸⁶ Under this resolution, the settlement agreement A made with plaintiff fails to protect A from B's and C's indemnity right. Second, the settlement agreement protects A from any further liability, and B and C lose their right to sue A.⁸⁷ Third, the settlement agreement protects A from further liability, but B and C can enforce their indemnity right against plaintiff.⁸⁸ The third resolution is easier to reach if the settlement agreement between A

84. Arguably, B and C could have asserted their indemnity right without making A a party to the lawsuit. See *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ); *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.).

85. Texas law is quite unclear on the substantive question, what gives rise to a tort right to indemnity of one tortfeasor by another. See discussions of that point in *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859-61 (Tex. 1977); *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416, 427-28 (Tex. Civ. App.—Corpus Christi 1977), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 165-66 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Friedman v. Martini Tile & Terrazzo Co.*, 298 S.W.2d 221, 226 (Tex. Civ. App.—Ft. Worth 1957, no writ); *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 782-83 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); see also *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 19-23 (S.D. Tex. 1968); Keeton, *Annual Survey of Texas Law—Torts*, 32 Sw. L.J. 1, 12-13 (1978); Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 St. MARY's L.J. 75, 85 (1978).

86. Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 St. MARY's L.J. 75, 86 n.94 (1978), citing *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.), for this resolution. In that case, however, the plaintiff took nothing from a defendant held entitled to indemnity from settlor because plaintiff had agreed to indemnify settlor and there was no point in pursuing that circle. It is not clear what the court would have done had there been no indemnity agreement between plaintiff and settlor. 248 S.W.2d at 784-85.

87. Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 St. MARY's L.J. 75, 86 n.95 (1978), citing *Frantom v. Neal*, 426 S.W.2d 268, 272 (Tex. Civ. App.—Ft. Worth 1968, writ ref'd n.r.e.), for this proposition. As acknowledged by the author, however, the case is equivocal on the point.

88. *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.).

and plaintiff contains an agreement by plaintiff to indemnify A and to protect him against a contribution or indemnity claim by B or C.⁸⁹ There is authority for this proposition, even when there is no agreement.⁹⁰ The logic of the third resolution is that to encourage settlements, which protects A from further liability and to give B and C an indemnity right, can only be accomplished by foreclosing the plaintiff from recovery.

Case 6a. and 6b. 2212a.

Nothing in the language of article 2212a, the commentary, or the cases speaks to the alternative resolutions posed for Case 6.

7. *Indemnity rights of putative tortfeasor who settled with plaintiff. [A settles with P. P v. B and C. A asserts right to indemnity against B and C.]*

Case 7. Prior law.

A settles with plaintiff. Plaintiff sues B and C, who unsuccessfully assert a contribution right against A or who fail to implead A and assert their right. Judgment is rendered for plaintiff against B and C, jointly and severally. A then asserts a right to indemnification by B or C. This right may be asserted in the main lawsuit or in a separate action.⁹¹ There is no requirement—as there was in Case 5, in which A settled and then sought contribution—that the settlement be for the full value of the claim, that it be court-approved, or that it amount to a “judgment.”⁹² A can establish his right to indemnification from B or C by showing that A had potential liability to plaintiff,⁹³ that the settlement was reasonable and prudent

89. See note 86 *supra*.

90. See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947).

91. In the following cases the settling tortfeasor asserted his right to indemnification as intervenor or cross-claimant in the main action. *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978); see also *Powell v. Brantley Helicopter Corp.*, 396 F. Supp. 646 (E.D. Tex. 1975). In other cases, the settling tortfeasor brought a lawsuit seeking indemnification. See *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972); *William Cameron & Co. v. Thompson*, 175 S.W.2d 307 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.). In two cases, the settling tortfeasor took an assignment of the victim's rights against the others and pursued an indemnification claim via that route. *Friedman v. Martini Tile & Terrazzo Co.*, 298 S.W.2d 221, 226 (Tex. Civ. App.—Ft. Worth 1957, no writ); see *Traveler's Ins. Co. v. United States*; 283 F. Supp. 14, 19 (S.D. Tex. 1968).

92. See authorities cited in note 91 *supra*.

93. *Missouri Pac. R.R. v. Southern Pac. Co.*, 430 S.W.2d 900, 904-05 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

under the circumstances, and that he can meet the test for indemnification under substantive tort principles.⁹⁴

Case 7a. and 7b. 2212a.

Probably the separate indemnification suit, like the separate contribution suit, is not affected by article 2212a.

Interim Summary:

When a putative joint tortfeasor settles with plaintiff and then seeks contribution, the cases imply that he must arrange the settlement to be equivalent to a "judgment." Further, it is probable that the settlement must discharge the full claim rather than a portion of it. Neither of these requirements exists when the settling tortfeasor is seeking indemnity rather than contribution. The distinction is without basis in reason or policy, yet the cases seem to support it. The correct resolution of the matter is to enable a tortfeasor who settles all or a part of a claim to assert contribution rights or indemnity rights against the other tortfeasor in either the main or a separate lawsuit. He would be entitled to recovery of contribution on showing that he was potentially liable to plaintiff, that the settlement was reasonable and prudent under the circumstances, that the others were joint tortfeasors, and that he had discharged more than his fair share of the liability. He would be entitled to indemnification on showing that he was potentially liable to the plaintiff, that the settlement was reasonable and prudent under the circumstances, and that he has a substantive right to indemnity against the other tortfeasors.

Another problem in section 2 of article 2212a is subsection (f), which provides for offset. If at the conclusion of a two-party litigation A is liable to B for \$10,000 and B is liable to A for \$5,000, then B will recover \$5,000 from A. This section of the statute, which protects liability insurers, has been called its "most objectionable feature."⁹⁵ The offset can create potentially complicated calculations by the trial judge in a multi-party case.⁹⁶ The commentators have assumed that the offset calculation is to be made on the basis of the parties' post-contribution share of the liability determined in

94. See Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 86 (1978); see also note 85 *supra*.

95. Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 12 (1974). See McGuire v. Commercial Union Ins. Co., 431 S.W.2d 347 (Tex. 1968), which may imply no offset in Texas law before 2212a.

96. See, e.g., Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 12-13 (1974).

the case, ignoring the joint and several liability feature.⁹⁷ However, the statute does not imply that this is the correct method of determining the parties ultimate responsibilities, and other methods of making the calculation that achieve different outcomes are also supportable under the statute's language.

The choices can be clarified by the following hypothetical.⁹⁸ A, B, and C are all negligent, and each is damaged in a traffic accident. The damages of each party are single, indivisible and unapportionable. Each sues the other two for his damages; each defends and cross-claims against the others for contribution. The jury finds: A, 30% negligent, \$80,000 damages; B, 40% negligent, \$100,000 damages; C, 30% negligent, \$60,000 damages.⁹⁹ On these findings, the consolidated lawsuit can be depicted as follows:

Table 1

A	v.	B	C	
\$56,000		\$32,000	\$24,000	post-contribution shares, section 2(b).
		\$56,000	\$56,000	each defendant jointly and severally liable for the entire amount awarded plaintiff, section 2(c).
				°
B	v.	A	C	
\$60,000		\$30,000	\$30,000	post-contribution shares, section 2(b).
		\$30,000	\$30,000	neither defendant jointly and severally liable, section 2(c).
C	v.	A	B	
\$42,000		\$18,000	\$24,000	post-contribution shares, section 2(b).
		\$42,000	\$42,000	each defendant jointly and severally liable, section 2(c).

Figuring the offset on the basis of the parties' post-contribution shares of the liability, the determination is:

97. See *id.* at 12-13; see also Abraham, *Proposed Texas Modified Comparative Negligence Statute: Its Operation and Effect*, 35 TEX. B.J. 1114, 1115 (1972); Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 665, 672-73 (1974); Giessel & Giessel, *Texas Comparative Negligence Law*, 8 TEX. TRIAL LAW. F., 12, 17-19 (1973).

98. Borrowed from Keeton, *Annual Survey of Texas Law—Torts*, 28 SW. L.J. 1, 12-13 (1974).

99. This hypothetical is borrowed from Keeton, *Annual Survey of Texas Law—Torts*, 28 SW. L.J. 1, 12-13 (1974).

B owes A \$32,000; A owes B \$30,000; B pays A \$2,000.
C owes A \$24,000; A owes C \$18,000; C pays A \$6,000.
C owes B \$30,000; B owes C \$24,000; C pays B \$6,000.

Note that this calculation shifts only \$14,000 of a total \$240,000 loss.

One could figure the offset in several different ways, each of which seems to yield different results. For example, the lawsuit A v. B and C yielded a determination that B was liable to A for \$56,000 with C owing B \$24,000 in contribution. Similarly, the lawsuit C v. A and B determined that A was liable to C for \$42,000, with B owing A \$24,000 in contribution. Under those two interpretations, the offset calculation would be:

B owes A \$56,000 + \$24,000 (A as cross-claimant for contribution), for a total of \$80,000; A owes B \$30,000. B pays A \$50,000.

C owes A \$0; A owes C \$42,000. A pays C \$42,000.

C owes B \$30,000 + \$24,000 (contribution), for a total of \$54,000; B owes C \$0. C pays B \$54,000.

Other permutations are possible. The assumption made in the literature—that the offset is correctly figured against the parties' post-contribution share—is only the simplest.¹⁰⁰

Summary of Part I:

The major changes effected by article 2212a on the respective rights and liabilities of multiple tortfeasors are the following:

(1) All claims for contribution among named defendants and by named defendants against non-party tortfeasors who have settled with plaintiff must be determined in the "primary" or main lawsuit.

(2) Defendants' post-contribution shares of the total liability to plaintiff are determined according to their percentage of negligence.

(3) When a tortfeasor settles with plaintiff but is not made a party to the primary lawsuit, for which reason the percentage of his negligence is not found, the defendants are entitled to a credit in the total amount of the settlement, apportioned among the defendants according to each defendant's share of the total defendant negligence found in the case.

(4) When a tortfeasor settles with plaintiff, but is nevertheless

100. The only reported decision treating the offset feature is *Willingham v. Hagerty*, 553 S.W.2d 137 (Tex. Civ. App.—Amarillo 1977, no writ). It does not address the questions under consideration.

“joined as a party defendant at the time of the submission of the case to the jury,”¹⁰¹ the non-settling defendants are entitled to a determination of whether the settling defendant was a joint tortfeasor, and, if so, what the settling defendant’s percentage of the total negligence was. The settlement is a complete release of the settling defendant’s percentage of the total liability.

A number of significant questions have not been resolved:

(1) What is the impact of 2212a on the rule that third-party actions for contribution are viewed as distinct and severable controversies such that venue of third-party actions must be determined independently?

(2) When named defendants implead a non-settling tortfeasor for contribution, is the third-party defendant’s percentage of negligence submitted to the jury?

(3) Is it necessary to bring a third-party action for contribution or indemnity in order to have a settling tortfeasor’s negligence submitted to the jury?

(4) Are named defendants entitled to implead a settling tortfeasor solely for the purpose of taking advantage of section 2(e) of article 2212a?

(5) Is a lawsuit brought by a tortfeasor or tortfeasors, who have paid a judgment or who have settled with plaintiff, seeking contribution from other (putative) tortfeasors governed by 2212a, or does 2212 continue to control?

(a) If 2212 controls, do the paying tortfeasors, if successful in their subsequent suit for contribution, share equally in the contribution award, or do they share in accordance with their respective percentages of negligence?

(b) If 2212a controls, what is the *res judicata* or collateral estoppel effect of the negligence percentage findings made in the first lawsuit?

(6) Are named defendants, unsuccessful in an attempt to show that a person who settled with plaintiff was a tortfeasor, entitled to a credit against their liability to the plaintiff in the amount of the settlement?

(7) Are named defendants, successful in showing that a person who settled with plaintiff was a joint tortfeasor, entitled to a credit in the amount of the settlement when that is a larger amount than the settling tortfeasor’s percentage share of total liability?

101. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1978-1979).

Part II of this article will address these questions and will recommend solutions.

II.

The principal thrust of the recommendations made is toward reducing the number of judicial proceedings and determinations that must be made before multi-party tort litigation is fully resolved. It should be possible to design a system whereby no more than one lawsuit is necessary to resolve all the rights and liabilities of the parties in the typical situation involving a single, indivisible injury.¹⁰²

Recommendation 1. Named defendants should be required to assert contribution or indemnity rights against other putative tortfeasors who have not settled with plaintiff by impleading them in the primary lawsuit regardless of whether they have been sued by the plaintiff.

Discussion: Section 2(g) of article 2212a provides that: "All claims for contribution between *named defendants in the primary suit* shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant."¹⁰³ This subsection has been construed as a special venue exception.¹⁰⁴ However, the important question is whether the subsection overrides prior law to the effect that venue of a third-party action is determined independently.¹⁰⁵

In *Union Bus Lines v. Byrd*,¹⁰⁶ a truck collided with a bus. Plaintiff, a bus passenger, was hurt. Although the collision occurred in Live Oak County, plaintiff sued the bus owner in Cameron

102. Much of the commentary urges a single lawsuit as a goal. See, e.g., Adams, *Special Considerations for the Negligent Plaintiff Under Comparative Negligence: Joinder of Defendants and the Feasibility of 100% Recovery*, 11 TEX. TRIAL LAW. F., 7, 8 (1976); Keeton, *Annual Survey of Texas Law—Torts*, 28 SW. L.J. 1, 11 (1974).

103. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978-1979)(emphasis added).

104. *Chaney v. Coleman Co.*, 567 S.W.2d 882 (Tex. Civ. App.—Dallas 1978, no writ); *Southwestern Eng'r Corp. v. Phillips*, 566 S.W.2d 30 (Tex. Civ. App.—Beaumont 1978, no writ); *Maintenance & Equip. Contractors v. John Deere Co.*, 554 S.W.2d 28 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ dismissed); *Winningham v. Connor*, 552 S.W.2d 579 (Tex. Civ. App.—Tyler 1977, no writ); *LaSorsa v. Burr*, 516 S.W.2d 265 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *Goodyear Tire & Rubber Co. v. Edwards*, 512 S.W.2d 748 (Tex. Civ. App.—Tyler 1974, no writ).

105. See TEX. R. CIV. P. 38(d) ("This rule shall not be applied so as to violate any venue statute, as venue would exist absent this rule.").

106. 142 Tex. 257, 177 S.W.2d 774 (1944).

County. Venue was sustainable in Cameron County on the basis of subdivision 24 of article 1995¹⁰⁷ because the bus line operated as a common carrier in Cameron County and had an agent there. Plaintiffs did not sue the truck owner. The bus owner brought a third-party action against the truck owner. The truck owner filed a plea of privilege.¹⁰⁸ At the venue hearing, the bus owner contended that the truck owner was a "necessary party" within the meaning of subdivision 29a of article 1995.¹⁰⁹ The Texas Supreme Court concluded that, although "it would be more convenient to try the controversy among all the parties in a single suit,"¹¹⁰ subdivision 29a did not apply because there was only one third-party defendant. Moreover, because a separate action for contribution could be filed, the third-party action was *distinct and severable*.¹¹¹

It has been suggested that article 2212a overrules *Union Bus Lines*.¹¹² It is difficult to sustain this suggestion in light of the language of section 2(g) of article 2212a. Although there are now a number of cases which have construed section 2(g), *Chaney v. The Coleman Company, Inc.*¹¹³ illustrates the problem nicely. Plaintiff brought a negligence action against Coleman, but did not name Chaney as a defendant. Coleman brought a third-party action against Chaney, who filed a plea of privilege. Coleman contended that venue of the third-party action was proper under section 2(g) of article 2212a and subdivision 29a of article 1995. With respect to section 2(g), the Dallas Court of Civil Appeals concluded that the language of the first clause of the section was not applicable because Chaney was not one of the "named defendants in the primary suit."¹¹⁴ With respect to Coleman's contention that subdivision 29a applied, the court cited *Union Bus Lines* for the proposition that a third-party action is a *distinct and severable* cause of action. On the

107. TEX. REV. CIV. STAT. ANN. art. 1995 (24) (Vernon 1964) (Carriers).

108. TEX. R. CIV. P. 86.

109. TEX. REV. CIV. STAT. ANN. art. 1995 (29a) (Vernon 1964) ("Two or more defendants. Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants, then suit may be maintained in such county against any and all necessary parties thereto.").

110. 142 Tex. 257, 177 S.W.2d 774, 776 (1944).

111. 177 S.W.2d at 776.

112. HODGES, JONES, & ELLIOTT, *THE JUDICIAL PROCESS PRIOR TO TRIAL IN TEXAS* 395 (2d ed. 1977); Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 666-70 (1974).

113. 567 S.W.2d 882 (Tex. Civ. App.—Dallas 1978, no writ).

114. *Id.* at 883.

basis of the statutory language, it is difficult to quarrel with the result reached.¹¹⁵ On the other hand, it is difficult to justify the statutory language. Venue of the contribution claim should not depend upon whether the "defendant" from whom contribution is sought is a party named by the plaintiff in the primary suit¹¹⁶ regardless of whether the contribution share of the third-party defendant is computed in accordance with article 2212 or section 2(b) of article 2212a.¹¹⁷ Therefore, it is recommended that section 2(g) be amended to provide the following:

All cross-claims and third-party actions for contribution or indemnity are compulsory claims which must be asserted in connection with the primary suit by named defendants against each other and by named defendants against persons not parties to the primary suit who are amenable to process and who have not effected a settlement with the claimant. Venue of the foregoing cross-actions is proper where the primary suit is maintained. A third-party defendant who is not amenable to process may be sued in a separate action.

*Recommendation 2.*¹¹⁸ The percentage of negligence of a nonsettling tortfeasor should be submitted to the jury when he is made a third-party defendant. The percentage finding should be used only to compute contribution shares unless plaintiff also names the third-party defendant as defendant in the primary suit.

Discussion: The choice here is an important one *when the plaintiff is guilty of negligence*, because if the percentage of negligence of the third-party defendant is submitted and considered in computing plaintiff's recovery from the named defendants, the percentage finding should increase the liability of named defendants who are more negligent than the plaintiff but decrease the liability of named defendants who are less negligent than the plaintiff. Moreover, when a tortfeasor is insolvent, submission of his percentage of negligence may have unfortunate consequences for plaintiff. Consider the following hypothetical: Plaintiff's negligence, 20%; A's, 60%; B's, 10%; C's, 10%; Damages, \$10,000. If A is not joined by the

115. It could be argued that the holding of *Union Bus Lines* is incompatible with comparative negligence and that when § 2(g) uses the language "primary suit" it means the lawsuit in which the contribution claim is first asserted. This reading of the statutory language is too tortuous to be satisfying.

116. See Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 13-14 (1974).

117. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1978-1979).

118. This is the recommendation of Professor Dorsaneo.

plaintiff because he is insolvent, but A's percentage is submitted, determined and used to calculate the amount of plaintiff's recovery, plaintiff bears the consequences of A's insolvency because plaintiff's negligence percentage is greater than the percentage attributable to each defendant named by plaintiff. Consequently, neither B nor C is jointly and severally liable to the plaintiff. However, under section 2(c), each is liable for his percentage share. Hence, on the foregoing hypothetical, plaintiff would recover only \$1,000 from B and \$1,000 from C. However, if the percentage of negligence of either B or C is equal to or greater than the percentage of negligence of the plaintiff, B or C, rather than the plaintiff, will bear the brunt of A's insolvency. Recovery will be reduced only on the basis of the plaintiff's percentage of negligence.¹¹⁹ For example, assume the following: Plaintiff's negligence, 10%; A's, 60%; B's, 15%; C's, 15%; Damages, \$10,000. B and C are jointly and severally liable for \$9,000. They have a theoretical right to contribution from A. But if A is insolvent, B and C bear the brunt of his insolvency.

Assume the percentage of A's negligence is not submitted and the jury finds as follows: Plaintiff, 50%; B, 25%; C, 25%; Damages, \$10,000. Plaintiff would recover \$2,500 each from B and C, \$3,000 more than if A's percentage of negligence were submitted and taken into account in determining the liability of the primary defendants. In effect, on the assumption that blameworthiness ratios are preserved, the non-submission of A's percentage of negligence has resulted in a division of the burden of A's insolvency among the parties in proportion to their respective percentages of negligence. Although this method seems fair on principle to both the plaintiff and the named defendants, it creates a problem with respect to the determination of contribution shares when the tortfeasor not sued by plaintiff is solvent. If A's percentage of negligence is not submitted, section 2(b) could not be employed in determining B's and C's contribution rights against A. Hence, the matter apparently would be governed by article 2212. Only the fact (not the percentage) of A's negligence would be submitted to the jury. If A were found to be a tortfeasor, B and C would be entitled to a one-third contribution share (or \$1,666.67) from A, which B and C would presumably share equally.¹²⁰ If A were insolvent—presumably the usual situa-

119. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1978-1979).

120. It could be argued that B's and C's right to A's 1/3 contribution would be determined according to their percentages of negligence, using article 2212a, § 2(d) as the appropriate analogy. However, we believe that if it is decided that A's percentage of negligence is not

tion; otherwise, plaintiff would have sued A—there would be no contribution as a practical matter. If A were solvent at the time of judgment, B's and C's liability to plaintiff would be \$2,500 apiece, and each could only obtain contribution from A for approximately \$833.34. B and C are in a worse position than if highly culpable A had been sued by plaintiff and A's percentage of negligence submitted. This seems unfair on principle.

There is, however, at least one other method that could be employed to resolve the problem. Assume that A's percentage of negligence is submitted *but* that it is not considered in determining anything other than the extent of contribution shares. For example, assume the findings are:

P—20%; A—60%; B—10%; C—10%; Damages, \$10,000.

If the trial court compares only the negligence of plaintiff and B and C in determining plaintiff's aggregate recovery, the amount for which B and C will be liable to plaintiff will be the same regardless of whether A's negligence is submitted. In other words, because plaintiff's negligence is not greater than the negligence of B and C, without regard to A's percentage, by focusing on only the parties to the primary lawsuit (plaintiff's action), the result is a reduction of plaintiff's recovery to \$5,000; \$2,500 each from B and C. This is *the same result as when A's percentage is not submitted*. However, this approach creates difficulty in other cases. Consider the following findings:

P—20%; A—70%; B—5%; C—5%; Damages, \$10,000.

If A is treated as a "person or party" within the meaning of section 1 of article 2212a, plaintiff can still recover \$500 from B and \$500 from C. On the other hand, if A's negligence is used only to determine contribution shares, the plaintiff recovers nothing because the negligence of B and C in the aggregate is less than plaintiff's negligence. Of course, an exception could be made to permit recovery.

In terms of the determination of contribution shares, the procedure would be to compare the percentages of negligence of tortfeasors named by the plaintiff and those not named. The following method would be used. Assume the facts of the basic hypothetical as follows:

P—20%; A—60%; B—10%; C—10%; Damages, \$10,000.

If P sued A, P would be entitled to a judgment for \$8,000. Based on

to be submitted to the jury, contribution against A is best governed entirely by article 2212. Hence, we would suggest an equal split. Here, of course, the point is moot, as B's and C's negligence percentages are the same.

the method of computation discussed above, when A is not sued, plaintiff recovers \$5,000 in the aggregate. A's negligence is 75% of the negligence of all tortfeasors. In theory A would have a contribution share equal to 75% of the judgment of \$8,000 (\$6,000). The difference between the amount the plaintiff could have recovered from A, B, and C, if all were sued, and the amount recoverable from B is, therefore, \$3,000. This amount should be subtracted from the \$6,000 (representing A's theoretical contribution share) in order to obtain the amount of contribution that B and C are entitled to receive from A. The amount then should be divided in proportion to their respective percentages of negligence. The net result is as follows:

(a) B is liable to plaintiff for \$2,500 with a \$1,500 contribution from A, leaving B with \$1,000 worth of responsibility if A is solvent.

(b) C is liable to plaintiff for \$2,500 with a \$1,500 contribution from A, leaving C with \$1,000 worth of responsibility if A is solvent. This solution avoids two problems. First, assuming A is solvent, it reaches the same end result as the view under which a third-party defendant is treated as a defendant named by the plaintiff. Second, if A is not solvent, the parties, plaintiff and defendant share the brunt of A's insolvency in proportion to their percentages of negligence. Another hypothetical demonstrates the difference between the methods. Assume the following:

P—20%; A—20%; B—30%; C—30%; Damages, \$10,000.

If plaintiff sued all tortfeasors, all would be jointly and severally liable for \$8,000. If plaintiff sued B and C, they would be jointly and severally liable. Under the prevailing view, A is treated as if plaintiff sued him. Consequently, A's percentage is submitted, and B and C are jointly and severally liable for \$8,000. If A's percentage is not submitted and assuming the jury made the same comparative fault determinations for plaintiff and B and C, the percentage findings would be:

P—25%; B—37 ½%; C—37 ½%; Damages, \$10,000.

Under these findings, plaintiff would recover \$7,500 jointly and severally from B and C. Under the article 2212 method of determining the contribution share of A, the questions of negligence and proximate cause would be submitted to determine whether A was a tortfeasor. If answered affirmatively, A's contribution share would be \$2,500.¹²¹

121. Note that A's contribution share exceeds by \$500 the maximum contribution liability he would have incurred if he had been sued by the plaintiff.

Under the method recommended, the amount of plaintiff's aggregate recovery from B and C would be the same as under the second method, or \$7,500. The key difference is in determining the amount of A's contribution. For example, assume again the jury finds the following:

P—20%; A—20%; B—30%; C—30%; Damages, \$10,000.

By considering the comparison between the percentage finding of plaintiff's negligence and the negligence of B and C so that the percentages are rounded to 100%, each of B and C is one and one-half times as negligent as plaintiff such that the percentages are:

P—25%; B—37 ½%; and C—37 ½%.

Hence, plaintiff recovers \$7,500 from B and C jointly and severally. But instead of proportionately setting A's contribution share, a comparison is based upon the relationship of A's negligence to the negligence of B and C. Assuming all tortfeasors are solvent, A's contribution share would be calculated by taking 20% of plaintiff's damages. If the \$500 representing the difference (between the amount A, B and C would have been adjudged liable to pay plaintiff, \$8,000, and the amount of plaintiff's recovery from B and C, \$7,500) is subtracted from the \$2,000 (A's hypothetical contribution share) in order to obtain the total amount of contribution recoverable by B and C from A, the result is as follows:

(a) B is liable to plaintiff for \$7,500 with a \$1,500 contribution right from A and a \$3,000 contribution from C.

(b) C is liable to plaintiff for \$7,500 with a \$1,500 contribution right from A and a \$3,000 contribution from B.

In other words, if A, B, and C all pay their appropriate share, A pays \$1,500, B pays \$3,000, and C pays \$3,000. On the other hand, if A is insolvent such that, as a practical matter, he pays nothing, the brunt of his insolvency is shared in proportion to the respective percentages of negligence of the plaintiff and the persons named as defendants by the plaintiff.

*Alternative Recommendation 2.*¹²² The percentage of negligence of a non-settling tortfeasor not sued by plaintiff but impleaded by named defendants, should not be submitted to the jury.

Discussion: As explained above, this choice is extremely difficult because the consequences of non-submission influence the amount that plaintiff will recover when plaintiff is guilty of some negligence. The basis for concluding that it is better not to submit

122. This is the recommendation of Professor Robertson.

the percentage of negligence of the third-party defendant is that plaintiff should have the choice of suing whomever he chooses. In accordance with section 1 of article 2212a,¹²³ plaintiff should recover if plaintiff's "negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought" ¹²⁴

This recommendation can be illustrated as follows: Suppose that plaintiff sued B and C, who implead A—who has not settled with plaintiff—for contribution. Assuming that the percentage of negligence of A is submitted to the jury, the jury would assess plaintiff's negligence at 40%; A's at 30%; B's at 20%; and C's at 10%.¹²⁵ Under section 2(c) of article 2212a, none of these defendants—each of whose negligence is less than plaintiff's—would be liable to plaintiff beyond his percentage of negligence; there is no joint and several liability for the whole amount of plaintiff's judgment. Hence, A would owe plaintiff \$3,000, B, \$2,000, and C, \$1,000. If A were insolvent, plaintiff would bear the loss of A's \$3,000 share, recovering only \$3,000 from B and C together. B and C would have forced that resolution on plaintiff by impleading A and having A's negligence submitted to the jury. In effect, B and C would have effected their contribution rights by forcing an insolvent tortfeasor on the plaintiff.

Hence, unless plaintiff joined A as defendant, the jury should not determine A's percentage of negligence, but only A's liability to plaintiff. If the jury answers that A would have been liable to the plaintiff, B and C should share equally in the contribution award against A in the amount of 1/3 of the total amount awarded plaintiff. Plaintiff's rights against B and C would be unaffected by the contribution action. Of course, in this situation the jury's determination of the percentages of negligence of plaintiff, B, and C would be different than in the three-defendant situation, and plaintiff could lose any right to recover against B and C if his negligence were 51% or more of the total.¹²⁶ If the jury in the case of *P v. B and C* were consistent with the hypothetical given in their assessment of the parties' relative fault, they would hold plaintiff guilty of 4/7 of the negligence, B of 2/7, and C of 1/7.¹²⁷ This, of course, means that

123. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979).

124. *Id.*

125. See note 10 *supra*.

126. *Id.* art. 2212a, § 1.

127. See note 123 *supra*. This amounts to redistributing A's "missing" 30% of the

plaintiff is not entitled to recovery¹²⁸ and that he would have been in an improved situation had he joined the insolvent A as defendant.¹²⁹ But the plaintiff should have that choice, not the defendants.

Recommendation 3. It should not be necessary to join a settling party as a third-party defendant.

Discussion: Most of the commentators have hesitantly agreed that defendants must implead a settling tortfeasor in order to assert contribution rights against him.¹³⁰ Because defendants have no rights that actually run against the settling tortfeasor, there is no reason to require that the settling tortfeasor be a party to the lawsuit. (If a defendant settled during the litigation, he should be dismissed from the case.) Defendant's rights to "contribution" that arise from the settling tortfeasor's existence actually run against the plaintiff; those rights should be asserted as affirmative defenses. The question whether a settling tortfeasor should be made a party to plaintiff's lawsuit against other tortfeasors is independent of questioning what the remaining defendants' contribution or indemnity rights should be. As has been pointed out,¹³¹ nothing prevents a court from making a determination that a non-party was negligent and from making a concomitant determination of that person's percentage of negligence in order to determine the remaining defendants' contribution rights.¹³² However, section 2(e) of article 2212a does not require this "charade."

Recommendation 4. Defendants who establish that a settling tortfeasor would have owed them indemnity should have no liability to plaintiff.

Discussion: This proposal probably maintains the status quo,¹³³

negligence among the parties in proportion to their blameworthiness. The three-defendant findings were:

P v. A B C

40% 30% 20% 10%

If A's 30% is redistributed proportionately, the corresponding two-defendant figures would be:

P v. B C

4/7 2/7 1/7

128. See note 124 *supra* and accompanying text.

129. See art. 2212(a), §§ 2(b), 2(c).

130. See notes 56, 69, 74-76 *supra* and accompanying text.

131. See notes 74-76 *supra* and accompanying text.

132. Under recommendations 5 and 6 it would not be necessary to determine a settling party's percentage of negligence. But the recommendations are not interdependent.

133. See notes 85-90 *supra* and accompanying text.

but the policy of encouraging settlement by protecting the settling tortfeasor from further liability should hold. The remaining tortfeasors should not lose their indemnity rights because of an agreement to which they were not a party. The plaintiff had the choice to settle with the party from whom indemnity was owed.

Taking into account the confusing state of substantive law on the question of when indemnity is owing,¹³⁴ the proposal to abolish tort indemnity in most instances is appealing.¹³⁵

Recommendation 5. Unless there is a right to indemnity from the settling tortfeasor, defendants who succeed in establishing that the plaintiff has received an amount in settlement would be entitled to a credit against their liability to plaintiff in that amount. This right would exist without reference to whether the settling party was liable to the plaintiff. Only in a relatively infrequent situation of a settlement between plaintiff and a defendant during jury deliberations or after the verdict would there be any determination of a settling party's percentage of negligence.

Discussion: This controversial proposal recommends restoring Texas law to the *status quo ante* of the 1964 decision in *Palestine Contractors, Inc. v. Perkins*.¹³⁶ It recommends handling virtually all settlement situations according to the provisions of section 2(d) of article 2212a, with section 2(e) coming into play only when a named defendant settled with plaintiff during jury deliberations or after verdict.¹³⁷

Palestine has been the definitive essay on contribution rights in settlement situations. Plaintiff settled with and released one putative tortfeasor for a consideration of \$10. The question was whether the defendant could assert a right to contribution against the settling party. The court thought each of three competing resolutions was meritorious: (1) credit in the amount of settlement, defendant retaining the right to pursue the settling party for contribution; (2) credit in the amount of settlement, defendant having no right to contribution; (3) defendant entitled to reduce his liability to plaintiff by 1/2 on showing that the settling party was a joint tortfeasor.¹³⁸ The court rejected the first resolution because leaving

134. See note 85 *supra*.

135. Keeton, *Annual Survey of Texas Law—Torts*, 32 Sw. L.J. 1, 13 (1978).

136. 386 S.W.2d 764 (Tex. 1964).

137. Dean Keeton argues that § 2(e) should virtually always govern. Keeton, *Annual Survey of Texas Law—Torts*, 28 Sw. L.J. 1, 14 (1974).

138. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767 (Tex. 1964).

the settling party open to contribution liability would discourage settlements.¹³⁹ It rejected the second because article 2212 provided a "right" to contribution that could not be defeated by a settlement.¹⁴⁰ Hence, it adopted the third resolution. The court recognized that the 1955 Uniform Contribution Act¹⁴¹ and a majority of the states had adopted the second resolution.¹⁴² The third resolution was in a minority. It had been discussed briefly in the dictum of a 1932 commission of appeals decision.¹⁴³ The principal argument in its favor, was the view that article 2212, granting a "substantive right"¹⁴⁴ to contribution, precluded the adoption of the Uniform Act resolution.

With the passage of article 2212a, the article 2212 impediment to adopting the most practical resolution of the settlement problem was removed. Section 2 of article 2212a "prevails over Article 2212 . . . , and all other laws to the extent of any conflict."¹⁴⁵ Section 2(d) of article 2212a provides for a method of crediting the judgment with the amount of the settlement:

If an alleged tort-feasor pays an amount to a claimant in settlement, but is never *joined as a party defendant*, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.¹⁴⁶

Section 2(e) provides the alternate method:

139. *Id.*

140. *Id.* at 767, 771.

141. The 1939 Uniform Act provided for a proportionate reduction, as did the resolution adopted by the *Palestine Contractors* opinion. The Uniform Act was changed in 1955 to provide for credit because of problems with the proportionate reduction solution. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 768-71 (Tex. 1960).

142. *Id.* at 769-70.

143. *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1006-07 (Tex. Comm'n App. 1932, holding approved); see generally Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947); Note, *Procedure—Torts—Covenant Not To Sue One of Several Joint Tortfeasors Reduces Total Recoverable Damages by Only the Amount Paid For It*, 43 TEXAS L. REV. 118 (1964).

144. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767 (Tex. 1964).

145. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(h) (Vernon Supp. 1978-1979).

146. *Id.* § 2(d) (emphasis added).

If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is *joined as a party defendant* at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.¹⁴⁷

Commentators have assumed that non-settling tortfeasors have the option whether to invoke credit under section 2(d) or to apply percentage reduction under section 2(e) and that they exercise that option by deciding whether to implead the settling tortfeasor and have the issue of his percentage of negligence submitted to jury.¹⁴⁸ On that assumption, section 2(e) perpetuates and codifies the view that a settling party must be sued for "contribution" by non-settling tortfeasors although no recovery is obtainable from the settling party. Alternatively, section 2(d) is applicable to the situation in which defendants do not seek contribution but do seek a credit. While that assumption is obviously plausible, it is not the most straightforward reading of the language of sections 2(d) and 2(e), which refer to the settling party in terms of whether he is "joined as a party defendant" at the time the case is submitted to the jury. It is more sensible to infer that 2(d) is the prevailing settlement/contribution rule, with 2(e) coming into play only when a settlement occurs after the case is submitted to the jury.

It might be argued that recommendation 5 encourages collusive settlements, whereby plaintiff could release a highly culpable party for a relatively small sum and then proceed against the less blameworthy tortfeasors without fearing a percentage reduction in the amount of the settling party's negligence. However, any plaintiff who believes that he may be adjudged guilty of some negligence—and the great majority of plaintiffs fall into this category—must be deterred from omitting a potentially highly culpable defendant from the lawsuit lest plaintiff's percentage of negligence be found to exceed that of the defendants sued. Under recommendation 5, a rational plaintiff would release a potentially highly culpable solvent tortfeasor only in exchange for a substantial sum of money that he knew would be credited against any judgment recovered from the other tortfeasors. The recurring problem has been

147. *Id.* § 2(e) (emphasis added).

148. See note 70 *supra* and accompanying text.

the sizable settlement between plaintiff and settling tortfeasor whereby the settling party buys into plaintiff's lawsuit against the other defendants.¹⁴⁹ If plaintiff knows that any judgment recovered against the other defendants is going to be reduced by the full amount of the settlement, the temptation to enter into one of these "Mary Carter" arrangements would seem to be greatly reduced.

If the section 2(e) method is used, it is to plaintiff's advantage to enter into settlement agreements and then litigate against the non-settling tortfeasors in such a way as to keep the settling tortfeasor's negligence percentage as low as possible. The tortfeasor who does not settle may have no effective way to combat the collusive agreement between plaintiff and the tortfeasors. On the other hand, if recommendation 5 were adopted, plaintiff and settling tortfeasor would know from the outset that any payment made to plaintiff in settlement will reduce his judgment against the other tortfeasors by the amount of the settlement payment. Of course, this solution would entail the risk that plaintiff would release a highly culpable tortfeasor for a pittance and then sue the remaining tortfeasors in hopes for a big "windfall." All other things being equal, a sensible plaintiff would be motivated to do that only if the highly culpable tortfeasor were insolvent. Moreover, if this is done, why should the plaintiff bear the entire brunt of the tortfeasor's insolvency? The current view discourages settlements with tortfeasors who are financially unable to pay their fair share. Finally, it is convincing that the potential for collusion—and, probably more importantly, for wholly legitimate but complicated non-collusive tactical maneuverings—is much greater under the current prevailing view, whereby defendants who have not settled must *guess* before the case goes to the jury whether 2(d) or 2(e) is the better method of crediting the settlement.

Recommendation 6. A party who settled with plaintiff would have no contribution or indemnity rights that could be made an issue in plaintiff's action against the other putative tortfeasors.

Discussion: When one of the putative tortfeasors has settled with plaintiff, neither plaintiff nor the remaining tortfeasors have rights against the settling tortfeasor. The settling tortfeasor would be protected from further liability *and* from the necessity of becoming a party, albeit wholly nominal, to a lawsuit. Concomitantly, the

¹⁴⁹ Miller v. Bock Laundry Mach. Co., 568 S.W.2d 648, 652 (Tex. 1977); General Motors Corp. v. Simmons, 558 S.W.2d 855, 857-59 (Tex. 1977).

other putative tortfeasors should be permitted to meet their responsibilities to the plaintiff among themselves without attention to the fact that the settlor may have paid more than his ultimate share of the claim. This proposal probably continues the status quo in those situations in which a putative tortfeasor has settled for less than the full value of plaintiff's claim.¹⁵⁰

When a putative tortfeasor has settled for what turns out to be the full value of the claim, or more, the "one satisfaction" rule¹⁵¹ means plaintiff has no recovery from the others. In that situation, and in the situation in which the settling party has indemnity rights against the other putative tortfeasors,¹⁵² it may seem harsh to deny the settlor any rights against the others. Here, the "one lawsuit, as simple as possible" thrust might acceptably yield to the equities so that the settling tortfeasor could have an action. His action would be to seek to require that each of the other tortfeasors pay all or a *pro rata* share of the damages represented by his payment to plaintiff.¹⁵³ A number of difficult questions would have to be answered: (1) If the asserted basis for recovery was negligence, would article 2212a be applicable? (2) If the asserted basis for recovery of a portion of the settlement or judgment was something other than negligence, would article 2212 be applicable?¹⁵⁴ (3) What would be the *res judicata* (collateral estoppel) effect of findings made in plaintiff's action against the non-settling tortfeasors regarding percentages of negligence and amount of damages?¹⁵⁵ The difficulty in answering these questions suggests that the legal system should leave the settling tortfeasor with no further rights against the other putative tortfeasors. However, it is clear that the principal situation that the two statutes and the decisional law were developed to meet—tort victim against putative tortfeasor—can be kept clear of these questions.

150. See note 78 *supra* and accompanying text.

151. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 84 S.W.2d 703 (1935).

152. Compare the proposal to abolish tort indemnity doctrines, on the view that "[w]hen two or more tortfeasors are at fault they should share the responsibility to some degree; no one should be entirely responsible." Keeton, *Annual Survey of Texas Law—Torts*, 32 Sw. L.J. 1, 13 (1978).

153. This right should not turn on whether the settling tortfeasor satisfied a "judgment." See notes 79-82 *supra* and accompanying text.

154. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 861-62 (Tex. 1977).

155. See Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 677 (1974). Cf. Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 676, 678 (1978).

Recommendation 7. Named defendants should receive a credit against their liability to the plaintiff in the amount of the settlement regardless of whether they are successful in proving that a person who settled with the plaintiff was a joint tortfeasor.

Discussion: In the recent case of *Deal v. Madison*,¹⁵⁶ the court of civil appeals achieved a commendable resolution of the problem confronted in recommendation 7. Plaintiff's decedent died in an apartment house fire. The potential defendants were: (1) the owner of the land at the time the apartments were built (D1); (2) the architect who designed them (D2); (3) an interim owner (D3); and (4) the owner at the time of the fire (D4). On the findings ultimately made by the jury in the case, it is possible to show the result in tabular form had plaintiff joined all four defendants, had none of the defendants settled, and had the defendants sought contribution from one another in the primary lawsuit. The table also shows what each of the parties who settled with plaintiff paid him.

Table 2

Party	% of Negligence	Damages	Liability to P	Post-contribution share	Settled for
P	0	\$445,000	\$	\$	\$
Defendant 1	45		445,000	200,250	
Defendant 2	30		445,000	133,500	130,000
Defendant 3	5		445,000	22,250	5,000
Defendant 4	20		445,000	89,000	450,000
Total	100%			\$445,000	\$585,000

Plaintiff sued D4. Plaintiff settled with D4 for \$450,000 and agreed to pursue the other tortfeasors, reimbursing D4 up to \$300,000 (67¢ on the dollar) out of any recovery achieved.¹⁵⁷ The trial court approved the settlement and rendered judgment against D4 in the amount of \$450,000. Plaintiff sued D1, D2, and D3. D1 impleaded D4 and cross-claimed against D2 and D4 for indemnity.

156. 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

157. The Texas Supreme Court recently looked at these "Mary Carter" agreements in *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), concluding that, while there are significant arguments such arrangements should be illegal, often their potential for perverting the adversary system can be handled by revealing the agreement to the jury. See note 149 *supra* and accompanying text.

Plaintiff settled with D2 (\$130,000) and D3 (\$5,000) and dismissed them as defendants. This left the litigation as P v. D1; D1 v. D2 and D4 for indemnity. Just before submission of the case to the jury, D1 moved to nonsuit D2 and D4 and to have only plaintiff's and D1's negligence submitted to the jury because D1 had determined to rely on the provisions of section 2(d) of article 2212a. Nevertheless, over D1's objection, the trial judge submitted the negligence of all parties to the jury. Alternatively, and to the same effect, D1 argued that the "one satisfaction" rule expressed in the 1946 *Bradshaw*¹⁵⁸ decision operated in D1's favor. Under either of those arguments, plaintiff would have been entitled to no recovery against D1 because the amounts paid in settlement by the other alleged tortfeasors (\$585,000) surpassed the damages found (\$445,000).

D1 waited until the last minute to nonsuit D2 and D4 because it was difficult to know whether the section 2(d) method of handling the settlements was more or less advantageous to him than would have been the alternative method described in section 2(e) of article 2212a. Under the 2(e) method, the settlements made by the other tortfeasors would have operated to release D1 from liability to plaintiff in the percentage of the damages found equal to the combined percentages of negligence against the settling parties. Under the 2(e) method, on the facts as found by the jury, D1's liability to plaintiff would have been \$200,250. Under the 2(d) method, it would have been \$0. Thus, hindsight teaches that D1 was correct to prefer the 2(d) method on these facts because the total amount paid in settlement by the other three tortfeasors far exceeded the total damages.

The trial judge concluded that D1 had waited too late. In the judge's view, D1 made a binding election by continuing to pursue his indemnity or contribution claims against D2 and D4 throughout the trial. Having made that election, he was precluded from later asserting a credit. This reasoning meant that D1 had to abide by the 2(e) method of treating the settling tortfeasors, under which D1 would have remained liable for \$200,250. However, the trial judge did not give D1 that reduction either, but entered judgment against him for the full \$445,000, apparently on the view that D1 had ultimately waived that right when he moved to dismiss D2 and D4 as third-party defendants.

The Dallas Court of Civil Appeals concluded that plaintiff was entitled to no further recovery against D1, because plaintiff had

158. *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 84 S.W.2d 703 (1935).

received amounts in settlement that more than equalled the value of the claim. The course of reasoning, however, was not as direct as its conclusion seemed to imply. The following propositions were expressed by the court of appeals regarding its resolution of the case:

(1) Under the pre-2212a law, the remaining tortfeasor, after settlement by other tortfeasors, was entitled to reduce his liability to plaintiff by the greater of the amount of the settlements or the settling tortfeasor's proportionate share of the liability.¹⁵⁹

(2) The better view of the pre-2212a law is that the remaining defendant did not have to assert a third-party claim for contribution against the settling party in order to assert either of those rights (credit in amount of settlement, or proportionate reduction); however, most practitioners and courts proceeded as though a third-party claim was necessary to the proportionate reduction right.

(3) Unfortunately, sections 2(d) and 2(e) of article 2212a seem to be based on the assumption that the defendant cannot achieve percentage reduction of the liability without asserting a third-party claim against the settling parties.

(4) This feature of article 2212a appears to mean that defendant must elect whether to claim a credit in the amount of the settlement (2(d)) or a percentage reduction (2(e)) before the case is submitted to the jury. Here, defendant made an acceptable election at that time. There is no reason why the defendant cannot pursue a claim for contribution or indemnity against a settling tortfeasor up to the time of submission of the case to the jury and then rely on his right to a credit under section 2(d).

(5) When a defendant does elect to pursue his right to percentage reduction by having the negligence of the settling parties submitted to the jury, it may be that he should have relied on credit because the amounts paid in settlement exceed the amounts of the percentage reductions. "We express no opinion on . . . whether . . . [defendant is entitled to credit] if the defendant seeks a proportionate [percentage] reduction under subdivision (e) rather than a deduction under subdivision (d), and fails to obtain a reduction that would be as much as the amount already received in settlement."¹⁶⁰ Because the plaintiff will not be harmed by the failure of the defendant to make the election before jury submission unless one assumes that submission of the percentage

159. *Deal v. Madison*, 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, no writ).

160. *Id.* at 420 n.2.

will cause the jury to reduce the sums set forth in their answers to the damage issues, no election should be necessary.¹⁶¹

Conclusion

Our recommendations have been made to simplify the practical choices encountered in negligence litigation. We hope that the complicated history surrounding negligence litigation has been clarified to some extent.

161. One court of civil appeals has reached the opposite conclusion. *Clem-Tex. Ltd. v. Dube*, 578 S.W.2d 813 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).