

Comparative/Contributory Negligence and Joint and Several Liability

A State by State Summary

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Counsel to Advance the Civil Justice System

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INTRODUCTION

The Commercial Transportation Litigation Committee of the Tort Trial & Insurance Practice Section of the American Bar Association is pleased to provide you with this summary of the laws on comparative/contributory negligence and joint and several liability for all states and the District of Columbia. The purpose of the summary is to provide an easy reference for industry members, insurance representatives, adjusters, and attorneys, of the general law on comparative/contributory negligence and joint and several liability in every jurisdiction.

Each article will provide you with a summary of the law for each state. At times, where relevant and space limitations allowed, the authors also addressed other issues pertinent to these topics. The summaries are just that, summaries only, and they are not intended to provide an exhaustive analysis of the issue.

The authors are attorneys and industry people who practice in the respective jurisdictions. Each author is designated at the bottom of each summary and you are encouraged to contact the author directly for additional information or a more in depth analysis. We hope this summary is helpful to you in your work or practice. As always, for specific legal advice on a specific matter, please contact your attorney. No effort is made hereto to provide such advice.

For further information about the Commercial Transportation Litigation Committee, visit our website at www.abanet.org/tips/commerical/home.

ALABAMA

By Jeremy Taylor

In order to prove negligence in Alabama, the plaintiff must prove a duty on the part of the defendant, the defendant's breach of that duty, causation, and damages. *See Bowden v. E. Ray Watson Co.*, 587 So.2d 944, 945 (Ala. 1991), citing *Thompson v. Lee*, 439 So.2d 113 (Ala. 1983). Negligence does not allow for an award of punitive damages. *See CP & B Enterprises v. Mellert*, 762 So.2d 356, 362 (Ala. 2002), citing *Tuscaloosa County v. Bennett*, 562 So.2d 166, 169 (Ala. 1990) and *Bradley v. Walker*, 93 S. 634, 635 (Ala. 1922).¹ Rather, negligence allows only for an award of compensatory damages. *See Montgomery City Lines, Inc. v. Davis*, 74 So.2d 923 (Ala. 1954).

Alabama Code § 6-11-20(b)(3) (Supp. 1990) defines wantonness as "conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Wantonness will allow for an award of punitive damages. *See Daniels v. East Alabama Paving, Inc.*, 740 So.2d (Ala. 1999).

Comparative / Contributory Negligence

Contributory negligence requires a showing by the defendant that "the plaintiff failed to exercise reasonable care." *H.R.H. Metals, Inc. v. Miller*, 833 So.2d 18, 27 (Ala. 2002). Alabama Courts have specifically chosen to employ contributory negligence over comparative negligence. *Williams v. Delta International Machinery Corp.*, 619 So.2d 1330 (Ala. 1993). The defendant asserting contributory negligence bears the burden of proving contributory negligence on the part of the plaintiff. *See Yamaha Motor Company v. Thornton*, 579 So.2d 619 (Ala. 1991). Contributory negligence is not a defense to wantonness. *See Id.* at 624. Contributory negligence is a defense to negligence. *See Sessions v. Nonnenmann*, 842 So.2d 649 (Ala. 2002).

Assumption of the risk proceeds from the injured person's actual awareness of the risk. ... Furthermore, with assumption of the risk the plaintiff's state of mind is determined by the subjective standard, whereas with contributory negligence the court uses the objective standard. ... The factfinder looks at whether the plaintiff knew of the risk, not whether he should have known of it.

Spence v. Southern Pine Electric Corporation, 643 So.2d 970, 971-972 (Ala. 1994) (citations omitted).

¹ Note that Alabama's Wrongful Death Statute, Code of Alabama § 6-5-410 (1975), allows only for punitive damages. *See Louisville v. N.R. Co. v. Lansford*, 102 F. 62 (5th Cir. Ala. 1900).

Reduced Standard of Care

- A. A disability on the part of a defendant may function as a defense insofar as the person with the disability may be held to the same standard as a reasonable person with the same or similar disability. *See Shepherd v. Gardner Wholesale, Inc.*, 256 So.2d 877 (Ala. 1972).
- B. Under the “sudden emergency doctrine,” a person who is placed in an emergency situation, through no fault of his or her own, is no longer held to the standard of a reasonably prudent person, but rather that of a person faced with a similar such emergency. *See Bettis v. Thornton*, 662 So.2d 256 (Ala. 1995).
- C. As to rescuers:

The rescue doctrine exists as an exception to the doctrines of assumption of the risk and contributory negligence. (Citation omitted). The rescue doctrine operates to close a gap in the chain of causation. ‘Essentially, the rescue doctrine provides that it is always foreseeable that someone may attempt to rescue a person who has been placed in a dangerous position and that the rescuer may incur injuries in doing so. Thus, if a defendant has acted negligently toward the person being rescued, he has acted negligently toward the rescuer.’ The rescue doctrine thus provides a mechanism by which a plaintiff can establish the element of causation in a negligence claim.

Laster v. Norfolk Southern Ry., 2009 Ala. LEXIS 1050532 (Ala., January 16, 2009).

- D. Under “subsequent contributory negligence,” or the “last clear chance doctrine,” a party’s continued, recurring negligence may bar him or her from recovery. *See Dees v. Guilley*, 339 So.2d 1000, 1002 (Ala. 1976); see also *Zaharavich v. Clingerman*, 529 So.2d 978 (Ala. 1988).
- E. Alabama Code § 6-5-332 (1975), the “good samaritan statute,” provides certain immunities to those rendering aid against claims by those receiving aid.

Joint and Several Liability

There is generally no contribution allowed among joint tort-feasors in Alabama. *See Sykes v. Blanks*, 533 So.2d 561 (Ala. 1988). However, Alabama law requires courts to apportion punitive damages amongst joint tort-feasors, except in wrongful death cases. Alabama Code § 6-11-21 (1975); *see also Boles v. Parris*, 952 So.2d 364, 366 (Ala. 2006). Alabama Code § 6-11-21(e) (1975) states:

Expect as provided in § 6-11-27, no defendant shall be liable for any punitive damages unless that defendant has been expressly found by the trier of fact to have engaged in conduct as defined § 6-11-20, warranting punitive damages, and such defendant shall be liable only for punitive damages commensurate with that defendant's own conduct.

Punitive damages are apportioned in wrongful death cases. Alabama Code § 6-11-21(j) (1975); *Boles v. Parris*, 952 So.2d 364, 366 (Ala. 2006).



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Comparative / Contributory Negligence

Alaska is a so-called “pure” comparative negligence state. The negligence of a claimant will therefore reduce the claimant’s recoverable damages but does not bar recovery entirely. The calculation of recoverable damages involves simply reducing the damages by the proportion that the claimant’s own fault bears to the total fault attributable to all responsible parties in causing the damages. If, for example, a plaintiff has himself/herself been negligent and such negligence is found to have caused 30% of plaintiff’s damages, the recovery is reduced by 30%. “Contributory negligence” as a concept that under the common law had been considered a complete bar to recovery is no longer applicable in Alaska.

Adoption of pure comparative negligence and rejection of contributory negligence as a bar to recovery were established by the Supreme Court of Alaska in the case of *Kaatz v. State of Alaska, et al.*, 540 P.2d 1037 (1975). The Court noted that the doctrine of “last clear chance,” under which a negligent plaintiff could still recover damages if a defendant had the last opportunity to avoid the accident and failed to do so, had survived in the state’s jurisprudence primarily as a means of ameliorating the harsh consequences of the contributory negligence rule. Under the principle of comparative negligence, “last clear chance” was an unnecessary relic. The Court held, however, that parties could still argue that the peculiar facts of an accident, which formerly would have fit a “last clear chance” analysis, should be considered as bearing on the assessment of comparative fault. Subsequently, in 1986, the legislature enacted a Tort Reform Act that codified a broad comparative negligence regime.

In claims for personal injury arising from motor vehicle accidents, the plaintiff’s failure to use a seat belt may be considered in Alaska for the purpose of apportioning damages under the concept of comparative negligence. *Hutchins v. Schwartz*, 724 P.2d 1194 (1986). The Supreme Court of Alaska in *Hutchins* declined to categorize evidence of seat belt use as a “seat belt defense” but noted that the concept of comparative negligence contemplated consideration of all relevant factors in assessing damages, finding that non-use of a seat belt was a relevant factor in that analysis.

Joint and Several Liability

Under the doctrine of joint and several liability, every tortfeasor in a case involving multiple tortfeasors can be held responsible for all of plaintiff’s damages regardless of the degree of its own fault. The purpose of a joint and several liability scheme is to ensure to the extent possible that plaintiffs are fully compensated for their injuries despite the insolvency or immunity of individual defendants. Alaska applied joint and several liability, in various forms, until Alaska voters passed an initiative in 1988 replacing joint and several liability with pure several liability. Several liability represents a shift in

emphasis from a desire to ensure full recoveries to plaintiffs to a desire to ensure that no defendant is required to pay more than its own fair share of the damages.

The new several liability scheme was codified by amendment to AS 09.17.080. A recent Alaska Supreme Court case, *Sowinski, et al. v. Walker, et al.*, 198 P.3d 1134, 1150 (2008), includes a good discussion of the historical development of several liability and a statement of the current application of comparative negligence and several liability:

Thus, Alaska has a system of pure comparative negligence with several liability. Alaska Statute 09.17.060 promulgates the basic comparative negligence principle that a claimant cannot recover the portion of damages attributable to the claimant's own fault for the harm complained of. Alaska Statute 09.17.080 promulgates the additional rule that of the total fault for harm attributable to defendants -- not the claimant -- the court shall enter a judgment against each defendant only for the defendant's own percentage of the total fault.

Alaska Statute 09.17 allows for a finding of fault against a person who is not a party to the litigation, although fault will not generally be assessed against a person who has not been joined in the suit but easily could have been joined. Civil Rule 14(c) provides a framework for a defendant's joining such potentially responsible persons in the original action. Because the objective of several liability is to assess damages against each party only according to its own degree of fault, it has been said that Alaska no longer recognizes contribution among joint tortfeasors or non-contractual indemnity among joint tortfeasors. But a liable defendant is now able to obtain contribution, through the concept of equitable apportionment, by an independent action against non-party persons who may be responsible for plaintiff's damages or through joinder under Rule 14(c) in the original suit initiated by plaintiff. See *McLaughlin, et al. v. Lougee, et al.*, 137 P.3d 267 (2006).



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Contributory / Comparative Negligence

The Arizona legislature adopted a pure comparative fault tort system as part of its enactment of the Uniform Contribution Among Tortfeasors Act (“UCATA”), A.R.S. § 12-2501, *et seq.* The purpose of UCATA is to ensure a fair liability apportionment system in which "each tortfeasor in a personal injury action is liable only for his or her share of fault." *Sanchez v. City of Tucson*, 191 Ariz. 128, 133, 953 P.2d 168, 173 (1998) (citing A.R.S. § 12-2506)); *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 404, 904 P.2d 861, 866 (1995).

Under UCATA, a jury must consider the fault of all persons who contributed to the alleged injury, death or property damage, regardless of whether a person was or could have been named as a party. A.R.S. § 12-2506(B). The fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with that nonparty or if the defending party gives notice before trial that a nonparty was wholly or partially at fault. A.R.S. §12-2506(B). A defendant can name a nonparty at fault even if the plaintiff cannot directly sue or recover from the nonparty. *See Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 821 P.2d 166 (1991) (joint tortfeasor may require employer’s negligence to be considered for assessment of fault under A.R.S. § 12-2506 when employer negligently contributes to employee’s injury). However, the assessment of fault against a nonparty does not subject that nonparty to liability in the adjudicated or any other action and it may not be introduced as evidence of liability in any action. *Id.*

UCATA defines “fault” as “an actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.” A.R.S. § 12-2506(F)(2). Under this definition, each party is liable only for the percentage of fault assigned to it by the trier of fact, who assesses “degrees of fault, not just degrees of causation.” *Larsen v. Nissan Motor Corp. in U.S.A.*, 194 Ariz. 142, 145, 978 P.2d 119, 122 (App. 1998), review denied.

In an indivisible injury case (where more than one cause produces a single injury in an accident), the fact-finder must multiply the total amount of damages sustained by the plaintiff by the percentage of fault of each tortfeasor to determine the maximum amount recoverable against each tortfeasor. A.R.S. § 12-2506(A); *Larsen*, 194 Ariz. at 146. As explained by the Arizona Supreme Court, "we see no reason to employ a different rule if the injuries occur at once, five minutes apart, or as in the present case, several hours apart. The operative fact is simply that the conduct of each defendant was a cause and the result is indivisible damage." *Piner v. Superior Court*, 192 Ariz. 182, 189, 962 P.2d 909, 196 (1998).

Joint and Several Liability

In 1987 the legislature amended UCATA to abolish joint and several liability among joint tortfeasors in most circumstances. The 1987 amendment, codified at A.R.S. § 12-2506, establishes a system of comparative fault, making “each tortfeasor responsible for paying his or her percentage of fault and no more.” *Dietz v. Gen. Elec. Co.*, 169 Ariz., 510, 821 P.2d 166, 171 (1991).

Under this system of several-only liability, plaintiffs, not defendants, bear the risk of insolvent joint tortfeasors. Each tortfeasor whose conduct caused injury is severally liable only for its percentage of the total damages recoverable by the plaintiff, the percentage based on each actor’s allocated share of fault. A.R.S § 12-2506(A) and (F)(2).

A.R.S. § 12-2506(D) provides only three exceptions to several-only liability: 1) where the parties were acting in concert; 2) where one party was acting as an agent or servant of another party; and 3) where a party’s liability for the fault of another person arises out of a duty created by the federal employers’ liability act, 45 U.S.C. § 51. A.R.S § 12-2506(F)(1) defines acting in concert as “entering into a conscious agreement to pursue a common plan or design in commit an intentional tort and actively taking part in that intentional tort.” The acting in concert exception applies only to intentional conduct, not to negligent conduct in any of its degrees. A.R.S. § 12-2506(F)(1).

In *State Farm Insurance Cos. v. Premier Manufactured Systems Inc.*, 217 Ariz. 222, 172 P.3d 410 (2007), the Arizona Supreme Court recently held that the legislature’s abolishment of joint and several liability extends to strict product liability actions and to each separate defendant in the chain of manufacture and distribution of a product. Consequently plaintiffs, not defendants, also bear the risk of insolvent joint tortfeasors in strict liability actions.



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ARKANSAS

By Christy Comstock

Arkansas is a modified comparative fault state. Under Arkansas law, a plaintiff may not recover any amount of damages if the plaintiff's own negligence is determined to be fifty percent (50%) or greater. Ark. Code Ann. § 16-55-216. A plaintiff whose negligence is less than 50% can recover from a defendant whose negligence is less than plaintiff's where defendants' combined negligence or fault exceeds plaintiff's. See *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962); *Riddell v. Little*, 253 Ark. 686, 488 S.W.2d 34 (1972). Plaintiff's recovery is diminished in proportion to Plaintiff's assessed percentage of fault. Ark. Code Ann. §16-64-122(b)(1).

In 2003, the Arkansas legislature passed the Civil Justice Reform Act of 2003 (Act 649 of 2003), codified at Ark. Code Ann. §§16-55-201 to 16-55-220 (Supp. 2003). The Act abolished joint and several liability in most negligence cases, providing by statute that "the liability of each defendant shall be several only and shall not be joint" and that "each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault." Ark. Code Ann. §16-55-201 (a), (b)(1). Only two exceptions exist where joint and several liability survived: (1) when there exists a vicarious liability relationship such that the other person or entity is "acting as an agent or servant" of the party, or (2) when the party is "acting in concert" with the other person or entity. Ark. Code Ann. §16-55-205(a). Under this scheme, each defendant pays only its assessed percentage of the damages awarded unless plaintiff can prove that one or more of defendant's shares are not reasonably collectible. In those circumstances, the statute provides for an increase in co-defendants' shares while granting defendants a right of contribution from any negligent but non-paying defendant(s). Ark. Code Ann. §§16-55-203(3), (4), (5).

Comparative fault is an affirmative defense. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993). Assumption of the risk is a matter to be considered by the fact-finder in comparing fault. *Simmons v. Frazier*, 277 Ark. 452, 642 S.W.2d 314 (1982).

The 2003 Act also provided that, in assessing percentages of fault, "the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit." Ark. Code Ann. §16-55-202(a). The fault of non-parties could be assessed by the fact finder where a litigant timely had pled notice of the alleged fault at least one hundred and twenty (120) days prior to trial. In *Johnson v. Rockwell Automation, Inc., et al.*, (April 30, 2009), the Arkansas Supreme Court answered certified questions concerning, *inter alia*, the constitutionality of Ark. Code Ann. §16-55-202, finding the "non-party fault" statute violative of Arkansas law, and striking it as unconstitutional. While litigants arguably may point to the "empty chair," there is currently no rule of procedure whereby litigants may obtain an assessment of the fault of non-parties.

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Comparative / Contributory Negligence

California has adopted a pure comparative negligence system. See *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 532 P.2d 1226 (1975) and *Safeway Stores v. Nest-Kart*, 21 Cal.3d 322, 579 P.2d 441 (1978). Under this system, the jury assigns a percentage of fault to each responsible party and then apportions the award accordingly. Using this system, plaintiff's award is reduced by her percentage of fault. The remainder is split jointly and severally amongst the liable defendants. In other words, if the plaintiff is found 50% at fault, her entire damages are reduced by 50%.

Joint and Several Liability

In the case where there is more than one alleged tortfeasor, the remaining liability (after deducting plaintiff's comparative negligence) is split between the liable parties differently depending on the nature of the damage. The economic damages (medical bills, lost wages, etc.) are a joint responsibility meaning a liable tortfeasor is on the hook for the entire amount that is not attributed to plaintiff, if she is found even 1% liable. The non-economic damages (pain and suffering, emotional distress, etc.) are apportioned according to fault.

For example, if the jury awards \$100,000 (\$50,000 economic, and \$50,000 non-economic) and finds the plaintiff 50% liable, defendant A 10% liable, and defendant B 40% liable, the resulting judgments would be as follows:

- Against defendants A and B: \$25,000 in economic damages which plaintiff can pursue in full against either defendant
- Against defendant A alone: \$2,500 in non-economic damages
- Against defendant B alone: \$10,000 in non-economic damages

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Comparative / Contributory Negligence

Colorado has adopted a system of modified comparative fault. Generally, in an action brought as a result of a death or injury to person or property, no defendant is liable for an amount greater than that represented by the percentage of fault attributable to that defendant. Section 13-21-111.5(1), C.R.S. However, when there is evidence credited by the fact finder that the plaintiff is also at fault, the plaintiff will be barred from recovery if the plaintiff's fault (sometimes referred to as "contributory negligence") is equal to or greater than that of the defendant or the combined fault of the defendants and designated non-parties at fault. Sections 13-21-111(1) & 13-21-111.5(3)(a), C.R.S. Thus, when the fact finder, using a special verdict form, assigns 50% or greater fault to the plaintiff, the plaintiff may not recover; when the fact finder assigns less than 50% fault to the plaintiff, the plaintiff may recover. Section 13-21-111(1), C.R.S. This means that a 50/50 verdict is a defense verdict, and the plaintiff cannot recover. When a plaintiff assigned less than 50% of fault, the amount of the plaintiff's recovery is reduced by the percentage of his or her fault. Section 13-21-111(1), C.R.S.

Comparative negligence applies when one or more of the defendants or non-parties at fault is or are alleged to have committed an intentional tort that contributes to an indivisible injury. *Slack v. Farmers Insurance Exchange*, 5 P.3d 280, 286 (Colo. 2000). However, an intentional tortfeasor's fault will not be reduced by a plaintiff's contributory negligence. *Toothman v. Freeborn & Peters*, 80 P.3d 804, 815 (Colo. App. 2002). Also, parties that are immune from liability may nevertheless be designated as non-parties at fault and assigned a percentage of fault. *See Paris ex rel. Paris v. Dance*, 194 P.3d 404, 408 (Colo. App. 2008).

Joint and Several Liability

Joint and several liability is limited by statute. Section 13-21-111.5(4), C.R.S. imposes joint liability on "two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act." Those held jointly liable have a right of contribution from other defendants "acting in concert." Section 13-21-111.5(4). Those held jointly liable are liable only for the percentage of fault assigned to those persons who are held to be jointly liable. Section 13-21-111.5(4).

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CONNECTICUT

By Pauline C. Will

Comparative / Contributory Negligence

Connecticut statutorily adopted the doctrine of modified comparative negligence. Conn. Gen. Stat. § 52-572h. The statute states, "contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought. . . [and] the economic or non-economic damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering. . . ." Conn. Gen. Stat. § 52-572h(b). Under this doctrine, a plaintiff is barred from recovery if the plaintiff's negligence is greater than that of the defendant or defendants. If the plaintiff's contributory negligence does not bar recovery, damages will nonetheless be diminished in proportion to the percentage of negligence attributed to the plaintiff. *Kraus v. Newton*, 14 Conn. App. 561, 542 A.2d 1163 (1988).

Joint and Several Liability

Abolished by statute, joint and several liability was replaced with a system of comparative fault. If the plaintiff's damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the plaintiff only for such party's proportionate share of the recoverable economic and non-economic damages. Conn. Gen. Stat. § 52-572h(c). The plaintiff's contributory negligence, if not greater than the combined negligence of the parties against whom recovery is sought, will reduce the award in proportion to the percentage of negligence attributed to the plaintiff. Conn. Gen. Stat. § 52-572h(b). The statute provides for reallocation of damages if it is determined that the plaintiff is unable to collect from a defendant. Conn. Gen. Stat. § 52-572h(g). More specifically, the court shall order the amount of uncollectible damages to be reallocated among the remaining defendants. Conn. Gen. Stat. § 52-572h(g).



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DELAWARE

By Delia A. Clark

Comparative / Contributory Negligence

Delaware is a comparative negligence state. A plaintiff may recover damages if not more than 50% at fault. 10 *Del. C.* 8132. Additionally, a plaintiff's recovery will be reduced by the percentage of plaintiff's negligence. 10 *Del. C.* 6301 et seq. For instance, in Delaware, a plaintiff may be contributorily negligent for voluntarily riding with a driver who is under the influence and his or her recovery will be reduced by the negligence attributed to the plaintiff. *Fell v. Zimrath*, 575 A.2d 267 (Del.Super. 1989).

If the plaintiff's negligence is greater than any attributable negligence, of the total number of defendants, then the plaintiff is a completely barred from any recovery under Delaware's comparative negligence statute, 10 *Del. C.* § 8132. That statute provides:

In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or the plaintiff's legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

For example, in *Triewel v. Sabo*, 714 A. 2d 742 (Del. 1998), the Delaware Supreme Court upheld the trial court's finding that the plaintiff's actions, as a matter of law, outweighed defendant's negligence. In *Triewel*, plaintiff, a bicyclist, attempted to cross a major four-lane highway when she was struck by a driver's truck. The plaintiff had a plain view of the oncoming traffic in broad daylight. The plaintiff died as a result of the collision. The Court found that she failed to exercise reasonable care for her own safety, and therefore the truck driver was not liable.

Joint and Several Liability

Delaware recognizes joint and several liability among defendants. 10 *Del. C.* 6301 et seq. The Delaware statute establishes with respect to tortfeasors certain standards of recovery which were unknown at common law. The statute defines joint tortfeasors as "persons jointly or severally liable in tort for the same injury to person or property." The statutory definition of "joint tortfeasors" differs from the common law definition. At common law, the status of joint tortfeasor arose where there existed joint or concurring negligence. *Ferguson v. Davis*, Del.Super., 9 Terry 299, 102 A. 2d 707 (1954); *Lutz v. Boltz*, Del.Super., 9 Terry 197, 100 A. 2d 647 (1953); *DiStefano v. Lamborn*, Del.Super., 7 Terry 195, 81 A. 2d 675(1951). Under , a finding of 1% negligence upon a defendant could result in the defendant paying the entire judgment. Under the joint tortfeasor statute, the defendants are entitled to contribution from the other defendant(s). In the

event that a plaintiff executes a joint tortfeasor release prior to judgment, then the award will be reduced under the terms of the release by the amount of consideration paid for the release or by the extent of the pro rata share of liability, whichever is greater.



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Comparative / Contributory Negligence

The District of Columbia follows the doctrine of contributory negligence. In the District of Columbia, contributory negligence is ordinarily an absolute bar to recovery in a negligence action. See *Felton v. Wagner*, 512 A.2d 291 (D.C. 1986), citing *Elam v. Ethical Prescription Pharmacy, Inc.*, 422 A.2d 1288, 1289 n. 2 (D.C. 1980); *Brown v. Clancy*, 43 A.2d 296, 298 (D.C. 1945); see also, District of Columbia Practice Manual. Contributory negligence is unreasonable conduct “‘which falls below the standard to which a plaintiff should conform for his own protection’ and contributes to the plaintiff’s injury.” *Scoggins v. Jude*, 419 A.2d 999, 1004, citing *Martin v. George Hyman Construction Co.*, 395 A.2d 63, 71 (D.C. App. 1978) and Restatement (Second) of Torts §463 (1965). Contributory negligence is the failure to act with the prudence demanded of an ordinary reasonable person under like circumstances. *Stager v. Schneider*, 494 A.2d 1307, 1311 (D.C. 1985), citing *Byas v. Dorsey*, 89 U.S. App.D.C. 403, 192 F.2d 613 (1951); RESTATEMENT (SECOND) OF TORTS § 464 (1977). “Put another way, ‘[t]he plaintiff is required to conform to the same objective standard of conduct, that of the reasonable person of ordinary prudence under like circumstances’ (footnote omitted).” *Id.*, quoting W. PROSSER & W. KEETON, THE LAW OF TORTS § 65 at 453 (5th ed. 1984). “To constitute contributory negligence, the negligence must be the proximate cause of the injury.” *First American Bank, N.A. v. District of Columbia*, 583 A.2d 993, 997 (D.C. 1990), citing *Sinai v. Polinger Co.*, 498 A.2d 520, 527 (D.C. 1985) (plaintiff not barred from recovery unless contributory negligence [is] a substantial factor in causing injury); W. PROSSER & P. KEETON, LAW OF TORTS § 65, at 457 (5th ed. 1984).

“[T]here is a narrow exception to the rule barring recovery when there is contributory negligence...” *Washington Metropolitan Area Transit Authority v. Young*, 731 A.2d 389, 394 (D.C. 1999). “Under the doctrine of last clear chance, a plaintiff may recover, despite his own contributory negligence, if he can demonstrate that ‘the defendant had a superior opportunity to avoid the accident.’” *Id.*, quoting *Phillips v. D.C. Transit System, Inc.*, 198 A.2d 740, 741-742 (D.C. 1964). “The doctrine ‘presupposes a perilous situation caused by the negligence of both the plaintiff and the defendant; it assumes that after the situation had been created there was a time when the defendant could, and the plaintiff could not, avoid the accident.’” *Id.*, quoting *Griffin v. Anderson*, 148 A.2d 713, 714 (D.C. 1959). “To recover under the last clear chance doctrine, therefore, the plaintiff must prove by a preponderance of the evidence: (1) that the plaintiff was in a position of danger caused by the negligence of both plaintiff and defendant; (2) that the plaintiff was oblivious to the danger, or unable to extricate [himself] from the position of danger; (3) that the defendant was aware, or by the exercise of reasonable care should have been aware, of the plaintiff’s danger and of [his] oblivion to it or [his] inability to extricate [himself] from it; and (4) that the defendant, with means available to him, could have avoided injuring the plaintiff after becoming aware of the danger and the plaintiff’s

inability to extricate [himself] from it, but failed to do so. *Id.* at 394-395, citing *Felton*, 512 A.2d at 296 (citations omitted).

Joint and Several Liability

In the District of Columbia, “the law pertaining to the right of contribution among joint tortfeasors has been established by case precedent rather than by statute.” *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d 332, 336 (D.C. 1998), citing *Lamphier v. Washington Hosp. Ctr.*, 524 A.2d 729, 733 (D.C. 1987). “[T]he general rule is that joint tortfeasors are jointly and severally liable for compensatory damages.” *Faison v. National Mortgage Corp.*, 839 F.2d 680, 685 (1987), citing *Hill v. McDonald*, 442 A.2d 133, 137 (D.C.App.1982).

“Under District of Columbia law, multiple defendants found liable for a single injury are deemed to be joint tortfeasors, and any compensatory damages for that single injury must be awarded jointly and severally against them.” *Id.* at 686. The D.C. Court of Appeals has stated that “[i]f two or more tortfeasors produce a single injury, the plaintiff may sue each one for the full amount of the damage and hold the defendants severally liable; but the plaintiff can obtain only a single recovery, and each defendant will be entitled to a credit for any sum that the plaintiff has collected from the other defendant. *Faison*, 839 F.2d at 686-687, citing *Leiken v. Wilson*, 445 A.2d 993, 999 (D.C. App. 1982) (citing *McKenna v. Austin*, 77 U.S. App. D.C. 228, 134 F.2d 659, 664 (1943)).

The available precedent, therefore, stands for the proposition “that there is a right of equal contribution among joint tortfeasors.” *District of Columbia*, 722 A.2d at 336, citing *Hall v. George A. Fuller Co.*, 621 A.2d 848, 850 (D.C. 1993); *Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 923 (D.C. 1966). Since the District of Columbia does not recognize degrees of negligence, “contribution is apportioned equally among all tortfeasors.” *Id.* at 336, citing *Early Settlers*, 221 A.2d at 923. Thus, the contribution among joint tortfeasors is pro-rata in the District of Columbia. *Id.* As such, the law of the District of Columbia permits a party to enforce contribution against one who shares common liability to the original Plaintiff. *Emmert v. U.S.*, 300 F. Supp. 45 (D.C. 1969).



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FLORIDA

By Eugene G. Beckham

Comparative / Contributory Negligence

Florida is a pure comparative negligence state with statutory exceptions. In most cases involving personal injury (“whether couched in terms of contract or tort, or breach of warranty and like theories”), Florida has abolished joint and several liability as of April 26, 2006.

Florida’s Comparative Fault statute, Fla. Stat. § 768.81 (2008), “diminishes proportionately the amount awarded as economic and noneconomic damages” due to “contributory fault, but does not bar recovery.” If comparative fault of a nonparty is pleaded as an affirmative defense, the court may apportion fault against the nonparty and name them on the verdict form based on a preponderance of the evidence standard. Drug or alcohol intoxication can completely bar a personal injury or property damage claim if the jury concludes that, at the time of injury, “[t]he plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff’s normal faculties were impaired or . . . had a blood or breath alcohol level of 0.08 percent or higher; and . . . [a]s a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.” Fla. Stat. § 768.36 (2008).

Joint and Several Liability

From 1999 until 2006, section 768.81 provided a statutory scheme of limited joint and several liability based on degree of fault and amount of damages, but the current statute abolishes it in most negligence cases. For causes of action accruing on or after April 26, 2006, a court will enter judgment based on the “party’s percentage of fault and not on the basis of the doctrine of joint and several liability.” Fla. Stat. § 768.81(3) (2008). “The enactment of section 768.81, Florida Statutes, represented a policy shift in the State of Florida from joint and several liability Therefore, instead of each defendant being severally responsible for all of the plaintiff’s damages, with limited statutory exceptions, the defendant is responsible only for the percentage of fault determined by the jury.” *Gouty v. Schnepel*, 795 So. 2d 959, 961 (Fla. 2001), *limited on other grounds by D’Angelo v. Fitzmaurice*, 863 So. 2d 311, 318 (Fla. 2003). Subsection 768.81(4)(b) provides that the statute does not apply to “any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403 [Environmental Control], chapter 498 [Land Sales Practices, repealed in July 2008 and renumbered as chapter 718], chapter 517 [Securities Transactions], chapter 542 [Florida Antitrust Act], or chapter 895 [Florida RICO Act].”



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Joint and Several Liability

In 2005, the Georgia General Assembly drastically amended O.C.G.A. § 51-12-33, the statute governing joint liability among tortfeasors. The amended statute arguably abolished joint and several liability in favor of mandatory apportionment amongst all parties – plaintiffs, defendants, and non-parties alike.

Comparative / Contributory Negligence

In cases in which the plaintiff's comparative fault is at issue, O.C.G.A. § 51-12-33 (a) requires juries to first determine the plaintiff's percentage of fault. Thereafter, the trial court must reduce the plaintiff's damages in proportion to his or her percentage of fault. Although the Georgia appellate courts have not interpreted this language, it is evident that, in cases involving a plaintiff's comparative fault, a jury will need to complete a special-verdict form, identifying the plaintiff's total damages as well as his or her percentage of fault.

Moreover, under subparagraph (d), the plaintiff shall not be entitled to recover any damages if he or she is 50 percent or more responsible for the injury or damages claimed. If the plaintiff's liability is less than 50 percent, however, then the judge shall reduce the plaintiff's recovery in proportion to his or her damages.

Following any necessary reduction against the plaintiff, subparagraph (b) requires the jury to apportion damages against each alleged joint tortfeasor based on "the percentage of fault of each person." In essence, this provision abolishes joint and several liability against defendants, and mandates apportionment in all cases. Additionally, it provides that damages apportioned against joint tortfeasors "shall be the liability against each person against whom they are awarded," and "shall not be subject to any right of contribution."

In addition to mandating apportionment against parties, the amended statute also requires the jury to apportion fault against non-parties as well. Subparagraph (c) of the amended statute codifies this empty-chair defense, irrespective of whether the non-party was or could have been named as a party to the suit. To invoke the empty-chair defense, subparagraph (d) requires a defendant to give at least 120 days' notice before trial that a non-party was wholly or partially at fault. Notice is not required if the non-party entered into a settlement with the plaintiff before trial.

In sum, subparagraphs (a) through (d) establish a four-part procedure. First, the jury apportions fault to the plaintiff. Second, the trial judge reduces the plaintiff's award accordingly. Third, the jury apportions the remaining damages, if any, against the defendants. Last, the jury apportions damages against all responsible non-parties, assuming the statute's notice provision was satisfied.



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Comparative / Contributory Negligence

In Hawaii, contributory negligence or comparative fault on the part of the plaintiff does not bar recovery if the plaintiff's negligence or fault is less than the negligence of the defendant, or in the case where there are multiple defendants, less than the aggregate negligence of all defendants. Hawaii Revised Statutes, § 663-31. In other words, a plaintiff will make a recovery if she is less than 51% at fault. Any damages allowed are reduced by the proportionate amount of the plaintiff's negligence.

Joint and Several Liability

Joint and several liability exists in Hawaii in a form which is governed by statute. § 663-10.9, Hawaii Revised Statutes nominally abolishes joint and several liability, but then creates a number of exceptions which preserve joint and several liability in many circumstances. Economic damages may be recovered on a joint and several basis against joint tortfeasors in all actions involving injury or death to persons. Joint and several liability will still apply for the recovery of both economic and noneconomic damages in actions involving: intentional torts; torts relating to environmental pollution; toxic and asbestos-related torts; torts relating to aircraft accidents; torts involving strict and products liability; and torts relating to most motor vehicle accidents. Additionally, where the individual degree of negligence of a single tortfeasor is less than 25%, the amount recoverable against that tortfeasor for noneconomic damages is limited to the degree of negligence assigned.



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Comparative / Contributory Negligence

Idaho follows a modified comparative fault system. It is premised on the proposition that a plaintiff whose damages are as much the result of his/her own negligence as of defendant's negligence ought not to recover; in such cases, the plaintiff should bear his/her own losses. *Seppi v. Betty*, 99 Idaho 186, 579 P.2d 683 (1978).

In 1971, the Idaho Legislature enacted the Comparative Negligence Act, codified at Idaho Code §§ 6-801 *et seq.*, which essentially allows a plaintiff whose own negligence contributed to his/her injury to recover against a negligent defendant if the plaintiff's negligence was "not as great" as the defendant's negligence. *Anderson v. Gailey*, 97 Idaho 813, 823, 555 P.2d 144, 154 (1976). Although a plaintiff's negligence contributing to his/her injury no longer necessarily bars recovery of damages in Idaho, such negligence still remains a bar whenever it is as great or greater than that of the defendant. *Fairchild v. Olsen*, 96 Idaho 338, 528 P.2d 900 (1974). Thus, a plaintiff who is determined to be 49% negligent can recover against a defendant who is 51% negligent, while a plaintiff who is 50% negligent cannot recover against a defendant who is also found to be 50% negligent. Any damages awarded to the plaintiff are then reduced by the percentage of the total negligence attributable to plaintiff. So if the plaintiff was found to be 49% negligent and the jury awarded \$10,000 in damages, he/she would be entitled to recover \$5,100.

In situations involving multiple defendants, Idaho follows the "individual rule" of comparative negligence under which each defendant's negligence is compared separately with the plaintiff's where the negligence of co-defendants is merely concurrent. Under the individual rule of comparative negligence, the plaintiff's negligence must be compared against each individual defendant in determining whether plaintiff may recover, and plaintiff must prove that any given defendant's negligence was greater than that of plaintiff before judgment can be rendered against that defendant. *Ross v. Coleman Co., Inc.*, 114 Idaho 817, 761 P.2d 1169 (1988). In order to account for this scenario, Idaho law allows the Court to direct the jury to return separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party. *See* Idaho Code § 6-802. By way of example, in a case where the plaintiff was found to be 30% negligent and defendants A and B were found to be 50% and 20% negligent respectively, the plaintiff could recover against defendant A, but could not recover against defendant B.

Joint and Several Liability

As far as joint and several liability is concerned, the Idaho Legislature "largely abrogated" this common law doctrine during the 1987 legislative session by limiting joint and several liability between joint tortfeasors to two narrow circumstances: (1) acting in concert, which is defined in the statute as pursuing a common plan or design which

results in the commission of an intentional or reckless tortious act; or (2) acting as a servant or agent for another person. See 1987 Idaho Sess. Laws, ch. 278, § 4, pp. 578-79; Idaho Code § 6-803; *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 88, 14 P.3d 1074, 1082 (Ct. App. 2000) (recognizing that the common law doctrine of joint and several liability was “largely abrogated” by I.C. § 6-803(3)).



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ILLINOIS

By James A. Foster and Joseph A. Panatera

Contributory / Comparative Negligence

Under Illinois law, if the contributory negligence of the plaintiff is 51% or more of the total fault, as assessed by the jury, the plaintiff will recover nothing. If the contributory negligence of the plaintiff is 50% or less of the total fault, the verdict will be reduced commensurate with the plaintiff's degree of fault. The jury is told this information by way of a jury instruction. Ill. Pattern Jury Instr.-Civ. B10.03 (West 2008).

Joint & Several Liability

Pursuant to 735 ILCS 5/2-1117, all defendants found liable are jointly and severally liable for a plaintiff's medical and medically related expenses. In terms of non-medical damages, a defendant who is found less than 25% at fault is only severally liable for the non-medical damages. In a recent 2008 Illinois Supreme Court case, the Court held that Section 2-1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit. *Ready v. United*, Docket No. 103474; 2008 WL 5746087 (Ill. 2008). Therefore, the percentage fault of a settling defendant cannot be used to reduce a non-settling defendant's percentage of fault below 25%. *See Id.*

The percentage fault of the plaintiff's employer is also not taken into consideration for purposes of joint and several liability pursuant to 735 ILCS 5/2-1117. Under Illinois Law, the fault to be considered for purposes of joint and several liability is the fault attributable to the plaintiff, non-settling defendants and any third-party defendant except the plaintiff's employer.



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INDIANA

By Robert B. Thornburg and Nancy B. Loucks

Comparative / Contributory Negligence

Indiana is a modified comparative fault state. See Ind. Code § 34-51-2-1, *et seq.* (“Comparative Fault Act”). The primary objective of the Comparative Fault Act is to modify the common law rule of contributory negligence under which a plaintiff who was only slightly negligent was barred from recovery. *Indian Trucking v. Harber*, 752 N.E.2d 168, 176 (Ind. Ct. App. 2001) (citing *Mendenhall v. Skinner & Broadbent Co., Inc.*, 728 N.E.2d 140, 142 (Ind. 2000)). Accordingly, under the Comparative Fault Act, each person whose fault contributed to the injury must bear his proportionate share of the total fault. *Id.* (citing *Mendenhall*, 728 N.E.2d at 142).

If the plaintiff’s fault is greater than 50% of the total fault that caused his injuries, the plaintiff is completely barred from recovery. Ind. Code §§ 34-51-2-6 & -7; see also *Thiele v. Norfolk & W. Ry. Co.*, 68 F.3d 179, 184 (7th Cir.) (finding that, under Indiana law, the injured motorist could not recover because he was more than 50% at fault for the accident that caused injuries). If the claimant’s fault is 50% or less, his recovery will not be barred, but his compensatory damages award will be reduced by his proportion of fault. Ind. Code § 34-51-2-5; see also *Baker v. Osco Drug, Inc.*, 632 N.E.2d 794, 797 (Ind. Ct. App. 1994) (“[I]f a plaintiff’s conduct satisfies the statutory definition of fault, he will be permitted to recover damages, but they will be reduced by his proportion of fault. Of course, recovery may still be completely barred if plaintiff’s fault is assessed at greater than 50%.”).

Under Indiana law, there is no contribution or indemnity among joint tortfeasors; a defendant is liable only for the proportion of the plaintiff’s total damages attributable to the defendant’s own fault. Ind. Code § 34-51-2-8; see also *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002).

Joint and Several Liability

Traditionally, joint tortfeasors have been jointly and severally liable to an injured plaintiff. Joint and several liability likely was abolished in comparative fault cases. In *Control Techniques*, the Indiana Supreme Court explained:

The Comparative Fault Act addressed two major concerns. Before adoption of the Act, a defendant whose negligence contributed only slightly to the plaintiff’s loss could be required to pay for all of the plaintiff’s damages and the plaintiff could proceed against and collect from the defendant of choice. Because there was generally no right of contribution, a defendant only slightly responsible could

be liable for the entire amount of damages. . . . In short, the Act did not change the standard for imposing liability. Rather, it changed the apportionment of the damages flowing from that liability.

Id. at 109. Accordingly, the Court found that “[u]nder the Comparative Fault Act, liability is to be apportioned among persons whose fault caused or contributed to causing the loss in proportion to their percentages of ‘fault’ as found by the jury.” *Id.* (citing Ind. Code § 34-51-2-8; *Cahoon v. Cummings*, 734 N.E.2d 535, 541 (Ind. 2000)). *See also Gray v. Chacon*, 684 F. Supp. 1481, 1485 n.6 (S.D. Ind. 1988) (“The abolition of joint and several liability is patent in the language of section 34-4-33-5: by requiring the fact-finder to “enter a verdict” against each defendant in an amount equal to that defendant's proportionate liability. . . .”).

Nevertheless, one panel of the Court of Appeals did not follow *Gray* and insisted that the Indiana Supreme Court has not yet resolved this specific issue. In *Smith v. Hansen*, the plaintiff, who had become intoxicated at a bar, was struck by an automobile. The plaintiff settled with, and released his claim against, the motorist. The plaintiff then sued the bar for negligently serving him liquor when he was obviously intoxicated. 582 N.E.2d 446, 447 (Ind. Ct. App. 1991), *trans. denied*. The trial court granted summary judgment for the bar presumably on grounds that the plaintiff agreed in the release that he was “giving up all the rights and claims that [he had] or may have against all persons in consequence of said accident, injuries and damage.” *Id.*

On appeal, the plaintiff, citing *Gray*, argued that the release of the motorist did not release the bar because the Comparative Fault Act abolished joint and several liability and required the fact-finder to apportion the plaintiff's entire loss among all the parties and nonparties. *Id.* at 448. The Court of Appeals stated that it did not accept *Gray* as the appropriate rule of law. *Id.* The court explained that the Indiana Supreme Court's most recent statement on the subject unanimously reaffirmed the joint-and-several-liability rule (*i.e.*, that a release of one joint tortfeasor is a release of all and that language in a release exempting certain joint tortfeasors from its operation is void). *Id.* (citing *Bellew v. Byers*, 396 N.E.2d 335, 336 (Ind. 1979); *Cooper v. Robert Hall Clothes, Inc.*, 390 N.E.2d 155, 157 (Ind. 1979)). The Indiana Supreme Court's two reasons for reaffirming the joint-and-several-liability rule were that (1) tortfeasors are jointly liable for a plaintiff's injuries; and (2) the rule prevents an unfair result by precluding “the plaintiff from recovering in excess of his injuries by successively obtaining settlements from the various tort-feasors in return for releases.” *Id.* (citing *Bellew*, 396 N.E.2d at 336).

The Court of Appeals acknowledged that *Bellew* and *Cooper* were decided before the Comparative Fault Act was enacted, but found that the Comparative Fault Act addressed only the Indiana Supreme Court's first reason for reaffirming the joint-and-several-liability rule. The court concluded that “[w]hether passage of the Comparative Fault Act has abolished the rule is a question for our supreme court to answer, not this one.” *Id.*

While the court did not find that the Comparative Fault Act abolished the joint-and-several-liability rule, the court, nevertheless, affirmed the trial court’s ruling because the release, in which plaintiff gave up “all the rights and claims that [he had] or may have against all persons,” was a contract that unambiguously released “all persons,” including the bar. *Id.* at 449.

The Court of Appeals stated that the Indiana Supreme Court has not directly resolved this specific question. But, the Indiana Supreme Court’s finding in *Control Techniques* that “the Act did not change the standard for imposing liability[;] [r]ather, it changed the apportionment of the damages flowing from that liability,” seems to suggest that the Comparative Fault Act *has* abolished any rule where liability is not apportioned among defendants. *See Control Techniques*, 762 N.E.2d at 109.



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Comparative / Contributory Negligence

Iowa has adopted a statutory scheme for comparative fault which tracks the Uniform Comparative Fault Act and is found at Iowa Code Chapter 668. Pursuant to the Act, “if the Claimant’s fault is not more than the fault of all other parties combined, then the Plaintiff is allowed to recover; but any damages allowed shall be diminished in proportion to the amount of fault attributable to the Claimant.” Thus, for example, if the Claimant’s fault is found to be 40% and the fault of all other parties is found to be 60%, then Claimant shall be allowed to recover 60% of the total damages found. If the Claimant is found to be 50% at fault and all other “parties” (combined) are also found to be 50% at fault, then the Claimant can recover 50% of the total damages. If, on the other hand, Claimant is found to be 51% at fault, and all other “parties” (combined) are found to be 49% at fault, then Claimant is barred from any recovery. *Id.* A party is defined as: (1) Claimants; (2) named Defendants; (3) settling Defendants under Iowa Code §668.7; and (4) Third-Party Defendants. Iowa Code §668.2. Therefore, contributory negligence is no longer a complete defense in Iowa. *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982).

The comparative fault statute also applies to consortium claims by reducing or barring the claim based on comparison of the injured spouse or family member’s fault with the combined fault of all other Defendants. Iowa Code §668.3(1)(b).

Assumption of risk is no longer a complete defense but is preserved as comparative fault. A voluntary and unreasonable assumption of risk is assessed as a percentage of contributory fault. *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 545 (Iowa 1980).

Iowa has enacted statutory rules of the road governing the operation of motor vehicles. See generally at Iowa Code Chapter 321.228, et seq., Iowa Civil Jury Instructions Chapter 600. Violation of any of these duties constitutes negligence per se or comparative fault per se. *Jones v. Blair*, 387 N.W.2d 344 (Iowa 1986). Nevertheless, violation of these rules or common law negligence is subject to legal excuse, including sudden emergency, as a defense to a rule of the road violation. *Thavenet v. Davis*, 589 N.W.2d 233 (Iowa 1999); *Vasconez v. Mills*, 651 N.W.2d 48 (Iowa 2002); Iowa Civil Jury Instruction 600.74 and 600.75.

Comparative fault does not apply to causes of action where the common law does not recognize negligence as a defense. These include:

1. First-party bad faith action. *Kelly v. State Farm Mutual Auto Ins. Co.*, 764 F.Supp 1337 (S.D. Iowa 1991).
2. Fraud actions or intentional torts. *Tratchel v. Essex Corp., Inc.*, 452 N.W.2d 171 (Iowa 1990); *Carson v. Webb*, 486 N.W.2d 278 (Iowa 1992).

3. Comparative fault cannot be used to reduce an award for punitive damages. *Godversen v. Miller*, 439 N.W.2d 206 (Iowa 1989).
4. Dram shop claims. *Jamieson v. Harrison*, 532 N.W.2d 779 (Iowa 1995).
5. Express warranty claims. *Flom v. Stahly*, 569 N.W.2d 135, 140-41 (Iowa 1997).
6. Comparative fault is not a defense where the Defendant alleges another party was the sole proximate cause of the Plaintiff's damages. *Baker v. City of Ottumwa*, 560 N.W.2d 578, 583 (Iowa 1997).
7. The failure to wear a seat belt is not contributory negligence but may be used to reduce Plaintiff's recovery by a maximum of 5% (after reductions for comparative fault) if the evidence establishes that the failure to wear the seatbelt contributed to Plaintiff's injuries. See Iowa Code §321.445(4)(b).

Joint and Several Liability

The underlying basis for joint and several liability in Iowa is that when the negligent acts of two or more defendants proximately cause a plaintiff's injury and injury is indivisible, the Plaintiff may sue the Defendants jointly and severally and recover against one or all. *McDonald v. Robinson*, 207 Iowa 1293, 1295-97, 224 N.W.2d 820, 821-22 (1929).

In Iowa, joint and several liability is closely tied to comparative fault. Iowa's comparative fault statute also modifies the rule of strict joint and several liability for all tortfeasors. Under Iowa Code §668.4 (2004), only tortfeasors who are more than 50% responsible for the total fault of all parties will be jointly and severally liable. However, even a Defendant who has been assessed with more than 50% of the fault is only jointly and severally liable for the economic damages, not the non-economic damages/awards.

Despite the relaxation of the common law rule by Iowa Code §668.4, all parties who act in concert, aiding and abetting each other to cause the negligence, will be held jointly and severally liable, despite each being less than 50% at fault. *Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006), modified and rehearing denied, 2007 Iowa Supp. Lexis 26 (Iowa Feb. 21, 2007). This joint liability also applies to both economic and non-economic damages. *Id.*

For purposes of comparing fault and determining joint and several liability, a joint tortfeasor must meet the definition of a party. A joint tortfeasor dismissed without prejudice before trial and without having received a release, covenant not to compete or similar agreement is not a party for apportionment of fault. *Dumont v. Keota Farmers Coop*, 447 N.W.2d 402, 404-05 (Iowa App. 1989). Similarly, the fault of "unidentified

parties” is not to be compared nor is the fault of parties “severed” before trial. *Payne Plumbing v. Bob McKinness Excavating*, 382 N.W.2d 156, 159 (Iowa 1989); *Baldwin v. City of Waterloo*, 372 N.W.2d 486, 492-93 (Iowa 1985). Obviously this can have the effect of a Defendant who is in reality less than 50% at fault being liable for an entire award.

Release of one tortfeasor does not release all tortfeasors unless the Release provides for such. Iowa Code §668.7; *Community School District of Postville in Allamakee, et al., Counties v. Gordon N., Inc.*, 276 N.W.2d 169, 175 (Iowa 1970). It does, however, discharge claims for contribution. The settling Defendants are still assessed fault in the case and the total award to the Plaintiff against the remaining Defendants is reduced pro rata by the percentage of fault that is assessed against the settling Defendants. Iowa Code §§668.5, 668.3(4) and 668.7. This can cut both ways for the Plaintiff. If the Plaintiff settles with a Defendant and is then successful in minimizing the settling Defendants’ fault at trial so that a lesser percentage of fault is attributable to the settling Defendant at trial than the settlement amount warranted, then the Plaintiff could get more than a full recovery. *Thomas v. Solberg*, 442 N.W.2d 73 (Iowa 1989). For example, if Plaintiff settles with Defendant for \$50,000 but is awarded \$100,000 at trial against the remaining Defendant and fault of only 30% is assessed against the settling Defendant, Plaintiff still recovers \$70,000 (70%) against the remaining Defendant. Thus, Plaintiff’s total recovery is \$120,000. Conversely, if 70% of fault has been attributed to the settling Defendant, Plaintiff would only receive \$80,000 (\$50,000 from settling Defendant and \$30,000 from the trial Defendant for its 30% fault).



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The Kansas comparative negligence statute was enacted effective in 1974. By its plain language, the statute proclaims that contributory negligence shall not be a bar to a plaintiff's recovery, so long as the negligence of the plaintiff is not greater than 49%. When the negligence of the plaintiff is 50% or more, there is no recovery. K.S.A. 60-258a(a). Total recoverable damages are reduced in proportion to the plaintiff's percentage of total fault. The statute specifically sets forth an individual judgment rule: each defendant is "liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of causal negligence attributed to all parties against whom such recovery is allowed." K.S.A. 60-258a(d).

Joint and several liability is not applicable in Kansas subsequent to the enactment of the comparative negligence statute. It no longer exists in actions to which the comparative negligence statute applies. *Brown v. Keill*, 224 Kan. 195, 580 P. 2d. 867 (1978).

There is no right of contribution in negligence actions because the liability of each defendant must be compared, and recover against any specific defendant is limited to that defendant's proportion of the total causal negligence. *Wood v. Groh*, 269 Kan. 420, 720 P. 3d. 1163 (2000). Without joint and several liability, the defendant is never responsible for the fault of other defendants, so there is no reason for any one defendant to have a right of contribution against others for the comparative fault of the others. Nor does Kansas comparative negligence law allow for claims of tort indemnity.

Because each responsible defendant is subject to an individual judgment, and because the judgments are based upon proportionate percentages of fault, no tort indemnity claims are allowed. An important corollary, however, is that non-tort (i.e., contractual) indemnity may be subject to compulsory cross-claim requirements (K.S.A. 60-213 (g) requires that in any comparative negligence action, all cross-claims must be asserted within the same action). In practice, such cross-claims are not typically litigated at the same time as the trial of the negligence action.

The fault of a potentially responsible party may be compared even if that person or entity cannot be joined as a party defendant, is immune from liability for some reason other than the absence of a duty, or is judgment proof. *Brown v. Keill, supra*. For example when statutory immunity would prevent a municipality or highway department from being liable in damages to a plaintiff, a defendant may compare the fault of the absent (phantom) defendant.

In general, the fault of an absent defendant (whether absent by settlement, immunity, or choice of the plaintiff), may be asserted by any defendant. The notion that K.S.A. 60-258a(c) required formal joinder was disavowed in early on. *Miles v. West*, 224 Kan. 284, 580 P. 2d. 876 (1978). The typical practice is for the defendants to simply allege the fault of non-parties. This identification is distinct from third-party practice (K.S.A. 60-214), or

formal joinder (K.S.A. 60-219). The burden of proof is on the defendant asserting the fault of the non-party. *McGraw v. Sanders Co. Plumbing & Heating, Inc.*, 233 Kan. 766, 667 P. 2d. 289 (1983). It is not necessary to join the non-party, but the non-party appears on the verdict form if the burden of proof for a prima facie allegation of fault against the non-party is established by the defendant's proof.

A "one-trial" rule has developed over the course of many years, and as currently interpreted, the statute allows for a plaintiff to bring more than one lawsuit if there is no judicial determination of fault in any action prior to the one at issue. For example, if a plaintiff sues one party to a vehicular collision, and settles with the party defendant, the settlement does not foreclose a later action by the plaintiff against the other party contributing to cause the collision. If the plaintiff goes to trial and a judicial determination of comparative negligence is made, however, plaintiff is foreclosed from pursuing the second defendant or any other potential defendants. As a practical matter, only when a plaintiff has included all parties who might be at fault, can the plaintiff be sure of maximizing the recovery from potentially responsible parties in the event of a trial. A plaintiff may settle with any one of those parties without destroying the right to a trial against the remaining defendants.

Defendants face the possibility that they may not have adequately preserved their right to have their proportion of total fault reduced by the comparative fault of other defendants. *Woodson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d. 1038 (1984). The courts will typically hold the defendants to the claims of comparative fault asserted in the Pretrial Conference Order, and if a settlement occurs after the pretrial conference, inadequate specification of fault may result in a finding of waiver of the affirmative defense of comparative fault.

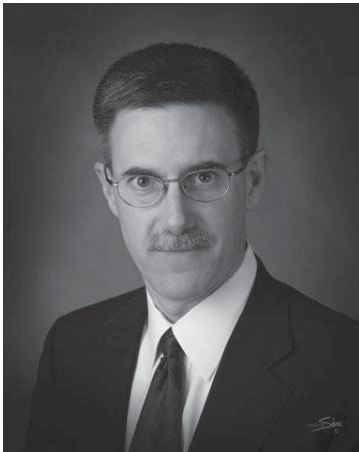
The comparative fault statute applies to product liability claims involving strict liability or implied warranty. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P. 2d. 788 (1980). It applies to statutory violations. *Wilson v. Probst*, 224 Kan. 459, 581 P.2d. 380 (1978). The intentional acts of a third person are not to be compared with the negligent acts of a defendant who has the duty of protecting against the acts of the third person. *Gould v. Taco Bell*, 239 Kan. 564, 722 P. 2d. 511 (1986).

The release of one tortfeasor does not constitute a release of other tortfeasors. Kansas applies a specific identity rule, requiring that in order to release all potential defendants, the potential defendants must be specifically named or identified, or described within the terms of a release. *Mulroy v. Olberding*, 29 Kan. App. 2d. 757, 30 P. 3d. 1050 (2001).

Subrogation may occur in the context of comparative fault actions. An employer has no common law liability, and cannot be sued, but the employer's negligence must be taken into consideration, and will reduce the employee's right of recovery. *Pape v. Kansas Power and Light*, 231 Kan. 441, 647 P. 2d. 320 (1982). The employer likewise suffers a reduction of the subrogation interest, but a percentage of the damage attributed to the negligence of the employer or others for whom the employer can be vicariously liable,

except the plaintiff (because the plaintiff's own fault reduces plaintiff's right of recovery, but not the employer's). *K.S.A. 44-504(d)*.

When applied in cases involving capped damages, comparative fault is applied to the jury's total award for a given level of damages that are subject to the cap. *Adams v. Via Christi Medical Center*, 270 Kan. 824, 19 P. 3d. 132 (2001). Such an application of comparative fault does not reduce the maximum permissible recovery pursuant to the cap. The capped amount would not be reduced unless the product of the cap times the total percentage of defendant's fault was less than \$250,000 (the statutory cap).



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Comparative / Contributory Negligence

Prior to 1984, the Commonwealth of Kentucky subscribed to the traditional defense of contributory negligence as a complete bar to a plaintiff's recovery when such negligence was a substantial factor in the cause of injury. In 1984, *Hilen v. Hays*, 673 S.W.2d 713 (Ky.1984), the Supreme Court of Kentucky first judicially adopted pure comparative fault, stating that "allocating liability proportionate to fault remains 'irresistible to reason and all intelligent notions of fairness'." *Id.* at 718. The Court went on to state:

Comparative negligence is not "no fault," but the direct opposite. It calls for liability for any particular injury in direct proportion to fault. It eliminates a windfall for either claimant or defendant as presently exists in our all-or-nothing situation where sometimes claims are barred by contributory negligence...

Id. Under the pure comparative analysis, factors which had previously absolved a defendant from liability and factors which allowed for a plaintiff to obtain a full recovery, merged into a general formula which allowed for a jury's determination of percentages of fault. Shortly after *Hilen*, the Supreme Court of Kentucky addressed the issue of comparative fault among multiple tortfeasors in *Purential Like Insurance Co. v. Moody*, 696 S.W.2d 503 (Ky.1985). Therein the Court stated:

We held [in *Hilen*] that a plaintiff who is only partially at fault cannot fairly be required to bear the entire loss. It would seem to follow, therefore, that defendant who is only partially at fault in causing an injury should not be required to bear the entire loss, but should, likewise, be chargeable only to the extent of his fault.

Id. at 505. See also *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 27 (Ky.1990).

In 1988, Kentucky enacted KRS 411.182 which codified certain aspects of the common law with respect to allocation of fault in tort actions. KRS 411.182(1) and (3) state in relevant part:

- (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

- (a) The amount of damages each claimant would be entitled to recovery if contributory fault is disregarded; and
- (b) The percentage of the total fault of all parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

...

- (3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

KRS 411.182.

Joint and Several Liability

The adoption of KRS 411.182 signaled the intent of the legislature to eliminate joint and several liability and protect parties from being penalized for the fault of others. As such, liability among joint tortfeasors in negligence cases is no longer joint and several in the Commonwealth of Kentucky. Because liability is several as to each joint tortfeasor, it is necessary to apportion a specific share of the total liability to each party, whether joined in the original Complaint or by third-party Complaint. Thus, the several liability of each joint tortfeasor with respect to the judgment is limited by the extent of his or her fault. *Degener v. Hall Contracting, Corp.*, 27 S.W.3d 775, 786 (Ky. 2000).



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Comparative / Contributory Negligence

Louisiana law follows a comparative negligence regime (comparative fault). While contributory negligence formerly barred recovery to a plaintiff whose negligence contributed to his or her injury, Louisiana Civil Code article 2323 establishes a comparative negligence regime whereby the plaintiff's contributory negligence reduces recovery by his or her portion of the fault.² The defendant bears the burden of pleading and proving the plaintiff was contributorily negligent.³ Article 2324(B), introduced in the 1996 legislative session, "places Louisiana into a 'pure comparative fault' jurisdiction in which the fault of all persons (whether parties or nonparties) is allocated, and each nonintentional tortfeasor is liable *only* for its share of liability."⁴ Notably, a factfinder in a pure comparative fault regime may consider the percentage of liability of "phantom defendants" who are not parties to the suit such as hit-and-run drivers.

Louisiana courts have developed a number of factors to consider in allocating fault.⁵ Illustrative of this application is *Brewer v. J.B. Hunt Transport, Inc.* where the driver of a pickup truck crashed into the back of an 18-wheeler that merged into the pickup's lane of travel and quickly decelerated.⁶ The driver of the pickup truck sued the driver of the 18-wheeler, and the factfinder assigned 60% of the fault to the driver of the 18-wheeler. The remaining 40% of the fault was assigned to the driver of the pickup truck (the plaintiff),

² Louisiana Civil Code article 2323 states:

A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

³ LA. CODE CIV. PROC. art. 1500.

⁴ FRANK L. MARAIST & THOMAS C. GALLIGAN, LOUISIANA TORT LAW § 9-4 (1996).

⁵ In allocating fault, the trier of fact should consider (1) the causal relationship between a person's conduct and the plaintiff's resulting injuries, and (2) the nature of the conduct. In assign the nature of the conduct of the parties, Louisiana courts consider various factors, including: (1) whether the conduct results from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought." See *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985).

⁶ *Brewer v. J.B. Hunt Transport, Inc.*, 2009 WL 700605 (La. App. 1 Cir. 2009).

and while the plaintiff's damages were \$13,177,634.93, the damage award was reduced by the plaintiff's degree of negligence (40%).

Joint and Several Liability

The introduction of a pure comparative fault regime in Louisiana “virtually abolished solidary liability among non-intentional tortfeasors”⁷ Under Civil Code article 2324, for nonintentional tortfeasors, “liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss”⁸ While it was once possible to enforce the entire delictual obligation “against any one of many solidary obligors, regardless of how small the obligor's percentage of fault might have been,” comparative fault necessitates that a “negligently joint tortfeasor cannot be liable for more than his degree of fault and cannot be solidarily liable with any other person for damages attributable to the fault of such other person.”⁹

An example is helpful to illustrate how pure comparative fault works. Driver “A” is sideswiped by a truck driven by driver “B,” who swerved to avoid a car running a red-light driven by driver “C.” Driver “A,” sues driver “B,” but driver “B” claims that driver “A” was contributorily negligent for talking on his phone while driving. Driver “A's” damages are for \$1 million. The factfinder apportions 10% of the fault to distracted driver “A,” 40% to Driver “B,” and 50% to driver “C.” Driver “C” cannot be located. The maximum amount the plaintiff can recover is \$400,000 because Driver “A” was 10% at fault and because he cannot recover from Driver “B” the portion of the negligence attributable to Driver “C.”

⁷ *Touro Infirmary v. Sizeler Architects*, 900 So. 2d 2200, 203 (La. App. 4 Cir. 2005).

⁸ LA. CIV. CODE ANN. art. 2324.

⁹ *Gresham v. Production Management, Inc.*, 868 So. 2d 171, 177 (La. App. 4 Cir. 2004).



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Maine law recognizes the defense of modified imperative fault provides that, if a plaintiff is found to be equally or more at fault than the defendant, she is not entitled to recover anything. 14 MRSA §156. If the plaintiff's negligence is found to be less than the negligence of the defendant, then plaintiff's award may be reduced to reflect her share of fault. 14 MRSA §156. The reduction should be "to the extent considered just and equitable, having regard to the claimant's share in the responsibility for the damages." *Id.* The Maine Supreme Court has held that this language leaves to the discretion of the jury how much to reduce an award; it is not necessary for the jury to reduce it by the same percentage they attributed to the plaintiff for fault. *Jackson v. Frederick's Motor Inn* 418 A.2d 168, 174 (Me. 1980). Therefore, a jury could find that a plaintiff was 40% at fault, but decide to reduce the award by only 20%.

The defendant has the burden of proof regarding the plaintiff's comparative negligence, and the defense must be plead as an affirmative defense. *Herrick v. Thebarge*, 474 A.2d 870 (Me. 1884).

It remains an open question under Maine law as to how the comparative fault provisions apply in multiple defendant actions. The statute does not make clear whether plaintiff's negligence should be compared to each defendant individually or all the defendants together. The question was left open by the court in *Minott v. F.W. Cunningham & Sons*, 413 A.2d 1325, 1328 n.3 (Me.1980) and *Otis Elevator Co. v. F.W. Cunnningham & Sons*, 454, A.2d 335, 336 n.3 (Me. 1983).

Comparative fault will apply in strict liability cases only where the plaintiff voluntarily and unreasonably proceeds to encounter a known danger, but not where plaintiff merely fails to discover or guard against a defect in a product. 14 M.R.S.A. §156; *Austin v. Raybeatos-Manhattan, Inc.*, 471 A.2d 280, 287 288 (Me. 1984). Assumption of the risk has been abolished in Maine except in certain limited circumstances imposed by statute, such as skiers accepting the inherent risks of skiing. *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976).

14 M.R.S.A. §156 imposes joint and several liability on multiple defendants' to an action.



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Comparative / Contributory Negligence

Maryland is one of the four remaining states that follow pure contributory negligence. There is no provision for comparative negligence and no percentage allocation as to liability. If the Plaintiff proves, by a preponderance of the evidence, that the Defendant was negligent, the burden then shifts to the Defendants to establish contributory negligence on the part of the Plaintiff. If the Plaintiff is found to be negligent, no matter how slight, he/she will be completely barred from recovery.

Joint and Several Liability

Maryland follows joint and several liability. Accordingly, if two defendant drivers are both found to have been negligent in a manner which contributed to the plaintiff's injuries, they would both be jointly and severally liable. Accordingly, each defendant would be responsible for paying the entire verdict awarded in favor of any plaintiff. The plaintiff(s) have the choice of pursuing judgment from either or both defendants, and, of course, typically pursues judgment against the "deeper pocket." It is important to note, there is no finding of any "percentage of fault" on the part of the multiple defendants – the jury simply answers "yes" or "no" as to the issue of negligence.

If a plaintiff pursues recovery of a judgment against only one of the liable defendants, that defendant may, in turn, seek "contribution" from any other liable defendants. There is, as such, an automatic right of contribution amongst joint tortfeasors. Such "contribution" is premised upon a pro rata share of the total verdict, based upon the number of liable parties. Of course, even being able to establish a claim for contribution against another defendant does not equate to actually being able to recover money from that defendant. If the adverse vehicle is covered by a minimum limits policy of \$20,000/\$40,000.00/\$15,000.00 in Maryland, while damages can legally be pursued against an individual co-defendant, such as the adverse driver, beyond the insurance policy, the ability to collect in that fashion may be questionable.



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MASSACHUSETTS

By Andrew J. Fay

Comparative / Contributory Negligence

Massachusetts has a modified form of comparative fault, by statute. See Mass. Gen. Laws c. 231B, §§ 1-4. The negligence of the plaintiff as compared to the negligence of all defendants, and the total causal negligence must equal 100%. If the negligence of the plaintiff is 50% or less, then his recovery is reduced pro rata. If his negligence is greater than 50%, plaintiff's recovery is barred. Given the interaction between the comparative negligence statute and Massachusetts rules on joint and several liability, however, a plaintiff could recover his entire judgment (reduced for his comparative negligence) against one defendant whose negligence was less than that of the plaintiff, if the negligence of all defendants was 50% or more. For example, if the plaintiff is 20% at fault, defendant A is 70% at fault, defendant B is 10% at fault, and the damages are \$100,000, then the verdict would be reduced to \$70,000, but that amount could be recovered solely against defendant B. Defendant B would then have an action for contribution against A, but could recover only \$35,000, notwithstanding B's greater degree of fault.

Additionally, comparative fault is not recognized with respect to counts based on breach of warranty against product manufacturers or designers. Further, at trial the fault of non-parties, or parties who have settled, cannot be part of the 100% calculation.

Joint and Several Liability

Under Massachusetts law, when two or more tortfeasors contribute to an injury, they are jointly and severally liable. That is, the plaintiff, at his sole option, can recover the entire judgment against any one of the defendants, i.e. the one with the deepest pocket. A defendant who pays more than his pro rata share may seek contribution against the other responsible defendants. A defendant who discharges "the common liability" by settling also has an action for contribution against those whose liability he has discharged. The contribution statute is also a shield, as well as a sword. A release "given in good faith" to a settling defendant is a defense against an action for contribution by any other tortfeasor. It is significant that the contribution scheme is strictly pro rata, and without regard to degrees of fault.



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MICHIGAN

By Ronald C. Wernette, Jr. and Nicholas G. Even

Comparative / Contributory Negligence

In 1979, Michigan common law abandoned contributory negligence and replaced it with a rule of pure comparative negligence, reducing a plaintiff's recovery to the extent that plaintiff's negligence contributed to the injury. *Placek v Sterling Hts.*, 405 Mich 638, 650, 275 NW2d 511 (1979). In 1996, Michigan enacted tort reform and created a statutory modified comparative fault scheme, as well as a related non-party fault scheme.

Statutory Comparative Fault

Under the Act, the trier of fact must determine the percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability, in any action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than one person (including third-party defendants and non-parties). MCL 600.2957(1); MCL 600.6304(1). When a plaintiff is assigned a percentage of fault, the total judgment amount is reduced by an amount equal to the percentage of that plaintiff's fault. MCL 600.2959; MCL 600.6306(3).

Statutory exceptions to the general rule of pure comparative fault are:

- A plaintiff is barred from recovering *non-economic* damages if fault is found to be greater than 50%. MCL 600.2959 (generally); MCL 500.3135(2)(b) (motor vehicle accident claims).
- A plaintiff is barred from recovering *any* damages if found to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability was found to be greater than 50% at fault. MCL 600.2955a.
- In motor vehicle accident cases, a plaintiff is barred from recovering *non-economic* damages if plaintiff was operating his or her own vehicle at the time the injury occurred and did not have in effect for that vehicle the mandatory no-fault insurance required by MCL 500.3101. MCL 500.3135(2)(c).

Note: Comparative negligence is an affirmative defense which must be pled in a defendant's first responsive pleading to be preserved. *Riddle v McLouth Steel Products Corp.*, 440 Mich 85, 98, 485 NW2d 676 (1992).

Statutory Non-Party Fault

MCL 600.2957, MCL 600.6304, and MCR 2.112(K) require that fault must be allocated by a fact-finder to all parties and non-parties involved in an action provided certain procedural requirements are satisfied. Generally:

- A defendant must file a notice of non-party fault within 91 days of filing its first responsive pleading. MCR 2.112(K)(3)(c);
- The notice must contain a designation of each non-party's name and last known address, and a brief statement of the basis for believing the non-party is at fault. MCR 2.112(K)(3)(b). Only the best identification possible of the non-party is required, even if not specifically identifiable by name. *Rinke v Potrzebowski*, 254 Mich App 411; 657 NW2d 169 (2003);
- A party "served with a notice" may file a motion seeking leave to file an amended pleading within 91 days of service of the notice of non-party fault and the court shall grant leave to serve an amended pleading stating a claim(s) against the non-party. MCL 600.2957; *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000);
- A cause of action added following the filing of a notice of non-party is not barred by the applicable statute of limitations unless it would have been barred by the statute of limitations at the time of the filing of the original action. *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2007); and
- For claims based on negligence, proof that a non-party owed plaintiff a legal duty is required before fault may be allocated to the non-party. *Romain v Frankenmuth Mut Ins Co*, No. 135546, __ NW2d __, 2009 WL 838129 (Mich March 31, 2009). A trier of fact may not apportion fault to a co-defendant that was dismissed, or to a non-party, if the court has determined that no legal duty was owed to the plaintiff. *Id.*

Joint and Several Liability

Michigan has *generally abolished* joint and several liability. MCL 600.2956; MCL 600.6304(4). With few exceptions, in any action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant is several only and it not joint. This is consistent with Michigan's statutory comparative negligence and non-party fault scheme.

Statutory exceptions to the general rule of several liability only, in which a defendant is still jointly liable, are:

- An employer's vicarious liability for an employee's act or omission. MCL 2956.
- Medical malpractice claims in which the plaintiff is determined to be without fault. MCL 600.6304(6)(a).
- Where the defendant has been convicted of a crime, an element of which is gross negligence. MCL 600.6312(a); MCL 600.6304(4).
- Where the defendant has been convicted of a crime involving the use of alcohol or a controlled substance and that is a violation of certain other Michigan statutes. MCL 600.6312(b); MCL 600.6304(4).



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Comparative / Contributory Negligence

Under Minnesota's comparative fault statute, contributory negligence does not bar a recovery. A plaintiff can recover from anyone whose fault is equal to or greater than his or her own fault. Minnesota Statutes, § 604.01, subd. 1. If recovery is allowed, the plaintiff's damages are reduced by the percentage of fault attributed to the plaintiff. *Id.* A plaintiff who is 50% at fault can recover from a defendant who is 50% at fault, but a plaintiff who is 50% at fault cannot recover when there are two defendants, each less than 50% at fault. *Id.*

Joint and Several Liability

Minnesota recently enacted significant modifications to its joint and several liability statute. The state's modified system applies to losses occurring on or after August 1, 2003. Under the state's new system, defendants who are 50% at fault or less are not jointly and severally liable with other defendants. Minnesota Statutes, § 604.02, subd. 1. A defendant who is 50% at fault or less now only has to pay for his or her percentage of fault. *Id.* Joint and several liability applies in the following situations: (1) a defendant is greater than 50% at fault, (2) a defendant is acting in a common scheme or plan, or (3) a defendant commits an intentional tort. *Id.* Joint and several liability also applies to certain environmental torts. *Id.* The fault of all parties to a transaction, including settling parties and parties not named in the lawsuit, is determined by the trier of fact. *Lines v. Ryan*, 272 N.W.2d 896, 902-903 (Minn. 1978). For losses occurring prior to August 1, 2003, Minnesota former joint and several liability statute provided that if a defendant was found to be more than 15% at fault for an injury, it could be liable for 100% of the damages if other defendants were unable to pay their share of a judgment. If a defendant was found to be 15% or less at fault, it could be held liable for four (4) times the amount of their fault if other defendants are unable to pay.



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Comparative / Contributory Negligence

Mississippi is a pure comparative negligence state.¹⁰ *Burton ex rel. Bradford v. Barnett*, 615 So. 2d 580, 582 (Miss. 1993). A plaintiff, regardless of his negligence, may still recover from a defendant whose negligence contributed to his injuries. His damages, however, are diminished proportionately. Miss. Code Ann. § 11-7-15 (Rev. 2004); *Coho Resources, Inc. v. Chapman*, 913 So. 2d 899 (Miss. 2005), citing *Blackmon v. Payne*, 510 So. 2d 483, 486 (Miss. 1987). For instance, if negligence on the part of the plaintiff was ninety percent (90%) and ten percent (10%) on the part of the defendant, the plaintiff would be entitled to theoretically recover that ten percent. *Coho Resources, Inc.*, 913 So. 2d at 911, citing *Burton ex rel. Bradford v. Barnett*, 615 So. 2d 580, 582 (Miss. 1993). “Mississippi’s comparative negligence statute speaks only in terms of reducing recovery in proportion to the fault of the injured party.”¹¹ *Hammond v. Shalala*, No. Civ. A. 2:98CV39-P-B, 2001 WL 640837 at *1 (N.D. Miss. April 28, 2000).

Comparative negligence is an affirmative defense and the defendant bears the burden of providing proof sufficient to establish fault attributable to a third party. *Travelers Cas. and Sur. Co. of America v. Ernst & Young LLP*, 542 F.3d 475 (Miss. 2008). In order to prove the percentage of fault that should be allocated to the plaintiff, the defendant needs to prove that the negligent acts of the plaintiff proximately caused some of his or her injuries. If there is a loss of consortium claim brought by a spouse, then any contributory negligence on the part of his or her injured spouse would serve to reduce the amount of damages the spouse could recover by that same percentage on the loss of consortium claim. *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988).

Questions of negligence and contributory negligence are for the jury to determine and the jury must diminish any damages allowed in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is sought. Miss.

¹⁰ Mississippi Code Section 11-7-15 (Rev. 2004) states:

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

¹¹ Mississippi Code Section 11-7-15 is not applicable if the negligence of the injured party is the sole proximate cause of the injuries, or where the sole proximate cause of the accident is the defendant’s negligence. *Salster v. Singer Sewing Mach. Co.*, 361 F. Supp. 1056 (N.D. Miss. 1973) (decedent was sole proximate cause of her death when she drove her vehicle into wrong lane in rainy weather conditions); *Stewart v. Kroger Grocery Co.*, 21 So. 2d 912 (Miss. 1945) (employee who was injured at store by swinging door was sole proximate cause of her injuries).

Code Ann. § 11-7-17. A trial court's failure to instruct the jury on the law of comparative negligence when both the plaintiff and defendant are negligent is grounds for a new trial. *Bradford v. Barnett*, 615 So. 2d 580 (Miss. 1993).

Joint and Several Liability

Mississippi applies comparative fault principles and each defendant is generally held liable for only the percentage of harm allocated to him. Miss. Code Ann. § 85-5-7 (2); *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 116-17 (Miss. 2003) (stating that under Mississippi Code Section 85-5-7, trier of fact should allocate fault to each party alleged to be at fault). Fault is defined as:

An act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn.

Miss. Code Ann. § 85-5-7 (1) (Supp. 2008). Allocation of fault by percentage among defendants applies both with respect to establishing liability of joint tortfeasors to the plaintiff and to determining contribution between joint tortfeasors. Miss. Code Ann. § 85-5-7 (3) and (4). Mississippi law limits joint and several liability for joint tortfeasors to cases involving defendants who intentionally “pursue a common plan or design to commit a tortious act.” Miss Code Ann. § 85-5-7 (4) (Supp. 2008); *Causey v. Sanders*, 998 So. 2d 393 (Miss. 2008).¹²

¹² Mississippi law relating to joint and several liability has changed significantly in the last twenty years. See Miss. Code Ann. § 85-5-7, credits Laws 1989, Ch. 311, § 1, eff. July 1, 1989. Amended by Laws 2002, 3rd Ex. Sess., Ch. 2, §4, effective January 1, 2003; Laws 2002 3rd Ex. Sess, Ch. 4, § 3, effective January 1, 2003; Laws 2004, 1st Ex. Sess., Ch. 1, § 6, eff. September 1, 2004.



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MISSOURI

By Matthew Shorey

Comparative / Contributory Negligence

Missouri is a pure comparative fault state. A plaintiff's negligence will not bar recovery but will instead merely reduce her recovery by the percentage of fault attributed to her own negligence. Accordingly, a plaintiff can recover damages even if he or she is more than 50% at fault for his or her injury. Fault is apportioned only among those at trial, and the total of all fault percentages must equal 100%.

Joint and Several Liability

Missouri applies joint and several liability. However, joint and several liability applies only to a defendant who is at least 51% at fault. In such circumstances, the defendant is jointly and severally liable for the amount of the judgment rendered against all defendants. Defendants that are less than 51% at fault are only liable for damages in proportion to the percentage of fault attributed to them. However, a defendant may nevertheless be liable for the fault of another defendant in federal Employers' Liability Act claims or if the other defendant was its employee.

If a defendant pays more than its proportionate share of the total liability, it is entitled to contribution from defendants who have paid less than their proportionate shares. A tortfeasor who settles with a plaintiff in good faith is discharged from contribution liability to any other tortfeasors.



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Comparative / Contributory Negligence

Montana is a comparative negligence state. Under Montana law, a plaintiff's contributory negligence is a defense to negligence, but it does not completely bar the plaintiff's recovery. *Peterson v. Eichhorn*, 344 Mont. 540, ¶ 31, 189 P.3d 615 (2008) (citing Mont. Code Ann. § 27-1-702). The law requires awards to be diminished in proportion to the percentage of negligence attributable to the person recovering so long as the plaintiff's negligence does not exceed 50 percent. *Id.*, *Payne v. Knutson*, 323 Mont. 165, ¶ 18, 99 P.3d 200 (2004) (holding it was not error to bar recovery and instruct the jury not to attribute fault to defendants where jury concluded plaintiff was 51 percent or more negligent). The applicable statute provides:

Contributory negligence does not bar recovery in an action by a person or the person's legal representative to recover damages for negligence resulting in death or injury to the person or property if the contributory negligence was not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought, but any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering.

Mont. Code Ann. § 27-1-702.

Contributory negligence may be considered even in negligence *per se* claims and in claims involving a nondelegable duty. *Nelson v. Shumaker Trucking and Excavating Contractors, Inc.*, 347 Mont. 1, ¶¶ 67-71, 196 P.3d 1265 (2008) (contributory negligence properly considered in workplace safety claim). Contributory negligence is not a defense however, in strict liability actions. Mont. Code Ann. § 27-1-719. And if the plaintiff is awarded punitive damages, that award cannot be reduced by the percentage of plaintiff's contributory negligence. *Shahrokhfar v. St. Farm Mut. Auto. Ins. Co.*, 194 Mont 76, 84, 634 P.2d 653, 658-59 (1981).

When contributory negligence is alleged, Montana allows presentation of a multiple-cause jury instruction. *Neal v. Nelson*, 347 Mont. 431, ¶ 32, 198 P.3d 819 (2008). Further, "even when a defendant is negligent as a matter of law, the issue of contributory negligence on the part of the plaintiff and the degree of comparative negligence, if any, is normally an issue for the jury or fact-finder to resolve." *Peterson v. Eichhorn*, 159 P.3d at ¶ 32.

Joint and Several Liability

Montana's joint and several liability law has been the subject of a long dispute between the Montana Legislature and the Montana Supreme Court. The legislature has tried to allow juries to apportion fault to non-parties, including defendants who settled, but the Court has struck down as unconstitutional three versions of the legislature's joint and several liability laws. *See* annotations to Mont. Code Ann. § 27-1-703. The legislature's latest version of the statute was adopted in 1997. The legislature enacted both a "temporary" provision that will remain in force until declared unconstitutional, and a backup or contingent provision that becomes effective if the temporary provision is declared unconstitutional. *Id.* The contingent provision is relatively straightforward: "Each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of." Mont. Code Ann. § 27-1-703 (contingent version).

The current (temporary) statute is not so simple. It imposes joint and several liability only on parties who are determined to be more than 50% negligent, but requires the defendant to join any party to whom liability is attributed and establishes detailed procedures for the joinder process. Mont. Code Ann. § 27-1-703. The statute places the burden of establishing the negligence of third parties, and of proving the injury is divisible on the defendant. *Truman v. Montana Eleventh Judicial Dist.*, 315 Mont. 165, ¶ 33, 68 P.3d 654 (2003). If the injury is indivisible, the defendant is liable for all the damages. *Id.* at ¶ 32.

In practical terms, the statute requires a jury verdict form to list the plaintiffs if they were allegedly negligent, all defendants, all parties with whom the plaintiff has settled, and all parties released from liability. Mont. Code Ann. § 27-1-703(4), (6). The jury then determines the percentage of fault of each person or entity listed on the verdict form. *Id.* However, the trier of fact may not consider the negligence of parties who are immune from liability, parties who are not subject to the state's jurisdiction, and parties who could have been but were not named as third-party defendants when determining the percentage of fault. Mont. Code Ann. § 27-1-703(6)(c)(i)-(iii). The Montana Supreme Court has made clear that presentation of evidence regarding the alleged negligence of an unnamed defendant is prohibited and the jury may not consider the negligence of an unnamed party. *Truman v. Montana Eleventh Judicial Dist.*, 315 Mont. 165, ¶¶ 22, 31, 68 P.3d 654 (2003).

Once the jury renders a verdict, a defendant has a right of contribution from other defendants, but has no right to contribution from settled parties. *Durden v. Hydro Flame Corp.*, 295 Mont. 318, ¶¶ 24, 26, 52, 983 P.2d 943 (2004). Moreover, the right of contribution is proportionate only to the percentage of fault attributable to the contributing party. *Id.* at ¶ 52.



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NEBRASKA

By Nathan Meisgeier and Edgar M. Elliott, IV

Comparative / Contributory Negligence

Nebraska's comparative negligence law is based on statute - Nebraska Revised Statute § 25-21,185.09 - which provides that "any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence."

The adoption of comparative negligence, however, did not abrogate the defense of assumption of risk. Assumption of risk is still an affirmative defense under Nebraska law. According to Nebraska statute, "assumption of risk shall mean that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger." Neb. Rev. Stat. § 25-21,185.12.

This statutory definition of assumption of the risk is reinforced by case law. Before the defense of assumption of risk can be submitted to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

Joint and Several Liability

Joint and Several liability exists in Nebraska, but in a modified form. Distinctions are drawn between economic and non-economic damages and whether the defendants were acting as part of a "common enterprise." Thus, according to Nebraska statute, "in an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and non-economic damages shall be joint and several." Neb. Rev. Stat. § 25-21,185.10 (emphasis added).

"In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount." Neb. Rev. Stat. § 25-21,185.10 (emphasis added).

In order for defendants to be jointly and severally liable based on a joint enterprise theory, the plaintiff must prove, among other things, that the defendants shared a common pecuniary interest. *Bahrs v. R M B R Wheels, Inc.*, 6 Neb. App. 354, 574 N.W.2d 524 (1998). Under tort law, where joint tort-feasors do not act as part of a common enterprise or plan, this section alters the common law by limiting a plaintiff's recovery of non-economic damages from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).



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In Nevada, defendants are jointly and severally liable for damages in cases where comparative fault is not raised as an affirmative defense. However, in cases where comparative fault is asserted as a defense, NRS 41.141 provides specific guidance for apportioning liability. Pursuant to NRS 41.141(1), a plaintiff may only recover damages if it is determined that the plaintiff's comparative fault in causing the injury does not exceed the combined negligence of the defendant(s). Specifically, if the finder of fact determines that a plaintiff was 50% or less at fault, the plaintiff may still recover; however, any damage award is subsequently reduced by the percentage of the plaintiff's comparative fault. If the finder of fact determines that the plaintiff was 51% or more at fault, the plaintiff is barred from any recovery whatsoever.

As noted above, when comparative fault is asserted as a defense, defendants are only liable for their own percentages of negligence. Exceptions to this general rule include actions based upon: (1) strict liability, (2) intentional torts, (3) discharge of toxic or hazardous substances, (4) the concerted acts of the defendants, or (5) an injury resulting from a product which is manufactured, distributed, sold or used in the state. Nev. Rev. Stat. Ann. § 41.141(5).

These five categories are generally self-explanatory. With respect to the concerted acts of the defendants exception, the defendants must have agreed to engage in conduct that is inherently dangerous or poses a substantial risk of harm to others. *See GES, Inc. v. Corbitt*, 21 P.3d 11 (Nev. 2001). While mere joint negligence or an agreement to act jointly does not suffice, the requirement is met when the defendants agree to engage in an inherently dangerous activity, with a known risk of harm, that could lead to the commission of a tort. *See Id.* at 15.

Finally, in cases with multiple defendants, if a defendant settles with the plaintiff before the entry of judgment, the comparative fault of the settling defendant and the amount of the settlement may not be admitted into evidence or considered by the jury. Nev. Rev. Stat. Ann. § 41.141(3). Instead, the court deducts the amount of the previous settlement from the net sum otherwise recoverable by the plaintiff pursuant to general and special verdicts. *Id.* However, this does not preclude a non-settling defendant from attempting to establish that either no negligence occurred, or that the entire responsibility for the plaintiff's injuries rested with non-parties, including those who have separately settled with the plaintiff. *See Banks ex rel. Banks v. Sunrise Hosp.*, 102 P.3d 52 (Nev. 2004).



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NEW HAMPSHIRE

By Marc R. Scheer & Gregory M. Sargent

Comparative / Contributory Negligence

Under New Hampshire's Comparative Negligence Law, the plaintiff may recover only if the plaintiff's fault is not greater than that of the defendant or, in cases in which there is more than one defendant, the defendants in the aggregate. RSA 507:7-d. A plaintiff 51% or more legally at fault for an accident cannot recover damages arising out of the accident. A plaintiff 50% or less legally at fault can recover damages - but only in proportion to the amount of defendant's legal harm. The defendant carries the burden of proof in a comparative negligence claim and must prove that the plaintiff failed to exercise care and that such failure was a substantial factor in bringing about the injury.

Joint and Several Liability

New Hampshire applies a modified joint and several liability. RSA 507:7-e. The statute provides that in all actions the Court shall enter judgment against each party liable on the basis of joint and several liability, but any party less than 50% liable is only severally liable, not jointly. Such a party is liable only for the damages attributable to him. Any party, however, that knowingly pursues or takes active part in a common plan or design resulting the harm, is subject to joint and several liability even if they are less than 50% at fault. Upon motion, the Court will determine whether all or part of a defendant's proportionate share of the judgment is uncollectible. The Court reallocates such amounts to any defendant 50% or more at fault.



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NEW JERSEY

By Roy Alan Cohen and Todd C. Richheimer

Comparative / Contributory Negligence

New Jersey has adopted a modified form of the comparative negligence rule. In accordance with the New Jersey Comparative Negligence Act, N.J.S.A. 2A:15-5.1 et seq., a plaintiff may recover all damages provided his/her negligence is not greater than the party or parties against whom recovery is sought, that is not greater than 50%. However, if the plaintiff's negligence is 50% or less, then his/her damages will be reduced by the plaintiff's allocated negligence.

Joint and Several Liability

Under the New Jersey Joint Tortfeasor Act, N.J.S.A. § 2A:15-5.3(a), joint and several liability is available to a plaintiff against a defendant. The law allows a plaintiff to recover the full amount of damages from any joint tortfeasor determined to be 60% or more responsible for the total damages. Any party found to be less than 60% responsible for the total damages is only responsible for the percentage of damages attributable to that party. *N.J.S.A. 2A:15-5.3(c)* In the event a party is required to pay more than his share of the damage award in accordance with the Joint Tortfeasors Act, he/she may seek contribution from the other joint tortfeasors for the excess over his/her pro rata share. *N.J.S.A. 2A:53A-3.*



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Comparative / Contributory Negligence

New Mexico has adopted the theory of pure comparative negligence. The plaintiff or person claiming damages is entitled to recover from each and every defendant the percentage of fault assessed against that defendant regardless of the percentage of fault assessed against the person making the claim. In cases involving a counter-claim, this may create a situation where all parties make a recovery if all parties are likewise deemed to be comparatively at fault.

The fault of parties or persons who are not parties to the lawsuit may also be compared. Thus, a party that has settled may appear on the verdict form and fault may be assessed against them but there is no recovery that will be effectively made. If a party seeking recovery fails to name a party as a defendant and it is determined that the trier of fact that the unnamed party bears some fault, they will also be listed on the verdict form but no actual recovery may be made from them. If a party is immune from the claim being asserted, such as sovereign immunity or a statute of limitations which has run, they may still be listed on the verdict but there will be no recovery against that entity and the person making the claim simply loses that percentage of the overall damage verdict. The defendant, or entity against whom damages are being claims, is free to present evidence as to the fault of non-parties without making a claim (for example a cross-claim) against non-named entities. Although there is case law in New Mexico that indicates a defendant may name an otherwise unnamed party, it is more common to follow the strict rationale of third-party practice by not naming a party unless there is an indemnity claim or a claim that the unnamed party may be liable to the defendant for all or party of the claims asserted by plaintiff.

New Mexico has allows the theory of comparative fault to include criminal activities. If one of the parties alleged to have damaged the party claiming damages did so as part of a criminal activity, that would be compared to the fault of parties who may merely be negligent.

The New Mexico courts have also allowed comparative fault in product liability cases. Thus, a claimant's negligence may be compared to the products liability cause of action asserted against a defendant. This is true if there are multiple defendants as well. The finder of fact compares the fault of the defendants whether it be negligence, criminal activity, or products liability, assigns a percentage to each.

In summary, the New Mexico Appellate Courts have been quick to apply comparative fault to virtually every situation involving multiple parties. The right of contribution among tort-feasors exists when a joint tort-feasor, defined as a person jointly or severally liable in tort for the same injury to personal property, until the one tort-feasor has paid the common liability or more than its pro-rata share thereof of any settlement or judgment

and has procured the release of the non-paying tort-feasor. (New Mexico Statutes Annotated 41-3-2).

Joint and Several Liability

The New Mexico law regarding several liability is embodied in New Mexico Statutes 41-3A-1. There are four situations that the statute states will give rise to several liability. First, to any person or persons who acted with the intention of inflicting injury or damages. Second, to persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons. Third, to any persons strictly liable for the manufacture and sale of a defective product but only to that portion of the total liability attributed to those persons. Fourth, the catch-all, to situations not covered by any of the foregoing and having a sound basis in public policy. The catch-all portion of the Statute (number four) is seldom, if ever, used so that several liability is not a factor except in cases enumerated above, one, two and three.



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NEW YORK

By David Y. Loh

Comparative / Contributory Negligence

New York is a pure comparative negligence jurisdiction. The rule on contributory negligence and assumption of the risk is codified in N.Y. C.P.L.R. Sec. 1411. New York also recognizes the right of apportionment among tortfeasors based upon their actual degrees of fault as determined by the factfinder. See N.Y. C.P.L.R. Sec. 1401.

Joint and Several Liability

New York allows joint and several liability which means that one liable party may be held responsible for the entire amount of provable damages caused by all liable parties. Said in another way, the plaintiff is free to pick and chose the tortfeasors against whom she wishes to proceed and/or against whom she wishes to enforce a judgment. See *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 556, 583 N.Y.S.2d 957, 964 (1992).

N.Y. C.P.L.R. 1601 provides for one exception to this rule. In a personal injury claim if a party is 50% or less liable, then he is severally liable for plaintiff's non-economic damages. In other words, that party may be held responsible for plaintiff's non-economic damages only in proportion to their respective percentages of fault.

Traditional joint and several liability however applies to claims for property damage and economic loss.

One other exception is N.Y. General Obligations Sec. 15-108 which allows a pre-judgment settling tortfeasor to limit her damages, provided the terms and conditions of the release and covenant not to sue to provide, without the concern that a non-settling tortfeasor might pursue a common law right of contribution. The settling tortfeasor would be required to waive its right of contribution against a non-settling tortfeasor. Generally speaking, the amount of plaintiff's recovery will reduced by the amount of money recovered from the settling tortfeasor(s), but not the settling tortfeasor(s) equitable share of the damages. See *Ott v. Barash*, 109 A.D.2d 254, 491 N.Y.S.2d 661 (2nd Dept. 1985). This exception, generally speaking, does not apply to indemnity claims between tortfeasors, especially a contractual right of indemnity. See, e.g., *Monaghan v. SZS 33 Associates*, 73 F.3d 1276 (2nd Cir. 1996).



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NORTH CAROLINA

*By Robert D. Moseley, Jr., D. Erik Albright
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Comparative / Contributory Negligence

As of April, 2009, North Carolina continues to recognize the doctrine of contributory negligence. However, the North Carolina legislature is considering in its current session several bills that would abolish contributory negligence and replace it with a version of comparative negligence and thus, by the time this is printed, the current system may have changed.

Where applicable, the defense of contributory negligence is a complete bar to recovery by a plaintiff. *See Hall v. K-Mart Corp.*, 136 N.C. App. 839, 525 S.E.2d 837 (2000). To determine if the evidence presented at trial justifies a court's submission of a contributory negligence jury instruction, North Carolina courts consider a "defendant's evidence in the light most favorable to [him], with all reasonable inferences therefrom, and disregard plaintiff's evidence except to the extent favorable to defendant." *Radford v. Norris*, 74 N.C.App. 87, 88, 327 S.E.2d 620, 621, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985). "Evidence which merely raises a conjecture as to plaintiff's negligence will not support an instruction." *Id.* Because negligence actions often involve questions of due care and reasonableness, determinations of negligence are especially appropriate for a jury. *Id.* at 88-89, 327 S.E.2d at 621-22. Therefore, fairness and judicial economy suggest that these issues be submitted to the jury in "borderline cases." *Id.* at 89, 327 S.E.2d at 622. Jury instructions on contributory negligence may be appropriate even in instances when the defendant is charged with the violation of a statute or negligence *per se.* *Brower v. Robert Chappell & Assoc. Inc.*, 74 N.C.App. 317, 320, 328 S.E.2d 45, 47, *disc. review denied*, 314 N.C. 537, 335 S.E.2d 313 (1985).

Additionally, while issues of negligence and contributory negligence are rarely appropriate for summary judgment, where the evidence establishes as a matter of law that the defendant was not negligent or that the plaintiff was contributorily negligent, then summary judgment for a defendant is proper. *Stansfield v. Mahowsky*, 46 N.C.App. 829, 266 S.E.2d 28, *disc. rev. denied*, 301 N.C. 96 (1980). Further, for a defendant to survive a plaintiff's motion for a directed verdict on the issue of contributory negligence, the defendant must present evidence of "(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Whisnant v. Herrera*, 166 N.C.App. 719, 722, 603 S.E.2d 847, 850 (2004).

Gross Negligence and "Last Clear Chance" Defeat Contributory Negligence

Aggravated conduct can eliminate this defense and contributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries. *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971). Further, North Carolina courts may apply the doctrine of "last clear chance" which is a rule of proximate cause that allows a contributorily

negligent plaintiff to recover where “[the] defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between [the] plaintiff's negligence and the injury and becomes the direct and proximate cause” of the accident. *Scott v. Darden*, 259 N.C. 167, 171, 130 S.E.2d 42, 45 (1963). To succeed on a claim of last clear chance, the contributorily negligent plaintiff must prove: (1) that the plaintiff negligently placed himself in a position of helpless peril; (2) that the defendant knew or, by the exercise of reasonable care, should have discovered the plaintiff's perilous position and his incapacity to escape from it; (3) that the defendant had the time and ability to avoid the injury by the exercise of reasonable care; (4) that the defendant negligently failed to use available time and means to avoid injury to the plaintiff and (5) as a result, the plaintiff was injured. *Parker v. Willis*, 167 N.C.App. 625, 627, 606 S.E.2d 184, 186 (2004), *disc. review denied*, 359 N.C. 411, 612 S.E.2d 322 (2005). The question of last clear chance “must be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine.” *Bowden v. Bell*, 116 N.C.App. 64, 68, 446 S.E.2d 816, 819 (1994).

Joint and Several Liability

“Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury.” *Bowen v. Iowa Nat. Mut. Ins. Co.*, 270 N.C. 486, 492, 155 S.E.2d 238, 243 (1967) (internal citations omitted). Where the separate and distinct negligence of two or more parties combines to proximately cause an injury, each party may be held liable, and an action may be brought against one or all as joint-tortfeasors. *Young v. Baltimore & O. R. Co.*, 266 N.C. 458, 465, 146 S.E.2d 441, 446 (1966). In determining whether or not parties are joint-tortfeasors, the focus is on whether the injury—not action of the parties—is indivisible. *Ipock v. Gilmore*, 73 N.C. App. 182, 186, 326 S.E.2d 271, 275 (1985).

Derivative Liability

Where a claim is based solely on the doctrine of *respondeat superior* or some other theory of derivative or vicarious liability, the agent and principal are not joint-tortfeasors, and are not jointly and severally liable. *Bowen v. Iowa Nat. Mut. Ins. Co.*, 270 N.C. 486, 492, 155 S.E.2d 238, 243 (1967).

Release/Contribution Among Joint-Tortfeasors

“[A] claimant may obtain judgments against any and all joint tort-feasors for a single injury or wrongful death, but the claimant may have only one satisfaction.” *Akins v. Mission St. Joseph's Health System, Inc.*, 667 S.E.2d 255 (N.C.App. 2008) (internal citations omitted). The recovery of judgment against one tortfeasor for injury or wrongful death does not of itself discharge the other tortfeasors from liability to the claimant. The satisfaction of the judgment discharges the other tortfeasors from liability

to the claimant for the same injury or wrongful death, but does not impair any right of contribution. N.C. Gen. Stat. § 1B-3(e).



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NORTH DAKOTA

By Tamara L. Novotny

Comparative / Contributory Negligence

North Dakota has a modified comparative fault statute which provides that, “[c]ontributory fault does not bar recovery in any action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury . . .” N.D.C.C. §32-03.2-02. In other words, if a plaintiff is deemed 50% at fault, such that their fault is equal to the fault of the defendant(s), the plaintiff will recover nothing. *See Andes v. Brogdin and PC Transport, Inc.*, 651 N.W.2d 692 (N.D. 2002) (affirming dismissal of plaintiff truck driver’s lawsuit because his fault was equal to defendant’s fault where he proceeded to drive close to an overturned trailer despite seeing a gas cloud from one-half mile away and then jack-knifed his trailer while attempting to back up in a panic).

A plaintiff who manages to stay below the 50% mark, however, will still have their ultimate recovery reduced in proportion to the amount of fault attributed to them. *See* N.D.C.C. §32-03.2-02. When properly requested, the court must instruct the jury as to the effect its comparative fault determinations will have on damages, unless it is determined that the instruction would confuse or mislead the jury. *See Sollin v. Wangler*, 627 N.W.2d 159 (N.D. 2001) (considering issue in case where operator of tractor-loader was deemed equally at fault to plaintiff injured when straw bale fell upon him).

Joint and Several Liability

The liability of defendants, in turn, is generally several. *See* N.D.C.C. §32-03.2-20. That is, each defendant is liable only for the amount of damages attributable to their percentage of fault. *Id.* There are, however, three categories which give rise to joint liability: persons who act in concert in committing a tortious act; persons who aid or encourage the tortious act; or persons who ratify or adopt the tortuous act for their benefit. *Id.* *See also Hurt v. Freeland*, 589 N.W.2d 551 (N.D. 1999).

North Dakota’s modified comparative fault/several liability statute has been upheld as constitutional, even though it can limit a plaintiff’s recovery if a defendant is judgment proof or lacks insurance. *See e.g. Kavadas v. Lorenzen*, 448 N.W.2d 219 (N.D. 1989) (considering constitutionality in a case where the defendant deemed 75% at fault lacked insurance). However, while a defendant’s share of the verdict will usually be limited to its percentage of fault, all defendants can be held jointly and severally liable for costs and disbursements. *Id.* (explaining a trial court may award costs and disbursements based upon the percentage of fault attributed to the parties but is not obligated to do so).

North Dakota’s adoption of several liability has also been held to preclude a defendant from maintaining a third-party claim for contribution against another potential tortfeasor. In *Target Stores v. Automated Maintenance Services, Inc.*, 492 N.W.2d 899 (N.D. 1992),

a fire occurred in a Target store while cleaners were using propane-powered buffers to clean the floors. Target brought suit only against the cleaning company, which then asserted a third-party action against the manufacturer of the buffer. This third-party claim, however, was dismissed since, given North Dakota's several liability statute, the cleaner could never be liable for more than its percentage of fault. The court therefore found no basis for asserting a contribution claim in a lawsuit where the plaintiff did not assert a direct claim against the manufacturer.



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Contributory / Comparative Negligence

For causes of action accruing on or after April 9, 2003, contributory fault in Ohio may be established as an affirmative defense to a tort claim pursuant to R.C. §§ 2315.32 - 2315.36. The contributory fault of the plaintiff does not bar the plaintiff from recovery as long as the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons. R.C. §§2315.33. Thus, a 51% modified comparative negligence rule is in effect in Ohio. In factoring the percentages of fault, the Ohio rules allow for the fault of all persons to be considered, whether or not plaintiff seeks recovery from such persons. In other words, fault may be apportioned to non-parties.

If contributory fault is asserted and established, pursuant to R.C. § 2315.34, the trier of fact shall determine the following:

- A. The total amount of the compensatory damages that would have been recoverable but for the tortious conduct of the plaintiff;
- B. The portion of compensatory damages that represents economic loss;
- C. The portion of the compensatory damages that represents non-economic loss;
- D. The percentage of tortious conduct attributable to all persons whether or not parties to the lawsuit, as determined pursuant to R.C. § 2307.23.

Pursuant to R.C. § 2307.23, the trier of fact is to further determine:

- 1. The percentage of tortious conduct attributable to plaintiff and to each party from whom the plaintiff seeks recovery;
- 2. The percentage of tortious conduct attributable to each person from whom the plaintiff does not seek recovery.

Once the trier of fact has decided the amount of damages and has apportioned percentages of fault to all persons, the court shall diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionally equal to the percentage of tortious conduct of the plaintiff. R.C. § 2315.35. Again, this can occur so long as the plaintiff's fault is not 51% or greater. R.C. §§2315.33.

Joint & Several Liability

With regard to joint and several liability for economic loss, the Ohio comparative fault statutes distinguish between tortfeasors who are more than 50% liable and those who are 50% or less. For non-economic loss, each defendant is legally responsible to the plaintiff for their proportionate share.

Economic Loss

For causes of action on or after April 9, 2003, when two or more persons proximately cause the same injury to a plaintiff and in which the trier of fact determines that more than 50% of the tortious conduct is attributable to one defendant, that defendant is jointly and severally liable for all compensatory damages that represent economic loss. R.C. § 2307.22(A)(1). Each defendant whose tortious conduct is 50% or less is liable only for that defendant's proportionate share of compensatory damages that represent economic loss. R.C. § 2307.22(B). (See R.C. § 2307.23 to calculate proportionate share).

Non-Economic Loss

In a tort action accruing on or after April 9, 2003, in which the trier of fact determines that two or more persons proximately caused the same injury, each defendant who is determined by the trier of fact to be legally responsible for the same injury shall be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent non-economic loss. R.C. § 2307.22(C). (See R.C. § 2307.23 to calculate proportionate share).

Plaintiff's Failure to Wear a Restraining Device – Is this Comparative Negligence in Ohio?

In Ohio, the admissibility of seatbelt or restraining device evidence is specifically governed by R.C. § 4513.263. Pursuant to this statute, the injured party's failure to wear a seatbelt or other proper restraining device does not serve as evidence of comparative negligence, but has a similar effect, since such evidence can be offered to reduce the value damages that arise specifically out of the party's failure to wear a proper safety restraint. Thus, the trier of fact may determine based on evidence admitted consistent with the Ohio Rules of Evidence that the plaintiff's failure to wear a restraining device contributed to the harm alleged in the tort action. The trier of fact may then diminish the recovery of compensatory damages that represent noneconomic losses which could have otherwise been recovered but for the plaintiff's failure to wear a restraining device.



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As in many jurisdictions, Oklahoma defines negligence as the want of ordinary care or skill which directly or proximately causes injury to the person or property of another. See OKLA. STAT. 76 §5; See also *Thomason v. Pilger*, 2005 OK 10, 112 P.3d 1162 (Okla. 2005). Nevertheless, since statehood, statutory and common law in Oklahoma recognized a caveat to any negligence claim by way of the defense of “contributory negligence.” *Id.* Oklahoma defines “contributory negligence” as “an act or omission on the part of a plaintiff amounting to want of ordinary care which, together with the negligence of the defendant, is the proximate cause of the plaintiff’s injury.” See *Id.* (citing *Sloan v. Anderson*, 1932 OK 782, 18 P.2d 274 (Okla. 1932); See also *Snyder v. Dominguez*, 2008 OK 53, ¶9; *Thomas v. Holliday By and Through Holliday*, 1988 OK 116, ¶9-11, 764 P.2d 165 (1988); and *Miller v. Price* (Okla. 2008); 1934 OK 332, ¶8, 33 P.2d 624, 626 (Okla. 1934). Once the defense of “contributory negligence” is plead, the inquiry becomes whether the plaintiff’s own conduct conformed to that of a reasonably prudent person in the protection of himself/herself and, if not, whether the plaintiff’s conduct was a contributing cause to his/her injury. *Id.*

From statehood until 1973, Oklahoma’s doctrine of “contributory negligence” provided that *any* negligence on the part of the plaintiff which contributed to his/her injuries operated as a complete bar to recovery from any other negligent party. *Laubach v. Morgan*, 1978 OK 5, ¶4, 588 P.2d 1071 (Okla. 1978). However, in 1973, Oklahoma amended its Comparative Negligence Act to incorporate the concept of “modified comparative negligence.” *Id.* The underlying principle of comparative negligence was founded on attaching liability in direct proportion to the respective fault of each person whose negligence caused the damage. *Id.* at ¶19. As a result, although the term “contributory negligence” survived and remains to this day the term most often used in Oklahoma, the concept evolved on two critical fronts.

First, OKLA. STAT. 23 §13 set forth that:

In all actions ... for negligence resulting in personal injuries or wrongful death, or injury to property, contributory negligence shall not bar a recovery, ***unless any negligence of the person so injured, damaged or killed, is of greater degree*** than any negligence of the person, firm or corporation causing such damage, or ... the combined negligence of any persons, firms or corporations causing such damage. (emphasis added).

Thus, a contributorily negligent plaintiff is now allowed to recover so long as his/her negligence is found to be 50% or less of the overall negligence which proximately caused his/her injuries. OKLA. STAT. 23 §13. Stated another way, a plaintiff found 51% percent or more contributorily negligent will recover nothing. *Id.* In situations concerning more than one defendant, “a plaintiff’s percentage of negligence is to be compared with the aggregate negligence of all defendants combined, and if the plaintiff is less than 50

percent negligent he shall be entitled to recovery from each negligent defendant.” *Laubach v. Morgan*, OK 5, ¶10, 588 P.2d 1071, 1073 (Okla. 1978). Nevertheless, in keeping with the principles of comparative negligence, each defendant’s liability to the plaintiff is limited to the percentage of plaintiff’s damages for which that defendant was determined to have been responsible. *Id.* at ¶13-14.

Second, OKLA. STAT. 23 §14 set forth “[w]here such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such person’s contributory negligence.” To illustrate the point, a plaintiff found 25% contributorily negligent for his/her own injury, although entitled to recover damages pursuant to OKLA. STAT. 23 §13, will be limited to a recovery of no more than 75% of his/her alleged damages by OKLA. STAT. 23 §14. Likewise, on the fine line where a plaintiff is found 50% liable for his/her own damages, he/she will be entitled to recover only 50% of those alleged damages.

Enforcement of the principles of comparative negligence faced initial complications in Oklahoma, and elsewhere, regarding situations involving multiple tortfeasor-defendants. Traditionally, where the negligence of two or more tortfeasors caused a single and indivisible injury to a plaintiff, each of the tortfeasors would be individually liable for the entirety of the plaintiff’s damages regardless of each tortfeasor’s percentage of responsibility. *Laubach v. Morgan*, OK 5, ¶11, 588 P.2d 1071, 1073 (Okla. 1978). Each defendant was said to be “jointly and severally liable for the entire amount of damages.” *Id.* However, in 1978, Oklahoma decided such a principle was “of questionable soundness under a comparative system where a jury determines the precise amount of fault attributable to each party.” *Id.* The Oklahoma Supreme Court stated that “[h]olding a defendant tortfeasor, who is only 20 percent at fault, liable for the entire amount of damages is obviously inconsistent with the equitable principles of comparative negligence ...” *Id.* at ¶16. As such, other than with one exception, Oklahoma abolished joint and several liability in multiple tortfeasor situations where the plaintiff is found contributorily negligent, and adopted instead a rule of several liability only, which set forth that each defendant’s liability to the plaintiff was limited to the percentage of plaintiff’s damages for which that defendant was determined responsible. *Id.* at ¶13-14. The singular exception exists where, for whatever reason, the jury is unable to apportion the damages. *Id.* at ¶16. Nevertheless, Oklahoma retained the concept of joint and several liability in situations where a plaintiff is found neither contributorily nor comparatively negligent. *Boyles v. Oklahoma Natural Gas*, 1980 OK 163, ¶10, 619 P.2d 616-617 (Okla. 1980).

Finally, pursuant to Article 23 Section 6 of the Oklahoma Constitution and OKLA. STAT. 23 §12, “[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.” The only caveat thereof is if a jury has been waived by the parties. OKLA. STAT. 23 §12. Nevertheless, a defendant may not submit the defense of contributory negligence for the jury’s consideration merely because he/she has pleaded same as a defense. *Miller v. Price*, 1934 OK 332, ¶8, 33 P.2d 624 (Okla. 1934). Rather, the defense as plead must first survive a “minimal evidence test” in order to prevent a potential confusion of the issues

before a jury. *Thomason v. Pilger*, 2005 OK 10, 112 P.3d 1162 (Okla. 2005); *Miller v. Price*, 1934 OK 332, 33 P.2d 624 (Okla. 1934). This “minimal evidence test” merely mandates that the defense of contributory negligence may be submitted to the jury only if there is *any* evidence of an act, omission, or circumstance tending to prove contributory negligence or from which an inference of contributory negligence might be drawn. *Id.* On the other hand, should there be *any* evidence produced at trial, either by plaintiff or defendant, from which contributory negligence might be inferred, then the issue of contributory negligence must be submitted to the jury and failure to do so may constitute reversible error. *Thomason v. Pilger*, 2005 OK 10, 112 P.3d 1162 (Okla. 2005)(citing *Denco Bus Lines, Inc. v. Rose*, 1950 OK 241, ¶3, 224 P.2d 260, 260-61 (Okla. 1950).



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OREGON

By Brian B. Williams and Alison R. Laird

Comparative / Contributory Negligence

In Oregon, a plaintiff is barred from recovery if plaintiff's negligence is greater than the combined fault of all tortfeasors, including third-party defendants and parties with whom the plaintiff has already settled. Or. Rev. Stat. § 31.600(1). Plaintiff's fault is not compared with persons who are immune from liability; not subject to the jurisdiction of the court; or not subject to the action because the claim is barred by a statute of limitations. Or. Rev. Stat. § 31.600(2). Any damages allowed are reduced according to the percentage of fault attributable to the plaintiff. *Id.* Several examples are illustrative:

EXAMPLE 1: Plaintiff is 30% at fault and defendant is 70% at fault. Total damages are \$100,000. Plaintiff recovers \$70,000.

EXAMPLE 2: Plaintiff is 40% at fault; defendant A is 30% at fault; defendant B is 30% at fault. Total damages are \$100,000. Plaintiff recovers \$60,000 (\$30,000 from each defendant).

Joint and Several Liability

In most instances, liability among defendants is several only and not joint. The jury is therefore required to determine the percentage of fault attributable to each defendant, the plaintiff, and any party who has settled so that damages can be apportioned accordingly. However, complicated rules govern the reapportionment of damages in the event that some of the damages are uncollectable. In that case, liability for the uncollectable portion of a judgment is joint if (1) the defendant's fault is more than the plaintiff's, and (2) the defendant is more than 25% at fault. Or. Rev. Stat. § 31.610(4). For instance:

EXAMPLE 3: Plaintiff is 20% at fault; defendant A is 30% at fault; defendant B is 50% at fault. Total damages are \$100,000. Damages are uncollectable from defendant B. Plaintiff collects \$80,000 from defendant A.

EXAMPLE 4: Plaintiff is 30% at fault; defendant A is 20% at fault; defendant B is 50% at fault. Total damages are \$100,000. Damages are uncollectable from defendant B. Plaintiff collects \$20,000 from defendant A. (Because plaintiff's fault is greater than defendant A's fault and because defendant A's fault is less than 25%, liability as to defendant A is several only).



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PENNSYLVANIA

By Kandice J. Giurintano

Comparative / Contributory Negligence

Pennsylvania has a comparative negligence statute, which provides that a plaintiff seeking to recover damages for bodily injury or property damage shall have any verdict in his favor reduced by the proportionate share of fault allocated to the plaintiff by the jury. If the plaintiff is deemed to be greater than fifty percent at fault, the plaintiff is barred from any recovery. *See* 42 Pa.C.S. § 7102. The Comparative Negligence Act applies only to claims for personal injury or property damage; the common law rule that any contributory negligence is a bar to a plaintiff's recovery continues to apply in cases where the plaintiff is seeking to recover solely for monetary losses.

Joint and Several Liability

Pennsylvania applies the rule of joint and several liability for joint tortfeasors. *See Id.* Where a plaintiff obtains a verdict against multiple defendants, each defendant is liable to the plaintiff for the percentage of the total amount of the verdict corresponding to the percentage of fault allocated to each defendant by the jury. The plaintiff, however, may choose to recover the entire amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is compelled to pay more than his percentage share of the plaintiff's recovery may then seek contribution from the other responsible defendants. *See Id.*; 42 Pa.C.S. § 8324.

With some publicity, the Pennsylvania General Assembly amended its comparative negligence statute in 2002 in an attempt to eliminate joint and several liability in most cases. The amendment, however, was subsequently struck down by the state Supreme Court, and the rule of joint and several liability remains the law in the Commonwealth.



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RHODE ISLAND

By Gary N. Stewart

Comparative / Contributory Negligence

In Rhode Island, pure comparative negligence is applied in a tort action. R.I.G.L. §9-20-4. Contributory negligence is only effective for the purpose of diminishing the amount of recovery in proportion to the extent of plaintiff's negligence. R.I.G.L. §9-20-4. Thus, a plaintiff may recover 1% even if he is 99% negligent.

A plaintiff may recover all of his damages from any one defendant. Each defendant is liable for all or a proportion of the total damages, but the paying defendant may seek contribution from non-paying defendants. R.I.G.L. §10-6-3.

Rhode Island has adopted the Uniform Contribution Among Tortfeasors Act which provides that an action for contribution must be commenced within one year after payment made by the joint tortfeasor which discharges common liability is made. R.I.G.L. §10-6-3 to 10-6-11.

Joint and Several Liability

In Rhode Island, joint tortfeasors must either act together to create the plaintiff's injuries or must otherwise be liable for each other's conduct. *Wilson v. Krasnoff*, 560 A.2d 335 (R.I. 1989). The effect of joint liability is that each defendant is liable for the entire amount of the damages to the plaintiff. The pro rata share is determined by the number of tortfeasors and the relative degree of fault. R.I.G.L. §10-6-3. The common law rule that a release given to one of several tortfeasors releases all of them has been abolished. R.I.G.L. §10-6-7. A master and servant or principal and agent are considered a single tortfeasor. R.I.G.L. §10-6-2.



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Comparative / Contributory Negligence

In 1991 South Carolina's Supreme Court replaced traditional contributory negligence with modified comparative negligence. Thus, when the plaintiff's negligence composes less than 50% of the whole, he may recover a proportionate measure of his damages. *Nelson v. Concrete Supply Company*, 303 S.C. 243, 399 S.E.2d 783 (1991). In general, the *Nelson* court intended that its ruling not affect existing tort principles other than contributory negligence; for example, the master-servant, joint enterprise, and family purpose doctrines went unchanged.

Inevitably, though, the change to comparative negligence has wrought some effect on traditional defenses to negligence actions. For instance, the last clear chance doctrine has been subsumed by comparative negligence, *Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998), though the trial judge may charge the jury on last clear chance as a factor for its consideration. *Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998). The same is true of the assumption of the risk defense. *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 331 S.C. 71, 508 S.E.2d 565 (1998).

Factors the jury should consider in apportioning fault include:

- Whether the conduct was mere inadvertence or was engaged in with an awareness or consciousness that negligence was involved;
- The magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury.
- The significance of the goal the actor was seeking to achieve and the need to achieve the goal in the particular manner utilized;
- The actor's superior or inferior capacities and ability to realize and eliminate the risk involved;
- The particular circumstances confronting the person at the time his conduct occurred;
- The closeness of the casual relationship of the negligent conduct to the injury, and
- Whether the conduct involved a violation of a safety statute.

Joint And Several Liability

A recent legislative tort reform package included a significant change to the traditional law of joint and several liability in South Carolina for actions arising after July 1st, 2005. While joint and several remains, S.C. Code Ann. §15-38-15 now provides that in an action to recover damages resulting from personal injury, wrongful death, damage to property, or to recover damages for economic loss or non-economic loss, joint and several liability does not apply to a defendant who is less than 50% at fault. The statute also provides for an apportionment by the jury of percentages of fault among the plaintiff and the defendants.

The statute does limit the application of this new approach in three important ways:

[T]he court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant,” S.C.

Code §15-38-15(C)(3)(a);

Traditional joint and several does apply to “a defendant whose conduct is determined to be willful, wanton, reckless, grossly negligent, or intentional”, and traditional joint and several does apply to “conduct involving the use, sale or possession of alcohol or drugs.” S.C. Code §15-38-15(E).



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Comparative / Contributory Negligence

In South Dakota, if the contributory negligence of the plaintiff is more than slight as compared to the defendant's negligence, the plaintiff is barred from recovery. SDCL § 20-9-2. Where the contributory negligence of the plaintiff is slight in comparison with the negligence of the defendant, the damages "shall be reduced in proportion to the amount of plaintiff's contributory negligence." *Id.* The determination of whether plaintiff's contributory negligence is slight in comparison with the negligence of the defendant is made by the fact finder without disclosing any determination of percentage of plaintiff's fault by special interrogatory. *Id.*

Joint and Several Liability

By statute, the right of contribution exists among joint tortfeasors in South Dakota. SDCL § 15-8-12 *et seq.* The term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share. SDCL § 15-8-13.

When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors are considered in determining their pro rata shares. If the court enters judgment against any party liable on the basis of joint and several liability, any party who is allocated less than fifty percent of the total fault allocated to all parties may not be jointly liable for more than twice the percentage of fault allocated to that party. SDCL § 15-8-15.1. In determining the percentages of fault, the fact finder considers both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors by the amount of consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid. SDCL § 15-8-17.

A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors. SDCL § 15-8-18.



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Comparative / Contributory Negligence

In 1992 the Tennessee Supreme Court dramatically revised the way courts in Tennessee address the issue of negligence. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); see also *McNabb v. Highways, Inc.*, 98 S.W.3d 649, 653 (Tenn. 2003). *McIntyre v. Balentine* was a case involving a truck accident in which the court found the state's rigid all-or-nothing contributory negligence rule "outmoded and unjust," abolished the rule, and announced the adoption of a system of modified comparative fault. *McIntyre*, 833 S.W.2d at 56. The court adopted the 49 percent rule, holding that "so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover." *Id.* at 57.

Following *McIntyre*, the Tennessee Supreme Court identified several factors to be considered when assigning fault to each party. *Eaton v. McLain*, 891 S.W.2d 587 (Tenn. 1994) These factors include:

- (1) The relationship between the conduct of the defendant and the injury to the plaintiff;
- (2) The reasonableness of the party's conduct in confronting a risk;
- (3) An analysis of whether a defendant had an opportunity to avoid injuring plaintiff;
- (4) The existence of a sudden emergency requiring a hasty decision;
- (5) The significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and
- (6) The party's age, maturity, training, education, and so forth. *Eaton*, 891 S.W.2d at 592.

As a result of *McIntyre*, under Tennessee's comparative fault system, defendants are allowed to plead the comparative fault of third parties in order to reduce their liability to plaintiff. However, the defendant must plead the comparative fault of the third party with enough specificity that the plaintiff can identify the third party and bring them into the lawsuit. *Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785, 788 (Tenn. 2000). Recognizing that plaintiffs might face problems caused by statutes of limitations, Tennessee adopted T.C.A. § 20-1-119, which allows a plaintiff 90 days to add a third party identified by a defendant even if the applicable statute of limitations would otherwise bar the claim against the third party. T.C.A. § 20-1-119.

Joint and Several Liability

McIntyre also significantly limited the doctrine of joint and several liability in Tennessee. *McIntyre*, 833 S.W.2d at 58; see also *Volz v. Ledes*, 895 S.W. 2d 677 (Tenn. 1995). As the law stands now, joint and several liability is available in Tennessee only in the following situations:

- (1) Against all strictly liable parties in the chain of distribution of a product, *Owens v. Truckstops of America*, 915 S.W. 420 (Tenn. 1996);
- (2) In traditional vicarious liability cases, specifically cases involving the family purpose doctrine, but most likely also master/servant relationships, *Camper v. Minor*, 915 S.W. 2d 437 (Tenn.1996);
- (3) Against tortfeasors who act in concert with each other, *Resolution Trust Corp. v. Block*, 924 S.W. 2d 354 (Tenn. 1996);
- (4) Against co-conspirators in civil conspiracy, *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W. 3d 691, 703 (Tenn. 2002); and
- (5) Where plaintiff is injured by both a negligent and intentional tortfeasor, where the intentional act was a foreseeable risk created by the negligent defendant, *Turner v. Jordan*, 957 S.W. 2d 815 (Tenn. 1997).

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Comparative / Contributory Negligence

In any tort action to recover damages for personal injury, property damage, or death, a claimant may recover damages only if his percentage of responsibility is less than or equal to 50 percent. TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (a) (Vernon 2008). If the claimant is not barred from recovery (i.e., his percentage of responsibility is 50 percent or less), then the court is required to reduce the amount of damages to be recovered by the percentage assigned to him. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012 (a) (Vernon 2008). “Claimant” includes not only the person that was injured, but also any other person seeking “damages for the injury, harm, or death of that person or for the damage to the property of that person” (e.g., wrongful death beneficiaries). See TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(1) (Vernon 2008).

Joint and Several Liability

Generally, a liable defendant is only liable for the percentage of responsibility assigned to him by the trier of fact. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a) (Vernon 2008). However, where the defendant is found to be greater than 50 percent responsible, or is otherwise found to have acted with a specific intent to do harm or has engaged in certain criminal activity, that defendant is jointly and severally liable for the entire amount of recoverable damages. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon 2008). To alleviate the risk of being found greater than 50 percent responsible, Texas law allows the trier of fact to also consider the conduct of “settling persons” and designated “responsible third parties,” as those terms are defined by the statute, when assigning percentages of responsibility. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a) (Vernon 2008).



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In Utah, comparative fault and joint and several liability are governed by the Utah Liability Reform Act, Utah Code Sections 78B-5-817 to -823. This legislation abolished joint and several liability and set forth a statutory scheme for comparing fault among Utah litigants.

Contribution and Implied Indemnity are superseded by the Utah Liability Reform Act

Prior to the Utah Liability Reform Act, multiple tortfeasors were jointly and severally liable. *Stephens v. Henderson*, 741 P.2d 952 (Utah 1987); *Cruz v. Montoya*, 660 P.2d 723, 728 (Utah 1983) A tortfeasor was potentially liable for an entire amount of damages, regardless of whether he or she was a major or minor tortfeasor as compared to any other tortfeasor. *Nat'l Serv. Indus., v. B.W. Norton Manuf Co*, 937 P.2d 551 (Utah Ct. App. 1997). Because of this inequity, claims for contribution and implied indemnity attempted to ensure that defendants were not liable beyond their degree of fault. These claims, however, required separate suits.

In 1986, the Utah Legislature passed the Liability Reform Act, abolishing joint and several liability. The purpose was to fairly distribute loss and fault. The Act states, "[n]o defendant is liable . . . for any amount in excess of the proportion of fault attributed to that defendant." Utah Code Ann. § 78B-5-818(3)(2009). The Act even expressly bans contribution suits: "[a] defendant is not entitled to contribution from any other person." Utah Code Ann. § 78B-5-820(2). Because the statutory scheme provides for the apportionment of fault, Utah courts have held that there is no right to contribution, implied indemnity, or any separate action to redistribute loss based on degree of fault. *Nat'l Serv. Indus.*, 937 P.2d at 555-56. The Liability Reform Act did not, however, modify any right to indemnity arising from statute or contract. Utah Code Ann. § 78B-5-823.

Comparative Fault is governed by the Utah Liability Reform Act

The Utah Liability Reform Act provides that a plaintiff who is more at fault than a defendant or group of defendants cannot recover. "[A] plaintiff may recover as long as the plaintiff's fault is less than the combined fault of all others that contributed to the injury." *Nixon v. Salt Lake City Corp.*, 898 P.2d 265 (Utah 1995). If the plaintiff's fault is equal to or greater than the fault of the defendant(s), whether an individual or group of defendants, then the plaintiff recovers nothing. In other words, a plaintiff who is 50% at fault recovers nothing. Utah Code. Ann. § 78B-5-818(2).

The maximum amount for which a defendant may be liable is the percentage of damages equivalent to that defendant's percentage of fault. Utah Code Ann. § 78B-5-820(1). This fault may be compared or apportioned to all parties. Fault is not limited to negligence, but is statutorily defined to encompass "any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages. Utah Code Ann. § 78B-5-817(2). Fault includes intentional conduct and strict liability. *Compare Field v. Boyer Co.*, 952 P.2d 1078 (Utah 1998) (fault includes intentional conduct), *with Jedrzewski v. Smith*, 128 P.3d 1146 (Utah 2005) (inviting legislation to address intentional torts); *Red Flame, Inc. v. Martinez*, 996 P.2d 540 (Utah 2000) (Dramshop Act strict liability subject to comparative fault); *S.H. v. Bistryski*, 923 P.2d 1376 (Utah 1996) (dog bite strict liability subject to comparative fault); *Sanns v. Butterfield Ford*, 94 P.3d 30 (Utah Ct. App. 2004) (strict products liability subject to comparative fault, with exception for passive retailers when manufacturer is a named party). Fault may be apportioned to an unidentified motor vehicle involved in an accident, but the existence of an unidentified motor vehicle must be proven by clear and convincing evidence. Utah Code Ann. § 78B-5-818(4)(a). In the end, any causally related act or omission should be considered.

The statutory scheme permits different mechanisms for apportioning fault. Third party complaints are proper, and a defendant may also cross-claim against another codefendant. Utah Code Ann. § 78B-5-821(1). Indeed, cross-claims must be brought in order to fully defend against another co-defendant. *Packer v. Nat'l Serv. Indus.*, 909 P.2d 1277 (Utah Ct. App. 1996). Fault may also be apportioned or compared to non-parties via a Notice of Intent to Apportion Fault. Utah Code Ann. 78B-5-821. This notice may be filed by a defendant against any tortfeasor, whether a party or not. Utah Code Ann. § 78B-5-821(2)-(4); Utah.R. Civ. P. 9(1). For example, fault may be apportioned to otherwise immune parties via a notice of intent to apportion fault. *Id.*; *Bishop v. GenTec*, 48 P.2d 218 (Utah 2002); *Dahl v. Kerbs Constr.*, 853 P.2d 887 (Utah 1993). An immune party is still not subject to any liability. Because this impacts a plaintiff's recovery, the fault of immune parties may be reallocated. Utah Code Ann. § 78B-5-818(4)(a). If the fault of all immune parties is less than 40 percent, the immune party's fault is reduced to zero, and the trial court then reallocates the fault of the immune party to the remaining at-fault parties in accordance with the percentages of fault apportioned to each by the factfinder. Utah Code Ann. § 78B-5-819(2). After reallocation, cumulative fault will equal 100% with those immune being allocated no fault. Utah Code Ann. § 78B-5-819(2)(a). If the fault of immune defendants is 40 percent or more, that proportion of fault is not reduced, and the plaintiff's recovery from that defendant is barred. Utah Code Ann. § 78B-5-819(2)(b) & 818(4)(b).



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Comparative / Contributory Negligence

Vermont has adopted a modified comparative fault system, which bars recovery if the plaintiff is more than 50 percent at fault. The Vermont comparative fault statute provides as follows:

Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants, but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

12 V.S.A. § 1036. Under this statute, “a plaintiff in a negligence action may recover damages if his or her own causal negligence is not greater than that of the defendant.” *Barber v. LaFramboise*, 908 A.2d 436, 440 (Vt. 2006). “Allocation of the respective percentages of causal negligence attributable to the plaintiff and defendant is generally a fact question for the jury, and plaintiff’s recovery is automatically reduced according to the proportional amount of his or her causal negligence.” *Id.*

Joint and Several Liability

The traditional rule in Vermont is that multiple tortfeasors are jointly and severally liable. *Zaleskie v. Joyce*, 333 A.2d 110, 115 (Vt. 1975) (“[T]he law of this state . . . permits a plaintiff to pursue all, or any part, of his recovery from either joint tortfeasor.”). The traditional rule is made inapplicable by 12 V.S.A. § 1036 when multiple tortfeasors are sued in the same action. *Plante v. Johnson*, 565 A.2d 1346, 1347-48 (Vt. 1989). Apportionment under 12 V.S.A. § 1036 is not permitted with respect to tortfeasors not named in the action. *Levine v. Wyeth*, 944 A.2d 179, 196 (Vt. 2006, *aff’d*, 129 S.Ct. 1187 (U.S. 2009) (jury not required to apportion negligence with respect to tortfeasor that reached settlement with plaintiff in separate lawsuit related to same injury). Furthermore, Vermont law precludes contribution among joint tortfeasors. *Howard v. Spafford*, 321 A.2d 74, 74-75 (Vt. 1974).



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Comparative / Contributory Negligence

Virginia is a pure contributory negligence state. Once a Plaintiff establishes that the defendant was negligent, the burden of proof shifts to the Defendant to establish by the greater weight of the evidence that the Plaintiff was negligent and that this negligence was the proximate cause of the Plaintiff's injuries. Virginia does not recognize comparative negligence. Any negligence on the part of the Plaintiff which was the proximate cause of the accident will bar the Plaintiff from recovery.

Joint and Several Liability

Virginia recognizes the doctrine of joint and several liability. If separate and independent acts of negligence of two Defendants directly cause a single indivisible injury to a Plaintiff, either or both of the Defendants are responsible for the whole injury. The Plaintiff has the option of pursuing the judgment from either or both of the Defendants. The jury is not called upon to apportion fault between the two Defendants, they are just called upon to determine if the Defendants were negligent.

If a Plaintiff elects to recover from just one of the liable Defendants, that Defendant has the right to seek contribution from the other Defendants who are also liable. The right of contribution between joint tortfeasors is based on the principle that when two or more tortfeasors are responsible for a common burden, they also share the verdict rendered equally regardless of whether one tortfeasor contributed to a greater degree than another to the injury.



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WASHINGTON

By Christopher W. Tompkins and Brandon R. Carroll

Comparative / Contributory Negligence

Washington is a pure comparative fault state, and a plaintiff's damages are reduced by his or her percentage of fault. *See Smith v. Fourre*, 71 Wn. App. 304, 858 P.2d 276 (1993). Contributory fault chargeable to the claimant proportionally diminishes the amount awarded as compensatory damages, but does not bar recovery. RCW 4.22.005. In determining whether a person was contributorily negligent, the inquiry is whether that person failed to use ordinary care or acted in some way that a reasonably careful person would not have under the existing facts or circumstances. *See Huston v. First Church of God*, 46 Wn. App. 740, 732 P.2d 173 (1987). Contributory negligence is ordinarily a question of fact. *See Baughn v. Malone*, 33 Wn. App. 592, 656 P.2d 1118 (1983).

Joint and Several Liability

As a general rule, Washington has abolished joint and several liability. RCW 4.22.070(1). Parties to a judgment are proportionately liable only for their share of the total fault, except (1) where the plaintiff was not at fault; (2) at-fault parties were acting in concert; or (3) the tortfeasor was an agent or servant of another party. *See Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 166 P.3d (2008). Additionally, if the cause of action relates to hazardous substances or solid waste disposal sites, defendants can be held jointly and severally liable. RCW 4.22.070(3)(a); *Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 146 P.3d 444 (2006).

A defendant who believes a non-party entity is at fault may raise that "empty chair" defense, and a plaintiff may not recover the percentage of fault assigned to that non-party entity by the trier of fact. RCW 4.22.070. The burden of proof lies with the defendant.



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Comparative / Contributory Negligence

West Virginia is a comparative negligence state. Syl. Pt. 3, *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). It follows the fifty percent modified comparative negligence doctrine. *Id.* Accordingly, “a plaintiff who is fifty percent or more at fault is barred from recovery.” *Adkins v. Whitten*, 297 S.E.2d 881, 883 (W. Va. 1982).

If the court fails to instruct the jury on the consequences of comparative negligence when such an instruction is requested, then it is reversible error. *Adkins*, 297 S.E.2d at 884.

Joint and Several Liability

A joint tortfeasor may be held jointly and severally liable if the trier of fact determines that the party is more than thirty percent at fault. W. Va. Code § 55-7-24(a)(2). Accordingly, if a joint tortfeasor is determined to be thirty percent or less at fault, that tortfeasor may be held only severally liable and only apportioned the percentage of total damages equal to that of the fault allocated by the trier of fact. *Id.*

An exception exists to the general rule of joint and several liability. If a plaintiff is unable to collect a judgment from a liable defendant despite a good faith effort, that plaintiff may move to have the uncollectible portion reallocated among the other defendants. W. Va. Code § 55-7-24(c). A motion for reallocation must be filed within six months after a final judgment. *Id.*

If the Court determines that a judgment is uncollectible from a defendant, then that defendant’s portion of the verdict is reallocated among all other parties, including the plaintiff, according the percentage of fault attributable to each. W. Va. Code § 55-7-24(c)(1). The amount reallocated to a defendant may never exceed that defendant’s percentage of fault multiplied by the uncollectible amount. *Id.* Furthermore, a judgment may not be reallocated to a defendant when that defendant’s fault is equal to or less than the plaintiff’s fault or when that defendant’s fault is less than ten percent. W. Va. Code § 55-7-24(c)(4)(A-B).



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Comparative / Contributory Negligence

Wisconsin's comparative negligence statute applies to actions for death, personal injury or property damage. Under Wis. Stat. §895.045(1), a plaintiff may recover damages against any particular defendant when his or her negligence is not greater than the negligence attributed to that defendant. When multiple defendants are involved, the negligence of each defendant is separately measured against any negligence attributed to the plaintiff; rather than to the combined percentage of negligence attributed to all persons against whom recovery is sought. This method of allocation of fault is known as the individual comparison rule. Wis. Stat. §895.045(2) provides an exception to the individual comparison rule and states if multiple tortfeasors are found to have acted in accordance with a common scheme or plan to cause the plaintiff's injuries, those parties are jointly and severally liable for all damages, except for punitive damages, resulting from that action, regardless of the apportionment of causal liability. This statutory provision is referred to as the concerted action theory of liability.¹³ A tortfeasor must already be found causally negligent under substantive law before Wis. Stat. §895.045(2) applies.¹⁴

Joint and Several Liability

Under Wisconsin's joint and several liability law, if the plaintiff is allowed to recover, the allowable recovery is equal to the plaintiff's actual loss, reduced in proportion to the amount of causal negligence attributable to the plaintiff. Additionally, under Wis. Stat. §895.045(1), the liability of each joint tortfeasor defendant found to be causally negligent whose percentage of causal negligence is less than 51% is limited to, and can only be compelled to pay, the percentage of the total causal negligence attributed to that particular joint tortfeasor defendant.¹⁵ A joint tortfeasor found liable whose percentage of causal negligence is assessed to be greater than or equal to 51% of the total causal negligence shall be jointly and severally liable for, and can be compelled to pay, the full amount of the allowable recovery.

¹³ Concerted action requires: (1) an explicit or tacit agreement among the parties to act in accordance with a common scheme or plan; (2) mutual acts in furtherance of the common scheme or plan; and (3) tortious acts taken to accomplish the common scheme or plan resulting in the plaintiff's injury. *Richards v. Badger Mutual Insur. Co.*, 309 Wis. 2d 541, 569 (2008). A tortfeasor must already be found causally negligent under substantive law before subsection (2) of Wis. Stat. §895.045 applies.

¹⁴ *Id.* at 561.

¹⁵ For example, in *Thomas v. Bickler*, 258 Wis. 2d 304 (Ct. App. 2006), the plaintiff brought an action against the lake club, the fireworks company and the municipality after she was injured while observing a Fourth of July fireworks display. The parties stipulated that the plaintiff was not negligent, and the jury awarded damages apportioning causal negligence among the defendants as 50% for the lake club, 19% for the fireworks company and 31% for the village. *Id.* at 308. The court found that only a tortfeasor who was 51% or more causally negligent was jointly and severally liable, and that because none of the defendants were more than 51% liable, the plaintiff could only recover damages in the amount of the apportioned causal negligence from each defendant. *Id.* at 319-20.



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WYOMING

By Greg Greenlee & Heather A. Zadina

Comparative / Contributory Negligence

Under Wyoming's Comparative Fault law, damages are recoverable by a plaintiff only when the plaintiff's percentage of fault for an accident is not more than fifty percent (50%) of the total fault of all actors, whether or not parties to the lawsuit. Damages awarded, if any, are diminished by the Court in proportion to the amount of fault attributed to the Plaintiff. Wyo. Stat. Ann. §1-1-109(b).

Joint and Several Liability

Wyoming abolished joint and several liability in 1986. A defendant is liable to the plaintiff only to the extent of the percentage of fault attributed to him. Wyo. Stat. Ann. § 1-1-109(e). In other words, a defendant is responsible to pay only that percentage of the verdict which corresponds to his/her own percentage of fault.



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