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Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence

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APPORTIONMENT OF DAMAGES: EVOLUTION OF A FAULT-BASED SYSTEM OF LIABILITY FOR NEGLIGENCE

KATHLEEN M. O'CONNOR*
AND GREGORY P. SREENAN**

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I. INTRODUCTION

DURING THE PAST fifty years, negligence law in the United States has undergone dramatic changes. Searching for a system of recovery that fairly balances the interests of both plaintiffs and defendants, legislatures and courts throughout the United States have moved away from harsh doctrines, such as contributory negligence and joint and several liability, toward a fault-based system of liability. While change began slowly, in recent years there has been an avalanche of new legislation and

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case law that drastically affects negligence cases, particularly those involving multiple tortfeasors. We will examine those changes in a historical context and analyze their effect on negligence law.

II. CONTRIBUTORY NEGLIGENCE AND JOINT AND SEVERAL LIABILITY: THE DOCTRINES OF "NO APPORTIONMENT"

A. CONTRIBUTORY NEGLIGENCE

Contributory negligence is conduct on the part of the plaintiff that falls below the standard of reasonable care and contributes as a legal cause to the harm the plaintiff has suffered.¹ Most authorities believe that the doctrine originated in the 1809 English case of *Butterfield v. Forrester*.² The common law rule was that any contributory negligence on the part of the plaintiff would completely bar recovery in a negligence action.³ This was sometimes known as the "all or nothing rule," because a fault-free plaintiff could recover all of his damages, but a plaintiff who was guilty of any negligence would recover nothing.⁴

No one theory has been advanced to explain this harsh and arbitrary rule.⁵ Some believe that the contributory negligence doctrine had, at least in part, a penal basis, so the plaintiff was denied recovery as punishment for his wrongful conduct.⁶ Sometimes the doctrine of "clean hands" was cited as justification for barring recovery to a negligent plaintiff.⁷ Contributory negligence was also based on a belief that fault for a single, indivisible injury could not be apportioned between two parties.⁸

In the United States, Massachusetts recognized contributory negligence as a complete bar to a plaintiff's recovery in the 1824 case of *Smith v. Smith*.⁹ During the next century a vast majority of states adopted the doctrine. Some believe the doctrine was

¹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 451 (5th ed. 1984) [hereinafter PROSSER AND KEETON]; RESTATEMENT (SECOND) OF TORTS §§ 463, 464 (1965).

² 103 Eng. Rep. 926 (K.B. 1809).

³ PROSSER AND KEETON, *supra* note 1, § 65, at 452.

⁴ *Smith v. Department of Ins.*, 507 So. 2d 1080, 1090 (Fla. 1987).

⁵ PROSSER AND KEETON, *supra* note 1, § 65, at 452.

⁶ *Id.*

⁷ *See id.*

⁸ *Id.* at 452-53.

⁹ 19 Mass. (2 Pick.) 621, 624 (1824).

strengthened by the advent of the Industrial Revolution and a perceived need to protect developing industries.¹⁰

B. JOINT AND SEVERAL LIABILITY

Under the common law, the doctrine of joint and several liability developed concurrently with the doctrine of contributory negligence.¹¹ The doctrine of joint and several liability allowed the plaintiff to sue any jointly liable tortfeasor and recover full damages from that tortfeasor.¹² Although joint and several liability originally applied only when defendants acted in concert, it was later expanded to include situations where separate acts of negligence combined to produce an injury.¹³ The doctrine of joint and several liability, like the doctrine of contributory negligence, was based on the assumption that injuries were indivisible and fault, therefore, could not be apportioned.¹⁴

III. TORT REFORM, PHASE ONE: THE ADOPTION OF COMPARATIVE NEGLIGENCE AND RECOGNITION OF CONTRIBUTION AMONG JOINT TORTFEASORS

Beginning in the middle of this century, growing discontent with the harsh doctrines of contributory negligence and joint and several liability paved the way for reform. Although neither doctrine was equitable, application of both doctrines in a given jurisdiction achieved a rough balancing of inequities. Plaintiffs were penalized, and defendants benefitted, by the application of contributory negligence. On the other side of the equation, plaintiffs benefitted and defendants were penalized by the application of joint and several liability. Reform on one side of the equation necessarily prompted reform on the other.

A. COMPARATIVE NEGLIGENCE

Increasing dissatisfaction with the absolute doctrine of contributory negligence eventually led to the adoption of comparative negligence in the vast majority of jurisdictions in the United

¹⁰ John W. Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 300 (1980).

¹¹ *Smith v. Department of Ins.*, 507 So. 2d 1080, 1090 (Fla. 1987).

¹² PROSSER AND KEETON, *supra* note 1, § 47, at 325.

¹³ *Id.* at 325, 327.

¹⁴ *Id.* at 325.

States.¹⁵ Most courts and legislatures became convinced that it was unreasonable to place upon the plaintiff the entire risk of a loss for which a defendant was also responsible.¹⁶ Most courts recognized that the plaintiff, by virtue of his injuries, was probably in a worse position than the defendant to bear the financial burden of a loss.¹⁷

An alternative to the harsh "all or nothing" rule of contributory negligence is comparative negligence, whereby responsibility for damages is apportioned between a negligent plaintiff and a negligent defendant. By the late 1960s, only seven states had recognized the doctrine of comparative negligence.¹⁸ Between 1969 and 1984, however, thirty-seven states adopted the doctrine.¹⁹ Presently, forty-six states have rejected contributory negligence in favor of some form of comparative negligence.²⁰

¹⁵ See generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (3d ed. 1994).

¹⁶ PROSSER AND KEETON, *supra* note 1, § 67, at 468-69.

¹⁷ *Id.* at 469.

¹⁸ Wade, *supra* note 10, at 302.

¹⁹ Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 228 (1990).

²⁰ See ALASKA STAT. § 09.17.060 (1994); ARIZ. REV. STAT. ANN. § 12-2505 (1994); ARK. CODE ANN. § 16-64-122 (Michie Supp. 1993); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); COLO. REV. STAT. ANN. § 13-21-111 (West 1989 & Supp. 1995); CONN. GEN. STAT. § 52-572h(b) (1995); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1994); FLA. STAT. ANN. § 768.81 (West Supp. 1995); GA. CODE ANN. § 51-11-7 (Harrison 1994); HAW. REV. STAT. ANN. § 663-31 (Michie 1988); IDAHO CODE § 6-801 (1990); ILL. ANN. STAT. ch. 735 para. 5/2-1116 (Smith-Hurd 1993); IND. CODE ANN. §§ 34-4-33-3 to -4 (Burns Supp. 1995); IOWA CODE ANN. §§ 668.1-.3 (West 1987); KAN. STAT. ANN. § 60.258a (1994); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); LA. CIV. CODE ANN. art. 2323 (West Supp. 1995); ME. REV. STAT. ANN. tit. 14, § 156 (West 1980 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1985); *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); MINN. STAT. ANN. § 604.01 (West 1988 & Supp. 1995); MISS. CODE ANN. § 11-7-15 (1972); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); MONT. CODE ANN. § 27-1-702 (1995); NEB. REV. STAT. § 25-21,185 (Supp. 1994); NEV. REV. STAT. ANN. § 41.141 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 507:7-d (Supp. 1994); N.J. STAT. ANN. § 2A:15-5.1 (West 1987); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981); N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); N.D. CENT. CODE §§ 32-03.2-01 to -03 (Supp. 1995); OHIO REV. CODE ANN. § 2315.19 (Anderson 1995); OKLA. STAT. ANN. tit. 23, §§ 13-14 (West 1987); OR. REV. STAT. § 18.470 (1993); 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1995); R.I. GEN. LAWS § 9-20-4 (1985); *Estate of Nelson v. Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991); S.D. CODIFIED LAWS ANN. § 20-9-2 (1987); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1995); UTAH CODE ANN. §§ 78-27-37 to -38 (Supp. 1995); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1995); WASH. REV. CODE ANN. § 4.22.005 (West 1988); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); WIS. STAT. ANN. § 895.045 (West Supp. 1994); WYO. STAT. § 1-1-109 (Supp. 1995).

Only Alabama, Maryland, North Carolina, and Virginia retain contributory negligence.²¹

There are presently three forms of comparative negligence: pure comparative negligence, modified comparative negligence, and slight-gross.

1. *Pure Comparative Negligence*

Under the pure form of comparative negligence, a plaintiff's negligence reduces his damages in proportion to the percentage of his or her fault.²² A defendant is liable to the plaintiff even where the plaintiff's percentage of fault is greater than that of the defendant.²³ Pure comparative negligence is a minority position. Of the forty-six states that have adopted comparative negligence, only thirteen have adopted the pure form.²⁴

While modified comparative negligence is the clear favorite of state legislators, pure comparative negligence has been endorsed by the majority of commentators.²⁵ Advocates of the pure form of comparative negligence argue that it is the only fair way to apportion fault.²⁶ The major criticism of pure comparative negligence is that, under certain circumstances, it may permit a primary wrongdoer to recover against a minor wrongdoer.²⁷ While that may be true in some cases, the harshness of that reality is tempered by the fact that any recovery by the plain-

²¹ See *Golden v. McCurry*, 392 So. 2d 815 (Ala. 1980); *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894 (Md. 1983); *Smith v. Fiber Controls Corp.*, 268 S.E.2d 504 (N.C. 1980); *Virginia Elec. & Power Co. v. Winesett*, 303 S.E.2d 868 (Va. 1983).

²² PROSSER AND KEETON, *supra* note 1, § 67, at 472.

²³ *Id.*

²⁴ Those states are Alaska, Arizona, California, Florida, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. See ALASKA STAT. § 09.17.060 (1994); ARIZ. REV. STAT. ANN. § 12-2505 (1994); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); FLA. STAT. ANN. § 768.81 (West Supp. 1995); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); LA. CIV. CODE ANN. art. 2323 (West Supp. 1995); *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); MISS. CODE ANN. § 11-7-15 (1972); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981); N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); R.I. GEN. LAWS § 9-20-4 (1985); WASH. REV. CODE ANN. § 4.22.005 (West 1988).

²⁵ Mutter, *supra* note 19, at 245.

²⁶ See, e.g., PROSSER AND KEETON, *supra* note 1, § 67, at 471-72.

²⁷ *Id.* at 472.

tiff is reduced proportionally according to the percentage of the plaintiff's negligence.²⁸

2. *Modified Comparative Negligence*

Under the modified system, a plaintiff can recover as long as the plaintiff's negligence is below a certain percentage of the total fault.²⁹ Thirty-one states utilize some form of modified comparative negligence.³⁰

There are two types of modified comparative negligence. Under the modified "not greater than" approach, a plaintiff may recover as long as his or her fault does not exceed that of the defendant.³¹ This is often referred to as the "fifty percent" rule.³² Twenty-one states follow this rule.³³

Under the "not as great as" approach, a plaintiff cannot recover if his or her fault is equal to or greater than that of the defendant.³⁴ This approach is known as the "forty-nine percent" rule.³⁵ Ten states currently follow this approach.³⁶

²⁸ *Id.* at 473.

²⁹ *Id.*

³⁰ See *infra* notes 33 and 36.

³¹ PROSSER AND KEETON, *supra* note 1, § 67, at 473.

³² Mutter, *supra* note 19, at 229.

³³ Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming. See CONN. GEN. STAT. § 52-572h(b) (1995); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1994); HAW. REV. STAT. § 663-31 (Michie 1988); ILL. ANN. STAT. ch. 735, para. 5/2-1116 (Smith-Hurd 1993); IND. CODE ANN. §§ 34-4-33-3 to -4 (Burns 1986 & Supp. 1995); IOWA CODE ANN. § 668.3 (West 1987); MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1985); MINN. STAT. ANN. § 604.01 (West 1988 & Supp. 1995); MONT. CODE ANN. §§ 27-1-702 to -703 (1995); NEV. REV. STAT. ANN. § 41.141 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 507:7-d (Supp. 1994); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1995); OHIO REV. CODE ANN. § 2315.19 (Anderson 1995); OKLA. STAT. ANN. tit. 23, § 13 (West 1987); OR. REV. STAT. § 18.470 (1993); 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1995); Estate of Nelson v. Concrete Supply Co., 399 S.E.2d 783 (S.C. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon Supp. 1995); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1995); WIS. STAT. ANN. § 895.045 (West Supp. 1994); WYO. STAT. § 1-1-109 (Supp. 1995).

³⁴ PROSSER AND KEETON, *supra* note 1, § 67, at 473.

³⁵ Mutter, *supra* note 19, at 258.

³⁶ Arkansas, Colorado, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia. See ARK. CODE ANN. § 16-64-122 (Michie Supp. 1993); COLO. REV. STAT. ANN. § 13-21-111 (West 1989 & Supp. 1995); IDAHO CODE § 6-801 (1990); KAN. STAT. ANN. § 60-258a (1994); ME. REV. STAT. ANN. tit. 14, § 156 (West 1980 & Supp. 1994); NEB. REV. STAT. § 25-21,185 (Supp. 1994); N.D. CENT. CODE § 32-03.2-02 (Supp. 1995); McIntyre v. Balentine, 833 S.W.2d 52

Under the modified system of comparative negligence, there are two methods of comparing the plaintiff's negligence to that of multiple defendants. Under the "Wisconsin Rule," a plaintiff's negligence is compared with that of each individual defendant.³⁷ The plaintiff can recover against a particular defendant only where the plaintiff's negligence is less than that of the particular defendant.³⁸ Some contend that this approach discourages the plaintiff from suing all potentially liable defendants and encourages defendants to join as many other defendants as possible.³⁹ Under the second comparative method, known as the "unit rule," the plaintiff can recover as long as his or her negligence does not exceed the aggregate negligence of all defendants.⁴⁰ The majority of modified comparative negligence states follow the "unit rule."⁴¹

Proponents of modified comparative negligence argue that it is unfair to allow a plaintiff who is more at fault to recover from a defendant who is less culpable.⁴² In *Bradley v. Appalachian Power Co.*,⁴³ the West Virginia Supreme Court rejected pure comparative negligence and set forth the primary arguments in favor of modified comparative negligence.⁴⁴ The court stated that pure comparative negligence departed too far from common law fault concepts.⁴⁵ The court noted: "It is difficult, on theoretical grounds alone, to rationalize a system which permits a party who is 95 percent at fault to have his day in court as a plaintiff because he is 5 percent fault-free."⁴⁶ The court also emphasized that because all parties are potential plaintiffs under pure comparative negligence, that approach favors a party who has sustained the most severe injuries, regardless of the level of his or her fault.⁴⁷ In addition, some commentators believe the

(Tenn. 1992); UTAH CODE ANN. § 78-27-38 (Supp. 1995); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

³⁷ Mutter, *supra* note 19, at 258.

³⁸ *Id.*

³⁹ See PROSSER AND KEETON, *supra* note 1, § 67, at 473-74.

⁴⁰ *Id.* at 474.

⁴¹ Mutter, *supra* note 19, at 258.

⁴² *Id.* at 249.

⁴³ 256 S.E.2d 879 (W. Va. 1979).

⁴⁴ *Id.* at 883.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

pure form of comparative negligence encourages "nuisance" lawsuits and is, therefore, more costly.⁴⁸

3. *Slight-Gross*

Under the slight-gross approach, a plaintiff is barred from recovery unless his or her negligence is "slight" and the defendant's is "gross." Where the plaintiff's negligence is "slight," his or her recovery is reduced in proportion to his or her percentage of fault.⁴⁹ Only two states, Nebraska and South Dakota, have ever adopted the slight-gross approach.⁵⁰ In 1992, however, Nebraska rejected the slight-gross approach and adopted modified comparative negligence.⁵¹

B. CONTRIBUTION AMONG JOINT TORTFEASORS

The common law rule of no contribution among joint tortfeasors was based upon the belief that injuries were indivisible and fault could not be apportioned. The rule, however, unfairly permitted the entire liability for a loss to be borne by a single negligent defendant. It did not matter that others may have contributed to an equal or greater degree to the plaintiff's injuries. In addition, the rule was criticized because it encouraged plaintiffs to sue "deep pocket" defendants who might be only marginally at fault.⁵²

The common law rule was attacked for decades and by the 1960s, the majority of jurisdictions in the United States had adopted statutes that permitted contribution among joint tortfeasors.⁵³ It has been noted that the move toward comparative negligence accelerated the move toward contribution, as many states' comparative negligence statutes provided for contribution.⁵⁴ Once apportionment of damages was permitted between plaintiffs and defendants, there was no longer any substantial justification for denying apportionment among tortfeasors through the vehicle of contribution.

Contribution is generally accomplished by one of two methods. Under the equality rule, liability is allocated equally among

⁴⁸ See Mutter, *supra* note 19, at 237-43.

⁴⁹ PROSSER AND KEETON, *supra* note 1, § 67, at 474.

⁵⁰ See NEB. REV. STAT. § 25-21,185 (1985); S.D. CODIFIED LAWS ANN. § 20-9-2 (1995).

⁵¹ NEB. REV. STAT. § 25-21,185 (1985).

⁵² Mutter, *supra* note 19, at 203.

⁵³ PROSSER AND KEETON, *supra* note 1, § 50, at 337.

⁵⁴ See *id.* at 338 n.17.

all joint tortfeasors.⁵⁵ Under the "comparative contribution" approach, liability is apportioned in accordance with the tortfeasors' respective percentage of fault.⁵⁶

IV. TORT REFORM, PHASE TWO: APPORTIONMENT OF DAMAGES AMONG JOINT TORTFEASORS

While contribution solved some of the inequities engendered by joint and several liability, contribution was not a "cure all." Contribution provided no meaningful remedy to a "deep pocket" defendant when a co-defendant or non-party whose negligence contributed to the plaintiff's injury was an "empty pocket," due to insolvency, lack of insurance, or immunity. In such a case, the "deep pocket" would be liable for all of the plaintiff's damages, pursuant to the doctrine of joint and several liability.

The shortcomings of contribution were aptly illustrated in *Walt Disney World Co. v. Wood*,⁵⁷ a Florida case that received national attention.⁵⁸ In that case, Ms. Wood was injured on a grand prix attraction at Disney World when her fiancé rammed her miniature race car from behind. A jury found the plaintiff fourteen percent at fault, her fiancé eight-five percent at fault, and Disney World one percent at fault.⁵⁹ Applying the doctrines of joint and several liability and comparative negligence, the trial court entered judgment against Disney World for eighty-six percent of the plaintiff's damages.⁶⁰ Disney World had no recourse against the plaintiff's fiancé.⁶¹

Spurred by a national insurance crisis, and cases such as *Wood*, which illustrate the unfair effects of joint and several liability, many states have re-examined the doctrine.⁶² In the past decade, approximately thirty-five states have enacted some type of

⁵⁵ *Id.* § 67, at 476.

⁵⁶ *Id.*

⁵⁷ 515 So. 2d 198 (Fla. 1987).

⁵⁸ See generally Armando Garcia-Mendoza, Comment, *Tort Law: Joint and Several Liability under Comparative Negligence—Forcing Old Doctrines on New Concepts*, 40 U. FLA. L. REV. 469 (1988).

⁵⁹ *Wood*, 515 So. 2d at 199.

⁶⁰ *Id.*

⁶¹ *Id.* at 202.

⁶² SCHWARTZ, *supra* note 15, § 15.4, at 311 ("In the mid-1980's a significant number of states changed the joint liability rule, in part because of growing awards against 'deep pocket' defendants who might be only peripherally responsible for the plaintiff's injuries.").

tort reform act that modified or abolished joint and several liability.⁶³

The real issue with apportionment of damages is whether the plaintiff, or a solvent defendant, should bear the risk of a joint tortfeasor's insolvency or absence. Some argue that several liability unfairly places the risk on the plaintiff, who is probably in a worse financial position to bear the risk than the solvent defendant. On the other hand, a plaintiff has always borne the risk of insolvency where a single defendant is involved. Under those circumstances, the injured plaintiff recovers nothing. Where a plaintiff is injured by two tortfeasors, each of whom is liable, and one of whom is insolvent, little justification exists for allowing the plaintiff to recover one hundred percent of his damages from the solvent tortfeasor who was only partially at fault. In *Bartlett v. New Mexico Welding Supply, Inc.*,⁶⁴ the New Mexico Court of Appeals stated: "Between one plaintiff and one defendant, the plaintiff bears the risk of the defendant being insolvent; on what basis does the risk shift if there are two defendants, and one is insolvent?"⁶⁵

The various approaches to apportionment of fault among joint tortfeasors range from outright abolition to various modifications. In some states, statutes contain a variety of exceptions to the abolition or modification of joint and several liability. Other jurisdictions have modified joint and several liability by enacting statutes that provide for its application only in limited circumstances.

A. ABOLITION OR MODIFICATION OF JOINT AND SEVERAL LIABILITY

1. *Joint and Several Liability Abolished*

A few states have abolished joint and several liability in favor of several liability only, thereby limiting a defendant's liability to his percentage of fault.⁶⁶ Where several liability is adopted,

⁶³ Mutter, *supra* note 19, at 203 ("[D]uring the last decade . . . [a]t least thirty-five . . . states have restricted the joint and several doctrine in various ways; some have virtually eliminated it.").

⁶⁴ 646 P.2d 579 (N.M. Ct. App. 1982).

⁶⁵ *Id.* at 585.

⁶⁶ These states are Arkansas, Kentucky, Tennessee, Utah, Vermont, and Wyoming. See ARK. CODE ANN. § 16-64-122 (Michie Supp. 1993); KY. REV. STAT. ANN. § 411.182 (Michie/Bobbs-Merrill 1992); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992); UTAH CODE ANN. § 78-27-40 (1992 & Supp. 1995); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1995); WYO. STAT. § 1-1-109 (Supp. 1995).

there is no longer a need for the remedy of contribution because a defendant will only be liable for the percentage of the plaintiff's damages occasioned by that defendant's negligence.⁶⁷

2. *Joint and Several Liability Abolished or Modified Except for Certain Types of Torts*

In some states, legislatures have abolished or modified joint and several liability except for certain types of torts. The most common exception is for torts involving concerted action.⁶⁸ In addition, some statutes abolishing or modifying joint and several liability contain exceptions for certain intentional torts,⁶⁹ while others except torts involving hazardous wastes.⁷⁰

3. *Dual Approach: Joint and Several Liability Retained Where Plaintiff Is Fault-Free*

Several states have adopted a dual approach, whereby joint and several liability is retained if a plaintiff is fault-free, but such liability is abolished in cases involving comparative negligence on the part of the plaintiff.⁷¹ Where the plaintiff is without fault and joint and several liability applies, tortfeasors who pay more than their share of damages may seek contribution from other tortfeasors.

4. *Joint and Several Liability Abolished or Modified Depending Upon Type of Damages*

In a number of states, including California, Florida, New York, and Oregon, statutes contain a distinction between eco-

⁶⁷ McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992).

⁶⁸ See, e.g., ARIZ. REV. STAT. ANN. § 12-2506 (1994 & Supp. 1995); COLO. REV. STAT. ANN. § 13-21-111.5 (West 1989 & Supp. 1995).

⁶⁹ See, e.g., FLA. STAT. ANN. § 768.81 (West Supp. 1995); NEV. REV. STAT. ANN. § 41.141 (Michie Supp. 1993); N.M. STAT. ANN. § 41-3A-1 (Michie 1989).

⁷⁰ ARIZ. REV. STAT. ANN. § 12-2506 (1994 & Supp. 1995); IDAHO CODE § 6-803 (1990); NEV. REV. STAT. ANN. § 41.141 (Michie Supp. 1993).

⁷¹ GA. CODE ANN. § 51-12-33 (Harrison 1994); IDAHO CODE § 6-803 (1990); MICH. COMP. LAWS ANN. § 600.6304 (West 1987); MO. ANN. STAT. § 537.067 (Vernon 1988); N.M. STAT. ANN. § 41-3A-2 (Michie 1989); OHIO REV. CODE ANN. § 2315.19 (Anderson 1995); OKLA. STAT. ANN. tit. 23, §§ 13-14 (West 1987); WASH. REV. CODE ANN. § 4.22.070 (West 1988 & Supp. 1995). See generally William J. McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence—Is Products Liability Next?*, 35 OKLA. L. REV. 195 (1982).

nomic and non-economic damages.⁷² In California, for instance, joint and several liability is retained for economic damages, but abolished for non-economic damages.⁷³ In Florida, joint and several liability is abolished for non-economic damages, but retained for economic damages when a defendant's percentage of fault equals or exceeds that of the plaintiff.⁷⁴

5. *Joint and Several Liability Modified Depending Upon Defendant's Percentage of Liability*

In a few states, application or modification of joint and several liability depends upon a defendant's percentage of fault.⁷⁵ In Illinois, for example, several liability applies to a tortfeasor who is less than twenty-five percent liable.⁷⁶ In Iowa, joint and several liability applies unless a tortfeasor's fault is "less than fifty percent of the total fault assigned to all parties."⁷⁷ In New Jersey, joint and several liability applies to any tortfeasor liable for sixty percent or more of the damages. If a tortfeasor is more than twenty percent but less than sixty percent liable, joint and several liability applies to economic damages, and several liability applies to non-economic damages.⁷⁸ Several liability also applies to a tortfeasor who is less than twenty percent liable.⁷⁹

6. *Reallocation of Liability Where Judgment Cannot Be Collected Against a Party*

In a few states, statutes provide for reallocation of liability for damages if a judgment against a particular defendant cannot be collected.⁸⁰ In Connecticut, if a plaintiff is unable to collect a

⁷² See, e.g., CAL. CIV. CODE §§ 1431-1432 (Deering 1994); FLA. STAT. ANN. § 768.81 (West Supp. 1995); N.Y. CIV. PRAC. L. & R. 1601 (McKinney Supp. 1995); OR. REV. STAT. § 18.485 (1993).

⁷³ CAL. CIV. CODE § 1431.2 (Deering 1994).

⁷⁴ FLA. STAT. ANN. § 768.81(3) (West Supp. 1995).

⁷⁵ ILL. ANN. STAT. ch. 735, para. 5/2-1117 (Smith-Hurd 1993); IND. CODE ANN. § 34-4-33 (Burns Supp. 1995); IOWA CODE ANN. § 668.4 (West 1987); MONT. CODE ANN. § 27-1-703 (1995); N.H. REV. STAT. ANN. § 507:7 (Supp. 1994); N.J. STAT. ANN. § 2A:15-5.3 (West Supp. 1995); N.Y. CIV. PRAC. L. & R. 1601 (McKinney Supp. 1995); OR. REV. STAT. § 18.485 (1993); S.D. CODIFIED LAWS ANN. § 15-8-15.1 (1995).

⁷⁶ ILL. ANN. STAT. ch. 735, para. 5/2-1117 (Smith-Hurd 1993).

⁷⁷ IOWA CODE ANN. § 668.4 (West 1987).

⁷⁸ N.J. STAT. ANN. § 2A:15-5.3 (West Supp. 1995).

⁷⁹ *Id.*

⁸⁰ These states are Connecticut, Michigan, and Missouri. See CONN. GEN. STAT. § 52-572h (1995); MICH. COMP. LAWS ANN. § 600.6304 (West 1987); MO. ANN. STAT. § 537.067 (Vernon 1988).

judgment against a particular defendant within one year, the court will reallocate the uncollectible amount among the other defendants according to their percentage of fault.⁸¹ In Michigan and Missouri, the reallocation is among all parties; the plaintiff, therefore, bears a part of the risk of a defendant's insolvency in proportion to the plaintiff's percentage of negligence.⁸²

B. APPORTIONMENT OF DAMAGES TO ABSENT TORTFEASORS

A tortfeasor may be absent from a lawsuit for a number of reasons including insolvency, lack of insurance, or inability to obtain jurisdiction over that party. This raises the question of whether apportionment of damages should be permitted to a nonparty. When fault is apportioned, the percentage of the fault of named defendants is reduced.⁸³ Apportionment to nonparties is particularly beneficial to defendants in states that have abolished or modified joint and several liability, because those defendants will be liable only for their respective percentage of fault.⁸⁴

The arguments regarding whether apportionment should be permitted to nonparties are the same as the arguments raised by proponents and opponents of joint and several liability. Proponents of several liability, who believe defendants should only be liable for their percentage of liability, argue that the negligence of nonparty tortfeasors must be considered in order to fairly determine the percentage of fault of named defendants.⁸⁵ Those who believe the primary focus should be on adequate compensation for the plaintiff argue that the fault of nonparties should not be considered.⁸⁶

In a few states where joint and several liability has been abolished or modified, statutes specifically limit apportionment to parties to the lawsuit, who are generally defined to include claimants, defendants, settling defendants, and third party defendants.⁸⁷ In a few states, the comparative negligence statutes

⁸¹ CONN. GEN. STAT. § 52-572h (1995).

⁸² MICH. COMP. LAWS ANN. § 600.6304 (West 1987); MO. ANN. STAT. § 537.067 (Vernon 1988).

⁸³ Mutter, *supra* note 19, at 262.

⁸⁴ *Id.* at 263.

⁸⁵ *Id.* at 268.

⁸⁶ *Id.*

⁸⁷ See ALASKA STAT. § 09.17.080 (1994); CONN. GEN. STAT. § 52-572h (1995); IOWA CODE ANN. § 668.2 (West 1987).

specifically provide that in assessing percentages of fault, the fact finder should consider the fault of all entities who contributed to the injury, including nonparties.⁸⁸

In the absence of a specific statutory provision, courts have been virtually unanimous in holding that true apportionment cannot be achieved unless it includes all negligent parties, regardless of whether they are parties to the lawsuit.⁸⁹ In *Paul v. N.L. Industries, Inc.*,⁹⁰ the Supreme Court of Oklahoma stated: "To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree."⁹¹ In addition, it appears that a majority of commentators support apportionment of damages to non-parties.⁹²

Negligence of a nonparty, like negligence of a plaintiff, is generally considered to be an affirmative defense, which must be pled by the defendant. Consequently, the defendant has the burden of proof on the issue of a nonparty's negligence.⁹³

⁸⁸ Arizona's statute provides that "[i]n assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit." ARIZ. REV. STAT. ANN. § 12-2506(B) (1994). Indiana's statute states: "[t]he jury shall determine the percentage of fault of the claimant, of the primary defendant, and of any person who is a non-party." IND. CODE ANN. § 34-4-33-5(a)(1) (Burns Supp. 1995).

⁸⁹ See *Prince v. Leesona Corp.*, 720 F.2d 1166, 1170-71 (10th Cir. 1983) (applying Kansas law); *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1226 (8th Cir. 1981) (applying Minnesota law); *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 144 (Cal. 1992); *Fabre v. Marin*, 623 So. 2d 1182, 1183-87 (Fla. 1993); *Pocatello Indus. Park Co. v. Steel West, Inc.*, 621 P.2d 399, 402-03 (Idaho 1980); *Brown v. Keill*, 580 P.2d 867, 875-76 (Kan. 1978); *Lines v. Ryan*, 272 N.W.2d 896, 902-03 (Minn. 1978); *Bode v. Clark Equip. Co.*, 719 P.2d 824, 827 (Okla. 1986); *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980); *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 878-84 (Utah 1993); *Connar v. West Shore Equip., Inc.*, 227 N.W.2d 660, 662 (Wis. 1975); *Payne v. Bilco Co.*, 195 N.W.2d 641, 645-46 (Wis. 1972); *Bowman v. Barnes*, 282 S.E.2d 613, 621 (W. Va. 1981).

⁹⁰ 624 P.2d 68 (Okla. 1980).

⁹¹ *Id.* at 70.

⁹² See PROSSER AND KEETON, *supra* note 1, § 67, at 475-76 ("But the failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault."); Mutter, *supra* note 19, at 271 ("Since the cornerstone of comparative negligence is an assessment of the fault of all persons who contributed to the harm, consideration of the fault of tortfeasors who are not named parties is a legitimate undertaking.").

⁹³ See Ind. Code Ann. § 34-4-33-10 (Burns Supp. 1995). "The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense." *Id.* § 34-4-33-10(b).

Statutes in some states require that a defendant give notice of the fault of nonparties within a specified time after commencement of a lawsuit. The Colorado statute, for instance, provides that negligence or fault of a nonparty may be considered if the claimant entered into a settlement agreement with the nonparty or if the defending party gives notice that a nonparty was wholly or partially at fault within ninety days following commencement of the action unless the court determines a longer period is necessary.⁹⁴ The statute further provides that notice must be given by filing a pleading designating the nonparty and setting forth the nonparty's name and last-known address, "or the best identification of such nonparty which is possible under the circumstances," together with a brief statement of the basis for believing the nonparty to be at fault.⁹⁵ The Indiana statute provides that a nonparty defense which is known to a defendant must be pled as part of the first answer. A defendant who gains knowledge of a nonparty defense after his or her answer has been filed must plead the defense with reasonable promptness.⁹⁶

In *Newville v. Department of Family Services*,⁹⁷ the Montana Supreme Court recently held that Montana's comparative fault act, as amended in 1987, is unconstitutional because it violates plaintiffs' substantive due process rights.⁹⁸ The amended act provided that, for purposes of determining the percentage of liability attributable to each party, "the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant."⁹⁹ The plaintiffs argued that the statute unfairly required plaintiffs to prepare a defense at the last minute for nonparties whom the defendants might seek to blame for the injury.¹⁰⁰ The

⁹⁴ COLO. REV. STAT. ANN. § 13-21-111.5 (West 1989 & Supp. 1995).

⁹⁵ *Id.*

⁹⁶ IND. CODE ANN. § 34-4-33-10(c) (Burns Supp. 1995).

⁹⁷ 883 P.2d 793 (Mont. 1994).

⁹⁸ *Id.* at 803.

⁹⁹ MONT. CODE ANN. § 27-1-703(4) (1993). Montana's comparative fault act was amended on April 5, 1995 to read: "For purposes of determining the percentage of liability attributable to each party . . . the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants." Act of April 5, 1995, 1995 Mont. Laws 330 (to be codified at MONT. CODE ANN. § 27-1-703(4)).

¹⁰⁰ *Newville*, 883 P.2d at 802.

court held that the statute "unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard."¹⁰¹ The court stated that the statute unfairly imposed a burden on plaintiffs to anticipate defendants' attempts to apportion blame up to the time of submission of the verdict form to the jury.¹⁰² The court noted that in other jurisdictions where apportionment of fault to nonparties is permitted, statutes contain specific procedural safeguards, such as notice to plaintiffs and specific burdens of proof.¹⁰³ Because of the wide variety of apportionment statutes that have been adopted, litigation will likely continue in this area for some time.

VI. CONCLUSION

The doctrines of contributory negligence and joint and several liability, which are premised on a belief that juries cannot "apportion" fault, have been criticized for decades. Consequently, all but four states have now rejected contributory negligence in favor of some form of comparative negligence. Moreover, half of the states have re-examined joint and several liability in the past decade and at least half of the states have abolished or modified the doctrine. These tort reforms show a clear movement toward equating liability with fault.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 802-03.

NEGLIGENCE SURVEY (Personal injury, property damage, and wrongful death actions)

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|--------------|----------------------------------|---|--|--|
| ALABAMA | Contributory negligence. | Joint and several liability. | No apportionment. | Buchanan v. Collier, 555 So. 2d 134 (Ala. 1989); Golden v. McCurry, 392 So. 2d 815 (Ala. 1980). |
| ALASKA | Pure comparative negligence. | Several liability for parties to lawsuit, including defendants, third-party defendants, and settling defendants. | Apportionment to settling defendants. | ALASKA STAT. §§ 09.17.060, 09.17.080 (1994); Benner v. Wichman, 874 P.2d 949 (Alaska 1994). |
| ARIZONA | Pure comparative negligence. | Several liability except in instances of agency, actions in concert, or conduct relating to hazardous wastes. | Apportionment permitted. | ARIZ. REV. STAT. ANN. §§ 12-2505, 12-2506 (1994 & Supp. 1995); Ocotillo West Joint Venture v. Superior Court of Maricopa County, 844 P.2d 653 (Ariz. Ct. App. 1993). |
| ARKANSAS | Modified comparative negligence. | Several liability for joint tortfeasors. | No apportionment. | ARK. CODE ANN. §§ 16-61-202, 16-64-122 (Michie 1987 & Supp. 1993). |
| CALIFORNIA | Pure comparative negligence. | Joint and several liability for economic damages; several liability for non-economic damages. | Apportionment permitted. | CAL. CIV. CODE §§ 1431-1432 (Deering 1994); DaFonte v. Up-Right, Inc., 828 P.2d 140 (Cal. 1992); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975). |
| COLORADO | Modified comparative negligence. | Several liability except where persons consciously conspire and deliberately pursue a common plan or design to commit a tortious act. | Apportionment permitted. Defendant must give notice that a non-party was wholly or partly at fault within 90 days of commencement of suit. | COLO. REV. STAT. ANN. §§ 13-21-111 to 13-21-111.7 (West 1989 & Supp. 1995). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|--------------|----------------------------------|--|---------------------------|--|
| CONNECTICUT | Modified comparative negligence. | Several liability for parties to lawsuit; if plaintiff unable to collect judgment against particular defendant within one year, court will reallocate uncollectible amount to other defendants according to their percentage of fault. | No apportionment. | CONN. GEN. STAT. § 52-572h (1995). |
| DELAWARE | Modified comparative negligence. | Joint and several liability. | No apportionment. | DEL. CODE ANN. tit. 10, § 8132 (Supp. 1994). |
| FLORIDA | Pure comparative negligence. | Joint and several liability abolished except: (1) as to economic damages where defendant's percentage of fault exceeds plaintiff's; (2) certain intentional torts; and (3) actions in which total damages do not exceed \$25,000. | Apportionment permitted. | FLA. STAT. ANN. § 768.81 (West Supp. 1995); <i>Fabre v. Marin</i> , 623 So. 2d 1182 (Fla. 1993). |
| GEORGIA | Modified comparative negligence. | Joint and several liability where no comparative negligence on part of plaintiff; several liability where comparative negligence on part of plaintiff. | Untested. | GA. CODE ANN. §§ 51-11-7, 51-12-33 (Harrison 1994). |
| HAWAII | Modified comparative negligence. | Joint and several abolished except for (1) economic damages; (2) certain types of intentional torts; and (3) non-economic damages as to tortfeasors whose negligence is 25% or more. | Apportionment permitted. | HAW. REV. STAT. ANN. §§ 663-10.9, 663-11, 663-31 (<i>Michie</i> 1988); <i>In re Hawaii Federal Asbestos Cases</i> , 960 F.2d 806 (9th Cir. 1992); <i>Wheelock v. Sport Kites, Inc.</i> , 839 F. Supp. 730 (D. Haw. 1993). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|--------------|----------------------------------|--|---|--|
| IDAHO | Modified comparative negligence. | Joint and several retained where plaintiff not negligent; joint and several liability abolished when plaintiff negligent except for: (1) actions in concert; (2) toxic torts; or (3) product liability actions involving medical devices or drugs. | Apportionment permitted. | IDAHO CODE §§ 6-801, 6-803 (1990); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399 (Idaho 1980). |
| ILLINOIS | Modified comparative negligence. | Several liability except in medical malpractice actions; joint and several liability exists on some non-economic damages. | Apportionment to any third-party defendant who could have been sued by plaintiff. | ILL. ANN. STAT. ch. 735, paras. 5/2-1116, 5/2-1117 (Smith-Hurd 1993), <i>amended in</i> , 1995 Ill. Legis. Serv. 89-7 (West). |
| INDIANA | Modified comparative negligence. | Several liability. | Apportionment permitted. Non-party defense must be asserted in answer; non-party shall not include claimant's employer. | IND. CODE ANN. § 34-4-33-1 to -10 (Burns 1986 & Supp. 1995). |
| IOWA | Modified comparative negligence. | Joint and several applies except where a tortfeasor's fault is less than 50% of the total fault assigned to all parties; parties include any claimant, defendant, third-party defendants, and the person released pursuant to section 668.7. | No apportionment. | IOWA CODE ANN. §§ 668.1-.14 (West 1987); Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). |
| KANSAS | Modified comparative negligence. | Several liability. | Apportionment permitted. | KAN. STAT. ANN. § 60-258a (1994); Brown v. Keill, 580 P.2d 867 (Kan. 1987). |
| KENTUCKY | Pure comparative negligence. | Several liability. | Apportionment permitted to former defendants in action. | KY. REV. STAT. ANN. § 411.182 (Michie/Bobbs-Merrill 1992); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985); Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|---------------|----------------------------------|---|---|---|
| LOUISIANA | Pure comparative negligence. | Joint and several liability to extent necessary to allow plaintiff to recover 50% of his damages; joint and several for conspiracy to commit an intentional tort. | Apportionment permitted; ratio approach whereby plaintiff and defendant share consequences of absent party's percentage of fault in proportion to their own degrees of fault. | LA. CIV. CODE ANN. arts. 2923, 2924 (West Supp. 1995); Gauthier v. O'Brien, 618 So. 2d 825 (La. 1993). |
| MAINE | Modified comparative negligence. | Joint and several liability. | No apportionment. | ME. REV. STAT. ANN. tit. 14, § 156 (West 1980 & Supp. 1994). |
| MARYLAND | Contributory negligence. | Joint and several liability. | No apportionment. | Leakas v. Columbia Country Club, 831 F. Supp. 1231 (D. Md. 1993); Harrison v. Montgomery County Bd. of Educ., 456 A.2d 894 (Md. 1983). |
| MASSACHUSETTS | Modified comparative negligence. | Joint and several liability. | No apportionment. | MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1985). |
| MICHIGAN | Pure comparative negligence. | If plaintiff is not at fault, joint and several liability applies; if plaintiff is at fault, several liability exists, subject to reallocation of any uncollectible amount; joint and several applies in product liability actions. | No apportionment. | MICH. COMP. LAWS ANN. § 600.6304 (West 1987); Placek v. City of Sterling Heights, 275 N.W.2d 511 (Mich. 1979); Department of Transp. v. Thrasher, 493 N.W.2d 457 (Mich. Ct. App. 1992). |
| MINNESOTA | Modified comparative negligence. | Joint and several liability. | Apportionment permitted. | MINN. STAT. ANN. §§ 604.01-.02 (West 1988 & Supp. 1995); Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978). |
| MISSISSIPPI | Pure comparative negligence. | Joint and several liability to the extent necessary to allow plaintiff to recover 50% of his damages; joint and several for conspiracy to commit a tort. | Untested. | MISS. CODE ANN. §§ 11-7-15, 85-5-7 (1972). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|---------------|----------------------------------|---|------------------------------------|---|
| MISSOURI | Pure comparative negligence. | If plaintiff not at fault, joint and several liability applies; if plaintiff at fault, several liability, subject to reallocation of any uncollectible amount. | Untested. | MO. ANN. STAT. § 537.067 (Vernon 1988); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983). |
| MONTANA | Modified comparative negligence. | Joint and several except any party whose negligence is 50% or less of the combined negligence is severally liable, unless that party acted in concert with others. | No apportionment. | MONT. CODE ANN. §§ 27-1-702 to -703 (1995); Newville v. Department of Family Servs., 883 P.2d 793 (Mont. 1994). |
| NEBRASKA | Modified comparative negligence. | Joint and several where defendants act in concert; joint and several for economic damages; several for non-economic damages. | Apportionment to settling parties. | NEB. REV. STAT. §§ 25-21,185.09 to 25-21,185.11 (Supp. 1994). |
| NEVADA | Modified comparative negligence. | Several liability except for claims involving strict liability, injury from toxic substances, intentional torts, or concerted action. | No apportionment. | NEV. REV. STAT. ANN. § 41.141 (Michie Supp. 1993). |
| NEW HAMPSHIRE | Modified comparative negligence. | Joint and several liability except any party less than 50% at fault is severally liable. | Untested. | N.H. REV. STAT. ANN. §§ 507:7-d, 507:7-e (Supp. 1994). |
| NEW JERSEY | Modified comparative negligence. | Joint and several liability for any tortfeasor 60% or more at fault; for a tortfeasor more than 20% but less than 60% liable, joint and several liability applies to economic damages and several liability applies to non-economic damages; tortfeasors less than 20% liable are severally liable. | No apportionment. | N.J. STAT. ANN. § 2A:15-5.1 to -3 (West Supp. 1995); Jarrett v. Duncan Thecker Assocs., 417 A.2d 1064 (N.J. Super. 1980). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|----------------|--|--|---------------------------|---|
| NEW MEXICO | Pure comparative negligence. | Joint and several abolished in cases involving plaintiff's comparative negligence, except cases involving (1) intentional torts, (2) vicarious liability, (3) strict products liability, and (4) situations having a sound basis in public policy. | Apportionment permitted. | N.M. STAT. ANN. §§ 41-3A-1, 41-3A-2 (Michie 1989); Scott v. Rizzo, 634 P.2d 1294 (N.M. 1981); Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. Ct. App. 1982). |
| NEW YORK | Pure comparative negligence. | Joint and several liability for economic damages; several liability for non-economic damages if tortfeasor's liability is 50% or less of the total fault. | Apportionment permitted. | N.Y. CIV. PRAC. L. & R. 1411, 1601 (McKinney 1976 & Supp. 1995). |
| NORTH CAROLINA | Contributory negligence. | Joint and several liability. | No apportionment. | Smith v. Fiber Controls Corp., 268 S.E.2d 504 (N.C. 1980). |
| NORTH DAKOTA | Modified comparative negligence for tort cases; pure comparative negligence for product liability cases. | Several liability except joint and several retained in product liability actions. | Apportionment permitted. | N.D. CENT. CODE §§ 32-03.2-01 to -03 (Supp. 1995); Beaudoin v. Texaco, Inc., 653 F. Supp. 512 (D.N.D. 1987). |
| OHIO | Modified comparative negligence. | Joint and several liability retained in cases where plaintiff was not negligent; where comparative negligence applies, joint and several liability for economic damages; several liability for non-economic damages. | No apportionment. | OHIO REV. CODE ANN. § 2315.19 (Anderson 1995); Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416 (Ohio 1991). |
| OKLAHOMA | Modified comparative negligence. | Joint and several liability where no negligence on part of plaintiff; several liability in comparative negligence cases. | Apportionment permitted. | OKLA. STAT. ANN. tit. 23, §§ 13-14 (West 1987); Paul v. N.L. Indus., 624 P.2d 68 (Okla. 1980). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|----------------|----------------------------------|---|---------------------------------------|---|
| OREGON | Modified comparative negligence. | Several liability for non-economic damages; several liability for economic damages if defendant is less than 15% at fault; joint and several liability for economic damages if defendant is at least 15% at fault. | No apportionment. | OR. REV. STAT. §§ 18.470, 18.485 (1993); <i>Mills v. Brown</i> , 735 P.2d 603 (Or. 1987). |
| PENNSYLVANIA | Modified comparative negligence. | Joint and several liability. | No apportionment. | 42 PA. CONS. STAT. ANN. § 7102 (1982 & Supp. 1994); <i>Kelly v. Carborundum Co.</i> , 453 A.2d 624 (Pa. Super. Ct. 1982), <i>aff'd</i> , 470 A.2d 969 (Pa. 1984). |
| RHODE ISLAND | Pure comparative negligence. | Joint and several liability. | No apportionment. | R.I. GEN. LAWS § 9-20-4 (1985); <i>Roberts-Robertson v. Lombardi</i> , 598 A.2d 1380 (R.I. 1991). |
| SOUTH CAROLINA | Modified comparative negligence. | Joint and several liability. | No apportionment. | <i>Estate of Nelson v. Concrete Supply Co.</i> , 399 S.E.2d 783 (S.C. 1991). |
| SOUTH DAKOTA | Slight-Gross. | Defendant allocated less than 50% of total fault may not be jointly liable for more than twice the percentage of fault allocated to that defendant. Several liability. | Untested. | S.D. CODIFIED LAWS ANN. §§ 15-8-15.1, 20-9-2 (1995). |
| TENNESSEE | Modified comparative negligence. | Several liability except where: (1) defendant's percentage of fault is greater than 20% and greater than plaintiff's; (2) plaintiff is not negligent and defendant is more than 10% at fault; or (3) action involves toxic torts. | Apportionment permitted. | <i>McIntyre v. Balentine</i> , 833 S.W.2d 52 (Tenn. 1992). |
| TEXAS | Modified comparative negligence. | | Apportionment to settling defendants. | TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001, 33.013 (Vernon Supp. 1995). |

| JURISDICTION | PLAINTIFF'S NEGLIGENCE | DEFENDANT'S NEGLIGENCE | NEGLIGENCE OF NON-PARTIES | RELEVANT AUTHORITIES |
|---------------|----------------------------------|--|--|---|
| UTAH | Modified comparative negligence. | Several liability. | Apportionment permitted. | UTAH CODE ANN. §§ 78-27-37 to -38, 78-27-40 (1992 & Supp. 1995); Sullivan v. Scouler Grain Co., 853 P.2d 877 (Utah 1993). Vt. STAT. ANN. tit. 12, § 1036 (Supp. 1995). |
| VERMONT | Modified comparative negligence. | Several liability. | No apportionment. | |
| VIRGINIA | Contributory negligence. | Joint and several liability. | No apportionment. | Virginia Elec. & Power Co. v. Winesett, 303 S.E.2d 868 (Va. 1983). |
| WASHINGTON | Pure comparative negligence. | Joint and several liability for sum of defendants' proportionate shares where plaintiff not at fault; where comparative negligence, several liability except where parties acted in concert. | Apportionment permitted except to employer immune pursuant to Worker's Compensation Act. | WASH. REV. CODE ANN. §§ 4.22.005, 4.22.070 (West 1988 & Supp. 1995). |
| WEST VIRGINIA | Modified comparative negligence. | Joint and several liability; several liability in medical malpractice cases. | Apportionment permitted. | W. VA. CODE § 55-7B-9 (1994); Bowman v. Barnes, 282 S.E.2d 613 (W. Va. 1981); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). |
| WISCONSIN | Modified comparative negligence. | Joint and several liability. | Apportionment permitted. | Wis. STAT. ANN. § 895.045 (West Supp. 1994); Connar v. West Shore Equip., Inc., 227 N.W.2d 660 (Wis. 1975). |
| WYOMING | Modified comparative negligence. | Several liability. | Apportionment permitted. | Wyo. STAT. § 1-1-109 (Supp. 1995). |

