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A UNIFORM COMPARATIVE FAULT ACT— WHAT SHOULD IT PROVIDE?†

John W. Wade*

EDITOR'S NOTE: *The following article is written from a different perspective than the traditional law review article. It is an attempt to bring before the legal community proposed legislation representing an important departure from existing law before it is adopted by the National Conference of Commissioners on Uniform State Laws. This presentation provides an opportunity for those who must eventually work with the statute to articulate their comments and criticisms before the uniform draft is adopted. Additionally, it provides insights into the process by which such legislation is promulgated. The author of this article is the principal draftsman of this statute.*

I. INTRODUCTION

Some four years ago the National Conference of Commissioners on Uniform State Laws (NCCUSL) appointed a Special Committee on Uniform Comparative Fault Act to determine whether the Conference should prepare a uniform act on the subject of comparative fault. The Committee conferred and reported back that the circumstances did warrant a Conference decision to engage in the activity and to prepare and promulgate either a uniform or a model act. The Conference agreed and directed the Special Committee to proceed with the work.

There were many reasons, principally stemming from the history of the common law, for the decision to draft a uniform comparative fault act. The common law contributory negligence rule, deriving from *Butterfield v. Forrester*,¹ is harsh and unjust — a product of

† For a general background on comparative fault, see generally C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); C.R. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE (1971) (primarily Wisconsin law); V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974) (texts of the various statutes and a good bibliography); G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (1951) (law of the United Kingdom); LAUFENBERG, COMPARATIVE NEGLIGENCE PRIMER (Defense Research Institute Monograph, vol. 1975, no. 4); McGough, *Comparative Negligence: A Preliminary View*, 26 WASH. ST. B. NEWS 25 (no. 3, 1974).

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¹ 11 East 60, 103 Eng. Rep. 926 (K. B. 1809).

the all-or-nothing common law approach at that time to the reaching of decisions. The courts, following the typical common law reaction to harsh, unjust rules, adopted a number of substantial exceptions to the rule. They too followed the all-or-nothing approach but granted all, instead of nothing. The rule and its exceptions may have balanced out on an average, but have accomplished no good in individual cases, since each individual decision was unfair to one or the other of the parties.

England deserted contributory negligence for comparative negligence over thirty years ago.² The Canadian provinces and Australian states soon followed,³ and the United States thus became the primary location of the contributory negligence rule. Some early change to comparative negligence had taken place in this country, beginning with the Federal Employers Liability Act⁴ in 1908 and spreading to other federal acts⁵ and statutes in a few states like Mississippi and Wisconsin.⁶ The action toward reform lagged until recently when with the advent of the vigorous movement for adoption of so-called no-fault insurance, and its heavy criticism of the common law tort system, the legal profession decided to correct some of the inequities of that system. The no-fault movement provoked a rash of statutes changing the contributory negligence rule and adopting some form of comparative negligence. These statutes, plus the judicial adoption of comparative negligence in three states, have raised the number of states with comparative negligence to substantially more than half.⁷

Many of the comparative negligence statutes were hastily and inartistically drafted. Determinations were sometimes made as a result of the influence of special interest pressure groups, and these

² See Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28.

³ For texts of the Canadian Acts, see G. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE*, App. 2, at 536 (1951). The Australian and New Zealand Acts are cited in J. FLEMING, *TORTS* 219 n.26 (4th ed. 1971).

⁴ Ch. 149, 53, 35 Stat. 66 (codified as 45 U.S.C. § 53 (1970)).

⁵ The Jones Act of 1920, ch. 250, 533, 41 Stat. 1007, (codified as 46 U.S.C. § 688 (1970)); Death on the High Seas Act of 1920, ch. 111, 56, 41 Stat. 537 (codified as 46 U.S.C. § 766 (1970)). See also *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (admiralty).

⁶ MISS. CODE ANN. § 11-7-15 (1972); WIS. STAT. ANN. § 895.045 (Supp. 1976-1977).

⁷ The thirty states presently following a comparative negligence system are: Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. In addition, the Canal Zone and Puerto Rico have such a system. Alaska, California and Florida adopted a comparative negligence system by judicial action, the others by legislation.

Texts for all but the most recent statutes are found in V. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, App. B, at 369 (1974). Citations are found in Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Acts*, 41 TENN. L. REV. 423, 444-45 n.79 (1975), (except for Pennsylvania, Alaska, and California, and the latter two are considered in cases cited in the preliminary note to the proposed statute).

conflicting pressures often produced undesirable compromises. Further, many of the statutes did not treat the more difficult peripheral problems, with language used in the statutes often binding the courts and interfering with the most desirable solution. The National Conference determined that if a carefully prepared model statute were available, some states would adopt it in lieu of their present, rather inadequate provisions, and other states that had not already acted might be induced to act. The National Conference, with its traditional impartiality, careful preparation, and expertise in drafting statutes of this nature, would be the ideal agency to undertake the project.

Commissioned to engage in the drafting project, the Special Committee commenced its work. It prepared a first tentative draft in 1975, which it offered that summer in Quebec City, to the floor of the Conference for discussion and criticism. On the basis of this discussion, suggestions from other sources and further committee study, the Special Committee prepared a new draft in 1976 for presentation with a view toward final adoption to the annual meeting of the Conference at Atlanta that summer. This draft had a preliminary note, plus written comments on the individual sections. During the early days of the convention, the Committee met again and made some changes in the proposed final draft. This revision also had some minor changes made as a result of suggestions from individual commissioners.

Unfortunately, the discussion of a number of other important acts, also up for final adoption, exceeded the available time and eventually crowded the Comparative Fault Act off the agenda entirely. This Act will now be presented to the annual convention of the National Conference, to be held in the summer of 1977 at Vail, Colorado.

In the meantime, the Committee has determined to treat the resultant delay as serendipitous and to use it for the purpose of improving the Act and presenting it in the best shape possible. To this end, as the Chairman of the Special Committee, I have prepared this presentation for publication. The presentation is intended to serve two purposes: (1) to provide for the legal profession information as to the present status of the Act, and the provisions it now carries, and (2) to solicit criticisms and suggestions for improvement from interested persons.

I am therefore presenting here the Uniform Comparative Fault Act in its latest form, the form it took as it was finally revised at Atlanta, and as subsequently subjected by me, with time to meditate carefully, to further stylistic changes. The prefatory note and the comments to the sections are those prepared for the original Atlanta draft, adapted by me to conform to the latest revision of the

statute. The composite result has been prepared for this article and has not previously been available to anyone.

Following the draft and comments of this Act is an appendix to the article, providing additional information and raising issues and ideas that are still in the contemplation of the Committee. The Committee is interested in comments about this draft and the accompanying questions.⁸

II. THE PROPOSED ACT

UNIFORM COMPARATIVE FAULT ACT

PREFATORY NOTE

The first question is whether a system of comparative negligence is superior to the common law system of contributory negligence. Comparative negligence is much fairer than contributory negligence and more consistent with the fault concept. The common law all-or-nothing approach that either let the plaintiff recover his full damages or did not give him anything is now outdated and inconsistent with contemporary ideals. Either way it went, it was unfair to one party or the other. This unfairness was not cured by the several exceptions such as last clear chance. Although they may have evened out on the average, that average did nothing for the particular parties in a particular case. One of the parties is always treated

⁸ Comments and suggestions from interested persons may be offered to any member of the Special Committee, presently composed of the following members: John W. Wade, Chairman, University of Missouri School of Law, Columbia, Missouri 65201 (until mid-May), and Vanderbilt University School of Law, Nashville, Tennessee, 37240 (thereafter); Francis Bergan, retired member of the New York Court of Appeals, 5 Circle Lane, Albany, New York 12203; Windsor Dean Calkins, practicing attorney in Oregon, 1163 Olive Street, Eugene, Oregon 97401; Floyd R. Gibson, member of the United States Court of Appeals for the Eighth Circuit, 837 United States Courthouse, Kansas City, Missouri 64106; and Elmer R. Oettinger, Director of the North Carolina Institute of Government, University of North Carolina, Chapel Hill, North Carolina 27514. Victor E. Schwartz, author of a treatise on comparative negligence, University of Cincinnati College of Law, Cincinnati, Ohio 45221, is serving as a consultant.

Ex officio members of the Committee are James H. Clarke, 800 Pacific Building, Portland, Oregon 97204, Chairman of Division F of the Conference and James M. Bush, 363 North First Avenue, Phoenix, Arizona 85003, President of the National Conference. Dean Lindsey Cowen, Case Western Reserve University Law School, Cleveland, Ohio 44106, is Chairman of a Review Committee for the Act.

Comments from other persons not directly connected with the Committee have proved to be helpful. The Committee would greatly appreciate useful comments of readers of this article. The comments may go to substantive issues, may suggest better drafting language, or propose matters that have not been included. The Committee especially seeks information about actual experience with a particular solution.

unfairly. Relying on the lay jury to accomplish some form of apportionment of damages, without proper instructions, and with the jury acting as "outlaws" in disregarding the law given to them by the judge, is simply not defensible.

The current trend is decidedly to comparative negligence, with a substantial majority of the states adopting it in one form or another, mostly in recent years. Almost every common law jurisdiction outside the United States has adopted comparative negligence. The language of the statutes varies considerably, and the form adopted often comes about as a result of a political compromise and without careful consideration of its practical implications. A strong case exists for the NCCUSL to undertake the necessary careful study required to prepare a Comparative Negligence Act, whether it is called a uniform act or a model act. This committee is acting on the basis of that case.

A preliminary question that should be considered before commenting on the individual provisions of the proposed act is what form of comparative negligence should be adopted.

There presently exist in this country four forms of comparative negligence: (1) plaintiff's negligence slight, and defendant's negligence gross, (2) plaintiff's negligence "not as great as" defendant's negligence, (3) plaintiff's negligence "not greater than" defendant's negligence, and (4) the "pure type," apportionment allowed even though plaintiff's negligence exceeds that of defendant.

The slight-gross form can be dismissed as having no current support. The second and third are "modified" forms, differing from each other only in the situation in which both parties are found to be 50% negligent. Number 2 would not allow recovery then; number 3 would allow recovery and seems the better of the two.

The real issue is between the modified forms and the pure form (number 4). The two modified forms may possibly work satisfactorily in the case in which only one party is hurt and he sues the other, and perhaps could be the choice if these were the only cases to arise. But when there are multiple plaintiffs and cross-claims, the modified form becomes entirely improper. To compare the two forms, take variations of a case in which A and B were both negligent and both injured. Assume A's negligence is found to be 25% and B's is found to be 75%.

Case (1). Assume each party suffers \$8,000 damages. Under the modified form, A recovers \$6,000; B recovers nothing. A's loss is \$2,000 (all his own), or 12.5% of the total of \$16,000. B's loss is \$14,000 (\$6,000 to A, and \$8,000 of his own) for 87.5% of the total. Under the pure form (assuming no set-off), A recovers \$6,000; B, \$2,000. A's loss is \$4,000 (\$2,000 to B and \$2,000 of his own) for

25% of the total; B's loss is \$12,000 (\$6,000 to A and \$6,000 of his own) for 75% of the total.

Case (2). Assume A suffers \$4,000 damages; B, \$12,000. Under the modified form, A recovers \$3,000; B, nothing. A incurs \$1,000 (all his own) for 6% of the total; B incurs \$15,000 (\$3,000 to A and \$12,000 of his own) for 94% of the total. Under the pure form, A recovers \$3,000; B, \$3,000. A incurs \$4,000 loss (\$3,000 to B and \$1,000 of his own) for 25% of the total; B incurs \$12,000 (\$3,000 to A and \$12,000 of his own) for 75% of the total.

Case (3). Assume A suffers \$12,000 damages; B, \$4,000. Under the modified form, A recovers \$9,000; B, nothing. A incurs \$3,000 loss (all his own) for 19% of the total; B incurs \$13,000 loss (\$9,000 to A, \$4,000 of his own) for 81% of the total. Under the pure form, A recovers \$9,000; B, \$1,000. A incurs \$4,000 loss (\$1,000 to B and \$3,000 of his own) for 25% of the total; B incurs \$12,000 loss (\$9,000 to A and \$3,000 of his own) for 75%.

Case (4). Now change the fault percentage. Assume that each party suffered \$8,000 damages and that A was 49% negligent; B, 51%. Under the modified form, A recovers \$4,080; B, nothing. A incurs \$3,920 loss (all his own) for 24.5% of the total; B incurs \$12,080 loss (\$4,080 to A and \$8,000 of his own) for 74.5% of the total. Under the pure form, A incurs \$7,840 loss (\$3,920 to B and \$3,920 of his own) for 49% of the total; B incurs \$8,160 loss (\$4,080 to A, and \$4,080 of his own) for 51% of the total.

Thus, it is apparent that the pure form always divides the total loss according to the established fault percentage, while the modified form fluctuates wildly and very unfairly.

While the pure form of comparative negligence is not presently the majority form, it has grown very substantially in the 1970's and is now sustained by an impressive list of authorities. First enacted in the Federal Employers Liability Act in 1908, it was later adopted in other federal acts. Mississippi adopted the pure form in 1910. It has also been adopted by legislation in New York (1975), Rhode Island (1971) and Washington (1973). In three states it has been judicially adopted by the supreme court. *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). It has also just been adopted by the United States Supreme Court for admiralty cases. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). The pure form is also adopted in Great Britain, most of the states and provinces in Australia and Canada, and other common law jurisdictions.

1 Section 1. [*Effect of Contributory Fault*]

2 In an action for injury to person or property, based
3 on negligence [of any kind], recklessness, [wanton misconduct,] strict
4 liability or breach of warranty, or a tort action based on a statute
5 unless otherwise indicated by the statute, any contributory fault on
6 the part of, or attributed to, the claimant, or of any other person
7 whose fault might otherwise have affected the claimant's recovery,
8 does not bar the recovery but diminishes the award of compensatory
9 damages proportionately, according to the measure of fault attributed
10 to the claimant. This Section applies whether the contributory fault
11 previously constituted a defense or not, and replaces previous common
12 law and statutory rules concerning the effect of contributory fault,
13 including last clear chance and unreasonable assumption of risk.

COMMENT

Torts covered by the Act. The Act is confined to injury to person or property. But it obviously includes consequences deriving from the injury, such as pain and suffering, doctor's bills, loss of wages, or costs of repair or replacement of property. It does not include matters like economic loss resulting from a tort like negligent misrepresentation or interference with contract or injurious falsehood nor harm to reputation resulting from defamation.

The Act applies to the traditional tort actions of negligence, recklessness and strict liability. The negligence action includes negligence as a matter of law, arising from court decision or criminal statute, or gross negligence.

As to recklessness, the common law rule that contributory negligence did not bar recovery or diminish damages was an overcure. A comparison of the relative fault of the parties is appropriate here.

There is more question about applying the act to strict liability, since the theory is that the defendant is liable regardless of fault. Yet for strict liability for both abnormally dangerous activities and for products there is strong similarity to negligence declared by the court as a matter of law (negligence per se); and it is not anticipated that the trier of fact will have serious difficulty in setting percentages of fault. Putting out a defective and dangerous product or engaging in a dangerous activity involves a measure of fault that can be weighed and compared, even though there is no negligence. In addition, it would be highly anomalous in a products liability case to have the damages mitigated if the plaintiff elects to sue in negligence, but to allow him to recover full damages if he elects

instead to sue for strict liability in tort. The two actions should be treated alike, especially when they are separate counts in the same complaint. There would also be anomaly in diminishing the amount of the plaintiff's recovery for contributory negligence if the defendant is found to be negligent but allowing the plaintiff to recover his full damages in the absence of a finding of a defendant's negligence.

Some difficulty is raised by the action for breach of warranty. It often sounds in contract, and there was no intent to include actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not obtain what he contracted to receive. But an action for breach of warranty should be within the coverage of the Act if it is for physical harm to person or property caused by a dangerously defective product. This is one reason why the Section is presently worded to apply to an "injury to person or property," rather than to tort actions in general.

"Tort action based on a statute" includes wrongful death and survival acts, dram-shop acts, dog-bite statutes, actions of negligence per se based on criminal statutes, etc. An attempt to enumerate them in the statute would almost inevitably leave some out. "Unless otherwise indicated by the statute" is to keep from repealing by implication and to give a court the authority to construe a statute such as a child labor act to prevent any mitigation if it thinks the policy of the act requires protection of a class of persons even against their own weaknesses or inadequacies.

By conscious decision, the Act does not apply to intentional torts. It seems inappropriate in that situation, and no state has attempted to extend the concept of comparative fault to intentional torts.

For certain types of torts, such as nuisance, the defendant's tortious conduct may be intentional, negligent or subject to strict liability. In the latter two instances the Act would apply, but not in the case of intentionally inflicting the injury on the plaintiff. A similar analysis applies to actions for misrepresentation.

Fault. Committing a tort (or breach of warranty) of the type listed in this Section constitutes "fault" on the part of the defendant. For liability to be imposed there must be an adequate causal relationship between the defendant's conduct and the plaintiff's injury.

"Contributory fault" is treated as a term of art referring to fault on the part of a claimant that has a causal relationship to the injury incurred. "Fault attributed to the claimant" includes imputed negligence such as that involved in a master and servant situation or an action for loss of services of a wife or child. "Contributory fault of any other person whose fault might otherwise have affected the

claimant's recovery" applies to situations in which the fault of the other person is not imputed but still might bar recovery. This is the situation, for example, in many states in an action under the wrongful death statute if the decedent's contributory negligence bars the recovery although it is not imputed to the person bringing the action. Some states may wish to make this language more specific to their individual situations.

"Whether the contributory fault previously constituted a defense or not" includes the several varieties of last clear chance and other exceptions to the contributory negligence rule, plus ordinary contributory negligence, although it is not a defense to recklessness or strict liability. It also includes all cases where contributory negligence was a complete defense, including assumption of risk, to the extent that it is unreasonable conduct and therefore based on fault. It does not include consent to defendant's conduct, nor the defense of *volenti not fit injuria* in its restricted sense.

1 Section 2. [*Apportionment of Damages*]

- 2 (a) In an action involving contributory fault, the court,
3 unless otherwise requested by all parties, shall instruct the jury
4 to give answers to special interrogatories [to render special verdicts],
5 or the court shall make findings itself if there is no jury, indicating:
6 (1) the amount of damages each claimant would recover if
7 contributory fault were disregarded, and
8 (2) the percentage of the fault allocated to each party,
9 including the claimant, as compared with the combined fault of all
10 parties to the action. For this purpose, the court may determine
11 that two or more persons are appropriately treated as a single party.
12 (b) In determining the percentage of fault allocable to each
13 party, the trier of fact shall consider, on a comparative basis, both
14 the nature and quality of the conduct of the party and how greatly it
15 contributed to causing the harm to the claimant.
16 (c) The court shall determine the award for each claimant
17 in accordance with these findings and shall enter judgment against
18 the parties liable on the basis of the common law joint-and-several
19 liability of joint tortfeasors; and the judgment shall also specify
20 the proportionate amount of damages allocated against each party liable,
21 in accordance with the percentage of fault established for that party.

COMMENT

Parties. "Parties to the action" includes third-party defendants (for purposes of contribution or indemnity) whether made defendants by the original plaintiff or only by another defendant.

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he was not a party would not be binding on him as *res judicata*. Both plaintiff and defendants will have significant financial incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the lesser the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

Comparative percentages of fault. In comparing the fault of the several parties for the purpose of obtaining percentages there are a number of implications arising from the concept of fault. The conduct of plaintiff, or of any defendant, may be more or less at fault, depending on such matters as (1) whether it was mere inadvertence or acting with an awareness of the danger involved, (2) the magnitude of the risk created by the conduct, (3) the significance of what he was seeking to attain by his conduct, (4) his superior or inferior capacities, and (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

A rule of law that a particular defendant owes a higher degree of care (as in the case of a common carrier of passengers) or a lesser degree of care (as in the case of an automobile host in a state having a valid automobile-guest statute) or that no negligence is required (as in the case of conducting blasting operations in an urban area) is important in determining whether he is liable at all. If the liability has been established, the rule itself does not play a part in determining the relative proportion of fault of this party in comparison with the others. But the policy behind the rule may be quite important. An error in driving on the part of a bus driver with a group of passengers may properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center; and an automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault than another manufacturer putting out a mechanical pencil with a defective clasp that due care would have discovered.

In determining the relative fault of the parties, the fact-finder may also give consideration to the relative closeness of the causal relationship of the negligent conduct of the defendants and the

harm to the plaintiff. Degrees of fault and proximity of causation are inextricably mixed, as a study of last clear chance indicates, and that common law doctrine has been absorbed in this Act. This position is followed under statutes making no specific provision for it, in such cases as *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968); and *Lovesee v. Allied Development Corp.*, 45 Wis. 2d 340, 173 N.W. 2d 196 (1970).

Control by the court. The total of the several percentages of fault for the plaintiff and all defendants, as found in the special interrogatories, should add up to 100%. The court may inform the jury of this, if it wishes.

The court should have, without providing for it in this Section, the usual powers of setting aside or modifying a verdict if it is internally inconsistent or shows bias or prejudice, etc. On the same basis as the remittitur principle, a court might indicate its intent to set aside a percentage allocation unless the parties agreed to a somewhat different one.

1 Section 3. [*Set-off*]

2 If there is no liability insurance, set-off of counterclaims,
3 as they are determined under this Act, takes place. If liability
4 insurance is available to cover both claims, no set-off takes place.
5 If liability insurance is carried by only one party (called the
6 insured party), the insurance company shall, within the limits of
7 its obligation to the uninsured party, instead pay to the insured
8 party the amount for which the uninsured party is liable to the
9 insured party. This payment then satisfies, completely or partially,
10 the insurance company's obligation to the uninsured party and
11 extinguishes, up to its amount, the counterclaims between the two
12 parties.

COMMENT

If plaintiff and defendant are both found to be 50% negligent and they suffered the same amount of damages, neither party would recover anything if set-off is applied, even though they both carried liability insurance and paid for coverage. The loss would be taken from the insurance companies, who were paid to carry it, and placed upon the parties who paid to have it carried. Factual variations do not change the essence of the result. Set-off would thus destroy the effectiveness of the Act when there is liability insurance.

1 Section 4. [*Rights of Contribution*]
 2 Rights of contribution among multiple defendants are determined
 3 in accordance with the percentage of fault of each party liable, as
 4 found by the trier of fact. If all or any part of the damages
 5 allocated against a party liable cannot be collected from that party
 6 within [one year] after the judgment becomes final, the responsibility
 7 for that amount shall be reallocated among the other parties, including
 8 any claimant who is at fault, in accordance with their established
 9 percentages of fault. Those parties have contribution rights against
 10 the defaulting defendant for the reallocated damages.

COMMENT

A state not already having a practice of granting contribution between joint tortfeasors may wish to start the Section with language like this: “The right of contribution exists as among multiple defendants, and apportionment is determined”

Joint and several liability under the common law means that every defendant contributing to a plaintiff’s injury is liable to him for the whole amount of the recoverable damages. This is not changed by the Act. Between the defendants themselves, however, the apportionment is in accordance with the percentages established under Section 2.

A special problem exists when defendants are not liable for exactly the same injuries, as when an automobile accident victim has his injury exacerbated by negligence of the doctor treating him; but these problems are better handled by the trial judge in the light of the facts before him than by providing for them in the statute in advance and in the abstract.

Another special problem arises when the negligent conduct of one party did not contribute to the happening of the accident but did contribute to the extent of the damage suffered by that party (failure to have a seat belt fastened, for example). That negligence should be taken into consideration in determining the percentage for the party as claimant, but not the percentage for the party as defendant.

Both of these special problems arise infrequently, and the solutions offered are not inconsistent with the text of the Section. It was thought best not to try to make special provision for them.

If an award against one defendant was uncollectible at common law the plaintiff could collect against any of the other defendants, who are jointly and severally liable. This seems unfair when the plaintiff is himself at fault. It also seems unfair to adopt the position of some statutes and throw the total loss on the plaintiff by abolish-

ing the joint and several liability. This Section therefore provides that the apportionment for the uncollectible amount will be made among all of the other parties, including the claimant, according to their respective percentages of fault in the suit.

1 Section 5. [*Effect of Release of One Joint Tortfeasor*]

2 A release or a covenant not to sue or enforce judgment given
3 by a tort claimant to a tortfeasor does not discharge other tort-
4 feasers liable for the same harm unless it so provides; but it
5 reduces the claim against the others to the extent of the consider-
6 ation paid for it or the amount stipulated in it, if greater. A
7 release or covenant given in good faith discharges the person to
8 whom it is given from liability for contribution.

COMMENT

The question of the contribution rights of tortfeasors A and B against tortfeasor C, who settled and obtained a release or covenant not to sue admits of three answers: (1) A and B are still able to obtain contribution against C despite the release, (2) the plaintiff's total claim is reduced by the proportionate share of C, and (3) B and C are not entitled to contribution unless the release was given not in good faith but by way of collusion. Experience has shown that the first two solutions both strongly discourage settlements, though for different reasons. A careful study of this matter was made when the Uniform Contribution Among Tortfeasors Act (1955) was drafted and the third solution was adopted in its Section 4. This Section follows that decision, though the wording is slightly different.

[So-called boilerplate sections, such as those on severability, time of taking effect and repeals are omitted.]

1 *Amendment of Uniform Contribution Among Tortfeasors Act (1955)*

1 Amend Section 2 of the Uniform Contribution Among Tortfeasors
2 Act to read as follows:

3 "Section 2. [*Pro Rata Shares.*] In determining the pro
4 rata shares of tortfeasors in the entire liability (a) ~~their~~
5 ~~relative degrees of fault shall not be considered~~ *their relative*
6 *degrees of fault shall be the basis for allocation*; (b) if
7 equity requires, the collective liability of some as a group
8 shall constitute a single share; and (c) principles of equity
9 applicable to contribution generally shall apply.

APPENDIX

On some major issues, the Special Committee has been consistently in agreement, and its decisions are embodied in the draft of the Act, as set out above. This does not mean, however, that it is inappropriate to reconsider them, or that discussion of them by outside sources would not be cordially welcomed and duly considered.

They include such matters as these:

Should there be a comparative fault act at all?

Should it be a uniform act or a model act? The Committee has taken no firm decision on this and it will be eventually decided by the Conference as a whole.

Should the form of comparative fault be the pure form or some type of the modified form? Would it be at all desirable, or even feasible, to apply one type to the situation where there is only one injured party and another to the situation where two or more injured parties are claiming against each other?

Issues on which the Committee has been less clear include the following. Reactions are particularly solicited on those marked with an asterisk.

Coverage. Should the Act be confined to negligence and contributory negligence or expanded to other torts and be a comparative fault act? * In any event should it be limited to injuries to person or property?

Should the Act apply to intentional torts — for either purposes of mitigating plaintiff's damages or allowing contribution, or both? To breach of trust?

Should it apply to mere economic loss, as in a case of deceit or negligent misrepresentation? To loss of reputation? To breach of contract — as in the case where one party tortiously induces another to breach a contract? Is the expression, "injury to person or property," clear enough — e.g., what about invasion of privacy? "Physical harm," instead of "injury" might give rise to a question about loss of wages.

*Would it be desirable to add to the Act a provision saying that the provision is not intended to be all-inclusive, and that when a court has a case in which it finds the principle of comparative fault or of contribution to be appropriate it may proceed to apply it?

Some statutes have not sought to list the types of torts to which the statute applies, but have instead defined the word, fault, to include designated conduct of both the defendant and of the plaintiff. Is this a better way to handle the matter? How about the term "culpable conduct"?

Unaffected tort rules. This Act is not intended to alter numerous common law and statutory tort rules. For instance: In the area of duty, the nature of the duty that a landowner owes to a trespasser or licensee or that an automobile driver owes his guest or that a manufacturer of an unavoidably dangerous product owes the user, is not changed by comparative fault. If the actor has not breached his duty he is not liable and comparative negligence does not come into play.

In the area of causation, if the fault of either the plaintiff or the defendant was not a cause in fact of the injury, comparative negligence still does not come into play. Thus, if a product is unreasonably dangerous solely because of a failure to warn of an unavoidable danger and the user had already known of that danger and had not read the instructions anyway, the manufacturer is not liable and the case is over. If the plaintiff negligently failed to fasten his seat belt, his negligence in this respect may diminish the amount of his recovery for the additional damages caused by the failure but will not affect the amount of his recovery for the injuries in which the seat belt did not play a part. Similarly, consider the questions with regard to the rules of proximate cause.

In the area of damages, the rule of joint and several liability does not apply if it is determined that the damages are apportionable on a causative basis among several actors, but only when there is indivisible harm. Comparative negligence would not be expected to affect punitive damages, nor would a statutory ceiling on the amount of damage (as in a wrongful death statute) do more than set a maximum for the ultimate amount awarded.

In the area of procedure, the rules as to burden of proof have not been affected. Nothing is said about all this in the Act on the theory that it is governed by the existing law and that an attempt to express these rules would simply confuse matters. Is this view correct? Should anything be said about avoidable consequences?

Parties. Does the Act follow the best course in limiting the application of the Act to persons who have been made parties to the action?

*Should it require the joinder of available parties or provide a penalty for failure to join, as by preventing a later suit by plaintiff against a nonjoined party, or a later suit by a defendant for contribution?

*Should the Act make some specific provision regarding a later action against a person not made a party to the original action?

Apportionment of damages. Are the two interrogatories properly phrased? Should the Act

direct the judge to instruct the jury that the total of all the apportioned percentages should be 100%? Should the Act take a position on whether the jury should be informed as to how the figures will be put together to determine the exact amounts of the awards?

Is the Act correct in providing that apportionment is to be determined on the basis of both the relative measure of fault and the relative measure of causative contribution to the injury? *Should the Act provide that if the evidence is not adequate to make an apportionment on the basis of relative fault and it seems fair, apportionment may be made on an equal or pro rata basis?

Set-off. After its last revision at Atlanta, Section 3 read as follows: "To the extent that liability insurance is available to pay a judgment entered under this Act, damages awarded under this Act may not be set off." But the principle behind the section as set out above was subsequently considered by Committee members and informally approved; and I have attempted to express it. Three cases illustrate its application: assume in each that A has insurance (\$10,000), and B does not.

(1) A is held to owe B \$4,000; B is held to owe A \$4,000. The insurance company pays A \$4,000, and all obligations are wiped out.

(2) A owes B \$8,000; B owes A \$4,000. The insurance company pays A \$4,000, and B \$4,000; and the obligations are wiped out.

(3) A owes B \$4,000; B owes A \$8,000. The insurance company pays A \$4,000 and B owes A \$4,000.

*Is this the best solution of the problem? Does the statute clearly and adequately express it?

Rights of Contribution. Should Sections 4 and 5 be left out of this Act and handled separately?

Should indemnity also be added to these provisions and handled in the same way, a la *Dole v. Dow Chemical Co.*?⁹ If apportionment is made according to fault, contribution and indemnity may well merge into each other.

*Would it be better to approach this problem by abolishing joint and several liability of tortfeasors and thus have every defendant liable only for his apportioned amount? This would eliminate a number of problems, but it casts all potential loss of nonpayment on the plaintiff alone. This seems completely unfair if the plaintiff was not at fault. Even if he is at fault, it seems better to have him share in the potential loss, rather than bear it all.

*Does Section 4 in spreading the loss from an insolvent defendant among all the parties, including the claimant, reach the best solution?

*Does Section 5 reach the best solution to the problem of the effect of a release of one tortfeasor? As indicated in the Comment to it, there are three possible solutions, and the one used here — no contribution if the release was given in good faith — is the one chosen for the Uniform Contribution Among Joint Tortfeasors Act (1955) after careful study. Further consideration of the matter leads me to lean toward the second solution listed in that Comment — the reduction of the plaintiff's claim by the amount of the share of the released tortfeasor. It is true that this has some tendency to discourage the plaintiff from making a settlement with one party, but not if the settlement is a fair one. If it is not a fair one, can one justify offering the opportunity to the plaintiff to give a release to a tortfeasor on any terms he sees fit to set and automatically to cast any loss on the other tortfeasors? This latter solution should provide for joining the released tortfeasor as a party to the action for the purpose of determining his appropriate share of the liability. His voluntary appearance, if he is notified, might be enforced by the threat of otherwise invalidating the release.

*Should there be treatment of the situation where the claimant is an employee who has obtained workmen's compensation from his employer and who then sues a third-party tortfeasor, such as the manufacturer of a machine used in the plant? I think a section is warranted here and that it should proceed by analogy to the section on release of one tortfeasor. It should provide that if the employer was negligent (or had negligence attributed to him), he might be joined in the tort action of the employee, for the purpose of determining his proportionate allocation of fault. From this would be determined an appropriate amount to be deducted from the plaintiff's recovery. There would also need to be a change in the workmen's compensation acts of most states, providing that in any action by the employer against the third-party tortfeasor under subrogation to the rights of the employee, his recovery would be reduced not only by any negligence of the employee but also by any negligence of the employer, or that attributed to him.

What about the situation where one potential tortfeasor has an immunity? One could seek

⁹ 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972).

to establish that person's percentage of fault and spread that amount among the other parties at fault, including the claimant. But this would obtain the same result as simply leaving him out of the action entirely. No statutory provision seems to be necessary.

Should there be any provision regarding the running of the statute of limitations against a tortfeasor?

Relationship of this Act to the Uniform Contribution Among Tortfeasors Act. To the extent that this Act is inconsistent with the Uniform Contribution Act, they must be reconciled. One amendment to the Contribution Act is recommended. Are there others? Should the Special Committee try to rework that Act as a whole? Should other provisions from that Act (such as the right to contribution on the part of a tortfeasor who has settled for the full claim) be put in this Act? Should the two acts be merged into a single one?

