

# A COMPARISON OF COMPARATIVE NEGLIGENCE STATUTES: JURY ALLOCATION OF FAULT—DO DEFENDANTS RISK PAYING FOR THE FAULT OF NONPARTY TORTFEASORS?<sup>1</sup>

## I. INTRODUCTION

*party* [pär' té] *n.* 1: a person or group taking one side of a question; 2: a person or group concerned in an action or affair: participant; 3: a group of persons detailed for a common task.<sup>2</sup>

The adoption of comparative negligence statutes in a majority of jurisdictions has prompted the legal definition of the word “party” to grow in importance.<sup>3</sup> This definition of “party” determines the parties to whom a jury may allocate fault.

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1. The importance of this topic is demonstrated by the number of tort suits filed each year. According to the Administrative Office of the United States Courts' Federal Court Management Statistics, tort suits comprised 21.7% of all civil suits filed in Federal Courts in 1995:

### NATURE AND NUMBER OF CIVIL SUITS FILED IN THE FEDERAL COURTS IN 1995

|   |         |
|---|---------|
| Prisoner Petitions  | 63,550  |
| Torts   | 53,986  |
| Civil Rights  | 36,600  |
| Contracts   | 29,360  |
| Labor Suits   | 14,954  |
| Social Security   | 9,354   |
| Real Property   | 6,869   |
| Copyright, Patent and Trademark   | 6,866   |
| Government-Initiated Forfeitures, Penalties and<br>Tax Suits                  | 4,719   |
| Government-Initiated Recovery of<br>Overpayments and Enforcement of Judgments | 1,822   |
| Antitrust   | 781     |
| All Other Civil   | 19,474  |
| Total   | 248,335 |

*Nature and Number of Civil Suits Filed in the Federal Courts in 1995; Busy Prisons*, NAT'L L.J., Aug. 26, 1996, at A1, A5.

2. THE MERRIAM-WEBSTER DICTIONARY 509 (3d ed. 1974).

3. Presently, only Alabama, Maryland, North Carolina and Virginia have retained contributory negligence. The other 46 states have rejected contributory negligence and adopted some form of comparative negligence. See Kathleen M. O'Connor & Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence*, 61 J. AIR L. & COM. 365, 369-70, nn. 20-21 (1996).

State negligence statutes define party in three different ways:

1. all litigants in the lawsuit; or
2. persons involved in the tort; or
3. defendants involved in the lawsuit.

When a narrow definition of party is used, the jury is limited in determining who should share the blame for the tort, with defendants possibly shouldering the blame for non-party tortfeasors. On the other hand, a broad definition allows the jury to consider more parties, but may limit the plaintiff's recovery. Because of the inequities to the defendant that come from a narrow definition of "party", this Note proposes that states adopt a new comparative negligence statute that allows the jury to consider the fault of everyone who may have contributed to the plaintiff's injury.

This Note focuses on the definition of "party" and analyzes the merits of definitions one and two. This Note will not examine definition three because it refers back to contributory negligence, where any fault of the plaintiff bars recovery, and is used only by a few states.<sup>4</sup> Part II of this Note will briefly examine the history of comparative and contributory negligence. Part III will examine how different states have defined "party" and the results that these various definitions have achieved. Finally, Part IV proposes that a new statute, which comports with traditional principles of efficiency and fairness, should be adopted in lieu of the current state comparative negligence statutes.

## II. CONTRIBUTORY AND COMPARATIVE NEGLIGENCE

### A. History

In common law tort cases, any fault by the plaintiff served as a complete bar to recovery. In 1809, this rule was established in England in *Butterfield v. Forrester*,<sup>5</sup> and recognized in the United States in 1824, in *Smith v. Smith*.<sup>6</sup> For a plaintiff to lose a suit in a contributory negligence jurisdiction, his or her conduct must fall below the standard of reasonable care and must

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4. Under the theory of contributory negligence, if there is any fault on the part of the plaintiff, the claim is dismissed; therefore, once that threshold question has been answered, the jury can focus on apportioning fault among the defendants. Alabama, Maryland, North Carolina and Virginia have retained contributory negligence. See O'Connor & Sreenan, *supra* note 3.

5. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). See Timothy Bettenga, *Instructing the Jury on Comparative Fault Issues: A Current Guide to Understanding the Nature of Comparison in Comparative Fault*, 14 WM. MITCHELL L. REV. 807 (1988).

6. See O'Connor & Sreenan, *supra* note 3, at 367 & n.9 (citing 19 Mass. (2 Pick.) 621, 624 (1824)).

contribute as a legal cause to the harm that the plaintiff suffered.<sup>7</sup> Under this rule, a plaintiff who was responsible for any negligence whatsoever would not recover any damages, while a fault-free plaintiff could recover all of his damages. Hence, this rule was known as the "all or nothing rule."<sup>8</sup> Professors Prosser and Keeton advance three possible explanations for the harshness of this rule. First, the contributory negligence doctrine had a penalty element, so that a negligent plaintiff was denied recovery as punishment for his wrongful conduct.<sup>9</sup> Second, the "clean hands" doctrine<sup>10</sup> justified the denial of recovery to a negligent plaintiff.<sup>11</sup> Third, contributory negligence was based on the belief that courts could not properly apportion fault between two parties for a single injury.<sup>12</sup>

The contributory negligence doctrine began to dissipate as state legislatures and courts realized that it was unreasonable to place the entire risk of loss on the plaintiff's shoulders.<sup>13</sup> The courts recognized that the defendant was in a better position than the plaintiff to bear the financial burden of the loss.<sup>14</sup>

The doctrine of comparative negligence developed from this rationale. The basis for this doctrine is that courts should apportion fault among the plaintiffs and the defendants. In addition to the policy of allocating losses among negligent parties, several courts also reasoned that because there was no longer a need to protect industry from "legal fetters,"<sup>15</sup> the rule of contributory negligence had no justification.<sup>16</sup> Other courts noted that the contributory negligence bar did not deter defendants, however, comparative

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7. See 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).

8. O'Connor & Sreenan, *supra* note 3, at 367-68 (citing *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1090 (Fla. 1987)).

9. See PROSSER AND KEETON, *supra* note 7, § 65, at 452.

10. One explanation of this doctrine is as follows:

Under this doctrine, equity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in prior conduct has violated conscience or good faith or other equitable principle. One seeking equitable relief cannot take advantage of one's own wrong.

BLACK'S LAW DICTIONARY 172 (abridged 6th ed. 1991).

11. See PROSSER AND KEETON, *supra* note 7, § 65, at 452.

12. See *id.*

13. See *id.* at 468-69.

14. See *id.* at 469.

15. Simply legal "[c]hains or shackles" that bind. BLACK'S LAW DICTIONARY 748 (4th ed. 1968).

16. See Joseph W. Little, *Eliminating the Fallacies of Comparative Negligence and Proportional Liability*, 41 ALA. L. REV. 13, 24 (1989) (citing *Hoffman v. Jones*, 280 So. 2d 431, 436-37 (Fla. 1973)); *Alvis v. Ribar*, 421 N.E.2d 886, 893 (Ill. 1981) (citing Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 4 (1953)).

negligence would increase deterrence.<sup>17</sup>

### B. Comparative Negligence Today

States have arrived at different conclusions on how to treat this doctrine. Some states only allow courts to apportion certain damages (i.e., only non-economic damages) to non-party tort-feasors.<sup>18</sup> Other states have a percentage of fault ceiling for plaintiff recovery whereby he will not recover if the jury finds that his contribution was more than a legislatively determined percentage of fault.<sup>19</sup> Finally, some states also have different types of contribution laws, where a plaintiff can recover from one defendant who can then obtain contribution from other defendants.<sup>20</sup> Furthermore, there are different variations of comparative fault doctrines, including both pure and modified comparative fault.<sup>21</sup>

Regardless of these permutations and combinations of comparative negligence law, the problem that this Note addresses remains constant: to whom does the jury apportion negligence? It is this determination that is affected by the state legislature's definition and the court's interpretation of the word "party" in the language of the comparative negligence statute.

Resolution of this question is important for both plaintiffs and defendants. A plaintiff can only recover if the party in the suit is found liable. A narrow reading of "party" means that the jury will only consider parties to the suit.

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17. See *Alvis*, 421 N.E.2d at 895; *Kaatz v. State*, 540 P.2d 1037, 1048 (Alaska 1975). According to Little: "Although the opinions did not develop the point, this argument, to make sense, must assume that certain categories of people or institutions are more likely to be defendants than plaintiffs, and that the 'defendant class' received an unbalanced advantage from the contributory negligence rule vis-à-vis the 'plaintiff classes.'" Little, *supra* note 16, at 72, n.56.

18. See, e.g., FLA. STAT. ANN. § 768.81(3) (West 1996).

19. See, e.g., N.J. STAT. ANN. § 2A:15-5.2 (West 1996).

20. See O'Connor & Sreenan, *supra* note 3. Their article describes the various methods that states have adopted regarding joint and several liability. Arkansas, Kentucky, Tennessee, Utah, Vermont, and Wyoming have abolished joint and several liability, and each defendant is only liable for the percentage of the plaintiff's damages equal to the defendant's fault. Florida, Nevada, New Mexico, Arizona, and Colorado have abolished joint and several liability with exceptions ranging from concerted actions, intentional torts, and hazardous wastes. Georgia, Idaho, Michigan, Missouri, Ohio, Oklahoma, and Washington abolished joint and several liability in cases where the plaintiff is also negligent. California, Florida, New York, and Oregon distinguish between economic and non-economic damages. Illinois, Iowa, and New Jersey condition their abolition of joint and several liability on certain levels of fault for either the plaintiff or the defendant. Finally, in Connecticut, Michigan, and Missouri, reallocation of damages may occur among the defendants and the plaintiff if damages cannot be collected from a defendant because of insolvency.

21. Pure comparative negligence requires an allocation of fault to all of the actors. Additionally, the plaintiff bears the burden of the amount of damages directly proportional to the amount of fault attributed to him. Various modified comparative negligence jurisdictions require the same allocation of fault between plaintiffs and defendants. If the plaintiff's fault reached a certain threshold level, either 50% or 50.1%, then the plaintiff's action is barred.

This means that a plaintiff will recover all damages from those parties, and the court will apportion fault only to the plaintiff and to those parties.<sup>22</sup> Therefore, the jury will not consider parties who contributed to the accident, but are not defendants, and the present parties will assume the non-parties' share of fault. If "party" is interpreted broadly, then parties not involved in the suit<sup>23</sup> but involved in the accident will also be apportioned fault.<sup>24</sup> In this scenario, a plaintiff may not recover all of the damages awarded, if the jury places some fault on an immune party or a party who the plaintiff has otherwise chosen not to sue. The defendants, however, will pay damages only in proportion to their percentage of fault.

### III. HOW DO STATES DEFINE "PARTY"?

#### A. *Party—All Litigants in the Lawsuit*

When a jury considers only the litigants in the lawsuit, parties who contributed to the accident but are immune from liability will not be considered. Because a jury's total fault allocation must equal 100%, the parties to the suit are assigned a percentage of fault that may be higher than it would have been if all the responsible parties were present in the courtroom. This frees the plaintiff from worrying about damages being allocated to a party from whom he or she cannot recover. New Jersey and Pennsylvania are two of the states whose legislatures have promulgated this result.

##### 1. *New Jersey*

The trier of fact shall make the following findings of fact . . . (2) The extent, in the form of a percentage, of each party's negligence or fault. The percentage of negligence or fault of each party shall be based on 100% and the total of all percentages of negligence or fault of all *the parties to the suit* shall be 100%.<sup>25</sup>

The New Jersey legislature defines "party" to include only the named entities to the suit. The results of this can be seen in the treatment of non-parties, who are not allocated fault by the jury.<sup>26</sup> However, settling co-

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22. See, e.g., *Straley v. United States*, 887 F. Supp. 728 (D.N.J. 1995).

23. This can include immune parties, settling codefendants and parties whom the plaintiff chose not to bring into the suit.

24. See, e.g., *Connar v. West Shore Equip. of Milwaukee, Inc.*, 227 N.W.2d 660 (Wis. 1975).

25. N.J. STAT. ANN. § 2A:15-5.2 (West 1996) (emphasis added).

26. See *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 476 A.2d 304 (N.J. Super. Ct. App.

defendants, although they are no longer parties to the suit, are still allocated a percentage of fault.<sup>27</sup>

In *Straley v. United States*,<sup>28</sup> the United States District Court for the District of New Jersey, interpreting New Jersey law, denied the defendant's motion to consider the fault of the plaintiff's non-party co-employee when apportioning the liability among the parties.<sup>29</sup> The co-worker was driving the vehicle on which the plaintiff was riding when he was injured.<sup>30</sup> The court, holding that the jury may not consider the non-party's negligence when apportioning fault,<sup>31</sup> was constrained by the holding in *Ramos v. Browning Ferris Industries*.<sup>32</sup> Because neither the co-worker nor his employer were parties to the suit, they could not be considered joint tort-feasors, and therefore could not be considered by the jury on the issue of comparative negligence.<sup>33</sup>

The seminal New Jersey case that affirmed this point of law is *Jarrett v. Duncan Thecker Associates*.<sup>34</sup> The plaintiff was injured while on the job, and the defendant asked to have the non-party employer's negligence allocated by the jury.<sup>35</sup> The court found that New Jersey's comparative negligence statute clearly limited the jury's deliberations to parties to the suit, rather than

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Div. 1984).

27. See *Young v. Latta*, 589 A.2d 1020 (N.J. 1991).

28. 887 F. Supp. 728 (D.N.J. 1995).

29. See *id.* at 742-43. In *Straley*, the plaintiff, Robin Straley, was working as a garbage collector on a truck owned by Circle Carting, Inc. See *id.* at 732-33. Plaintiff and his co-worker Rodney Gumaer admitted to drinking four seven-ounce beers on the day of the accident. See *id.* Plaintiff was riding on the back of the garbage truck and was either struck by the mirror of a passing postal truck or slipped and fell while trying to avoid being struck. See *id.* His legs were injured by the rear wheels of the garbage truck and were later amputated below the knees. See *id.* At the scene of the accident, Gumaer, the driver, failed a sobriety test. See *id.* The plaintiff sued the manufacturers of the truck's chassis, the assembler of the truck, the wholesaler, the shipper, and other various parties who had bought and sold the truck. See *id.* at 732-33. The plaintiff, however, did not sue Gumaer. It was his negligence that the defendants petitioned the court to allow the jury to consider. See *id.*

30. See *id.* at 732.

31. See *id.* at 742-43.

32. 510 A.2d 1152 (N.J. 1986).

33. See *Straley*, 887 F. Supp. at 742. The court also noted that although the party may be insulated by law from liability as a joint tortfeasor, that party's negligence may be considered a "supervening" cause of the damage if 100% of the damage can be causally attributed to it. See *id.* However, as a practical matter, the chances of a jury finding this are slim. It is unlikely that, while an amputee plaintiff sits in a courtroom, a corporate defendant would be able to shift the blame to a garbage truck driver who would be unable to pay the damage judgement because that would result in no recovery for the plaintiff.

34. 417 A.2d 1064 (N.J. Super. Ct. Law Div. 1980). Plaintiff was an employee of Thomas Procter Company, Inc., and was injured while performing contractual work for the defendant, Duncan Thecker Associates. See *id.* at 1065.

35. See *id.* The employer was not a party to the suit because the workers' compensation bar prevents plaintiffs from direct suit. See N.J. STAT. ANN. § 34:15-8 (West 1996).

parties to the transaction,<sup>36</sup> and thus did not allow the jury to consider the employer's fault.<sup>37</sup>

The New Jersey courts are less strict in their interpretation of "party" when the situation involves a settling co-defendant. In *Young v. Latta*,<sup>38</sup> the court held that a non-settling defendant is entitled to have the settling defendant's negligence apportioned by the jury.<sup>39</sup> Then, regardless of the actual settlement, the non-settling defendant is entitled to a credit reflecting the settler's fair share of the verdict amount.<sup>40</sup> Thus, a plaintiff may recover more or less than the jury's award of damages, depending on how good or bad the settlement is in comparison to the settling defendant's percentage of fault.<sup>41</sup> Furthermore, the settling defendant shall have no additional liability to any party beyond that provided for in the settlement terms.<sup>42</sup> The court's

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36. See *Jarrett*, 417 A.2d at 1067. It is worth noting that although the court ruled that the language of the statute clearly mandated this ruling, the court would have favored allowing the jury to consider the employer's negligence. See *id.* at 1066 (citing *Connar v. West Shore Equip. of Milwaukee*, 227 N.W.2d 660 (Wis. 1975)). The court reasoned, however, that the legislature was aware of the case of *Farren v. New Jersey Turnpike Authority*, 106 A.2d 752 (N.J. Super. Ct. App. Div. 1954), which held that a tortfeasor may not obtain contribution from an employer subject to the Workers' Compensation Act because such an employer was not a "joint tortfeasor" within the meaning of the Joint Tortfeasors Act. Furthermore, the court reasoned that the legislature's intent indicated that because an employer could not be a tortfeasor, the jury should not consider the employer's liability when attributing negligence. See *Jarrett*, 417 A.2d at 1067.

37. See *id.*; see also *Bencivenga v. J.J.A.M.M., Inc.*, 609 A.2d 1299, 1303-05 (N.J. Super. Ct. App. Div. 1992) (holding that a jury should not have been instructed to consider the intentional conduct of the unnamed, unknown defendant for the purposes of comparing fault under the comparative fault act because a fictitious party is not a party to the suit; rather, a defendant's comparative fault should be considered only when the defendant's true name is substituted in an amended complaint and service is effected); *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 476 A.2d 304, 309 (N.J. Super. Ct. App. Div. 1984) (holding that a trier of fact cannot better compare the negligence of an employee with that of a third party if it also assigns a percentage of negligence to the immune employer).

38. 589 A.2d 1020 (N.J. 1991).

39. See *id.* at 1024 (citing *Dimogerondakis v. Dimogerondakis*, 485 A.2d 338 (N.J. Super. Ct. Law Div. 1984)).

40. See *Young*, 589 A.2d at 1020-22. The plaintiff, Steven Young, suffered injuries and, as a result, sued several doctors and the hospital. See *id.* The hospital and one doctor were dismissed with only Dr. Latta and Dr. Alamenno remaining as defendants. See *id.* Young then settled with Dr. Alamenno for \$20,000. At trial, the jury apportioned negligence at 20% to Dr. Latta and 80% to Dr. Alamenno, with total damages of \$150,000. See *id.* Therefore, Dr. Latta was only liable for \$30,000 (20% of \$150,000). See *id.* Young ended up recovering only \$50,000, because Latta was only liable for his share of the damages and the plaintiff made a poor settlement with Alamenno. See *id.* at 1020-22.

41. Had the plaintiff recovered more than the jury's award, the remaining defendant would not be entitled to an additional credit. See, e.g., *Theobald v. Angelos*, 208 A.2d 129, 134-36 (N.J. 1965). Therefore, had Dr. Latta been allocated 90% of fault, he would be forced to pay \$135,000, so that even though the jury award was \$150,000, the plaintiff's total recovery would be \$155,000 (\$135,000 from Dr. Latta plus \$20,000 from the Alamenno settlement). In addition, the non-settling defendant is not entitled to any credit if the plaintiff settles with a party found not to be a tortfeasor. See, e.g., *Rogers v. Spady*, 371 A.2d 285, 287-88 (N.J. Super. Ct. App. Div. 1977).

42. See *Young*, 589 A.2d at 1024; see also *Kiss v. Jacob*, 650 A.2d 336, (N.J. 1994).

rationale indicated that the purpose of the comparative negligence statute is to limit a defendant's liability to the percentage of negligence found against him.<sup>43</sup> However, this reasoning seems inconsistent with the above discussion, whereby the jury allocates fault only to parties in the suit. These inconsistencies demonstrate the flaws in the New Jersey comparative negligence statute and show why New Jersey should adopt the statute proposed in Part IV.

## 2. Pennsylvania

Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants *against whom recovery is allowed*.<sup>44</sup>

The Pennsylvania legislature has provided for apportionment of liability only among those defendants against whom recovery is allowed, not among all persons responsible for a tortious injury.

The leading Pennsylvania case in this area is *Ryden v. Johns-Manville Products*.<sup>45</sup> In *Ryden*, the court held that an employer who was immune from liability because of the workers' compensation bar could not be joined in a negligence action.<sup>46</sup> The court further ruled that the focus of this inquiry should not be on the inequities that may result from the exclusion of immune parties from the jury.<sup>47</sup> The court cited the clear language of the Pennsylvania

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43. See *Young*, 589 A.2d at 1025.

44. 42 PA. CONS. STAT. § 7102(b) (1996) (emphasis added).

45. 518 F. Supp. 311 (W.D. Pa. 1981). In these consolidated cases, plaintiffs and plaintiffs' decedents sought to recover damages from the manufacturer/supplier of certain asbestos products. See *id.* at 313-15. The defendants sought to join the employers. See *id.* The court joined the employers because the employees suffered injuries before the enactment of the worker's compensation bar. See *id.* The jury was not allowed to allocate fault to employers who were injured after the bar. See *id.*

46. See *id.* at 316.

The Negligence Act does not . . . provide for apportionment among *all persons responsible* for a tortious injury. It merely provides for apportionment among those *defendants* against whom recovery is *allowed*. There is no suggestion in that statute that all possible tortfeasors be brought into court, and certainly no requirement that this be done to achieve the purposes of the act. The trier of fact is simply to apportion liability on a percentage basis among those defendants on the record against whom recovery is allowed.

*Id.*

47. See *id.* The inequities cited by the defendants, which the court held were not enough to stray from the legislature's language, were: a culpable third party having to pay an entire damage award, or a negligent employer recouping workers' compensation payments through subrogation. See *Ryden*, 518 F. Supp. at 316. The federal court relied on the earlier Pennsylvania decisions of *Hefferin v.*

statute in holding that only defendants who may be found liable can have negligence apportioned by the jury.<sup>48</sup> Because the employers at issue were protected by the workers' compensation bar, they could not be found liable, and therefore could not be joined in the suit or assigned a percentage of fault by the jury.<sup>49</sup>

Pennsylvania's treatment of settling co-defendants is similar to that of New Jersey. The leading case in this area is *Thompson v. City of Philadelphia*,<sup>50</sup> in which the court held that the defendants' "settlements with plaintiff did not render the dispute as to the apportionment of liability moot, since the ultimate apportionment of liability . . . will govern the defendants' rights of contribution amongst each other in a pending contribution action."<sup>51</sup> However, unlike New Jersey, Pennsylvania does not necessarily give the remaining defendants a credit equal to the settling defendants' pro rata share.<sup>52</sup> Despite this distinction, the result for purposes of this Note is the same as in New Jersey; settling co-defendants still have their fault allocated

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*Stempkowski*, 372 A.2d 869 (Pa. Super. Ct. 1977) and *Arnold v. Borbonus*, 390 A.2d 271 (Pa. Super. Ct. 1978).

48. See *Ryden*, 518 F. Supp. at 315.

49. See *id.* at 316. For other Pennsylvania cases affirming this point of law, see *Tysenn v. Johns-Manville Corp.*, 517 F. Supp. 1290, 1295-96 (E.D. Pa. 1981) (holding that where plaintiffs did not have a negligence claim against the employer due to the exclusive remedy under the Occupational Disease Act, the employer's alleged negligence had no relevance for the purpose of allocating liability against other defendants); *Heckendorn v. Consolidated Rail Corp.*, 465 A.2d 609, 612 (Pa. 1983) (holding that because an employer cannot be found liable due to the workers' compensation bar, liability cannot be apportioned between the defendants and the employer); *Kelly v. Carborundum Co.*, 453 A.2d 624, 627 (Pa. Super. Ct. 1982) ("This statute does not provide for apportionment among all tortfeasors causally responsible for an injury—'It merely provides for apportionment among those defendants against whom recovery is allowed. . . .' (citations omitted). The law does not now and never has required that all possible tort-feasors be made parties to an action. . . .").

50. 493 A.2d 669 (Pa. 1985).

51. *Id.* at 671. Although contribution is the rationale behind allowing allocation of fault for a settling co-defendant, the focus of this Note is on whether fault is allocated, not the impact of contribution laws. Therefore, contribution will be discussed only minimally throughout the Note.

52. See, e.g., *Wirth v. Miller*, 580 A.2d 1154 (Pa. Super. Ct. 1990) (holding that if the release signed by the plaintiff and settling party so states, then the remaining defendants are entitled to a credit equal to the amount of the settlement, regardless of the liability; however, a percentage of fault is still established for later contribution hearings). *But see Charles v. Giant Eagle Markets*, 522 A.2d 1 (Pa. 1987) (holding that a non-settling joint tortfeasor is not relieved of responsibility for payment of a proportionate share of damages where the consideration paid by the settling tortfeasor exceeds his or her proportionate share of damages as determined by the jury and the release provides for reduction of the verdict by the pro rata share of the settling joint tortfeasor). While these cases are not inconsistent—both hold that the settling defendant's negligence is allocated by the jury—the result is that the plaintiff and settling defendant choose the type of credit that will be given the remaining defendants. Allowing the plaintiff to choose a dollar amount deduction instead of a proportionate share deduction creates a scenario whereby a remaining defendant may pay more or less than his proportionate share. Although this disparity may be recovered in a contribution proceeding, the policy should be geared towards having a defendant pay the plaintiff only his proportionate share, without having to participate in a contribution proceeding to recoup some of the overpayment.

by the jury in a negligence action. However, Pennsylvania's treatment of settling co-defendants is inconsistent with its treatment of immune parties. Therefore, Pennsylvania's legislature needs to consider amending the comparative negligence statute.<sup>53</sup>

### *B. Party—Persons Involved in the Tort*

When the jury considers all of the entities that contributed to the tort, regardless of their presence in the suit, a defendant is assured to pay only a percentage of damages that is equal to their percentage of fault. This results in greater efficiency because the plaintiff is forced to join all the parties who may be liable. However, a plaintiff may not recover all damages if some fault is assigned to a party who cannot be liable to the plaintiff. Wisconsin, Minnesota, and Florida are examples of states that choose this method of fault allocation.

#### *1. Wisconsin and Minnesota*

The negligence of the plaintiff shall be measured separately against the negligence of *each person found to be causally negligent*.<sup>54</sup>

The Wisconsin legislature structured the comparative negligence statute to result in the allocation of fault among all the parties involved in the tortious activity. Recently, however, a lower court created an exception to this general rule.<sup>55</sup>

The seminal case in Wisconsin and the leading case cited nationwide by courts on allocation of fault to non-parties<sup>56</sup> is *Connar v. West Shore Equipment of Milwaukee, Inc.*<sup>57</sup> In this case, the Supreme Court of Wisconsin held that when apportioning negligence the jury must be given the opportunity to consider the fault of all parties to the transaction, regardless of whether they are parties to the lawsuit, and regardless of whether they can be

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53. For other states using the same definition of "party" as New Jersey and Pennsylvania, see Oregon, OR. REV. STAT. § 18.470(2) (1996); *Mills v. Brown*, 735 P.2d 603 (Or. 1987) (holding that the comparative fault statutory scheme restricts the jury to consideration of fault of parties to the suit, and excludes from consideration those persons not in the case, including settling defendants protected by a covenant not to sue).

54. WIS. STAT. ANN. § 895.045(1) (West 1996) (emphasis added).

55. See *Hauboldt v. Union Carbide Corp.*, 467 N.W.2d 508 (Wis. 1991).

56. See, e.g., *Johnson v. Niagara Machine & Tool Works*, 666 F.2d 1223, 1226 (8th Cir. 1981); *Gauthier v. O'Brien*, 618 So. 2d 825, 829 (La. 1993); *Mills v. Brown*, 735 P.2d 603, 606 (Or. 1987); *Haderlie v. Sondgeroth*, 866 P.2d 703, 727 (Wyo. 1993).

57. 227 N.W.2d 660 (Wis. 1975).

liable to the plaintiff or other tortfeasors, either by operation of law or because of a prior settlement agreement.<sup>58</sup> There is only one prerequisite to sending the negligence of a non-party to the jury: the trial judge must determine as a matter of law that there is "evidence of conduct, which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about."<sup>59</sup> Subsequently, the court held that whether the party or entity is not a party or is immune from further liability is immaterial.<sup>60</sup>

Since this landmark decision, several lower courts have distinguished cases and held opposite to the *Connar* principle. In *Hauboldt v. Union Carbide Corp.*,<sup>61</sup> the court held that where a plaintiff is entirely fault-free, and a change in apportionment among the defendants would not affect his amount of recovery, the defendant is not entitled to present complete evidence of a partially immune co-defendant's negligence.<sup>62</sup> The court stated that the sole reason the jury should be given an opportunity to "consider the negligence of all persons involved is that adding in the causal negligence of the omitted tort-feasor(s) may affect the amount of recovery by the injured party."<sup>63</sup> In this case, where one defendant could not be liable to the plaintiff because of an immunity, and the other defendant was strictly liable, the liable

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58. *See id.* at 662-63. In *Connar*, the plaintiff's decedent was employed by the Druml Company when he was killed during the course of his employment. Plaintiff sued both the manufacturer and the distributor of the Bobcat machine the decedent was operating at the time of his death. Both defendants requested that the employer's negligence be considered by the jury when apportioning negligence. This request was refused and the Supreme Court of Wisconsin reversed the lower court decision. *See id.*

59. *Id.* at 662-63.

60. *See id.* The court cited two earlier Wisconsin cases to affirm this point of law. The court noted that *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963), and *Payne v. Bilco Co.*, 195 N.W.2d 641 (Wis. 1972), both held that the apportionment of negligence by the jury must include all parties whose negligence may have contributed to the transaction that led to the cause of action. Specifically, the *Payne* court stated that "[t]he failure to include the settling tortfeasors and the employer . . . would necessarily have been prejudicial to [the two remaining defendants]. . . [However,] it was necessary that all alleged tortfeasors be included in the special verdict for comparison purposes." *Payne*, 195 N.W.2d at 646.

61. 467 N.W.2d 508 (Wis. 1991).

62. In this case, the plaintiff, Robert Hauboldt, was an injured fire fighter who sued Union Carbide, the manufacturer of the defective acetylene tank that exploded during a fire. Union Carbide brought a third party suit against Coleman, the owner of the land where the tank was being stored. Union Carbide sought to demonstrate that Coleman's negligence was a defense against the plaintiff's claim of product defect. However, the judge excluded the evidence of Coleman's negligence. Coleman was immune under the fire fighter's rule, and only his failure to warn of the tank's presence was outside the scope of the rule. Coleman's possible negligence in constructing and maintaining the garage that caught fire was protected by the rule, and therefore, there was no need to produce evidence on this point, because he would not be liable to the plaintiff or Union Carbide for such conduct. *See id.* at 515.

63. *Id.*

defendant was not entitled to present evidence of the third party's negligence because that information was protected under the immunity.<sup>64</sup>

Recently, however, the *Connar* decision has been reaffirmed. In *Martz v. Trecker*,<sup>65</sup> the Wisconsin Court of Appeals held that in circumstances similar to *Hauboldt*, the lower court was correct to include in the jury instructions the negligence of a non-party tortfeasor, even though it had no bearing on the amount of the plaintiff's recovery.<sup>66</sup> The inclusion of non-parties in jury deliberations was also affirmed in *Zintek v. Perchik*.<sup>67</sup> The court restated that a jury must have the opportunity to consider anyone who may have contributed to the tortious act.<sup>68</sup> However, under the facts of the case, the defendants failed to meet the threshold evidentiary standard of law because, according to the court, they did not produce sufficient evidence to warrant submission of the matter to the jury.<sup>69</sup>

As noted above, Wisconsin also includes settling co-defendants in jury instructions when apportioning fault among several defendants.<sup>70</sup> One type of settlement procedure is known as a "*Pierringer* release" and is used in several states other than Wisconsin.<sup>71</sup> For example, Minnesota also uses this same system for the treatment of settling defendants.<sup>72</sup> In the case of

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64. *See id.* *See also* *York v. National Continental Ins. Co.*, 463 N.W.2d 364, 368 (Wis. Ct. App. 1990) (distinguishing *Connar* and holding that where there is no causal negligence on the part of the plaintiff, there is no prejudice from failure to include the immune employer in the special verdict question).

65. 535 N.W.2d 57 (Wis. Ct. App. 1995).

66. *See id.* at 61. Plaintiff, Marilyn Martz, was a passenger in a vehicle driven by Young, which was struck by defendant Trecker. A jury found that both Young, the non-party driver, and Trecker, the defendant, were negligent and apportioned negligence accordingly. *See id.* at 58.

67. 471 N.W.2d 522 (Wis. Ct. App. 1991).

68. *See id.* at 528.

69. *See id.* at 528-29. Plaintiffs sued two doctors in a medical malpractice action. The court held that in the medical malpractice setting, in order for the *Connar* standard to be satisfied, the remaining defendants must have expert testimony to introduce the negligence of non-parties. Because this standard was not met, the court upheld the lower court decision to exclude the evidence, while affirming the *Connar* standard as still good law. *See id.*; *see also* *Spearing v. Nat'l Iron Co.*, 770 F.2d 87, 90 (7th Cir. 1985) (holding that "the logic of the Wisconsin comparative negligence law requires that the proportional fault of all tortfeasors be determined, whether or not they are named as defendants. This is a necessary step in fixing the proportional fault of the plaintiff and of the named defendant(s)") (citing *Connar v. West Shore Equip. of Milwaukee, Inc.*, 227 N.W.2d 660, 662 (Wis. 1975)).

70. *See Connar*, 227 N.W.2d 660.

71. This concept comes from *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963), where the court held that releases of joint tortfeasors may have several different legal effects, including partial satisfaction of damages and cause of action, covenant not to sue, accord and satisfaction of whole cause of action or discharge of liability. The true legal consequences of this release have a great effect on the right to contribution for the defendants remaining in the lawsuit. For the purposes of this Note, it is important to realize that whatever the contribution result, the settling party still is assigned a percentage of fault to properly assess the nonsettling party's fault.

72. Minnesota, like Wisconsin, also allows a jury to consider all parties to the transaction when

*Rambaum v. Swisher*,<sup>73</sup> the Minnesota Supreme Court stated some of the characteristics of the *Pierringer* settlement.<sup>74</sup> Generally, in this type of settlement, the tort-feasor settles for a specified percentage of the damage award as determined by the jury. So, in actuality, the settlement is for a fixed percentage of the jury's yet-to-be-determined damage award.<sup>75</sup> The court held that when this settlement method is used, the amount of the settlement is not used to reduce the remaining defendants' liability pro tanto.<sup>76</sup> According to the court, this would be contrary to the intentions of the settling parties, who had previously agreed to deduct from the verdict the portion of damages equal to the agreed upon percentage of the settling defendant's fault.<sup>77</sup> The result of this type of settlement is similar to the result found in New Jersey when dealing with a settling co-defendant. Both the plaintiff and the settling co-defendant take the risk of a bad settlement, and of either paying too much or accepting too little for the release.<sup>78</sup> However, in either case, the remaining

apportioning fault. *See* MINN. STAT. ANN. § 604.01 (West 1996), which states that:

The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

*Id.*; *see also* *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978), where the court held that when some of the defendants have settled with the plaintiff, the settling defendants' negligence is to be submitted to the jury even though they have been dismissed from the lawsuit. *See id.* at 896. The Minnesota Supreme Court, citing the Wisconsin cases of *Pierringer*, and *Payne v. Bilco Co.*, 195 N.W.2d 641 (Wis. 1972), further articulated that the apportionment shall include all parties whose negligence may have contributed to the cause of action. *See id.* at 903. Regardless of whether they are parties to the lawsuit, negligent parties may be liable to the plaintiff, either by operation of law or settlement release. Finally, the court cited the Jury Instruction Guides to re-enforce their point.

In submitting the comparative fault question, the court must submit the names of all persons whose conduct could be found to be negligent and contributing as a cause to the plaintiff's injury or to the accident. If the total combined negligence is to equal 100%, then the percentage contribution [of fault] by all persons whose conduct potentially contributed to the accident or the injury, whether or not a party to the proceeding, must be submitted.

*Lines*, 272 N.W.2d at 903 (quoting 4 MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES, JIG II, 148 S, Comment, at 128 (2d ed. 1974)).

73. 435 N.W.2d 19 (Minn. 1989).

74. *See id.* at 22-23.

75. *See id.* In return for this, the plaintiff agrees to indemnify the settling tortfeasor for claims of contribution by the nonsettling defendants. This assures the nonsettling defendants that they will not pay more than their percentage share of the jury award. *See Rambaum*, 435 N.W.2d at 22.

76. *See id.* at 22-23.

77. *See id.*; *see also* *Fry v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978) ("[T]he *Pierringer* release is based on the formula that each joint tortfeasor including the nonsettling defendant is liable only for that part of the award which is his percentage of casual negligence. [T]he nonsettling defendant is relieved from paying more than his fair share of the verdict. . .").

78. The *Rambaum* court noted that the fairness of the settlement is judged at the time it is made. If the jury determinations subsequently result in the plaintiff receiving a windfall, or the defendant settling for less than his fair share, this result is acceptable because of the law's strong encouraging of settlements. *See Rambaum*, 435 N.W.2d at 23.

non-settling defendants are liable for only their proportion of fault as allocated by the jury.

## 2. Florida<sup>79</sup>

[T]he court shall enter judgment against *each party liable* on the basis of *such party's* percentage of fault. . . .<sup>80</sup>

Florida's statutory language indicates that, similar to New Jersey and Pennsylvania, juries can only consider parties who may be liable. The recent case of *Fabre v. Marin*,<sup>81</sup> however, has altered the comparative negligence landscape in Florida.

The *Fabre* decision resolved a conflict between two lower court decisions, *Fabre v. Marin*<sup>82</sup> and *Messmer v. Teacher's Insurance Co.*<sup>83</sup> In the *Fabre* case, the lower court held that in creating the comparative fault statute, the legislature did not intend to stop a fault-free plaintiff from recovering full damages; rather, it intended to apportion liability only among tort-feasors who were defendants in the lawsuit.<sup>84</sup> In *Messmer*, the lower court reached the opposite conclusion on a similar set of facts.<sup>85</sup> The court reasoned:

The use of the word "party" [in the statute] simply describes an entity against whom judgment is to be entered and is not intended as a word of limitation. Had the legislature intended the apportionment computation to be limited to the combined negligence of those who happened to be parties to the proceeding, it would have so stated. The

79. For the discussion of Florida law, any reference to "damages" is limited to noneconomic damages.

80. FLA. STAT. ANN. § 768.81(3) (West 1996) (emphasis added).

81. 623 So. 2d 1182 (Fla. 1993).

82. 597 So. 2d 883 (Fla. Dist. Ct. App. 1992).

83. 588 So. 2d 610 (Fla. Dist. Ct. App. 1991).

84. See *Fabre*, 597 So. 2d at 885. In this case, Ann Marin was injured while riding in a car driven by her husband Ramon. Mrs. Marin sued Marie Fabre, claiming Fabre's vehicle negligently changed lanes in front of the Marins' vehicle, causing the accident. The defendant requested apportionment of fault between Mrs. Fabre and Mr. Marin, who was immune because of interspousal tort immunity. The court, however, ruled that it lacked jurisdiction to enter judgment against Mr. Marin, who was an immune non-party. The court noted that the statute was ambiguous in its definition of the word "party" and chose to apply the definition of "all litigants" instead of "all participants in the accident." *Id.* at 883-85.

85. In *Messmer*, plaintiff Ann Messmer was riding in an automobile being driven by her husband when they collided with Waldron, who was uninsured. The defendant was the insurance company that had issued a \$300,000 policy to Messmer for uninsured motorist coverage. The trial court found that Waldron was 20% at fault, and Mr. Messmer was 80%. Mrs. Messmer argued that the comparative negligence law required apportionment among the actual parties to the suit, not to immune non-parties, such as her husband. The court disagreed with her argument and ruled accordingly. See *Messmer*, 588 So. 2d at 611-12.

plain meaning of the word percentage is a proportionate share of the whole, and this meaning should apply in the absence of any language altering or limiting the plain meaning.<sup>86</sup>

In 1993, the Supreme Court of Florida resolved this conflict in *Fabre v. Marin*,<sup>87</sup> by upholding the decision of the *Messmer* court.<sup>88</sup> The court concluded that the comparative negligence statute was unambiguous, and that "judgment should be entered against each party liable on the basis of that party's percentage of fault."<sup>89</sup> Furthermore, the court noted that the only way to determine a party's percentage of fault is to compare that party's actions to all of the other parties who contributed to the accident, regardless of whether they have been or could have been liable to the plaintiff and joined as defendants.<sup>90</sup>

This point of law was confirmed in *Allied-Signal, Inc. v. Fox*,<sup>91</sup> a case decided the same day as *Fabre v. Marin* that answered a certified question from the United States Court of Appeals for the Eleventh Circuit, concerning the interpretation of Florida's comparative negligence statute.<sup>92</sup> On the strength of *Fabre v. Marin*, the Florida Supreme Court answered the United States Court of Appeals that an immune employer should have liability apportioned to it even though it can have no further liability to the plaintiff in order to properly determine the actual defendant's fault.<sup>93</sup>

Florida's treatment of settling co-defendants is similar to that of New

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86. *Messmer*, 588 So. 2d at 611-12. *See also* *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). The *Messmer* court also noted that the purpose of the statute was to partially eliminate the doctrine of joint and several liability, and not to include the fault of a non-party in the jury's allocation of fault would thwart this intent. *See Messmer*, 588 So. 2d at 612.

87. 623 So. 2d 1182 (Fla. 1993).

88. *See id.*

89. *Id.* at 1185. For example, under the *Fabre* facts, the defendant's percentage of fault was 50%. To accept a contrary reading of the statute would "require the entry of a judgment against [defendant] in excess of their percentage of fault and directly contrary to the wording of the statute." *Id.*

90. *See id.* at 1185. The court noted that the California Supreme Court has ruled similarly in reading a comparable California statute. In *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992), the court, reviewing a statute that provided that each defendant shall be liable only for the percentage of damages equal to their percentage of fault, held that this required a determination of the percentage of fault of all entities that contributed to the accident, not only those who had been joined as defendants.

91. 623 So. 2d 1180 (Fla. 1993).

92. 966 F.2d 626 (11th Cir. 1992). The circumstances of the case were as follows: the plaintiff, Kevin Fox, was working for Eastern Airlines when he caught his fingers on an Allied aircraft fan with an unattached safety screen. Eastern Airlines was immune from suit under the Worker's Compensation Act, FLA. STAT. Ch. 440 § 440.11 (1996), but the defendant wanted the airline's fault included in the jury deliberations because of its noncompliance with OSHA standards. *See id.*

93. *See Allied-Signal*, 623 So. 2d at 1181 (citing *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Johnson v. Niagra Mach. & Tool Works*, 666 F.2d 1223 (8th Cir. 1981); *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992); *Connar v. West Shore Equip. Co.*, 227 N.W.2d 660 (Wis. 1975)).

Jersey and consistent with their own treatment of non-parties. For example, in *DeWitt Excavating, Inc. v. Walters*,<sup>94</sup> the court reiterated the doctrine established in *Fabre v. Marin*:<sup>95</sup> a defendant is responsible for the portion of damages that is equivalent to the percentage of fault attributable to that defendant.<sup>96</sup> However, unlike New Jersey, Wisconsin, and Minnesota, plaintiffs in Florida cannot recover more than the jury awarded damages.<sup>97</sup>

### 3. Other States

Several other states also define “party” as all persons involved in the transaction. For example, interpreting the Kansas comparative negligence statute,<sup>98</sup> the Kansas Supreme Court in *Brown v. Keill*,<sup>99</sup> the Supreme Court

94. 642 So. 2d 833 (Fla. Dist. Ct. App. 1994).

95. 623 So. 2d 1182 (Fla. 1993).

96. See *DeWitt*, 642 So. 2d at 833-34; see also *A.W. Chesterson v. Fisher*, 655 So. 2d 170 (Fla. Dist. Ct. App. 1995) (reaffirming the *Fabre* doctrine that a jury must apportion fault to alleged tortfeasors who have settled with the plaintiff before trial); *Schindler Elevator Corp. v. Viera*, 644 So. 2d 563 (Fla. Dist. Ct. App. 1994) (holding that it is reversible error if a lower court fails to include the settling defendant in the special jury verdict).

97. The *DeWitt* court described the following procedure for determining the amount each defendant owes in a case where one of the defendants has settled with the plaintiff:

Step 1) Multiply each nonsettling defendant’s percentage of liability by the noneconomic damages awarded by the jury to determine the amount each nonsettling defendant owes the plaintiff.

Step 2) If there has been a settlement, apply the same formula to determine the amount the settling defendant would have owed pursuant to the jury verdict.

A) If the amount settled for is less than the amount the settling would have owed, the remaining defendants pay their amount owed without regard to the settlement.

B) If the amount settled for is greater than the amount the settling defendant would have owed, the remaining defendant(s) are entitled to have the amount they owe reduced proportionately.

*DeWitt*, 642 So. 2d at 834.

98. KAN. STAT. ANN. § 60-258a (1995) reads as follows:

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants. . . . (c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage or economic loss, shall be joined as an additional party to the action. (d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party’s causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

*Id.*

99. 580 P.2d 867 (Kan. 1978). The plaintiff, Britt Brown, was a car owner who was involved in an accident while his son was driving his car. The jury found the defendant driver 10% negligent and entered judgment against her for 10% of the total damage award. The son was not made a defendant of the suit. See *id.*

of Kansas ruled that the purpose of the Kansas comparative negligence statute was to "equate recovery and duty to pay to degree of fault."<sup>100</sup> The court went on to hold that the language in part (d) of the statute, which reads "all parties against whom such recovery is allowed,"<sup>101</sup> must be read to impose liability for damages based on the relative fault of all parties to the transaction or occurrence, even when one or more parties cannot be joined as a defendant or held liable to the plaintiff.<sup>102</sup>

For other examples of states using this definition of "party", see California,<sup>103</sup> New Mexico,<sup>104</sup> and Oklahoma<sup>105</sup> cases.

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100. *Id.* at 873-74. The court also stated that

there is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some compelling social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not.

*Id.*

101. KAN. STAT. ANN. § 60-258a (1995).

102. *See* *Brown v. Keill*, 580 P.2d 867 (Kan. 1978). In resolving this issue, the court answered several other questions. First, the court held that the comparative negligence statute "permit[s] a defendant in a comparative negligence case to bring in other joint tort-feasors so their percentage of fault can be determined and their liability, if any, adjudged." *Id.* at 875. Second, the court held that if this party has a valid defense such as interspousal immunity or a covenant not to sue, this will not defeat the intention of the statute of assigning that party a percentage of fault even though they cannot be liable to the plaintiff. *See id.* at 876.

It appears after considering the intent and purposes of the entire statute that such a party's fault should be considered in each case to determine the other defendant's percentage of fault and liability, if any. The proportionate liability . . . under K.S.A. § 60-258a(d) should not be increased merely because a party joined under subsection (c) has a valid defense to plaintiff's claim, other than lack of negligence.

*Id.*

For other Kansas cases on this point of law, see *Cerretti v. Flint Hills Rural Elec. Cooperative Ass'n*, 837 P.2d 330, 347 (Kan. 1992) ("The [comparative negligence] statute was enacted to impose individual liability for damages based on the proportionate fault of all the parties to the occurrence which gave rise to the injuries and damages in a single action whenever possible.").

103. *See* *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992) (stating that § 1431.2 requires a determination of the percentage of fault of all entities who contributed to the accident rather than only those who had been joined as defendants).

104. *See* *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. 1982) (stating that the defendant should not be held liable for the negligence of an unknown driver who contributed to the accident).

105. *See* *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980) ("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. It cannot, and more important should not, be done.").

#### IV. PROPOSAL

When states determine the best way to set up a system of fault comparison in a tort setting, there are many factors that need to be considered. These include efficiency of the court system, compensation of the plaintiff for their injuries, and proper allocation of the damages to the defendants who are involved in the litigation. The following proposed statute would help to accomplish these goals. This Note proposes that states, especially New Jersey, Pennsylvania, and Oregon, consider the merits of the statute and adopt similar legislation.

##### **State X Comparative Negligence Statute**

A) In all suits alleging negligence or wrongful death, the negligence of the plaintiff shall not serve as a bar to recovery.

B) The jury or fact finder shall make the following findings of fact:

- 1) the percentage fault of the defendant(s) in the suit;
- 2) the percentage fault of the plaintiff(s) in the suit; and

3) the percentage fault of all parties not in the suit who have contributed to the accident or transaction at issue—this shall include the following categories of parties: settling co-defendants, immune parties (including spousal immunity, worker's compensation bar, etc.), parties who have signed a covenant not to sue, and any party involved in the transaction who the plaintiff has chosen not to sue.

C) A fact finder shall not consider the fault of any party in Section (B)(3) who is:

1) not identifiable (i.e., a phantom tort-feasor); or

2) any party designated in (B)(3) unless, as a matter of law, there is evidence of conduct, which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about.

D) Each party in (B)(1), (2), and (3) shall be assigned a percentage of fault so that the total of all fault assigned is 100%. The fact finder shall make a determination of the total damages awarded to the plaintiff, and each defendant shall be liable for the percentage of that damage award equal to that party's percentage of fault. Under no circumstances shall a party be liable for a dollar amount greater than that which their percentage of fault dictates.

E) A jury shall not be made aware of the dollar amount of any previous settlement the plaintiff has made with a defendant(s). That party shall be still assigned a percentage of fault. There is no alteration to any liability of any defendant if the plaintiff receives more or less in

the settlement than they would have received from that party had they not settled, based on that party's percentage of fault. This section shall be read to allow a plaintiff to recover more or less than the damages a jury awards based on whether they settled for more or less than a defendant's percentage of the damage award. If a plaintiff settles with a defendant who is later found to have 0% fault, the remaining defendants are not entitled to any reduction in damages.

This proposed statute has several features that help accomplish the above stated goals.

#### *A. Section A—Comparative Negligence*

Section A makes clear that the statute eliminates all links to a system of contributory negligence.<sup>106</sup> A plaintiff should not be denied all recovery simply because he has some fault in the transaction at issue.<sup>107</sup>

#### *B. Section B—Jury Allocation of Fault*

Sections B(1) and B(2) simply state the obvious, that the plaintiff and defendant(s) are all to receive a percentage of fault from the jury. Subsection (3) mandates that all entities involved in the accident are allocated a percentage of fault, assuming they meet the two conditions of section C: (1) they are identifiable; and (2) they meet the required evidentiary standard.

##### *1. Immune Parties*

If juries do not consider immune parties, then a defendant who is partially liable may end up paying more than his true share of fault. For example, consider a hypothetical involving an employer that is immune because of the workers' compensation bar.<sup>108</sup> Plaintiff is employed by ABC Company, which has a solid waste container behind its facilities.<sup>109</sup> The defendant is a

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106. According to O'Connor & Sreenan, Alabama, Maryland, North Carolina and Virginia have retained systems of contributory negligence. See O'Connor & Sreenan, *supra* note 3, at 381.

107. See *supra* notes 5-21 and accompanying text (discussing contributory versus comparative negligence).

108. See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 729-49 (1993). Employers are barred from further liability to an employee because of the exclusivity of the workers' compensation remedy. "Exclusivity is one of the founding principles of workers' compensation. In exchange for a no-fault system (which benefited workers), workers' compensation became the exclusive remedy against the employer for a worker injured on the job (which benefited employers)." *Id.* at 729.

109. This hypothetical is based on *Ramos v. Browning Ferris Industries of South Jersey, Inc.*, 476 A.2d 304 (N.J. Super. Ct. App. Div. 1984).

solid waste hauler that leased the container to ABC Co., who is immune from liability because of the state's workers' compensation statute. In its operations, the defendant, creates a rut in the ground while hauling the container, and the plaintiff, while rolling a large drum of solid waste, trips on the rut, which was recently covered with snow.<sup>110</sup> Assuming 25% negligence to the plaintiff (as the jury found in the *Ramos* case),<sup>111</sup> there is no reason why the defendant, the solid waste hauler, should be responsible for 75% of the damages, without a jury contemplating that the employer, ABC Co., may have some fault for failing to clear the lot where the plaintiff was injured. A defendant should not be responsible for damages greater than its fault merely because it has found itself in the unfortunate circumstance of being a joint tort-feasor with an immune party.<sup>112</sup>

A named defendant should not be forced to bear some percentage of negligence or fault that rightfully belongs to someone else, even if that other party is immune [or] nonliable. In some situations, this may mean that the plaintiff cannot obtain satisfaction of a judgment for all of the negligence or fault the jury attributes to the nonparty. However, at least the named defendant is not forced to shoulder blame that belongs elsewhere.<sup>113</sup>

## 2. *Nonparties*

Parties that a plaintiff has simply chosen not to sue, possibly for personal reasons, also should be included in the jury deliberations on the allocation of fault. Plaintiffs control the litigation by deciding the jurisdiction and the venue, as well as deciding when to commence the suit. Plaintiffs should not

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110. In *Ramos*, the court refused to allow the jury to allocate negligence to the employer, who was not liable to the plaintiff because of the workers' compensation bar. The court held that "[a] truer verdict is more likely to be returned where the fact finder's attention is ultimately fixed on the conduct of the parties who will be affected by the verdict." *Ramos*, 476 A.2d at 309.

111. *See id.* at 306.

112. The Wisconsin cases of *Hauboldt v. Union Carbide Corp.*, 467 N.W.2d 508 (Wis. 1991), *see supra* notes 61-64, and *York v. National Continental Insurance Co.*, 463 N.W.2d 364 (Wis. Ct. App. 1990), held that where there is no causal negligence on the part of the plaintiff, there is no prejudice from failure to include the immune or non-party from the jury's consideration. However, these courts have missed the point of including non-parties in the jury's allocation of fault. In negligence cases, the point of such a distribution of fault is so the defendants who are in the case do not end up paying more than their own proportion of fault. By only allowing this to occur when there is fault on the part of the plaintiff, the court creates a situation of uncertainty. For instance, when the issue of plaintiff's negligence is disputed, should the court allow evidence of non-parties' fault, but allow the jury to consider that evidence if it assigns any fault to the plaintiff?

113. Kurt G. Stiegelmeier, *Designation of Immune, Nonliable, and Unknown Nonparties*, 22 COLO. LAW. 31, 31 (1993).

be able to force a “deep pocket” defendant to pay more than their proportionate share of damages by choosing not to sue a party, possibly because the party is insolvent. Plaintiffs must take defendants as they find them.<sup>114</sup>

For example, take the following hypothetical. The plaintiff steps off a bus at a bus stop, crosses in front of the bus, and as the plaintiff is crossing the street, he is hit by a car traveling in the opposite direction. Assume that the car that hits the plaintiff is driven by a woman who is soon to file for bankruptcy. Learning this before filing suit, the plaintiff quickly settles with the driver for a small sum and signs a covenant not to sue her. Therefore the plaintiff sues only the bus company, knowing that the driver of the car would be unable to satisfy any large judgment. Under the laws of New Jersey<sup>115</sup> and Pennsylvania,<sup>116</sup> the jury would only be able to allocate fault to the plaintiff and to the bus company, the parties to the suit.<sup>117</sup> This result is completely unfair to the defendant bus company.<sup>118</sup> With the control over the litigation that the plaintiff has from a procedural standpoint, the plaintiff should not be allowed to force a defendant to pay more damages by not joining a particular party.<sup>119</sup> The plaintiff, not the bus company, should shoulder the risk of being

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114. See Julie O’Daniel McClellan, Note, *Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants?*, 82 KY. L.J. 789, 816 (1994) (under Kentucky law, plaintiff can “no longer avoid apportionment and recover fully from a defendant who is only partially at fault by not bringing an action against a negligent friend, relative, or financially unstable tortfeasor. The defendant can prevent such a result by bringing a third-party claim against the unnamed joint tortfeasor.”). *Dix & Associate Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24 (Ky. 1990), was the first case in which the Kentucky Supreme Court held in favor of apportionment of liability to a nonparty, and to an employer immune because of the workers’ compensation bar.

115. See N.J. STAT. ANN. § 2A:15-5.2 (West 1996).

116. See 42 PA. CONS. STAT. § 7102 (1996).

117. However, according to the court in *Straley v. United States*, 887 F. Supp. 728 (D.N.J. 1995), the bus company defendant would be able to introduce the negligence of the insolvent car driver as an intervening cause, which means that the defendant would have to show that the intervening cause was 100% liable for the resulting accident.

118. See *Fabre v. Marin*, 623 So. 2d 1182, 1185-86 (Fla. 1993). The court held that:

a result where a party involved in the accident but who is not assigned a percentage of fault defies common sense. It would be incongruous that the legislature would have intended that the [defendant’s] responsibility be 100% in situations where [plaintiff’s] vehicle was operated by her husband and only 50% in situation where by chance she was a passenger in a vehicle operated by [a driver who was not immune].

*Id.*

119. See *id.* at 1186. In *Fabre* the court concluded that:

The legislature decided that . . . a plaintiff should take each defendant as he or she finds them. If a defendant is insolvent, the judgment of liability of another defendant is not increased. The statute requires the same result where a potential defendant is not or cannot be joined as a party to the lawsuit.

*Id.*

involved in an accident with a third party who is unable to pay her proportionate share of liability.

### C. Section C—Unidentifiable Parties and the Evidentiary Standard

There are two criteria that must be met before a jury may consider the fault of an entity that is not a party to the suit.

#### 1. Unidentifiable Parties

Allowing a defendant to argue that a party who cannot be identified is at fault takes the concept of fairness to the defendant too far. Parties that are immune and parties that settle should not cause a defendant to pay more than his proportionate share of damages, because these parties are out of the case either by action of the legislature or of the plaintiff. However, a phantom tortfeasor is not present because of his own elusiveness. The plaintiff, who may not recover his full damage award because of fault designated to an immune party or settling defendant, should not be denied recovery because of the fault of an unidentifiable party. An example of this situation is *Bencivenga v. J.J.A.M.M., Inc.*<sup>120</sup> In this case, the plaintiff brought a personal injury suit against a dance club after an unknown tortfeasor hit him in the face with a bottle. The court denied the defendant's request to apportion fault to the unnamed tortfeasor.<sup>121</sup>

#### 2. Evidentiary Standard

The second criteria is that an immune or non-present party must, as a matter of law, meet the threshold evidentiary standard that there is evidence of conduct, which, if believed by the jury, would constitute negligence on the part of the person or of the other legal entity about whom such evidence is introduced.<sup>122</sup> The purpose of this threshold is to place limits on the

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120. 609 A.2d 1299 (N.J. Super. Ct. App. Div. 1992).

121. The court noted that "a fictitious person is not someone against whom recovery can be sought because . . . due process prevent[s] entry of judgment against a person designated by a fictitious name." *Id.* at 1303.

122. This same legal standard is used in both Wisconsin and Minnesota. *See* MINN. STAT. ANN. § 604.01 (West 1996); *Johnson v. Niagra Mach. & Tool Works*, 666 F.2d 1223, 1226 (8th Cir. 1981).

Under the Minnesota comparative negligence statute . . . , "(if there is 'evidence of conduct which, if believed by the jury would constitute negligence (or fault) on the part of the person . . . inquired about,' the fault or negligence of that person should be submitted to the jury" even though that person is not party to the lawsuit.

*Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978) (citing *Connar v. West Shore Equip., Inc.*, 227 N.W.2d 660, 662 (Wis. 1975)); *see also* *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978); WIS. STAT. ANN. § 895.045 (West 1996); *Connar*, 227 N.W.2d at 663.

defendant's right to have fault allocated by the jury. If a non-party does not meet this evidentiary standard, then it would be too distracting for the jury to hear evidence about it. While a defendant should be permitted to display evidence of a party who may be at fault, this right should not extend so far as to bring in evidence of a party who cannot meet this standard, for this will only serve to take the focus away from the parties who are involved in the matter.<sup>123</sup>

#### *D. Section D—Apportionment of Monetary Damages*

Section D clarifies that no party shall be liable for more than their fair share of damages. To calculate each party's liability, simply multiply the total damages award with a particular defendant's percentage of fault. No defendant can be liable for more than that amount.

#### *E. Section E—Settling Parties*

The final section of the statute addresses the way a court shall treat parties who have settled with the plaintiff. The text of this section follows the treatment of settling defendants in New Jersey.<sup>124</sup> Under this statute, a settling party is assigned a percentage of fault, and the remaining parties are to pay the proportion of damages equal to their own percentage of fault. This system may allow a plaintiff to recover more or less than the jury awarded damages.<sup>125</sup> However, these results are acceptable in the context of encouraging settlement, which will increase the efficiency of the judicial system.

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123. See Bryan Aylstock, *Phantom Tortfeasors: Parties for the Jury to Consider in its Apportionment of Fault?*, 45 FLA. L. REV. 733, 742 (1993) (allowing jury apportionment of fault among all parties to the transaction "places Florida plaintiffs in the unenviable position of having to defend an absent tortfeasor because many of the tortfeasors named in lawsuits will undoubtedly concentrate their defense on blaming the empty chair"). While this is a valid criticism of allowing the jury to allocate fault to immune and non-parties, the evidentiary standard used in this Note's proposed statute, as well as in Wisconsin and Minnesota, alleviates some of these problems by creating a minimum level of proof that must be met before evidence of that party's negligence can be presented to the jury.

124. See *Young v. Latta*, 589 A.2d 1020 (N.J. 1991).

125. For example, assume plaintiff (P) sues defendants (D1, D2 and D3) in a suit resulting from a four car collision. Plaintiff settles with D1 for \$60,000, and the jury awards \$100,000 in damages and allocates negligence as follows: P—25%; D1—25%; D2—25%; D3—25%.

Had there been no settlement, each defendant would be liable for \$25,000, and plaintiff would recover a total of \$75,000. However, as a result of the settlement, D2 and D3 are still liable for \$25,000 each, but plaintiff ends up recovering \$110,000, more than the jury award of damages. Had the plaintiff's settlement with D1 been for \$10,000, plaintiff would then only recover a total of \$60,000; less than the jury award of damages.

## V. CONCLUSION

In a negligence action involving multiple defendants, the fates of the various parties are determined by how the jury allocates fault. When a jury can only allocate fault to the parties in the litigation, then defendants may be forced to pay more than their fair share of the damages if there are parties to the transaction who cannot be liable to the plaintiff, whom the plaintiff has not made a party to the suit, or who have already settled with the plaintiff.<sup>126</sup> However, when a jury allocates fault to all parties in a transaction, then each defendant can be confident that they only will be liable for their share of damages equivalent to their share of fault.<sup>127</sup> Fairness and efficiency dictate that all parties to a transaction should be assigned a percentage of fault. This, in addition to being fair to the defendant, takes some power away from plaintiffs, who in a jurisdiction like New Jersey or Pennsylvania, can choose not to sue insolvent parties, so that “deep-pockets” will be forced to pay the damages, even if they are not entirely at fault. These results can be avoided by the enactment of the statute proposed by this Note.

*Daniel Levi*

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

127. *See supra* note 57 and accompanying text.