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Compensation, Fairness, and the Costs of Accidents- Should Pennsylvania's Legislature Modify or Abrogate the Rule of Joint and Several Liability Among Concurrently Negligent Tortfeasors?

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"Until it does, alas, there will be few Memorial Day parades sponsored by communities such as Harrisville."[1]

I. Introduction

The rule of joint and several liability, often referred to as the "deep pockets" theory,[2] has been the subject of much controversy. Essentially, the rule allows a successful plaintiff to collect his entire damage award from any one defendant when two or more defendants have acted negligently, either in concert or independently, to cause one indivisible injury.[3] This is true even when responsibility for the loss is apportioned among the parties to the accident under the theory of comparative negligence. A tortfeasor who pays more than his proportionate share of the award may seek contribution from his fellow judgment debtors, but he bears the risk that they will be unable to pay.[4]

Plaintiffs recovering judgments under joint and several liability routinely seek recovery first, and usually entirely, from that tortfeasor with the greatest assets. The rule of joint and several liability thus has the effect of singling out government entities, industries, and professionals. These are the so-called "deep pockets" that are most likely to have the resources to satisfy a victim's damage award.

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1. Elder v. Orluck, ___ Pa. ___, ___, 515 A.2d 517, 526 (1986) (Flaherty, J., concurring) (discussed *infra* notes 7-22 and accompanying text).

2. The "deep pockets" theory is manifested not only in the rule of joint and several liability, but also in theories of liability such as respondeat superior, enterprise liability, and strict products liability. The theory is that those most able to pay a damage award without suffering serious social or economic dislocation should be compelled to do so. *See* G. CALABRESI, THE COSTS OF ACCIDENTS 40 (1970); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 474 (1985).

3. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 711 (1956); V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.3, at 258 (1986).

4. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 351 (5th ed. 1984) [hereinafter PROSSER].

Advocates of tort reform identify the joint and several liability rule as one of the aspects of the civil justice system that should be changed in order to remedy the insurance crisis.[5] Whether or not one believes that tort reform will have an effect on the insurance crisis, the doctrine of joint and several liability deserves some critical attention from the Pennsylvania General Assembly. First, the doctrine operates within Pennsylvania's comparative negligence system to create a likelihood of unfair results to minimally culpable defendants who may be compelled to pay the entire recovery to more culpable plaintiffs. Second, while changing the rule of joint and several liability would not cure the insurance crisis, it should be recognized that a rule that encourages suits against minimally culpable "deep pocket" defendants and then compels payment by such defendants of awards that are excessive in relation to their relative fault may tend to contribute to problems of liability insurance affordability and availability. Quite apart from this obvious effect on insurance pricing, joint and several liability may tend to frustrate desired insurance pricing

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5. *See* Granelli, *The Attack on Joint and Several Liability*, A.B.A. J., July 1985, at 61. The Insurance Committee of the Pennsylvania House of Representatives disagrees with the proposition that tort reform will remedy the insurance crisis. In a report issued in September 1986, the Committee made the following comments:

> The present "crisis" of unavailability and unaffordability [of liability insurance] is not caused by the civil justice system but by the unrestrained price cutting which occurred in the late 1970's and early 1980's, which created artificially low prices when the insurance industry attempted to obtain as much new business as possible in order to invest premium income at the extremely high investment yields which existed [at] that time . . .
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> . . . [At the hearings held by the Committee] [t]here was no convincing evidence presented which indicated that making the changes in the civil justice system which have been proposed by the proponents of "tort reform", will solve the current problems of unavailability and affordability of liability insurance or prevent a similar "crisis" in the future. Not one witness, under direct questioning, would predict the effect tort reform would have on either premium rates or insurance availability. Further, not a single actuarial study was presented to the committee showing either the effects of existing tort reforms or projecting the effects of the enactment of any additional changes in the Civil Justice System.

REPORT OF THE INSURANCE COMMITTEE, PENNSYLVANIA HOUSE OF REPRESENTATIVES, 170th General Assembly, 1986 Sess., LIABILITY INSURANCE CRISIS IN PENNSYLVANIA, Conclusions and Recommendations [hereinafter INSURANCE COMMITTEE REPORT].

If one believes that incremental tort reform is appropriate only if it can be guaranteed as a complete cure for the liability insurance crisis, the conclusion must be that such tort reform is not appropriate. A complete overhaul of the accident law system, such as that undertaken in New Zealand, where a comprehensive social insurance system replaced tort law in accident cases, could certainly achieve such a cure. *See infra* note 140. Such a radical change, however, is not politically feasible. If, on the other hand, one recognizes that certain tort reform measures conceivably could have a desirable effect upon insurance rates over time, and if in addition one is receptive to the modest suggestion that present tort law rules may not reflect a perfect balance of our society's goals in the field of accident law, then a critical look at these rules is certainly appropriate, and change may indeed be warranted. *See infra* notes 130-70 and accompanying text.

effects on economically efficient accident cost reduction.[6]

This Comment will trace the development of the joint and several liability rule and examine its function within Pennsylvania's present system of comparative negligence. The rule will be compared to alternatives adopted in other states and to the recent proposals in the Pennsylvania General Assembly. The analysis will focus upon how each rule functions to balance competing goals within our system of comparative negligence, with a view toward answering two ultimate questions: Should Pennsylvania change its rule of joint and several liability, and, if so, what change is desirable?

II. The *Elder* Case—Modified Comparative Negligence and the Aggregate Rule

The recent Pennsylvania Supreme Court decision of *Elder v. Orluck*[7] is a poignant comment on the joint and several liability doctrine. On Memorial Day 1977, the Borough of Harrisville, with the permission of the Pennsylvania Department of Transportation, closed a section of Route 8, a state highway, in order to conduct a parade. As a result, traffic was slowed on the stretch of Route 8 to the north of the Borough. George Elder was driving south on Route 8 toward Harrisville when, just as he was approaching the Harrisville Borough limits, he saw a truck traveling directly ahead of him slow abnormally as it reached the crest of a hill. Elder, in response, began to slow down as he neared the hill's crest. As he cleared the hill, his vehicle was struck from behind by a vehicle driven by Adam Orluck. Elder sustained serious personal injuries for which he brought suit. Orluck, the original defendant, joined the Borough of Harrisville as an additional defendant, alleging that Harrisville was negligent in

6. *See infra* notes 130-70 and accompanying text. The doctrine of joint and several liability applies to defendants held strictly liable for injuries caused by defective products as well as to defendants held liable for negligence. *See, e.g.*, Capuano v. Echo Bicycle Co., 27 Pa. D. & C.3d 524 (1982); Stewart v. Uniroyal, Inc. No. 2, 72 Pa. D. & C.2d 206 (1975) *aff'd*, 238 Pa. Super. 726, 356 A.2d 821 (1976) (per curiam). This comment, however, focuses only upon how the joint and several liability rule functions within Pennsylvania's system of comparative negligence. While the Pennsylvania Supreme Court has not ruled on the issue, it is probable that the court would construe the Comparative Negligence Act, 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982 & Supp. 1986), to be inapplicable to cases involving strict products liability. *See* Conti v. Ford Motor Co., 578 F. Supp. 1429 (E.D. Pa. 1983), *rev'd on other grounds*, 743 F.2d 195 (3d Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). The topic of joint and several liability of concurrent tortfeasors held liable on a theory of strict products liability is, therefore, outside the scope of this comment. For an excellent discussion of the application of comparative negligence principles to products liability, see Leff & Pinto, *Comparative Negligence in Strict Products Liability: The Courts Render the Final Judgment*, 89 DICK. L. REV. 915 (1985).

7. ___ Pa. ___, 515 A.2d 517 (1986), *aff'd*, 334 Pa. Super. 329, 483 A.2d 474.

failing to warn oncoming traffic of the obstruction, in failing to detour traffic around the parade, and in failing to direct traffic in order to avoid danger.[8]

At trial, Elder's damages were found to be $250,000. The jury apportioned responsibility among the parties to the suit as follows: Elder (plaintiff)—twenty-five percent; Orluck (defendant #1)—sixty percent; and Harrisville (defendant #2)—fifteen percent. Harrisville filed a motion to mold the verdict to deny Elder the right to recover from Harrisville on the grounds that he was found to bear greater responsibility for the accident than was the Borough. This proposition is arguable under the language of the Comparative Negligence Act (CNA),[9] which established a rule of "modified" comparative negligence in Pennsylvania.[10] The trial court denied the motion. On appeal, the superior court affirmed the trial court's ruling, construing the CNA to hold that a plaintiff is barred from recovery only when his causal negligence is greater than the combined causal negligence

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8. *Id.* at 518; *see also* Elder v. Orluck, 334 Pa. Super. 329, 335-37, 483 A.2d 474, 477-78 (1984).

9. *See* 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982).

This statute provides as follows:

> (a) General rule.—In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative *where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought*, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.
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> (b) Recovery against joint defendant; contribution.—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*. The plaintiff may recover the full amount of the allowed recovery from *any defendant against whom the plaintiff is not barred from recovery*. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

Id. (emphasis added). Harrisville argued that the emphasized language in the second paragraph quoted above indicated a legislative intention that a plaintiff's negligence should be compared to that of an individual defendant in order to determine whether the plaintiff was barred from recovering against that defendant in suits involving multiple defendants. Harrisville also argued that if the legislature had intended a plaintiff's negligence to be compared to the aggregate negligence of multiple defendants to determine whether the plaintiff is barred from all recovery, this intention would have been expressed more clearly. The supreme court rejected this argument, relying on the language emphasized in the first paragraph quoted above to hold that a plaintiff's negligence bars his recovery only when it is greater than the combined negligence of all defendants. The legislature's use of the plural "defendants" was dispositive of the statutory construction issue. *Elder*, ___ Pa. at ___; 515 A.2d at 518-21.

10. There are three types of comparative negligence — "pure," "modified," and "slight-gross." Only Nebraska and South Dakota apply the "slight-gross" system. *See* NEB. REV. STAT. § 25-21,185 (1985); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979). For a discussion of "pure" and "modified" systems of comparative negligence see *infra* notes 55-62 and accompanying text.

of all the defendants. The court noted that the individual comparison approach urged by Harrisville would frustrate the policy favoring compensation of contributorily negligent plaintiffs that the CNA was enacted to promote. Under the individual comparison approach, a plaintiff could be only ten percent negligent and yet be wholly barred from recovery if he sued ten defendants who were each found to be nine percent negligent. The goal of compensation, the court reasoned, necessitates the combined comparison approach.[11] This approach to comparison under modified comparative negligence is known as the "aggregate rule."[12] On September 25, 1986, the Pennsylvania Supreme Court affirmed the superior court's ruling.[13]

Because the CNA expressly provides for joint and several liability,[14] the Supreme Court's ruling meant not only that Harrisville was liable to Elder, but also that Harrisville was liable to Elder for the entire award he was entitled to recover, $187,500.[15] Under the CNA, Harrisville would have a right to contribution from Orluck in the amount of $150,000,[16] but if Orluck is unable to pay the amount, Harrisville must bear the deficit. The *Elder* decision means that even when one of several defendants is found to be less negligent than the plaintiff in a particular case, that defendant may be called upon to pay the plaintiff's entire award, so long as the plaintiff's negligence is not greater than that of all defendants in the aggregate. Thus, in theory, a fifty percent responsible plaintiff could collect his entire award from a one percent negligent defendant, who would then bear the risk that the other defendant in the case would turn out to be judgment-proof. Justice Flaherty, who filed a concurring opinion, joined by Justices Hutchinson and Zappala, recognized that such a rule is manifestly inequitable.[17] Justice Flaherty noted that the courts of Pennsylvania are constrained from reaching any other result by the unequivocal language of the CNA.[18] Justice Larson, who

11. *See Elder*, 334 Pa. Super. 329, 346-58, 483 A.2d 474, 483-89.

12. *See infra* note 62 and accompanying text.

13. *Elder*, ___ Pa. ___, 515 A.2d 517 (1986).

14. *See* 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982). The pertinent language provides that "[t]he plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery." *Id.*

15. This amount represents the damages found by the jury, $250,000, reduced by the proportion of plaintiff's responsibility, 25%. Thus, $250,000 - .25 ($250,000) = $187,500.

16. The CNA provides that "[a]ny defendant who is . . . compelled to pay more than his percentage share may seek contribution." 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982).

17. *See* Elder v. Orluck, ___ Pa. ___, ___, 515 A.2d 517, 526 (1986) (Flaherty, J., concurring).

18. *Id.* (Flaherty, J., concurring). Because the hands of the courts are tied on this issue, Justice Flaherty called upon Pennsylvania's General Assembly to take action. *Id.*

announced the judgment of the court, wrote in dicta that "any unfairness that results when a tortfeasor cannot be made to pay his proportionate share of the damages is a product of the joint and several liability doctrine."[19]

The *Elder* decision comes at a time when the crisis of affordability and availability of liability insurance has focused attention on the civil justice system. The joint and several liability doctrine is particularly troublesome to municipalities such as Harrisville, which, along with other "deep pockets" such as industries and professionals, bear the risk of disproportionate loss when they are sued with parties less capable of satisfying a plaintiff's damage award. If any theory of liability can be conceived against "deep pockets" in a given accident situation, plaintiffs are well advised to join such parties as additional defendants in order to guarantee that there will be a solvent judgment debtor.[20] As a result of this effect of the joint and several liability rule, "deep pockets" such as municipalities are bad risks from the standpoint of insurers.[21]

Advocates of tort reform support legislation which would limit a defendant's liability to that portion of a plaintiff's loss corresponding to the defendant's percentage of negligence. In response to the call for reform, Pennsylvania legislators have introduced several bills that would affect the doctrine of joint and several liability.[22] The decision of whether to change the joint and several liability rule should rest upon a firm understanding of its historical development and how it functions in the contemporary context of Pennsylvania's comparative negligence system.

III. Joint and Several Liability—Historical Development and Contemporary Context

A. Development of Joint and Several Liability

Pennsylvania has recognized joint and several liability among joint tortfeasors for over a century.[23] The rule originated in England, born through the evolution of procedural rules of joinder and the

19. *Id.* at 525.

20. Thus, joint and several liability means not only that "deep pocket" defendants will be liable for larger sums than under a system that limits liability to a proportionate share of an award, but also that they may tend to be sued more often than under a system that limits the liability of minimally culpable parties.

21. *See Insurance crisis solution urged—demand action, chamber chief tells businessmen*, Harrisburg Patriot-News, June 4, 1986, at B2, col. 4.

22. *See infra* notes 113-29 and accompanying text.

23. *See* Klauder v. McGrath, 35 Pa. 128 (1860).

conjunction of these rules with the substantive rules of causation.[24] The early common law rules of joinder were extremely strict.[25] Joinder was permitted only in cases of concerted action, when a mutual agency relationship might be found between tortfeasors. When defendants did not act in concert, the English courts refused to allow them to be joined as defendants in the same action, even though their acts combined to cause a single, indivisible injury to the plaintiff.[26] More liberal joinder rules gradually were adopted in American courts, most notably by the Field Code of Procedure in New York and similar codes in other states,[27] the plaintiff was permitted, though not required, to join in a single action tortfeasors who independently were liable to him for his entire injury, even though there was no concert of action or other relationship giving rise to joint responsibility.[28]

The effect of this evolution of procedural law was that a plaintiff could, in one action, recover a joint and several judgment against each tortfeasor whose tortious conduct was a proximate cause of the plaintiff's entire injury.[29] Once the plaintiff obtained the joint and several judgment, he could elect to execute against one judgment debtor or any combination of them, with recovery limited by the rule that only one satisfaction for the loss would be allowed.[30]

The substantive aspect of the rule of joint and several liability, which holds each joint tortfeasor[31] liable for the plaintiff's entire

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24. PROSSER, *supra* note 4, §§ 47, 51, at 324-25, 345.

25. *Id.* § 47, at 324-25.

26. *Id.* For an early discussion of this rule as it was applied in Pennsylvania, see Bard v. Yohn, 26 Pa. 482 (1856) (holding that without concert there is no joint liability).

27. The joinder provisions in these codes were framed to permit "the complete settlement of all questions connected with a transaction in a single suit." PROSSER, *supra* note 4, § 47, at 325. Present Pennsylvania procedural provisions allow a plaintiff to join as defendants

> persons against whom he asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liability of all such persons will arise in the action.

PA. R. CIV. P. 2229(b).

28. PROSSER, *supra* note 4, § 47 at 325-27. In Pennsylvania, the rule in Bard v. Yohn, 26 Pa. 482 (1856), barring joint suit of concurrent tortfeasors, had given way to established rules of liberal joinder by the end of the first quarter of the twentieth century. *See supra* note 26. *See also* Smith v. Yellow Cab Co., 285 Pa. 229, 132 A. 124 (1926); Smith v. Reading Transit & Light Co., 282 Pa. 511, 128 A. 439 (1925); Klauder v. McGrath, 35 Pa. 128 (1860).

29. Comment, *Abrogation of Joint and Several Liability: Should Missouri Be Next in Line?*, 52 UMKC L. REV. 72, 74 (1983) (authored by Linda K. Knight).

30. PROSSER, *supra* note 4, § 48, at 330.

31. The term "joint tort" has been defined in a variety of ways. Dean Prosser, attempting to derive a pattern of consistency among the American cases involving multiple tortfeasors, wrote:

> [It] would seem to be, that a tort is "joint", in the sense which the Ameri-

award, is a manifestation of the law of causation, which requires that a tortfeasor be liable for the entire injury of which his tortious conduct was a substantial cause.[32] In an action involving a single defendant, liability for the plaintiff's entire compensable loss can be imposed upon the defendant if it is shown that his conduct was "a material element and a substantial factor" in the injury's causation.[33] The conjunction of this substantive rule with liberal joinder rules has resulted in the present rule of joint and several liability.[34] An evaluation of the historical and theoretical foundations of the rule, as outlined above, suggests that it made fine sense—within a system that did not recognize principles of apportionment of loss through comparative responsibility.

B. Allocation of Loss and the Advent of Comparative Responsibility

The early common law of torts concerned itself with allocation of loss primarily between the tortfeasor and the victim; if liability was found, loss was allocated to the tortfeasor; if not, the loss was

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> can courts have given to the word, when no logical basis can be found for apportionment of the damages between the defendants. The question is whether, upon the facts, it is possible to say that each defendant is responsible for a separate portion of the loss sustained. The distinction is one between injuries which are capable of being divided, and injuries which are not. If two defendants, struggling for a single gun, succeed in shooting the plaintiff, there is no reasonable basis for dividing the injury, and the tort is joint. If they shoot him independently, with separate guns, and he dies, the tort is still joint, for death cannot be apportioned. If they merely inflict separate wounds, and he survives, a basis for division exists, no matter how difficult the proof may be, and the torts are several. If two defendants each pollute a stream with oil, it is possible to say that each has interfered to a separate extent with plaintiff's rights in the water, and to attempt some rough apportionment of the damages; it is not possible if the oil is ignited, and burns the plaintiff's barn.

See Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 442 (1937). By this definition, "joint tortfeasors" are "defendants whose tortious conduct has made a substantial contribution to the cause of a single, indivisible injury." V. SCHWARTZ, *supra* note 3, § 16.3, at 257.

32. PROSSER, *supra* note 4, §§ 41, 47, at 268, 328.

33. PROSSER, *supra* note 4, § 41, at 267. The "substantial factor" test of the factual question of whether a defendant's conduct caused the plaintiff's injury was formulated to meet situations in which the traditional "sine qua non" or "but for" test of cause in fact would have absolved blameworthy parties from liability and denied victims compensation. The "but for" test held that if the plaintiff's injury would not have occurred but for the defendant's blameworthy conduct, then this conduct was the "cause in fact" of the plaintiff's injury. Situations arise, however, in which concurrent events, each of which would have brought about a particular harm, combine to cause injury. Neither can be said to have been a *sine qua non*, yet justice demands that blameworthy injurers compensate their victims; hence, the "substantial factor" rule of cause in fact developed. *Id.* at 266-67.

34. Thus, more or less by accident, a rule that possesses potent functional implications in the context of our system of loss allocation through comparative negligence came into being.

left where it lay, upon the injured victim.[35] In cases involving multiple tortfeasors, another question of loss allocation arises. Should the loss, once allocated to the defendants on the basis of joint and several liability, be further distributed between or among them? The general American rule had been that there was no right to contribution, once a particular judgment debtor had satisfied the joint obligation.[36] The rule against contribution had its origin in the English case of *Merryweather v. Nixan*,[37] which involved a joint judgment for conversion entered against two defendants who had acted in concert.[38] One defendant sought contribution from the other, on the theory that the first had paid money "for the use" of the other, that is, that he had satisfied a duty owed by both as joint obligors.[39] Contribution was denied because the parties had acted intentionally and in concert and because, in the eyes of the law, the claim for contribution rested upon what was entirely the plaintiff's own deliberate wrong.[40] Later cases held that the rule against contribution did not apply in cases of vicarious liability, negligence, accident, mistake, or other unintentional breaches of law.[41] While the earliest American cases applied the rule only in cases of willful misconduct, as the rules of joinder become more liberal, allowing a joint suit against defendants who had merely caused the same damage,[42] the majority of American courts adopted a general rule against contribution even in cases in which independent but concurrent negligence had contributed to a single result.[43]

Initially, Pennsylvania followed this general rule against contribution among joint tortfeasors.[44] In 1928, however, the Pennsylvania

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35. *See infra* note 98.

36. PROSSER, *supra* note 4, § 50, at 337; *see generally* Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WISC. L. REV. 365 (discussing the desirability of contribution between joint tortfeasors); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

37. 101 Eng. Rep. 1337 (1799); *see* Note, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898) (authored by Theodore W. Reath).

38. PROSSER, *supra* note 4, § 50, at 336.

39. *See id.*

40. *Id.* "It was believed that since contribution was an equitable concept, the equitable rule of 'clean hands' would protect the non-paying tortfeasor from being hauled into court by an intentional tortfeasor who had discharged the communal obligation." Comment, *Loss Allocation in Pennsylvania's Comparative Negligence System: Is it "Fair"?*, 91 DICK. L. REV. 241 (1986) (authored by Laurie G. Israel).

41. PROSSER, *supra* note 4, § 50, at 337.

42. *See id.*

43. *Id.*

44. *See* Betcher v. McChesney, 255 Pa. 394, 100 A. 124 (1917); Oakdale Borough v. Gamble, 201 Pa. 289, 50 A. 971 (1902); Turton v. Powelton Elect. Co., 185 Pa. 406, 39 A. 1053 (1898); *but see* Armstrong County v. Clarion County, 66 Pa. 218 (1870).

Supreme Court limited the rule to allow contribution except when liability was based upon a willful wrong, in effect adopting the English rule.[45] In 1951, Pennsylvania enacted the Pennsylvania Contribution Among Tortfeasors Act (PaCATA),[46] which provides for pro rata allocation of loss among joint tortfeasors. The PaCATA was based on the 1939 version of the Uniform Contribution Among Tortfeasors Act,[47] which included an optional section providing for allocation of loss among joint tortfeasors by reference to their relative fault. Pennsylvania instead chose the "pro rata" or "equal division" rule. Thus, the Commonwealth's approach to the law of accidents began to recognize principles of loss apportionment among parties to an injury-causing event; at this stage, however, Pennsylvania was not prepared to apportion accident losses on the basis of comparative responsibility, either between tortfeasors or among all parties to the accident.[48]

During the twentieth century, notions of comparative responsibility have become predominant in American tort law, as evidenced by the nearly universal adoption of some form of comparative negligence among the American states.[49] By early 1985, comparative negligence had replaced contributory negligence as a complete defense in at least forty-four states, Puerto Rico, and the Virgin Islands.[50] The contributory negligence rule, which originated in England in the case of *Butterfield v. Forrester*,[51] held that a plaintiff was barred from recovery if his own negligent conduct contributed to the causation of his injury. While contributory negligence was long the majority rule in America, it came to be viewed as being somewhat harsh in that it prevented injured parties from receiving any compensation for their injuries, even when their own contribution to a mishap was slight in comparison to the contribution of other parties at fault.

45. Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928).

46. Act of July 19, 1951, 1950-51 Pa. Laws 1130. The current version of the Act is codified as amended at 42 PA. CONS. STAT. ANN. § 8321 (Purdon 1982).

47. UNIF. CONTRIB. AMONG TORTFEASORS ACT §§ 1-12, 12 U.L.A. 57-59 (1975).

48. In 1943, a bill proposing the adoption of comparative negligence was introduced in the Pennsylvania General Assembly. The bill met with failure. H.B. 604, 135th Gen. Assembly, 1942 Sess., 1 Pa. Leg. J. 725 (1943); *see also* Note, *Comparative Negligence in Pennsylvania?*, 17 TEMP. L.Q. 276 (1943) (authored by Arthur R. Harris).

49. "The term 'comparative negligence' might be used to describe any system of law that by some method and in some situations apportions costs of an accident, at least in part, on the basis of the relative fault of the responsible parties." V. SCHWARTZ, *supra* note 3,] 2.1], at 29.

50. *Id.* § 1.1, at 3.

51. 103 Eng. Rep. 926 (1809). The defense of contributory negligence was erroneously characterized as "a rule from time immemorial" that was "not likely to be changed in all time to come." *See* Pennsylvania R.R. Co. v. Aspell, 23 Pa. 147, 149 (1854).

Strictly applied, the contributory negligence rule functioned to make loss allocation an either-or proposition: either the defendant was liable, and bore the burden of all compensable loss, or the plaintiff bore the entire loss because of his contributory negligence. In response to the perceived harshness of this rule, the courts developed doctrines such as "last clear chance"[52] and "defendant's recklessness"[53] to limit the rule. Also, when the issue of a plaintiff's contributory negligence was sent to a jury, the jury often would not follow the instruction regarding the rule, but instead would apply a comparative negligence approach sub silentio by reducing the recovery that the negligent plaintiff would have recovered had he been wholly innocent of fault.[54]

A trend slowly developed toward the replacement of the harsh contributory negligence rule with comparative negligence, either through legislation or judicial decision.[55] Several types of comparative negligence were eventually adopted by the various states. The most common are pure comparative negligence and modified comparative negligence. "Pure" comparative negligence completely abolishes the rule that a plaintiff is barred from recovery by his contributory fault. Under this approach, the plaintiff's percentage of responsibility reduces the amount of damages he will be permitted to recover from the defendant or defendants. Thus, if plaintiff is ninety-eight percent negligent and damages are found to be one hundred dollars, plaintiff can recover two dollars.[56] The "pure" system of comparative negligence is the most common rule adopted by judicial decision.[57] "Modified" comparative negligence, which retains a "bar

52. Under this rule, if the defendant has the "last clear chance" to avoid the injury, plaintiff's contributory fault will not bar his recovery. The most often-stated explanation for this rule is that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a "proximate cause" of the result. *See* PROSSER, *supra* note 4, § 66, at 463.

53. Reckless behavior differs from ordinary negligence in kind as well as degree; it is a state of mind more akin to intent than inadvertence. Thus, the general rule developed that the plaintiff's contributory negligence did not bar recovery when the defendant's conduct was found to be reckless. If plaintiff's conduct was reckless, however, it would bar his action against a reckless defendant. *See* PROSSER, *supra* note 4, § 65, at 462. Prosser suggests that this doctrine may be viewed as a form of comparative fault. *Id.*

54. V. SCHWARTZ, *supra* note 3, § 1.2(B), at 7.

55. *See id.* §§ 1.4, 1.5, at 10, 15.

56. If, in such a situation, two defendants are equally at fault and the rule of joint and several liability is applied, the plaintiff would be entitled to recover up to two dollars from either one, his aggregate recovery being limited to two dollars. Once a defendant paid more than his percentage share, he would have a right to contribution from the other. Such a system provides for the complete apportionment of loss among parties to the accident, on the basis of comparative responsibility. Note, however, that if one defendant is insolvent, the other will bear disproportionate loss. Prosser has noted that "pure" comparative negligence is "probably the simplest method of allocating damages." *See* PROSSER, *supra* note 4, § 67, at 471-72.

57. *Id.* at 472.

to recovery" feature, has been the rule most frequently adopted by legislation.[58] There are two common types of modified comparative negligence, referred to by Prosser as the "equal fault bar" and the "greater fault bar."[59] Under the former, a plaintiff is barred from recovery if his fault is found to be equal to, or greater than, that of the defendant; under the latter, the plaintiff's recovery is barred only if his fault is greater than that of the defendant.[60] A significant question arises under such systems when there are multiple defendants in a single suit: Should the plaintiff's negligence be compared to that of individual defendants or to that of the entire group? Some states apply the former approach, and when the plaintiff's negligence exceeds that of a particular defendant, recovery against that defendant is barred.[61] Other jurisdictions compare the plaintiff's negligence to the aggregate negligence of all defendants and bar the plaintiff's recovery against all defendants when his negligence is equal to (equal fault bar) or greater than (greater fault bar) the aggregate.[62] Pennsylvania adopted a modified "greater fault bar" comparative negligence system with the enactment of the CNA on July 9, 1976.[63]

As *Elder v. Orluck* established, the "aggregate rule" applies in the Pennsylvania system. Furthermore, the CNA has repealed the PaCATA insofar as the latter provides for pro rata contribution in negligence cases, replacing the equal contribution rule with a system of contribution among joint tortfeasors based upon comparative responsibility.[64] Thus, the law of negligence in Pennsylvania has

58. *Id.* at 473.

59. *Id.*

60. The "modified" comparative negligence systems ease the harsh effects of the contributory negligence rule somewhat. They do, however, retain the bar to the plaintiff's recovery when his or her fault exceeds a specific level in relation to that of the defendants. The very fact that a particular legislature has adopted such a modified approach suggests that the policy favoring compensation of accident victims has been tempered with concerns arising from notions of fairness. That is, the legislature has concluded that when, for the most part, victims have brought injury upon themselves, they should not be permitted to shift their losses to other parties to the accident. Under modified comparative negligence, loss that is disproportionate to relative fault is deemed to be fairly allocated to plaintiffs in such circumstances. Thus, the policy favoring compensation is balanced against more traditional concepts of corrective justice that underly the law of torts. *See infra* text accompanying notes 130-70.

61. *See* PROSSER, *supra* note 4, § 67, at 473. The individual comparison approach creates an incentive for defendants to join as many nominal defendants as possible in hopes of avoiding liability altogether and, conversely, it operates to discourage plaintiffs from joining all the potential defendants. *Id.*

62. *Id.* Pennsylvania has firmly adopted the "aggregate rule." *See* Elder v. Orluck, ___ Pa. ___, 515 A.2d 517 (1986) (discussed *supra* notes 7-13 and accompanying text).

63. 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982 & Supp. 1985). For an overview of Pennsylvania's system of comparative negligence and the many issues arising thereunder, see Comment, *Loss Allocation in Pennsylvania's Comparative Negligence System: Is it "Fair"?*, 91 DICK. L. REV. 241 (1986) (authored by Laurie G. Israel).

64. 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982 & Supp. 1985). The CNA's

evolved from the early common law system that in essence represented an either-or loss allocation system as between tortfeasor and victim, a system in which the rule of joint and several liability had its roots, to a system recognizing allocation of accident losses among all parties through comparative fault and contribution. Significantly, both the PaCATA and the CNA expressly retain the rule of joint and several liability.[65]

C. Joint and Several Liability in Systems of Comparative Fault—How the Rule has Fared

While Pennsylvania has retained the rule of joint and several liability through express statutory language, apparently without any discussion,[66] the question of whether the rule is theoretically compatible with a system of comparative fault, and ultimately whether the rule is desirable within such a system, has been considered in other jurisdictions. There is a theoretical conflict between joint and several liability, which initially assigns to a joint defendant liability that is not in proportion to his fault, and comparative negligence, which apportions responsibility according to the relative fault of all parties to the injury-causing event or to the subsequent litigation.[67] To be sure, contribution among joint defendants based upon comparative fault attempts to correct this situation, but if one or more of the defendants is insolvent or otherwise escapes execution, contribution fails in this attempt. In effect, joint and several liability puts a joint tortfeasor at risk of bearing a loss that is out of proportion to the relative fault attributed to him by the trier of fact.[68]

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contribution provisions apply only between defendants held liable on a theory of negligence and not strict liability. *See* Capuano v. Echo Bicycle Co., 27 Pa. D. & C.3d 524 (1982).

65. *See* 42 PA. CONS. STAT. ANN. §§ 7102(b), 8322 (Purdon 1982).

66. There is no indication that the issue of joint and several liability was considered during legislative debates attending the passage of the CNA. *See* 1 Pa. Legis. J. 1703-07 (Senate 1976).

67. While Pennsylvania's Comparative Negligence Act, 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982) provides for comparison of a plaintiffs fault with that of the *defendant or defendants*, suggesting that accident losses are to be apportioned among litigants, other jurisdictions provide that the fault of all parties to the injury-causing event is to be compared. *See, e.g.*, Pieringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1983) (holding that, under Wisconsin's system of comparative negligence, the fault of a party absent to the litigation should be considered when apportioning liability); *see also infra* note 90.

68. It should be recognized that under a modified comparative negligence system, a plaintiff bears a similar risk. If the plaintiff's fault reaches the threshold that either wholly bars his recovery, as under the aggregate rule (in force in Pennsylvania), or bars his recovery against a particular tortfeasor under the individual comparison approach, the plaintiff will bear a loss that is not in direct proportion to the relative fault attributed to him by the trier of fact. In a system in which the aggregate rule is observed, however, the apparent reciprocity is illusory. With respect to the plaintiff, the risk borne is related to his degree of fault. One can

Loss allocation by reference to relative fault, however, is not the only purpose of a comparative negligence approach. Comparative negligence systems have at least two separate, but interdependent goals: (1) insuring fair but adequate compensation to injured victims; and (2) providing fair allocation of responsibility among wrongdoers.[69] The first of these purposes relates to the abandonment of the contributory negligence defense, which traditionally operated as a complete bar to a plaintiff's recovery. Comparative negligence was adopted to ease the harshness of this rule.[70] "Fairness" was maintained by (1) diminishing the plaintiff's recovery when he or she contributed to the injury, and additionally, in modified systems, by (2) barring the plaintiff's recovery if his or her relative fault passed a specific threshold.[71] Through comparative negligence, therefore, the policy favoring compensation of victims was effectuated to the degree desired by each particular jurisdiction. Additionally, comparative negligence systems provided for allocation of loss among defendants by reference to their relative degree of fault. While joint and several liability may conflict with a policy of allocating accident loss by reference to relative fault, it is conducive to a policy of providing a greater likelihood that injured victims will be compensated.

The states have dealt with the problems of theory and policy attending the application of the joint and several liability rule within systems of comparative negligence in a variety of ways. Some have retained the joint and several liability rule in its traditional form. Others have wholly abrogated the rule, limiting liability of defendants to a portion of damages corresponding to their relative fault. Still other jurisdictions have adopted modified forms of the rule. The choice ultimately depends on how a particular jurisdiction defines and values the goals of compensation and fairness.

1. Retention of Joint and Several Liability.—Most of the states that have adopted comparative negligence have retained the

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conclude that since the plaintiff is for the most part responsible for his own loss, he should not be permitted to shift that loss to another. The risk that a defendant will bear a loss that is excessive with respect to his or her proportion of fault is allocated without reference to his or her relative fault. *Cf.* McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1, 10 (1979) (discussing the difference between systems of pure and modified comparative negligence as it bears upon the question of whether joint and several liability should be retained).

69. *Id.* at 11.

70. *See supra* text accompanying note 55.

71. *See supra* notes 59-62 and accompanying text.

rule of joint and several liability in its traditional form.[72] The arguments advanced for retention of the rule generally have been based upon both its historical foundation in the law of causation and the policy favoring full compensation of accident victims.[73]

The California Supreme Court decision in *American Motorcycle Association v. Superior Court*[74] is an example of this line of reasoning. Three years before the *American Motorcycle* decision, California had adopted the "pure" form of comparative negligence by judicial decision in *Li v. Yellow Cab Co. of California.*[75] In *American Motorcycle*, the American Motorcycle Association (AMA), after being sued as a joint tortfeasor on a theory of negligence, asserted a cause of action against cross-defendants

> based on an implicit assumption that the *Li* decision abrogates the rule of joint and several liability of concurrent tortfeasors and establishes in its stead a new rule of 'proportionate liability', under which each concurrent tortfeasor who has proximately caused an indivisible harm may be held liable only for a *portion* of plaintiff's recovery, determined on a comparative fault basis.[76]

In support of this theory, the AMA argued that after *Li*, there was a basis for dividing damages even when an injury was indivisible, and therefore the underlying rationale for joint and several liability of concurrent tortfeasors was undermined. The California Supreme Court rejected this argument, holding that

> the simple feasibility of apportioning fault on a comparative negligence basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule . . . . [A] defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm.[77]

The AMA also argued that under comparative negligence,

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72. PROSSER, *supra* note 4, § 67, at 475; *see* V. SCHWARTZ, *supra* note 3, § 16.4, at 268.

73. Such arguments were advanced by two recent commentators. *See* Comment, *Abrogation of Joint and Several Liability: Should Missouri Be Next in Line?*, 52 UMKC L. REV. 72 (1983) (authored by Linda K. Knight); Comment, *An Analysis of the Proposed Abrogation of California's Joint and Several Liability Doctrine—Is Abrogation the Answer to the Insurance Industry Crisis?*, 8 WHITTIER L. REV. 263 (1986) (authored by Jay M. Tenenbaum).

74. 20 Cal.3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

75. 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

76. *American Motorcycle*, 20 Cal.3d at 585-86, 578 P.2d at 903, 146 Cal. Rptr. at 186.

77. *Id.* at 588-89, 578 P.2d at 905, 146 Cal. Rptr. at 188.

plaintiffs who are allowed recovery are no longer always innocent. The court acknowledged this point, but distinguished between a plaintiff's negligence, which is a lack of care for oneself, and a defendant's, which is a lack of care for others. The court offered this point to justify the allocation of the risk of an insolvent judgment debtor to the defendants rather than to the plaintiff.[78] Finally, the court indicated its real justification for retention of joint and several liability within the context of comparative negligence:

> [W]e think that AMA's suggested abandonment of the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries. One of the principle by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery . . . even when one or more of the responsible parties do not have the financial resources to cover their liability.[79]

Thus, in the name of providing adequate compensation to negligently injured persons, the California Supreme Court applied an analysis of the joint and several liability rule based upon its foundation in traditional concepts of causation to justify its retention. The same policy underlying the court's innovative break from the traditional contributory negligence rule only three years earlier in *Li* was asserted in *American Motorcycle* to justify that judicial inertia known as *stare decisis* with respect to joint and several liability. The *fairness* of adequate compensation for a "negligently injured person" appears to have been to a large extent assumed.[80] Interestingly, the people of California have recently modified the joint and several liability rule

78. *Id.* at 589, 578 P.2d at 906, 146 Cal. Rptr. at 189. The court in *American Motorcycle* apparently felt that it was faced with a choice between allocating the risk of an insolvent judgment debtor either to plaintiffs, through adoption of the AMA's "proportionate liability" theory, or to the defendants as a group, through retention of the joint and several liability rule. The court's justification of the latter approach, based in part upon a characterization of a plaintiff's negligence as less culpable in kind than that of a defendant, is highly questionable. One must wonder whether such a characterization truly comports with what a jury is measuring when it looks at the conduct of the parties to an accident and assigns to each a numerical value representing the comparative responsibility of each for the plaintiff's harm.

79. *Id.* at 590, 578 P.2d at 906, 146 Cal. Rptr. at 189.

80. The "fairness" of allocating to the defendants the risk that a judgment debtor would turn out to be judgment-proof was based upon the court's questionable distinction between a plaintiff's culpability and that of a defendant. *See supra* note 78. The joint and several liability rule would operate within California's system of "pure" comparative negligence, after the *American Motorcycle* decision, in holding minimally culpable defendants liable for a more negligent plaintiff's entire award, much as the rule presently does in Pennsylvania's "modified/aggregate rule" system.

by referendum.[81]

The *American Motorcycle* case exemplifies the majority approach. The courts of several other states have indicated that joint and several liability for indivisible injuries is retained under comparative negligence.[82] Some states have retained the rule through express statutory language,[83] as did Pennsylvania.[84]

2. Abrogation of Joint and Several Liability—The "Proportionate" Liability Rule.—There is a growing trend toward the abrogation of the joint and several liability rule;[85] where wholly abrogated, the rule is replaced by the "proportionate" liability rule.[86] Under "proportionate" liability, a defendant's liability is limited to that portion of the plaintiff's award which corresponds to the defendant's portion of the fault contributing to the plaintiff's injury.[87] With respect to the allocation of the risk that a party will have to bear loss that is not in proportion to his relative fault, proportionate liability is the precise opposite of joint and several liability.[88] Under proportionate liability, the plaintiff will always bear this risk, even when wholly innocent.

The Court of Appeals of New Mexico advanced a persuasive argument for the adoption of proportionate liability in *Bartlett v. New Mexico Welding Supply, Inc.*[89] In a case arising from an automobile accident caused by the defendant and an unknown party who was not before the court, the question of whether joint and several liability would be retained under New Mexico's system of "pure"

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81. California voters passed Proposition 51, which will eliminate joint and several liability for noneconomic damages, on June 3, 1986, by a margin of sixty-two percent to thirty-eight percent. *See infra* notes 106-11 and accompanying text.

82. *See, e.g.*, Wheeling Pipe Line, Inc. v. Edrington, 259 Ark. 600, 535 S.W.2d 225 (1976); Dunham v. Kampman, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 192 Colo. 448, 560 P.2d 91 (1977); Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979); Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 588 P.2d 1308 (1978); Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

83. *See, e.g.*, IDAHO CODE § 6-803(4) (1979). Two states that formerly provided for joint and several liability by express statutory language are Utah and Wyoming. *See* UTAH CODE ANN. § 78-27-40(3) (repealed 1986); WYO. STAT. § 1-1-109 (Supp. 1986).

84. *See supra* note 14.

85. *See* V. SCHWARTZ, *supra* note 3, § 16.4, at 258; *see also supra* note 83.

86. Some commentators refer to the proportionate liability rule as "several" liability. *See, e.g.*, sources cited *supra* note 73.

87. PROSSER, *supra* note 4, § 67, at 475.

88. Joint and several liability allocates this risk to the defendants. *See supra* note 68 and accompanying text.

89. 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1982), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

comparative negligence was answered in the negative.[90] The court held that "the retention of joint and several liability ultimately rests on two grounds; neither ground is defensible."[91]

First, the court rejected the *American Motorcycle* holding that comparative negligence does not make an indivisible injury divisible. "We are unwilling," the court wrote, "to say that although fault may be apportioned, causation cannot. If the jury can do one, it can do the other."[92] To say that causation is capable of apportionment is not technically correct. Dean Prosser noted that "[c]ausation in fact is an absolute concept, which by its nature is incapable of being divided into comparative degrees—it either exists or it does not."[93] Legal or proximate cause, however, is in essence a policy determination and "may be susceptible to proportionate division."[94] The *Bartlett* court recognized that comparative fault provides a foundation upon which apportionment of accident losses can be based.

The second ground upon which retention of joint and several liability is based, according to the *Bartlett* court, is the policy which requires that liability rules should "favor plaintiffs."[95] The court flatly rejected this policy, adopting instead what it found to be the

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90. The *Bartlett* decision established not only that concurrent tortfeasors would not be subject to joint and several liability, but also that the loss attributable by comparative fault principles to an absent tortfeasor would be borne by the claimant. Clearly, this approach subordinates the goal of compensation to a concept of fairness which requires that a defendant's liability be limited to a share of the loss corresponding to his or her percentage of negligence. *See supra* note 67.

91. *Id.* at ____, 646 P.2d at 584.

92. *Id.* at ____, 646 P.2d at 585.

93. *See* PROSSER, *supra* note 4, § 67, at 474.

94. *Id.*; *see also* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalvin, Jr.*, 43 U. CHI. L. REV. 69 (1975); Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343 (1980).

95. *Bartlett*, 98 N.M. at ____, 646 P.2d at 585. The same proposition was offered in *American Motorcycle*, except that instead of referring to claimants as "plaintiffs," the court used the words "negligently injured persons." American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 590, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978). The emotive value of the language chosen by each court is significant. The California court in *American Motorcycle*, which announced a policy favoring compensation, attempted to justify this policy by characterizing defendants as more culpable than plaintiffs, regardless of their comparative fault as determined by the trier of fact. *See supra* note 78. The New Mexico court in *Bartlett*, using the neutral term "plaintiff," was embracing the idea that fairness requires liability to be limited to responsibility, as determined by comparative fault. The court saw no merit in the argument that a plaintiff should not bear the risk of being unable to collect his judgment. "Between one plaintiff and one defendant," the court reasoned, "the plaintiff bears the risk of the defendant being insolvent: on what basis does the risk shift if there are two defendants, and one is insolvent?" *Bartlett*, 98 N.M. at ____, 646 P.2d at 585; *see also* Elder v. Orluck, ____ Pa. ____, ____, 515 A.2d 517, 526 (1986) (Flaherty, J., concurring) ("Justice Larsen might lead the reader to an impression that 'modern notions of fault and liability' require that the instant statutes be construed in a manner favorable to plaintiffs. Such is not the case. The purpose of law should be and is to achieve equality and fairness irrespective of whether a party is a plaintiff or a defendant.").

policy upon which "pure" comparative negligence is founded: the apportionment of liability in direct proportion to fault.[96] The court held that concurrent tortfeasors would not be jointly and severally liable; instead, liability would be measured by reference to relative fault.

The chief difference between the *American Motorcycle* and *Bartlett* decisions, and in essence between jurisdictions retaining joint and several liability and those replacing it with proportionate liability, is the extent to which each values the policy favoring adequate compensation for accident victims. Retention of joint and several liability allocates to defendants the risk that one of them will be unable to contribute his proportionate share toward payment of plaintiff's damages. This approach is taken by those jurisdictions which value compensation to the extent that they reject the idea that "fairness" is equivalent to limiting liability of defendants to that portion of the plaintiff's award directly corresponding to the relative fault of each. Traditional concepts of proximate cause allocate the risk of disproportionate loss to each defendant. On the other hand, proportionate liability allocates to the plaintiff the risk that one or more of the defendants will be unable to satisfy his proportionate share of the damage award. This approach is favored by those jurisdictions which have embraced the idea that fairness is equivalent to limiting a defendant's liability to that portion of the damage award directly corresponding to his or her percentage of fault and have subordinated the policy favoring adequate compensation to the pursuit of fairness thus defined.

Both approaches take a narrow view of the possibilities for an allocation of the risk of bearing loss that is disproportionate to relative fault. Some jurisdictions, however, have recognized that the allocation of this risk to either the defendants in every case, or to the plaintiffs in every case, is unnecessary.

3. Compromise Approaches.—A number of jurisdictions have modified the operation of the joint and several liability rule within their particular systems of comparative negligence. Several modified approaches have been devised by the courts and legislatures.

Oklahoma first abrogated joint and several liability by judicial decision,[97] then limited this ruling by retaining joint and several liability when the plaintiff was without fault.[98] The logic of this ap-

96. *Bartlett*, 98 N.M. at ____, 646 P.2d at 583.

97. *See* Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

98. *See* Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983); Barry v. Empire Indem. Ins. Co., 634 P.2d 718 (Okla. 1981); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613

proach is appealing. To abrogate joint and several liability in the case of the faultless plaintiff would place such persons in a worse position, with respect to the likelihood of receiving adequate compensation, under comparative negligence than under contributory negligence.[99]

Louisiana, Nevada, Oregon, and Texas have adopted an innovative approach to modification of joint and several liability within comparative negligence. In these states, a defendant is jointly and severally liable only if his relative fault exceeds that of the plaintiff; otherwise, the defendant is liable only for a portion of the award corresponding to his percentage of fault.[100] In effect, this approach compares the fault of the plaintiff to that of each defendant and then, in each instance of comparison, allocates to the more culpable party the risk of bearing a loss that is disproportionate to relative fault in the event that a defendant is insolvent.

For the sake of illustration, consider the factual scenario of *Elder v. Orluck*.[101] Plaintiff was found twenty-five percent negligent, the first defendant, Orluck, was found sixty percent negligent, and the second defendant, the Borough of Harrisville, was found fifteen percent negligent. Under the Louisiana rule, Orluck would have been subject to joint and several liability, and, in the improbable event that Harrisville would be unable to pay its award, Orluck would ultimately bear responsibility for the loss represented by Harrisville's share of the award. Realistically, the plaintiff would bear any loss for which he himself was responsible and additionally whatever portion of the loss for which Orluck was responsible and unable to compensate him. Since, as between Harrisville and the plaintiff, the plaintiff was for the most part to blame for his own loss,

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(Okla. 1980). In limiting the abrogation of joint and several liability effected by *Laubach*, the *Boyles* court held that

> [t]he *common-law negligence liability* concept may be described as "all or nothing" to the plaintiff. If he be blame-free, "all" is due him; if he be at fault, however slightly, "nothing" is his due. The *statutory comparative negligence approach* allows the victim at fault to secure some, but not all, of his damages. The *raison d'etre* and rationale of comparative negligence are tied, hand-and-foot, to the narrow parameters of a blameworthy plaintiff's claim. We hold that neither the rationale nor the holding of *Laubach* applies to that class of negligence litigation in which the plaintiff is not one among several negligent co-actors.

619 P.2d at 616 (emphasis in original).

99. *See* Pearson, *supra* note 94, at 364.

100. LA. CIV. CODE ANN. art. 2324 (West Supp. 1985); NEV. REV. STAT. § 41.141(3) (1985); OR. REV. STAT. § 18.485 (1983); TEX. CIV. PRACT. & REM. CODE ANN. § 33.013 (Vernon 1986).

101. ___ Pa. ___, 515 A.2d 517 (1986) (discussed *supra* notes 7-22 and accompanying text).

Harrisville's liability would be limited to its proportionate share of the award. Assuming Harrisville was able to compensate the plaintiff for its fifteen percent share of the loss, the plaintiff would recover this amount plus whatever Orluck was able to pay.

The Louisiana rule is especially appropriate in systems of modified comparative negligence. By definition, such systems have not wholly embraced the idea that fairness requires losses to be apportioned in a manner strictly corresponding to percentages of relative fault.[102] The parties to the accident who bear greatest responsibility bear the risk of disproportionate loss. The adoption of this approach might be just the bit of legislative fine-tuning Pennsylvania's comparative negligence system needs in order to prevent the inequity inherent in cases such as *Elder*.

Iowa has carried the Louisiana rule a step further. There, joint and several liability is imposed upon a defendant only when he or she is found to bear fifty percent or more of the fault assigned to all parties.[103]

The Uniform Comparative Fault Act (UCFA)[104] proposes that joint and several liability be retained and that, in the event a judgment debtor is unable to contribute his proportionate share toward satisfaction of the award, the uncollectible amount be reallocated among the parties, including a claimant at fault, according to their respective percentages at fault.[105] This approach splits the risk of disproportionate loss among all parties whose fault contributed to the accident.[106] Minnesota has adopted the UCFA approach.[107]

As noted above, California has recently modified the retention of joint and several liability announced in *American Motorcycle* by referendum.[108] California now retains joint and several liability of concurrent tortfeasors only for that portion of a plaintiff's damage award representing compensation for economic loss.[109] Defendants

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102. *See supra* note 60.

103. *See* IOWA CODE ANN. § 668.4 (West Supp. 1986).

104. 12 U.L.A. 38-47 (Supp. 1986).

105. *Id.* § 2(d), at 41.

106. *Id.* The virtue of the risk splitting approach is that it "avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant." *Id.* § 2 commentary at 42.

107. *See* MINN. STAT. ANN. § 604.01(1) (West Supp. 1986). Interestingly, Minnesota has applied the UCFA risk splitting approach to its "greater fault bar" system of comparative negligence. The UCFA proposes a "pure" comparative negligence system. *See supra* notes 56-57 and accompanying text.

108. *See* CAL. CIV. CODE §§ 1431.1-.5 (West Supp. 1986).

109. "Economic loss" means objectively verifiable pecuniary loss and may include such items as burial costs, medical expenses, loss of earnings, loss of use of property, and similar

are proportionately liable for any portion of plaintiff's damage award representing compensation for noneconomic harm, such as pain and suffering. This innovative approach attempts to assure adequate compensation for those elements of harm that will, absent such compensation, cause economic displacement of the victim.[110] The plaintiff bears a risk, however, that some portion of his award representing, at least theoretically, compensation for pain will be uncollectible.[111]

D. Legislative Proposals to Abrogate or Modify the Joint and Several Liability Rule in Pennsylvania

The insurance crisis[112] with which America is faced has given rise to a popular cry for reform of the civil justice system. Pennsylvania legislators have responded by introducing a number of bills, several of which propose to change the rule of joint and several liability, either generally throughout the civil justice system or in specific contexts such as medical malpractice, products liability, and governmental liability. These bills are briefly described below.

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expenses. *See infra* note 110.

110. Economic losses, if left uncompensated, will cause the average accident victim to be displaced economically, that is, they will cause the victim financial hardship and diminish his or her standard of living. This is not true, of course, for victims with assets sufficient to absorb such costs without hardship, nor is this true for individuals who are insured sufficiently. The assumption appears to be, however, that most victims are not rich and are not insured sufficiently to bear accident losses without hardship. Economic losses, therefore, must be compensated. Thus, the people of California have modified their definition of "adequate" compensation. Theoretically, the California approach is attractive and represents a balance between goals of corrective justice and distributive justice. *See infra* notes 131-40 and accompanying text. The extent to which the segregation of economic and noneconomic losses will prevent economic displacement, however, is problematic. *See infra* note 111.

111. In theory, awards for pain and suffering, and other noneconomic losses such as humiliation and injury to reputation, compensate for such harms. Since money cannot erase the fact that such harms have been suffered, it is clear that such awards are a substitutive remedy that attempts to "make the plaintiff whole" in some metaphoric sense. To a large extent, such awards serve goals of corrective justice. *See infra* notes 131-33 and accompanying text. In practice, awards for noneconomic harm more or less offset the cost to the plaintiff of obtaining adequate compensation for economic losses, that is, attorney's contingent fees, and the like. To the extent that the California approach will result in a plaintiff's inability to collect some portion of his or her noneconomic damage award, therefore, it may fail to prevent economic displacement.

112. The author uses the term as it is commonly understood, to mean the present problems of affordability and availability of liability insurance. While some would argue that trends toward more litigation and larger awards in the civil justice system are the cause of this crisis, others reject this suggestion and place the blame upon the insurance industry. *See* INSURANCE COMMITTEE REPORT, *supra* note 5. The author embraces neither view. It is submitted that a problem of concurrent causation exists here, and that the legislature should apportion responsibility between the insurance industry and the civil justice system rather than place blame wholly on either. Tort reform combined with regulation of insurance would be the better reasoned approach to dealing with the insurance crisis.

1. General Tort Reform—House Bill 2426.—House Bill 2426[113] envisages a broad range of pro-defense changes in the civil justice system. The issue of joint and several liability is addressed in the context of the bill's proposal of significant changes in Pennsylvania's system of comparative negligence.[114] The bill would wholly abrogate the joint and several liability rule, replacing it with proportionate liability.[115]

2. Products Liability—House Bill 2425.—House Bill 2425[116] proposes a number of pro-defense changes in Pennsylvania's law of products liability. This bill would abrogate joint and several liability in the limited context of product liability actions, replacing the rule with proportionate liability.[117] The bill raises an interesting question: Would defendants sued on a theory of negligence be encouraged by such a law to implead sellers and manufacturers of products in order to escape joint and several liability?[118]

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113. H.B. 2426, 170th Gen. Assembly, 1986 Sess. (Printer's No. 3388).

114. H.B. 2426 would also provide guidelines for attorney fees, admissibility of evidence of collateral sources of compensation, the reduction of future damage awards to present worth, caps on awards for noneconomic loss, and a variety of other tort reform measures.

115. The relevant language of H.B. 2426 reads as follows:

> § 7105. Apportionment of responsibility.
>
> (a) Apportionment of responsibility among defendants.—Where recovery is allowed against more than one defendant, each defendant shall be liable only for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal contribution to injury attributed to all defendants. The court shall enter separate, several judgments in favor of the plaintiff, and against each defendant against whom recovery is allowed, only for the amount for which that defendant is liable. The doctrines of joint and several liability, contribution, and indemnity shall not be applicable to this section, but nothing in this section shall limit the right of a person who is found vicariously liable for the acts of another from asserting a claim for contribution or indemnity against any other person.

Id. § 7105(a), at 9-10. Subsequent subsections of the bill provide for application of "pure" comparative responsibility to strict liability claims, apparently leaving modified comparative negligence principles intact for negligence actions in which no defendants are liable on a theory of strict liability. The bill also provides for apportionment of responsibility to absent tortfeasors. Thus, the bill is heavily pro-defense. It would allocate to the plaintiff not only the risk that a judgment debtor will prove insolvent, but also the loss represented by an absent tortfeasor's share of responsibility. *See id.* § 7105(b)-(d), at 10-11.

116. H.B. 2425, 170th Gen. Assembly, 1986 Sess. (Printer's No. 3387).

117. The relevant language of H.B. 2425 reads as follows:

> (c) Proportional liability of multiple defendants.—Each defendant shall be liable only for that proportion of the total dollar amount awarded as damages in the ratio of his responsibility to the amount of responsibility attributed to all others.

Id. § 8374, at 14.

118. Since joint and several liability would remain the rule in cases not involving products liability, defendant in non-product actions would apparently have an incentive to implead products manufacturers or sellers, if a cause of action is imaginable against such party, in order to bring the whole action within the proportionate liability rule.

3. Medical Malpractice—House Bills 2230 and 2391.—House Bill 2230[119] apparently would abrogate joint and several liability in medical malpractice actions. This bill would enact a rule of proportionate liability.[120]

House Bill 2391,[121] another medical malpractice bill, would retain joint and several liability and enact a risk splitting rule similar to that proposed by the UCFA.[122] The bill's risk splitting provision differs in one significant way from that proposed in the UCFA: the plaintiff would be excluded from reallocation of the uncollectible amount.[123]

4. Governmental Liability—House Bill 2814.—House Bill

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119. H.B. 2230, 170th Gen. Assembly, 1986 Sess. (Printer's No. 3070).

120. The language of H.B. 2230 is somewhat obscure on the issue of joint and several liability. It reads as follows:

> (e) In a medical negligence action the award made against any single defendant shall only be that portion of the total dollar amount awarded as damages in ratio to the amount of the defendant's personal liability. In no event shall a defendant be required to make payment in excess of that defendant's pro rata share of an award.

Id. § 207(A)(e), at 15. The first sentence of this passage, taken alone, is relatively clear. If "defendant's personal liability" means his percentage of fault, the sentence would appear to propose proportionate liability. The second sentence is less clear. If one assumes that "pro rata share" refers to a portion of the award corresponding to a percentage of fault, the sentence is a redundancy. If "pro rata share" refers to an equal division, as the term does in the PaCATA, 42 PA. CONS. STAT. ANN. § 8324 (Purdon 1982), *see* Lasprogata v. Qualls, 263 Pa. Super. 174, 397 A.2d 803 (1979), this second sentence, read in conjunction with the first, would lead to absurd results. One can imagine scenarios in which a defendant would not be required to pay the entire award made against him. The drafters of this bill probably meant to propose proportionate liability.

121. H.B. 2391, 170th Gen. Assembly, 1986 Sess. (Printer's No. 3322).

122. The relevant language in H.B. 2391 reads as follows:

> (c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction, and enter judgment against each party liable on the basis of rules of joint and several liability. For purposes of contribution, the court shall also determine, and state in the judgment, each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
>
> (d) Upon motion made not later than one year after a final judgment is entered, the court shall determine whether all or a part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, *excluding* a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Id., § 1210(c), (d), at 36.

123. This bill proposes risk splitting only among defendants, rather than among all parties, as does the UCFA. Thus, it wholly retains the benefits of joint and several liability for the plaintiff. Depending on how many defendants are held jointly and severally liable, and on the range of percentages of negligence assigned to members of the defendant group, this provision would to some extent diminish the risk that a defendant will bear a loss that is grossly disproportionate to his relative fault.

2814[124] would exempt Commonwealth parties[125] and local agencies[126] from joint and several liability when their percentage of fault is equal to or less than that of the claimant *and* is equal to or less than fifty percent of all negligence attributed to defendants as a group.[127] This approach is a combination of the Louisiana rule and a modified Iowa rule.[128]

At the time of this writing, only three days remained in the 1986 session. No significant action was taken on any of these tort reform proposals within this period. Tort reform, however, is an issue which is still alive, and some, if not all, of the legislative proposals described above are likely to be reintroduced.[129]

IV. Pennsylvania's Choice: Retention, Abrogation, or Modification of Joint and Several Liability

Should Pennsylvania retain its present rule of joint and several liability? If not, what change is most desirable? The answers to these questions should ideally rest upon a careful examination of the function of joint and several liability and the prospective functions of its various alternatives within Pennsylvania's present system of handling loss apportionment in cases involving multiple defendants. Function must be evaluated with reference to the various goals of

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124. H.B. 2814, 170th Gen. Assembly, 1986 Sess. (Printer's No. 4059).

125. "Commonwealth parties" include "Commonwealth agenc[ies] or any other agency of the Commonwealth government and any employee thereof, but only with respect to an act within the scope of his office or employment." *Id.* § 8501, at 2. "Commonwealth agencies" include almost any executive officer, administrative department, board or commission, or entity of the state government. *See id.* § 8501, at 1-2.

126. "Local agency" means a government unit other than a Commonwealth party, such as an intermediate unit, local authority, municipal authority, and the like. *Id.* § 8501, at 3.

127. The relevant language in H.B. 2814 reads as follows:

> (d) Contribution—Where damages are recoverable against parties to an action in addition to the Commonwealth party, notwithstanding the provisions of section 7102 (relating to comparative negligence), unless the Commonwealth party is substantially at fault, the Commonwealth party shall be liable only for that portion of the total dollar amount awarded as damages in the ratio of the amount of the Commonwealth party's causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The Commonwealth party shall be deemed substantially at fault only if the causal negligence of the Commonwealth party exceeds the contributory negligence of the plaintiff and only if the ratio of the Commonwealth party's causal negligence to the amount of causal negligence of all defendants against whom recovery is allowed exceeds 50%.

Id. § 8529(d), at 17. Section 8553(d) is identical, except that "local agency" is substituted for "Commonwealth party" at the appropriate places.

128. *See supra* notes 100, 103 and accompanying text.

129. Interview with Mary R. Woolley, Counsel to the Judiciary Committee of the Pennsylvania House of Representatives, in Harrisburg, Pa., (Nov. 14, 1986).

our evolving system of accident law.[130] In the most general terms, these goals may be segregated, for conceptual purposes, into two categories—goals of corrective justice and goals of distributive justice.

Corrective justice concentrates on the litigant parties, with the goal of restoring or maintaining a given equilibrium.[131] This category of goals reflects the genesis of the law of torts. The equilibrium with which the early law of torts was concerned, and with which the law of accidents to some extent remains concerned, is based upon a concept of fairness between parties to an event that causes injury. The courts sought this equilibrium to provide an alternative to individual acts of vengeance, and to promote order and the peaceful resolution of disputes;[132] thus, "the blameworthy injurer must compensate the innocent victim."[133]

Distributive justice, as distinguished from corrective justice, transcends the mutual relationship between litigant parties "by linking it to the totality of society. The situation of the individual would be measured against the collectivity's resources and judged accordingly."[134] In more recent times, goals of distributive justice have increased in importance. The increasing number of accidents that accompanied the industrialization of American society "created social pressure for the compensation of . . . victim[s]"[135] when traditional fault concepts would have left the victims to bear their losses without compensation. As a result, the idea of moral culpability was weakened through the objectification of the elements of fault and causation,[136] thus making compensation through the tort law system more readily available. In order to distribute the cost of compensation, liability insurance came into use.[137] The compensation goal that developed is largely distributive in nature.[138]

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130. For a discussion of the development of principles of apportionment of loss through comparative fault, *see supra* notes 35-67 and accompanying text.

131. Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 27 n.2 (1980).

132. *See* PROSSER, *supra* note 4, § 4, at 21-22.

133. Englard, *supra* note 131, at 27. While there is some dispute as to whether the moral aspect of a defendant's conduct was from the beginning a central concern in assessing liability, "the law has moved forward toward the recognition of moral responsibility as one basis of remedy, and at least partial identification of tort liability with the immoral conduct which would not be expected of a good citizen." PROSSER, *supra* note 4, § 4, at 22.

134. Englard, *supra* note 131, at 27 n.2.

135. *Id.* at 28.

136. *Id.*; *see also* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 244-47 (1965).

137. Englard, *supra* note 131, at 28.

138. The corrective justice notion that a blameworthy injurer must compensate his innocent victim has been to some extent relaxed by the fact that the law permits faulty parties to distribute loss through liability insurance. *See generally* G. CALABRESI, *supra* note 2.

Some legal scholars deemed compensation of victims the preeminent concern in the law of accidents and suggested that the fault-oriented system of tort law should be invalidated in favor of a system of compensation through social insurance.[139] Under such a system, the cost of compensating victims of accidents, once the accidents had occurred, would be distributed broadly, thus minimizing the post-accident economic losses to be borne by any individual.[140] Other theorists suggest that the goal of distributing post-accident costs should be balanced against other distributive goals of the accident law system, such as the deterrence of conduct likely to cause accidents, in order to minimize the overall economic costs of accidents.[141]

A balance must be sought because the goals of deterrence and post-accident cost minimization conflict; concentration of loss promotes deterrence,[142] while distribution of loss minimizes post-accident compensation costs.[143] The key to balancing these approaches is the pricing of insurance coverage in accordance with expected loss.[144] When society makes collective decisions regarding rules of tort law, the distributive goal of accident cost reduction and the corrective goal of seeking fairness between litigant parties should be

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139. Most notable among these proponents of compensation-oriented accident law was Fleming James. "James saw accidents as inevitable consequences of productive activity, and he conceived the principle function of tort law to be, not the resolution of disputes, rule definition, or the expression of moral values, but compensation of the injured." Priest, *supra* note 2, at 470.

140. Such a system is appealing in that the costs of productive activity would be borne by the collectivity that benefits from it. The adoption of such a system would, of course, mark a radical departure from traditional tort law. New Zealand has adopted such a system; tort law has been abolished insofar as it deals with accidental injuries. A broad plan of social insurance provides compensation to the victims of accidents. For a brief overview of the New Zealand approach, see P. ATIYAH, ACCIDENTS, COMPENSATION, AND THE LAW 564-66 (2nd ed. 1975).

141. *See* G. CALABRESI, *supra* note 2. Calabresi proposes a framework for the analysis of accident law with a view toward the reduction of the overall costs of accidents in society. He identifies three subgoals: primary accident cost reduction (the reduction of the number and severity of accidents through deterrence achieved either through collective prohibition of conduct or the "market" effect of liability rules upon individual conduct), secondary cost reduction (the reduction of the cost of compensating victims *after* an accident has occurred, through devices of loss-distribution) and tertiary cost reduction (the reduction of "administrative" costs attending the pursuit of both primary and secondary cost reduction). *Id.* at 26-31. For a critical analysis of Calabresi's approach, see Englard, *supra* note 131, at 33-51.

142. By concentrating loss upon the party who causes it, the accident costs generated by particular activities are internalized and the participants upon whom accident losses are concentrated are encouraged to engage in loss prevention. *See* G. CALABRESI, *supra* note 2, at 73-75.

143. While any particular accident loss may represent a relatively constant dollar amount, whether or not it is distributed, the economic displacement caused by concentration of loss will vary by (1) where it is concentrated and (2) the extent to which it is distributed. *See id.* at 37-45.

144. *See*, K. ABRAHAM, DISTRIBUTING RISK, 12, 17 (1986); *see also* G. CALABRESI, *supra* note 2.

considered and balanced.[145]

A. Retention of Joint and Several Liability—Why Not?

The rule of joint and several liability as it applies within Pennsylvania's system of comparative negligence has two basic faults. From the corrective justice standpoint, the rule creates the likelihood of unfair results. In terms of distributive justice, joint and several liability frustrates the goal of efficient accident cost reduction.

The way "fairness" is defined is crucial to a corrective justice analysis.[146] In the discussion above, the author proposed that those states which have abrogated the rule of joint and several liability have embraced the idea that fairness is equivalent to limiting the liability of a defendant to that portion of the plaintiff's loss corresponding to the defendant's percentage of fault.[147] The states retaining joint and several liability have retained the more traditional definition of fairness, which finds its expression in the rule that a defendant whose tortious conduct is a substantial cause of the plaintiff's injury can be held liable for the plaintiff's entire loss.[148]

Under either definition of fairness, there is manifest injustice in a system in which a defendant who is found one percent causally negligent could be compelled to compensate half of a fifty percent causally negligent plaintiff's loss.[149] This proposition does not reject the traditional notion of fairness behind the joint and several liability rule, nor does it necessarily entail an adoption of the notion that fairness requires a limitation of a defendant's liability to his percentage of fault. It merely recognizes that the trier of fact has compared the culpability of the plaintiff and defendant and has found that, as between the two, the plaintiff is primarily to blame for his own loss.[150] There is no notion of fairness that will support the imposition of entire liability upon the defendant who is less negligent than the

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145. In reference to the need to balance goals when contemplating a change in the accident law system, Calabresi argues, not unpersuasively, as follows:

> We cannot have all of our goals for accident law perfectly met. This is not to say, however, that at any given time we may not be able to improve the *existing* system in a way that brings us closer to all those goals. To say that the goals are ultimately inconsistent with one another is far from saying that a change cannot further all of them somewhat, especially if the change is from a system that developed haphazardly, with none of the goals specifically in mind.

G. CALABRESI, *supra* note 2, at 94 (emphasis in original).

146. *See supra* text accompanying notes 131-33.

147. *See supra* notes 66-111 and accompanying text.

148. *Id.*

149. *See supra* notes 7-22 and accompanying text (discussion of the *Elder* case).

150. *See supra* note 78.

plaintiff. The allocation of the risk of disproportionate loss to defendants regardless of relative fault disregards fairness and must rest upon other grounds.

From the viewpoint of distributive justice, whether joint and several liability is desirable within Pennsylvania's "greater fault bar/aggregate rule" system of comparative negligence depends on the orientation of the analyst. The "deep pockets" effect of joint and several liability may appeal to those who hold compensation and post-accident loss distribution to be the preeminent concern.[151] On the other hand, those who believe that tort law should reflect a concern with the efficient allocation of resources with respect to the reduction of the costs of accidents would argue that doctrines such as joint and several liability, which "enable some plaintiffs to recover from defendants who have not actually caused the loss (or the entire loss) in question,"[152] tend to frustrate the efficiency goal. Under joint and several liability,

> [m]inimally culpable defendants . . . [are] held liable for [all] damages suffered by a victim when, in fact, the injuries resulted from the combined activities of many other actors. Insurance premiums will have to take account of this quasi-vicarious liability exposure.
>
> [U]nder such circumstances, the potential imposition on some [actors] and the concomitant evasion of liability by otherwise culpable [actors] may tend to distort the premium-setting process. In fact, the premiums charged all [participants in a certain activity] may gravitate toward the same level, notwithstanding significant differences in the safety precautions or operating procedures of different [actors]. Thus, although [joint and several liability] may facilitate victim compensation, to the extent that [it] impose[s] liability out of proportion to the loss causing potential of each insured, [it] may distort the desired effects of insurance pricing.[153]

As noted above, an efficient balance between deterrence and loss distribution depends upon the pricing of insurance to reflect expected loss.[154] If expected loss includes loss due to the action of others, liability insurance consumers may make inefficient choices in deciding how to balance loss prevention activities and risk distribution through insurance. If, for instance, insurance is overpriced, those

151. *See supra* note 139.
152. K. ABRAHAM, *supra* note 144, at 49.
153. *Id.*
154. *See supra* text accompanying note 144.

purchasing insurance may over-allocate resources to loss prevention. If insurance is underpriced in relation to a particular consumer, the opposite may occur.[155]

The rule of joint and several liability in Pennsylvania does not reflect a desirable balance of corrective justice, or "fairness" concerns, and distributive justice goals. While the rule promotes the goal of compensation, it does so at the expense of fairness and efficiency.

B. The Alternatives

Depending upon the definition of fairness one adopts, proportionate liability, which allocates the risk of disproportionate loss to the plaintiff, is either desirable or undesirable from the standpoint of corrective justice. If fairness requires that a defendant's liability be limited to his percentage of fault, and that a plaintiff should not be advantaged with respect to collectibility of his award when injured by two or more defendants rather than one,[156] then proportionate liability may be palatable in terms of corrective justice. If, on the other hand, fairness requires that the risk of disproportionate loss be allocated with respect to relative fault, then proportionate liability is objectionable, since it arbitrarily allocates this risk to plaintiffs.[157] Additionally, one must ask whether the wholly innocent plaintiff should be worse off under comparative negligence than he was under the traditional contributory negligence rule.[158]

While proportionate liability may promote desired effects on insurance pricing,[159] it does so at the expense of the compensation goal by allocating to plaintiffs the risk of uncollectibility of damages. It would appear that some method of distribution of this risk, or perhaps its allocation by reference to relative fault, is to be preferred.

Both the UCFA risk splitting approach[160] and the Louisiana approach[161] to the application of joint and several liability within a system of comparative negligence balance the corrective justice goals of achieving a fair result between litigant parties and distributive jus-

155. For a discussion of the pursuit of optimal deterrence, that is, the efficient combination of loss prevention and risk, see K. ABRAHAM, *supra* note 144, at 10-18. *See also* G. CALABRESI, *supra* note 2; *cf.* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (discussing the economic implications of the fault system of tort law).

156. *See supra* note 95.

157. *See supra* note 68.

158. *See supra* text accompanying note 99.

159. *See supra* text accompanying notes 152-55.

160. *See supra* notes 104-06 and accompanying text.

161. *See supra* note 100 and accompanying text.

tice goals of efficient compensation and deterrence. Either one is a desirable alternative to Pennsylvania's present rule of joint and several liability.

The idea of using relative percentages of fault to reapportion among all parties those amounts uncollectible through contribution, proposed by the UCFA, is attractive in terms of fairness. In this system, fault determines the extent to which a party will bear a risk of loss that is not strictly in proportion to relative fault. Proportion is preserved to the greatest extent practicable.[162] The definition of fairness underlying this approach is more akin to that embraced in systems of proportionate liability; however, under the UCFA approach, compensation of the injured party is more highly valued.

The Louisiana approach also uses fault to allocate the risk of disproportionate loss. The fault of the plaintiff is compared to that of each defendant, and in each instance of comparison, the risk of a defendant's insolvency is allocated to the more culpable party. If the plaintiff's fault is greater than that of each defendant, compensation is allowed, but the defendants will be liable only for their proportionate share of the plaintiff's allowed recovery. If the plaintiff's fault is less than that of each defendant, all defendants will be jointly and severally liable, and each will bear the risk of disproportionate loss. When the plaintiff's fault is greater than that of one defendant, and less than that of another, as was the case in *Elder*,[163] the former defendant will be only proportionately liable, while the latter defendant will be jointly and severally liable and thus bear the risk of disproportionate loss.

Since proportion is not preserved, the Louisiana approach would appear to be founded upon a definition of fairness that is more congruent to that which underlies modified comparative negligence, which by definition provides for allocation of loss that is disproportionate to relative fault when a plaintiff is barred from recovery.[164] Since, under both the UCFA approach and the Louisiana approach, the risk of disproportionate loss is allocated not arbitrarily to either plaintiffs or defendants, but rather by reference to relative fault, the goal of compensation would be promoted to a greater extent than

162. The UCFA approach would preserve proportionate loss not only for defendants, but also for plaintiffs. In this way it actually is superior to the proportionate liability rule, which, although keeping defendants' losses in proportion to their responsibility, creates a potential for disproportionate loss to the plaintiff.

163. *See* Elder v. Orluck, ___ Pa. ___, 515 A.2d 517 (1986).

164. *See supra* notes 146-48 and accompanying text; *see also supra* text accompanying notes 100-02.

under the proportionate liability rule, and the goal of fairness would be promoted to a greater extent than under joint and several liability.[165] Finally, through allocation of the risk of disproportionate loss by reference to relative percentage of fault, each system to some extent would represent an improvement over joint and several liability in terms of promoting desirable insurance pricing effects on the balance of loss prevention and risk distribution.[166]

The Iowa approach,[167] which provides for proportionate liability of a defendant unless he bears at least half of the responsibility for the plaintiff's loss, represents a balance similar to that of the Louisiana rule. "Fairness" would appear to be articulated in a slightly different way under the Iowa approach: if a defendant is not for the most part to blame for the plaintiff's loss, he should not bear the risk of disproportionate loss as a concurrent tortfeasor. The compensation goal would be promoted to a lesser extent than under the Louisiana approach, while the economic efficiency goal might be promoted to an extent greater than under the Louisiana approach, since it is reasonable to expect that the Iowa rule would impose liability in proportion to fault more often than would the Louisiana approach.

As previously mentioned, the California approach, which abolishes joint and several liability for noneconomic damages, appears to effect a balance between distributive justice concerns of providing adequate compensation and corrective justice concerns of fairness between litigant parties.[168] As did the California Supreme Court in *American Motorcycle*,[169] the people of California appear to have subordinated the idea that fairness requires a defendant's liability to be limited by his or her percentage of fault to the policy favoring compensation, at least for economic harms. The California rule retains joint and several liability for economic loss and limits a defendant's liability for noneconomic damages to the defendant's proportionate share of such damages. While in theory this approach has its attractions, whether it will effectively promote its theoretical goals is questionable.[170]

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165. *See supra* text accompanying notes 146-50.

166. *See supra* text accompanying notes 152-55.

167. *See supra* note 103 and accompanying text.

168. *See supra* note 110.

169. American Motorcycle Ass'n v. Superior Court, 20 Cal.3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *see also supra* notes 108-11 and accompanying text.

170. *See supra* note 111.

V. Conclusion

Pennsylvania should not retain the rule of joint and several liability of concurrently negligent tortfeasors in its traditional form. Although the rule may facilitate the compensation of accident victims, it operates within Pennsylvania's "aggregate rule" system of modified comparative negligence to create a likelihood of unfairness to minimally negligent "deep pocket" defendants. While compensation of injured persons is of utmost importance in the law of accidents, justice requires not only compensation, but compensation that is fair. To be sure, fairness is an amorphous concept, but some things are clearly unfair. To compel a one percent causally negligent defendant to compensate half the loss of a fifty percent causally negligent plaintiff is clearly unfair. Fairness might allow recovery in such a situation, but surely it does not allow disproportionate liability. This is true whether the defendant is a government entity, product manufacturer, professional, or an average citizen. The goal of *fair* compensation warrants a general change, not one which protects special classes of persons or activities.

Furthermore, while incremental tort reform will not cure the insurance crisis, some changes in the civil justice system may contribute to an improvement of the situation. Joint and several liability, which both encourages suits against "deep pockets" regardless of whether their negligence is minimal and imposes liability for greater amounts than would an alternative system, is a prime candidate for change. Additionally, joint and several liability may frustrate the goal of economically efficient accident cost reduction.

The proportionate liability rule is equally undesirable, because it arbitrarily allocates to plaintiffs the risk of disproportionate loss and thereby frustrates the goal of compensation. Pennsylvania should choose a middle ground, one that represents a balance of the goals of compensation, fairness between litigant parties, and the economically efficient reduction of the costs of accidents.

R. Michael Lindsey