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A Comparative Negligence Checklist To Avoid Future Unnecessary Litigation

BY JOHN M. ROGERS* & RANDY DONALD SHAW**

INTRODUCTION

Systems of comparative negligence, whereby the negligence of a plaintiff serves to reduce rather than to preclude tort recovery in negligence, have been adopted in thirty-nine states.¹ The common law rule that contributory negligence is an absolute bar to recovery is still the law in Kentucky,² although modified by the doctrine of "last clear chance."³ Kentucky may soon join the trend toward comparative negligence, however. In the last legislative session, bills to adopt comparative negligence were introduced in both the House of Representatives⁴ and the Senate.⁵ A hearing on this subject was held by the Interim Judiciary and Civil Procedure Committee in March, 1983,⁶ and it is likely that a comparative negligence bill will again be introduced in the 1984 session of the General Assembly.⁷ Although most states have

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¹ See generally C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* §§ 3.70-580 (rev. 1978 & Supp. 1982) [hereinafter cited as HEFT & HEFT] V SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 3.1-.5 (1974 & Supp. 1978); H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* 421-595 (1978), 159-250 (Cum. Supp. 1982). Both HEFT & HEFT and H. WOODS contain up-to-date analyses of the comparative negligence laws of jurisdictions which have adopted the system. For a table of state statutory enactments of comparative negligence, see HEFT & HEFT, at 159 (Supp. 1982).

² See, e.g., *Williams v. Chilton*, 427 S.W.2d 586, 591 (Ky. 1968); *Peerless Mfg. Corp. v. Davenport*, 136 S.W.2d 779, 780 (Ky. 1940); *Mackey v. Greenview Hosp., Inc.*, 587 S.W.2d 249, 257 (Ky. Ct. App. 1979); *Vinson v. Gobrecht*, 560 S.W.2d 242, 243 (Ky. Ct. App. 1977).

³ See notes 214-18 *infra* and accompanying text.

⁴ See H.R. 480, 1982 Reg. Sess.

⁵ See S. 270, 1982 Reg. Sess.

⁶ Minutes of the Sixth Meeting of the 1982-83 Interim Joint Committee on Judiciary-Civil (March 15, 1983) (available at Legislative Research Commission, Frankfort, Kentucky).

⁷ Telephone interview with Edith Schwab, Kentucky Legislative Research Commission Staff (May 27, 1983).

adopted comparative negligence statutorily, a few have done so by court decision.⁸ Kentucky courts will soon have the opportunity to adopt comparative negligence. The Kentucky Supreme Court has recently granted discretionary review in a case in which the only issue preserved for appeal is the denial of the plaintiff's request for a comparative negligence instruction to the jury.⁹

This Article will not attempt to assess the relative merits of contributory and comparative negligence.¹⁰ Presumably, those issues will be aired thoroughly before the legislature and the courts. However, many states which have decided either legislatively or judicially to adopt comparative negligence have failed to resolve in advance a number of accompanying issues. This failure has resulted in extensive litigation to "fill the gaps."¹¹ Such litigation

⁸ See, e.g., *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *L1 v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973); *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981); *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

⁹ See *Hilen v. Hays*, No. 82-CA-1238-MR (Ky. Ct. App. May 20, 1983), *petition for discretionary rev. granted*, No. 83-SC-458-DG (Ky. S. Ct. Oct. 5, 1983).

It is interesting to note that some opponents of comparative negligence argue to the courts that adoption of comparative negligence should be left to the legislature, see, e.g., Appellee's Brief at 22-24, *Bustle v. Kentucky Power Co.*, No. 83-CA-785, (Ky. Ct. App. Sept. 24, 1983), while other opponents argue to the legislature that consideration of comparative negligence should be left to the courts. See, e.g., Comments by Larry Forgy, Minutes of the Sixth Meeting of the 1982-83 Interim Committee on Judiciary-Civil (March 15, 1983).

¹⁰ For helpful analyses of these two doctrines see HEFT & HEFT, *supra* note 1, at § 1.10; V. SCHWARTZ, *supra* note 1, at 1-29; Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1 (1953).

Of course, examining how to resolve difficulties inherent in the adoption of comparative negligence may influence the decision of whether to adopt comparative negligence in the first place.

¹¹ See, e.g., *L1 v. Yellow Cab Co.*, 532 P.2d at 1239-41 (recognized the serious problems arising under comparative negligence in multiple party litigation but chose not to resolve them since the case did not involve a multiple party situation. Many of the problems raised were resolved in *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899 (Cal. 1978)); *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 388 N.E.2d 1221, 1223 (N.Y. 1979) (the court discussed, but left open, the question of whether the doctrine of last clear chance survived New York's adoption of comparative negligence); *Laubach v. Morgan*, 588 P.2d 1071, 1073 (Okla. 1978) ("Oklahoma's very general comparative negligence statute is admittedly ambiguous in reference to situations involving multiple parties such as we have here." The court attempted to resolve questions of contribution and joint and several liability left in the legislative void).

can be avoided by anticipating issues likely to arise when the doctrine is adopted, and resolving the issues by careful statutory drafting or considered judicial opinion.¹²

This Article will examine several of the more important issues that should be addressed when comparative negligence is adopted. The issues to be discussed are: (1) how to apportion liability among multiple tortfeasors; (2) whether to retain the doctrine of last clear chance; (3) whether to permit setoff; and (4) what limits to put on jury instructions.¹³ Reasonable alternatives for each issue will be set out, with possible statutory language for the adoption of each alternative. The relative advantages and disadvantages of each alternative will then be discussed in light of the current state of Kentucky tort law, the underlying rationale for adopting comparative negligence, and the type of comparative negligence system—pure or modified—adopted.

In a pure comparative negligence system, the plaintiff recovers his damages, reduced by the percentage of fault attributable to the plaintiff's negligence, regardless of whether the plaintiff's negligence is deemed greater than defendant's.¹⁴ In the majority

¹²If a court adopts comparative negligence without the benefit of legislation, it is perhaps of questionable propriety for the court at the same time to resolve subsidiary issues not presented by the particular facts of the case. However, court resolution of such issues at the time of adoption may not necessarily be mere dicta. Resolution of the subsidiary issues may be theoretically necessary to determine whether comparative negligence should be adopted by the court. One argument against judicial adoption of a comparative negligence system is that such adoption would require a court to resolve a number of finely drawn, difficult legislative choices. A court could meet this argument by explaining how the resolution of many of these issues follows easily from a decision to adopt comparative negligence. The best proof that the issues may be easily resolved by the judiciary is simply to resolve them in the opinion of the case adopting comparative negligence.

¹³Other issues, not discussed in this Article, also merit the attention of the legislature or judiciary if comparative negligence is adopted. One issue is the extent to which the adoption is retroactive. See generally *V. SCHWARTZ*, *supra* note 1, at 141-51; *H. WOODS*, *supra* note 1, at 347-56. Another issue is whether to extend comparative fault to strict products liability. See, e.g., *Coney v. J.L.G. Indus.*, 51 U.S.L.W. 2728 (Ill. May 19, 1983). A third issue is the effect of comparative negligence on intentional torts. See generally *V. SCHWARTZ*, *supra* note 1, at 99-113; *H. WOODS*, *supra* note 1, at 159-70.

¹⁴See *Kaatz v. State*, 540 P.2d at 1049 ("Under a 'pure' form the plaintiff's damages are simply reduced in proportion to the amount of negligence which is attributed to him"); *Li v. Yellow Cab Co.*, 532 P.2d at 1243 ("in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering.").

of modified comparative negligence systems, on the other hand, the plaintiff may recover damages reduced by the percentage of fault attributable to his own negligence, only when his negligence is *less than or equal to* that of the defendant. But, if the plaintiff's negligence is *greater* than the defendant's, the contributory negligence bar applies and the plaintiff recovers nothing.¹⁵ The minority of modified comparative negligence systems provide that plaintiffs may recover only where their negligence is *less than* defendant's. Under this system, a plaintiff found equally negligent relative to the defendant is not entitled to damages.¹⁶

THE UNIFORM COMPARATIVE FAULT ACT provides a model statute for enactment of pure comparative fault:

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

UNIFORM COMPARATIVE FAULT ACT § 1, 12 U.L.A. 36 (Supp. 1982) [hereinafter cited as UCFA].

¹⁵ This system is presently in effect in Connecticut, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Texas, Vermont and Wisconsin. See generally H. WOODS, *supra* note 1, § 4:4, 20-21 (Supp. 1982).

For an example of a statutory adoption of this form of modified comparative negligence see CONN. GEN. STAT. ANN. § 52-572h(a) (West Supp. 1983-84), which states:

In causes of action based on negligence contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages resulting from injury to persons or damage to property, if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought. Any damages allowed shall be diminished in the proportion of the percentage of negligence attributed to the person recovering.

¹⁶ Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Minnesota, North Dakota, Utah, West Virginia and Wyoming have adopted such a system. See generally H. WOODS, *supra* note 1, at § 4:3, 20 (Supp. 1982). For example, the Colorado statute provides:

Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

COLO. REV. STAT. § 13-21-111(1) (1973).

One other form of comparative negligence is followed in three jurisdictions which have modified systems. This form is known as "slight-gross" and is in effect in Nebraska

For the most part, the policies articulated in support of adoption of comparative negligence may be used to support either a pure or a modified system.¹⁷ It is argued in support of comparative negligence that the denial of any recovery by contributory negligence where the injured plaintiff is only partially at fault is harsh, unfair and inconsistent with the compensatory purposes of American tort law.¹⁸ The underlying premise of this argument is that responsibility should be distributed in proportion to fault.¹⁹ Further, presently available means of mitigating the harshness of the contributory negligence bar are argued to be unsatisfactory for various reasons. One such means, the "last clear chance" doctrine, preserves the "all or nothing" result of contributory negligence, and has no sound logical foundation.²⁰

and South Dakota. In Nebraska a plaintiff's contributory negligence does not bar recovery when it is only "slight" in comparison to the defendant's "gross" negligence. In South Dakota, the plaintiff's negligence does not bar recovery if it is "ordinary." See generally H. WOODS, *supra* note 1, at § 4:5. Similarly, in Tennessee, if the plaintiff's contributory negligence is "remote," it is not a bar to recovery. *Id.*

¹⁷ No attempt will be made to evaluate the relative merits of pure and modified comparative negligence. For a discussion of the differing rationales, see *L1 v. Yellow Cab Co.*, 532 P.2d at 1242-43; UCFA commissioners; prefatory note, 12 U.L.A. 35-36 (Supp. 1983); James Kalven, Keeton, Leflar, Malone and Wade, *Comments on Malk v. Frelken-Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889, 910-11 (1968); Prosser, *supra* note 10, at 21-25. Of course, an evaluation of the subsidiary issues raised by the adoption of comparative negligence may assist in determining whether to adopt pure or modified comparative negligence. See text accompanying notes 27-53 *infra* for a discussion of a potentially difficult issue that does not arise at all under pure comparative negligence, but has proved to be extremely troublesome in modified jurisdictions.

¹⁸ See, e.g., *L1 v. Yellow Cab Co.*, 532 P.2d at 1230 ("Although criticized almost from the outset for the harshness of its operation, [the complete defense of contributory negligence] has weathered numerous attacks. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault." (footnote omitted)); *Hoffman v. Jones*, 280 So.2d at 436 ("today [contributory negligence] is almost universally regarded as unjust and inequitable. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise."). See also W. PROSSER, *THE HANDBOOK OF THE LAW OF TORTS* § 1, at 6 (4th ed. 1971) ("The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another." (footnote omitted)).

¹⁹ See note 18 *supra*. See also Miller, *Extending the Fairness Principle of L1 and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835, 845-46 (1983); Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1670 (1981).

²⁰ See text accompanying notes 213-18 *infra*.

Reliance on the fact that juries already apparently apportion liability between negligent plaintiffs and defendants²¹ is unsatisfactory since it tacitly approves jury defiance of the law. Finally, determining the plaintiff's standard of care,²² or whether there is proximate cause,²³ differently for the plaintiff than for the defendant may mitigate the harshness of contributory negligence, but is logically indefensible. The various alternatives for the resolution of subsidiary issues must be evaluated against the backdrop of these articulated reasons for the adoption of comparative negligence.

I. APPORTIONING LIABILITY AMONG MULTIPLE TORTFEASORS

Jurisdictions which have adopted comparative negligence have been confronted with a number of issues where the plaintiff's injury is the result of the negligence of more than a single plaintiff and single defendant. Resolving multiple party issues when comparative negligence is adopted by a court or legislature will avoid subsequent litigation and inconsistent decisions in the lower courts. The issues raised by multiple party litigation which most clearly need such resolution are: (A) whether to compare the plaintiff's negligence with each defendant individually or with the combined negligence of all the defendants; (B) whether to determine plaintiff's negligence with respect to all tortfeasors or only with respect to joined parties; (C) how to treat settlement by one or more of the joint tortfeasors; (D) whether comparative negligence should eliminate joint and several liability; and (E) whether contribution should survive comparative negligence.²⁴

²¹ See, e.g., *L1 v. Yellow Cab Co.*, 532 P.2d at 1231 ("Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some discrimination of the damages because of the plaintiff's fault." (quoting Prosser, *supra* note 10, at 4)); *Hoffman v. Jones*, 280 So.2d at 437 (the court notes that contributory negligence is defended on the grounds that it is not as harsh as it might be "because juries tend to disregard the instruction given by the trial judge in an effort to afford some rough justice to the injured party").

²² See generally James, *Contributory Negligence*, 62 YALE L.J. 691, 723-24 (1952-53).

²³ See generally *id.* at 726-27.

²⁴ Other issues generated by multiple party litigation under comparative negligence that will not be discussed here include those surrounding indemnity, principal-agent as multiple parties, and negligent entrustment. For discussion of these issues, see generally V SCHWARTZ, *supra* note 1, at §§ 16.1, 16.9; H. WOODS, *supra* note 1, at §§ 13:11-15.

A. *Whether to Compare Plaintiff's Negligence with Each Defendant or with All Defendants' Joint Negligence*

If Kentucky adopts a modified form of comparative negligence,²⁵ it will be necessary in multiple defendant cases to resolve whether plaintiff's negligence must be less than that of each defendant, or merely less than that of all defendants together, in order for the plaintiff to recover. Under the majority of modified comparative negligence systems, the plaintiff is awarded damages, reduced by the fault apportioned to him or her, only when the defendant's negligence is greater than or equal to the plaintiff's.²⁶ When there are multiple tortfeasors, a plaintiff could be found to be more negligent than some tortfeasors and equally or less negligent than others. Situations will also arise where a plaintiff is found to be less than fifty percent negligent, but more negligent than each defendant individually.²⁷ The questions these situations raise are: (1) whether the plaintiff whose negligence is less than the combined negligence of all the other tortfeasors should be barred from compensation for injuries caused by those defendants found to be proportionally less negligent than the plaintiff; or (2) whether such a plaintiff may be permitted recovery against all the tortfeasors because his negligence was not greater than that of all the tortfeasors combined.

Jurisdictions which have considered this issue have resolved it in different ways. Some states have specifically provided in their comparative negligence statutes that the plaintiff's negligence must be compared to the combined negligence of all the defendants.²⁸

²⁵ See notes 14-16 *supra* and accompanying text for the distinction between pure and modified comparative negligence. The comparative fault bill introduced in the 1982 Session of the Kentucky House of Representatives was a modified system. See H.R. 480, 1982 Reg. Sess.

²⁶ See note 15 *supra* and accompanying text. For discussions of the various types of modified comparative negligence, see generally V SCHWARTZ, *supra* note 1, § 3:5 at 73-78; H. WOODS, *supra* note 1, at 82-86.

Some states with modified comparative negligence only allow recovery where defendant's negligence is greater than plaintiff's. See note 16 *supra* and accompanying text.

²⁷ For example, the jury finds P 40% negligent, D₁ 30% negligent and D₂ 30% negligent. P is more negligent than either D₁ or D₂ but less than 50% at fault for the resulting injuries.

²⁸ See CONN. GEN. STAT. ANN. § 52-572h(a) (West Supp. 1983-84); MASS. ANN. LAWS ch. 231, § 85 (Michie/Law Co-op. 1983); NEV. REV. STAT. § 41.141 (1979); N.J. STAT.

Jurisdictions which have decided the issue judicially, due to ambiguous statutes, are divided about evenly on the issue. Some courts have followed the approach taken originally by the Wisconsin Supreme Court in *Walker v. Kroger Grocery & Baking Co.*,²⁹ that under modified comparative negligence the plaintiff's negligence must be less than a particular defendant's for the plaintiff to be awarded damages against that defendant.³⁰ The op-

ANN. 2A.15-5.1 (West Supp. 1983-84); OR. REV. STAT. § 18.470 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1982-83); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1983). The Connecticut, New Jersey, Oregon and Vermont statutes contain the clearest provisions directing that the plaintiff's degree of negligence or fault be compared with the combined negligence of the defendants. The pertinent portion of the Connecticut statute states that the contributory negligence of the plaintiff does not bar recovery "if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought." CONN. GEN. STAT. ANN. § 52-572h(a). See note 15 *supra* for the complete text of this statute. The wording of the Oregon statute is different only in that it expresses the comparison in terms of "fault" instead of "negligence." OR. REV. STAT. § 18.470.

Depending upon whether Kentucky adopts comparative "fault" or comparative "negligence," either the Connecticut or Oregon statute provides an excellent model for a statute designed to mandate comparison of the plaintiff's negligence to that of the combined defendants. The Massachusetts, Nevada and Texas statutes would not be good models since they do not expressly call for combining the defendants' negligence and thus could create confusion.

²⁹ 252 N.W. 721 (Wis. 1934), cited with approval in *Wisconsin Natural Gas v. Ford, Bacon & Davis Constr. Corp.*, 291 N.W.2d 825 (Wis. 1980) (interpreting WIS. STAT. ANN. § 895.045 (West 1983)).

³⁰ *Walker v. Kroger Grocery*, 252 N.W. at 727-28. See also *Mishoe v. Davis*, 14 S.E.2d 187, 193 (Ga. 1941) ("No plaintiff is entitled to a judgment against a tortfeasor to whose negligence plaintiff's negligence is equal."); *Odenwalt v. Zaring*, 624 P.2d 383 (Idaho 1980) (interpreting IDAHO CODE § 6-801 (1979)); *Marier v. Memorial Rescue Serv., Inc.*, 207 N.W.2d 706 (Minn. 1972) (plaintiff and two defendants were all found to be 33-1/3% negligent, and thus plaintiff could not recover under MINN. STAT. ANN. § 604.01 (1973)). The Minnesota statute in *Marier*, as amended in 1978, now allows recovery if the plaintiff's contributory negligence is not greater than the defendant's. This amendment would change the result of this case but the language requiring comparison of plaintiff's negligence with each defendant's was retained.) *Van Horn v. William Blanchard Co.*, 438 A.2d 552 (N.J. 1981) (interpreting N.J. STAT. ANN. 2A:15-5.1 (West 1973)). *Van Horn* was overturned statutorily in 1982 by N.J. STAT. ANN. 2A:15-5.1 (West Supp. 1983-84) (which provides for comparison of the plaintiff's negligence with the combined negligence of all the defendants); *Stannard v. Harris*, 380 A.2d 101 (Vt. 1977) (interpreting Vt. Stat. Ann. tit. 12 § 1036 (1973)). *Stannard* was overturned statutorily in 1979 when the legislature added language making it clear that plaintiffs' negligence should be compared with the total negligence of all defendants. VT. STAT. ANN. tit. 12 § 1036 (Supp. 1982); *Board of County Comm'rs v. Ridenour*, 623 P.2d 1174 (Wyo. 1981) (interpreting WYO. STAT. § 1-1-109 (1977)).

posite result was first reached by the Supreme Court of Arkansas in *Walton v. Tull*,³¹ where the court held that the statute in question³² should be interpreted to allow recovery by the plaintiff against all defendants when the plaintiff's negligence was less than fifty percent³³ regardless of the fact that one defendant was found no more negligent than the plaintiff.³⁴ Since *Walton*, a number of other jurisdictions have held that it is the combined negligence of the defendants which is compared to plaintiff's negligence in determining whether plaintiff's contributory negligence bars recovery against an individual defendant.³⁵ When *Walker* and *Walton* were decided the comparative negligence statutes of both states required comparison of the plaintiff's negligence with that of the *person* against whom recovery is sought.³⁶ Yet the Wisconsin court held this to mean that if plaintiff's negligence was greater than one of the tortfeasor's he or she could not recover from that party,³⁷ while the Arkansas court found that such a result was unjust and did not represent basic legislative intent in adopting comparative negligence.³⁸

The rationale underlying the Wisconsin approach is that in adopting modified comparative negligence, as opposed to the pure form,³⁹ the legislature intended to prevent plaintiffs from recovering from defendants who are less negligent.⁴⁰ In addi-

³¹ 356 S.W.2d 20 (Ark. 1962).

³² ARK. STAT. ANN. § 27-1730.1 (1962) *repealed by* ARK. STAT. ANN. § 27-1764 (1979), which removes the prior ambiguity by specifying that plaintiff's negligence must be compared to that of the party or *parties* against whom recovery is sought.

³³ 356 S.W.2d at 25-27.

³⁴ *Id.* at 26.

³⁵ *E.g.*, *Negley v. Massey Ferguson, Inc.*, 625 P.2d 472 (Kan. 1981)(interpreting KAN. STAT. ANN. § 60-258a (1976)); *Graci v. Damon*, 374 N.E.2d 311, 316-18 (Mass. App. Ct.), *aff'd*, 383 N.E.2d 842 (Mass. 1978)(interpreting MASS. ANN. LAWS ch. 231 § 85 (Michie/Law Co-op. Supp. 1983)). The court emphasized that in 1973 the legislature amended the phrase "person against whom recovery is sought" to "person or persons against whom recovery is sought." *Laubach v. Morgan*, 588 P.2d 1071, 1072 n.2 (Okla. 1978)(interpreting Okla. Stat. Ann. tit. 23 § 13 (West Supp. 1982-83) which the court determined was patterned after the Arkansas statute)).

³⁶ *See* ARK. STAT. ANN. § 27-1730.1 (1962)(as set out in *Walton v. Tull*, 356 S.W.2d at 27); WIS. STAT. ANN. § 895.045 (West 1983).

³⁷ *Walker v. Kroger Grocery & Baking Co.*, 252 N.W. at 727-28.

³⁸ *Walton v. Tull*, 356 S.W.2d at 26.

³⁹ *See* notes 14-16 *supra* and accompanying text for a comparison of pure and modified comparative negligence.

⁴⁰ *See* V. SCHWARTZ, *supra* note 1, § 16:16, at 257.

tion, in jurisdictions allowing defendants to be held jointly and severally liable,⁴¹ the Wisconsin rule prevents defendants who are only at fault by a relatively small percentage from being liable for the plaintiff's entire award.⁴² In contrast, the Arkansas court reasoned that the purposes behind adopting comparative negligence were basically to enforce fair apportionment of damages with relative fault and to abrogate the harsh results of contributory negligence,⁴³ and that these purposes would be undermined by following the Wisconsin rule.⁴⁴ The unfair harshness of contributory negligence reappears when a plaintiff's ability to recover for injuries is put in jeopardy merely because the incident involved multiple tortfeasors.⁴⁵ Also, a plaintiff involved in an action against multiple tortfeasors would be discouraged from joining all the potentially culpable participants since the chances of obtaining full recovery lessen as more defendants are joined.⁴⁶ Since the only reasonable way to apportion liability fairly among multiple tortfeasors is to bring them all before the court for determination of their proportionate negligence,⁴⁷ a rule that potentially punishes plaintiffs for joining all tortfeasors obstructs one of the primary goals of comparative negligence, that of fairly apportioning damages among all persons responsible for an injury.

If Kentucky adopts modified comparative negligence statutorily, the legislature should specifically choose either the Wisconsin or Arkansas approach in the language of the statute. For example, if the intention in adopting a modified form of comparative negligence is to preclude recovery by a claimant from a person less negligent than the claimant, then a statute such as the cur-

⁴¹ See notes 132-35 *infra* and accompanying text.

⁴² See V SCHWARTZ, *supra* note 1, § 16:6, at 257.

⁴³ See *Walton v. Tull*, 356 S.W.2d at 26.

⁴⁴ *Id.* See also V SCHWARTZ, *supra* note 1, § 16:6, at 259.

⁴⁵ For example, if in one tortious occurrence P is found 40% negligent and D is 60% negligent, P will recover 60% of the damages. But if the same occurrence involved multiple tortfeasors and P was 40% negligent, D₁ 30% and D₂ 30%, P would recover nothing. See V SCHWARTZ, *supra* note 1, at 259. See also *Laubach v. Morgan*, 588 P.2d 1071, 1073 (Okla. 1978).

⁴⁶ For example, in the situation described in note 45 *supra*, P would probably stand a greater chance of recovery by joining only D₁ or D₂. See Note, *supra* note 19, at 1674.

⁴⁷ See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 503-04 (1953).

rent Wisconsin law would make a useful model.⁴⁸ But if modified comparative negligence were selected merely to prevent recovery to plaintiffs who are more than fifty percent responsible for their injuries, then a statute such as the present one in Connecticut should be adopted.⁴⁹

If a system of modified comparative negligence is adopted in which the plaintiff cannot recover from a defendant less negligent than the plaintiff, and in which the plaintiff's negligence is compared to each defendant's negligence, the question arises as to whether the burden of eliminating the share apportioned to a defendant less negligent than the plaintiff should fall entirely on the plaintiff, entirely on the other defendants, or be distributed equally among all the remaining parties.⁵⁰ At least one comparative negligence statute has been drafted to address this issue and places the burden completely on the other defendants.⁵¹ One

⁴⁸ WIS. STAT. ANN. § 895.045 (West 1983) which states:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the *person* against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.

(emphasis added).

Insertion of the word "individual" before the phrase "negligence of the person against whom recovery is sought" would help to insure avoidance of the Arkansas result on similar language. See note 36 *supra* and accompanying text.

⁴⁹ CONN. GEN. STAT. ANN. § 52-572h(a) (West Supp. 1983-84). See note 15 *supra* for the text of this statute.

⁵⁰ For example, if P is found 20% negligent, D₁ 10%, D₂ 30% and D₃ 40%, the question arises as to who absorbs the loss of D₁'s share. For a discussion of this example, see Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 342, 357-58 (1980).

⁵¹ N.H. REV. STAT. ANN. § 507:7-a (Supp. 1979) which states, in pertinent part:

Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; *provided that where recovery is allowed against more than one defendant, each such 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.*

(emphasis added).

commentator has pointed out that this solution is inconsistent with the rationale for adopting comparative negligence, that of apportioning loss according to relative fault, and that a fairer result would be obtained by distributing the deleted share among all parties to the action, including the plaintiff.⁵² Since this question will certainly arise where modified comparative negligence of the type that compares plaintiff's negligence with each defendant's is adopted, it should be anticipated and clarified in the enacting legislation.⁵³

B. *Whether to Determine Plaintiff's Negligence with Respect to All Tortfeasors or Only Parties to an Action*

Once the problem of comparing plaintiff's negligence to either the individual or combined negligence of multiple defendants is resolved, the problem of whether to consider the negligence of tortfeasors not joined as parties in formulating the apportionment of damages still remains. Some states have dealt with this issue statutorily.⁵⁴ In states where either the statutes were sufficiently

⁵² See Pearson, *supra* note 50, at 357-58.

⁵³ The New Hampshire statute quoted in note 51 *supra*, is illustrative of one approach which may be followed to clarify this issue in advance. To reach a different result this statute could simply be modified thus:

provided that where recovery is allowed against more than one defendant, each such 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 the causal negligence attributed to all defendants against whom recovery is sought.

It should be noted that this model contemplates that the liability of joint tortfeasors is several.

⁵⁴ Some of the states having pure comparative negligence statutes use the negligence of all negligent *participants* in determining plaintiff's proportionate negligence. See, e.g., LA. CODE CIV. PROC. ANN. art. 1811(B)(2) (West Supp. 1983) (see Pearson, *supra* note 50, at 355 n.49 for further clarification of this statute); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976) ("damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant bears to the culpable conduct which caused the damages." (emphasis added)).

Other states have statutes that are ambiguous, see, e.g., MISS. CODE ANN. § 11-7-15 (1972); R.I. GEN. LAWS § 9-20-4 (Supp. 1982). At least one state has a statute which seems to call for consideration only of the fault of parties to the action. See WASH. REV. CODE ANN. § 4.22.015 (1981) ("A comparison of fault shall involve consideration of both the nature of the conduct of the *parties to the action* and the extent of the causal relation between such conduct and the damages." (emphasis added)).

ambiguous or comparative negligence was adopted judicially in the first instance, resolution has come from the courts.

This issue arises under both modified and pure comparative negligence systems. In adopting pure comparative negligence judicially, the California Supreme Court, in *Li v. Yellow Cab Co. of California*,⁵⁵ noted that if multiple persons are involved in an occurrence involving negligence, and not all of those persons are before the court, it is difficult for the jury to evaluate the proportionate negligence of all participants in the occurrence.⁵⁶ The court also noted that such an evaluation would not be res judicata in a subsequent action against a tortfeasor not joined in the first action.⁵⁷ Despite a recognition of these concerns, the California court, in *American Motorcycle Association v. Superior Court of Los Angeles*⁵⁸ [hereinafter *AMA*], later held that in order to determine plaintiff's proportionate negligence the plaintiff's negligence must be compared to that of all tortfeasors whether or not they are parties to the suit.⁵⁹ In so holding, the California court followed what is often referred to as the "Wisconsin rule."⁶⁰ The reasoning underlying adoption of this rule in Wisconsin was that the statutory language called for diminishing

Of the modified comparative negligence states, some jurisdictions have statutes expressly requiring determination of the plaintiff's proportionate share in relation *only* to parties to the action. See e.g., MASS. ANN. LAWS ch. 231 § 85 (Michie/Law Co-op Supp. 1983) ("In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the *total negligence of all persons against whom recovery is sought.*" (emphasis added)). See also HAWAII REV. STAT. § 663-31 (1976).

⁵⁵ 532 P.2d at 1226.

⁵⁶ *Id.* at 1239-40.

⁵⁷ *Id.* A similar concern is expressed in UCFA § 2 commissioners' comment, 12 U.L.A. 39 (Supp. 1983). The court in *Li* did not resolve this issue since multiple parties were not involved. 532 P.2d at 1241.

⁵⁸ 578 P.2d 899 (Cal. 1978).

⁵⁹ *Id.* at 906 n.2.

⁶⁰ This view was first expressed in *Walker v. Kroger Grocery & Baking Co.*, 252 N.W. 721, 727-28 (Wis. 1934). For other jurisdictions adopting this view, see also *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980) ("To limit the jury to viewing the negligence of only one tortfeasor and then ask it to apportion that negligence to the overall wrong is to ask it to judge a forest by observing just one tree.", *Bowman v. Barnes*, 282 S.E.2d 613, 619-21 (W. Va. 1981)). West Virginia had already adopted comparative negligence judicially in *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979), but this case left some ambiguity as to whether to consider all tortfeasors or only parties. See *Bowman v. Barnes*, 282 S.E.2d at 619.

the plaintiff's recovery proportionally to his or her own negligence⁶¹ and, therefore, "the causal negligence of all of the other participants in the transaction must be deemed to constitute the other term of the proportion."⁶² To limit this part of the proportion to consideration of only joined parties would serve to allow the negligence of a non-joined participant to be allocated to some other participant, thus altering the proportion attributed to the plaintiff in a way contrary to the intent of the statute.⁶³ In those states which have reached the result of the "Wisconsin rule" without statutory direction,⁶⁴ the underlying rationale is that the predominant determination is the proportion of the plaintiff's negligence, and this can only be logically and fairly ascertained by considering the actions of all participants in an event.⁶⁵ Even where statutory language has expressly called for comparing plaintiff's negligence with that of all *parties* against whom recovery is sought,⁶⁶ courts have held that the legislative intent was to require comparison of plaintiff's negligence to that of all participants in a tortious event.⁶⁷ Such a stretching of statutory language emphasizes the need for drafting comparative negligence legislation to mandate legislative intent unequivocally.⁶⁸

⁶¹ See note 48 *supra* for the language of the Wisconsin Statute.

⁶² Walker v. Kroger Grocery & Baking Co., 252 N.W. at 727.

⁶³ *Id.*

⁶⁴ See, e.g., AMA, 578 P.2d at 906 n.2; Bowman v. Barnes, 282 S.E.2d at 619-21.

⁶⁵ See 578 P.2d at 906 n.2 ("In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence"); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d 399, 403 (Idaho 1980). See also Comment, *Illinois Comparative Negligence: Multiple Parties, Multiple Problems*, 1982 S. ILL. U. L.J. 89, 94-96. See generally HEFT & HEFT, note 1, *supra*, at § 8.131.

⁶⁶ See, e.g., KAN. STAT. ANN. § 60-258a (1976).

⁶⁷ See Brown v. Keill, 580 P.2d 867, 876 (Kan. 1978) ("[W]e conclude the intent and purpose of the legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries."). See also Greenwood v. McDonough Power Equip, Inc., 437 F. Supp. 707, 712 (D. Kan. 1977); Pocatello Indus. Park Co. v. Steel West, Inc., 621 P.2d at 403 ("true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence whether or not they are parties to the case") (quoting HEFT & HEFT, *supra* note 1, at § 8.131); Lines v. Ryan, 272 N.W.2d 896, 902-03 (Minn. 1978). See generally HEFT & HEFT, *supra* note 1, at § 8.131.

⁶⁸ Cf. Comment, *Brown and Miles: At Last, an End to Ambiguity in the Kansas Law of Comparative Negligence*, 27 KAN. L. REV. 111, 117 (1978):

An opposite approach to the Wisconsin rule has been embodied in the Uniform Comparative Fault Act (UCFA) section 2(a)(2), which limits determination of relative fault to those individuals who are parties to an action or who have obtained releases.⁶⁹ The drafters of this rule listed three reasons for its adoption: (1) ascertaining the relative fault of a non-party and knowing whether a non-party will ever be held accountable for any negligent acts is impossible; (2) any adjudication of relative negligence would not be binding in subsequent suits; and (3) joinder of as many tortfeasors as possible will be encouraged since the proportionate negligence of plaintiff and each defendant will decrease with each negligent party joined, and the likelihood of a plaintiff selectively joining defendants is diminished where the negligence of a non-party could partially or entirely be attributed to the plaintiff.⁷⁰ Although some authorities have expressed agreement with the logic of the first two of these three reasons,⁷¹ or have recommended adoption of the UCFA in this regard based on other arguments,⁷² relatively few states have adopted this approach either statutorily⁷³ or judicially.⁷⁴

Since a central purpose in adopting comparative negligence is to apportion responsibility fairly according to the relative fault of the parties involved, the resolution of this issue depends on

Both the *Brown* court and the *Greenwood* court have linguistic difficulties in explaining the consideration of an absent tortfeasor (traditionally speaking, a non-party) as a party solely for the limited purpose of determining and allocating all causal negligence because paragraphs (b) and (c) of section 60-258a specifically refer to persons being joined as 'parties.'

Id.

⁶⁹ See UCFA § 2(a)(2) & commissioners' comment, 12 U.L.A. 39 (Supp. 1983).

⁷⁰ See UCFA commissioners' comment, 12 U.L.A. 39. These are basically the same concerns expressed by the California Supreme Court in *Li v. Yellow Cab Co.*, 532 P.2d at 1239-40. See notes 55-57 *supra* and accompanying text. For a criticism of the rationale underlying UCFA § 2(a)(2), see Comment, *supra* note 65, at 94-96.

⁷¹ See *Li v. Yellow Cab Co.*, 532 P.2d at 1239-40. See also H. WOODS, *supra* note 1, § 13:3, at 224-25; Fleming, *The Supreme Court of California 1974-75*, 64 CALIF. L. REV. 239, 258 (1976).

⁷² See Pearson, *supra* note 50, at 364-65.

⁷³ See note 54 *supra*.

⁷⁴ See HEFT & HEFT, *supra* note 1, § 8.131 at n.1. See also Blocker v. Wynn, 425 So. 2d 166, 168-69 (Fla. Dist. Ct. App. 1983); Davis v. Lewis, 331 So. 2d 320, 323 (Fla. Dist. Ct. App. 1976), *cert denied*, 348 So. 2d 946 (Fla. 1977); Pocatello Indus. Park v. Steel West, Inc., 621 P.2d at 403.

whether any unfairness that might occur as a result of consideration of a non-party's negligence is outweighed by the enhancement of fair apportionment resulting from considering the actions of all negligent participants. In adopting comparative negligence the Kentucky courts or legislature should consider the relative merits of these countervailing interests. If it is determined that it would be unduly detrimental to the interests of fairness to consider the negligence of persons not before the court, the language used by the UCFA⁷⁵ or the current Massachusetts statute⁷⁶ could serve as model legislation. On the other hand, if it is thought that fair apportionment requires consideration of the negligence of *all* persons involved in the occurrence, the New York comparative negligence statute⁷⁷ provides a suitable model.

C. *Effect of Settlement by a Joint Tortfeasor*

Regardless of whether a non-party's negligence is considered in determining the plaintiff's proportionate negligence, there still remains the issue of how to treat apportionment of damages when one or more of the persons causing the injuries has settled with the claimant. Three questions must be resolved when there has been such a settlement: (1) whether the settlement between the claimant and settlor is final or whether the settlor can be held liable

⁷⁵ UCFA § 2(a)(2), 12 U.L.A. 39 states that the factfinder shall determine "the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability."

⁷⁶ MASS. ANN. LAWS ch. 231 § 85 (Michie/Law Co-op. Supp. 1983) states, in pertinent part: "In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought."

⁷⁷ N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976) states:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

The language could be further clarified by rephrasing the last sentence: "the culpable (or negligent) conduct of all participants in the transaction or occurrence, whether parties to the action or not, which caused the damages." It should be noted that this sample mandates a pure form of comparative negligence.

for further damages should his or her proportionate share be determined in subsequent litigation to be greater than the value of the settlement; (2) how to apportion the loss of the difference between the value of the settlement and the settlor's proportionate share should such settlement be less than the settlor's proportionate share; and (3) how to consider the negligence of a settling tortfeasor in determining the defendants' proportionate shares.⁷⁸

1. *Whether There Should Be Contribution Against Tortfeasors Who Have Settled*

Basically two approaches have been followed regarding contribution between nonsettling and settling tortfeasors and the ability to limit liability to the amount of the settlement. The first approach is embodied in the 1939 version of the Uniform Contribution Among Tortfeasors Act⁷⁹ (1939 UCATA). Under this version of the Act, a released joint tortfeasor remained subject to contribution for the difference between the settlement amount and his or her pro rata share, provided the settlement was for less than this share.⁸⁰ However, the settlor could avoid contribution if the release stipulated that the damages awarded against the nonsettling tortfeasors would be reduced by the settlor's pro rata share.⁸¹ Because subjecting a settling tortfeasor to contribution

⁷⁸ See generally Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1464, 1494-98 (1979); Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966); Comment, *Ohio's Comparative Negligence Statute: The Effect of Joint and Several Liability, Absent Defendants and Joinder*, 50 U. CINN. L. REV. 342, 356-58 (1981).

⁷⁹ 1939 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 [hereinafter cited as 1939 UCATA], 12 U.L.A. 58 (1975).

⁸⁰ *Id.*

⁸¹ See *id.* Thus the nonsettling defendants achieve the equivalent of contribution at the expense of the plaintiff or the settlor. For example, P sues D₁, D₂ and D₃ and settles with D₁ before trial for \$10,000. If the jury determines P's injury to be worth \$36,000, either D₁ is liable to the remaining two defendants for \$2,000 each (\$12,000 minus \$10,000), or, if the release so specifies, D₁ is free from contribution, but P's award is reduced by \$12,000. Either way, the unreleased defendants are liable for no more than their pro rata shares.

The 1939 UCATA also contains an optional provision providing that the relative degrees of fault of joint tortfeasors may be considered in determining pro rata shares. See notes 188-91 *infra* and accompanying text.

and reducing the plaintiff's recovery by the settlor's pro rata share regardless of the amount of settlement provided a strong disincentive to settlement,⁸² only three states have adopted the 1939 Act in its entirety.⁸³

In response to the resistance met by the 1939 UCATA, the commissioners amended the Act in 1955 (1955 UCATA) to provide for discharge of a tortfeasor from contribution when a release or covenant not to sue is received in good faith.⁸⁴ This version has been accepted more widely, having been adopted in many states,⁸⁵ including California.⁸⁶

The 1955 UCATA does not adapt well to a comparative negligence system since it provides for contribution on a pro rata basis rather than on the basis of fault proportion.⁸⁷ Moreover,

⁸² See note 81 *supra*. Either the plaintiff or the settlor individually suffered the full financial consequences of a low settlement. One of them was forced to make up the difference between the amount of settlement and the pro rata share attributable to each joint tortfeasor. See also 1955 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 commissioners' comment [hereinafter cited as 1955 UCATA], 12 U.L.A. 99 (1975); Fleming, *supra* note 78, at 1494-95.

⁸³ The 1939 Act was adopted only in Arkansas, Hawaii and South Dakota. See 1955 UCATA commissioners' prefatory note, 12 U.L.A. 59 (1975). See, e.g., ARK. STAT. ANN. § 34-1005 (1962).

⁸⁴ 1955 UCATA § 4 and commissioners' comment, 12 U.L.A. 98, 99-100 (1975).

⁸⁵ For a table of states that have enacted one or the other versions of UCATA, see 12 U.L.A. 58 (Supp. 1983).

⁸⁶ California is not listed in the table cited in note 85 *supra*, but it substantially enacted the 1955 UCATA in 1958. See CAL. CIV. PRO. CODE §§ 875-80 (West 1980). The section dealing with settlement is virtually identical to the 1955 UCATA. Compare CAL. CIV. PRO. CODE § 877 (West 1980) with 1955 UCATA § 4, 12 U.L.A. 98 (1975).

⁸⁷ See 1955 UCATA §§ 1(b), 2(a), 12 U.L.A. 63, 87 (1975). Thus, a state enacting comparative negligence without repealing an existing statute based on the 1955 UCATA would create a situation where juries were called upon to apportion damages according to the party's relative degree of fault, but contribution would be limited to a tortfeasor's pro rata share. This result occurs in some comparative negligence states that have adopted the UCATA. See, e.g., *Graci v. Damon*, 374 N.E.2d 311, 317 (Mass. App. Ct.), *aff'd* 383 N.E.2d 842 (Mass. 1978) ("the negligence of a plaintiff is to be compared with the total negligence of all the defendants, all of whom are liable to the plaintiff, with contribution among the joint tortfeasors on a pro rata basis"); *Celotex Corp. v. Campbell Roofing & Metal Works, Inc.*, 352 So. 2d 1316, 1319 (Miss. 1977). This situation has also caused some jurisdictions to go to manipulative extremes to avoid this outcome. See Miller, *supra* note 19, at 846-48.

For a discussion of joint and several liability under comparative negligence see notes 130-76 *infra* and accompanying text. For a discussion of contribution outside the context of settlement, see notes 177-212 *infra* and accompanying text.

permitting a joint tortfeasor to avoid payment of contribution through agreement with the plaintiff may result in collusion.⁸⁸ Finally, "good faith" may be difficult to ascertain and its adoption as a standard may result in unnecessary litigation.⁸⁹

The UCFA attempts to synthesize the best features of the 1939 and 1955 versions of the UCATA. It follows the 1955 UCATA by providing that a release discharges a joint tortfeasor from contribution, but resembles the 1939 UCATA in reducing the plaintiff's recovery by the settling tortfeasor's *proportionate* share of fault.⁹⁰ Although this somewhat reduces the plaintiff's incentive to settle by placing the entire burden of a low settlement upon him or her, it has been justified as preserving the fair apportionment principles of comparative fault.⁹¹

2. *How to Apportion a Loss to Plaintiff Due to a Low Settlement*

If the 1939 UCATA approach is adopted, the settling tortfeasor, assuming his solvency, usually must make up the difference between his settlement and his greater proportionate share of the damages by contribution to the nonsettling tortfeasors. Under the system provided in the UCFA, however, the settling tortfeasor gets the benefit of his or her bargain and the difference must be borne by the plaintiff. If the plaintiff's damages are reduced by the

⁸⁸ See 1955 UCATA § 4(b), 12 U.L.A. 98 (1975). *But cf.* UCATA commissioners' comment, 12 U.L.A. 99 ("The requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive and if so there is no discharge.").

⁸⁹ See *id.*, Note, *supra* note 19, at 1695.

⁹⁰ See UCFA § 6, 12 U.L.A. 44 (Supp. 1983) which provides:

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

Compare 1939 UCATA § 5, 12 U.L.A. 58 (1975) with 1955 UCATA § 4A, 12 U.L.A. 98 (1975).

⁹¹ See UCFA § 6 commissioners' comment, 12 U.L.A. 44 (Supp. 1983). Of course, this rule only provides fair apportionment among the defendants. Plaintiffs will ultimately have their damages reduced by more than their proportionate share.

amount of a settlement, regardless of the settlor's proportionate share of fault, and no right of contribution exists between settling and nonsettling tortfeasors, the burden of a low settlement falls directly on the nonsettling tortfeasors, who end up being liable for more than their proportionate shares. Requiring the nonsettling tortfeasors to bear the burden of a low settlement encourages settlements, of course, but it would not be consistent with the principle of allocating liability according to fault. The UCFA shifts the burden to the plaintiff by reducing plaintiff's award by the settlor's proportionate share regardless of the amount of the settlement.⁹² The UCFA approach is a reasonable one. The settling defendant is not subject to contribution and thus is inclined to pursue an out of court solution. Any disincentive engendered by virtue of a reduction of the plaintiff's award by the settlor's proportionate share is mitigated by the fact that a plaintiff who negotiates a generous settlement will be able to retain the benefits.⁹³ The plaintiff is in control of any risk inherent in allowing a defendant to buy his or her peace since the plaintiff can refuse a low settlement offer.⁹⁴ Finally, the UCFA approach negates any incentive for a collusive settlement for less than a reasonable amount between the plaintiff and a tortfeasor.⁹⁵

3. *How to Consider the Negligence of Settling Tortfeasors in Determining Proportionate Negligence of Other Defendants*

A third issue raised by settlement in multiparty situations is how to consider the settlor's proportionate negligence in determining the nonsettling defendants' relative degree of fault. One approach to this question was enunciated by the Wisconsin Supreme Court in *Pierringer v. Hoger*.⁹⁶ The court decided the issue by calculating the percentage of causal negligence attributable

⁹² See text accompanying notes 90-91 *supra*. See also Pearson, *supra* note 50, at 371.

⁹³ Under the UCFA the plaintiff's damages are reduced only by the value of the proportionate share attributed to settling tortfeasors, which if less than the amount of the settlement, results in no penalty to the plaintiff. See note 90 *supra* for the text of UCFA § 6.

⁹⁴ See Fleming, *supra* note 78, at 1496; Miller, *supra* note 19, at 865-66.

⁹⁵ See Fleming, *supra* note 78, at 1496; Miller, *supra* note 19, at 865-66.

⁹⁶ 124 N.W.2d 106 (Wis. 1963).

to the nonsettling defendant, concluding that this percentage could not be appropriately determined without allocating the proportionate negligence of all tortfeasors and the plaintiff.⁹⁷ The court further held that the settling tortfeasors need not be joined as parties in order for the jury to apportion their negligence.⁹⁸ This solution has been adopted in at least two other states.⁹⁹ UCFA sections 2(a)(2) and (6), when read together, also provide for the consideration of a released party's fault in apportioning damages between joint tortfeasors.¹⁰⁰

A different approach has been taken in Arkansas, where the courts have ruled that the 1939 UCATA, as adopted there,¹⁰¹ gives nonsettling tortfeasors the right to bring in settling tortfeasors as third party defendants in order to apportion fault among all tortfeasors, even when the plaintiff has dismissed the settlers from the suit.¹⁰² One commentator has suggested that the Arkansas approach is preferable because the Wisconsin rule has proven to be difficult to apply and it is unreasonable to expect juries to be able to apportion the fault of tortfeasors who are not before the court.¹⁰³ The Arkansas approach would not work very well if settling tortfeasors are not subject to contribution, however, since they will have no incentive to defend the third party claim. Kentucky Rule of Civil Procedure (CR) 14.01¹⁰⁴ would not allow

⁹⁷ *Id.* at 111-12.

⁹⁸ *Id.* at 111.

⁹⁹ See *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978) ("In almost every case the trial court should submit to the jury the fault of all parties, including the settling defendants, even though they have been dismissed from the lawsuit."); *Bartels v. City of Williston*, 276 N.W.2d 113, 119 (N.D. 1979) (adopting verbatim the holding in *Pierringer*).

¹⁰⁰ See UCFA §§ 2(a)(2), (6), 12 U.L.A. 39, 44.

¹⁰¹ See ARK. STAT. ANN. § 34-1007(1)-(5) (1962) (adopts 1939 UCATA § 7).

¹⁰² See *Giem v. Williams*, 222 S.W.2d 800 (Ark. 1949). In *Giem*, the court held that the defendants had the right, under ARK. STAT. ANN. § 34-1007, to join a settling tortfeasor as a third party defendant even though the plaintiff had dismissed the action as to him. Because they did not exercise this right, the defendants could only rely on the reduction of damages due to settlement provisions of ARK. STAT. ANN. § 34-1004 (1962). But since the jury had been told of the settlement and knew of its amount, the court concluded that the jury must have considered the settlement in awarding plaintiff's damages and no reduction was allowed. 222 S.W.2d at 804-05.

¹⁰³ See H. WOODS, *supra* note 1, at 224-25.

¹⁰⁴ KY. R. CIV. P. 14.01 [hereinafter cited as CR] governs when a defendant may bring in a third party.

third party claims against persons previously released by the plaintiff for purposes of apportionment of fault if contribution were not allowed against the settlor-third-party-defendant. CR 14.01 only allows assertion of a claim by a defendant against a person who is not a party to the action (this includes the situation where a plaintiff has dismissed a released individual) *and* who might be liable to the defendant for all or part of any damages awarded to the plaintiff against the defendant.¹⁰⁵ If contribution is not allowed between nonsettling and settling tortfeasors, then a settling tortfeasor cannot be liable to the defendant for any part of the plaintiff's award and cannot be brought in as a third party defendant. Thus, while the Arkansas approach is preferable if contribution against settling tortfeasors is permitted, where such contribution is not permitted, as under the UCFA, joinder of settling parties solely for the purpose of determining apportionment of fault should not be required.¹⁰⁶

4. *Kentucky Settlement Law and Comparative Negligence*

Two Kentucky statutes now govern apportionment and contribution among joint tortfeasors. Kentucky Revised Statutes (KRS) section 454.040,¹⁰⁷ allows jurors the option of apportioning damages among joint tortfeasors in relation to the percentage of

¹⁰⁵ *Id.* CR 14.01 provides: "A defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

¹⁰⁶ Although the UCFA does not clearly require that a released individual be joined as a third party defendant in order to apportion his or her fault, the commissioners' comment to UCFA § 2, expresses both the need for a state to allow parties to be brought in as third party defendants *and* a strong preference for only determining the relative fault of those actually joined as parties.

¹⁰⁷ KY. REV. STAT. § 454.040 (Bobbs-Merrill 1975) [hereinafter cited as KRS] states:

In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include joint judgment for the costs.

Even though the statute refers to actions of trespass, "[f]rom time immemorial it has been held applicable to personal injury actions based on negligence." *Orr v. Coleman*, 455 S.W.2d 59, 61 (Ky. 1970) (citing *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 224 S.W.2d 165, 168 (Ky. 1949)).

causation attributed to each.¹⁰⁸ Although the language of the statute is permissive,¹⁰⁹ some authorities have suggested that the jury *should* apportion damages among multiple defendants.¹¹⁰ The fact that one or more tortfeasors have settled does not affect the power of the jury to apportion damages between the settling and nonsettling tortfeasors.¹¹¹ When the jury so apportions, liability will no longer be joint and several among defendants and no defendant will be required to pay more than his or her proportionate share.¹¹² Further, where there are both settling and nonsettling tortfeasors, and the jury has apportioned damages among them, the nonsettling tortfeasors are liable for their proportionate share regardless of the amount of any settlement.¹¹³

¹⁰⁸ See *Cox v. Cooper*, 510 S.W.2d 530, 536 (Ky. 1974); *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 719 (Ky. Ct. App. 1979)(citing *S.W. Corum Hauling, Inc. v. Tilford*, 511 S.W.2d 220, 223 (Ky 1974)). See also German, *Remedies: Contribution and Apportionment Among "Joint Tortfeasors"*, 65 Ky. L.J. 285, 291-94 (1976-77).

An interesting question is whether a judge sitting as factfinder without a jury can apportion damages. Although the literal words of the statute indicate only "juries" may apportion, one court has held to the contrary. See *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d at 717. See also German, *supra*, at 291-92.

¹⁰⁹ The word "may" is used in KRS § 454.040. KRS § 446.010(20)(Michie Supp. 1982) provides: "[a]s used in the statute laws of this state, unless the context requires otherwise: 'may' is permissive."

¹¹⁰ See *Orr v. Coleman*, 455 S.W.2d at 61 ("The practical answer is that the jury *should be required* to assess the total amount of the claimant's damages and fix the proportionate share of the nonsettling tortfeasor's liability on the basis of his contribution to the causation." (emphasis added)). See also *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d 672, 674 (Ky. 1978)(citing with approval *Orr v. Coleman*, 455 S.W.2d at 61); Park, *Comparative Negligence is Here Now?*, KY. BENCH & BAR, Jan., 1975, at 18, 21. Judge Park writes, "[T]his writer suggests that the jury should be required to determine and apportion the percentage of causation in *every* case in which the jury has determined that a plaintiff is entitled to recover as a result of joint negligence." *Id.* This suggestion has not been followed. See *Cox v. Cooper*, 510 S.W.2d at 536. See also German, *supra* note 108, at 297 n.61.

¹¹¹ See *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d at 672 (a jury instruction calling for the jury to apportion between a settling and nonsettling tortfeasor approved).

¹¹² See *Orr v. Coleman*, 455 S.W.2d at 61 ("The trial court may then compute the amount of the judgment to be entered against the nonsettling tortfeasor, *thus fixing his ultimate liability* (and incidentally obviating any question of or necessity for contribution") (emphasis added)). See also *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d at 674; *Cox v. Cooper*, 510 S.W.2d at 536-37.

¹¹³ See *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d at 672. Here one of the defendants settled for \$16,500, while the other defendant went to trial. The

Thus, settlement by a party for more money than what the ultimate liability would have been had he or she not settled in no way diminishes the liability of the nonsettling parties for their full proportionate shares of damage to the plaintiff.¹¹⁴ In addition, since apportionment under KRS section 454.040 eliminates the right of contribution among multiple tortfeasors,¹¹⁵ the nonsettling defendant cannot recover through contribution from a party who had settled for less than his proportionate share of the damages awarded.¹¹⁶ The rationale underlying these rules is twofold: first, as among joint tortfeasors, liability should be apportioned according to relative fault and not depend upon the amount of any settlement; second, if a nonsettling tortfeasor can enforce a right of contribution against a settling tortfeasor, the party who settled will have gained little by settling. Therefore, any incentive to settle is greatly diminished, in direct opposition to the public policy encouraging settlements.¹¹⁷ A different situation arises where the jury is not allowed to apportion damages or chooses not to apportion damages.¹¹⁸ There is joint liability for the entire amount of damages when apportionment under KRS section 454.040 does not apply.¹¹⁹ In such circumstances, KRS

jury found that the plaintiffs total damages were \$20,000 and that each tortfeasor was 50% liable. The Court held that under *Orr* the nonsettling defendant was liable to the plaintiff for \$10,000. *Id.* at 674.

¹¹⁴ See *id.*

¹¹⁵ See note 112 *supra*.

¹¹⁶ See 569 S.W.2d at 674 ("*Orr* plainly requires the elimination of any question of contribution where apportionment is made.").

¹¹⁷ See *Orr v. Coleman*, 455 S.W.2d at 61. See also 569 S.W.2d at 674.

¹¹⁸ Where there are two joint tortfeasors, and the plaintiff does not intend to assert a claim against one of them, apportionment is not permitted even if the joined defendant brings in the other tortfeasor in a third party claim. *Nix v. Jordan*, 532 S.W.2d 762, 763 (Ky. 1975). In *Nix* the Court distinguished *Orr* where there was an active assertion of a claim and subsequent settlement, thus allowing KRS § 454.040 to apply, and the situation where the plaintiff had not, nor probably ever would have, asserted a claim against one of two joint tortfeasors. The Court held in this situation the jury could not apportion damages under KRS § 454.040 because there was only one "defendant" relative to the plaintiff (the second tortfeasor being a third party defendant) and the statute only allowed apportionment between "defendants." 532 S.W.2d at 763. This result is discussed at length and criticized in *Germain*, *supra* note 108, at 294-99.

¹¹⁹ Under KRS § 454.040, set out in note 107 *supra*, a jury may assess *either* joint or several damages. If the jury chooses not to apportion, or cannot apportion under the rationale of *Nix*, as set out in note 118 *supra*, then the joint liability provision of KRS

section 412.030¹²⁰ permits contribution among joint tortfeasors on an equal apportionment basis.¹²¹

Under current Kentucky law it is clear that if the jury has chosen to apportion liability among all defendants and any parties that have settled, the individuals who have settled cannot be held jointly and severally liable for the entire award, and no right of contribution exists between nonsettling and settling tortfeasors.¹²² Since juries must assign a negligence proportion to each tortfeasor under a comparative negligence system, and juries are far more likely to apportion damages than are judges, adopting comparative negligence would eliminate any possibility of contribution against settling tortfeasors. Such a result should not obtain without conscious consideration of relevant policies.

If comparative negligence were adopted in Kentucky, KRS section 454.040, as interpreted by the courts, would offer a satisfactory outcome regarding the relative liability of nonsettling and settling tortfeasors. Juries may be required to apportion damages in every instance¹²³ among settling and nonsettling tortfeasors.¹²⁴

§ 454.040 governs. See German, *supra* note 108, at 294-95. The rationale for allowing joint liability among multiple tortfeasors is discussed in *Murphy v. Taxicabs of Louisville, Inc.*, 330 S.W.2d 395, 397-98 (Ky. 1959).

¹²⁰ KRS § 412.030 (1972) states: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."

¹²¹ *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d at 719 ("Under the doctrine of contribution, the liability of each joint tort-feasor is equal and is not apportioned on the basis of causation." (citing *Nix v. Jordan*, 532 S.W.2d at 762; *Lexington Country Club v. Stevenson*, 389 S.W.2d 137, 143 n.4 (Ky. 1965); *Elpers v. Kimbel*, 366 S.W.2d 157, 161 (Ky. 1963)). The question of contribution between settling and nonsettling tortfeasors under KRS § 412.030 will not be discussed here since the statute would likely be rendered meaningless by enactment of comparative negligence and would probably be abolished. See notes 169-73 *infra* and accompanying text.

¹²² See *Orr v. Coleman*, 455 S.W.2d at 61. See also *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d at 674.

¹²³ This would, of course, emasculate KRS § 412.030 as a form of pro rata contribution between nonsettling tortfeasors, since the choice of not apportioning will no longer be available.

¹²⁴ *Orr v. Coleman*, 455 S.W.2d at 61, mandates that when a jury apportions, the nonsettling tortfeasor's shares must be determined "on the basis of his *contribution to causation*." *Id.* (emphasis added). Such language would likely be construed to mean that all tortfeasors' negligence should be considered by the jury in ascertaining a nonsettling tortfeasor's proportion of the total fault. This was the procedure used for apportionment in *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d at 673.

The Kentucky Supreme Court has held that when the jury apportions damages there is no right to contribution among settling and nonsettling tortfeasors.¹²⁵ Further, the plaintiff's damages are reduced by the amount of the settlor's proportionate share, not by the amount of any settlement.¹²⁶ This amounts to the identical approach drafted into the UCFA.¹²⁷ Thus, Kentucky courts may apportion the negligence of nonsettling and settling tortfeasors without the settlor being before the court.¹²⁸ This solution comes closest to realizing the apportionment principles of comparative negligence. Although this result would occur automatically from a requirement that juries apportion fault under comparative negligence, passage of UCFA section six,¹²⁹ or clear approval of the same result in an opinion adopting comparative negligence, would eliminate the possible need for litigation to resolve the issue.

D *The Effect of Comparative Negligence on Joint and Several Liability Among Joint Tortfeasors*

Under current Kentucky law, if a jury apportions damages, joint tortfeasors become severally liable only for the amount of the award attributed to their own negligence.¹³⁰ Since with comparative negligence the jury would apportion the negligence of the plaintiff and all tortfeasors, or at least between the plaintiff and all defendants,¹³¹ the adoption of comparative negligence in

¹²⁵ 569 S.W.2d at 674. See note 116 *supra* and accompanying text.

¹²⁶ 569 S.W.2d at 672. See note 113 *supra* and accompanying text.

¹²⁷ See UCFA § 6, 12 U.L.A. 44. See also notes 90-91 *supra* for the language of the section and its interpretation.

¹²⁸ This would be like the Wisconsin rule in *Pierringer v. Hoyer*, 124 N.W.2d at 106. See notes 96-98 *supra* and accompanying text. This seems to be the approach favored by the Kentucky Supreme Court in *Orr v. Coleman*, 455 S.W.2d at 61. See note 124 *supra*.

¹²⁹ UCFA § 6, 12 U.L.A. 44. See note 90 *supra* for the text of this provision.

¹³⁰ See *KRS* § 454.040. See also *D.D. Williamson & Co. v. Allied Chem. Corp.*, 569 S.W.2d at 672; *Cox v. Cooper*, 510 S.W.2d at 530; *Orr v. Coleman*, 455 S.W.2d at 59, for interpretation by Kentucky's highest court.

¹³¹ See notes 54-74 *supra* and accompanying text for the approaches taken by California, Wisconsin, and the UCFA on the issue of whether the negligence of all tortfeasors should be considered in apportioning the defendants' negligence. As pointed out in note 124 *supra*, current Kentucky law appears to call for consideration of the negligence of both settling and nonsettling tortfeasors.

Kentucky without modification of KRS section 454.040 would require that the liability of joint tortfeasors be several in all multiparty litigation. If comparative negligence is to be enacted, then the effect of this statute should be considered in light of the issues to be discussed in this section.

Where joint and several liability between multiple tortfeasors existed prior to the enactment of comparative negligence, it has survived, unless specifically abolished by statute.¹³² In some states, joint and several liability was specifically provided for by the comparative negligence statutes.¹³³ Three states' statutes provide for joint and several liability only between defendants found more negligent than the plaintiff.¹³⁴ Based upon statutory interpretation or common law doctrines, many other jurisdictions have judicially decided that joint and several liability survives adoption of comparative negligence.¹³⁵

¹³² See generally V. SCHWARTZ, *supra* note 1, § 16.4 at 253-54; H. WOODS, *supra* note 1, § 13:4 at 225-27. For statutes that have been held to abrogate joint and several liability see KAN. STAT. ANN. § 60-258a(d) (1976); VT. STAT. ANN. tit. 12 § 1036 (Supp. 1983).

¹³³ See IDAHO CODE § 6-803(3)-(4) (1979); UTAH CODE ANN. § 78-27-40(2)-(3) (1977); WYO. STAT. § 1-1-110(h) (1977). As stated in the Wyoming statute: "W.S. 1-1-110 through W.S. 1-1-113 do not affect the common law liability of the several joint tortfeasors to have judgments recovered and payment made from them individually by the injured person for the whole injury." WYO. STAT. § 1-1-110(h).

¹³⁴ See NEV. REV. STAT. § 41.141(3) (1979); OR. REV. STAT. § 18.485 (1981) and TEX. REV. CIV. STAT. ANN. art. 2212a § 2(c) (Vernon Supp. 1982-83). This approach avoids a situation where a slightly negligent, but solvent, tortfeasor is forced to pay the plaintiff's entire award when all the other defendants are insolvent.

The Oregon statute is well-stated: "Each joint tortfeasor defendant is jointly and severally liable for the entire amount of the judgment awarded a plaintiff, except that a defendant whose percentage of fault is less than that allocated to the plaintiff is liable to the plaintiff only for that percentage of the recoverable damages." OR. REV. STAT. § 18.485 (1981).

¹³⁵ See, e.g., *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 903-06 (Cal. 1978) (applying the rationale underlying joint and several liability and finding that it is still valid under comparative negligence); *Weeks v. Feltner*, 297 N.W.2d 678, 680 (Mich. Ct. App. 1980) (the argument that comparative negligence is incompatible with joint and several liability "ignores the fact that the comparative negligence doctrine also seeks to assure fair and adequate compensation for injured plaintiffs"); *Saucier v. Walker*, 203 So. 2d 299, 302-03 (Miss. 1967) (interpreting MISS. CODE ANN. § 11-7-177, -179 (1972)); *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 291 N.W.2d 825, 833-35 (Wis. 1980) (reaffirming the rule allowing joint and several liability first announced in *Walker v. Kroger Grocery & Baking Co.*, 252 N.W. at 727-28). *But see* *Brown v. Keill*, 580 P.2d at 874 (no joint and several liability under the comparative negligence

The California Supreme Court recently developed a lengthy rationale for the retention of joint and several liability among multiple tortfeasors in *AMA*¹³⁶ despite the argument that retaining joint and several liability was logically inconsistent¹³⁷ with the decision in which California adopted comparative negligence, *Li v. Yellow Cab Co.*¹³⁸ In *Li*, the California court stated that the underlying rationale in adopting comparative negligence was to replace the illogical and unjust doctrine of contributory negligence "by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."¹³⁹ In *AMA* it was argued that this reasoning undermined the basis for allowing joint and several liability, and required its abolition.¹⁴⁰ The court stated:

Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole. *The reason for imposing liability on each for the entire consequences is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.*¹⁴¹

The defendants had first argued that under comparative negligence there was now a basis for dividing the damages between tortfeasors.¹⁴² The court countered this argument by stating that simply because there was a means of apportioning fault, the indivisibility of the injury for joint and several liability was not abrogated.¹⁴³ This analysis is arguably contrary to *Li*, which at

statute, KAN. STAT. ANN. § 60-258a(d) (1976)); *Howard v. Spafford*, 321 A.2d 74, 76 (Vt. 1974) ("[Vt. STAT. ANN. tit. 12 § 1036 (Supp. 1983)], as written, does away with joint and several liability among joint tortfeasors held liable in a judgment.").

¹³⁶ 578 P.2d at 899.

¹³⁷ *Id.* at 905.

¹³⁸ 532 P.2d at 1226.

¹³⁹ *Id.* at 1232.

¹⁴⁰ 578 P.2d at 905.

¹⁴¹ *Id.* (quoting *Finnegan v. Royal Realty Co.*, 218 P.2d 17, 32 (Cal. 1950) (emphasis in original)).

¹⁴² 578 P.2d at 905.

¹⁴³ "In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury." *Id.*

least implicitly rejected indivisibility of the injury as a justification for not apportioning loss between plaintiff and defendants;¹⁴⁴ therefore indivisibility should not serve to place the burden of an insolvent defendant solely on the other defendants.¹⁴⁵

The second argument offered by the defendant was that with comparative negligence a plaintiff could be awarded damages even though at fault to some degree.¹⁴⁶ If negligent in some manner, the plaintiff is no longer an "innocent" compared to a wrongdoing defendant, and therefore should also suffer a loss if a defendant proves insolvent.¹⁴⁷ The AMA court responded with two propositions. First, in many cases the plaintiff would be completely innocent and to abolish joint and several liability in these circumstances would unfairly place the burden of insolvent defendants upon such innocent plaintiffs.¹⁴⁸ Additionally, the court stated that plaintiff's negligence is only a failure to exercise due care for his or her own protection and, as such, is not as serious an offense as the defendant's failure to exercise due care in regard to others.¹⁴⁹ The first proposition only justifies retention of joint and several liability where there actually is an innocent plaintiff¹⁵⁰ and does not take into account the possibility of having separate rules for negligent and nonnegligent plaintiffs.¹⁵¹ The second proposition suggests that "plaintiff's and defendants' culpability are of a different order,"¹⁵² and is arguably inconsistent with the principles underlying *Li*, since it could be viewed as questioning the correctness of comparing plaintiff's and defen-

¹⁴⁴ See Miller, *supra* note 19, at 851-52. Cf. 532 P.2d at 1230-32.

¹⁴⁵ See Miller, *supra* note 19, at 851-52.

¹⁴⁶ 578 P.2d at 905.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 906.

¹⁵⁰ Miller, *supra* note 19, at 852 (citing 578 P.2d 920-21 (Clark, J., dissenting)).

¹⁵¹ See *id.* (citing 578 P.2d at 920-26 (Clark, J., dissenting)). This is currently the situation in Oklahoma. In *Laubach v. Morgan*, 588 P.2d 1071, 1074 (Okla. 1978), the Supreme Court of Oklahoma held that under comparative negligence, liability of multiple tortfeasors is several and in proportion to the damages attributable to him or her. But in *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613, 616-17 (Okla. 1980), the court held that *Laubach* did not apply "to that class of negligence litigation in which the plaintiff is not one among several negligent co-actors." *Id.* at 616.

¹⁵² Fleming, *supra* note 78, at 1483.

dants' negligence.¹⁵³ Moreover, a plaintiff, in breaching a duty of care to himself, could be creating a large risk of harm to others, as great or greater than any risk created by the defendants.¹⁵⁴

Finally, the court in *AMA* argued that "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."¹⁵⁵ While this rationale has been given a more polite reception than the court's other arguments on the grounds that it upholds the principle of fair compensation for the plaintiff's injuries,¹⁵⁶ it nevertheless has been criticized because of the unfairness joint and several liability could cause defendants.¹⁵⁷ For example, suppose P is found 40% negligent, D₁, 30%, D₂, 20% and D₃, 10%. If D₃ is the only solvent defendant, he or she could end up compensating plaintiff for 60% of the total damages even though only 10% at fault. Thus the plaintiff is fully compensated for injuries but D₃ has paid far more than his or her proportionate share.¹⁵⁸ Even if the right of contribution exists, it is of no avail against insolvent tortfeasors. While this result might be justifiable in a situation involving a completely innocent plaintiff, it is hardly compatible with the principles of fair apportionment of damages according to fault¹⁵⁹ where the plaintiff is more negligent than each of the individual defendants.

The UCFA offers a reasonable compromise to the problems engendered by joint and several liability. In order to preserve the just compensation principles of tort law, the UCFA retains joint and several liability against each party.¹⁶⁰ To assure that one

¹⁵³ See *id.* See also Miller, *supra* note 19, at 853.

¹⁵⁴ Miller, *supra* note 19, at 852.

¹⁵⁵ 578 P.2d at 906.

¹⁵⁶ See Miller, *supra* note 19, at 853. Professor Miller argues that the California Supreme Court's opinion failed to disclose the real reason for its refusal to abandon joint and several liability. Miller's view is that the court thought it was faced with either burdening the plaintiff or the defendants with unsatisfied judgments and "the court chose the defendant, who at least, is always culpable to bear the burden," as opposed to the plaintiff, who in some instances is faultless. *Id.* at 854.

¹⁵⁷ See *id.* at 853.

¹⁵⁸ Fleming, *supra* note 78, at 1483-84.

¹⁵⁹ See *Li v. Yellow Cab Co.*, 532 P.2d at 1232. See also Fleming, *supra* note 78, at 1483-84; Miller, *supra* note 19, at 854.

¹⁶⁰ UCFA § 2(c), 12 U.L.A. 39. See note 175 *infra* for the text of this provision.

defendant is not ultimately required to pay more than his or her apportioned share, contribution is enforceable among defendants up to their respective proportionate shares.¹⁶¹ Finally, in order to mitigate the harshness to a solvent defendant when one or more of the other defendants are insolvent, the UCFA allows the court, upon motion, to reallocate the uncollectible portion of a judgment among all other parties, *including* the plaintiff, according to the relative degree of fault.¹⁶² This approach balances the need for just compensation of the plaintiff with fair apportionment of liability in relation to fault.¹⁶³ A further refinement of the UCFA has been suggested which would retain the reallocation provision, but would make the liability of defendants *several*, in proportion to their own fault, when the plaintiff is negligent as well.¹⁶⁴ Under this approach the burden is placed on the plaintiff to collect from all negligent defendants, rather than forcing defendants who have paid more than their share to seek contribution from the other defendants.¹⁶⁵ This modification has been justified on two grounds: (1) there are no valid policy reasons for shifting the burden of obtaining satisfaction of a judgment from the plaintiff to a defendant; and (2) under a system of reallocation of uncollectible damages with joint and several liability, a solvent defendant runs the risk that the plaintiff will be insolvent upon reallocation and unable to repay what he or she has already collected from the solvent, jointly liable defendant.¹⁶⁶ This suggested refinement is meant to apply only if the plaintiff was guilty of some degree of negligence.¹⁶⁷ When the plaintiff is totally innocent, joint and several liability must be retained to avoid putting the plaintiff in a worse condition than under contributory negligence where joint and several liability of defendants is allowed.¹⁶⁸

¹⁶¹ UCFA §§ 2(c), 4(a), 12 U.L.A. 39, 42. For the text of § 2(c) see note 175 *infra*. See note 199 *infra* for the text of § 4(a).

¹⁶² UCFA § 2(d), 12 U.L.A. 39. For the text of UCFA § 2(d) see note 175 *infra*.

¹⁶³ This solution has been endorsed by some commentators. See Fleming, *supra* note 78, at 1483-84; Miller *supra* note 19, at 853-54; Note, *supra* note 19, at 1691.

¹⁶⁴ See Pearson, *supra* note 50, at 361-68.

¹⁶⁵ *Id.* at 364.

¹⁶⁶ *Id.* at 364-65.

¹⁶⁷ *Id.* at 365.

¹⁶⁸ *Id.* at 366.

If comparative negligence is adopted in Kentucky without abrogating the current rules of joint and several liability, the defendants' liability will apparently be several in all cases.¹⁶⁹ This result would be in keeping with the language used by the Kentucky Supreme Court in interpreting KRS section 454.040.¹⁷⁰ If the legislature intends to retain several liability where the jury apportions damages, adoption of a statute based upon the one presently in effect in Kansas¹⁷¹ is advised to clear up any lingering ambiguity resulting from Kentucky case law.¹⁷² If, on the other hand, joint liability is desired, KRS section 454.040 must be amended or repealed, and the legislature should determine how joint and several liability will apply in order to avoid unnecessary

¹⁶⁹ See note 112 *supra* and accompanying text.

¹⁷⁰ See *Orr v. Coleman*, 455 S.W.2d at 61, (the court stated that where a jury apportions damages in a situation involving joint and several liability between settling and nonsettling tortfeasors, KRS § 454.040 limits a tortfeasor's ultimate liability to his or her allocated share). Subsequent cases have made it clear that the several liability of joint tortfeasors announced in *Orr* also applies where there are no settling defendants. See *S.W. Corum Hauling, Inc. v. Tilford*, 511 S.W.2d 220, 223 (Ky. 1974); *Bacigalupi v. Mucker*, 486 S.W.2d 52, 55 (Ky. 1972).

¹⁷¹ See KAN. STAT. ANN. § 60-258a(d) (1976) which states:

Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

¹⁷² In establishing jury apportionment of negligence between tortfeasors, the enactment of comparative negligence in Kentucky should address directly any lingering problems engendered by the rule that a jury cannot apportion damages when there are only two tortfeasors and the plaintiff has not, and probably would not, assert a claim against one of them. See *Nix v. Jordan*, 532 S.W.2d at 762. See also note 118 *supra*. To retain this rule under comparative negligence weakens the concept of fair apportionment of damages in all tortious conduct by replacing it with a haphazard system dependent upon coincidental interrelationships between the tortfeasors and the injured party. For example, if one of two tortfeasors in an automobile collision were the spouse of the plaintiff, the jury could not apportion damages even if the negligent spouse were joined by the defendant as a third party defendant. Cf. 532 S.W.2d at 763 (jury cannot apportion where plaintiff would not assert a claim).

To alleviate all doubt, KRS § 454.040 should be repealed or amended to require jurors to apportion damages among all tortfeasors in every case. The apportionment provision of the UCFA § 2, 12 U.L.A. 38-39 provides an excellent model for alleviating the current ambiguity in Kentucky law in the context of comparative negligence.

subsequent litigation.¹⁷³ Three options are available: (1) pure joint and several liability;¹⁷⁴ (2) a modified form of joint and several liability with reallocation of uncollectible damages;¹⁷⁵ or (3) modified several liability with a reallocation provision.¹⁷⁶

E. *Contribution Among Joint Tortfeasors*

The final issue to be addressed regarding multiple party litigation under comparative negligence is the question of what type of contribution should be allowed among joint tortfeasors found liable for injury to the plaintiff.¹⁷⁷ Exploration of available approaches must begin within the framework of current Kentucky law.

The rules of contribution among joint tortfeasors in Kentucky are the same as those for contribution among nonsettling and set-

¹⁷³ Of course, if joint and several liability is adopted, current Kentucky case law could no longer be relied upon to resolve satisfactorily the issue of contribution against settling tortfeasors. See text accompanying notes 107-16 *supra*. A provision permitting or, as in UCFA, precluding contribution against settling tortfeasors would then be not only desirable, but necessary. See UCFA § 2(c), 12 U.L.A. 39. See the text of UCFA § 2(c) at note 175 *infra*.

¹⁷⁴ Suitable language for such enactment is found in WYO. STAT. § 1-1-110(h) (1983). See note 133 *supra* for the text of this provision.

¹⁷⁵ An excellent model for this approach is the UCFA § 2(c)-(d), 12 U.L.A. 39:

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction [resulting from releases], and enter judgment against each party liable on the basis of the rules of joint-and-several liability.

(d) Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or 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, including a claimant at fault, according to their respective percentages of fault.

¹⁷⁶ See Pearson, *supra* note 50, at 361-68. This variation is discussed in notes 164-68 *supra* and accompanying text. No statutes have been drafted to this effect, but a simple modification of UCFA § 2(c) to mandate several liability would serve this function. Possible modification could be made as follows: "The court shall enter judgment against each party liable on the basis of the rules of [several liability]." See note 175 *supra* for the complete text of UCFA § 2(c). In addition, the language in the statute regarding contribution would have to be deleted or rewritten. See UCFA § 2(c)-(d), 12 U.L.A. 39.

¹⁷⁷ For a detailed discussion of the history and concepts underlying the doctrine of contribution, see generally Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203 (1975-76). For a discussion of the development of contribution in Kentucky, see generally German, *supra* note 108, at 290-91.

ting tortfeasors discussed previously.¹⁷⁸ Therefore, if Kentucky law as it presently exists is incorporated wholesale into a system of comparative negligence there might not be room for contribution among multiple tortfeasors since juries would apportion damages in every case involving negligence.¹⁷⁹ This result would render KRS section 412.030 meaningless¹⁸⁰ and would remove the option not to apportion presented in KRS section 454.040.¹⁸¹ This strongly suggests that both statutes ought to be repealed or, in the case of section 454.040, at least modified with the advent of comparative negligence.¹⁸²

Of course, in enacting comparative negligence statutorily, the Kentucky legislature could decide to change the rules of contribution which have evolved under present law. Such a change should be closely related to the decision regarding the status of joint and several liability between multiple tortfeasors, a topic discussed in detail in the previous section.¹⁸³ For example, if it were decided that the public policy favoring just compensation to injured plaintiffs overrides any unfairness to a defendant liable for an entire

¹⁷⁸ See note 112 *supra* and accompanying text. *Orr* is not limited to situations involving settling tortfeasors. See *S.W. Corum Hauling, Inc. v. Tilford*, 511 S.W.2d at 220; *Bacigalupi v. Mucker*, 486 S.W.2d at 52.

¹⁷⁹ Any argument that *Orr* allowed contribution to survive apportionment by juries was permanently laid to rest in *Cox v. Cooper*, 510 S.W.2d at 536-37, where the Court stated: "From a literal construction of KRS § 454.040 there can be little doubt that when the jury chooses to apportion its award between or among joint tortfeasors their respective liabilities become fixed and finally settled, not only as to the plaintiff or plaintiffs but as among themselves." *Id.* (emphasis added). See also *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d at 719 ("If the trier of fact chooses to apportion its award among the joint tort-feasors, the question of contribution becomes moot.").

¹⁸⁰ See note 120 *supra* for the text of KRS § 412.030. As discussed in note 179 *supra* where a jury apportions damages there can be no contribution under current Kentucky law.

¹⁸¹ See note 107 *supra* for the text of KRS § 454.040. At the least, the permissive language of the statute would have to be deleted to enforce a system of comparative negligence in all tort litigation.

¹⁸² For example, repeal of KRS § 454.040 without simultaneous repeal of KRS § 412.030 creates a situation in which the courts would be forced to hold that under comparative negligence there is pro rata contribution among joint tortfeasors. This certainly is incompatible with a system of apportionment of liability according to relative fault since ultimate liability would depend upon the number of other tortfeasors and not their relative degrees of fault.

¹⁸³ See text accompanying notes 174-76 *supra* for a discussion of the options available regarding joint and several liability.

judgment,¹⁸⁴ or if a system of comparative negligence were adopted that spread the burden of an unsatisfied judgment among both plaintiffs and defendants,¹⁸⁵ enactment of joint and several liability when the jury apportions is an option open to the legislators.¹⁸⁶ But enactment of joint and several liability must be accompanied by the establishment of a right of contribution, up to a defendant's proportionate share, to preserve the fair apportionment principles underlying comparative negligence.¹⁸⁷

Proportionate contribution based on relative fault was actually first introduced outside of the context of comparative negligence by the 1939 UCATA in the form of an optional provision: "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability contribution, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares."¹⁸⁸ Although this provision has been criticized for the ambiguity inherent in the terms "disproportionate" and "inequitable,"¹⁸⁹ two states have inserted it verbatim into their

¹⁸⁴ This is ultimately the position taken by the California Supreme Court in *American Motorcycle Ass'n v. Superior Court*, 578 P.2d at 906. See text accompanying notes 155-56 *supra*.

¹⁸⁵ This is the result achieved under UCFA § 2(d). See text accompanying note 162 *supra*. For text of UCFA § 2(d) see note 175 *supra*.

¹⁸⁶ See text accompanying notes 174-76 *supra* for a list of possible options.

¹⁸⁷ See, e.g., V SCHWARTZ, *supra* note 1, § 16.7, at 260. Professor Schwartz states: Under the older common-law rule, a tortfeasor who pays a judgment for which he and other tortfeasors are jointly and severally liable has no enforceable right to contribution from the others. If comparative negligence is to fulfill its role of apportioning damages on the basis of fault, this rule must be abolished. If the legislature fails to modify the common-law rule, the change should be made by the courts.

See also H. WOODS, *supra* note 1, § 13:5, at 228. ("It is illogical to allocate negligence of plaintiffs and the defendants and then reject allocation of negligence between defendants."). According to Professor Schwartz, four states, Colorado, Connecticut, Nebraska and Oklahoma make joint tortfeasors jointly and severally liable with no right of contribution. See V SCHWARTZ, *supra* note 1, § 16.7, at 268.

¹⁸⁸ See 1939 UCATA § 2(4), 12 U.L.A. 37 (1975).

¹⁸⁹ See V SCHWARTZ, *supra* note 1, § 16.7, at 262.

comparative negligence statutes,¹⁹⁰ and three states have the optional provision in their statutes relating to contribution.¹⁹¹

The 1955 revision of the UCATA dropped the optional provision and inserted language unequivocally disallowing consideration of relative fault in determining the pro rata shares of tortfeasors for contribution purposes.¹⁹² Of the states with comparative negligence that have adopted the 1955 UCATA, three have retained the language forbidding consideration of relative degrees of fault in determining the pro rata shares;¹⁹³ three have altered their statutes to allow consideration of relative fault in determination of the pro rata shares;¹⁹⁴ and two leave the meaning of the pro rata shares ambiguous.¹⁹⁵ Although Kentucky has adopted neither the 1939 nor the 1955 UCATA, it does have a statute governing contribution. KRS section 412.030 has been interpreted to call for pro rata contribution among joint tortfeasors

¹⁹⁰ See IDAHO CODE § 6-803(3) (1979); UTAH CODE ANN. § 78-27-40(2) (1977). Both statutes also state that the determinations of pro rata shares of fault are used "solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law." V SCHWARTZ, *supra* note 1, § 16.7 at 262.

¹⁹¹ Three states have adopted the 1939 UCATA with the optional provision. See ARK. STAT. ANN. § 34-1002(4) (1962); HAWAII REV. STAT. § 663-12 (1976); S.D. COMP. LAWS ANN. § 15-8-15 (1969).

Florida limits the right to contribution to the "pro rata" share, as under the 1955 UCATA § 2, 12 U.L.A. 87 (1975), discussed in notes 192-95 *infra* and accompanying text. However, the contribution statute expressly states that the "relative degree of fault shall be the basis for allocation of liability" in defining pro rata share. See FLA. STAT. ANN. § 768.31 (West Supp. 1983).

¹⁹² 1955 UCATA § 2, 12 U.L.A. 87 (1975) states, in part: "In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered. "

¹⁹³ See ALASKA STAT. § 09.16.020 (1973); MASS. ANN. LAWS ch. 231B § 2 (Michie/Law Co-op. 1974); N.D. CENT. CODE § 32-38-02 (1976) (the North Dakota comparative negligence statute remedies this inconsistency: "When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each. " N.D. CENT. CODE § 9-10-07 (1975)).

¹⁹⁴ See COLO. REV. STAT. § 13-50.5-103 (Supp. 1982); FLA. STAT. ANN. 768.31 (West Supp. 1983); OHIO REV CODE ANN. § 2307.31(A) (Page 1981).

¹⁹⁵ See NEV. REV STAT. § 17.175(2) (1979) (substitutes "equitable share" for "pro rata share"); PA. CONS. STAT. ANN. tit. 42 § 8324(b) (Purdon 1982). The Pennsylvania contribution statute simply calls for pro rata shares for contribution purposes, but is silent on whether proportionate fault can be considered in making this determination. However, the comparative negligence statute alleviates any confusion by providing for contribution based upon proportionate fault. See PA. CONS. STAT. ANN. tit. 17 § 2102 (Purdon 1982).

in situations where it applies¹⁹⁶ and its existence should be considered in a legislative enactment of comparative negligence, especially if such enactment simultaneously repeals KRS section 454.040.¹⁹⁷

The UCFA's section on contribution was drafted with the intention of replacing the 1955 UCATA in those states which adopted comparative negligence.¹⁹⁸ The section allows contribution among persons jointly and severally liable based upon an individual's "equitable share" of the damages.¹⁹⁹ Although use of the term 'equitable' in describing the measure of the share might raise some question as to meaning, any doubt should be dispelled by the commissioners' comments, which clearly indicate that contribution is based upon proportionate fault.²⁰⁰

Many states have had to come to terms with the contemporaneous existence of rules mandating pro rata contribution and comparative negligence laws. The most influential decision in this area was that of the Wisconsin Supreme Court in *Bielski v. Schulze*.²⁰¹ In Wisconsin, the right of contribution prior to *Bielski*

¹⁹⁶ See notes 120-21 *supra* and accompanying text.

¹⁹⁷ If KRS § 454.040 were repealed by enactment of comparative negligence and if KRS § 412.030 were left unchanged, the case law interpreting KRS § 454.040 to preclude contribution where the jury apportions damages (*see* notes 107-17 *supra* and accompanying text) would no longer have precedential weight and courts would have to grapple with contribution in light of KRS § 412.030 alone.

¹⁹⁸ See UCFA § 4 commissioners' comment, 12 U.L.A. 42 (Supp. 1983).

¹⁹⁹ UCFA § 4 provides:

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.

(b) Contribution is available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable.

²⁰⁰ See UCFA § 4 commissioners' comments, 12 U.L.A. 42-43 ("[T]he test for determining the measure of contribution and thus establishing the ultimate responsibility is no longer on a pro rata basis. Instead, it is on a basis of proportionate fault determined in accordance with the provisions of [UCFA] Section 2.").

²⁰¹ 114 N.W.2d 105 (Wis. 1962).

derived from common law and was based upon the pro rata share of the joint tortfeasor.²⁰² The court in *Bielski* held that the Wisconsin legislature, in enacting comparative negligence, intended to make recovery contingent on the relative degree of negligence and, therefore, the only logical approach to the question of contribution was to base shares of common liability on the proportion of causal negligence.²⁰³ A similar result has been reached in a number of jurisdictions following the reasoning of the court in *Bielski*.²⁰⁴ An alternative method of reasoning was utilized by the highest courts of New York and California in overcoming statutes specifically mandating contribution based on the defendants' pro rata shares of damages²⁰⁵ to allow, in effect, contribution based on proportionate fault.²⁰⁶ The courts of both states embraced the concept of "partial indemnity" and through the use of this semantic legerdemain avoided the constraints of statutes governing contribution.²⁰⁷ Current Kentucky case law clearly would not tol-

²⁰² See *id.* at 108.

²⁰³ *Id.* at 109.

²⁰⁴ See, e.g., *Kennedy & Cohen, Inc. v. Van Eyck*, 347 So. 2d 1085, 1086 (Fla. Dist. Ct. App. 1977) (in the face of a statute modeled after the 1955 UCATA which expressly precluded consideration of fault in determining pro rata shares, Fla. Stat. Ann. § 768.31(3) (1975), the court held it was not error for a court to order contribution on a 20-80% basis on the ground that it was "basing the order upon the equities between appellees and appellant." (referring to FLA. STAT. ANN. § 768.31(3)(b)). The statute was subsequently amended to call for consideration of relative fault in determining pro rata shares. See note 191 *supra*; *Packard v. Whitten*, 274 A.2d 169, 179-80 (Me. 1971) (the right to contribution derived from common law and the court decided to follow the exact rationale of *Bielski*); *Tolbert v. Gerber Indus.*, 255 N.W.2d 362, 367-68 (Minn. 1977) (overruling a long line of cases to the contrary, the court adopted contribution based on relative fault); *Rogers v. Spady*, 371 A.2d 285, 287 (N.J. Super. Ct. App. Div. 1977) (interpreting a provision in N.J. STAT. ANN. § 2A:15-5.3 (West Supp. 1983-84) calling for contribution up to the percentage share to mean the percentage share of negligence attributable to that tortfeasor).

²⁰⁵ See CAL. CIV. PRO. CODE § 876 (West 1980) (section (a) provides: "The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them."); N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976) (the current version was amended in 1974 to conform to *Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (N.Y. 1972)). Compare the N.Y. CIV. PRAC. LAW § 1401 with *Dole v. Dow Chem. Co.*, 282 N.E.2d at 291-92.

²⁰⁶ See *American Motorcycle Ass'n v. Superior Court*, 578 P.2d at 899; *Dole v. Dow Chem. Co.*, 282 N.E.2d at 288.

²⁰⁷ See *American Motorcycle Ass'n v. Superior Court*, 578 P.2d at 907-16 (relying on language in *Li v. Yellow Cab Co.*, 532 P.2d 1226 calling for liability based on proportionate fault). There was a possible conflict with CAL. CIV. PRO. CODE § 876(a) (West 1980) (see note 205 *supra* for the text of this statute), which only allowed contribution based

erate any notion that indemnity could be "partial"²⁰⁸ and, therefore, even if sound reasons could be expressed for adoption of such a doctrine, it would be unlikely to meet with a friendly reception in the courts of Kentucky.²⁰⁹

The problems that have arisen in California, New York and Wisconsin, brought on by the coexistence of laws calling for contribution based on pro rata shares and comparative negligence statutes, point sharply to the need for legislative clarity in enacting comparative negligence. Existing laws which are contradictory to the principles of comparative negligence should be dealt with from the beginning. Contribution based on pro rata shares is a prime example of a law which is incompatible with the fair apportionment principles of comparative negligence. Where liability is to be based upon relative fault and multiple tortfeasors are held jointly and severally liable, it is imperative that contribution be based on proportionate fault.²¹⁰ The UCFA offers suitable language for drafting this approach into a comparative negligence statute.²¹¹ Of course, the need for such enactment would be obviated by the retention of several liability among joint tortfeasors when damages are apportioned.²¹²

on an equal division. The court modified the existing common law concerning indemnification to allow "partial" indemnification based upon proportionate fault by holding that the legislative history did not show an attempt to prevent the judiciary from furthering the act's purpose of easing the unfairness of the no contribution rule. 578 P.2d at 912-14.

New York likewise adopted a similar rationale in *Dole v. Dow Chem. Co.*, 282 N.E.2d at 288. N.Y. CIV. PRAC. LAW § 1401 called for pro rata distribution of shares for contribution purposes, but the court allowed apportionment of liability based on indemnity, thereby circumventing the express statutory language. 282 N.E.2d at 291, 293. The statute was subsequently amended in 1974 to remove the requirement of pro rata shares. See note 205 *supra*.

²⁰⁸ See *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 719 (Ky. Ct. App. 1979) ("Indemnity, in essence, is shifting the *entire* loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead." (emphasis added)(quoting *V V Cooke Chevrolet, Inc. v. Metropolitan Trust Co.*, 451 S.W.2d 428, 430 (Ky. 1970)). See also German, *supra* note 108, at 290-91.

²⁰⁹ See note 197 *supra*, for an example of how the need for such a doctrine could arise in Kentucky.

²¹⁰ Commentators have uniformly approved proportionate contribution. See Pearson, *supra* note 50, at 369 n.100.

²¹¹ See UCFA § 4, 12 U.L.A. 42. See note 199 *supra* for the text of this provision. To remove any ambiguity and the inevitable resulting litigation, the word "proportionate" should be substituted for the word "equitable." See note 200 *supra* and accompanying text.

²¹² See notes 169-71 *supra* and accompanying text. If defendants are only severally liable for their apportioned share, there is no need to enforce contribution among them.

II. COMPARATIVE NEGLIGENCE AND LAST CLEAR CHANCE

The doctrine of last clear chance evolved as a palliative for the harshness of the contributory negligence bar to recovery.²¹³ A contributorily negligent plaintiff can recover if he or she can prove that the defendant could have avoided injury to the plaintiff by the exercise of proper care after the negligent act of the plaintiff.²¹⁴ Two rationales are often cited to support the last clear chance doctrine: (1) if the defendant had a clear opportunity to avoid injury to the plaintiff and failed to act reasonably in doing so, then the plaintiff's negligence is not the proximate cause of his or her injury;²¹⁵ and (2) the defendant's negligence involves a higher degree of fault than the plaintiff's, and thus last clear chance is actually a method allowing for comparing relative fault.²¹⁶ As Dean Prosser has written, neither reason actually explains the existence of the doctrine.²¹⁷ Its true origin stems from courts' dislike of the harshness of the doctrine of contributory negligence.²¹⁸ To the extent that adoption of comparative negli-

²¹³ See *Kaatz v. State*, 540 P.2d 1037, 1050 (Alaska 1975) ("But it is recognized by nearly all who have reflected upon the subject that the last clear chance doctrine is, in the final analysis, merely a means of ameliorating the harshness of the contributory negligence rule." (footnote omitted)).

²¹⁴ See generally *W PROSSER, HANDBOOK OF THE LAW OF TORTS 427-33* (4th ed. 1971); *V SCHWARTZ, supra* note 1, at 129-40.

²¹⁵ *W PROSSER, supra* note 214, at 427; *V SCHWARTZ, supra* note 1, at 130.

²¹⁶ *W PROSSER, supra* note 214, at 428. The idea that a defendant's culpability is somehow greater than a negligent plaintiff's was one of the rationales used by the California Supreme Court in *AMA* to justify retaining joint and several liability among tortfeasors. See text accompanying note 149 *supra*. This reasoning has been sharply criticized. See notes 152-54 *supra* and accompanying text.

²¹⁷ Saying that defendant's last clear chance keeps the plaintiff's negligence from being the proximate cause of his own injury leads to anomalous results. For instance, driver A who negligently put himself in a helpless position of peril, and whose car is hit by a negligent driver, B, who is aware of the peril, would still be liable to a third party, C, injured by the collision. See, e.g., cases cited in *W PROSSER, supra* note 214, at 427 n.8; *V SCHWARTZ, supra* note 1, at 130 n.8. It is illogical to say that the collision was proximately caused by A for purposes of compensating C's injury, but that the same collision was *not* proximately caused by A for purposes of A's injury. *W PROSSER, supra* note 214, at 427-28.

The argument that the defendant is more culpable merely because his negligence occurred later in time is illogical. Obviously, very gross negligence can put a plaintiff in a position of helpless peril.

²¹⁸ See *W PROSSER, supra* note 214, at 428; *V SCHWARTZ, supra* note 1, §§ 7.1-2, at 130-31, 139 n.57.

gence mitigates that very harshness, the doctrine of last clear chance is no longer needed and should be discarded.

A. *Last Clear Chance in Kentucky*

Since only two states have had the legislative foresight to deal with the last clear chance doctrine upon the enactment of comparative negligence statutes,²¹⁹ its common law existence in states adopting comparative negligence has spawned much litigation.²²⁰ In Kentucky, last clear chance was initially rejected in a long line of cases²²¹ before finally being recognized in 1911.²²² It has evolved into a concept allowing recovery for negligent plaintiffs in two types of situations: (1) the plaintiffs' negligence places them in a position of peril from which they are unable to extricate themselves and the defendants either knew or, using reasonable care, should have discovered this peril in time to avoid the injury; and (2) plaintiffs could have escaped the peril but were inattentive and were injured by defendants who were aware of the danger and negligently failed to avoid the injury.²²³ Although all three of the rationales expressed for the existence of last clear chance have been expounded by Kentucky courts,²²⁴ the Kentucky Supreme Court

²¹⁹ See CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1983-84) ("The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished."); OR. REV. STAT. § 18.475(1) (1981) ("The doctrine of last clear chance is abolished.")

²²⁰ E.g., *Cushman v. Perkins*, 245 A.2d 846 (Me. 1968); *Ratlief v. Yokum*, 280 S.E.2d 584, 588-89 (W. Va. 1981). See generally the cases cited in H. WOODS, *supra* note 1, § 8:3.

²²¹ See, e.g., *Louisville & N.R.R. v. Trisler*, 131 S.W. 198, 200 (Ky. 1910) for a list of cases rejecting last clear chance.

²²² See *Chesapeake & O. Ry. v. Banks' Adm'r*, 137 S.W. 1066, 1074 (Ky. 1911) (Although the decision is equivocal in adopting the doctrine, subsequent cases that clearly accept last clear chance cite this case as authority. E.g., *Louisville Ry. v. Broadus' Adm'r*, 202 S.W. 654, 658 (Ky. 1918).

²²³ See *Beasley v. Standard Paving & Eng'g Co.*, 511 S.W.2d 667, 668-69 (Ky. 1974); *General Tel. Co. v. Yount*, 482 S.W.2d 567, 568-69 (Ky. 1972). See also Ausness, *Kentucky Law Survey—Torts*, 63 Ky. L.J. 753, 758-60 (1974-75).

²²⁴ See, e.g., *General Tel. Co. v. Yount*, 482 S.W.2d at 568 ("The doctrine of last clear chance is a humanitarian doctrine designed to soften the harsh effects of the contributory negligence rule. "); *Johnson v. Morris' Adm'r*, 282 S.W.2d 835, 836 (Ky. 1955) ("In a sense, [last clear chance] compares the negligence of the parties."); Under-

in recent years has recognized that the last clear chance doctrine is a means to soften the harshness to plaintiffs of the complete defense of contributory negligence.²²⁵ Therefore, whether to continue to recognize last clear chance after adoption of comparative negligence should depend primarily on whether the harshness of contributory negligence still needs to be mitigated under the new system. The answer to this question depends, in part, upon whether a pure or modified system of comparative negligence is adopted.

B. *Pure Comparative Negligence and Last Clear Chance*

Under pure comparative negligence, plaintiffs are allowed to recover for their injuries regardless of whether they are more negligent than the defendants. Therefore, contributory negligence is never a complete bar to recovery but, instead, serves only to reduce plaintiffs' awards by the percentages of negligence attributed to them.²²⁶ If the last clear chance doctrine were retained under pure comparative negligence, plaintiffs would be allowed their entire damages without reduction for their own negligence when it is determined that the defendant had the last clear chance to avoid the occurrence.²²⁷ Because such an application of the doctrine of last clear chance would severely limit the impact of a pure comparative negligence rule,²²⁸ the courts of four states, in adopting pure comparative negligence, expressly eliminated the doctrine of last clear chance.²²⁹ An additional reason cited by

wood v. Gardner, 249 S.W.2d 950, 951 (Ky. 1952) ("Where both parties are negligent, the one with the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is held wholly responsible for it, his negligence being deemed the direct and proximate cause of it." (citations omitted)).

²²⁵ See General Tel. Co. v. Yount, 482 S.W.2d at 568.

²²⁶ E.g., V SCHWARTZ, *supra* note 1, § 3.2, at 46.

²²⁷ *Id.* § 7.2, at 133.

²²⁸ See *id.* § 7.2, at 137; Prosser, *supra* note 10, at 27.

²²⁹ See Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975) ("Without the contributory negligence rule there would be no need for the palliative doctrine of last clear chance. To give continued life to that principle would defeat the very purpose of the comparative negligence rule—the apportionment of damages according to the degree of mutual fault."); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1240 (Cal. 1975) ("[W]hen true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff

these courts for the abolition of the doctrine was that it arose in order to mitigate the harshness of contributory negligence as a complete defense to recovery for an injured plaintiff, and therefore is no longer required under pure comparative negligence.²³⁰

Since Kentucky courts have recognized that the underlying justification for last clear chance is solely to relieve the harshness of contributory negligence,²³¹ if pure comparative negligence were adopted judicially the doctrine of last clear chance should be abolished simultaneously. Not only would it have no reason to exist, but it would also serve as a barrier to fair apportionment of damages according to fault and result in unjustifiable windfalls to otherwise culpable plaintiffs. Any statutory enactment of pure comparative negligence should not ignore the common law existence of last clear chance, since to do so would cause unnecessary litigation.²³² Enactment of pure comparative negligence in Kentucky should include a statutory provision like that of Oregon²³³ expressly abolishing last clear chance.

C. *Modified Comparative Negligence and Last Clear Chance*

Contributory negligence continues to serve as a bar to recovery by a plaintiff who is fifty percent or more negligent under many modified comparative negligence systems.²³⁴ Therefore, in modified comparative negligence states there is a stronger argument supporting the retention of last clear chance,²³⁵ and the courts of

in direct contravention of the principle of liability in proportion to fault."); *Hoffman v. Jones*, 280 So. 2d 431, 437-38 (Fla. 1973) ("The doctrine of last clear chance would, of course, no longer have any application in these cases."); *Alvis v. Ribar*, 421 N.E.2d 886, 898 (Ill. 1981) ("We have already noted that the doctrine of 'last clear chance' was created to escape the harshness of the contributory negligence rule. As the need for it disappears in the face of this decision, the vestiges of the doctrine of 'last clear chance' are hereby abolished.").

²³⁰ See *Kaatz v. State*, 540 P.2d at 1047; *L1 v. Yellow Cab Co.*, 532 P.2d at 1240; *Hoffman v. Jones*, 280 So. 2d at 438; *Alvis v. Ribar*, 421 N.E.2d at 898.

²³¹ See *General Tel. Co. v. Yount*, 482 S.W.2d at 568.

²³² See generally H. WOODS, *supra* note 1, §§ 8:2-7 (discussing various inconsistent approaches to last clear chance in jurisdictions adopting comparative negligence).

²³³ OR. REV. STAT. § 18.475(1)(1981) ("The doctrine of last clear chance is abolished.").

²³⁴ See V. SCHWARTZ, *supra* note 1, at § 3.5.

²³⁵ See *id.* § 6.2 at 139; Durney, *Last Clear Chance and Comparative Negligence*, 45 INTER ALIA, Dec. 1980, at F9, F11-12.

a few such states have refused to abolish the doctrine.²³⁶ Three rationales for retaining last clear chance have been advanced: (1) where legislative enactment of comparative negligence did not abolish last clear chance, the legislative intent was to retain it;²³⁷ (2) last clear chance is grounded in proximate cause and is not altered by comparing degrees of fault;²³⁸ and (3) the "party who has a last clear opportunity to avoid [an] accident should bear greater responsibility for it" even though the plaintiff's negligence may be greater than that of the defendant.²³⁹ None of these are persuasive. The first argument avoids any policy analysis and is inconsistent with the notion that a legislature, in enacting comparative negligence, intended for liability to be in proportion to fault, while application of the last clear chance doctrine abrogates apportionment.²⁴⁰ The second argument relies on the untenable and repudiated idea that the last clear chance doctrine can be supported on proximate cause grounds.²⁴¹ The third argument does not logically support retention of last clear chance because any greater culpability inhering in having the last opportunity to avoid injury *will* result in greater responsibility under modified comparative negligence anyway. Having an opportunity to avoid an accident and failing to do so should merely be a factor in measur-

²³⁶ See, e.g., *Malcolm v. Dox*, 100 N.W.2d 538, 541-42 (Neb. 1960) (Nebraska has a slight-gross form of modified comparative negligence. For a discussion of this type of system see V SCHWARTZ, *supra* note 1, at § 3.4(B); H. WOODS, *supra* note 1, at 514-15 app., *Hanson v. N.H. Pre-Mix Concrete, Inc.*, 268 A.2d 841, 844 (N.H. 1970) (In New Hampshire, plaintiffs can recover so long as their negligence is not greater than defendants' See generally H. WOODS, *supra* note 1, at 519 app. The court in *Hanson* simply refused, with little discussion, to abolish last clear chance); *Wilson v. Great N. Ry.*, 157 N.W.2d 19, 24 (S.D. 1968) ("Nevertheless, it has been recognized that under certain factual situations it might be 'within the province of the jury to find that the negligence of defendant after discovering plaintiff's peril was the proximate cause of her injuries.'" (footnote omitted). South Dakota has a unique form of comparative negligence sometimes referred to as slight-ordinary. For a discussion of this type of system, see generally V SCHWARTZ, *supra* note 1, § 3.4(B) and H. WOODS, *supra* note 1, at 555 app.).

²³⁷ V SCHWARTZ, *supra* note 1, § 7.2, at 136-37.

²³⁸ *Id.* § 7.2 at 137. Dean Prosser characterized this explanation of last clear chance as 'very questionable' PROSSER, *supra* note 10, at 27.

²³⁹ See Durney, *supra* note 235, at 11-12.

²⁴⁰ See V SCHWARTZ, *supra* note 1, § 7.2 at 137.

²⁴¹ See note 217 *supra* and accompanying text.

ing the parties' relative negligence and does not logically require full recovery for a negligent plaintiff.²⁴²

The purpose of softening the harshness of the contributory negligence bar might support the retention of last clear chance under modified comparative negligence in some circumstances, however. If Kentucky were to adopt a system of modified comparative negligence in which a plaintiff fifty percent or more negligent is barred from recovering, situations would arise where a plaintiff whose negligence is equal to or greater than that of the defendant would be denied compensation for injuries suffered. To the extent that the doctrine of contributory negligence thus survives, the same harsh results to plaintiffs which were mitigated by last clear chance would remain.²⁴³ It would be untenable to argue that the last clear chance doctrine should enable a plaintiff who is fifty percent or more negligent to recover one hundred percent of the total damages under modified comparative negligence, as this defeats fair apportionment of damages with fault, and might even reward a plaintiff for being more than fifty percent negligent. But a variation of modified comparative negligence that essentially switches over to pure comparative negligence when a defendant's last clear chance is established²⁴⁴ could serve to mitigate the harshness of contributory negligence²⁴⁵ in modified systems. Although this approach has been recommended,²⁴⁵ it has not been adopted, possibly because of the complexity involved in its application and the fact that legislative intent in enacting a modified form of comparative negligence might well have been to preclude plaintiffs from being compensated for their injuries if they are

²⁴² See HEFT & HEFT, *supra* note 1, § 1.220:

No real reason exists under the philosophy of comparative negligence to continue the rule of last clear chance, since the doctrine's component parts—the degree of plaintiff's negligence, its remoteness in time, the degree of defendant's negligence, the efficiency of its causation, the defendant's awareness of plaintiff's peril, the defendant's opportunity to avoid doing damage and his failure to do so—remain as factors to be considered by the jury in measuring and comparing the parties' relative fault.

Id. (footnotes omitted).

²⁴³ *Cf.* General Tel. Co. v. Yount, 482 S.W.2d at 568.

²⁴⁴ For example, if the jury finds P 55% negligent and D 45% negligent, but D had the last clear chance to avoid the accident and negligently failed to do so, then P could recover 45% of the entire award instead of no recovery being allowed.

²⁴⁵ See Durney, *supra* note 235, at F12.

found to be more negligent than defendants. Indeed, if the court or legislature adopting comparative negligence is concerned about the harshness of the contributory negligence bar to recovery where the plaintiff is fifty percent or more negligent, the court or legislature should simply adopt pure comparative negligence.

Since last clear chance is a viable doctrine in Kentucky and is difficult to reconcile with the existence of modified comparative negligence, it should be addressed in either a judicial adoption or a legislative enactment of a modified system. Most state courts which have been confronted with this issue have abolished last clear chance²⁴⁶ and the two states whose statutes address last clear chance have chosen to abolish it.²⁴⁷ In addition, the great majority of commentators have concluded that comparative negligence and last clear chance are incompatible.²⁴⁸ In light of this overwhelming trend toward abolition of last clear chance in comparative negligence states, Kentucky should follow a similar path and abolish it along with any judicial adoption of comparative negligence, or insert a clause to that effect in any statutory enactment.²⁴⁹ The complexities involved in applying a last clear chance doctrine under a modified system without interfering with fair apportionment far outweigh any benefits arising from designing and maintaining such a system.

III. SETOFF IN COMPARATIVE NEGLIGENCE

In a tort action involving negligence of both the plaintiff and defendant, a counterclaim will often be asserted by the defendant for compensation for his or her injuries. In those comparative

²⁴⁶ See *Kaatz v. State*, 540 P.2d at 1050; *Li v. Yellow Cab Co.*, 532 P.2d at 1240; *Burns v. Ottati*, 513 P.2d 469, 472 (Colo. Ct. App. 1973); *Hoffman v. Jones*, 280 So. 2d at 438; *Cushman v. Perkins*, 245 A.2d 846, 847-51 (Me. 1968); *Scott v. Webb*, 583 S.W.2d 846, 850 (Tex. Civ. App. 1979); *Ratlief v. Yocum*, 280 S.E.2d at 588-89; *Butts v. Ward*, 279 N.W. 6, 13 (Wis. 1938); *Danculovich v. Brown*, 593 P.2d 187, 194-95 (Wyo. 1979). *But see* cases cited at note 236 *supra*.

²⁴⁷ See CONN. GEN. STAT. ANN. § 52-572h(c); OR. REV. STAT. § 18.475(1).

²⁴⁸ See, e.g., V SCHWARTZ, *supra* note 1, § 7.2 at 139 & n.61. *But see* *Durney*, *supra* note 235, at F12.

²⁴⁹ See CONN. GEN. STAT. ANN. § 52-572h(c); OR. REV. STAT. § 18.475(1) for examples of possible statutory language. See note 219 *supra* for the two statutes that have done so and the statutory language adopted.

negligence jurisdictions where it is possible that both the plaintiff and defendant may be entitled to recover damages, it must be determined whether the damages awarded to each should be set off by the court to arrive at one award. If so, the real winner in many comparative negligence cases may be the liability insurance company whose aggregate liability is lessened.²⁵⁰ Under one common form of modified comparative negligence, claimants are entitled to damages only when their negligence is less than that of the adverse party.²⁵¹ Under such a system, the question of setoff usually does not arise since only the claim or counterclaim can bring recovery to the less negligent party.²⁵² Setoff does raise questions in modified comparative negligence jurisdictions where the fifty percent negligent claimant is allowed recovery and in pure comparative negligence states. A review of current Kentucky law regarding setoff will set the stage for resolution of the problems raised by setoff under comparative negligence.

A. *Kentucky Law of Setoff and Counterclaim*

In Kentucky, the procedure for bringing counterclaims is governed by CR 13.01 and 13.02. The civil rules compel a counterclaimant to plead any counterclaim arising out of the "same transaction or occurrence" in the responsive pleading to the original claim regarding that transaction or occurrence.²⁵³ Counterclaims against opposing parties are permitted in other than responsive pleadings when the claim did not arise out of the "same transaction or occurrence that [was] the subject matter of the [original] claim."²⁵⁴ Under these liberal rules, counterclaims are often

²⁵⁰ See generally H. WOODS, *supra* note 1, at § 17:2 (discussing setoff in pure comparative negligence states).

²⁵¹ See note 16 *supra* and accompanying text.

²⁵² For example, P sues D and D counterclaims. If the jury finds P 45% negligent and D 55% negligent, P would recover 55% of the entire damages and D would recover nothing on the counterclaim. Similarly, if D was 45% negligent and P 55% negligent, only D would be allowed recovery. If the jury found each party 50% negligent neither would be entitled to damages.

In certain multiparty situations, however, setoff problems may still arise. See text accompanying notes 259-60 *infra*.

²⁵³ See CR 13.01.

²⁵⁴ See CR 13.02.

asserted in tort actions.²⁵⁵ But no issue regarding whether one claimant's award should be setoff against the other's can arise, because under current law a party's contributory negligence completely bars recovery. Only the claimant alone or the counterclaimant alone can be awarded damages for injuries arising out of a single tortious occurrence. But if contributory negligence is removed as an absolute bar to recovery, situations could arise where both claimants and counterclaimants would be entitled to damages.

Since this situation cannot occur under present negligence law, there is no precedent as to whether there should be a reduction of each claimant's award by the amount of a counterclaimant's award under tort law. But it has long been the rule in Kentucky that when damages are awarded in other types of counterclaims, the defendant's award should be set off against any award to the plaintiff and judgment should be for the party with the highest award in one amount.²⁵⁶ Depending on the type of comparative negligence adopted in Kentucky, such a rule could greatly reduce total recoveries in tort litigation.

B. *Setoff and Modified Comparative Negligence*

In states that maintain contributory negligence as a bar to the plaintiff's recovery when his or her negligence is greater than or equal to defendant's,²⁵⁷ setoff due to a successful counterclaim is not normally an issue because either the plaintiff or defendant will be entitled to an award of damages, but not both.²⁵⁸ A problem can arise from multiparty litigation in jurisdictions that follow the Arkansas rule which compares the plaintiff's negligence to that

²⁵⁵ Even under earlier pleading rules, counterclaims sounding in tort were permissible when arising out of the same transaction as the original complaint. *See, e.g., Kramer v. Gough*, 220 S.W.2d 577, 579 (Ky. 1949) (where defendant counterclaimed based on plaintiff's negligence, "[t]he cause of action stated in the counterclaim certainly arose out of the transaction stated in the petition, and was connected with the subject of the action" and therefore was erroneously dismissed as an improper counterclaim.)

²⁵⁶ *E.g., Great Atl. & Pac. Tea Co. v. Lexington-Hazard Express Co.'s Receiver*, 54 S.W.2d 631, 632 (Ky. 1932); *Moore v. Caruthers*, 56 Ky. (17 B. Mon.) 532, 541 (1856).

²⁵⁷ *See V. SCHWARTZ, supra note 1, § 3.5(B) at 76, 22 (1978 Supp.)*.

²⁵⁸ *H. WOODS, supra note 1, at § 17:1.*

of the defendants' combined negligence.²⁵⁹ Under this rule each litigant could be less negligent than the combined negligence of all the opposing parties; thus each could be entitled to an award.²⁶⁰

More than one opposing party can also be entitled to damages under modified comparative negligence in those states like New Hampshire which allow recovery to a plaintiff equally as negligent as a defendant.²⁶¹ In these states a plaintiff and defendant claiming damages against each other could both be found fifty percent at fault and both be eligible to recover damages from the other.

C. *Setoff and Pure Comparative Negligence*

The problem of setoff will arise most frequently under a pure comparative negligence system. In every case where a counterclaim is asserted in which both the plaintiff and defendant are found to be negligent to some degree, the question of whether to set off recovery can arise. This follows from the fact that under pure comparative negligence a claimant is entitled to recover even when his or her negligence exceeds that of an opposing party.²⁶² Thus the courts in those states adopting pure comparative negligence have had the most opportunity to decide whether or not the awards received by opposing parties ought to be offset.²⁶³

D. *Approaches to Problems of Setoff*

The major difficulties in allowing setoff under comparative negligence are that it can undermine the just compensation ob-

²⁵⁹ See notes 31-34 *supra* and accompanying text.

²⁶⁰ For example, if P is 40% negligent, D₁, D₂, and D₃ are each 20% negligent and all the defendants counterclaim against P and crossclaim against each other, the negligence of each claimant is less than the combined negligence of the adverse parties. H. WOODS, *supra* note 1, at § 17:1.

²⁶¹ See note 15 *supra* and accompanying text.

²⁶² For example, P is 60% negligent, D is 40% negligent, and D has counterclaimed. P's damages are assessed at \$100,000 and so P is entitled to recover \$40,000 from D. D's damages are assessed at \$50,000 and D is entitled to recover \$30,000 from P. See H. WOODS, *supra* note 1, at § 17:3.

²⁶³ E.g., *Jess v. Herrmann*, 604 P.2d 208, 210-15 (Cal. 1979); *Stuyvesant Ins. Co. v. Bournazian*, 342 So. 2d 471 (Fla. 1977); *Hoffman v. Jones*, 280 So. 2d at 439 (Fla. 1973). See also H. WOODS, *supra* note 1, § 17:2, at 358 ("In pure jurisdictions the possibilities of counterclaims and setoffs are unlimited.").

jectives of tort law while simultaneously producing a windfall for liability insurance carriers at the expense of insured claimants.²⁶⁴ For example, suppose a twenty percent negligent plaintiff is injured to the extent of \$5,000 in an accident and an eighty percent negligent defendant has a successful counterclaim finding damage in the amount of \$50,000. Under pure comparative negligence, the plaintiff would be entitled to recover \$4,000 from the defendant and the defendant should be given an award of \$10,000 on the counterclaim. If these awards are offset the result is a judgment for the defendant for \$6,000.²⁶⁵ If neither party has his or her liability covered by insurance this result is fair. It merely serves to avoid duplicative exchanges of money and reduces the risk that one of the claimants will be deprived of the value of his or her award if the other claimant is insolvent.²⁶⁶ But if both parties have sufficient insurance, the reduction in awards through setoff would serve only to benefit their insurance carriers, while preventing the claimants from receiving their full damages. This causes an anomalous situation in which the liability of an insurer is not dependent upon the damages *caused* by the insured so much as it depends upon the amount of damages *incurred* by the insured.²⁶⁷

The Florida Supreme Court, in adopting pure comparative negligence in *Hoffman v. Jones*,²⁶⁸ held that where both parties are negligent, setoff should result in one judgment in favor of the party having the larger verdict.²⁶⁹ Several years later, however, in *Stuyvesant Insurance Company v. Bournazian*,²⁷⁰ the Florida court decided that the rule in *Hoffman* only applied where no insurance was involved, on the theory that allowing setoff abrogated the insurer's contractual obligations to the insured.²⁷¹

²⁶⁴ E.g., *Jess v. Herrmann*, 604 P.2d at 212.

²⁶⁵ Walkowiak, *Innocent Injury and Loss Distribution: The Florida Comparative Negligence System*, 5 FLA. ST. U.L. REV. 66, 82 n.56 (1977).

²⁶⁶ See, e.g., *Stuyvesant Ins. Co. v. Bournazian*, 342 So.2d at 473.

²⁶⁷ See *Jess v. Herrmann*, 604 P.2d at 212.

²⁶⁸ 280 So. 2d at 431.

²⁶⁹ *Id.* at 439.

²⁷⁰ 342 So. 2d at 471.

²⁷¹ *Id.* at 473-74. The court's reasoning is interesting. The court held that the jury's verdict, before offset, defined the "legal liability" of an insurer under a given policy and that to reduce the insurer's liability by setoff would be tantamount to forcing the insured

Express recognition of the windfall resulting to insurance companies through setoff underlies the holding of the Supreme Court of California in *Jess v. Herrmann*.²⁷² The court found there would be no setoff under pure comparative negligence:

As these facts demonstrate, a mandatory setoff rule in the typical setting of insured tortfeasors does not serve as an innocuous accounting mechanism or as a beneficial safeguard against an adversary's insolvency but rather operates radically to alter the parties' ultimate financial position. Such a mandatory rule diminishes *both* injured parties' actual recovery and accords both insurance companies a corresponding fortuitous windfall at their insureds' expense.²⁷³

Thus, of the two pure comparative negligence jurisdictions that have confronted the issue of setoff judicially, both have favored full recovery of the claimants' awards where they are to be paid by the opposing party's insurer, allowing no setoff.

Some comparative negligence statutes produce very different results from that reached by the courts of California and Florida. The Texas statute, for instance, mandates setoff where both the plaintiff and defendant are allowed to recover.²⁷⁴ Texas has a New Hampshire type of modified comparative negligence, so setoff may occur when a jury finds a plaintiff and a defendant equally negligent.²⁷⁵ This provision has been severely criticized for causing unfairness to litigants and for the complications it will cause

to pay a portion of the insurer's legal obligation. See *id.* For a detailed discussion of the *Hoffman* and *Bournazian* decisions, see Walkowiak, *supra* note 265.

²⁷² 604 P.2d at 208.

²⁷³ *Id.* at 211-12. The court in *Jess* reserved judgment on whether setoff could ever be used if no insurance was involved. See *id.* at 213-14.

²⁷⁴ See TEX. REV. CIV. STAT. ANN. art. 2212a § 2(f) (Vernon Supp. 1982-83) ("[T]he claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.")

²⁷⁵ See TEX. REV. CIV. STAT. ANN. art. 2212a § 1 (Vernon Supp. 1982-83). This statute also calls for comparing the plaintiff's negligence to the combined negligence of the "persons or parties against whom recovery is sought." *Id.* Therefore, setoff would also be mandated in multiparty situations when plaintiff is less negligent than the negligence of the defendants combined.

in evaluating claims.²⁷⁶ Two states, Oregon and Rhode Island, have statutes which, in complete contrast to the Texas statute, absolutely prohibit setoff.²⁷⁷ These statutes have been criticized for being overly broad in not allowing setoff even when there are uninsured parties involved, thus preventing an uninsured claimant from using the amount awarded to reduce his or her liability to the opposing party.²⁷⁸

The drafters of the UCFA have attempted to forge a compromise to eliminate this possibility of unfairness if setoff is never allowed, while avoiding the conflict with the just compensation principles of comparative negligence when setoff benefits insurers at the expense of insured parties. There are two different versions of UCFA section three. The 1977 version provided for allowing setoff of all awards but, where either or both claimants were covered by insurance, the insurers were required to pay their own insured any amounts the insurer's liability was reduced by virtue of a setoff.²⁷⁹ The rationale expressed for this approach was that setoff, in reducing the award of a claimant and the liability of his or her insurer to an opposing party, results in the claimant paying a portion of the insurer's liability. Therefore, requiring the insurer to repay to the insured any of the benefits the insurer derived because of the insured's reduction in damages is fair.²⁸⁰

²⁷⁶ See Keeton, *Torts, Annual Survey of Texas Law*, 28 SW. L.J. 1, 12 (1974). Dean Keeton also illustrates the extreme complications that can be caused by setoff in multiple party litigation. See *id.* at 12-13.

²⁷⁷ OR. REV. STAT. § 18.490 (1981) ("Setoff of damages shall not be granted in actions subject to [the statutes governing comparative negligence.];"); R.I. GEN. LAWS § 9-20-4.1 (Supp. 1982) ("There shall be no set-off of damages between the respective parties.").

²⁷⁸ See UCFA § 3 commissioners' comment (1977) quoted in *V. SCHWARTZ, supra* note 1, § 21.4 at 136 (Supp. 1978); *V. SCHWARTZ, supra* note 1, at § 19.3; H. WOODS, *supra* note 1, at § 17:4; Pearson, *supra* note 50, at 359.

²⁷⁹ UCFA § 3, 12 U.L.A. 41 (Supp. 1983) stated:

A claim and counterclaim shall be set off, and only the difference between them is recoverable in the judgment. However, if either or both of the claims are covered by liability insurance and an insurance carrier's liability under its policy is reduced by reason of the set-off, the insured is entitled to recover from the carrier the amount of the reduction. Amounts so recovered shall be credited against pertinent liability policy limits. For purposes of uninsured-motorist and similar coverages, the amounts so recovered shall be treated as payment of these amounts to the insured by the party liable.

²⁸⁰ See UCFA § 3 commissioners' comment (1977) quoted in *V. SCHWARTZ, supra* note 1, § 21.4, at 136 (Supp. 1978).

In 1979, UCFA section three was amended to provide a different solution to the problem of setoff. The amended section now provides that there shall be no setoff except where agreed upon by both parties.²⁸¹ As a result, insurance companies obtain no windfall. The unfairness of not allowing setoff where one party is insolvent and a portion of the judgment is uncollectible is alleviated by a provision that a claimant may petition the court to order both parties to pay into the court for subsequent distribution. The court will then distribute the funds collected in a manner allowing the solvent tortfeasor to obtain full credit for payment to the insolvent claimant, yet receive back from the court the amount he or she is owed by the insolvent claimant out of the funds the solvent claimant paid in originally. This procedure results in the functional equivalent of setoff, but only where some part of a judgment is uncollectible.²⁸²

The options available to Kentucky concerning the question of setoff are as varied as the types of comparative negligence. If a modified form is adopted which only allows recovery to claimants less negligent than the party the claim was asserted against and which requires comparison of each claimant's negligence with that of each party individually in multiparty situations, there would never be litigation over a single occurrence in which two opposing claimants could receive awards.²⁸³ This situation is identical to the current state of tort law setoff in Kentucky,²⁸⁴ so the issue need not be addressed. But if Kentucky were to adopt either (a) a pure comparative negligence system, or (b) a modified com-

²⁸¹ UCFA § 3, 12 U.L.A. 41 (Supp. 1983), which states:

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment to him by the other party.

²⁸² See note 281 *supra* for the text of UCFA § 3. For examples of how the statute works to allow no setoff where both parties are solvent or insured, but results in a functional setoff where one or more of the parties is insolvent or has inadequate insurance, see UCFA § 3 commissioners' comment, 12 U.L.A. 41-42, illustrations 4-8 (Supp. 1983).

²⁸³ H. WOODS, *supra* note 1, at § 17:1.

²⁸⁴ See notes 253-56 *supra* and accompanying text.

parative negligence system which (1) allows a fifty percent negligent plaintiff to recover or (2) permits comparison of a claimant's negligence to that of all other tortfeasors in multiparty litigation, more than one claimant will be entitled to recover for injuries arising out of a single tortious occurrence and the issue of whether to permit setoff in negligence cases will arise.²⁸⁵ The issue should be disposed of at the time one of these types of comparative negligence is adopted.

As discussed earlier, reducing damages by the amount of the awards of successful counterclaimants could lead to unsatisfactory results.²⁸⁶ A great amount of authority in other jurisdictions and many commentators express the view that allowing setoff where both parties are fully insured defeats the just compensation of injured parties while benefiting only insurance companies.²⁸⁷ On the other hand, if setoff is allowed in all cases, even those involving insured parties, it could be argued that the loss of a particular claimant's compensation for injuries is justified by a general benefit to the public derived from a reduction in the cost of accidents to insurers and a concomitant reduction in insurance rates.²⁸⁸ Even if setoff succeeded in reducing the cost of accidents to insurers,²⁸⁹ thereby lowering the overall cost of liability insurance, it still would engender a negative result to the public by reducing the risk spreading benefits of liability insurance and placing a greater burden on insureds to bear a portion of their injuries individually.²⁹⁰ Thus the risk spreading aspect of insurance, combined with the just compensation goal of tort law, outweigh any asserted benefit to society from potentially lower

²⁸⁵ See H. WOODS, *supra* note 1, at §§ 17:2-4.

²⁸⁶ See notes 264-78 *supra* and accompanying text.

²⁸⁷ See notes 271-72 *supra* and accompanying text. See also Flynn, *Comparative Negligence: The Debate*, 8 TRIAL May-June 1972, at 49, 52; Keeton, *supra* note 276, at 12-13; Levy, *Pure Comparative Negligence: Set-Offs, Multiple Defendants and Loss Distribution*, 11 U.S.F.L. REV. 405, 413 (1976-77).

²⁸⁸ This notion was expressed in a concurring opinion by Circuit Judge Alderman in the original Florida Supreme Court decision in *Bournazian*. This decision was withdrawn and is unpublished but has been reprinted in Walkowiak, *supra* note 265, at 121-25.

²⁸⁹ See *id.* at 81-92 for a persuasive argument that the cost of accidents to insurers would actually increase because of additional sums expended by insurance companies attempting to avoid losses where setoff is allowed.

²⁹⁰ See *id.* for a discussion of these social costs.

insurance premiums. Setoff should accordingly not be allowed if it results in a windfall to insurers at the expense of injured claimants.²⁹¹

Since banning setoff completely, as has been done in Oregon and Rhode Island, also can produce negative results when one or more injured claimants are insolvent,²⁹² the best approach would be one of the compromises used elsewhere. One of these compromises was taken by the Florida Supreme Court in *Bournazian*: setoff is not allowed where an insurance company's liability is reduced at the expense of the insured's award.²⁹³ Another approach is the one originally adopted by the UCFA, which allows setoff in every situation where awards are made to opposing parties but requires insurers to repay insureds any benefit received from such offset.²⁹⁴ A third compromise is the current provision of the UCFA, which prohibits setoff except where agreed upon between both parties, but simultaneously provides for the equivalent of setoff when one of the parties is unable to pay the full amount of the judgment against him.²⁹⁵ All of these approaches satisfy the just compensation principles of comparative negligence; one of them should be adopted judicially or enacted statutorily along with comparative negligence in Kentucky to avoid needless litigation attempting to reconcile current rules of setoff with a new system of apportioning damages with relative fault.

IV. PROBLEMS IN INSTRUCTING JURIES UNDER MODIFIED COMPARATIVE NEGLIGENCE

Comparative negligence also raises the problem of whether the jury should be made aware of how much money will actually

²⁹¹ See *id.* at 84 nn.61 & 93.

²⁹² See notes 277-78 *supra* and accompanying text.

²⁹³ See *Stuyvesant Ins. Co. v. Bournazian*, 342 So.2d at 473-74. See also notes 270-71 *supra* and accompanying text. A statutory provision codifying *Bournazian* might provide: A claim and counterclaim shall not be set off, except where both the claimant and counterclaimant are not covered by liability insurance or where both claimants' insurance does not completely cover their obligation. The liability of both claimants in excess of amounts covered by insurance shall be set off against each other.

The present UCFA § 3 produces a result which is for practical purposes identical. See notes 281-82 *supra* and accompanying text.

²⁹⁴ See UCFA § 3 (1977). See also notes 279-80 *supra* and accompanying text.

²⁹⁵ See UCFA § 3 (1983). See also notes 281-82 *supra* and accompanying text.

be recovered as a result of its particular apportionment of fault. The issue is particularly significant in states where a plaintiff is only allowed to recover when his negligence is less than that of the defendant.²⁹⁶ In such jurisdictions when the jury finds each party equally at fault, as it often may do, particularly if it does not know the effect of its decision, no damages at all will be awarded to the plaintiff. The issue discussed in this section is whether juries should be instructed as to the effect of finding a plaintiff fifty percent or more negligent under this type of modified system or whether jurors should be required to assign relative negligence to each party without being informed that their finding could deprive the plaintiff of any recovery. Similar policy considerations will apply in resolving the issue under other types of comparative negligence, although the stakes will not be so high. Resolution of the issue depends first on whether a general or special form of verdict may be used.

A. *The Form of Verdicts in Kentucky*

Under the Kentucky Rules of Civil Procedure a trial court may either require general verdicts, special verdicts, or general verdicts with interrogatories.²⁹⁷ The purpose of allowing interrogatories to accompany submission of a general verdict is to insure that the jury does not award damages to a party in disregard of its findings on factual questions.²⁹⁸ If it appears from the

²⁹⁶ See note 16 *supra* for a list of states which have adopted such a system.

²⁹⁷ See CR 49.01 (special verdicts); CR 49.02 (general verdict accompanied by answers to interrogatories). Although CR 49.01 and CR 49.02 could be interpreted to allow only special verdicts and general verdicts with interrogatories, general verdicts alone are also utilized in Kentucky. See 2 J. PALMORE, INSTRUCTIONS TO JURIES IN KENTUCKY, § 13.09 (1977):

Instructions directing the jury to find for one party or another if it is satisfied from the evidence that certain things are so result in a "general verdict." In the event the trial court chooses to use a combination of both, as authorized by CR 49.02, the answers to the interrogatories control over the general verdict to the extent that they are not consistent with it.

(footnotes omitted)(emphasis added).

²⁹⁸ See, e.g., *Jones v. Slone*, 304 S.W.2d 918 (Ky. 1957). In *Jones* the jury awarded approximately \$8,000 in a general verdict to a plaintiff in an automobile-pedestrian accident case, but in answer to a written interrogatory found the plaintiff was contributorily negligent. The court held:

answers to interrogatories that such is the case a trial judge may either enter judgment in accordance with the answers to interrogatories and ignore the general verdict, instruct the jury to consider its answers further, or order a new trial.²⁹⁹

If modified comparative negligence is adopted in Kentucky without mandating one specific form of instruction for all tort litigation, incongruous results would certainly arise under the current rules. General verdicts inherently allow jurors to be informed of the consequences of their findings. The jury is instructed to find for one party if a certain set of facts exist, but otherwise to find for the opposing party.³⁰⁰ Under modified comparative negligence the jury cannot make such a finding without being informed of the appropriate rules of law regarding the effect of the relative percentages of negligence assigned each party.³⁰¹ Therefore, if a general verdict were chosen, with or without the use of interrogatories, the jury would be informed of the consequences of finding the plaintiff and defendant equally negligent.

Since the legal effect of the jury's special finding was that the plaintiff was contributorily negligent, and since no proper issue of defendant's last clear chance negligence was presented, the general verdict imposing liability on the defendants was inconsistent with the special finding which absolved them of liability. In our opinion, under the provision of CR 49.02, the court should have entered judgment on the special finding for the defendants.

Id. at 920.

²⁹⁹ See *id.* CR 49.02 states in part:

When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict or may order a new trial.

³⁰⁰ For an example of a model instruction where contributory negligence is a defense, see 2 J. PALMORE, note 297 *supra* at § 16.27.

³⁰¹ For example, the instruction cited in note 300, *supra*, might be modified to read, in part: "If you are satisfied from the evidence that D failed to comply with any of these duties and that such failure was more than fifty percent responsible for causing the accident, you will find for P; otherwise you will find for D."

Unless the jury is told the percentage of negligence that bars the plaintiffs' recovery, it cannot decide which party shall be granted a general verdict in his or her favor. Even leaving out the phrase, "than fifty percent," the jury is still aware that if one party is found more negligent than the other, the more negligent party is not entitled to damages.

On the other hand, if the trial judge chose to utilize a special verdict, the jury would not necessarily be given this information,³⁰² since the fact finding role can be limited to answering the questions put forth in the interrogatories. Because one of the major purposes behind the use of special interrogatories is to alleviate jury bias and sympathy toward parties, it is often argued that the jury should not be made aware of the consequences of its findings of fact.³⁰³ The Kentucky Supreme Court has adopted this view and held that only issues of fact should be submitted to the jury on special verdicts.³⁰⁴ Therefore, if comparative negligence were adopted in Kentucky without explicitly determining the form of verdict to be used in every action, some claimants could get the benefit of the jury being informed of the consequences

³⁰² CR 49.01 seems to leave the amount of information to be given to the jury open to the discretion of the trial court: "The court shall give to the jury such written instructions concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.*

³⁰³ See Wasson, *Drafting Special Verdict Instructions and Interrogatories*, 46 KY. BENCH & BAR, Jan. 1982, at 14; Comment, *Comparative Negligence—Jury Instructions—Jury Must Be Informed of the Legal Effect of its Answers to Special Verdicts Prior to Deliberations*, Roman v. Mitchell, 82 N.J. 336, 413 A.2d 322 (1980), 12 RUT. L.J. 365, 367 & n.16 (1980-81).

³⁰⁴ *E.g.*, Robinson v. Murlin Phillips & MFA Ins. Co., 557 S.W.2d 202, 204-05 (Ky. 1977). In *Robinson*, the Court considered the prejudicial effect of the jury being instructed to award any damages jointly and severally against the defendant and his insurer. Although under the facts before the Court such instruction was held not to be prejudicial error, the Court recognized that such questions of law should not be brought before the jury. "In Anglo-American jurisprudence the function of the jury is to decide contested issues of fact. In order to perform this function there is no need for jurors to know the legal effect of their resolution of contested issues of fact." *Id.* at 204. The Court here cites 2 J. PALMORE, *supra* note 297, at § 13.01, where Justice Palmore writes:

In other jurisdictions, as at common law, it may be appropriate to say that the purpose of instructions is to advise the jury on the law of the case, but not in this state. The increasing use of interrogatories instead of general instructions reflects a realization that the less the jurors know about the law of the case the easier it is for them to remain strictly within the province of fact-finding.

(footnotes omitted).

The Court went on to state:

The best way to restrict the jury to its fact finding function and prevent its consideration of immaterial issues of law is for the trial judge to exercise the discretion granted him by CR 49.01 and submit only the contested issues of fact to the jury for their determination in a special verdict.

557 S.W.2d at 205.

while others, in the discretion of the trial judge, could have their verdicts submitted on special interrogatories. The general verdict would inform the jury that if the plaintiff is fifty percent negligent, he or she gets no award. The special verdict would only ask for the assignment of relative fault. Thus a jury could unintentionally deprive the plaintiff of any damages under a special verdict by simply deciding that the parties were equally to blame. This mistake could not occur under a general verdict; plaintiffs whose juries receive this kind of instruction would have a distinct advantage.³⁰⁵ This situation can be avoided if the relative merits of whether to inform the jury are considered in advance and a single, consistent rule is adopted along with comparative negligence in Kentucky.

B. *Approaches in Other Jurisdictions*

Since only six comparative negligence states prohibit the use of special verdicts,³⁰⁶ the most litigated issue regarding jury instructions is whether the jury will be told of the legal consequences of its findings where a special verdict is used.³⁰⁷ One approach taken in some modified comparative negligence jurisdictions requires that jurors not be informed. This rule is currently in effect only in Arkansas and Wisconsin.³⁰⁸ It is justified on the theory

³⁰⁵ See H. WOODS, *supra* note 1, at § 18:1.

³⁰⁶ Maine, Mississippi, Nebraska, New Hampshire, South Dakota and Vermont require general verdicts. Colorado, Florida, Hawaii, Kansas, Massachusetts, New Jersey and Wisconsin require the use of special verdicts. In Idaho, Minnesota, Nevada, North Dakota, Oregon, Utah and Wyoming special verdicts are allowed in the discretion of the court but are required if requested by any party. The rest of the jurisdictions leave it to the discretion of the trial court whether to use a general or special verdict. *Id.*

³⁰⁷ See generally V. SCHWARTZ, *supra* note 1, at § 17:5; H. WOODS, *supra* note 1, at § 18:2.

³⁰⁸ See *Argo v. Blackshear*, 416 S.W.2d 314, 316 (Ark. 1967) (“[W]hen special verdicts are employed, the judge should not give any charge ‘beyond what is reasonably necessary to enable the jury to answer intelligently the questions put to them.’ Under that procedure ‘the appeal to the jurors’ cruder prejudices will frequently be less effective.’” (quoting *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 66 (2d Cir. 1948) which contains an exhaustive critique of general verdicts)); *Fehrman v. Smirl*, 121 N.W.2d 255, 265 (Wis. 1963) (“[T]his instruction is highly objectionable because it tends to inform the jury of the legal effect of their answer to a question of the special verdict.”).

Because of the great number of 50-50 verdicts rendered in Wisconsin allowing no recovery to the plaintiff, the legislature amended the comparative negligence statute to

that if a jury does not know the legal effect of its answers to interrogatories the verdict will more likely be untainted by juror prejudice.³⁰⁹ In recent years this rationale has come under increasing criticism. Three major counterarguments have been expressed: (1) the rule is without foundation since an intelligent juror will already know the effect of his or her answers on the ultimate award of damages; (2) when jurors are uninformed they will often speculate as to the results of their findings and inevitably, in a certain number of instances, come to incorrect conclusions; the verdict then does not accurately reflect the jury's intent; and (3) juries have long had a role in mitigating the harsh effects of legal doctrines and requiring uninformed special verdicts invades this "traditional province of the jury"³¹⁰

In reaction to these criticisms, and in recognition of the inequitable results accruing to the fifty percent negligent plaintiff who might have recovered had the jury known the rules of law, every state except Arkansas that precludes a fifty percent negligent plaintiff from recovering now allows the jury to be informed of

allow a 50% negligent plaintiff to recover, thus mitigating to a great extent the harshness of not informing the jury in a special verdict. Smith, *Comparative Negligence Problems With the Special Verdict: Informing the Jury of the Legal Effects of Their Answers*, 10 LAND & WATER L. REV. 199, 223-24 (1975). See Flynn, *supra* note 287, at 49-51.

³⁰⁹ See HEFT & HEFT, *supra* note 1, at § 8.10. See also Smith, *supra* note 308, at 204-07; Comment, *supra* note 303, at 367 n.16.

³¹⁰ See Smith, *supra* note 308, at 207-14 for further discussion of these criticisms. An alarming example of an uninformed jury misapprehending the rules of comparative negligence is discussed in Comment, *supra* note 303, at 371 n.43. In *Argo v. Blackshear*, 416 S.W.2d 314 (Ark. 1967), the jury had found the plaintiff 50% negligent and fixed damages at \$18,000. After being informed by the trial judge that a 50% negligent plaintiff could not recover any damages, the jury was sent back to fix liability in a general verdict. The jury returned a general verdict of \$18,000 for the plaintiff. The Arkansas Supreme Court found "that judgment to be erroneous [and ordered] that the special verdict of the jury be entered." *Id.* at 316.

Another variation on the problem of jury speculation about the legal effect of their answers to interrogatories is that jurors have been found to have unwittingly reduced the plaintiff's damages by the amount of the negligence attributed to him or her, not realizing that the judge would make the same reduction again, thus resulting in a "double deduction" for the damages apportioned to the plaintiff's negligence. See Nixon, *The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute*, 12 N.H.B.J. 17, 27 (1969); Comment, *supra* note 303, at 372. This problem was recognized by the Supreme Court of Kansas as a rationale for holding that juries could be informed of the results of special verdicts. See *Thomas v. Board of Township Trustees*, 582 P.2d 271, 281 (Kan. 1978).

the legal effect of its answer to interrogatories under a special verdict.³¹¹ Whether imparting such information is mandatory or permissive is another question. Some courts have held that the trial judge has some discretion as to whether to inform the jury of the effect of apportioning fifty percent or more of the negligence to the plaintiff.³¹² However, a growing trend is for courts and legislatures to require that the jury be informed of the results of apportioning negligence under a special verdict.³¹³

³¹¹ See Comment, *Comparative Negligence—Jury Instructions on the Legal Effect of the Jury's Apportionment of Negligence*, 1980 UTAH L. REV. 690, 692-94 (1980) (discussing *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974), *overruled*, *Dixon v. Stewart*, 658 P.2d 591 (Utah 1979)).

³¹² A well developed critique of the rule which prevents informing the jury which concludes that in most cases a jury should be informed, but that the discretion of the trial judge may be used where issues are so complex that such instruction might tend to confuse or mislead the jury, appears in *Seppi v. Betty*, 579 P.2d 683, 687-92 (Idaho 1978). See also *Thomas v. Board of Township Trustees*, 582 P.2d at 280-81; *Roman v. Mitchell*, 413 A.2d 322, 327 (N.J. 1980) ("We conclude that, ordinarily, a jury informed of the legal effect of its findings as to percentages of negligence in a comparative negligence trial is better able to fulfill its fact finding function." The court proceeded to hold that an "ultimate outcome instruction should be given [unless] it would tend to mislead or confuse the jury." (citing *Seppi*)); *Dixon v. Stewart*, 658 P.2d at 596.

MINN. R. CIV. P. 49.01(2)(1979) should produce the same result:

In actions involving [Minnesota's comparative negligence statute] the court shall inform the jury of the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law, or complex issues of law or fact are involved, which may render such instruction or comment erroneous, misleading or confusing to the jury.

³¹³ *E.g.*, *Appelgren v. Agri Chem Inc.*, 562 P.2d 766, 766-67 (Colo. Ct. App. 1977) (interpreting COLO. REV. STAT. § 13-21-111(4) (Supp. 1982)); *Resser v. Boise-Cascade Corp.*, 587 P.2d 80, 83 (Or. 1978) (interpreting Or. Rev. Stat. § 18.480(2) (1981)); *Pear v. Home Ass'n of Enola Legion No. 751*, 430 A.2d 665, 671-72 (Pa. Super. Ct. 1981) ("We have concluded that the jury should be informed of the consequence of its apportionment of negligence. We regard such information as essential if the jury is to be able to apply the equitable considerations and arrive at the compromises that are an inherent part of the jury system.").

See WYO. STAT. § 1-1-109(b)(iii) (1983) which provides: "The court *may*, and when requested by any party *shall*: [I]nform the jury of the consequences of its determination of the percentage of negligence." (emphasis added). The Oregon statute, Or. Rev. Stat. § 18.480 (1981), requires a special verdict when requested by any party and then provides: "(2) A jury shall be informed of the legal effect of its answer to the questions [regarding the amount of damages and the degree of fault]."

In addition, many commentators support informing the jury. See, *e.g.*, V SCHWARTZ, *supra* note 1, § 17.5, at 292-93; Gunn, *The Jury System and Special Verdicts*, 2 ST. MARY'S L.J. 175, 175 (1970); Ryan, *Are Instructions Which Inform the Jury*

If Kentucky adopts a modified form of comparative negligence which precludes a fifty percent negligent plaintiff from recovery, the current procedural rules regarding special verdicts should be overhauled. If the use of a general verdict is retained as an option available to trial courts, then CR 49.01 should be amended to include a provision similar to the one in effect in Oregon³¹⁴ mandating that juries shall be informed of the effect of their special verdicts. Failure to do this would result in unfairness to claimants who are unsuccessful in convincing the court to use a general verdict.³¹⁵ Conversely, if in establishing comparative negligence it is determined that the general verdict should be abandoned, this incongruity would be removed since under current Kentucky law the jury should not be informed of the effects of answers under special verdicts.³¹⁶ This could be accomplished by enacting legislation requiring special verdicts in all negligence litigation.³¹⁷

of the Effect of Their Answers Inimical to Justice?, 1940 WIS. L. REV. 400, 402-06; Smith, *supra* note 308, at 226-28; Thode, *Comparative Negligence, Contribution Among Tortfeasors, and the Effect of a Release—A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406, 417-18; Comment, *supra* note 303, at 371-73, 375; Comment, *supra* note 311, at 693-94.

³¹⁴ See OR. REV. STAT. § 18.480 (see note 322 *infra*).

³¹⁵ See notes 300-04 *supra* and accompanying text.

³¹⁶ See, e.g., *Robinson v. Murlin Phillips & MFA Ins. Co.*, 557 S.W.2d at 204-05; see also notes 303-04 *supra* and accompanying text.

³¹⁷ Statutes currently in effect in Hawaii and New Jersey unequivocally mandate this result. See HAWAII REV. STAT. § 663-31(b) (1976) which states:

(b) In any action [in] which [the negligence of parties is compared], the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

(1) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(2) The degree of negligence of each party expressed as a percentage.

N.J. STAT. ANN. 2A:15-5.2 (West Supp. 1983-84) provides:

In all negligence actions in which the question of liability is in dispute, the trier of fact shall make the following findings of fact:

a. The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence, that is, the full value of the injured party's damages;

b. The extent, in the form of a percentage, of each parties' [sic] negligence. The percentage of negligence of each party shall be based on 100% and the total of all percentages of negligence of all the parties to a suit shall be 100%.

c. The judge shall mold the judgment from the finding of fact made by the trier of fact.

As discussed above, however, this approach has been severely criticized³¹⁸ and is followed in only a few modified comparative negligence jurisdictions.³¹⁹ In adopting a modified system the Kentucky courts or legislature should recognize the expanding body of authority allowing or requiring that jurors be informed of the consequences of their apportionment of negligence in a special verdict³²⁰ and clearly establish such a rule in Kentucky. If this is done, there will no longer be any inherent unfairness in allowing general verdicts as well. Either the current rules could be retained giving courts the option of using a general or special verdict,³²¹ or, if it is decided that special verdicts are clearly preferable, an approach could be adopted whereby a special verdict would be required if requested by any party.³²²

³¹⁸ See notes 310-13 *supra* and accompanying text.

³¹⁹ See note 308 *supra* and accompanying text for cases from those jurisdictions which support this view.

³²⁰ See notes 312-13 *supra* and accompanying text. One statute that unambiguously effects this result is COLO. REV. STAT. § 121-111(4) (Supp. 1982) which provides:

In a jury trial in any civil action in which contributory negligence is an issue for determination by the jury, the trial court shall instruct the jury on the effect of its findings as to the degree of negligence of each party. The attorneys for each party shall be allowed to argue the effect of the instruction on the facts which are before the jury.

For two statutes not providing for attorneys to argue the effect of the jury's findings, but still mandating the jury be informed by the court, see OR. REV. STAT. § 18.480(2) (1981) (text provided in note 322 *infra*); WYO. STAT. § 1-1-109(b)(iii) (1983) (text provided in note 313 *supra*).

³²¹ See note 297 *supra* and accompanying text.

³²² *E.g.*, OR. REV. STAT. § 18.480 which provides:

(1) When requested by any party the trier of fact shall answer special questions indicating:

(a) The amount of damages to which a party seeking recovery would be entitled, assuming that party not to be at fault;

(b) The degree of each party's fault expressed as a percentage of the total fault attributable to all parties represented in the action.

(2) A jury shall be informed of the legal effect of its answer to the questions listed in subsection (1) of this section.

See also WYO. STAT. § 1-1-109 (1983). The UCFA takes a slightly different approach by requiring special verdicts except where all the parties agree otherwise. See UCFA § 2(a), 12 U.L.A. 38 (Supp. 1983).

CONCLUSION

Kentucky may soon join the overwhelming national trend of rejecting the absolute bar of contributory negligence by judicially or statutorily adopting either a pure form or a modified form of comparative negligence. The purpose here has not been to evaluate the merits of such a move, but rather to raise important sub-issues that should be resolved at the time of adoption. The issues include whether to compare a plaintiff's negligence against the combined negligence of more than one tortfeasor; whether to compare a plaintiff's negligence against the negligence of nonparties or settling parties, whether to permit setoff, whether to retain the doctrines of contribution, joint and several liability, and last clear chance, and whether a jury should be informed of the effect of its apportionment of negligence. The issues should be resolved at the time of adoption in order to flesh out at the beginning the theoretical underpinnings for the adoption of comparative negligence. These underpinnings will govern in large part the outcome of the subsidiary issues. Resolution of the issues at the time of adoption will also avoid extensive and needless litigation of issues that can easily be foreseen now. In this way Kentucky, if it adopts comparative negligence, can profit from the experiences of other states and turn to its advantage its position as a latecomer among states following the national trend of adopting comparative negligence.