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Multiple Party Litigation under Comparative Negligence in Oklahoma--Laubach v. Morgan

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NOTES & COMMENTS

MULTIPLE PARTY LITIGATION UNDER COMPARATIVE NEGLIGENCE IN OKLAHOMA— *LAUBACH V. MORGAN*

In 1973, the Oklahoma State Legislature enacted legislation providing for a system of modified comparative negligence.[1] This system, as its name implies, is based upon evaluation of the plaintiff's and defendant's negligence in comparison to one another. As with any comparison, the complexity of the operation compounds greatly with an increase in the number of parties to the comparison. The Oklahoma Supreme Court, in its recent decision in *Laubach v. Morgan*,[2] recognized the very general nature of Oklahoma's comparative negligence legislation and its ambiguity in regard to actions involving multiple parties.[3] The purpose of this comment is to examine the effectiveness of the Oklahoma comparative negligence system in actions involving multiple parties. The focus will be on the two central objectives of comparative negligence: just compensation for the negligent plaintiff, and equitable damage apportionment among the defendants.[4] The attainment of these objectives within the Oklahoma system is influenced by three distinct factors. The comparative negligence statute, the Oklahoma Supreme Court by its decision in *Laubach*, and lingering common law doctrines have all interacted to define the operation of comparative negligence in multi-party litigation.

In order to identify the present system, these sources will be considered separately to determine their individual impact on the two basic comparative negligence objectives. Essential to this analysis is an understanding of the common law background in the multiple party negligence action.

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1. Act of April 18, 1973, ch. 30, §§ 1, 2, 1973 Okla. Sess. Laws 40 (codified at OKLA. STAT. tit. 23, §§ 11, 12 (Supp. 1977)).
2. 49 OKLA. B.A.J. 60 (1978).
3. *Id.* at 61.
4. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 2.1 (1974) [hereinafter cited as SCHWARTZ].

I. BACKGROUND OF MULTIPLE PARTY LITIGATION

Before the advent of comparative negligence, the multiple party negligence action in Oklahoma was governed by three basic common law doctrines. First, a plaintiff found contributorily negligent to any degree was denied recovery pursuant to the doctrine of contributory negligence.[5] Second, if the plaintiff was innocent of any negligence, the doctrine of joint and several liability provided that each defendant was liable for the entire judgment.[6] Finally, a co-defendant forced to pay more than his proportionate share of the damages was denied any cause of action for contribution from his joint tortfeasors.[7]

A. Contributory Negligence

In *Butterfield v. Forrestor*[8] the defendant was found negligent in having left a pole projecting across the road, but Lord Ellenborough denied recovery to the plaintiff who had failed to use ordinary care in avoiding the obstruction.[9] This decision evolved into a complete bar to the negligent plaintiff's recovery known as the defense of contributory negligence. The *Butterfield* decision, though often criticized for allowing inequitable results, was given broad application in the United States.[10] American jurisdictions, determined not to provide aid to the negligent plaintiff, reasoned that such faulty conduct was not to be rewarded but deterred by the denial of a legal remedy for damages.[11]

Beginning in 1896, the courts of Oklahoma have held that a plaintiff guilty of contributory negligence could not recover damages as a matter

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5. Pittman v. City of El Reno, 4 Okla. 638, 46 P. 495 (1896). *See also* notes 12-19 *infra* and accompanying text.

6. Home Indem. Co. v. Thompson, 434 P.2d 250 (Okla. 1967); National Trailor Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967). *See also* text accompanying notes 20-22 *infra*.

7. Rose v. Chicago, Rock Island and Pac. R.R., 308 F. Supp. 1357 (W.D. Okla. 1970). *See also* text accompanying notes 23-34 *infra*.

8. 103 Eng. Rep. 926 (K.B. 1809).

9. Lord Ellenborough stated: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he did not use common and ordinary caution to be in the right." *Id.* at 927.

10. Some authors have claimed that the decision has been given a much broader scope than was originally intended, and that *Butterfield* could easily be read in terms of "assumption of the risk." *See* SCHWARTZ, *supra* note 4, § 1.2; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 (4th ed. 1971) [hereinafter cited as PROSSER]. For a more thorough discussion of the historical development and spread of the contributory negligence doctrine in the United States, see Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953) [hereinafter cited as *Comparative Negligence*]; Comment, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).

11. *See* PROSSER, *supra* note 10, § 65, at 418.

of law.[12] Recognizing the inequity of the doctrine where the plaintiff was only slightly negligent, exceptions were adopted to mitigate its often harsh results.[13] For instance, the defense of contributory negligence was generally not available to a defendant whose acts were considered "willful" or "reckless,"[14] or where violation of a statute resulted in harm that the statute was intended to prevent.[15] The major exception to the defense was the well known doctrine of "last clear chance," which applied when the defendant perceived the dangerous position of the plaintiff in time to reasonably have avoided the injury.[16] However, the most radical attempt to modify the contributory negligence defense was found in *Haily-ola Coal v. Morgan*.[17] The trial court in that case had gone so far as to *judicially adopt* "comparative negligence" by instructing the jury that the plaintiff's negligence would not exonerate the defendant, but would only serve to mitigate the damages.[18] This attempted modification was short-lived, as the Oklahoma Supreme Court promptly ruled such instruction in error and reaffirmed the contributory negligence defense as a complete bar to recovery.[19]

B. Joint and Several Liability

If the defendants were found to be negligent and failed in their affirmative defense of contributory negligence, the doctrine of joint and several liability was applied. This principle provided that in situations involving a single indivisible injury,[20] proximately caused by two or

12. Hopson v. Triplett, 380 F. Supp. 1169 (E.D. Okla. 1974); Rader v. Fleming, 429 P.2d 750 (Okla. 1967); Thorp v. St. Louis & S.F. R., 73 Okla. 123, 175 P. 240 (1918); Pittman v. City of El Reno, 4 Okla. 638, 46 P. 495 (1896).

13. *See generally* PROSSER, *supra* note 10, § 65, at 418; Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

14. In Conner v. Burdine, 120 Okla. 20, 250 P. 109 (1926), the Oklahoma Supreme Court embraced the rule that when the defendant's wrongdoing is willful, contributory negligence is no defense. *See* PROSSER, *supra* note 10, at 426.

15. *See generally* Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105 (1948).

16. The doctrine originated in the English case of Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842). Though the plaintiff was found to have been contributorily negligent in causing the accident, the court allowed him to recover, stating that the defendant had the last chance to avoid the accident and should have done so. *Id.* at 589. For a statement of the rule in Oklahoma, see Atchinson, T. & S. F. Ry. v. Taylor, 196 F. 878, 880 (8th Cir. 1912). Note that the doctrine of "last clear chance" allows the plaintiff total recovery, and, for this reason, it has been criticized as a means of damage apportionment. *See* James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

17. 39 Okla. 71, 134 P. 29 (1913).

18. *Id.* at 72, 134 P. at 30.

19. The Oklahoma Supreme Court stated: "The law will not weigh or apportion the concurring negligence of a plaintiff and defendant. There can be no recovery by a plaintiff who has been guilty of contributory negligence." *Id.*

20. *See generally* PROSSER, *supra* note 10, §§ 46-48.

more tortfeasors, each defendant was liable for the entire damage award.[21] By holding each defendant jointly and severally liable, the risk of an insolvent defendant was placed on the wrongdoers rather than on the innocent plaintiff.[22] Furthermore, a co-defendant forced to pay a disproportionate share of the entire liability was left without recourse against his co-defendants, as the third doctrine, denying the right to contribution among joint tortfeasors, operated to deny him a legal right to contribution from his co-defendants.[23]

C. Right of Contribution

The common law denial of a right to contribution originated in the English case of *Merryweather v. Nixan*.[24] The case involved an intentional tort of conversion and resulted in a joint judgment against two defendants. According to Dean Prosser, the basis of the decision denying one co-defendant any right to contribution from the other rested on the intentional nature of the tort.[25] Early American decisions appropriately applied the rule in situations of willful or intentional conduct, but not in cases of negligent acts.[26] As the doctrine spread, the original context and purpose of the rule became obscured, and most jurisdictions came to deny any right to contribution among joint tortfeasors in all tort actions, including negligence.[27]

Oklahoma has followed the common law denial of contribution as it evolved in the United States.[28] The legislature has only provided for the right of contribution in the context of breach of contract.[29] Except for a minor exception,[30] this contribution statute has repeatedly been held

21. Home Indem. Co. v. Thompson, 434 P.2d 250 (Okla. 1967); National Trailor Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967).

22. For a discussion of how the Oklahoma Supreme Court has shifted the risk of loss under comparative negligence, see notes 84-91 *infra* and accompanying text.

23. National Trailor Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967).

24. 101 Eng. Rep. 1337 (K.B. 1799). *See* Reath, *Contribution Between Persons Jointly Charged for Negligence— Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

25. PROSSER, *supra* note 10, § 50, at 306.

26. For a thorough discussion of the early application of the contribution rule, see Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

27. *See* PROSSER, *supra* note 10, § 50.

28. Rose v. Chicago Rock Island and Pac. R.R., 308 F. Supp. 1357 (W.D. Okla. 1970).

29. OKLA. STAT. tit. 12, § 831 (Supp. 1977).

30. The so-called "lenient exception" to the general rule of no contribution among joint tortfeasors, provides that one held constructively or vicariously liable for injuries caused to a party, by the active negligence of another, has a right of indemnity against the causal actor. Peak Drilling Co. v. Halliburton Oil Well Cement Co., 215 F. 2d 368, 369 (10th Cir. 1954).

inapplicable to joint tortfeasors.[31] Professor Merrill has argued that the statute has been too tightly construed because the 1910 amendment adding the words "regardless of the nature of the demand upon which judgment was rendered," evidenced the legislative intent to extend the right of contribution beyond the contractual context.[32] However, in 1967 the Oklahoma Supreme Court specifically held that the 1910 amendment did not change the rule denying contribution among joint tortfeasors.[33] *Laubach* reaffirms this position.[34]

Consequently, the common law doctrines of contributory negligence, joint and several liability and the denial of contribution among tortfeasors provide the framework for the multiple party negligence action. Contributory negligence, as a complete bar to recovery, is directly opposed to the concept of just compensation for a negligent plaintiff, the first objective of comparative negligence. However, a plaintiff free from contributory negligence was provided with a greater opportunity for just compensation by the principle of joint and several liability. Since degrees of negligence among the co-defendants were of no concern, the second objective of equitable damage apportionment was also not achieved. Further, the denial of a right to contribution actually prevented damage apportionment where it might otherwise have occurred.

The Oklahoma comparative negligence statute and the *Laubach* decision have drastically altered these common law doctrines.[35] The legislative and judicial impact upon the common law will now be assessed to determine the present application of the system and the status of the two comparative negligence objectives.

II. THE IMPACT OF COMPARATIVE NEGLIGENCE

With the passage of a comparative negligence statute in 1973,[36] Oklahoma joined the national trend in abolishing the common law de-

31. *See* Hartford Accident & Indem. Co. v. Tri-State Ins. Co., 384 F.2d 386 (10th Cir. 1967); Cain v. Quannah Light & Ice Co., 131 Okla. 25, 267 P. 641 (1928); Fakes v. Price, 18 Okla. 413, 89 P. 1123 (1907).

32. Merrill, *Oklahoma and the Uniform State Law Program, 1966*, 38 OKLA. B.A.J. 643 (1967); Comment, *Contribution: Between Joint Debtors Exclusive of Contract Express or Implied*, 8 OKLA. L. REV. 349 (1955).

33. In National Trailor Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967), the Oklahoma Supreme Court held: "It is our conclusion that 12 O.S. 1961, § 831, did not change the rule denying contribution where one joint tortfeasor satisfied a joint judgment for tort liability." *Id.* at 244.

34. 49 OKLA. B.A.J. at 61.

35. *See* notes 37, 38, & 84-87 *infra* and accompanying text.

36. *See* Act of April 18, 1973, ch. 30, §§ 1, 2, 1973 Okla. Sess. Laws 40 (codified at OKLA. STAT. tit. 23, §§ 11, 12 (Supp. 1977)).

fense of contributory negligence.[37] A plaintiff is no longer completely barred from recovering damages because of his own negligence. Instead, recovery in negligence actions is based on a comparison of negligence.[38] The state legislature had three basic alternatives to select from in adapting comparative negligence to Oklahoma tort law. Although all three types abrogated common law contributory negligence, each represented an explicit policy choice regarding the first objective of just compensation for the negligent plaintiff.

The Pure Form of Comparative Negligence

Under the pure form of comparative negligence, the plaintiff may recover damages diminished by his own measure of fault—regardless of whether his negligence is greater than or equal to the negligence of the adverse party.[39] Just compensation for the negligent plaintiff is considered to be whatever portion of damages which was not self-caused. For example, assume the plaintiff has suffered $10,000 in damages, and the jury finds the plaintiff to have been 60% negligent and the defendant 40% negligent. Following the pure system of comparative negligence, the defendant is liable for his proportion of the entire liability according to his percentage of negligence. Thus the plaintiff will recover $4,000 from the defendant.

The fact that only three state legislatures[40] have adopted the pure form is evidence of the general legislative dissatisfaction with a system

37. In regard to the general spread of comparative negligence, see SCHWARTZ, *supra* note 4, § 1.1; Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

38. The relevant statutes provide:

> § 11. Comparative negligence. Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of lesser degree than the negligence of any person, firm, or corporation causing such damage.
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> In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of lesser degree than any negligence of the person, firm, or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence.
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> § 12. Defense of contributory negligence or assumption of risk as question of fact. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times be left to the jury, unless a jury is waived by the parties.

OKLA. STAT. tit. 23, §§ 11, 12 (Supp. 1977) (effective August 16, 1973).

39. *See* C. HEFT & C. JAMES HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.50 (1971) [hereinafter cited as HEFT]; *Comparative Negligence, supra* note 10, at 508; SCHWARTZ, *supra* note 4, § 3.2.

40. *See* MISS. CODE ANN. § 11-7-15 (1972); R.I. GEN. LAWS § 9-20-4 (Supp. 1976); WASH. REV. CODE § 4.22.010 (Supp. 1973).

which allows the negligent plaintiff to recover damages for an injury which he may be more responsible for than the defendant.[41] However, in recent years Alaska, California and Florida have judicially adopted the pure form.[42]

The Modified Form of Comparative Negligence

The modified form of comparative negligence represents a legislative effort to limit the ability of a negligent plaintiff to recover damages.[43] Just compensation for the plaintiff is limited in the sense that he must qualify for recovery within the legislative design. This is accomplished in either of two ways: either the plaintiff's negligence must not be greater than the negligence of the defendant, or his negligence must be lesser than the defendant's. The first method is referred to as the 50% modified form of comparative negligence, and would allow a plaintiff equally negligent with the defendant to recover one-half of his damages. The second alternative is the 49% modified form, and it requires that the plaintiff's negligence be less than the defendants. This formula results in no damage award when both parties are found to be equally at fault.[44]

The Slight-Gross Form of Comparative Negligence

In all negligence actions in Nebraska[45] and South Dakota,[46] the slight-gross form of modified comparative negligence is applied. These jurisdictions provide that a plaintiff may recover damages if his negligence is "slight" in comparison to that of the defendant. The difficulty in attempting to define what constitutes "slight" negligence is apparent, and both states appear to be moving away from strict adherence to this term.[47] The administrative difficulties inherent in such a system support the conclusion that this form will not be expanded beyond its present use.[48]

41. For criticism of such a result, *see* Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 ORE. L. REV. 38, 46 (1969).

42. Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

43. *See* HEFT, *supra* note 39, § 1.40; SCHWARTZ, *supra* note 4, § 3.5.

44. The 49% modified form is the most widely accepted type of comparative negligence. HEFT, *supra* note 39, § 1.4; SCHWARTZ, *supra* note 4, § 3.5.

45. NEB. REV. STAT. § 25-1151 (1975).

46. S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

47. "[T]he history of Nebraska and South Dakota cases show a trend away from trying to define 'slight negligence' and more toward making a comparison of negligence between the plaintiff and defendant. The result is very close to a defacto 50% system." SCHWARTZ, *supra* note 4, § 3.4. For discussion of the development of the slight-gross form, see *Comparative Negligence, supra* note 10, at 486.

48. The difficulties involved include: the computation of the award on the basis of the

The Oklahoma Version

The Oklahoma lawmakers copied the Arkansas comparative negligence statute[49] and chose the 49% modified form of comparative negligence.[50] The statute is a concise statement abolishing contributory negligence and establishing comparative negligence as the basis for just compensation. Beyond this initial statement, the legislation is without explicit guidelines for its operation and is considered a "general" type of comparative negligence act.[51]

At the time of its enactment, the comparative negligence statute was criticized as having created considerable interpretative problems and conflicts with existing Oklahoma tort doctrine.[52] For instance, the statute specifically provides that the claimant's negligence is to be compared to the negligence of "the person, firm or corporation *causing such damage*."[53] It was contended that because the legislature chose this phraseology, the only negligence to be compared was that of the causal actors.[54] However, most other jurisdictions have interpreted such language as

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negligence distribution, determination of the appropriate bases for allocating fault, proper jury instructions, and the distinction of questions of law and fact. *See* SCHWARTZ, *supra* note 4, § 3.4.

49. In adopting the Arkansas law, the only modification made by the Oklahoma legislature was a grammatical correction, changing "less" to "lesser" in section 11. For the full text of Oklahoma's statute see note 38 *supra*. *See* ARK. STAT. ANN. §§ 27-1730.1 to .2 (1962) (repealed 1969) (current version ARK. STAT. ANN. §§ 27-1763 to 27-1765) (Supp. 1977). The 1973 Arkansas comparative negligence act extends the comparative system beyond negligence suits and establishes a "fault" basis for liability apportionment. *See* note 57 *infra* and accompanying text.

50. *See* note 44 *supra* and accompanying text.

51. It has been argued that the absence of a comprehensive statute or specific legislative guidance is the failing of most comparative negligence statutes. *See* Leflar, *Comments on Mak v. Freck*, 21 VAND. L. REV. 918 (1968). Others contend that the Oklahoma type of statute may prove beneficial by allowing judicial discretion in filling in the details. *See* Keeton, *Comparative Negligence—The Oklahoma Version*, 10 TULSA L.J. 19 (1974) [hereinafter cited as Keeton].

52. Several authors contended that the comparative negligence act was unconstitutional in light of OKLA. CONST. art. 23, § 6, which provides for the defense of contributory negligence. *Compare* Cooper & Olson, *Constitutional Aspects of the Comparative Negligence Statutes*, 28 OKLA. L. REV. 49 (1975) (contending comparative negligence to be unconstitutional) *with* Gibbens, *Constitutionality of Oklahoma's Comparative Negligence Statute*, 28 OKLA. L. REV. 33 (1975) (arguing the constitutionality of the legislation). Other conflicts and areas of concern were noted in the following: Keeton, *supra* note 51; Woods, *Comparative Negligence in Oklahoma—A New Experience*, 28 OKLA. L. REV. 1 (1975) [hereinafter cited as Woods]; Comment, *Torts: Oklahoma's Uncharted Land of Comparative Negligence,* 27 OKLA. L. REV. 122 (1974); Comment, *Comparative Negligence—Oklahoma Takes a Crippled Step Forward*, 9 TULSA L.J. 239 (1973).

53. OKLA. STAT. tit. 23, § 11 (Supp. 1977) (emphasis added). See note 38 *supra* for the complete text of the statute.

54. This issue has particular significance with respect to the negligent entrustment action and imputed negligence. The Oklahoma Supreme Court in *Laubach* chose not to deal with this issue. 49 OKLA. B.A.J. 60, 62 n.13 (1978). It has been argued that in such

requiring apportionment of liability to be based on an examination of proximate cause.[55] Also, the Oklahoma statute is specifically limited to negligence actions.[56] Soon after the Arkansas law was copied in Oklahoma, the Arkansas legislature rewrote their comparative negligence statute in terms of "comparative fault."[57] Therefore the scope of the new Arkansas statute is considerably broader as it encompasses such areas as products liability and breach of warranty.

Beyond the interpretative problems inherent within the comparative negligence statute, there are several areas for potential conflict between traditional tort doctrine and the new Oklahoma law. These areas include the judicial doctrines that preceded comparative negligence and attempted to mitigate the results of the harsh common law defense of contributory negligence.[58] Various other areas of procedure and traditional tort doctrine are beyond the scope of this comment, but they have posed problems and required clarification in other modified comparative negligence jurisdictions. These include: the rule of voluntary assumption of risk;[59] the effect of settlement;[60] the award of punitive damages;[61] rele-

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cases only the negligence of the causative actor should be compared to that of the claimant. *See* Comment, *Agency: Negligent Entrustment—May the Defendant Choose the Plaintiff's Theory?*, 30 OKLA. L. REV. 181 (1977); Comment, *Torts: Imputed Comparative Negligence*, 28 OKLA. L. REV. 941 (1975).

55. For an excellent discussion of proximate cause as it relates to comparative negligence, see SCHWARTZ, *supra* note 4, §§ 4.2-4.5.

56. The Oklahoma Supreme Court affirmed the limited application of the Oklahoma statute in Kirland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). *See* McNichols, *The Kirkland v. General Motors Manufacturer's Products Liability Doctrine—What's In a Name?*, 27 OKLA. L. REV. 347 (1974).

57. The new Arkansas law specifically provides: "The word 'fault' as used in this Act includes any act, omission, conduct, risk assumed, breach of warranty or breach of any legal duty which is a proximate cause of any damages sustained by any party." ARK. STAT. ANN. § 27-1763 (Supp. 1977).

58. Whether "willful" or "reckless" conduct and the doctrine of "last clear chance" will survive comparative negligence remains to be determined. An interesting issue with regard to the first exception is whether the Oklahoma courts will define "willful" as only intentional conduct or whether it will include reckless conduct. According to Professor Schwartz, if the former interpretation is adopted, the plaintiff's contributory negligence will probably not be taken into account in determining the division of liability. The latter interpretation may require a negligence comparison. SCHWARTZ, *supra* note 4, § 5.3. *See also* Woods, *supra* note 52, at 13. Concerning the "last clear chance" doctrine, it has been argued that it is merely a step toward comparative negligence and should not co-exist with such a system. *See* Comment, *Torts: Comparative Negligence and the Doctrine of Last Clear Chance—Are They Compatible?*, 28 OKLA. L. REV. 444 (1975).

59. The rule of voluntary assumption of risk provides that if the plaintiff knowingly and voluntarily assumed the risk of harm arising from the negligence of the defendant, the defendant is relieved of any liability for his negligence. Davis v. Whitsett, 435 P.2d 592, 599 (Okla. 1967). The issue with respect to comparative negligence is whether the assumption of risk should be included as a factor in the comparative negligence calculus, rather than acting as a complete defense for the negligent defendant. The fact that the Oklahoma comparative negligence legislation specifically states the defense of assumption of risk as

vant jury instructions;[62] joinder of parties;[63] and the appropriateness of imputed negligence.[64]

III. IMPACT OF THE *LAUBACH* DECISION

Until January of 1978, the Oklahoma Supreme Court had not been presented with a question on the application of the comparative negligence statute in the context of multiple parties.[65] *Laubach v. Morgan*[66]

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a question of fact for the jury, seems to indicate a legislative intent to maintain the defense. OKLA. STAT. tit. 23, § 12 (Supp. 1977). For the text of the statute see note 38 *supra*. For discussion of the unfairness of such a rule, see Comment, *Torts: Comparative Negligence+Implied Assumption of Risk=Injustice*, 27 OKLA. L. REV. 549 (1974).

60. The issue of settlement focuses on the negligence comparison and inclusion of all parties relevant to the suit. Texas has attempted to solve the confusion over settlement by legislating guidelines both for situations where a settling joint tortfeasor is joined in the suit and where he is not. *See* TEX. REV. CIV. STAT. ANN. art. 2212(a)(2)(d)-(e) (Vernon 1978).

61. Oklahoma has established a policy allowing a plaintiff to recover exemplary damages for the sake of deterence and punishment. OKLA. STAT. tit. 23, § 9 (1971). The question is whether this policy is applicable in the context of comparative negligence. Wisconsin has considered such damages to be incompatible with a system of comparative negligence and has abolished punitive damages in negligence cases. Bielski v. Schulze, 16 Wis. 2d 1, —, 114 N.W.2d 105, 113 (1962). *See generally* Woods, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 WASHBURN L.J. 1, 9 (1975); Woods, *supra* note 52, at 16-30.

62. For an excellent discussion of the use of comparative negligence jury instructions and interrogatories in Arkansas and their possible adaptation to Oklahoma, *see* Woods, *supra* note 52, at 16-30.

63. To attain a valid comparison and equitable apportionment of liability, all relevant parties should be joined in an action where comparative negligence is at issue. The potential for variable damage apportionment by different juries should be sufficient incentive to avoid multiple trials of the same suit. Though the Oklahoma comparative negligence statute does not specifically empower the plaintiff or defendant to implead all parties relevant to the controversy, the general civil procedure sections provide the necessary joinder provisions. The comparative negligence system requires an informed apportionment of liability among all relevant parties, and the Oklahoma courts must encourage a liberal interpretation of the statutory joinder provisions to implement comparative negligence. *See generally* SCHWARTZ, *supra* note 4, § 17.1.

64. The master-servant relationship, where the negligence of the servant is imputed to the master, Oklahoma City v. Dobbs, 193 Okla. 183, 142 P.2d 369 (1943), and the joint enterprise doctrine, Gilmore v. Grass, 68 F.2d 150 (10th Cir. 1933), are specific instances where Oklahoma law has followed the policy of imputed contributory negligence. According to Dean Keeton: "The thought has been that in those situations where a person is vicariously liable for the negligence of another he should in like manner be charged with his negligence if an attempt is made to recover against another." Keeton, *supra* note 51, at 34. Keeton concludes that a proper construction of the comparative negligence statute will be that imputed contributory negligence has been legislatively abolished. *Id. But see* Comment, *Torts: Imputed Comparative Negligence*, 28 OKLA. L. REV. 941 (1975).

65. The courts had only ruled twice on comparative negligence: once in Hopson v. Triplett, 380 F. Supp. 1169 (E.D. Okla. 1974), where the Federal district court held that comparative negligence did not apply to actions arising before the statute's effective date; and then in Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974), the Oklahoma Supreme Court found the comparative negligence statute did not apply beyond the negligence context.

66. 40 OKLA. B.A.J. 60 (1978).

presented the first such opportunity, nearly five years after the advent of comparative negligence in Oklahoma. This case arose out of an action for damages resulting from a three car collision. At trial, the jury returned a verdict in favor of the plaintiff and assessed damages of $4,000.00. The jury also apportioned the negligence among the parties in the following manner: Plaintiff Laubach 30%; Defendant Morgan 20%; Defendant Martin 50%. The trial court entered judgment for Laubach and reduced the $4,000.00 award to $2,800.00,[67] this amount representing the portion of damages caused by the defendants.

A. The Negligence Comparison

On appeal, defendant Morgan contended no liability should be assessed against him because he had been found less negligent than the plaintiff.[68] As a result, the first issue that faced the court was whether the negligence of the plaintiff was to be compared to each defendant individually or to the combined negligence of the defendants as a unit. The resolution of this issue centered on the first objective of comparative negligence, the provision of just compensation for the negligent plaintiff injured by multiple defendants.

According to the statute, the negligent plaintiff may recover damages diminished in proportion to his contributory negligence—if such negligence is of "lesser degree than any negligence of the *person, firm or corporation* causing such damage."[69] In instances involving a single plaintiff and single defendant, the statutory application is simple: the claimant found less negligent than the defendant will recover damages reduced by his percentage of the negligence.[70] When multiple parties are involved, the language of the statute becomes ambiguous. In the *Laubach* situation, a comparison between the plaintiff and defendants individually would allow recovery only against Martin, whereas combining the negligence of the defendants and comparing it as a unit would permit recovery against both Martin and Morgan.

The plaintiff's ability to attain just compensation is highly complicated when a large number of defendants cause the injury. Assume for example, that the jury finds the plaintiff 25% at fault and

67. *Id.*
68. *Id.* at 61.
69. OKLA. STAT. tit. 23, § 11 (Supp. 1977) (emphasis added).
70. Though not expressly required by the Oklahoma statute, the trier of fact is typically instructed to make three specific findings: (1) the percentage of causal negligence attributable to the plaintiff; (2) the percentage of causal negligence attributable to the defendant; (3) the amount of damage suffered by the plaintiff. *See generally* SCHWARTZ, *supra* note 4, §§ 17.1, 17.4.

apportions the remaining negligence among the co-defendants in the following manner: *D1*—20%; *D2*—20%; *D3*—20% and *D4*—15%. An individual comparison would find the plaintiff's negligence exceeding that of each defendant and the plaintiff would be denied recovery.[71] Conversely, a unit comparison would establish the plaintiff's negligence as less than the combined negligence of the defendants and allow the plaintiff to recover 75% of the damages. It is apparent that the plaintiff would then be recovering from defendants whose individual negligence was each less than that of the plaintiff.[72]

Other jurisdictions have reached varying interpretations in regard to this question. The Arkansas Supreme Court, in the well reasoned opinion of *Walton v. Tull*,[73] chose to compare the negligence of the plaintiff to the negligence of the defendants taken as a unit. The court considered this interpretation to coincide with the common law rule which allows a plaintiff free from contributory negligence to recover his entire damages from any defendant found to have negligently caused the plaintiff's injury.[74] The legislatures of Kansas[75] and Texas[76] have explicitly adopted the Arkansas method of comparison within their respective comparative negligence statutes.

The Wisconsin Supreme Court reached the opposite interpretation in dealing with nearly identical statutory language. The original Wisconsin comparative negligence statute was enacted in 1931 and provided that contributory negligence would not bar a plaintiff's recovery where "such negligence was not as great as the negligence of the *person* against whom recovery is sought."[77] Though the original Wisconsin statute has been modified, the singular "person against whom recovery is sought," was retained in the 1971 revision.[78] Soon after the passage of the original act, the Wisconsin Supreme Court held that a plaintiff could not recover against *any* defendant whose negligence was equal to or less than the

71. *See* notes 43 & 44 *supra* and accompanying text.

72. Though the legislature has required that the plaintiff's negligence be of a "lesser" degree than the defendants', the statutory ambiguity in the multiple party action may permit recovery where a plaintiff is the *most* negligent party.

73. 234 Ark. 882, 356 S.W.2d 20 (1962).

74. *Id.* at —, 356 S.W.2d at 26. In a vigorous dissent, Chief Justice Harris argued that such an interpretation allows a plaintiff to recover against a defendant equally or less negligent than the plaintiff, and thus was not in accordance with the legislative intent. *Id.* at —, 356 S.W.2d at 27.

75. KAN. CIV. PRO. STAT. ANN. § 60-258a(a) (Vernon Supp. 1977).

76. TEX. REV. CIV. STAT. ANN. art. 2212a(2)(b) (Vernon Supp. 1973).

77. Act of July 26, 1949, ch. 548, § 2, 1949 Wis. Laws (codified at WIS. STAT. § 331.045 (1949) (repealed in 1971)) (emphasis added).

78. Act of June 23, 1971, ch. 47, 1971 Wis. Legis. Serv. 80 (West) (codified at WIS. STAT. § 895.045 (1971)).

plaintiff's.[79] This position committed the Wisconsin courts to an individual comparison between the negligent parties in the multi-party suit and has repeatedly been followed in accordance with the perceived legislative policy.[80]

The Oklahoma Supreme Court in *Laubach* considered both interpretations of the statutory language and adopted the unit comparison construction of the Arkansas Supreme Court.[81] This approach was considered more appropriate to provide the plaintiff with just compensation when multiple tortfeasors are involved.

B. Damage Apportionment

Anticipating that the supreme court might affirm the unit comparison made by the trial court, Morgan argued in the alternative that his liability should be limited to 20% of the damage award.[82] This brought into issue the second objective of the comparative negligence statute, equitable damage apportionment. The trial court had ruled, on the basis of common law joint and several liability, that Laubach could collect his entire award from either Morgan or Martin.[83] In this situation, the supreme court found the joint liability principle to be of "questionable soundness,"[84] and could not condone the inequity of forcing a defendant to pay the entire damages when his negligence was less than the plaintiff's.[85] Recognizing that the unfairness of the system was magnified by the denial of contribution among joint tortfeasors, the court found it necessary to make one of two possible decisions:

1. Allow "comparative contribution" among joint tortfeasors in proportion to the party's negligence.
2. Do away with the "entire liability rule" and provide that multiple tortfeasors are severally liable only, thus each

79. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, —, 252 N.W. 721, 728 (1934).

80. "The general rule in this state is that the comparison of negligence in a multiple defendant case is required to be between the plaintiff and the individual defendants." Mariuzza v. Kenower, 68 Wis.2d 321, —, 228 N.W.2d 702, 704 (1975). The sole exception to this rule was noted in Reber v. Hanson, 260 Wis. 632, 51 N.W.2d 505 (1952), where in the case of negligent parents the court ruled: "[T]he duty to protect was joint, the opportunity to protect was equal, and as a matter of law neither the obligation nor the breach of it was divisible." *Id.* at —, 51 N.W.2d at 508. *Accord* Soczka v. Rechner, 73 Wis. 2d 157, 242 N.W.2d 910 (1976). *See generally* Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289.

81. 49 OKLA. B.A.J. at 61.

82. *Id.*

83. *Id.* at 61.

84. *Id.*

85. *Id.* at 62.

> defendant will be liable only for the percentage of the award attributable to him.[86]

In an effort to complete the comparative negligence system and achieve the objective of equitable damage apportionment, the court chose options which required drastic modification of traditional common law doctrines.[87] Both options identified by the court concerned the apportionment of damages among the defendants, but the results of selecting one were not the same as the other. In opting for the second solution and abolishing the joint and several liability principle, the court chose to apportion damages through liability limitation. Each tortfeasor in the multiple party suit is now liable only in proportion to his comparative negligence. Consequently, the plaintiff must now attempt to execute a judgment against each defendant and, perhaps more importantly, bear the risk of insolvent or unavailable wrongdoers.

1. The Judicial Basis

The underlying basis of the method for equitable damage apportionment chosen by the Oklahoma Supreme Court must be carefully considered. The court employed a highly novel approach to reach the result of abrogating joint and several liability. Finding "no pattern related to the consequences of the elimination of the bar of contributory negligence upon the question of joint versus several liability of co-defendants,"[88] the court relied on its perception of the common law basis for the joint and several liability principle and the recent California decision in *American Motorcycle Association v. Superior Court*.[89]

As explained by the Oklahoma court, the joint and several liability principle was used to balance the inequity of common law contributory negligence.[90] Under the common law system, a slightly negligent plaintiff was completely barred from recovering damages. According to the

86. *Id.*

87. For the discussion of joint and several liability, see text accompanying notes 20-22 *supra*; and for right of contribution see text accompanying notes 23-34 *supra*.

88. 49 OKLA. B.A.J. at 62.

89. 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977).

90. The Oklahoma Supreme Court stated:

> Under the common law system of contributory negligence, a plaintiff who was guilty of even slight negligence, could recover nothing. The law balanced this possible inequity by allowing a plaintiff who was found to be legally "pure" because he was not even slightly negligent, to collect his entire judgment from any defendant who was guilty of "even slight negligence". The adoption of comparative negligence, even in the modified form, gives judgment to any plaintiff whose negligence is less than 50 percent. There is no longer a need to compensate a "pure" plaintiff.

49 OKLA. B.A.J. at 62. This paragraph appeared without cited support.

Supreme Court of Oklahoma, this inequity was balanced by allowing a plaintiff free from negligence to recover the entire award from any defendant.[91]

The "balance" perceived by the court was actually a balance of inequities achieved by distributing them among successive parties. In the court's opinion, the hardship of the slightly negligent plaintiff, barred from any recovery, was equalized by imposing the burden of joint and several liability upon later defendants. Such an understanding mistakes the function of the joint and several liability doctrine. That function was not to evenly distribute the inequities among plaintiffs and defendants, but to assure full compensation to the injured plaintiff. Nevertheless, the Justices concluded that the adoption of comparative negligence, permitting a plaintiff less than 50% negligent to recover, tipped the balance in favor of the plaintiff and removed the necessity of joint and several liability.[92]

In the *Laubach* opinion, the court called attention to the California Court of Appeals decision in *American Motorcycle Association.* The California case judicially abolished the rule of joint and several liability of concurrent tortfeasors.[93] The context of the California decision is critical. Two years prior to *American Motorcycle Association*, the California Supreme Court had judicially adopted the *pure* form of comparative negligence. Under that system, a negligent plaintiff is allowed recovery reduced by his percentage of fault, regardless of whether his negligence exceeds that of the defendants.[94] Theoretically, a 99% negligent plaintiff could recover 1% of his damages from a defendant found 1% negligent. Because the pure system provides the greatest potential for compensating the negligent plaintiff, it is highly plaintiff oriented.

The California Court of Appeals was faced with the question of maintaining joint and several liability in this plaintiff oriented comparative negligence context. After an analysis of the social costs involved in "loss shifting" through the device of joint and several liability, the California court ruled that in a system of pure comparative negligence joint and several liability was not appropriate.[95] Therefore the plaintiff must bear the risk of an insolvent defendant. This conclusion restored the balance within a system favoring the negligent plaintiff.

91. *Id.*
92. *Id.*
93. 65 Cal. App. 3d 694, 704, 135 Cal. Rptr. 497, 503 (1977).
94. Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
95. 65 Cal. App.3d 694, 702-03, 135 Cal. Rptr. 497, 502 (1977).

The Oklahoma decision to abrogate joint and several liability was not made in the same context as the California ruling. The 49% modified form of comparative negligence in Oklahoma already represents the legislative limit on the ability of a negligent plaintiff to recover damages.[96] A plaintiff may only recover if his own negligence is less than that of the defendant. Of the comparative negligence systems, the Oklahoma form places the most stringent qualification on the negligent plaintiff and is the least plaintiff oriented. The plaintiffs in the pure and 49% modified systems of comparative negligence are not similarly situated, and the analysis of the California Court of Appeals is not appropriate to the Oklahoma system.

The Oklahoma Supreme Court has chosen to meet the objective of equitable damage apportionment by abrogating the joint and several liability principle and limiting liability in direct proportion to the respective negligence of each defendant. In the *Laubach* context, this result is desirable. The stark inequity of forcing a defendant less negligent than the plaintiff to bear the entire liability without a right to contribution is clear. It is questionable whether this result is as desirable when the jury finds the plaintiff free from contributory negligence. For example, if the jury apportions the negligence between *D1* and *D2* to be 30% and 70% respectively, the plaintiff would be permitted to recover 30% of his damages from *D1* and 70% from *D2*. If either is insolvent, the innocent plaintiff will not be fully compensated. The result is a system potentially more unjust for the innocent plaintiff than the common law system of contributory negligence. The judicially adopted means of damage apportionment has shifted the balance in favor of the negligent defendant.

Except for the recent California decision in *American Motorcycle Association*, no other comparative negligence jurisdiction has judicially reached the result of the Oklahoma Supreme Court.[97] Joint and several liability has been explicitly abolished by the Nevada comparative negligence statute,[98] and the liability apportionment provision in the New Hampshire statute[99] could also be interpreted as abolishing joint and

96. *See* notes 43 & 44 *supra* and accompanying text.

97. As explained by SCHWARTZ, *supra* note 4, § 16.4: "The concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question." *Id.* at 253.

98. NEV. REV. STAT. § 41.141 (1977).

99. The pertinent portion of the New Hampshire statute provides that:

> [W]here 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.

N.H. REV. STAT. ANN. tit. 12, § 507:7-2 (Supp. 1975).

several liability. The New Hampshire provision has been adopted in the Vermont[100] and Kansas[101] comparative negligence statutes as well. The author of the New Hampshire statute justified the abrogation of joint and several liability on the basis that the plaintiff could protect himself from an incomplete recovery by not joining an insolvent defendant.[102] Other state statutes have made it clear that joint and several liability is to be maintained within the comparative negligence system.[103]

2. Alternative Solutions

The Oklahoma Supreme Court could have avoided the inequity of requiring a defendant less negligent than the plaintiff to bear the entire liability, without the extreme solution of complete abrogation of joint and several liability. The Texas comparative negligence statute[104] represents a compromise solution to the same problem that faced the court in *Laubach*. The Oklahoma Supreme Court recognized that the Texas statute provided answers to a variety of issues involving modified comparative negligence[105] but the court ignored the Texas solution to damage apportionment.

According to the Texas comparative negligence statute, a plaintiff's negligence must not exceed the total negligence of *all* the defendants.[106] This unit comparison is the same as the result reached judicially in Oklahoma. Thereafter, the Texas law provides that each defendant is jointly and severally liable for the entire judgment, *except* that a defendant less negligent than the plaintiff is only liable in proportion to his percentage of causal negligence.[107] Just compensation is provided for the plaintiff by the unit comparison and maintenance of joint and several liability.[108] At the same time, the defendant who is less negligent than the

100. VT. STAT. ANN. tit. 12, § 1036 (1973).

101. KAN. CIV. PRO. STAT. ANN. § 60-258a (Vernon Supp. 1976).

102. Nixon, *The Actual "Legislative Intent" Behind New Hampshire's Comparative Negligence Statute*, 12 N.H.B.J. 17 (1969).

103. ARK. STAT. ANN. § 34-1002(4) (1962); IDAHO CODE § 6-803(3) (Supp. 1977); N.J. STAT. ANN. § 2A: 15-5.3 (Supp. 1977); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-41(1) (1977); WYO. STAT. § 1-7.3(c) (Supp. 1975).

104 TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978).

105. 49 OKLA. B.A.J. at 62 n.10.

106. Section (2)(b) of the Texas law provides: "In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant." TEX. REV. CIV. STAT. ANN. art. 2212a(2)(b) (Vernon Supp. 1978).

107. City of Gatesville v. Truelove, 546 S.W.2d 79, 84 (Tex. Ct. App. 1976); TEX. REV. CIV. STAT. ANN. art. 2212a(2)(c) (Vernon Supp. 1978).

108. In the multiple party context, under a system of modified comparative negligence, the unit negligence comparison combined with the principle of joint and several liability,

plaintiff is protected from suffering a disproportionate share of the liability. If a defendant's negligence equals or exceeds that of the plaintiff and the former is required to bear the entire liability, the statute provides a right to contribution to be determined in the main action.[109] By restricting the joint and several liability principle and providing for the right to contribution, the Texas legislature combined the two "alternatives" posed by the Oklahoma Supreme Court in *Laubach*.[110]

Minnesota has also reached a compromise position in regard to the principle of joint and several liability. As explained by the Minnesota Supreme Court in *Kowalske v. Armour and Company*,[111] joint and several liability is only maintained when the defendants have engaged in a joint adventure and the plaintiff is free from contributory negligence.[112] When the plaintiff is found contributorily negligent, he must execute judgments against each responsible defendant. However, where the plaintiff is free from contributory negligence, joint and several liability is maintained, and the joint tortfeasor who bears a disproportionate share of the liability may seek contribution from his co-defendants.[113]

The Oklahoma Supreme Court's decision to completely abrogate the joint and several liability principle represents an extreme solution in the face of other available compromises. The first alternative identified by the court, allowing "comparative contribution" among joint tortfeasors, would have been a less drastic modification of common law doctrine. However, judicial extention of contribution to negligent tortfeasors was dismissed by the court as productive of unnecessary litigation and as an infringement upon the legislature's power to grant contribution.[114] Though many states have provided for the right of contribution by statute,[115] both Maine[116] and Nebraska[117] have recently followed Wiscon-

provide the plaintiff with the greatest potential for compensation. *See* notes 68-81 *supra* and accompanying text.

109. Section (g) of the Texas statute provides: "All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant." TEX. REV. CIV. STAT. ANN. art. 2212a(2)(g) (Vernon Supp. 1978).

110. *See* text accompanying note 86 *supra*.

111. 300 Minn. 301, 220 N.W.2d 268 (1974).

112. *Id.* at —, 220 N.W.2d at 272.

113. MINN. STAT. ANN. § 604.01(1) (West Supp. 1978).

114. 49 OKLA. B.A.J. at 62-63.

115. For an extensive compilation of the jurisdictions which provide for contribution by statute, see Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 981-84 (1959).

116. Packard v. Whitten, 274 A.2d 169 (Me. 1971).

117. Royal Indem. Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975). After considering the historical basis for the denial of a right of contribution among

sin's lead[118] and judicially extended the right of contribution to negligent tortfeasors.

Arkansas legislatively provided for the right of contribution in 1941[119] by adopting the 1939 Uniform Contribution Among Tortfeasors Act.[120] This act provided the general right to contribution on a pro rata basis, and the optional subsection selected by Arkansas stipulated that contribution was to be based on relative degrees of fault in situations where a pro rata division would be inequitable.[121] The Arkansas courts have consistently maintained joint and several liability, and since the adoption of comparative negligence have based the right of contribution on the jury's apportionment of negligence.[122]

In 1918, Wisconsin judicially established the right of contribution among joint tortfeasors on a pro rata basis.[123] The landmark decision in *Bielske v. Schulze*[124] changed this system of damage apportionment. There, the Wisconsin Supreme Court found the doctrine of comparative negligence to be based on "natural justice,"[125] and concluded that contribution among tortfeasors should be determined in accordance with the percentage of causal negligence assigned by the jury.[126] The Wisconsin court took pains to clarify that the plaintiff's right to complete recovery from the combined defendants or any individual defendant was unaltered.[127] In judicially establishing "comparative contribution," the

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negligent tortfeasors, the Nebraska Supreme Court recognized that the rule was judicially created and that modification of the rule would not be an invasion of the legislative realm. *Id.* at —, 229 N.W.2d at 189.

118. *See* notes 123-126 *infra* and accompanying text.

119. Uniform Contribution Among Tortfeasors Act, §§ 1-9, 1941 Ark. Acts 788 (codified at ARK. STAT. ANN. §§ 34-1001 to 34-1009 (1962)).

120. 9 UNIFORM LAWS ANN. 233 (1957).

121. In jurisdictions allowing contribution, it was generally based on a pro rata division. The optional subsection of the 1939 Act attempted to change this method and to distribute the liability according to relative degrees of fault. *See* PROSSER, *supra* note 10, at 310; SCHWARTZ *supra* note 4, § 16.7, at 261.

In contrast, the 1955 Uniform Contribution Among Tortfeasors Act specifies that each tortfeasor is liable for his pro rata share of the entire liability. Relative degrees of fault are not to be considered. 9 UNIFORM LAWS ANN. 127 (Supp. 1967). Thus a defendant determined to be 5% negligent and forced to satisfy the entire judgment would only be entitled to recover 50% of his payment from a co-defendant found 90% negligent. Only Massachusetts and North Dakota have adopted the 1955 Act, and though more simplistic in its operation than the 1939 version, such a mathematical division of liability is not in accordance with a comparative system of fault *and* liability apportionment. *See* note 115 *supra* and accompanying text.

122. Walton v. Tull, 234 Ark. 882, 356 S.W.2d 20 (1962); Little v. Miles, 213 Ark. 725, 212 S.W.2d 935 (1948).

123. Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918).

124. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

125. *Id.* at —, 114 N.W.2d at 108.

126. *Id.* at —, 114 N.W.2d at 110.

127. "We make it plain at the outset, this refinement of the rule of contribution does

traditional leader among modified comparative negligence jurisdictions recognized the need for damage apportionment and joint and several liability.

In considering *legislative* action as the apparently exclusive means of extending the right of contribution to negligent tortfeasors,[128] the Oklahoma Supreme Court failed to recognize the origins of this doctrine. The common law denial of contribution has expanded far beyond its original context.[129] The original objectives of deterring wrongful conduct and not aiding one who has helped cause damage to himself are no longer pressing considerations in today's context of damage and liability apportionment. Acts of the negligent tortfeasor are no longer characterized as evil or immoral, but are considered merely careless or inadvertant.[130] Through the enactment of comparative negligence, the Oklahoma Legislature has determined that a plaintiff may recover damages though guilty of a negligent act. Judicially permitting the negligent defendant, who has provided compensation beyond his degree of liability, to recover from his co-defendants would have been in keeping with the modern conception of liability and damage apportionment.

By judicially extending the right of contribution to negligent tortfeasors on the basis of the jury's apportionment of negligence, the Oklahoma court could have provided equitable damage apportionment[131] and completed the comparative negligence system. This solution would not have affected the plaintiff's ability to achieve just compensation, since the risk of insolvency would still have rested among the defendants. In a system of 49% modified comparative negligence, providing the right of contribution as the means for equitable damage apportionment would have maintained the necessary balance in the multiple defendant suit.

IV. CONCLUSION

Laubach v. Morgan presented the Oklahoma Supreme Court with its first opportunity to clarify the Oklahoma comparative negligence statute in actions involving multiple parties. The court was called upon to identify the appropriate means for comparing negligence where multiple

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not apply to or change the plaintiff's right to recover against any defendant tortfeasor the total amount of his damage to which he is entitled." *Id.* at —, 114 N.W. 2d at 107.

128. "The adoption of the theory of comparative fault satisfies the need to apportion liability without invading the Legislature's power to grant contribution." 49 OKLA. B.A.J. at 62-63.

129. *See* notes 24-34 *supra* and accompanying text.

130. *See generally* PROSSER *supra* note 10, § 50.

131. *See* notes 116-118 *supra* and accompanying text.

defendants are involved and to prescribe a means of damage apportionment to complete the comparative negligence system.

In the first instance, the court affirmed the unit comparison as the correct application of the statute. This decision furthers the comparative negligence objective of just compensation for the plaintiff by allowing the plaintiff's negligence to be compared to the combined negligence of the defendants. However, the plaintiff's ability to attain just compensation was diminished by the court's second determination.

The Oklahoma Supreme Court chose to abolish the principle of joint and several liability to complete the comparative negligence system and provide for equitable damage apportionment. Thus each defendant is severally liable in accordance with his percentage of negligence, whenever the jury is capable of apportioning the liability. As a result, the plaintiff must attempt to execute judgment against each responsible defendant and bear the risk of insolvency. In reaching this decision, the Oklahoma Supreme Court chose not to adopt the compromise positions of other jurisdictions by simply limiting the joint and several liability principle. The court also considered judicial extension of the right of contribution to negligent tortfeasors as inappropriate. Either alternative dismissed by the court would have provided the necessary means of damage apportionment, without the detrimental impact on the plaintiff.

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