



## Comparing Fault

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### INTRODUCTION

The rule that contributory negligence completely bars a plaintiff's recovery for negligence arose in England in the early nineteenth century,<sup>1</sup> soon spread to the United States,<sup>2</sup> and flowered throughout the common law world with the growth of the industrial revolution. The development of exceptions, such as the doctrine of the last clear chance,<sup>3</sup> helped to alleviate the harshness of the rule overall, but did nothing to ameliorate its unfairness to the parties in individual cases, since recovery was still had on an all-or-nothing basis.<sup>4</sup>

A century after the birth of the contributory negligence rule, Congress enacted the Federal Employers' Liability Act, providing that contributory negligence did not bar recovery but merely reduced it proportionately to the

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1. *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809).

2. *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 65 (5th ed. 1984) [hereinafter cited as *PROSSER & KEETON*].

3. See *Davies v. Mann*, 152 Eng. Rep. 588 (Ex. 1842).

4. For a discussion of the injustice of the common law contributory negligence rule, see G. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *YALE L.J.* 697 (1978).

plaintiff's fault.<sup>5</sup> Other federal statutes incorporating this principle soon followed,<sup>6</sup> as did state laws in Mississippi (1910)<sup>7</sup> and Wisconsin (1931).<sup>8</sup> After England adopted comparative negligence in 1945,<sup>9</sup> comparative fault swept the common law world, leaving the United States as the only common law country generally adhering to the old contributory negligence rule.<sup>10</sup>

Beginning in the late 1960's, possibly in reaction to criticism of the tort system and calls for no-fault insurance,<sup>11</sup> many American states adopted a form of comparative negligence, usually by statute,<sup>12</sup> but occasionally by judicial development of the common law of torts.<sup>13</sup> The conquest of America by the principle of comparative fault is now an accomplished fact: forty-four states have adopted the doctrine.<sup>14</sup> Commentators who continue to

5. Federal Employers' Liability Act, ch. 149, § 3, 35 Stat. 65, 66 (1908) (codified at 45 U.S.C. § 53 (1982)).

6. *E.g.*, Merchant Marine (Jones) Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified at 46 U.S.C. § 688 (1982)); Death on the High Seas Act, ch. 111, § 6, 41 Stat. 537, 537-38 (1920) (codified at 46 U.S.C. § 766 (1982)).

7. Act of Apr. 16, 1910, ch. 135, 1910 Miss. LAWS 125 (codified at Miss. CODE ANN. § 11-7-15 (1972)).

8. Act of June 15, 1931, ch. 242, 1931 Wis. LAWS 375 (codified at Wis. STAT. ANN. § 895.045 (West 1983)).

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

10. See generally Honoré, *Causation and Remoteness of Damage*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 7, § 7-147, at 96 (1972); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

11. See V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 1.4, at 15, & 21.2, at 341 (1974); H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* § 1:11, at 27 (1978).

12. See, *e.g.*, HAWAII REV. STAT. § 663-31 (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); N.H. REV. STAT. ANN. § 507:7-a (1983).

13. See, *e.g.*, *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). For a discussion of the legitimacy of adoption of comparative fault by judicial decree, see *Comments on Maki v. Freik—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968) [hereinafter cited as *Comments on Maki v. Freik*].

14. See *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); ARIZ. REV. STAT. ANN. § 12-2505 (Supp. 1984); ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); COLO. REV. STAT. § 13-21-111 (1973 & Supp. 1984); CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1984); DEL. CODE ANN. tit. 10, § 8132 (Supp. 1984); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Elk Cotton Mills v. Grant*, 140 Ga. 727, 79 S.E. 836 (1913) (construing Ga. Code §§ 2781, 4426 (1910) (current version at GA. CODE ANN. §§ 46-8-291, 51-11-7 (1982))); HAWAII REV. STAT. § 663-31 (1976); IDAHO CODE § 6-801 (1979); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); IND. CODE §§ 34-4-33-1 to 34-4-33-8 (Supp. 1984); *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); KAN. STAT. ANN. § 60-258a (1983); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); LA. CIV. CODE ANN. art. 2323 (Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. GEN. LAWS ANN. ch. 231, § 85 (West Supp. 1984); *Placek v. Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); MINN. STAT. ANN. § 604.01 (West Supp. 1984); MISS. CODE ANN. § 11-7-15 (1972); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (en banc); MONT. CODE ANN. § 27-1-702 (1983); NEB. REV. STAT. § 25-1151 (1979); NEV. REV. STAT. § 41.141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1983); N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1984); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976); N.D. CENT. CODE § 9-10-07 (1975); OHIO REV. CODE ANN. § 2315.19 (Page 1981); OKLA. STAT. ANN. tit. 23, § 13 (West Supp. 1983); OR. REV. STAT. § 18.470 (1983); 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1982 & Supp. 1984); R.I. GEN. LAWS § 9-20-4 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1984); UTAH CODE ANN. § 78-27-37 (1977);

deride comparative fault as "an example of a short-sighted humanitarianism"<sup>15</sup> have come to resemble King Canute in their attempt to stem or roll back a seemingly irreversible tide of decisions and legislation.<sup>16</sup>

Yet a workable system of comparative fault requires resolution of a host of troubling issues, ignored by most of the states in the general rush to

VT. STAT. ANN. tit. 12, § 1036 (Supp. 1984); WASH. REV. CODE ANN. § 4.22.005 (Supp. 1984); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); WIS. STAT. ANN. § 895.045 (West 1983); WYO. STAT. § 1-1-109 (1977).

As of this writing, states without comparative fault include Alabama, Maryland, North and South Carolina, and Virginia. Of these, Alabama and Maryland have expressly rejected judicial adoption of comparative fault. See Golden v. McCurry, 392 So. 2d 815, 817 (Ala. 1980); Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 463, 456 A.2d 894, 905 (1983). Although, in a recent opinion, the South Carolina Court of Appeals ruled in favor of the adoption of comparative fault, the South Carolina Supreme Court quashed the opinion on the grounds that the supreme court had denied plaintiff permission to argue for the overruling of precedent. See Langley v. Boyter, 325 S.E.2d 550 (S.C. Ct. App. 1984), *opinion quashed*, 332 S.E.2d 100 (S.C. 1985). Finally, the supreme courts of North Carolina and Virginia have not specifically considered the adoption of comparative fault. See Langley v. Boyter, 325 S.E.2d at 558. But cf. Lawrence v. Wirth, 226 Va. 408, 309 S.E.2d 315 (1983) (mitigation of damages), discussed in LeBel, *Contributory Negligence and Mitigation of Damages: Comparative Negligence Through the Back Door?*, 10 VA. B.A.J., Fall 1984, at 11.

Tennessee is sometimes classified as a comparative negligence jurisdiction. H. Woods, *supra* note 11, at 559. Tennessee courts distinguish between negligent conduct by plaintiff that proximately causes plaintiff's injury and plaintiff's "remote contributory negligence." Although plaintiff's "proximate" negligence bars all recovery, her "remote" negligence results only in a reduction of her recovery "in proportion to plaintiff's contribution to the injury." Arnold v. Hayslett, 655 S.W.2d 941, 945 (Tenn. 1983) (quoting Street v. Calvert, 541 S.W.2d 576, 585 (Tenn. 1976)). The Tennessee Supreme Court distinguishes this approach from comparative fault on the grounds that the Tennessee approach deals with "causation, rather than with a comparison of the relative degrees of fault among the litigating parties." Arnold v. Hayslett, 655 S.W.2d at 946; see also *id.* at 945 n.4 (explaining difficulty, under Tennessee law, of judicially implementing "an effective system of 'comparative negligence'"); Street v. Calvert, 541 S.W.2d at 585-86 (approving doctrine of "remote contributory negligence" while refusing to consider adoption of "comparative negligence"). But many authorities limit "comparative fault" to assessment of the extent of causation between the parties' negligence and plaintiff's damages. See *infra* note 59. Once one accepts a focus on causation, a striking resemblance emerges between Tennessee law and the law in Nebraska and South Dakota, both generally considered to have systems of "comparative negligence," see, e.g., PROSSER & KEETON, *supra* note 2, § 67, at 471 & n.26; H. Woods, *supra* note 11, at 514, 555; Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668 (1981); both states bar a negligent plaintiff's recovery unless her fault is "slight," in which event plaintiff's recovery is reduced "in proportion to the amount" of plaintiff's "contributory negligence." NEB. REV. STAT. § 25-1151 (1979); S.D. CODIFIED LAWS ANN. § 20-9-2 (1979). See generally Sobelsohn, "Pure" vs. "Modified" Comparative Fault: Notes on the Debate, 34 EMORY L.J. 65 (1985). Nevertheless, most observers agree that "Tennessee is not a true comparative negligence jurisdiction." Stein, *Appendix: State Summaries*, in 3 COMPARATIVE NEGLIGENCE, at APP-117 (1984); accord, e.g., PROSSER & KEETON, *supra* note 2, at 471 & n.30 (listing Tennessee as one of the "remaining contributory negligence states"). See generally Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423 (1974).

15. R. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 338 (1982) [hereinafter cited as R. POSNER, TORT LAW]; see R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.3, at 123-24 (2d ed. 1977) [hereinafter cited as R. POSNER, ECONOMIC ANALYSIS]; accord, e.g., Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 27 (1972). See generally G. Schwartz, *supra* note 4.

16. Of the 44 states with comparative fault, seven have adopted the doctrine since 1980. These include Arizona, Delaware, Illinois, Indiana, Iowa, Kentucky, and Missouri. See *supra* note 14.

adopt comparative fault.<sup>17</sup> For example, although all American comparative fault systems require apportionment of damages according to each party's relative "percentage" of fault,<sup>18</sup> none indicates how a factfinder is to translate a finding of negligence—traditionally an all-or-nothing determination<sup>19</sup>—into numerical terms,<sup>20</sup> much less how to compare "fault" in cases brought under the doctrine of *res ipsa loquitur*<sup>21</sup> or a theory of strict liability.<sup>22</sup> Lawmakers in jurisdictions with comparative fault must also decide the reach of the principle's application—for example, whether to apply it at all in strict liability cases<sup>23</sup> or when plaintiff has suffered some non-"physical" injury.<sup>24</sup> Finally, adopting comparative fault requires determining whose fault is to be compared—an issue whose resolution may prove particularly vexing.<sup>25</sup> Although a state need not resolve such issues immediately upon adopting comparative fault,<sup>26</sup> ultimately any comparative fault jurisdiction must consider the "how," "when," and "whose" of "comparing fault."

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17. Dean Wade has called American comparative fault statutes "hastily and inartistically drafted," Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J.L. REF. 220, 221 (1977) [hereinafter cited as Wade, *What Should It Provide?*], and has accused the drafters of these statutes of avoiding "many of the most difficult problems" raised by the adoption of comparative fault. Wade, *Uniform Comparative Fault Act*, 14 FORUM 379, 380-81 (1979) [hereinafter cited as Wade, *Uniform Act*].

On the various issues raised by comparative fault see generally C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (J. Palmer & S. Flanagan rev. ed. 1985); V. SCHWARTZ, *supra* note 11; H. WOODS, *supra* note 11; Fleming, *The Supreme Court of California, 1974-75—Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976) [hereinafter cited as Fleming, *Foreword*]; 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. 1465 (1979) [hereinafter cited as Fleming, *Report*]; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Note, *supra* note 14.

18. See, e.g., CONN. GEN. STAT. ANN. § 52-572h(b)(2) (West Supp. 1984); IND. CODE § 34-4-33-5 (Supp. 1984); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984) (quoting UNIF. COMPARATIVE FAULT ACT § 2(a)(2), 12 U.L.A. 39 (Supp. 1984)). See generally H. WOODS, *supra* note 11, §§ 20:2 & 20:3.

19. See Comment, *Mathematics, Fuzzy Negligence, and the Logic of Res Ipsa Loquitur*, 75 NW. U.L. REV. 147, 153-54 (1980). See generally Coons, *Approaches to Court Imposed Compromises—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964) (criticizing "winner-take-all" approach to legal conflicts generally).

20. See *infra* text accompanying notes 27-89.

21. See *infra* text accompanying notes 90-96.

22. See *infra* text accompanying notes 97-155.

23. See *infra* text accompanying notes 160-97.

24. See *infra* text accompanying notes 214-38.

25. See *infra* text accompanying notes 239-357.

26. A rare judicial attempt to resolve all the issues surrounding comparative fault before implementing the doctrine is *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983), in which the court, upon adopting comparative fault, deemed it necessary immediately to decide "the simplest and most clear, concise, and direct method for adopting a comprehensive system of comparative fault." *Id.* at 15. The court then announced: "Insofar as possible this and future cases shall apply . . . the Uniform Comparative Fault Act," *id.* at 15-16, a copy of which the court appended to its opinion. See *id.* at 17-27. On the background of the *Gustafson* decision, see Anderson & Bruce, *Recent Developments in Missouri Tort Law: Gustafson v. Benda*, 52 UMKC L. REV. 538 (1984). See also *Hilen v. Hays*, 673 S.W.2d 713, 721 (Ky. 1984) (Leibson, J., concurring in court's adoption of comparative fault and urging that "[t]he Missouri approach is well suited to our problems in the present case and the needs of our system").

## I. How

### A. Negligence

#### 1. In General

As Dean Prosser once pointed out, because a system of “comparative fault” changes tort law primarily in allowing a negligent plaintiff some measure of recovery, one might more appropriately term a comparative fault law a “damage apportionment” statute.<sup>27</sup> But adoption of such a statute does not automatically suggest any particular method of apportionment.<sup>28</sup> Indeed, common law courts cited the difficulty of deriving a fair apportionment as their justification for refusing to compare fault in cases in which plaintiff had been contributorily negligent.<sup>29</sup> Even some recent observers, while generally approving the modern trend away from the contributory negligence rule, have argued that, with regard to allocation of fault, “no rational or objective legal standard or definition is possible.”<sup>30</sup> This conclusion has led to proposals that, in cases of contributory negligence, the court divide damages evenly among the parties<sup>31</sup> or reduce plaintiff’s recovery by “a uniform index factor, such as 30, 50 or 70 percent.”<sup>32</sup> In fact, until very recently, an even-division rule prevailed in admiralty cases.<sup>33</sup> Such a rule

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27. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 68, at 438 n.97 (4th ed. 1971); *accord*, e.g., *Wing v. Morse*, 300 A.2d 491, 499 (Me. 1973).

28. *Cf.* Prosser, *supra* note 17, at 465 n.2 (rule might even allow for full recovery).

29. *See, e.g.*, *Heil v. Glanding*, 42 Pa. 493, 499 (1862) (arguing “the law cannot measure how much the damages suffered is attributable to the plaintiff’s own fault”).

30. Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation*, 53 *MARQ. L. REV.* 293, 295 (1970) (emphasis omitted); *accord* Epstein, *Plaintiff’s Conduct in Products Liability Actions: Comparative Negligence, Automatic Division and Multiple Parties*, 45 *J. AIR L. & COM.* 87, 109 (1979) (claiming that “[a]ll allocation of responsibility between the two parties [to a tort action] is arbitrary”). In his classic work on comparative fault and contribution among tortfeasors, Glanville Williams found himself forced to admit that “in attempting to assess degrees of negligence the judge is trying to measure the immeasurable. . . . [W]e should recognize that the action is arbitrary . . . [and] does not in itself involve any question of fact . . . .” G. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* § 44, at 158 (1951). *But cf. infra* text accompanying notes 55-58 (suggesting method for connecting percentages of fault to evidence in case).

31. *See, e.g.*, Epstein, *supra* note 30, at 111.

32. *Daly v. General Motors Corp.*, 20 *Cal. 3d* 725, 749, 575 P.2d 1162, 1176, 144 *Cal. Rptr.* 380, 394 (1978) (Clark, J., concurring); *see* Epstein, *supra* note 30, at 110 (asserting need for “a fixed judicial or legislative rule” to promote “certainty and predictability”).

33. *See* *United States v. Reliable Transfer Co.*, 421 *U.S.* 397 (1975); Fleming, *Foreword*, *supra* note 17, at 248. Some commentators classify the “even division” rule as an alternative to what are known as the “pure” and the “modified” approaches to comparative fault. *See, e.g.*, V. SCHWARTZ, *supra* note 11, § 2.1, at 32; Wade, *Uniform Act*, *supra* note 17, at 384-85. *See generally* Sobelsohn, *supra* note 14. This is misleading. The choice between “pure” and “modified” comparative fault concerns the circumstances under which plaintiff ought to recover anything. *See id.* By contrast, the “even division” rule concerns the precise proportion of his or her damages plaintiff ought to recover. Nothing would prevent a state, for example,

does have the advantage of easy administration.<sup>34</sup> But it is so patently arbitrary<sup>35</sup> and unfair,<sup>36</sup> and places such enormous importance on the number of parties involved in the accident (or, even worse, joined to the lawsuit),<sup>37</sup> that today not a single state follows an even-division rule.<sup>38</sup>

Instead, every state requires the factfinder to determine each party's "percentage of fault"<sup>39</sup> and to award damages in accordance with these percentages.<sup>40</sup> Devising a formula for determining fault "percentages" is no easy task.<sup>41</sup> But virtually every comparative fault law in the United States assumes that a jury can simply divide up fault "as if it were a tangible and measurable commodity."<sup>42</sup>

The difficulty in devising an apportionment formula rests principally in the apparent requirement that any such formula provide an intelligible basis for "comparing" the culpability of two or more different actors. The behavior of negligent parties often seems incommensurable.<sup>43</sup>

Judicial opinions and academic commentary have suggested various means of resolving this difficulty. Perhaps the most helpful suggestion is that the factfinder conceive of the parties' conduct as lying on a scale from 0 to 10, with reasonable conduct at 0 and intentional misconduct at 10.<sup>44</sup> By providing a way to state the culpability of each party in numerical terms, this approach—which one might call the "fault-line"<sup>45</sup> or "benchmark"<sup>46</sup> approach—at least provides an intelligible basis for comparing fault in terms of percentages.<sup>47</sup>

from allowing recovery only to plaintiffs less than 50% at fault, and *in addition* limiting the recovery of negligent plaintiffs to 50% or some other fixed percentage of their damages. See Prosser, *supra* note 17, at 465 n.2 (rejection of contributory negligence rule does not require any particular approach to apportionment of damages).

34. Fleming, *Foreword*, *supra* note 17, at 248-49.

35. Note, *Product Liability Reform Proposals in Washington—A Public Policy Analysis*, 4 U. PUGET SOUND L. REV. 143, 159 (1980); see *United States v. Reliable Transfer Co.*, 421 U.S. 397, 404 (1975).

36. Fleming, *Foreword*, *supra* note 17, at 248-49.

37. See Epstein, *supra* note 30, at 113 (claiming "the only possible rule is one that uniformly divides the loss by the number of responsible parties to the case").

38. Wade, *Uniform Act*, *supra* note 17, at 384.

39. See *supra* sources cited notes 14 & 18.

40. See *id.*

41. See Epstein, *supra* note 30, at 111 (calling apportionment of fault a "fruitless pursuit for illusory percentages").

42. V. SCHWARTZ, *supra* note 11, § 17.1, at 276.

43. Epstein, *supra* note 30, at 109. Application of comparative fault principles to strict liability only aggravates the difficulty. *Id.*; accord Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 806 (1977); see *infra* text accompanying notes 97-155 & 160-97.

44. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 348-49 (1980); see *Wing v. Morse*, 300 A.2d 491, 500 (Me. 1973); cf. *Sandford v. Chevrolet Div.*, 292 Or. 590, 642 P.2d 624, 633-35 (1982) (applying approach to products liability).

45. See Pearson, *supra* note 44, at 349.

46. See *Sandford v. Chevrolet Div.*, 292 Or. 590, 642 P.2d 624, 633-34 (1982).

47. But see G. WILLIAMS, *supra* note 30, § 98, at 390 (question of comparative fault "cannot be determined by mathematics"); Aiken, *supra* note 30, at 300 (arguing that "spelling out the

Nevertheless, without modification, the fault-line approach has serious inadequacies. First, the approach includes no formulae for deriving the numbers reflecting each party's percentage of fault. The only hint of a standard is the suggestion that the key variable is each party's state of mind.<sup>48</sup> That suggestion itself constitutes a second serious flaw: it is simply untrue that state of mind is the only variable in determining fault. Although a mass murderer and a practical joker may each consciously intend harmful or offensive contact with his victim, surely no one would for that reason consider the two equally "blameworthy," at least in any moral sense.

The essential problem with the fault-line approach is its focus on only one of the traditional elements in the concept of "fault."<sup>49</sup> Judge Learned Hand defined negligence as the failure to take cost-justified precautions.<sup>50</sup> Under the Hand formulation, a party acts unreasonably when the overall risk of not taking a particular precaution (the product of the likelihood of an injury, "P," times the probable extent of the loss, "L"), outweighs the savings in not taking that precaution ("B").<sup>51</sup> It seems logical to use precisely the same factors to compare fault that determine whether a party was at fault in the first place.<sup>52</sup> If "fault" means "a departure from a standard of conduct required of a person by society for the protection of his neighbors,"<sup>53</sup> "comparing fault" ought to mean a comparison of the extent to which each party deviated from the applicable standard of conduct. One can accurately fix the extent of the deviation only by considering all the factors that go into formulating the applicable legal standard.

With this modification—and abandonment of the artificial limit of the number ten—the fault-line approach becomes a workable method of comparing fault, at least in negligence actions;<sup>54</sup> one can now translate, into numerical terms, the extent of a party's deviation from a standard of "rea-

mathematics" will "inevitably contradict and confuse juries, ourselves, and everyone else"). See also Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971) (use of mathematics in litigation may lead to "erosion of the public's sense that the law's fact-finding apparatus is functioning in a somewhat comprehensible way").

48. See Pearson, *supra* note 44, at 349 (fault line consists of "absence of fault at one end" and "deliberate wrongdoing at the other").

49. See generally PROSSER & KEETON, *supra* note 2, § 31, at 169-70. For additional problems with the "fault line" approach in the context of products liability cases, see *infra* text accompanying notes 126-42.

50. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); see Brown, *Towards An Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 333-35 (1973); Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799, 815 (1983); Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 198 (1981).

51. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); see R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 15, § 6.2, at 122.

52. V. SCHWARTZ, *supra* note 11, § 17.1, at 278; Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 434 (1978); see *Associated Eng'rs, Inc. v. Job*, 370 F.2d 633, 641 (8th Cir. 1966) (applying South Dakota law).

53. See PROSSER & KEETON, *supra* note 2, § 75, at 535; accord J. FLEMING, *THE LAW OF TORTS* 256 (5th ed. 1977).

54. For application of the fault-line approach, as thus modified, to strict liability cases, see *infra* text accompanying notes 119-25 & 143-55.

sonable care." If " $P \times L$ " is the overall risk of not taking a particular precaution,<sup>55</sup> and "B" is the cost of taking that precaution, then, as  $P \times L$  becomes greater relative to B, the actor is more and more negligent.<sup>56</sup> The number representing each party's negligence is simply the quotient of  $P \times L$  for that party, divided by B—what one might call each party's "fault quotient."

To compare each party's deviation requires only two additional steps. First, one must total the fault quotients of all the parties;<sup>57</sup> this produces the sum of all the parties' deviations—the total fault in the case. Then, to ascertain any given party's fault percentage, one simply divides the number representing that party's fault quotient by the total fault figure.<sup>58</sup>

For example, suppose plaintiff, on the way to an important meeting, drove across defendant's railroad tracks without slowing down or looking to see whether a train was coming. Assume that the overall risk of injury was \$60 (the probability of injury multiplied by the likely seriousness of the injury), and the cost of plaintiff's slowing down was \$15 (the risk of being late to the meeting). Since the risk of injury exceeded the cost of avoiding the injury, plaintiff was negligent. But assume that defendant was also negligent, in not having a whistle on its train. The overall accident risk without a whistle was \$40; the whistle would cost \$20. Plaintiff's fault quotient is  $60/15$ , or 4; defendant's is  $40/20$ , or 2. To determine the total

55. In computing the overall risk of particular behavior—by either party—the factfinder should take into account not only the risk of harm to the other party to the lawsuit, but rather the risk that behavior poses to all foreseeable victims. See Thode, *Some Thoughts on the Use of Comparisons in Products Liability Cases*, 1981 UTAH L. REV. 3, 9.

56. If  $P \times L$  is smaller than B for any party, that party has acted reasonably; the expected accident rate was simply not worth the cost of prevention. See Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972).

57. In jurisdictions that require the factfinder to consider the fault of nonparties, this total will include the fault quotients of all persons contributing to the accident. For a discussion of the inclusion of nonparties in the fault comparison, see *infra* text accompanying notes 241-319.

58. Algebraically (assuming a case with only two parties, "A" and "B"), this equation is:

$$\text{PERCENTAGE FAULT OF PARTY A} = \frac{\frac{P_A \times L_A}{B_A}}{\frac{P_A \times L_A}{B_A} + \frac{P_B \times L_B}{B_B}}$$

For cases with more than two parties, one should simply add additional fractions to the denominator.

Judge Posner suggests that the factfinder should "compare the ratio of each party's optimal expenditure on care to the expected accident cost" of taking no precautions. R. POSNER, *TORT LAW*, *supra* note 15, at 337. This cannot be correct, for both sides of Judge Posner's equation ignore the actual conduct of the parties to the case, who may have in fact taken *some* precautions that left only an amount *less* than "optimal expenditure" required to constitute "reasonable care."



fault, add the parties' fault quotients: 4 plus 2 equals 6. Finally, to determine each party's percentage of fault, simply divide that party's fault quotient by 6. Thus, plaintiff's relative fault is 4/6, or about 67%; defendant's is 2/6, or about 33%.

A factfinder applying this approach should consider the culpability of each party's conduct, as well as the extent of the causal relation between that conduct and the accident.<sup>59</sup> Prime factors in considering the culpability of conduct are the magnitude of the risk created by that conduct and the burden required to avoid that risk— $P \times L$  and  $B$  in the Learned Hand formula.<sup>60</sup> The fault-quotient approach also accommodates more subjective factors, such as the existence of an emergency<sup>61</sup> or a party's capacity<sup>62</sup> or

59. Many authorities consider the comparison of causation to be the best approach to the apportionment of fault. *See, e.g.*, *Murray v. Fairbanks Morse*, 610 F.2d 149, 159 (3d Cir. 1979); *Coney v. J.L.G. Indus., Inc.*, 97 Ill. 2d 104, 116, 454 N.E.2d 197, 203 (1983); *Davies v. Swan Motor Co.*, [1949] 2 K.B. 291, 326 (Denning, L.J.); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 326 (1977). *See generally* Honoré, *supra* note 10, ch. 7, § 7-175, at 121-22. Dean Prosser, among others, vigorously disputed this approach, insisting that, after proof of actual and proximate cause, the issue of causation should drop out of the case and the finder of fact should assess only the relative culpability of the parties' conduct. *See* Prosser, *supra* note 17, at 481; *accord, e.g.*, *Gele v. Wilson*, 616 F.2d 146, 147-48 (5th Cir. 1980) (admiralty law); *State v. Kaatz*, 572 P.2d 775, 782 (Alaska 1977); *Amend v. Bell*, 89 Wash. 2d 124, 130-31, 570 P.2d 138, 142 (1977); *see also* G. WILLIAMS, *supra* note 30, § 44, at 157 (doubting that apportionment on the basis of causation is even "logically possible"); Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 695 (1984) (arguing that the extent of a party's causation of an accident has no necessary relation to the extent of that party's "fault"). Some authorities would require the factfinder to consider both conduct as well as causation in apportioning fault. *See, e.g.*, *Kohler v. Dumke*, 13 Wis. 2d 211, 215-16, 108 N.W.2d 581, 583-84 (1961); WASH. REV. CODE § 4.22.015 (Supp. 1985); MODEL UNIF. PROD. LIAB. ACT § 111(B)(3), 44 Fed. Reg. 62,735 (Dep't of Com. 1979); UNIF. COMPARATIVE FAULT ACT § 2(b), 12 U.L.A. 43 (Supp. 1985); James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207, 217 (1974).

60. *See supra* text accompanying notes 50-51.

61. Courts have traditionally instructed the jury that "a person . . . suddenly and unexpectedly confronted with peril . . . is not expected nor required to use the same judgment and prudence that is required . . . in calmer and more deliberate moments." *Leo v. Dunham*, 41 Cal. 2d 712, 714, 264 P.2d 1, 2 (1953); *accord, e.g.*, *Ferrer v. Harris*, 55 N.Y.2d 285, 292, 434 N.E.2d 231, 235, 449 N.Y.S.2d 162, 166 (1982); *see* PROSSER & KEETON, *supra* note 2, § 33, at 196-97.

62. Within limits, a party's capacity has also traditionally affected the extent of his or her legal responsibility. *See, e.g.*, *Argo v. Goodstein*, 438 Pa. 468, 265 A.2d 783 (1970) (blind person held to standard of one with that physical disability); *Peterson v. Taylor*, 316 N.W.2d 869 (Iowa 1982) (holding children to standard of child with like "age, intelligence, and experience"); RESTATEMENT (SECOND) OF TORTS § 298 comment d, at 69 (1965) (actor held to use "those superior qualities and facilities which he himself has"). *But see* *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837) (level of intelligence irrelevant to legal responsibility). *See generally* PROSSER & KEETON, *supra* note 2, § 32; Wertheimer, *Comparative Negligence and Persons Under a Disability*, in 2 COMPARATIVE NEGLIGENCE §§ 10.00-10.50 (1984).

The factfinder, in a case of comparative fault, should limit consideration of the parties' capacities to the traditional categories. This follows from the assumption that the objective "reasonable person" standard of tort law rests primarily on the administrative difficulty of applying a different standard to every tortfeasor and accident victim. *See* F. HARPER & F. JAMES, *THE LAW OF TORTS* § 16.2, at 903 (1956). This administrative difficulty is no less—indeed, it is greatly increased—in a system of comparative fault, where the issues for the factfinder are already complicated by the need to compare fault.

awareness of the risk.<sup>63</sup> The cost to a person, faced with a sudden emergency, of choosing an accident-avoiding path quickly enough far exceeds the cost ("B") to one with time to deliberate about various alternative safety measures. Similarly, an actor with "inferior" capacity to avoid harm must expend more effort to avoid a danger than need a person with "superior" ability.<sup>64</sup> Finally, a person about to cause injury inadvertently must expend much more effort to avoid the danger than need one who is at least aware of the danger involved.

In theory, the fault-quotient approach could include consideration of both actual and proximate causation.<sup>65</sup> A comparison of actual causation would require considering "the likelihood, at a percentage basis," that a given party's conduct caused plaintiff's injury.<sup>66</sup> The factfinder would use such a percentage to discount each party's initial fault quotient<sup>67</sup> prior to determining that party's fault percentage. For example, if the jury initially fixes plaintiff's fault quotient at 6 and finds only a 50% probability that plaintiff's misconduct caused her injury, the jury would reduce plaintiff's fault quotient to 3.<sup>68</sup>

But comparing cause-in-fact presents several problems. First, in very few cases will comparing actual causation help allocate fault; actual cause is seldom a significant issue.<sup>69</sup> More broadly, the task of comparing the culpability of the parties' conduct will probably tax the capacity of the ordinary jury to its limits; an additional layer of complexity requires substantial justification. Finally, juries ultimately base virtually all their decisions on probabilities.<sup>70</sup> It is unclear why a comparative fault system should single

63. Courts have traditionally cited "awareness of the danger" as a factor distinguishing mere negligence from the higher state of culpability commonly known as "recklessness" or "willful and wanton conduct." See, e.g., *Ellis v. Ferguson*, 238 Ark. 776, 779, 385 S.W.2d 154, 155 (1965); RESTATEMENT (SECOND) OF TORTS § 500 comment g, at 590 (1965). See generally PROSSER & KEETON, *supra* note 2, § 34, at 212-14.

64. See R. POSNER, *TORT LAW*, *supra* note 15, at 230-31.

65. On the relation between actual and proximate causation, see Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975). See also PROSSER & KEETON, *supra* note 2, § 41, at 263-64.

66. Twerski, *supra* note 43, at 828 (emphasis deleted); see Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 742 (1974); Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 413-14 (1978). For arguments that juries, as a general matter, should explicitly consider probabilities in assessing damages, see Coons, *supra* note 19, at 757; Finkelstein & Farley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970); Comment, *supra* note 19, at 156, 163-65; Note, *Towards Principles of Jury Equity*, 83 YALE L.J. 1023, 1045-46 (1974).

67. See *supra* text accompanying notes 55-58.

68. Cf. Twerski, *supra* note 43, at 826-29 (discussing *Barry v. Manglass*, 55 A.D.2d 1, 389 N.Y.S.2d 870 (1976)). A similar approach is evident in some of the "DES" cases, such as *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (absent specific proof of causation, manufacturer held liable for proportionate share of market), *cert. denied*, 449 U.S. 912 (1980). See Coons, *supra* note 19, at 753; Comment, *supra* note 19, at 155 n.49. See generally Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982).

69. See *Sandford v. Chevrolet Div.*, 292 Or. 590, 642 P.2d 624, 633 (1982).

70. See Broun & Kelly, *Playing the Percentages and the Law of Evidence*, 1970 U. ILL. L.F. 23; Cullison, *Probability Analysis of Judicial Fact-Finding: A Preliminary Outline of the*

out the issue of actual causation for special treatment, yet the typical jury could not handle instructions requiring discounting of fault quotients according to the probabilities as to every evidentiary issue in the case.<sup>71</sup>

One can somewhat more easily support inclusion of a concept of proximate cause in the fault comparison.<sup>72</sup> Courts articulate at least two different tests of "proximate cause." The "direct causation" test, often associated with the English case *In re Polemis*<sup>73</sup> and with Judge Andrews's dissent in *Palsgraf v. Long Island Railroad*,<sup>74</sup> requires only that the conduct be a "direct" cause of the harm. The test turns on the presence or absence of significant intervening causes.<sup>75</sup> By contrast, under the "foreseeability" test, sometimes identified with the English case *The Wagon Mound*<sup>76</sup> and with Judge Cardozo's majority opinion in *Palsgraf*,<sup>77</sup> plaintiff can recover only when defendant could have foreseen the "type" of harm caused.<sup>78</sup>

The fault-quotient approach to comparing fault could accommodate the *Wagon Mound* version of proximate cause: the factfinder would simply determine the likelihood, from the actor's point of view, that, assuming an accident would occur, that accident would be of the same general "type" as the accident that did occur.<sup>79</sup> The probability thus derived, expressed in percentage terms, would then be used to discount the actor's fault quotient in much the same way as might the probability of actual causation.<sup>80</sup> But this approach raises some of the same problems raised by comparing actual causation,<sup>81</sup> particularly the danger of excess jury confusion. It is far from

*Subjective Approach*, 1969 U. Tol. L. Rev. 538; Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 168 (1958); Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 Mich. L. Rev. 1456, 1456 (1977). See generally I. GOOD, PROBABILITY AND THE WEIGHING OF EVIDENCE 62 (1950).

71. See Kalven, *supra* note 70, at 168 ("the law . . . can hardly write a formula that would accommodate . . . the ambiguities in the basic evidence itself"); Tribe, *supra* note 47, at 1358-78. But see Comment, *supra* note 19, at 157 n.62, 160-61 (claiming jury in fact does reduce recovery according to empirical probabilities despite absence of instructions to do so); cf. Burr v. State, 466 So. 2d 1051 (Fla. 1985) (improper for sentencing jury in capital case to consider residual doubt concerning defendant's guilt), cert. denied, 106 S. Ct. 201 (1985).

72. See, e.g., Fietzer v. Ford Motor Co., 622 F.2d 281, 287 (7th Cir. 1980); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977); Kohler v. Dumke, 13 Wis. 2d 211, 215-16, 108 N.W.2d 581, 583-84 (1961); MODEL UNIF. PROD. LIAB. ACT § 111(B)(3), 44 Fed. Reg. 62,735 (Dep't of Com. 1979) (requiring comparison of both conduct "and the extent of the proximate causal relation between [that] conduct and the damages claimed").

73. *In re Arbitration Between Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560, 1921 All E.R. 40.

74. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 356, 162 N.E. 99, 104-05 (1928) (Andrews, J., dissenting).

75. See *Martinez v. Lazaroff*, 48 N.Y.2d 819, 820, 399 N.E.2d 1148, 1148, 424 N.Y.S.2d 126, 127 (1979); PROSSER & KEETON, *supra* note 2, § 43, at 293-94.

76. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co.*, 1961 A.C. 388.

77. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 346-47, 162 N.E. 99, 101 (1928).

78. See RESTATEMENT (SECOND) OF TORTS § 281 comment e (1965); PROSSER & KEETON, *supra* note 2, § 43, at 283-84.

79. See V. SCHWARTZ, *supra* note 11, § 17.1, at 278.

80. See *supra* text accompanying notes 66-68.

81. See *supra* text accompanying notes 69-71.

clear what benefits would flow from comparing this type of proximate cause to justify the costs of making the comparison.

Comparing "direct" causation is more difficult and, at first blush, may appear even less justifiable. One might compare the number of intervening causes, but this seems arbitrary and irrelevant to any understandable notion of "culpability."<sup>82</sup> Moreover, focusing on the "directness" of the link between a party's conduct and the accident would bias the law against certain classes of plaintiffs, such as consumers in products liability cases, whose negligence is always closer to the injury (and thus always a more "direct" cause of the injury) than is the wrong of defendant.<sup>83</sup> In addition, at least one commentator has questioned the feasibility of intelligibly measuring and comparing the "directness" of a causal link so as to come up with percentages of fault.<sup>84</sup>

Once one translates direct causation into probabilities, however,<sup>85</sup> one can sensibly assess the "directness" of a causal link in apportioning fault under the fault-quotient approach.<sup>86</sup> The less direct a cause is, "the more surely do other causes intervene to affect the result."<sup>87</sup> Those other causes pose not only the risk of aggravating an injury, but also the hope of ameliorating or even avoiding it. Consequently, as a general matter, as causal conduct becomes more remote from an accident, the less that conduct—in retrospect—seems to have increased the risk of that particular accident.

This is not always so. A manufacturer designing, producing, and selling a defective product surely has done more to increase the risk to a user of that product than has the retailer who simply receives, stores, and sells the product—perhaps even in a sealed container. Indeed, this example illustrates the danger in treating comparative direct causation as a concept apart from risk. At least in terms of the number of intervening factors, the retailer's conduct has a more "direct" effect on plaintiff's injury than does the conduct of the manufacturer, yet no one would contend the factfinder should allocate more of the fault to the retailer for that reason.

With the translation of proximate cause into a matter of risk, comparing the causal relation between a party's conduct and the accident becomes intelligible and justifiable. The court should instruct the jury to consider causation, but only as it affects their assessment of the dangerousness of each party's risk-producing behavior.<sup>88</sup>

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82. See Fischer, *supra* note 52, at 446-47.

83. See Epstein, *supra* note 30, at 111.

84. Fischer, *supra* note 52, at 446.

85. Cf. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 415-34 (1984) (analyzing direct causation as device for minimizing probable social cost).

86. See *supra* text accompanying notes 50-58. See also G. WILLIAMS, *supra* note 30, § 44, at 157 (calling proximate cause "only another expression for legal blame").

87. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 354, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting).

88. One might wonder, if "culpability of conduct" and "extent of causal relation" both serve only as proxies for "risk of injury" and "burden to avoid harm," why the factfinder

Limiting the factors in comparing fault to the burden of avoiding an accident and the risk of not taking particular precautions, by allowing comparison of two reasonably commensurable criteria, helps greatly in deriving percentages of fault. With this approach, the jury can base its verdict less on speculation and more on "the particular pattern of factual information"<sup>89</sup> introduced as evidence in the case.

## 2. Res Ipsa Loquitur

Res ipsa loquitur poses a unique problem for comparative fault. By definition, in a res ipsa loquitur case the negligent party's conduct is unknown; the accident itself provides the necessary inference of negligence.<sup>90</sup> Moreover, because one does not know precisely what caused the accident, one cannot tell exactly what precautions would have prevented it. Knowing neither what caused the accident nor what could have prevented it seems to make it impossible either to assess the culpability of the negligent party's conduct or to compare the risk of the accident with the burden of taking the precautions necessary to avoid it.

One can solve this dilemma in a number of ways. For example, the jury could assess only the fault of parties found negligent without the use of res ipsa loquitur, essentially ignoring the fault of the party found negligent only by using res ipsa loquitur.<sup>91</sup> But this approach assumes a case with only two parties; applying the approach when there are several parties—only some of whom are found negligent under res ipsa loquitur—would present great difficulty. Moreover, not all circumstantial evidence suggests negligence of the same degree; one set of facts may indicate negligence far more serious than that indicated by another set of facts. Surely the jury should have the tools to distinguish the culpability of the parties in such cases.

Those tools become available once one translates a finding of res ipsa loquitur into terms of risk and burden. A key element of a res ipsa loquitur finding is the conclusion that, ordinarily, accidents of the type that occurred do not happen without negligence.<sup>92</sup> To reach this conclusion, the jury may need expert testimony,<sup>93</sup> describing, for example, precautions generally taken

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should consider either culpability or causation, instead of focusing on risks and burdens as such. The answer is that both culpability and direct causation aid in understanding the magnitude of the risk of dangerous conduct, as well as the cost of avoiding that risk. The factfinder thus considers culpability and direct causation as a way of more precisely ascertaining the actual level of unnecessary risk posed by the parties' conduct.

89. Epstein, *supra* note 30, at 109.

90. See, e.g., *Newing v. Cheatham*, 15 Cal. 3d 351, 540 P.2d 33, 124 Cal. Rptr. 193 (1975); *Mayes v. Kansas City Power & Light*, 121 Kan. 648, 249 P. 599 (1926). See generally PROSSER & KEETON, *supra* note 2, § 39.

91. Cf. Fischer, *supra* note 52, at 446-47 (proposing similar approach to use of comparative fault in strict liability cases).

92. PROSSER & KEETON, *supra* note 2, § 39, at 244. See generally *Kaye*, *supra* note 70; Comment, *supra* note 17.

93. See, e.g., *Bucklew v. Grossbard*, 87 N.J. 512, 435 A.2d 1150 (1981).

to avoid the kind of accident that occurred.<sup>94</sup> From this evidence—or, in many cases, from the jurors' own experience—the jury can roughly estimate the average cost of avoiding this kind of accident. A finding of negligence based on *res ipsa loquitur* represents, in essence, the conclusion that the risk of such an accident ordinarily outweighs the cost of avoiding it. One can describe the relationship between these two variables in precisely the same way one can describe their relationship when one knows exactly what happened. The only difference is that, instead of variables derived from the exact circumstances of the accident that occurred, the variables come from generalized findings concerning the type of activity that led to the accident. So, for example, when a car swerves off the road for no apparent reason,<sup>95</sup> the jury can compare the average cost to drivers of avoiding sudden swerves, to the overall risk of injury (taking into account both the probability and likely seriousness of the injury) from a sudden swerve. The jury can then compare the resulting fault quotient to the fault quotient for the other parties in the case in order to derive the parties' respective percentages of fault.<sup>96</sup>

### B. *Strict Liability*

Strict liability cases present the most difficult problem for a system of comparative fault.<sup>97</sup> One commentator, perhaps resignedly, has declared that, in order to derive fault percentages in a strict liability case, "one must simply close one's eyes and accomplish the task."<sup>98</sup>

But surely the requirement that justice be blind does not mandate that cases be decided in the dark. If coming up with a rational approach to comparing "fault" in the strict liability context proves so difficult that juries

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94. See, e.g., *McCray v. Galveston, H. & S.A. Ry.*, 89 Tex. 168, 34 S.W. 95 (1896) (expert testimony that, if properly loaded, steel bar would not have fallen on plaintiff).

95. See, e.g., *Winter v. Scherman*, 57 Hawaii 279, 554 P.2d 1137 (1976).

96. The calculation is thus identical to the one set forth *supra* note 58, except that, for the party found liable only through *res ipsa loquitur*, the values are derived from an overall average of the risk-burden ratio for that type of accident, rather than from the ratio of the risk and burden of the specific misconduct of the party found negligent.

97. Most jurisdictions with comparative fault extend the doctrine to cases of strict liability. See PROSSER & KEETON, *supra* note 2, § 67, at 478. Recent decisions include *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280 (Me. 1984); *Day v. General Motors Corp.*, 345 N.W.2d 349 (N.D. 1984); and *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984). *Contra*, e.g., *Young's Mach. Co. v. Long*, 692 P.2d 24 (Nev. 1984) (rejecting use of comparative fault in strict liability cases); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974) (same); see PROSSER & KEETON, *supra* note 2, § 67, at 478 n.93 (citing cases). See generally Woods, *Products Liability: Is Comparative Fault Winning the Day?*, 36 ARK. L. REV. 360 (1982); Note, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695 (1983-84). For a discussion of the arguments for and against comparing fault in strict liability cases, see *infra* text accompanying notes 160-97.

98. Twerski, *supra* note 43, at 806.

cannot receive any better instructions than to "close your eyes and do it," perhaps comparative fault should not apply in strict liability cases. The legal system already contains enough arbitrary decisionmaking.<sup>99</sup>

Indeed, the supposed conceptual difficulty of comparing fault in a strict liability action constitutes the most often-raised argument against the use of comparative fault in strict liability cases.<sup>100</sup> Since strict liability imposes liability without regard to defendant's "fault,"<sup>101</sup> it is said to be logically "impossible" to consider plaintiff's fault in a strict liability action.<sup>102</sup> According to one commentator, negligence and strict liability differ to such an extent that "[t]he concepts cannot be compared rationally."<sup>103</sup>

Courts and commentators have suggested various resolutions of this conceptual dilemma.<sup>104</sup> For example, courts have analogized strict liability to negligence per se, treating the test for finding a product "defective" as if it were a standard of care drawn from a criminal statute.<sup>105</sup> But cases of negligence per se typically involve conduct a jury might reasonably find negligent.<sup>106</sup> A finding of negligence per se simply reflects judicial respect for a legislative<sup>107</sup> or administrative<sup>108</sup> codification of the community judgment about the tolerability of a certain type of behavior.<sup>109</sup> By contrast, strict liability assumes the non-negligent character of defendant's conduct.

99. See Thode, *supra* note 55, at 5 n.3 (criticizing "close your eyes" approach on the grounds that "we should reject any system that cannot be defended rationally").

100. For additional arguments against considering plaintiff's conduct in strict liability cases, see *infra* text accompanying notes 160-97.

101. See Fischer, *supra* note 52, at 434, 442; Note, *supra* note 14, at 1682.

102. Kalven, *Comment on Maki v. Frelk*, *supra* note 13, at 904; accord Dickerson, *Products Liability and the Disorderly Conduct of Words*, 20 A.T.L.A. L. REP. 422, 423 (1977); see *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1435 (5th Cir. 1983) (federal maritime law) (Poltz, J., dissenting) (likening comparison of fault in strict liability action to "an attempt to measure the amount of water in an empty glass"); see also *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 683 (D.N.H. 1972); PROSSER & KEETON, *supra* note 2, § 67, at 478; V. SCHWARTZ, *supra* note 11, § 12.6, at 206. Professor Fischer calls this the "one serious difficulty" of comparing fault in a strict liability action. Fischer, *supra* note 52, at 433-34.

103. Fischer, *supra* note 52, at 442 (footnote omitted).

104. See generally *id.* at 434-47; Note, *supra* note 14, at 1684-85.

105. See, e.g., *Dippel v. Sciano*, 37 Wis. 2d 443, 461-62, 155 N.W.2d 55, 64-65 (1967); *Thomas v. Board of Township Trustees*, 224 Kan. 539, 547, 582 P.2d 271, 278 (1978). See also Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 850 (1973).

106. See, e.g., *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920) (driving after dark without headlights deemed negligent per se). The courts have carved out exceptions to the negligence per se doctrine for conduct no reasonable jury could find negligent. See, e.g., *Brotherton v. Day & Night Fuel Co.*, 192 Wash. 362, 73 P.2d 788 (1937) (not negligence per se when headlights suddenly go out without warning); *Reuille v. Bowers*, 409 N.E.2d 1144 (Ind. 1980) (not negligence per se to drive on left when right lane blocked); *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987 (1939) (not negligence per se to violate traffic law when obedience more dangerous). See generally RESTATEMENT (SECOND) OF TORTS § 288A (1965) (listing incapacity, ignorance, reasonable effort to comply, emergency, and danger of compliance as excuses for conduct otherwise constituting negligence per se).

107. E.g., *Walker v. Bignell*, 100 Wis. 2d 256, 301 N.W.2d 447 (1981).

108. E.g., *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265 (Iowa 1977) (occupational safety and health regulations).

109. See RESTATEMENT (SECOND) OF TORTS § 286 comment d, at 26 (1965); PROSSER & KEETON, *supra* note 2, § 36, at 222; *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P.2d 777 (1943).

Indeed, strict products liability cases ignore defendant's conduct as such and focus on the defective nature of the product.<sup>110</sup> Analogizing strict liability to negligence per se thus not only ignores the theoretical underpinnings of the negligence per se concept, but also fails to provide any intelligible basis for comparison in the most common of modern strict liability cases, those alleging injuries caused by defective products.<sup>111</sup>

Other courts have found in "comparative causation" a solution to the problem of conceptual incompatibility.<sup>112</sup> But without more, the concept of comparing causation neither relates to any meaningful notion of "fault" nor yields an intelligible basis for deriving relative fault percentages.<sup>113</sup>

A final approach to the conceptual problem is simply to redefine the problem out of existence by claiming that engaging in an abnormally dangerous activity<sup>114</sup> or selling a dangerously defective product<sup>115</sup> does constitute a type of "fault," thus providing an appropriate basis for comparison with plaintiff's fault.<sup>116</sup> Labels cannot substitute for analysis. Nevertheless, the redefinitional approach, carefully elaborated, does at least render intelligible the notion of comparing "fault" in strict liability cases.

The basic premise for comparison requires recognition that "fault," in the legal sense, does not mean moral obloquy, but rather constitutes departure from a legally-mandated standard of conduct.<sup>117</sup> Given that definition of "fault," one may define "comparing fault" to mean a comparison of the extent to which each party deviated from the legal standard applicable to that particular party's conduct.<sup>118</sup> The same legal standards need not apply

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110. See *Feldman v. Lederle Labs*, 97 N.J. 429, 449, 479 A.2d 374, 385 (1984); RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965) (seller of dangerously defective product liable despite having exercised "all possible care" in preparation and sale of product).

111. See *Fischer*, *supra* note 52, at 441-47; *Thode*, *supra* note 55, at 4 n.2, 5; *Note*, *supra* note 14, at 1684-85.

112. See, e.g., *Murray v. Fairbanks Morse*, 610 F.2d 149, 159-61 (3d Cir. 1979) (applying law of Virgin Islands); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427 (Tex. 1984). See also *Twerski*, *supra* note 43, at 826-29.

113. See *Fischer*, *supra* note 52, at 441-47; *Note*, *supra* note 14, at 1684-85. See generally *supra* text accompanying notes 65-88.

114. See RESTATEMENT (SECOND) OF TORTS § 519 (1977).

115. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

116. See, e.g., *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 373-74, 551 P.2d 398, 406, 131 Cal. Rptr. 78, 86 (1976) (Clark, J., dissenting); UNIF. COMPARATIVE FAULT ACT § 1 commissioners' comment, 12 U.L.A. 41 (Supp. 1985); *Fleming*, *Foreword*, *supra* note 17, at 270; *Wade*, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978). Some would argue that even those who "innocently" manufacture a defective product deserve greater blame than do that product's users—however negligent. See, e.g., *Twerski*, *supra* note 43, at 799-801; cf. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 589-90, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978) (arguing that negligent defendants, because they have endangered others, are more blameworthy than negligent plaintiffs, who may have endangered only themselves).

117. PROSSER & KEETON, *supra* note 2, § 75, at 535; accord *J. FLEMING*, *supra* note 53, at 256.

118. See, e.g., *Wing v. Morse*, 300 A.2d 491, 500-01 (Me. 1973); *Pennington v. Norris*, 96 C.L.R. 10 (Austl. 1956); *J. FLEMING*, *supra* note 53, at 256; *G. WILLIAMS*, *supra* note 30, § 98, at 390.



to both parties, as long as one can sensibly compare the extent of the deviations.

### 1. Abnormally Dangerous Activities

Strict liability for abnormally dangerous activity presents the easier context for comparing fault. Not only does this form of strict liability focus on a particular type of conduct, but there is a fundamental similarity between a judgment of negligence and one categorizing a particular activity as "abnormally dangerous." Negligence, as discussed above, is based on a comparison of the risk with the burden to avoid the risk.<sup>119</sup> Section 520 of the *Second Restatement of Torts* lists six factors to consider in determining whether to categorize an activity as "abnormally dangerous":

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.<sup>120</sup>

One can include each of these factors within the negligence calculus.<sup>121</sup> The degree of risk, the gravity of the harm, and the value of the activity are all factors in a determination of negligence.<sup>122</sup> Activities of common usage tend to have either little danger or great value; otherwise, their usage would not be so common. Similarly, an activity that, given its context, a community considers of little danger or of great value, the community will probably also consider in an "appropriate" place.<sup>123</sup> Finally, a requirement that reasonable care could not "eliminate" the risk is no more than a restatement of the proposition that defendant has acted reasonably and yet an accident has occurred. Consequently, all but one of the factors in finding an activity abnormally dangerous, and thus proper for strict liability, are also factors in determining negligence, and the remaining "factor" simply restates the premise that plaintiff needs something more than a standard of "reasonable care" to recover from defendant.<sup>124</sup> A judgment that strict liability is the

119. See *supra* text accompanying notes 50-51.

120. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

121. See *Yukon Equipment, Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1211 (Alaska 1978) (observing that the Restatement's factors "suggest a negligence standard").

122. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 15, § 6.2, at 122; *supra* text accompanying notes 50-51.

123. Cf. Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462, 496 n.246, 497 (1977) (definition of "appropriate place" in first amendment doctrine depends in part on value of that place for free speech purposes).

124. Restatement § 520(c) follows logically from—and adds nothing to—the premise that plaintiff's theory is strict liability. If reasonable care could have "eliminated" the risk, rea-

appropriate legal standard amounts to a conclusion that, for an entire category of conduct, the costs of carrying on that conduct in a particular place outweigh its benefits.<sup>125</sup> Thus, upon close examination, the supposed "conceptual difficulty" of comparing strict liability with negligence vanishes, at least in the context of ultrahazardous activities. To adapt the fault-quotient approach to this context of strict liability, one need only instruct the jury to compare the risks with the benefits of defendant's activity, taking into account the costs to society of defendant's curtailing its activity or conducting that activity in some other location.

## 2. Defective Products

Because of its focus on a defendant's product rather than on defendant's conduct, strict products liability cases present a more difficult problem for comparing fault. Various commentators have suggested methods of comparing fault in strict products liability cases. For instance, a number of writers, finding in comparative fault "a kind of homespun judgment that plaintiff should have his verdict reduced" by an amount reflecting his share of the fault,<sup>126</sup> have suggested that the jury abandon any attempt to assign fault to a strictly liable manufacturer and concentrate on assessing the extent to which plaintiff deviated from the standard of reasonable care.<sup>127</sup> The jury could then derive plaintiff's percentage of fault by assigning her a number on a scale of 0 to 10, with 0 being reasonable care and 10 representing willful self-injury.<sup>128</sup>

This is essentially the unmodified "fault-line" approach described previously,<sup>129</sup> applied to only one party to the case. Not only does the use of this approach here fall prey to the criticisms already noted,<sup>130</sup> but it presents even graver problems here because of its limited application. If, in apportioning liability, one cannot take account of the defendant's fault, one must

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sonable care could have prevented the accident. But a strict liability action assumes both that defendant has acted reasonably and that an accident has occurred. Therefore, any strict liability action necessarily proceeds on the assumption that reasonable conduct would not have sufficed to "eliminate" the risk. Articulating that assumption only restates the obvious: that the theory of plaintiff's action is strict liability. *But see* A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 117-18 (1983); Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980). Professors Polinsky and Shavell would distinguish between activities whose risk can be reduced through greater care and those activities whose risk can be reduced only through reduction in the level of that activity. Such a distinction—whatever its usefulness—is perfectly consistent with the argument that one can employ the same general risk-burden calculus in cases of strict liability as one uses in negligence actions. *See* R. POSNER, TORT LAW, *supra* note 15, at 476-78; Shavell, *supra*, at 22 & n.27.

125. *See* R. POSNER, TORT LAW, *supra* note 15, at 476-78.

126. Twerski, *supra* note 59, at 326.

127. *See id.*; Fischer, *supra* note 52, at 449-50.

128. *See* Sandford v. Chevrolet Div., 292 Or. 590, 608-09, 642 P.2d 624, 634-35 (1982) (citing Pearson, *supra* note 44, at 348).

129. *See supra* text accompanying notes 44-47.

130. *See supra* text accompanying notes 48-49.

ignore the dangerousness of the defendant's product. But surely the manufacturer of a product whose dangers far outweigh its benefits deserves more blame—and should suffer more liability—than should the maker of a product for which the balance comes closer to equivalence.<sup>131</sup> Indeed, the exclusive focus on plaintiff's conduct may produce perverse results: as the danger posed by a product increases, the same conduct with regard to that product becomes more and more unreasonable.<sup>132</sup> But unless jurors consider the fault of the manufacturer, they will allocate larger shares of the fault to plaintiffs injured by more dangerous products, thus assuring that manufacturers of the most dangerous products will pay proportionately the least in damages.<sup>133</sup>

To avoid this conundrum, a system of comparative fault covering strict liability should require a true comparison of fault between negligent plaintiffs and strictly liable defendants. But because of the policies of strict liability,<sup>134</sup> courts should take exceeding care in instructing the jury as to what constitutes "fault" on the part of the manufacturer of a defective product. In particular, it would defeat the purpose of strict liability to permit the manufacturer of a defective product, by introducing evidence of its reasonable care, to obtain apportionment of a relatively small share of the fault.<sup>135</sup> Indeed, it is theoretically possible that, by introducing compelling evidence of reasonable care, a manufacturer could obtain an allocation of no fault at all.<sup>136</sup> One can only sympathize with the confusion of lay jurors told by the judge that, while they may consider defendant's reasonable care, they must allocate defendant some non-zero percentage of fault.

The Oregon Supreme Court has attempted to solve this problem by modifying the fault-line approach to apply to strict products liability cases.<sup>137</sup> Under the modification, the trial judge must instruct the jury to compare plaintiff's conduct with that of a reasonable person, assigning plaintiff a number on a scale of 0 to 10. The jury must then compare defendant's

131. [A]n automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence . . . , properly be held to a greater measure of fault than another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.

UNIF. COMPARATIVE FAULT ACT § 2 commissioners' comment, 12 U.L.A. 44 (Supp. 1985); see also Twerski, *supra* note 59, at 329 (noting that "a bad defect most probably stems from serious fault").

132. See *supra* text accompanying notes 50-51.

133. Exclusive focus on plaintiff's fault also makes it all-too-likely that victims of the most dangerous products will be allocated more than 50% of the fault—fatal to recovery in well over half the states with comparative fault. See generally Sobelsohn, *supra* note 14.

134. See *infra* text accompanying notes 166-97.

135. But see Wade, *supra* note 116, at 378 (suggesting relevance of "the nature of the [manufacturer's] spot-checking" in "determining the respective percentages of fault" in strict liability actions).

136. It seems quite probable that the manufacturer could at least persuade the jury to allocate it less than 50% of the total fault—a result that, in many of the "modified" jurisdictions, would have the same effect as an allocation of 0%. See Fischer, *supra* note 52, at 434, 441, 443, 450. See generally Sobelsohn, *supra* note 14.

137. Sandford v. Chevrolet Div., 292 Or. 590, 642 P.2d 624 (1982).

product with a product that would not have been defective, assigning the defective product a number on a scale of 0 to 10.<sup>138</sup> As with the "fault-line" approach discussed earlier,<sup>139</sup> the jury then adds the two numbers and, by dividing each party's fault number into the total, determines each party's percentage of fault.<sup>140</sup>

Although the Oregon court's approach makes a great deal of sense, it has some drawbacks. First, as to plaintiff, the Oregon approach, like the basic fault-line approach, erroneously assigns a paramount and undeserved position to one single factor—state of mind.<sup>141</sup> Moreover, as to defendant, the Oregon modification is simply unintelligible. Neither the "product" equivalent of intentional misconduct nor what qualifies a defective product for a "10" is intuitively obvious. Finally, the Oregon approach leaves no room for considering a manufacturer's conduct aside from its bare manufacture and sale of the product. But surely a manufacturer proven to have sloppy inspection practices deserves a greater share of fault than a manufacturer with excellent but unavoidably imperfect quality control.<sup>142</sup>

The problem of comparing fault in strict products liability cases can be resolved, but only by carefully considering the different types of products liability actions. Easiest are the design-defect cases.<sup>143</sup> Whether a product has a defective design generally turns on the extent to which the design's risks outweigh its benefits.<sup>144</sup> Such a calculation is identical to the calculation employed to determine negligence; thus, one can easily adapt the fault-quotient approach to design-defect cases.<sup>145</sup>

A more sophisticated analysis would divide design-defect cases into two categories: first, cases in which a reasonable manufacturer could have fore-

138. *Id.* at 609 n.19, 642 P.2d at 635 n.19.

139. *See supra* text accompanying notes 44-49.

140. *Sandford v. Chevrolet Div.*, 292 Or. 590, 609 n.19, 642 P.2d 624, 635 n.19 (1982).

141. *See Thode, supra* note 55, at 11 (in comparing fault in products cases, the plaintiff's percentage of fault "should not vary according to whether the plaintiff's conduct was intentional or merely negligent"); *cf. supra* text accompanying notes 48-49 (discussing basic fault-line approach). Professor Thode, although rejecting any consideration of state of mind, makes a mistake similar to that of the proponents of the fault-line approach: Thode would place exclusive emphasis on risk and ignore the burden required of the parties to avoid that risk. *See Thode, supra* note 55, at 9. *But see id.* at 13 (arguing that "plaintiff should be entitled to establish an excuse . . . for the knowing use of a defective product").

142. *See, e.g., Wade, supra* note 116, at 378. *See also Thode, supra* note 55, at 12-13 (factfinder should disregard fault of plaintiff who proves manufacturer negligent). This is not to say that a manufacturer should have the right to open up the issue of its reasonable care in an attempt to reduce its percentage of fault; rather, the option of introducing the issue of negligence should belong solely to plaintiff. *See supra* notes 135-36 and accompanying text; *infra* note 150.

143. *See, e.g., Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). As used in this article, the category "design defects" includes cases of inadequate instructions or warnings. *See Feldman v. Lederle Labs.*, 97 N.J. 429, 449, 479 A.2d 374, 385 (1984).

144. The California Supreme Court calls this a design's "excessive preventable danger." *See Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978).

145. With " $P_D \times L_D$ " as the risk and " $B_D$ " as the benefits of the allegedly defective design, one can revise the formula set forth *supra* note 58 as follows (" $A$ " is the accident victim):

seen the dangers of the product design,<sup>146</sup> and, second, cases in which the dangers became knowable only after the product was on the market.<sup>147</sup> The cases in the first group are, essentially, negligence cases:<sup>148</sup> a product design is defective when its risks outweigh its benefits; if those risks were foreseeable, the manufacturer was negligent.<sup>149</sup> In what are essentially negligence cases, there is no reason to focus on the product and thereby lose the advantage of having the manufacturer's allocation of fault reflect such factors as the company's awareness of the risk or greater expertise. By contrast, cases in which the manufacturer incurs liability for a design whose dangers became known only after marketing are true strict liability cases, in which a focus on the reasonableness of the manufacturer's conduct might well lead to a finding of minimal or even no liability. In those cases, focus on the product alone is appropriate.

In design-defect cases in which the parties dispute the issue of foreseeability, the court can effect the dichotomy between "negligence" design cases and "strict liability" design cases through instructions to the jury. If the manufacturer is found negligent, the jury should then proceed to compare the parties' fault, focusing on each party's overall conduct. On the other hand, if the jury finds the manufacturer not negligent but the product

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$$\begin{array}{l} \text{PERCENTAGE FAULT} \\ \text{OF} \\ \text{ACCIDENT VICTIM} \end{array} = \frac{\frac{P_A \times L_A}{B_A}}{\frac{P_A \times L_A}{B_A} + \frac{P_D \times L_D}{B_D}}$$

In assessing the overall risks of a product design, the factfinder should consider the risks to all foreseeable victims of that design. See Thode, *supra* note 55, at 12; *cf. supra* note 55 (discussing basic fault-quotient approach).

146. See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

147. See *Hayes v. Ariens Co.*, 462 N.E.2d 273, 277-78 (Mass. 1984); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434 (Mo. 1984); *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). Commentators have criticized decisions holding manufacturers liable for product designs of whose dangers even a reasonable manufacturer would not have known before the injury. See, e.g., V. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901-05 (1983); Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983). Indeed, at least one court has retreated from a prior decision suggesting the propriety of strict liability for dangers "knowable" only after sale of the product. See *Feldman v. Lederle Labs.*, 97 N.J. 429, 452, 479 A.2d 374, 386 (1984) (restricting *Beshada* to "the circumstances giving rise to its holding"). Such criticism seems misconceived. If only those dangers a manufacturer could have foreseen are relevant to determining whether a product design was defective, strict liability in design-defect cases is functionally equivalent to negligence. See *infra* notes 148-49 and accompanying text. Thus, those who argue against holding manufacturers liable for "unknowable" design dangers are, in reality, simply arguing against imposition of strict liability in design-defect cases. See generally Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 877-82 (1983).

148. *But cf. Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978) (shifting burden of proof in design cases brought under theory of strict liability); *Feldman v. Lederle Labs.*, 97 N.J. 429, 455-56, 479 A.2d 374, 388 (1984) (same).

149. See *Wade, supra* note 105, at 835, 836.

defective anyway, then, in comparing the parties' fault, the jury should focus, as to the manufacturer, solely on the defective product.

Some manufacturing-defect cases present little difficulty. These are cases in which plaintiff has some specific evidence of negligence in the defective product's manufacture (for example, negligent failure to inspect properly). When the evidence in such a case persuades the jury of defendant's negligence, the case can be treated as a design-negligence case, with the jury comparing the parties' overall conduct.

But in many cases of manufacturing defect, the plaintiff presents no specific evidence of negligence, and the case goes to the jury on a theory of strict liability.<sup>150</sup> Because it would defeat the purpose of strict products liability to require a jury to consider the reasonableness of the manufacturer's conduct, in these cases the court should instruct the jury to focus on the defective nature of the product.<sup>151</sup> But although focusing on the product allows an assessment of its defect's overall danger, a product focus makes it impossible to assess either the level of precaution taken by the manufacturer or the cost of any precautions not taken. Indeed, to the extent strict liability in manufacturing-defect cases differs at all from negligence, the difference consists at least partly in the irrelevance, under strict liability, of the cost to the manufacturer of avoiding the accident.<sup>152</sup> Consequently, if fault cannot be allocated without considering each party's cost of avoiding the accident, it will be difficult to derive a fault quotient for the producer of a defectively manufactured product.

To resolve this dilemma, however, requires only slight modification of the fault-quotient approach. Most products, even when not defective, carry a certain degree of danger to life and limb.<sup>153</sup> In manufacturing-defect cases, then, instead of comparing the risk of injury to the cost of avoiding that injury, one may compare the risk of injury from a defectively manufactured

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150. For reasons already discussed, *see supra* notes 135-36 and accompanying text, the plaintiff should have the right, by not raising the issue of the manufacturer's negligence, to prevent introduction of evidence of the manufacturer's reasonable care. *Cf. Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 437 (Mo. 1984) (en banc) ("It is a plaintiff's prerogative to choose the theory upon which he will submit his case . . ."); *see id.* at 438 (manufacturer's reasonableness not relevant to strict liability).

151. *See supra* text accompanying notes 135-36.

152. This has sparked much of the criticism of strict liability. *See, e.g., R. POSNER, ECONOMIC ANALYSIS, supra* note 15, § 6.10, at 139.

153. *Cf. Fleming, Report, supra* note 17, at 1474 (discussing concept of "enterprise risk" in German accident law). For example, although over 50,000 deaths occur annually on our highways, *see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984*, at 78 (104th ed.) (Table No. 109) (reporting 53,200 auto accident deaths in 1980), no one suggests that most of these accidents result from defectively manufactured automobiles; automobiles simply present grave dangers even when perfectly manufactured. *See also Note, Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984) (arguing against imposition of strict liability on manufacturers of products perfectly manufactured but whose norm is danger).

product with the risks inherent in such a product *without the defect*. For example, even a perfectly made power saw carries certain hazards. The fault quotient for the manufacturer of a defective power saw would be the ratio of the risks posed by the saw *with the defect* to the risks *inherent* in the use of a power saw.<sup>154</sup> To derive fault percentages in a manufacturing-defect case, one need only use the fault-quotient formula, with "risks of a well-made product" substituted, on the manufacturer's side of the comparison, for "burden to avoid the injury."<sup>155</sup> This approach should greatly ease the comparison of fault-in manufacturing-defect cases.

## II. WHEN

Despite Justice Holmes's famous dictum,<sup>156</sup> the law need not do "all that it can." In particular, the feasibility of making a precise comparison of fault, and of deriving percentages of fault from that comparison, does not inexorably lead to application of a comparative fault principle to all tort actions. Both the type of action<sup>157</sup> and the type of injury suffered<sup>158</sup> may affect the applicability of comparative fault.

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154. See *Sandford v. Chevrolet Div.*, 292 Or. 590, 607-10, 642 P.2d 624, 633-35 (1982) (manufacturer's fault in strict products liability case assessed by comparing defective product with well-made product).

155. If one uses " $P_D \times L_D$ " to represent the overall risk of a defective product, and " $P_W \times L_W$ " to represent the overall risk of a well-made product, one can revise the formula set forth *supra* note 58 as follows ("A" is the accident victim):

$$\begin{array}{l} \text{PERCENTAGE FAULT} \\ \text{OF} \\ \text{ACCIDENT VICTIM} \end{array} = \frac{\frac{P_A \times L_A}{B_A}}{\frac{P_A \times L_A}{B_A} + \frac{P_D \times L_D}{P_W \times L_W}}$$

One might object to this formula as resulting in a greater allocation of fault to the manufacturer of a product with few inherent dangers than to the manufacturer of an inherently dangerous product such as an automobile. There are several responses to such an objection. First, consideration of the seriousness of the likely injury might well render the manufacturer of a defective automobile far more at fault than the manufacturer of, for example, a defective beer bottle. Second, even a well-manufactured beer bottle carries potential for danger. Indeed, most products can be made dangerous by the right (or wrong) kind of use after their sale—even a chair can collapse if abused by its owner. Finally, products that carry extreme danger even when well-made, such as automobiles, generally induce an extreme degree of caution in their users, which itself reduces the risk of injury. By contrast, the manufacturer of a defective product that is normally risk-free has violated the consumer's safety expectations to a greater degree than has the manufacturer of a defective automobile, and thus deserves a greater degree of blame. See generally Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370 (1974) (arguing that products liability cases should focus on seller's portrayal of product to consuming public).

156. See *Buck v. Bell*, 274 U.S. 200, 208 (1927) ("the law does all that is needed when it does all that it can").

157. See *infra* text accompanying notes 159-213.

158. See *infra* text accompanying notes 214-38.

### A. Type of Action

An action based on negligence is the paradigm case for application of comparative fault principles. Indeed, many works on comparative fault use the term "comparative negligence," even while approving application of comparative fault principles outside the negligence area.<sup>159</sup>

#### 1. Strict Liability

The extension of comparative fault to actions based on strict liability has generated the most controversy. Although the vast majority of states<sup>160</sup> and commentators<sup>161</sup> have approved such an extension, there are cogent arguments against comparing fault in strict liability actions.

The most frequently raised argument against comparing fault in strict liability cases is that one cannot, in any rational way, compare negligent behavior with conduct triggering strict liability.<sup>162</sup> If there is no rational way to compare the two types of conduct, any jury allocation of fault in strict liability cases is necessarily arbitrary.<sup>163</sup> This argument, however, is refuted by the fault-quotient approach,<sup>164</sup> a principled method of "comparing" negligence with strict liability and of deriving fault percentages in strict liability cases. Thus, whether plaintiff's conduct should reduce her recovery in a strict liability action ultimately rests not on supposed "conceptual" difficulties, but on questions of public policy.<sup>165</sup> Resolving these questions requires discussion of the major substantive justifications for strict liability.

One of those justifications is a manufacturer's ability to insure against accidents and to spread the cost among the public as part of the price of its products.<sup>166</sup> To the extent that it diminishes plaintiff's recovery, com-

159. See, e.g., V. SCHWARTZ, *supra* note 11, § 12.6, at 200 (strict liability); Note, *supra* note 14, at 1682 ("willful and wanton misconduct"). On the distinction between "comparative fault" and "comparative negligence," see Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV. 925, 927 (1984); Comment, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399, 399 n.1 (1982).

160. See *Coney v. J.L.G. Indus., Inc.*, 97 Ill. 2d 104, 112-14, 454 N.E.2d 197, 201 (1983) (citing cases); *supra* note 97.

161. See Fischer, *supra* note 52, at 432 & n.11; Note, *Comparative Negligence and Strict Products Liability*, 1978 ANN. SURV. AMER. L. 577, 579 & n.12.

162. See *supra* notes 100-03 and accompanying text.

163. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 756, 575 P.2d 1162, 1181, 144 Cal. Rptr. 380, 399 (1978) (Jefferson, J., dissenting); Epstein, *supra* note 30, at 109; H. Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 356 (1977) (comparative fault in strict liability action places "impossible demand" on jury).

164. See *supra* text accompanying notes 114-55.

165. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 737, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978); *Kaneko v. Hilo Coast Processing*, 65 Hawaii 447, 461, 654 P.2d 343, 352 (1982); Fleming, *Report, supra* note 17, at 1474.

166. See, e.g., *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). See generally G. CALABRESI, *THE COSTS OF ACCIDENTS* 50-51 (1970); PROSSER & KEETON, *supra* note 2, § 98, at 692-93.



parative fault obviously impairs this loss-spreading function.<sup>167</sup> Responding to this argument, one commentator has wondered why it is "desirable to transfer to the other users of the product—all innocent—the cost of that part of plaintiff's injury that is attributable to his own fault."<sup>168</sup> The answer is that such transference is desirable for the same reason spreading the loss is desirable when plaintiff has not been negligent.<sup>169</sup> "Those who suffer injury from defective products are unprepared to meet its consequences,"<sup>170</sup> regardless of whether they suffered that injury in part from their own carelessness. The superior ability of manufacturers to predict and insure against accidental injuries caused by defects in their products does not fluctuate depending upon the degree of fault one can ascribe to persons injured by those products. Consumers generally do not plan on being careless.<sup>171</sup>

A second important policy behind strict liability is accident avoidance, or "deterrence."<sup>172</sup> "It is to the public interest to discourage the marketing of products having defects that are a menace to the public,"<sup>173</sup> defects against which consumers typically "are powerless to protect themselves."<sup>174</sup> By reducing the liability of a defective product's manufacturer in cases in which plaintiff has been negligent, comparative fault will reduce that manufacturer's incentive to produce a safe product.<sup>175</sup>

The California Supreme Court, in holding comparative fault applicable to strict liability actions, considered this argument to have "more shadow than substance," finding that comparative fault would result in "no substantial or significant impairment of the safety incentives" of manufacturers.<sup>176</sup> The court reasoned that, even with comparative fault, manufacturers

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167. See O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L.F. 591, 594-96; V. SCHWARTZ, *supra* note 11, § 12.6, at 206 (calling this a "fundamental argument against" comparing fault in strict liability actions).

168. Wade, *supra* note 116, at 379.

169. See O'Connell, *supra* note 167, at 595-96.

170. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

171. A small exception must be conceded for those users so prone to accidents that they can more precisely predict their own chance of injury than could the manufacturer. But most accidents are not caused by such accident-prone persons. See G. SCHWARTZ, *supra* note 4, at 715 & sources cited n.80; see also A. POLINSKY, *supra* note 124, at 102 (noting that consumers who underestimate the risk of accident may not insure against that risk).

172. See generally G. CALABRESI, *supra* note 166, at 68-75; PROSSER & KEETON, *supra* note 2, § 98, at 693.

173. *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

174. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

175. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 764, 575 P.2d 1162, 1186, 144 Cal. Rptr. 380, 404 (1978) (Mosk, J., dissenting); Twerski, *supra* note 43, at 801-02.

176. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 737-38, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978). For a discussion of the impact of the *Daly* decision, see Woods, *supra* note 97, at 362-64.

would still incur liability for defective products; that "a manufacturer, in a particular case, cannot assume that the user of a defective product upon whom an injury is visited will be blameworthy"; and that, without its merger into comparative fault, the doctrine of assumption of the risk would encourage manufacturers to produce obviously defective products, which would cause a manufacturer's incentives to be "inverted."<sup>177</sup>

But the California court's argument collapses under close examination. No doubt manufacturers will still incur some liability under comparative fault, just as they incurred liability for negligence before the adoption of strict liability.<sup>178</sup> But comparative fault will clearly reduce that liability, and thus—to the extent of the reduction—reduce the manufacturer's incentive to produce a safe product.<sup>179</sup> Of course, no one in any given case can predict whether a particular consumer will be negligent, but the incentives of strict liability do not operate on a case-by-case basis; they operate on the aggregate of cases resulting from the manufacture of a defective product. For example, suppose a product results in accidents costing about \$1 million. To redesign the product would cost about \$900,000. Imposing the full costs of the accidents on the manufacturer will cause the manufacturer, as a matter of economics, to redesign the product, thus netting the manufacturer and society a savings of \$100,000. But the manufacturer can predict that, over the long run, a certain percentage of consumers will negligently contribute to their own injuries while using the product.<sup>180</sup> With comparative fault in effect, this consumer negligence will reduce the manufacturer's liability, perhaps to less than \$900,000. It will now be cheaper for the manufacturer to pay tort claims than to redesign the product, and society will have lost the savings that a redesigned product would have generated.

The court's argument concerning assumption of risk also has serious flaws. First, the argument rests on the premise that, without adoption of comparative fault, assumption of risk would remain as a bar to recovery in strict liability cases.<sup>181</sup> But this assumes at least a partial answer to the question of the proper role of plaintiff's misconduct in an action founded on strict liability—the very question under consideration.<sup>182</sup> Moreover, there is nothing

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177. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 737-38, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978).

178. *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

179. Twerski, *supra* note 43, at 802.

180. For example, the incidence of drunk driving in this country, *see Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979), makes consumer negligence an easy prediction for an automobile manufacturer.

181. This is true also of the argument that retaining the doctrine of assumption of the risk instead of adopting comparative fault would require the drawing of "shadowy lines" and result in a "tremendous amount of litigation." V. SCHWARTZ, *supra* note 11, at §§ 12.5, at 201, & 12.6, at 205; *cf. Wade, supra* note 116, at 387-88 (rejecting, on similar grounds, suggestion that only when plaintiff has responsibility for product safety should plaintiff's contributory fault reduce his or her recovery). *See generally* Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872 (1982).

182. *Compare, e.g.,* RESTATEMENT (SECOND) OF TORTS § 402A comment n, at 356 (1965) (assumption of risk complete defense to strict liability) *with* Note, *supra* note 181 (arguing

“inverted” in encouraging manufacturers to make the dangers of their products so obvious that consumers can consciously choose whether to encounter those dangers; this allows risk-preferring consumers to “trade on their taste” for risk<sup>183</sup> and, indeed, underlies every ruling of liability for failure to warn.<sup>184</sup>

The problems with the California Supreme Court’s assumption of risk argument raise probably the most widely held theory of why comparative fault will not increase the incidence of injuries caused by defective products: adoption of comparative fault will give product users the incentive to protect themselves, since they will know that their own lack of care will reduce their recovery should they suffer injury. This incentive should keep the number of accidents to a minimum.<sup>185</sup>

against retention of the doctrine). Cf. O’Connell, *supra* note 167 (proposing general abolition of defenses based on accident victim’s conduct).

A similar mistake is made by those who argue that, because plaintiffs in products liability cases commonly allege both negligence and strict liability, and because comparative fault will apply to plaintiff’s negligence action, it would be “anomalous” and cause confusion not to apply comparative fault also to plaintiff’s strict liability action. See, e.g., *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 46 (Alaska 1976); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 424-28 (Tex. 1984); Smith & Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, 989 (1984); Wade, *supra* note 116, at 379; Woods, *Comparative Fault and Product Liability in Indiana*, 17 IND. L. REV. 999, 1024-26 (1984). See also Note, *Use of the Comparative Negligence Doctrine in Warranty Actions*, 45 OHIO ST. L.J. 763, 787 (1984) (making same argument for applying comparative fault in products liability actions for breach of implied warranty). This argument assumes that comparative fault should apply to the products liability action for negligence. Cf. Thode, *supra* note 55, at 13 (proposing that products liability plaintiff’s negligence reduce her recovery only in her action for strict liability but not when plaintiff has proven manufacturer negligent). Moreover, strict products liability was originally proposed precisely because of the difficulties of a negligence action. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). It undermines this rationale to limit plaintiff’s recovery in strict liability simply because recovery would also be limited under a negligence theory.

183. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 15, § 6.6, at 128; see Note, *supra* note 181, at 877-78. For criticism of the proposition that barring consumer recovery for injuries caused by obvious defects allows consumers to express a preference for risk, see *id.* at 878-82.

184. See, e.g., *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 129-30 (9th Cir. 1968).

185. See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 737, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978); Analysis of Model Uniform Product Liability Act § 111[A], 44 Fed. Reg. 62,735 (Dep’t of Com. 1979); Epstein, *supra* note 30, at 103-07; Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 658 (1978); Fischer, *supra* note 52, at 433; Note, *supra* note 14, at 1686; cf. *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1432-33 (5th Cir. 1983) (admiralty case). A related argument is that failing to consider consumer negligence in products liability cases “causes inefficiency because manufacturers must include in their cost calculus those accident costs caused by negligent use even when such accidents could have been avoided more cheaply by product users than by the product manufacturer.” Smith & Wade, *supra* note 182, at 989 (footnote omitted); cf. *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1432 (5th Cir. 1983) (admiralty law). This argument has at least two major flaws. First, comparative fault does not allow manufacturers to remove from their “cost calculus” accidents the consumer could have more cheaply avoided—indeed, some commentators see this as a major weakness of comparative fault (and a reason to retain the common law rule of contributory negligence). See, e.g., R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 15, § 6.3, at 124; R. POSNER, *TORT LAW*, *supra* note 15, at 337-38; Demsetz, *supra* note 15, at 27. The second problem with the argument is that it assumes that comparative fault will induce consumer carefulness. See A. POLINSKY, *supra* note 124, at 102. The soundness of this assumption is discussed below. See *infra* text accompanying notes 186-93.

Whether one takes this argument seriously depends on one's view of the causes of human behavior in the face of the risk of personal injury—whether one thinks it realistic to expect that a product user, faced with the prospect of losing a limb or his life through carelessness, will carefully weigh the additional risk of losing part of a money judgment should an accident occur.<sup>186</sup> Note that this risk rests on multiple contingencies: that an accident will occur; that the victim will suffer injuries serious enough to result in financial loss requiring compensation; that the product will prove to have been defective;<sup>187</sup> that the product's manufacturer will be both solvent and subject to service of process; that the manufacturer's attorney will learn of the victim's carelessness; and that, some years down the road, a jury will consider that carelessness sufficiently serious to warrant substantial reduction of plaintiff's recovery.<sup>188</sup> Add to this the probability that the victim has first-party insurance for her most pressing medical needs<sup>189</sup> and that she knows next to nothing about tort law,<sup>190</sup> and perhaps there is room for skepticism that adoption of comparative fault will induce consumers to handle products with care lest their recovery be reduced.<sup>191</sup> If criminal law scholars recognize the simple behavioral principle that punishment, to be effective, must be both certain<sup>192</sup> and reasonably swift,<sup>193</sup> then it is time for tort scholars to acknowledge that principle as well.

In sum, the policies underlying strict liability do not support—and, in fact, cut against—applying comparative fault to strict liability actions.<sup>194</sup> Perhaps not surprisingly, then, the final argument for extending comparative fault to this class of cases rests on the principle of justice. Comparative

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186. See O'Connell, *Elective No-Fault Insurance for Many Kinds of Accidents: A Proposal and an "Economic" Analysis*, 42 TENN. L. REV. 145, 153-54 (1974); O'Connell, *supra* note 167, at 593; G. Schwartz, *supra* note 4, at 710-12, 716-17.

187. Tort rules can affect a potential accident victim's safety incentives "only to the extent that the potential victim can predict that his injury will occur in circumstances indicating the tort liability of some other party." G. Schwartz, *supra* note 4, at 711.

188. These multiple contingencies distinguish the effect of adopting comparative fault from the effect of lowering the speed limit to 55 miles per hour, an analogy raised in Epstein, *supra* note 30, at 104. The behavioral effect of a change in the speed law—which is generally well publicized and known to all motorists—rests on only one real contingency: the risk of being caught.

189. See O'Connell, *supra* note 167, at 593.

190. See J. O'CONNELL & W. WILSON, *CAR INSURANCE AND CONSUMER DESIRES* 12-13 (1969).

191. Cf. G. Schwartz, *supra* note 4, at 719 (noting that, after workers' compensation laws abolished defense of contributory negligence, accident rate declined).

192. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 44 (1968).

193. See C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 192 and sources cited n.34 (1978).

194. Some commentators would reconcile the tension between comparative fault and the policies underlying strict products liability by limiting the kind of negligent consumer conduct the factfinder could consider in reducing a product plaintiff's recovery. See, e.g., Thode, *supra* note 55, at 11 (factfinder should disregard plaintiff's negligent failure to discover the product's defect); Twerski, *supra* note 43, at 817-18 (factfinder should consider only plaintiff's negligent "misuse" of the product or her failure to maintain the product in proper repair). These commentators fail to recognize that *any* consideration of plaintiff's fault in products liability cases weakens the policies underlying strict products liability.

fault is said to be the "fairest way" of dealing with plaintiff's negligence in a products liability action.<sup>195</sup> As one commentator has put it, consumers also have "certain basic obligations that should . . . not be negated."<sup>196</sup> Those who would reduce a negligent plaintiff's recovery in strict liability cases in essence believe that negligent accident victims, at least in part, deserve their misfortune, and therefore should be made to suffer for it. Whether the importance of appeasing this retributive sentiment, against someone who by definition may have endangered only himself, justifies rendering accident victims destitute for want of compensation for their injuries is a fundamental issue of tort law and morality each individual must decide for herself.<sup>197</sup>

## 2. Intent and Recklessness

At the opposite extreme from strict liability lie cases in which defendant has injured plaintiff intentionally or through recklessness. At common law, a plaintiff's contributory fault had no effect on her recovery for intentional or reckless misconduct.<sup>198</sup> As Dean Prosser explained, common law courts considered intentional or reckless misconduct "differ[ent] from negligence not only in degree but in kind, and in the social condemnation attached to it."<sup>199</sup>

Even with the adoption of comparative fault, courts have generally maintained the distinction between intentional torts and negligence and have refused to apportion damages.<sup>200</sup> But many courts show no reluctance to

195. PROSSER & KEETON, *supra* note 2, § 102, at 712; *accord* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978); Kaneko v. Hilo Coast Processing, 654 P.2d 343, 352 (Hawaii 1982); Seay v. Chrysler Corp., 93 Wash. 2d 319, 326, 609 P.2d 1382, 1386 (1980) (Utter, C.J., dissenting); *see* Fleming, *Report*, *supra* note 17, at 1476; Twerski, *supra* note 59, at 326 ("equity and justice"). *See also* Note, *supra* note 181, at 887 (compared to instrumental arguments, "principles of fairness may better explain the continued vitality of the doctrine of assumption of risk in the products area").

196. Wade, *supra* note 116, at 388.

197. For general discussion of the role of retribution in tort law, *see* Blum & Kalven, *The Empty Cabinet of Dr. Calabresi—Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, 268-69 (1967); Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U.L. REV. 855 (1953); Linden, *Faulty No Fault: A Critique of the Ontario Law Reform Commission Report on Motor Vehicle Accident Compensation*, 13 OSGOODE HALL L.J. 449, 456-58 (1975). For an argument that fairness considerations do not justify retention of the defense of assumption of the risk in products cases, *see* Note, *supra* note 181, at 887-90. This argument applies equally as well to the doctrine of comparative fault.

198. *See* RESTATEMENT (SECOND) OF TORTS §§ 481, 482, 503 (1965); Note, *supra* note 14, at 1681.

199. PROSSER & KEETON, *supra* note 2, § 65, at 462.

200. *See, e.g.*, Munoz v. Olin, 76 Cal. App. 3d 85, 142 Cal. Rptr. 667 (1977); Finnigan v. Sandoval, 600 P.2d 123 (Colo. Ct. App. 1979); Stephan v. Lynch, 136 Vt. 226, 230, 388 A.2d 376, 379 (1978). *But see* Comeau v. Lucas, 90 A.D.2d 674, 455 N.Y.S.2d 871 (1982) (comparing fault in action for assault). *See generally* H. Woods, *supra* note 11, § 7.1, at 46-47 (Supp. 1983); Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations*, 24 SANTA CLARA L. REV. 1 (1984); McNichols, *Should Comparative*

diminish a negligent plaintiff's recovery from a reckless defendant under comparative fault.<sup>201</sup> As Professor Fleming points out, the claim "that recklessness or willful misconduct is fault of a different kind rather than degree was merely a rhetorical device which is no longer necessary to do justice in this situation."<sup>202</sup> Under a system of comparative fault, juries can be trusted to allocate the lion's share of the blame to parties previously singled out as "reckless";<sup>203</sup> the common law rule has become "an overcure."<sup>204</sup>

Under comparative fault, however, an airtight categorical distinction between recklessness and intent no longer makes sense. Although, as a general matter, those who commit intentional torts have a rather weak moral claim to have their fault compared with that of their victims,<sup>205</sup> "in many intentional torts the element of intention is severely attenuated."<sup>206</sup> A tort called "intentional" may involve "simply a conflict between legitimate activities."<sup>207</sup> Our legal system should not judge the landowner protecting his property<sup>208</sup> or the surgeon operating reasonably but beyond her patient's express consent<sup>209</sup> by the same standards applicable to a person who deliberately spits in another's face.<sup>210</sup> Moreover, intentional and reckless conduct differ principally in the probability of injury;<sup>211</sup> it is therefore somewhat incongruous to draw a sharp and inviolable line between the two for the purpose of apportioning damages. Finally, if juries can be trusted to allocate most of the fault to a party guilty of conduct deemed "reckless,"<sup>212</sup> they can be trusted to do the same when one of the parties has caused harm intentionally. Consequently, rather than bar comparative fault in all cases of intentional tort, a comparative fault

*Responsibility Ever Apply to Intentional Torts?*, 37 OKLA. L. REV. 641 (1984); Note, *supra* note 14, at 1680.

201. See, e.g., *Amoco Pipeline Co. v. Montgomery*, 487 F. Supp. 1268 (W.D. Okla. 1980); *Zavala v. Regents of the Univ. of California*, 125 Cal. App. 3d 646, 178 Cal. Rptr. 185 (1981); *Bielski v. Schulze*, 16 Wis. 2d 1, 14-19, 114 N.W.2d 105, 111-14 (1962). *Contra*, e.g., *Draney v. Bachman*, 139 N.J. Super. 503, 351 A.2d 409 (1976); *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979). See generally Comment, *supra* note 159.

202. Fleming, *Report*, *supra* note 17, at 1478; accord *Bielski v. Schulze*, 16 Wis. 2d 1, 17, 114 N.W.2d 105, 113 (1962) (finding that distinction "no longer fulfills a purpose in comparative negligence").

203. Note, *supra* note 14, at 1682. See also V. SCHWARTZ, *supra* note 11, § 5.3, at 108 ("the core of comparative negligence is full apportionment on the basis of fault").

204. Wade, *What Should It Provide?*, *supra* note 17, at 226 (quoting draft of commissioners' comment to § 1 of Uniform Act).

205. Note, *supra* note 14, at 1681; see McNichols, *supra* note 200, at 681.

206. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 15, § 6.1, at 119; see McNichols, *supra* note 200, at 689 (suggesting extension of comparative fault to cases of "technical battery" or "where defendant intends an invasion of plaintiff's interests but is incapable of appreciating its wrongfulness or foreseeing its harmful consequences").

207. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 15, § 6.1, at 120.

208. See, e.g., *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971), discussed in McNichols, *supra* note 200, at 695-96 (proposing application of comparative fault).

209. See, e.g., *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905).

210. See, e.g., *Alcorn v. Mitchell*, 63 Ill. 553 (1872).

211. See PROSSER & KEETON, *supra* note 2, § 8, at 36.

212. See *supra* text accompanying note 203.

system should at least permit the court, in individual cases, to instruct the jury to compare the parties' fault.<sup>213</sup>

### B. Type of Injury

Comparative fault principles typically apply to actions to recover damages for personal injury.<sup>214</sup> But tort actions can involve other types of harm, including economic<sup>215</sup> or emotional harm.<sup>216</sup> Nevertheless, some comparative fault statutes apply only to actions arising "from injury to persons or damage to property,"<sup>217</sup> a phrase courts might well construe as limited to "physical harm."<sup>218</sup>

To the extent such statutes assure the inapplicability of comparative fault principles to ordinary breach of contract actions, the limitation makes sense. Contract negotiations provide an opportunity for parties to "bargain and allocate risks and duties";<sup>219</sup> courts should hold the parties to that allocation, regardless of foreseeable carelessness by the party damaged.<sup>220</sup>

But there is no compelling reason to exclude other actions, more typically sounding in tort, simply because plaintiff seeks recovery for economic harm or emotional distress. For example, the *Second Restatement of Torts* expressly recognizes the tort of negligent misrepresentation,<sup>221</sup> and negligence

213. See McNichols, *supra* note 200, at 698 (proposing "case-by-case determinations" of comparative fault, reducing recovery only of a plaintiff deemed more at fault than defendant); cf. Dear & Zipperstein, *supra* note 200, at 39 (urging application of comparative fault principles to cases of intentional nuisance). The Uniform Comparative Fault Act appears to adopt the case-by-case approach. Although, by its terms, the Act does not apply to cases of intentional tort, UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 41 (Supp. 1985) (definition of fault); see *id.* commissioners' comment, at 41, the Act was drafted so as not to preclude a court, as a matter of common law, from applying comparative fault to a case of intentional tort if the court "determin[ed] that the general principle [of comparative fault] should apply." *Id.* See generally Sobelsohn, *The Uniform Comparative Fault Act*, in 3 COMPARATIVE NEGLIGENCE 19-31 to -33 (1984).

214. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (automobile collision).

215. See, e.g., *White v. Guarente*, 43 N.Y.2d 356, 361-62, 372 N.E.2d 315, 318-19, 401 N.Y.S.2d 474, 477-78 (1977) (negligent misrepresentation).

216. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

217. CONN. GEN. STAT. ANN. § 52-572h (Supp. 1984); accord, e.g., IND. CODE § 34-4-33-1(1)(a) (Supp. 1984) ("injury or death to person or harm to property"); MINN. STAT. ANN. § 604.01 subd. 1 (Supp. 1985) ("death or . . . injury to person or property").

218. See UNIF. COMPARATIVE FAULT ACT § 1 commissioners' comment, 12 U.L.A. 41 (Supp. 1985).

219. *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983).

220. See *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50 (Minn. 1982). But see *Chamberlain v. Bissell Inc.*, 547 F. Supp. 1067, 1083-84 (W.D. Mich. 1982) (contributory negligence of employee reduces recovery for employer's negligent evaluation). Certain misconduct by a contracting party, however—such as failure to render cooperation necessary to performance of the contract—might well suffice to release defendant from her obligations under the original contract. See A. CORBIN, CORBIN ON CONTRACTS § 1233, at 984 (one vol. ed. 1952).

221. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

has played a major part in the action for defamation for more than ten years.<sup>222</sup> According to the *Restatement*, plaintiff's negligent reliance totally bars recovery for negligent misrepresentation,<sup>223</sup> but it seems as logical here as elsewhere to replace the total bar rule with comparative fault principles.<sup>224</sup> It also makes sense to reduce the recovery of a defamation plaintiff who fails to take advantage of a reasonable opportunity to prevent the publication of a false and defamatory statement about her.<sup>225</sup>

Even more appropriate is the application of comparative fault to actions in which plaintiff seeks recovery for emotional distress.<sup>226</sup> Yet it is far from clear that a comparative fault law limited to actions based on "physical harm"<sup>227</sup> would cover such cases. Although many jurisdictions require that, in order to recover for the negligent infliction of emotional distress, plaintiff suffer at least some physical "manifestation" of that distress,<sup>228</sup> some states do not require the symptoms to rise to the level of physical "harm,"<sup>229</sup> and a few courts have done away with the physical-manifestation requirement altogether.<sup>230</sup> Perhaps it would suffice under such statutes if the distress results from witnessing physical injury to someone else,<sup>231</sup> but not all actions for emotional distress involve a victim other than plaintiff.<sup>232</sup> There is no good reason to exclude these cases from the scope of comparative fault.<sup>233</sup>

222. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); RESTATEMENT (SECOND) OF TORTS § 580B(c) (1977). See generally R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 251-55 (1980); Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 COMM./ENT. L.J. 259 (1984).

223. RESTATEMENT (SECOND) OF TORTS § 552A (1977).

224. *But see id.* comment b ("Precedents to date have not made this extension."); e.g., *Carroll v. Gava*, 98 Cal. App. 3d 892, 897, 159 Cal. Rptr. 778, 781 (1979).

225. *But see* RESTATEMENT (SECOND) OF TORTS § 583 comment c (1977) (not necessarily a defense to prove plaintiff's "indifference to publications that defame him").

226. See generally Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583 (1982).

227. See statutes cited *supra* note 217; *supra* note 218 and accompanying text.

228. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 555, 437 N.E.2d 171, 181 (1982).

229. See, e.g., *Vance v. Vance*, 286 Md. 490, 500, 408 A.2d 728, 733-34 (1979) (requiring "physical injury," defined as injury "capable of objective determination"); *Melton v. Allen*, 282 Or. 731, 736, 580 P.2d 1019, 1022 (1978) (requiring "physical injury or physical consequences").

230. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 927-31, 616 P.2d 813, 819-21, 167 Cal. Rptr. 831, 837-39 (1980); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982).

231. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (mother's emotional distress at seeing child killed by automobile); *Leong v. Takasaki*, 55 Hawaii 398, 520 P.2d 758 (1974) (child seeing accidental death of step-grandmother).

232. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (emotional distress upon negligently being erroneously told spouse had syphilis; physical consequences not required); *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (emotional distress upon being erroneously told of mother's death; physical consequences not required).

233. It also would seem consistent to apply comparative fault to actions for invasion of privacy, *but see* Wade, *What Should It Provide?*, *supra* note 17, at 233 (questioning whether phrase "injury to person or property" covers privacy action), or to recover for lost consortium,



The same is true of the newly emerging cause of action for "wrongful birth."<sup>234</sup> If the law is to grant recovery to parents who unexpectedly conceive a child because of the negligence of a doctor<sup>235</sup> or a contraceptive manufacturer,<sup>236</sup> it makes little sense to distinguish such actions from other negligence actions for purposes of determining the impact of plaintiffs' contributory fault. Totally barring recovery seems as unfair here as elsewhere; awarding full damages, however, would eliminate a significant deterrent to consumer carelessness in one area in which consumers probably do consider the financial consequences of their behavior before risking an accident.<sup>237</sup> Yet not every court may categorize a normal pregnancy as "physical harm."<sup>238</sup> Thus, comparative fault statutes limited to "physical harm" should be rewritten to clarify their applicability to cases of economic harm, emotional distress, and wrongful birth.

### III. WHOSE

Deciding how and when to compare fault leaves unresolved one significant and particularly difficult question: whose fault is to be compared? This question is answered easily when an accident involves only two parties; an answer becomes far more elusive in multiple-party situations. In particular, when one or more of the relevant actors has not been joined to the lawsuit, should the factfinder consider the fault of that unjoined tortfeasor?<sup>239</sup> Furthermore, under what circumstances, if ever, should a factfinder, in allocating fault, group two or more tortfeasors together as one party?<sup>240</sup>

#### A. Absent Tortfeasors

There are two basic approaches to the problem of the unjoined tortfeasor:<sup>241</sup> one can include the absent tortfeasor in the allocation of fault,

see Wilkins, *supra* note 59, at 692; cf. UNIF. COMPARATIVE FAULT ACT § 1 commissioners' comment, 12 U.L.A. 41 (Supp. 1985) (suggesting phrase "injury to person" does cover lost consortium).

234. See generally PROSSER & KEETON, *supra* note 2, § 55, at 370-73; Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 WASH. U.L.Q. 919.

235. See, e.g., Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981).

236. See, e.g., J.P.M. v. Schmid Labs., Inc., 178 N.J. Super. 122, 428 A.2d 515 (1981).

237. Cf. *supra* text accompanying notes 186-93 (suggesting low probability that prospect of reduced tort recovery will deter consumer negligence).

238. Compare *People v. Sargent*, 86 Cal. App. 3d 148, 151-52, 150 Cal. Rptr. 113, 115-16 (1978) (pregnancy caused by rape and ending in abortion constitutes "great bodily injury" under criminal sex-offense law) with 10A G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 41A:10, at 13 (R. Anderson & M. Rhodes 2d rev. ed. 1982) (normal pregnancy is not "bodily injury or disease" within meaning of typical disability insurance policy).

239. See *infra* text accompanying notes 241-319.

240. See *infra* text accompanying notes 320-57.

241. See generally Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903 (1984); Fleming, *Foreword, supra* note 17, at 256-59; Comment, *Torts: Comparative Negligence and Absent Parties*, 18 WASHBURN L.J. 692 (1979).

comparing fault among all persons who legally caused the plaintiff's harm;<sup>242</sup> or one can ignore the absent tortfeasor, limiting comparison of fault to the parties to the lawsuit.<sup>243</sup> Neither approach escapes difficulty.

### 1. Including the Unjoined Tortfeasor

Including unjoined parties in the fault comparison has some advantages. First, one can conceptualize comparative negligence as based on the principle that a plaintiff should generally recover full compensation, less only that portion of plaintiff's damages corresponding to plaintiff's own actual percentage of the total fault.<sup>244</sup> But in order to ascertain the plaintiff's "actual" or "true" percentage of fault, one must include, in the comparison, the fault of all persons legally responsible for the accident. This was the rationale of the Wisconsin Supreme Court in *Walker v. Kroger Grocery & Baking Co.*<sup>245</sup> Under Wisconsin's comparative fault statute, an injured party's recovery "shall be diminished in the proportion to the amount of negligence attributable to the person recovering."<sup>246</sup> The court interpreted this language to require that a negligent plaintiff's recovery be reduced only by the actual proportion of fault attributable to the plaintiff; it reasoned that the plaintiff's actual portion of fault equalled 100% of the total fault less "the causal negligence of *all of the other participants in the transaction,*" joined or not.<sup>247</sup>

Allocating the fault (at least initially) over all responsible parties has a second possible advantage: a jury may have difficulty apportioning fault

242. Many states use this approach. *See, e.g.,* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589 n.2, 578 P.2d 899, 906 n.2, 146 Cal. Rptr. 182, 189 n.2 (1978); Brown v. Keill, 224 Kan. 195, 207, 580 P.2d 867, 876 (1978); Lines v. Ryan, 272 N.W.2d 896, 902-03 (Minn. 1978); Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); Paul v. N.L. Indus., Inc., 624 P.2d 68, 69-70 (Okla. 1980); Bowman v. Barnes, 282 S.E.2d 613, 621 (W. Va. 1981); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 534-36, 252 N.W. 721, 727-28 (1934); Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1191-92 (Wyo. 1981). *See generally* C.R. HEFT & C.J. HEFT, *supra* note 17, § 8.100, at 14 (claiming an "accepted practice to include all tortfeasors in the apportionment question").

243. Several states and two model statutes take this approach. *See, e.g.,* National Farmers Union Prop. & Cas. Co. v. Frackelton, 662 P.2d 1056, 1060-61 (Colo. 1983) (en banc); Kapchuck v. Orlan, 332 So. 2d 671 (Fla. Dist. Ct. App. 1976); WASH. REV. CODE ANN. § 4.22.015 (Supp. 1985); MODEL UNIF. PROD. LIAB. ACT § 111(B)(1)(b), 44 Fed. Reg. 62,734-35 (Dep't of Com. 1979); UNIF. COMPARATIVE FAULT ACT § 2(a)(2), 12 U.L.A. 43 (Supp. 1985). *See generally* Smith & Wade, *supra* note 182, at 979 & nn.56-57 (claiming "a majority of states . . . restrict fault comparison to parties"). For a recent thorough review of the law on this issue in the several states, see Little, *Multiple Parties in 2 COMPARATIVE NEGLIGENCE* § 13.80 (1984).

244. *See* Alvis v. Ribar, 85 Ill. 2d 1, 25, 421 N.E.2d 886, 890-91 (1981); G. Schwartz, *supra* note 4, at 724-27.

245. 214 Wis. 519, 252 N.W. 721 (1934).

246. WIS. STAT. ANN. § 895.045 (West 1983).

247. 214 Wis. at 535, 252 N.W. at 727 (emphasis added); *accord* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589 n.2, 578 P.2d 899, 906 n.2, 146 Cal. Rptr. 182, 189 n.2 (1978) (finding it "logically essential that the plaintiff's negligence be weighed against the

while ignoring someone who obviously shares the blame for the accident.<sup>248</sup> As a result, including the unjoined tortfeasor may increase the accuracy of the percentage assigned to the plaintiff and joined defendants.<sup>249</sup> As one court put it, limiting the jury's allocation of fault to joined parties resembles asking someone "to judge a forest by observing just one tree."<sup>250</sup>

Finally, allocation of fault among all tortfeasors facilitates the bringing of a subsequent action against the unjoined tortfeasor—either by plaintiff on the original claim or by defendant for contribution. An original allocation including the unjoined tortfeasor, because it may be binding on the parties to the original action,<sup>251</sup> fixes the maximum amount of recovery in the subsequent action. This should encourage settlement, by setting the maximum value of the claim. Moreover, allocating fault to all responsible parties makes clear precisely who *should* retain a subsequent right of action against the unjoined tortfeasor. An original party should have a subsequent right of action only to the extent that that original party has had to assume the share of the unjoined tortfeasor. Thus, if the jurisdiction limits defendants' liability to their own proportionate shares,<sup>252</sup> plaintiff should retain the traditional common law right to sue joint tortfeasors in separate actions.<sup>253</sup> On the other hand, if the jurisdiction retains joint-and-several liability despite the adoption of comparative fault,<sup>254</sup> only a defendant who pays an unidentified portion of the unjoined tortfeasor's share should have the right to obtain contribution from the unjoined tortfeasor;<sup>255</sup> plaintiff's claim should be extinguished. Finally, if the jurisdiction reallocates the shares of unjoined

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combined total of all other causative negligence"); *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980); *Board of County Comm'rs v. Ridenour*, 623 P.2d 1174, 1189 (Wyo. 1981) (determining unjoined party's proportionate fault is "necessary for a total negligence picture"). See generally C.R. HEFT & C.J. HEFT, *supra* note 17, § 8.100, at 14 (impossible to achieve "true apportionment" without allocating fault to "all tortfeasors guilty of causal negligence"); Eilbacher, *supra* note 241, at 905-06 n.2.

248. *But see Wash. Sen. Select Comm. on Tort Reform & Prod. Liab.*, 2 *Hearing Transcripts*, Dec. 29, 1979, at 34 (testimony of Victor Schwartz, U.S. Commerce Dep't Task Force on Prod. Liab.) ("juries . . . don't like to apportion blame to people who are not there") [hereinafter cited as 2 *Hearing Transcripts*].

249. See *National Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1059 (Colo. 1983) (en banc).

250. *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 70 (Okla. 1980); accord *Bowman v. Barnes*, 282 S.E.2d 613, 620 (W. Va. 1981) (noting, however, that "factual development may well lack the vigor and clarity which would be present if the absent party were actually in the litigation").

251. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

252. See, e.g., *Brown v. Keill*, 224 Kan. 195, 203, 580 P.2d 867, 874 (1978).

253. See PROSSER & KEETON, *supra* note 2, § 47, at 327-28; G. WILLIAMS, *supra* note 30, § 111, at 421 n.1. *But see Greenwood v. McDonough Power Equip., Inc.*, 437 F. Supp. 707, 715 (D. Kan. 1977) (Kansas law) (plaintiff who failed to join potentially liable third party, in order to maintain federal diversity jurisdiction, held to "forfeit any right of recovery" against third party).

254. See, e.g., *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 432 (Alaska 1979); *Fitzgerald v. Badger State Mut. Cas. Co.*, 67 Wis. 2d 321, 331-32, 227 N.W.2d 444, 449 (1975).

255. See generally Note, *Reconciling Comparative Negligence, Contribution, and Joint and Several Liability*, 34 WASH. & LEE L. REV. 1159 (1977).

parties among the parties to the original action,<sup>256</sup> both plaintiff and the original defendants should retain rights of action against the unjoined tortfeasor.

Determining who has assumed the share of the unjoined tortfeasor, and thus who should retain a subsequent cause of action, becomes far more complex if the finder of fact in the original lawsuit ignored the unjoined party's fault. In such a case, one simply does not know to whom the factfinder assigned the share of the unjoined party; it may have been allocated to any one of the originally joined parties or divided among all of them. This uncertainty may lead one to conclude that the original parties all deserve the right to establish that they were the one forced to assume the unjoined party's share, but then the possibility of separate actions against the unjoined tortfeasor raises the risk of overlapping and unfair judgments. For example, suppose plaintiff, whose damages total \$10,000, brings suit against two of three potential defendants (*A* and *B*). The original action results in an even division of the fault (50% each) between the two defendants (*A* and *B*). Both therefore pay plaintiff half of plaintiff's damages, or \$5,000. But either *A* or *B*—or both—may have assumed a portion of the share of the unjoined tortfeasor (*C*). Both *A* and *B* should thus have a right of action against *C*. Assume, then, that in separate actions both *A* and *B* are found equally at fault with *C*. What do *A* and *B* recover? If each recovers \$2,500 (half the sum each paid plaintiff),<sup>257</sup> then each will ultimately have paid \$2,500, while *C* will have paid a total of \$5,000—even though they were all equally at fault. Giving *C* the right to join all parties to the action for contribution is one possible solution, but *C* may be unable to effect such joinder, and it is not clear that a court would find all parties to the contribution action "indispensable."<sup>258</sup> Allocating fault in the original action to all tortfeasors obviates this difficulty by making it clear which of the joined parties has been compelled to assume the unjoined party's share.

## 2. Excluding the Unjoined Tortfeasor

Despite these considerations, many states, as well as the Model Uniform Product Liability Act and the Uniform Comparative Fault Act, limit fault allocation to the parties joined to the action.<sup>259</sup> Courts and legislatures in

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256. See *infra* text accompanying notes 315-19.

257. UNIF. COMPARATIVE FAULT ACT § 5 commissioners' comment, illustration 10, 12 U.L.A. 48 (Supp. 1985).

258. See *In re Johns-Manville Corp.*, 99 Wash. 2d 193, 660 P.2d 271 (1983) (joint tortfeasors not indispensable parties, despite risks of multiple litigation or inconsistent relief). See generally *Niles-Bement-Pond Co. v. Iron Moulders' Union, Local No. 68*, 254 U.S. 77, 80 (1920) ("There is no prescribed formula for determining in every case whether a person . . . is an indispensable party").

259. See *supra* note 243 and accompanying text. See also G. WILLIAMS, *supra* note 30, § 110, at 416-17.

these states, as well as the drafters of the Uniform Acts, give several reasons for their position. First, far from agreeing that accurate fault allocation requires including the absent tortfeasor, they claim that the finder of fact would have difficulty including a nonparty in the apportionment of fault. As the drafters of the Uniform Comparative Fault Act put it, with a nonparty "[i]t cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him . . . ."<sup>260</sup>

But tort law does not require proof to a "certainty"; the typical standard is preponderance of the evidence.<sup>261</sup> Perhaps those who would have the factfinder ignore the unjoined tortfeasor assume that even the "preponderance" standard is unattainable as to the fault of an unknown or unlocatable individual, and that only anonymity or disappearance will prevent joinder of potentially liable tortfeasors.<sup>262</sup> However, one can raise serious doubts about both of these assumptions. Although a tortfeasor's unavailability does make it difficult to determine the nature of her conduct,<sup>263</sup> it is not impossible. One can infer negligence without having any explanation or precise description of a negligent party's actions.<sup>264</sup> Indeed, inferences of negligence from circumstantial evidence form the basis of the doctrine of *res ipsa loquitur*.<sup>265</sup> Thus, for example, in *Bartlett v. New Mexico Welding Supply, Inc.*,<sup>266</sup> a car in front of plaintiff's car, after signalling a turn, turned into and then suddenly pulled out of a service station, causing plaintiff and defendant—whose truck was behind plaintiff's car—to slam on their brakes. The sudden braking caused defendant's truck to skid into plaintiff's car.<sup>267</sup> Despite the absence—and apparent anonymity—of the driver of the lead car,<sup>268</sup> the jury had no trouble apportioning negligence to that driver, and the court approved the jury's apportionment.<sup>269</sup>

But inferring negligence under *res ipsa loquitur* is distinguishable from

260. UNIF. COMPARATIVE FAULT ACT § 2 commissioners' comment, 12 U.L.A. 43 (Supp. 1985); see G. WILLIAMS, *supra* note 30, § 110, at 417 ("apportioning degrees of blame is troublesome enough in any case, but it is likely to be doubly difficult if the court is required to allot a portion of the responsibility to a party who is not present").

261. See *Botta v. Brunner*, 26 N.J. 82, 90, 138 A.2d 713, 717 (1958). See generally PROSSER & KEETON, *supra* note 2, § 38, at 239.

262. The paradigm would be the hit-and-run driver. *E.g.*, *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); *Jacobs v. Milwaukee & Suburban Transp. Corp.*, 41 Wis. 2d 661, 663, 165 N.W.2d 162, 163 (1969) ("the unknown driver of the red automobile").

263. See *supra* notes 60-64 and accompanying text (discussing evaluation of conduct in determining relative fault).

264. *Bowman v. Barnes*, 282 S.E.2d 613, 620 (W. Va. 1981) ("problems of proof" regarding absent tortfeasors may be alleviated "through the other parties, or independent witnesses").

265. See generally PROSSER & KEETON, *supra* note 2, § 39, at 243-44.

266. 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

267. See *id.* at 153, 646 P.2d at 580.

268. See *id.* ("The driver of the lead car is unknown.").

269. *Id.* at 159, 646 P.2d at 586; see also *Jacobs v. Milwaukee & Suburban Transp. Corp.*, 41 Wis. 2d 661, 165 N.W.2d 162 (1969).

inferring the percentage of fault of an absent tortfeasor. First, use of *res ipsa loquitur*, in a typical case, may provide the only means of obtaining any compensation for an injured plaintiff. By contrast, inferring negligence against an unjoined tortfeasor will increase plaintiff's recoverable damages only if a joined, solvent tortfeasor is available to assume the unjoined party's share.<sup>270</sup> Moreover, *res ipsa loquitur* involves only an inference of negligence *simpliciter*; it is far harder to infer any particular *percentage* of fault without having some specific evidence.<sup>271</sup> Finally, the possibility of "flushing out" probative evidence by inferring negligence against a defendant in the absence of that evidence—a separate justification for *res ipsa loquitur*<sup>272</sup>—has no application to the situation of the unjoined tortfeasor, whom an inference of negligence cannot affect.<sup>273</sup> Consequently, it makes sense not to allocate fault to a party who cannot be located.

However, failure to join a party does not necessarily mean that that party cannot be located and made a subject of discovery.<sup>274</sup> Tortfeasors might not appear as parties for a number of reasons.<sup>275</sup> They may be immune from suit as a matter of substantive law.<sup>276</sup> They may be beyond the jurisdiction of the court, or a party wishing to join them may be unable to do so procedurally. Finally, the parties may have tactical<sup>277</sup> or personal reasons<sup>278</sup> for not joining a potential defendant. Once one makes the basic assumption

270. See, e.g., *Ross v. Koberstein*, 220 Wis. 73, 74-75, 264 N.W. 642 (1936) (defendant not prejudiced by failure to allocate fault to unjoined tortfeasor, since defendant would be responsible for unjoined tortfeasor's share).

271. See *supra* text accompanying notes 90-96.

272. See J. WIGMORE, EVIDENCE § 2509 (3d ed. 1940); Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1, 6 (1951).

273. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 823, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975) (evaluation of relative fault "would not be *res judicata* in a subsequent suit against the absent wrongdoer"); accord, e.g., *National Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1062 (Colo. 1983) (en banc).

274. See 2 *Hearing Transcripts*, *supra* note 248, Dec. 29, 1979, at 34 (testimony of Victor Schwartz, Chair of U.S. Dep't of Commerce Task Force on Prod. Liab.) (most states' procedural codes "provide adequate resources to get evidence . . . from non-party witnesses").

275. See generally G. WILLIAMS, *supra* note 30, § 110, at 414; James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1162-64 (1941); Smith & Wade, *supra* note 182, at 980-81; Note, *Consequences of Proceeding Separately Against Concurrent Tortfeasors*, 68 HARV. L. REV. 697, 697-98 (1955).

276. See generally PROSSER & KEETON, *supra* note 2, §§ 131-35.

277. See *In re Johns-Manville Corp.*, 99 Wash. 2d 193, 660 P.2d 271 (1983) (defendant's access to particular experts causes plaintiff's dismissal of that defendant). Parties may also escape joinder because they are "judgment-proof," because proving the case against them will present great difficulty, or because joinder would destroy federal jurisdiction. See G. WILLIAMS, *supra* note 30, § 110, at 414; Smith & Wade, *supra* note 182, at 981; Note, *supra* note 275, at 697-98.

278. See, e.g., *Traveler's Ins. Co. v. Ballinger*, 312 So. 2d 249 (Fla. Dist. Ct. App. 1975) (unjoined tortfeasor was plaintiff's daughter, who was driving her father's car in which her mother was a passenger); *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978) (unjoined tortfeasor was plaintiff's son, who was driving his father's car when it collided with defendant's vehicle). One commentator has observed that membership in the same economic unit may make it unprofitable for plaintiff to bring suit against a close relative. Eilbacher, *supra* note 241, at 913. Note, also, that a close personal relationship often coincides with a tort immunity. See,

that fault *can* be compared,<sup>279</sup> the difficulty of determining the proportionate fault of, for example, an immune nonparty-*witness* does not appear insurmountable. Thus, even conceding the difficulty of allocating fault to an unavailable witness, that difficulty suggests a distinction based on availability for discovery, rather than on joinder as a party.

Those who would exclude nonparties from comparison of fault make a second argument, based on principles of *res judicata*: because an allocation of fault cannot bind a nonparty,<sup>280</sup> determining a nonparty's percentage of fault is said to be "futile."<sup>281</sup> But this assessment assumes that determining the nonparty's share of the fault serves no useful purpose unless *res judicata* principles apply against the nonparty. Yet none of the rationales for allocating fault to the nonparty<sup>282</sup> requires entry of a binding judgment against that party. One can ascertain plaintiff's "actual" share of the fault, and award plaintiff full compensation reduced only according to plaintiff's "actual" proportionate overall responsibility, without having to enter a binding judgment against the absent tortfeasor. Nor does making the comparative fault calculation easier for the factfinder require entry of a binding judgment against the absent tortfeasor. Finally, it will clearly aid—though not resolve—subsequent litigation if fault percentages have been assigned to all parties in the original action. Hence, the "futility" label seems unjustified, and the argument from *res judicata* unavailing.

A third argument sometimes raised for excluding nonparties from the fault comparison is that such an approach encourages joinder, on the theory that "[t]he more parties joined . . . , the smaller the percentage of fault allocated to each of the other parties."<sup>283</sup> Encouraging joinder in the comparative fault context is clearly a worthy goal. But it is not at all clear to what extent ignoring the fault of nonparties adds to the incentives for joinder. First, both sides have considerable incentive to join additional parties regardless of the jurisdiction's approach to fault allocation.<sup>284</sup> Because certain discovery devices are typically available only against parties,<sup>285</sup> joinder will usually increase both sides' access to evidence.<sup>286</sup> Moreover, joinder gives plaintiff

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*e.g.*, *Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1976) (unjoined tortfeasor was plaintiff's husband, immune from suit under interspousal immunity).

279. See *supra* text accompanying notes 49-58.

280. See cases cited *supra* note 273. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

281. H. WOODS, *supra* note 11, § 22:5, at 417; Wade, *Uniform Act*, *supra* note 17, at 389; see G. WILLIAMS, *supra* note 30, § 110, at 417.

282. See *supra* text accompanying notes 244-58.

283. UNIF. COMPARATIVE FAULT ACT § 2 commissioners' comment, 12 U.L.A. 43 (Supp. 1985); accord G. WILLIAMS, *supra* note 30, § 110, at 416-17.

284. See PROSSER & KEETON, *supra* note 2, § 47, at 327 n.25.

285. See, *e.g.*, FED. R. CIV. P. 33 (written interrogatories); 34 (production of documents and things; entry upon land); 35 (physical and mental examinations).

286. This factor may weigh more heavily for plaintiff than for defendant in certain classes of cases. For example, in product liability cases, the joined defendants may well have an ongoing business relationship with, and thus not need the aid of formal discovery devices to obtain evidence from, the unjoined tortfeasor.

an additional source for compensation and the joined defendants a guaranteed source for contribution. Finally, to the extent either side would have the option of bringing a separate action against an unjoined tortfeasor, joinder saves litigation expenses. It is thus doubtful that additional incentives for joinder would have more than marginal effect.<sup>287</sup>

But there is reason to doubt that ignoring an absent party's fault will even marginally increase the incentives for joinder. It will probably not increase plaintiff's incentives. First, the claim of increased joinder incentive is based on the assumption that increasing the number of parties will decrease the fault percentages allocated to each of the already-joined parties.<sup>288</sup> But this will not occur in any case in which the jury allocates a certain percentage of fault to the plaintiff and a corresponding percentage to defendants *as a group*.<sup>289</sup> The addition of another party defendant in such a case would reduce the percentages assigned to each of the already-joined defendants, but would have no effect on plaintiff's percentage. Plaintiff would thus gain nothing from joinder.

On the other hand, suppose joinder would, in fact, reduce plaintiff's share and consequently increase plaintiff's recoverable damages. In most situations, plaintiff could have secured the same result by suing defendants in separate actions.<sup>290</sup> This tactic might, of course, hamper plaintiff's access to evidence and increase litigation expenses, but these are costs of nonjoinder that arise regardless of the approach taken to allocation of fault.<sup>291</sup>

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287. See Fleming, *Foreword*, *supra* note 17, at 256-57 (noting paucity of precedent on the issue of unjoined tortfeasors, and speculating that cause is "that plaintiffs usually prefer to sue all possible defendants in one proceeding or that the defendant(s) sued will [usually] bring in any others in third-party proceedings").

288. See *supra* text accompanying note 283.

289. See Note, *The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act*, 36 U. FLA. L. REV. 288, 306 (1984). This seems especially likely in a products liability case in which plaintiff is charged with product misuse and defendants are the manufacturer and retailer charged with selling the same defective product. *Cf. infra* text accompanying notes 320-57 (discussing treating two or more persons as a single party for purposes of allocation of fault).

290. Joinder of concurrent tortfeasors "is not compelled, and each tortfeasor may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it." PROSSER & KEETON, *supra* note 2, § 47, at 327.

291. The claim that ignoring the unjoined tortfeasor increases plaintiff's incentives for joinder is so dubious that one court concluded that it was "full comparison in the original suit" that "encourages plaintiffs to join all potential tortfeasors in a single lawsuit." *National Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1059-60 (Colo. 1983) (en banc). This statement is correct in those jurisdictions without joint-and-several liability, *see, e.g.*, *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978); in those jurisdictions, failure to join a party to the original action will require filing a separate action against that party if plaintiff is ever to recover that party's share of the damages. *See Wilkins*, *supra* note 59, at 705. *But cf.* *Greenwood v. McDonough Power Equip., Inc.*, 437 F. Supp. 707, 715 (D. Kan. 1977) (failure to join additional defendant in original action bars subsequent action by plaintiff). In that second action, the percentages allocated in the original action—although they will not bind defendant—may well bind plaintiff. *See Fleming, Foreword*, *supra* note 17, at 258 n.77; RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). This would enable the second defendant to fight to increase plaintiff's share of the fault, but bar plaintiff from trying to decrease that share. *See Eilbacher*,



Ignoring the absent tortfeasor will not only have no effect on plaintiff's incentives for joinder; it may well diminish defendant's joinder incentives. First, assuming joint-and-several liability,<sup>292</sup> if fault were allocated to all tortfeasors, collateral estoppel principles might well bind defendant, in a subsequent contribution action, to the percentages allocated in the original action.<sup>293</sup> Those same principles would leave the contribution defendant—the originally unjoined tortfeasor—free to argue for an *increase* in the original defendant's percentage of fault.<sup>294</sup> Only by joining a tortfeasor to the original action can defendant avoid this result. Thus, allocating fault to all tortfeasors, in combination with joint-and-several liability, gives defendants a powerful incentive to join all potentially responsible parties in one action.

This incentive is lost by ignoring the absent tortfeasor. Because the unjoined tortfeasor's fault was disregarded in the original action, the percentages allocated in that action are irrelevant to a subsequent contribution action: the relationship between the fault of plaintiff and one defendant has no bearing on the relative fault of that defendant and any other defendant. Thus, defendant risks far less from nonjoinder when the absent tortfeasor is ignored than would be risked under the competing approach.

Finally, if joinder would in fact decrease plaintiff's share, ignoring the absent tortfeasor may give the joined defendants substantial incentive to *resist* joinder. Because, under joint-and-several liability,<sup>295</sup> defendants will each be liable for 100% of plaintiff's damages less only plaintiff's percentage of the fault, defendants may want to focus on maximizing plaintiff's share rather than on minimizing their own individual shares. If joinder will reduce plaintiff's share, then each defendant will have an incentive to resist joinder of additional defendants.<sup>296</sup> Consequently, the claim that ignoring the fault of an absent tortfeasor will increase the incentives for joinder seems, at best, speculative.

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*supra* note 241, at 915-16 (noting that plaintiff "bears the risk" of any inconsistency). Only by joining all tortfeasors in the original action can plaintiff avoid this problem.

292. Most states with comparative fault have retained the principle of joint-and-several liability. *See, e.g.,* Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 432 (Alaska 1979); American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 582, 578 P.2d 899, 901, 146 Cal. Rptr. 182, 184 (1978); Fitzgerald v. Badger State Mut. Cas. Co., 67 Wis. 2d 321, 331-32, 227 N.W.2d 444, 449 (1975). *Contra* Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 157-59, 646 P.2d 579, 584-86 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); Brown v. Keill, 224 Kan. 195, 204, 580 P.2d 867, 874 (1978).

293. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

294. *See id.*

295. *See supra* note 292 and accompanying text.

296. This incentive is intensified by the provision in some state laws for a right of contribution even against parties not joined to the original action. *See, e.g.,* WASH. REV. CODE ANN. § 4.22.040(1) (Supp. 1985). That right gives joined defendants the opportunity to reduce their net liability by resisting joinder and subsequently bringing a separate action for contribution to which plaintiff is not joined. For example, suppose *A*, a plaintiff with \$20,000 in damages, sues *B*, one of two defendants. Limiting fault to the parties before the court, the factfinder allocates fault 40% to *A* and 60% to *B*. *B* pays 60% of *A*'s damages (\$12,000), then sues *C*, the unjoined tortfeasor, for contribution. In the contribution action *B* and *C* are found equally

One final argument, rarely articulated, does support excluding unjoined tortfeasors from allocation of fault. Under the approach taken by the supreme courts of Wisconsin<sup>297</sup> and California,<sup>298</sup> fault is allocated to the unjoined tortfeasor, and plaintiff can recover from any joined defendant found liable<sup>299</sup> 100% of plaintiff's damages, less only the percentage attributable to plaintiff's own fault. Consequently, the joined defendants must assume the full shares of tortfeasors who cannot be found.

The fairness of this approach is not intuitively obvious. Under such a system, a defendant found 2% negligent would have to pay a plaintiff found 1% negligent compensation for 99% of plaintiff's damages; plaintiff would have to bear only 1% of the damages, while defendant might have no hope of obtaining contribution for the 99%. Fault percentages so similar should not lead to responsibility so disparate.

The California Supreme Court, in *American Motorcycle Association v. Superior Court*,<sup>300</sup> justified its approach as follows:

[I]nasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint [sic] and severally liable should fluctuate in such a manner.<sup>301</sup>

But the reference to joint-and-several liability is somewhat misleading. A defendant held jointly and severally liable with another joined defendant has a legal right, in most states, to seek contribution from that other defendant.<sup>302</sup> The other defendant's identity and, probably, his or her location are known. By contrast, it may be that no one knows the identity or whereabouts of the unjoined tortfeasor. Moreover, the court cannot enter

at fault; the court may thus award *B* a contribution judgment for \$6,000 (half of *B*'s payment to *A*). See UNIF. COMPARATIVE FAULT ACT § 5 commissioners' comment, illustration 10, 12 U.L.A. 48 (Supp. 1985). *B* and *C* have thus each paid \$6,000. But had *C* been joined to, and found equally negligent with *B* in, the original action (and had *A*'s percentage relative to *B*'s been the same, that is, 40:60, or 2:3), the percentages would have been *A*, 25%; *B*, 37.5%; and *C*, 37.5%. Each defendant would have ultimate responsibility for 37.5% of plaintiff's damages, or \$7,500. *B* thus has saved \$1,500 (the difference between \$6,000 and \$7,500) by not joining *C* in the original action.

297. See *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 534-36, 252 N.W. 721, 727-28 (1934).

298. See *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 589 n.2, 578 P.2d 899, 906 n.2, 146 Cal. Rptr. 182, 189 n.2 (1978).

299. In Wisconsin, which has "modified" comparative negligence, plaintiff can recover only from a defendant whose fault equals or exceeds the plaintiff's. See WIS. STAT. ANN. § 895.045 (West 1983). See generally Sobelsohn, *supra* note 14.

300. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

301. *Id.* at 589 n.2, 578 P.2d at 906 n.2, 146 Cal. Rptr. at 189 n.2. Accord *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 536, 252 N.W. 721, 728 (1934) (comparative fault effects no "change in the common-law rule that all tort-feasors who are liable at all are liable to the injured person for the entire amount now recoverable by him").

302. See PROSSER & KEETON, *supra* note 2, § 50.

binding judgment against an unjoined party.<sup>303</sup> As a result, a joined defendant cannot recover the unjoined tortfeasor's share of the damages without re-litigating the factual issues in a separate action for contribution. And in that separate action, collateral estoppel may well bind joined defendants (but not the unjoined tortfeasor) to the percentages allocated in the original lawsuit;<sup>304</sup> indeed, the original defendant might even lose. Of course, defendants held to joint-and-several liability always bear the risk that the other joined defendants will be judgment-proof and unable to pay contribution.<sup>305</sup> But there is an obvious difference between taking only the risk of an insolvent joint tortfeasor, and bearing that risk in addition to the risk that the other tortfeasor will never be found, the expense of retrying the lawsuit if the other tortfeasor is found, and the chance that, even if the other tortfeasor is found, he or she will be exculpated on retrial. Finally, requiring any party to bear ultimate responsibility for the share of any other party violates the principle of proportionate responsibility underlying comparative fault—the principle that, as a matter of fairness, persons contributing to an injury should pay neither more nor less than their proportionate share of the damages.<sup>306</sup>

Other states allocating fault among all responsible parties place the entire burden regarding the absent tortfeasor on the plaintiff. For example, in *Brown v. Keill*,<sup>307</sup> a Kansas case, plaintiff's son was driving plaintiff's automobile when it collided with defendant's car. Plaintiff sued for property damage; neither party joined plaintiff's son. Expressly disregarding the "literal import" of the Kansas comparative fault statute<sup>308</sup> in favor of what it perceived to be the legislative intent,<sup>309</sup> the Kansas Supreme Court found the statute to compel apportionment of fault among "all parties to the occurrence," even those who "cannot be joined formally as a litigant."<sup>310</sup> Finding,

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303. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 823, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975) (evaluation of relative fault "would not be res judicata in a subsequent suit against the absent wrongdoer"); accord, e.g., *National Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1062 (Colo. 1983) (en banc).

304. See *National Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1060 (Colo. 1983) (en banc). See generally RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

305. Indeed, until recently, contribution between joint tortfeasors was unavailable in most states. See PROSSER & KEETON, *supra* note 2, § 50, at 337.

306. See *Paul v. N.L. Indus., Inc.*, 624 P.2d 68, 69 (Okla. 1980).

307. 224 Kan. 195, 580 P.2d 867 (1978).

308. The Kansas comparative fault statute requires the factfinder to "determin[e] the percentage of negligence attributable to each of the parties" and, in awarding damages, to compare plaintiff's fault "to the amount of the causal negligence attributed to all parties against whom . . . recovery is allowed." KAN. STAT. ANN. § 60-258a (1983) (emphasis added).

309. 224 Kan. at 200, 580 P.2d at 872.

310. *Id.* at 207, 580 P.2d at 876; accord *Miles v. West*, 224 Kan. 284, 286, 580 P.2d 876, 879 (1978) (court or jury should "determin[e] fault of all the parties responsible for causing or contributing to the collision or occurrence"). On this point, the Kansas court agreed with the California and Wisconsin courts. For an attempt to reconcile the *Brown* decision with the Kansas statute, see Comment, *Brown and Miles: At Last, An End to Ambiguity in the Kansas Law of Comparative Negligence*, 27 U. KAN. L. REV. 111 (1978).

however, that the Kansas "legislature intended to equate recovery and duty to pay to degree of fault,"<sup>311</sup> the court held the statute to abolish joint-and-several liability in comparative fault cases, and thus to place on plaintiff the entire burden of assuming the share of an unjoined tortfeasor.<sup>312</sup> As a result, under the Kansas statute the "liability of each defendant now rests upon proportionate fault. . . . [T]he risk of an immune or judgment-proof tort-feasor falls upon the plaintiff."<sup>313</sup>

But imposing the entire burden of the unjoined tortfeasor on the plaintiff—the Kansas approach—seems no fairer than imposing the entire burden on defendants—the Wisconsin-California approach.<sup>314</sup> More in keeping with the philosophy of proportionate responsibility would be to apportion the burden of unjoined tortfeasors among the joined parties according to their relative fault. A comparative fault system can accomplish this in two ways: either initially allocating fault among all contributing tortfeasors, then reallocating, among the joined parties, the fault of those tortfeasors not joined;<sup>315</sup> or simply ignoring the unjoined tortfeasor altogether, on the assumption that the factfinder will automatically reallocate that portion of the responsibility to the parties according to their relative fault.<sup>316</sup>

Although it would seem more direct—and a better assurance of actual implementation of the policy—to allocate fault to the unjoined tortfeasor and then explicitly to reallocate that fault among the parties,<sup>317</sup> this approach has a fatal flaw: if the fault percentage assigned to the absent tortfeasor is to be proportionately divided among the parties, none of the parties will have any incentive to minimize the absent tortfeasor's share.<sup>318</sup> Under such circumstances, an adversarial system may have difficulty accurately establishing the fault of the unjoined tortfeasor.<sup>319</sup> Thus, one can justify ignoring

311. 224 Kan. at 203, 580 P.2d at 873-74; see KAN. STAT. ANN. § 60-258a(d) (1983).

312. 224 Kan. at 203, 580 P.2d at 874. The court saw "no compelling social policy which requires the codefendant to pay more than his fair share of the loss." *Id.*

313. *Miles v. West*, 224 Kan. 284, 286, 580 P.2d 876, 879 (1978); *accord Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 155, 159, 646 P.2d 579, 582, 586 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); *Stannard v. Harris*, 135 Vt. 544, 547, 380 A.2d 101, 103-04 (1977). See also IND. CODE § 34-4-33-5(b)(4) (Supp. 1984) (providing for entry of verdict against "each" liable defendant "in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages").

314. *Eilbacher*, *supra* note 241, at 913; *Wilkins*, *supra* note 59, at 736-37.

315. See *Fleming, Report*, *supra* note 17, at 1493-94; Note, *supra* note 255, at 1174-75; *cf.* UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 43 (Supp. 1985) (treatment of uncollectible shares).

316. See *G. Williams*, *supra* note 30, § 110, at 416-17; *cf.* UNIF. COMPARATIVE FAULT ACT § 6 commissioners' comment. 12 U.L.A. 49 (Supp. 1985) (discussing immune parties: "spreading the immune party's obligation among all of the parties at fault" accomplished by "leaving the immune party out of the action altogether").

317. See *Fleming, Report*, *supra* note 17, at 1493-94.

318. *Smith & Wade*, *supra* note 182, at 995-96.

319. The drafters of the Washington comparative fault law, WASH. REV. CODE ANN. §§ 4.22.005-4.22.060 (Supp. 1985), gave essentially this explanation for their decision to require

the fault of nonparties as the only practical means of accurately and fairly distributing the share of an unjoined tortfeasor.

### B. *Treating Two or More Parties as One*

Under certain circumstances, a court might want to instruct the jury to consider two or more parties as one for the purpose of allocating fault. For example, the Arizona comparative fault law provides that, "[i]f equity requires, the collective liability of some as a group constitutes a single share."<sup>320</sup> Commentators have suggested that such situations include those in which common liability arises from a vicarious relationship,<sup>321</sup> such as master-servant<sup>322</sup> or vehicle driver-owner.<sup>323</sup> Other relationships appropriate for treating two parties as one may include manufacturer-retailer<sup>324</sup> as well as "co-owners of property, members of an unincorporated association, those engaged in a joint enterprise and the like."<sup>325</sup>

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exclusion of the fault of a nonparty from the fault comparison. According to the senator who chaired the committee that drafted the Washington statute,

[T]he idea of having fault allocated to parties with no real interest in the lawsuit, to 'empty chairs' in the lawsuit, was not the kind of thing that we wanted to have in our trial system. The trial system is based on an adversarial concept where people with real interests to the litigation [sic] fight it out with one another and we want to make sure that only real parties with real interest in the lawsuit are there when the fault is allocated.

2 *Hearing Transcripts, supra* note 248, July 25, 1980, at 11 (comments of Senator Talmadge). A witness before the committee elaborated:

[O]nce you permit an allocation of fault against somebody who is not in the action and has no potential liability to the plaintiff . . . you don't get a truly fair and honest result in a lawsuit because the integrity of the tort system really depends upon people with a stake in the outcome being present in the courtroom and fighting for something real.

*Id.* June 27, 1980, at 22 (testimony of Ron Bland, President, Wash. St. Trial Lawyers Ass'n); see also *Washington Sen. Select Comm. on Tort Reform & Prod. Liab.*, 1 *Hearing Transcripts*, Sept. 8, 1979, at 66 (same witness to same effect).

320. ARIZ. REV. STAT. ANN. § 12-2502-2 (Supp. 1984); cf. WASH. REV. CODE ANN. § 4.22.040(1) (Supp. 1985) ("two or more persons [may] be treated as a single person for purposes of contribution"). See also MODEL UNIF. PROD. LIAB. ACT § 111(B)(1)(b), 44 Fed. Reg. 62,734-35 (Dep't of Com. 1979); UNIF. COMPARATIVE FAULT ACT § 2(a)(2), 12 U.L.A. 43 (Supp. 1985); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 2(b), 12 U.L.A. 87 (1975) ("if equity requires the collective liability of some as a group shall constitute a single share").

321. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 2 commissioners' comment, 12 U.L.A. 87 (1975); RESTATEMENT (SECOND) OF TORTS § 886A comment h, at 341 (1979).

322. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 2 commissioners' comment, 12 U.L.A. 87 (1975).

323. UNIF. COMPARATIVE FAULT ACT § 2 commissioners' comment, 12 U.L.A. 43 (Supp. 1985).

324. See *id.*; Epstein, *supra* note 30, at 113 & n.48.

325. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) § 2 commissioners' comment, 12 U.L.A. 87 (1975). Another example might be derivative actions, in which negligence by another person is charged to plaintiff. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 733, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968) (child's contributory negligence bars recovery of mother suing for emotional distress suffered upon seeing child killed in auto accident). See also G. WILLIAMS,

The device of treating two parties as one arose when contribution was awarded according to the parties' pro rata shares of plaintiff's damages.<sup>326</sup> Under such a scheme, it makes a great deal of sense to combine the shares of, for instance, an employer and employee; holding each liable for a full share would amount, in effect, to charging the vicariously liable employer for two full shares. However, this rationale collapses in a comparative fault system, which can base contribution upon the parties' individual percentages of fault. One would expect the jury, under such a system, to allocate 0% of the fault to a party held liable only vicariously.<sup>327</sup> Indeed, if plaintiff has introduced no evidence of a party's personal negligence, the court can instruct the jury to return a finding of 0% for that party.<sup>328</sup> In any event, the court would enter judgment against the party held vicariously liable for the sum of that party's separate fault, if any, plus the fault of the party for whom he or she was responsible.<sup>329</sup> Then, in a subsequent contribution action brought by any other defendant, the vicariously liable party would have to pay up to the combined share.

At first glance, it may seem that there is "no practical difference" between treating two parties as one and allocating 0% of fault to one of the two and imputing the fault of the second to him.<sup>330</sup> Yet treating two or more parties as one has significant costs. First, a jury might have difficulty understanding instructions to treat, as one party, two different individuals. For example, in *Cartagena v. P & F Trucking, Inc.*,<sup>331</sup> the trial court told the

*supra* note 30, § 115, at 438 (discussing actions brought under survival statutes); *id.* at 444 (discussing assigned claims, such as those that pass to a trustee in bankruptcy).

326. *See, e.g.*, *Wold v. Grozalsky*, 277 N.Y. 364, 14 N.E.2d 437 (1938); *Martindale v. Griffin*, 259 N.Y. 530, 182 N.E. 167 (1932); UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1955) §§ 1(b), 2(a) & (b), 12 U.L.A. 63, 87 (1975).

327. Comparing fault also resolves the problem of co-owned property or joint enterprises. If each defendant has personally acted negligently, careful jury instructions on the proper method of comparing fault should avoid any unfair allocation of fault on the fortuitous basis of the number of tortfeasors involved in the accident. If, on the other hand, one or more defendants are liable only vicariously, whichever defendant pays the common liability extinguishes the liability of the other defendants and can recover contribution according to the defendants' respective personal shares of the fault (since each vicariously liable defendant was found 0% at fault personally, this would amount to even division).

328. *See Larsen v. Minneapolis Gas Co.*, 282 Minn. 135, 148-49, 163 N.W.2d 755, 764 (1968) (judge should exclude, from fault comparison, party liable only vicariously).

329. In derivative tort actions, the court would add the plaintiff's personal negligence, if any, to the share of fault allocated to the accident victim from whose injury or death plaintiff's action derives, and enter judgment for plaintiff for the difference between the sum and 100%.

330. *See Patino v. Grigg & Anderson Farms*, 97 Idaho 251, 257, 542 P.2d 1170, 1176 (1975); C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 75-76 (1936). For example, a court, treating a vicariously liable employer as one party with his or her negligent employee, should award the employer a right of indemnity against the employee. *See G. WILLIAMS, supra* note 30, § 45, at 162. Were the jury to allocate fault separately to employer and employee, presumably (absent some personal employer negligence, independent of the employee's) the employer would be assigned 0% of the fault, and should have the right to 100% contribution—in effect, indemnity—from the employee. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972); *see also Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973).

331. 73 A.D.2d 490, 426 N.Y.S.2d 486 (1980).

jury to treat a worker and his employer as one party, whereupon the jury returned a verdict assigning 20% of the fault to the plaintiff, 20% to the employee, and 60% to the employer.<sup>332</sup>

A second argument against treating two parties as one rests on the provision in many state statutes of a right of contribution among joint tortfeasors.<sup>333</sup> Such statutes seem to contemplate basing contribution, at least among parties joined to plaintiff's action,<sup>334</sup> on the same fault percentages allocated for the purpose of determining plaintiff's recovery.<sup>335</sup> But treating two parties as one seems to rule out an allocation of fault, as between those two parties, in plaintiff's original action. Without such allocation, a party seeking contribution apparently will have to file—and try—a separate action, even though the contribution defendant was joined to plaintiff's original action.

Alternatively, a separate allocation could take place in plaintiff's action between two parties otherwise treated as one.<sup>336</sup> But this will confuse the jury even more. Moreover, if the legal system can trust the jury to allocate fault between two parties for purposes of contribution, one wonders why the jury need treat these parties as one for any purpose.<sup>337</sup>

A final argument against treating two parties as one rests on the language in some state statutes governing the effect of a release. A recent North Dakota case<sup>338</sup> illustrates this problem. Plaintiff had settled with an employee but not with her employer. Under North Dakota law, “[i]f equity requires the collective liability of some as a group shall constitute a single share.”<sup>339</sup> But state law also provides that a release “reduces the claim against the [nonsettling tortfeasors] to the extent of the relative degree of fault (per-

332. The judgment was reversed for inconsistency in the verdict. *Id.* at 491-92, 426 N.Y.S.2d at 487.

333. See generally PROSSER & KEETON, *supra* note 2, § 50.

334. Because an allocation of fault cannot bind a nonparty, a reallocation of fault must take place in any contribution action against someone not joined to plaintiff's original action. See *supra* text following note 294. See generally Note, *A Separate Cause of Action for Contribution Among Joint Tortfeasors*, 49 Mo. L. Rev. 121 (1984); Note, *supra* note 255.

335. See, e.g., WASH. REV. CODE ANN. § 4.22.040 (Supp. 1985). See also MODEL UNIF. PROD. LIAB. ACT § 113(A), 44 Fed. Reg. 62,739 (Dep't of Com. 1979).

336. Cf. ARIZ. REV. STAT. ANN. § 12-2509(C) (Supp. 1984) (setting forth different criteria for comparing fault between plaintiff and strictly liable defendants in plaintiff's action, and among strictly liable defendants in action for contribution).

337. Glanville Williams argues that a vicariously liable employer should generally be treated as one party with her negligent employee. See G. WILLIAMS, *supra* note 30, §§ 114-15, at 431-32. But Professor Williams adds that if “the master is guilty of personal negligence, this may be taken into account as an independent factor in the apportioning of loss.” *Id.* § 144, at 431 (footnote omitted); cf. *id.* § 45, at 165 (suggesting that an employee be awarded contribution against an employer who “has contributed to the damage by his own fault”). Presumably Professor Williams contemplates instructing the jury to treat the employer and employee as one only when the jury finds the employer free of personal fault, and not otherwise. But it is far simpler and clearer for the jury to be told to treat the parties independently in all cases, and for the court to effect imputation of fault to the employer.

338. *Horejsi v. Anderson*, 353 N.W.2d 316 (N.D. 1984).

339. N.D. CENT. CODE § 32-38-02(2) (1976).

centage of negligence) attributable to the released joint tort-feasors."<sup>340</sup> Construing the two statutory sections together, the state supreme court found that the servant's negligence constituted "the entire 'single share' of liability attributable jointly to the master and servant," and thus plaintiff, by releasing the employee, had (perhaps unwittingly) released the employer as well.<sup>341</sup> A decision like this is sure to discourage separate settlements;<sup>342</sup> moreover, it is seemingly inconsistent with the common statutory provision<sup>343</sup> (also the law in North Dakota)<sup>344</sup> that a release given to one tortfeasor does not discharge other persons liable upon the same claim unless the release so provides.<sup>345</sup> Yet the decision of the North Dakota Supreme Court is completely consistent with the provision for treating two parties as one.

If the jurisdiction limits the allocation of fault to the parties before the court,<sup>346</sup> treating two parties as one will make sense in only one situation: when a defendant is vicariously liable for the fault of a nonparty. If the comparative fault law forbids the allocation of fault to nonparties, the only way to allocate any fault to a joined defendant vicariously liable for a nonparty will be to treat the joined defendant and the unjoined tortfeasor as one party.<sup>347</sup> Otherwise, only rarely—if ever—should the court instruct the jury to treat two persons as one party.<sup>348</sup>

340. *Id.* § 32-38-04(1), as construed in *Bartels v. City of Williston*, 276 N.W.2d 113, 121 (N.D. 1979).

341. *Horejsi v. Anderson*, 353 N.W.2d 316, 318 (N.D. 1984).

342. The North Dakota Supreme Court responded to this argument in two ways. First, the court claimed that, in fact, its decision would encourage settlements, reasoning that, if "the vicarious liability of [the employers] was not discharged by the release, the end result may be that [the employee] would be liable to [the employers] for indemnity." *Horejsi v. Anderson*, 353 N.W.2d 316, 318 (N.D. 1984). This liability for indemnity would obviously discourage the employee from settling. See *Holmstead v. Abbott G.M. Diesel, Inc.*, 27 Utah 2d 109, 114, 493 P.2d 625, 628 (1972); 44 TENN. L. REV. 188, 198 (1976). The court also suggested that the terms of the release, requiring plaintiff to reimburse the employee for any judgment for indemnity, would produce a "circuitous procedure" under which, as soon as the employers secured a contribution judgment against the employee, plaintiff would have to turn over to the employee the amount of any judgment she had received from the employers. *Horejsi*, 353 N.W.2d at 319-20. Both of these arguments, of course, rest on the existence of an implied right of indemnity between employers and employees. There are good reasons not to recognize such a right, see, e.g., James, *supra* note 275, at 1169, especially after adoption of contribution and comparative fault. See W. Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. COUNS. J. 630, 631 (1960); Sobelsohn, *supra* note 213, at 19-109. In any event, the court's argument does not apply outside the employment situation in any context in which there is no right of indemnity.

343. See UNIF. COMPARATIVE FAULT ACT § 6 commissioners' comment, 12 U.L.A. 48 (Supp. 1985).

344. N.D. CENT. CODE § 32-38-04(1) (1976).

345. See *Clark v. Brooks*, 377 A.2d 365 (Del. Super. Ct. 1977) (based on similar provision, release given to hospital does not release hospital's putative agents), *aff'd sub nom.* *Blackshear v. Clark*, 391 A.2d 747 (1978).

346. See *supra* text accompanying notes 317-19.

347. G. WILLIAMS, *supra* note 30, § 110, at 418-19.

348. See *id.* § 115, at 442 (reporting that "[t]he tide has long been running against" treating two or more parties as one).



A final problem arises in strict products liability when plaintiff sues both the manufacturer and at least one other member of the product-distribution chain.<sup>349</sup> If that other seller—for example, a retailer—has been negligent, the case presents no real problem: the jury can fairly apportion fault to the retailer based on its negligence, to the manufacturer based on its negligence (or the product defect),<sup>350</sup> and to the plaintiff. The court can then base a contribution award on these percentages.<sup>351</sup> A troublesome problem arises, however, when the retailer has not been negligent but has incurred only strict liability. In such a case, the jury—focusing on the product defect rather than on any more general review of the retailer's conduct<sup>352</sup>—will likely allocate a similar percentage of fault to the retailer and manufacturer. As a result, the manufacturer and retailer will probably end up sharing the liability more or less equally. This seems unfair and inconsistent with the policies underlying strict products liability. Surely the manufacturer, who built the product and who presumably had the best opportunity to inspect it, bears more of the responsibility and deserves more of the blame for a defective product than does a retailer,<sup>353</sup> who may have received and sold the product in a sealed package. Moreover, the manufacturer is usually in a far better position than any other member of the product-distribution chain to absorb and spread the cost of an accident.<sup>354</sup> These considerations appear to underlie the current movement to make the retailer's strict products liability secondary, active only when the manufacturer is insolvent or cannot be found;<sup>355</sup> they would also appear to provide the basis for the old common law rule that even a negligent retailer can recover full indemnity from the supplier of a defective product.<sup>356</sup> The same considerations suggest making the retailer's strict liability secondary—akin to vicarious liability—as a matter of comparative fault and contribution. Thus, for the purposes of strict products liability, a judge should treat a nonmanufacturer product-liability defendant like an employer liable under respondeat superior: personally

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349. Cf. Epstein, *supra* note 30, at 113 & n.48 (court should treat manufacturer and retailer as one party for purposes of fault allocation).

350. See generally *supra* text accompanying notes 126-55.

351. See *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); *City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis. 2d 641, 207 N.W.2d 866 (1973). But see G. WILLIAMS, *supra* note 30, § 45, at 160 (arguing that, because of difficulty of comparing fault in strict liability cases, a strictly liable tortfeasor should be awarded indemnity against a negligent codefendant).

352. See *supra* text accompanying notes 151-52.

353. See Fischer, *supra* note 52, at 434, 443.

354. See *id.* at 443. But see Jensvold, *supra* note 66, at 739 (noting that the manufacturer is not always in the best position to spread the loss).

355. See, e.g., MODEL UNIF. PROD. LIAB. ACT § 105, 44 Fed. Reg. 62,726 (Dep't of Com. 1979); Leete, *Products Liability for Nonmanufacturer Product Sellers: Is It Time to Draw the Line?*, 17 FORUM 1250, 1264 (1982).

356. See RESTATEMENT (SECOND) OF TORTS § 886B(2)(d) (1979). See also *Kerns v. Engelke*, 54 Ill. App. 3d 323, 340, 369 N.E.2d 1284, 1297 (1977) (awarding indemnity from manufacturer to strictly liable retailer).

allocated only so much fault as is justified by its own level of negligence, and only derivatively liable for the product defect.<sup>357</sup>

#### CONCLUSION

Adoption of comparative fault raises a number of difficult issues. In particular, few if any comparative fault laws give guidance on how to compare fault or how to derive percentages from such a comparison. Moreover, there is serious question whether—even if practicable—comparative fault should apply at all to actions grounded in strict liability. Additional particularly troubling issues include whether to allocate fault to unjoined tortfeasors, and when, if ever, to treat two parties as one. Following the suggestions set forth in this article will advance tort law toward a more intelligible and justifiable approach to comparative fault.

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357. *But see* G. WILLIAMS, *supra* note 30, § 45, at 160 (arguing that, because of difficulty of comparing fault, strictly liable tortfeasors should divide damages equally).