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A Survey of Contribution:
Equal or Fault-Based Shares?

INTRODUCTION

Under the common law, there is no right to contribution among joint tortfeasors. Joint tortfeasors are jointly and severally liable for the plaintiff's injury, and the plaintiff may execute the entire judgment, or any part of it, against any of the defendants. The tortfeasor who pays more than his proportionate share of the obligation cannot force his co-tortfeasors to contribute. Thus, one tortfeasor can be made to bear the entire burden of an injury caused by several. The policy behind the no-contribution rule is that courts should not aid a wrongdoer whose cause of action is predicated upon his own illegal or immoral act.

Yet in a judicial system where liability is based on fault, it appears unjust that one tortfeasor should be required to pay for

1. E.g., Parker v. Mauldin, 353 So. 2d 1375 (Ala. 1977); National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967); Burmeister v. Youngstrom, 81 S.D. 578, 139 N.W.2d 226 (1965). These cases represent only a small fraction of the numerous decisions following the traditional rule. Its origin is usually traced to the English case of Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), in which contribution was denied between two intentional tortfeasors. Originally, the term joint tortfeasors referred only to those wrongdoers who acted intentionally and in concert to cause an injury. Now it embraces negligent tortfeasors acting independently as well. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46, at 291-93 (4th ed. 1971). The American jurisdictions following the common law rule originally applied it only in cases involving intentional tortfeasors. As joinder rules became more liberal and negligent wrongdoers were joined in a single action, however, the courts denied contribution among negligent tortfeasors, too. For a historical discussion of the development of this rule in the United States, see Annot., 60 A.L.R.2d 1366 (1958). See also Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130 (1932).

2. W. PROSSER, supra note 1, § 46, at 291-92. Joint and several liability means the plaintiff can sue any or all of the possible defendants who caused the injury.

3. Id. at 305. A tortfeasor is also denied contribution from a party the plaintiff decides not to sue. At common law, the plaintiff was considered "lord of his action" and could place the burden where he saw fit. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 1939 Act, 9 U.L.A. 230, 230-32 (1955) (Commissioners' Prefatory Note). [hereinafter cited as 1939 Act].

more than his fair share of the plaintiff’s injury. In modern tort law, fault does not necessarily imply moral blame, but often merely signifies conduct that falls below a prescribed standard of care. Thus, the policy supporting the common law rule, while applicable to an intentional tortfeasor whose acts are illegal and immoral, is inappropriate to the negligent or strictly liable defendant of today.

At one time, most American jurisdictions followed the traditional rule. Increased recognition of the many inequities associated with the rule, however, led a large majority of states to either abolish or modify the no-contribution rule and permit contribution among joint tortfeasors. Most states effected this reform through legislation, but a significant number of states altered the no-contribution rule by judicial decision.

5. Prosser stated this inequity as follows:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the evidence of liability insurance, the plaintiff’s whim or spite, or his collusion with the other wrongdoers, while the latter goes scot free.

W. Prosser, supra note 1, § 50, at 307.

6. Id. § 75, at 492-94.


8. See, e.g., Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 Harv. L. Rev. 1170 (1941); James, Replication, 54 Harv. L. Rev. 1178 (1941); Gregory, Rejoinder, 54 Harv. L. Rev. 1184 (1941).

Contribution permits a tortfeasor who has paid more than his share of the common liability to recover from the other tortfeasors the amount paid in excess of that share. Each tortfeasor’s share is computed either on a numerical or relative basis. Where the determination is numerical, the total amount of damages is divided by the number of tortfeasors, with each tortfeasor’s share of liability being equal. When the determination is made on a relative basis, the shares are computed according to the percentage of causal fault attributable to each wrongdoer. Thus, the shares are unequal, unless all are equally at fault. In either case, the right to contribution does not arise until one pays more than his share of the total liability.

This article will survey the types of contribution statutes in the United States, focusing on whether they provide for distribution of liability among tortfeasors on a numerical or relative basis. It will also examine distribution in the states that allow contribution without a statute. The recent direction of contribution law is toward relative-fault liability. This article will consider the effect comparative negligence has had on this trend. The article will then analyze the strengths and weaknesses of each type of distribution and conclude that relative-fault distribution of liabil-

(Supp. 1983-84) W. Va. Code § 55-7-13 (1981); Wyo. Stat. §§ 1-1-110 to 1-1-113 (1977). In many of these states, the no-contribution rule was altered initially by a court decision, with the statute enacted subsequently.

Five states recognize contribution by judicial decision. These states and the decisions in which the common law rule was abolished are: Iowa—Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Kansas—Kennedy v. City of Sawyer, 228 Kan. 439, 618 P.2d 788 (1980); Maine—Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Nebraska—Royal Indem. Co. v. Aetna Casualty & Surety Co., 193 Neb. 752, 229 N.W.2d 183 (1975); Wisconsin—Ellis v. Chicago & N.W. R.R., 167 Wis. 392, 167 N.W. 1048 (1918). In addition, the District of Columbia changed the common law rule in George’s Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942).

Six states still follow the common law rule, with some judicial exceptions. These states are: Alabama, Arizona, Connecticut, Indiana, South Carolina and Vermont.

10. Revised Act, supra note 7, § 1.

11. For example, if there are two responsible tortfeasors, each one's share is 50% of the total damages. If there are three tortfeasors, then the share of each is 33 1/3%.

12. Thus, when the trier of fact finds a tortfeasor has caused 80% of the total injury to the plaintiff, that tortfeasor’s share is 80%, and he has no right to enforce contribution until he pays at least 80% of the judgment. On the other hand, in a jurisdiction that computes shares under a numerical rule, he would only be responsible for 50% of the judgment (if there were two tortfeasors).


14. Of the 19 contribution statutes passed or amended since 1970, 15 specifically state that each tortfeasor’s share is based on relative-fault considerations.
ity between joint tortfeasors is the more equitable system.\textsuperscript{15}

**THE UNIFORM CONTRIBUTION ACTS**

Many state contribution statutes are patterned after the 1939 Uniform Contribution Among Tortfeasors Act\textsuperscript{16} (1939 Act) or the 1955 Revised Uniform Contribution Among Tortfeasors Act\textsuperscript{17} (Revised Act). The drafters of these uniform acts attempted to create a model for state legislatures and thereby foster uniformity among the growing number of states considering contribution laws.\textsuperscript{18} To a degree, this goal has been achieved;\textsuperscript{19} however, there is variance between the two Acts and thus among the states as to the type of share determination used in computing a tortfeasor's share of total liability. The earlier version permits the finder of fact to consider the relative degrees of fault in determining tortfeasors' shares of liability.\textsuperscript{20} On the other hand, the Revised Act states that relative degrees of fault are not to be taken into account.\textsuperscript{21} The revision reflected an apparent reluctance to adopt a relative-fault rule.\textsuperscript{22} That revision may have been premature, however, because recently most states have

\textsuperscript{15} A numerical distribution is often referred to as a pro rata apportionment. See, e.g., Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728 (1967). Thus, the term "pro rata shares" is often used synonymously with equal shares. Many of the recent contribution statutes, however, provide for relative-fault shares and still use the term "pro rata shares" to describe the apportionment. An example is the Illinois contribution act. ILL. REV. STAT. ch. 70, §§ 301-305 (1981). Therefore, the term "pro rata share" can generate confusion. To avoid this confusion, whenever "pro rata share" is used in this article, it will refer to a tortfeasor's share in the total liability, whether that share is determined numerically or relatively.

\textsuperscript{16} 1939 Act, supra note 3, at 230.

\textsuperscript{17} Revised Act, supra note 7.

\textsuperscript{18} 1939 Act, supra note 3, Commissioners' Prefatory Note at 231; Revised Act supra note 7, Commissioners' Prefatory Note at 59-60.

\textsuperscript{19} For example, settlement and release procedures in contribution statutes are fairly uniform now.

\textsuperscript{20} The 1939 Act provides in pertinent part: "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares." 1939 Act, supra note 3, § 2(4), at 235.

\textsuperscript{21} The 1955 Act states: "In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply." Revised Act, supra note 7, § 2, at 87.

\textsuperscript{22} See infra note 28.
rejected the new version and instead have adopted relative-fault provisions similar to the 1939 Act.\(^\text{23}\)

The drafters of the 1939 Act strongly urged states to adopt the Act with the relative-fault provision included. They argued that great injustice would result if a more culpable tortfeasor were able to shift half of the burden onto a less culpable wrongdoer. To the drafters, this inequity was unacceptable. The drafters emphasized that a plaintiff's rights would be unaffected by the relative-fault provision because each defendant would remain jointly and severally liable for the plaintiff's injury.\(^\text{24}\)

According to the provisions of the 1939 Act, relative degrees of fault were to be considered only when there was such disproportionate fault so as to make equal distribution inequitable.\(^\text{25}\) Therefore, if the court decided that fault apportionment was not necessary to prevent inequity, shares of liability would be divided equally. If the evidence did indicate disproportionate fault, the court would then instruct the jury that a verdict for the plaintiff would require it to determine the relative fault of each defendant.\(^\text{26}\) To insure fairness to all the parties, a further provision required that the issue of proportionate fault actually be litigated before the relative-fault rule could operate.\(^\text{27}\)

By 1955, it was apparent that the 1939 Act had not achieved its goal of uniformity. Few of the states which had enacted contribution laws had included relative-fault provisions in their statutes.\(^\text{28}\) Consequently, in revising the Act, the drafters amended the model statute to provide that relative degrees of fault would not be considered in determining each tortfeasor's share of total liability.\(^\text{29}\) In an additional change, the drafters amended the 1939 Act by denying contribution to intentional tortfeasors.\(^\text{30}\)

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\(^{23}\) See supra note 14.
\(^{24}\) 1939 Act, supra note 3, Commissioners' Note at 236.
\(^{25}\) See supra note 20.
\(^{26}\) 1939 Act, supra note 3, Commissioners' Note at 237. If there is no jury, then the court makes any necessary apportionment. Id. See also United States Fire Ins. Co. v. State Farm Fire & Casualty Co., 246 Ark. 1269, 1277-79, 441 S.W.2d 787, 791 (1969).
\(^{27}\) 1939 Act, supra note 3, § 7(5), at 247.
\(^{28}\) Of the states adopting the 1939 Act only Arkansas, Delaware, Hawaii, and South Dakota included the relative fault language.
\(^{29}\) See supra note 21.
\(^{30}\) The 1955 Act states: "There is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury or wrongful death." Revised Act, supra note 7, § 1(c), at 63. The 1939 Act had been silent with respect to intentional tortfeasors.
These two changes were interrelated. Intentional tortfeasors are likely to have a greater degree of fault than negligent tortfeasors.\textsuperscript{31} Thus, an equal-share contribution rule is often to their advantage because they are responsible for less damage than they cause. The 1939 Act did not adopt equal-share contribution because of a reluctance to aid intentional tortfeasors in this manner. By denying contribution to intentional wrongdoers, the 1955 Revised Act drafters were able to adopt equal sharing without aiding intentional tortfeasors and eliminate the primary argument in favor of relative fault.\textsuperscript{32} The Revised Act did not eliminate the inequity which existed between negligent tortfeasors whose respective degrees of fault varied widely, however.

Two other provisions of the 1955 Revised Act relate to the determination of pro rata shares. First, section 2(b) provides that "if equity requires, the collective liability of some as a group shall constitute a single share."\textsuperscript{33} Thus, two or more tortfeasors may, because of a special relation to each other, be counted as one for purposes of determining the shares of liability. For example, if a servant commits a tort for which he and his master are liable along with a third defendant, equitable considerations justify treating the master and servant as a single unit. The net effect is to reduce the amount of their liability.\textsuperscript{34}

The second provision, section 2(c), asserts that "principles of equity applicable to contribution generally shall apply."\textsuperscript{35} One of the purposes of this section is to remedy the problem that exists when one tortfeasor is insolvent.\textsuperscript{36} It operates to increase the

\textsuperscript{31} See id. Commissioners' Comment § 3, at 87.

\textsuperscript{32} Id. The 1955 Revised Act resembles the common law rule of contribution as originally formulated in Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). The Merryweather rule, like the Revised Act, denied contribution to intentional tortfeasors, but allowed it for other wrongdoers. See supra note 1.

\textsuperscript{33} Revised Act, supra note 7, § 2(b), at 87.

\textsuperscript{34} Id. Commissioners' Comment § 3, at 87. The share of the master and servant combined, applying this section, is 50%. If each were treated individually their shares would total 66 2/3% (33 1/3% each). Besides vicarious relationships, the comment lists co-owners of property, members of unincorporated associations, and those involved in joint enterprises as others to whom this section applies.

\textsuperscript{35} Id. § 2(c), at 87.

\textsuperscript{36} Id. Commissioners' Comment § 3, at 87. This section is intended to operate as follows: Assume A, B, and C cause an injury and C is insolvent. If A pays the entire judgment, he normally could demand contribution in the amount of one-third each from B and C. Since C is insolvent, however, A can get nothing from him. "Principles of equity" will allow A to obtain contribution from B in the amount of one-half, instead of one-third. If C ever becomes solvent, A and B each have a right to contribution from him.
shares of solvent tortfeasors by requiring them to take on the shares of insolvent defendants. It is not intended to allow a court to use "principles of equity" to apportion liability among defendants on a relative fault basis.37

The survey which follows divides the states into four groups. The first group consists of those states with contribution statutes that follow the 1955 Act and specifically provide for numerical shares. The second comprises those states which specifically allow relative fault consideration. Within this group are two subcategories: states with statutes based on the 1939 Act and states with statutes that depart from the 1939 Act. Third are those states with contribution statutes which do not specify how liability is to be apportioned. Fourth are the states which have adopted contribution by judicial decision. The survey will then examine the individual states within each group to determine how the contribution shares are allocated and the respective numerical or relative liability provisions interpreted.

TYPES OF CONTRIBUTION LAW

Equal-Share Statutes

Eight states have contribution statutes that specifically divide joint tortfeasors' shares on a numerical basis.38 Generally, the courts in these states follow the literal language of their respective statutes and divide liability equally without regard to fault. The emergence of comparative negligence, however, has necessitated a reevaluation of the policy of equal sharing. Of the eight states with equal-share statutes, six also adopted comparative

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37. Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 430-31 (Alaska 1979); Revised Act, supra note 7, Commissioners' Comment § 3, at 87.

38. The statutes in Alaska, Massachusetts, Michigan, North Carolina and Tennessee are similar to the 1955 Act. See supra note 21 for the relevant texts. Mississippi and California have statutes that differ from the 1955 Act. The Mississippi statute provides in pertinent part: "In any action for damages where judgment is rendered against two (2) or more defendants, jointly and severally, as joint tortfeasors, the defendants against whom such a judgment is rendered shall share equally the obligation imposed by such judgment . . . ." Miss. Code Ann. § 85-5-5 (1972). The California statute states: "The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them." Cal. Civ. Proc. Ann. § 876(a) (West 1980).
negligence, and four directly faced the issue of whether, in light of comparative negligence, relative-fault contribution is now the law.\textsuperscript{39}

Comparative negligence and relative-fault contribution are similar doctrines. Under each, liability is distributed according to the percentage of fault attributable to the respective parties. Comparative negligence apportions liability between plaintiffs and defendants; relative-fault contribution applies only to defendants. The goal of both doctrines is to apportion liability in the most equitable manner possible.

Comparative negligence abolishes the all or nothing rule of contributory negligence and allows a plaintiff to recover even though partially at fault for his own injury.\textsuperscript{40} Criticism of the contributory negligence rule had been as harsh as the criticism directed at the rule denying contribution among tortfeasors, primarily because the principal objections to each are the same: that liability is not divided equitably according to fault. When numerical share states adopted comparative negligence, the likely question became what effect this development would have on their contribution statutes.

One of the major arguments against relative-fault contribution is that computing percentages of fault is too difficult a task for either a court or a jury. The successful application of comparative negligence has undermined this argument, however. For example, in Mississippi, which adopted comparative negligence by statute in 1910, the state courts allocate fault between plaintiffs and defendants but, because of the state contribution statute, do not apply relative-fault principles to determine liability among defendants.\textsuperscript{41} The Mississippi Supreme Court has emphasized the similarity between comparative negligence and relative-fault contribution, stating that fault apportionment solely among defendants poses no more of a problem for a jury than do com-

\textsuperscript{39} The states adopting comparative negligence are Alaska, California, Massachusetts, Michigan, Mississippi and North Dakota. The courts in Alaska, California, Massachusetts and North Dakota decided cases pitting comparative negligence against an equal-share contribution statute.

\textsuperscript{40} In contributory negligence jurisdictions, a plaintiff found negligent in contributing to his own injury is precluded from recovering anything at all from the defendant. There are two types of comparative negligence. The pure form permits the plaintiff to recover that part of the injury he did not cause, no matter how much he is at fault. The modified form denies recovery to a plaintiff when he has caused 50% or more of his injury.

\textsuperscript{41} See supra note 38 for the relevant text of the Mississippi contribution statute.
parative negligence verdicts. Nevertheless, the court upheld equal liability in deference to the legislative policy as expressed in the contribution statute. Thus, Mississippi maintains equal-share distribution, although the state's supreme court recognizes the merits of relative-fault liability.

Two federal courts in Michigan have concluded that the state supreme court's adoption of comparative negligence amended by implication the earlier contribution statute which provided for equal shares. Both courts found that comparative negligence rendered factfinders just as competent to allocate fault among joint tortfeasors as between plaintiff and defendant. The Michigan Supreme Court has yet to address the issue.

Massachusetts and Alaska also retain equal-share contribution despite the adoption of comparative negligence. Unlike other courts which have favorably compared comparative negligence to relative-fault contribution, the Massachusetts courts have found that equal sharing sufficiently alleviated the unfairness of the traditional no-contribution rule. The purpose of the Massachusetts contribution statute, according to the state supreme court, is to achieve a more equitable distribution of the burden between defendants. Apparently, in Massachusetts, equal-share contribution is equitable enough.

The Alaska Supreme Court reached a similar result in Arctic Structures, Inc. v. Wedmore. The party challenging the equal share statute in Arctic Structures argued that the underlying purpose of the statutes was the fair and equitable treatment of multiple defendants. The challenger added that relative-fault

42. Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316 (Miss. 1977).
43. Id. at 1319.
45. See Conkright v. Ballantyne of Omaha, Inc., 496 F. Supp. 147 (W.D. Mich. 1980); Jorae v. Clinton Crop Serv., 465 F. Supp. 952 (E.D. Mich. 1979). Both decisions were limited to the products liability field, not addressing the issue of whether comparative fault is applicable in all tort actions. Yet the courts appeared to suggest that it would be applicable. No Michigan state court has come to a similar conclusion. A Michigan appellate court in Sexton v. American Aggregates, 60 Mich. App. 524, 231 N.W.2d 449 (1976), found that relative-fault contribution is analogous to comparative negligence. Since the contribution statute provided for equal shares, and comparative negligence had not yet been adopted in Michigan, however, it decided not to adopt relative fault.
contribution was a more equitable means of apportionment than equal shares and therefore more consistent with the underlying legislative intent. In addition, the court's recent decision to adopt comparative negligence proved that relative-fault contribution was judicially acceptable as well.49 The supreme court rejected this argument, holding that joint and several liability remained intact and refusing to adopt relative fault.50 Although the court discussed the joint and several liability issue in detail, it dismissed the relative fault argument with a short footnote.51

One justice in Arctic Structures concurred with the resolution of the joint and several liability issue, but dissented from the majority's decision to retain equal shares. He argued that, while equal sharing furnished a rough approximation of justice and was certainly preferable to the traditional no-contribution rule, the better rule of apportionment was one based on relative fault. He added that, since the adoption of comparative negligence, the reasons supporting equal liability no longer existed and further asserted that equal distribution was so arbitrary that its application in certain instances might violate constitutional due process.52

Courts in California and North Dakota have held, in contrast, that the adoption of comparative negligence effectively overruled and amended their equal-share contribution statutes.53 The Cali-

51. The court merely concluded: "However, we have considered and reject judicial creation of a partial indemnity rule of law, adopted by the California Supreme Court in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 195, 578 P.2d 899, 912 (1978)." Id. at 435 n.27.
52. Arctic Structures, 605 P.2d at 440-44. The dissenter gave an example of a defendant who is only 10% at fault for an injury, but yet may have to pay 50% of the damages. The possible constitutional issue focuses on substantive due process. The test under Alaskan law for a violation of substantive due process is whether the action is arbitrary or whether there is a reasonable relationship to a legitimate state purpose. The only legitimate state purpose supporting equal distribution would seem to be simplicity. However, since the adoption of comparative negligence, simplicity no longer justifies the inequitable result when degrees of fault are not used. Id. at 441 n.1.
53. In North Dakota the contribution statute was originally enacted in order to eliminate the need to assess the degree of fault between tortfeasors. Steuber v. Hastings Heating & Sheet Metal Co., 153 N.W.2d 804, 808-09 (N.D. 1967). See also Sayler v. Holstrom, 239 N.W.2d 276, 282-83 (N.D. 1976). However, when the North Dakota legislature adopted comparative negligence, the state supreme court, after attempting to reconcile the pertinent provisions of each statute, concluded the equal share section of the contribution statute had been amended by implication. Bartels v. City of Williston, 276 N.W.2d 113, 121 (N.D. 1979).
fornia contribution statute distributes liability equally among tortfeasors, yet the California Supreme Court held that it did not prohibit the development of common law comparative indemnity. Under this new partial indemnity rule, each tortfeasor's liability is in direct proportion to his respective fault. In concluding that the partial indemnity rule is workable, the California court pointed to the success of comparative negligence. The court also stated that the rule did not conflict with the contribution statute because the legislative history of the statute demonstrated that its purpose was to lessen the harshness and inequity of the no-contribution rule. Allowing comparative indemnity advanced this legislative purpose by further reducing the inequity of the no-contribution rule.

Although four of the six states with both equal-share contribution statutes and comparative negligence have not altered their statutes in favor of relative-fault contribution, the increasing acceptance of comparative negligence in other states has had a tremendous impact in these states. The success of comparative

54. See supra note 34. Thornton v. Luce, 209 Cal. App. 2d 542, 551-52, 26 Cal. Rptr. 393, 398 (1962); Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1960). At least one case has expressed doubt as to whether the statute requires an equal distribution, offering the possibility that the pro rata share is only a ceiling on liability. See Rollins v. State, 14 Cal. App. 3d 160, 165 n.8, 92 Cal. Rptr. 251, 254 n.8 (1971).


56. Id. at 599, 146 Cal. Rptr. at 915, 578 P.2d at 912 (1978). Traditional indemnity is an all or nothing proposition. If one defendant is entitled to indemnity, the entire loss shifts onto another party, who, according to notions of equity and justice, ought to bear the loss. It is an equitable doctrine. Rollins v. State, 14 Cal. App. 3d 160, 165, 92 Cal. Rptr. 251, 254-55 (1971). Indemnity was often used to remedy the inequity of the no-contribution rule. For example, a tortfeasor guilty of passive negligence could obtain indemnity from a tortfeasor who was actively negligent. A passively negligent tortfeasor is less at fault than the active tortfeasor; therefore, equity entitles him to shift the entire burden on to a more responsible party. See generally Note, Skinner v. Reed-Prentice Division Package Co.: Adoption of Contribution in Illinois, 9 Loy. U. Chi. L.J. 1015, 1017-18 (1978). Oftentimes, however, indemnity did not produce an equitable allocation of a loss because partial shifting of a loss is not allowed. American Motorcycle allowed partial indemnity between two negligent defendants. A later case permitted partial indemnity between a negligent defendant and a strictly liable defendant. The allocation of fault becomes much more difficult when there is a strictly liable tortfeasor who is liable without fault. Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).


59. Id.
negligence has convinced many courts that relative fault is a workable rule. These courts have conceded that relative fault is more equitable than equal sharing but have deferred to the legislature to make the change. It is possible that the legislatures in these states may soon follow the lead of the judiciary.\footnote{60}

\textit{Relative-Fault Statutes}

There are presently twenty states with contribution statutes providing for relative-fault contribution.\footnote{61} In many of these

\footnote{60. Of the eight states with numerical share statutes, two, North Carolina and Tennessee, have not adopted comparative negligence. Courts in both states adhere to the language of their statutes and apportion tortfeasors' shares equally without regard to fault. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390 (1972); Terminal Transp. Co. v. Clifford Co., 608 S.W.2d 850 (Tenn. App. 1980-datepicker).

The purpose of the North Carolina statute is to enable litigants to determine in one action all matters in controversy growing out of the same subject. Bell v. Lacey, 248 N.C. 703, 705, 104 S.E.2d 833, 835 (1958); Read v. Young Roofing Co., 234 N.C. 273, 275, 66 S.E.2d 821, 822 (1951). Defendants equally at fault can sue for contribution when they have paid more than their proportionate amount of the liability. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390 (1972).

In Tennessee, the contribution statute is based on equal sharing, but one commentator has suggested that relative fault be adopted. Wade, Crawford & Ryder, \textit{Comparative Fault in Tennessee Tort Actions: Past, Present and Future}, 41 TENN. L. REV. 423, 461 (1973-1974). The authors suggested the following be adopted: "In determining the pro-rata shares of tortfeasors in the entire liability (a) considerations shall be given both to the relative amount of fault of the parties and to the relative directness with which their conduct contributed to the injury." The legislature and the courts in Tennessee have not agreed with this proposal.

\footnote{61. The 20 states are Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Louisiana, Minnesota, Montana, New Hampshire, New York, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Washington and Wyoming. Some of these states are discussed in the accompanying text, other are discussed in this footnote.

Louisiana originally recognized contribution in 1804. In 1979 the statute was amended to read:
When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi-contract, an offense or a quasi-offense, the debt shall be divided between them. If the obligation arises from a contract or a quasi-contract, each debtor is liable for his virile portion. If the obligation arises from an offense or quasi-offense, it shall be divided in proportion to each debtor's fault.


states, the courts originally adopted fault-based contribution, and the legislatures subsequently codified the judicial decisions.62

62. In Illinois, for example, the state legislature enacted a contribution statute shortly after the Illinois Supreme Court approved the rule in Skinner v. Reed-Prentice Div. Pack-
In other instances, the legislature acted first. Almost all of these twenty states recognize relative-fault contribution as a more equitable rule than equal-share contribution.

The major controversy and discussion in these states has centered around the practical application of relative fault. Critics of the rule have argued that it is judicially unmanageable, that it involves great administrative expense and judicial time, and that it depends upon standards which are difficult to apply. The courts in those states which have adopted fault-based contribution acts have had to address these practical problems. In doing so, they have sometimes interpreted their respective statutes in different ways.

In *Chrysler Corp. v. Todorovich*, the Wyoming Supreme Court discussed the difficulty of determining percentages of fault under the state's contribution act. At issue was whether the jury should apportion the negligence attributable to multiple defendants for the plaintiff's death in an auto accident. The court refused to allow apportionment, stating that any such attempt could not rationally be made and would result in jury speculation and conjecture. While recognizing that the Wyoming contribution statute would allow an apportionment of fault in a separate action, the court stated its concern that such an apportionment would be as difficult to achieve in a separate contribution action as it would be in the case at bar. The case highlighted the tension that existed between the Wyoming legislature,
which believed relative-fault contribution is workable, and the Wyoming Supreme Court, which viewed fault-based contribution as arbitrary and difficult to apply. 70

Washington, like Wyoming, has a relative-fault contribution statute towards which the judiciary has shown little enthusiasm. 71 Washington enacted its contribution statute in 1981, three years after the state supreme court had expressly declined to overrule the state's no-contribution rule. In Wenatchee Wenoka Growers Association v. Krack Corp. 72 the Washington Supreme Court was asked to adopt fault-based contribution in recognition of the recent legislative adoption of comparative negligence. Warning that application of a relative-fault contribution theory was loaded with difficulty, the court stated: "many courts first considering the issues surrounding contribution focus solely upon the prohibitions theoretical underpinnings, rather than its practical complications." 73 The Washington legislature disregarded Wenatchee. Despite the court's warning, it passed a relative-fault statute.

In Florida, New York, and Illinois, it was the judiciary that favored and initially adopted relative-fault contribution. Prior to the adoption of relative fault, equal-share contribution existed in New York and Florida. 74 Illinois followed the traditional rule against contribution. 75 By expressing displeasure with equal-share contribution, the courts in New York and Florida influenced their respective legislatures to amend the state statutes to allow relative-fault determination. In Illinois, the supreme court acted before the legislature.

The New York legislature amended its contribution statute to permit relative-fault apportionment in 1974 after the New York...
Court of Appeals decided *Dole v. Dow Chemical Co.* The court in *Dole* adopted a comparative indemnity system similar to the one allowed in California.

Prior to *Dole*, New York, like many states, had permitted indemnity between an actively negligent tortfeasor and a passively negligent tortfeasor. This active-passive form of indemnity helped lessen the sometimes inequitable impact of equal-share contribution by requiring an actively negligent tortfeasor to shoulder the entire liability. In theory, a passively negligent defendant was considered less culpable than one who was actively negligent. This premise provided the justification for shifting the entire burden to the one defendant who was more at fault. As a practical matter, however, the active-passive approach allowed courts to make comparative judgments as to the degree of fault of each tortfeasor and enabled them to make a limited use of fault apportionment through indemnity.

New York courts became increasingly dissatisfied with the active-passive approach because it provided inadequate protection against the inequities of the no-contribution rule and because it was highly artificial. The comparative indemnity system adopted in *Dole* allowed partial shifting of liability based on relative responsibility, with due regard to the particular facts of each case. Although comparative indemnity did not affect the contribution statute directly, its adoption did provide guidance for the New York legislature. The legislature subsequently

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76. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). The statute was changed to read: “No person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.” N.Y. Civ. PRAC. LAw § 1402 (McKinney 1976).


79. Active and passive negligence became merely conclusory labels. In practice, when the factual disparity of fault between two tortfeasors was great enough that it would be inequitable to divide the damages equally, the court simply labeled the less culpable party as passively negligent and the more culpable party actively negligent. When the equity of the situation demanded it, these labels were used to allow indemnity. See *Putvin v. Buffalo Elec. Co.*, 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959).

amended its statute to permit relative-fault contribution in order to accurately reflect the new indemnity rule.\textsuperscript{81}

The Florida legislature also changed its contribution act in response to a clearly expressed judicial preference for a comparative-fault standard.\textsuperscript{82} In \textit{Lincenberg v. Issen},\textsuperscript{83} the Florida Supreme Court followed the state contribution statute which provided for equal sharing, but added, "the most equitable result that can ever be reached by a court is the equation of liability with fault."\textsuperscript{84} Comparing contribution and comparative negligence, the court saw no sound justification for refusing to apportion fault among defendants when Florida permitted such apportionment between plaintiffs and defendants.\textsuperscript{85} The court concluded that if fault determination were manageable in a comparative negligence setting, then it ought also to work in the contribution context.\textsuperscript{86} In a concurring opinion, one justice suggested that the "principles of equity" section in Florida's equal-share statute could be interpreted to permit relative-fault apportionment.\textsuperscript{87} If this theory were accepted, then it would not have been necessary for the legislative to change the contribution statute.

\textsuperscript{81} Under the new contribution statute, equitable apportionment is not limited to negligence actions. It is also applicable to cases with strictly liable defendants. See Doundoullakis v. Town of Hempstead, 42 N.Y.2d 440, 368 N.E.2d 24, 398 N.Y.S.2d 401 (1977).

\textsuperscript{82} The relative-fault section of the contribution statute now reads:

\begin{itemize}
\item In determining the pro rata share of tortfeasors in the entire liability:
\item (a) Their relative degrees of fault shall be the basis for allocation of liability.
\item (b) If equity requires the collective liability of some as a group shall constitute a single share.
\item (c) Principles of equity applicable to contribution generally shall apply.
\end{itemize}

\textit{FLA. STAT. ANN. § 763.31(3) (West Supp. 1982).}

\textsuperscript{83} 318 So. 2d 386 (Fla. 1975). In this case, two defendants were held responsible for the plaintiff's injury in an auto accident. The jury apportioned the damages between them at 85\%-15\%. A question was certified to the Florida Supreme Court regarding whether such apportionment of liability was proper. During the pendency of this appeal, the Florida legislature passed the initial contribution statute not allowing relative degrees of fault to be considered by courts.

\textsuperscript{84} \textit{Id.} at 393.

\textsuperscript{85} Florida adopted comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

\textsuperscript{86} \textit{Lincenberg v. Issen}, 318 So. 2d 386 (Fla. 1975).

\textsuperscript{87} \textit{Id.} at 394 (Boyd, J., concurring specially). Florida has a "principles of equity" section in its statute like the one in the 1955 Revised Act. See supra note 82 for the text of the Florida statute. The drafters of the Revised Act, however, did not permit trial courts to use this section to apportion liability according to fault. See supra notes 35-37 and accompanying text. The concurring justice disagreed with the Revised Act drafters and stated that "principles of equity" required the trial court to use its equity power to apportion liability according to fault in all cases. The majority opinion had merely suggested
In Illinois, it was the supreme court, not the legislature, that first adopted relative-fault contribution. The contribution statute enacted in 1979\(^8\) was a codification of the Illinois Supreme Court's decision in *Skinner v. Reed-Prentice Division Package Machinery Co.*\(^9\) Prior to *Skinner*, Illinois followed the traditional no-contribution rule although, like New York, it did apply the active-passive system of indemnity.\(^90\) Dissatisfaction with the inequities of the no-contribution rule and the inadequacies of the active-passive doctrine were the court's stated reasons for changing Illinois law.\(^91\)

In adopting relative-fault contribution, the court in *Skinner* used a quantitative comparison. It focused on the extent to which the fault of each of the two defendants proximately caused the plaintiff's injury. The Contribution Among Joint Tortfeasors Act, however, envisions a qualitative as well as quantitative comparison. The use in the statute of the phrase "relative culpability" suggests that both degrees of wrongdoing and percentage of cause could be compared depending upon the individual case.\(^92\)

One state which uses a qualitative approach is Hawaii. The

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88. An Act in Relation to Contribution Among Joint Tortfeasors P.A. 81-601, §§ 1-5, I.L. REV. STAT. ch. 70, §§ 301-305 (1981). The relevant part of the statute provides:

> Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However no person shall be required to contribute an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectable. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectable obligation in accordance with their pro rata liability. If equity requires, the collective liability of some as a group shall constitute a single share.

*Id.* § 303.


91. 70 Ill. 2d at 14, 374 N.E.2d at 442. The court stated, "governing equitable principles require that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them." *Id.*

Hawaii Supreme Court has applied its relative-fault contribution statute in a qualitative manner where the gross negligence of one defendant is combined with the ordinary negligence of another. A qualitative analysis looks to the nature and character of the negligent act to determine the percentage of each defendant’s liability. The gross negligence/ordinary negligence distinction is similar to the active-passive negligence doctrine because it also attempts to alleviate the inequity of the no-contribution rule where two or more defendants have degrees of fault widely disparate. In the Hawaii case, though, the gross negligence/ordinary negligence distinction was not used for this purpose, but was used as a tool to allocate the liability of each defendant.

The twenty states that have enacted relative-fault contribution statutes share a common goal: to totally eliminate the inequity of the no-contribution rule. Initially, some of these states were hesitant to adopt relative fault, primarily because of criticisms that it was unmanageable, impractical and infeasible. Ultimately, each of these states concluded that the inequity of no-contribution or equal-share contribution outweighed the potential problems of determining relative fault. None of these states have encountered serious problems with their statutes and the clear trend in contribution law is toward relative fault.

Statutes Not Specifying the Type of Shares

Eleven states presently have contribution statutes that do not specify how shares of liability are to be apportioned among multiple tortfeasors. For the most part, these statutes allow contri-
bution but leave to the courts the decision of whether to use relative-fault shares or numerical shares. Of these eleven states, seven apportion shares equally, two permit relative fault, and two are undecided.

Most of the states in this group enacted their statutes at a time when contribution was fairly new. Equal sharing was presumed

Oklahoma only recently enacted a statute in 1978. Okla. Stat. Ann. tit. 12, § 832 (West Supp. 1981-1982). There are no cases interpreting how liability is determined. Oklahoma has adopted comparative negligence, though, which may be an indication of how the statute will be interpreted.

The Nevada statute has a section stating that "principles of equity applicable to contribution generally apply." Nev. Rev. Stat. § 17.295 (1979). However, the Nevada courts, unlike Florida's, have not addressed whether this section allows relative fault to be considered.

The Virginia statute simply states: "Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." Va. Code § 8.01-34 (1977). The statute was interpreted to provide that each tortfeasor is liable for an equal amount. Nationwide Mut. Ins. Co. v. Minnifield, 213 Va. 797, 196 S.E.2d 75 (1973).

The West Virginia statute provides in its entirety:

Where a judgment is entered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution [sic] to the same extent as if the judgment were upon an action ex contractu.


See Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967), for an application of the New Jersey statute. The shares were divided equally, but the court invoked the statute's collective liability section to decrease the net share of a master and servant. The court stated that the whole field of contribution is based on equitable considerations. Id. at 80, 228 A.2d at 73.


In Maryland, the legislature intentionally left undefined the phrase "pro rata shares." Lahocki v. Contee Sand & Gravel Co., 41 Md. App. 579, 616-17, 398 A.2d 490, 512 (1979) (rev'd on other grounds). Except for the absence of the relative fault provision, the Maryland statute is patterned after the 1939 Uniform Act. It was recently argued that the absence of this provision can only mean that shares are to be determined equally, without regard to fault. The Maryland Supreme Court agreed and refused to permit fault apportionment. Id. at 615-19, 398 A.2d at 510-14. See also Early Settlers Ins. Co. v. Schweid, 221 A.2d 920 (D.C. 1966).

99. A good example is the Virginia contribution statute. See supra note 98.

100. The seven states dividing shares equally are Georgia, Maryland, New Jersey, New Mexico, Pennsylvania, West Virginia and Virginia. Kentucky and Missouri permit
to be the most acceptable method of apportioning fault, and that is generally how the courts have interpreted and continue to interpret these older statutes. Only Missouri and Kentucky courts decided otherwise, and even they did so hesitantly. The Missouri Supreme Court recently reevaluated its contribution statute and adopted a form of comparative indemnity. Its contribution statute, first adopted in 1855, had been interpreted to provide for equal shares.

Kentucky also allows relative fault, but in a unique manner. The Kentucky courts have not attempted to reevaluate their contribution statute, which, like Missouri’s, has been interpreted to require equal sharing. Instead, a different statute, which permits the apportionment of liability among defendants according to comparative fault in trespass actions, has been applied where possible. The statute permits courts to enter judgment severally, rather than jointly. In addition the Kentucky courts have applied this statute to all types of tort actions, not simply to trespass actions. The statute only applies, however, where joint defendants are sued by a plaintiff; third-party defendants cannot take advantage of the statute.

Georgia is more representative of the states in this group. Although it has a trespass statute similar to Kentucky’s, Georgia allows several apportionment according to comparative fault only in trespass to property actions. The state’s contribution statute is silent with respect to tortfeasor shares, but the state courts have interpreted it to require equal shares.

relative fault, and Oklahoma and Nevada are undecided.

101. Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978). The type of comparative indemnity adopted in Missouri is very similar to the kind in New York and California.
103. Ky. Rev. Stat. § 412.030 (1972). The text of this statute is the same as the Virginia statute. See supra note 98.
106. Id.
New Mexico also has resisted the opportunity to reevaluate contribution in light of modern principles of fairness. According to the New Mexico Supreme Court, "equality is equity" and justice is best served by not comparing degrees of negligence or fault. Significantly, the same court also has described contribution as a concept deeply rooted in principles of equity, fair play and justice. Apparently, the New Mexico Supreme Court does not consider relative fault to be the most equitable, just or fairest form of contribution.

Judicially-Mandated Contribution

Five states and the District of Columbia permit contribution among tortfeasors, or an equivalent form of recovery, by means of judicial decision only. These decisions not only are influential in their respective jurisdictions, but also are respected in states with contribution statutes. In many jurisdictions the traditional no-contribution rule was initially changed by the courts, not the legislature. Because the no-contribution rule was judicially created, the courts in these states, as in others, concluded that they might properly alter judicial doctrine without waiting for the legislature to act.


When the courts of Iowa and the District of Columbia changed from a traditional no-contribution rule to a rule allowing contribution based on equal shares, both courts specifically stated that contribution was an equitable doctrine. In *Best v. Yerkes*, the Iowa Supreme Court discussed the historical background of the traditional rule before concluding that the no-contribution rule should not apply to negligent tortfeasors who inadvertently cause an injury. The District of Columbia Court of Appeals also based its decision on its authority to modify judicial doctrine. Because the law in the District of Columbia does not recognize degrees of negligence, contribution is based on equal shares.

Maine and Wisconsin adopted contribution among tortfeasors relatively early. As in Iowa and the District of Columbia, the Maine and Wisconsin courts originally identified contribution as an equitable right founded upon principles of natural justice. Although equal shares was the initial method of apportionment accepted in each state, courts in both states now have adopted relative fault.

In 1968, Maine passed a comparative negligence statute which laid the groundwork for judicial change to fault-based contribution. The Maine Supreme Court adopted fault-based contribu-

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116. 247 Iowa 800, 77 N.W.2d 23 (1956). The court distinguished negligent tortfeasors from intentional wrongdoers, finding that the policy behind the common law is inapplicable to merely negligent defendants. Id. at 805-10, 77 N.W.2d at 26-29.


122. The statute in pertinent part provides:

   In a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff’s damages. However, any defendant shall have the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant.

   ME. REV. STAT. ANN. tit. 14, § 156 (1980). The Maine Supreme Court interpreted the second sentence of this part of the statute as having the sole purpose of laying the basis for comparative contribution. Packard v. Whitten, 274 A.2d 169, 180 (Me. 1971).
tion in Packard v. Whitten, stating that the original adoption of equal-share-based contribution "was only a step toward a truly just distribution of responsibility." The court saw no great difficulty in applying the new rule, based on five years experience in apportioning causal fault under comparative negligence.

In Bielski v. Schulze, the Wisconsin Supreme Court reached a similar conclusion. Both contribution and comparative negligence had existed in Wisconsin since the early 1900's, yet until Bielski, in 1962, contribution was only permitted on an equal basis. Bielski directly addressed the issue of whether numerical or relative-fault distribution is more equitable. The trial court apportioned fault between the defendants at ninety-five percent to five percent. In finding relative fault the more equitable system, the Wisconsin Supreme Court stated that there is no justification in making the tortfeasor five percent at fault bear fifty percent of the total burden. Logic and justice required that each tortfeasor be responsible only for the part of plaintiff's injury he caused. The court also stressed that the use of special verdicts makes practical application of fault-based contribution possible, as already evidenced by their use in comparative negligence actions.

123. 274 A.2d 169 (Me. 1971).
124. Id. at 180.
125. Id. The court also emphasized that the use of devices such as special verdicts, jury interrogatories, and cross-claims would all aid the jury in dealing with fault issues. It stated that the fairness associated with comparative fault outweighs any increased difficulties that might be encountered by the new rule and concluded that the judicial system has the appropriate resources to handle any new problems. Id.
126. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
128. The court posed the issue in the following manner:

The crux of the question is whether the present automatic method of determining the number of equal shares between the number of joint tort-feasors involved is as equitable and as just a determination of contribution as determining the amount of the shares in proportion to the percentage of causal negligence attributable to each tort-feasor.

Bielski, 16 Wis. 2d at 7, 114 N.W.2d at 108 (1962).
129. Id. at 9, 114 N.W.2d at 109.
130. Id. at 12, 114 N.W.2d at 110. Wisconsin was one of the states which used a gross negligence/ordinary negligence distinction in order to alleviate the inequity which could result from equal-share contribution. Since liability was to be based completely on fault principles, the gross negligence doctrine was abolished by the Bielski case. Id. at 14-18, 114 N.W.2d at 111-14. Under the new rule, a grossly negligent tortfeasor can obtain a partial recovery for the part of the plaintiff's injury he did not cause. Wisconsin also
ANALYSIS: STRENGTHS AND WEAKNESSES OF EACH SYSTEM

There is a clear trend in contribution law towards adopting relative-fault contribution, as illustrated by the large percentage of recently enacted contribution statutes and the increased acceptance of comparative negligence. Although the principle that tort liability ought to be based on fault is not new, there is, however, debate as to whether fault principles are appropriate in the context of contribution.

Theoretically, the principle that a wrongdoer should pay for the damages he causes by his actions is difficult to dispute. If the fairest and most just result is a court's ultimate goal, then the distribution of liability should be in proportion to the degree of negligence or fault of the various parties, except in rare circumstances. However, courts must deal with practical realities as well in order to administer justice in the most equitable and efficient manner possible. Doubt concerning the manageability of relative-fault contribution is thus a proper and appropriate judicial concern.

The inequities of the traditional, no-contribution rule have led ninety percent of American jurisdictions to modify this rule. Initially, many states modified the rule by allowing contribution in equal shares. Equal sharing was a substantial improvement. Not only was it more equitable, it could be applied simply, consistently, and with predictability. The total amount of damages was simply divided by the number of defendants.

The only issues to decide were whether the individual defendants were liable to the plaintiff and, if so, whether equity required that two or more tortfeasors be treated as one tortfeasor for pur-

abandoned the active-passive negligence doctrine because it does not strictly conform to fault-based principles. Pachowitz v. Milwaukee & Suburban Transp. Corp., 56 Wis. 2d 383, 202 N.W.2d 268 (1972). A passively negligent tortfeasor remains slightly at fault and ought to contribute for the portion of the injury he caused.

131. Of the 45 jurisdictions surveyed in this note, 28 permit contribution or indemnity on a relative fault basis, 14 allow contribution on the basis of equal shares, and 3 have yet to decide which of the two to follow. Of the 19 contribution statutes passed or amended since 1970, 15 specifically state that each tortfeasor's share is based on relative fault.

132. See W. Prosser, supra note 1, § 75, at 492-94. Many of the states discussed in this article were hesitant not only to adopt relative-fault contribution, but also to adopt contribution at all.

133. See W. Prosser, SELECTED TOPICS ON THE LAW OF TORTS 61-66 (Thomas M. Cooley Lectures No. 4, 1953).
poses of apportioning damages. Courts and juries did not inquire into degrees or nuances of fault. Once a defendant was found liable, he was responsible for a numerical proportion of the judgment, either to the plaintiff or to his co-tortfeasors by way of contribution.

But an equal-share rule also can be inequitable in many instances, just as the no-contribution rule can be. A tortfeasor who is five percent at fault should not in fairness be required to pay fifty percent of the judgment. Being liable for one-half of the burden is not as unfair as imposing 100 percent of the liability on him, but it certainly does not fairly measure his responsibility for the plaintiff's injury. The flexibility required to insure fairness in all cases is lacking under the equal-share rule. Although simple and practical, it is often only a partial cure for the no-contribution rule. States that apply the active-passive negligence doctrine are attempting to remedy the possible inequities of equal-share contribution, but that is not enough. That doctrine is too artificial. It is applied to remedy outrageous results and does not insure fairness in the vast majority of cases.

On the other hand, relative-fault contribution completely remedies the traditional no-contribution rule. It permits flexibility, unlike the rigidity of equal shares, and apportions liability in the fairest manner possible. Each defendant is responsible only for the portion of the plaintiff's injury he caused. The plaintiff's right to recover the entire judgment is protected by retaining joint and several liability.

The primary criticism of relative-fault contribution, though, centers on its practical application in the judicial system. Critics argue that there are no standards of measurement that courts can use to determine percentages of fault.\(^{134}\) Other criticism focuses on the additional time and money that must be spent under a relative-fault system.

Yet the successful application of comparative negligence and relative-fault contribution in the states adopting either of them shows that fault apportionment is possible. The judicial system is equipped with a number of devices to facilitate fault compari-

\(^{134}\) See Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 334-35, 579 P.2d 441, 447-48, 146 Cal. Rptr. 550, 556-57 (1978) (Clark, J., concurring). The concurring justice asserted "Blind inquiry into relative fault is no better than the flip of a coin, and disputes over degrees of fault must greatly increase the time and cost of litigation." Id. at 335, 579 P.2d at 448, 146 Cal. Rptr. at 557
son. Jury interrogatories, severance of claims, and special verdicts are examples. The only additional issue the court must decide under a relative-fault system is the degree of the defendant's liability. In order for relative-fault contribution to be effectively applied, fault percentages need not be computed to the precise percentage. Apportionment to the nearest five or ten percent is adequate. Juries are capable of such computations and should be allowed the flexibility to apportion liability in the most equitable manner.

CONCLUSION

The trend towards relative-fault contribution is a good one. Contribution based on relative fault is more equitable than equal sharing and is workable within the judicial system. Although equal sharing partially eliminates the inequities of the traditional rule, relative fault provides a much fairer and more equitable method of apportioning liability among multiple defendants. The experiences of the states that have adopted either comparative negligence or relative-fault contribution prove comparisons of fault can be made in a fair and efficient manner.

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