Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases

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I. INTRODUCTION

The multiplication of theories of recovery[1] in product litigation has been accompanied by a multiplication of the number of defendants in almost every product suit as plaintiffs "shotgun," that is, sue everyone connected with the product whether or not those defendants' "fault" contributed to the injury.[2] When the confusion of the law of contribution and indemnity,[3] such as the active-passive distinction,[4] is imposed on the multiple theories of product liability,

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[1]In the literature devoted to product liability the terms explosion, revolution, and even multiplication are used to describe a process perceptively described by Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970) as a revolution that is part of a much larger phenomenon where risks have been reversed between active and passive parties. Under Professor Gilmore's analysis what is called a multiplication of theories in products liability can more accurately be described as a use of the division of civil obligations into the fields of tort and contract to resort to torts when there are roadblocks in the contract doctrines and to come back to contract when tort doctrines block the realignment of liabilities to meet changes in the society that the law reflects.

For the purposes of this Article the characterization of products liability as tort or contract is obviated by an assumption that products liability cases fall into four functional classifications: cases in which (1) a product was represented or warranted and did not live up to the promises; (2) a product was defectively manufactured; (3) a product was defectively designed; ;or (4) there were inadequate or defective warnings. And, to make the following discussion free of discussion of whether products liability is tort or contract, it is assumed that all four functional classifications can be characterized as cases of "fault."

This does not mean that shifting back and forth between contract and tort is meaningless. It simply means that cases in which such problems have sharp significance, such as where a product damages itself, *e.g.*, Jig, The Third Corp. v. Puritan Marine Ins. Und. Corp., 519 F.2d 171 (5th Cir. 1975), are explored elsewhere, in articles such as Wade, *Is Subsection 402A of the Second Restatement of Torts Preempted by the U.C.C. and therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

[2]Just as the color red may be "defined" by pointing to a stop light, the term "shotgunning" might best be understood by looking at the paradigm cases described in the text accompanying notes 22-35 *infra*.

[3]The confused history of contribution and indemnity and its literature is explored in a later section of this Article. See notes 76-86 *infra* and accompanying text.

[4]When contributory negligence barred a plaintiff from recovery against a negligent defendant it was logical to hold as a corollary that a negligent defendant sued by an injured plaintiff could not cross claim over against a codefendant tortfeasor

the rights of the defendants among themselves seem beyond rational resolution. Yet litigation does come to a close, generally by settlement.

The major premise on which the following discussion is built is that settlements are, or at least have been and should be, effected by distributing costs in proportion to fault.[5] As courts and legislatures in over one-half the states have moved toward adoption of the distributive principle in trials the focus has generally been on comparative negligence (where the fault of the plaintiff is compared with that of all defendants) rather than on comparative contribution (where the degrees of fault of each defendant are compared to determine the share each should pay). Using the terms comparative negligence and comparative contribution invites a distinction between those concepts, and suggests that courts or legislatures can adopt one and not the other. If both are seen as logical deductions from the distribution principle, then the adoption of either comparative negligence or comparative contribution requires that the other be adopted. Unfortunately, little attention has been given to how the distribution principle can be preserved in settlements.[6]

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for contribution. It perhaps illustrates Professor Gilmore's suggestion discussed in note 1 *supra*—that there is a larger phenomenon shifting responsibility to active parties from passive ones—that, even when there was a rule of no contribution between tortfeasors, the courts would allow a passive tortfeasor to recover indemnity from an active tortfeasor. This mitigation of the harsh and unjust effect of the no contribution rule, however, seems to have done a poor job. Efforts to apply the distinction were confused, and it has been observed that "as applied by a court or jury, the 'active'—'passive' test usually becomes a search for the more reprehensible, better insured, or more solvent defendant." Comment, *Contribution in Collision Cases*, 68 YALE L.J. 964, 977-78 (1959). As will be seen in the discussion of *Dole v. Dow Chemical Co.* in notes 10 and 11 *infra*, the use of percentages of fault allowed courts to abandon the unsatisfactory all-or-nothing rule of indemnity based on the active-passive distinction and sweep the problem of when to give "indemnity" into the distribution of costs according to findings of degrees of fault.

[5]One of the clearest statements of the distribution principle is found in Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), in which the court established "pure" contribution between concurrent tortfeasors and brought the gross negligence of the automobile guest case within the comparative negligence approach. The court said: "[W]e are stressing the basic goal of the law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it." *Id.* at 10, 114 N.E.2d at 113. For a fuller discussion, see Davis, *Third-Party Tortfeasors' Rights Where Compensation Covered Employers Are Negligent—Where Do Dole and Sunspan Lead?*, 4 HOFSTRA L. REV. 571 (1976) [hereinafter cited as Davis, *Third-Party Tortfeasors' Rights*].

[6]The indispensable writings on the subject of settlements by one of the multiple parties under comparative negligence are Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655 (1974); Raskoff, *Comparative Negligence in California: Multiple Party Litigation*, 7 PAC. L.J. 770 (1976); Thode, *Comparative Negligence, Contribution Among Tort-Feasors, and the Ef-*

Even the Uniform Comparative Fault Act, as now proposed,[7] would sacrifice distribution in settlements as it moves to make comparative fault logically consistent in trials. A minor premise is that workers' compensation statutes are settlements between employers and employees for fault within the compensation system.[8] Where plaintiffs have settled with one or more actors, either directly or under a compensation statute, an argument will be made that equal protection as well as the distribution principle requires both types of settlements to be treated similarly, with a pro-rata distribution according to degrees of fault.

It will be suggested that the distinction between comparative negligence and comparative contribution should serve primarily as a description of alternate routes to the recognition of the distribution principle. This will be illustrated by what has happened in New York and what should happen in Connecticut. And the major premise will be applied to various forms of currently used settlement arrangements, such as the loan receipt and covenants not to sue. Questions will be raised about the right of a plaintiff at fault (and of a defendant subrogated to a plaintiff's rights under a loan receipt) to use the doctrine of joint and several liability to make the defendant(s) left in a suit after settlement with another pay for proportions of damages that exceed their proportionate degree of fault.[9] Here the major and minor premise interact to ask why the costs of fault within the compensation system should be passed out to third

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fect of a Release—A Triple Play by the Utah Legislature, 1973 UTAH L. REV. 406; and Berg, *Comparative Contribution and Its Alternatives: The Equitable Distribution of Accident Losses*, 1976 INS. COUNS. J. 577.

[7]The proposed draft of the Uniform Comparative Fault Act contained in Wade, *A Uniform Comparative Fault Act—What Should it Contain?*, 10 U. MICH. J. L. REF. 220 (1977) is the draft discussed in this article. Although section 5 of the draft set out in Professor Wade's article proposed that a release given in good faith bars suits against the person to whom it was given and allows the remaining defendants only a pro tanto reduction in any recovery against them, the National Conference of Commissioners on Uniform State Laws in their August 1977 meeting adopted the pro rata approach. The final draft allows a non-settling defendant in a case in which a party has settled to reduce any recovery by the percentage of negligence of the settling party.

[8]This minor premise is fully stated in Davis, *Third-Party Tortfeasors' Rights*, *supra* note 5, and is based on N.Y. Central R.R. v. White, 243 U.S. 188 (1917), which upheld the compensation scheme against constitutional attack saying the tradeoff of no fault liability of employers under compensation for their common law tort liability was a basis for upholding such statutes.

[9]*See* note 71 *infra* and the related text, in which the question is asked whether the doctrine of joint and several liability among tortfeasors should not be abandoned under comparative negligence when the plaintiff is at fault as well as the defendants. The leading case is American Motorcycle Ass'n v. Superior Court, 65 Cal. App.3d 694, 135 Cal. Rptr. 497 (1977).

party tortfeasors, and it will be suggested that equal protection arguments may offer courts a way to rationalize incomplete comparative negligence systems.

II. Comparative Negligence and Comparative Contribution as Alternate Routes to the Distribution Principle: Legislative vs. Judicial Change

Dole v. Dow Chemical Co.,[10] perhaps the leading New York case of this decade, can, I believe, fairly be characterized as a landmark case on comparative contribution. The principal significance of *Dole* is that it swept away the active-passive distinction and made indemnity and contribution a simple comparison of fault.[11] Decided when a plaintiff's contributory negligence was still a bar to recovery, *Dole* was followed by legislative adoption of comparative negligence for the two-party suit.[12]

In Connecticut, on the other hand, comparative negligence between plaintiffs and defendants has been legislated,[13] but the legislature did not speak on whether the rule of no contribution among tortfeasors should be changed.[14] One Connecticut lower court has declined to extend the distribution principle and apply it among defendants,[15] while another Connecticut lower court opinion says once a plaintiff at fault can recover from others at fault, it is no longer logical to say a defendant at fault cannot recover contribution from another defendant also at fault.[16] When and if comparative contribution comes to Connecticut, the full application of the distribution principle will have been reached by a different route from that of New York.

Although a majority of states now have comparative negligence, the most by statutes[17] and some like California by judicial action,[18] states like Indiana and Illinois—which have neither comparative

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[10]30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See* note 43 *infra* and related text for a full statement of this case.

[11]Phillips, *Contribution And Indemnity In Products Liability*, 42 Tenn. L. Rev. 85 (1974), describes this signal achievement of *Dole* and places it in perspective.

[12]N.Y. Civ. Prac. Law § 1411 (McKinney 1976).

[13]Conn. Gen. Stat. Rev. § 52-572h (1977), *discussed in* James, *Connecticut's Comparative Negligence Statute: An Analysis Of Some Problems*, 6 Conn. L. Rev. 207 (1974).

[14]*Id.*

[15]Smith v. Boccuzzi, 33 Conn. Supp. 187, 369 A.2d 635 (1976).

[16]Hays v. Hazard, 3 Conn. L. Tribune No. 14.

[17]*See* Heft & Heft, note 52 *infra*.

[18]Comparative negligence was adopted judicially in California in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

negligence nor contribution—may want to consider these routes to change. As Illinois has "flirted" with the adoption of comparative negligence,[19] but ultimately left the problem for legislative action,[20] and a federal court in Indiana has required contribution,[21] the Connecticut experience to date should be described to illustrate how much less satisfactory some legislative solutions are than judicial ones. This seems particularly true because comparative fault statutes generally fail to deal with settlements; thus even though costs are distributed in proportion to fault at trials, when one defendant settles the remaining defendant(s) gets only the benefit of a right to offset that settlement, not a pro-rata reduction.

Now that routes of change have been described, it is necessary to describe various forms of settlements and trace the effects of these settlement arrangements on the policy of encouraging settlements while seeking to distribute costs.

III. A Paradigmatic (Side by Side) Display of Settlement Arrangements

In the hope that later discussion will be easier to follow if a few relatively complex settlement cases can be referred to in the discussion by name rather than a recitation of their facts or even their holdings, consider the following cases. Note in each not only whether the state had either or both of the emerging rules of comparative negligence and comparative contribution but whether the plaintiff was an employee plaintiff, and thus entitled to receive compensation benefits, or was a consumer plaintiff and had no compensation benefits. Note also whether any or all of the multiple defendants had settled with the plaintiff.

1. Payne v. Bilco Co.[22]—from Wisconsin, a comparative negligence state with comparative contribution.

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[19]The "flirting" with comparative negligence in Illinois is the subject of a Symposium with articles by leading torts scholars entitled, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 Vand. L. Rev. 891 (1968), where James, Kalven, Keeton, Leflar, Malone and Wade discuss *Maki v. Frelk.*

[20]Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

[21]Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974) rejected Indiana's no contribution rule for air collision cases.

[22]54 Wis. 2d 345, 195 N.W.2d 641 (1972). The working out of the distribution in settlements can be seen in other cases. In Laster v. Gottschalk, 255 N.W.2d 210 (Mich. Ct. App. 1977), one of two defendants in an automobile case paid for a pro rata release without admitting liability. The remaining defendant successfully kept the settling defendant in for the apportionment of fault. The dissenting opinion, perhaps correctly, points out the real reason to keep the settling defendant in. "In order for a pro rata share to be found then there must be at least two culpable parties." The dissent then

Plaintiff, injured when a door hit his arm on his employer's premises, received compensation from the employer (Blackhawk), sued the manufacturer of the doors (Bilco), and the contractor that built the building (Permanent Construction Company). Bilco cross-complained against Permanent and impleaded the architect who designed the doors for the owner (Sommerville), the subcontractor that installed the doors (Skobis), and the manufacturer's representative for Bilco (J. M. Mitchell Products).

The plaintiff settled with Permanent, Sommerville and Skobis for $6,000. At trial the special verdict apportioned the fault as follows:

40%	to Sommerville, the architect
10%	to Permanent, the contractor
15%	to Skobis, the subcontractor
0	to Bilco, the door manufacturer
0	to Mitchell, the manufacturer's rep.
20%	to Payne, the plaintiff
15%	to Blackhawk, the compensation covered employer
100%	

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argues that as the settlement was arrived at before the verdict there could be no determination of pro rata shares, and suggests that the way to let the jury know of possible fault of the settling party is to subpoena that defendant and get his testimony.

Although the majority opinion does not exploit this inconsistency in the dissent, it does arrive at the same result as *Payne v. Bilco* when it says that on the trial with the settling party in: (1) if the jury finds the settling defendant solely liable the remaining defendant will be discharged; (2) if the remaining defendant is solely liable that defendant will be entitled to a pro tanto reduction; but (3) if the jury finds both liable the non-settling defendant will be responsible for only its share and the settling defendant's share will be satisfied by the settlement.

Letting the jury find out about the settling defendant's fault, if any, under a subpoena, the solution suggested by the dissent, would not allow the determination of shares if that defendant was not a party. Because the release did not admit liability, the court said it could not be introduced. Keeping the settling party in was the only practical way to achieve a pro-rata distribution.

Other cases include Leger v. Drilling Well Control, Inc., 69 F.R.D. 358 (W.D. La. 1976) and Fruge v. Damson Drilling Co., 423 F. Supp. 1276 (W.D. La. 1976), where the working out of the distribution rule in maritime torts was deemed to require that when one defendant settled the remaining defendant could be held responsible only for its pro rata share. The *Fruge* opinion says this will require a detailed and complex determination by the jury of the degrees of fault of all—the defendants who have settled as well as those who have not—and questions whether the complexities and expenditure of judicial time can be justified by the benefits that would stem from achieving a true pro rata distribution according to degrees of fault. This may well be true in *Fruge* where the working out of pro rata effect saved the defendant only $1,200. However, the principle may have greater impact in other cases.

Because Sommerville, Permanent, and Skobis had settled with the plaintiff, and Blackhawk was covered under compensation, judgment was entered against Payne on Bilco's motion.

To the plaintiff's objections that it was error to include the employer and the settling defendants the court concluded failure to do so would have been "prejudicial" to Bilco and that "it was necessary that all the alleged tortfeasors be included in the special verdict for comparison purposes."[23]

2. Castillo Vda Perdomo v. Roger Construction Co.[24]—from Pennsylvania, a contribution state with "joint tortfeasor" releases—*i.e.*, releases that operate to release other defendants to the extent of pro-rata share of common liability of person released.

Five people died as a result of inhalation of carbon monoxide fumes emitted from a propane gas generator that did not cut off when normal power service was resumed and was not adequately vented. The administrators of their estates sued the Friedman interests (that is, the owners of the apartment, and the principal contractors) and the electric contractor (Bohem), the heating contractor (D'Anjollel), the contractor that graded the site and may have obstructed the exhaust (Main Line Contractors), the manufacturer of the switch (Zenith Automatic Controls), the suppliers of the switch and generator (Maris Equipment and Rose Electric), and the manufacturer of the generator was added (Kohler Company).

The Friedman interests paid $500,000 for a joint tortfeasor or pro-rata release; the other defendants then settled as follows:

Zenith	$100,000
Main Line	20,000
Rose Electric	5,000
Maris Equipment	5,000
Kohler	27,500
D'Anjollel	20,000
Bohem	82,500
	$260,000

Having paid $500,000 of the total of $760,000, the Friedman interests asked for contribution from the other defendants who settled for what seemed far less than their "pro-rata" share. Contribu-

[23]54 Wis. 2d at 345, 195 N.W.2d at 646.

[24]418 F. Supp. 529 (E.D. Pa. 1976), *rev'd and remanded*, 560 F.2d 1146 (3d Cir. 1977), in an opinion which stresses the distribution principle. The opinion also states that the primary purpose in settlements is to get money in the hands of the victim and the secondary reason is to reduce the burdens on courts. This opinion offers the view that all parties must settle together.

tion was denied. This opinion appears to be a case of first impression denying to a tortfeasor who settled a right to contribution from those who settled thereafter.[25]

Like *Payne v. Bilco*, *Castillo* has a discussion of the mechanics of settlements, and language that indicates that courts should follow the practice of attorneys who settle by allowing the costs to be distributed among the defendants in proportion to perceived relative degrees of fault.[26]

3. Reese v. Chicago, Burlington & Quincy R.R.[27]—from Illinois, a no contribution state.

A railroad employee supervising a crew loading with a crane manufactured by Koehring was killed when a brake pedal "jumped off the floor." Suit was brought against the railroad under the Federal Employees Liability Act and against Koehring under product theories. The railroad got a loan receipt from the plaintiff, paying $57,500 secured by rights against Koehring. Only if the plaintiff recovered more than $57,500 from Koehring could she keep the excess.[28]

The suit proceeded against Koehring and not the railroad despite evidence of the railroad's improper maintenance of the crane. The jury verdict was $149,000. The trial court set off the railroad's payment. The appellate court reversed, holding that a loan receipt agreement is enforceable according to its terms.

For the sake of completeness, even though *Reese* involved a payment to the plaintiff by the railroad, if a state approves "loan receipts" and allows one tortfeasor to shift all the loss to a co-tortfeasor, some courts have gone on and used "Mary Carter" settlements. A Mary Carter does not provide a cash "loan" but merely limits liability and provides for extinguishment of that agreed liability to the extent of recovery against co-tortfeasors.[29]

It is easy to understand how loan receipts came to be used in states which barred contribution between tortfeasors. In the typical case involving multiple defendants, one of those defendants with an insurance policy with low limits will rush to the plaintiff and settle for the policy limit, providing that the plaintiff will use every effort to recover more from the defendants that have high limits or happen to be very solvent. Faced with a defendant with limited resources to offer, and who offers all, a plaintiff might well take the

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[25]*Id.*

[26]*Id.*

[27]55 Ill. 2d 356, 303 N.E.2d 382 (1973).

[28]*See* the excellent Annotation at 62 A.L.R.3d 1111 (1975).

[29]Mary Carters are the subject of an Annotation at 65 A.L.R.3d 602 (1975) and the Comment, 25 FLA. L. REV. 762 (1973).

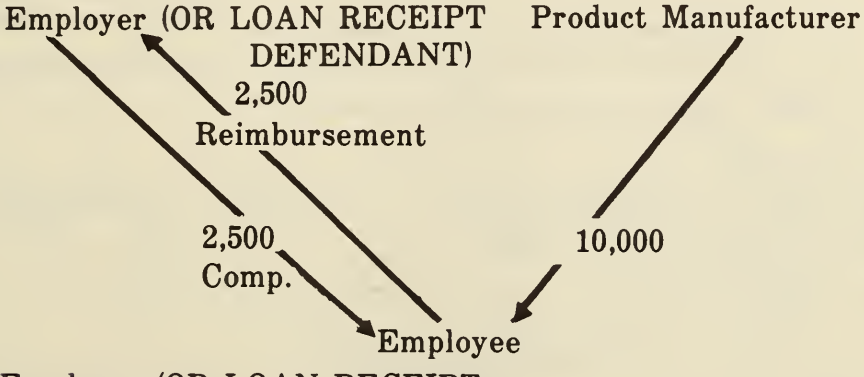
money offered and agree to allow that defendant to be subrogated to the plaintiff's rights against third parties to the extent of the payment. For compensation-covered employers, most statutes provide this remedy for the employer[30] when it gives the injured employees the benefits of the compensation statute.

4. Compensation Analogies

a. *Iowa Power & Light Co. v. Abild Construction Co.*[31]—from Iowa, a contribution state.

IN *IPALCO*, an employee was injured when an iron bar he was holding came into contact with a power line. The power company settled for $177,090.79 and sought to recover from the plaintiff's compensation-covered employer all or half of the settlement by indemnity or contribution. Unlike the *Dole v. Dow* court, the Iowa court, as have a majority of courts in this country, held that the full responsibility for the employee's injuries could be cast upon the third party defendant power company despite employer fault.

To show the effect of the loan receipt and its analogy to *IPALCO* in diagrammatic form, assume that the compensation, or loan receipt amount, is $2,500; assume the common law damages recoverable by the plaintiff are $10,000. Under *IPALCO* and under a loan receipt the effect would be:



Employer (OR LOAN RECEIPT DEFENDANT) Pays	-0-
Product Manufacturer Pays	10,000
Employee Gets	10,000

With the reimbursement or subrogation features of compensation and loan receipts the compensation carrier, and the defendant that takes a loan receipt, can push all the costs onto a remaining defendant.

For completeness, consider also the analogy of the settling

[30]*See* Davis, *Third-Party Tortfeasors' Rights*, *supra* note 5.

[31]259 Iowa 314, 144 N.W.2d 303 (1966).

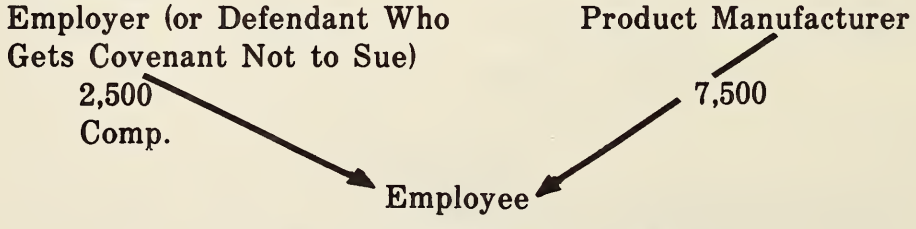
defendant who takes a covenant not to sue with the compensation carrier, or employer, that does not have subrogation or reimbursement rights. The use of *IPALCO* in a state, such as Ohio,[32] which does not have reimbursement rights can be diagrammed as follows:

Employer Pays	2,500
Product Manufacturer Pays	10,000
Employee Gets	12,500

Where a defendant settles for $2,500, and the plaintiff covenants not to sue that defendant, the usual result would be analogous to what can be called, in compensation, "load sharing." This is shown in:

b. *Santisteven v. Dow Chemical Co.*[33] In *Santisteven*, again a product liability defendant sued on a defective warning theory by an injured employee was denied the right to sue the employer for contribution. The *Santisteven* court, however, recognized the inequity of casting the whole burden on Dow Chemical and noted that the recovery against Dow would be reduced by the amount of compensation benefits, thus effecting a "load sharing."

Santisteven:



Employer Pays	2,500
Product Manufacturer Pays	7,500
Employee Gets	10,000

The diagram for *Santisteven* shows what happens when a defendant pays for a covenant not to sue and the plaintiff proceeds to

[32]Ohio Rev. Code Ann. § 4123.74 (1973).
[33]506 F.2d 1216 (9th Cir. 1974).

judgment against a remaining defendant. Even in a no contribution state the amount received in the settlement will be deducted from the amount of the jury verdict.[34]

The foregoing discussion has not treated "releases" because some states still hold that a release of one joint tortfeasor releases all.[35] Therefore our building blocks are "pro rata" or Pennsylvania joint tortfeasor releases, covenants not to sue, and loan receipts. These and their compensation analogies are:

1. Loan receipts and *IPALCO;*
2. Covenants not to sue and *Santisteven;*
3. Pro-rata releases of the settling party's proportionate degree of fault and *Payne v. Bilco.*

These are the basic patterns for settlements. It should not be forgotten that variations exist, such as the practice of paying some money to a plaintiff while the suit is pending, without asking for anything but a credit against whatever is ultimately recovered. This practice does not involve a true release or settlement, so it is not treated here. It will be relevant when asking what the jury should know.[36] It is obvious that if such payments are known to the jury, that may affect their verdict.

IV. A Theory of Settlements

A. Tests

With the spread of comparative negligence and comparative contribution the Wisconsin case of *Payne v. Bilco* is the paradigm for the future, in the sense that it is the model or ideal. The court in *Payne v. Bilco* distributed responsibility among multiple defendants in proportion to their respective degrees of fault. It approved the submission of the degrees of fault of actors who have either settled by taking a pro rata release for their own degree of fault or settled under compensation. The opinion points out that such a distribution of costs in proportion to degrees of fault is the way parties settle, and it is the way the court allowed the litigation to be closed.

This is a model for the future in that each defendant before the court has either settled for a proportionate degree of fault or will suffer a judgment for that degree of fault. However, no defendant has paid or can be made to pay for more than that defendant's proportionate part.

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[34]Dwy v. Connecticut Co., 89 Conn. 74, 92 A. 883 (1915).

[35]Annot., 73 A.L.R.2d 403 (1960).

[36]*See* Taylor v. Yellow Cab Co., 548 S.W.2d 528 (Mo. 1977). This case involves the admissibility of evidence of advanced payments predicated on possible tort liability and holds that such evidence shall not be admitted before the jury although there can be a credit against the plaintiff's ultimate recovery.

It is a model under the principle of *distribution.* Any scheme of settlements that fails to distribute costs in proportion to perceived fault will fail a threshold test, which can be stated as a question: Does the settlement scheme distribute costs in proportion to fault? Settlement schemes which flunk this test, such as loan receipts and Mary Carters, violate the distribution principle. With the working out of the distribution principle, those practices will be rejected.[37] As will be seen, it can be argued that the offset approach can satisfy this threshold test in a rough fashion. Therefore, the later discussion will compare the dollar offset in settlements with pro rata releases, and little or no attention will be given to loan receipts or Mary Carters.

Payne v. Bilco did not adjudicate the rights of the defendants among themselves or suggest motivational tests for a scheme of settlements; therefore it is necessary to look to *Castillo* where a defendant (or group) had settled, paying approximately two-thirds of the total the plaintiff received from all defendants in settlement, and sought contribution. The defendants that paid $500,000 argued that allowing them to recover contribution from the remaining defendants that settled for $260,000 would "encourage all parties to settle at the same time."[38]

Firmly committed to a policy of encouraging settlements, the court set out three principal motivations for settlement: "(1) to avoid the risk of payment of a potentially larger sum in damages if they are found liable; (2) to eliminate the expense of further proceedings, including trial; and (3) to avoid the possibility of a *formal,* adverse judicial determination such as a finding of fault."[39]

In attempting to set out and test schemes of settlement, these can be rephrased as questions and called motivational tests. The *Castillo* opinion suggests these are stated in descending order of importance. It should be generally agreed that limiting expenses is more important than the other two tests; however, a product manufacturer may well put the final above the penultimate one because of the potentially destructive impact of an adverse finding in one case upon future cases.

Although *Castillo* involved a defendant that settled first and then sought contribution from defendants that settled later, the policy reasons for holding that the former could not recover contribution apply with equal force to a defendant that settles later, or suffers a large judgment, and sues those who settled first seeking

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[37]Other objections to the loan receipt are discussed in Annot., 62 A.L.R.3d 1111 (1975).

[38]418 F. Supp. at 535.

[39]*Id.*

contribution. At the heart of the matter is the court's discussion of the idea that allowing contribution on these facts will encourage all parties to settle at once rather than one at a time. To this argument the court says: "In our experience, however, things just do not happen that way, in the real world. It is always much less likely that three or more parties will come to a meeting of the minds than two will."[40]

This conclusion in *Castillo* can be read as stating a procedural requirement for settlement practice, which can be added to the three motivations enumerated by the court to test the desirability of various settlement schemes. Any workable scheme of settlements must permit one defendant to settle if that defendant and the plaintiff can agree even though other defendants refuse to join. This goal, or test, can be met in product suits only if indemnity implied at law is swept into a comparison of degrees of fault as the New York court has done in *Dole v. Dow.*[41]

Finally, the *Castillo* opinion discusses the need for "benefits"[42] to the party from whom contribution is sought. Where pro rata releases are used benefits cannot appear. If a reluctant defendant "holds out" when others are settling, especially if they get pro rata releases, the fact the holdout pays far more to settle a given percentage of fault still does not benefit the defendant that settled earlier for fewer dollars for the same percentage of fault.

With covenants not to sue, a holdout defendant enjoys a dollar offset. A holdout that does not settle cannot confer a true benefit on the defendant that did obtain a covenant not to sue. But if enough was paid for a covenant from a defendant anxious to settle, a benefit might be conferred on a subsequent holdout. Thus, a further test of settlement schemes is: Can the scheme result in one defendant benefiting from what another pays?

Pro rata settlements pass this test while the covenant and offset scheme may occasionally fail because it is not distributional. Before attempting to compare the offset and pro rata approaches further, and test them further under the six stated principles, it is appropriate to trace briefly the history of both pro rata releases and the offset approach. In doing this a full description of each can be made, using New York as the distributional model and the proposed Uniform Comparative Fault Act as the dollar offset model.

B. New York—The Working Out of the Distribution Principle

Dole v. Dow Chemical Co.[43] is the leading New York case which

[40] *Id.* at 536.

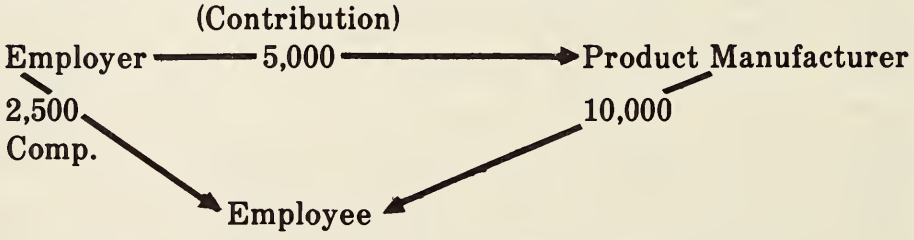
[41] *See* the discussion in note 11 *supra* and accompanying text.

[42] 418 F. Supp. at 537.

[43] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

knocks down the compensation arrangement that allowed an employer at fault to pass all responsibility out to another. Like the Iowa case that said loan receipts must fall as a violation of that state's contribution principles,[44] *Dole v. Dow* can be read as saying that an employer's compensation immunity under the statute must fall because it violates comparative contribution. To diagram *Dole v. Dow* as earlier cases were diagrammed, that is, assuming compensation responsibility of $2,500 and common law damages of $10,000, and that the employer and Dow were each 50% at fault, then this leading case can be described as follows: The New York Court of Appeals allowed Dow Chemical—a product liability defendant sued on a defective warning theory by the widow of a deceased employee of the Urban Manufacturing Company—to sue Urban for contribution despite the argument that the compensation act gave the employer immunity.

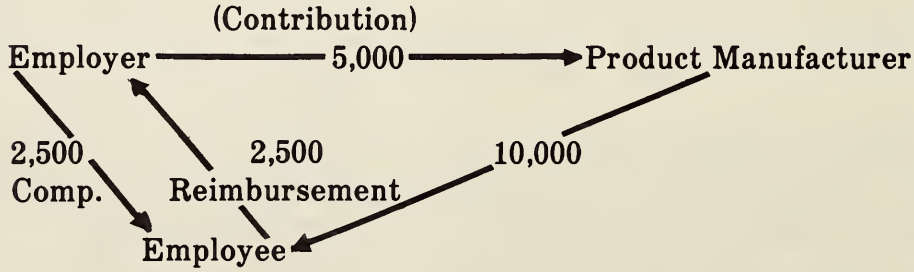
(A) A *Dole* approach in a state which does not give the employer subrogation or reimbursement rights:



The result (disregarding the cost of shifting):

Employer Pays	7,500
Product Manufacturer Pays	5,000
Employee Gets	12,500

(B) A *Dole* approach where the employer has subrogation or reimbursement rights:



Employer Pays	5,000
Product Manufacturer Pays	5,000
Employee Gets	10,000

[44]Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953).

Parties in other states wishing to attack *IPALCO* and urge the adoption of a principle of distribution should consider whether their facts are as appealing as those in *Dole*. Someone working for the employer probably had removed Dow's warning. To follow *IPALCO* and permit the plaintiff to recover one hundred percent common law damages from Dow would be malapportioned justice. It was especially malapportioned when the employer under *IPALCO* would be entitled to subrogation. In other cases it has been held that where a defendant interferes with a codefendant manufacturer's warnings, the manufacturer escapes all the responsibility.[45] Yet *IPALCO* would put all the losses on the manufacturer. Perhaps the ultimate reason for *Dole* was that the New York Court of Appeals could not accept this form of malapportioned justice. This is supported by that part of the opinion which expressly states the case should be governed by a principle of distribution.[46] To examine this working out of the distribution principle of *Dole* consider what followed *Dole* in New York, especially the provision for settlements.

C. Pro Rata Releases

After *Dole*, New York adopted comparative negligence in the two-party suit,[47] extending the principle that costs should be shared among parties in proportion to their respective degrees of fault to include the plaintiff. For the New York lawyer, the legislature also gave guidance on how the principle of sharing costs in proportion to respective degrees of fault would be applied when one of many defendants settled with the plaintiff. Section 15-108 of the New York General Obligations Law provides:

> (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in-

[45]Magee v. Wyeth Labs, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963); Harper v. Remington Arms Co., 156 Misc. 53, 280 N.Y.S. 862 (Sup.Ct. 1935).

[46]See that part of Dole v. Dow Chemical Co., 30 N.Y.2d 142, 150; 282 N.E.2d 288, 293; 331 N.Y.S.2d 382, 389 (1972), which quotes Werner, *Contribution and Indemnity*, 57 CAL. L. REV. 490, 516 (1969), to state: "tort policy goals" include an "equitable loss sharing by all the wrongdoers" in multiple party cases.

[47]*See* note 12 *supra*.

> the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.[48]

The pro rata approach has been criticized as a deterrent to settlements, and it has been argued that no plaintiff's lawyer can settle with a defendant and go to trial against the other defendants because if, after the ultimate judgment (and determination of the settling defendant's percentage of fault), the plaintiff receives less than the total indicated by the verdict the client will be unsatisfied.[49]

Certainly from the plaintiff's viewpoint it would be desirable to be able to settle with one defendant and have to offset against the verdict recovered from other defendants only the actual sum received—especially if that defendant was underinsured—and not have to reduce the judgment by the percentage of fault attributable to the settling defendant. That would put great pressure on the defendant who refused to join in a settlement by a codefendant. However, if the defendant who refuses to settle can file a cross action against a defendant that has settled (a right cut off by the New York General Obligations Law) the defendant that has settled has gained nothing by paying for a settlement, and will have provided financing for the plaintiff's suit, which can boomerang when the suit for contribution or indemnity is prosecuted, as it did in *Dole* and continues to do in the employee-plaintiff cases.[50] And, if the defendant that does not settle cannot sue for contribution or sharing of the costs in excess of what the plaintiff accepted from the defendant that settled, but still must pay for more than the proportionate share of damages fixed by the jury in determining the percentages of fault, the principle of sharing costs in proportion to degree of fault suffers. It can be said that joint and several liability is used to

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[48]N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1976).

[49]Wilner & Farrell, *Dole v. Dow Chemical Co.: The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457, 465 (1976).

[50]Examples of *Dole's* application to pierce the compensation-covered employer's limitation of liability to the compensation settlement are legion, but a recent case, Nelson v. Dykes Lumber Co., 52 App. Div. 2d 808, 383 N.Y.S.2d 335 (1976), deserves special attention for what it hints at in the apprortioning of responsibility in many close cases. The case involved a compensation-covered employer that had its hoist protectively screened by a third party. An employee who was injured when a brick came through the screen sued the third party. The screen contractor then sued over against the employer and the jury split the responsibility 50-50! It is interesting that the United States Supreme Court abandoned the divided damages rule when it decided United States v. Reliable Transfer Co., 421 U.S. 397 (1975), but that juries that have difficulty in apprortioning damages may come back to the 50-50 split.

provide coverage for underinsured defendants.[51] However, to state that points out a practical objection to a scheme which holds the defendant that doesn't settle is responsible for all damages, offsetting only what was received in the settlements. A local defendant guilty of a substantial degree of fault can buy out early in a sweetheart settlement, or for low policy limits in the case of underinsured defendants. This would let foreign defendants or fully insured defendants pay the plaintiff all the damages in excess of what the plaintiff accepted from the settling defendant even if the degree of fault attributable to these defendants was small in comparison to that of the defendant that settled.

The Wisconsin experience[52] suggests that lawyers who are familiar with the theories of products liability and who have experience with comparative fault can work out settlements that satisfy their clients. As the plaintiff's lawyer tries to explain a settlement that releases the settling defendant's percentage of fault to the client, the obvious analogy is the landowner who has given an oil and gas lease where the lessee is about to drill and wants to buy some of the landowner's royalty. If the landowner sells some and keeps some, there will be some cash even if the well is dry, although less if the well is a producer. The client who settles gets some cash even if the well is dry, so that offsets getting a little less than the full amount if the suit is successful.

D. Settlements in the Proposed Uniform Comparative Fault Act

New York is not the only model for handling settlements under the distribution principle. The proposed Uniform Comparative Fault Act[53] in attempting to make comparative fault consistent, has chosen the offset approach. When one defendant settles, the plaintiff's recovery against the remaining defendant(s) is reduced by the amount received in or stipulated in the settlement.[54] Giving credit to the remaining defendants only for the amount received, or stipulated in a settlement, is contrary to a principle that the costs of injury be distributed in proportion to fault. Thus in the application of the distribution principle, the New York solution is clearly preferable to the proposed Uniform Act because it, like Wisconsin and

[51]The view that joint and several liability provides insurance coverage for uninsured defendants that might better be the result of legislative choice rather than judicial inertia can be found in James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207 (1974).

[52]*See* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL §§ 4.200-.220 (1971), which argues that approtioning damages makes settlements easier and describes the working out of the implications of apportionment.

[53]Wade, *supra* note 7.

[54]*Id.*

Pennsylvania, requires the plaintiff to release the pro rata proportion of fault of the party that obtains a settlement and does not shift to the remaining defendant(s) responsibility for the degree of fault of the settling defendant.

The solution of the proposed Uniform Comparative Fault Act is grounded in the past in the Uniform Contribution Act which was adopted prior to the spread of comparative negligence. It needs to be rethought in light of the adoption of comparative negligence and comparative contribution. Such a rethinking is required, if for no other reason, because on the face of the proposed Act there is an obvious inconsistency. Further, the goal of encouraging settlements by letting a settling defendant be dropped from the trial, which might be thought to be served by the dollar offset provisions of the proposed Uniform Act, should be considered in light of the practical consequences that flow from use of the dollar offset, especially the risk of "sweetheart" settlements, and the question should be asked whether the Uniform Act, in order to encourage settlements by dropping the defendant that settles, pays too high a price in terms of the other tests for settlements.

The inconsistency in the proposed Act which shows a failure to consider the settlement provision in relation to distribution of costs in proportion to fault is that settlements before judgment reduce the remaining defendant's responsibility by a dollar offset,[55] not by a percentage. However, after judgment has been entered and a plaintiff finds that one defendant is underinsured, the proposed Act redistributes that uncollectable part of the underinsured defendant's responsibility among the remaining parties, plaintiff and defendants, in proportion to their respective degrees of fault![56] Thus the proposed Act encourages plaintiffs to accept the policy limits of underinsured, or asset poor, defendants before judgment because the failure to settle with such a defendant before judgment will require a sharing of the uncollectible portion of fault of an underinsured defendant by a plaintiff found to be at fault in even a slight degree.

E. Using a "Good Faith" Standard in the Uniform Act To Deny Contribution (and Indemnity) from a Defendant that Settles

One way in which the Uniform Comparative Fault Act could be amended to avoid "sweetheart" settlements with one defendant while the plaintiff's suit continues against others is to test such set-

[55] *Id.*

[56] The position taken by the proposed act is that suggested in Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289, 297. For a further working out of the implications of sharing, see discussion of *American Motorcycle* in note 71 *infra*.

tlements by a standard of "good faith." If the settlement is not made in good faith that defendant may be required to contribute to the payment of any ultimate recovery. Such a provision is found in section 15-108 of the New York General Obligation Law[57] where such protection seems unnecessary for the defendant that refuses to settle because that defendant's responsibility is limited. A reason for providing that a defendant that has settled may be required to contribute if the settlement was in "bad faith" might be that, with joint and several liability, a defendant that does not settle may suffer a judgment for percentages of fault that exceed the percentage of fault found by the jury. Thus a test of good faith may have to inquire whether a defendant that gets a release of its own share of fault should have expected to have to share responsibility for a share of fault attributable to another defendant that may be bankrupt if the matter goes to trial.

There is a history of the use of good and bad faith tests in contribution suits. Some cases suggest that when one defendant settles, the bad faith of a defendant that refuses to settle can bar the latter's suit for contribution from the defendant that settled.[58] There is a certain logical reciprocity in arguing that if a defendant who refuses to settle in bad faith cannot recover contribution when, after judgment, that defendant pays a disproportionate share of the costs, then it logically follows that if a defendant settles in good faith other defendants that refuse to settle are impliedly not acting in good faith.

However, practice experience, for which I cannot cite reported cases, teaches me that the relation of verdicts and settlements is often tenuous at best. That is, cases that could be settled for $15,000 or less often end with jury verdicts that exceed $150,000. Cases involving an insurer's negligent failure to settle within the insured's policy limits[59] suggest that virtually any figure in a settlement can be a good faith figure, but such cases have disturbing implications about the duties that multiple defendants may owe each other when one defendant wants to settle and another refuses and each can "injure" the other if neither can make a separate peace, or if, in settlements, each owes a duty of "good faith" conduct to the other.

[57]N.Y. GEN. OBLIG. LAW § 15-108(b) (McKinney Supp. 1976), provides that a release given under subdivision (a) will relieve all liability for contribution if "given in good faith."

[58]Bad faith bars a right to contribution. American Export Isbrandtsen Lines, Inc. v. United States, 390 F. Supp. 63 (S.D. N.Y. 1975); New Amsterdam Cas. Co. v. Lundquist, 198 N.W.2d 543 (Minn. 1972).

[59]*See* note 57 *supra;* Keeton, *Liability Insurance and Responsibility for Settlement,* 67 HARV. L. REV. 1136 (1954); Schwartz, *Statutory Strict Liability for an Insurer's Failure to Settle: A Balanced Plan for an Unresolved Problem,* 1975 DUKE L.J. 901.

There are other objections to the use of a "good faith" standard. First, a subjective standard like good faith will always be difficult to use. Subjective standards create uncertainty, unlike pro rata settlements where a party that settles gets a release of the percentage of fault attributable to the settling party. The pro rata release is objective if all parties, including the one that settles, are kept in the suit until the jury's verdict fixing of fault percentages are known. This approach, keeping the settling party in the suit, would also resolve the indemnity problem if it has not been resolved by accepting the great contribution of *Dole v. Dow*: the concept that indemnity and contribution are merged into the principle of comparative fault. Without such a merger, no manufacturer can obtain a settlement and be free from claims that the manufacturer must indemnify a seller that refuses to settle. Under distributional fault if the retailer of a product was without fault, the jury should find no percentage of fault attributable to the retailer that refused to settle, while fixing all the fault on the manufacturer that settled, or the plaintiff. This might distress retailers who claim that when they pass on a manufacturer's product they are entitled to indemnity in the full sense: attorney fees,[60] as well as protection against amounts paid out in satisfaction of claims; but one of the complicating factors in products litigation is that the plaintiff not only sues the manufacturer, but sues the retailer as well, as permitted by present doctrine.[61] Plaintiffs do this to keep the foreign manufacturer from removing cases filed in state courts to the federal courts, as well as for other reasons. Also, there may be independent grounds for recovery against local defendants. They have duties to warn and can appraise the use the buyer intends to make of the product, so when the law of indemnity with its provision of attorney fees for the defendant entitled to indemnity is used, there will be inevitable tenders of the defense to the manufacturer and refusals when the manufacturer sees the plaintiff making direct or independent claims against the retailer or when such grounds are suspected. When it is the plaintiff that elects to sue the retailer as well as the manufacturer, and an obvious additional reason for this joinder is to increase the number of defendants that can be expected to contribute to a settlement, it seems odd to allow this plaintiff tactic to be used to fasten the cost of the retailer's attorney fees on the manufacturers. It seems appropriate to allow each defendant to handle its own defense unless there are contractual indemnity agreements, and not to allow adherence to indemnity at or implied by law to give the retailer the right to recover attorney fees and threaten such

[60]*See* Sendroff v. Food Mart Inc., Conn. L. Tribune, March 21, 1977, at 24, col. 2.
[61]RESTATEMENT (SECOND) OF TORTS § 402A (1965).

recovery to coerce the manufacturer to assume the defense and payment of all settlement costs.

Second, even with a "good faith" test the proposed act fails the distribution test; even though the Uniform Comparative Fault Act could be claimed to roughly satisfy the threshold test of distributional justice. Plaintiffs who want to pick up a readily available settlement from the underinsured defendant will suggest that the offset solution is best.[62] They would drop from the trial the defendant that settles and allow the suit to proceed with the jury instructed to proportion the damages or fault among the remaining parties only.[63] This could be said to distribute the percentage of fault of a party that settles between the plaintiff and defendants that remain in the suit. While this may solve the problem of making the Uniform Act consistent in a fashion, provided the amount received in settlement is used to reduce the total damages that will be divided among the parties in proportion to fault, such a solution does not obscure its impact. It still makes the remaining defendants provide coverage for risk of the settling party's underinsurance. Further it requires a belief that a plaintiff's degree of fault will be increased when a defendant who seems at fault is absent. The reasoning of *Payne v. Bilco* points in the opposite direction. In order to fairly determine the respective degrees of fault the jury should consider and fix the respective degrees of fault of all parties.

Dropping the defendant that settles not only conflicts with what *Payne v. Bilco* teaches us, it makes civil litigation more like the criminal case described in *An Anatomy of a Murder*, where the defense seeks to point the finger of blame not only at plaintiff, but at an absent party. Some defendants might like this, since it creates the possibility that jurors will suspect that where a party clearly at fault is not before the court the plaintiff will have settled with that defendant. If one of the underlying reasons for adopting comparative negligence is that it was thought that when contributory negligence was a bar the jury was acting in an "outlaw" fashion when they compared negligence and reached compromise verdicts on damages while finding the plaintiff free of negligence, this approach (thinking that the jury will speculate about possible settlements with a party not before the court) is also an "outlaw" approach. Should not the jury be given all the facts?

The third is that by dropping the defendant that settles, the only

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[62] *See* note 49 *supra*.

[63] The answer to this suggestion that juries will apportion the fault of absent defendants among the plaintiff and the remaining defendants can be found not only in the decisions collected in note 22 *supra*, but also has been perceptively analyzed by Fisher, Nugent, & Lewis, *supra* note 6, at 666.

test of "fairness" is lost. Should not the party that settles be before the court and jury to get a final appraisal of the degree of fault attributable to the settling party as well as the party that has not settled? And, when this is done, and the figure of settlement does not nearly approach the figure determined by multiplying the damages by the settling party's degree of fault, cannot it be argued that the figure was not a "good faith" settlement?

F. *Problems Under the New York Pro Rata Release*

The New York solution, which makes a settlement with one defendant a release of that defendant's percentage of fault, encourages the opposite tactic in settlement negotiations from the offset approach. A plaintiff will not willingly accept the policy limits of an underinsured defendant before trial, but will settle with that defendant only after the main (in the sense of assets as well as possible degree of fault) defendant has settled. If the main defendant does not settle, the plaintiff will not take the policy limits of the underinsured defendant in prejudgment settlement, but will wait until after judgment. This is a logical result when the principle of joint and several liability permits the plaintiff to shift to any defendant able to respond in damages the whole loss, including the costs attributable to the fault of the underinsured defendant. Unfortunately it also promotes sharp practice: the plaintiff may not settle with the underinsured defendant, but may make a collateral agreement not to collect on any judgment in excess of the underinsured defendant's policy limits; or the plaintiff may bargain with that defendant for other cooperation in fixing responsibility on the solvent defendants or increasing their degree of fault.

In the rush to adopt comparative negligence in order to give plaintiffs at fault a right to collect damages and remove the last real contingency, the consequences of adopting a principle that distributes the losses in proportion to fault were not fully considered. Too little consideration was given to how this principle affects settlements. Only the effect in trials seems to have been considered. Now, however, the risk of an increase in sharp practice by the lawyers who want to zero in on the defendant that can respond in damages and let those with little or no resources escape must be considered. There must be some way to control misuse of the settlement provisions and the malapportioned results obtained by loan receipts, and even from covenants not to sue. The practical way is to limit the responsibility of defendants that go to trial (or settle) to responsibility for their own degrees of fault. If all actors are not made parties, those before the court could share the fault of defendants not made parties, but only by limiting the responsibility of

parties before the court to such an expansion from their own degrees of fault can sharp practices be controlled.

Another method might be to let the jury know everything. Let the jury know that a defendant is underinsured and that when percentages of fault are assigned to that defendant they are really fixing responsibility on the remaining defendants. A jury that knows everything might well apportion the underinsured defendant's responsibility between the plaintiff and the remaining defendants, and, of course, may decide to help a plaintiff recover "all" from a defendant guilty of some lesser degree of fault.

If juries are not told the fact of settlement and its effect, they may guess that a plaintiff employee gets compensation and the carrier will reach part of the proceeds of the suit by subrogation[64] or

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[64]In a recent jury case in Conneticut Bernier v. National Fence Co., No. 42408 (Sup. Ct., New London County, Conn. June 28, 1976) (motion for new trial denied), a state employee was killed when attempting to rescue employees of a contractor working on state property. The suit was similar to *IPALCO*. The decedent's plaintiff could not sue the state, which paid compensation, so suit was brought against the third-party defendant on the theory there was negligence in failing to cut off the electric power in the area where the men were working.

At the outset of the jury trial it came to the attention of the attorneys that members of the jury may have read an account of the suit in the local paper. In the examination of the jurors it was found that a juror had read an account of the suit and that the juror knew the ad damnum figure mentioned in the article. After discussion, the attorneys accepted the juror and the judge instructed the juror not to discuss the article with other jurors.

After the trial, which resulted in a verdict for the third-party defendant, it was discoverd that among the newspaper articles on the trial there was one that concluded by stating that the State was a party seeking reimbursement of compensation.

In overruling the plaintiff's motion in arrest of judgment based on this discovery, the trial court concluded that the right to object was waived. Although this case may ultimately be reported, it will probably not explore the impact that a juror's knowing that the decedent's employer was going to be subrogated to the claim against the third-party defendant had on the verdict. However, the fact jurors are not wholly ignorant cannot be ignored. Many jurors are employees and may well know that in their state cases like *IPALCO* permit even a negligent employer to cast all the costs of employee injury, including reimbursement for the compensation paid, on the third-party defendant. If that legal rule is known, or even guessed at, jurors might well return a verdict for a third-party defendant because jurors could easily disapprove of a negligent employer getting reimbursement from the relatively less blameworthy third-party.

One such case may not be sufficient to support a generalization, but there is a great temptation to conclude that where an employer is negligent a jury would not like the *IPALCO* results and that trying to keep the jury in the dark may be worse than letting them know the effect of their verdict. For attorneys engaged in suits by employees against third-parties, the plaintiffs' attorneys might pause as they consider whether to take a fairly knowledgeable employee who might know that the employer will seek reimbursement from the jury verdict, and attorneys for the third-party defendant might more willingly take such employees as jurors in the hopes that

they may guess that the plaintiff has settled for a small sum with an obviously-at-fault defendant just because that defendant was underinsured. A plaintiff would not want the jury to know such facts because the jury might use the settlement figure and what they find to be the settling defendant's degree of fault to determine the extent of damages.

G. What Should A Jury Know About Settlements?

It is in the area of how much the jury should know that there is the least guidance. Would it be grounds for reversal to learn from a juror after trial that the jury discussed the probability that one defendant had settled, or that the compensation carrier of the employer of the injured plaintiff would reach part of the proceeds of a suit?[65] It can be argued that no plaintiff will settle if that settlement will be made known to the jury; however, the lawyers and judges know or should know such facts, and they may play a role in pretrial settlements. If this is so, why shouldn't the jury know too? Further, there are ethical dilemmas for a defendant's lawyer who has settled with the plaintiff, perhaps with a loan receipt and subrogation agreement. Is it ethical for this defendant to come before the court and jury to argue that the remaining defendant is really at fault and should respond in damages, without also revealing that the defendant will profit by the bigger award against the other defendant?[66]

Perhaps some practical considerations in the controversy over letting the jury know about compensation benefits and settlements should be mentioned. If the jury is allowed to know what dollar amount the plaintiff will receive from the compensation carrier, employers might object because this will lead to pressure to raise compensation benefits. Unions might be in a dilemma: if the evidence were introduced, the jury might index off the compensation benefits to estimate the damages due one plaintiff under the common law, but if employers object they might well see that in the

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evidence of the employer's fault can be coupled with the juror's knowledge that a verdict for the plaintiff may serve to shift losses from the "at fault" employer to a relatively less blameworthy third-party.

Finally, courts unwilling to let juries in *IPALCO* states know what will be the effect of an employee's verdict against a third party might well wonder at the desireability of the *IPALCO* rule if it must be kept from the jury out of fear that jurors might not want to let an "at fault" employer recover from the third-party defendant.

[65] *Id.*

[66] A recent Indiana decision, City of Bloomington v. Holt, 361 N.E.2d 1211 (Ind.Ct. App. 1977) shows a defendant unhappy with having to defend with a loan-receipt defendant who is a "wolf in sheep's clothing."

long run the interest of the unions in getting increased compensation benefits is more important than what an individual plaintiff gets.

Letting the jury know what the plaintiff received in a settlement with a defendant while the plaintiff proceeds with another defendant presents a much sharper controversy, one with few compensations for the plaintiff if the settlement is a bad one. Plaintiffs will object to letting the jury know that the plaintiff has settled with one defendant because it is far more likely that if the amount is known or even guessed at by the jury, the jury will index off that figure by estimating what percentage of fault the settlement covered and fix the amount of damages using the plaintiff's own acts to estimate them. Plaintiffs will surely say this discourages settlements in which they accept the policy limits of the underinsured or seemingly reasonable sums from asset-poor defendants. It will be said to require the making of side agreements between the plaintiff and such defendants not to execute on any judgment against such defendants in excess of some agreed upon sum rather than the payment of the available money to the plaintiff when the agreement is reached. The possibility of such back door tactics might support the argument that under a distribution principle there need not be joint and several liability among multiple defendants before the court. So long as there is joint and several liability, plaintiffs will be tempted to negotiate with some asset-poor or underinsured defendants to get their cooperation and guarantees similar to Mary Carter agreements, when Mary Carters and their substitutes should fall as inconsistent with the distribution principle. Here, the decision in *Israel Aircraft*[67] might help. Courts have ways to compel the parties to keep all their actions aboveboard and open to judicial review.

To the extent that the desire to promote settlements can be said to require that a party be able to buy its way out of litigation expenses as well as limit exposure, it will be objected that keeping a party in a suit once it has settled defeats two of the three motivational tests. Defendants want to avoid litigation expenses and adverse findings, as well as limit their exposure. But if the defendant has settled for the percentage of negligence ultimately attributed to that defendant, and the jury knows this, the expense of defending such a party must surely be less than what it would be if that defendant had a continuing exposure. The jury would understand why a defendant was not active if it knew that defendant had

[67]Israel Aircraft Indus. v. Standard Precision, 72 F.R.D. 456 (1976). The failure of Israel Aircraft to reveal payments in exchanges for releases from the defendant to the court and the jury was deemed under Rule 37 and Rule 60(b) to warrant the reversal of the $1.2 million verdict.

settled. Thus the avoiding litigation expense test could be substantially satisfied without sacrifice of the distribution principle if the jury was told that a given defendant had settled even if the jury was not told how much that defendant had paid. A compromise that might help keep the jury from becoming "outlaws" would be to tell them of the fact of settlement even if the amount was kept from the jury so they would not index off the figure. This could be done even in the case of compensation benefits. The jury could know the scheme, without knowing the amounts involved, and be told to fix total damages and percentages, leaving with the court the responsibility to look at the figures and apply the percentages.

Finally, it will be argued that even if the dollar figure is not disclosed, the mere fact that a settling defendant is kept in and a verdict may come down fixing some percentage of fault will defeat the final stated reason why defendants settle, the desire to avoid a determination they were at fault. Here again, if the figure is disclosed this purpose will be defeated, but if the figure is kept from the jury, not reported by the courts, and not discoverable by subsequent plaintiffs who sue that defendant, the mere fact that a defendant bought its way out, and did not actively defend, should cut the edge off any verdict fixing some degree of fault on the defendant that settled.[68]

These slight disadvantages of the pro rata approach in damaging the two secondary motivations for settlement, can be said to offset the clear advantage the pro rata system has over the offset provision in achieving distribution of costs in proportion to fault. However, I believe the adverse effects of a true pro rata system on the lesser motivations are far fewer than the disadvantages of the offset approach in failing the distribution test. The offset approach denies distribution in proportion to fault, promotes sweetheart settlements, and can only devise a poor method of policing them. The offset method does not keep all parties in the suit to permit the use of *Dole* comparative fault to cover the problem of indemnity which will always complicate product cases because the rights of all parties are not adjudicated in one comparison of fault, but may require further litigation.

For all these reasons, it is suggested that the percentage scheme (and not the dollar amount) of the New York statute makes sense. It

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[68]Courts serious about promoting settlements cannot fail to see that letting other plaintiffs use discovery rules to look at prior settlements can have a chilling effect. The plaintiff seeking to find out about prior settlements wishes to find an index of that experience. The discovery issue and its effect on settlements cannot be explored here, but it is an area that will have to be worked out as part of a full theory of settlements under the distribution principle.

will force the plaintiff to look for a settlement with the "main" defendant, as was apparently done in *Castillo*, and then the little or underinsured defendants can settle. Settlements with the underinsured first will cause a malapportionment of the percentages of fault if the plaintiff compares fault with the main defendant alone.

H. Reasons Pure Pro Rata Settlements Are Preferable

The New York statute provides that a settlement by one defendant will reduce the liability of the remaining defendants by either the degree of fault or the amount received,[69] whichever is larger. Settlements are more likely to be encouraged if percentages alone are used. If a plaintiff stands to lose by a disadvantageous settlement (one where the cash received was less than the percentage of that defendant's fault times the total verdict), giving the plaintiff the benefits of a good settlement (one where the cash received was greater than the settling defendant's degree of fault times the verdict) might encourage settlements.

Under an analysis of the settlement as a contract, it is difficult to conceive that there would ever be an intent, by either the plaintiff or one defendant who settles, to give any dollar benefit to the remaining defendant when settling parties agree to a pro rata reduction. If those bargaining parties think of a benefit when the dollar amount of the settlement exceeds the settling defendant degree of fault times the ultimate verdict, they would consider that a benefit for the plaintiff.

For these reasons, it is suggested that a pro rata release should not be coupled with a dollar offset. Pro rata settlements carry out the principle of distributing fault. A plaintiff that runs the risk of a bad settlement and getting too little when releasing a percentage of fault can reap the benefit of a good settlement under a pro rata only provision. Finally, it is difficult to believe the defendant that refuses to settle should be considered a third party beneficiary of a good settlement by the plaintiff with a defendant that settles. The only possible reason for keeping the dollar offset in pro rata schemes is that in some cases the presence of judgment-proof defendants will, under joint and several liability, result in a defendant that refuses to settle having to bear costs that exceed the jury determination of that party's percentage of fault. If each party bears only its own degree of fault, no reason exists to continue the dollar offset.[70]

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[69]N.Y. GEN. OBLIG. LAW § 15-108 (Supp. 1976).

[70]Fisher, Nugent, & Lewis, *supra* note 6, at 665-66, discuss how Texas lawyers have the option to include the defendant settling to achieve a pro rata distribution or not include the settling defendant and have a pro tanto credit. This requires tactical thinking and an evaluation of whether the settlement was excessive or inadequate.

Before leaving New York to look at other states, it might be asked why the scheme of section 15-108 as applied to a consumer product defendant that settled was not legislatively applied to the negligent compensation covered employer who has "settled" with the plaintiff employee under the compensation act. For the New York lawyer perplexed by this lack of coordination, the obvious suggestion is that compensation covered employers sued on a *Dole* theory should argue equal protection brings them within the provisions of section 15-108. Authorities that may be relevant to this argument will be discussed in a later section of this paper.

I. Avoiding Responsibility for the Fault of Others as a Motivation for Settlement

The principle of distributing costs in proportion to respective degrees of fault seems to call for the abandonment of joint and several liability among parties before the court unless one defendant can be said to be responsible for the fault of the other as, for example, under respondent superior. When plaintiffs as a group were anxiously awaiting the day that contributory negligence would no longer be a bar, they argued it was wrong to have an all or nothing principle apply to them. It was argued that even if the plaintiff was only slightly at fault and a defendant's fault far exceed the plaintiff's, it was not proportioned justice to allow the defendant to escape responsibility. It is just as logical to suggest that the principle of joint and several liability among codefendants before the court is an "all or nothing" principle (possibly based on the concept that any cause of an innocent plaintiff's injury was sufficient to warrant the imposition of liability for all damages on that cause) that should be rejected and not applied to make a fiscally able defendant guilty of two percent fault pay for the judgment proof defendant's ninety percent of the fault now that the plaintiff escapes the all or nothing principle of contributory negligence as a bar. It is equally a malproportioned form of justice.

This is not the place to mount an extended attack on joint and several liability or consider what may be the landmark case, *American Motorcycle Association v. Superior Court*;[71] however, joint and

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[71]American Motorcycle Ass'n v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977) should be the subject of a plethora of writing even if not discussed here. It is a thoughtful and logical working out of the distribution principle. If the life of the law is not logic the case may not be approved by the highest court in California. Yet it still is worthy of study because it concludes that the adoption of comparative negligence requires a distribution of the loss among multiple tortfeasors in proportion to their respective degrees of fault and refuses to permit the use of the doctrine of

several liability is an all or nothing principle that is often inconsistent with a principle calling for distribution of costs. It is suggested here that if all parties are present, costs can be distributed among the parties to the suit, and that a problem arises in settlements when one defendant seeks to avoid responsibility for more than a pro rata share of costs by settling. If one defendant settles for only the pro rata share, and others whose conduct contributed to the plaintiff's injury are not before the court, a plaintiff can use joint and several liability to fasten upon the defendant that does not settle all responsibility for the defendants who are not present in the suit.

To use an area of tort law that is not as emotional as personal injury, consider the problem of one of a number of defendants who put salt water in a stream and is sued by an injured plaintiff. The classic Texas cases are *Sun Oil Co. v. Robicheaux*[72] and *Landers v. East Texas Salt Water Disposal Co.*[73] *Robicheaux* held that a plaintiff could recover from a given defendant only for the damages apportioned to the salt water that defendant added to the stream. *Landers* overruled *Robicheaux* and held that where an injury "cannot be apportioned with reasonable certainty" among the individual wrongdoers, all the wrongdoers will be held jointly and severally liable for the entire damages. It is suggested that both are extreme solutions, with *Landers* being preferable so long as the plaintiff was without fault, and *Robicheaux* when the plaintiff shares fault.[74] This

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joint and several liability. If it is not already known as the "joint and several liability" case, it will be so known.

Where joint and several liability is ended, as it is in Vermont, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1977), there is no need for contribution because no defendant pays more than the proportion of damages allocated in the jury's verdict fixing degrees of fault. This raises an interesting problem of what courts should do when comparative negligence is adopted in the two party suit, and nothing else is done; should they then allow contribution? *See* the discussion of *Hayes v. Hazard*, in note 16 *supra*. Should they go further and adopt the result in *American Motorcycle?* Perhaps at another time it will be possible to state more fully why a rule of contribution between tortfeasors seems appropriate where the plaintiff is not at fault because the plaintiff keeps the right to hold the defendants jointly and severally liable. But when the plaintiff is at fault, as well as the defendant, then all are "active." If logic says the plaintiff can hold defendants jointly and severally liable, then one of multiple defendants required to pay more than a proportionate share under the doctrine of joint and several liability should be able to recover contribution on a joint and several basis from all active parties, even the plaintiffs, less only the share of the defendant.

[72]23 S.W.2d 713 (Tex. Com. App. 1930).

[73]151 Tex. 251, 248 S.W.2d 731 (1952).

[74]Continuity with the past might justify the retention of joint and several liability when the plaintiff is not at fault. However, when comparative negligence is introduced so that an "at fault" plaintiff can recover from others at fault, especially in a pure comparative negligence jurisdiction, the possibility that a defendant—guilty of a lesser

is a middle ground, distributing the costs among parties in the suit in proportion to their degrees of wrongdoing as perceived by the jury when the plaintiff as well as the defendants are at fault. No plaintiff could then shift the risk of one defendant's being underinsured or unable to respond to damages to another defendant, so long as all defendants are in the suit, even those who have settled. The risk of one defendant being unable to pay for the share determined by the jury should be spread between the plaintiff and the remaining defendants in proportion to their respective degrees of fault, after all degrees of fault have been determined, much as the Uniform Comparative Fault Act provides in cases in which a judgment against one defendant cannot be collected.[75]

Until all the implications of comparative negligence and comparative contribution are worked out, and so long as defendants are operating under the rules of joint and several responsibility and no contribution, but merely a setoff for prior settlements, there will always be a holdout in multiple party situations. There will be at least one defendant who does not want to contribute anything. Perhaps there has been a tender of the defense to another defendant and the hope that the ultimate loss can be shifted to the manufacturer even though the holdout may have been guilty of failure to warn. Or the holdout may merely believe that the plaintiff was guilty of misuse of the product and should not recover. If courts are really serious about promoting settlements, that defendant can be seen as a "dog-in-the-manger" and maybe needs to be allowed to go the whole route. He can get off scot free if he wins but may lose and suffer a judgment for all the damages with only a setoff for what the settling defendant paid. Having taken the chance, I believe the "reluctant-to-settle" defendant should be cut off from all rights against any party who settles even in the confused state of the law at present.

The theory is there to effect this result in the employee-plaintiff cases. Many courts, such as the Iowa court in *IPALCO*,[76] have held that when the employee has no direct cause of action against the employer, the third party tortfeasor cannot sue the employer for contribution. It would be simple to extend this immunity of the employer who settled under the compensation act to the consumer product defendant that settled privately while the action proceeds

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degree of fault than a plaintiff and sued with other defendants unable to respond in damages—might be required to bear all the degrees of fault of others, seems to require some relief, perhaps the relief provided in *American Motorcycle*.

[75]*See* Wade, *supra* note 7.

[76]259 Iowa 314, 144 N.W.2d 303 (1966).

against the other defendants. The obvious reference is to an equal protection argument rather than an appeal to courts to merely apply this requirement of contribution (that the plaintiff *have* a direct right) as a matter of consistent application of contribution doctrine. The equal protection authorities discussed in a later part of this paper should be helpful here as they might be in efforts to let compensation covered employers in New York come in under section 15-108. Before reaching the equal protection arguments, some analysis of contribution and indemnity is necessary.

V. The Confused History of Contribution When a Plaintiff's Contributory Negligence Was a Bar

If the rule that contributory negligence of a plaintiff is a bar was based on the assumption that courts need not look out for someone who does not look out for himself, the same assumption could be the basis of the rule of no contribution among joint tortfeasors. Elementary logic suggests a rule that a tortfeasor at fault cannot collect contribution has to fall when the rule that a plaintiff at fault cannot recover falls.

The common law rule of no contribution among tortfeasors is generally recognized as having its origin in *Merryweather v. Nixan*,[77] and was the subject of many analytical writings in the 1930's.[78] One of the writers of the 1930's proposed a statute proportioning or distributing liabilities in accordance with the degrees of fault.[79] This suggestion was referred to a proposed statute for Wisconsin[80] and in turn was relied on by Arthur Larson in a lengthy article.[81] In

[77]8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). However, it could be placed earlier, as suggested in Reath, *Contribution Between Persons*, 12 Harv. L. Rev. 176 (1898) in a discussion of *Battersey's Case*, Winch's Rep. 48, decided almost a century before.

[78]Perhaps the landmark work is C. Gregory, Legislative Loss Distribution in Negligence Actions (1930). An argument against apportionment, James, *Contribution Among Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941) led to a debate between Gregory and James in volume 54 of the *Harvard Law Review*.

The work of other eminant writers in this period should not be overlooked, in addition to Professor Larson's article cited in note 81 *infra*, there was Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1930), and Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L.Q. 552 (1936) (Part I) and 22 Cornell L.Q. 469 (1937) (Part II).

[79]Note, *Contribution Between Tortfeasors: A Legislative Proposal*, 24 Cal. L. Rev. 702 (1936). This article looked to a New York Law Revision Committee report, Legis. Doc. (1936) No. 65 (K)4, which proposed a statute distributing liabilities in accordance with degrees of fault.

[80]Note, *Contribution-Joint Tortfeasors—A Proposed Act*, 1938 Wis. L. Rev. 580.

[81]Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party*, 1940 Wis. L. Rev. 467.

reading Professor Larson's treatise and critizing it when I wrote on this subject[82] I debated asking why had Professor Larson dropped from his treatise the suggestion he so forcefully urged in 1940, and which was enacted for all but compensation covered employers when New York enacted section 15-108 of its General Obligations Law.

Perhaps Larson abandoned his proposal because the works cited above had no immediate effect because of judicial and legislative adherence to the rule that contributory negligence was a bar to a plaintiff's recovery. It has only been with the spread of comparative negligence to more than half the states that we have been forced to relive and rewrite the work done in the 1930's, and that the Wisconsin courts, in cases like *Payne v. Bilco*,[83] have done what Larson urged the legislature to do forty years ago. I suggest that many of the leading articles of today[84] are rooted in the debate of the 1930's. Finally, it is only fair to acknowledge that Larson's 1940 Wisconsin article proposed a solution quite similar to the one I proposed in 1976.[85]

Unfortunately the Uniform Contribution Among Tortfeasors Act did not clarify the problem, and the practicing lawyer is probably more interested in looking at an annotation collecting cases not decided under the Uniform Act[86] than one dealing with cases decided under the Act.[87] A review of the few cases collected in these annotations, and the supplements, shows that the cases decided in the absence of a statute spelling out the effect of a settlement on the right of the remaining defendants to contribution, are divided. Some allow contribution from the defendant that settled,[88] a result changed by statute in New York, while others do not. Unlike Professor Larson, who in his 1940 *Wisconsin Law Review* piece concluded there should be a right to contribution from a defendant who settled—despite his initial conclusion there should not be a right to contribution—I believe that the policy reasons discussed in cases such as *Castillo Vda Perdomo*, especially the desire to end exposure, as well as equal protection arguments looking to the treatment of compensation covered employers, require that one defendant's settlement with the plaintiff be a bar to suit for contribution in the ex-

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[82]Davis, *supra* note 5.

[83]54 Wis. 2d 345, 195 N.W.2d 641 (1972).

[84]*E.g.*, those collected in note 6 *supra*.

[85]Davis, *supra* note 5.

[86]Annot., 8 A.L.R.2d 196 (1949).

[87]Annot., 34 A.L.R.2d 1101 (1954).

[88]Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N.Y. 746 (Sup. Ct. 1931).

panded *Dole v. Dow* sense by defendants that do not settle, provided that the settlements are pro rata settlements.

Another conclusion from a review of the literature is that urging legislatures to work out a solution came to very little. However, the implications and suggestions of such pieces as Larson's 1940 article have been realized in *Payne v. Bilco* and show that the logic of conforming the rules of contribution and implied indemnity to the practice of settlement requires that a settling tortfeasor be able to obtain protection from suits for contribution and indemnity implied at law.

VI. Equal Protection

A. Background

Notions of equal protection may have played some role in the adoption of comparative negligence because settlements have long been made on a comparative basis even in states where contributory negligence was stated to be a bar. The difference between such settlements and litigation where the jury applied comparative negligence may have offended equal protection notions and may help bring about wider adoption of comparative negligence.

It is not the purpose here to trace the evolution of equal protection from a constitutional guarantee limited to undoing discrimination against persons on the basis of race[89] to use in an expanding number of other areas[90] (including worker's compensation).[91] However, some background on equal protection seems necessary. It generally involves a claimant, or a group of claimants, who find a factually similar situation which state or federal law treats more favorably than their own, and then urge the courts to place a carpenter's level (equal protection) on these two similar cases and bring them up "equal." Sometimes the efforts are limited to evidence of inequality on the face of a statute, and sometimes evidence is brought forward to show inequality in the impact of a statute.

The analogy of the carpenter's level was suggested by a colleague, Professor Alan Cullison, at a time when the author was putting down a stone walk. We visualized the carpenter's level as a rather short tool, useful to bring up one stone when it had sunk, or was laid, a little below its neighbor (by the legislature and, in impact

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[89]The Slaughter-House Cases, 83 U.S. 36 (1872).

[90]*Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969) and Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

[91]E.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

cases, perhaps by administrators although almost never by courts)[92] but not useful for leveling over long distances—for example, from inside the compensation system to the common law system[93] or when the slope of the ground indicated that there be steps as in the "one step at a time" doctrine of *Jefferson v. Hackney*[94] permitting benefits for permanently and totally disabled to differ from benefits for Aid to Families with Dependent Children. Further, judicial repairs made under equal protection, like stone walk repairs with a carpenter's level, require that the courts ask whether, when two stones are uneven, the claimant's stone should be raised or the other lowered.[95] And finally, where a statute treats dissimilar cases alike—for example, gives the same benefits to persons suffering different degrees or kinds of incapacity—equal protection cannot be used to proportion differences in treatment.[96]

Although the focus here will be on equal protection, there is an interaction with due process. Equal protection has been less concerned with motivation than due process, unless the widow's tax exemption case[97] which may be viewed as a remedy for past discrimination can be cited as a motivation case. If it can, perhaps motivation may fit into the anology of the carpenter's level to the extent that it may help reach the conclusion that improperly motivated classifications, or steps, are arbitrary, and do not rest on a rational basis.

B. Arguing From the Compensation Statute To Give the Defendant Who Settles Equal Protection

Let us now consider Iowa, a state which unlike Connecticut, even though it held to the rule that a plaintiff's negligence was a

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[92]Perhaps one of the difficulties with the impact cases is that impacts are often judicial. The author collected all of the Connecticut compensation decisions involving "Arising and in the Course" including court opinions as well as commissioners' decisions and pointed out that there were real questions of equality of treatment within factually similar cases as well as across roughly similar cases. If the article—assuming it correctly stated what the courts had done—were enacted as a statute, would the courts strike the statute on the grounds it denied equal protection?

[93]Kaznoski v. Consolidation Coal Co., 368 F. Supp. 1022 (1974).

[94]406 U.S. 535, 546 (1972).

[95]This is the problem considered in Mr. Justice Harlan's concurring opinion in Welsh v. United States, 398 U.S. 333, 344 (1970).

[96]*See* Davis, *Schedule Injuries—Equal Protection*, 33 ATLA L.J. 196 (1970).

[97]Kahn v. Shevin, 416 U.S. 351 (1974). An annual property tax exemption for widows was provided by Florida statute since at least 1885. In suit by widower claiming a denial of "equal protection," the court declined to give widowers a similar exemption. The majority opinion speaks in terms of reparations or compensation for widows who have been denied equal access to jobs and pay in the past, but it would not be unrealistic to see this as a case involving "good" motivation, not a classification made merely for administrative convenience.

bar to recovery, did not hold to the corollary rule barring suits for contribution.[98] When the Iowa Supreme Court decided *IPALCO* it rejected the passive-active basis for allowing contribution or indemnity and held that a third party tortfeasor could not sue a negligent employer for contribution or indemnity when the employer had provided compensation coverage. Reasoning from the fact that the employee had no direct action against the employer, the Iowa court held[99] that a third party tortfeasor could not sue the negligent employer for contribution.

The Iowa requirement that the plaintiff in the suit from which the right of contribution or indemnity develops must have a direct right against the defendant against whom contribution or indemnity is sought is also the basis for decision in *Blunt v. Brown*,[100] a case which involved both marital immunity and the automobile guest statute, and it denied the defendant sued by the auto guest a right to seek contribution from the driver of the plaintiff's car.

Admittedly in both *IPALCO* and *Blunt v. Brown*, the defendant against whom contribution was sought had been immunized by statute from direct suit by the injured plaintiff: in *IPALCO* the compensation statute, and in *Blunt* the guest statute as well as the marital immunity. However, Iowa did not have a compulsory compensation statute; either the employer or the employee could elect out.[101] Is there a rational basis to distinguish an Iowa employer that "settles" with an employee by voluntarily coming under compensation and the employer that does not come under compensation but settles with an employee on an individual basis? Should not equal protection say that if the compensation covered employer cannot be sued for contribution or indemnity because the employee (the injured party who sues the third party defendant) has no direct right, then the employer who did not elect coverage but voluntarily settled should also enjoy protection from actions for contribution or indemnity when the third party defendant sues? In both cases the injured party has no direct action. Finally, where one of multiple product defendants is sued, should not the product defendant that settles be accorded the same protection against suits for contribution and indemnity that the court has accorded the employer that voluntarily settles?

Despite the general tendency to not consider equal protection arguments in such cases, there is at least one third party tortfeasor

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[98]*See* Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31 (1966).

[99]*See* note 31 *supra*.

[100]225 F. Supp. 326 (S.D. Iowa 1963).

[101]*See* Davis and Others, THE IOWA LAW OF WORKMEN'S COMPENSATION (1967).

opinion that offers some help in considering this argument. In *Coleman v. General Motors Corp.*,[102] an employee was injured while installing equipment in a General Motors plant. The employee sued General Motors who in turn sued the employer who was allegedly at fault. In granting the employer's motion for summary judgment the court cited cases holding that where the injured party has no direct right against defendant, another defendant cannot sue such a defendant for contribution or indemnity.

The court then went on to consider claims of a violation of equal protection by such a decision, which the court said is:

> [T]he proposition that because it voluntarily chose to deal with an employer with greater than five employes, . . . [and subject to madatory compensation coverage] and is sued for its alleged negligence by an employee of such employer, then it is denied equal protection because *if it had* chosen to deal with an employer with less than five employees who did not voluntarily elect to be covered by workmen's compensation, and was similarly sued, then it could maintain a third-party suit. The classification complained of by General Motors then would have to be third-party joint tortfeasors who deal with . . . employers not mandatorily covered and who voluntarily chose not to be covered as the other class.[103]

The court concluded: "Such a classification first is not created by the statute and secondly is too tenuous a classification on which to hang an equal protection argument."[104]

I suggest that there is a classification and that the real reason General Motors lost its equal protection argument was that there is a rational basis for distinguishing a defendant sued for contribution that has settled with the injured party and a defendant that has not.

The *Coleman* court does not say this, but its opinion helps focus the issue, which is: Is there a rational basis for different treatment of a defendant that settles, either individually or by voluntarily accepting compensation responsibility, to an employee and one of multiple product defendants that settles with the plaintiff? *Coleman* does not face this issue, and I have not been able to find, albeit in a hurried search, any case that has; however, the compensation statute in Iowa classifies employer's compensation settlements as a defense to suits for contribution and indemnity (as it is construed) and thus creates two classes: Compensation covered employers (and

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[102].386 F. Supp. 87 (N.D. Ga. 1974).

[103]*Id.* at 91 (emphasis added).

[104]*Id.* at 91.

probably non-compensation covered employers who voluntarily settle) that need not respond in contribution or indemnity to a third party on the one hand, and one of multiple product defendants that settles with the plaintiff on the other.

Is there a rational basis to let employers have such a benefit and deny it to others that voluntarily settle with a product plaintiff? I suggest there is not, but would have to look to other situations where classifications in exculpatory legislation in tort situations have been held to deny equal protection.

Such a situation arose in Illinois, when Illinois courts held that landlords could have exculpatory clauses in leases that were effective to exempt the lessor from liability for the lessor's negligence or negligence attributable to the lessor. In response to this, Illinois legislature enacted a statute making exculpatory clauses in all leases, except those where the lessor was a municipal corporation, government unit, or corporations regulated by state of federal commissions, void.[105] In *Sweney Gasoline & Oil Co. v. Toledo, P. & W. R.*[106] the Illinois Supreme Court struck down this statute holding there was no reasonable basis for the exemptions in the statute.

One way to view *Sweney* is to say that it granted other landlords equality with governmental or regulated landlords. It did this by striking down the statute so non-governmental landlords were given the same right to protect themselves as those landlords excluded from the statute. The analogy of the settlement by one of multiple defendants to *Sweney* is that where an employer gains immunity to an employee's suit because the employer has settled for common law claims by assuming compensation liability, it would be a denial of equal protection to hold that one of multiple defendants who settles voluntarily should be denied the immunity from liability or contribution while the employer who voluntarily assumed compensation has such immunity. There is no reasonable basis for allowing one set of possible multiple party defendants, employers, to elect compensation coverage (and the right to settle and obtain immunity from suits for contributions) from other multiple defendants and not allow other defendants to settle and obtain immunity from suits for contribution.

In view of the fact that in Iowa the employer in *IPALCO* could not only get immunity but could get back out of the employee's recovery against a third party whatever the employer, or the carrier, had paid in the settlement, the multiple defendant who settled has stronger equities to be held immune to contribution actions than

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[105]ILL. REV. STAT., ch. 80, § 15a (repealed 1971).

[106]42 Ill. 2d 265, 247 N.E.2d 603 (1969).

the employer. It is only in the load sharing states, states which follow *Santisteven*, that the equities are even for the compensation covered employer and the defendant that settled.

C. In New York, Getting the Compensation Covered Employer Under Section 15-108, and Out of Dole, by Equal Protection

The ultimate issue in New York is whether there is a rational basis for granting immunity to contribution suits when one of multiple defendants settles (with a reduction of the plaintiff's recovery against other defendants by the degree of fault attributed to the defendant that settles) and the treatment of employers under *Dole*, considering that they have settled their fault with the plaintiff, and must still suffer suits for contribution. From the plaintiff's viewpoint, is it rational to classify a non-employee who settles as distinct from the employee that settles under compensation, and reduce the recovery of the plaintiff who settles with one defendant by the degree of fault of the settling defendant, and treat employees differently, letting them get compensation, sue the third party and not be held to recovery from the third party only to the degree of the third-party's fault?

As New York's compensation statute is compulsory, it could be suggested that the settlement by the employee with the employer is not strictly analogous to a plaintiff's voluntary settlement with one of many third-party defendants. However, this flies in the face of the "trade-off" basis for upholding the compensation act found in the Supreme Court's opinion in *White*.[107]

I urge you to follow the New York situation. *Dole* spawned the New York comparative negligence statute and section 15-108. It will undoubtedly be argued that the New York Court of Appeals should defer to the legislature to act on *Dole* to bring the treatment of employers in line with section 15-108. I merely suggest here that despite such arguments, if the New York Court of Appeals sees that *Dole* has done its work,[108] comparative negligence now obtains, and

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[107]N.Y. Central R.R. v. White, 243 U.S. 188 (1917).

[108]In Klingler v. Dudley, 41 N.Y.2d 362, 393 N.Y.S.2d 323, 361 N.E.2d 874 (1977), the New York Court of Appeals refused to allow a *Dole* plaintiff to reach the third-party defendant directly when the main defendant could not satisfy the plaintiff's judgment. One plaintiff in these suits was limited to the compensation benefits and a small amount from the main defendants and held not to be entitled to reach the employer directly or indirectly when the third-party was unable to respond in damages.

One way of looking at these cases is that the Court of Appeals may be beginning to see that *Dole* has done its work and that the apportionment process called for under comparative fault requires a rethinking of the plaintiff-employee's right to pierce the compensation act because the employer has settled for fault within the compensation system.

section 15-108 has been enacted, the court of appeals might want to blunt the economic disadvantage that *Dole* puts New York employers under when almost no other state makes the employer covered by compensation bear such risks, covered in New York by workman's compensation and employer liability "B" coverage, if at all. If it does, the equal protection argument gives the court the chance to rationally resolve the hottest issue in New York personal injury practice, the compensation-piercing aspect of *Dole;* it can be done by saying that the Constitution tells the court to do so. This would let the Constitution take the wrath the plaintiff's bar would feel when their verdicts are reduced so that the plaintiff injured in a compensation situation is treated like section 15-108 plaintiffs.

VI. Conclusions

When parties settle multiple party suits they settle in proportion to relative degrees of fault. Courts and legislatures are working toward the application of the same distribution principle in trials. Until courts, or legislatures, work out the implication of this distributive principle in a consistent manner for settlements as well as trials, as the Wisconsin court did in *Payne v. Bilco*, courts faced with a situation where one defendant has settled are going to face problems that should be answered by asking how they want settlements to be effected.

The first problem is whether they want to let one of many defendants settle or whether they want to coerce all defendants to settle at once. If they want to coerce all defendants to settle at once they can let a holdout defendant that refused to settle, go ahead and force the other defendants to try the suit because if a holdout defendant suffers a disproportionate judgment the court will let that defendant sue a defendant that settled for contribution or indemnity. However, if courts see that common sense suggests that a defendant willing to settle with a plaintiff willing to accept from that defendant what cash is offered for a pro rata release, no reason exists to prevent such a separate peace, then they will deny the defendant who refuses to settle a right to both contribution and indemnity.

In 1940, Professor Larson said that when one of multiple defendants is considering settling "what the practicing lawyer wants to know is whether he can be assured that an individual settlement will enable him to wipe the case from his books. The answer to his problem can be given with confidence: there is enough doubt on the matter to make it hardly worthwhile. . . ."[109] The adoption of com-

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[109]*See* Larson, *supra* note 81, at 480.

parative negligence and the sweeping of indemnity into the comparison of negligence by *Dole v. Dow* and the use of the pro rata release should permit one of multiple parties that wants to buy out to do so with confidence. Courts have the tools to supply that confidence and to encourage settlements. If this is desired, then it must be asked whether a defendant who settles should be able to cast costs onto a defendant who refuses to settle. I suggest that nothing in the distribution principle supports the right of one party at fault to buy out by a loan receipt, Mary Carter or a covenant not to sue or even under the applicable compensation act, and cast costs on the remaining defendant. The only distributional method is the pro-rata settlement. Under the pro-rata settlements neither the defendant who refuses the settlement nor the defendant who settles can cast costs on the other.

Finally, when one party settles, and another refuses, should the settling party remain in the litigation and special verdicts be used to see if the jury finds the plaintiff can recover from the "holdout" on some independent grounds? If a party settles and is dropped from the trial, the plaintiff and the remaining defendant will worry about the jury knowing something was up and will speculate about what it is. Should the jury be told? I tend to believe that the jury might as well be told all the facts of a settlement short of the actual figures.[110] The jury might as well be told what will be the effect of their verdict.[111]

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[110]*Id.* at 501.

[111]Consider Apelgren v. Agri Chem. Inc., 562 P.2d 766, 767 (Colo. Ct. App. 1977), where the comparative negligence statute provides the jury must be charged on the effect of its findings, and the court says: "[I]t would be mere speculation on our part to hold that the jury verdict would not have been altered had the jury known of the effect of its finding . . . ."