It Was My Fault, But Do I Have to Pay?

Allocation of Fault and Apportionment of Damages in Tort Actions

Introduction

Understanding how judges and juries allocate fault and then how that allocation relates to damages can become unexpectedly complex. Allocating fault entails parceling out responsibility for a plaintiff's injury, generally as percentages.[1] For example, if a hunter shot a birdwatcher after failing to adequately identify her target but the birdwatcher had chosen not to wear orange clothing while exploring near a game preserve, the defendant hunter might be 85% at fault, and the plaintiff bird-watcher only 15% at fault, in the accidental shooting. Significantly, the trier-of-fact[2] compares only "causal fault"—fault that proximately (*i.e.*, legally) caused the injury.[3] In contrast, damages are the amount of money a plaintiff is entitled to receive from other parties for her injury.[4]

It is also crucial to distinguish two layers of this process: allocation and apportionment between the plaintiff and one or more defendants; and allocation and apportionment between a defendant and one or more co-defendants or nonparty tortfeasors.[5] As we will discuss later, jurisdictions use the doctrines of contributory negligence and comparative negligence (in its various forms) to apportion damages based on a plaintiff's fault, as compared to the total amount of causal fault. In contrast, jurisdictions use several and joint liability, several liability, and their various mutations to decide how much each defendant will have to pay of the total damages awarded to the plaintiff.

The Starting Point – Common Law Rules

To understand the law as it is requires understanding the law as it was. And even a cursory understanding requires a certain historical perspective. Allocating fault to apportion damages developed and remains grounded in tort actions for negligence. Put simply, a tort is "a violation of a duty imposed by law[,]" a "civil wrong" for which the injured party can seek compensation from the injurer.[6] In a negligence action, the duty that the injurer violated is the duty to exercise a particular level of care towards another person (or towards members of the public generally).[7]

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[1] "The orthodox view...is that comparative negligence is just what it sounds like—a comparison between the negligence or culpability of each party, an idea easily understood as a comparison of the unjustified risks taken by each." See Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, 1 THE LAW OF TORTS § 221 (2d ed. 2011).

[2] This could be a judge or jury.

[3] Id. § 201.

[4] See Black's Law Dictionary (9th ed. 2009)("Damages").

[5] A nonparty tortfeasor is an individual (or entity) who is legally responsible, at least partially, for the plaintiff's injury but who was not sued by the plaintiff in the current lawsuit or brought into the lawsuit by a defendant.

[6] See 86 C.J.S. Torts § 1.

[7] 57A Am. Jur. 2d Negligence § 5. "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts § 282 (1965).

Historically, a few basic rules governed the allocation of fault and apportionment of damages across the country well into the second half of last century.[8] In the early to mid-1800s, nearly all jurisdictions in the United States employed "contributory negligence" to relate fault to damages as between a plaintiff and a defendant.[9] Contributory negligence precludes recovery by the plaintiff if the trier-of-fact allocates even partial fault to the plaintiff. Also, at common law, a plaintiff who suffered a single harm caused by multiple parties could recover the entire amount of her damages from any one of the responsible defendants, regardless of the individual defendant's level of fault. In other words, at common law, joint tortfeasors were jointly and severally liable. Lastly, many jurisdictions also acknowledged a right to contribution. This allowed a defendant who paid more than her fair share of the plaintiff's damages to seek money from other parties responsible for the injury.

But this relative uniformity ended rapidly. "From 1969 through 1984, thirty-seven states abolished their contributory negligence doctrines and adopted comparative negligence."[10] Although it has various permutations, generally speaking, comparative negligence apportions damages according to each actor's proportionate level of fault, including the plaintiff.[11] States accomplished this change through legislative action, judicial decision, or a combination of these forces. When change issued from the bench, courts usually selected a "pure" form of comparative negligence; when it issued from the state legislature, lawmakers tended to favor a "modified" form.[12] This shift towards comparative negligence created a complex landscape, with allocation and apportionment rules varying significantly between jurisdictions.

But This Is Not Ancient History – Maryland's Coleman v. Soccer Ass'n of Columbia

In 2013, the Maryland Court of Appeals[13] faced the question that numerous other jurisdictions had also tackled: whether contributory negligence should remain the law of the land.[14] As Justice Glenn T. Harrell, Jr. memorably wrote, "[a] dinosaur roams yet the landscape of Maryland.... The name of that dinosaur is the doctrine of contributory

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[8] Arthur Best, Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence, 40 Ind. L. Rev. 1, 3 (2007).

[9] See, e.g., Christopher J. Robinette and Paul G. Sherland, CONTRIBUTORY OR COMPARATIVE: WHICH IS THE OPTIMAL NEGLIGENCE RULE?, 24 N. Ill. U. L. Rev. 41, 41 (2003). Contributory negligence rose to prominence in a landmark English case, *Butterfield v. Forrester*. There, a plaintiff was injured after he struck a pole while riding his horse speedily through the streets. Although the pole's owner had acted negligently in placing the pole in the street, the rider could not recover damages from the pole's owner because the rider had failed to use reasonable care while riding. 11 East 60, 103 Eng Rep 926 (1809).

[10] Best, supra, at 3.

[11] DEPARTMENT OF LEGISLATIVE SERVICES (Maryland), NEGLIGENCE SYSTEMS: CONTRIBUTORY NEGLIGENCE, COMPARATIVE FAULT, AND JOINT AND SEVERAL LIABILITY 4 (2013). Victor Schwartz defines "comparative negligence" as "any system of law that by some method and in some situations apportions costs of an accident, at least in part, on the basis of the relative fault of the responsible parties." VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 2.01 (5th ed. 2013).

[12] See McIntyre v. Balentine, 833 S.W.2d 52, 55-56, n. 3 & 4 (Tenn. 1992). In deciding to adopt a modified "50% Bar" comparative negligence scheme, the *McIntyre* court offered a succinct historical and legal analysis of the shift from contributory to comparative fault.

[13] In Maryland, this is the highest appellate court in the state, termed the "supreme court" in most other jurisdictions.

[14] Coleman v. Soccer Ass'n of Columbia, 432Md. 679, 69 A.3d 1149 (2013).

negligence."[15] The question before the Justices was whether "[w]ith the force of a modern asteroid strike, this Court should render...this dinosaur extinct."[16]

In *Coleman*, an "accomplished" 20-year-old soccer player was seriously injured by a soccer goal's metal frame. While coaching a younger group of players at a Soccer Association event, the 20-year-old shot a ball into the goal and, on his way to retrieve it, jumped up to grab the goal's metal crossbar. But, because no one had secured the goal to the ground, the player's weight pulled the crossbar on top of him, causing facial fractures and requiring titanium plates in his face. At trial, the jury found the Soccer Association negligent for failing to secure the goal but also found the player's conduct negligent. Thus, consistent with Maryland's doctrine of contributory negligence, the court rendered a judgment barring recovery by the soccer player. The player then appealed the doctrine's application.[17]

Ultimately, the court spared their Jurassic ward. Although even the majority opinion offered little defense of the doctrine,[18] the court maintained contributory negligence as the law in Maryland, preferring to let the legislative branch decide whether Maryland would adopt comparative negligence.[19]

In deciding to leave this question to the General Assembly, the *Coleman* court discussed a prior Maryland Court of Appeals case, *Harrison v. Montgomery County Bd. of Educ.*[20] In *Harrison*, the court chose not to overturn contributory negligence, in part, because the move to comparative negligence entailed multiple, complex decisions. First, multiple comparative negligence schemes exist.[21] Second, adopting any form of comparative negligence would affect other doctrines and practices throughout tort law, and other jurisdictions had not worked out any uniform way to approach these different effects on the overall system.[22] The court in *Coleman* decided similarly, that the General Assembly should handle these questions.

When the *Coleman* court looked at the state of the law, it saw jurisdictions that diverged on numerous issues, both basic and complex. In this article, we seek to provide an overview of the landscape that the Maryland Court of Appeals surveyed while deciding *Coleman*. First, we will offer a brief summary of the major apportionment schemes adopted by jurisdictions in the U.S., including the multiple forms of comparative negligence. Then, we will address just a few of the major effects that a switch to comparative negligence creates in the broader negligence or tort system.

At this juncture, it is prudent to mention that the rules followed by each jurisdiction in allocating fault and apportioning damages are often complex. Although we will mention specific state law to demonstrate or contrast larger trends, you must

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[15] Coleman, 432 Md. at 695 (Harrell, J., dissenting).
[16] Id. at 696 (Harrell, J., dissenting).
[17] See id. at 682-85.
[18] Gifford, supra note 7, at 710-711.
[19] See Coleman, 432 Md. at 695.
[20] 295 Md. 442, 456 A.2d 894 (1983).
[21] Coleman, 432 Md. at 690 (Eldridge, J.), 700 (Harrell, J., dissenting)
[22] Id. at 700 (Harrell, J., dissenting)("Noting the lack of uniformity among the systems adopted by new comparative fault jurisdictions in their treatment of these areas, we characterized the decision whether to adopt either pure or modified comparative fault as one 'plainly involve[ing] major policy considerations.'" (*quoting* Harrison, 295 Md. at 462)).

consult the law of your jurisdiction to understand how these concepts will apply in any particular case.

Allocation and Apportionment Between a Plaintiff and One or More Defendants

Contributory Negligence

As mentioned previously, contributory negligence allocates fault between a plaintiff and one or more defendants and denies recovery to the plaintiff if she is even partially at fault.[23] Technically, contributory negligence is an affirmative defense that can be plead by the defendant.[24] It is a term of art used to describe a plaintiff's failure to exercise appropriate care for their own safety.[25] Only five jurisdictions still allow a defendant to plead contributory negligence as a complete bar to the plaintiff's recovery: Alabama, North Carolina, Virginia, Washington D.C., and Maryland.

In North Carolina, a trier-of-fact will find the plaintiff contributorily negligent when, under the circumstances, the plaintiff failed to exercise "ordinary care" for her own safety, defining ordinary care as "such care as an ordinarily prudent person would exercise under similar circumstances to avoid injury."[26] But even these states may not apply contributory negligence across the board. In Virginia, for instance, a railroad worker can recover for damages, despite her contributory negligence; the jury simply diminishes damages.[27]

In 1847, the Maryland Court of Appeals voiced the reasoning behind contributory negligence:

> When a plaintiff may, by the exercise of ordinary care and diligence, avoid an injury arising from a nuisance...and did not exercise such care and diligence, he cannot recover damages for a personal injury arising from such nuisance. Under such circumstances, he must bear the consequences of his own folly.[28]

Many saw contributory negligence as harsh and inequitable, forcing a negligent but injured party to shoulder the entire cost of an injury for which the plaintiff was not primarily or entirely responsible. But proponents of contributory negligence highlight a few factors in its defense.[29] Supporters of contributory negligence have argued that the doctrine promotes economic efficiency and incentivizes everyone to exercise appropriate care, knowing that a negligent plaintiff will lack recovery.[30]

Proponents of comparative negligence argue differently.[31] Scholars have reasoned that comparative negligence is more equitable because even careless plaintiffs should not bare the entire cost of their injury.[32] Additionally, as comparative negligence still

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[23] See Black's Law Dictionary (9th ed. 2009) ("Contributory – Negligence Doctrine").
[24] Dobbs, Hayden & Bublick, 1 THE LAW OF TORTS § 218 (2d ed.).
[25] Id.
[26] Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 48 (1999).
[27] See Va. Code Ann. § 8.01-58.
[28] Irwin v. Sprigg, 6 Gill 200, 200 (1847)(Court of Appeals of Maryland).
[29] Gifford, supra note 7, at 728.
[30] Id. at 729.
[31] See id. at 723.
[32] Id.

requires the plaintiff to bear some portion of the injury's costs, it also incentivizes careful behavior by potential victims. Lastly, scholars have noted that, "[i]n many cases where the juries believe that plaintiffs were contributorily negligent, they nevertheless find in the plaintiff's favor but reduce the verdicts to account for the plaintiff's fault."[33] Essentially, juries will often circumvent a contributory negligence scheme to reach a result they view as more fair.

Comparative Negligence

Comparative negligence sought a different approach, by apportioning the cost of an injury[34] between a plaintiff and a defendant based on their level of fault. But many jurisdictions adopted comparative negligence only partially, resulting in four primary forms: slight-gross negligence; pure comparative negligence; 50% modified comparative negligence; and 51% modified comparative negligence.

Slight-Gross Negligence

Somewhere between contributory negligence and more robust forms of comparative negligence stands the doctrine of "slight-gross negligence." Slight-gross negligence allows a negligent plaintiff to recover, even if he or she contributed to her injury, unless the plaintiff's contribution was more than slight.[35] The only state which employs this rule is South Dakota.

In South Dakota, a plaintiff can recover reduced damages if the plaintiff's negligence is only "slight" compared to the defendant's negligence.[36] The trier-of-fact analyzes the negligence of both parties and, if both parties were negligent, decides whether the plaintiff's negligence was slight in comparison.[37] Triers-of-fact have three primary factors to guide this slight-gross determination: (1) the precautions the plaintiff took for her own safety; (2) the extent to which the plaintiff should have comprehended the risk as the result of warnings, experience, or other factors; and (3) the foreseeability of injury as a consequence of the plaintiff's conduct.[38]

In *Flanagan v. Slattery*, a man was driving his tractor and attempted to turn left into his driveway, but failed to use the turn signal to warn other drivers.[39] Another driver, who was driving above the speed limit, hit the tractor while trying to pass the tractor in the left lane.[40] There, the tractor-driver could not recover because his failure to use the turn signal constituted negligence which was not "slight" in comparison to the speeding driver's negligence.[41]

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[33] Id. at 726.
[34] *I.e.*, the damages.
[35] See Flanagan v. Slattery, 74 S.D. 92, 96, 49 N.W.2d 27, 29 (1951)(stating that, "...if the evidence is such that it may be said as a matter of law that plaintiff was guilty of contributory negligence more than slight and such negligence is the proximate cause of the accident[,] then the trial court should direct a verdict for the defendant").
[36] S.D. Codified Laws § 20-9-2.
[37] 1 Comparative Negligence Manual § 1:3 (3d ed).
[38] See Associated Engineers, Inc. v. Job, 370 F.2d 633, 641 (8th Cir. 1966).
[39] Flanagan v. Slattery, 74 S.D. 92, 98, 49 N.W.2d 27, 30 (1951).
[40] Id.
[41] Id. at 32.

Slight-gross negligence mitigates some of contributory negligence's harsher elements, but it does so only in the more egregious situations.

Pure Comparative Negligence

By contrast, some jurisdictions have adopted a "pure" form of comparative negligence, meaning that a plaintiff can recover as long as they were not the sole cause of their injury.[42] But the trier-of-fact will reduce the plaintiff's recovery in proportion to her fault.[43] Thus, if the trier-of-fact found the plaintiff responsible for 99% of the total negligence, it would award the plaintiff 1% of her damages.[44] Twelve states employ this version of comparative fault, and they include: Florida, Kentucky, Louisiana, Mississippi, New York, Rhode Island, California, Arizona, Alaska, New Mexico, Washington, and Missouri.

To illustrate, New York established its form of pure comparative negligence by statute. The statute applies to personal injury, injury to property, and wrongful death, regardless of any amount of contributory negligence.[45]

Florida also established pure comparative fault by statute. The law in Florida requires that, for any action rooted in negligence, a plaintiff's contributory negligence does not bar recovery.[46] Here, a "negligence action" means any case regarding "negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories."[47]

In *Li v. Yellow Cab Company*, the Supreme Court of California adopted pure comparative negligence for that state, writing that, "in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering."[48]

The Second Circuit applied the doctrine of pure comparative negligence in a case called *Barlow v. Liberty Maritime Corporation*. There, an experienced seaman improperly operated a winch after a mooring line had become stuck.[49] Contrary to his superior's instructions, the seaman did not follow the instructed procedure. The line subsequently broke free and hit the seaman.[50] Even though the seaman was 90% at fault for his injury, he recovered 10% of his damages.[51]

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[42] See Miss. Code. Ann. § 11-7-15.
[43] Id.
[44] 1 Comparative Negligence Manual § 1:5 (3d ed).
[45] See N.Y. C.P.L.R. 1411.
[46] See Fla. Stat. Ann. § 768.81(2). See also *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973).
[47] See Fla. Stat. Ann. § 768.81(1)(c).
[48] 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243 (1975).
[49] Barlow v. Liberty Mar. Corp., 746 F.3d 518, 522 (2d Cir. 2014).
[50] Id.
[51] Id. at 23.

Modified Comparative Negligence

As a compromise position,[52] a majority of states that adopted comparative negligence opted for a "modified" version.[53] Modified comparative negligence allocates fault and apportions damages accordingly, but only to a point. If the plaintiff shoulders a particular percentage of fault for the injury, the plaintiff cannot recover. However, states set that breaking point at different levels. Some proponents suggest that, compared with its pure form, modified compared negligence reduces the number of claims that are filed and therefore preserves public resources that might otherwise be used in adjudicating cases where the plaintiff was predominantly or overwhelmingly at fault. [54]

The 50% Bar

Eleven states use a "50% Rule."[55] In these jurisdictions, the plaintiff can recover if he or she is less at fault than the defendant.[56] For example, Georgia's apportionment statute reads: "...the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed."[57]

Although some jurisdictions require the trier-of-fact to compare the plaintiff's negligence to each individual defendant (and allow recovery from that defendant only if the plaintiff is less at fault), the vast majority of jurisdictions compare the plaintiff's negligence to the combined negligence of all tortfeasors.[58] Thus, in most jurisdictions, a negligent plaintiff in a "50% Rule" jurisdiction can recover proportionally-reduced damages until the plaintiff's negligence accounts for 50% of the total fault.[59]

The 51% Bar

Twenty-two states employ a "51% Rule."[60] In these jurisdictions, the plaintiff's fault must be less than *or equal to* the defendants' fault.[61] When the plaintiff's fault is compared to the collective fault of all negligent actors, this modified version will bar recovery when the plaintiff is 51% or more at fault for the injury.

Although the 50% Bar and 51% Bar schemes differ only slightly in terms of percentage, the difference is not insignificant. In *McIntyre v. Balentine,* two drivers crashed near Savannah, Tennessee; both drivers were intoxicated. One driver sued the

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[52] Gifford, see supra note 7, at 745 ("Modified comparative fault is a political compromise that often has enabled legislatures to agree to adopt a form of comparative fault, but it is also a compromise justified by real-world experience with comparative fault.").

[53] Thirty-three states have adopted modified comparative negligence, with only twelve opting for the pure form. Id.

[54] Id. at 744-45.

[55] They are: Georgia, Tennessee, West Virginia, Maine, Colorado, Nebraska, North Dakota, Utah, Arkansas, Idaho, and Kansas.

[56] AMY A. DEVADAS, ET AL, NEGLIGENCE SYSTEMS 24 (2013).

[57] O.C.G.A. § 50-12-33.

[58] See 57B Am. Jur. 2d Negligence § 1033; 65A C.J.S. Negligence § 366.

[59] See, e.g., O.C.G.A. § 51-12-33; McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992). Stated in another way, a plaintiff can recover even when he or she was 49% at fault, but not beyond that.

[60] They are: South Carolina, Connecticut, Delaware Massachusetts, New Jersey, New Hampshire, Pennsylvania, Vermont, Hawaii, Montana, Nevada, Oklahoma, Oregon, Texas, Wyoming, Illinois, Indiana, Iowa, Minnesota, Wisconsin, Michigan, and Ohio.

[61] 1 Comparative Negligence Manual § 1:4 (3d ed).

other, and after a trial, the jury found the parties "equally at fault."[62] Because the Tennessee Supreme Court adopted a "50% Bar" scheme, the plaintiff would be unable to recover under that fault allocation.[63]

Including Nonparties in Allocating Fault

Jurisdictions have different rules on how to handle nonparties. A plaintiff may decline to include an individual or entity in a lawsuit for multiple reasons. The plaintiff may be insolvent, immune from liability,[64] beyond the court's jurisdiction, or simply unknown. Most jurisdictions seek to allocate fault among all actors that contributed to the injury.[65] However, some limit or preclude the inclusion of nonparties.[66] It must be noted that a nonparty will not be liable for damages even if the trier-of-fact allocates fault to the nonparty; only parties can be liable for damages without a separate action.

For example, in Georgia, if the defendant gives proper notice[67] of her intent to assign fault to a nonparty or if the nonparty settled with the plaintiff, the trier-of-fact will consider any appropriate nonparty's fault.[68] The defendant can then argue that the judge or jury should assign fault to the nonparty. Several states have notice requirements or similar procedural mechanisms to regulate the inclusion of nonparties for fault allocation.[69] In fact, the Montana Supreme Court actually held its state's prior apportionment statute unconstitutional for failure to include such a safeguard.[70]

On the other hand, under Pennsylvania's comparative negligence statute, the trier-of-fact can apportion fault only to parties, except that it may include nonparties that settled with the plaintiff.[71] Sometimes, inclusion varies by the type of nonparty involved. To cite but one example, in Connecticut, the trier-of-fact may not apportion liability to an immune actor.[72]

Allocation and Apportionment Between Multiple Defendants or Tortfeasors

Joint & Several Liability

Comparative negligence principles also affect how a trier-of-fact allocates fault and apportions liability between defendants. The common law uses joint and several liability to apportion damages among multiple defendants. If two defendants contribute to a single, "indivisible" harm to the plaintiff, the plaintiff can recover the entire amount

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[62] McIntyre, 833 S.W.2d at 53.
[63] Id. at 57. In the end, the Tennessee Supreme Court remanded the case for new fault allocation with amended jury instructions that accorded with the new comparative negligence scheme. See id.
[64] This could be the case with spouses in jurisdictions with spousal immunity, government entities protected by sovereign immunity, or employers under workers' compensation statutes.
[65] 1 Comparative Negligence Manual § 14:9 (3d ed). In *McIntyre*, the Tennessee Supreme Court specifically noted that a finder-of-fact should apportion fault to appropriate nonparties. 833 S.W.2d at 58.
[66] Id.; 65A C.J.S. Negligence § 376; 57B Am. Jur. 2d Negligence § 1034.
[67] The defendant must give notice at least 120 days before trial. O.C.G.A. § 51-12-33(d).
[68] O.C.G.A. § 51-12-33(d).
[69] 1 Comparative Negligence Manual § 14:9 (3d ed).
[70] Newville v. State, Dep't of Family Servs., 267 Mont. 237, 883 P.2d 793 (1994)
[71] 42 Pa. Cons. Stat. Ann. § 7102(a.2).
[72] See Conn. Gen. Stat. Ann. § 52-102b(c). In contrast, Georgia's statute appears to allow allocation to an immune tortfeasor. See O.C.G.A. § 50-12-33(c) ("In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, *or could have been, named as a party to the suit*." (emphasis added)).

from both defendants.[73] Although the plaintiff may not recover more than the judgment, the plaintiff can seek her damages from either or both defendants. Several and joint liability is driven by the desire to have the plaintiff recover fully for her damages.[74] Often, the defendant most at fault for the plaintiff's injury is least able (or not liable) to pay for the plaintiff's damages, whether because the tortfeasor is insolvent, unknown, beyond the court's jurisdiction, or immune.

With the move to comparative negligence, most jurisdictions recognized a conflict: allowing the plaintiff to recover the entire judgment from any one of multiple defendants contravenes the idea that damages should be apportioned in proportion to fault. Some jurisdictions, like Tennessee,[75] simply abolished joint and several liability, preferring to apportion damages to defendants based on their level of fault in nearly all cases.[76]

To alleviate the concern that plaintiffs would recover inadequately if each defendant only paid in proportion to their fault, most jurisdictions retained joint and several liability for some torts, for some types of damages, or depending on the respective degrees of fault.[77] For example, some jurisdictions retain joint and several liability for particular kinds of torts, such as intentional, medical malpractice, or environmental torts.[78] In others, joint and several liability survives only for economic damages or only for non-economic damages.[79] Some jurisdictions will only apply joint and several liability when a defendant's fault rises above a certain threshold.[80] In Illinois, a defendant responsible for greater than 25% of the total fault will be jointly and severally liable.[81] In New Jersey, a party that is responsible for 60% of the total fault will be jointly and severally liable for the damages of all defendants.[82]

Another method for helping the plaintiff recover under comparative negligence is reallocation. Under at least some circumstances, eight jurisdictions allow the court to reallocate to other tortfeasors the damages apportioned to a tortfeasor from which the plaintiff cannot recover.[83] "Modified" joint and several liability and reallocation are not mutually exclusive; some jurisdictions use both.[84]

What Happens When a Tortfeasor Settles Before Trial?

Regardless of whether a jurisdiction employs joint and several liability or a variation of several liability, a plaintiff can settle with one or more defendants and then

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[73] AMY A. DEVADAS, et. al, NEGLIGENCE SYSTEMS 14 (2013).
[74] See Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1125 (5th Cir. 1995).
[75] See Banks v. Elks Club Pride of Tennessee 1102, 301 S.W.3d 214, 223 (2010).
[76] See DEPARTMENT OF LEGISLATIVE SERVICES (Maryland), supra note 9, at 19. This approach is termed pure "several liability." They include: Alaska, Arizona, Georgia, Kentucky, Oklahoma, Utah, Vermont, and Wyoming.
[77] See id. at 19-20.
[78] See id. at 20.
[79] See id. at 19-21. See, e.g., Haw. Rev. Stat. § 663-10.9 (providing a list of exceptions to the abolishment of several and joint liability, based on both types of tort and species of damage).
[80] 1 Comparative Negligence Manual § 1:24 (3d ed).
[81] See 735 ILCS 5/2-1117.
[82] See N.J. Stat. Ann. § 2A:15-5.3.
[83] See DEPARTMENT OF LEGISLATIVE SERVICES (Maryland), supra note 9, at 21.
[84] See id. at 20.

litigate against one or more of the remaining defendants.[85] When each defendant is liable only for damages corresponding to her individual fault, the amount that a plaintiff received in settlement from another tortfeasor before trial is usually irrelevant, because the defendant will not have to overpay.[86] But this is not the case in jurisdictions that employ joint and several liability, whether broadly or only in specific cases.

Because the remaining defendant is theoretically liable for the entirety of the plaintiff's damages, these joint and several liability jurisdictions must ensure that this liability accounts for the prior settlement payment. And there are two primary ways that jurisdictions do this: *pro rata*[87] or *pro tanto*.[88] In *pro tanto* jurisdictions, a defendant will only receive credit for the dollar amount of a settling tortfeasor's settlement. In contrast, the *pro rata* approach gives the defendant credit for the amount of damages for which the settling tortfeasor would have been liable if the settling tortfeasor had remained in the case.[89] The 11th Circuit offered this explanation:

> Assume, for example, that the negligence of A and B combine to injure C, who then files a lawsuit against A and B. On the morning of trial A settles with C for $50,000. The jury subsequently finds that A was 75% responsible[3] and B was 25% responsible for the accident and that C's damages totaled $100,000. If neither party had settled, judgment would be entered against A for $75,000 and B for $25,000. But given A's settlement for $50,000, how much should B pay? Under a *pro rata* approach, B would receive a credit for 75% of C's damages ($75,000) because A, the settling joint tortfeasor, was 75% responsible for the accident. Thus, B would owe $25,000 ($100,000–$75,000) to C. Under the *pro tanto* approach, B would only receive a credit for the dollar value of A's settlement ($50,000). Therefore, B would owe $50,000 ($100,000–$50,000) to C. Clearly, the manner in which the settlement credit is calculated has a significant effect.[90]

Contribution

A related subject, the right of contribution permits a defendant who pays more than her share of a judgment to recover a portion of their pay-out from other responsible tortfeasors. Not available at common law, contribution generally derives from state statute. For the most part, contribution continues as a viable cause of action in jurisdictions that preserve joint and several liability, whether in total or under certain circumstances. Even in these jurisdictions, uniformity is absent: some jurisdictions

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[85] Lewis A. Kornhauser & Richard L. Revesz, SETTLEMENTS UNDER JOINT AND SEVERAL LIABILITY, 68 N.Y.U. L. Rev. 427, 435 (1993).

[86] See 57B Am. Jur. 2d Negligence § 1049.

[87] A Latin phrase meaning "[p]roportionately; according to an exact rate, measure, or interest." Black's Law Dictionary (9th ed. 2009)("pro rata").

[88] A Latin phrase meaning "[t]o that extent; for so much; as far as it goes." Black's Law Dictionary (9th ed. 2009)("pro tanto").

[89] Wilson Elser Moskowitz Edelman & Dicker LLP, "Joint and Several Liability: 50-State Survey" 3-4 (2013).

[90] Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1579 (11th Cir. 1992)(*cited* in Wilson Elser, "Joint and Several Liability: 50-State Survey").

provide for contribution *pro rata*, while others look to each defendant's individual fault to determine what each defendant should owe the others.[91]

Although its application will be limited, contribution can even survive in jurisdictions that abolished joint and several liability. To offer an example, in Georgia, no right of contribution exists after the trier-of-fact allocates fault.[92] But contribution is still available when only one defendant remains after pretrial settlement by another tortfeasor or in other situations where the proceeding was not tried on the merits.[93] Moreover, it is currently unclear in Georgia whether a party can pursue contribution from a responsible nonparty if the defendant fails to have fault apportioned at trial.[94]

When Do Comparative Negligence Rules Apply?

The above sections discussed the general schemes that jurisdictions use to allocate fault and apportion damages between a plaintiff and one or more defendants and between multiple defendants or torfeasors. But these broad descriptions only minimally describe the law in many jurisdictions. Jurisdictions also disagree on when allocation and apportionment will apply.

The initial question will often be whether the jurisdiction's apportionment rules apply in a given case. In Georgia, for example, the trier-of-fact *must* apportion damages in a case where the plaintiff was partially at fault; where there are multiple defendants; where the plaintiff settled with a culpable nonparty outside of court; or where a defendant gives proper notice that it will seek to assign fault to a nonparty.[95] But jurisdictions employ different rules to dictate when the trier-of-fact may or must allocate fault and apportion damages.

Conduct That Is Subject to Apportionment

Next, it is important to investigate whether the defendant's conduct warrants apportionment. At common law, contributory negligence was not a defense to intentional torts. And many jurisdictions also refuse to apply comparative negligence to intentional torts (*i.e.*, torts not caused by negligence).[96] In Florida, apportionment only applies in negligence actions.[97] But others allow apportionment to intentional tortfeasors, like criminal assailants. In Georgia, for example, fault can be apportioned to a criminal assailant in a civil action against another party, such as a property owner.[98] In Arizona, although the judge or jury may not compare an intentional tortfeasor's fault with that of the victim, the judge or jury can generally allocate fault among both negligent and intentional tortfeasors.[99] Lastly, some jurisdictions take a middle ground.

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[91] See 57B Am. Jur. 2d Negligence § 1043.
[92] O.C.G.A. § 51-12-33(b).
[93] See Brian T. Moore and Myles D. Levelle, *Apportionment and the Tort Reform Act of 2005: Where Do We Stand after Nearly Ten Years of Litigation?*, 2014 Georgia Defense Lawyers Association L.J. 195, 197, 202 (2014)(*citing* Zurich Amer. Ins. Co. v. Heard, 321 Ga. App. 325, 740 S.E.2d 429 (2013)).
[94] See id. at 204.
[95] See O.C.G.A. § 51-12-33.
[96] See 1 Modern Tort Law: Liability and Litigation § 12:18.50.
[97] See Hennis v. City Tropics Bistro, Inc., 1 So. 3d 1152, 1154 (Fla. Dist. Ct. App. 2009).
[98] See Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012).
[99] See Strawberry Water Co. v. Paulsen, 220 Ariz. 401, 409-10, 207 P.3d 654, 662-63 (Ariz. Ct. App. 2008).

Louisiana gives judges the discretion to allow allocation to intentional tortfeasors when it comports with sound public policy.[100]

Neither is negligent conduct a monolithic category. Where a tortfeasor's conduct is reckless, willful, or wanton and the plaintiff acted with mere ordinary negligence, contributory negligence is not a defense. Some comparative negligence jurisdictions similarly refuse to compare this heightened species of negligence with "ordinary" negligence.[101] Nonetheless, the majority of jurisdictions have decided that these distinctions among negligent conduct are irrelevant under comparative negligence. In part, this is because the trier-of-fact will compare the various exacerbating factors, which previously distinguished these different forms of negligence, when apportioning fault.[102]

Lastly, conduct that gives rise to strict liability[103] has also created disagreement among jurisdictions. Strict liability often arises in product liability, animal ownership tort, or ultrahazardous activity cases. The majority of jurisdictions apply comparative negligence in strict liability actions.[104] For example, thirty-four jurisdictions apply comparative negligence to strict product liability actions.[105]

Damages That Are Subject to Apportionment

Just as some conduct is excluded from apportionment rules, some damages are also excluded. Most states will not apportion punitive damages.[106] Because punitive damages are meant to punish and deter conduct, rather than compensate the injured party, most jurisdictions do not apply comparative negligence principles to punitive damages. But some jurisdictions have complex rules for other kinds of damages. For example, Michigan's apportionment rules apply comparative negligence to economic damages (like medical bills or lost wages) but use a modified "51% Rule" version for noneconomic damages (like pain and suffering damages).[107]

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[100] 1 Modern Tort Law: Liability and Litigation § 12:18.50 (2d ed.)(*citing* Landry v. Bellanger, 805 So. 943 (La. 2003)(Judge did not permit comparison between rapist's intentional act and victim's negligence, in an action against a property owner.)).

[101] 1 Comparative Negligence Manual § 1:14 (3d ed)(*citing* Stroud v. Arthur Andersen & Co., 2001 OK 76, 37 P.3d 783, 793, and Rubel v. Wainwright, 86 Conn. App. 728, 740, 862 A.2d 863, 871 (2005)("As a general legal proposition, the plaintiff is correct that comparative negligence is not a defense to a cause of action alleging recklessness.")).

[102] Id. (*citing* Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011)).

[103] Strict liability "does not depend on actual negligence or intent to harm, but...is based on the breach of an absolute duty to make something safe." Black's Law Dictionary (9th ed. 2009)("liability").

[104] See 1 Modern Tort Law: Liability and Litigation §§ 12:30-31; 57B Am. Jur. 2d Negligence § 978.

[105] See DEPARTMENT OF LEGISLATIVE SERVICES (Maryland), supra note 9, at 18.

[106] Texas is a possible exception. 1 Modern Tort Law: Liability and Litigation § 12:21 (2d ed.)(*citing* Pedernales Elec. Cooperative, Inc. v. Schulz, 583 S.W.2d 882 (Tex. Civ. App. 1979)).

[107] See DEPARTMENT OF LEGISLATIVE SERVICES (Maryland), supra note 9, at 17 (*citing* Mich. Comp. Laws Service § 600.2959 (2012).

Related Common Law Doctrines

Assumption of the Risk

Assumption of the risk is a common-law defense to a negligence action.[108] As its name implies, the driving concept behind the defense is that an injured party cannot recover when the party voluntarily undertook an activity which he or she knew had an unreasonable or heightened risk of injury. Today, assumption of the risk has splintered into three fragmentary doctrines: express assumption of the risk; primary assumption of the risk; and secondary assumption of the risk.[109]

In express assumption of the risk, the injured party explicitly agreed (often through a written waiver) with the tortfeasor to assume a known risk.[110] Nearly all states retain this defense.

In primary and secondary assumption of the risk, the injured party's agreement is implied. Primary assumption of the risk exists when the injured party assumed some relationship to the tortfeasor, knowing that the activity he or she was undertaking had unreasonable or heightened risks and that the tortfeasor would not protect him or her from those risks. The plaintiff has essentially relieved the tortfeasor from any duty to him or her, without which there can be no negligence action.[111] For example, some have invoked this version of the defense to shield stadium-owners from liability when baseballs or hockey pucks strike spectators during sporting events. Primary assumption of the risk also survives in many jurisdictions.[112]

Lastly, secondary assumption of the risk exists when an injured party voluntarily undertook an activity with known risks that caused their injury.[113] In contrast to the express and primary assumption of the risk, most jurisdictions applying comparative negligence no longer recognize this defense as a complete bar to recovery, tending to incorporate its concepts into their comparative negligence rules.[114]

Last Clear Chance

The "last clear chance" doctrine is another common-law area that jurisdictions have navigated differently. Under the last clear chance doctrine, a negligent plaintiff can recover for her injury from a negligent defendant, despite having contributed to the injury through her own negligence, if the defendant had a subsequent opportunity to avert the consequences of the defendant's and the plaintiff's negligence but failed to do

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[108] The primary distinction between assumption of the risk and contributory negligence has been stated in several ways: that assumption of the risk entails an intentional exposure to risk; that assumption of the risk is grounded in an implied contract, rather than in tort; or that assumption of the risk deals with known or obvious risks, whereas contributory negligence deals with risks that would have been discovered but for the plaintiff's own negligence. See 65A C.J.S. Negligence § 254.

[109] 1 Comparative Negligence Manual § 1:34 (3d ed).

[110] See Id. § 1:35.

[111] See Id. § 1:37.

[112] See Id.

[113] See Id. § 1:38. Although this defense is functionally similar to contributory negligence, some distinguish the two by pointing to assumption of the risk's subjective standard.

[114] See Id. § 1:39.

so.[115] Formerly, jurisdictions employed this doctrine to mitigate the severity of contributory negligence towards negligent plaintiffs.

The last clear chance doctrine lost much of its import in jurisdictions that moved to comparative negligence. And, although some jurisdictions retain some vestige of the doctrine, the majority have recognized its lack of utility under comparative negligence principles.[116] In those jurisdictions, the trier-of-fact simply incorporates the defendant's subsequent negligence into its larger evaluation and allocation of fault.

Conclusion

When asked to supplant a major feature of Maryland's tort law, the Maryland Court of Appeals punted. According to the court's majority opinion, the state's General Assembly should decide whether to replace contributory negligence with its trendier cousin. Although contributory negligence produced an unfortunate outcome for the promising young soccer player, larger issues were at play. This article has attempted to explain, in part, what gave the Maryland Court of Appeals such pause.

We have surveyed the legal landscape on fault allocation and damages apportionment, attempting to explain general boundaries and point out areas of disagreement. But, at the end of the day, one can only find correct answers to questions on fault allocation and damages apportionment by thoughtfully and diligently delving into the particular law of the specific jurisdiction. Discussing the interplay of comparative negligence, several and joint liability, and contribution, one commentator noted: "Tort law frequently resembles a Rubik's cube. With each attempt to align one aspect of the puzzle, the effort distorts another."[117] The distortions in each jurisdiction vary, depending on how the legislators and judges have turned the pieces.

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[115] See 65A C.J.S. Negligence § 306; DEPARTMENT OF LEGISLATIVE SERVICES (Maryland), supra note 9, at 4.
[116] 1 Modern Tort Law: Liability and Litigation § 12:17 (2d ed.).
[117] William R. Tapella, II, COMPARATIVE FAULT, CONTRIBUTION, AND JOINT AND SEVERAL LIABILITY: AN ARGUMENT, 88 Ill. B.J. 694 (2000).