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COMPARATIVE NEGLIGENCE: AN EXERCISE IN APPLIED JUSTICE

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On September 1, 1973, Texas tort law emerged unshackled from the archaic, common law principle that the slightest degree of negligence on the part of a claimant totally barred any recovery he might seek in a court of law. With the abolition of the theory of contributory negligence and the advent of the "modified" comparative negligence system, Texas jurisprudence committed itself to the proposition that every person is and should be responsible to others only to the extent *he* caused any injury or damages and that an injured party whose negligence is not greater than those who caused him injury should not be barred from recovery. However, to maintain that the principles of comparative negligence constitute a "new" or "modern" tort theory is to make the same error in thinking as to propose that comparative negligence constitutes a simple, unifaceted theory of apportionment of damages.

HISTORY AND DEVELOPMENT OF COMPARATIVE NEGLIGENCE

The first writings indicating that fault or damages might be an apportionable factor occurred in the sea laws of the middle ages. Particularly, the *Rolls of Oleron* had clauses dealing with the damage question in ship collisions.[1] The English admiralty in the 17th century at-

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1. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 220 (1950).

tempted a primitive type of apportionment of damages by sharing equally the damages occasioned by the collision of ships; no attempt was made, however, to apportion negligence in terms of percentages of fault.[2] Other types of apportionment formulae are evident as early as the 1794 Prussian Code, the 1804 Code Napoleon, the 1811 Austrian Civil Code as well as similar statutes in Portugal, Switzerland, Germany, China, Japan, Russia and Turkey.[3] By 1911, the idea that fault could be apportioned had become so prevalent that the vast majority of the maritime states in Europe adopted the principles of pure comparative negligence in all admiralty cases.[4]

Today, in foreign jurisdictions whose jurisprudence is predicated on the common law, comparative negligence is the rule, not the exception. England has completely abandoned contributory negligence as a tort concept in favor of a pure comparative negligence system.[5] All Canadian provincial jurisdictions provide for apportioning damages in negligence cases.[6] Other countries in addition to the European maritime nations which have adopted some form of comparative negligence include Puerto Rico, the Canal Zone, Israel, Persia and New Zealand.[7]

Although the United States has been generally regarded as the bastion of contributory negligence, the number of states adopting comparative negligence statutes has increased appreciably in recent years. The first appearance of comparative negligence in the United States occurred in 1908, with the passage of the Federal Employers' Liability Act.[8] Later, the concept of apportioning damages was incorporated into other federal legislative efforts, including the Jones Act[9] and the Death on the High Seas Act.[10] Today, some form of comparative negligence is utilized in Arkansas, Colorado, Georgia, Hawaii, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, Oregon,

2. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 475-76 (1953).

3. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 238 (1950).

4. *Id.* at 230-31.

5. Law Reform Act, 8 & 9 Geo. 6, c. 28 (1945), which provides that if a person suffers damage partly due to his own fault and partly because of another's fault, the claim is not defeated by reason of the fault of the person suffering damage; however, his damages are reduced proportionately with his own degree of fault. *See generally* Williams, *The Law Reform (Contributory Negligence) Act, 1945*, 9 MOD. L. REV. 105 (1946).

6. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 154 (1958).

7. Stone, *Comparative Negligence*, 17 LA. B.J. 13 (1969).

8. 45 U.S.C. §§ 51-60 (1970).

9. 46 U.S.C. § 746 (1970).

10. 46 U.S.C. §§ 688, 766 (1970).

Rhode Island, South Dakota, Texas, Vermont, and Wisconsin.[11] Although all of these states have adopted comparative negligence, several different theories have developed as to how comparative negligence is to be applied. Although classifications usually prove to be oversimplifications, there have developed four main theories of comparative negligence in the United States: (1) the pure form, (2) the modified "not greater than" form, (3) the modified "not as great as" form, and (4) the slight-gross form.

In the pure comparative negligence jurisdictions, the claimant may recover no matter how much at fault he might have been, but of course, his recovery is diminished by his contributing degree of negligence. Therefore, in Mississippi and Rhode Island, where pure comparative negligence is applied, a claimant may still recover 20 percent of his damages even though he is found to have been 80 percent at fault.

Within the framework of law applied in the modified comparative negligence states, a claimant may still recover if his negligence was equal to or less than one-half of the total, but his recovery will be diminished in proportion to the amount of his negligence. However, the modified comparative negligence theory has been bifurcated into two sub-theories: the "not greater than" form and the "not as great as" form. The "not greater than" approach, adopted in New Hampshire, Vermont, Wisconsin and now in Texas, specifies that the claimant can still recover provided that he is found to be not more than 50 percent at fault and his negligence is "not greater than" that of the other defendant or defendants. Therefore, within this framework, a claimant who is found to be 40 percent at fault, as compared to three defendants who are found to be 30 percent, 20 percent, and 10 percent at fault, respectively, can still recover 60 percent of his damages.

The other mode of modified comparative negligence, termed the "not as great as" form, provides that the claimant may recover so long as his negligence is "not as great as" that of the defendant. Under this

11. ARK. STAT. ANN. § 27-1730.2 (1962); COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971); GA. CODE ANN. § 105-603 (1968); HAWAII REV. STAT. § 663-31 (Supp. 1972); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 231, § 85 (Supp. 1972); MINN. STAT. ANN. § 604.01 (Supp. 1973); MISS. CODE ANN. § 11-7-15 (1972); NEB. REV. STAT. § 25-1151 (1965); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1972); ORE. REV. STAT. § 18.470 (1971); R.I. GEN. LAWS ANN. § 9-20-4 (Supp. 1972); S.D. CODE ANN. § 20-9-2 (1969); TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974); VT. STAT. ANN. tit. 12, § 1036 (1973); WIS. STAT. ANN. § 895.045 (Supp. 1973).

system, adopted in Arkansas, Colorado, Hawaii, Maine, Massachusetts, Minnesota and Oregon, a claimant could not recover anything if he was found to have contributed 50 percent to the accident because in that situation his negligence would be equal to that of the other defendant or defendants.

Nebraska and South Dakota utilize the slight-gross concept of comparative negligence. Under this approach, the negligence of each party is considered separately and the jury must decide whether the claimant's negligence is slight in comparison with the other party's negligence. If the defendant's negligence is determined to be gross in comparison with the plaintiff's, then the latter may recover his total damages, diminished in accordance with the negligence attributable to him.[12]

UNDERSTANDING THE TEXAS LAW

On September 1, 1973, by legislative enactment, a modified form of comparative negligence went into effect in Texas.[13] The statute states in part:

> Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.[14]

This particular section of the statute is simple and straightforward. If the plaintiff's negligence is "not greater than" the defendant's, the plaintiff recovers the percentage of damages attributable to the negligence of the defendant. Stated simply, the plaintiff recovers against the defendant only if the plaintiff's negligence does not exceed 50 percent. For example:

TABLE 1

		Pl	Def
(a)	Damages Found	$10,000	
	Causal Negligence	50%	50%
	Net Recovery	$ 5,000	

12. *See* Sayers v. Witte, 107 N.W.2d 676 (Neb. 1961); Nugent v. Quam, 152 N.W. 2d 371 (S.D. 1967).
13. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974).
14. *Id.* § 1.

(b)	Damages Found	$10,000	
	Causal Negligence	70%	30%
	Net Recovery (Plaintiff's negligence exceeded 50 percent)	0	
(c)	Damages Found	$10,000	
	Causal Negligence	40%	60%
	Net Recovery	$ 6,000	

Likewise, the same rules and application of apportionment of damages remain when there are multiple defendants. In the example which follows in Table 2, note that the plaintiff in part (b) still recovers 60 percent of his damages notwithstanding the fact that there was attributed to him the highest percentage of negligence (40 percent). The plaintiff recovers in such a situation because his negligence "does not exceed the total negligence of all defendants . . . ."[15]

TABLE 2

		Pl	Def[1]	Def[2]	Def[3]
(a)	Damages Found	$10,000			
	Causal Negligence	50%	20%	20%	10%
	Net Recovery	$ 5,000			
(b)	Damages Found	$10,000			
	Causal Negligence	40%	30%	20%	10%
	Net Recovery	$ 6,000			

Proportional Contribution Between Joint Tort-feasors

As is readily apparent from the above examples, a system whereby multiple defendants would be contributing to the plaintiff's recovery in proportion to their degree of fault spelled the need for a modified system of contribution in Texas. Accordingly, a new contribution statute[16] was enacted in order to more fairly implement the concomitant comparative negligence law which completely supersedes article 2212 and the theories of contribution which have evolved through the common law.[17]

The predicate of the new contribution statute is embodied in section 2(b):

> In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all

15. *Id.* § 2(b).
16. *Id.* § 2(b).
17. *Id.* § 2(h).

> defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

If this section is applied to the hypothetical situation set forth in part (b) of Table 2, it can readily be seen that in contributing to the plaintiff's $6,000 recovery, defendant 1 will pay $3,000, defendant 2 will pay $2,000 and defendant 3 will contribute $1,000.

Joint and Several Liability

In addition to modifying the established law of contribution, the new comparative negligence law has changed the existing concepts of joint and several liability of joint tort-feasors. Specifically, the statute will now provide that each defendant whose negligence is greater than the plaintiff's negligence is jointly and severally liable for the entire amount of the plaintiff's recovery.[18] Each defendant whose negligence is less than the plaintiff's negligence is not responsible for the entire net recovery, but owes instead only the particular percentage of damages attributable to him.[19] This effects a radical change in the historical Texas concept of joint and several liability of all joint tort-feasors. Therefore, in the situation depicted in part (b) of Table 2, there would be no joint and several liability imposed upon any of the three defendants since each of their degrees of fault was less than that of the plaintiff's. The plaintiff, therefore, in satisfying his $6,000 judgment would be restricted to collecting only $3,000 from defendant 1, $2,000 from defendant 2 and $1,000 from defendant 3. When one or more defendants are insolvent or have only limited insurance coverage, this change in the law may have significant impact upon the trial strategy of all parties.

TABLE 3

	Pl	Def[1]	Def[2]	Def[3]
Damages Found	$10,000			
Causal Negligence	20%	10%	40%	30%
Net Recovery	$ 8,000			

Note how the imposition of joint and several liability results when the causal degrees of fault change as in Table 3. Under the new statute defendants 2 and 3 would be jointly and severally liable to the plaintiff

18. *Id.* § 2(c).
19. *Id.* § 2(c).

for the *entire* $8,000 judgment. Defendant 1 is not jointly and severally liable because his degree of fault (10 percent) is less than that of the plaintiff's (20 percent). Therefore, the most defendant 1 must ever pay to the plaintiff is $1,000. Faced with such a situation, the plaintiff has several alternatives in satisfying his judgment. He has the right to collect the entire $8,000 from either defendant 2 or defendant 3; or he could collect any portion of the $8,000 from either defendant 2 or defendant 3 and hold the other non-paying defendants responsible for the difference, with defendant 1's liability being limited to $1,000. Of course, if either defendant 2 or defendant 3 are forced to pay more than their proportionate degree of fault, each may recoup any amount paid over and above the amount attributable to his comparative fault from the other defendant or defendants, again with defendant 1's liability being limited to $1,000.

The new concept of joint and several liability will become of particular importance in those situations where one or more of the defendants are wholly or partially insolvent at the time of judgment. As is readily apparent from the hypothetical situations posited in Table 4, the insolvency of one or more defendants should basically affect the plaintiff's recovery only in those situations where the solvent defendant or defendants are less negligent than the plaintiff.

TABLE 4

		Pl	Def[1]	Def[2]	Def[3]
(a)	Damages Found	$10,000			
	Causal Negligence	10%	50%	35%	5%
	Contribution		$5,000	$3,500	$500
	Net Recovery	$ 9,000			
(b)	Damages Found	$10,000			
	Causal Negligence	10%	50%	35%	5%
	Contribution		$8,500	Insolvent	$500
	Net Recovery	$ 9,000			
(c)	Damages Found	$10,000			
	Causal Negligence	10%	50%	35%	5%
	Contribution		Insolvent	Insolvent	$500
	Net Recovery	$ 500			

As is clearly evident in studying part (c) of Table 4, the fact that defendant 3's negligence was less than that of the plaintiff and because defendant 1 and defendant 2 were insolvent, the plaintiff's potential collectible recovery was reduced from $9,000 to $500. Defendant 3,

whose negligence is less than plaintiff's, is not liable for the entire $9,000 because he is not jointly and severally liable to the plaintiff.

Settlements With Tort-feasors

Prior to the advent of comparative negligence, the Texas law dealing with settlements and the procedural and substantive effects of releases was primarily governed by the holding in the case of *Palestine Contractors, Inc. v. Perkins.*[20] Under the concept of *Perkins*, if the plaintiff settled with a party who was later determined to have been one of two joint tort-feasors, the plaintiff would have released one-half of his cause of action. If the party with whom the plaintiff settled was found to have been one of four joint tort-feasors, the plaintiff would have released 25 percent of his cause of action.

The new comparative negligence statute, in dealing with this problem, now provides:

> If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or non-suited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.
>
> If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.[21]

It is clear that the statute now envisions two potential means of dealing with a settling party. In one situation, the non-settling defendants are given credit for the *sum* of money paid the plaintiff by one who has settled but who is never joined as a party to the litigation and whose conduct is never submitted to the jury for a determination as to his percentage of negligence. In the other situation, when the settling defendant is actually made a party to the suit, by way of cross-action or otherwise, and the settling defendant's negligence is deter-

20. 386 S.W.2d 764 (Tex. Sup. 1964).
21. TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 2(d) and 2(e) (Supp. 1974).

mined by the jury, the remaining defendants are given credit, proportionately, for the *percentage* of negligence attributed by the jury to this settling party.

1. *Non-Joinder of Settling Party.* Under the new comparative negligence statute, if the plaintiff settles with one person or party before judgment and the non-settling defendant or defendants do not cause the settling party to be joined in the suit, then each non-settling defendant may deduct from the amount for which he is liable a certain percentage of the settlement. The amount of credit each non-settling defendant receives is "based on the relationship the defendant's own negligence bears to the total negligence of all defendants."[22] This should become clear in the following example:

TABLE 5

(Prior to judgment, P1 settled with a third person or party for $8,000 who is never joined as a third party defendant)

	Pl	Def[1]	Def[2]	Settling Party
Damages Found	$100,000			
Causal Negligence	20%	30%	50%	no finding
Contribution		$27,000	$45,000	$8,000
Net Recovery	$ 80,000			

As is evident from Table 5, each of the non-settling defendants reduced the amount they would have had to pay ($30,000 and $50,000 respectively) by the *amount* of the total settlement multiplied by a fraction which represented the degree of his negligence as compared to the total negligence percentage of all defendants. That is, of the 80 percent negligence attributable to all defendants, defendant 1 contributed 30 percent of it, or three-eighths. Therefore, defendant 1 was credited with three-eighths of the $8,000 settlement, or $3,000, and thereby reduced the amount he owed the plaintiff from $30,000 to $27,000. Defendant 2 was credited with five-eighths of the $8,000 settlement, or $5,000, since he contributed five-eighths of the total negligence of the

22. *Id.* § 2(d). It should be pointed out that the statute, in delineating how contribution is to be computed when the settling joint tort-feasor is not joined in the lawsuit, speaks of: "If an alleged joint tort-feasor *pays* an amount to a claimant in settlement . . . ." A possible construction of that portion of the statute could be that a court may not credit the amount of a settlement to the verdict assessed against a non-settling defendant where the settlement had not been *paid* at the time the verdict is rendered and judgment is to be entered. On the other hand the courts may decide that an agreement to pay, as opposed to complete payment, may be sufficient to satisfy this requirement.

defendants. Because of the $5,000 credit, defendant 2 thereby reduced the amount he owed the plaintiff to $45,000.

The drastic results that may befall a non-settling defendant when there exist only two potential defendants is demonstrated in the following set of hypothetical examples:

TABLE 6

(a) Assume plaintiff settled with defendant 2 for $60,000 prior to judgment and defendant 2 is never joined as a party to the suit.

	Pl	Def[1]	Settling Def[2]
Damages Found	$100,000		
Causal Negligence	20%	80%	no finding
Payment by Def[1]		$20,000	
Net Recovery	$80,000		

Defendant 1 is entitled to deduct the entire amount, eight-eighths, of the $60,000 settlement since he is the only party whose negligence is determined by the jury.

(b) Assume plaintiff settled with defendant 2 for $10,000 prior to judgment and defendant 2 is never joined as a party to the suit.

	Pl	Def[1]	Settling Def[2]
Damages Found	$100,000		
Causal Negligence	20%	80%	no finding
Payment by Def[1]		$70,000	
Net Recovery	$80,000		

If there is a lesson to be learned in the damage and payment results of Table 6, it is that a non-settling defendant should thoroughly investigate the possibility of potentially inadequate or inflated settlements which a plaintiff has made with other persons or parties. The only factor which caused defendant 1 to pay $50,000 more to the plaintiff in part (b) of Table 6 than in part (a) was the inadequacy of the settlement which defendant 2 made with the plaintiff in part (b). As will be shortly seen, defendant 1 may have made a $50,000 mistake when he did not file a cross-action against defendant 2 seeking contribution or indemnity in the primary suit after the settlement was obtained.

2. *Joinder of the Settling Party as a Third Party Defendant.* The trial strategy involved in deciding whether a settling person or party

should be joined in the primary suit is better understood when viewed within the framework of the new comparative negligence statute. Section 2(e) of the statute sets forth that where the plaintiff settles with a third person or party defendant and thereafter the non-settling defendants by cross-action seek contribution from the settling party, the ultimate result is that the settling party's *degree of negligence* in causing the accident is submitted to and determined by the jury. In such a situation, the settlement with the plaintiff acts as a complete release of the portion of the judgment attributable to the *percentage of negligence* found on the part of the settling tort-feasor.[23] The ultimate effects of underestimated and inflated settlements is again quite interesting, as evidence by Table 7.

TABLE 7

(a) Assume plaintiff settled with defendant 3 for $60,000 prior to judgment and defendant 3 is then joined in the suit as a third party defendant.

	Pl	Def[1]	Def[2]	Settling Def[3]
Damages Found	$100,000			
Causal Negligence	20%	30%	40%	10%
Contribution		$30,000	$40,000	$60,000
Net Recovery	$130,000			

(b) Assume plaintiff settled with defendant 3 for $1,000 prior to judgment and defendant 3 is then joined in the suit as a third party defendant.

	Pl	Def[1]	Def[2]	Settling Def[3]
Damages Found	$100,000			
Causal Negligence	20%	30%	40%	10%
Contribution		$30,000	$40,000	$1,000
Net Recovery	$ 71,000			

As is readily apparent from the fact that the plaintiff ultimately recovered $130,000 in part (a) as compared to only $71,000 in part (b) of Table 7, the amount of the settlement directly affected the amount of the plaintiff's recovery and did not affect in any manner the sums paid by defendants 1 and 2 to the plaintiff. They merely received credit for the *percentage* of negligence attributable to defendant 3 in the sense that if defendant 3 had not been joined as a third

23. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Supp. 1974).

party defendant, the jury would probably have found higher percentages of negligence on the non-settling party defendants.

Again, note particularly that when the settling party's percentage of negligence is submitted to the jury, the amount of money defendant 1 and 2 must pay to the plaintiff is governed *not* by the amount of defendant 3's settlement but rather by the *percentage* of fault which the court or jury attributes to defendant 3. If the non-settling defendants succeed in convincing the jury to find a high percentage of negligence attributable to the settling defendant, their trial strategy will have been successful because their respective percentages of negligence will have been substantially reduced.

After viewing the relationships as set forth in Tables 5, 6 and 7, several aspects of trial strategy in respect to settlements are quite evident. In the first place, in a situation where the plaintiff may have made an *inadequate* settlement with a third person or party, the non-settling defendants should file a cross-action against the settling person or party for that person or party's *percentage of negligence* will probably act to decrease the ultimate amount of money the non-settling defendant will pay to the plaintiff to a greater extent than would the *amount* of the settlement. Likewise, part (b) of Table 7 should warn plaintiff's attorneys to seriously evaluate settlement offers from one of several defendants. Because the plaintiff accepted defendant 3's inadequate settlement offer in part (b), Table 7, he decreased his ultimate recovery by at least $9,000 ($80,000 minus $71,000).

To summarize, Texas settlement procedures under comparative negligence contemplate two basic alternatives:

1. If the settling joint tort-feasor is *not* added as a party, the *amount of the settlement* is simply deducted from the judgment and the defendants pay their relative percentages of the difference.
2. If the settling joint tort-feasor *is* added as a party and a percentage finding is made by the jury as to his negligence, then the *percentage of his fault* found by the jury is completely released. The other defendants only pay their own percentages without reference to the amount the settling defendant paid.

Venue Considerations

Any discussion of the principles to be applied to the concept of contribution among tort-feasors under the Texas law would be incomplete if it did not point out the major revisions that will occur in relation to the application of venue and the right to be tried in the county of

one's residence. The clear intent of the new comparative negligence act is that one primary lawsuit should determine all the issues of comparative fault, damages and the rights to contribution and indemnity that have not otherwise been resolved through settlement.[24] By the express terms of the statute, not only will the results of the primary suit be res judicata as to all named parties and persons who settled with any named parties, but in addition, all rights of contribution *must be pleaded and determined in the primary suit or be forever barred,* except in a very limited situation.[25] These innovations in the procedural rights to contribution will particularly affect applicable venue provisions in those cases involving multiple defendants who live in different counties. Take for example a situation where a plaintiff is injured while riding as a passenger in defendant 1's bus when the bus is involved in a collision with defendant 2's vehicle in county A. If the plaintiff thereafter brought suit only against the bus company in county B (the county of the plaintiff's residence wherein the bus company as a common carrier operates and has an agent) venue would be proper in county B as to defendant 1, the bus company.[26] If thereafter, the bus company wished to institute a third party cross-action against defendant 2, who resided in county C, seeking contribution or indemnity, he would be met with defendant 2's plea of privilege which would have been properly sustained by the court, prior to the adoption of comparative negligence, by reason of the fact that defendant 2 would not be a "necessary" party to the lawsuit.[27] This result is supported by the reasoning of the Texas Supreme Court in the case of *Union Bus Lines*

24. Id. § 2(g).

25. In all probability, the most innovative feature of the effect of the new comparative negligence law on the theory of contribution and the procedures of cross-actions relates to *when* such cross-actions and the right to contribution *must* be resolved. No longer may a defendant institute an initial suit or cross-action seeking contribution after the primary suit has concluded, except in a very limited situation. Section 2(g) of the Act reads as follows:

> All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

Clearly therefore, not only will the results of the primary suit be res judicata as to all named parties and persons who settled with any named parties, but in addition, all rights of contribution must be pleaded and determined by the court or jury in the primary suit or be forever barred unless the contribution is sought against a person who was not joined in the primary lawsuit and who has not settled with any party named in the primary suit. In this manner, the statute attempts to force all interested persons to adjudicate once and for all, in one lawsuit, all of the claims arising out of a particular occurrence.

26. TEX. REV. CIV. STAT. ANN. art. 1995, § 24 (1964).

27. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § 29a (1964).

v. Byrd,[28] concerning the question of venue of necessary parties under section 29a of article 1995, and is predicated on the fact that since defendant 1 could seek contribution or indemnity from defendant 2 *after* the primary suit was conducted, he would not be prejudiced by defendant 2's absence from the lawsuit instituted by the plaintiff in county B.

Note how an application of the new comparative negligence statute must change the result of the *Byrd* case. If under comparative negligence, the plaintiff settles with defendant 2 prior to instituting a lawsuit against defendant 1, the latter, as the only named defendant in the primary suit, has the unqualified right under the comparative negligence statute to have defendant 2 joined in the lawsuit in order that the percentage of defendant 2's negligence can be determined and the relative rights of defendants 1 and 2, as joint tort-feasors, resolved. In fact, if defendant 2 is not joined in the primary suit after settling with the plaintiff, defendant 1 will be forever barred from seeking contribution from him under the express terms of the statute.[29] As is readily apparent, to apply the principles of the *Byrd* case would be to deny defendant 1 the right to have defendant 2's percentage of negligence determined by the court in the primary suit in complete derogation of the intent of the comparative negligence statute. Clearly therefore, the effect of an application of this venue provision as done in the *Byrd* case conflicts with the Act and in such a situation the Act specifically provides: "This section prevails over . . . all other laws to the extent of any conflict."[30]

Some readers of the comparative negligence statute might point out that a situation such as the *Byrd* circumstances might be preserved within the comparative negligence framework by the following rationale: Allow the plaintiff to sue only defendant 1 in county B, sustain defendant 2's plea of privilege to be sued in county C, and let the primary suit resolve the comparative negligence of the plaintiff and defendant 1. Thereafter, allow defendant 1 to bring an independent lawsuit against defendant 2 in county C, seeking contribution or indemnity, and thus allow the second lawsuit to determine the comparative fault of defendant 1 and defendant 2 in causing the plaintiff's injuries and apportion the contribution between the two defendants accordingly. Such a solution would constitute an erroneous application of compara-

28. 142 Tex. 257, 177 S.W.2d 774 (1944).
29. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Supp. 1974).
30. *Id.* § 2(h).

tive negligence in at least three particulars. First, the primary suit would undermine the very crux of comparative negligence in that although there would be voluminous evidence tending to show the involvement of two vehicles in the accident, only the negligence of defendant 1 causing the accident would be submitted to and determined by the court or jury. Secondly, should the plaintiff and defendant 2 reach a settlement before the conclusion of the primary suit, defendant 1 would be precluded from seeking contribution from defendant 2 via an independent suit in county C under the express terms of the statute. Thirdly, regardless of whether the plaintiff and defendant 2 reach a settlement, defendant 1 must be afforded the *unrestricted right* to have the quantum of defendant 2's negligence determined in the primary suit. To deny such right to defendant 1 would completely destroy the concepts of contribution under the new comparative negligence statute.

In addition to modifications in the application of section 29a of article 1995, section 4 of the same article, dealing with multi-party suits brought in the county of residence of one defendant, may also require revision in its application. Under the current application of section 4, a claimant may bring a suit in the county of residence of one defendant against all other defendants, not domiciled there, who are proper parties.[31] If any of the non-resident defendants files a plea of privilege, the claimant must controvert that plea by proving a prima facie case against the resident defendant. Such a construction of section 4 could prove quite embarrassing within the framework of the new comparative negligence statute in the following situation: Plaintiff is injured in county A by reason of the negligent acts of defendant 1 and defendant 2, who are domiciled in county B and county C, respectively. Plaintiff thereafter brings suit against defendant 1 in county B, however, he does not join the non-resident defendant 2 in that lawsuit. Under the application of section 4 prior to the advent of comparative negligence, defendant 1 could seek contribution or indemnity from defendant 2 after the primary suit had concluded in county B. Under the present law, which states that all rights to contribution must be determined in the primary suit or be forever barred, defendant 1, as the named-resident defendant might be placed in the awkward position of having to prove a prima facie cause of action *against himself* in order to hold defendant 2 in county B. Obviously, since the plaintiff never

31. TEX. REV. CIV. STAT. ANN. art. 1995, § 4 (1964).

sued defendant 2 in county B, he should not be required to prove a prima facie case against the non-resident defendant for the vicarious benefit of defendant 1. Likewise, if no other venue provision was applicable to hold defendant 2 in county B other than section 4, whose venue facts require proof of a prima facie case against the resident defendant, defendant 1 will be required to either admit or prove the plaintiff's case against himself if he desires to join defendant 2 in the primary suit in county B.

As is readily apparent from the preceding hypothetical, a much more simple and workable solution to the problems of multi-defendant litigation is the approach of the new comparative negligence statute which would resolve in one lawsuit, once and for all, all the rights of contribution, as between potential joint tort-feasors. To that extent, the new Act will call for revision of the previous applications of section 4 of article 1995.

Credit or Set-Off of Damages Between Claimants

Under the modified system of Texas comparative negligence law, it is now possible for multiple parties to recover by counter-claiming and cross-claiming against other claimants. Section 2(f) of the Act provides:

> In [*sic*] the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

The concepts involved in this section are relatively simple when viewed within a one plaintiff-one defendant framework.

TABLE 8

	Pl	Def
Damages Found	$10,000	$5,000
Causal Negligence	40%	60%
Net Recovery	$ 6,000	$ 0

In Table 8, obviously the defendant cannot offset the amount he owes to the plaintiff, notwithstanding the $5,000 in damages he suffered, because his negligence is greater than 50 percent. Only the plaintiff recovers because his negligence is "not greater than" that of the other claimant. In cases involving one plaintiff-one defendant, the

only time the offset provision will apply is when the court or jury finds both parties equally at fault in causing the accident, because this is the only situation in which neither plaintiff's nor defendant's negligence is "not greater than" his opponent's. In such a situation, the plaintiff is entitled to recover 50 percent of the damages he suffered and the defendant is likewise entitled to recover 50 percent of the damages he suffered, subject to the "credit clause" of section 2(f) as set forth by example in Table 9.

TABLE 9

	Pl	Def
Damages Found	$10,000	$5,000
Causal Negligence	50%	50%
Net recovery without set-off	$ 5,000	$2,500
Net recovery with set-off	$ 2,500	$ 0

As is evident from Table 9, the plaintiff does not pay the defendant $2,500 and the defendant does not pay the plaintiff $5,000. The mathematical computation is made before payment, and only the claimant who is entitled to the greater amount of money after set-off will achieve any monetary recovery.

Some defense counsel view section 2(f) as an incentive to the defendant to counter-claim in an attempt to diminish the plaintiff's recovery. But is this really practical or advisable from the defendant's standpoint? In cases involving only one plaintff and one defendant, the set-off is only applicable in the limited situation of a 50 percent-50 percent jury finding. In every other instance in which the defendant is found to be more than 50 percent at fault it would seem that defendant's counsel will be risking the ire of the jury to be seeking damages against the plaintiff. Also, if counter-claims for damages are routinely filed by defendant's counsel in cases of probable liability on the part of the defendant, it would seemingly be quite difficult in many cases to argue that the plaintiff's alleged damages are unreasonable when the defendant is also seeking affirmative damages. It would, therefore, seem that far from encouraging defendant counterclaims, section 2(f) will discourage such action except in those situations where the defendant is almost positive that the negligence of the plaintiff was the major cause of the accident in question or at least one-half of the cause. Of course, as will be discussed later, in multiple party lawsuits

counter-claims and cross-claims may be encouraged but in those situations the rationale behind such action is not so much "credit off-set" as it is attempting to merely "spread the blame."

Ethical problems

There is a far more serious impediment to the promiscuous filing of counter-claims against plaintiffs as mere tactics of "trial strategy." The Texas Supreme Court in *Employers Casualty Co. v. Tilley*[32] has clearly held that an attorney employed by an insurance company to defend an insured has a conflict of interest when the rights of the insured potentially conflict with his insurance company, and in that instance the defense lawyer cannot ethically represent both parties.[33] It would appear that insurance companies, through their counsel, will not be permitted ethically to file counter-claims for injuries to their insureds if their insureds' rights to allege and maintain actions for damages should in any way be, at any time, inconsistent with the interests of the insurance companies. In these situations it will undoubtedly be necessary for the insurance carrier to advise the insured of the conflict of interest which exists and of the insured's right to be independently represented by counsel.

Plaintiff Sues Multiple Defendants Who Counter-Claim and File Cross Actions

TABLE 10

	Pl	Def[1]	Def[2]
Damages Found	$20,000	$10,000	$5,000
Causal Negligence	40%	40%	20%
Net Recovery	$ 6,000	$ 0	$ 0

In this example, all parties can potentially recover from each other because each party's negligence is "not greater than" the total negligence of the other parties. However, when the set-off is applied, all parties do not recover.

The plaintiff would owe the first defendant 40 percent of $10,000, or $4,000, without the set-off. Defendant 1 would owe the plaintiff 40 percent of $20,000, or $8,000, without the setoff. Applying the set-off, since defendant 1 owes the greater amount, he is entitled to a set-off; and he therefore owes the plaintiff a net sum of $4,000.

32. 496 S.W.2d 552 (Tex. Sup. 1973).
33. *Id.* at 558.

The plaintiff would owe the second defendant 40 percent of $5,000, or $2,000, without the set-off. Defendant 2 would owe plaintiff 20 percent of $20,000, or $4,000, without the set-off. Since defendant 2 owes the greater sum, he gets a set-off and only pays the plaintiff a net sum of $2,000.

Between defendant 1 and defendant 2, defendant 1 owes the second defendant 40 percent of $5,000, or $2,000. Defendant 2 owes the first defendant 20 percent of $10,000, or $2,000. Therefore, with the set-off, neither recovers anything against the other since they owe each other the same sum.

Of course, the above calculations and results were made under a hypothetical situation which assumes that all possible counter-claims and cross-claims had been filed. With more than one plaintiff or more than two defendants, the calculations could get confusing unless the following rule of thumb is kept in mind: Each individual's recovery or liability should be calculated separately, step by step, with every other party, just as though he were a plaintiff in a lawsuit without any cross-claims.

In every multiple party suit there are certain guidelines to always follow:

1. In every individual match-up between parties, only the excess is collectible by the party with the biggest *dollar* recovery *if* they are in a situation in which they can recover against each other.

2. In a multi-defendant suit, each defendant whose negligence is *more* than the plaintiff's is liable for the *entire* judgment owed by the defendants. If a defendant's negligence is *less* than the plaintiff's, that defendant only owes his fixed percentage of the recovery, and he has no joint and several liability.

3. Defendants receive credit for *money* if a settling "joint tort-feasor's" negligence does *not* go to the jury. Defendants are given credit for a *percentage* if the settling "joint tort-feasor's" percentage of negligence is submitted to the jury due to the settling tort-feasor's being made a *party* to the suit.

APPLICATION OF COMPARATIVE NEGLIGENCE TO FUNDAMENTAL TORT PRINCIPLES

With the adoption of a system of negligence based on the proportion of fault attributable to each of the parties, there will be substantial changes in the litigation of some traditional tort principles.

Products Liability

Since the concept of comparative apportionment of damages is based upon a system of "negligence," it is submitted that Texas law continues to recognize that a claimant's contributory negligence is still unavailable as a defense in products liability cases predicated on strict liability in tort. The statute specifically states that it is: "An Act relating to reform of civil suits based on *negligence* . . . ."[34] The landmark decisions of *Shamrock Fuel & Oil Sales Co. v. Tunks*[35] and *McKisson v. Sales Affiliates, Inc.*[36] will still be applicable insofar as they stand for the well-reasoned proposition that a claimant's contributory negligence is not a defense to a strict liability products case where such alleged negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence. Therefore, in a case involving the doctrine of strict liability in tort, a defendant will not be allowed to diminish a claimant's recovery by any percentage on the basis that the claimant failed to discover the defect or guard against the defect's existence. Not only will the defendant be denied any special issues or instructions which attempt to allow the jury to determine whether the claimant's failure to discover or guard against the possibility of the defective product constituted negligence, but also the court will exclude any evidentiary material which would tend to have the same purpose. Otherwise, the entire purpose and underlying concept behind the doctrine of strict liability in tort will have been undermined.

On the other hand, a claimant's recovery may be proportionately reduced to reflect his degree of negligence in a strict products liability case where the negligence of the claimant is based on the fact that upon discovering the defect and appreciating its dangerous condition, the claimant nevertheless proceeded to make use of the product. This form of negligence consisting of deliberately and unreasonably proceeding to encounter a known danger overlaps assumption of risk and the "misuse" defense often asserted in products liability suits. Like Wisconsin[37] and the other states which have adopted the modified form of comparative negligence now the law in Texas, the defense of assumption of

34. Tex. Laws 1973, ch. 28, preamble, at 41 (emphasis added).
35. 416 S.W.2d 779 (Tex. Sup. 1967).
36. 416 S.W.2d 787 (Tex. Sup. 1967).
37. Gibson v. Drees Bros., 120 N.W.2d 63 (Wis. 1963); Colson v. Rule, 113 N.W. 2d 21 (Wis. 1962); McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14 (Wis. 1962).

risk will have a comparative application *and not an absolute application that would totally bar a claimant's recovery.*

The Seat Belt Defense

The concept of whether a claimant has a duty to wear an available seat belt has been discussed by the courts within the framework of contributory negligence and mitigation of damages. Although a number of Texas cases have referred to what has been termed the "seat belt defense," no Texas appellate court has to date permitted a defendant to avoid liability to the plaintiff because of the plaintiff's failure to fasten an available seat belt.[38] In fact, the great weight of American authority is to the effect that the "seat belt defense" is not available either in the form of contributory negligence or by way of mitigation of damages.[39] The reasoning is simple: As one case termed it: "Unbuckled plaintiffs do not *cause* accidents."[40]

Contributory negligence is wholly inapplicable to invoke the seat belt defense because whether or not a claimant buckled his seat belt is rarely, if ever, determinative in relation to the *cause of the accident.* The usage or non-usage of seat belts only relates to the *extent of injuries* suffered by the claimant.

In view of the fact that the wearing of seat belts only relates to the *extent* of injuries, various attempts have been made to contort the principle of mitigation of damages and argue that a claimant's recovery should be diminished for his failure to mitigate his damages in not fas-

38. *See* Mercer v. Band, 484 S.W.2d 117 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); United Furniture & Appliance Co. v. Johnson, 456 S.W.2d 455 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); Red Top Taxi Co. v. Snow, 452 S.W.2d 772 (Tex. Civ. App.—Corpus Christi 1970, no writ); Quinius v. Estrada, 448 S.W.2d 552 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); Polasek v. Quinius, 438 S.W.2d 828 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); Sonnier v. Ramsey, 424 S.W.2d 684 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.); Tom Brown Drilling Co. v. Nieman, 418 S.W.2d 337 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

39. Woods v. Smith, 296 F. Supp. 1128 (N.D. Fla. 1969); Robinson v. Bone, 285 F. Supp. 423 (D. Ore. 1968); Moore v. Fischer, 505 P.2d 383 (Colo. Ct. App. 1972); Clark v. State, 264 A.2d 366 (Conn. Super. Ct. 1970); Remington v. Arndt, 259 A.2d 145 (Conn. Super. Ct. 1969); Lipscomb v. Diamiani, 226 A.2d 914 (Del. Super. Ct. 1967); Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966); Selmo v. Baratono, 184 N.W.2d 367 (Mich. Ct. App. 1970); Romankewiz v. Black, 167 N.W. 2d 606 (Mich. Ct. App. 1969); Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970); Barry v. Coca-Cola Co., 239 A.2d 273 (N.J. Super. Ct. 1967); Miller v. Miller, 160 S.E.2d 65 (N.C. 1968); Jones v. Dague, 166 S.E.2d 99 (S.C. 1969); Stallcup v. Taylor, 463 S.W.2d 416 (Tenn. Ct. App. 1971); Derheim v. Fiorito Co., 492 P.2d 1030 (Wash. 1972).

40. Romankewiz v. Black, 167 N.W.2d 606, 610 (Mich. Ct. App. 1969) (court's emphasis).

tening an available seat belt. Such attempts to apply the principle of mitigation of damages to the seat belt defense have been resoundingly rejected by the courts across this nation. In a rather exhaustive analysis of the cases heretofore decided on this point, the Supreme Court of Alabama recently held in *Britton v. Doehring*[41] that evidence of a plaintiff's non-use of an available seat belt is inadmissible to mitigate damages. The court made reference to at least 39 cases on this subject, representing 18 state, eight federal and two Canadian jurisdictions which have considered the seat belt defense in relation to mitigation of damages.[42] The court points out that after exhaustive studies by safety experts, doctors and lawyers in all those jurisdictions, only one (Illinois) has permitted evidence to be admitted of the plaintiff's non-use of an available seat belt in regard to mitigation of damages.[43] The reason for the rejection of the seat belt defense within the framework of mitigation of damages is quite simple: The theory of mitigation has absolutely no application since the duty to mitigate only arises *after* the wrongful act of the defendant. To maintain that a plaintiff has a duty to "buckle up" in order to mitigate his damages is to indulge in a fantasy that the plaintiff has time to fasten his seat belt in the brief interim between the initial impact of the vehicles and the subsequent infliction of bodily injuries. It is expected that Texas will remain among the vast majority of American jurisdictions which have rejected the so-called "seat belt defense."

Wisconsin, in an attempt to delineate percentage of fault in a guest-host situation, has held that a passenger has a common law duty to wear an available seat belt and that the non-use of an available seat belt may be considered by the jury in determining if such non-use constituted negligence contributing to the claimant's injuries.[44] Therefore, Wisconsin has recognized and attempted to bifurcate causation; that is, the recognition of negligence contributing to the *accident* and negligence contributing to the claimant's *injuries.* In this manner, a double submission of special issues and instructions is required. Issues are submitted inquiring into what percentage of each party's negligence contributed to the *accident.* Upon these percentages it is determined whether in fact the claimant is entitled to recover (*i.e.*, that his percentage of negligence, contributing to the accident is 50 percent or less).

41. 242 So. 2d 666 (Ala. 1970).
42. *Id.* at 671.
43. Mount v. McClellan, 234 N.E.2d 329 (Ill. Ct. App. 1968).
44. Bentzer v. Braun, 149 N.W.2d 626 (Wis. 1967).

Then, only after competent medical evidence is adduced, demonstrating to what extent the claimant's injuries would have been reduced had the claimant been wearing a seat belt at the time of the accident, is a party allowed a special issue inquiring as to whether such non-use was negligence, and if so, to what extent did this negligence contribute to the *injuries* he received.

If Texas, contrary to the great weight of American authority, does impose an arbitrary duty to wear seat belts, the Texas courts may choose to follow the Wisconsin system in determining how to handle causative negligence relating to the *extent* of injuries received by a claimant.

CONCLUSION

With the advent of comparative negligence in Texas, the causative negligence of the various parties to the dispute will now be apportioned by the court or jury. Such a system is a vast improvement over the archaic concepts of contributory negligence, for no longer will a claimant be denied any recovery when his negligence contributed very little to the cause of his injury as compared to the negligence of the other parties to the dispute.

The new concept of comparative negligence will also revolutionize trial and settlement procedures by reason of its effect on the rationales underlying counter-claims, cross-actions, contribution, indemnity, and potential conflicts of interest between attorney and client. With the obvious effect which comparative negligence will have on traditional theories such as assumption of risk, strict liability, discovered peril, and mitigation of damages, attorneys in Texas must revise their thinking in order to fit these traditional theories into the comparative negligence framework. Far from constituting a unifaceted concept of fault, comparative negligence, with its system of apportionment of damages, should spell the dawning of a new era in Texas litigation; an era limited only by the creative imagination of its practitioners.