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BEYOND BRADLEY: A CRITIQUE OF COMPARATIVE CONTRIBUTION IN WEST VIRGINIA AND PROPOSALS FOR LEGISLATIVE REFORM

JAMES B. STONEKING

I. INTRODUCTION

With the adoption of comparative negligence in the 1979 decision of Bradley v. Appalachian Power Company,¹ West Virginia joined a majority of states in removing contributory negligence as a bar to recovery in tort actions.² If from Bradley we find a central teaching, it would be this: One whose negligence is less than that of all other participants in an accident may recover damages, but these damages will be reduced in proportion to his own wrongdoing.³ Bradley introduced a totally new and untested procedure into West Virginia law. More importantly, Bradley signalled a change in philosophy.⁴ As a result, it was sure to have a ripple effect in many areas of legal practice. Of course, Bradley was never intended or expected to be the final word, and would require future decisions to give needed guidance on its impact.⁵ It has been seven years since the decision of Bradley, and regrettably, this long-awaited guidance has not been provided. Many unanswered questions, both practical and conceptual, continue to trouble the practicing attorney.

One of the most important areas of the law that felt Bradley’s presence was that of contribution. Nationwide, the approach has been to legislatively address the way in which contribution fits into the comparative negligence system. A total of thirty-eight states have now given approval to some type of comparative negligence scheme, and all but ten have done so by legislation.⁶ Of the ten states

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² As of July 1986, a total of 38 states had modified the common law rule of contributory negligence. H. Woods, COMPARATIVE FAULT (1979 & 1986 Supp.).
³ This “teaching” is merely a synthesis of Bradley’s two major holdings: (1) abolition of the contributory negligence bar where a party’s negligence is less than the combined negligence of all other parties, and (2) a reduction of the verdict based upon the plaintiff’s percentage of negligence. Bradley, 163 W. Va. at 342-43, 256 S.E.2d at 885.
⁵ The Court commented in this regard: “We do not intend to consider exhaustively all of the particular ramifications of the new rule, since they are best resolved within the particular factual framework of the individual case.” Bradley, 163 W. Va. at 342, 256 S.E.2d at 885.
which have adopted comparative negligence judicially, seven already had statutory provisions governing contribution, and two subsequently passed laws to do so. Only West Virginia has failed to actively implement its comparative contribution system by legislative prerogative.

This article has a two-fold aim. Initially, it will offer a critique of the system of comparative contribution wrought by Bradley and its progeny. This will hopefully illustrate the direction that Bradley has taken. Beyond this, it will also offer suggestions for a comprehensive legislative package to resolve the questions raised but unanswered since the decision of Bradley. In undertaking this task, a constant resort will be made to provisions of various uniform acts, but with concern for the particular needs of the West Virginia attorney.

II. JOINT AND SEVERAL LIABILITY

The appropriate starting point requires an overview of the role of joint and several liability in tort law. From a realistic standpoint, it is the very presence of joint and several liability which gives rise to the need for contribution and other loss-shifting devices. Generally, the rule of joint and several liability may be summarized in this way: A party who suffers a single indivisible harm re-

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7 ALASKA STAT. § 9.16.010-.060 (1983); CAL. CIV. PRO. CODE §§ 875-80 (Deering 1973 & 1986 Supp.); FLA. STAT. ANN. § 768.31 (West 1986); ILL. ANN. STAT. ch. 70, §§ 301-05 (Smith-Hurd 1986 Supp.); KY. REV. STAT. § 412.010-.160 (1972); MICH. STAT. ANN. § 27A.2925 (Callaghan 1980); N.M. STAT. ANN. §§ 41-3-1 to -8 (1978).
8 Mo. ANN. STAT. § 537.060 (Vernon 1986 Supp.); IOWA CODE ANN. § 668.1-.10 (West 1986 Supp.).
9 Along with contribution, West Virginia case law also recognizes an implied right of indemnity among joint tortfeasors. While contribution permits one tortfeasor to shift a part of the loss to another, the purpose of indemnity is to shift the whole loss. J. DOOLEY, MODERN TORT LAW § 26.01 (1982). Prior to Bradley, indemnity was used to lessen the rigidity of pro tanto contribution by more fairly allocating loss among tortfeasors guilty of different degrees of wrongdoing. For example, one whose negligent acts were found to be “passive” in nature was deemed to have an implied indemnity against a fellow tortfeasor whose wrongdoing was “active.” See Goldring v. Ashland Oil & Refining Co., 59 F.R.D. 487, 489 (N.D. W. Va. 1973). This active/passive distinction would appear to have been overruled sub silentio. Hill v. Joseph T. Ryerson & Son, 165 W. Va. 22, 268 S.E.2d 296 (1980), decided 7 years after Goldring, holds that one is entitled to implied indemnity only if he is without fault. It follows that if a party is guilty of negligence in any degree, his remedy against his co-defendants would lie in contribution, and not in indemnity.
10 If the acts of multiple wrongdoers result in distinct harms then joint and several liability would not apply, even where the acts concur in both time and place. This is not an easy principle to apply in practice. Take, for example, a typical “fender bender” in which an automobile passenger is injured and sues the driver on a negligence theory. In addition, he joins the manufacturer of the automobile as a defendant because an alleged design defect aggravated his injury. Is the passenger’s injury divisible? Should it matter what the type of injury was? Courts are sharply divided on these questions. See, e.g., Caiazzo v. Volkswagenwerk, 647 F.2d 241 (2d Cir. 1981)(holding that proof of enhancement or aggravation of injury is an integral part of a plaintiff’s prima facie case); Mitchell v. Volkswagenwerk, 669 F.2d 1199 (8th Cir. 1982)(placing upon the manufacturer the burden of proving a divisible injury).
sulting from the acts of two or more wrongdoers\textsuperscript{11} is free to choose the defendants to be named, and to recover his damages from them in any proportion he sees fit.\textsuperscript{12} As is readily apparent, the upshot of this rule is to make each of the joint tortfeasors liable for the entire harm regardless of his degree of fault.\textsuperscript{13} A tortfeasor may be held jointly and severally liable for an injury only if two tests are met. First, the injury sustained must not reasonably be susceptible of apportionment or division. Second, the acts or omissions of each tortfeasor must be the legal cause of the injury.\textsuperscript{14} In essence, the policy lying behind joint and several liability is to assure the collectability of a judgment.\textsuperscript{15} It has been justified on the ground that, as between an injured plaintiff and a proved wrongdoer, the latter should bear any losses due to uncollectability.\textsuperscript{16}

In recent years, the notion of joint and several liability has met with increasing criticism. Many reformers have pointed out the unfairness in imposing liability for the full amount of a tort judgment upon one whose percentage of wrongdoing is comparatively small.\textsuperscript{17} A tortfeasor may be compelled to pay a judgment regardless of whether his fault was as large as ninety-nine percent or a mere one percent. Further, insurance carriers must be prepared to provide coverage for the full amount of any possible judgment against their insureds and not just for their proportionate shares. In other words, the risk which must be insured against is not based upon fault, but rather upon the full amount of any potential judgment.\textsuperscript{18} This has led to higher premiums, higher litigation costs, and greater unrest within the insurance industry.

For all of these reasons, the push for reform has been strong. Not surprisingly, the West Virginia Legislature passed two bills during the 1986 extraordinary session which struck a blow to the continued reign of joint and several liability. Senate Bill 3 was a comprehensive measure governing the availability of liability

\textsuperscript{11} An older West Virginia case held that multiple wrongdoers may be joined in a single suit only if they acted in concert. Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920). Though Farley has never been overruled, decisions over the last 50 years have uniformly held that joinder is proper so long as the wrongful acts of the parties produce a single, indivisible injury. See, e.g., Long v. Weirton, 158 W. Va. 741, 214 S.E.2d 832 (1975).

\textsuperscript{12} Metro v. Smith, 146 W. Va. 983, 124 S.E.2d 460 (1962); Sitzes v. Anchor Motor Freight, Inc., 169 W. Va. 698, 289 S.E.2d 679 (1982). The RESTATEMENT (SECOND) OF TORTS § 875 (1979) phrases the rule in this way: "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."

\textsuperscript{13} Id.

\textsuperscript{14} E.g., Guy, \textit{Let's Say Goodbye to Joint Liability, 27 For the Def. I} (June 1985).

\textsuperscript{15} For discussions on this issue from opposing viewpoints, see Neil, \textit{Limiting Malpractice Costs in California, 28 For the Def. I} (Apr. 1986); Guy, \textit{supra} note 17; Rutigliano, \textit{Insurance Crisis for Doctors, 22 Trial 29} (May 1986); Note, \textit{Medical Malpractice Insurance Crisis: The Boys Who Cry "Wolf," 21 LAND & WATER L. REV. 203 (1986).}
insurance to political subdivisions.¹⁹ House Bill 149 implemented long-awaited tort reform for medical malpractice suits.²⁰ A provision common to both of these two bills was a mandatory limitation on joint and several liability.²¹ Generally, the bills require an apportionment of fault among all parties to be undertaken by the jury. After a verdict has been returned, the trial court must enter a joint and several judgment against any party whose negligence is assessed at 25 percent or greater. The judgment of all other parties is to be several, but not joint.²²

Both Senate Bill 3 and House Bill 149 were compromise measures. No one would seriously suggest that there is something magical about a threshold of 25 percent which should operate to transform an otherwise joint and several obligation into one which is several only. Consider that this is really the first move away from what has in the past been an unwavering adherence to joint and several liability.²³ It is a step in the right direction and shows a willingness by the legislature to address this question anew. But for the present, where a party subject to these reform bills is chargeable with 25 percent or more of the total negligence, his liability remains joint and several and the general principles of contribution still apply. It is therefore necessary to define contribution and to attempt to set forth these general principles.

III. WEST VIRGINIA LAW OF CONTRIBUTION

Very broadly, contribution is the right of one who owes a joint obligation to call upon his fellow obligors to reimburse him if compelled to pay more than his proportionate share of the obligation.²⁴ Limiting this definition to the tort context, contribution is a method to promote an equitable distribution of loss among those who are jointly and severally liable for a given wrong.²⁵ It operates as a counter-principle to joint and several liability. While joint and several liability permits a plaintiff to recover his damages however he chooses, contribution permits the defendants to adjust the loss inter se. There are two conditions which

²¹ Identical language in both bills reads as follows:
The court shall enter judgment of joint and several liability against every defendant who bears twenty-five percent or more of the negligence attributable to all defendants. The court shall enter judgment of several, but not joint, liability against and among all defendants who bear less than twenty-five percent of the negligence attributable to all defendants.
W. VA. CODE § 29-12A-7(d) (1986 Supp.); W. VA. CODE § 55-7B-9(b) (1986 Supp.).
²² Id.
²³ Bradley held: “Neither our comparative negligence rule nor Haynes is designed to alter our basic law which provides for joint and several liability among joint tortfeasors after judgment.” Bradley, 163 W. Va. at 344, 256 S.E.2d at 886.
²⁴ BLACK’S LAW DICTIONARY 297 (5th ed. 1979).
²⁵ J. DooLEY, supra note 9, at § 26.01 (1982).
must be met to trigger the contribution remedy. First, the obligation for which contribution is sought must be jointly held. Second, the party seeking contribution from another must have paid more than his share of the judgment.26

Historically, the law looked with disfavor upon the contribution remedy, as it was for some time unavailable to tortfeasors.27 The trend today signifies a complete reversal, with a focus towards a broadening of availability of contribution. Under the common law of England, as applied and interpreted by American courts, there was no right of contribution conferred upon joint tortfeasors.28 This harsh and inflexible rule was justified on the ground that the law should not come to the aid of wrongdoers.29 The principle was first set down by the Court of Kings Bench in Merryweather v. Nixan.30 Modern writers question the interpretation given to Merryweather by later courts in England and the United States.31 They suggest that its true holding was that contribution should be denied only to intentional tortfeasors, and available to all other tortfeasors.32 Regardless of the merit of this view, the effect of Merryweather was to make the right of contribution unavailable except by legislative intervention.

As early as 1872, West Virginia sought to lessen the blow of Merryweather by passing remedial legislation.33 West Virginia Code § 55-7-13 provides that:

"Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the other shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu."34

This is the only statutory provision regulating contribution in West Virginia, and the limitations on its scope should be highlighted. First, a right of contribution may be enforced under the statute only when a joint judgment has been rendered. It does not authorize an action for contribution apart from the main action against the named defendants, nor does it authorize joinder of other tortfeasors who are not named by the plaintiff. Second, the contribution right given to a joint tortfeasor is the same as that given to a party in an action ex contractu. This involves a matter of simple arithmetic. The amount of the judgment rendered in favor of the plaintiff is divided by the total number of named defendants. This amount is known as the pro tanto share of each defendant.35 Only when a defendant pays

26 Restatement (Second) of Torts § 886A.
27 H. Woods, supra note 3; Restatement (Second) of Torts § 886A comment a.
29 F. Harper, F. James & O. Gray, The Law of Torts § 10.2 (2d ed. 1986); Restatement (Second) of Torts § 886A comment a.
32 Id.
35 Sitzes, 169 W. Va. at 715 n. 23, 289 S.E.2d at 689 n.23. Where a defendant's contribution
more than his pro tanto share of the judgment are his co-defendants liable to him in contribution.36

Though it ignores the relative fault of the parties, the pro tanto method of contribution has been supported for at least two reasons. An old legal maxim, "equality is equity," supposed that requiring each defendant to bear an equal share of the judgment achieved a rough sense of equity.37 A second and more practical consideration was the simplicity of the rule which assured that it would be easy to administer in actual cases.38 The statutory right of contribution provided a simple and evenhanded distribution of any judgment among multiple wrongdoers.

West Virginia law on contribution underwent little change until the last decade. Even before Bradley, the West Virginia Supreme Court of Appeals began to interpret the law of contribution more expansively. The first major breakthrough was the removal of the requirement of a joint judgment. In Haynes v. City of Nitro,39 a passenger was injured when the automobile in which she was riding dropped from a paved city street down to a railroad bed. She sued both the city and the railroad. The trial court directed a verdict in favor of the railroad, holding as a matter of law that it owed no duty to maintain its right of way. A jury returned a verdict against the city which, on appeal, asserted a right of contribution against the railroad in the absence of a joint judgment.

On these facts, the court held that the city had an "inchoate" right of contribution which survived the dismissal of the railroad as a party.40 The provisions of West Virginia Code § 55-7-13 were held not to foreclose a right of contribution where a defendant was dismissed prior to judgment. Rather, the statute served merely to guarantee the enforceability of a contribution right where a joint judgment has been rendered.41 Underlying this holding was the implicit suggestion that a right of contribution may arise outside of the statute itself, though the court stopped short of such a radical departure from prior law.42

As might be expected, the most sweeping changes in contribution law were made in the wake of Bradley. Of particular significance was the manner in which the Bradley court misread the earlier decision of Haynes so as to lay the foundation for a full-fledged third-party practice in West Virginia. Bradley interpreted

share is based upon fault rather than the number of defendants, this article will use the term "proportionate" share.

36 Id.; Restatement (Second) of Torts § 886A(2).
37 J. Dooley, supra note 9, at § 26.20.
38 Id.
40 Id. at 234-40, 240 S.E.2d at 547-50.
41 Id. at 234, 240 S.E.2d at 547.
42 The limited holding in Haynes is summarized in the penultimate paragraph of the opinion: "[W]hen a plaintiff names two joint tort-feasor codefendants, and there is no possibility of joint judgment because of trial court error, the codefendant is still entitled to seek contribution. Id. at 240, 240 S.E.2d at 550.

Haynes to permit a named defendant to implead other non-parties for the sole purpose of asserting contribution claims. The Bradley opinion noted:

Haynes established that there is an inchoate right of contribution between joint tortfeasors in advance of judgment except where the act is *malum in se*. Thus, while the original defendant may have to respond only to a plaintiff for the latter's damages, the defendant in a third-party action can have these damages apportioned among the third-party defendants.43

This interpretation was without any direct support in the text of the Haynes opinion, but was in accord with the opinion's broad dicta.44 In effect, the holding in Haynes removed the restrictions of West Virginia Code § 55-7-13 making it applicable only to named defendants.45 Bradley brought the case law into line with the provisions governing impleader in the West Virginia Rules of Civil Procedure46 and opened the door to third party practice.

A review of a few of the important post-Bradley decisions will be helpful in chronicling the further growth and refinement of the contribution remedy. In Bowman v. Barnes,47 the court was called upon to decide whether the jury must assess the fault of all parties to a lawsuit or of all parties involved in the occurrence, whether they are joined or not. The Bowman court was quick to point out that as a result of the liberalizing provisions of Haynes and Bradley, both plaintiffs and defendants exercise a large measure of control over who is made a party to a given suit.48 For this reason, where a tortfeasor is not joined the jury should nevertheless make a determination of his allocable percentage of fault. This provides a more suitable backdrop against which to view the plaintiff's contributory negligence.49

Sydenstricker v. Unipunch Products, Inc.,50 involved a worker who was injured while using machinery manufactured by Unipunch. The worker brought a products liability suit against Unipunch, which prompted Unipunch to bring third party action against the worker's employer, Terrell. This third party action was predicated upon willful, wanton and reckless misconduct51 and sought both contribution and indemnity from Terrell as a joint tortfeasor. On appeal, one of the issues addressed was whether a contribution claim was proper where the parties were guilty of different degrees of wrongdoing. Without providing an extended

43 Bradley, 163 W. Va. at 344, 256 S.E.2d at 886 (emphasis added).
44 The Haynes opinion went to great lengths to dispel what it referred to as the “no contribution” rule, that is, the view that West Virginia Code § 55-7-13 provided the sole basis for contribution in West Virginia. Haynes suggests just the opposite view. A tortfeasor has a “general right” to contribution unless his wrongful act is *malum in se*. Haynes, 161 W. Va. at 238-39, 240 S.E.2d at 549.
45 W. VA. CODE § 55-7-13 confers a right of contribution only “[w]here a judgment is rendered . . . against several persons jointly.”
48 Id. at 123, 282 S.E.2d at 620.
49 Id. at 123-24, 282 S.E.2d at 620-21.
discussion, the court held merely that it could conceive of situations in which a manufacturer and employer would be joint tortfeasors. Though there was no specific holding in this regard, *Sydenstricker* must be read as an approval of a broader concept of comparative "fault" in the contribution context.\(^{32}\)

Another important case decided after *Bradley* was *Groves v. Compton*,\(^ {53}\) which left a lasting mark on the law of contribution. One of the key issues raised in *Groves* was the manner in which a trial court should treat a settlement by one of several tortfeasors. *Groves* overruled a line of prior decisions allowing the defendants themselves to dictate whether the jury was advised of the settlement amount.\(^ {54}\) This is now a matter to be left to the sound discretion of the trial judge.\(^ {55}\) On a related question, *Groves* also reaffirmed the type of verdict reduction procedure to be applied in settlement situations. If the jury returns a verdict against the non-settling defendants, then it is to be reduced by the amount received by the plaintiff under the terms of the settlement. Judgment is then to be entered against the non-settling defendants in this reduced amount.\(^ {56}\)

Undoubtedly, the seminal case in this state with regard to the workings of contribution under our comparative negligence system is *Sitzes v. Anchor Motor Freight*.\(^ {57}\) In *Sitzes*, James Roberson was driving a pickup truck in which his wife, Patricia, was a passenger. They were struck by a delivery truck driven by an employee of the defendant, Anchor Motor Freight. Mrs. Roberson was killed, and her personal representative brought an action for wrongful death against the defendant in federal district court. The defendant thereafter brought a third-party action against Mr. Roberson, alleging that he was negligent in the operation of his truck. At trial, special interrogatories\(^ {58}\) were submitted to the jury, which found the defendant’s fault to be 70 percent and Roberson’s fault to be 30 percent. A series of questions was then certified to the West Virginia Supreme Court of Appeals, including the issue of whether tortfeasors should be liable in contribution *pro tanto* or according to their respective degrees of fault.\(^ {59}\)

Justice Miller, writing for the court, commented that the trend of its recent

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\(^{32}\) This is the operative language necessary to overcome the immunity bar under *Mandolidis v. Elkins Indus. Inc.*, 161 W. Va. 697, 246 S.E.2d 907 (1978). For a more detailed discussion of the impact and scope of *Mandolidis*, see infra note 68.

\(^{33}\) The concept of comparative "fault" is also seen in the application of comparative negligence principles in the setting of strict liability cases. See *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982).


\(^{35}\) *Groves*, 280 S.E.2d at 712.

\(^{36}\) Id.


\(^{38}\) Submission of special interrogatories to the jury is governed by the provisions of W. VA. R. CIV. P. 49(b).

\(^{39}\) *Sitzes*, 169 W. Va. at 705 n.8, 289 S.E.2d at 684 n.8.
decisions had been to temper the more rigid rules of the common law with fairness and equity. A commonly cited shortcoming of the older contribution system is illustrated by the situation in which a party who was 95 percent negligent could call upon a fellow tortfeasor who was a mere 5 percent negligent to contribute to him one-half of any judgment. Bradley would not countenance such a result, but instead was premised "on making a more equitable adjustment of tort liability based on a party's degree of fault."

With this brief introduction, the court adopted what may be referred to as "pure" comparative contribution. The jury is to determine the percentage of fault of each party by comparing it with the total fault of all other parties involved in the accident. Under Sitzes, it is the relative fault of the parties—and not their numbers—which provides the basis for contribution shares. The language in Bradley which limited a right of recovery to one whose negligence was "less than" the negligence of all other wrongdoers had no application to the issue of contribution, provided that he was compelled to pay more than his proportionate share of the judgment based upon fault.

Beyond this, the court also offered some instruction as to how comparative contribution was to apply procedurally. Under Sitzes, comparative contribution was not deemed to be self-operating. The court set forth two preconditions which must be met to invoke comparative contribution. First, since the rule was designed to benefit defendants, it could only be invoked by a party against whom a claim for contribution is sought. Second, special interrogatories must be submitted to the jury under West Virginia Rule of Civil Procedure 49(b) in order to permit an apportionment of fault among all of the parties. Where such a request is not made, contribution would be determined according to the pre-Sitzes or ex contractu basis.

With this history of the development of contribution law in West Virginia as a background, it is helpful to consider a few general observations. First, contribution is no longer the "black sheep" of the legal community, but is now a favored remedy to allocate loss among co-defendants. As the all or nothing rule of the common law has been replaced with an interlocking system of comparative negligence and comparative contribution, the primary emphasis is now on apportionment of loss based upon fault. This is so even where defendants may be subject to liability upon totally different legal theories. The theme which runs throughout the case law is a willingness to rely upon the ability of jurors to apply common sense in assessing damages and assigning fault among the parties.

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60 Id. at 710-11, 289 S.E.2d at 687.
61 Id. at 713, 289 S.E.2d at 688.
62 Id. at 714-15, 289 S.E.2d at 689.
63 Id. at 715, 289 S.E.2d at 689.
64 Id. at 713, 289 S.E.2d at 688.
65 W. VA. R. Civ. P. 49(b).
66 See supra notes 33-38 and accompanying text.
Obviously, West Virginia has undergone substantial change in the field of contribution. Nonetheless, the case law since Bradley gives only the barest outline of contribution law. It provides a mere pencil sketch and leaves to the imagination of each lawyer the color and texture the picture should take. For the litigator, the best approach is that of the pragmatist. It is impossible for a lawyer to practice his trade where the rules of the game are in a constant flux or even unintelligible. For this reason, Sitzes was a lawyer’s dream. Though it consisted largely of dicta, it was written as a handbook on procedure and set forth plainly and simply the “dos and don’ts”. Unfortunately, Sitzes did not go far enough in giving instruction, which is not necessarily the fault of the court. The function of the court is to decide cases, not to legislate. If the holding in Sitzes was the result of overreaching, it nonetheless may have been welcome. However, the case by case approach will not produce the predictability and certainty that lawyers need. The responsibility for this task properly lies with the legislature. It is the legislature which can properly look beyond the individual case and consider all the questions with a broad perspective. Further, it is the responsibility of the legislature to provide a single comprehensive plan of attack in these situations.

The remainder of this article will endeavor in part to identify the gaps and shortcomings of West Virginia’s comparative contribution system as it now stands. However, this is not the sole objective. Just as a doctor is called upon not only to diagnose but also to cure, it is necessary to suggest methods to remedy the problems once they are identified. In short, for every open question identified this article will lay on the table a proposed answer.

IV. CONTRIBUTION AND AGGRAVATED MISCONDUCT

One question of policy which must be addressed at the threshold concerns the availability of the remedy of contribution. Put another way, should there be a limitation placed on who may sue for contribution? As noted above, contribution was initially disfavored. Later, drawing upon the analogy of a contractual obligation, courts began to make the remedy of contribution available to tortfeasors as well. Eventually, as the wave of comparative negligence reform caught on, virtually all barriers to contribution were eliminated. One question remains: Does one who is guilty of aggravated misconduct have a right to contribution? Obviously, this question takes on great significance in West Virginia, where employers may be subject to tort liability for wilful, wanton and reckless misconduct.

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67 This is the mirror image of the question addressed in Sydenstricker. In that case, the Court permitted the defendant in a product liability action to implead an employer guilty of aggravated misconduct. The question unaddressed was whether such an employer could assert a right of contribution.

68 Mandolidis, 161 W. Va. 697, 246 S.E.2d 907. Some discussion of the history and impact of the Mandolidis decision is warranted. Mandolidis is an aberration which flies in the face of nationwide authority protecting an employer from civil suit except where his actions are intentional. Briefly, Mandolidis broadened the definition of “deliberate intention” on the part of the employer to include
It has been stated in many older West Virginia decisions that contribution is unavailable to a party whose wrongful acts are *malum in se*. 69 Though this term is often used, the precise breadth and nature of the exception is unclear. It is generally acknowledged throughout the country that *malum in se* embraces intentional conduct.70 Yet other jurisdictions would also deny contribution to a tortfeasor who has engaged in aggravated conduct which falls short of intentional wrongdoing.71 The origin of contribution as an equitable doctrine22 traditionally placed focus upon the mental state of the wrongdoer. So, for example, some states limit the availability of the remedy to situations where the wrong "results from negligence and involves no moral turpitude."73 Also, West Virginia has long distinguished between negligent conduct and other more egregious types of wrongdoing.74 Frequently, particular stress has been laid on the volitional aspect

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69 A term of Latin origin meaning "bad in and of itself." It is generally used to refer to actions that are inherently wrong, regardless of any intent to cause harm.

70 The concept of mens rea, or the mental state of the accused, is a fundamental aspect of criminal law and is often considered when determining the availability of contribution.

71 This refers to situations where conduct falls between negligence and intent, but is more serious than mere negligence.

72 The Restatement (Second) of Torts provides a framework for understanding the equitable doctrine of contribution.

73 This is a quote from *Stoneking v. Sanders*, 70 W. Va. 363, 73 S.E. 937 (1912), emphasizing the moral aspect of the wrong.

74 West Virginia law has long distinguished between different types of wrongdoing, with negligent conduct being distinguished from more intentional forms.

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The legislature, in response to this decision, passed legislation which sharply curtailed the *Mandolidis* cause of action. Simply put, *Mandolidis* was legislatively overruled. In its place, the legislature substituted a five-part test which must be met to overcome the employer's immunity. This test includes findings as follows:

a) That a specific unsafe working condition existed in the workplace presenting a high degree of risk and a strong probability of serious injury or death;

b) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

c) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

d) That notwithstanding the existence of the facts set forth in subparagraphs (a) through (c) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

e) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.


69 *E.g.*, Buskirk v. Sanders, 70 W. Va. 363, 73 S.E. 937 (1912); Hutcherson v. Slate, 105 W. Va. 184, 142 S.E. 444 (1928).

70 RESTATEMENT (SECOND) OF TORTS § 886A, comment j.

71 UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 57 (1975). At least one federal district court opinion has held that West Virginia law does not permit a willful tortfeasor to obtain contribution. *James v. Stedman Machine Co.*, Inc., No. 82-2030 (N.D. W. Va. Jan. 10, 1984). As will be shown, however, this holding runs counter to the policies set forth in *Sitzes*.

72 RESTATEMENT (SECOND) OF TORTS § 886A, comment c (1965); *Sydenstricker*, 169 W. Va. 440, 288 S.E.2d 511.


74 *E.g.*, Stone v. Rudolph, 127 W. Va. 335, 32 S.E.2d 742 (1944) (distinguishing reckless or willful conduct from mere negligence).
of wilful conduct as the benchmark which distinguishes it from simple negligence. This distinction was at the very heart of Mandolidis v. Elkins Industries, Inc. Even so, other more compelling considerations require its rejection in the context of contribution law.

This type of analysis seems strangely out of place in a system whose very purpose is to allocate loss. Malum in se harkens back to a day in which judges, like God, searched the hearts of men. If society, as a matter of policy, wishes to punish intentional wrongdoers by requiring them to bear the whole loss without recourse against fellow wrongdoers, so be it. This was probably what Merryweather meant all along. But the rule should not be read any more broadly for, by doing so, the policy of allocating loss would be sacrificed.

The modern trend is decidedly away from a broad interpretation of malum in se. Sitzes stands from the proposition that the percentage of wrongdoing has no bearing on who may sue for contribution. Bradley's policy that one who substantially contributes to a harm is barred from recovery applies only to plaintiffs, and not to defendants seeking contribution. The question one must ask is: Should the nature of the wrongdoing affect a party’s right to contribution? Modern thinking is that it should not. The Uniform Comparative Fault Act, which was revised in 1977, makes contribution available to all whose acts or omissions are “in any measure negligent or reckless.” Interestingly, in the comments which follow the Act, the drafters state that even opening up contribution to intentional wrongdoers would not be inconsistent with the spirit of the Act.

How should the foregoing affect Mandolidis? The type of misconduct encompassed by Mandolidis, even under recent statutory revisions, is no different from any other type of aggravated wrongdoing. Mandolidis represents a legislative decision to treat one narrow class of work-related injuries as a problem properly addressed by the tort system. The classic Mandolidis type of conduct is expressly distinguished from intentional wrongdoing, which is defined as “a consciously, subjectively and deliberately formed intention to produce injury.” The purpose of Mandolidis was not to point up one type of conduct as worthy of legislative contempt and disdain. Rather, it represented the judgment of the legislature that at some point the policy of absolute immunity gives way, and an employer must

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77 Mandolidis, 161 W. Va. at 705-06, 246 S.E.2d at 913-14.
77 Id.
79 Id. comment at 39. For a discussion of some of the policy considerations raised by extending contribution rights to intentional wrongdoers, see Dear & Zipperstein, Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, 34 Considerations, 34 Def. L. J. 383 (1985).
81 Id. § 23-4-2(c)(2)(i).
defend himself like any other tortfeasor. By carefully itemizing the requirements which must be met to remove the shield of immunity\textsuperscript{82} and by admonishing judges to be mindful of summary judgment,\textsuperscript{83} the legislature has struck a proper balance between these two opposing policy goals. The employer in a Mandolidis suit is on equal footing with any other tortfeasor and should be treated accordingly.

In summary, it is necessary to define legislatively the class of defendants to whom contribution is available. This definition should be as broad as possible to include all types of wrongdoing which fall short of intentional acts. The focus in the field of contribution is not on the alleged evil of the wrongful acts themselves. The true goal of the system is to weigh fault and to allocate loss.

V. Settlemens

Undoubtedly, the area which has raised the most troublesome questions about the workings of comparative contribution involves a settlement by less than all of the defendants in multiparty litigation. This is a topic which has received much attention in relevant literature.\textsuperscript{84} This discussion is limited to three principal areas:

(1) The effect of a settlement on claims for contribution;

(2) The validity of a settlement agreement vis-a-vis non-settling defendants; and

(3) The effect of a settlement by one defendant on the liability of those defendants remaining in the suit.

A. Contribution Claims and the Settling Tortfeasor

A threshold matter which must be discussed is the effect a settlement should have on claims by other parties for contribution.\textsuperscript{85} West Virginia law is peculiarly

\textsuperscript{82} See supra note 69.

\textsuperscript{83} W. VA. CODE § 23-4-2(c)(2)(iii)(B) provides as follows:

Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it shall find, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved . . . do not exist . . . .

\textsuperscript{84} E.g., Hirshon, Release of Defendants in Multiparty Litigation, 26 FOR THE DEF. 27 (Feb. 1984).

\textsuperscript{85} These claims may take a variety of forms. Typically, contribution claims are asserted against named defendants by cross-claims, W. VA. R. CIV. P. 13(g), and against unnamed defendants by third party complaint, W. VA. R. CIV. P. 14. If, however, there are multiple plaintiffs, contribution may be asserted by counterclaim. Assume A is driving an automobile in which B is a passenger. A is involved in an accident with C, resulting in bodily harm to both A and B. They join as co-plaintiffs in a suit against C. Under such circumstances, C may bring a counter-claim against A alleging his negligence was the proximate cause of B's injury. No such claim need be asserted by C against A for A's injury. If A's negligence contributed to his own injury, then Bradley provides that his damages will be reduced accordingly.
silent on this question. Whether contribution claims remain enforceable after set-

tlement is of paramount concern to a defendant who desires to settle in advance of trial. Of course, the motivation behind settlement is to buy one’s peace, that is, to fully and finally resolve the dispute without the hassle or expense of litiga-

tion. If a settling tortfeasor is still subject to contribution claims by fellow tortfeasors despite his settlement, then any attempt to settle would defeat its very purpose.

This is not a purely academic inquiry. One need only look at the example of New York, where courts had held that a settling tortfeasor was required to remain in the suit after settlement so a proper apportionment of fault could be made. Further, he remained liable in contribution for the amount by which his apportioned share exceeded the amount tendered in settlement. This runs counter to the goal of finality in the area of settlement and is a totally undesirable approach. It proved to be too much for New York as well, and was repealed legislatively.

Some federal district court decisions, making an Erie “best guess” at West Virginia law, have held that a settlement operates to extinguish claims for con-

tribution. While these decisions are helpful in gauging how our court might rule on this issue, they are obviously not authoritative. Given the uncertainty in this area, West Virginia practitioners have resorted to an ingenious, albeit cum-

bersome, method by which to provide protection to settling defendants. A provision is often added to a settlement agreement requiring the plaintiff to indemnify the settling party for any sums that party must pay in contribution, in excess of the amount paid under the settlement. The quid pro quo under such a settlement looks like this. For his part, the defendant agrees to pay compensation to the plaintiff without an admission of fault, for the purpose of avoiding litigation. The plaintiff, in turn, agrees to remain content with the settlement sum and reimburse the defendant for any contribution he must pay beyond this sum.

This type of indemnity arrangement may be illustrated as follows. A sues B and C. B settles before trial for the sum of $25,000.00. At trial, the jury returns a verdict of $100,000.00 and apportions fault equally between B and C. The court reduces the amount of the verdict by $25,000.00, which is the amount of the settlement with B. A then collects the net amount of $75,000.00 from C. C pursues his claim for contribution against B in the amount of $25,000.00 (which represents the difference between the amount of B’s proportionate share and the amount paid in the settlement). If C should recover from B, then B would be

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86 See generally Hirshon, supra note 84.
90 See supra notes 53-56 and accompanying text.
entitled to indemnity from A for the full amount of any sums so paid. After the dust has settled, C has paid $50,000.00, his proportionate share. B, on the other hand, has managed to protect the $25,000.00 "investment" which enabled him to buy his peace.91

This settlement technique, while fully workable, is needlessly complex and unnecessary. The approach taken by the legislature in the 1986 medical malpractice and tort immunity bills provides a partial solution to the problem. Under the two bills, contribution can not be asserted against one who has settled with the plaintiff in good faith.92 Exactly what is meant by "good faith" is a subject of considerable debate. Even so, this is a preferable approach. It encourages settlements by promising an end to litigation and a cap on liability. What it fails to do is to provide guidance on the right of a settling party to obtain contribution from the other tortfeasors. A handful of commentators would recommend expanding contribution to enable settlors to recover "overpayments" on their settlements.93 This right, though defensible, is again in contradiction to the goal of finality for it would leave open the door to future litigation. Further, it would be one-sided to permit a settlor to pursue his claims for contribution while denying that right to non-settling parties. There appears to be no legitimate reason to support this type of disparate treatment. With these considerations in mind, a settlement should operate to do two things:

(1) Release the settling tortfeasor from liability for contribution owed to his fellow tortfeasors; and

(2) Release all other tortfeasors (whether joined or not) from liability for contribution owed to the settling tortfeasor.

B. Settlements and "Good Faith"

It is accepted that the courts have long encouraged settlements.94 Recent studies have shown that as many of 95 of every 100 lawsuits brought in the United States are disposed of prior to trial.95 It is safe to say that settlement has become an everyday fact of life in the practice of law. Yet in the setting of the multiparty

91 This type of settlement arrangement is similar to the so-called "Pierringer" release, as it was first approved by the Wisconsin Supreme Court in Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963). For a brief discussion of the Pierringer release, see Hirshon, supra note 84.
92 "No right of contribution exists against any defendant who entered into a good faith settlement with the plaintiff prior to the jury's report of its findings to the court or the court's findings as to the total dollar amount awarded as damages." W. Va. Code §29-12A-7(e) (1986 Supp.); W. Va. Code § 55-7B-9(c) (1986 Supp.).
93 See, e.g., State ex rel. Vapor Corp. v. Narick, 320 S.E.2d 345 (W. Va. 1984). The law provides its own "built in" incentives for settlement. For example, settlement negotiations or offers actually tendered are inadmissible in evidence as an assurance that a party will not be penalized for his willingness to participate. W. Va. R. Evid. 408.
94 Neely, Tort Reform, Charleston Gazette, July 22, 1986, at C-4.
litigation which has become so prevalent today, there are problems which do not submit themselves to easy solution. One such question is: When should a settlement agreement be enforceable against non-settling tortfeasors? A settlement by a tortfeasor has two adverse effects on those defendants who remain in the suit. As outlined above, a settlement insulates the settlor from claims for contribution. As a result, the remaining defendants must absorb the judgment amount themselves or seek to shift part of it to some unnamed party in a separate contribution suit. Second, a settlement reduces the damages the plaintiff may recover, and so affects the total liability of those parties who choose not to participate.

It seems evident that not all settlement agreements should be accorded equal treatment. The evil which must be guarded against is the possibility of a "sweet-heart" deal between the plaintiff and one or more defendants which unfairly prejudices the others. Since settlement negotiations are a matter strictly inter partes, those who do not actively participate in the settlement have no means available to protect themselves. It is thus left to the courts to provide the necessary protection.

The standard to be applied in determining the enforceability of a settlement must provide the necessary protection to non-settling defendants. The Uniform Contribution Among Tortfeasors Act, and the 1986 medical malpractice and tort immunity bills apply a standard of good faith. However, these statutory provisions do not attempt to define what good faith is, nor offer any guidelines regarding what factors should be looked to by judges. Scholars have largely overlooked this important matter as well.

How then does one gauge good faith? With the complexity of most litigation today, this is not at all an easy task. A plaintiff will often join any potential liable parties as defendants, without significant regard for their degree of fault.
or remoteness from the accident. As discovery progresses, he is able to identify those defendants he believes will bear the greater portion of fault. To finance the litigation against these “high-fault” defendants, he may turn to others with settlement offers which might be greater or less than his prediction of what their fault will be. His prediction, and that of the other parties, are only a rule of thumb and rarely match up precisely with the findings of a jury. As a result of this uncertainty, a defendant might be willing to pay in settlement an amount equal to the attorney fees he would otherwise incur even though he believes his chances of prevailing at trial are good. On the other hand, a plaintiff might accept an amount lower than his estimate evaluation because of a need for funds to cover mounting costs. At any rate, this brief discussion highlights two important considerations in the process of settlement negotiation. First, a party will negotiate based upon his individual perception of the facts. Second, factors outside of the control of a party may persuade him to ignore his perception of the facts to hopefully achieve a long term gain.

For these reasons, the requirement of good faith should not be applied too strictly. A party should not be penalized for exercising independent judgment in his negotiations. The comments discussing good faith under the Uniform Contribution Among Tortfeasors Act suggests that this good faith requirement should be enforced with a view towards avoiding actual collusion between the plaintiff and other defendants. In the absence of collusion, the benefit of the doubt should be given to those taking part in the settlement negotiations.

100 The fact-finding stage of the settlement process, both prior to bringing suit and through discovery, is recognized as essential by personal injury lawyers. E.g., S. Horwood & I. Hollingsworth, Systematic Settlements § 6:1 (2d ed. 1986).

101 Indeed, if all parties to the suit settle in advance of trial, there is no means available by which to gauge the success of settlement negotiations from the standpoint of individual parties. It is conceivable that the plaintiff and all defendants will walk away from their respective settlements believing themselves to be “winners.”

102 This is not a phenomenon which is peculiar to the law. For example, political scientists have long recognized that governments act in reliance upon their individual views of the world and not upon reality. J. Schlesinger, Might of Nations (1977). It is perhaps true that all animals and humans alike do so in all their interactions with others.

103 For some general discussion of techniques used by plaintiffs lawyers in personal injury suits, see Oatley, Negotiation Techniques For Lawyers, 6 ADVOC. Q. 214 (Aug. 1985); Charfoos & Christiansen, Negotiating Settlements, 32 PRAC. LAW. 27 (Mar. 1986).

104 The California courts have long been struggling with the meaning of good faith in the settlement context. At first the test adopted for good faith was quite loose. Under the “tortious conduct” test, a settling party was entitled to the benefit of his settlement so long as he was not guilty of some type of tortious or unlawful conduct in obtaining it. See Dompeling v. Superior Court, 117 Cal. App.3d 798, 173 Cal. Rptr. 38 (1970). This is closely aligned with the “absence of collusion” test under the Uniform Contribution Among Tortfeasors Act. However, in 1985 the California Supreme Court rejected the “tortious conduct” test and held instead that a settlement is made in good faith only if it falls within the reasonable range of the settling party’s potential liability. Tech-Bilt, Inc. v. Woodward Clyde & Assoc., 38 Cal.3d 488, 698 P.2d. 159, 213 Cal. Rptr. 256 (1985). Chief Justice Bird, in a well-reasoned dissent, argued that the more stringent test proposed by the majority would discourage settlements and result in unnecessary “mini-trials” on the single issue of good faith. Id. at 502-08, 698 P.2d at 168-73, 213 Cal. Rptr. at 265-70 (Bird, C.J., dissenting).
Two related matters are not touched upon in the 1986 malpractice and tort immunity legislation. What is left unclear regards the point at which the good faith issue should be raised, and how it should be raised. One option is to require the trial court to hold a hearing on good faith after every settlement. Although a mandatory hearing would provide needed protection and require all settling parties to justify their agreement, this approach is fraught with serious shortcomings. Today, settlement is a routine occurrence, and the limited number of fraudulent settlements does not justify a hearing on all of them. Moreover, the workload of state courts is ever increasing. A mandatory hearing would only add to the backlog. Lastly, requiring a hearing for every settlement could prompt courts to address the question in a sloppy, perfunctory way. These criticisms, taken collectively, call for a rejection of this option.

A more suitable approach is to place the burden upon the affected defendants to request a hearing on the issue of good faith. Again, in light of the goal of finality, this is not a matter which should be permitted to linger. The time within which a hearing is to be requested should be relatively short, for example, within thirty to sixty days after the settlement. The party challenging the settlement should bear the burden of proof. To upset the settlement, a party must go forward with evidence of actual collusion or fraud. If the aggrieved defendant fails to carry his burden, then the settlement is enforceable against all of the defendants and the amount of any verdict at trial will be reduced accordingly. If the settlement is successfully challenged, then the contribution claims against the settling tortfeasor remain alive, and there is no reduction of the verdict.

C. The Verdict Reduction Problem

If fewer than all defendants settle with the plaintiff and the case proceeds to trial, it is necessary to devise some method of reducing the verdict to account for the prior receipt of settlement amounts. An injured party is entitled to only

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The concerns which prompted the "reasonable range" analysis in *Tech-Bilt* are not present under the approach recommended in this article. The need for a stringent good faith requirement is minimized considerably by the adoption of a fault-based method for reducing the jury verdict after settlement. This type of approach would mandate a reduction of the verdict commensurate with the percentage of fault of the settling party. Thus, if the plaintiff allows one of the defendants to "buy out" cheap, it is he who suffers the loss because his verdict will be reduced by the amount he should have been paid based upon fault. This will be discussed in more detail in part C.

105 Naturally, it is impossible to obtain figures to document "fraudulent" settlements for at least two reasons: (1) the term "fraudulent" is still largely undefined, and (2) those settlements which are "fraudulent" will tend to be clandestine in nature.

106 Mandatory judicial review is used quite sparingly today. Its most frequent use involves review of death penalty cases.

107 In 1980, the California legislature passed a bill providing a mechanism for determining the good faith aspect of a settlement with both fairness and dispatch. *Cal. Civ. Pro. Code* § 877.6 (1986 Supp.).
one satisfaction for his injury, and the reduction of verdict simply prevents over-recovery. As has already been noted, West Virginia law now provides for a simple dollar-for-dollar verdict reduction. In other words, the verdict is reduced by the amount of any settlements, and the court enters a joint and several judgment against the remaining defendants for the difference. This method of verdict set-off has obvious disadvantages in the context of a system of comparative contribution. First of all, it opens the door to "sweetheart" deals with favored defendants. As previously discussed, good faith settlements (that are designed to ward off this problem) are nearly impossible to apply in practice. With only a monetary set-off, there is no reasonable protection afforded to those defendants who do not participate in the settlement. More importantly, a monetary set-off totally ignores the fault of settlors. The Groves dollar-for-dollar approach might have been appropriate before the decision of Sitzes, when contribution was a matter of simple mathematics and there was no apportionment of fault. However, Sitzes authorizes a determination of fault for all parties to an occurrence, and seemingly compels a consideration of fault in determining the amount of the set-off. Hence, Groves is simply not adequate in this context.

Another alternative for reducing the verdict after settlement is to allow a set-off based solely upon the proportion of fault of the settlor. Mechanically, this is as simple to apply as the monetary set-off. If the settlor is found to be 25 percent at fault, then the verdict is reduced by 25 percent regardless of the settlement amount. Unlike the monetary set-off model, this approach actively incorporates the fault of the defendant into the computation of the set-off amount. However, this approach is not without conceptual problems. Its shortcomings merit some discussion. Importantly, the pure comparative contribution model gives no assurance of compensation to the plaintiff. The possibility of either under or over compensation is too great. Of course, the only time a plaintiff will receive

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109 See supra note 56 and accompanying text.
110 See supra notes 95-97 and accompanying text.
111 It should be noted here that both Bradley and Sitzes speak in terms of parties to an accident. This is an unfortunate choice of words, and should not be taken literally. Later decisions of the court demonstrate that comparative negligence and comparative contribution apply regardless of whether a given loss arose out of an accident. E.g., Brammer v. Taylor, 338 S.E.2d 207 (W. Va. 1985)(applying comparative negligence to a case involving a lost legacy).
112 This is the method proposed by the UNIF. COMPARATIVE FAULT ACT § 6.
113 Consider a simple illustration. A sues B and C. A settles with B. At trial, the jury returns a verdict of $100,000 and apportions the fault among the parties as follows:
   A 10%
   B 30%
   C 60%
Regardless of the sum paid by B in his settlement with A, the verdict is reduced by 30% or $30,000.
the amount fixed as damages by the jury is when the proportionate share of the settling defendant is equal to the settlement amount.\textsuperscript{114}

Some writers would defend this apparent inequity by positing a "gambling" or "risk taking" theory.\textsuperscript{115} Under this view, it is the plaintiff who has the final word in accepting a settlement. If he gambles successfully and obtains a settlement which exceeds the proportionate share of the settlor, he should reap the benefit. On the other hand, if his settlement is less than the proportionate share as determined by the jury, the plaintiff must be satisfied with the lesser amount.\textsuperscript{116}

The trouble with this analogy is that likening settlement to a "crap shoot" elevates risk taking to the level of a goal which the system encourages. The system should not encourage verdict set-offs in this way, as the primary goal should be to fairly compensate the plaintiff for the loss. In other words, the set-off should operate to minimize the chances of over or under compensation. Another important goal, as discussed previously, is to provide maximum protection to non-settling defendants.\textsuperscript{117} Finally, a necessary corollary of this particular goal is to ensure that it is the plaintiff who is at risk in accepting a settlement. After all, the defendants should not be penalized for the bad judgment of the plaintiff in his negotiations.\textsuperscript{118}

With these goals as a backdrop, a suitable set-off model may be fashioned by combining elements of the previous two. A verdict should be reduced by the proportionate share of the settlor, or the settlement amount, whichever is greater. In effect, this was the hybrid form of set-off agreed upon by the New York legislature after reassessing its common law of contribution. The New York statutory provision states that:

When a release or a covenant not to sue or not to enforce a judgment is given to one or two or more persons liable or claimed to be liable in for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent

\textsuperscript{114} Using the example in the previous footnote, if A obtained only $25,000 in his settlement with B, he would nevertheless be forced to accept a verdict reduction of $30,000. A would thus suffer a net loss of $5,000 as a result of his settlement. On the other hand, if B paid $35,000 under the terms of the settlement, A would experience a windfall of $5,000.

\textsuperscript{115} E.g., Fleming, Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court, 30 Hastings L. J. 1465 (1979). It is telling to note that the California Legislature, in implementing its tort reform, rejected the proposal for a fault-based verdict reduction and instead opted for the monetary reduction model. See supra note 101.

\textsuperscript{116} Fleming, supra note 115, at 1494-98.

\textsuperscript{117} See supra notes 95-97 and accompanying text.

\textsuperscript{118} A reduction of verdict which exceeds the settlement amount "is the risk the plaintiff takes when he elects to seize the bird in the hand by settling with one of the tortfeasors." N.Y. GEN. OBLIG. LAW § 15-108, comment at 718 (McKinney 1974).
of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages [that is, his proportionate share], whichever is the greatest.119

Only by combining the monetary and fault based approaches may the goal of fair compensation be fully realized without prejudicing the rights of the other defendants.

D. Workers' Compensation and Verdict Reduction

The problems which surround the issue of verdict reduction become even more complex where the injury for which suit is brought is work-related. With the advent of the Mandolidis decision in 1978, literally hundreds of employers have been swept from administrative boards and panels into the courtroom. The flood of Mandolidis suits has resulted in a rapid and often haphazard development of principles to regulate them. Yet all would agree that care should be taken so as not to disrupt the delicate balance which supports the superstructure of the compensation system.120 Thus, the contribution rules to be applied in the Mandolidis setting must be moulded to protect the various interests at stake: (1) the employee's interest in obtaining recompense for his injury, (2) the employer's interest in immunity from suit, and (3) the interest of other defendants in receiving a credit for compensation awarded to the plaintiff.

Most Mandolidis-type litigation today is not the simple "excess" suit brought against an employer.121 With increasing frequency, the employer is joined with other defendants on different theories of liability. For example, let us assume a worker is injured at the workplace while using equipment which was manufactured by X Company. The worker may sue his employer directly under Mandolidis. In addition, he may sue X Company in the same action upon theories of strict liability, negligence, and warranty. If the employer is actually joined in the suit, he is entitled by statute to a set-off against any verdict in an amount equal to the compensation benefits received or receivable by the worker.

West Virginia Code § 23-4-2(b)(1986) provides in part:

If injury or death result to any employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall have cause of action against the employer, as if this chapter

119 Id. at § 15-108.
121 The term "excess" suit is derived from the nature of the cause of action originally preserved in favor of an employer whose injury resulted from the deliberate intention of his employee, and was merely a suit for damages in excess of the benefits paid under compensation. W. VA. CODE § 23-4-2(b) (1985).
had not been enacted, for any excess of damages over the amount received or receivable under this chapter.\textsuperscript{122}

A recent decision has held that an employer does not have a valid cause of action against a tortfeasor for the value of benefits he is compelled to pay to his employee as a result of the tort.\textsuperscript{123} This does not, however, answer the subsidiary question whether a co-defendant might avail himself of the statutory set-off in reducing the verdict. In other words, the issue is whether or not the set-off inures to the benefit of parties other than the employer. This is the important question which has faced many trial judges in West Virginia, yet this area of the law remains largely undefined.

Traditionally, the right to a set-off for the payment of compensation benefits has been deemed to be exclusively that of the employer. This view is based upon what is perceived as a lack of any relationship between the employer and other parties, which would warrant extending it to them as well.\textsuperscript{124} The set-off, so the argument goes, is the result of the relationship existing between the employer and employee. In a sense, it is a collateral source from the employer.

There is an important legal fiction which has grown up around the law of workers' compensation. Obviously, workers' compensation is not a deal struck between employer and employee and sealed by a handshake. It is a state-imposed and operated system designed to provide compensation to those injured due to the hazards of their jobs. Ideally, it works totally outside of the tort system. But if the employer loses his immunity and is subject to tort liability, then it follows that he should be treated like any other tortfeasor. This is true not only for the injured party, but also for the other defendants. Compensation benefits paid to a plaintiff are a partial recompense for his injury, and a contribution by the employer toward a jointly held obligation. In keeping with the "one satisfaction" rule, all defendants should be given a credit for this payment and a corresponding reduction in their joint liability.\textsuperscript{125}

How should this credit for benefits be implemented? Consider the following two-tiered approach. First, the verdict should be reduced to account for the receipt of benefits, regardless of whether the employer is made a party to the suit. This reduction must be in an amount equal to the benefits actually paid or to be paid.\textsuperscript{126}

\begin{footnotesize}
\textsuperscript{122} Id. (emphasis added).
\textsuperscript{124} Id. at 129-30.
\textsuperscript{125} The policy of allowing one "satisfaction" for an injury remains just as valid in the Mandolidis context as it does elsewhere. See supra note 109 and accompanying text.
\textsuperscript{126} A set-off under W. Va. Code § 23-4-2 differs from a settlement with a tortfeasor in that the amount by which the verdict is to be reduced may not be a sum certain at the time of trial. In such a circumstance, it is necessary to call upon the jury to make a factual finding as to the amount of the future award of benefits. Mooney v. Eastern Assoc. Coal Corp. 427 (W.Va. 1984). What Mooney requires the jury to do in this regard remains a matter of shbarger, in his opinion for the Court, stated that evidence of future benefits. \end{footnotesize}
Unlike a settlement by a tortfeasor, compensation benefits are not based upon fault by any party, but are simply “no fault” proceeds for which credit must be duly given. For this reason, a dollar-for-dollar reduction is preferable. Obviously, this approach would require that the present law be rewritten. This change is warranted in light of the need to bridge the gap between the tort and no fault systems. A similar proposal has been suggested by Arthur Larson, the nation’s foremost authority on compensation law, as well as other noted scholars.

While this first tier would be sufficient to complete the task in any other state, it would not be enough in West Virginia. As has been stressed throughout, West Virginia stands alone in subjecting its employers to tort liability for acts which were the result of less than deliberate intention. Thus, while a simple verdict reduction may be applied where the employer is not a party, some supplementation of the rule is necessary where he is joined in the suit. Under such circumstances, the credit for compensation benefits discussed above would first be applied so as to reduce the amount of judgment. If there is no settlement and the jury apportions some degree of fault to the employer, his proportionate share would then be based on the reduced verdict. If the employer settles, the remaining defendants would be entitled to a further verdict reduction in accordance with the New York approach, like any other tortfeasor. This second tier assures employers equal treatment with all other tortfeasors and serves to protect the interests of the plaintiff and the other defendants.

VI. CONCLUSION

As has been shown, West Virginia contribution law has undergone substantial growth and refinement in the last ten years. Following the introduction of comparative negligence in Bradley, the primary goal of the contribution became the distribution of judgments among multiple defendants based upon fault. Our court has given general instruction on the workings of contribution, but definite answers in many delicate areas are needed to assist practitioners in applying contribution to actual cases. The recommendations proposed by this Article may be summarized as follows:

(1) To define broadly the class of parties who may assert contribution, so as to include all but intentional tortfeasors;

(2) To establish “absence of collusion” as the standard by which to measure the enforceability of a settlement agreement in multi-party litigation;

trial of the main action. Id. at 430. Justice Miller, joined by three of his colleagues, held that the question of future benefits should be decided at a bifurcated hearing after the trial on the merits. Id. at 433 (Miller, J., dissenting). Thus, the view of Justice Miller represents the majority opinion on this question. A bifurcated hearing would be a good approach to determine the verdict reduction under the first tier of my proposal.

127 A. LARSON, LAW OF WORKMEN’S COMPENSATION § 76.00 (1966)
128 Fleming, supra note 115, at 1507.
(3) To provide that a settlement obtained in the absence of collusion extinguishes all claims for contribution by or against a settling party;

(4) To provide that where fewer than all defendants settle, a verdict rendered against the non-settling defendants will be reduced by the greater of:

(a) the amount of the settlement, or
(b) the proportionate share of the settling party;

(5) To allow any offset for compensation benefits to inure to the benefit of all defendants, and otherwise to treat a Mandolidis defendant in like manner as any other defendant.

These proposals, taken collectively, provide a fair and workable system of comparative contribution. It is submitted, however, that their usefulness to the bar depends upon their being enacted as a unit. This is a task which only the legislature can fulfill, and it is the legislature's responsibility to step in and fill the void.