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# COMPARATIVE NEGLIGENCE IN WEST VIRGINIA: A DEFENSE OVERVIEW

ALVIN L. EMCH\*

## INTRODUCTION

The opinion of the Supreme Court of Appeals of West Virginia in *Bradley v. Appalachian Power Co.*<sup>1</sup> is the last in a quartet of decisions by the court which, collectively, have brought about the dawn of a new era in West Virginia tort law. With that dawning has come great uncertainty, for many of the rules by which tort cases were decided four years ago are clearly invalid today, and most others are now open to question.

*Haynes v. City of Nitro*<sup>2</sup> was the first of these very important decisions. In *Haynes* the court recognized an inchoate right of contribution among joint tortfeasors<sup>3</sup> and, as it explained subsequently in *Bradley*,<sup>4</sup> established that any tortfeasor could implead other joint tortfeasors as third-party defendants.<sup>5</sup> Then, in *Mandolidis v. Elkins Industries, Inc.*,<sup>6</sup> the court greatly weakened the statutory bar to common law suits by employees against their employers for injuries that were covered by the workmen's compensation system. Next, the court's decision in *Morningstar v. Black & Decker Manufacturing Co.*<sup>7</sup> introduced the doctrine of strict liability in tort into the law of West Virginia.

The final and probably most far reaching and important decision of the four is *Bradley*, which rejects the traditional contributory negligence law of West Virginia and adopts the fifty percent

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<sup>1</sup> 256 S.E.2d 879 (W. Va. 1979). *Bradley* was consolidated for argument and decision with the case of *Napier v. Elk Grocery Co.*, Appeal No. 14345, which presented the same question.

<sup>2</sup> 240 S.E.2d 544 (W. Va. 1977).

<sup>3</sup> The court phrased the question as "does a defendant have an inchoate right to contribution from joint tort-feasors . . ." *Id.* at 547. The remainder of the opinion, though far from clear and containing no specific answer to the question, certainly held that such a right exists.

<sup>4</sup> 256 S.E.2d at 886.

<sup>5</sup> The impleader problem was not directly addressed in *Haynes* and was subject to some dispute prior to *Bradley's* clarification.

<sup>6</sup> 246 S.E.2d 907 (W. Va. 1978).

<sup>7</sup> 253 S.E.2d 666 (W. Va. 1979).

brand of comparative negligence. While this symposium is primarily directed toward a discussion of the ramifications and effects of *Bradley*, the reader must keep in mind that the practical effects of the other three decisions are only now beginning to be felt, and many of the questions which those cases raised have not yet been addressed and answered.<sup>8</sup> The solutions to many of the problems posed by *Bradley* will, therefore, have to be formulated upon a background composed largely of unanswered questions and unsettled doctrine.

The purpose of this article is to provide the West Virginia defense practitioner with a brief overview of the problems and difficulties he or she may face during the course of comparative negligence litigation. No effort has been made to critique the relative merits of the comparative negligence doctrine vis-à-vis the contributory negligence doctrine, or to provide the reader with a litany of case citations on the various points discussed. There is a great deal of literature on comparative negligence,<sup>9</sup> and the lawyer can easily locate several relevant cases on any particular point in one of the excellent single volume treatises on comparative negligence that is currently available.<sup>10</sup> This article will also point out

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<sup>8</sup> For example, this writer knows of no case that has been tried to verdict under *Mandolidis*, which is the case that raises the most difficult procedural and tactical questions. As some of the following discussion will illustrate, comparative negligence may underscore the practical and conceptual problems created by *Mandolidis*.

<sup>9</sup> A representative sample might include the following: L. LAUFENBERG, *COMPARATIVE NEGLIGENCE PRIMER* (No. 4, 1975); Boone, *Multiple-Party Litigation and Comparative Negligence*, 45 INS. COUNSEL J. 335 (1978); Ghiardi & Hogan, *Comparative Negligence — The Wisconsin Rule and Procedure*, 18 DEF. L.J. 537 (1969); Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 OR. L. REV. 38 (1969); Prosser, *Comparative Negligence*, 41 CALIF. L. REV. (1953); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); *Comments on Maki v. Freik — Comparative Negligence: Should the Court or the Legislature Decide?*, 21 VAND. L. REV. 889 (1968); Note, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 SW. L.J. 669 (1978); NEW TOPIC SERVICE, AM. JUR. 2D, *COMPARATIVE NEGLIGENCE* (1977); Annot., 78 A.L.R.3d 339 (1977); Annot., 32 A.L.R.3d 463 (1970); Annot., 114 A.L.R. 830 (1938).

<sup>10</sup> C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (1978) [hereinafter cited as HEFT & HEFT]; V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974) [hereinafter cited as SCHWARTZ]; H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* (1978) [hereinafter cited as WOODS].

some of the practical difficulties that will be encountered if implementation of the doctrine continues on what appears to be its present course and will suggest some alternative interpretations that could alleviate these difficulties.

#### GENERAL CONSIDERATIONS

##### *The Attitude of the Defense Attorney*

In the midst of the proliferation of articles, commentaries, opinions, and discussions purporting to explain what the law is under *Bradley*, the defense attorney must focus upon the bare fact that the total law of comparative negligence in West Virginia is contained in fewer than three pages of the *Bradley* opinion<sup>11</sup> (the rest is really only speculation at this point, including this article). Those pages raise many more questions than they answer and only discuss a scant few of the many problems that will have to be resolved in implementing comparative negligence. The court is to be commended for its restraint in this regard, however, for the only issue that was thoroughly briefed and argued in *Bradley* and its companion case was whether comparative negligence should be adopted (the question of which specific form of comparative negligence was preferable was also touched upon, but only lightly); to the extent the court addressed other questions, it did so in the abstract. We must hold the court to its pledge that "all the particular ramifications of the new rule" are to be "resolved within the particular factual framework of the individual case;" the explanation and expansion of *Bradley* must come in concrete case decisions, not in seminars or speeches.

The most important element in the West Virginia defense attorney's preparation for litigation under the comparative negligence concept is the development of an attitude of total open-mindedness and skepticism. *Bradley* said that prior contributory negligence cases were overruled to the extent they were "inconsistent with this rule."<sup>12</sup> The comparative negligence concept, however, is not just a new "rule;" it is the embodiment of a wholly new public policy approach to the fault principal.

The idea that even slight negligence on the part of a party would deny that party recovery for his or her injuries has influ-

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<sup>11</sup> 256 S.E.2d at 885-87.

<sup>12</sup> *Id.*

enced, to some degree, every decision rendered in the tort field in West Virginia. As this basic underlying premise is no longer true, a fundamental element of *all* prior tort decisions in West Virginia has been altered. No prior decision should be readily or easily accepted as "consistent" with the comparative negligence doctrine. Each must be carefully reexamined and reevaluated in light of the policy goals and professed bases of comparative negligence. We must force each old rule, practice, doctrine, or procedure to come forward and prove itself worthy of continued validity in light of comparative negligence. We must resist accepting any "interpretation" of *Bradley*, no matter who renders it, without a thorough exploration and presentation of all the options. Similarly, we must recognize that all of *Bradley's* pronouncements regarding the effects of comparative negligence were created in an adversarial vacuum and that they, too, must be put to the test. To implement the new, we must continue to challenge the old.

### *Bradley: Problems and Pluses*

The first and foremost problem encountered in *Bradley* is that much of the language in the decision is contradictory and subject to differing interpretations. Until the court gives a definitive ruling concerning these areas, it is not possible to provide any concrete guidance concerning the effects of *Bradley* on the defense practice. There are three areas which may cause the greatest number of problems until finally clarified by the court.

The first is the question of which parties will be assigned a specific percentage of negligence or fault. Although the decision seems to contemplate an apportionment with respect to all parties to the accident,<sup>13</sup> it would certainly seem to *require* an apportionment with respect to all parties in the lawsuit.<sup>14</sup> Nevertheless, early extra-judicial indications from the court apparently accept the idea that only the plaintiff's negligence or fault need be apportioned.<sup>15</sup>

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<sup>13</sup> When the *Bradley* Court speaks of apportionment, it always uses the phrase "parties to the accident." 256 S.E.2d at 885, 887 n.19.

<sup>14</sup> *Id.* at 885-86.

<sup>15</sup> This is evidenced by the sample Instructions on Jury Verdict Forms and Verdict Forms distributed by Justices Miller and Harshbarger at a recent judicial conference. See *Symposium on Bradley v. Appalachian Power Co. — West Virginia Adopts Comparative Negligence, Sample Special Interrogatory Forms*, 82 W.

The second major problem remaining after *Bradley* concerns the validity of a settlement by one joint tortfeasor with the plaintiff, and the effect of such a settlement on any verdict obtained by the plaintiff against one or more remaining tortfeasors. The third major area of conflict in the court's opinion is that of contribution and joint and several liability. This problem is intimately entwined with the settlement and apportionment questions and is even more complex because of the obscurity of the *Bradley* decision in this area. Some discussion of this problem is warranted at this juncture. The court indicates that the defendant can implead other joint tortfeasors pursuant to *Haynes*, and then can have any damages assessed against him "*apportioned* among the third party defendants."<sup>16</sup> Later, the court states that the comparative negligence rule is not designed "to alter our basic law which provides for joint and several liability among joint tortfeasors after judgment."<sup>17</sup> The basic law, of course, has been equal contribution.

Equal contribution, however, does not comport with the idea of "apportioning" damages among the various responsible parties. Nor, does it comport with the court's direction that the percentage of negligence or fault be assessed with respect to each party. If the defendants whose negligence or fault contributed to cause the plaintiff's injury are to share equally in the judgment, there is obviously no need for the assignment of a *percentage* with respect to those defendants. It is only necessary to determine the plaintiff's percentage of negligence so as to know whether the plaintiff is to recover at all, and to determine which defendants are liable. As the court clearly seems to require that a percentage of negligence be assigned to each party to the accident, beginning with the plaintiff,<sup>18</sup> it seems quite logical to take the next step and to assess the responsibility for payment of judgment according to the percentage of negligence or fault found against each responsible party.

This concept, usually referred to as comparative contribution, seems most in tune with the professed goals of comparative negli-

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VA. L. REV. 545, 546 n.4 (1980).

<sup>16</sup> 256 S.E.2d at 886 (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 885-86.

gence.<sup>19</sup> However, if we accept the old equal contribution rule, as the court seems to intend, the results are unfair. For example, a plaintiff sues two joint tortfeasors. After trial, plaintiff is assessed 20% negligence or fault, while defendant A is assessed 20% negligence or fault and defendant B is assessed 60% negligence or fault. Under the equal contribution rule, the defendant whose negligence or fault is equal to that of the plaintiff would have to pay *one half*<sup>20</sup> of the plaintiff's damages. Carried to an even greater extreme, defendant A could be held only 5% negligent or at fault, and still have to pay *one half* of the final judgment. Is there *any* rational justification for requiring a party who is 5% negligent or at fault to pay one-half of the damages to a party who is 20% negligent or at fault. The more equitable and logical approach clearly would be to adopt the principle of "comparative contribution," which makes each defendant responsible for damages according to the proportion of negligence or fault assigned to him by the jury.<sup>21</sup>

The reader should not, however, assume that comparative contribution is the most desirable situation in all instances.<sup>22</sup> Spe-

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<sup>19</sup> Comparative contribution is probably the majority view. See HEFT & HEFT, *supra* note 10, app. II & ch. 3. It certainly seems to be the best reasoned and most logical approach. See *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); *Packard v. Whitten*, 274 A.2d 169 (Me. 1971); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); HEFT & HEFT, *supra* note 10, §§ 1.310-.330; SCHWARTZ, *supra* note 10, § 16.8; UNIFORM COMPARATIVE FAULT ACT §§ 2, 4, reprinted in SCHWARTZ, *supra* note 10, ch. 22.

<sup>20</sup> This would be 40% in this instance. Plaintiff recovers only 80% of his damages because of his 20% contributory negligence. Each defendant would then pay one-half of the 80%, or 40% of the total damages assessed.

<sup>21</sup> Thus, in the extreme example above in which plaintiff was 20% at fault, A, 20%, and B, 60%, A would pay 20% of plaintiff's total damages and B would pay 60%. Plaintiff, of course, would not recover the remaining 20%, for which he was solely responsible.

<sup>22</sup> The following example illustrates the complexity that may arise:

A sues B, C, and D. Each of the defendants cross-claims against all other defendants and counterclaims against the plaintiff. The jury finds fault and damages as follows:

A = 20% with \$10,000 damages

B = 5% with \$5,000 damages

C = 30% with \$20,000 damages

D = 45% with \$40,000 damages

Under comparative contribution, A would recover \$8000 of which B would pay 5% of \$10,000 of \$500; C would pay 30% of \$10,000 or \$3000; and D would pay 45% of \$10,000 or \$4500. Similar calculations would be made with respect to each party,

cifically, one should address the type of defendant involved. If you represent a so-called "target defendant," or customarily represent such defendants, arguing in favor of comparative contribution will probably be arguing against the interests of your usual client. This occurs because it is likely that a target defendant will receive the lion's share of the percentage of negligence or fault assigned. Thus, in a comparative contribution scheme, the target defendant will usually have to pay the heavier portion of the judgment. If you customarily represent less prime targets, the comparative contribution principle might work more often in your favor. Regardless of the "category" of defendant you represent, however, comparative contribution will very likely encourage an adversarial relationship among multiple defendants as, unlike the situation under equal contribution, each defendant would have an interest in decreasing his percentage and increasing that of the other defendants. Unless avoided by arbitration or agreement among the defendants prior to trial, this enhances the advantage already enjoyed by plaintiffs because of infighting among multiple defendants.

However, in an academic sense, the final analysis ought not to be based strictly on the advantage or disadvantage to a particular client or type of client, but rather bottomed on what seems most fair and most conducive to accomplishing the overall goals of a comparative negligence scheme. If we assume that an important goal of comparative negligence is to bring all parties before the court, insofar as possible, in the same lawsuit and to decide all of the disputes at the same time, certainly comparative contribution would seem to be the most rational approach to adopt.

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after which setoffs would be made to determine who finally owed what to whom. In the final tabulation, A would pay a total of \$5000; B would recover a total of \$1250; C would pay \$2500; and D would recover \$6250.

However, equal contribution too creates a problem. For example, in the above hypothetical, application of equal contribution would require the court first, to use the percentages assigned by the jury to determine that all parties could recover, and how much, and then, to disregard the percentages and make each party pay an equal share of every other party's damages. Thus, A would pay one-third of B's \$4750 recovery or \$1583, plus one-third of C's \$14,000 recovery or \$4667, plus one-third of D's \$22,000 recovery or \$7333, for a grand total of \$13,583. Fully calculated and offset against their own recoveries, A would pay \$5583; B would pay \$9917; C would recover \$2417; and D would recover \$13,083. As can be seen, the big losers under equal contribution in this instance are A and B, the least negligent of all parties, while the big winners are C and D, the most negligent.

The *Bradley* decision has several positive aspects from the defense viewpoint. The explanation offered in *Bradley* of the liberalized impleader rules under *Haynes* certainly gives the defense much needed flexibility in its pleadings and clarifies a point that was being litigated in many lower courts across the state. Additionally, the adoption of comparative negligence focuses the attention of the litigants and of the jury on the negligence of the plaintiff. The court specifies that the jury is to apportion the negligence of the parties "beginning with the plaintiff."<sup>23</sup> Therefore, the court's instructions and the verdict forms submitted to the jury will place in issue initially the amount of negligence or fault of the plaintiff. This often represents an important tactical advantage to the defense. The court must also be commended for adopting the 50% brand of comparative negligence as opposed to the "pure" form, which is the type that the four other jurisdictions<sup>24</sup> that judicially adopted the doctrine have chosen. The 50% brand,<sup>25</sup> of course, means that contributory negligence can still be

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<sup>23</sup> 256 S.E.2d at 885.

<sup>24</sup> Alaska in *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); Florida in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); California in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226; 119 Cal. Rptr. 858 (1975); and Michigan in *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977) (by an equally divided court). Seven other jurisdictions, consisting of five states, the Canal Zone, and Puerto Rico, have adopted the pure form by statute. Arkansas originally had the pure form by statute, but amended it to the 49% system.

<sup>25</sup> The so-called 50% brand has been adopted in 27 jurisdictions, all by statute with the exception of West Virginia. Fourteen states and the Virgin Islands allow the plaintiff a recovery so long as his negligence does not exceed that of the defendant or defendants (50% negligence still permits a recovery). Eleven states (including West Virginia) and Guam permit plaintiff to recover so long as his negligence does not equal or exceed that of the defendant or defendants (50% negligence bars a recovery). Three states, Hawaii, Massachusetts, and Wisconsin, originally barred a recovery if plaintiff was 50% negligent, but subsequently amended their statutes to permit recovery in that instance. Two states (Nebraska and South Dakota) have the "slight/gross" system by statute.

Fifteen jurisdictions, including the District of Columbia, continue to recognize the contributory negligence defense.

As can be seen by the summary in this and the preceding footnote, the various "systems," including the old contributory negligence rule, have about an equal number of followers. The researchers seeking support for a point being briefed in West Virginia must keep this diversity in mind. Even if cases from the other jurisdictions having the same 50% scheme as West Virginia are utilized, it must be recognized that those jurisdictions have adopted that system by *statute*, and that each statute differs in some respects from those of other jurisdictions. Thus, court decisions from these jurisdictions must be interpreted in light of the applicable

a complete bar to the plaintiff's recovery.<sup>26</sup>

Except for these introductory observations, very little concrete direction can be given concerning the practical effects of *Bradley* until further interpretation has been sought and obtained from the court. For now, the best that can be done in many areas is to highlight the options available.

## PRETRIAL CONSIDERATIONS

### *Parties*

Under *Bradley*, the plaintiff still enjoys the right to sue only one of several joint tortfeasors.<sup>27</sup> The *Haynes* decision, however, as explained in *Bradley*, grants a defendant the right to implead other joint tortfeasors on the theory of contribution. The first matter that should be addressed, therefore, upon receipt of a complaint is the inclusion or exclusion, alignment, and availability of all the "parties to the accident." If the plaintiff has joined more than one defendant, a cross-claim or cross-claims must obviously be considered. If, as is more likely, the plaintiff has not joined all potential tortfeasors, then the defendant is faced with the decision of whether to implead them.

To implead is a touchy decision under comparative negligence, and it is especially so in West Virginia because of the many

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statutory language. With those caveats, it is suggested that the case law and interpretive literature of Wisconsin (the original 50% jurisdiction) and Texas are most informative and innovative.

For a list of the comparative negligence states and the corresponding statutes, see Cady, *Symposium on Bradley v. Appalachian Power Co. — West Virginia Adopts Comparative Negligence, Alas and Alack, Comparative Negligence Comes to West Virginia*, 82 W. Va. L. Rev. 473, 479 nn. 36, 37, 39, 40, 480 n.41.

<sup>26</sup> The reasoning expressed by Justice Miller for the court's selection of the 50% system over the pure form is compelling, and suggests that the court has a good practical understanding of the equities of our fault-based tort system. There is no justifiable reason to allow a party to recover for injuries or damages of which he has been the primary cause. As Justice Miller quite correctly points out, the pure system simply rewards one, whose negligence is so significant that he causes himself grave harm, by making the less negligent party pay part of his losses. The 50% rule, on the other hand, successfully reflects the traditional argument that it is unfair for one who is only slightly negligent to be barred any recovery, but does not overcompensate as the pure form does. See 256 S.E.2d at 883-85.

<sup>27</sup> *Id.* at 886.

unanswered questions. The best one can do at this point is to address the jumble of considerations that exist and endeavor to make the best decision depending upon the facts of the particular case in which you are involved. It is generally agreed, for example, that if a particularly culpable defendant is left out of the litigation, the overall effect will be to increase the percentage of negligence or fault assigned to the plaintiff. Conversely, it is also generally agreed that increasing the number of defendants in a lawsuit decreases the percentage apportioned to the plaintiff. Obviously, however, such generalizations will seldom be the sole consideration.

Consider the situation where the plaintiff has sued only your client. If, at this early stage of the litigation, you are able to determine with some degree of confidence that the plaintiff was guilty of negligence, and that his negligence was considerably *greater* than that of your client, then serious consideration should be given to remaining as the sole defendant. The percentage apportionment is, after all, relative. If the plaintiff's negligence is approximately twice as bad as that of your client, and the jury's final apportionment is only between those two parties, it is certainly possible that the split would be 66 2/3% assigned against the plaintiff and 33 1/3% assigned against the defendant.<sup>28</sup> Suppose two other defendants were added in the apportionment. It is wholly possible that on the same facts the apportionment could then be 40% against the plaintiff and 20% against each of the three defendants. Note that the *ratio* of plaintiff's negligence to your client's remains the same (two to one). The crucial difference, however, is that in the first case the plaintiff would not have recovered under *Bradley*, while in the second, the plaintiff recovers against each of the three defendants.<sup>29</sup>

Admittedly, there probably will be few cases where your assessment of the parties' negligence at the initial stages of litigation is such that you could consciously decide to exclude other

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<sup>28</sup> The example is even easier to understand if we assume that there will not be apportionment among defendants. With one defendant, the jury may tend to compare plaintiff's fault with the single defendant in a strictly relative sense; with three defendants and one plaintiff, the "three against one" idea may cause plaintiff's fault to appear less significant.

<sup>29</sup> This assumes that other possible tortfeasors are not brought into the analysis and not included as parties for the jury to apportion.

potential joint tortfeasors. The more likely situation is where one or more joint tortfeasors cannot be joined or impleaded because of jurisdictional problems or because they simply cannot be found. In that instance, the choice really boils down to whether the defendant wishes to have the negligence or fault of the absent party decided and apportioned by the jury. *Bradley* certainly seems to contemplate that all parties will be involved in the apportionment. The decision does not say that the apportionment will be among the parties to the *lawsuit* but refers instead to "the other parties involved in the *accident*."<sup>30</sup> Early experience indicates that the judiciary is following this view in permitting the jury to apportion the negligence or fault of parties to the accident even though they are not parties to the litigation.<sup>31</sup>

The resolution of whether to apportion the negligence of absent parties could in most instances have a crucial effect upon the later assertion of contribution rights against those parties.<sup>32</sup> For example, suppose the plaintiff sues your client and you decide not to implead defendant B, who you think is a joint tortfeasor. Hypothecate further that the jury apportions 30% fault against the plaintiff and 70% against your client. Would you subsequently be able to maintain a lawsuit seeking contribution from defendant B? How could defendant B be held responsible when a jury has already assessed 100% of the fault or negligence that contributed to the accident in question? Certainly the 70% assessment against your client could be considered collateral estoppel in the later lawsuit for contribution against defendant B, and a very strong argument could be made that the apportionment of 30% against the plaintiff should also be held against your client. This is especially true in view of the fact that your client would have had a full and ample opportunity to litigate the question of negligence or fault in the initial lawsuit and to have brought in defendant B as well.

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<sup>30</sup> 256 S.E.2d at 885, 887 n.19.

<sup>31</sup> The question of how to handle parties to the accident who are absent from the lawsuit is very complicated. For additional discussions, see SCHWARTZ, *supra* note 10, § 16.5; Boone, *Multiple-Party Litigation and Comparative Negligence*, 45 INS. COUNSEL J. 335, 338 (1978); 18 WASHBURN L.J. 692 (1979).

<sup>32</sup> See generally, SCHWARTZ, *supra* note 10, §§ 16.2-.8; HEFT & HEFT, *supra* note 10, §§ 1.300-.350; WOODS, *supra* note 10, §§ 13.5-.10; McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence — A Puzzling Choice*, 32 OKLA. L. REV. 1 (1979).

Thus, as long as actual percentages are assigned to the parties in the lawsuit, a party defendant's right of contribution may be imperiled by his failure to implead other joint tortfeasors, or at least to have their negligence or fault apportioned by the jury. In this regard it should be acknowledged that some individuals interpret *Bradley* as not requiring any apportionment beyond the plaintiff's.<sup>33</sup> However, the language of *Bradley* clearly seems to require the assignment of a percentage to all. It is difficult to believe that the statement "it will be the jury's obligation to assign the proportion or degree of this total negligence among the various parties, beginning with the plaintiff"<sup>34</sup> could be interpreted otherwise. Moreover, in many cases a percentage would have to be assigned, regardless of the interpretation, for example, anytime two defendants are present and there is a cross-claim.<sup>35</sup> The problem simply cannot be avoided.

One underlying goal of comparative negligence is to have all of the parties who are or who may be responsible for a given accident brought before the court in the same litigation so that the entire matter may be disposed of at the same time. The mechanism of impleader as expanded under *Haynes*, liberal joinder rules, and the apportionment of negligence or fault all lend themselves to this result. Accordingly, the more prudent approach for the defense lawyer would seem to be to implead all other joint tortfeasors if they can be brought within the jurisdiction of the court. If they cannot, to protect fully the right of contribution the defendant should ensure that the absent party's negligence or fault is shown during trial, and decided and apportioned by the jury.

The various theories of recovery that the plaintiff may have

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<sup>33</sup> The verdict forms distributed recently by Justices Miller and Harshbarger do not require an apportionment with respect to the defendant or defendants. See note 15, *supra*. Whether the court intends to mandate such a course in future decisions cannot be known; however, it does not appear that most trial courts are following this procedure at this time.

<sup>34</sup> 256 S.E.2d at 885.

<sup>35</sup> Under *Bradley*'s 50% rule, any party can recover so long as his negligence or fault does not equal or exceed the *combined* negligence or fault of the other parties to the accident. 256 S.E.2d at 885. In a three-party lawsuit with a cross-claim and a counterclaim, a percentage would *have* to be assigned to each party in order to determine who was entitled to a recovery, and how much the recovery would be. In many cases, each party does assert a claim against all other parties.

against potential defendants and associated problems of proof greatly enhance the difficulty of the decision respecting impleader. For example, a not uncommon fact situation might be as follows. Plaintiff, P, is injured on the job. The injury is the result of three concurrent factors: P's employer, A, who is in charge of the job in question, did not provide adequate safety equipment to P, and failed to enforce safety rules on the job; B, an independent contractor, negligently operated the piece of equipment that injured P; the piece of equipment involved, manufactured by C, had a defect which contributed to the injury.

Obviously, A, B, and C are all potential defendants. However, each presents a different set of considerations and problems. In order to prevail against A, P (or one of the other defendants if he attempts to implead A) must overcome the workmen's compensation defense. This means that the employer must be shown to have been guilty of wilful, wanton, or reckless misconduct.<sup>36</sup>

Defendant B, on the other hand, could be sued under a straightforward negligence theory, while defendant C could be sued under various theories, the most advantageous of which is strict liability pursuant to *Morningstar v. Black & Decker*.<sup>37</sup> Assuming that all three defendants can be, and are, brought into the litigation and that a factfinder has determined all three contributed to cause the plaintiff's injury, how is the question of contribution handled? Is defendant A wholly and solely responsible as a matter of public policy because he is guilty of wilful and wanton misconduct?<sup>38</sup> Is C wholly responsible because he is strictly lia-

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<sup>36</sup> See *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 914 (W. Va. 1979).

<sup>37</sup> 253 S.E.2d 666 (W. Va. 1979).

<sup>38</sup> The *Mandolidis* standard, after all, defines the phrase "deliberate intention" as used in W. VA. CODE § 23-4-2 (1978 Replacement Vol.); the *Bradley* court, citing *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742 (1944), reaffirmed that contributory negligence is not a defense in the case of an intentional tort. 256 S.E.2d at 887. Would this mean that an employer found guilty of "deliberate intention" could not take advantage of plaintiff's contributory negligence? If so, what would be the effect on other "joint tortfeasors?" As the cause of action preserved by § 23-4-2 is only "for any excess of damages over the amount received or receivable under this chapter," would plaintiff's total damages be reduced by his workmen's compensation award; would the employer's contribution share be offset by the award amount; or would the award be introduced at trial and the jury instructed to deduct it from the damage verdict? See generally, 63 W. VA. L. REV. 90 (1960); 54 W. VA. L. REV. 172 (1952).

ble?<sup>39</sup> Can defendant B's *negligence* be compared with that of the plaintiff, while the *fault* of A and/or C cannot? Is responsibility to be apportioned among the three defendants, either equally or by percentage?

The plaintiff's bar will undoubtedly argue under prior case law that proof of wilful or wanton misconduct, or even gross negligence, should permit the plaintiff a full recovery irrespective of the plaintiff's contributory negligence.<sup>40</sup> This idea evolved because of the harshness of the "slight negligence bars recovery" principle. Under comparative negligence, there seems to be no need for such a device. With apportionment and comparative contribution, the jury can certainly express the grossness or wantonness of a defendant's misconduct most adequately and impose the heavier liability burden on him by assigning either all or an extremely large portion of the percentage of "negligence or fault" to that defendant. Even without apportionment among the defendants, the assignment of a very small percentage of negligence or fault to the plaintiff and the application of comparative negligence to reduce his recovery should certainly be permitted. There is no reason to do other than permit comparison as long as the conduct involved falls short of an intentional tort. This certainly seems to be the better view and the court clearly held only that comparative negligence would not come into play where an intentional tort was involved.<sup>41</sup>

Similarly, the strictly liable defendant should be included in the comparison and apportioned along with the other parties. The court, after all, talks about the apportionment of "negligence or fault," not the apportionment of "negligence." The court seems to have accepted the idea that "faults" other than those that are characterized as negligence may and do contribute to accidents, and that these too should be apportioned according to their proportionate cause of that accident. With respect to strict liability, the more enlightened view seems to be that which has been taken by the Texas courts. Texas adopted what might be called comparative causation, which permits the proportionate *causation* attrib-

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<sup>39</sup> See discussion *infra* at 506.

<sup>40</sup> See *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742 (1944); See SCHWARTZ, *supra* note 10, ch. 7; HEFT & HEFT, *supra* note 10, § 1.230. See also Farrell, *Comparative Negligence*, 1 Y.L.S. Newsletter, Nov. 1980 at 1.

<sup>41</sup> 256 S.E.2d at 887.

utable to the *defect* in the product to be apportioned and factored into the comparative analysis.<sup>42</sup> Defense attorneys should not pass up the opportunity to fashion, under the mantel of both strict liability and comparative negligence (which are going to be developing together) a fair, understandable, and equitable method of dealing with these complicated and sometimes confusing legal doctrines. Much of the justifiable criticism of strict liability that has been leveled in other states certainly could be avoided in West Virginia by an enlightened approach to the concept as it grows alongside comparative negligence. Acceptance of comparative causation is an important step in the right direction.

Although conceptual and theoretical problems obviously exist, it does not seem to be too difficult to accept the proposition that a "fault" for a given injury is 30% due to a defective product, 40% due to negligent operation of that product, and 30% due to the responsibility of the injured party. If plaintiff and all three defendants share responsibility for the accident, logic and justice require that they all share in liability for its consequences; this is the public policy basis of comparative fault.

### *Pleadings and Pretrial Motions*

The advent of comparative negligence calls into question most of the rules by which tort cases were tried and decided. Any policy judgment made under the rule that any contributory negligence on the part of the plaintiff would bar recovery should be reexamined in the context of comparative negligence which permits a plaintiff to recover as long as he is not as negligent as or more negligent than the defendant or defendants. Thus, the defense attorney should look very carefully at the plaintiff or plain-

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<sup>42</sup> For a thorough discussion of this approach, see Fischer, *Products Liability — Applicability of Comparative Negligence*, 43 Mo. L. REV. 431 (1978); Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Note, *Another Citadel Has Fallen — This Time the Plaintiff's*, 6 PEPPERDINE L. REV. 485 (1979); Note, *Torts — Comparative Negligence Statute's Provisions for Apportioning Damages Among Joint Tortfeasors Are Not Applicable When the Basis of Liability For One Is Strict Liability*, 9 TEX. TECH. L. REV. 701 (1978).

The Third Circuit Court of Appeals recently held comparative causation applicable under the Virgin Island's comparative negligence statute. *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979). See also HEFT & HEFT, *supra* note 10, § 1.110; WOODS, *supra* note 10, ch. 14; SCHWARTZ, *supra* note 10, ch. 12.

tiffs in a given lawsuit.

Many categories of plaintiffs in the past, such as infants, children, and aged or incapacitated people, have been held either incapable of contributory negligence or at least capable only of some diminished form of contributory negligence. Similarly, in many situations where it might have seemed appropriate to impute the negligence of another to the plaintiff, it was not permitted. Comparative negligence should ease the defendant's burden with respect to establishing the negligence of these plaintiffs as the complete bar of slight contributory negligence has been removed. The comparative system thus permits a more realistic evaluation, for example, of the seven-year old child's own responsibility for his injury, of his parents' responsibility due to their lack of supervision, and of the defendant's responsibility. The defense attorney's responsive pleading should consider and, where appropriate, lay the groundwork for these arguments.<sup>43</sup>

Where appropriate, the defense attorney should also assert the defense of assumption of the risk. The *Bradley* court did not mention assumption of the risk at all in its decision. One must assume, therefore, that it continues to be a viable defense, and that it would act as a total bar to recovery by the plaintiff.<sup>44</sup> It is undoubtedly important, however, that the defense attorney make as clear as possible to the court and the jury the distinction between true assumption of the risk and the traditional contributory negligence. The two concepts have been greatly blurred in court decisions in the past, with many courts flatly accepting the proposition that assumption of the risk is merely a form of contributory negligence. Certainly in cases where there is specifically expressed consent to the risk involved, or where there is agreement among the plaintiffs and the defendants that there is no duty running from one to another, assumption of the risk is the appropriate designation for the defense.

Beyond this, the true assumption of the risk is clearly different in character from traditional contributory negligence. The plaintiff, for example, who escapes from the burning building, but decides to return in order to retrieve his gold watch, has assumed

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<sup>43</sup> See SCHWARTZ, *supra* note 10, ch. 14; WOODS, *supra* note 10, ch. 12.

<sup>44</sup> See HEFT & HEFT, *supra* note 10, § 1.210; SCHWARTZ, *supra* note 10, ch. 9; WOODS, *supra* note 10, ch. 6.

the risk. He has made a conscious decision to deviate from the ordinary standard of care with respect to his safety, rather than having deviated from that standard through inadvertence, unawareness, or inattention, which would constitute ordinary negligence. The defense bar must take care to define carefully the assumption of the risk defense. If we endeavor to characterize what really is only negligence as assumption of the risk, we may run the risk of deadening the courts' receptiveness to the legitimate assumption of the risk defense in cases where it is actually applicable.

It is useful at this point to mention that the *Bradley* court held that the doctrine of last clear chance is still available to the plaintiff "in appropriate circumstances."<sup>45</sup> Defining the quoted phrase should prove quite difficult. Will it be applicable, for example, only in cases where plaintiff is 50% or more at fault as this is the only instance in which the plaintiff would be barred a recovery as under the old contributory negligence doctrine? Or, would last clear chance be applicable to erase any and all negligence on behalf of the plaintiff?

As the doctrine was developed as a counter to the harsh contributory negligence bar, it would seem that if it is to be applicable under comparative negligence, it should be applicable only in instances where the plaintiff's negligence is such that it would bar him from recovery. It should be noted that many jurisdictions have abandoned the last clear chance doctrine as being a vestige of the old contributory negligence system that is no longer necessary to ensure an appropriate and just result among the parties.<sup>46</sup> This certainly appears to be the best view and ought to be espoused by the defense bar.

The effect on pre-trial motions is also worthy of discussion. Pretrial motions under comparative negligence will not be appreciably different from those under contributory negligence. However, it should be pointed out that a motion for summary judgment on the grounds that plaintiff is barred by his negligence is

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<sup>45</sup> 256 S.E.2d at 887.

<sup>46</sup> See HEFT & HEFT, *supra* note 10, ch. 3, § 1.220; SCHWARTZ, *supra* note 10, ch. 7; WOODS, *supra* note 10, ch. 8. New Hampshire's approach is probably the most appropriate; it has abolished the doctrine but allows its components to remain as factors for the jury's consideration in making the comparative analysis. See *Macon v. Sewart Const. Co., Inc.*, 555 F.2d 1 (1st Cir. 1977).

probably much less likely to succeed under comparative negligence than it was even under contributory negligence. It is clearly easier for a court to rule as a matter of law that the plaintiff was negligent to *some* degree than to hold as a matter of law that the plaintiff was 50% or more negligent. In any multiple party case involving cross-claims, counterclaims, or third-party claims, the possibility of a partial or total summary judgment seems even more remote because of the mathematical complexity of the decision the court would have to make.<sup>47</sup>

One other motion that might be considered by the defense, especially in these early days under comparative negligence when many of the rules by which we are to try cases are unknown or at least uncertain, is the motion *in limine*.<sup>48</sup> Such a motion serves the purpose of airing possible problems prior to trial so as to avoid confusion and disagreement before the jury by interposing objections, conferences at the bench, etc. For example, one important issue is the question of whether the jury in a comparative negligence trial in West Virginia is to be informed of the consequences of its percentage assignment with respect to the various parties.<sup>49</sup> There are several reasons why the jury should not be so informed.<sup>50</sup> One of the underlying bases for comparative negligence is its ability to remove from the tort system much of the old prejudice and sympathy that might influence the jury's decision. This is done by focusing the jury's attention upon the specific facts involved, and asking them simply to determine who is at fault and how much without having them address the overall question of who will recover what from whom. Informing the jury that a 50% assignment means no recovery defeats this goal. The motion *in limine* seems to be an appropriate device to resolve this question prior to trial. Other considerations, such as the treatment of absent parties,<sup>51</sup> might also be addressed in the motion *in limine* so as to permit the litigants to go forward fully aware of how such matters will be handled at the close of the trial.

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<sup>47</sup> The court would, in effect, have to decide every parties' percentage negligence or fault. A summary judgment that a party was not guilty of any negligence or fault would be possible, however, leaving damages and the remaining apportionment (if any) to the jury.

<sup>48</sup> See HERT & HERT, *supra* note 10, § 5.131.

<sup>49</sup> See discussion *infra* at 515-16.

<sup>50</sup> All of the verdict forms this writer has seen thus far do so, however.

<sup>51</sup> See discussion *supra* at 503-04.

## SETTLEMENT

It is generally accepted that the comparative negligence system encourages settlement.<sup>52</sup> This is because it compels a realistic view by both parties as neither has as great an expectation for an "all or nothing" victory as he would have had under contributory negligence. Comparative negligence also encourages the presence of all parties to an accident in the same litigation. In almost every instance, the parties would undoubtedly prefer to assign the percentages of negligence or fault themselves, by agreement, rather than leaving that assignment to a jury or to the court. This is especially true if the old "equal contribution" rule remains in force as settlement would represent the best, if not *only*, chance for the defendants to "apportion" the payment of plaintiff's recovery among themselves.

When the plaintiff is adamant or unwilling to negotiate a settlement, some sort of arbitration or agreement among the defendants is an avenue that ought to be explored.<sup>53</sup> If the defendants can agree beforehand as to the split of any verdict that might be rendered, they can then proceed to trial with a unified position against the plaintiff and avoid airing their "dirty linen" before the jury by fighting among themselves and, consequently, making the plaintiff's burden in the litigation much lighter. This may be an especially attractive option in cases where the plaintiff seems to have been guilty of a substantial amount of negligence, and there is some reluctance to implead other defendants for fear of decreasing the relative appearance of the severity of the plaintiff's negligence.

The prospect of settlement, however, raises some very significant questions such as whether the settlement will be upheld; how, if at all, will it affect contribution among the joint tortfeasors; whether the settling tortfeasor will be apportioned as a "party to the accident" at the end of any subsequent trial; and how the settler's payment will affect the final verdict in the litigation.

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<sup>52</sup> See generally the discussion of settlements under comparative negligence in HEFT & HEFT, *supra* note 10, ch. 4; WOODS, *supra* note 10, § 19.1; Note, *Multiple Party Litigation in Comparative Negligence; Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669 (1978).

<sup>53</sup> See Boone, *Multiple-Party Litigation and Comparative Negligence*, 28 INS. COUNSEL J. 335, 341-42 (1978).

If you represent the settling tortfeasor, your primary concern must be to obtain a final and enforceable settlement through a release that is obtained from the plaintiff. It must be borne in mind that we do not yet have a ruling from the court as to whether a settlement by the plaintiff with one joint tortfeasor extinguishes any future rights of contribution against the settling tortfeasor that might have existed in other joint-tortfeasors. Authority on the question is split, but the majority and better view seems to be that, if the settlement is made in good faith, all contribution rights are extinguished.<sup>54</sup> Until the court decides, however, we must continue to protect the finality of settlements through the release obtained. With some additions to the traditional language, a release can be drafted that should protect your client.

In the multiple party context, a settlement between one tortfeasor and the plaintiff is really only a settlement of so much of the plaintiff's recovery as would be forthcoming from that

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<sup>54</sup> Section 4 of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, *reprinted in* 12 UNIFORM LAWS ANNOTATED § 4, at 98, provides:

[w]hen a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort for the same injury, or the same wrongful death:

(a) 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 against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

As of January 1, 1978, nineteen states had adopted the Uniform Act. 12 UNIFORM LAWS ANNOTATED (1979 Supp.) 43. In addition, California and New York have adopted their own contribution statutes which release a settling joint tortfeasor from any liability for contribution. CAL. CIV. PROC. CODE § 877 (Deering 1979 Supp.); N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1978); *De Cruz v. Reid*, 69 Cal. 2d 296, 444 P.2d 342, 70 Cal. Rptr. 550 (1968); *Driscoll v. New York City Transit Authority*, 53 A.D.2d 828, 385 N.Y.S.2d 540 (1976). Five other jurisdictions have established similar rules judicially. *Simonsen v. Barlo Plastics Co.*, 551 F.2d 469 (1st Cir. 1977) (New Hampshire); *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975) (Louisiana); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (Virgin Islands); *Butters v. Kane*, 347 A.2d 602 (Me. 1975); *Jacobs v. General Accident, Fire & Life Assurance Corp.*, 14 Wis. 2d 1, 109 N.W.2d 462 (1961). *See also* *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. 1964); *Mihoy v. Proulx*, 113 N.H. 698, 313 A.2d 723 (1973).

tortfeasor;<sup>55</sup> this is true whether we use equal contribution or comparative contribution. Thus, the release obtained in such a case should specifically indicate that, in consideration of the amount paid, the plaintiff releases so much of his *total* damages as was caused or was contributed to by the negligence or fault of the settling defendant.<sup>56</sup> Additionally, for added protection, the release should include an indemnification agreement whereby the plaintiff or plaintiffs agree to indemnify and hold harmless the settling defendant from any claims for contribution that other tortfeasors might later assert against him. If comparative contribution is accepted, the release could indicate that the settlement amount satisfies whatever percentage of any subsequent judgment the plaintiff might recover as would have been represented by the negligence or fault assigned to the settling defendant.

The release drafted as above should permit the settling defendant to be included as a "party to the accident" in any subsequent trial involving the plaintiff and other joint tortfeasors, and would allow the verdict amount to be decreased by the full contribution share of the settling tortfeasor, eliminating any contribution cause of action that might have existed in the non-settling tortfeasors.<sup>57</sup>

A release including the elements noted above should fully protect the settling tortfeasor from further involvement in the litigation. The only arguments remaining would be those, undoubtedly made by remaining defendants, that the settlement was unjust, unfair, or collusive in such a way as to unduly prejudice the rights of remaining defendants. An attorney representing one of the remaining defendants should certainly consider such an argument and realistically assess the effect the absence of the settling defendant will have on the subsequent litigation.

Under equal contribution the situation will remain basically the same: the plaintiff simply will try for the largest verdict possible. Apportionment and comparative contribution, however, present a different situation. At trial, the remaining defendants will

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<sup>55</sup> *E.g.*, *Brightheart v. McKay*, 420 F.2d 242, 243 (D.C. Cir. 1969); *Martello v. Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962).

<sup>56</sup> See *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105, 111 (1962); *Jacobs v. General Accident Fire & Life Assurance Co.*, 14 Wis. 2d 1, 109 N.W.2d 462 (1961).

<sup>57</sup> Excellent suggestions as to the form and language of these releases are contained in *HEFT & HEFT*, *supra* note 10, app. III at 3-10.

attempt to point the finger of guilt at the settling and absent defendant to get a higher percentage assigned against him, while the plaintiff will endeavor to protect the absent defendant and assess a greater degree of fault upon the remaining defendants (thus enhancing the judgment amount against those defendants).

Viewed from the standpoint of a non-settling defendant, certain factors should be considered and decided immediately upon notification that another joint tortfeasor has settled with the plaintiff. If the other settlement does not provide in the release for a subsequent decrease in the verdict, the non-settling defendant should determine before trial what affect the settling defendant's agreement will have upon the final outcome of the litigation. *Bradley* said simply that "our comparative negligence rule does not change the right of the joint tortfeasors to obtain a *pro tanto* credit on the plaintiff's judgment for monies obtained by the plaintiff in a settlement with another joint tortfeasor."<sup>58</sup> However, a *pro tanto* decrease in the final judgment is an insufficient device to protect either the settling joint tortfeasor from a later action for contribution, or the non-settling tortfeasor from the possibility of having to pay more of the total judgment than would be his share under the principles of equal contribution.

If the *pro tanto* rule is permitted to operate as it has in the past, the developing law will have to accept one of two equally unjust alternatives. If the settlement, so long as in good faith, is deemed to stand inviolate, regardless of the verdict amount that the plaintiff finally obtains from the remaining tortfeasors, with only the *pro tanto* credit being applied against the judgment, then remaining defendants may be forced to pay more than their equal share of the plaintiff's damages. However, if the remaining defendants still are deemed to have a legitimate right of contribution against a settling tortfeasor for the difference between the settlement amount he paid and his equitable share of the plaintiff's total verdict, then the very important public policy concern for encouraging out of court settlements is greatly undermined because a defendant contemplating settlement could not with any certainty assume that he has bought his peace.

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<sup>58</sup> 256 S.E.2d at 886-87, citing *Tennant v. Craig*, 156 W. Va. 632, 195 S.E.2d 727 (1973), *Hardin v. New York Central R.R.*, 145 W. Va. 676, 116 S.E.2d 697 (1960).

The most acceptable and fair solution would seem to be that which is embodied in the release discussed above; a plaintiff, by settling his dispute with any potential tortfeasor, has explicitly accepted a reduction in any subsequent verdict he might obtain by an amount equal to the proportion of the verdict that would have been represented by the settling tortfeasor's contribution share.<sup>59</sup> This view should prevail under equal or comparative contribution. In those cases where one of multiple defendants settles without executing an adequate release, the issue as to the treatment of the settlement amount should certainly be faced and decided prior to trial, if possible. This will permit all parties, including the settling defendant, to present their views and to know exactly where they stand prior to the commencement of the actual trial.

#### TRIAL CONSIDERATIONS

Only a few points seem worthy of specific reference. First is the question, mentioned above, of whether the jury is to be told the effect, or possible effect, of its percentage assignments on the final recovery of the plaintiff.<sup>60</sup> The states that have adopted comparative negligence have taken every available position on this question. Some *require* that the jury be told the effect of its decisions;<sup>61</sup> one makes it discretionary with the trial judge;<sup>62</sup> and some make it reversible error to inform the jury of the effect of its decision.<sup>63</sup> The latter view seems to be the better and more logical approach in light of the goals of comparative negligence. Comparative negligence is designed to direct the jury's attention to finding the facts, assigning the negligence or fault, and stating the total damages suffered by each party. If the goal of the court in adopting comparative negligence is truly to encourage just deci-

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<sup>59</sup> See note 54, *supra*. This is really just another way of stating the majority view that a good faith settlement discharges the settling tortfeasor from all liability for contribution to other tortfeasors.

<sup>60</sup> See SCHWARTZ, *supra* note 10, § 17.5; WOODS, *supra* note 10, § 18.2; 18 WASHBURN L.J. 606 (1979).

<sup>61</sup> COLO. REV. STAT. ANN. § 13-21-111(4) (Cum. Supp. 1978); CONN. GEN. STAT. § 52-572h(b) (Cum. Supp. 1980); Nevada and North Dakota require such instructions if any party so requests, while Oregon requires them if a special verdict is requested. See HEFT & HEFT, *supra* note 10, § 7.40.

<sup>62</sup> NEV. REV. STAT. § 41.141 (1977).

<sup>63</sup> *Holland v. Peterson*, 95 Idaho 728, 518 P.2d 1190 (1974); *Zombrowski v. Wisconsin River Power Co.*, 267 Wis. 77, 64 N.W.2d 236 (1954).

sions that are based upon logic and facts rather than upon sympathy, it seems best not to inform the jury of the effect of their percentage assignment on any party's ability to recover.

In many situations the "50/50" argument is very effective with juries. Percentages are, after all, rather subjective, and the jury that deliberates more than a few minutes will probably come to realize this quite quickly. It is often a comfortable decision for the jury to determine that the parties involved are "equally at fault." If the defendant has no concern with losing his counterclaim, this can be a most useful position to state to the jury. The argument's effectiveness may, of course, be reduced if the jury is told of the effect of its percentage assignments, although it still might produce at least a 49% apportionment against the plaintiff.

Some fact situations lend themselves to an argument that lists the specific acts of negligence of the plaintiff and the defendant, thus giving the jury a more or less numerical reference by which to determine its percentages.<sup>64</sup> Looking, for example, at a typical two-car accident, the defense attorney might be able to argue to the jury that the plaintiff was guilty of negligence in that he (1) failed to keep a proper lookout, (2) failed to signal, and (3) was speeding, while the defendant was guilty of negligence, if at all, only in failing to keep a proper lookout. As the plaintiff was guilty of three negligent acts while the defendant was guilty of only one, the plaintiff is 75% at fault while the defendant is only 25% at fault.

The assumption of the risk defense, if in the case, also should be strenuously argued. In this regard, the defense attorney should recognize that the distinction between negligence and assumption of the risk may still be blurred to the jury, or the jury may simply be reluctant to bar the plaintiff from recovery by accepting that defense. The defense attorney should, therefore, argue the extreme seriousness of the conduct that constitutes assumption of the risk, thus promoting it as a very bad type of negligence. The jury should have the choice after closing arguments of denying the plaintiff recovery under assumption of the risk or of finding the plaintiff negligent or at fault to a very significant degree because of the conduct that constitutes assumption of the risk.

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<sup>64</sup> See HEFT & HEFT, *supra* note 10, §§ 8.30, 8.40.

*Special Verdict Form*

The importance of the verdict forms that are prepared and submitted to the jury to guide in its deliberations under the comparative negligence scheme cannot be overemphasized.<sup>65</sup> The use of the special verdict form presents an excellent opportunity to focus the jury's attention on the pertinent facts which it must find, to monitor the jury's performance, to insure that there are no inconsistencies in the verdict, and to isolate error both in trial and in decision. The format of the form and the questions asked, both in phrasing, in order, and in quantity, are extremely important.

*Bradley* is somewhat confusing in its discussion of the verdict form to be used in West Virginia. The court states that the jury must be required "by general verdict" to find the total or gross amount of damages of each party, but confuses this statement by ending with the phrase "whom they find entitled to a recovery."<sup>66</sup> It will be argued that this phrase indicates that the jury is to compute the effect of the percentages assigned and to find in favor of one party or another, thus determining the total damages only of the party that the jury has determined is going to recover. Such a reading of the language cannot be correct, for certainly in multi-party, multi-claim cases it would be impossible for the jury to make the required calculations. Rather, the jury should simply find the gross amount of damages suffered by each party that it determines has incurred damages.<sup>67</sup> This interpretation is consistent with the remainder of the passage, as the court next states that the jury will, "by special interrogatories," assign the percentage of fault or negligence attributable to each party *beginning with the plaintiff*, and that the *trial court* will then calculate each party's amount of recovery by applying the appropriate mathematical calculations.<sup>68</sup>

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<sup>65</sup> HEFT & HEFT, *supra* note 10, ch. 8, presents an excellent discussion of special verdicts under comparative negligence generally, and includes many examples of forms and special questions. See also SCHWARTZ, *supra* note 10, § 17.4; Woods, *supra* note 10, § 19.3.

HEFT & HEFT also sets forth a comprehensive list of instructions that may be suggested in various situations under comparative negligence. HEFT & HEFT, *supra* note 10, ch. 7, Woods, *supra* note 10, ch. 20, is also useful in this regard.

<sup>66</sup> 256 S.E.2d at 885-86.

<sup>67</sup> This is the more likely meaning of the phrase "whom they find entitled to a recovery."

<sup>68</sup> 256 S.E.2d at 886.

The extreme importance of the verdict forms submitted to the jury requires the defense attorney to argue strenuously for appropriate questions, properly phrased. The precise nature of the verdict form used will vary depending upon the particular facts of the case in which the attorney is involved. However, some general principles will apply in most situations. *Bradley* clearly requires that the negligence or fault of the plaintiff be decided and apportioned by the jury *first*.<sup>69</sup> This is a very important tactical point, and one that must be preserved by the defense. If the jury is permitted to address the responsibility of the defendants first, the almost certain result will be a decrease in the plaintiff's percentage. The initial attention of the jury should be, as *Bradley* requires, focused upon the negligence or fault of the plaintiff.

Beyond this, the most important point from the defense view is to consider the wording of the questions very carefully. As a general rule, questions should be phrased so that an affirmative answer would be argued for by the party bearing the burden of proof on the issue involved. Instructing the jury a second time in the verdict form should be avoided because the fewest pitfalls seem to lie in the approach that produces simple, straightforward questions with minimum explanation and direction. The verdict form should include absent parties, including parties that have settled with the plaintiff prior to trial.<sup>70</sup>

The defense attorney should not include more than one phrasing of essentially the same question in the special verdict form as this will increase the possibility of an inconsistent verdict. Questions should focus upon a single factual issue or decision to be made by the jury, and should require a simple yes or no, or

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<sup>69</sup> *Id.* at 885.

<sup>70</sup> An interesting question that might arise in this context concerns employers under workmens' compensation. Suppose, whether made a party to the law suit or not, an employer is not guilty of wilfull or wanton misconduct such as to make him liable to the plaintiff employee. Nevertheless, the employer might be guilty of "negligence or fault" with respect to the plaintiff's injury. If this is the case, should the employer's percentage of negligence or fault be assessed, and should this have an effect upon the plaintiff's verdict and the amount of liability imposed upon the remaining defendants? If the employer is guilty of only negligence, he has essentially fulfilled his liability responsibility to the employee through the workmens' compensation system. Accordingly, it seems equitable and just to reduce the verdict obtained by the plaintiff in some way to reflect the workmens' compensation award.

percentage or amount, answer. Professor Schwartz suggests that only two categories of questions be submitted to the jury: (1) the amount of damages which would have been recoverable if there had been no contributory negligence with respect to each party, and (2) the degree of negligence or fault of each party expressed as a percentage.<sup>71</sup> Of course, the questions would have to be phrased in such a manner so as to include the proximate cause issue.<sup>72</sup> With this information, in even the most complicated case, the court could do the necessary computation to determine the form of the actual recoveries.

### POST TRIAL

The most significant statement relative to the post-trial situation is that there are always going to be grounds for appeal of a case tried under the new comparative negligence doctrine. Considering the uncertainty under comparative negligence at the present time, the possibility of compromise with the plaintiff after the verdict and during or prior to the taking of an appeal seems much more likely as well.

Post-trial motions will remain the same as under contributory negligence, with one possible exception. As a special verdict form involving specific questions may be used, it is possible and advisable for the defense attorney to make a motion, where appropriate, to have an answer or answers to certain questions in the special verdict changed. This motion can be joined, in the alternative, with a motion for a new trial. The viability of such a motion, however, depends upon and presumes that the questions in the special verdict were properly framed and submitted to the jury, and that the verdict form and facts of the case are sufficiently developed and sufficiently specific to permit the trial court to recognize an erroneous decision or answer by the jury.

In preparing for a post-trial motion, of course, it is crucial that the defense attorney examine the verdict forms and the jury's answers very carefully, and also that he check the court's interpretation and mathematics with extreme care. Remember, in the beginning that no one — not the judge, not the plaintiff's attor-

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<sup>71</sup> SCHWARTZ, *supra* note 10, § 17.4.

<sup>72</sup> *Bradley* makes it clear that the requirements of proximate cause have not been altered. 256 S.E.2d at 885.

ney, and certainly not the jury — has had much (if any) experience under comparative negligence. Thus, the practitioner involved in the litigation who is most conversant with the doctrine of comparative negligence should have the advantage during any discussion of how the doctrine should be applied in West Virginia.

The defense attorney should recognize the power of the court to monitor a jury's decision.<sup>73</sup> In appropriate cases, the defense attorney should argue that the court ought to declare a certain party negligent as a matter of law, leaving, of course, the actual percentage assignment to the jury. The defense attorney may also ask that the court declare the plaintiff equally at fault with the defendant as a matter of law or that the court disagree with a certain percentage assigned and either alter that percentage or grant a new trial.

A variation on the latter choice is the technique of remittitur in a situation where the jury seems obviously to have been influenced by passion or prejudice in its assignment of percentages. The court could, in effect, raise the percentage assigned to the plaintiff by indicating to the plaintiff that he must take a remittitur with respect to the amount of recovery that is determined by the straight application of mathematics or suffer a new trial.

The most important decision, perhaps, that will face the defense if it has lost at the trial level is the decision with respect to seeking contribution and/or indemnification<sup>74</sup> from other joint tortfeasors, who may or may not have been party to the lawsuit and who may or may not have been apportioned by the jury. By the time trial is over, however, most of the defense strategy with respect to seeking contribution or indemnification should already have been formulated as these strategems should have been addressed and applied initially at the pleading stage when the defendant determined who, if anyone, to implead.

### CONCLUSION

The adoption of comparative negligence by the Supreme

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<sup>73</sup> See HEFT & HEFT, *supra* note 10, ch. 9; SCHWARTZ, *supra* note 10, ch. 18; WOODS, *supra* note 10, ch. 21.

<sup>74</sup> See Note, *Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779 (1978).

Court of Appeals of West Virginia presents a very great challenge and a very great opportunity to the bar and bench of this state. In view of the recent changes made by the court in the areas of impleader, contribution, strict liability, and comparative negligence, we have a unique opportunity to fashion a scheme of tort compensation that is at once just and equitable to all parties who come before the courts.

As we strive to accomplish this goal, however, be aware that none of the tangential questions mentioned in *Bradley*, including those answered, were presented to the court in the context of an actual controversy. No attorney should consider any question settled until it has been properly presented. Until that time, we must beware of taking the easy way out and of riding along with the flow. We must fulfill our duties as advocates to understand the law and to argue for an application of the law that is at once advantageous to our client and just, fair, and equitable.

In the form adopted by the West Virginia court, the doctrine of comparative negligence represents a step toward a more equitable system than has existed in the past. To insure that it lives up to its potential, however, and perhaps to insure that West Virginia can come to occupy a place as an enlightened and forward-looking jurisdiction that deals with all litigants fairly and realistically in the modern legal atmosphere, the attorneys of the state must fulfill their very important adversary responsibility. Each of us, whether we be members of the plaintiff or the defense bar, must apprise ourselves of the ramifications of comparative negligence; we must argue the points that favor our clients; and we must be creative in our efforts to assist the courts in fashioning a tort system that is truly innovative and fair to all. We must, as has always been true under the system that we have in this country, inform the judiciary in an adversarial way of the advantages of the opposing points of view, so as to permit the judiciary to make the best decision for all concerned. The opportunity is there, but it may not remain for long. Let us not willingly let it pass.

