

**THE BURDEN OF THE BARGAIN:
REVISITING THE PREDICAMENT OF MESHING
WORKERS’ COMPENSATION AND TORT LAW
IN LIGHT OF WIDESPREAD ACCEPTANCE OF
ALIGNING LIABILITY WITH FAULT**

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INTRODUCTION

Most courts, legislatures, and scholars agree that the widespread movement over the past half-century toward aligning liability with fault has positively influenced tort law;¹ however, the change has not come without difficulty.² Courts and legislatures have struggled to determine how these developing doctrines affect apportionment of damages in various contexts.³ This note addresses the issue of how damages should be apportioned among multiple tortfeasors when an injured plaintiff has suffered a workplace injury and the employer or a coworker is partially to blame. In certain situations, workers' compensation laws undercut the principles of comparative fault by requiring a non-immune defendant to compensate an injured worker greater than the defendant's percentage of fault, while a blameworthy but immune employer is reimbursed in full.⁴

An example illustrates the problem: Eddy Employee and Carl Coworker work together at Employer Co. While on the job, Eddy is riding as a passenger in a work vehicle driven by Carl, and they are involved in a car wreck with Driver. As a result of the accident, Eddy is severely injured and later receives \$20,000 in workers' compensation benefits from Employer Co. (likely paid by its workers' compensation insurance carrier). Eddy then sues Driver seeking \$200,000 in damages. The crux of the problem is that even if Carl was negligent in the operation of the vehicle as a coworker he is given immunity from fault allocation under the workers' compensation laws, as would the employer. Further, since Eddy was just a passenger and did not in any way cause the car accident, there is no fault to allege against him as the plaintiff.

In every state, workers' compensation laws create an arrangement where an employer pays limited benefits to an employee injured on the job in exchange for the employer's immunity to tort liability.⁵ This immunity also extends to coworkers in the majority of states.⁶ As in the example

1. COMPARATIVE NEGLIGENCE MANUAL 3D § 1:2 (1995).

2. See generally Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002).

3. Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY J. EMP. & LAB. L. 65, 66 (2005).

4. *Id.* at 66–67.

5. LARSON'S WORKERS COMPENSATION LAW § 1.01 (2014).

6. *Id.* § 111.03.

above, however, another party may have contributed to the employee's harm. Under the traditional approach, used in the majority of states, workers' compensation laws also preclude consideration of an employer's fault in the context of litigation involving an injured employee against a third-party defendant for a workplace injury,⁷ including the fault of any of the employer's employees.⁸ In neither situation can fault be allocated to the employer or coworker for their negligence, so the only fault considered is that of the plaintiff and the third-party defendant.⁹ Even if the coworker or employer was substantially more at fault than the third-party defendant, the jury cannot consider this in its fault allocation.¹⁰ Therefore, if at trial the jury finds Driver to be at fault, no matter what the percentage, then Driver, a non-immune defendant who was only partially at fault for Eddy's injury, will have to bear liability both for his own fault and that of Eddy's negligent coworker Carl.

Further, after the injured worker recovers from the third-party defendant, the immune employer typically has the right to recover in subrogation the full amount of workers' compensation benefits paid to the injured employee.¹¹ It is said that the employer's right to subrogation ensures that the injured worker is not permitted to recover twice, through both workers' compensation benefits and a tort award, and it is generally deemed justifiable when the employer is permitted to recover from the only party to blame for the injury.¹² But the right to recover through subrogation exists regardless of whether the employer or one of its employees were at fault.¹³ Thus, assuming Eddy prevails at establishing some fault of Driver and recovers \$200,000, Employer Co. (or its insurance carrier) has the right to pursue its subrogation lien for the \$20,000 that it paid previously in workers' compensation benefits. Since workers' compensation laws permit this, the employer recovers this amount regardless of the fact that its employee Carl was also negligent and arguably should have shared in the fault allocation.

This concerning result conflicts with the routine practice of courts, which is to use prevalent comparative fault principles to make calculations that align liability with fault. If courts are able to adjust damage awards

7. *Id.* § 120.02; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C20(a)(ii) & cmt. b (AM. LAW INST. 2000).

8. LARSON'S WORKERS COMPENSATION LAW § 120.02 (2014).

9. *Id.*

10. *Id.*

11. *Id.* § 121.09.

12. *See, e.g.,* *Struhs v. Protection Techs., Inc.*, 992 P.2d 164, 168 (Idaho 1999) (quoting *Presnell v. Kelly*, 740 P.2d 43, 45 (Idaho 1987)) ("The dual purposes of subrogation . . . are to achieve an equitable distribution between responsible parties 'by assuring that the discharge of an obligation be paid by the person who in equity and good conscience ought to pay it' and 'to prevent the injured claimant from obtaining a double recovery for an injury.'").

13. LARSON'S WORKERS COMPENSATION LAW § 121.09 (2014).

based on each tortfeasor's contribution to the harm, then a nonimmune third-party defendant should not be forced to compensate an injured plaintiff greater than his percentage of fault and an employer should not be fully reimbursed for workers' compensation payments when the employer or its employee was to blame for the harm. However, it must be considered that the individual interests of three separate parties are at play. The law must seek to accommodate the injured employee's interest in full compensation for his harm, the employer's interests in limited liability and subrogation, and the third-party defendant's interest in a reduced liability that is in proportion to his own fault. Although it appears that no perfect solution is possible, a solution in which each of the parties bears a portion of the burden of inequity created by the inability to neatly mesh workers' compensation and tort law is attainable.

In support of this conclusion, Part I of this note describes the background principles of comparative fault and workers' compensation law, which led to the problem of meshing the two systems in an injured employee's suit against a third-party defendant. Using the Eddy Employee example from above as a guide, Part II examines the differing results produced by existing approaches that address the concurrent negligence of an employer or coworker, and Part III analyzes various solutions suggested by scholars for the apportionment of liability in such workplace injury cases. Finally, after considering these varied approaches, Part IV lays out a new proposed solution, discusses the problems with the current approaches and suggested solutions in light of widespread acceptance of the alignment of fault and liability, and explains why the new proposal improves upon the other approaches in this regard.

I. BACKGROUND

A. Negligence Suits and Movement Towards Principles of Comparative Fault

The central task of tort law is to remedy accidental harms,¹⁴ and the tort of negligence is said to lie at the heart of civil liability,¹⁵ as most accidents, professional malpractice, and personal injury cases, are governed by the common law of negligence.¹⁶ While negligence law varies from state to state, a plaintiff must generally prove the following elements: (1) the defendant owed the plaintiff a legal duty; (2) the defendant breached that legal duty by behaving negligently; (3) the plaintiff suffered actual damage; and (4) the defendant's behavior was an actual and proximate cause of that

14. RICHARD A. EPSTEIN, TORTS 69 (1999).

15. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 45 (4th ed. 2010).

16. EPSTEIN, *supra* note 14, at 109.

damage.¹⁷ According to the Restatement (Second) of Torts, “negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm,”¹⁸ and the Restatement (Third) of Torts indicates that conduct is considered negligent if the actor does not exercise reasonable care.¹⁹ Either definition may apply, but in all jurisdictions the tort of negligence requires blameworthy conduct, or fault.²⁰ Development of tort law has revolved, in part, around this concept of fault, as the law tends to disfavor liability without fault, and specifically around the apportionment of fault.²¹

When the conduct of multiple parties can be said to have caused a particular indivisible harm, it creates the question of how to divide responsibility for damages among the parties, including both plaintiffs and defendants.²² An indivisible harm can be described as a single injury a plaintiff sustains as a result of successive acts of negligence by more than one tortfeasor.²³ Each tortfeasor’s negligent act works together to bring about the injury,²⁴ such as when one driver who was speeding and another who was sending a text message both crash into the plaintiff’s car.²⁵ If the plaintiff emerges with a back injury as a result of the combined impact, the injury could be considered an indivisible harm.²⁶ The rules of fault apportionment, predominately developed over the past several decades, address this issue.²⁷ As discussed in the following sections, the vast majority of jurisdictions now recognize at least some form of comparative fault, which has made a major impact on existing common law methods of apportionment, or the lack thereof.

1. Contributory Negligence

Contributory negligence is a common affirmative defense to a claim of negligence.²⁸ In raising the defense of contributory negligence, the defendant asserts that the plaintiff also behaved negligently, and, therefore,

17. Robert Cary, *Torts: Playing the Blame Game: The Division of Fault Between Negligent Parties in Minnesota—Daly v. McFarland*, 39 WM. MITCHELL L. REV. 275, 277 (2012).

18. RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW INST. 1965).

19. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 4, cmt. a (AM. LAW INST. 2000).

20. See DAN B. DOBBS ET AL., THE LAW OF TORTS § 122 (2d ed. 2011).

21. See generally *id.* at § 487.

22. *Id.*

23. EPSTEIN, *supra* note 14, at 223.

24. *Id.*

25. DOBBS ET AL., *supra* note 20, at § 487.

26. *Id.*

27. *Id.* The rules of fault apportionment can be contrasted with causal apportionment, which is applicable when multiple parties cause a divisible harm. Therefore, if there is an evidentiary basis for causal apportionment, different rules may be applied by the court.

28. Cary, *supra* note 17, at 278.

the plaintiff's recovery should be reduced.²⁹ Traditionally, contributory negligence was treated as an all-or-nothing defense, meaning a plaintiff could not recover from the defendant if the plaintiff was responsible for any degree of the harm.³⁰ This rule often led to particularly harsh results, especially when the injured plaintiff's own negligence was relatively insignificant compared to the defendant's negligent behavior.³¹ Nevertheless, those courts that were early adopters of contributory negligence as a defense adhered to the belief that liability for a single, indivisible injury must fall on one party or the other.³²

Today, however, almost every jurisdiction has adopted a more modern approach for apportioning damages between the plaintiff and defendant, based on their proportionate shares of fault: comparative negligence.³³ This doctrine was introduced as a response to the traditional contributory negligence rule,³⁴ as courts began to shift the focus in negligence suits toward compensating the injured plaintiff in the most just way possible.³⁵ Georgia led this slow movement by enacting a comparative negligence statute in 1855, and by 1931, Mississippi and Wisconsin had followed suit. Between 1969 and 1973, at least 20 more states had adopted a form of comparative negligence by statute or judicial decision.³⁶

Although administrative simplification arguments favor the contributory negligence rule, the argument for comparative negligence was ultimately deemed to be stronger, as 46 states now recognize some form of comparative fault.³⁷ Unlike contributory negligence, comparative fault is

29. *Id.* at 279.

30. COMPARATIVE NEGLIGENCE, *supra* note 1, § 1:1.

31. Cary, *supra* note 17, at 280.

32. *Id.* (citing *Heil v. Glanding*, 42 Pa. 493, 499 (1862)) (“The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is . . . that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault.”).

33. See generally COMPARATIVE NEGLIGENCE, *supra* note 1, § 2:4–2:6. The term *comparative fault* typically encompasses both the concept of comparative negligence and comparative fault, which are often used interchangeably. Brian P. Dunigan & Jerry J. Phillips, *Comparative Fault in Tennessee: Where Are We Going, and Why Are We in this Handbasket?*, 67 TENN. L. REV. 765, n.6 (2000). Both terms describe methods of allocating damages based on each party's fault for the injury; however, comparative negligence specifically refers to the measure of the plaintiff's negligence used for the purpose of reducing the plaintiff's recovery from the defendant, while comparative fault specifically refers to the determination of how to apportion damages among multiple defendants according to the percentage of fault attributed to each. *Id.*

34. COMPARATIVE NEGLIGENCE, *supra* note 1, § 1:1.

35. Cary, *supra* note 17, at 281.

36. EPSTEIN, *supra* note 14, at 211.

37. *Id.* Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still recognize the traditional contributory negligence rule. *Contributory Negligence/Comparative Fault Laws in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. 1–2 (Dec. 15, 2015), <https://www.mwl-law.com/wp-content/uploads/2013/03/contributory-negligence-comparative-fault-laws-in-all-50-states.pdf> [perma.cc/F52M-ZKPL].

based on the rationale that each party should bear the financial responsibility for their own failure to exercise ordinary care under the circumstances.³⁸ It also rests on the assumption that the old “all-or-nothing” rule is unjust because it requires a negligent plaintiff to bear the full burden of loss, even if the defendant’s conduct was far more blameworthy.³⁹ In contrast, the comparative fault rule gives neither the negligent plaintiff nor the lucky defendant a free pass for failing to exercise due care.⁴⁰

As the doctrine of comparative fault developed, two distinct approaches to allocating liability emerged: pure comparative fault and modified comparative fault.⁴¹ In a jurisdiction following pure comparative fault, which is the simplest form of comparative fault, damages are reduced strictly in proportion to the plaintiff’s own responsibility for his or her own injury.⁴² Thus, the jury determines the percentage of fault for both the plaintiff and the defendant, and the plaintiff’s recovery is reduced in proportion to the plaintiff’s own fault.⁴³ This is true regardless of the plaintiff’s degree of fault.⁴⁴ A plaintiff who is primarily at fault may still recover from a defendant who was less at fault.⁴⁵ Twelve states follow this system.⁴⁶

In order to avoid situations in which a severely negligent plaintiff would be permitted to recover against a slightly negligent defendant, most states have adopted a modified comparative fault approach.⁴⁷ Under a modified approach, damages are similarly reduced in proportion to the plaintiff’s own percentage of fault, but recovery is not permitted if the plaintiff’s negligence exceeds a certain percentage.⁴⁸ Therefore, the plaintiff is required to prove that his degree of fault is below the fixed threshold before he can recover.⁴⁹ In 11 states, the jury must determine the plaintiff

38. Jay M. Allen, *Damage Apportionment In Accounting Malpractice Actions: The Role Of Comparative Fault*, 1990 BYU L. REV. 949, 971 (1990).

39. EPSTEIN, *supra* note 14, at 211.

40. *Id.*

41. *See generally* David C. Sobelsohn, “Pure” vs. “Modified” Comparative Fault: *Notes on the Debate*, 34 EMORY L.J. 65 (1985).

42. Cary, *supra* note 17, at 282.

43. *Id.*

44. *Id.*

45. *See id.*

46. *Contributory Negligence*, *supra* note 37, at 2–3 (Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington).

47. Cary, *supra* note 17, at 282. Courts have given other reasons for adopting modified comparative fault. For example, the Supreme Court of Appeals of West Virginia noted that the pure comparative negligence rule makes potential plaintiffs out of all parties whose fault contributed to an accident and that the rule favors the party who incurred the most damages, even if that party is apportioned a greater percentage of fault. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 887 (W. Va. 1979).

48. *Contributory Negligence*, *supra* note 37, at 3.

49. *Id.* In addition, South Dakota recognizes a form of modified comparative fault in which the fault of the plaintiff and defendant is only compared if the plaintiff’s negligence is

was less than 50% at fault before recovery is permitted.⁵⁰ In 22 states, the bar is set at 51%, so the plaintiff cannot recover if he is apportioned 51% or more of the fault.⁵¹ In all 33 states following the modified contributory fault rule, if the plaintiff's percentage of fault falls below the relevant percentage, he is not barred from recovering.⁵² Therefore, this modified rule can be seen as a compromise between traditional contributory negligence and pure comparative fault, in that it only imposes a complete bar to recovery if the plaintiff is equally or more at fault than the defendant.⁵³ The goal of compensating the plaintiff is balanced with the competing goal of deterring negligence on the part of the plaintiff.⁵⁴

Most lawmakers and scholars agree that comparative fault has positively changed tort law and recognize that comparative fault alleviates the harsh results of the traditional contributory negligence rule.⁵⁵ It should also be noted that courts and legislatures did not only consider fairness to plaintiffs when moving toward a system of comparative fault, but also fairness to defendants or any other wrongdoers. The specific reasons for the shift vary considerably from jurisdiction to jurisdiction, but the underlying philosophy is this: "each wrongdoer should pay for his or her own fault, no more and no less."⁵⁶

2. Joint and Several Liability

With the widespread acceptance of comparative fault principles came challenges to the common law doctrine of joint and several liability.⁵⁷ Joint and several liability comes into play when multiple defendants are

"slight" and the defendant's is "gross." *Id.* at 6. If the factfinder determines that the plaintiff's negligence is more than "slight," the plaintiff is barred from recovery. *Id.*

50. *Id.* at 3 (Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia).

51. *Id.* at 4 (Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming).

52. *Id.* at 3.

53. Cary, *supra* note 17, at 282.

54. *Id.*

55. COMPARATIVE NEGLIGENCE, *supra* note 1, § 1:2.

56. *Id.* For example, in moving to a modified comparative fault system, the Supreme Court of Tennessee stated:

Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's . . . Further, because a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence, situations where a defendant has paid more than his "share" of a judgment will no longer arise.

McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992).

57. EPSTEIN, *supra* note 14, at 223.

responsible for a single, indivisible harm to a plaintiff, and the loss must be apportioned between them.⁵⁸ Traditionally the legal response to joint tortfeasors was to hold each responsible for the entire indivisible harm.⁵⁹ Under this system of joint and several liability, a plaintiff may recover all of the damages for an injury from any individual defendant who is partially at fault, and the joint tortfeasors can typically be sued together or separately.⁶⁰ Therefore the risk of insolvency of one or more defendants and the burden of identifying additional tortfeasors is placed on the defendants, rather than on the plaintiff.⁶¹ This traditional rule of joint and several liability, often called pure joint and several liability, is still followed in eight jurisdictions.⁶²

However, since the advent of comparative fault and the move away from the all-or-nothing rule of contributory negligence, the pure system of joint and several liability has also been modified or thrown out altogether in the majority of jurisdictions, giving way to several liability.⁶³ Several liability describes a system of apportionment wherein each defendant is liable to the plaintiff only for the share of damages attributable to that defendant's negligence, placing the burden of identifying additional tortfeasors and the risk of insolvency on the plaintiff.⁶⁴ This is known as pure several liability, and is the practice in 14 states.⁶⁵ Rather than fully shift that burden to the plaintiff, 28 states have adopted a modified version of the traditional joint and several liability rule.⁶⁶ These jurisdictions that recognize a modified rule typically only allow a defendant whose fault is above a certain threshold to be responsible for the entire loss.⁶⁷

States that follow the modern trend of moving away from joint and several liability rely on the principle that it is possible and desirable to apportion loss among multiple parties and propose that the principles of comparative fault used to allocate fault between a plaintiff and defendant can also work for allocating fault between two or more defendants.⁶⁸ By

58. *Id.*

59. *Id.*

60. *Joint and Several Liability and Contribution Laws in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. 2 (Jan. 26, 2016), <https://www.mwl-law.com/wp-content/uploads/2013/03/contribution-actions-in-all-50-states.pdf> [perma.cc/CKG7-E7RJ].

61. *Id.*

62. *Id.* (Alabama, Delaware, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, and Virginia).

63. EPSTEIN, *supra* note 14, at 225.

64. *Joint and Several*, *supra* note 60, at 2.

65. *Id.* (Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Tennessee, Utah, Vermont, and Wyoming).

66. *Id.* (California, Colorado, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin).

67. *Id.*

68. EPSTEIN, *supra* note 14, at 225.

infusing the justification for comparative fault into the context of a suit against multiple defendants, these jurisdictions recognize that each party, including all plaintiffs and defendants, should only be held responsible for the consequences of his or her own actions.⁶⁹

3. Contribution

Recognition of comparative fault principles also led to dissatisfaction with the traditional common law rule of disallowing contribution.⁷⁰ Contribution is a claim brought by one joint tortfeasor against another to recover all or part of the damages the first owes to an injured plaintiff.⁷¹ The rule denying contribution among tortfeasors originally flowed from the idea that the law will not lend its hand in aid of a wrongdoer, so one defendant that had partially or fully compensated a plaintiff was not permitted to use the courts to obtain contribution from another defendant.⁷² Therefore, at common law, a defendant could not only potentially be held responsible for the full amount of damages under the doctrine of joint and several liability, but could also be precluded from filing a separate action to recover from a joint tortfeasor.⁷³

Although the common law no-contribution rule was widely accepted and applied for many years, it was also criticized, especially in light of the growing acceptance of comparative fault principles in the late 1960s and early 1970s.⁷⁴ A rule that allowed a plaintiff to attach full liability to a defendant with deep pockets even if his percentage of fault for the harm was minimal eventually became too difficult to justify.⁷⁵ Today most states have created, either by statute or judicial decision, a right to bring a contribution suit when two or more tortfeasors are jointly or severally liable for the same injury.⁷⁶ The right exists when a tortfeasor has paid in excess of his pro rata share of the common liability.⁷⁷ The tortfeasor has the option to claim contribution in the original lawsuit by filing a cross-claim against a co-defendant or impleading a new party.⁷⁸ There is also the option of seeking contribution in a separate lawsuit.⁷⁹

69. *Id.*

70. *Id.* at 231.

71. *Id.* at 230.

72. *Id.*

73. *Id.*

74. *Id.* at 231.

75. *Id.*

76. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 7 (1982).

However, the rule of no-contribution remains unchanged for intentional tortfeasors. EPSTEIN, *supra* note 14, at 231.

77. UNIFORM CONTRIBUTION, *supra* note 76.

78. *Joint and Several*, *supra* note 60, at 2.

79. *Id.*

4. Immunities

Yet another area of tort liability in which comparative fault principles created complications is that of immunity. In raising an immunity defense, a defendant asserts that he should escape liability for his conduct because of his status or relationship to the plaintiff.⁸⁰ Exemption from tort liability must be justified by compelling policy aims, and each established immunity is justified for different reasons.⁸¹ As discussed in the following section, the issue of immunity arises most frequently when employers provide employees benefits through workers' compensation and, thus, are generally immune to tort liability.⁸² Because the practical result of granting immunities is that the plaintiff is not compensated for harm suffered, the law generally favors limiting the availability of immunities.⁸³

When more than one individual causes a plaintiff's harm, but one of those individuals is immune from liability, the jury is required to compare the entire fault that is the cause of the harm, including the fault of the immune individual.⁸⁴ So not only must courts decide whether juries should apportion fault to tortfeasors not joined as parties because they cannot be located or are insolvent, but courts must also determine whether fault should be apportioned to those who have established their immunity.⁸⁵ Many courts have held that the negligence of immune parties must be considered in determining the fault percentages of other tortfeasors, but statutes in several states provide that the negligence of non-parties is not to be compared.⁸⁶ In jurisdictions recognizing principles of comparative fault, if the fault of an immune party is considered, it will reduce the amount of fault that can be assigned to the defendant and the plaintiff's recovery.⁸⁷

B. The Workers' Compensation "Bargain"

All states have some sort of workers' compensation statute, which is meant to wholly substitute the tort system whenever an employee is injured in the course of employment.⁸⁸ States began to pass workers' compensation laws in the early part of the 20th century in response to the great difficulty employees faced in recovering tort damages for workplace injuries among other things.⁸⁹ Before workers' compensation laws

80. EPSTEIN, *supra* note 14, at 611.

81. *Id.* at 612.

82. DOBBS ET AL., *supra* note 20, § 495.

83. DIAMOND ET AL., *supra* note 15, 240.

84. DOBBS ET AL., *supra* note 20, § 495.

85. *Id.*

86. *Id.*

87. *Id.*

88. JOHN P. LUDINGTON & CLARK BOARDMAN CALLAGHAN, MODERN WORKERS COMPENSATION § 102:1 (1993).

89. Klein, *supra* note 3, at 69.

intervened, employees would file suit only to be met with various defenses that they were unlikely to overcome, such as the fellow servant rule, voluntary assumption of the risk, and contributory negligence.⁹⁰ Most were not even able to secure representation.⁹¹ The early founders of workers' compensation law stressed the importance of avoiding the uncertainties and complications of litigation and substituting simple remedies.⁹²

Under modern state workers' compensation statutes, employees are able to recover even when a tort suit likely would fail because an employee's right to compensation depends solely on whether or not the employee suffered a work-related injury, so negligence and fault are essentially immaterial.⁹³ Thus, even if the employer was not remotely at fault, liability is not extinguished, and even if the injured employee is partially to blame for his own injury, his right to contribution is not affected.⁹⁴

But, of course, in exchange for this benefit there is a tradeoff. All states have exclusive remedy provisions, which serve as part of the quid pro quo by making workers' compensation the exclusive remedy for the employee's injury once the act becomes applicable.⁹⁵ Whether the act becomes applicable through compulsion or, in some states, by election, an injured employee no longer has the right to sue the employer in tort or otherwise recover compensation.⁹⁶ In addition, a majority of states also bar an injured employee from bringing a negligence action against a coworker for injuries caused during the course of employment.⁹⁷ The interests of employees and employers are supposedly put in balance by relieving the possibility of a large damage verdict against the employer.⁹⁸ However, critics argue that the limited benefits available to employees are insufficient to make the tradeoff a fair one.⁹⁹

While exclusive remedy provisions may bar an injured employee from suing an employer (and generally coworkers) in tort, these provisions do not prevent an employee from suing others for work accidents, so the employee retains the right to file a tort action against a third-party

90. *Id.*

91. *Id.*

92. LUDINGTON, *supra* note 88, § 121.09.

93. *Id.* §§ 1.01, 1.03.

94. *Id.* § 1.01.

95. *Id.* § 100.01.

96. *Id.* § 102:1.

97. LARSON'S WORKERS COMPENSATION LAW § 111.03 (2014). However, intentional torts by coworkers are typically considered an exception to the exclusive rule. *See, e.g.*, KY. REV. STAT. ANN. § 342.690 (West 2015) ("The exemption from liability given an employer by this section shall also extend to . . . all employees, officers or directors . . . provided the exemption . . . shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.").

98. LARSON'S WORKERS COMPENSATION LAW § 100.01 (2014).

99. Klein, *supra* note 3, at 70; LARSON'S WORKERS COMPENSATION LAW § 100.02 (2014) ("Exclusiveness clauses have consistently been held to be constitutional.").

defendant.¹⁰⁰ However, under the typical workers' compensation statute, the employer (or the employer's insurance carrier) is then permitted to seek subrogation against the award to recover the compensation paid to the employee. The proceeds from the tort suit are used to reimburse the employer and any balance goes to the employee.¹⁰¹ Additionally, a majority of jurisdictions ban contribution by a third-party defendant against an employer, which means third-party defendants are not allowed to sue or join a concurrently negligent employer as a joint tortfeasor when the employer's negligence was also to blame for the injury.¹⁰² The theory behind this rule is that the employer is not jointly liable to the employee in tort because of the exclusive remedy provision and therefore is not jointly liable.¹⁰³

II. EXISTING APPROACHES

When an injured employee receives workers' compensation benefits and decides to sue a third party who also contributed to the employee's injury, litigation often ends with a troublesome result: the blameworthy employer is able to profit by reimbursement of its compensation expenditures. Although there is general agreement among scholars that the adoption of comparative fault principles has been a positive development, states have struggled with determining how those principles should affect other areas of the law, such as here. Though there is a clear majority view regarding how to treat such situations, a number of alternative approaches have emerged, including the "California–North Carolina approach," the "New York approach," and the "Minnesota approach."

A. The Majority Approach: No Fault Allocation and No Contribution

In most jurisdictions, a third-party defendant cannot raise a defense that the employer's negligence contributed to an employee's injury, and the employer may not be assigned a percentage of comparative responsibility.¹⁰⁴ The rationale behind this majority approach is that fault may be attributed only to those persons against whom the plaintiff has a cause of action in tort, and the plaintiff does not have a cause of action against an immune employer or co-employee.¹⁰⁵ Rejecting an argument that fault should be assigned to an immune employer, one court noted:

100. Klein, *supra* note 3, at 66.

101. LARSON'S WORKERS COMPENSATION LAW § 1.01 (2014).

102. *Id.* § 121.02.

103. *Id.*

104. *Id.* § 120.02[3]; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C20(a)(ii) & cmt. b (AM. LAW INST. 2000).

105. JOHN A. DAY ET AL., TENN. PRAC. TENNESSEE LAW OF COMPARATIVE FAULT § 5:11 (2d ed. 2002). However, it should be noted that defendants in such third-party actions still

[P]laintiffs would be subject to a *double reduction* of their recovery against third parties who contributed to their on-the-job injuries. The first reduction would occur when the jury apportioned fault to the employer. The second would occur when the workers' compensation insurance carrier exercised its right to subrogation against the plaintiff's recovery from the third party.¹⁰⁶

The majority rule is also justified by the theory that the cause of action is the employee's, and therefore his full recovery should not be affected by his employer's negligence.¹⁰⁷

Additionally, any recovery-over by the third-party defendant against the employer by either contribution or implied indemnity is barred, and the employer retains its subrogation lien for the full amount it has paid to the employee against any award or settlement the employee obtains against the third-party defendant, without regard to the employer's fault.¹⁰⁸ In these jurisdictions, the continued right of subrogation even when the employer is partially at fault for the plaintiff's injuries is justified by the generally accepted rule that the plaintiff should not be permitted double recovery.¹⁰⁹ In these states the injured employee comes out "fully compensated," in that the employee ends up with roughly the full amount of damages received from the third-party defendant and no more.¹¹⁰ Another justification is that because the employer is not a "tortfeasor," there is no common liability with the third-party defendant to allow for a claim for contribution.¹¹¹ For these reasons, commentators have deemed the majority approach a "pro-employer approach" and an "all-or-nothing rule."¹¹²

Returning to the Eddy Employee example above, under the majority approach, if at trial the jury finds Driver to be at fault for Eddy Employee's injuries, no matter what the percentage, then Driver will have to bear the liability both for his own fault and that of Carl Coworker. Assuming Eddy prevails at establishing some fault and recovers \$200,000, Employer Co. will be permitted to recover the \$20,000 that it paid

have a clear right to introduce evidence of the employer or coworker's negligent conduct to argue that it was that conduct alone that was the cause-in-fact of the employee's injuries. These third-party defendants can avoid liability by arguing that an employer's conduct was so egregious that it essentially became a "superseding cause."

106. *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143, 147 (Tenn. 2007).

107. Arthur Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 493 (1982).

108. LARSON'S WORKERS COMPENSATION LAW § 121.09[2][b] (2014).

109. *See id.*

110. *Id.* § 121.09[2][e].

111. Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 TENN. L. REV. 881, 889 (1997).

112. LARSON'S WORKERS COMPENSATION LAW § 121.09[2][b] (2014); DAY ET AL., *supra* note 105, § 5:11.

previously in workers' compensation benefits even though its negligent employee Carl was more at fault than Driver.

B. The California–North Carolina Approach: Reduction of Tort Recovery

In response to the result of the majority approach, several jurisdictions have adopted a different approach, either by judicial decision or by statutory reform, based primarily on the general idea that no one should profit from his own wrong.¹¹³ These jurisdictions allow a third-party defendant to offer evidence of the concurrent negligence of an employer (or coworker) as a *pro tanto* defense, resulting in a direct reduction of the injured employee's damage award if the defendant is successful.¹¹⁴ This general approach varies slightly from jurisdiction to jurisdiction.¹¹⁵ In North Carolina, California, Idaho, and Nevada, for example, when the defendant proves that the employer's negligence was a contributing factor, the damage award is reduced by the amount of workers' compensation benefits paid to the employee.¹¹⁶ Conversely, in Arizona, Utah, Kansas, and Louisiana, the recovery is reduced to the extent of the employer's proportional fault.¹¹⁷ In most of these jurisdictions, the concurrently negligent employer can still bring a subrogation claim for the amount by which the compensation paid exceeded the employer's proportional share of fault for the injury.¹¹⁸ However, it appears that at least one jurisdiction eliminates the employers subrogation entirely if the employer is found to be concurrently negligent.¹¹⁹

113. Larson, *supra* note 107, at 493. Eight states follow this general approach (Arizona, California, North Carolina, Idaho, Nevada, Kansas, Louisiana, and Utah). Contributory Negligence, *supra* note 37, at 2–4.

114. LARSON'S WORKERS COMPENSATION LAW § 120.02[3] (2014).

115. *Id.*

116. *Id.* See *Essick v. City of Lexington*, 65 S.E.2d 220, 225 (1951) (“[T]he third party tort-feasor . . . is entitled to plead contributory negligence on the part of the employer as a bar to reimbursement pro tanto for the award paid.”); *Witt v. Jackson*, 366 P.2d 641, 649 (1961) (“[T]he third party tortfeasor should be able to invoke the concurrent negligence of the employer to defeat its right of reimbursement . . . to the extent that compensation benefits have been paid to the employee.”); *Liberty Mut. Ins. Co. v. Adams*, 417 P.2d 417, 422–23 (1966) (indicating that Idaho intends to follow California's *Witt* rule); *Santisteven v. Dow Chem. Co.*, 362 F. Supp. 646, 651 (D. Nev. 1973) (cited with approval by the Supreme Court of Nevada in *Kellen v. Second Judicial Dist. Court*, 642 P.2d 600, 601 n.1 (1982)).

117. LARSON'S WORKERS COMPENSATION LAW § 120.02 (2014). See *Dietz v. General Elec. Co.*, 821 P.2d 166, 172 (1991) (“When an employer negligently contributes to an employee's injury, the joint tortfeasors may require the employer's negligence to be considered for the assessment of fault.”); UTAH CODE ANN. § 78B-5-818(4) (LexisNexis 2012); KAN. STAT. ANN. § 44–504(d) (2014); LA. CIV. CODE ANN. art. 2323 (2010).

118. LARSON'S WORKERS COMPENSATION LAW § 120.02 (2014).

119. See *Santisteven*, 362 F. Supp. at 651 (“If the jury determines that concurring negligence or actionable conduct of [the third party] and [the employer] caused plaintiff's injuries, the Industrial Commission's right of subrogation will be eliminated and the amount of plaintiff's recovery will be reduced by the amount of compensation paid or to be paid.”).

Using the Eddy Employee example, if the accident occurred in North Carolina, California, Idaho, or Nevada, Eddy's \$200,000 verdict would be reduced by the \$20,000 that Employer Co. paid him in workers' compensation benefits.¹²⁰ The jury would be permitted to allocate fault to Driver and to Carl; however, Driver would be responsible for the remaining \$180,000 regardless of the result. The percentages determined by the jury would only be used to calculate the amount for which Employer Co. is entitled to reimbursement. Assuming that Carl was more at fault than Driver, Employer Co. would not be able to receive reimbursement because the compensation paid would not exceed Carl's proportional share of fault.

Under the modified version of the approach followed in Arizona, Utah, Kansas, and Louisiana, the jury would be permitted to allocate fault to Driver and to Carl. Suppose the jury determined that Driver was 25% at fault, while Carl was determined to be 75% at fault. In Eddy's suit against Driver, Driver would be responsible for \$50,000 of the total damage award of \$200,000. Employer Co. or its insurance carrier would not be permitted to recover in subrogation because the amount of workers' compensation benefits paid, \$20,000, did not exceed Carl's proportional share of fault. However, to change the facts, suppose the jury first determined that Eddy had suffered \$100,000 in damages, and Employer Co. had already paid Eddy \$20,000 in workers' compensation benefits. Also assume the jury determined that Carl was only 10% at fault, while Driver was 90% at fault. In this situation, Driver would be responsible for \$90,000 of the damage award, and Employer Co. would be able to seek reimbursement for \$10,000, the amount that exceeded Carl's proportional share of fault.

C. The New York Approach: Contribution Proportionate to Fault

New York has addressed the dilemma by allowing third-party defendants to seek contribution from negligent employers based on the employer's proportion of fault, while retaining the employer's right of subrogation.¹²¹ The New York courts fashioned a rule that goes the furthest in protecting the interests of third-party defendants, providing unlimited recovery-over.¹²² In New York, the employee recovers workers'

121. See Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 RUTGERS L. REV. 657 (1998). Today, only New York follows this approach, and even there, the rule's application has been limited. Illinois previously allowed proportional contribution. See *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437, 442-43 (Ill. 1977).

122. *Larson*, *supra* note 107, at 536; *Dole v. Dow Chemical Co.* 282 N.E.2d 288, 295 (N.Y. 1972) (holding that the third-party defendant in a suit by the employee's widow could implead the partially responsible employer and an amount proportionate to the employer's share of fault); see also LARSON'S WORKERS COMPENSATION LAW § 121.03[8] (2014) (explaining that New York's rule was accomplished by creating an implied contract of indemnity in favor of any tortfeasor by any other tortfeasor, rather than a traditional contribution right).

compensation benefits from the employer, full tort damages from the third-party defendant, and reimburses the employer for compensation benefits received out of the damages award.¹²³ The defendant then receives contribution from the employer proportionate to the employer's fault.¹²⁴

Therefore, the liability of the employer and the third-party defendant is ultimately proportioned to their relative fault, and the employee is left fully compensated.¹²⁵ Generally this approach led to employers paying only slightly more to an injured employee than it would have under the typical workers' compensation award,¹²⁶ but one can imagine circumstances under which the employer would pay substantially more than its typical limited liability, particularly when the damages awarded are high and the employer is allocated a large percentage of fault. This led the New York legislature to limit the rule's application to allow employer liability for contribution or indemnity only when the employee has suffered a "grave injury."¹²⁷

Changing the facts in the Eddy Employee example illustrates the typical outcome under the New York approach. Suppose that Eddy suffered a "grave injury," such as the loss of a limb,¹²⁸ that the total damage award was \$20,000, and that Eddy received \$9,000 in benefits from Employer Co. If the jury assigns 60% of the fault to Carl Coworker and 40% of the fault to Driver, Eddy would recover the full \$20,000 award from Driver, but Driver is entitled to seek contribution from Employer Co. for \$12,000, which reflects the percentage of Carl's fault. Additionally, Employer Co. retains its subrogation right, and is entitled to \$9,000 of Eddy's tort award, preventing Eddy's double recovery. Therefore, Eddy is left fully compensated, receiving the full tort award of \$20,000. Driver eventually pays only \$8,000, calculated in relation to his fault, and Employer Co. eventually pays \$12,000, in relation to its fault (via Carl Coworker). Although Employer Co. is saddled with a payment higher than it would have typically been responsible for under the exclusive remedy rule, the difference between \$9,000 and \$12,000 is not extreme.

123. Eaton, *supra* note 111, at 890.

124. *Id.*

125. *Id.*

126. LARSON'S WORKERS COMPENSATION LAW § 121.03[8] (2014).

127. N.Y. WORKERS' COMP. LAW § 11 (McKinney 2013) (defining *grave injury* to include death, loss of certain extremities, blindness, deafness, certain facial injuries, certain brain injuries, and paraplegia or quadriplegia); McCluskey, *supra* note 121, at 905; see LARSON'S WORKERS COMPENSATION LAW § 121.03[8] (2014) ("One interesting bit of irony—the third-party defendant is left with an uncomfortable need to double-speak. It is generally in the best interests of any defendant to argue that the employee's injuries are not severe, so as to minimize the resulting verdict, but on the other hand, the third-party defendant may only look to the New York employer for contribution/indemnity if the employee's injuries are characterized as 'grave.'").

128. For the loss of an extremity to be considered *grave*, it must be "permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, [or] loss of multiple toes." N.Y. WORKERS' COMP. LAW § 11 (McKinney 2013).

Yet, consider how the example case would play out under the original facts. Eddy suffered a “grave injury,” and he received a \$200,000 verdict and \$20,000 in benefits. The jury determined that Driver was 25% at fault and Carl was 75% at fault. Again, Eddy is left fully compensated, receiving the full \$200,000 tort award. However, after contribution and subrogation rights are exercised, Driver will have paid \$50,000, and Employer Co. will have paid \$150,000. Consequently, the portion of the total \$200,000 award paid by Employer Co. greatly exceeds the limited benefits that it would ordinarily expect to pay to an injured employee.

D. The Minnesota Approach: Limited Contribution

Minnesota’s Supreme Court, recognizing the problems with New York’s approach, sought to balance the policies in favor of comparative fault and those in favor of workers’ compensation exclusive remedy provisions.¹²⁹ The Minnesota approach, like the New York rule, allows the injured employee to receive his full tort award from the third-party defendant but also allows contribution by the employer in proportion to its fault.¹³⁰ But Minnesota places a ceiling on the employer’s liability in the amount of its workers’ compensation obligation.¹³¹ The employer also retains its subrogation right.¹³² In adopting this approach, the Supreme Court of Minnesota relied on the concept that contribution is an equitable doctrine.¹³³ It conceded the lack of common liability, which is ordinarily required to support contribution, between a third-party defendant and employer, but the court concluded that the concept should not prevent an equitable result.¹³⁴ The approach is also consistent with the workers’ compensation policy of limited liability for employers, in that the employer

129. LARSON’S WORKERS COMPENSATION LAW § 121.03[5] (2014); *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 *passim* (1977). The Minnesota rule was adopted from a decision of the Pennsylvania Supreme Court. *Lambertson*, 257 N.W.2d at 689; *Maio v. Fahs*, 14 A.2d 105 (Pa. 1940), *superseded by statute*, Act of Dec. 5, 1974, No. 263, sec. 6, § 303(b), 1974 Pa. Laws 782, 787, *as recognized in* *Tsarnas v. Jones & Laughlin Steel Corp.*, 412 A.2d 1094, 1096 (1980).

130. LARSON’S WORKERS COMPENSATION LAW § 121.03[5] (2014).

131. Klein, *supra* note 3, at 75. Kentucky and Illinois also appear to follow this general approach. *See* KY. REV. STAT. ANN. § 342.690 (West 2015) (“The liability of an employer to another person who may be liable for or who has paid damages on account of [the work-related injury or death of an employee] caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable.”); *Kotecki v. Cyclops Welding Corp.*, 585 N.E.2d 1023, 1027 (Ill. 1991) (“We find that the Minnesota rule provides the fairest and most equitable balance between the competing interests of the employer and the third-party defendant.”).

132. Klein, *supra* note 3, at 75.

133. LARSON’S WORKERS COMPENSATION LAW § 121.03[5] (2014); *Lambertson*, 257 N.W.2d at 689.

134. LARSON’S WORKERS COMPENSATION LAW § 121.03[5] (2014). *Lambertson*, 257 N.W.2d at 689.

pays out no more than it expected to under the compensation act.¹³⁵ For these reasons, this approach is often considered a compromise between the policies underlying the workers' compensation and tort systems.¹³⁶

Using the Minnesota rule, the litigation would play out much as it would under the New York approach. Eddy will be able to recover the full \$200,000 from Driver, and Driver is permitted to seek contribution from Employer Co. But because Employer Co. cannot be forced to contribute beyond its workers' compensation liability, Driver will only be able to recover \$20,000 from Employer Co. Employer Co. will then exercise its subrogation right against Eddy's tort award. Therefore, Driver, who was 25% at fault, eventually pays \$180,000 and Employer Co., responsible for Carl's 75% of fault, pays \$20,000, amounts that are undoubtedly not in proportion to their relative fault.

Nevertheless, under a different set of facts, the result under the Minnesota approach might not seem as severe. Assuming Eddy received a \$20,000 verdict and \$9,000 in benefits and that Carl and Driver were each 50% at fault, Driver would be permitted to recover \$9,000 from Employer Co. Although Driver would be left paying \$11,000, which is still in excess of his proportion of fault, the result is much closer to being proportionate under these facts.

III. VARIOUS SUGGESTED SOLUTIONS TO THE DELIMMA

In addition to legislatures and courts, commentators and scholars have weighed in on the discussion to propose solutions to the problem of meshing workers' compensation and tort law. Although none of these approaches have been adopted in any jurisdiction, these proposals have gained differing levels of support in the legal field. The most prevalent of these approaches include (1) abolishment of suits against third parties, (2) a separation of workers' compensation and tort systems, (3) the "Murray Credit" rule, (4) a proposal by Professor Clifford Davis, (5) a proposal by Professor Arthur Larson, and (6) a proposal by Professor Andrew R. Klein.

A. Abolish Third Party Suits

Often considered the most extreme approach, some have advocated for the complete elimination of third-party lawsuits.¹³⁷ Such scholars have

135. LARSON'S WORKERS COMPENSATION LAW § 121.03[5] (2014).

136. Eaton, *supra* note 111, at 892.

137. Klein, *supra* note 3, at 78; See, e.g., Merton C. Bernstein, *Third Party Claims in Workers' Compensation: A Proposal to Do More with Less*, 1977 WASH. U. L. Q. 543, 556 (1977); Jeffrey O'Connell, *Bargaining for Waivers of Third-Party Tort Claims: An Answer to Product Liability Woes for Employers and Their Employees and Suppliers*, 1976 U. ILL. L.F. 435, 441 (1976). The abolition of third-party actions was also the program of the "Special Committee on Workplace Liability Reform," formed in 1977 and headed by former Senator Taft. LARSON'S WORKERS COMPENSATION LAW § 121.09[2][e] (2014).

argued, in various forms, that a system for improving compensation benefits received by the employee in the event of a workplace injury should be put in place, eliminating the need for third-party suits.¹³⁸ Some proponents support the idea of complete abolition of such suits, but under one theory, the employer, not the employee, would be given the chance to negotiate or litigate for reimbursement from third parties who might otherwise be liable in tort.¹³⁹

Considering the Eddy Employee example, the obvious result if third-party suits were abolished would be that Eddy's only recovery would come from workers' compensation benefits. Although the difference might be less pronounced under a different set of facts, the difference in Eddy's case, a \$200,000 tort award versus \$20,000 in benefits, would be particularly drastic. This is the result assuming that the workers' compensation system is not improved.

B. Completely Separate Workers' Compensation and Tort Systems

Some academics have supported the idea of a complete separation of workers' compensation and tort systems.¹⁴⁰ Such an approach would limit the third-party defendant's liability to his proportional share of fault and eliminate the employer's right of subrogation.¹⁴¹ This proposal would serve the defendant's interest in proportional liability and the employer's interest in limited liability, but, in contrast to all of the existing approaches to the dilemma, it is likely that the injured employee would not be fully compensated.¹⁴²

Under this complete separation approach, Eddy Employee would not receive full compensation. Assume Eddy received a \$200,000 verdict and \$20,000 in benefits and that the jury found Driver to be 25% at fault and Carl to be 75% at fault. Driver's damages would be reduced to \$50,000 in proportion to his relative fault. Therefore, taking into account the workers' compensation benefits paid by Employer Co., Eddy would receive \$70,000 of the \$200,000 that it would take to place him back in his rightful position according to the jury.

Nevertheless, Eddy could be fully compensated under this approach if a different set of facts is considered. Assume that Eddy received a \$20,000 verdict and \$9,000 in benefits, but this time, Carl was 40% at fault and Driver was 60% at fault. Driver's damages would then be reduced to

138. LARSON'S WORKERS COMPENSATION LAW § 121.09[2][e] (2014).

139. Jeffrey O'Connell, *Supplementing Workers' Compensation Benefits in Return for an Assignment of Third-Party Tort Claims—Without an Enabling Statute*, 56 TEX. L. REV. 537, 542 (1978).

140. Eaton, *supra* note 111, at 894; Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 845 (1989).

141. Eaton, *supra* note 111, at 894.

142. *Id.*

\$12,000, proportionate to his fault. Consequently, Eddy would actually be over-compensated, receiving \$21,000 from the combination of the tort award and the workers' compensation benefits.

C. The "Murray Credit" Rule

Some commentators have recognized a potential solution to the problem using the holding of the Court of Appeals for the District of Columbia in the case of *Murray v. United States*,¹⁴³ which involved a government employee who was injured on the job.¹⁴⁴ In the employee's suit against a concurrently negligent third-party defendant, the court acknowledged that because the government was the employer, it had immunity; however, rather than placing full responsibility for the tort damages on the defendant, the court viewed the government as a party that had settled its dispute with the injured employee.¹⁴⁵ In doing such, it triggered the rule that

"where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had 'bought his peace,' is nonetheless protected by having his tort judgment *reduced by one-half*, on the theory that one-half of the claim was sold by the victim when he executed the settlement The Murray rule, therefore, allows the third-party a per capita credit based on the employer's contribution to the injury."¹⁴⁶

Thus, if this rule was implemented, third-party recovery would simply be reduced by half if the employer was found to be negligent, and the employer would still retain its subrogation right.¹⁴⁷

Returning to the example case, under the "Murray Credit" rule, allocation of fault is not necessary. If Carl Coworker is found to be partially to blame, the damage award would be cut in half, and Driver would be responsible for \$100,000 of the \$200,000 in damages. Moreover, Employer Co. is entitled to exercise its subrogation right and recover the \$20,000 paid in benefits. This leaves Eddy with a total recovery of compensation plus damages of only \$80,000, even though at trial Eddy presumably established actual damages of \$200,000.

143. Klein, *supra* note 3, at 76.

144. *Murray v. United States*, 405 F.2d 1361, 1363 (D.C. Cir. 1968).

145. *Id.* at 1364–65.

146. *Id.* at 1365.

147. LARSON'S WORKERS COMPENSATION LAW § 121.09[2][e] (2014).

D. Professor Clifford Davis's Proposal

Professor Clifford Davis proposed a unique solution to the dilemma as early as 1976.¹⁴⁸ He asserted that in a suit between an employee and a third-party defendant, the percentage of fault of the employer and defendant should first be calculated.¹⁴⁹ This percentage would then be applied to the damage award, so the third-party defendant would be liable for the damage verdict multiplied by the defendant's percentage of fault.¹⁵⁰ When the employer exercises its subrogation right, the employer's recovery from the plaintiff would be reduced according to its percentage of fault.¹⁵¹ An employer found to be 10% at fault for an employee's injury, therefore, would have its subrogation recovery reduced by 10%.¹⁵² This approach increases the use of comparative fault principles in assessing employer liability.¹⁵³

Recall that in the Eddy Employee example the jury found Driver to be 25% at fault and Carl Coworker to be 75% at fault. Under Professor Davis's approach, Eddy would receive \$50,000, or 25% of the \$200,000 verdict, from Driver. Employer Co. would retain its subrogation right, but the \$20,000 it paid in workers' compensation benefits would be reduced by 75%, Carl's percentage of fault, to \$5,000. Thus, Employer Co. would recover \$5,000 from Eddy, and Eddy would be left with \$45,000 of the \$200,000 verdict.

E. Professor Arthur Larson's Proposal

In 1982, Professor Arthur Larson first suggested an approach that he described as an adaptation of the North Carolina-California approach, which he considered to be too complex.¹⁵⁴ He sought to create an approach that would "achieve maximum simplicity without, perhaps, too shocking a departure from equity."¹⁵⁵ Under Professor Larson's approach, the employee's recovery from the third-party defendant would be reduced by the amount of workers' compensation benefits received.¹⁵⁶ This reduction would occur in all cases, not just in those involving employer negligence.¹⁵⁷ Next, subrogation by the employer would be abolished in all cases because

148. Clifford Davis, *Third-Party Tortfeasors' Rights Where Compensation-Covered Employers Are Negligent—Where Do Dole and Sunspan Lead?*, 4 HOFSTRA L. REV. 571 (1976).

149. LARSON'S WORKERS COMPENSATION LAW § 121.09[2][e] (2014).

150. *Id.*

151. *Id.*

152. *Id.*

153. Klein, *supra* note 3, at 78.

154. Larson, *supra* note 107, at 540.

155. *Id.*

156. *Id.*

157. *Id.*

the employee would not be fully compensated by the third-party defendant.¹⁵⁸ All recovery-over by the third-party defendant would also be abolished.¹⁵⁹ Thus, under this approach, the employee comes out with full damages, and the defendant's liability is reduced, though not in proportion to fault.¹⁶⁰ The employer is left without opportunity for reimbursement through subrogation but is protected from contribution claims by the third-party defendant.¹⁶¹

This proposed solution achieves Professor Larson's goal of simplicity, but opinions on the fairness of the result might depend on the particular facts of the case. Consider the Eddy Employee example with the original facts. Driver's liability would be decreased by \$20,000, the amount of workers' compensation benefits paid, from \$200,000 to \$180,000. This result seems unjust from Driver's perspective, given that Carl Coworker was 75% at fault.

However, suppose Eddy received \$20,000 in benefits but only a \$50,000 verdict. Also assume that Driver was 80% at fault and Carl was only 20% at fault. Under these facts, Driver's liability would be reduced to \$30,000, which is less than his percentage of fault. Here, the result, while obviously more appealing to Driver, is that Employer Co. would pay greater than its percentage of fault through workers' compensation benefits and would be left without a subrogation right.

F. Professor Andrew R. Klein's Proposal

More recently, Professor Andrew R. Klein made a proposal, which would treat the payment of workers' compensation benefits as a settlement and limit the third-party defendant's tort liability according to comparative fault principles.¹⁶² Treating a workers' compensation payment as a settlement between the injured employee and the employer would eliminate the employer's subrogation rights.¹⁶³ According to Professor Klein, there is no reason to alter this "settlement" by giving the employer a right to subrogation or by ignoring the limited liability rule and giving the plaintiff additional payment.¹⁶⁴ He expressed great concern with importing comparative fault principles into the workers' compensation system because doing so would violate the core workers' compensation principle of limited liability.¹⁶⁵

158. *Id.*

159. *Id.*

160. Arthur Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 493 (1982).

161. *Id.*

162. Klein, *supra* note 3, at 81.

163. *Id.*

164. *Id.* at 81–82.

165. *Id.* at 79.

Applying Professor Klein's approach, Eddy Employee might come out over-compensated or under-compensated, depending on the particular facts. Under the original facts, Eddy would receive \$50,000, or 25% of the \$200,000 verdict, in damages from Driver. The \$20,000 that Eddy received in benefits from Employer Co. would be treated as a settlement. Therefore, Eddy would retain \$70,000 from the combined tort award and workers' compensation benefits, leaving him significantly undercompensated.

Yet, consider a situation in which Eddy suffered \$50,000 in damages and received \$10,000 in workers' compensation benefits. Suppose Driver was 90% at fault and Carl was only 10% at fault. Eddy would recover \$45,000 from driver and retain the \$10,000 in benefits, leaving Eddy over-compensated by \$5,000. He would retain \$55,000 total, when he only suffered \$50,000 in damages.

IV. AUTHOR'S PROPOSED SOLUTION

As stated by Professor Klein, "Ideally, a scholarly proposal should mesh tort law and workers' compensation while respecting the essential components of both systems."¹⁶⁶ The problem is that these two systems of law cannot be meshed perfectly. The tort concepts of ensuring that each party is not taxed with any liability for an injury beyond the extent of his actual fault and an injured party's right to compensation are simply inconsistent with the no-fault system created by the employee-employer bargain in workers' compensation law.¹⁶⁷ Professor Larson has long described the problem as the "most evenly balanced controversy" for which one of the three parties' interests will always be favored over the others.¹⁶⁸

A. The New Approach

While agreeing that a solution is in order, this note favors a slightly different, and perhaps unconventional, solution to the dilemma. This new approach seeks to account, in part, for the interests of all three parties, while still recognizing principles of comparative fault and respecting the employee-employer workers' compensation bargain. Under this approach, the damage verdict would initially be reduced by the amount of workers' compensation benefits received by the injured employee. The jury would be permitted to allocate fault between the third-party defendant and the employer, and rather than permitting contribution, the defendant's liability would be reduced in proportion to his percentage of fault. Any portion of the total damage verdict that remained unaccounted for would then be divided equally between the plaintiff and the third-party defendant.

166. *Id.*

167. *Id.* at 70.

168. *See* Larson, *supra* note 107, at 484.

Additionally, the employer's subrogation right would be eliminated upon a finding that the employer (or a coworker) was partially at fault.

Depending on the particular facts of the case, the burden of inequity would fall on a different party. Returning to the Eddy Employee example, under this new approach, the \$200,000 damage verdict would be reduced by the \$20,000 in workers' compensation benefits paid by Employer Co., leaving it at \$180,000. Driver's liability would initially be reduced to \$50,000 because Driver was found to be 25% at fault. To make Eddy whole, the \$130,000 difference between Driver's liability and workers' compensation benefits would then be split between Driver and Eddy. In effect, this would increase Driver's liability to \$115,000 (\$50,000 plus half of the \$130,000 difference). In this scenario, Eddy does not come out fully compensated and Driver pays in excess of his relative percentage of fault.

Consider, however, a different set of facts. Suppose the total damage award was \$20,000, and Eddy received \$9,000 in benefits from Employer Co. Assume the jury determines that Carl Coworker was 40% at fault and Driver was 60% at fault. After the damage verdict is reduced by the compensation benefits, it is left at \$11,000. Ordinarily, Driver's liability would be reduced to \$12,000 in proportion to his fault; however, Driver would only be liable for \$11,000 under these facts, the portion of the verdict remaining. Although Employer Co. paid \$9,000 in benefits, which is greater than its relative percentage of fault, it is left without a right to recover the amount it paid in excess through subrogation. Therefore, under this scenario, Employer Co. bears the burden of inequity.

B. Comparison to Existing Approaches and Other Suggested Solutions

The new approach seeks to improve upon the various issues created by the existing approaches. First, consider the majority approach, which scholars, judges, lawyers, and other commentators have heavily criticized for many years.¹⁶⁹ Under the majority approach, the third-party defendant, the only party that was not a part of the statutory workers' compensation arrangement, bears the burden of inequity created by the workers' compensation bargain.¹⁷⁰ Additionally, this approach "potentially leaves the third-party defendant bearing more than its actual share of the loss in a state that is supposed to apportion liability in accordance with fault."¹⁷¹ Another noteworthy problem is that the majority approach can be confusing to juries, particularly when the third-party defendant offers convincing evidence of the employer's fault at trial in attempt to establish that the employer was the cause of the employee's injury, as the defendant is permitted to do. If it is clear that both the employer and the third-party defendant are each an actual cause of the injury, the jury is then instructed

169. See generally LARSON'S WORKERS COMPENSATION LAW § 121.09 (2014).

170. See Klein, *supra* note 3, at 71.

171. *Id.* at 73.

that fault can only be apportioned between the defendant and the plaintiff, potentially leading juries to attempt to manipulate a “fair” result.¹⁷²

In contrast, the new approach avoids placing the entire burden of inequity created by the workers’ compensation bargain on the third-party defendant by instead requiring the injured employee and the employer to share in the risk. Also, rather than removing the issue of the employer’s liability from the jury, the new approach allows the jury to allocate fault to the employer. This also eliminates the jury manipulation problem because the calculations would be conducted by the court after the jury allocates fault to the parties.

Next, consider the California-North Carolina approach, which several states have presumably adopted in attempt to alleviate the harsh results achieved by the majority approach. Although this approach purports to achieve a similar outcome as limited contribution but by avoiding the complicated motion process, the California-North Carolina approach has come to be known as a complex one that requires involvement of all three parties and that leaves courts struggling to decide multifaceted problems on a case-by-case basis.¹⁷³ It also leaves too much room for manipulation of the outcome by the parties through settlement.¹⁷⁴ For these reasons, several jurisdictions have deliberately declined to follow this approach.¹⁷⁵

Conversely, by eliminating subrogation claims by the employer when it or an employee is found to be partially at fault, the new approach ensures that the damage suit will only involve the injured employee and the third-party defendant. Because the employer’s interests are not affected by the outcome of the suit, the employer is unlikely to involve itself in the proceedings. In addition, in states where an employer is prevented from exercising its subrogation right against injured employee’s settlement with a third party, the problem of the employee attempting to manipulate the result through settlement is avoided. Under the new approach, there would

172. See DAY ET AL., *supra* note 105, § 5:11 (2d ed. 2002) (“Jurors can be expected to struggle with the notion that conduct of the employer they deem to be a cause in fact of the plaintiff’s injuries cannot be allocated as fault to the nonparty employer. One can imagine situations in which the jury will shift that ‘fault’ to the defendant or the plaintiff, or divide it somehow between them. One can also imagine situations in which they jury will not assign fault to either the defendant or the plaintiff rather than sticking one party or the other with the percentage of fault the jury wanted to allocate to the employer.”).

173. LARSON’S WORKERS COMPENSATION LAW § 120.02[3] (2014) (“Thus, the employee might, for example, settle his or her damage action before receiving any compensation benefits. In California, such a settlement is not subject to the employer’s lien. In addition, the employee can then apply for workers’ compensation benefits, which will be paid in proportion to the employer’s concurring fault as adjudicated by the Board. If the case goes to judgment, it is to the employee’s advantage to have received as little compensation as possible, since the judgment is reduced only by the amount of past compensation actually paid. By the same token, it may be to the third party’s advantage to delay the damage suit as long as possible, since the more compensation benefits are actually paid, the more the judgment is reduced.”).

174. *Id.*

175. *Id.*

not be an added incentive for the injured employee to settle with the third-party defendant, as in the California-North Carolina approach, because the subsequent reimbursement of the employer would not be an issue.

Finally, the New York approach, which allows the third-party defendant to seek contribution against the employer, has been criticized for swinging too far in the other direction, creating an inequitable result for the employer (or the employer's insurance carrier).¹⁷⁶ Under this approach, the employer does not receive limited liability, the benefit of its bargain with the injured employee. While principles of comparative fault are observed, this approach ignores the policies behind the exclusive remedy provision of its workers' compensation laws, though now this only occurs when there is a "grave injury." Minnesota's approach, in seeking to improve upon New York's rule by capping the employer's liability up to the amount of workers' compensation benefits, did so at the expense of aligning each party's liability with its percentage of fault.¹⁷⁷ The Minnesota approach can still result in unfairness to the third-party defendant, especially when the employer (or coworker) is largely to blame for the employee's injury.¹⁷⁸

The Minnesota approach addresses the New York approach's failure to grant the employer limited liability, the most obvious problem with that approach. However, the Minnesota approach does not address the fact that the New York approach does not apportion liability among the parties. In contrast, the new approach addresses both of these problems, recognizing the employer's limited liability while still requiring the jury to allocate fault to the employer.

It is worth noting that each of the existing approaches protects the injured employee's interest in full recovery at the expense of the interests of the third-party defendant, the employer, or both. Interestingly, no state approach forces the injured employee to bear the risk of under-compensation in its suit against a third-party defendant, when "this is the same sort of undercompensation that an employee would face *without* the fortuity of having a third-party defendant in the case."¹⁷⁹ The proposed solution seeks to address this problem by spreading the burden of potential inequity among all three parties involved. This risk of under-compensation on the part of the plaintiff, or injured employee, and the risk of paying in excess of fault on the part of the employer can be justified as being a part of the quid pro quo of the limited liability workers' compensation bargain. Placing the entire burden of inequity on the third-party defendant, who was not a party to the workers' compensation bargain, is clearly not the fairest solution; however, it is a fundamental concept of tort law that the defendant must take the plaintiff as he finds him. Therefore, placing some of the risk

176. *Id.*

177. Klein, *supra* note 3, at 76.

178. *Id.*

179. *Id.* at 83.

on the third-party defendant that he will have to pay heightened damages due to the vulnerability of the particular plaintiff is not unjustified.

In addition to addressing the problems with the existing approaches, the new approach also seeks to improve upon the various solutions suggested by scholars. Each of the suggested solutions discussed herein raise the issue of either over-simplifying or further complicating this complex dilemma. The elimination of third-party lawsuits, the most over-simplified option, would require a dramatic increase in the benefits provided to injured employees from employers or other sources,¹⁸⁰ and such a development appears impractical and unlikely. Similarly uncomplicated is the concept of separating the workers' compensation and tort systems entirely by reducing the third-party defendant's liability in proportion to his share of fault and eliminating the employer's subrogation right. But, this suggested solution places the full burden of inequity on the injured employee, running the risk of severe undercompensation. Also, under this complete separation approach, the burden of defending the employer's conduct against the third-party defendant would completely fall on the employee because the employer would have no real stake in the litigation.¹⁸¹

The new approach improves upon these simplified solutions by providing a solution that merely requires courts and juries to allocate fault, a task that courts regularly engage in, rather than requiring a dramatic change in workers' compensation schemes. Additionally, the new approach does not require the injured employee alone to bear the risk of inequity but allocates the risk among all the parties. Although, under the new approach, the injured employee would bear the burden of defending the employer's conduct in the damage suit, this problem is largely neutralized by the automatic reduction of the damage award in the amount of workers' compensation benefits and by the equal division of any portion of the total damage award not attributed to the third-party defendant's fault.

It is most concerning that several solutions suggested by scholars still fail to require allocation of fault to the employer in an injured employee's damage suit, while the principles of several liability and comparative fault effectively compel consideration of the employer's level of fault.¹⁸² Without considering the employer's fault, it seems that it would be nearly impossible for a jury to assign an exact percentage of responsibility to the third-party defendant or, for that matter, the injured employee.¹⁸³ Nevertheless, the "Murray Credit" rule and Professor Larson's approach both avoid fault allocation to the employer, instead opting to automatically reduce the damage award by half or by the amount of workers' compensation benefits, respectively. Under the Murray Credit

180. *Id.*

181. Eaton, *supra* note 111, at 894.

182. *Id.*

183. *Id.*

rule, the injured employee is likely to come out undercompensated due to the extreme reduction to the award and the employer's right to subrogation. Professor Larson's approach somewhat addresses this problem by only reducing the award according to the benefits actually paid by the employer and by eliminating the employer's subrogation right. But, under both approaches, liability will rarely reflect the fault of the parties.

The new approach, however, improves upon these suggested solutions by requiring a fault allocation between all of the parties from the outset. Although in many cases the ultimate liability born by the employer and the third-party defendant would not likely be precisely in proportion to their respective fault, the approach does not favor any one party. As discussed, depending on the circumstances, either the injured employee, the immune employer, or the third-party defendant may be forced to accept a seemingly inequitable result.

Professor Davis's proposal and Professor Klein's proposal do in fact involve allocation of fault, including that of the employer. While Professor Klein's proposal only uses the employer's percentage of fault to reduce the damage award, Professor Davis's proposal also uses the percentage to calculate the amount the employer is permitted to recover from the injured employee through subrogation. But, because Professor Davis's proposal makes the amount an employer can recover in subrogation dependent on the fault allocation, the employer has a greater stake in the litigation. Therefore, if this proposal was adopted, it would likely result in the same complications that have arisen under the California-North Carolina approach. Professor Klein's proposal, on the other hand, seems to be a reasonable solution, but it is unclear how this approach is different, in effect, from the complete separation approach. Under both approaches, the damage award is calculated in proportion to the third-party defendant's fault and the right to subrogation is eliminated. The only difference seems to be that Professor Klein conceptualizes the workers' compensation payment as a settlement.

The new approach is undoubtedly similar to Professor Davis's proposal and Professor Klein's proposal in that it begins with requiring fault allocation among the parties and reduces the damage award to reflect the third-party defendant's percentage of fault, but it is the new approach's departure from these previous proposals that provides the improvement. The new approach, unlike Professor Davis's approach, eliminates subrogation, ensuring that the employer does not become involved and complicate the damage suit. Also, assuming that the damage award will not fully compensate the injured employee after being reduced by the amount of workers' compensation benefits and by the percentage of the employer's fault, the new approach does not require the employee alone to bear the full loss, as Professor Klein's proposal would. Instead, the loss is divided equally between the injured employee and the third-party defendant, ensuring that each bears the burden of inequity.

CONCLUSION

Thus, we must conclude on the realistic note that there is no perfect solution for this “most evenly balanced controversy.” Courts, legislatures, and scholars have grappled with this problem of how to treat the concurrent negligence of the employer in the plaintiff’s suit against a third-party defendant for decades. Endless amounts of research lead to the frustrating result that it is practically impossible to fully account for all of the interests involved. However, one thing is sure: under the majority approach, unfairness to the third-party defendant is obvious. The defendant is held liable for the full amount of harm, even if his relative percentage of fault was small, and meanwhile, the negligent employer benefits from avoiding tort responsibility and retains the right to recover its workers’ compensation payments through subrogation. This result has become even less justifiable considering the emergence of comparative fault principles designed to align liability with fault.

The author’s proposed solution is not a perfect one. Depending on the facts of the particular case, the interests of at least one of the three parties will, in part, be ignored. The plaintiff will not always be fully compensated for his injury, and either the third-party defendant or the employer will likely be forced to pay in excess of its relative percentage of fault. The purpose of the solution is to, as equally as possible, spread the risk of being burdened with inequity among the parties. The new solution accomplishes that aim by eliminating the employer’s subrogation right when it is determined to be partially at fault, reducing the damage verdict by the workers’ compensation benefits paid and in proportion to the third-party defendant’s fault, and then dividing any portion of the total damage verdict that remains unaccounted for between the plaintiff and the third-party defendant. Therefore, the solution simultaneously respects the essential components of both tort law and workers’ compensation.