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## Apportionment in Kentucky after Comparative Negligence

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# Apportionment in Kentucky After Comparative Negligence

By JOHN M. ROGERS\*

## INTRODUCTION

Adoption of comparative negligence gives juries the task of allocating fault between a plaintiff and a defendant when both were negligent and both caused the plaintiff's injury. A logical corollary must be that juries are theoretically and practically able to make such an allocation. If so, it follows that juries are able to make such an allocation among multiple *defendants*, each of whom was found to be both negligent and a cause of the plaintiff's injury. The judicial adoption of comparative negligence in Kentucky<sup>1</sup> therefore requires a reexamination of the rules applicable to multiple tortfeasors. Cases decided since the adoption of comparative negligence, however, have not signalled significant changes in the law of apportionment among joint tortfeasors.<sup>2</sup>

Courts can assign liability two basic ways when the negligent acts of more than one person cause injury to a plaintiff (disregarding hybrids for the moment). First, each tortfeasor could be liable for the proportion of total damages equal to the proportion of his fault. Because no tortfeasor would be liable for more than his share of the damages, no necessity for contribution among joint tortfeasors would exist.<sup>3</sup>

Second, each tortfeasor could be made liable for the entire amount of the plaintiff's injury (reduced under comparative

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<sup>1</sup> *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984).

<sup>2</sup> See notes 46-125 *infra* and accompanying text.

<sup>3</sup> Indemnity might still be available, for instance in those cases where the liability of one defendant (*e.g.*, an employer) is based upon the negligence of another (*e.g.*, an employee). For an explanation of the distinction between indemnity and contribution, see W. KEETON, PROSSER & KEETON ON TORTS §§ 50-51 (5th ed. 1984); Germain,

negligence principles only by the proportion corresponding to the plaintiff's negligence, if any). This is clearly the majority rule.<sup>4</sup> Because a plaintiff may recover all of his damages from one of multiple tortfeasors, fairness dictates that such a defendant be able to recover from other tortfeasors at least a portion of what he must pay the plaintiff. Contribution among joint tortfeasors is therefore allowed. Contribution is either determined on a pro rata basis (*i.e.*, equal shares for each negligent party)<sup>5</sup> of proportioned according to relative fault.<sup>6</sup>

### I. THE LAW BEFORE *HILEN*: IT DEPENDS

Prior to the adoption of comparative negligence in *Hilen v. Hays*,<sup>7</sup> either of these two schemes was applicable in Kentucky, depending upon the circumstances. Kentucky Revised Statute section 454.040 (KRS) led to this result by providing that "the jury *may* assess joint or several damages against the defendants."<sup>8</sup> It is thus in the jury's discretion whether or not to apportion damages when multiple defendants are before the

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*Remedies: Contribution and Apportionment Among "Joint Tortfeasors"*, 65 Ky. L.J. 285, 288-91 (1976-77). There is also the possibility of full indemnity in favor of a "passive" tortfeasor against an "active" one, after an apportioned verdict against each of them. See *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 224 S.W.2d 165 (Ky. 1949). It is not entirely clear whether or not indemnity based upon the "active/passive" distinction has survived the adoption of comparative negligence in Kentucky. Cf. *Williams v. St. Claire Medical Center, Ky. Ct. App. Nos. 84-CA-2707-MR; 85-CA-609-MR* (Dec. 13, 1985) (reversing indemnity award because defendant's negligence held not to be passive).

<sup>4</sup> W. KEETON, *supra* note 3, § 52 at 347.

<sup>5</sup> See, e.g., *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 719 (Ky. Ct. App. 1979).

<sup>6</sup> See, e.g., UNIFORM COMPARATIVE FAULT ACT § 4, 12 U.L.A. 44 (Supp. 1986) [hereinafter UCFA].

<sup>7</sup> 673 S.W.2d 713 (Ky. 1984).

<sup>8</sup> KY. REV. STAT. § 454.040 (Bobbs-Merrill 1975) [hereinafter KRS] (emphasis added). This section states in full:

In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include joint judgment for the costs.

Although referring to actions of trespass, the statute has consistently been held applicable to personal injury actions based on negligence. See *Orr v. Coleman*, 455 S.W.2d 59, 61 (Ky. 1970) (citing *Brown Hotel Co. v. Pittsburgh Fuel Co.*, 224 S.W.2d 165, 168 (Ky. 1949)).

court.<sup>9</sup> When a jury does apportion damages, no contribution right among defendants exists.<sup>10</sup>

In *Orr v. Coleman*<sup>11</sup> the Kentucky Supreme Court perceived the policy underlying KRS section 454.040 to *require* apportionment by the jury where one of the defendants had previously settled. In *Orr*, the plaintiff, Coleman, had been injured in an automobile collision. She sued the owner and driver of the car in which she had been a passenger, and the driver of the other car.<sup>12</sup> Coleman settled with the first two for \$19,000 before trial, and the jury awarded \$22,000 against the remaining defendant. The Kentucky Supreme Court reversed, holding that the jury should not have been informed of the settlement.<sup>13</sup>

The court then decided that where there has been a settlement with one of multiple tortfeasors, "the jury should be *required* to assess the total amount of the claimant's damages and fix the proportionate share of the nonsettling tortfeasor's liability on the basis of his contribution to the causation."<sup>14</sup> This conclusion was based on the "long-standing policy [evinced by KRS section 454.040] that although their liability to the injured party may be joint and several, as between or among the joint tortfeasors themselves the burden should be apportioned according to their comparative culpability."<sup>15</sup>

This statement of the policy underlying KRS section 454.040 is an oversimplification, since KRS section 454.040 gives juries the *choice* whether to apportion or to require joint and several liability. When a plaintiff has settled with one of two defendants, however, it is not possible to give the jury an unfettered choice. The settling defendant is no longer before the court, so presumably the jury will never apportion unless required to.

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<sup>9</sup> *Cox v. Cooper*, 510 S.W.2d 530, 536 (Ky. 1974) (approving jury instruction giving the jury the choice whether to apportion).

<sup>10</sup> *Id.* at 536-37.

<sup>11</sup> 455 S.W.2d 59 (Ky. 1970).

<sup>12</sup> *Id.* at 60. Coleman also sued the owner of the other car, but he was let out on a peremptory at the conclusion of trial. *Id.*

<sup>13</sup> *Id.* at 61-62.

<sup>14</sup> *Id.* at 61 (emphasis added).

<sup>15</sup> *Id.*

Thus, to give effect to the policy of allowing the jury a choice when an unfettered choice was no longer practical, the court needed to decide whether juries should be assumed generally to apportion or to opt for joint and several liability.

The *Orr* court selected the former to avoid what it perceived to be the Hobson's choice presented by adoption of the latter. If entire liability were imposed on the remaining defendant, then that defendant would have to shoulder the excess burden resulting from a low settlement between the plaintiff and the settling defendant. While, in the absence of settlement, such a disproportionate burden *might* result under KRS section 454.040 if the jury were to choose joint liability (and, for instance, the other defendant has little money), at least under KRS section 454.040 the defendant has a *chance* that the jury will apportion. Settlement by the other defendant would deprive him of that chance, resulting in unfairness.<sup>16</sup>

Shifting the burden of a low settlement to the nonsettling defendant could be dealt with by permitting nonsettling defendants to obtain contribution from settling defendants, but this would obviously discourage partial settlements.<sup>17</sup> Because this alternative is also unsatisfactory, it makes sense simply to assume that, had there been no settlement, the jury would have apportioned under KRS section 454.040. The *Orr* court's requirement of an apportionment instruction in prior settlement cases in effect does that. Of course, contribution is not permitted when there has been a required apportionment under *Orr*.<sup>18</sup>

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<sup>16</sup> In the court's words, the objective of apportioning the burden among joint tortfeasors according to their comparative culpability:

[I]s not achieved when the amount of the nonsettling tortfeasor's liability is made to depend on the amount for which the other has settled, and over which the nonsettling tortfeasor may or may not have exercised any control. In such a case the claimant gives up nothing by settling with the one, since he gets the balance from the other.

*Id.*

<sup>17</sup> In the court's words: "And if the nonsettling tortfeasor may then enforce contribution from the one who has settled, the purpose of the settlement is defeated. Should we hold that to be the case there would simply be no more partial settlements."

*Id.*

<sup>18</sup> *Id.* On the other hand, a remaining defendant gets no benefit from a high settlement by a settling tortfeasor. See *D.D. Williamson & Co. v. Allied Chemical Corp.*, 569 S.W.2d 672 (Ky. 1978).

*Orr* rests at least in part on the policy of encouraging partial settlements, and thus conserving court resources. This policy arguably does not come into play where one tortfeasor is unlikely to be sued in the first place, such as where one tortfeasor is the plaintiff's spouse. This was the situation presented in *Nix v. Jordan*,<sup>19</sup> the other side of the apportionment coin in Kentucky.

In *Nix*, "Mary K. Jordan [the plaintiff] was injured in a collision between an automobile driven by her husband, Orval Jordan, in which she was a passenger, and an automobile owned by Robert Nix, and driven by his son, Robert, Jr., within the family purpose doctrine."<sup>20</sup> The plaintiff sued the Nixes, but not her husband. The Nixes, however, brought a third-party claim against him for contribution. The jury awarded Jordan \$7,000 from the Nixes, but awarded the Nixes half that amount as contribution from her husband.<sup>21</sup>

The Kentucky Supreme Court affirmed, and rejected an argument by the Nixes that the jury should have been permitted to apportion. The court interpreted KRS section 454.040 to permit apportionment only against joint defendants, which did not include third-party defendants.<sup>22</sup> *Orr* was distinguished. While the settling tortfeasor in *Orr* was no longer a defendant in the sense of being a party to the lawsuit, "the public policy of encouraging settlements justified our construing KRS section 454.040 to include as 'defendants' joint tortfeasors who probably would have been defendants but for the fact that they had bought their peace."<sup>23</sup> The court also noted that in *Orr*, "the settlement itself attests the active assertion of a claim," in contrast to the absence of any assertion of a claim against the plaintiff's husband in *Nix*.<sup>24</sup>

In cases such as *Nix* where there is no apportionment, contribution is permitted. Although the Kentucky statute permitting contribution among joint tortfeasors does not expressly so

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<sup>19</sup> 532 S.W.2d 762 (Ky. 1975).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 763.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

require,<sup>25</sup> contribution has always been on a pro rata basis in Kentucky.<sup>26</sup>

Despite *Nix*, the court required apportionment in the absence of evidence of a settlement in *Daulton v. Reed*.<sup>27</sup> In the course of a second trial, one of two negligent defendants was dismissed by the plaintiff before submission to the jury. The court stated that the rationale of *Orr* (apportionment required "when there has been an active assertion of a claim against one who would be a defendant but for the fact that he has settled the claim")<sup>28</sup> applied where an asserted claim was later dropped, "whatever may have been the reason."<sup>29</sup> Although there may have been no settlement in *Daulton*, the case is consistent with *Nix* because the *Orr* policy of encouraging settlements is supported by the interest in resolving cases that would otherwise burden the court system. That interest is furthered when a claim is brought and then dismissed for whatever reason,<sup>30</sup> while it is not furthered at all in a case like *Nix* where the plaintiff would be unlikely to sue the particular tortfeasor in the first place.

The difficulty with this rationale for *Daulton* is that the *Orr* result was intended to encourage settlements by preserving the incentive of a *tortfeasor* to make a partial settlement (*i.e.*, without fear of subsequent contribution claims). There seems little need to preserve a defendant's incentive to accept dismissal of a suit without any payment at all; any defendant would readily do so. It may be, then, that the *Daulton* court reasoned that there must have been some sort of *quid pro quo* without which the claim would not have been dismissed.<sup>31</sup> Al-

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<sup>25</sup> KRS § 412.030 (Bobbs-Merrill replacement vol. 1985) provides: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."

<sup>26</sup> See note 5 *supra*.

<sup>27</sup> 538 S.W.2d 306 (Ky. 1976).

<sup>28</sup> *Id.* at 308.

<sup>29</sup> *Id.*

<sup>30</sup> The Kentucky Supreme Court has not been called upon to decide whether there should be apportionment where a potential defendant has settled prior even to the institution of suit. The logic of *Orr*, however, would suggest that apportionment should be required regardless of whether the tortfeasor was ever technically a defendant. *Carlisle Constr. Co. v. Floyd*, 33 KY. LAW SUMM. 13, at 4 (Ky. Ct. App., Sept. 3, 1986).

<sup>31</sup> For instance, a tort claim may be dismissed in return for a release by the defendant from any malicious prosecution suit against the plaintiff.



ternatively, the plaintiff may have hoped—by dismissing a defendant with fewer resources—to avoid apportionment, and thus recover all of his damages from a defendant with greater resources. The *Daulton* court may have simply wanted—as in *Orr*<sup>32</sup>—to avoid permitting the plaintiff to deprive the remaining defendant of the chance to have his liability apportioned under KRS section 454.040.

In summary, at least prior to *Hilen*, the law could be stated as follows. (1) There was apportionment without contribution among joint tortfeasors if there had been a prior settlement by one tortfeasor or if one tortfeasor had been dismissed following “active assertion of a claim.” (2) There was apportionment without contribution—at the jury’s discretion—where multiple tortfeasors were actually sued (and the tortfeasors were still before the court when the case was sent to the jury). (3) Otherwise, there was joint liability among multiple tortfeasors, with the availability of contribution on a pro rata basis.<sup>33</sup>

This state of the law could be criticized in a number of ways. Professor Germain for instance noted that *Nix* permits KRS section 454.040 to be “sidestepped by any plaintiff who chooses to avoid the possibility of several, apportioned verdicts against co-tortfeasors.”<sup>34</sup> Plaintiffs might avoid apportionment “to protect against uncollectibility of part of the total judgment due to insolvency, or to insulate co-tortfeasors who are relatives or friends of the plaintiff from bearing more than a pro rata share of the total judgment.”<sup>35</sup>

Avoiding the possibility of apportionment may also cause plaintiffs to make anomalous litigation decisions. For instance, a plaintiff suing a social host who served liquor to a drunk driver might normally join the drunk driver. Doing so in Kentucky, however, might mean that a jury will apportion most of the fault to the driver, thus eliminating the possibility of substantial recovery from the social host. The plaintiff might be well advised to avoid joining the driver as a defendant in

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<sup>32</sup> See text accompanying note 16 *supra*.

<sup>33</sup> Indemnity would also be available, of course, in an appropriate case under each possibility. See note 3 *supra*.

<sup>34</sup> Germain, *supra* note 3, at 287 (footnote omitted).

<sup>35</sup> *Id.* (footnotes omitted).

order to prevent apportionment, although tactical or other considerations might strongly support joining the driver.

Moreover, the "it depends" state of the Kentucky law of apportionment lacks a sound theoretical basis. First, the theory supporting apportionment among joint tortfeasors is simply that liability can and should be allocated according to fault.<sup>36</sup> If that theory supports apportionment when the jury decides to apportion or when the plaintiff has entered into a partial settlement, it is difficult to see why allocation of liability according to fault does *not* support apportionment when the jury simply decides not to apportion or when the plaintiff for whatever reason has decided not to assert a claim against a particular defendant.

Second, the theories underlying joint and several liability among joint tortfeasors do not support the "it depends" state of the law. One theory underlying joint liability is that a plaintiff suffering one injury cannot logically divide that injury among several tortfeasors, each one of whom caused the entire injury.<sup>37</sup> Indivisibility of injury applies equally well regardless of whether the jury decides to apportion, and regardless of whether there has been a previous settlement.

An alternative theoretical basis for joint and several liability is that it helps to insure adequate compensation for injured persons.<sup>38</sup> If a plaintiff is injured and one of the tortfeasors is without financial resources, fairness requires that the other tortfeasor (who after all caused the entire injury as well) bear the extra burden, rather than the innocent, injured plaintiff. Again, however, this rationale applies regardless of whether the jury decides to apportion, and is largely unrelated to whether there has been a previous settlement, because the very reason that a plaintiff settles with one tortfeasor may be the plaintiff's perception that the settling tortfeasor has few resources.

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<sup>36</sup> See notes 11-17 *supra* and accompanying text.

<sup>37</sup> See *Murphy v. Taxicabs of Louisville, Inc.*, 330 S.W.2d 395, 397-98 (Ky. 1959).

<sup>38</sup> See *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 906 (Cal. 1978).

## II. THE ARRIVAL OF COMPARATIVE NEGLIGENCE

One might expect, upon the adoption of comparative negligence with its emphasis on assigning proportions of fault, that juries in all cases would be instructed to apportion among negligent parties, whether plaintiff or defendant. Prior to the adoption of comparative negligence in Kentucky, Randy Shaw and I anticipated that if comparative negligence were adopted, apportionment among negligent tortfeasors would be the rule and there would be no more contribution, even if the apportionment and contribution statutes were not modified.<sup>39</sup> That speculation was premature.

The Kentucky Supreme Court held in *Hilen v. Hays*<sup>40</sup> that contributory negligence will no longer bar recovery. Instead, a claimant's negligence will reduce the damages awarded against a negligent tortfeasor in the proportion that the claimant's contributory negligence bore to the total negligence that caused the injury.<sup>41</sup> The theory underlying this conclusion supports apportionment among joint tortfeasors, but the implicit policy underlying *Hilen* may not.

A logically necessary premise for the adoption of comparative negligence is that if two or more persons are each negligent, and each negligent act is one of several causes of a single harm, there exists a basis for allocating the relative responsibility of each negligent person, even though each negligent person was a cause in fact, and a proximate cause, of the entire injury. Fairness requires, in the words of the *Hilen* court, that "liability for any particular injury [be] in direct proportion to fault."<sup>42</sup> The idea that liability for a single injury can be apportioned among negligent parties supports apportionment among defendants as well. If an injury is "divisible" for purposes of contributory negligence, it is difficult to see why it should be "indivisible" for purposes of multiple defendants. Indeed, the Kentucky Supreme Court rec-

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<sup>39</sup> Rogers and Shaw, *A Comparative Negligence Checklist to Avoid Future Unnecessary Litigation*, 72 Ky. L.J. 25, 49, 56 (1983-84).

<sup>40</sup> 673 S.W.2d 713 (Ky. 1984).

<sup>41</sup> *Id.* at 720.

<sup>42</sup> *Id.* at 718.

ognized the connection, at least in reverse, by relying upon the apportionment statute as partial support for the adoption of comparative negligence.<sup>43</sup> Thus the *theory* of comparative negligence supports apportionment among joint tortfeasors.

On the other hand, the implicit *policy* underlying the adoption of comparative negligence may be to insure greater compensation for persons injured through the fault of others. The harshness of the contributory negligence doctrine was most apparent when a grievously injured but slightly negligent plaintiff recovers nothing from a very negligent, and perhaps wealthy, defendant. The unfairness of such a result stems not so much from the abstract idea that liability is not allocated according to fault, but rather from the fact that an injured person gets inadequate (*i.e.*, no) compensation from a solvent tortfeasor. This supports the adoption of comparative negligence, but does not support apportionment among joint tortfeasors. Instead, the policy of insuring adequate compensation for persons injured through the fault of others supports joint liability, leaving the defendants to allocate liability among themselves. The burden of finding and suing all negligent persons, some of whom may be insolvent or unreachable, is thrown upon the negligent defendant, rather than upon the injured plaintiff. Joint liability, in other words, maximizes the possibility of compensation to the injured party. Because such maximization may also have been a consideration in *Hilen*, the adoption of comparative negligence may in one sense be consistent with joint and several liability.

Placing the burden of recovering from additional tortfeasors on negligent defendants is a particularly strong policy where the injured plaintiff was free of negligence. Under comparative negligence, joint liability would permit a *negligent* plaintiff to place the burden of recovering from other tortfeasors on a defendant who may be less negligent than the plaintiff. The only basis for such a scheme is that the plaintiff is injured, while the defendant is not, but this basis is inconsistent with the idea that liability should be allocated according to fault, not injury.

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<sup>43</sup> The court stated that "KRS 454.040, if it has a bearing, seems to favor a policy of liability apportioned according to fault." *Id.* at 715.

Assuming that joint and several liability is consistent with comparative negligence, however, no reason exists for contribution to remain on a pro rata basis. Once one accepts that fault can be apportioned, pro rata contribution has no remaining logical basis.<sup>44</sup> The Kentucky contribution statute does not specifically mandate pro rata contribution,<sup>45</sup> and could easily be interpreted—in light of *Hilen's* conclusion that liability should be allocated according to fault—to provide for contribution on the basis of relative fault.

### III. THE LAW AFTER *HILEN*: APPARENTLY, IT STILL DEPENDS

In cases decided since *Hilen*, the Kentucky Supreme Court has not signalled a radical change in the law of apportionment among joint tortfeasors. Post-*Hilen* apportionment law must be rationalized in a comparative negligence context, however, and the justices of the court have attempted to do so.

The first case addressing these issues was *Burrell v. Electric Plant Board*,<sup>46</sup> decided before *Hilen*, but modified on denial of rehearing on October 4, 1984, three months after *Hilen*. The *Burrell* Court decided that Workers' Compensation benefits paid by a negligent employer would not be treated as a prior settlement for purposes of resolving a subsequent claim by an employee against a third-party. The employee sued an electric utility for injuries sustained on his employer's premises and allegedly caused by negligent construction and maintenance of a high-voltage line.<sup>47</sup> The employer, who had previously paid over \$136,000 in Workers' Compensation benefits to the employee, intervened to assert a statutory right of subrogation for the payments.<sup>48</sup> The utility then counterclaimed against the employer for indemnity and contribution, alleging that the employer had been negligent.<sup>49</sup> The major portion of the *Burrell* opinion supported the court's conclusion that the

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<sup>44</sup> See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407 (1975) (replaced the admiralty rule of divided damages with a rule of comparative fault).

<sup>45</sup> See notes 25-26 *supra* and accompanying text.

<sup>46</sup> 676 S.W.2d 231 (Ky. 1984).

<sup>47</sup> *Id.* at 232.

<sup>48</sup> *Id.* See KRS § 342.700 (Bobbs-Merrill replacement vol. 1983).

<sup>49</sup> 676 S.W.2d at 232-33.

utility was not precluded by the Workers' Compensation Act from suing for indemnity, or from suing for contribution up to the amount of compensation for which the employer is liable under the Workers' Compensation Act.<sup>50</sup>

At the end of its opinion, however, "as direction to the trial court," the court stated that neither KRS section 454.040 nor *Orr* permitted apportionment of liability between the employer and the utility.<sup>51</sup> Workers' Compensation benefits were seen as "in the nature of insurance" rather than analogous to payment or settlement of a tort claim.<sup>52</sup> Accordingly, the "situation is analogous to *Nix*" and "[t]he employer's liability, if any, is to a third-party under the contribution statute or for common law indemnity."<sup>53</sup> The court went on to state that if the jury does make findings supporting a contribution award for the utility from the employer, it would be for "one-half," but not to exceed the employer's liability under the Workers' Compensation Act.<sup>54</sup>

In dissent, Justice Vance criticized this "gratuitous advice," suggesting as an inadequately discussed possible alternative that the Workers' Compensation payments could be treated as payments by a settling tortfeasor.<sup>55</sup> Under the principle of *Orr* then, if both the utility and the employer were negligent, liability of the utility would be limited to its portion of the total negligence.<sup>56</sup> Justice Vance relied upon the theory

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<sup>50</sup> *Id.* at 233-37.

<sup>51</sup> *Id.* at 237.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* The court also stated that an award for indemnity against the employer would be "for all" of the award against the utility, but perhaps limited to the amount of the employer's liability under the Workers' Compensation Act. *Id.*

<sup>55</sup> *Id.* at 238 (Vance, J., dissenting).

<sup>56</sup> Criticizing the final statements of the majority, Justice Vance pointed out that the employee was not a party to the appeal. *Id.* Although it appears the employee would prefer the majority's scheme because it puts no limit on the liability of the third-party to the plaintiff, it is conceivable that a plaintiff in these circumstances would fare better under Justice Vance's suggested scheme. This might occur if a jury found the third-party's negligence much greater than the employer's.

For example, assume Workers' Compensation benefits in a case are \$130,000, but the jury awards \$200,000 for the same elements of damages. Further assume the jury apportions negligence 20% to the employer and 80% to the third party, and that there is no basis for indemnity. Under the majority's scheme, the employee would end up

of *Hilen*—although he had dissented in that case—stating that *Hilen* “was predicated upon the theory that in a system where liability is based upon fault, the extent of liability should be determined by the degree of fault.”<sup>57</sup>

The *Burrell* majority’s reference to *Nix* indicates that *Nix* remains good law, and that joint and several liability, with the possibility of contribution (on a pro rata basis), remains in cases where that was the result before *Hilen*. It is possible to read *Burrell* for much less, however. First, it is questionable to what extent the concluding comments of the opinion will be deemed binding precedent. As Justice Vance suggested, the employee was not a party to the appeal,<sup>58</sup> and his rights may have been adversely affected by the statements.<sup>59</sup> On the other hand, the central holding of *Burrell* (to which Justices Vance and Stephenson dissented) was that a tort defendant may counterclaim against an employer for contribution. This may logically require the conclusion that apportionment is inappropriate, because contribution principles only fit into schemes of joint as opposed to apportioned liability. If rejection of apportionment is a necessary concomitant to permitting contri-

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with \$200,000 total: \$130,000 in Workers’ Compensation benefits from the employer, plus \$70,000 from the third party in the tort action (\$200,000 determined as damages by the jury, minus \$130,000 subrogated to the employer under KRS § 342.700) (The possibility of a contribution claim by the third party against the employer would not affect the plaintiff’s recovery.).

Under Justice Vance’s scheme (later set forth in greater detail in his concurrence in *Fireman’s Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986)), the employee in this example might end up with \$290,000: \$130,000 in Workers’ Compensation benefits, plus \$160,000 in the tort suit against the third party (80% of \$200,000). Under Justice Vance’s scheme, there would be no contribution or indemnity, *id.* at 462. It is not clear whether there would still be subrogation of the employer to the employee’s claim against the third party under KRS § 342.700. This example assumes either a \$160,000 award against the third party and no subrogation, or a \$200,000 award against the third party, but with the employer entitled to subrogation only in the amount proportionate to the employer’s fault, *i.e.*, 20% of \$200,000 or \$40,000.

Of course the employee would be worse off under Justice Vance’s scheme than the majority’s if the jury were to apportion negligence, for instance, 80% to the employer and 20% to the third party. Then the employee would end up with only \$170,000: \$130,000 in Workers’ Compensation benefits, plus \$40,000 in the tort action (20% of \$200,000).

<sup>57</sup> 676 S.W.2d at 238 (Vance, J., dissenting).

<sup>58</sup> *Id.* (Vance, J., dissenting).

<sup>59</sup> See note 56 *supra*.

bution, then the final portion of the *Burrell* opinion cannot be considered pure dictum.

The concluding portion of *Burrell* may be limited, however, to the Workers' Compensation context. Comparing the fault of tortfeasors when one is an employer under the Workers' Compensation Act may be particularly inappropriate. In several ways the payment of Workers' Compensation benefits is not comparable to settlement of a negligence claim. A plaintiff may settle a tort claim for less than he believes a jury would award to avoid the costs and chances of litigation. The extent to which Workers' Compensation benefits are less than what a plaintiff would get in litigation reflects not only those savings, but also a reduction in liability to compensate the employer, in effect, for his responsibility for injuries regardless of negligence. Thus the average Workers' Compensation benefits may compare to "low" settlements.

On the other hand, because Workers' Compensation benefits are by their nature "entire," and not apportioned according to fault, they may in many instances amount to "high" settlements, compared to what a plaintiff could recover in negligence under an apportionment scheme. In either case, Workers' Compensation benefits bear far less relation to the proportion of fault than do settlements of tort claims.

In addition, the Kentucky Workers' Compensation Act provides for subrogation of the employer to the employee's rights against the third-party,<sup>60</sup> while a settling tortfeasor presumably has no right to obtain contribution from a remaining defendant against whom damages are apportioned under *Orr*.<sup>61</sup>

Considerations unique to the presence of Workers' Compensation benefits in *Burrell* thus supported the rejection of apportionment in that case. Whether *Nix* and the retention of joint liability among negligent tortfeasors will survive outside the Workers' Compensation context remains to be seen.

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<sup>60</sup> KRS § 342.700.

<sup>61</sup> Cf. *D.D. Williamson & Co. v. Allied Chemical Corp.*, 569 S.W.2d 672 (Ky. 1978) (defendant, allocated 50% of fault and required to pay 50% of \$20,000 damages under *Orr* instruction, held not entitled to benefit of plaintiff's high settlement of \$16,500 with other negligent party to whom the jury allocated the other 50% of fault).



The opposite question, whether the principle of *Orr* should be retained, was debated in *Prudential Life Insurance Co. v. Moody*.<sup>62</sup> The plaintiffs, injured when a balcony on which they were standing collapsed, sued the builder and the owner of the building. The jury apportioned 50% liability to each defendant under KRS section 454.040.<sup>63</sup> The Kentucky Supreme Court later ruled that the statute of limitations had run as to the builder.<sup>64</sup> The Kentucky Supreme Court affirmed the denial of plaintiffs' motion for a judgment against the owner for 100% of the damages.<sup>65</sup> The court reasoned that the builder was a "defendant" for purposes of KRS section 454.040, and that the case was squarely within the rule of *Daulton v. Reed*,<sup>66</sup> which held that apportionment was the rule when there had been "an active assertion of a claim" against a person no longer before the court.<sup>67</sup>

*Prudential* is different from *Daulton* because the plaintiff never dropped his claim against the builder. The policy in *Orr* of encouraging settlements—arguably still a basis for *Daulton* because the *Daulton* plaintiff dropped his suit against one defendant for *some* reason<sup>68</sup>—appears completely inapplicable where the plaintiff litigated persistently, although ultimately unsuccessfully, against one defendant.<sup>69</sup>

Perhaps sensing that difficulty, Justice Vance concurred on the more general ground that the result "fairly apportions liability according to the percentage of fault,"<sup>70</sup> relying squarely on *Hilen*, in which he had dissented. *Hilen*

held that a plaintiff who is only partially at fault cannot fairly be required to bear the entire loss. It would seem to

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<sup>62</sup> 696 S.W.2d 503 (Ky. 1985).

<sup>63</sup> *Id.* at 503-04.

<sup>64</sup> *Id.* at 503 (KRS § 413.135 (Bobbs-Merrill 1970) barred this action).

<sup>65</sup> *Id.* at 504.

<sup>66</sup> See text accompanying notes 27-32 *supra*.

<sup>67</sup> 696 S.W.2d at 504.

<sup>68</sup> See text accompanying notes 28-32 *supra*.

<sup>69</sup> Prior to *Prudential*, the Sixth Circuit Court of Appeals expressed uncertainty about whether *Daulton* would be extended to a case in which two of sixteen defendant asbestos manufacturers had obtained stays, under federal bankruptcy law, of wrongful death proceedings against them. *Herron v. Keene*, 751 F.2d 873, 874 (6th Cir. 1985).

<sup>70</sup> 696 S.W.2d at 504 (Vance, J., concurring).

follow, therefore, that a defendant who is only partially at fault in causing an injury should not be required to bear the entire loss but should, likewise, be chargeable only to the extent of his fault.<sup>71</sup>

The "gross unfairness" of entire liability under common law was alleviated by pro rata contribution statutes, and by statutory or judicial adoption in Kansas and New Mexico of apportionment among joint tortfeasors. The court's holding is therefore "not a completely radical departure from the mainstream of law."<sup>72</sup>

Justice Leibson, dissenting, undertook a fullscale attack on KRS section 454.040. He stated that the statute is "unusual," "arbitrary," contrary "to the entire course of American law,"<sup>73</sup> and inconsistent with the idea that the injury caused by joint tortfeasors is "obviously incapable of any logical, reasonable, or practical division."<sup>74</sup> The statute was not applied to negligence cases until almost 50 years after initial passage in 1839, and was extended unnecessarily, and only by analogy, in *Orr* and *Daulton* to cases involving dismissed parties.<sup>75</sup> *Orr* was an "unprecedented abandonment of the common law which benefits no one except the wrongdoer at the expense of the victim."<sup>76</sup> KRS section 454.040 should accordingly be "limited to its terms," and not applied where a party is "subsequently held immune from liability."<sup>77</sup> Otherwise, "[t]he innocent victim is compensated for half his damages. Half justice is half injustice."<sup>78</sup>

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<sup>71</sup> *Id.* at 505 (Vance, J., concurring).

<sup>72</sup> *Id.* at 505-06 (Vance, J., concurring).

<sup>73</sup> *Id.* at 507 (Leibson, J., dissenting).

<sup>74</sup> *Id.* (quoting W. PROSSER, LAW OF TORTS § 52 (4th ed. 1971)).

<sup>75</sup> *Id.* at 509-10 (Leibson, J., dissenting).

<sup>76</sup> *Id.* at 508 (Leibson, J., dissenting).

<sup>77</sup> *Id.* at 509-10 (Leibson, J., dissenting).

<sup>78</sup> *Id.* at 509 (Leibson, J., dissenting). It should be noted, however, that plaintiffs, were they barred by an ordinary statute of limitations, could have gotten full justice by complying with the statute of limitations.

The statute of limitations applicable to suits based on building defects, however, started to run from the completion of the building. KRS §§ 413.120 and 413.135. Thus where, as in *Prudential*, the injuries occurred more than five years after the construction of the building, the plaintiff was effectively precluded from recovering from the builder. *Carney v. Moody*, 646 S.W.2d 40 (Ky. 1983). In this context, the "statute of limitation"

Responding to Justice Vance's reliance upon the theory of *Hilen*, Justice Leibson pointed out that six of seven state high courts preserved joint and several liability for joint tortfeasors following the adoption of comparative negligence.<sup>79</sup> In addition to relying upon authority from other states,<sup>80</sup> Justice Leibson appeared to accept that the underlying policy of *Hilen* was to increase compensation for persons injured by the negligence of others, a policy fully consistent with joint and several liability:

Most certainly, comparative negligence is no justification for a new rule freeing a wrongdoer from liability in the present situation. Here the plaintiff was an innocent victim, free from fault by any definition of the term. *Comparative negligence, which we instituted as a reform to cure a preexisting injustice, is not an acceptable device to shelter a wrongdoer from a portion of his former liability* for the single, indivisible harm which he helped to perpetrate.<sup>81</sup>

Although the *Prudential* court pointedly refused to use the policy of increasing compensation for injured victims, arguably implicit in *Hilen*, to curtail apportionment among joint tortfeasors, the debate was nonetheless continued in *Burke Enterprises v. Mitchell*.<sup>82</sup> The *Burke Enterprises* plaintiff was injured while operating a rented power post-hole digger<sup>83</sup> and sued both the manufacturer and the company from which he had rented

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was really a no-action statute. Apportionment of fault to a person as to whom there is never a right of recovery is less consistent with the policy of allocating liability according to fault than when the party was a potential defendant for at least a period.

Since *Prudential*, however, the Kentucky Supreme Court has held that KRS § 413.135 is in any event invalid because it violates the Kentucky Constitution's prohibition of "special" legislation. Ky. Const. 59; *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986), cert. denied, 55 U.S.L.W. 3209 (U.S. Oct. 6, 1986).

<sup>79</sup> *Id.* at 509-10 (Leibson, J., dissenting) (Illinois, West Virginia, Michigan, Alaska, California, and Iowa). More recently in California, voters approved a legislative initiative eliminating joint and several liability for non-economic damages in personal injury and wrongful death lawsuits. 54 U.S.L.W. 2643.

<sup>80</sup> The relative unanimity of opinions in other jurisdictions does not insure that they are well reasoned. The California case retaining joint and several liability, *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899 (Cal. 1978), is criticized in Rogers and Shaw, *supra* note 39, at 52-54.

<sup>81</sup> 696 S.W.2d at 510 (Leibson, J., dissenting) (emphasis added). See text between notes 43 and 44 *supra*.

<sup>82</sup> 700 S.W.2d 789 (Ky. 1985).

<sup>83</sup> *Id.* at 790.

the digger. The manufacturer settled on the eve of trial for \$10,000.<sup>84</sup> The rental company did not ask for an apportionment instruction under *Orr* and none was given.<sup>85</sup> The jury returned a verdict of \$17,956 against the rental company. The rental company sought a credit for the \$10,000 paid by the manufacturer<sup>86</sup> and the Kentucky Supreme Court held that it should have been granted.<sup>87</sup>

The court reasoned that the *Orr* apportionment procedure presupposes a finding of fault by the settling defendant.<sup>88</sup> Because there was no request for an *Orr* instruction, there was no determination that the manufacturer was negligent; therefore, the apportionment result of *Orr* did not apply.<sup>89</sup> The court held that the failure to give an apportionment instruction should not result in double recovery, and the \$10,000 should have been credited against the award.<sup>90</sup>

Although agreeing with the result, Justice Leibson dissented on the ground that "we cannot be logical in reaching this result unless we also overrule *Orr*."<sup>91</sup> He again urged that *Orr* be overruled, and that apportionment be limited to cases required by the explicit terms of KRS section 454.404, *i.e.*, where the jury decides among multiple defendants on trial.<sup>92</sup> Justice Leibson argued that *Orr* "works against the grain of the tort system" because

[T]he plaintiff will *never* be paid the amount the jury has decided is appropriate for the injury *unless* the percentage of the award set by the jury against the settling defendant, when translated to dollars, *and* the percentage of the award set by the jury against the nonsettling defendant, when translated to dollars, total the jury's award. *Invariably* the plaintiff will be overcompensated or undercompensated.<sup>93</sup>

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<sup>84</sup> *Id.* at 791.

<sup>85</sup> *Id.* at 794-95.

<sup>86</sup> *Id.* at 790, 794.

<sup>87</sup> *Id.* at 797.

<sup>88</sup> *Id.* at 795.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at 795-96.

<sup>91</sup> *Id.* at 797 (Leibson, J., dissenting).

<sup>92</sup> *Id.* at 797 (Leibson, J., dissenting).

<sup>93</sup> *Id.* at 797-98 (Leibson, J., dissenting) (emphasis in original). It might be argued

Justice Wintersheimer also dissented, but on the entirely different ground that the case should have been remanded for a new trial with the proper apportionment instruction under *Orr*.<sup>94</sup>

The effect of *Burke Enterprises* appears to be that when there has been a prior partial settlement, the parties have the option of agreeing to joint liability principles rather than apportionment. For practical purposes, this will occur when the remaining defendant believes that the settlement was high (compared to what the jury would have awarded), and the plaintiff believes that the settlement was low (compared to what the jury would have awarded). Thus the result is consistent with the idea in *Orr* of protecting a nonsettling defendant from having to make up for a low settlement by a co-tortfeasor.<sup>95</sup>

More recently, the Workers' Compensation apportionment issues surfaced in *Fireman's Fund Insurance Co. v. Sherman & Fletcher*.<sup>96</sup> The court held that an injured employee of a subcontractor could not recover in tort from an owner who acted as his own contractor,<sup>97</sup> and that the insurer of the subcontractor, having paid Workers' Compensation to the employee of the subcontractor, could not indemnify itself against the contractor even if the negligence of the contractor caused the injury.<sup>98</sup> The court refused to decide the additional question—on the ground that it was not properly preserved—of the extent to which a negligent third-party has a right to indemnity from the otherwise immune owner/contractor.<sup>99</sup>

In a concurring opinion joined by Justice Aker, Justice Vance explained how he would answer the question.<sup>100</sup> Relying again upon the *Hilen* theory that liability should be measured

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in response that over- or undercompensation results from the plaintiff's bargain with the settling tortfeasor, and that a similar over- or undercompensation occurs whenever a case against any single defendant is settled.

<sup>94</sup> *Id.* at 798 (Wintersheimer, J., dissenting).

<sup>95</sup> See text accompanying note 16 *supra*.

<sup>96</sup> 705 S.W.2d 459 (Ky. 1986).

<sup>97</sup> *Id.* at 460-62, interpreting KRS §§ 342.610 and 342.690(1) (Bobbs-Merrill 1983).

<sup>98</sup> *Id.* at 462-64, interpreting KRS § 342.690(1) and upholding its constitutionality under KY. CONST. §§ 14, 54, and 241.

<sup>99</sup> *Id.* at 462.

<sup>100</sup> *Id.* at 464-66 (Vance, J., concurring).

by the degree of fault, he argued that when an employer and a third-party are negligent, the employee sues the third-party, and the third-party impleads the employer, "[a] jury could then determine the amount of damage caused by the injury and could apportion liability between the third-party and the employer."<sup>101</sup> Under this scheme, "[t]he proportionate part of the damages attributed to the employer could be deemed to be discharged by the payment of compensation benefits," and "[t]here would be no need for indemnity or contribution."<sup>102</sup>

Justice Vance felt that adoption of this scheme would require overruling *Nix*, because the scheme contemplated apportionment of liability between a defendant and a third-party defendant.<sup>103</sup> *Nix*, he reasoned, is wrong because "a third-party defendant is a defendant nonetheless" and because *Hilen* adopted the principle of liability according to fault.<sup>104</sup>

If adopted, Justice Vance's position would largely, if not totally, do away with the possibility of joint and several liability in negligence cases in Kentucky, and would effectively abolish contribution as unnecessary, despite the continued presence of the contribution statute. The apportionment principles urged by Justice Vance would apply *a fortiori* outside of the Workers' Compensation context.<sup>105</sup> In his concurrence, however, Justice Vance made no attempt to deal with the possible *stare decisis* effect of the facially inconsistent statements made at the conclusion of the court's *Burrell* decision.

Justice Leibson, joined by Chief Justice Stephens, dissented in *Sherman & Fletcher*.<sup>106</sup> He stated, "[i]t is a recognized axiom of Kentucky Workers' Compensation Law that the third-party tortfeasor liable to an injured employee has a claim

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<sup>101</sup> *Id.* at 465 (Vance, J., concurring).

<sup>102</sup> *Id.* (Vance, J., concurring).

<sup>103</sup> *Id.* (Vance, J., concurring). In *Burrell*, the employer was not a third party defendant, but an intervenor seeking subrogation; Justice Vance's dissent in *Burrell* thus did not raise the question of overruling *Nix*. But in the absence of employer intervention for subrogation, there would be no reason for the defendant to implead the employer, because the proportionate part of the damages attributed to the employer would be deemed discharged by the payment of compensation benefits.

<sup>104</sup> *Id.* at 465-66 (Vance, J., concurring).

<sup>105</sup> Compare text accompanying notes 60-61 *supra*.

<sup>106</sup> 705 S.W.2d at 466-70 (Leibson, J., dissenting).

against the employer for contribution or indemnity," although it may be limited to the amount of workers' compensation due and payable.<sup>107</sup> Criticizing the scheme advocated by Justice Vance as unfair, Justice Leibson argued that "[t]here is no justice in a rule of apportionment between a negligent defendant and an empty chair"<sup>108</sup> and that the remaining defendant will almost always get the jury to assign a disproportionate share of liability to the dismissed or immune party, at the expense of the injured victim.<sup>109</sup> Justice Leibson continued that to overrule *Nix* would be "harsh and unprecedented" and that to do so in the Workers' Compensation context "by rights" would require amendment of the Workers' Compensation Act.<sup>110</sup>

Where do all of the post-*Hilen* cases leave us? The law can perhaps be summarized as follows, at least where the plaintiff is not negligent.

(1) *Nix* is still alive. Joint and several liability, with the possibility of contribution (on a pro rata basis),<sup>111</sup> remains in those cases that would have had that result before *Hilen*. But the only authority for this (*Burrell*) conceivably is not binding, and arguably is limited to the Workers' Compensation context.

(2) *Orr* is still alive, despite continuing attack. Apportionment is: (a) permitted when more than one defendant is actually before the court (KRS section 454.040); (b) required when there has been a settlement (unless neither the plaintiff nor the remaining defendant requests such an instruction (*Burke En-*

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<sup>107</sup> *Id.* at 467-68 (Leibson, J., dissenting).

<sup>108</sup> *Id.* at 469 (Leibson J., dissenting).

<sup>109</sup> *Id.* at 470 (Leibson J., dissenting).

<sup>110</sup> *Id.* (Leibson, J., dissenting).

<sup>111</sup> The Kentucky Court of Appeals, however, has recently indicated that contribution should be determined according to proportion of fault. *Commonwealth v. Arrow Truck Lines*, 713 S.W.2d 1 (1986). In *Arrow Truck Lines* a flagman employed by the Kentucky Transportation Cabinet was injured because of the negligence of both the Cabinet and an Arrow Truck Line driver. Arrow Truck settled with the flagman for \$167,500, and sought \$50,000 (the statutory limit of the state's liability) from the Kentucky Board of Claims. The Court of Appeals held that contribution was proper and that it could "be applied to apportion [joint-tortfeasors'] financial liability in accordance with their respective degree of negligence." The court of appeals in *Arrow Truck*, however, held that such contribution could not be more than the amount of employer liability under Workers' Compensation, or more than the \$50,000 limit on Commonwealth liability.

terprises)); and (c) at least permitted even when one negligent defendant is later successful in avoiding liability on appeal (*Prudential*).

Thus while the adoption of comparative negligence in *Hilen* provides additional ammunition both for and against apportionment among joint tortfeasors, it has not signalled a significant change in apportionment law. Whether it will do so in the future remains to be seen.

#### IV. THE FUTURE

The present state of the law is no more logical or defensible than before *Hilen*. The same criticisms apply, perhaps with even greater strength.<sup>112</sup> The central underlying difficulty stems from statutory provisions (KRS sections 454.040 and 412.030) that preserve logically inconsistent schemes for dealing with multiple tortfeasors. As long as KRS section 454.040 preserves for juries a choice whether to apportion, it will be impossible to have an internally consistent scheme. Accordingly, statutory reform is needed. The best statutory substitute for current provisions would be a modified version of the Uniform Comparative Fault Act (U.C.F.A.).<sup>113</sup>

The U.C.F.A. retains joint and several liability against each party, and permits contribution among defendants up to their respective proportionate shares.<sup>114</sup> In order to mitigate the harshness to a solvent defendant when one or more of the other defendants are insolvent, the U.C.F.A. allows the court, upon motion, to reallocate the uncollectible portion of a judgment among all other parties, *including* the plaintiff, according to the relative degree of fault.<sup>115</sup> The U.C.F.A. provisions should be modified, however, to make the liability of defendants several rather than joint, and proportioned according to fault, when the plaintiff is also negligent.<sup>116</sup>

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<sup>112</sup> See text accompanying notes 36-38 *supra*.

<sup>113</sup> 12 U.L.A. 38 (Supp. 1986).

<sup>114</sup> U.C.F.A. §§ 2(c), 4(a); 12 U.L.A. at 41, 44.

<sup>115</sup> U.C.F.A. § 2(d), 12 U.L.A. at 41 (Supp. 1986).

<sup>116</sup> See Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 342, 361-68 (1980); Rogers and Shaw, *supra* note 39, at 54-55.



In the absence of action by the General Assembly, the courts will have to continue to deal with KRS section 454.040 as best they can in light of the adoption of comparative negligence. Although the law resulting from the Kentucky Supreme Court's interpretation of KRS section 454.040 is subject to criticism, overruling *Orr* or *Nix* will not result in a more logical or consistent scheme.

Overruling *Orr* and limiting KRS section 454.040 to situations where all tortfeasors continue to remain before the jury would preserve apportionment in some instances, but would give the plaintiff extraordinary power to circumvent the possibility of apportionment by either not suing or by settling with one defendant. Defendants would be too easily deprived of their statutory right to a *chance* of apportionment.

On the other hand, overruling *Nix* and permitting apportionment when a defendant impleads another allegedly negligent tortfeasor, or even when a defendant merely asserts that another person's negligence contributed to the plaintiff's injury, would preserve joint and several liability in some instances, but would give a defendant extraordinary power to circumvent the possibility of joint and several liability. Plaintiffs would be deprived too easily of a realistic chance of a joint judgment.

In a rough way then, *Orr* and *Nix* serve whatever policy is inherent in KRS section 454.040 that supports leaving a determination of whether a joint or apportioned verdict is appropriate to the jury.

Nonetheless, to the extent that joint and several liability is retained in some cases, with a concomitant right to contribution, no logical basis remains for contribution on a pro rata basis.<sup>117</sup> Because under *Hilen* harms are no longer theoretically "indivisible," contribution should be according to relative fault,<sup>118</sup> at

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<sup>117</sup> See generally Rogers and Shaw, *supra* note 39, at 57-63. The Kentucky Court of Appeals has approved the Kentucky Board of Claims' determination of contribution on a fault-proportion basis. *Commonwealth v. Arrow Truck Lines*, 713 S.W.2d at 4-5 (1986).

<sup>118</sup> See W. KEETON, *supra* note 3, § 51 at 344; H. WOODS, *THE NEGLIGENCE CASE: COMPARATIVE FAULT* § 13:5 at 228 (1978); Berg, *Comparative Contribution and its Alternatives: The Equitable Distribution of Accident Losses*, 43 INS. COUNS. J. 577, 587

least outside the Workers' Compensation context.<sup>119</sup> KRS section 412.030 does not specifically mandate pro rata contribution,<sup>120</sup> and a number of courts have adopted proportional contribution,<sup>121</sup> even in the presence of traditional indemnity and contribution statutes.<sup>122</sup>

Finally, in the absence of statutory amendment, apportionment among joint tortfeasors should be required where the plaintiff's own negligence contributed to his injury. None of the post-*Hilen* apportionment cases involved a negligent plaintiff, and even Justice Leibson, arguing against apportionment in *Prudential*, emphasized that the plaintiff in that case "was

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(1976); Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 252-56 (1976); Griffith, Hemsley & Burr, *Contribution, Indemnity, Settlements and Releases: What the Pennsylvania Comparative Negligence Statute Did Not Say*, 24 VILL. L. REV. 494, 504 (1978-79); Pearson, *supra* note 116, at 369; Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 87 (1974).

A number of states have adopted comparative contribution by statute. ARK. STAT. ANN. § 34-1002(4) (1962); DEL. CODE ANN. tit. 10, § 6302 (1975); FLA. STAT. ANN. § 768.31(3)(a) (West Supp. 1986); HAWAII REV. STAT. § 663-12 (1976); ILL. ANN. STAT. ch. 70 § 303 (Smith-Hurd Supp. 1985); MICH. COMP. LAWS ANN. § 600.2925a-.2925b (West Supp. 1985); MONT. CODE ANN. § 27-1-703 (1985); N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976); OHIO REV. CODE ANN. § 2307.31 (Page 1981); OR. REV. STAT. § 18.440 (1981); R.I. GEN. LAWS § 10-6-3 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 15-8-15 (1984); UTAH CODE ANN. § 78-27-40 (1953); WASH. REV. CODE §§ 4.22.040 (1983); WYO. STAT. §§ 1-1-110 to -111 (1977).

A New Jersey appellate court interpreted the New Jersey comparative negligence statute to modify the state's previous statutory provision for pro rata contribution. *Lee's Hawaiian Islanders v. Safety First Prod.*, 480 A.2d 927, 933 (N.J. Super. Ct. App. Div. 1984), *cert. denied*, 491 A.2d 703 (N.J. 1984).

<sup>119</sup> Because of the differences between a Workers' Compensation payment and settlement of a negligence claim (in particular the relatively distant relation between the amount of Workers' Compensation benefits and the proportion of the employer's fault, see text accompanying notes 59-60 *supra*), it may not be logical to permit proportional contribution against an employer by a defendant in a suit brought by an employee. *But see* 713 S.W.2d 1, 4-5; *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437, 443 (Ill. 1977), *cert. denied*, *Hinckley Plastic, Inc. v. Reed*, 436 U.S. 946 (1978).

<sup>120</sup> See note 25 *supra*.

<sup>121</sup> *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 912 (Cal. 1978); 374 N.E.2d at 442; *Kennedy v. City of Sawyer*, 618 P.2d 788, 803 (Kan. 1980); *Packard v. Whitten*, 274 A.2d 169, 180-81 (Me. 1971); *Tolbert v. Gerber Indus.*, 255 N.W.2d 362, 367-68 (Minn. 1977); *Missouri Pac. R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 472-73 (Mo. 1978); *Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 295 (N.Y. 1972); *Sitges v. Anchor Motor Freight*, 289 S.E.2d 679, 685-89 (W.Va. 1982); *Bielski v. Schulze*, 114 N.W.2d 105, 107 (Wis. 1962).

<sup>122</sup> 578 P.2d at 912-16 (statute specifically determined contribution share "by dividing the entire judgment equally"). *Id.* at 912 n.5; 566 S.W.2d at 473; 289 S.E.2d at 686.

an innocent victim, free from fault by any definition of the term.”<sup>123</sup> Once the theory of indivisible injury is rejected, as it was in *Hilen*, and liability according to fault is adopted, the remaining policy basis for joint and several liability is that the extra burden of an insolvent tortfeasor’s portion of liability should be placed upon a negligent defendant rather than upon an innocent plaintiff.<sup>124</sup> Where the plaintiff is also negligent, there is no remaining policy reason for shifting the burden of suing and obtaining satisfaction of a judgment from the plaintiff to a defendant.<sup>125</sup>

### CONCLUSION

The adoption of comparative negligence undermined at least one of the theoretical bases for entire liability of concurrent tortfeasors—“indivisibility” of injury. While most states adopting comparative negligence have nonetheless preserved joint and several liability, those states did not have Kentucky’s unique statute which permitted apportionment among joint tortfeasors in some circumstances even prior to the adoption of comparative negligence. The Kentucky Supreme Court so far has not expanded significantly the class of cases in which apportionment rather than joint and several liability is to be applied. The court has also refused to restrict this class of cases significantly, despite the implicit policy, arguably underlying the adoption of comparative negligence, of increasing compensation for persons injured by the negligence of others. While the state of the law is as difficult to justify logically as it was prior to the adoption of comparative negligence, it is difficult to hypothesize an internally consistent scheme without reading some statutory provisions off the books. A statutory solution is needed.

Without action by the General Assembly, however, apportionment law could be rendered more consistent with the doc-

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<sup>123</sup> *Prudential Life Ins. Co. v. Moody*, 696 S.W.2d 503, 510 (Ky. 1985). Obviously, none of the pre-*Hilen* apportionment cases involved negligent plaintiffs either, because contributory negligence was a complete bar to recovery.

<sup>124</sup> See text accompanying note 38 *supra*.

<sup>125</sup> See Berg, *supra* note 118, at 585; Fleming, *supra* note 118, at 251-52; Griffith, Hemsley, & Burr, *supra* note 118, at 505; Pearson, *supra* note 116, at 362.

trine of comparative negligence by putting contribution on a proportional fault basis. In addition, joint and several liability principles should not be applied in cases where the plaintiff is negligent—cases in which, prior to *Hilen*, the plaintiff would have recovered nothing at all.