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## Comparative Fault in Missouri

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## COMMENT

# COMPARATIVE FAULT IN MISSOURI

I. INTRODUCTION .....	141
II. CAUSATION .....	144
III. IMPUTED NEGLIGENCE .....	144
IV. FAILURE TO AVOID INJURY OR MITIGATE DAMAGES .....	145
V. ASSUMPTION OF RISK .....	146
VI. NEGLIGENCE PER SE .....	147
VII. STRICT LIABILITY .....	147
VIII. WRONGFUL DEATH .....	149
IX. WORKERS' COMPENSATION .....	149
X. RECKLESS CONDUCT .....	150
XI. CONTRIBUTION .....	150
XII. SETTLEMENTS .....	154
XIII. CONCLUSION .....	155

### I. INTRODUCTION

Until recently, Missouri courts have followed the traditional rule that even the slightest contributory negligence of a plaintiff completely bars recovery.<sup>1</sup> The harshness of the rule gave rise to the doctrine of last clear chance.<sup>2</sup> Although last clear chance alleviated some of the hardship on a negligent plaintiff, it was not totally satisfactory because it shifted the loss entirely onto the defendant.<sup>3</sup> Before 1978, these all-or-nothing rules were accompanied by a rule which provided that a joint tortfeasor could not maintain an action for contribution against the other wrongdoer unless there was a joint judgment against them.<sup>4</sup> Again, as between two wrongdoers, the loss was many times borne by only one.

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1. See, e.g., *Walsh v. Southtown Motors Co.*, 445 S.W.2d 342, 348 (Mo. 1969); *Worth v. St. Louis-S.F. Ry.*, 334 Mo. 1025, 1029-30, 69 S.W.2d 672, 674 (1934); *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 521, 19 S.W. 199, 202 (1892) (en banc).

2. See James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 706-07 (1938); Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J.L. REF. 220, 223 (1977).

3. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 428 (4th ed. 1971).

4. See, e.g., *Layman v. Uniroyal, Inc.*, 558 S.W.2d 220, 225 (Mo. App., K.C.D. 1977).

In *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*,<sup>5</sup> the Missouri Supreme Court took the first significant step toward a system of comparative fault by allowing contribution between joint tortfeasors on the basis of relative fault. Subsequently, however, the court refused to abandon the doctrine of contributory negligence in favor of comparative negligence, deferring instead to the General Assembly.<sup>6</sup> The legislature, in turn, passed up numerous opportunities to adopt comparative negligence.<sup>7</sup>

Finally, in *Gustafson v. Benda*,<sup>8</sup> the supreme court took a radical step toward the just allocation of tort losses. In a sweeping opinion, the court abolished the doctrine that contributory negligence completely bars recovery as well as the doctrine of last clear chance.<sup>9</sup> In the aftermath, Missouri law now recognizes a system of "pure" comparative fault<sup>10</sup> which distributes losses to all responsible parties.<sup>11</sup>

This landmark case arose when the plaintiff, Tom Gustafson, was passing a line of cars on his motorcycle.<sup>12</sup> Just as Gustafson's motorcycle was overtaking the defendant's car, the defendant made a left turn.<sup>13</sup> In the ensuing accident, the plaintiff sustained personal injuries for which he brought an action based on the "humanitarian doctrine."<sup>14</sup> At trial, the jury found for the plain-

5. 566 S.W.2d 466 (Mo. 1978) (en banc).

6. See, e.g., *Steinman v. Strobel*, 589 S.W.2d 293, 294 (Mo. 1979) (en banc).

7. See, e.g., H.B. 1123, 82d Gen. Assembly, 2d Reg. Sess. (1984); H.B. 860, 81st Gen. Assembly, 1st Reg. Sess. (1980); S.B. 207, 81st Gen. Assembly, 1st Reg. Sess. (1980).

8. 661 S.W.2d 11 (Mo. 1983) (en banc).

9. *Id.* at 15.

10. In this Comment, the terms comparative fault and comparative negligence are sometimes used interchangeably. The apparent distinction between the two terms relates to their applicability to strict liability actions. Some jurisdictions recognize "comparative negligence" but do not compare the strict liability of one party to the ordinary negligence of another. See, e.g., *Kinard v. Coats Co.*, 37 Colo. App. 555, —, 553 P.2d 835, 837 (Colo. Ct. App. 1976) (no appropriate basis of comparison); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1367 (Okla. 1974) (comparative negligence statute does not apply to strict liability). In contrast, the concept of "comparative fault" is broad enough to cover strict liability. See *infra* notes 53-58 and accompanying text.

11. In some circumstances, Missouri law will not completely distribute losses in accordance with respective fault. For example, the way in which settling and immune parties are treated may cause some parties to bear more of a loss than their fault would indicate. See *infra* notes 93-95, 105-07 and accompanying text.

12. 661 S.W.2d 29, 30 (Mo. App., E.D. 1982), *rev'd*, 661 S.W.2d 11 (Mo. 1983) (en banc). The facts of the case are found in the court of appeals opinion, 661 S.W.2d at 29-33.

13. *Id.* at 32.

14. *Id.* Missouri has recognized a unique form of last clear chance known as the humanitarian doctrine under which a plaintiff may recover if he was in a position of "immediate danger" and the defendant was thereafter negligent in failing to prevent the accident. For a discussion of Missouri's humanitarian doctrine and the concept of "immediate danger," see *Epple v. Western Auto Supply Co.*, 548 S.W.2d 535, 540-43, *supplemented*, 557 S.W.2d 253 (Mo. 1977) (en banc); see also W. PROSSER, *supra*

tiff and awarded damages.<sup>15</sup> The Missouri Court of Appeals for the Eastern District reversed, stating that under a proper interpretation of last clear chance the plaintiff should recover, but under existing Missouri law the plaintiff had failed to make a submissible case.<sup>16</sup> Specifically, the court suggested that *McClanahan v. St. Louis Public Service Co.*,<sup>17</sup> had erroneously eliminated any distinction between last clear chance and humanitarian negligence.<sup>18</sup> Instead of allowing recovery by the plaintiff, the appellate court invited the Missouri Supreme Court to reexamine the law in this area.

The supreme court responded by adopting pure comparative fault<sup>19</sup> under which a party who is ninety-nine percent at fault still may collect one per cent of his damages.<sup>20</sup> Moreover, in a remarkable feat of judicial legislation, the court announced that "insofar as possible," Missouri would administer its system of comparative fault in accordance with the Uniform Comparative Fault Act (UCFA).<sup>21</sup> The UCFA and its comments purport to explain the application of comparative fault in the context of many substantive areas of tort law. This Comment will examine these areas and reveal inconsistencies between the UCFA and Missouri law.<sup>22</sup> In addition, this Comment will look to other comparative fault jurisdictions to suggest possible solutions to problem areas.

note 3, at 432.

15. 661 S.W.2d at 30.

16. *Id.* at 34.

17. 363 Mo. 500, 251 S.W.2d 704 (Mo. 1952) (en banc).

18. 661 S.W.2d at 32, 34; *see also* Becker, *The Humanitarian Doctrine*, 15 Mo. L. Rev. 359, 362 (1950) (many "humanitarian" cases are really last clear chance cases).

19. 661 S.W.2d at 15. Many other judicial adoptions of comparative negligence have also been of the "pure" type. *See, e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (en banc); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981). The Supreme Court of West Virginia adopted the "modified" form of comparative negligence. *See* Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979).

20. *See* 661 S.W.2d at 15. The *Gustafson* court founded its actions on principles of "fairness." *Id.*

21. *Id.* The Act can be found in 12 U.L.A. 34 (Supp. 1985). The Act also appears in an appendix to the *Gustafson* opinion. 661 S.W.2d at 17-21. Apparently, no jurisdiction has yet adopted the Act in its entirety. *See* 12 U.L.A. 34 (Supp. 1985).

Washington follows some of the Uniform Act. *See* WASH. REV. CODE §§ 4.22.005-.050 (Supp. 1983). Minnesota, a "modified" comparative fault jurisdiction, follows the "fault" provision of the Uniform Act. *Compare* MINN. STAT. § 604.01(a) (Supp. 1983) with UNIF. COMP. FAULT ACT § 1 (b), 12 U.L.A. 37 (Supp. 1985).

22. The Uniform Act became effective in Missouri for cases tried after January 31, 1984. Although it is not yet clear what the court meant by stating that Missouri law will follow the Uniform Act "insofar as possible," the court will not follow section 6 of the Uniform Act because of a conflict with existing statutory law. *Gustafson*, 661 S.W.2d at 15 n.10; *see infra* notes 105-08 and accompanying text.

## II. CAUSATION

All legal requirements of causation will continue to apply under the UCFA. Rules of cause-in-fact and proximate cause apply to both fault as the basis of liability and contributory fault.<sup>23</sup> The trier of fact is to consider the causal relationship between the conduct complained of and the damages claimed when assessing percentages of fault.<sup>24</sup>

Missouri courts have required both "but for" and proximate causation before liability will be imposed.<sup>25</sup> The test for proximate cause is whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the act or omission, and not whether a reasonable person could have foreseen the particular injury.<sup>26</sup> An intervening cause may relieve a defendant from liability, unless the intervening force was foreseeable.<sup>27</sup> Moreover, even under comparative fault, a plaintiff may be barred from recovery if his conduct is found to be the "sole proximate cause" of his damages.<sup>28</sup>

## III. IMPUTED NEGLIGENCE

The comments to the UCFA make clear that imputed fault comes within the meaning of contributory fault.<sup>29</sup> Where the plaintiff's claim is derivative from an injury to a third person, such as a loss of consortium, Missouri courts have imputed the negligence of the injured person to the plaintiff.<sup>30</sup> In such a case, plaintiff's recovery should now be reduced by the percentage of negligence attributable to the injured person.<sup>31</sup>

23. UNIF. COMP. FAULT ACT § 1(b), 12 U.L.A. 37 (Supp. 1985); *id.* § 1 comment, 12 U.L.A. 37 (Supp. 1985).

24. UNIF. COMP. FAULT ACT § 2(b), 12 U.L.A. 39 (Supp. 1985); *id.* § 2 comment, 12 U.L.A. 39 (Supp. 1985). Other factors to be considered in arriving at percentages of fault include: (1) the actor's awareness of the danger involved; (2) the potential severity of the risk of harm; (3) the utility of the actor's conduct; and (4) any exigent circumstances requiring hasty decision. *Id.*

25. *See Bass v. Bi-State Dev. Agency*, 661 S.W.2d 609, 613 (Mo. App., E.D. 1983).

26. *Gaines v. Monsanto Co.*, 655 S.W.2d 568, 571-72 (Mo. App., E.D. 1983).

27. *See Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 298 (Mo. App., E.D. 1983).

28. *See Minor v. Zidell Trust*, 618 P.2d 392, 394 (Okla. 1980) (defendant not liable because plaintiff's conduct was a supervening cause). Missouri law presently prohibits the use of a "sole cause" instruction. *See MO. APPROVED INSTR. 1.03* (1965). Nevertheless, sole cause can be argued to the jury. *Hoehn v. Hampton*, 483 S.W.2d 403, 409 (Mo. App., St. L.D. 1972).

29. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 34 (Supp. 1985) states "Contributory fault chargeable to the claimant" includes legally imputed fault."

30. *See, e.g., Huff v. Trowbridge*, 439 S.W.2d 493, 498 (Mo. 1969) (wife may not recover for loss of consortium if husband was contributorily negligent, because her claim is merely derivative).

31. *See, e.g., Eggert v. Working*, 599 P.2d 1389, 1390 (Alaska 1979) (where husband sues for personal injuries and wife sues for loss of consortium, wife's damages

In actions which are not truly derivative, fault nevertheless may be imputed because of a relationship between the plaintiff and another.<sup>32</sup> Missouri courts, however, have not imputed negligence merely because of a relationship between the plaintiff and a third person<sup>33</sup> unless there is an agency or joint enterprise relationship.<sup>34</sup> In addition to imputing fault, a court may treat two persons as a single party for purposes of allocating fault, as, for example, in the case of a principal and agent or manufacturer or retailer of a product.<sup>35</sup>

#### IV. FAILURE TO AVOID INJURY OR MITIGATE DAMAGES

Under the UCFA, failure to avoid injury or mitigate damages is fault which will reduce the plaintiff's recovery.<sup>36</sup> Failure to avoid an injury can take many forms, however, and it is not clear that it will always reduce the plaintiff's recovery. For example, Missouri courts have indicated that the failure to use a seat belt is not a defense.<sup>37</sup> The UCFA comments state that negligent

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are diminished by percentage of fault attributable to husband); *Acevedo v. Acosta*, 296 So. 2d 526, 529 (Fla. Dist. Ct. App. 1974) (husband's damages for medical expenses incurred on behalf of wife reduced by negligence attributable to wife); *Victorson v. Milwaukee & Suburban Trans. Co.*, 70 Wis. 336, 234 N.W.2d 332 (1975) (consortium claim reduced by negligence attributable to wife); *cf. Lantis v. Condon*, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (Cal. Dist. Ct. App. 1979) (action for loss of consortium is not derivative; therefore, negligence of one spouse not attributable to other spouse).

32. *See, e.g., Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980) (mother's damages for mental distress caused by witnessing injury to child are reduced by both her negligence and the child's negligence).

33. *See, e.g., Graeff v. Baptist Temple*, 576 S.W.2d 291 (Mo. 1978) (en banc) (negligence not imputed from mother to son); *Morris v. Israel Bros., Inc.*, 510 S.W.2d 437 (Mo. 1974) (driver's negligence not imputed to passenger absent contention that passenger entered car with knowledge of driver's intoxication); *Price v. Bangert Bros. Road Builders*, 490 S.W.2d 53 (Mo. 1973) (negligence of parent not imputed to child); *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632 (Mo. App., E.D. 1975) (same).

34. *See Stover v. Patrick*, 459 S.W.2d 393 (Mo. 1970) (neither husband and wife relationship, nor family purpose doctrine, nor joint ownership of automobile is sufficient to impute negligence of driver-spouse to passenger-spouse); *Sanfilippo v. Bolle*, 432 S.W.2d 232 (Mo. 1968) (absent joint enterprise or agency relationship, the negligence of one parent would not be imputed to the other parent); *Robinson v. St. John's Medical Center*, 508 S.W.2d 7 (Mo. App., Spr. D. 1974) (joint control is *sine qua non* of joint effort or enterprise sufficient to impute negligence).

Other comparative negligence jurisdictions also do not impute fault because of a relationship unless there is an agency relationship or joint enterprise. *See, e.g., Hass v. Kessell*, 432 S.W.2d 842 (Ark. 1968) (negligence of driver not imputed to passenger); *Brown v. Keill*, 580 P.2d 867 (Kan. 1978) (negligence not imputed from driver of car to owner).

35. *See UNIF. COMP. FAULT ACT* § 2(a)(2), § 2 comment, 12 U.L.A. 43 (Supp. 1985).

36. *See UNIF. COMP. FAULT ACT* § 1(b), § 1 comment, 12 U.L.A. 41 (Supp. 1985); *see also Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983) (unreasonable failure to mitigate damages is "fault" which reduces recovery).

37. *See Miller v. Haynes*, 454 S.W.2d 293 (Mo. App., St. L.D. 1970) (as a

failure to fasten a seat belt would diminish recovery of damages where the lack of a seat belt increased the severity of the injuries.<sup>38</sup>

### V. ASSUMPTION OF RISK

Assumption of risk has been categorized as express or implied, primary or secondary, and reasonable or unreasonable.<sup>39</sup> Whether an assumption of risk is express or implied depends upon the manner in which plaintiff accepts the risk. Acceptance of a risk may be by express consent, or implied from the surrounding circumstances.<sup>40</sup> Primary assumption of risk refers to situations where the defendant owes no duty to the plaintiff.<sup>41</sup> Secondary assumption of risk is the assumption of negligently created risks.<sup>42</sup> Unreasonable assumption of risk occurs when a risk is negligently assumed.<sup>43</sup> Reasonable assumption of risk is not fault and will, therefore, not be a defense.<sup>44</sup>

Under the UCFA, only unreasonable implied assumption of risk is treated as a form of comparative fault.<sup>45</sup> Reasonable assumption of risk will not re-

matter of law, evidence of the failure to use a seat belt is inadmissible to show lack of due care). *Compare* Price v. Bangert Bros. Road Builders, 490 S.W.2d 53, 56 (Mo. 1973) (dicta) (error to show non-use of seat belt) *with* Uribe v. Armstrong Rubber & Tire Co., 55 A.D.2d 869, 870, 390 N.Y.S.2d 419, 420 (1977) (upholding reduction of plaintiff's recovery because of failure to wear a seat belt). For a discussion of non-use of seat belts as evidence of comparative negligence, see Annot., 95 A.L.R.3d 239 (1979).

38. See UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 42 (Supp. 1985).

39. In Missouri, assumption of risk has been based upon a voluntary consent, express or implied, to accept the danger of a known and appreciated risk. See Turpin v. Shoemaker, 427 S.W.2d 485, 489 (Mo. 1968); see also Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982) (en banc) (whether plaintiff has assumed risk of defendant's reckless conduct in an athletic event is a question for the jury).

40. See Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?*, 1982 S. ILL. U.L.J. 371, 374-75.

41. See *id.* at 376; see, e.g., Armstrong v. Mailand, 284 N.W.2d 343, 351 (Minn. 1979).

42. Kionka, *supra* note 40, at 378.

43. *Id.* at 382.

44. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1985); Fischer, *Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk*, 43 MO. L. REV. 643, 662 (1978).

45. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1985); see, e.g., Li v. Yellow Cab Co., 13 Cal. 3d 804, 820, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975) (court will treat assumption of risk like any other form of contributory negligence); Brown v. Kreuser, 38 Colo. App. 554, —, 560 P.2d 105, 108 (1977) (same); Kopischke v. First Continental Corp., 610 P.2d 668, 687 (Mont. 1980) (dicta) (same); Moore v. Burton Lumber & Hardware Co., 631 P.2d 865, 870 (Utah 1981) (secondary assumption of risk is treated in same manner as contributory negligence under comparative negligence statute); see also Anderson v. Cahill, 528 S.W.2d 742, 749 (Mo. 1975) (en banc) (Donnelly, J., concurring) (assumption of risk should be abrogated upon adoption of comparative negligence); Kionka, *supra* note 40, at 381 (unreasonable assumption of risk overlaps completely with contributory negligence). For a good discussion of the effect of adoption of comparative negligence systems on

duce recovery.<sup>46</sup> Assumption of risk will continue to be a complete bar to recovery where the plaintiff expressly consents to the presence of an obvious hazard or where the defendant owes "no duty" to the plaintiff. In either of these situations, a plaintiff will not recover damages.<sup>47</sup>

## VI. NEGLIGENCE PER SE

The UCFA provides for the diminution of plaintiff's recovery even where the defendant's negligence is based on the violation of a statute.<sup>48</sup> To utilize negligence per se in Missouri, it must appear that the injured party was within the class of persons intended to be protected by the statute, that the injury was of a character the statute was designed to prevent, and that the violation of the statute was the proximate cause of the injury.<sup>49</sup> Contributory fault will not reduce recovery, however, where the statute is intended to protect the plaintiff despite his shortcomings.<sup>50</sup> The plaintiff's violation of a statute may also constitute contributory negligence per se and thereby reduce his recovery.<sup>51</sup>

## VII. STRICT LIABILITY

There is a conceptual problem in applying comparative fault to strict liability. The difficulty is that in strict liability cases the defendant is held liable without regard to fault. Consequently, there may be nothing to compare with the plaintiff's fault.<sup>52</sup>

The UCFA specifically applies to actions based on strict liability.<sup>53</sup> The

assumption of risk, see Annot., 16 A.L.R.4th 700 (1982).

46. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1985); Fischer, *supra* note 44, at 662.

47. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1985); see *Armstrong v. Mailand*, 284 N.W.2d 343, 348 (Minn. 1979).

48. See UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1985); see also *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, 610 P.2d 1107 (1980) (applying comparative negligence to negligence per se); *Scott v. Independent School Dist.*, 256 N.W.2d 485, 488 (Minn. 1977) (same).

49. *Hartenbach v. Johnson*, 628 S.W.2d 684, 687 (Mo. App., E.D. 1982); *Purdy v. Foreman*, 547 S.W.2d 889, 892 (Mo. App., Spr. D. 1977).

50. See UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 57 (Supp. 1985); see, e.g., *D.L. v. Huebner*, 110 Wis. 2d 581, 329 N.W.2d 890, 917 (1983) (child labor law deemed to provide for full recovery notwithstanding plaintiff's contributory negligence).

51. See, e.g., *Harless v. Boyle-Midway Div., Am. Home Prods.*, 594 F.2d 1051 (5th Cir. 1979) (applying Florida law).

52. See Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 Mo. L. REV. 431, 434 (1978).

53. See UNIF. COMP. FAULT ACT § 1(b), 12 U.L.A. 36 (Supp. 1985). Other jurisdictions have also applied comparative negligence to strict liability. See, e.g., *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977). For a good discussion of the applicability of comparative negligence to actions based on strict liability, see Annot., 9 A.L.R.4th 633 (1981).



UCFA avoids the absence of a basis of comparison in these cases by defining "fault" to cover claims for injuries resulting from unreasonably dangerous products,<sup>54</sup> ultrahazardous activities,<sup>55</sup> and breaches of warranty sounding in tort.<sup>56</sup> Under the UCFA, misuse generally reduces recovery.<sup>57</sup> The Act, however, does not apply to a misuse giving rise to a danger that the defendant could not have reasonably anticipated and guarded against. In these cases, the product is simply not defective or unreasonably dangerous.<sup>58</sup>

In Missouri, a plaintiff has the burden of showing the product was being put to a use reasonably anticipated by the manufacturer.<sup>59</sup> Missouri courts have distinguished between contributory *negligence*, which is not a defense in strict liability actions, and contributory *fault*, which is a defense. To relieve defendant of liability, it must be shown that the plaintiff discovered the defect and was aware of the danger, but nevertheless proceeded unreasonably to make use of the product and was thus injured. This is the defense of contributory fault.<sup>60</sup>

54. See UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1985). It has been suggested that where comparative negligence is applied to a products liability claim, the plaintiff's conduct should be compared to that of a reasonable man in similar circumstances and his recovery should be reduced by the amount that his conduct deviated from the objective standard. See Fischer, *supra* note 52, at 449; see also Sanford v. Chevrolet Div. of Gen. Motors Corp., 296 Or. 590, —, 642 P.2d 624, 633 (1982) (plaintiff's conduct measured against reasonable man standard and recovery diminished accordingly).

55. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 36 (Supp. 1985).

56. See UNIF. COMP. FAULT ACT § 1(b), § 1 comment, 12 U.L.A. 37 (Supp. 1985). When a claim based on breach of warranty sounds in contract, however, it is not covered by the Uniform Act. *Id.*; see, e.g., Peterson v. Bendix Home Sys., Inc., 318 N.W.2d 50 (Minn. 1982).

57. "Fault includes . . . misuse of a product for which the defendant otherwise would be liable." See UNIF. COMP. FAULT ACT § 1(b), 12 U.L.A. 36 (Supp. 1985); see, e.g., Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) (plaintiff's misuse of winch compared to defendant's strict liability).

58. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1985); see Fischer, *supra* note 44, at 643 (under principles of comparative negligence, misuse is sometimes a complete defense, sometimes a partial defense, and sometimes no defense at all); Fischer, *Role of Misuse in Products Liability Litigation*, 35 J. MO. BAR 304 (1979) (same).

59. See McGowne v. Challenge-Cook Bros., 672 F.2d 652, 661 (8th Cir. 1982); Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 425 (Mo. App., S.D.), *cert. denied*, 456 U.S. 906 (1982); MO. APPROVED INSTR. 25.04.

60. Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 787 n.6 (Mo. 1977) (en banc) (per curiam); see also MO. APPROVED INSTR. 32.23 (affirmative defense instruction for products liability); cf. Dripps, *Comparative Fault and Comparative Negligence—Is There a Difference?*, 72[1] ILL. B.J. 16 (1983) (comparative negligence which consists of ordinary negligence or failure to discover a defect does not diminish recovery but comparative fault which consists of assumption of risk and misuse will diminish a plaintiff's recovery). The Uniform Act states that contributory fault diminishes recovery "whether it was previously a bar or not, as, for example, in the case of ordinary contributory negligence in an action based on strict liability." UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 38 (Supp. 1983).

## VIII. WRONGFUL DEATH

Missouri's wrongful death statute provides that a defendant may assert "any defense the defendant would have against the deceased."<sup>61</sup> Accordingly, the contributory negligence of the decedent is a defense to this action even though it is not conceptually "imputed" to the plaintiff. Missouri courts have also held that a plaintiff's negligence in a wrongful death action will bar recovery.<sup>62</sup> Negligence of one beneficiary under the wrongful death statute, however, has not barred the recovery of the other beneficiaries.<sup>63</sup>

The UCFA definition of contributory fault is broad enough to cover the negligence of both the decedent and the plaintiff. Where the fault of a person is not strictly imputed, but nonetheless would have previously barred the plaintiff's recovery, such recovery is now diminished by the percentage of fault attributable to the other person.<sup>64</sup> The UCFA also reduces a plaintiff's recovery because of his own negligence.<sup>65</sup>

## IX. WORKERS' COMPENSATION

Missouri's statutory scheme of workers' compensation provides for recovery by employees "irrespective of negligence."<sup>66</sup> The statute also immunizes employers from liability to third parties for contribution.<sup>67</sup> The UCFA comments briefly address this area, but do not purport to change state law.<sup>68</sup> Moreover, the Missouri Supreme Court has indicated that where the UCFA conflicts with a Missouri statute, the statute will govern.<sup>69</sup> Therefore, the *Gus-*

61. MO. REV. STAT. § 537.085 (Cum. Supp. 1983). See generally Note, *Missouri's New Wrongful Death Act*, 45 MO. L. REV. 476 (1980).

62. See, e.g., *Slagle v. Singer*, 419 S.W.2d 9 (Mo. 1967) (action by surviving spouse for wrongful death is barred by surviving spouse's negligence); *State ex rel. St. Louis-S.F. Ry. v. Pinnell*, 605 S.W.2d 537 (Mo. App., S.D. 1980) (negligence of parent bars his action for wrongful death of child).

63. *Sanfilippo v. Bolle*, 432 S.W.2d 232 (Mo. 1968) (absent joint enterprise or agency relationship, negligence of one parent not imputed to other parent).

64. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1985).

65. Cf. *Hood v. Dealers Transp. Co.*, 472 F. Supp. 250 (N.D. Miss. 1979) (plaintiff's negligence will not diminish recovery where statute allows recovery if decedent could have recovered).

66. MO. REV. STAT. § 287.120(1) (1978).

67. *Id.*; see *State ex rel. Hillyard Chem. Co. v. Shoenlaub*, 610 S.W.2d 957 (Mo. 1981) (per curiam) (employer is immunized from liability to third party by workers' compensation law); *State ex rel. Maryland Heights Concrete Contractors v. Ferriss*, 588 S.W.2d 489 (Mo. 1979) (en banc) (employer who is immune under workers' compensation statute cannot be held liable for contribution).

68. The last section of the comment to section 6 of the Uniform Act briefly mentions workers' compensation, employer immunity, and third party liability to employees. In another section, however, the Uniform Act states that contributory fault will reduce recovery whether it was previously a bar or not. UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1983).

69. *Gustafson*, 661 S.W.2d at 15 n.10 (legislative provision on releases will gov-

*tafson* opinion should not affect this statutorily authorized scheme of recovery.

## X. RECKLESS CONDUCT

The concept of "fault" under the UCFA is broad enough to encompass acts which are reckless.<sup>70</sup> In contrast, intentional conduct is not to be compared under the UCFA.<sup>71</sup> Reckless conduct includes "gross negligence" and, in some jurisdictions, "willful and wanton" misconduct as well.<sup>72</sup> Sometimes, however, willful conduct is akin to intentional conduct. In those cases, it should not be a basis of comparison.<sup>73</sup>

Punitive damages are sometimes available when a defendant's conduct is characterized as reckless or willful and wanton.<sup>74</sup> While Missouri courts have associated "willful and wanton" conduct with intentional torts, recovery of punitive damages has been allowed when the defendant's conduct was completely indifferent to or in conscious disregard for the safety of others.<sup>75</sup> The UCFA does not address the question of whether punitive damages should be reduced by the plaintiff's share of fault. Comparative negligence jurisdictions generally have not reduced the recovery of punitive damages.<sup>76</sup> This is apparently because punitive damages are designed to punish rather than compensate.<sup>77</sup>

## XI. CONTRIBUTION

The Missouri Supreme Court established a right to contribution among joint tortfeasors in *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*<sup>78</sup> The court limited its decision to joint tortfeasors who are culpably negligent, which implies that *Whitehead & Kales* is not applicable where one tortfeasor

ern and Uniform Act section 6 will not be followed).

70. See UNIF. COMP. FAULT ACT § 1(b), 12 U.L.A. 36 (Supp. 1985). See generally Hasenfus, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399 (1982).

71. See UNIF. COMP. FAULT ACT § 1 comment, 12 U.L.A. 37 (Supp. 1985).

72. Uniform Act section 1 comment states that sometimes "reckless conduct goes by a different name such as willful or wanton misconduct." UNIF. COMP. FAULT ACT § 1, 12 U.L.A. 37 (Supp. 1985); see also Sorensen v. Allred, 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441, 446 (1980) (comparative negligence applies even though either party's conduct is willful and wanton); Personal Representative of Estate of Starling v. Fisherman's Pier, Inc., 401 So. 2d 1136 (Fla. Dist. Ct. App. 1981) (plaintiff who is guilty of "gross" misconduct may recover from a less culpable defendant).

73. See *Davies v. Butler*, 95 Nev. 763, 602 P.2d 605 (1979).

74. See, e.g., *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 275, 294 N.W.2d 437, 442 (1980); *Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979).

75. *Sharp v. Robberson*, 405 S.W.2d 394, 399 (Mo. 1973) (en banc).

76. See, e.g., *Danculovich v. Brown*, 593 P.2d 187, 194 (Wyo. 1979). But see *Perdernalles Elec. Coop. v. Schulz*, 583 S.W.2d 882, 885 (Tex. Civ. App. 1979) (recovery of exemplary damages reduced by proportion of plaintiff's negligence).

77. *Bowman v. Doherty*, 235 Kan. 870, —, 686 P.2d 112, 121 (1984).

78. 566 S.W.2d 466 (Mo. 1978) (en banc).

is strictly liable.<sup>79</sup> The UCFA does not appear to be so limited. Instead, it speaks of a right of contribution existing "between or among two or more persons who are jointly or severally liable."<sup>80</sup> Because it is based upon principles of "relative fault," Missouri's law of contribution is consistent with contribution based upon "comparative fault" under the UCFA.<sup>81</sup>

The *Gustafson* opinion suggested liberal use of joinder so that the fault of all parties may be compared in a single lawsuit.<sup>82</sup> Missouri Rule of Civil Procedure 52.11 allows for impleader of third party defendants.<sup>83</sup> The UCFA provides that only *parties* are assessed a percentage of fault.<sup>84</sup> "Phantom" fault is not considered by the jury.<sup>85</sup> Both plaintiffs and defendants will, therefore, have incentive to join all possible parties to make their respective percentages of fault appear smaller.<sup>86</sup>

The UCFA specifically retains the doctrine of joint and several liability.<sup>87</sup> This rule breaks down, however, when one defendant is insolvent and the plaintiff has contributed to his own injury. In this situation, the UCFA reallocates the insolvent defendant's share of the loss among the plaintiff and all solvent defendants in proportion to their relative fault.<sup>88</sup> The rule of joint and

79. *Id.* at 468 n.2.

80. UNIF. COMP. FAULT ACT § 4(a), 12 U.L.A. 46 (Supp. 1985); *see also* Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977) (ordinary negligence of one defendant compared with strict liability of other defendant for purpose of contribution).

Contribution between successive tortfeasors has not been allowed in Missouri because there is no common liability to the plaintiff. *State ex rel. Baldwin v. Gaertner*, 613 S.W.2d 638, 640-41 (Mo. 1981) (en banc). Similarly, the Uniform Act does not allow contribution "[i]f the defendants cause separate harms or if the harm is found to be divisible on a reasonable basis." UNIF. COMP. FAULT ACT § 4 comment, 12 U.L.A. 47 (Supp. 1985). *See generally* Anderson, *Recent Developments in Missouri Tort Law*, 48 UMKC L. REV. 660 (1980); Comment, *Contribution in Missouri—Procedure and Defenses Under the New Rule*, 44 MO. L. REV. 691 (1979).

81. *See* 566 S.W.2d at 472; UNIF. COMP. FAULT ACT § 4(a), 12 U.L.A. 47 (Supp. 1985) (basis for contribution is each person's equitable share of the obligation); *id.* § 5(a) (same), 12 U.L.A. 47 (Supp. 1985).

82. 661 S.W.2d at 15.

83. MO. R. CIV. PROC. 52.11.

84. UNIF. COMP. FAULT ACT § 2(a)(2), 12 U.L.A. 43 (Supp. 1985).

85. *Id.* § 2, 12 U.L.A. 43 (Supp. 1985).

86. *See id.*, 12 U.L.A. 43 (Supp. 1985). Rules of discretionary impleader should be applied liberally. *Compare* Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d at 733 (Welliver, J., concurring) (discussing desirability of making impleader mandatory) with Note, *A Separate Cause of Action for Contribution Among Joint Tortfeasors*, 49 MO. L. REV. 121, 131 (1984) (discussing undesirability of making impleader mandatory). *See generally id.*; Comment, *supra* note 80, at 699.

87. *See* UNIF. COMP. FAULT ACT § 2 comment, 12 U.L.A. 40 (Supp. 1985). This is consistent with present and prior Missouri law. *See Gustafson*, 661 S.W.2d at 16; *Whitehead & Kales*, 566 S.W.2d at 474.

88. UNIF. COMP. FAULT ACT § 2(d), 12 U.L.A. 40 (Supp. 1985). Under this section, the court "reallocates" an uncollectable amount among all parties at fault in accordance with their respective fault. For example, assume that the plaintiff is 10% at

several liability "breaks down" here in that a plaintiff must absorb part of the insolvent defendant's share and, therefore, cannot recover the *total* amount of his judgment against any defendant who is liable.<sup>89</sup> Before *Gustafson*, Missouri law placed the risk of insolvency on defendants.<sup>90</sup> Accordingly, it is not clear whether Missouri courts will follow the UCFA reallocation provision. The Washington comparative fault statute, which contains many of the UCFA's provisions, does not include the reallocation provision.<sup>91</sup>

The UCFA makes no provision for the treatment of persons who have an immunity from liability to the plaintiff.<sup>92</sup> Immune persons are not liable for contribution under prior Missouri law.<sup>93</sup> This rule is consistent with the holding of *Whitehead & Kales* that the right to contribution presupposes *actionable* negligence of both parties.<sup>94</sup> This rule should not change under *Gustafson* because, as a policy matter, the supreme court has indicated that allowing contribution in this situation would defeat the purpose of granting the immunity.<sup>95</sup>

Both the UCFA and Missouri law allow for contribution in a separate action.<sup>96</sup> Under the UCFA, the separate action for contribution is designed to

fault, defendant *A* is 40% at fault, and defendant *B* who is insolvent is 50% at fault. A court will reallocate the fault of defendant *B* so that the plaintiff is considered to be 20% at fault and defendant *A* is considered 80% at fault. See Miller, *Extending the Fairness Principle of Li and American Motorcycle: Adoption of the Uniform Comparative Fault Act*, 14 PAC. L.J. 835 (1983).

89. The comments to the Uniform Act state that the reallocation rule avoids the unfairness of the common law rule of joint and several liability upon the solvent defendants, as well as the unfairness to the plaintiff of completely abolishing joint and several liability. UNIF. COMP. FAULT ACT § 2 comment, 12 U.L.A. 40 (Supp. 1985).

90. See *Whitehead & Kales*, 566 S.W.2d at 474 (plaintiff may collect entire judgment from his choice of tortfeasors).

91. See WASH. REV. CODE §§ 4.22.005-.925 (Supp. 1985).

92. UNIF. COMP. FAULT ACT § 6 comment, 12 U.L.A. 45 (Supp. 1985). Apparently, this issue was not addressed because it is treated in many different ways by the states.

93. *Kendall v. Sears, Roebuck & Co.*, 634 S.W.2d 176 (Mo. 1982) (en banc) (parental immunity bars contribution); *State ex rel. Maryland Heights Concrete Contractors v. Ferriss*, 588 S.W.2d 489 (Mo. 1979) (en banc) (employer who is immune under workers' compensation statute cannot be held liable for contribution); *Renfrow v. Gojohn*, 601 S.W.2d 77 (Mo. App., W.D. 1980) (interspousal immunity bars contribution); cf. *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (en banc) (parental immunity not applied where mother and father have been divorced; father is not immune from suit by daughter for wrongful death of mother).

94. 566 S.W.2d at 468.

95. *Kendall*, 634 S.W.2d at 179; *Maryland Heights*, 588 S.W.2d at 491 (quoting *Seaboard Coast Line R.R. v. Simon*, 359 So. 2d 427, 429 (Fla. 1978)); see *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P.2d 948 (1982) (en banc). *But cf.* Pulliam, *Comparative Loss Allocation and the Rights and Liabilities of Third Parties Against an Immune Employer: A Modest Proposal*, 31 FED'N INS. COUNSEL Q. 80, 81 (1980) (immunity from contribution often leads to the imposition of liability against third persons who are not primarily at fault).

96. *Safeway Stores, Inc. v. City of Raytown*, 633 S.W.2d 727, 732 (Mo. 1982);

operate with a one year statute of limitations.<sup>97</sup> Under Missouri law, the statute of limitations is five years.<sup>98</sup> When the Missouri Supreme Court created the right to contribution in a separate action it suggested a one year statute of limitations, but stood by the legislatively-enacted five year statute.<sup>99</sup> The court should reconcile this conflict between the Missouri statute and the UCFA by deferring to the five year statute.

Rules of collateral estoppel will have an effect on the maintenance of a separate action for contribution.<sup>100</sup> In situations involving multiple parties and multiple suits, collateral estoppel may be used to prevent re-litigation of the issue of liability and the percentages of fault.<sup>101</sup> However, a defendant in a

UNIF. COMP. FAULT ACT §§ 4(a), 5(b), 12 U.L.A. 42, 43 (Supp. 1985). For a complete discussion of the separate cause of action for contribution and its interaction with Missouri law, see Note, *supra* note 86.

97. The "one year" language appears in brackets signifying that a different number may be used where desired. See UNIF. COMP. FAULT ACT § 5(c), 12 U.L.A. 43 (Supp. 1985). Contribution may also be obtained in some instances when there has been no judgment, for example, where a person discharges the common liability of the joint tortfeasors. *Id.*; *id.* § 4(b)(1), 12 U.L.A. 43 (Supp. 1985). In the absence of a judgment, contribution will be allowed only to the extent that the amount paid is reasonable. See *id.* § 4(b)(2), 12 U.L.A. 43 (Supp. 1984); *cf.* Stephenson v. McClure, 606 S.W.2d 208 (Mo. App., S.D. 1980) (settling tortfeasor may obtain contribution).

98. MO. REV. STAT. § 516.120(1) (1978); see *Safeway*, 633 S.W.2d at 732; Note, *supra* note 86, at 127. The running of the statute of limitations begins when a joint tortfeasor pays more than his proportionate share. Federated Mut. Ins. Co. v. Gray, 475 F. Supp 679, 681 (E.D. Mo. 1979); Simon v. Kansas City Rug Co., 460 S.W.2d 596, 600 (Mo. 1970). Under the Uniform Act, the statute of limitations begins running at final judgment. See UNIF. COMP. FAULT ACT § 5(c), 12 U.L.A. 43 (Supp. 1983).

99. *Safeway*, 633 S.W.2d at 732-35; Note, *supra* note 86 at 127. A one year statute promotes fairness by requiring the action to be brought while evidence is still readily available to the contribution defendant. *Safeway*, 633 S.W.2d at 733 (citing State Farm Mutual Automobile Ins. v. Schara, 56 Wis. 2d 262, 201 N.W.2d 753 (1972)). See generally State *ex rel.* General Elec. Co. v. Gaertner, 666 S.W.2d 764, 767-68 (Mo. 1984) (en banc).

100. Collateral estoppel is defined as "issue preclusion." See Davis, *Collateral Estoppel—An Awesome Specter*, 34 FED'N INS. COUNSEL Q. 73, 73 (1983). For a discussion of collateral estoppel in Missouri prior to *Gustafson*, see Note, *supra* note 86, at 128.

101. Consider, for example, a case involving a multi-car accident in which the first suit resulted in a finding that Driver A was not at fault and that Driver B was 100% at fault. In a later action, Driver C sues Driver A for personal injuries, and they are each found to be 50% at fault. In a separate action for contribution by Driver A against Driver B, may Driver A make Driver B reimburse him for the entire judgment? See Carlson v. Yellow Cab Co., 308 Minn. 293, 242 N.W.2d 86 (1976) (answering in the affirmative).

Alternatively, suppose that Driver C had sued Driver B for personal injuries. If Driver B attempts to implead Driver A, may Driver A assert collateral estoppel to dismiss a third-party suit? See *id.* (answering in the affirmative).

Finally, assume that in an action between Driver A and Driver B, Driver A is found 100% at fault. In a subsequent action by Passenger against both Driver A and Driver B, Passenger asserts collateral estoppel against Driver A. May Passenger never-

separate action for contribution cannot be bound by the findings of the original action to which he was not a party.<sup>102</sup> He should, therefore, be permitted to litigate issues such as the plaintiff's percentage of fault and the amount of damages.<sup>103</sup> In these circumstances, the contribution defendant will be asserting the fault of a non-party. Although the UCFA prohibits the assessment of fault to a non-party by the jury,<sup>104</sup> the contribution defendant should be able to assert the plaintiff's fault because every party is entitled to at least one opportunity to litigate the issues.

## XII. SETTLEMENTS

The UCFA provision concerning the effect of a release directly conflicts with Missouri legislation on the subject. Section 6 of the UCFA provides that a release reduces a plaintiff's recovery by the released party's equitable share of the obligation.<sup>105</sup> In contrast, the Missouri statute provides that a release reduces the plaintiff's recovery by the greater of the amount stated in the release or the amount paid in consideration for it.<sup>106</sup> Although the two provisions conflict, there are similarities. For example, both provide that a release of one tortfeasor does not release other tortfeasors. Under both statutes, a settling defendant is released from all further liability.<sup>107</sup>

The *Gustafson* court made it clear that the Missouri settlement statute will remain in full force until the legislature chooses to change it.<sup>108</sup> Other

theless re-litigate the case against Driver B? See *Shubeck v. Ondek*, 167 N.J. Super. 121, 400 A.2d 544 (1979) (held: no; plaintiff asserting offensive collateral estoppel must accept the burden as well as the benefit). *But cf. Shanley v. Callahan Indus.*, 54 N.Y.2d 52, 429 N.E.2d 104, 444 N.Y.S.2d 585 (1981) (if party is found 100% at fault in first action, he is not precluded from seeking recovery from other parties in a later action).

102. See *Safeway*, 633 S.W.2d at 732 (contribution defendant is "entitled to a full opportunity to defend against the present allegations of . . . fault and the amount of damages which the injured party suffered"); see also *Davis*, *supra* note 100, at 76. *But see Note, Collateral Estoppel of Non-parties*, 87 HARV. L. REV. 1485, 1486 (1974) (collateral estoppel may sometimes be used against a non-party).

103. See *Safeway*, 633 S.W.2d at 732 (contribution defendant may assert "all defenses which would have been available in the original action").

104. UNIF. COMP. FAULT ACT § 2(a)(2), § 2 comment, 12 U.L.A. 39 (Supp. 1985).

105. *Id.* § 6, 12 U.L.A. 44 (Supp. 1985). This provision is in keeping with the Uniform Act's emphasis upon basing liability on a party's equitable share of the obligation.

106. MO. REV. STAT. § 537.060 (Supp. 1984). The Missouri statute is based on Section 4 of the 1955 version of the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 101 (1955). *Gustafson*, 661 S.W.2d at 15 n.10. See generally *Fischer, The New Settlement Statute: Its History and Effect*, 40 J. MO. BAR 13 (1984).

107. Compare UNIF. COMP. FAULT ACT § 6 & § 6 comment, 12 U.L.A. 44-45 (Supp. 1985) with MO. REV. STAT. § 537.060 (Supp. 1984).

108. 661 S.W.2d at 16 n.10. The court invited the legislature to adopt section 6 of the Uniform Act. In the meantime, however, the courts will apply section 537.060. *Id.* Because the plaintiff's recovery will be reduced by the amount of the settlement and

jurisdictions have found judicially adopted comparative negligence to be compatible with release statutes similar to the Missouri statute.<sup>109</sup> Consequently, Missouri courts should have ample guidance in dealing with the effect of settlements on negligence actions.<sup>110</sup>

One important issue involves whether the amount of a settlement should be subtracted from the plaintiff's award before or after diminution for contributory negligence. If the award is reduced by the amount of the settlement before the plaintiff's percentage of fault is applied, there will be a relatively smaller reduction of the award. In contrast, if the plaintiff's award is reduced by his percentage of fault before subtracting the amount of the settlement, the plaintiff's ultimate recovery will be smaller.

The Washington Supreme Court has considered this precise issue.<sup>111</sup> The Washington settlement statute requires that the *claim* of the releasing party be reduced by the amount of the settlement.<sup>112</sup> By defining the plaintiff's "claim" as the amount attributable to the negligence of others, the court correctly reduced the award by the percentage of plaintiff's negligence *before* subtracting the amount of the settlement.<sup>113</sup> Missouri's settlement statute similarly requires the "claim" to be reduced.<sup>114</sup> Consequently, the same result should be obtained under Missouri law.

### XIII. CONCLUSION

The Missouri Supreme Court has made an innovative move in making Missouri the first state to adopt judicially a significant portion of the UCFA. Although the *Gustafson* decision leaves many questions in Missouri tort law

not by the released party's equitable share of the obligation, there is no need to assess a percentage of fault to a released party as required by section 2(a)(2) of the Uniform Act. Therefore, there is no reason to join a settling tortfeasor into the action.

109. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 912-16, 146 Cal. Rptr. 182 (1978) (application of comparative negligence to settlement statute); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); CAL. (CIV. PROC.) CODE § 877 (West 1980); ILL. ANN. STAT. ch. 70 § 302(c) (Smith-Hurd Supp. 1983); MICH. COMP. LAWS § 600.2925(d) (Supp. 1984); MICH. STAT. ANN. § 27A.2925(4) (Callaghan Supp. 1984). Washington, which has legislatively adopted some sections of the Uniform Act, also reduces a plaintiff's recovery by the amount of the settlement and not by the released party's equitable share. WASH. REV. CODE ANN. § 4.22.060 (Supp. 1985).

110. See *Mayhew v. Berrien County Road Comm'n*, 414 Mich. 399, 326 N.W.2d 366 (1982) (excellent discussion of the application of comparative negligence to this type of settlement statute).

111. See *Scott v. Cascade Structures*, 100 Wash. 2d 537, 673 P.2d 179 (1983) (en banc).

112. WASH. REV. STAT. § 4.22.060(2) (Supp. 1985).

113. See *Lemos v. Eichel*, 83 Cal. App. 3d 110, 147 Cal. Rptr. 603 (1978) (reducing claim by fault attributable to plaintiff first).

114. MO. REV. STAT. § 537.060 (Supp. 1984).



unanswered, the court has given the bench and bar guidance to structure the interaction between comparative fault and Missouri law by utilizing the UCFA and its comments. Many areas of Missouri tort law will not be affected significantly by the adoption of comparative fault. Other areas of tort law will benefit from principles derived from the UCFA.

In many ways, the UCFA fits nicely into the pattern of prior law. Comparative fault will further the goal of "fairness" which impelled the court to allow contribution based on relative fault. The wrongful death statute is also compatible with comparative fault. Most importantly, by completely eliminating contributory negligence as a bar to recovery, the adoption of the UCFA has eliminated the need for artificial and unsatisfactory rules such as last clear chance and humanitarian negligence.

Although the court stated that the UCFA will be followed "insofar as possible," Missouri statutory law nevertheless will govern when in conflict with the UCFA. Where the UCFA conflicts with existing court decisions, however, the courts will be able to look to the UCFA and modify judge-made rules in accordance with the process of common law. In the final analysis, the Missouri Supreme Court appears to have committed itself to the structure of the UCFA. This commitment will be beneficial to Missouri tort law by modernizing outmoded tort concepts. Through *Gustafson*, Missouri has become one of the most progressive jurisdictions in the development of a just system for allocating tort losses.

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