Apportionment of Liability in Workplace Injury Cases

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I. INTRODUCTION ............................................................................. 65
II. THE DILEMMA............................................................................... 69
   A. Workers' Compensation Background ................................... 69
   B. An Example............................................................................ 71
III. WORKING WITH COMPARATIVE RESPONSIBILITY AND SEVERAL LIABILITY .......................................................... 73
   A. Judicial Responses............................................................... 73
   B. Scholars' Approaches.......................................................... 78
IV. A NEW PROPOSAL ......................................................................... 80
   A. The Basics: Several Liability ................................................ 80
   B. Additional Complications .................................................... 83
      1. Joint and Several Liability with Reallocation .................. 84
      2. Liability Based on Threshold ............................................ 86
   C. The Problem of Insolvency ................................................... 89
V. SUGGESTIONS FOR STATUTORY REFORM .................................. 92
VI. CONCLUSION................................................................................ 93

I. INTRODUCTION

Most scholars agree that the advent of comparative fault has been a positive development in tort law. The transition to comparative fault has not been easy, however, as states have grappled with its effects on a number

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of principles that developed in an earlier day.\(^1\) One area that remains particularly unsettled is how comparative fault affects the apportionment of damages in cases involving multiple tortfeasors. An especially vexing issue is how courts should apportion damage awards in multiparty workplace injury cases.

Prior to comparative fault, states handled such cases in a straightforward fashion. Injured employees could seek compensation from employers pursuant to workers' compensation laws—statutory arrangements under which employers paid limited benefits for workplace injuries, regardless of fault. Employees, however, still could file tort actions against other entities ("third-party defendants") that contributed to their harm.\(^2\) If an employee won damages, the employer then could seek subrogation against the tort award to recover benefits it had paid. Two primary grounds supported subrogation: first, it prevented employees from receiving excessive compensation,\(^3\) and second, it allowed employers to recover from the only party deemed culpable for the employee's injury.\(^4\)

The logic behind this process became questionable, however, as some states began to adopt comparative fault, and in many instances, abrogated the traditional rule of joint and several liability.\(^5\) These doctrinal changes

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1. See, e.g., Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. Rev. 1103 (2002) (discussing how courts have struggled with a number of rules that evolved in the pre-comparative fault era, including the rule of last clear chance, the doctrine of joint and several liability, and the issue of pro rata contribution).


3. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. I (hereinafter RESTATEMENT (THIRD): APPOINTMENT] ("These subrogation claims were justified because the plaintiff allowed to retain both full-tort damages and workers' compensation payments would be overcompensated.").

4. See, e.g., Struhs v. Protection Techs., Inc., 992 P.2d 164, 168 (Idaho 1999) ("The dual purposes of subrogation... are to achieve an equitable distribution between responsible parties 'by assuring that the discharge of an obligation be paid by the person who in equity and good conscience ought to pay it' and 'to prevent the injured claimant from obtaining a double recovery for an injury.'” (quoting Presnell v. Kelly, 740 P.2d 43, 45 (Idaho 1987)). See also Swanson v. Hartford Ins. Co. of Midwest, 46 P.3d 584, 587 (Mont. 2002); Youngblood v. American States Ins. Co., 866 P.2d 203, 205 (Mont. 1993).

5. Joint and several liability means that a single tortfeasor can be responsible for the entire amount of the plaintiff's damages. When states began to move away from the "all or nothing" system of contributory negligence, they also began to move away from the "all or nothing" rule of joint and several liability. See Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1303–04 (1997) ("Today, only fourteen states and the District of Columbia retain virtually pure joint and several liability. Of the remaining thirty-six states, sixteen states have abolished, or nearly abolished, joint and several liability, and twenty have adopted a hybrid of the two systems.").
meant that courts could align liability with fault and potentially reduce tort awards based on the level of an employer's negligence.\textsuperscript{6} When a court makes such calculations, the traditional approach lacks justification. Why should an employer receive full reimbursement for workers' compensation payments through subrogation when a court has the ability to adjust an award based on its actual contribution to the harm?\textsuperscript{7}

Several possibilities for reform exist. A small number of courts, for example, have suggested that employers should bear a comparative share of tort damages, regardless of limitations that workers' compensation laws place on liability.\textsuperscript{8} Others have suggested that employers should contribute to the payment of tort damages, but with limits based on the employer's workers' compensation liability.\textsuperscript{9} A more nuanced proposal can be found in the American Law Institute's 1991 Reporters' Study titled \textit{Enterprise Liability for Personal Injury}.\textsuperscript{10} The Reporters' Study approach would eliminate employer subrogation altogether and reduce tort awards by the amount of workers' compensation benefits that employers owe to employees.\textsuperscript{11}

In jurisdictions that adhere to the traditional rule of joint and several liability, the Reporters' Study approach has appeal: it would prevent a third party from unjustly paying the full amount of a plaintiff's damages, and it would do so in an environment where a comparative fault analysis would be unnecessary.\textsuperscript{12} In jurisdictions that have abrogated joint and several liability,\textsuperscript{13} however, the Reporter's Study approach makes less sense. These states essentially compel fact-finders to consider relative shares of fault. Under such circumstances, the employer's level of culpability would seem

\textsuperscript{6} See LARSON’S WORKERS’ COMPENSATION LAW §120.02[3], at 120--10.1 – 120.13 (Bender 2001) (hereinafter LARSON’S WORKERS’ COMPENSATION) (“A growing number of states . . . have ruled that the third party [in a tort action] may be permitted to plead the employer’s contributory negligence as a \textit{pro tanto} defense to the extent of the workers’ compensation benefits paid to the employee or to the extent of the employer’s proportional fault in a comparative negligence jurisdiction.”).

\textsuperscript{7} Most states, however, have not altered workers’ compensation acts, which has sometimes compelled courts to apply obviously outdated mandates. See Sullivan v. Scoular Grain Co., 853 P.2d 877 (Utah 1993). \textit{But see} Aitken v. Indus. Comm’n of Ariz., 904 P.2d 456, 460 (Ariz. 1995) (“Courts should not limit themselves to the rigid construction or application of a statute when significant changes in circumstances since its enactment produce results plainly contrary to legislative intent.”).

\textsuperscript{8} See infra notes 48–51 and accompanying text.

\textsuperscript{9} See infra notes 51–53 and accompanying text. Presumably, under this approach, employers would retain subrogation actions if their workers' compensation liability exceeded their comparative share of tort damages. Although this approach offers much in terms of fealty to comparative fault, it is overly complex and potentially leaves the plaintiff undercompensated in an inordinate number of cases.

\textsuperscript{10} AMERICAN LAW INSTITUTE, REPORTERS’ STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY (1991) [hereinafter REPORTERS’ STUDY].

\textsuperscript{11} See id. at 191–92.

\textsuperscript{12} The reason that the comparative fault analysis would be unnecessary is that the employer is immune from tort liability under the workers’ compensation law, and the third-party defendant is responsible for 100 percent of the plaintiff's damages under the doctrine of joint and several liability.

\textsuperscript{13} See supra note 5 and accompanying text.
to be a more sensible set-off against third-party liability than the amount of workers' compensation benefits.  

In fairness, the Reporters' Study was promulgated more than a decade ago, at a time when many states still retained joint and several liability in its traditional form. In the years that followed, however, more states altered the traditional rule, making this a sensible time to reconsider the Reporters' Study approach.

This Article builds upon the Reporters' Study by setting forth a new proposal that accounts for current developments in the law. First, the proposal suggests that courts allow fact finders in tort actions to assign a share of fault to all who contributed to an employee's injuries—including employers who are immune from liability under workers' compensation laws. Employees then should collect damages from all responsible tort defendants according to a jurisdiction's normal apportionment rules. Employees also should receive full workers' compensation benefits, without employers having a right to seek subrogation against the tort award. In essence, the proposal would view the workers' compensation payment like a pre-trial settlement: An employer who ends up paying "too much" in workers' compensation according to the fault allocation in the tort action (or an employee who received "too little") simply would bear the consequence of the bargain, just like a party must bear the consequence of a settlement with an opposing litigant. In light of tort law's progression in

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14. See, e.g., supra note 6 and accompanying text.

15. See RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, § A18 cmt. a; Cardi, supra note 5, at 1303–04.

16. For example, if a jurisdiction applies several liability only, the third-party defendant would be responsible only for its proportional share of the employee's damages. If the jurisdiction follows a "hybrid" approach between joint and several liability and several liability, this Article generally favors the Reporters' Study approach where joint and several liability attaches and this Article's proposal where it does not. The Article explores these possibilities in Part IV infra.

17. Some workers' compensation statutes specifically require subrogation. See, e.g., GA. CODE ANN. § 34-9-11.1(b) (Harrison 1998) ("In the event an employee has a right of action against such other person . . . and the employer's liability under this chapter has been fully or partially paid, then the employer . . . shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter, against such recovery.") (citations omitted). This Article instead urges legislators to consider whether subsequent comparative fault acts have implicitly altered the requirement of subrogation. See infra Part V.

18. See infra notes 58–65 and accompanying text.

19. See RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, § B19 cmt. l. At least one commentator, however, has criticized the general description of workers' compensation as a "bargain" between employer and employee. See Martha T. McCluskey, The Illusion of Efficiency in Workers' Compensation 'Reform', 50 RUTGERS L. REV. 657, 673–75 (1998) (criticizing the description of workers' compensation as a "bargain" on three grounds: "First, the ideal of a balance between the interests of 'workers' and 'employers' in the aggregate obscures the conflicting interests and ideologies within those two groups. Second, the image of historic compromise belies the fact that many labor groups strongly opposed adoption of workers' compensation systems. . . . Third, the image of workers' compensation as an exchange of tort remedies for expanded liability is misleading because the common law tort system was not necessarily the only alternative available to be 'traded.'") (citations omitted).
the years following the Reporters' Study, this approach goes a long way toward properly balancing the interests in what has been described as the "most evenly-balanced controversy in all of workers' compensation law."

The Article begins in Part II by describing the problem of meshing workers' compensation with the tort system. Part III describes previous proposals for reform set forth by courts and scholars. Part IV sets out a new proposal and explains why the proposal improves upon previous suggestions for reform. Finally Parts V and VI of the Article conclude and suggest guidelines for revising workers' compensation statutes.

II.

THE DILEMMA

A. Workers' Compensation Background

Until the 20th century, employees had difficulty recovering tort damages for workplace injuries. Initially, the "unholy trinity" of employer defenses (the fellow servant rule, voluntary assumption of the risk, and contributory negligence) barred most claims. Even after states began to loosen these rules, most employees did not have the resources or sufficiently valuable claims to obtain representation.

In response to these difficulties and others, states began to pass workers' compensation laws. Under these laws, employers insured...
against certain losses that "arose out of and in the course of employment."24 Employees benefited from the fact that workers' compensation laws were no-fault in nature (i.e., they did not require proof that the employer was negligent).25 They also benefited from an administrative process designed to ensure timely compensation.26 Employers, however, also benefited—most notably from the fact that workers' compensation laws limited awards to an amount that accounted only for certain economic loss.27 In addition, workers' compensation laws immunized employers from tort actions, in which they might otherwise face liability for non-economic harm, such as pain and suffering or even punitive damages.28

Critics have long charged, however, that the limited benefits of workers' compensation are insufficient.29 Therefore, in the 1970s, when products liability law became more plaintiff-friendly, it is not surprising that injured employees began to seek additional recovery against potential third-party defendants in the tort system.30 Defendants, however, frequently

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24. See Weiler, supra note 21, at 826.
26. Id.
27. See Weiler, supra note 21, at 826.
28. See LARSON'S WORKERS' COMPENSATION, supra note 6, § 1.03[2], at 1–5 (1999) ("The ultimate social philosophy behind [workers'] compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form . . . .").
30. "[I]t is not hard to fathom why individual workers have developed such an increased propensity to bring tort suits rather than rely on guaranteed [workers' compensation] benefits. This phenomenon is the product of recent trends that have made [workers' compensation] less valuable and tort liability (especially, though not exclusively, for defective products) much more valuable." Weiler, supra note 21, at 828. Beyond products liability, Larson also identifies the extension of the unseaworthiness doctrine to longshore workers as a reason for an increase in "the potential for inequity as between third party and employer" in workplace injury cases. See LARSON'S WORKERS' COMPENSATION, supra note 6, § 121.01[2], at 121–7 (2000); see also Karen M. Moran, Note, Indemnity Under Workers' Compensation: Recognizing a Special Legal Relationship Between Manufacturer and Employer, 1987 DUKE L.J. 1095, 1097 ("The inequities of strict application of the workers' compensation exclusive-remedy provision have multiplied with the development of products liability
chafed at the way a typical case played out. Because of joint and several liability, defendants faced liability for the full amount of an employee’s harm. Yet, because workers’ compensation laws contained exclusive remedy provisions, defendants could not seek contribution from employers, even where it was clear that an employer’s negligence contributed to the harm. Employers, meanwhile, retained a statutory right of subrogation against the employee’s damage award to recover the amount paid in workers’ compensation. This result was clearly unfair to a tort defendant who paid a disproportionate amount of the employee’s damages, especially in the face of a highly culpable employer who was immune from suit or a contribution claim.

But crafting a solution to accommodate the no-fault arrangement that provides an employer limited liability, while simultaneously recognizing an injured employee’s right to compensation, is difficult. As one commentator stated, it appears that “[p]resent law cannot fulfill the reasonable expectations of [all] three parties.” The result is a frustrating situation in which it seems impossible to account for all of the interests involved.

**B. An Example**

To better understand this “most evenly balanced controversy,” consider an example. Suppose that Edward Employee works for Major Manufacturing Company where his job is to assemble widgets at Major’s plant. One day, a piece of equipment that Edward uses on the job malfunctions, causing severe injury to his hand. Edward files a workers’ compensation claim and receives $10,000 in benefits for the injury. Subsequently, Edward files a products liability claim against Component Company, which manufactured the equipment that malfunctioned. In this

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31. See Eaton, supra note 25, at 885.
32. See infra notes 36–39 and accompanying text.
33. See Eaton, supra note 25, at 888 (“[H]ow should the law accommodate the employee’s interest in full recovery, the employer’s interest in subrogation and limited liability, and the product manufacturer’s interest in reducing its tort liability, especially when employer fault is involved?”).
34. Philip D. Oliver, Once is Enough: A Proposed Bar of the Injured Employee’s Cause of Action Against a Third Party, 58 FORDHAM L. REV. 117, 134–35 (1989) (“Present law cannot fulfill the reasonable expectations of the three parties. First, the employee argues that workers’ compensation statutes were never intended to preclude the employee’s action against a third party because the exclusive remedy provision bars only the suit against the employer. . . . Second, the third party, under modern comparative fault principles, simply argues for shifting a portion of the loss to another whose fault has contributed to the loss. . . . Finally, the employer argues that it should not be forced to contribute a large damage award against the third party. The employer has already assumed the burden of compensating all its injured employees regardless of culpability, and as part of a recognized trade-off, is entitled to the exclusive remedy provision.”) (citations omitted).
35. See supra note 20.
action, a jury awards Edward $50,000 as full compensation for his harm. Following the traditional approach, Major then seeks subrogation against the award, requesting reimbursement of the $10,000 that it (or its insurer) paid in workers' compensation.

These results are simple enough, assuming that there is no evidence of negligence on Major's part. But suppose that Major did not properly service the equipment—an act of negligence that contributed to Edward's harm. Today, many states still would permit Major to obtain subrogation, while denying Component any right of contribution or offset. The theory behind the outcome is that the "claim of the employee against the employer is solely for statutory benefits; his claims against the third party is for damages. The two are different in kind and cannot result in a common liability."38

The unfairness to the third-party defendant is obvious. The third party remains liable for the full amount of harm, while the negligent employer not only avoids tort responsibility, but retains the ability to recover its workers’ compensation payments through subrogation. Further, while the result does not impact the plaintiff's ability to recover full compensation, it does raise serious questions about the system's effectiveness in terms of accident prevention and deterrence.39 The problem is exacerbated by the emergence of comparative fault and the corresponding movement away from joint and several liability—doctrinal developments explicitly designed to align liability with responsibility.

36. See Larson's Workers' Compensation, supra note 6, § 116.01, at 1–2 ("[T]hese statutory schemes may be roughly divided into four basic categories: (1) Those which subrogate the employee's action to the payor of compensation unconditionally; (2) Those which allow the payor's (subrogee's) action to coexist with the employee's right of action; (3) Those which give the employee priority in filing suit; and (4) Those which give the subrogee priority in filing suit.").

37. See Reporters' Study, supra note 10, at 187 ("At this time the great majority of states still deny the third-party manufacturer any contribution at all from the negligent employer toward the full tort damages awarded to the injured employee."); Larson's Workers' Compensation, supra note 6, § 121.02, at 121–12 ("The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law."); Weiler, supra note 21, at 839 ("A large majority of jurisdictions deny the third-party manufacturer any contribution at all from the negligent employer towards the full tort damages paid to the injured employee.").

38. Larson, supra note 20, at 488; Larson's Workers' Compensation, supra note 6, § 121.02, at 121–12.

39. See Reporters' Study, supra note 10, at 188 (mentioning "potentially serious gap and distortion in effective [accident] prevention" because "employer faces no legal/financial impact from its misuse of 'defective' products."). On the other hand, "[f]rom the point of view of administration this position is the most economical because it avoids any need to resolve an often contentious dispute over whether and to what extent the employer was at fault in the accident, as compared with the responsibility of worker and manufacturer." Id. Professor Eaton writes: "The majority approach is deemed unfair in that it saddles the product manufacturer with liability that is disproportionate to its culpability. It also reduces an employer's incentive to invest appropriate resources in injury avoidance. Despite decades of criticism from prominent academics, the employer subrogation-no contribution approach continues to operate in more than forty states." Eaton, supra note 25, at 889–90.
III.
WORKING WITH COMPARATIVE RESPONSIBILITY AND SEVERAL LIABILITY

The advent of comparative responsibility and changes in joint and several liability have sparked a number of responses to the dilemma.40 This Part addresses the primary judicial and academic responses to these developments.

A. Judicial Responses

Somewhat surprisingly, the most common judicial response to the problem has been to ignore it.41 A recent example comes from the Tennessee Supreme Court’s decision in Ridings v. Ralph M. Parsons Co.42 In Ridings, the plaintiff fell off a ladder while on the job and filed a tort action against both the ladder’s manufacturer and distributor. The tort defendants sought to introduce evidence that the plaintiff’s employer had contributed to the harm, despite the fact that the Tennessee workers’ compensation law immunized the employer from tort liability. Tennessee had adopted comparative fault only four years earlier43 and the question whether the rule of joint and several liability permitted apportionment of fault to an employer was one of first impression. The court answered the question in the negative:

"[T]he rationale of [comparative fault] postulates that fault may be attributed only to the persons against whom the plaintiff has a cause of action in tort. . . . Since the plaintiff’s employer cannot be made a party to the plaintiff’s tort action for personal injuries sustained in the course and scope of his employment, the rationale of [the decision adopting comparative fault], both as to principle and procedure, will not permit fault to be attributed to the plaintiff’s employer."44

The problem with this approach is that it potentially leaves the third-party defendant bearing more than its actual share of the loss in a state that is supposed to apportion liability in accordance with fault. It also might reduce the employer’s incentives to operate safely.45

Over the years, several courts have recognized these difficulties and

40. At least early on, these proposals were not viewed as successful. In 1982, for example, Professor Larson wrote that in “a number of states . . . the intervening adoption of comparative negligence has been seized upon as a basis for attempting to change the rule; these attempts have been consistently unsuccessful. There is nothing in the embracing of comparative negligence that implies any intention to alter the fundamental principle of exclusiveness of compensation liability.” Larson, supra note 20, at 488.
41. See Eaton, supra note 25, at 889–90; Larson, supra note 20, at 488.
42. 914 S.W.2d 79 (Tenn. 1996).
43. See McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).
44. 914 S.W.2d at 81–82. The Tennessee Supreme Court explicitly affirmed this ruling the following year. See Snyder v. LTG Lufttechnische GmbH, 955 S.W.2d 252, 254–55 (Tenn. 1997).
45. See Eaton, supra note 25, at 889–90.
tried to resolve the problem. Among the best-known efforts is the New York Court of Appeals’ 1972 decision in *Dole v. Dow Chemical Co.* In *Dole*, an employee died after exposure to a chemical while on the job. The employee’s survivors filed a tort action against Dow Chemical Co., the manufacturer of the chemical, for failure to warn of its hazards. Dow brought a third-party action against the victim’s employer, asserting that the employer had access to warnings about the chemical’s risks. The Court of Appeals ultimately allowed the action to proceed. The court recognized the difficulty presented by the fact that New York’s workers’ compensation law provided an exclusive remedy for the plaintiff against the employer. But, as between the employer and Dow, the court ruled that the policies underlying comparative fault trumped any concern over exclusivity: “Right to apportionment of liability or to full indemnity, then, as among the parties involved together in causing damage by negligence, should rest on relative responsibility and... be determined on the facts.”

While the *Dole* court solved the problem of leaving a third-party defendant with an inordinate amount of liability, it swung the problem’s pendulum too far in the other direction. That is, the *Dole* court ignored the fact that workers’ compensation systems are designed to limit employer liability in exchange for providing employees with quick compensation for a full range of workplace injuries—many which will not involve fault at all. Thus, the *Dole* approach does no better job than the traditional approach in balancing the interests among all parties involved. Indeed, criticism of *Dole* led the New York legislature to severely restrict its application in 1996 by amending the state’s workers’ compensation statute to prohibit employer liability for contribution or indemnity, save only where an

46. Indeed, discussing the various approaches that courts have taken could fill a treatise—as it does in Larson’s work. See *Larson’s Workers’ Compensation*, supra note 6, § 121.03[1]–[9]. The goal here is not to regurgitate the treatise. Instead, this Article will lay out the major judicial responses that represent fundamentally different approaches to the problem. This discussion will frame the Article’s new proposal in the context of previous attempts to resolve the problem.


48. Id. at 295. The *Dole* court appeared to treat the case as one involving indemnity. But, as Larson points out, “for all the court’s repeated references to ‘indemnity,’ [it effectively] revolutionize[d] the sharing of damages between joint wrongdoers in New York... It is difficult to see what is left over to be handled under the regular contribution statute apportioning damages equally between joint tortfeasors.” *Larson’s Workers’ Compensation*, supra note 6, § 121.03[8], at 121–40–41. For a brief period of time, Illinois actually went the full distance and explicitly abolished the “no-contribution” rule between employers and third parties. See *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437 (Ill. 1978). The Illinois legislature, however, quickly amended the state’s contribution laws in a way that seems to overrule the *Skinner* holding. See 740 ILL. COMP. STAT. ANN. § 302 (West 1979) (authorizing contribution only among those liable in tort); *Larson’s Workers’ Compensation*, supra note 6, § 121.03[9], at 121–44–45 (“[I]t [is] widely assumed that the purpose and effect of the amendment was to rule out contribution on the *Skinner* facts...”).

49. See Weiler, supra note 21, at 843 (“[T]he entire line of argument underlying the rulings in cases such as *Dole* and *Skinner* assumes the dominance of the tort system and its fault perspective. The contrary vision and policy of [workers’ compensation] are entirely ignored.”).
employee has suffered a "grave injury."\textsuperscript{50}

Recognizing the problems inherent in a \textit{Dole}-type approach, several courts have tried to split the difference between the goals of comparative responsibility and those of workers' compensation. One of the best-known efforts is the Minnesota Supreme Court's 1977 decision in \textit{Lambertson v. Cincinnati Corp.}\textsuperscript{51} In \textit{Lambertson}, the plaintiff suffered a workplace injury while using a press brake manufactured by defendant Cincinnati Corp. The plaintiff received workers' compensation benefits from his employer and then filed a product liability action against Cincinnati. At trial, the jury set damages at $40,000 and allocated 15 percent of the fault to the plaintiff, 25 percent to Cincinnati, and 60 percent to the plaintiff's employer.\textsuperscript{52} The trial court entered judgment of $34,000—the full amount of damages, less only the plaintiff's 15 percent share. Cincinnati sought reimbursement from the negligent employer in light of the fact that the judgment exceeded Cincinnati's fair share of the loss. Rather than completely deny the claim (as states like Tennessee do) or tie contribution to the fault allocation (as the \textit{Dole} court attempted to do), the Minnesota Supreme Court compromised. The court held that it would allow "contribution from the employer \textit{up to} the amount of the workers' compensation benefits."\textsuperscript{53}

\textsuperscript{50} See N.Y. [WORKERS' COMPENSATION LAW] § 11 (McKinney 1996) (specifically defining grave injury as including death; permanent and total loss or amputation of arm, leg, hand, or foot; loss of multiple fingers; loss of multiple toes; paraplegia or quadriplegia; total and permanent blindness; total and permanent deafness; loss of nose; loss of ear; permanent and severe facial disfigurement; loss of an index finger; or an acquired injury to the brain caused by an external physical force resulting in permanent total disability). The Editor's Notes to the statute state: "It is the intent of this legislature to enact a package of statutory provisions that are balances and which seek to affirm the spirit of cooperation between labor and management that distinguished the workers' compensation law's enactment. It is the further intent of the legislature to create a system which protects injured workers and delivers wage replacement benefits in a fair, equitable and efficient manner, while reducing time-consuming bureaucratic delays, and repealing \textit{Dole} liability except in cases of grave injury." Courts have interpreted the statute's "grave injury" language quite narrowly. See Castro v. United Container Mach. Group, Inc., 761 N.E.2d 1014 (N.Y. 2001) (loss of multiple fingertips was not "loss of multiple fingers" and therefore not "grave" pursuant to statute); Ibarra v. Equip. Control, Inc., 707 N.Y.S.2d 208 (N.Y. App. Div. 2000) (loss of use and function of right eye not "grave" under statute); Barbieri v. Mount Sinai Hospital, 706 N.Y.S.2d 8 (N.Y. App. Div. 2000) (facial scarring and brain injury not sufficiently "grave" under statute).

\textsuperscript{51} 257 N.W.2d 679 (Minn. 1977).

\textsuperscript{52} Interestingly, the trial court asked the jury to assign responsibility to each of these parties, even though Minnesota at the time still followed the rule of joint and several liability and even though the employer was immune from tort liability under workers' compensation laws. See \textit{id. at 681}.

\textsuperscript{53} \textit{id. at 689} (emphasis added) (citing Maio v. Fahs, 339 Pa. 180 (1940); Brown v. Dickey, 397 Pa. 454 (1959)). As the court stated, "This approach allows the third party to obtain limited contribution, but substantially preserves the employer's interest in not paying more than workers' compensation liability." \textit{id.} A handful of other states have used somewhat similar approaches in attempts to balance the competing interests. In Kansas, for example, the workers' compensation statute provides that an employer's subrogation interest "shall be diminished by the percentage of the recovery attributed to the negligence of the employer." KAN. STAT. ANN. § 44-504(D) (2003). See Brabander v. W. Coop. Elec., 811 P.2d 1216 (Kan. 1991) (interpreting the statute to reduce the subrogation interest by the employer's share of the entire tort damage award). In Kentucky, on the other hand, a recent
The *Lambertson* approach is superior to that of *Dole* in its attempt to balance the interests involved. While the *Dole* approach would damage the core of workers’ compensation by ignoring its essential principle of limited liability, *Lambertson* at least recognized this principle by limiting the employer’s contribution to the amount payable under the workers’ compensation scheme. But the *Lambertson* approach remains flawed, regardless of whether the jurisdiction applies joint and several liability. First, Lambertson leaves open the possibility of unfairness to the third-party defendant where joint and several liability exists. In particular, if a highly culpable employer is involved, the *Lambertson* approach still requires a third-party defendant to bear a disproportionate amount of liability.

Second, if joint and several liability is abrogated, *Lambertson* provides no guidance about whether it is appropriate to retain the employer’s right of subrogation against the tort damage award. Where tort law has moved to align liability and fault, one can (and should) question the fairness of retaining subrogation.

In short, even the most creative caselaw fails to provide an adequate solution to the problem of meshing workers’ compensation and the tort system. Crafting a better response, therefore, requires looking in a different direction. The next subpart does so by considering *Murray v. United States*, an older decision from the D.C. Circuit that has attracted less scholarly attention than *Dole* and *Lambertson*.

Appellate court decision first calculated the figure that would make the plaintiff whole by taking the tort damage award and then reducing that figure twice—initially by subtracting the amount of workers’ compensation and then by subtracting the amount associated with the employee’s share of fault. See Great Am. Ins. Cos. v. Witt, 964 S.W.2d 428, 430–31 (Ky. Ct. App. 1998). Without direct reference to the workers’ compensation act itself, the court then limited the employer’s subrogation claim to any remaining amount. *Id.*

54. *See supra* notes 48–50 and accompanying text.

55. Suppose, for example, that an employee received $20,000 in workers’ compensation benefits for a workplace injury, and the jury awarded him $60,000 in tort damages. Even if the employer was highly culpable (e.g., 90 percent at fault), *Lambertson* would limit its liability to one-third of the loss (i.e., the $20,000 in workers’ compensation benefits). The third-party defendant, although only 10 percent at fault, must bear the burden of paying two-thirds of the tort law damage award.

56. Indeed, notwithstanding the attempts of *Dole*, *Skinner*, and *Lambertson* to ameliorate the traditional approach’s unfairness, a vast majority of courts continue to leave third-party defendants without an opportunity to seek contribution from negligent employers. *See Larson’s Workers’ Compensation*, supra note 6, § 121.02. These third-party defendants can only avoid liability by arguing that an employer’s conduct was so egregious that it essentially became a “superceding cause”—breaking the proximate cause connection between the third party’s own action and the employee’s harm. *See Restatement (Third): Apportionment*, supra note 3, § C20. Even where a third-party successfully asserts such an argument, the outcome is not satisfying. While the superceding cause argument might protect the third-party defendant, it effectively shifts any compensation shortfall entirely to the employee who, of course, is limited to workers’ compensation benefits in a claim against the employer. It is worthwhile, therefore, to continue exploring new approaches to the problem.

57. 405 F.2d 1361 (D.C. Cir. 1968).

58. For brief discussions of *Murray*, see Larson, *supra* note 20, at 494–97; Weiler, *supra* note 21, at 845 & n.56; and Eaton, *supra* note 25, at 894 & n.65.
In Murray, the plaintiff was a federal government employee who became injured in an elevator at a building owned by defendant Murray. Plaintiff sued Murray for negligence. Murray, in turn, filed a third-party action against the government under the Federal Torts Claim Act, seeking contribution based on the government’s responsibility for the accident. The trial court dismissed this action, and the appellate court affirmed, noting that no right of contribution existed under District of Columbia law, unless the parties to the contribution action were jointly liable for the plaintiff’s harm. The government, the court reasoned, could not be jointly liable because it was immune from tort liability under the Federal Employees’ Compensation Act (FECA)—the federal version of workers’ compensation.

Under the traditional approach, Murray, the third-party defendant, would have been responsible for the entire amount of plaintiff’s tort damages, given that the District of Columbia was (and remains) a joint and several liability jurisdiction. The court, however, took a different approach and viewed the government as a party that had settled its dispute with the injured plaintiff through operation of FECA. Viewing the government as akin to a settling party meant that the third-party defendant was entitled to a credit for the settlement:

Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule in Martello v. Hawley, 112 U.S.App.D.C. 129, 300 F.2d 721 (1962). Martello holds that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had ‘bought his peace,’ is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar.

The Murray rule, therefore, allows the third-party a per capita credit based
on the employer's contribution to the injury.

A per capita credit makes sense in a jurisdiction (like D.C.) that applies the old rule of contributory negligence and imposes joint and several liability. While it may appear that this approach has limited value in jurisdictions that have moved away from these principles, the exact opposite is true. Indeed, there is great wisdom in Murray's underlying premise of treating the immune employer just like a settling party. With this key premise in mind, this Article next looks at some of the proposals made by scholars who have addressed the problem. The Article then focuses on perhaps the most important of those—the Reporters' Study approach—and uses it in combination with Murray's premise to propose reform.

B. Scholars' Approaches

Scholars have suggested a variety of solutions to the dilemma of meshing workers' compensation and tort law. These proposals run the gamut from advocating the complete elimination of third-party lawsuits\(^6\) to suggesting more complicated versions of third-party and subrogation claims that, in essence, would increase the use of comparative fault in assessing employer liability.\(^6\)

Neither end of the spectrum, however, is especially appealing. The elimination of third-party lawsuits would require a dramatic increase in the benefits provided to injured employees from employers or other sources. Given the fate of recent attempts to shift the costs of accidents and health care to government-sponsored programs, such a development appears unlikely.\(^6\)

Importing comparative fault principles into the workers' compensation system would increase the use of comparative fault in assessing employer liability in a way that is both more straightforward and less cumbersome than the proposals on the other end of the spectrum. Moreover, such an approach would also provide a mechanism for dealing with the problem of subrogation claims that arise when an injured employee recovers damages against a third party. This mechanism would allow employers to negotiate (or, if need be, litigate) for appropriate reimbursement from third parties who might otherwise face common law tort liability. Id.; see also Reporters' Study, supra note 10, at 193–95; Weiler, supra note 21, at 848.

| 65. Professor Jeffrey O'Connell is the patriarch of this camp, having proposed the passage of a statute "under which workers' compensation benefits would be raised in return for making workers' compensation the sole remedy for industrial accident victims." Jeffrey O. O'Connell, Supplementing Workers' Compensation Benefits in Return for an Assignment of Third-Party Tort Claims—Without an Enabling Statute, 56 Tex. L. Rev. 537, 542 (1978). Professor O'Connell then would allow employers to negotiate (or, if need be, litigate) for appropriate reimbursement from third parties who might otherwise face common law tort liability. Id.; see also Reporters' Study, supra note 10, at 193–95; Weiler, supra note 21, at 848. |
| 66. Some years ago, for example, Professor Clifford Davis suggested that courts account for an employer's negligence by reducing the size of the employer's subrogation claim in relation to its share of fault. See Clifford Davis, Third-Party Tortfeasors' Rights Where Compensation-Covered Employers Are Negligent—Where Do Dole and Sunspan Lead?, 4 Hofstra L. Rev. 571, 580–83 (1976). An employer found to be 10 percent at fault for an employee's injury, therefore, would have its subrogation recovery reduced by 10 percent if the employee recovered tort damages against a third party. Id. at 580–81. Other commentators have proposed slightly different approaches to the problem. See, e.g., Moran, supra note 30 (arguing that third-party manufacturers should have claims against employers who rebuff efforts to cure product problems). |
compensation system also is unattractive. Doing so would violate the limited liability principle that resides at the core of the workers’ compensation system. Ideally, a scholarly proposal should mesh tort law and workers’ compensation while respecting the essential components of both systems.

A more balanced proposal to mesh the two systems, and the one to which this Article will devote the most attention, appears in the ALI Reporters’ Study.68 The Reporters’ Study described its suggested approach as follows: “State [workers’ compensation] legislation should be altered by eliminating any subrogation right of an employer against the injured worker’s tort award. At the same time, product liability law should be altered by reducing the size of tort damages by the amount of [workers’ compensation] benefits payable.”69 The Reporters’ Study explains:

Under this proposal the manufacturer’s tort liability would be reduced only by the [workers’ compensation] benefit actually payable by the employer, rather than by some appropriate measure of the culpable employer’s share of the larger tort award. At the same time, all employers, not only culpable employers, would lose their subrogation right against the workers’ tort award. The aim is to exclude not simply the contentious issue of the employer’s comparative fault, but also the very presence of the employer from the tort contest between injured worker and third-party manufacturer.70

This proposal has appeal. First, the Reporters’ Study alleviates the potential unfairness of applying joint and several liability against a manufacturer, and sensibly creates an offset based on the amount of the employer’s statutory responsibility. Second, the Reporters’ Study respects workers’ compensation’s limited liability principle by restricting the employer’s liability to the amount owed under state statutes. Finally, the Reporters’ Study attempts to resolve all of the plaintiff’s claims in an efficient manner by eliminating the need to litigate the issue of employer fault. As the Reporters’ Study asserts, this would shift costs associated with compensating injured workers away from the tort system to the workers’ compensation system, which is cheaper to administer.71

1990s addressed a perceived problem that workers’ compensation insurance costs had actually become too high. See McCluskey, supra note 19, at 684–98. This issue continues to attract attention today. See Joseph B. Treaster, Cost of Insurance for Work Injuries Soars Across U.S., N.Y. TIMES, June 23, 2003, at A1 (“Across the country, the cost of workers’ compensation insurance is soaring at the highest rate in nearly a decade . . . .”).

68. The chapter of the REPORTERS’ STUDY on workers’ compensation and product liability was based on Professor Paul Weiler’s article cited in note 21, supra.

69. REPORTERS’ STUDY, supra note 10, at 191–92.

70. Id.

71. Id. at 192. The REPORTERS’ STUDY also argues that such a shift eventually would benefit employers “because the manufacturers’ rising expenses for product liability insurance and legal fees are eventually incorporated in the prices firms charge customers for their products; and in the case of workplace products, the customers are those very employers.” Id.
If tort law had remained static from the time of the Reporters' Study, the approach might be satisfactory. The Reporters' Study approach, however, fits awkwardly in the increasing number of states that have reconsidered their position on joint and several liability and created systems designed to align liability more closely with fault. This reality requires a tweaking of the Reporters' Study approach.

IV.
A NEW PROPOSAL

This Part of the Article begins by proposing an approach that builds on the Reporters' Study, assuming we are in a jurisdiction that applies several liability in all instances. After that, the Article will consider the problem in jurisdictions where the law is more complicated.

A. The Basics: Several Liability

As an example, begin with a hypothetical case in a several liability jurisdiction where a jury has concluded that a third-party defendant bears a great deal of responsibility for an employee's harm. Suppose, for instance, that Edward from the earlier hypothetical suffered $50,000 in damages and received $10,000 in workers' compensation benefits. In the tort action against Component, a jury found that Component is 90 percent at fault and that Major is 10 percent at fault for the harm.

The Reporters' Study approach would reduce the damage award to $40,000—the full amount of damages less the amount paid in workers' compensation. This result makes the plaintiff whole. It also avoids having Component pay 100 percent of the damages, which would be the outcome under joint and several liability. In a state that applies several liability only, however, Component would not bear an accurate amount of the damages based on its level of responsibility (the "accurate" amount would be $45,000—90 percent of the full $50,000).

The Reporters' Study defends its approach by noting the benefit of "exclud[ing] not simply the contentious issue of the employer's comparative fault, but the very presence of the employer from the tort contest..." The movement to several liability, however, effectively

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72. For example, it would seem awkward, at best, in states that have abrogated joint and several liability for a third party's share of the plaintiff's loss to become more dependent on the level of workers' compensation rather than on a jury's assessment of its fault level.

73. See RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, §§ B18, B19 cmt. I.

74. This example also assumes that the jurisdiction permits the assignment of a percentage of responsibility to the otherwise immune employer. According to the RESTATEMENT, more than half of the states that apply several liability do allow this type of assignment. See id. § 17, cmt. a, reporters' note.

75. REPORTERS' STUDY, supra note 10, at 191–92.
APPORTIONMENT OF LIABILITY

compels consideration of the employer's level of fault. Without considering the employer, how can a jury assign an accurate level of responsibility to the third-party defendant—or, for that matter, the plaintiff? Therefore, one of the primary justifications for the Reporters' approach essentially drops out when one moves away from the traditional rule of joint and several liability.

With this in mind, one way to resolve the problem is to follow an approach similar to Lambertson and permit Component to seek contribution up to the amount of workers' compensation. Component, therefore, could seek contribution for $5000 from Major to reduce its liability to an accurate amount. Under current workers' compensation laws, however, Major still would have a right of subrogation against the plaintiff's award to avoid any "overcompensation." This Article favors a different approach. First, it would limit the third party's tort liability according to that state's comparative fault principles. In this hypothetical where the state has adopted several liability, Edward would receive $45,000 in damages from Component. Second, like the Reporters' Study, the proposal would eliminate the employer's subrogation rights. The rationale for this preference, however, is different than that of the Reporters' Study. The Reporters' Study eliminates subrogation to avoid the complication of litigating the employer's fault level. But, again, the elimination of joint and several liability essentially compels this calculation in most states today. A better justification for eliminating subrogation is conceptualizing a workers' compensation payment as a settlement between the parties—much as the Murray court did more than 35 years ago. Based

76. *See id.*

77. An additional concern is that a jury would not accurately assign a share of fault to an immune employer who has no reason to participate in the tort litigation. However, as in a case where a jury assigns a share of fault to a settlor, the remaining parties to the litigation have opposite interests, which should substantially resolve the problem. *See RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, § 16 cmt. c & cmt. c, reporters' note ("Evidence bearing on [a settling party's] responsibility would be introduced by plaintiff and nonsettling defendants, and, because of their opposing interests in the assignment of responsibility to the settling tortfeasor, the evidence will be presented in an adversarial context.") (citing Amerada Hess Corp. v. Owens-Corning Fiberglass Corp., 627 So.2d 367, 378 (Ala. 1993); Estate of Hunter v. Gen. Motors Corp., 729 So.2d 1264 (Miss. 1999); Daniel Klerman, *Settling Multidefendant Lawsuits: The Advantage of Conditional Setoff Rules*, 25 J. LEGAL STUD. 445, 448 (1996).

78. *See supra* notes 51–53 and accompanying text.


80. *See RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, § C20(b).

81. As noted in the introduction to the Article, some workers' compensation statutes specifically require subrogation. *See supra* note 17. Again, this Article urges reconsideration of such requirements, particularly whether subsequent comparative fault acts implicitly alter the requirement of subrogation. *See infra* notes 133–34 and accompanying text.

82. *See supra* notes 70–71 and accompanying text.

83. *See supra* notes 76–77 and accompanying text.

84. *See supra* note 64 and accompanying text.
on this rationale, there is no reason to alter this “settlement”—either by giving the employer back what it paid out through subrogation or by giving the plaintiff additional payment by ignoring the limited liability rule.

From this point, the approach derived from Murray allows the workers’ compensation “settlement” to remain in place, for better or for worse. In the hypothetical, Edward would retain $55,000—$45,000 from the tort award and $10,000 from worker’s compensation. A critic might point out that Edward has been “overcompensated” by $5000. The overcompensation exists, however, only because the employer’s workers’ compensation liability exceeds the share of damages for which the employer would have been liable in tort. This “inequity” is justifiable because the employer is treated like a person who settles a tort action to avoid further litigation and the possibility of greater liability. The possibility that the employer’s share of tort award will not be as large as the amount paid in workers’ compensation is simply the risk that a settlor assumes.8

Of course, it is also possible that a case will play out so that an employee receives the short end of the workers’ compensation “settlement.” Consider a situation where a jury sets the third party’s share of fault much lower than in the previous example. Once again, suppose that Edward (who has suffered $50,000 in damages) received his $10,000 in workers’ compensation benefits. In this example, however, assume that a jury found Component only 50 percent at fault. The Reporters’ Study approach assumes that joint and several liability would make Component initially responsible for the full $50,000. The award then would be reduced by $10,000 (the amount of workers’ compensation), and the employer would be precluded from seeking subrogation. The outcome is fair to Edward because he is made whole. It also is fair to Major because Major has paid no more than the allowable benefits under workers’ compensation. But Component has paid $40,000, $15,000 more than its “fair share” pursuant to the assessment of fault by the jury. This result improves the situation that would exist in a jurisdiction retaining joint and several liability8 because Component is not liable for the full amount of the damages. But it does not reflect the way in which many states have abrogated the traditional rule of joint and several liability. It also places the burden of inequity on the only party that was not part of the statutory arrangement that limited the employer’s share of damages.87

85. Indeed, in a case in which there is no employer fault and the employee recovers workers’ compensation, one might also say the worker has been “overcompensated.” Moreover, with a comparative share credit for settlement, plaintiffs might be “overcompensated” compared to the tort damage award. See RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, § 16 cmt. e.

86. This is effectively the same approach as the Lambertson case. See supra notes 50–52 and accompanying text.

87. The Lambertson approach could reach the same conclusion, but in a much less efficient way.
Again, this Article’s approach is different. Assuming a jurisdiction that applies several liability only, a court should limit Component’s responsibility to an amount based on its share of fault (50 percent of $50,000, which comes out to $25,000). The plaintiff would collect that amount in addition to his $10,000 workers’ compensation benefit, while the employer would have no right to seek subrogation against the tort award. Of course, here Edward would be undercompensated by $15,000 relative to his actual damages. But this is the same sort of undercompensation that an employee would face without the fortuity of having a third-party defendant in the case. The undercompensation is simply the result of a bargain that provides broad benefits for all employees hurt on the job. There is no justification to address the undercompensation only in those cases where a plaintiff has the fortuity of an available third-party defendant—and then making that third party pay more than its fair share to cover the difference. This makes the third party address purported inequities in the workers’ compensation system—a problem (if it is a problem that at all) that would be best addressed by the creator of the workers’ compensation system (i.e. the legislature).  

**B. Additional Complications**

The previous subpart set forth this Article’s basic approach to the problem. The examples, however, are incomplete because they assume a

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Under that approach, the employer would pay $10,000 in workers’ compensation benefits. The employee then would receive a $50,000 tort award with the court allowing the third-party defendant to seek contribution against the employer up to the amount of workers’ compensation (i.e., $10,000). See *supra* note 50 and accompanying text.

88. Of course, the analysis will differ in jurisdictions that do not apply several liability only. See *supra* notes 5 and 12 and accompanying text.

89. One possibility for reducing the amount of the employee’s shortfall when his or her workers’ compensation benefit is less than the employee’s tort share of damages would be to reallocate that shortfall between the third-party defendant and the plaintiff based on relative shares of fault. This is what some states do with other unenforceable judgments. See *Restatement (Third): Apportionment, supra* note 3, § C21. For example, suppose that Edward from the hypothetical received $10,000 in workers’ compensation benefits and then went to trial against Component. Suppose the jury found that Edward suffered $50,000 in damages, and assigned relative shares of fault to Component (50 percent), Major (25 percent) and Edward himself (25 percent). Under this Article’s proposal in a several liability jurisdiction, Edward would receive $35,000 total—his workers’ compensation plus Component’s share of the tort award. This sum falls short of the sum that would fully compensate him, which would be $37,500 (i.e., $50,000 less Edward’s own 25 percent). The “shortfall” is attributable to the difference between the employer’s tort share ($12,500) and the amount paid in workers’ compensation ($10,000). Earlier, the Article suggested that the employee should bear the entire shortfall, much as a plaintiff must bear the consequence of a “bad” settlement. In a reallocation jurisdiction, however, Edward and Component could bear the shortfall proportionally. In the example, therefore, a court could allocate the shortfall between Component and Edward using a 2–1 ratio (based on Component’s 50 percent share of the fault being double Edward’s 25 percent). Component would pay $1666.67 in addition to its share of the tort damages.
regime imposing only several liability on third-party defendants. In reality, many states use more complicated systems that fall somewhere between the traditional rule of joint and several liability and a system of several liability only. This subpart considers how the proposal might play out in some of these states.

1. Joint and Several Liability With Reallocation

A number of comparative fault states retain joint and several liability, but reallocate “unenforceable” or “uncollectible” portions of damages to all remaining parties in proportion to their percentage of comparative responsibility. How states should treat a share of damages assigned to an employer is a complicated matter. The Restatement (Third) of Torts: Apportionment sets out a range of possibilities in section C20.

The first part of section C20 describes possible outcomes in states that ultimately reduce tort damages based on assignment of a comparative share to an otherwise immune employer. Two options exist: (1) to “provide a defendant in a third-party action with a credit against the judgment for any employer responsibility up to the amount of the workers’ compensation claim,” or to “permit a contribution claim by the third party against the employer that is limited by the employer’s workers’ compensation liability.”

Both of these approaches create a dilemma much like that described in the previous section. Where the employer’s comparative share of damages exceeds its workers’ compensation liability, fealty to traditional rules forces third-party defendants to bear the difference. This Article asserts that a better approach is to view workers’ compensation payments as akin to a settlement. This might allow an employee to retain “overcompensation” where the employer’s comparative share is less than the amount paid in workers’ compensation. Conversely, it might require an employee to accept less than full compensation from an employer as “a quid pro quo by

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91. Id. §§ C18, 21; see also id. § 17 (noting seven states that apply some version of the reallocation approach: Connecticut, Michigan, Minnesota, Missouri, Montana, New Hampshire, and Oregon).

92. Id. § C20(a)(i) & cmt. b.

93. Id. § C20(a)(ii) & cmt. b. Of course, some jurisdictions do neither. See id. § C20(b) (“If the applicable law of the jurisdiction does not permit either a reduction of recoverable damages based on the comparative responsibility of an employer or a contribution claim against the employer, the employer may not be assigned a percentage of comparative responsibility.”).

94. See supra note 85 and accompanying text.
employees in exchange for guaranteed workers’ compensation benefits.\textsuperscript{95}

The examples used in the previous section demonstrate how this scenario might work. To begin, focus on a situation where the employer’s comparative responsibility exceeds the amount of workers’ compensation benefits. In the previous example, a fault-free Edward suffered $50,000 in damages and received $10,000 in workers’ compensation from Major. Edward filed a tort action against Component, the negligent third party. Under the scenario described above, a court would allocate a share of fault not only to Component, but to Major as well. Assume again that the jury found each to be 50 percent at fault. Although a joint and several liability jurisdiction would require Component to pay the full amount of the tort award as the sole defendant in the lawsuit, both scenarios described in section C20 allow some set-off based on the workers’ compensation award.

The first approach simply would provide Component with a credit against the judgment up to the amount of the workers’ compensation award, reducing Component’s liability to $40,000 and allowing Edward to make himself “whole” by collecting that judgment along with his $10,000 workers’ compensation award.\textsuperscript{96} The second approach is more complicated, but would arrive at the same result. Under this approach, Major would retain its traditional subrogation claim against the $50,000 tort award. Such a claim would allow it to recover the $10,000 it paid to Edward. Component then would be able to seek contribution against Major, recovering an amount up to Major’s workers’ compensation liability—again $10,000.\textsuperscript{97}

The result in either case, however, is that Component has borne more than its fair share of the damages to cover the gap between workers’ compensation and Major’s proportional share of the damages. As discussed in the previous section, a better approach would make Edward bear this shortfall where the employer’s tort share exceeds its workers compensation liability, much the same as if he had settled with another tortfeasor.\textsuperscript{98} Thus, a state that allows a jury to assign employers a share of fault in the tort action should reduce the plaintiff’s award by that amount, just as a jury should reduce an award for a plaintiff’s own fault. Here, where the employer and the third party are each 50 percent at fault, Edward’s award would be $25,000. With no subrogation claim by the employer, Edward

\textsuperscript{95.} RESTATEMENT (THIRD): APPORTIONMENT, supra note 3, § C20, cmt. d, reporters’ note; see also id. § C20 cmt. d.
\textsuperscript{96.} See supra note 91 and accompanying text.
\textsuperscript{97.} See supra note 92 and accompanying text.
\textsuperscript{98.} Again, this is the “bargain” that workers’ compensation envisions in exchange for granting broad coverage to all workers, regardless of employer fault and regardless of whether a third-party defendant exists in the suit.
end would end up with $35,000.  

Unfortunately, many states that retain joint and several liability in some form do not allow juries to allocate a share of liability to employers, even if jurors implicitly consider employer conduct in reaching a decision. In such cases, the opportunity to compare the workers’ compensation award to the employer’s “actual” share of the tort damages is missing. Although not this Article’s preferred approach, the best way to handle such situations is to follow the recommendation of the Reporters’ Study, eliminating any subrogation action and crediting the third-party an amount up to workers’ compensation in the tort action.

In sum, jurisdictions that use joint and several liability with reallocation of unenforceable shares present a more complicated challenge than states that apply several liability only. But by conceptualizing workers’ compensation as the equivalent of a settlement, the framework from this Article’s proposal can resolve issues in such jurisdictions.

2. Liability Based on Threshold

In some jurisdictions, the question whether a tortfeasor is jointly and severally liable depends on whether its share of responsibility exceeds a certain threshold. In these states, therefore, the level of responsibility that a fact finder assigns to the third-party defendant determines the approach to a workplace injury action.

The least complicated scenario in a threshold jurisdiction involves a situation similar to that described in section 19(b) of the Restatement (Third) of Torts: Apportionment where a third-party defendant could only be jointly and severally liable.

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99. See Restatement (Third): Apportionment, supra note 3, § C20, cmt. d, reporters’ note (citing authority in support of this position). Of course, as in the previous section, Edward would get the benefit of a “good bargain” should the numbers be different. See supra notes 81–85 and accompanying text.


101. See supra notes 68–71 and accompanying text.

102. See Restatement (Third): Apportionment, supra note 3, § D18; see also id. §17 (listing the following states as having threshold rules in at least some cases: Hawaii, Illinois, Iowa, Montana, New Hampshire, New Jersey, New York, Ohio, Texas, and Wisconsin).

103. See Restatement (Third): Apportionment, supra note 3, § D19(b). This section actually envisions the possibility of multiple defendants who might be jointly and severally liable. For the sake of simplicity, this Article continues to assume that only a single defendant (for example, a third-party...
Restatement suggest that there is no need for a court to allocate a share of fault to an immune employer,\textsuperscript{104} and the case would play out just as it does in jurisdictions that always apply joint and several liability.\textsuperscript{105} Under such circumstances, adherence to the Reporters’ Study approach makes sense\textsuperscript{106} and would allow third-party defendants a credit in the amount of the plaintiff’s workers’ compensation award while eliminating the employer’s right to subrogation.

For example, suppose that Edward is not at fault in relation to his own injury. Component, the sole tort defendant, either would be found entirely responsible for the harm or not liable at all. If Edward wins the lawsuit, under the Reporters’ Study approach, Component would owe him $50,000 in tort damages, less the $10,000 that Edward received in workers’ compensation.\textsuperscript{107}

Once the possibility of several liability enters the equation, however, a threshold jurisdiction faces many of the same issues described earlier. For example, suppose that Component alleges that Edward was partially at fault for his own injury. A jury would need to allocate responsibility between Component and Edward, and a possibility exists that Component’s share of fault would fall below the threshold for joint and several liability. Once the jury must engage in deciding relative shares of fault, it should consider all potential sources of the plaintiff’s harm, including the employer.\textsuperscript{108}

Suppose that a jury found Edward 20 percent at fault for his $50,000 in damages and then assigned 40 percent each to Component and Major. If the state’s threshold for joint and several liability was more than 40 percent, Component would be severally liable for only $20,000, and Edward would be left with $30,000—his $20,000 tort award plus his workers’ compensation payment.\textsuperscript{109}

While this result sometimes may be disadvantageous for the plaintiff, it also can work the other way. Suppose, for example, that the jury found that Edward’s damages totaled $15,000. Edward then would receive

\begin{footnotesize}
\begin{itemize}
\item[104.] See id. § D19 cmt. f ("[W]hen Subsection (b) governs and all defendants can be held only jointly and severally liable, an immune employer may not be assigned comparative responsibility. The treatment of employers under Subsection (b) is consistent with their treatment in the 'A' Track, which provides for pure joint and several liability.").
\item[105.] \textit{Id.}
\item[106.] See supra notes 68–71 and accompanying text.
\item[107.] See supra notes 68–69 and accompanying text.
\item[108.] The RESTATEMENT considers this type of situation: “Consistent with the treatment of other nonparties ... employers who are immune from suit by the plaintiff-employee because of workers' compensation may be assigned a percentage of comparative responsibility when Subsection (a) of this Section is operative.” \textit{RESTATEMENT (THIRD): APPORTIONMENT, supra} note 3, § D19(a), cmt. f.
\item[109.] See id. § D19(a) cmt. g ("When all independent tortfeasors are only severally liable ... and when not inconsistent with statute, no subrogation claim exists on behalf of the employer (or its insurer) against any tort recovery from independent tortfeasors.").
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Component's share of liability in tort ($6,000, or 40 percent of total damages) plus his $10,000 workers' compensation payment. Here, Edward is "overcompensated", but gets the benefit of a "good" workers' compensation deal.

Of course, it also is possible that the jury would find the third-party defendant to have a share in excess of the joint and several liability threshold. Here, the situation is more complicated. A first instinct might be to treat such a case exactly like the situation of a third party who could only be jointly and severally liable. However, here, the jury already has been compelled to consider the employer's fault level, so contrary to the Reporters' Study's concern, calculating a more suitable setoff against third-party liability would not complicate the proceedings. A court could, like the Murray court, view the workers' compensation award as a settlement and simply provide the defendant with a per capita credit. With a more accurate allocation in hand, however, reason does not counsel toward proceeding as if it does not exist. On the other hand, providing a comparative setoff in all cases effectively ignores the jurisdiction's view that joint and several liability is appropriate where the defendant's share is above a certain threshold.

To balance these concerns, while still viewing the workers' compensation payment as a settlement, the best approach in this situation is to follow the Lambertson model, using the employer's fault level to reduce the amount of the tort award up to the level of workers' compensation. This allows a court to reduce the third party's liability where the employer's share of fault is low relative to the amount of workers' compensation while retaining the core principle of limited liability where the employer's tort share is high in relation to its workers' compensation liability. This approach might seem unfair to a third party who must bear more than its comparative share where the employer is highly negligent. But it does take account of both the state's initial policy decision that the third party be jointly and severally liable for the plaintiff's harm and the existence of the workers' compensation settlement.

110. See supra notes 103-107 and accompanying text.
111. See supra note 69-70 and accompanying text.
112. See supra notes 50-52 and accompanying text.
113. For example, suppose that the jury found Component 90 percent at fault for Edward's harm and Major 10 percent. Component would be jointly and severally liable for Edward's harm, but would receive a credit for the employer's share in relation to its tort share—i.e., 10 percent of $50,000, or $5000. This Article continues to advocate against subrogation, forcing the employer to bear the consequence of its "bad" settlement. Edward, therefore, benefits by receiving $55,000—$45,000 from Component in tort and $10,000 from Major in workers' compensation.
114. For example, suppose the jury found Component 60 percent at fault for Edward's harm and Major 40 percent. Here, Component would be jointly and severally liable for Edward's harm, but would receive a credit only up to the amount of worker's compensation—$10,000.
In sum, even when jurisdictions use a more complicated approach to apportionment problems, this Article’s proposal for integrating workers’ compensation and third-party tort claims leads toward a principled and consistent result. The proposal separates the tort action from the workers’ compensation award; it treats the workers’ compensation award as akin to a settlement, and it determines the plaintiff’s ultimate recovery in accordance with those principles. \(^{115}\)

### C. The Problem of Insolvency

The Article’s previous two subparts recognize that a jurisdiction’s apportionment regime might affect its approach to the workplace injury problem. Individual circumstances, however, also might play an important role. This subpart considers whether the insolvency of a culpable third-party represents a rare situation where a jurisdiction should break from the limited liability rule of workers’ compensation. \(^{116}\) In approaching this question, the subpart sets forth some of the grounds for creating exceptions to limited liability. In the end, however, it continues to advocate that courts uphold the workers’ compensation “bargain” by limiting the employee’s recovery against an employer to the amount of the statutory benefit.

A jurisdiction might pursue two options if a culpable third-party defendant is insolvent. One option is to create an exception to the limited liability rule in situations where the employee’s workplace injury was caused, at least in part, by the tortious conduct of an insolvent third party. \(^{117}\) This Article’s preferred option, however, is to make the employee bear at least part of the burden of insolvency by limiting the employee’s recovery to the amount payable in workers’ compensation. \(^{118}\) Although this approach might appear harsh, it simply places the employee in the same position as

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115. The same principles could guide an approach to the problem in jurisdictions that impose “hybrid” liability based on the type of damages involved. In these states, courts impose joint and several liability on tortfeasors for a plaintiff’s economic harm, and several liability only for a plaintiff’s non-economic harm. See Restatement (Third): Apportionment, supra note 3, §§ E18, E19 cmt. g (“[I]n the case of economic damages, the immune employer and its responsibility would be irrelevant, and all liable independent tortfeasors would be jointly and severally liable to the plaintiff-employee for all recoverable damages. However, when the plaintiff seeks to recover noneconomic damages, the factfinder would... assign responsibility to the nonparty employer, and each independent tortfeasor is liable only for the comparative share of the noneconomic damages assigned to that independent tortfeasor.”).

116. As noted throughout, this limitation is one the Article endorses.

117. In fact, cases like Dole and Skinner are themselves examples. See supra notes 48–49 and accompanying text; see also Mark H. Kolter, And the Lion Shall Lay Down with the Lamb: Third-Party Actions Under Vermont Workers’ Compensation Law, 28 Vt. B.J. 30, 32–34 (Sept. 2002) (listing multiple exceptions to the limited liability rule under Vermont’s workers’ compensation statute); Edwin L. Felter, Jr. and Sarah A. Hubbard, Erosion of the Exclusive Remedy in Workers’ Compensation, 31 Colo. Law. 83, 84 (Dec. 2002) (noting that courts “are reluctant to carve out exceptions to the exclusive remedy” rule but listing the few exceptions that Colorado courts have developed).

118. See infra.
others who are injured at work without the fortuity of a third-party tort defendant. That is, employees in both circumstances receive workers’ compensation—and nothing more.

In general, courts allow exceptions to the limited liability principle only when doing so serves a goal that “trumps” the policy behind limited liability. For example, it might make sense to create an exception if shifting additional costs to employers would encourage investment in safety measures that would reduce the overall number of workplace accidents.119 In this regard, the “dual capacity doctrine,” a doctrinal path that a small handful of states have followed in analogous situations, might be relevant.120 One commentator succinctly summarizes this doctrine as follows:

The dual capacity doctrine [interprets] the exclusive remedy rule to bar only suits based on duties stemming from the employment relationship, not those based on independent duties generated by other relationships between employers and employees. Thus, employers that occupy additional roles with respect to their employees—such as manufacturer or lessor of workplace products or provider of medical services—cannot escape tort liability for breaching the duties associated with those roles. Instead, workers can sue their employers on grounds such as product liability for injuries caused by defects in employer-made equipment.121

119. Other examples would be to encourage the availability of insurance and to deter intentional tortious conduct. See Note, Exceptions to the Exclusive Remedy Requirements of Workers’ Compensation Statutes, supra note 21, at 1646 (“For optimal results, the party to whom costs are assigned must be the one able to avoid accident costs most cheaply; otherwise, unnecessary resources would have to be expended to achieve any given level of safety.”).

120. Id. at 1648-49 nn.51 & 56. At the time this Note was written, only two states actually had adopted the doctrine and California had largely repealed it by statute. See Bell v. Indus. Vangas, Inc., 637 P.2d 266 (1981); Mercer v. Uniroyal, Inc., 361 N.E.2d 492 (1976); see also Note, Workers’ Compensation: The Dual-Capacity Doctrine, 6 WM. MITCHELL L. REV. 813 (1980). Subsequently, however, more states have moved in this direction. See Kolter, supra note 117, at 33 (“Another exception to the exclusive remedy rule arises when the employer functions in a second, or ‘dual capacity,’ aside from that of ‘employer.’ For example, where the employer is also the manufacturer of a defective product . . . then the injured worker may be entitled to workers’ compensation and also seek tort remedies from the employer as a ‘third-party’ manufacturer.”); Felter and Hubbard, supra note 117, at 86 (“The dual capacity doctrine bars workers’ compensation immunity for employer-employee relationships involving injuries resulting from independent duties generated by additional relationships between the employer and employee.”) (citing Wright v. Dist. Ct., 661 P.2d 1167 (Colo. 1983)). But see Melissa M. Jackson, Note, Employer Liability Under the Third Party Provision of the Washington Industrial Insurance Act: The Dual Capacity and Dual Persona Doctrines in Evans v. Thompson, 19 SEATTLE U. L. REV. 187, 192 (1995) (“[B]ecause [the dual capacity doctrine] effectively destroys employer immunity whenever a separate relationship or theory of liability exists, many jurisdictions have rejected it altogether.”).

121. Note, Exceptions to the Exclusive Remedy Requirements of Workers’ Compensation Statutes, supra note 21, at 1649. Some have suggested a narrower exception referred to as the “dual persona” doctrine. See Jackson, supra note 120, at 195 (describing doctrine as follows: “An employer may become a third person, vulnerable to tort suit by an employee if and only if he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal persona.”) (citing LARSON’S WORKERS’
The idea is to ensure that the party in the best position to avoid the accident costs in the first place—the employer—is the party that bears the loss under the tort rule. Just as in the “dual capacity” situation, this principle might be appropriate where the third party is a separate entity but is currently insolvent, particularly if the third party is a product manufacturer. Once the manufacturer is effectively out of the picture, the only party in a position to ensure the equipment’s safety in the workplace is the employer itself. Otherwise, an employer could continue to use dangerous equipment manufactured by a third party, with no one other than the employee in a position to assume the costs associated with that product’s hazards. Thus, while it is not a perfect analogy to say that the employer effectively becomes the same entity as the insolvent third party, it might be fair to argue that an employer should assume some of the third party’s legal responsibilities.

Nevertheless, this Article counsels against creating an exception to the limited liability rule, even when a third-party defendant is insolvent. While it is easy to understand the sympathetic position of an employee who is harmed by the negligence of an insolvent third party, creating such an exception would violate two of the core principles that have guided this Article’s proposal—treating the workers’ compensation payment as akin to a settlement, and avoiding different outcomes for employees based solely on the fortuity of having a third party involved in the case. Thus, while the “dual capacity” analogy could be of interest in the few states that accept the doctrine, it is not a theory that most courts should use to change the limited liability rule of workers’ compensation.

Compensation, supra note 6, at § 72.81).

121. This would especially seem to be the case if the employer knew, or had reason to know, that the third party was insolvent.

122. This principle would be especially appropriate if the employer knew, or had reason to know, that the third party was insolvent.

123. Breaking from the limited liability rule when a culpable third party is insolvent, however, does not necessarily mean that the employee must bear the full burden of the insolvency. If other entities have contributed to the harm, it would make sense for a court in a comparative fault jurisdiction to reallocate the unenforceable share to all parties in proportion to their percentage of comparative responsibility. Even without additional third parties, a court could allocate the unenforceable share between the employee and the employer. See Restatement (Third): Apportionment, supra note 3, § C21 (“court reallocates the uncollectible portion of the damages to all other parties, including the plaintiff, in proportion to the percentages of comparative responsibility assigned to the other parties”). Of course, doing this would not be possible in a state that did not assign a share of fault to an employer otherwise immune under workers’ compensation laws. In such states, it would be hard to avoid having the unenforceable share borne entirely by the employee, unless a court was inclined to shift part (or all) of the loss to an employer without a determination of fault at all.
V.

SUGGESTIONS FOR STATUTORY REFORM

The Article’s final section sets forth several principles to guide the revision and interpretation of workers’ compensation laws in light of the Article’s proposal. First, a brief statement of two things that this Article is not attempting to accomplish. This section of the Article does not propose specific changes to the language of workers’ compensation statutes. State laws are too varied to make such an exercise fruitful within the confines of a single article. Relatedly, the section does not propose uniform workers’ compensation law to address the problems it has identified. Rather, this section of the Article attempts to provide broad guidelines that legislators and courts could use under a variety of different systems.

These guidelines seek to serve several values, broadly identified as stability, fairness, and simplicity. In terms of stability, states should give respect to the tradition of exclusivity in workers’ compensation law. This means that states should not alter workers’ compensation laws in ways that would require employers to pay more than the amount required by such laws for an employee’s workplace injury. This compels the rejection of earlier experiments in New York and Illinois that would allow comparative fault principles to effectively override policies that have long supported stable and consistent recovery in the worker’s compensation arena.

Attempts to serve stability, however, quickly lead to a conflict with fairness—at least fairness to third-party tort defendants, who might bear a disproportionate amount of damages in cases where an employer’s negligence contributed to an employee’s harm. States should address this in two ways.

First, legislatures and courts should revise or interpret laws to be consistent with each state’s current policy on apportionment among multiple tortfeasors. If this is “several liability,” then a third party should pay only its proportionate share in a workplace injury case, just as it would in any other case. If the decision is triggered by a threshold requirement,

124. In 1996, such a suggestion was included in section 111 of the proposed “Common Sense Product Liability Legal Reform Act.” H.R. 956, 104th Cong., § 111 (1996). For a thorough critique of this proposal, see Eaton, supra note 25, at 902–12.
125. See Larson’s Workers’ Compensation, supra note 10, § 121.09(3); see also Reporters’ Study, supra note 10, at 187 (“the development of legal policy should be appraised against three utilitarian aims: sensible compensation, effective prevention, and economical administration”).
126. This limitation is, of course, one of the primary components of the workers’ compensation “bargain.”
127. See supra notes 47–49 and accompanying text.
128. See supra note 48.
129. See supra note 89 and accompanying text.
then the threshold requirement should apply. But in general, any reform should permit juries in tort actions to consider an employer's fault when assigning responsibility to others parties that may have contributed to a plaintiff's harm, unless, of course, the jurisdiction has elected to retain joint and several liability. Fairness in this context should not include artificially inflating a third party's share because a jury was shielded from considering an employer's actual contribution to an employee's harm.

Second, as the Reporters' Study proposed, states should eliminate employers' subrogation claims against employee tort awards. This suggestion serves the fairness value in at least two ways. First, it protects employees against losing part of their tort award, which already may be reduced by comparative fault principles in the third-party action. Second, it shifts at least some accident costs caused by multiple tortfeasors to the workers' compensation system, thereby offsetting any potential unfairness that might be caused by the proposal's firm adherence to the exclusivity principle.

Finally, the proposal serves the goal of simplicity. This is most obviously accomplished through the suggestion that states preclude subrogation. More broadly, the proposal serves the goal of simplicity by largely separating the workers' compensation proceeding from the tort proceeding—thereby allowing employers and employees to "settle" injury claims just as they do in cases that do not involve third parties. At the same time, the proposal allows employees to seek compensation from third parties, just as they might do if they did not happen to be injured in the workplace.

VI.
CONCLUSION

Workers' compensation and tort law are separate systems with different goals. Tort law is frequently viewed as a way to achieve just compensation and to deter risky behavior. Workers' compensation, on the other hand, is social insurance. It is designed to provide "the most

130. See supra notes 102–14 and accompanying text.
131. See supra notes 100–01 and accompanying text.
132. See Eaton, supra note 25, at 898 for a brief description of the various mechanisms that are used to effectuate subrogation.
133. It may seem excessively generous to employers to suggest that they should never pay more than the amount of their workers' compensation liability, even where they may have contributed to the employee's harm. The suggestion here, however, counters this notion by disallowing employers from receiving subrogation against an employee's tort award.
efficient, most dignified, and most certain... financial and medical benefits for victims of work-connected injuries which an enlightened community would feel obliged to provide." When the two systems collide, as in cases involving third-party defendants, they are difficult to mesh.

The best way to accommodate such situations is to view the two systems as separate entities. Trying to integrate the social insurance features of workers' compensation into tort law or working to achieve full compensation or perfect deterrence in workers' compensation inevitably leads to trouble. Thus, this Article's proposal insists that courts insulate workers' compensation awards from alteration in third-party tort actions. In short, the proposal treats the workers' compensation payment in a tort action the same way that the law handles a plaintiff's settlement with a potential defendant.

Of course, a workers' compensation award is not exactly the same as a settlement. Clearly, a worker does not have the same choices and options that a tort plaintiff possesses. Nonetheless, a quid pro quo exists. All workplace injury victims receive prompt payment for certain economic harm, regardless of fault. In return, employers receive limited liability and, traditionally, reimbursement against any tort award that the employer received from a third party.

In the mid-20th century courts and scholars began to think more about the fairness of ignoring employer fault in the tort process. Not surprisingly, this issue attracted increasing attention as states adopted comparative fault and, in many instances, abrogated the rule of joint and several liability. The Reporters' Study proposed a good solution for states that retained joint and several liability. But the proposal needs updating in an environment where few states adhere to that traditional doctrine.

That, of course, is what this Article has addressed. Under its proposal, injured employees would be entitled to workers' compensation in addition to tort damages from all responsible defendants pursuant to each state's

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136. As Larson's treatise states, "Almost every major error that can be observed in the development of compensation law, whether judicial or legislative, can be traced either to the importation of tort ideas, or less frequently, to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy." Id. § 1.02 at 1–3.
137. See supra notes 17–19 and accompanying text.
138. See Larson's Workers' Compensation, supra note 6, § 1.03[1]. Indeed, this is true even if the employee is at fault. Id.
139. Id.
140. Of course, ignoring employer fault might lead to the imposition of excessive burdens on third-party tort defendants. It also might send improper deterrence signals to employers, who might be shielded from incorporating the true cost of their risky behavior. See supra note 40 and accompanying text.
141. Again, the proposal would reduce third-party tort awards by the amount of workers' compensation, thus denying employers' their right to reimbursement. See supra notes 11–12 and accompanying text.
apportionment scheme. Where such schemes compel relative assessments of fault, the employer’s fault should be considered. The assessment should not impact the employer’s overall liability, however, because of the limited liability principle that is at the core of the workers’ compensation system. Instead, the employer’s share of fault should only impact the third-party’s liability in those states that have moved to several liability and other apportionment systems. This means that at times, the workers’ compensation “bargain” will be a good deal for an employee. At other times, it will not, just as in cases where parties settle existing litigation.

This Article’s proposal, therefore, gives full consideration to the important principle of limited liability in workers’ compensation. It improves the tort system’s ability to allocate a fair share of a plaintiff’s loss to a third-party tortfeasor in those states that have abrogated joint and several liability. And it protects the plaintiff’s interest in those awards by eliminating the possibility of a subrogation claim from an employer. In the end, the proposal might not achieve absolute perfection. But it does the best possible job of balancing the interests in this “most evenly balanced” controversy.