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WYOMING'S NEW COMPARATIVE FAULT STATUTE

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I. INTRODUCTION

The 1994 Wyoming Legislature substantially revised Wyoming's comparative negligence statute,[1] significantly broadening its applicability

1. Wyoming's original comparative negligence statute was enacted in 1973. 1973 Wyo. Sess. Laws ch. 28 (codified at WYO. STAT. § 1-7.2 (Supp. 1973)). The statute was subsequently renumbered and amended in 1977, and amended again in 1986. 1977 Wyo. Sess. Laws ch. 188; 1986 Wyo. Sess. Laws ch. 24. The most recent version of the comparative negligence statute (prior to the 1994 revision) was codified as amended at WYO. STAT. § 1-1-109 (1988). It is reproduced in Appendix A.

as a defense and renaming it the Wyoming "comparative fault" statute.[2] The new statute became effective July 1, 1994, and applies to causes of action that accrue after that date.[3]

The comparative fault statute contains several important provisions. Some are analogous to provisions of the Uniform Comparative Fault Act and/or other states' statutes; others are unique. Several provisions are problematic. Tying the definition of "fault" to proximate cause raises difficult conceptual and practical problems. Allowing certain types of non-negligent conduct by a plaintiff and/or other third parties to be a defense to claims for negligence seems patently unfair. And including nonparties in the allocation of fault with no procedural safeguards for plaintiffs is potentially unconstitutional.[4] How the courts will apply the new statute given these significant problems raises a number of important issues.

This article summarizes and explains the changes in the law; opines that the inclusion of nonparties in the allocation of fault without due process protections for the plaintiff is unconstitutional; proposes jury instructions to be used in interpreting and implementing the statute; and concludes with suggested amendments to the new statute.[5]

II. THE CHANGES

A. *Definitions*

The new statute begins with a comprehensive definitional section, a feature which the previous comparative negligence statute did not contain. The inclusion of such a section is a good idea. Unfortunately, a couple of the definitions create substantial problems, particularly the definitions of "actor" and "fault."

1. Actor

The definition of "actor" is both unique and troublesome. It is unique because Wyoming is the only state that has defined the term. It is

2. 1994 Wyo. Sess. Laws ch. 98 (codified at WYO. STAT. § 1-1-109 (Supp. 1995)). The new statute is reproduced in Appendix B.

3. 1994 Wyo. Sess. Laws ch. 98, §§ 2, 4. Wyoming is a discovery state, meaning that a cause of action accrues when the plaintiff knows, or should know in the exercise of reasonable diligence, of his or her right to recover from a defendant. *See* Bredthauer v. Christian, Spring, Seilbach and Associates, 824 P.2d 560, 562 & nn.1-2 (Wyo. 1992).

4. The old statute also permitted the allocation of fault to nonparties. WYO. STAT. § 1-1-109(b)(i), (ii) (1988). That provision was never challenged as unconstitutional.

5. The proposed revision to the comparative fault statute appears in Appendix C.

troublesome because the definition raises both Constitutional and implementation issues.

"Actor" is defined as "a person or other entity, including the claimant, whose fault is determined to be a proximate cause of the death, injury or damage, whether or not the actor is a party to the litigation."[6] The use in the definition of the terms "fault," "proximate cause" and "whether or not the actor is a party" raises important questions.

The inclusion of "proximate cause" in the definition of actor is unfortunate for two reasons. First, the phrase "proximate cause" has traditionally been used in connection with the commission of a tort, negligence in particular. Its use outside of that context is inappropriate and needlessly confusing. Second, even in the context of tort law, the meaning of "proximate cause" is murky, at best. The problems with using "proximate cause" out of context are discussed in detail below.[7]

The reference to "fault" in the definition of "actor" brings in the new statutory definition of "fault," and is a major change from the old comparative negligence standard. The reason is that the definition of "fault" broadens the applicability of the statute beyond the negligence of the parties (and any nonparty actors) to include other types of non-negligent conduct by the plaintiff and/or other actors, including conduct that would subject an actor to liability for strict liability, strict products liability, breach of warranty, assumption of risk and misuse or alteration of a product.[8]

"Fault" is a term often used in comparative negligence or fault statutes. No state, however, has defined it the way Wyoming has. The definition raises a number of questions, which are discussed in detail below.[9]

The most potentially troublesome aspect of the new statute is the inclusion in the definition of "actor" of a person or other entity "whether or not the actor is a party to the litigation."[10] The inclusion of nonparties in the allocation of "fault" is not new. Wyoming's comparative negligence statute permitted the finder of fact to allocate "fault" to an actor

6. WYO. STAT. § 1-1-109(a)(i) (Supp. 1995).

7. *See infra* notes 20-35 and accompanying text.

8. Although the old statute used the word fault several times, "fault" was undefined, and the Wyoming Supreme Court interpreted the statute to apply only to "negligence" by the plaintiff, not non-negligent "fault." Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834, 836 (Wyo. 1991). The court even suggested that the words "negligence" and "fault" were synonymous. *Id.* at 837 n.3. Under the new statute they are not.

9. *See infra* part II.A.4.

10. WYO. STAT. § 1-1-109(a)(i) (Supp. 1995).

"whether or not a party."[11] The inclusion of nonparties in the allocation of fault under the comparative negligence statute was never challenged as unconstitutional, though there are good arguments to support such a challenge.[12]

The new statute's definition of "actor" is incorporated into the statute's provision for allocation of fault. A plaintiff (or "claimant," in the statute's vernacular) may recover if his or her "fault" is not more than fifty percent of the total fault "of all actors."[13] Since the definition of "actor" includes nonparties, this means that the claimant's fault is measured against the fault of all parties and nonparties that fall within the definition of "actor," including the claimant's fault.

The inclusion of nonparties in the allocation formula is not per se unconstitutional; it is common for comparative fault or comparative negligence statutes to include nonparties. Many states' statutes include parties that have either settled with or been released from liability by the plaintiff.[14] Others include nonparties other than settling or released parties.[15] As discussed in detail below, in the absence of procedural safeguards to protect the claimant, the inclusion in the allocation equation of nonparties other than released or settling defendants raises constitutional due process and equal protection questions.

2. Claimant

The new statute defines a "claimant" to include a third party plaintiff and/or a counterclaiming defendant.[16] This definition makes explicit what was implicit in the old statute. That is, the comparative

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11. WYO. STAT. § 1-1-109(b)(i)(A), (ii) (1988). The statute used, but did not define, "fault." The Wyoming Supreme Court interpreted "fault" under the old statute to mean "negligence." Phillips v. Duro-Last, 806 P.2d at 837 n.3.

12. For a complete discussion of the potential constitutional infirmities of this provision, see *infra* part III.C.

13. WYO. STAT. § 1-1-109(b) (Supp. 1995).

14. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572h(b) (West 1991) (In a negligence action, the plaintiff may recover if the plaintiff's contributory negligence "was not greater than the combined negligence of the . . . persons from whom recovery is sought including settled or released persons."); IOWA CODE ANN. § 668.3.1 (West 1987) (Contributory fault shall not bar recovery "unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released.").

15. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506(B) (1994 & Supp. 1995) (negligence of a nonparty may be considered if the defendant gives notice before trial in accordance with court rules); COLO. REV. STAT. ANN. § 13-21-111.5(3)(b) (West Supp. 1995) (jury may consider fault of a nonparty if the defendant gives notice that a nonparty was wholly or partially at fault within ninety days after commencement of the suit).

16. WYO. STAT. § 1-1-109(a)(ii) (Supp. 1995).

fault statute is a defense to a complaint, a counterclaim and/or a third-party complaint.

3. Defendant

"Defendant" is defined as "a party to the litigation against whom a claim for damages is asserted, and includes third party defendants. Where there is a counterclaim, the claimant against whom the counterclaim is asserted is also a defendant."[17] Again, the definition simply clarifies that the statute works both ways.

4. Fault

The new definition of "fault" is one of the more significant changes to the statute.[18] The change makes the new defense of comparative fault available in far more instances than the old defense of comparative negligence. "Fault:"

> includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product.[19]

Under the definition, the determination of "fault" is now a two step process. First, the fact finder must determine whether the actor's "acts or omissions . . . [were] a proximate cause of death or injury to person or property." If so, the next question is whether those acts or omissions were either: (1) "in any measure negligent;" or (2) would "subject an actor to strict tort or strict products liability." Fault includes "breach of warranty, assumption of risk, and misuse or alteration of a product." The revised definition raises important conceptual questions and expands the defense of comparative fault enormously.

The threshold question focuses only on causation. Was the act or omission a "proximate cause" of the claimant's injury? The use of "proximate cause," like the definition of "actor," is unusual and troublesome. It is unusual because only four other states use "proximate" or "proximate-

17. WYO. STAT. § 1-1-109(a)(iii) (Supp. 1995).

18. Although the comparative negligence statute used the term "fault," it was not defined. The Wyoming Supreme Court held that in the absence of a definition, "fault" meant "negligence." Phillips v. Duro-Last, 806 P.2d at 837 n.3.

19. WYO. STAT. § 1-1-109(a)(iv) (Supp. 1995).

ly" in defining fault.[20] It is troublesome because of the uncertainty of its meaning, particularly when the term is not used in conjunction with tortious conduct.

There may be no more commonly used term in tort law than "proximate cause." The reason for its prevalence is that some sort of cause, usually denominated "proximate cause," is an essential element of every tort claim. While commonly used, the meaning of "proximate cause" is elusive. It is, in the words of one commentator, "an extraordinarily changeable concept . . . [it has] 'no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult.'"[21] But while the concept may be changeable, there are two generally accepted principles in operation.

First, "proximate cause" is the necessary link between a defendant's tortious conduct and a plaintiff's injury. Second, "proximate cause" is an important limitation on a defendant's liability for damages which the defendant helped cause.

As an element of a plaintiff's claim, "proximate cause" refers to "the notion that 'the accident or injury must be the natural and probable consequence of'" the defendant's tortious conduct.[22] Defining the contours of that "notion" has proven to be an impossible task.

Courts and lawyers have proposed many different formulations of "proximate cause."[23] Others have abandoned the term as hopelessly unclear.[24] The Wyoming Supreme Court has used "proximate cause" and

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20. The four states are Arizona (ARIZ. REV. STAT. ANN. § 12-2506(F)(2) (1994 & Supp. 1995)), Arkansas (ARK. CODE ANN. § 16-64-122(c) (Michie 1987 & Supp. 1995)), Mississippi (MISS. CODE ANN. § 85-5-7(1) (1991)), and Utah (UTAH CODE ANN. § 78-27-37(2) (1992 & Supp. 1995)). Thus far, there are no reported cases interpreting the use of the term in any of these states. The Uniform Comparative Fault Act defines "fault" broadly, and requires that "[l]egal requirements of causal relation apply." UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 45 (Supp. 1995).

21. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 276 (5th ed. 1984) (quoting Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471 (1950)).

22. Natural Gas Processing Co. v. Hull, 886 P.2d 1181, 1186 (Wyo. 1994) (quoting Bettencourt v. Pride Well Serv., Inc., 735 P.2d 722, 726 (Wyo. 1987)).

23. *See, e.g.*, BLACK'S LAW DICTIONARY 1225-26 (6th ed. 1990) ("That which is nearest in the order of responsible causation . . . The last negligent act contributory to an injury . . . The moving or producing cause . . . The efficient cause . . . act or omission occurring or concurring with another, which, had it not happened, injury would not have been inflicted.").

24. The Restatement, for example, has rejected the term in favor of "legal cause." RESTATEMENT (SECOND) OF TORTS § 9 (1965). Similarly, the drafters of the Wyoming Civil Pattern Jury Instructions recommend that the words "proximate cause" be deleted from the instruction on cause in favor of "substantial part in bringing about the injury or damage." W.C.P.J.I. No. 3.04 (1994).

"legal cause" interchangeably.[25] Whatever the formulation, there is a second principle at work. There are some cases where a defendant's tortious conduct that is a cause of a plaintiff's injury should not and does not lead to liability.

The Wyoming Supreme Court has expressed causation this way: "Legal cause" must be more than conduct that "created only a condition or occasion for the harm to occur . . . [It must] be a substantial factor in bringing about the harm."[26] While that definition may appear to draw a meaningful distinction between actions or inactions that should lead to liability and those that do not, it does not. Consider, for example, the owner of a retail store that fails to clean up spilled liquid. A customer slips and falls on the liquid. The store owner could argue that the failure to clean up the liquid "created only a condition or occasion for the harm," and the store is, therefore, not liable because there was no proximate cause under the standard of *Natural Gas Processing Co. v. Hull.* The owner would be wrong.

The slip and fall example is based on the facts of *Rhoades v. K-Mart Corporation.*[27] In that case, the Wyoming Supreme Court reversed a directed verdict in favor of K-Mart. The court focussed on the foreseeability that liquid could have been spilled, and, without discussing proximate cause, said that there could be liability if the circumstances "were such as created a reasonable probability that the dangerous condition would occur."[28] There was no allegation or evidence that K-Mart employees were responsible for spilling the liquid on the floor, only an assertion that they had a duty to discover and clean up the spill. The court found that the store's failure to remedy the dangerous condition presented a sufficient question to go to a jury.

The court's inconsistent treatment of proximate cause suggests another rule. Proximate cause exists if proximate cause exists. That, in fact, is the rule adopted by the Restatement of Torts. "Legal cause" (the Restatement has abandoned "proximate cause") exists "if a) [the actor's] conduct is a substantial factor in bringing about the harm, and b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."[29] The gist is clear. A defendant is liable if the defendant's conduct was a substantial factor in causing the plaintiff's harm and the law says there is liability. Or, to

25. *See, e.g.*, Natural Gas Processing Co. v. Hull, 886 P.2d 1181, 1186 (Wyo. 1994).
26. *Id.* (quoting Buckley v. Bell, 703 P.2d 1089, 1092 (Wyo. 1985)).
27. 863 P.2d 626 (Wyo. 1993).
28. *Id.* at 630.
29. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

paraphrase Justice Potter Stewart,[30] courts know proximate cause when they see it.

Whatever the definition, "proximate cause," or "legal cause," is both a link between a defendant's tortious conduct and liability, and an important limitation on the defendant's liability for harm that the defendant's actions or omissions helped to cause.

A significant problem with the new statute is that the cart has been placed before the horse. Normally, a jury is asked to decide if a defendant owes a duty to the plaintiff that was breached before deciding whether that breach was a proximate cause of the plaintiff's injury. Under the new statute, however, before determining whether a claimant was negligent or is otherwise at fault, the fact finder must first determine whether the claimant's acts were a "proximate cause" of the claimant's injuries.[31] Asking a jury to decide whether an act or omission is a proximate cause before deciding whether the actor has breached a duty to act or not act in a certain way, or whether the actor should be held to a strict liability standard, is to ask the jury to make a conclusion about proximate cause without having the necessary foundation, for example, did the actor in question have a duty to act in a certain way and did he or she do so?

Because "proximate cause" has historically served as the necessary link between a defendant's conduct and liability, and a limitation on a defendant's liability, perhaps the best interpretation of "proximate cause" in Wyoming's comparative fault statute is that the phrase is intended to be a limitation. That is, there is some conduct by a claimant and/or other actors which, although causally linked to the claimant's injury, was not a proximate cause of the claimant's injury. This means that the fact finder may determine that although the claimant (or any other actor) was a cause in fact of the claimant's injury, the actor was not a proximate cause of that injury. Accordingly, the fact finder should not allocate any percentage of fault to the claimant or that actor.

Construing "proximate cause" as a limitation on comparative fault is consistent with the Wyoming Supreme Court's interpretation of Wyoming's original comparative negligence statute. That statute provided for the reduction of a plaintiff's damages in proportion to "the amount of

30. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("But I know [pornography] when I see it . . . .").

31. WYO. STAT. § 1-1-109(a)(iv) (Supp. 1995). Proximate cause is one of the elements of the prima facie case of negligence. *See, e.g.*, KEETON ET AL., *supra* note 21, § 41, at 263. Therefore, a determination of whether a party is negligent necessarily entails a finding of proximate cause.

negligence attributed to the person recovering."[32] In construing that statute, the court cautioned that "particular care should be taken . . . so that only the negligence that *proximately causes* any particular injury is considered by the jury when apportioning fault."[33]

Since the new statute empowers the jury to find that an actor that was a cause in fact of the claimant's injury was not a proximate cause, the instructions to the jury will need to make the distinction clear, or, come up with a different method of describing causation. Drawing the line between cause in fact and proximate cause is difficult for lawyers. It will be a more difficult task for juries. Of all the attempts to describe the causation that will lead to liability, the Restatement's is probably the clearest. Proximate or legal cause exists "if a) [the actor's] conduct is a substantial factor in bringing about the harm, and b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."[34]

Under this standard, a court would not, presumably, let the question of proximate cause go to the jury if there were a rule of law relieving the actor from liability, even if the actor's acts or omissions were a substantial factor in causing the harm. Assuming no such rule exists, the jury will be left with the manageable task of deciding whether the actor's conduct was a substantial factor in causing the claimant's harm. Instructing the jury to focus on whether the actor's conduct was a "substantial factor" avoids the problem presented by trying to make a distinction between conduct that merely created a condition, and other types of conduct.[35] The question for the jury will become whether the defendant's actions in creating or allowing a dangerous condition were a substantial factor in causing the harm.

Back to the new statute. If the fact finder determines that the acts or omissions of an actor were a "proximate cause," there is a second step in determining fault. The fact finder must determine whether the acts or omissions: (1) were in any measure negligent; or (2) would subject an actor to strict tort or strict products liability.[36] The statute contains an additional clause: "and includes breach of warranty, assumption of risk,

32. WYO. STAT. § 1-7.2(a) (Supp. 1973). Wyoming's original comparative negligence statute was enacted in 1973. 1973 Wyo. Sess. Laws ch. 28 (codified at WYO. STAT. § 1-7.2 (Supp. 1973).

33. Board of County Comm'rs v. Ridenour, 623 P.2d 1174, 1192 (Wyo. 1981) (emphasis added). Despite that cautionary language, Wyoming's Civil Pattern Jury Instructions do not distinguish between cause and proximate cause. Rather, the jury is to be instructed that a person is at fault when "that person's negligence is a *cause* of the injury." W.C.P.J.I. No. 10.01 (1994) (emphasis added).

34. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

35. *See infra* pp. 39-41 for proposed jury instructions.

36. WYO. STAT. § 1-1-109(a)(iv) (Supp. 1995).

and misuse or alteration of a product."[37] This clause, it appears, is intended to provide examples of the type of conduct that is negligent, that would subject an actor to strict liability or strict products liability, or that would be a defense to strict liability or strict products liability. As discussed below, those examples are more confusing than illuminating.

Although awkwardly drafted, the statute makes sense in the context of a negligence action where the defense is the claimant's contributory negligence or the negligence of a third party. It does not make sense in cases involving negligence by the defendant and non-negligent conduct by the claimant and/or another actor that is raised as a defense.

In a negligence action where the defendant asserts that the claimant's or another actor's actions were "in any manner negligent," the statute will operate as the old one did. That is, the defendant's negligent conduct will be compared with the negligent conduct of the claimant and/or other actors. Such comparisons have been done for years, and present neither conceptual nor implementation issues. The difficult issue will arise in cases where non-negligent conduct is compared with negligent conduct, which will happen in a variety of circumstances.

"Fault" includes actions or omissions "that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product."[38] This language, which applies to all actors, including claimants, expands the applicability of the defense of comparative fault enormously by including several kinds of non-negligent conduct within the definition of "fault."

The first problem with the provision is determining which language applies to claimants and which applies to other actors. The statement that fault includes "acts or omissions that subject an actor to strict liability or strict products liability . . . [or] breach of warranty" cannot be intended to apply to claimants. The reason is simple. It is nearly impossible to conjure up circumstances where the acts or omissions of a claimant would subject him or her to liability for strict liability, strict products liability, or liability for breach of warranty. Those claims, particularly strict products liability and breach of warranty, have been recognized to allow an injured consumer to recover in circumstances where the defendant is better able to bear or spread the loss than a plaintiff.[39] Accordingly, the more reasonable interpretation of the language is to allow the jury to apportion liability to non-negligent actors other than the claimant, actors

37. *Id.*
38. *Id.*
39. Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 342 (Wyo. 1986).

that may be more like a typical defendant in a strict products liability or breach of warranty claim.

The language may also have been included to overrule the Wyoming Supreme Court's decision in *Phillips v. Duro-Last Roofing, Inc.*,[40] in which the court limited the applicability of the comparative negligence statute to claims for negligence. In so doing, the court refused to apply the comparative negligence statute to claims based on breach of warranty and strict liability.[41] The new language overrules *Phillips* by expressly providing for a comparison of the claimant's conduct and the defendant's in an action to recover for personal injury, property injury or death, and by defining "fault" to include conduct that would subject an actor, including a defendant, to liability for strict liability, strict products liability or breach of warranty.

The remaining language of the definition, "including assumption of risk, and misuse or alteration of a product," seems aimed directly at conduct by claimants. Although the aim may be true, the language misses the target of clarity.

The statement that fault includes "conduct that would subject an actor to . . . assumption of risk or misuse or alteration of a product" is confusing, at best. Since there is no cause of action for assumption of risk or misuse or alteration of a product, the only time an actor would be "subject to" those principles is when they are raised as a defense to a claim. Therefore, the only reasonable reading is that the phrase describes defenses to a claimant's tort claims. Unfortunately, neither "assumption of risk" nor "misuse or alteration of a product" has a well-defined meaning, leaving the meaning of the statute murky.

When applied to the tort of negligence, "assumption of risk" has been confusingly used to describe two distinctly different situations: primary assumption of risk and secondary assumption of risk. Neither concept works with the new statute.

Courts have sometimes referred to "assumption of risk" to describe what is more precisely described as "primary assumption of risk." Primary assumption of risk means a plaintiff's voluntary decision, either expressed or implied, to encounter some known risk, thereby eliminating some duty of care otherwise owed by a defendant to that plaintiff.[42] Although the risk may be significant, the decision to assume it may be perfectly reasonable.

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40. 806 P.2d 834 (Wyo. 1991).

41. *Id.* at 836-37.

42. *See* Halpern v. Wheeldon, 890 P.2d 562, 565 (Wyo. 1995); KEETON ET AL., *supra* note 21, § 68, at pp. 480-81.

"Secondary assumption of risk," by contrast, is an affirmative defense asserted by a negligent defendant. It refers to conduct by a plaintiff that is both unreasonable and a substantial factor in bringing about the harm to the plaintiff. Secondary assumption of risk, in other words, is just another way to describe contributory negligence.[43]

When applied to the torts of strict liability or strict products liability, "assumption of risk" has yet another meaning. Assumption of risk has been recognized as a defense to strict liability where that liability is based on a defendant's involvement in an abnormally dangerous activity.[44] Mere contributory negligence is not enough; where, however, a plaintiff is aware of the defendant's dangerous activity, the risks that the activity presents, and voluntarily proceeds to encounter that risk, the plaintiff has assumed the risk of the dangerous activity and may not recover for harm caused by that activity.[45]

Assumption of risk has also been recognized as a defense to a claim for strict products liability. Section 402A of the Restatement (Second) of Torts, which is the most widely accepted definition of strict products liability,[46] imposes liability regardless of fault.[47] Nevertheless, certain conduct by the plaintiff may preclude recovery. If a plaintiff becomes aware of the danger presented by the product, but continues to use the product in spite of that knowledge, the plaintiff is said to have assumed the risk by "voluntarily and unreasonably proceeding to encounter a known danger."[48] This concept suggests that there could be a comparison between the conduct of the defendant in placing the product in the stream of commerce and that of the claimant, if the claimant knew about a risk presented by the product and proceeded to use the product anyway.

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43. KEETON ET AL., *supra* note 21, § 68, at pp. 480-81.

44. RESTATEMENT (SECOND) OF TORTS § 523 (1977).

45. *Id.* § 523 cmt. e.

46. *See, e.g.*, Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986) (adopting § 402A in Wyoming).

47. The Restatement of Torts is in the process of revision. Tentative Draft No. 2 substantially revises liability for defective products by creating three categories with two different standards of liability. The categories are manufacturing defects, design defects, and defects based on inadequate instructions or warnings. RESTATEMENT (THIRD) OF TORTS § 2 (Tentative Draft No. 2, 1995). The rule of strict liability applies only to manufacturing defects. *Id.* § 2(a). Liability for design defects and/or defective instructions or warnings exists only if the resulting product is "not reasonably safe." *Id.* § 2(b), (c).

48. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). The proposed revisions to the Restatement eliminate categories of conduct by a plaintiff, opting, instead, for a general provision that apportionment of liability in a products liability case is appropriate whenever a plaintiff, or other person, "fails to conform to an applicable standard of care." RESTATEMENT (THIRD) OF TORTS § 12 (Tentative Draft No. 2, 1995). The comments that follow section 12 contain an extensive discussion of the pros and cons of separating plaintiffs' conduct into distinct categories.

There are, accordingly, at least three different definitions of "assumption of risk" floating around the law of torts. Although the new statute could be construed to refer to any of these forms of assumption of risk in any given case, it should not be. Only the last meaning makes sense.

If "assumption of risk" is construed, in a negligence case,[49] to refer to primary assumption of risk, the proper question is whether the plaintiff voluntarily assumed a known risk, and thereby eliminated the duty of care owed by a defendant. If the jury finds such an assumption of risk, the case is over.[50] Since the defendant owed the claimant no duty of care, the claim for negligence fails. There is no need for any subsequent comparison of the conduct of the claimant and the defendant (since the defendant owes no duty, his or her conduct is, by definition, not negligent). Therefore, interpreting "assumption of risk" to mean primary assumption of risk would render the term meaningless, a result contrary to the rules of statutory construction,[51] because there is no negligent conduct by the defendant.

If the statute is interpreted to refer to secondary assumption of risk, that is, contributory negligence, the language becomes nothing more than a restatement of the previous sentence, which includes negligent conduct within the definition of fault. Once again, such an interpretation would render the "assumption of risk" language surplusage (unless the language is intended simply to be an example of conduct which is "in any measure negligent"). The only interpretation that makes sense is that "assumption of risk" refers to conduct by a claimant that may be a defense to a claim for strict liability or strict products liability.

Assumption of risk must refer to a plaintiff knowingly and unreasonably proceeding in the face of a known risk presented by an abnormally dangerous activity or an unreasonably dangerous product. In that context, the claimant's actions should not be a defense unless they are something more than mere failure to discover the danger, that is, more than mere contributory negligence. Such an interpretation gives meaning to the term and is consistent with generally accepted tort defenses.

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49. As noted earlier, the proposed revisions to the Restatement treat design defects and defects resulting from inadequate instructions or warnings more like negligence cases. *See supra* note 47.

50. In cases alleging defective design, a plaintiff's assumption of an obvious and open risk may not preclude recovery. *See, e.g.*, Micallef v. Miehle Co., 348 N.E.2d 571, 577 (N.Y. 1976) (The court found that a manufacturer of an obviously defective product may be held liable even though the plaintiff was aware of the risk. The plaintiff's actions may, however, be considered by the jury in evaluating comparative negligence.).

51. Bowen v. State, 900 P.2d 1140, 1143 (Wyo. 1995) ("We construe the statute as a whole, giving effect to each word, clause, sentence . . . ." (citation omitted)).

The use in the statute of "misuse or alteration of a product" is also directed at conduct of claimants. Once again, the precise meaning of the words is regrettably murky. It seems, rather obviously, to be intended to make misuse or alteration of a product into a defense to strict products liability; the term has no apparent application to any other types of claims. The meaning is a bit murky because the language used does not expressly confine the defense to such claims, and the language is not consistent with the Wyoming Supreme Court's explication of the defense in strict products liability cases.

Section 402A makes the imposition of strict products liability contingent upon a showing by the plaintiff that the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[52] The Wyoming Supreme Court has interpreted that language to mean that "[m]isuse of a product by using it for an unintended or unforeseeable purpose would . . . bar recovery under strict liability."[53] The court subsequently expanded the defense beyond "unintended or unforeseeable" use to include "an obviously dangerous manner" of using the product for an intended or foreseeable use.[54] The result of the two decisions is that product misuse is a defense to strict products liability if such misuse was unintended, unforeseeable, or the product was used in an obviously dangerous way that was not foreseeable. Furthermore, although not explicit in the Wyoming Supreme Court's opinions, misuse or alteration should not be a defense unless the misues or alteration was negligent.[55]

Although the statute's use of "misuse or alteration" makes it unclear whether the intention was to incorporate the previously recognized defenses, that is the sensible result. "Misuse or alteration of a product" should mean unintended use, unforeseeable use, or use in an obviously dangerous manner. Such an interpretation incorporates the existing law in Wyoming regarding product misuse. Such a construction is also consistent with the statutory language that fault means an act or omission that is "in any measure negligent . . . and includes . . . misuse or alteration of a product."[56]

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52. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965). Liability extends to an alteration or misuse of the product that was reasonably foreseeable. *See* KEETON ET AL., *supra* note 21, § 102.

53. *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 582 (Wyo. 1992) (citation omitted).

54. Anderson v. Louisiana-Pacific, 859 P.2d 85, 88 (Wyo. 1993).

55. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS § 12 reporter's note cmt. c at 307 (Tentative Draft No. 2, 1995) (stating that most courts take the position that negligent misuse or alteration of a product is a defense to a strict products liability claim).

56. WYO. STAT. § 1-1-109(a)(iv) (Supp. 1995).

As a result of the ambiguities in the greatly expanded definition of "fault," the defendant in a strict liability action or a strict products liability action could attempt to defend on the basis that the claimant was at fault because of negligent conduct or non-negligent conduct that would subject the claimant to the defenses of "assumption of risk, and misuse or alteration of a product."[57] The defendant could also allege that some other actor was at fault for conduct that would subject that actor to "strict liability, strict products liability . . . [or] breach of warranty." Allowing such comparisons is to the obvious advantage of defendants and the obvious disadvantage of plaintiffs. It also undercuts the very basis for imposing strict liability or strict products liability.

Strict liability is premised on the notion that there are occasions that a defendant should be held responsible for an injury to another regardless of whether the defendant acted reasonably. Liability exists if the defendant has engaged in some abnormally dangerous activity which was the proximate cause of harm to the plaintiff.[58] Strict liability, in other words, is "liability without fault."[59] And while there are defenses to strict liability, the claimant's negligence has not been a defense unless the plaintiff knowingly and unreasonably subjected himself to the risk, that is, assumed the risk.[60]

Strict products liability is also imposed without regard to a defendant's fault. A seller of consumer products is liable "although the seller has exercised all possible care in the preparation and sale of his product."[61] Once again, liability is imposed in the absence of fault. Liability is imposed, instead, because when a defective product enters the stream of commerce and an innocent person is injured, "it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim."[62] As with strict liability, the plaintiff's contributory negligence was not a defense to strict products liability unless the plaintiff knowingly and unreasonably used an unreasonably dangerous product or a product in an unreasonably dangerous way.[63]

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57. If "misuse or alteration" is interpreted to mean negligent misuse or alteration of a product, simple misuse would not be a defense.

58. *See* KEETON ET AL., *supra* note 21, § 78.

59. *Id.* § 75.

60. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 524 (1977).

61. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965) (adopted in Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986)).

62. Ogle v. Caterpillar Tractor Co., 716 P.2d at 342.

63. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (cited in Anderson v. Louisiana-Pacific, 859 P.2d 85, 89 (Wyo. 1993)).

As with claims for strict liability or strict products liability, an action for breach of warranty was not premised on any unreasonable conduct by the defendant. Rather, allowing recovery for breach of warranty provides a method of allocating loss to the cheapest cost avoider, regardless of fault.[64] The action may sound either in tort or contract.[65] It is generally based, however, on theories of express or implied warranties under the Uniform Commercial Code, which has been adopted in Wyoming.[66] Neither contributory nor comparative negligence is a defense to an action for breach of warranty.[67]

Allowing the claimant's contributory negligence to be a defense to claims for strict liability, strict products liability or breach of warranty erodes the concept of liability without fault. And liability without fault is the cornerstone of those claims.

Similarly, allowing the non-negligent fault of the claimant and/or other actors to be a defense to negligence causes of action also erodes the foundation of negligence law; liability based on fault (a defendant's unreasonable actions).

The new definition of fault presents at least two significant issues. First, the breadth of the definition of "fault" will hold a claimant, in at least some instances, to a higher standard than the defendant. Second, the non-negligent acts or omissions of actors other than the claimant will be a defense to the defendant's negligence.

By defining "fault" to include a claimant's assumption of risk or misuse of a product, regardless of whether the claimant acted unreasonably, the statute skews traditional tort doctrine by holding the claimant to a strict liability standard. In an action for strict liability, strict products liability or breach of warranty, the defendant may defend on the basis that the claimant was contributorily negligent, even if that contributory negligence does not rise to the level of assumption of risk. In a negligence action, the claimant will be able to recover only if the defendant acted unreasonably. The defendant may be allowed to defend even if the claimant's misuse of a product was reasonable.

In addition, the defendant will also be allowed to claim the "fault" of a non-negligent third party actor as a defense on the basis that such acts or omissions might subject the actor to liability for strict liability, strict products liability or breach of warranty—actions unrelated to fault in the traditional sense.

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64. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 587 (Wyo. 1992).
65. *Id.* at 586.
66. Ogle v. Caterpillar Tractor Co., 716 P.2d at 338 n.2.
67. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d at 586.

Consider a claimant that asserts a claim of negligence against a defendant. The defendant may now defend on the basis that the claimant's non-negligent conduct was a proximate cause of his or her injury, and/or that the non-negligent conduct of other actors was a proximate cause.

X is a house painter. She buys an extension ladder from Y, who is in the business of supplying equipment to housing contractors (Y obtained the ladder from Z, a wholesaler of such equipment). Y normally inspects each ladder after removing it from the shipping box and before it is sold. This time, however, Y was in a hurry. She sold the ladder to X without an inspection. As it turns out, an inspection would have disclosed a serious structural flaw in one of the rungs. X used the ladder on her next job. Because she was short of scaffolding, she jury-rigged the ladder to support one end of a plank. When she stepped on the plank, the defective rung broke, sending X plunging to the ground. She sues Y for negligently failing to inspect the ladder.

Y defends, claiming that X was at fault for misusing the product, and that Z, the wholesaler, would be subject to strict products liability under section 402A of the Restatement (Second) of Torts,[68] and/or breach of warranty (assume that X did not sue Z for whatever reason). Assume X's misuse does not rise to the level of contributory negligence because it was not unreasonable. Similarly, assume Z did nothing more than act as the intermediary between the manufacturer of the ladder and the retailer (Z never even opened the shipping box). Nevertheless, under the language of the new statute, the conduct of each falls within the definition of "fault," and can be a defense to Y's negligence.

X's non-negligent misuse of the product is arguably a form of "fault."[69] And Z's non-negligent involvement could subject Z to liability for strict products liability or breach of warranty. It, too, is "fault." Under the new statute, the jury would be allowed to reduce, or even eliminate, X's recovery by apportioning fault to X and/or Z, despite Y's negligent conduct and the absence of negligence by X or Z.

One consequence of allowing non-negligent conduct to reduce a claimant's recovery in a negligence action is that claimants will, at least potentially, receive reduced awards, or no awards at all, in situa-

68. As discussed above, the proposed revisions to the Restatement might well change the result. *See supra* note 47.

69. As noted above, misuse or alteration of a product should not be a defense unless such use or alteration was negligent. *See supra* note 55 and accompanying text. The words of the statute, however, do not dictate that construction.

tions where they could have recovered fully under the old system of contributory negligence. In the above example, X's non-negligent actions would not have been a defense under the old doctrine of contributory negligence because they were not unreasonable. Accordingly, X could have fully recovered because X was not contributorily negligent. A plaintiff's non-negligent conduct was not, generally, a defense to negligence.[70] Similarly, the non-negligent conduct of other actors was not a defense at common-law or under the old comparative negligence statute.[71]

Allowing non-negligent conduct to reduce or eliminate a claimant's recovery seems contrary to decades of American tort law. The reasons for such a drastic change are unclear. Courts and juries have, for years, successfully meted out justice based on a comparison of the negligence of the plaintiff, the defendant and, in some cases, other actors. Now, in at least some circumstances, juries will be allowed to compare a defendant's negligent conduct with the non-negligent conduct of the claimant and other actors. The benefit to defendants is obvious. The detriment to plaintiffs is equally apparent.

5. Injury to person or property

The new statute applies to actions to recover damages for "wrongful death or injury to person or property." The phrase "injury to person or property" is defined extremely broadly, continuing the pattern of expanding the availability of the defense of comparative fault. "Injury to person or property" means:

> in addition to bodily injury, without limitation, loss of enjoyment of life, emotional distress, pain and suffering, disfigurement, physical or mental disability, loss of earnings or income, damage to reputation, loss of consortium, loss of profits and all other such claims and causes of action arising out of the fault of an actor.[72]

It is hard to envisage any form of injury that does not come within the definition. The applicability of the defense of comparative fault is, however, limited by the definition of "fault." It is limited because the new statute provides for the comparison of the claimant's "fault" with

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70. A plaintiff's non-negligent (primary) assumption of risk was available as a defense to a negligence claim. *See supra* text accompanying note 42.

71. A defendant could have brought a party that was potentially liable to that defendant into the case as a third-party defendant. *See, e.g.*, WYO. R. CIV. P. 14.

72. WYO. STAT. § 1-1-109(a)(v) (Supp. 1995).

that of the other actors, including the defendant. Where the conduct of the defendant is not "fault" as defined by the statute, there is no basis for a comparison.

"Fault" does not include actions or omissions that would subject an actor to liability for an intentional tort or a tort based on reckless conduct. So although comparative fault is no longer simply a defense to negligence claims, the defense of fault will be inapplicable in those cases where the defendant's actions do not fall within the definition of "fault."

6. Wrongful death

"Wrongful death" is defined by referring to the statutory cause of action for wrongful death.[73] Accordingly, comparative fault will be a defense to a claim brought when the death of a person "is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued."[74] Once again, the decedent's non-negligent conduct, or the non-negligent conduct of third party actors, may be a defense to a defendant's negligent conduct.

B. Comparative Fault Replaces Comparative Negligence

As the change in the name of the statute and the definition of "fault" make clear, "comparative fault" has replaced "comparative negligence" as a defense. The result is that "contributory fault" is now available as a defense in an action to recover damages for "wrongful death or injury to person or property" where the fault of two or more actors can be compared. As discussed above, the only limitation of the applicability of the defense is the definition of fault, which does not include intentional or reckless conduct.

C. Comparative Fault Applies Even Where the Claimant is Free From Fault; Court Must Inform the Jury of the Consequences of Its Allocation of Fault

1. Comparative fault statute applies even where the claimant is free from fault

The new statute applies "[w]hether or not the claimant is free of fault."[75] This means that joint and several liability is abolished in all

73. WYO. STAT. § 1-1-109(a)(vi) (Supp. 1995).
74. WYO. STAT. § 1-38-101 (1988).
75. WYO. STAT. § 1-1-109(c) (Supp. 1995).

cases arising under the statute, regardless of whether the claimant is without fault.[76]

2. Court must inform the jury of the consequences of its allocation of fault

The new statute requires the court to inform the jury "of the consequences of its determination of the percentage of fault."[77] The old statute, by contrast, provided that the court "may, and when requested by any party shall" inform the jury of the consequences of its determination of the percentage of fault.[78]

The allocation of fault under the old statute had at least five consequences: (1) a plaintiff could recover only if the plaintiff's contributory negligence did not exceed fifty percent of the total negligence; (2) the court would reduce the plaintiff's damages by the percentage of fault allocated to the plaintiff; (3) each defendant was liable only to the extent that the jury allocated fault to that defendant; (4) if a defendant to whom the jury allocated fault was insolvent or judgment proof the plaintiff would not be able to collect that portion of the verdict; and (5) a plaintiff could not recover (at least in this action) for negligence allocated to a nonparty. It appears, however, that courts did not always inform the jury of all such consequences.

The Wyoming Civil Pattern Jury Instructions suggest that the jury be informed of the first three consequences, leaving the jury unaware of the other consequences.[79] The Wyoming Supreme Court held that the old statute's language to "[i]nform the jury of the consequences of its determination of the percentage of fault" meant that the jury should also be apprised of the fifth. Either the jury verdict form or the statement of the issues should advise the jury who among the actors has "available pockets," and who is included only for purposes of allocating fault.[80] The only effect of which the

76. Subdivision (a) of the old statute said that "[c]ontributory negligence shall not bar a recovery." WYO. STAT. § 1-1-109(a) (1988). Since the abolition of joint and several liability was contained in subdivision (d) of that statute, it was possible to argue that no part of the statute would apply in the absence of some contributory negligence by the plaintiff. (One could also argue, of course, that subdivision (d) applied regardless of the applicability of subdivision (a)).

This was a potentially very significant omission. If the statute did not apply in the absence of the plaintiff's contributory negligence, the statutory abolition of joint and several liability, which was a part of the contributory negligence statute, would arguably not apply. That issue was never raised before the Wyoming Supreme Court.

77. WYO. STAT. § 1-1-109(c)(ii) (Supp. 1995).

78. WYO. STAT. § 1-1-109(b) (1988).

79. *See, e.g.*, W.C.P.J.I. Nos. 10.03, 10.05 (1994).

80. Burton v. Fisher Controls Co., 723 P.2d 1214, 1222 n.6. (Wyo. 1986).

jury was apparently not informed is the fourth; that a plaintiff cannot recover the percentage of fault allocated to insolvent or judgment-proof defendants.[81]

The new statute has similar "consequences." Under the Wyoming Supreme Court's holding in *Burton*, it is clear that the jury should be informed of at least every consequence other than the plaintiff's inability to recover from an insolvent or judgment proof defendant. The argument for not informing the jury of that consequence is that it is a result of a defendant's financial status, not a consequence of the jury's allocation of fault.

Whether to advise a jury of the consequences of its allocation of fault has been a subject of considerable debate and disagreement among states.[82] On one side are the proponents of the "blindfold" rule, under which the jury is not informed of the effect of allocating fault to the plaintiff. On the other are those that support informing juries of the consequences of their decisions.

The clear trend is away from the blindfold rule, also known as the "Wisconsin rule," to allowing or requiring the court to inform a jury of the consequences of its decisions. Only five states still adhere to the blindfold rule.[83] Ten states permit the court to inform the jury of the effect of its ruling.[84] Thirteen states, now including Wyoming, require that the jury be so informed.[85] The remaining states either do not

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81. The jury is also not informed of the amount of a plaintiff's settlement with other potential defendants. Haderlie v. Sondgeroth, 866 P.2d 703, 714 (Wyo. 1993).

82. *See, e.g.*, Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 DUKE L.J. 824; Michael J. Norton, Comment, McGinn v. Utah Power & Light Co.—*Jury Blindfolding in Comparative Negligence Cases*, 1975 UTAH L. REV. 569; Glenn E. Smith, *Comparative Negligence Problems With the Special Verdict: Informing the Jury of the Legal Effects of Their Answers*, 10 LAND & WATER L. REV. 199 (1975).

83. Kentucky (Robinson v. Murlin Phillips & MFA Ins. Co., 557 S.W.2d 202 (Ky. 1977)); Michigan (Mitchell v. Perkins, 54 N.W.2d 293 (Mich. 1952)); Ohio (McClure v. Neuman, 178 N.E.2d 621 (Ohio Ct. App. 1961)); Texas (TEX. R. CIV. P. 277); and Wisconsin (McGowan v. Story, 234 N.W.2d 325 (Wis. 1975)).

84. Georgia (Ebanks v. Southern Ry. Co., 640 F.2d 675, 678 (5th Cir. 1981)); Idaho (Seppi v. Betty, 579 P.2d 683, 692 (Idaho 1976)); Kansas (Nail v. Doctor's Bldg., Inc., 708 P.2d 186, 188 (Kan. 1985)); Massachusetts (Morgan v. Lalumiere, 493 N.E.2d 206, 209 (Mass. App. Ct. 1986)); New Jersey (Roman v. Mitchell, 413 A.2d 322, 327 (N.J. 1980) (court should inform jury of effect of answers to interrogatories, but has the discretion to withhold)); New York (Schabe v. Hampton Boys Union Free Sch. Dist., 480 N.Y.S.2d 328, 337 (N.Y. App. Div. 1984)); Oklahoma (Smith v. Gizzi, 564 P.2d 1009, 1013 (Okla. 1979)); Oregon (OR. REV. STAT. § 18.480(2) (1988)); Utah (Dixon v. Stewart, 658 P.2d 591, 596 (Utah 1982) (upon request of a party, the court shall inform the jury of the effects of its allocation unless it finds issues are so complex that to do so would confuse the jury)); and West Virginia (Adkins v. Whitten, 297 S.E.2d 881, 884 (W. Va. 1982) (court has a duty to inform jury when so requested)).

85. Colorado (COLO. REV. STAT. ANN. § 13-21-111.5(5) (West Supp. 1995)); Connecticut (CONN. GEN. STAT. ANN. § 52-572h(e) (West 1991)); Hawaii (HAW. REV. STAT. § 663-31(d)

allow comparative fault or have no reported case law or statutes on point.[86]

Although considerable attention and litigation have been devoted to the issue of informing the jury, there is no empirical evidence on whether advising a jury of the consequences of its allocation of fault is beneficial to the plaintiff or the defendant(s). For now, at least, the issue in Wyoming is moot. The new Wyoming statute requires the court to instruct the jury as to the consequences of its decision.

D. Extent of Defendants' Liability Clarified

Former subdivision (d), now subdivision (e), was amended with the apparent objective of making it clear that a defendant is liable "only to the extent" of the fact finder's allocation of fault.[87] The amendment makes no substantive change to the old statute.

III. THE INCLUSION OF NONPARTIES IN THE ALLOCATION OF FAULT SUGGESTS A NEED FOR PROCEDURAL PROTECTIONS FOR THE PLAINTIFF[88]

A. Introduction

There may be a number of potentially liable defendants in a lawsuit. A plaintiff often believes it to be advantageous to join as many defendants as possible. There are times, however, when a plaintiff either cannot join or decides not to join one or more of the potential defendants. One set of questions arises when a plaintiff cannot join a potential defendant. Another set arises when a plaintiff decides not to join a potential defendant.

B. Potential Nonparties

There are four important categories of nonparties: (1) settling nonparties; (2) inadvertently omitted nonparties; (3) intentionally omitted

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(1995)); Illinois (ILL. ANN. STAT. ch. 735, para. 2-1107.1 (Smith-Hurd 1992)); Indiana (IND. CODE ANN. § 34-4-33-5(b) (Burns Supp. 1995)); Iowa (IOWA CODE ANN. § 668.3(5) (West 1987)); Louisiana (Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 632 (E.D. La. 1975)); Maine (ME. REV. STAT. ANN. tit. 14, § 156 (West 1980)); Minnesota (MINN. R. CIV. P. 49.01(B)); Nebraska (NEB. REV. STAT. § 25-21.185.09 (1992)); Pennsylvania (Peair v. Home Assoc. of Enola Legion, 430 A.2d 665, 672 (Pa. Super. Ct. 1981)); Tennessee (McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992)); and Wyoming (WYO. STAT. § 1-1-109(c)).

86. The Uniform Comparative Fault Act is silent on the issue.

87. WYO. STAT. § 1-1-109(e) (Supp. 1995).

88. The inclusion of nonparty actors is not a new provision; the old statute also included nonparty actors in the allocation of fault. WYO. STAT. § 1-1-109(b) (1988).

nonparties; and (4) immune nonparties. There are different reasons for not joining potential defendants in each category. The reasons for non-joinder in some situations highlight the need for procedural safeguards to protect the plaintiff and the defendants that are joined, and the need for additional safeguards to implement Wyoming's new comparative fault statute.

1. Settling nonparties

It is common for one or more potential defendants to settle with a plaintiff before trial. By settling, a potential defendant achieves finality; that defendant will never have to make any additional payment to the plaintiff. By definition, therefore, the plaintiff knows the identity of a settling party; there is at least some colorable legal basis to recover from that party; and the plaintiff has been able to find and communicate with that party. Further, the plaintiff has made a judgment that a settlement is in the plaintiff's best interests. Accordingly, the due process concerns that arise when a plaintiff does not know about or is not able to join a potential defendant are not present. Rather, the only question that may arise is how should the fact finder's allocation of fault to the settling nonparty affect the plaintiff's judgment; that question is easily answered in Wyoming.

There should be no concern about the fact finder allocating fault to a settling nonparty. After all, the reason the nonparty actor settled is, presumably, the fear of being found at least partially at fault for the plaintiff's injuries. More importantly, the plaintiff knows that the non-settling parties will attempt to persuade the fact finder to allocate all, or at least a majority, of the fault to the settling nonparty, and the plaintiff has made a considered judgment that settlement is, nevertheless, in the plaintiff's best interest. The question then becomes what is the effect of a partial settlement on a plaintiff's overall recovery.

The new statute specifies that "[e]ach defendant is liable only to the extent of that defendant's proportion of the total fault" allocated to that defendant by the fact finder.[89] The amount of any settlement, therefore, is irrelevant to the liability of the remaining defendants.[90] Each defendant will be responsible for the share of liability allocated to that defendant by the jury, no more and no less. The settling defendant is liable for the

89. WYO. STAT. § 1-1-109(e) (Supp. 1995).

90. The non-settling defendant does not receive credit for amounts paid to the plaintiff in settlement. The defendant that goes to trial must pay the full amount of damages allocated by the jury to that defendant, regardless of whether the plaintiff is over or undercompensated. Haderlie v. Sondgeroth, 866 P.2d 703, 710 (Wyo. 1993). Although *Haderlie* was decided under the old statute, there should be no difference under the new statute.

amount of the settlement, no more and no less (assuming a release was given by the plaintiff). This may result in a settling plaintiff being under or overcompensated.

Assume, for example, that plaintiff P has a claim against X and Y. P settles with Y for $100,000. At trial, the jury allocates fault as follows: P = 20 percent; X = 30 percent; and Y = 50 percent. The jury awards damages of $100,000. Under the new statute, X is liable for 30 percent of $100,000, or $30,000. Under the new statute, P would have been entitled to collect $30,000 from X, and $50,000 from Y if both had gone to trial. Yet P is allowed to collect $30,000 from X and keep the $100,000 already received from Y. The result is that P is overcompensated, recovering a total of $130,000 ($100,000 settlement from Y; $30,000 from X). According to the jury's allocation of fault, however, P should have received only $80,000 (80 percent of the jury verdict of $100,000).

The plaintiff may also be undercompensated. Assume the same facts except that the jury awards $300,000 (P is 20 percent at fault, X is 30 percent, and Y is 50 percent). To be fully compensated P should receive $240,000 (80 percent of the verdict). Instead, P receives $190,000 ($100,000 settlement from Y; and $90,000, 30 percent of the verdict, from X).

Although the statute may result in under or overcompensation in any particular case, it has the great virtue of clarity. Plaintiffs and defendants alike will know the potential risks and/or benefits of settling before trial. The statute does nothing to discourage settlement, and may even provide an incentive to settle (the incentive of certainty). Further, it should not, unlike some schemes, provide a reason for defendants to race to settlement.[91]

2. Intentionally omitted nonparties

A plaintiff may decide not to sue a potential defendant for a variety of reasons. Those reasons may include "whim, spite, collusion, or any possible tactical or personal consideration."[92] For example, a plaintiff

91. In California, for example, prior to the adoption of the Fair Responsibility Act, the treatment of settling defendants or potential defendants created an incentive for one party to settle as quickly as possible. The reason was that the remaining defendant(s) could be liable for more than their "share" of the damages since the doctrine of joint and several liability survived the adoption of comparative fault. American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 901 (Cal. 1978).

92. Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 912 (1993) (quoting Goldenberg & Nicholas, *Comparative Liability Among Joint Tortfeasors: The Aftermath of* Li v. Yellow Cab Co., 8 U. WEST L.A. L. REV. 23, 45 (1976)).

may not want to sue a family member or friend that was involved in an automobile accident, even though that individual may have been a proximate cause of the accident.

A plaintiff that makes the decision to omit a potential defendant, an "actor" in the statute's parlance, may pay a significant price for doing so. This is because the omitted "actor" will still appear on the verdict form and may be allocated part of the fault. Furthermore, since joint and several liability was abolished in Wyoming with the 1986 amendments to the comparative negligence statute,[93] the remaining defendant(s) will not be required to pay any portion of the verdict allocated to the omitted actor. Also, the remaining defendant(s) will defend on the basis that it was all the fault of the omitted nonparty actor, thereby putting an additional burden on the plaintiff, who will have to prove that the remaining defendants were responsible for the plaintiff's injuries.

Although the price of omitting a known, potential defendant may be high, that decision, presumably, is an informed one. As discussed above with respect to settling nonparties, there is no compelling need for due process protections for the plaintiff that omits a known potential defendant that is subject to the court's jurisdiction. The plaintiff's protection comes from access to counsel to advise the plaintiff about the potential costs and benefits of omitting a known potential defendant, including the additional burden that the plaintiff will assume at trial.

3. Inadvertently omitted nonparties

A plaintiff may inadvertently omit a potentially liable party. The most common reasons are the plaintiff's lack of diligence or inability to discover all potentially liable parties. In a complex products liability suit, for example, the plaintiff may fail or be unable to discover that an unnamed actor actually manufactured a component of the allegedly defective product. At trial, the named defendant(s) will, and ought to be able to, point the finger of liability at the manufacturer of the component, even if that manufacturer is not a named party.

Allowing the allocation of fault to a nonparty actor raises two concerns. First, the remaining defendant(s) will to try to shift the blame to a nonparty inadvertently omitted by the plaintiff. Second, the plaintiff will be unable to recover for any portion of liability allocated to nonparties. This raises the specter of the plaintiff trying to battle a ghost; if the ghost wins, the plaintiff will not be adequately compensated.

93. 1986 Wyo. Sess. Laws ch. 24.

Unless notified before trial that the defendant(s) will raise the defense that a hitherto unknown nonparty is at fault, the plaintiff is, by definition, without information to counter the assertion that a nonparty is responsible for the injury. That inability will translate into a greater allocation of fault to the nonparty, and a corresponding reduction in the plaintiff's recovery. Not only will the plaintiff be sandbagged at trial, the plaintiff may be unable to join the inadvertently omitted defendant because of the passage of a statute of limitations or jurisdictional problems. The question thus becomes what safeguards, if any, ought to be in place to enable the plaintiff to respond effectively to the defense that the plaintiff's injuries were caused by an inadvertently omitted nonparty.

The new statute has no procedural safeguards to protect a claimant from the defense that an unknown nonparty is responsible for claimant's damages.[94] The absence of any such safeguards calls into serious question the constitutionality of the inclusion of such nonparties in the allocation of liability. That issue is discussed in detail below.[95]

4. Immune Nonparties

Certain actors are immune from tort liability in certain circumstances. The primary groups of immune actors are employers, co-employees, and government employees.[96]

a. Employers

The immunity provided to employers and co-employees under the Wyoming Worker's Compensation Act[97] presents troublesome issues when read in conjunction with the comparative fault statute.

An employer that participates in Wyoming Worker's Compensation enjoys absolute immunity from suit by an injured employee who is injured while on the job. The "exclusive remedy" of an employee who suffers an injury "arising out of and in the course of employment" is a

94. It is possible, of course, for the claimant to attempt to learn of the existence of other actors through discovery.

95. *See infra* part III.C.

96. There are other types of tort immunity in Wyoming. The Wyoming Supreme Court has not abrogated the doctrine of charitable immunity, although it is seldom used as a defense. *See* Lutheran Hosp. and Homes Soc'y of Am. v. Yepsen, 469 P.2d 409, 411 (Wyo. 1970). In recent years, the Legislature has enacted statutes providing immunity for individuals acting in a variety of contexts, including the sponsors of amateur rodeos (WYO. STAT. § 1-1-118 (1988)); governmental boards (WYO. STAT. § 1-23-107 (Supp. 1995)); volunteers acting on behalf of nonprofit organizations (WYO. STAT. § 1-1-25 (Supp. 1995)); members of volunteer fire departments (WYO. STAT. § 35-9-701 (1994)); and reporters of suspected child abuse (WYO. STAT. § 14-3-209 (1994)).

97. WYO. STAT. §§ 27-14-101 to -805 (1991 & Supp. 1995).

claim for Worker's Compensation benefits.[98] The employer's immunity extends even to intentional torts.[99]

Co-employees enjoy more limited immunity. A co-employee is immune for acts committed within the scope of employment unless the co-employee "intentionally act[s] to cause physical harm or injury."[100]

The immunity of employers and co-employees does not extend to third parties, such as suppliers or manufacturers, that may have been involved in the incident that led to the employee's injury.[101] Such parties may even have a right to indemnity against the employer.[102]

A case involving multiple actors, including an employer and/or a co-employee, may put the plaintiff in a difficult position. Assuming it is not possible to sue either the employer or a co-employee, the obvious defense for those parties subject to suit is to blame the employer, the co-employee, or both. This will put the plaintiff in the position of having to prove both liability and that the employer and/or co-employee are not at fault, or at least not much at fault.

The immunity provided by the Worker's Compensation Act is not, at least, going to surprise a plaintiff. The plaintiff should know early on who is immune and who is not. The plaintiff will then be in a position to decide whether it is worth proceeding, and how to best counter the inevitable defense that the injury was primarily the fault of an immune actor. Since the decision to afford immunity is a legislative one, there is little a plaintiff can do about it, other than consider requesting that the jury be informed that a consequence of its allocation of fault to immune actors is that the plaintiff will not be able to recover for such amounts.

b. Government employees

In 1977 the Legislature enacted the Wyoming Governmental Claims Act.[103] The Act recognized the continued vitality of the defense of sovereign immunity, except where otherwise specified in the Act.[104] As a result, public employees of all units of state and local government are immune from tort liability while acting within the scope of their employment except as specified in the Act. In addition, in those instances where

98. WYO. STAT. §§ 27-14-102(a)(xi), -104(a) (Supp. 1995).

99. *See id.*

100. WYO. STAT. § 27-14-104(a) (Supp. 1995).

101. Pan Am. Petroleum Corp. v. Maddux Well Serv., 586 P.2d 1220, 1224 (Wyo. 1978).

102. *Id.*

103. 1979 Wyo. Sess. Laws ch. 157 (codified at WYO. STAT. §§ 1-39-101 to -120 (1988 & Supp. 1995)).

104. WYO. STAT. § 1-39-102 (1988).

the statute abrogates sovereign immunity, liability of the governmental entity, including a public employee acting within the scope of employment, is limited.[105]

The immunity conferred by the Governmental Claims Act means that one or more "actors" may not be susceptible to suit and/or liability (and even if not immune, liability will be limited). Once again, non-immune actors will have a strong incentive to argue that the plaintiff's injuries were caused by immune nonparties. And once again, the immunity provided by the Governmental Claims Act is not going to surprise a plaintiff. As with the Worker's Compensation Act, the plaintiff should know early on who is immune and who is not. The plaintiff will then be in a position to decide whether it is worth proceeding, and how to best counter the inevitable defense that the injury was primarily the fault of an immune actor. Since the decision to afford immunity is a legislative one, there is little a plaintiff can do about it, other than consider requesting that the jury be informed that a consequence of its allocation of fault to immune actors is that the plaintiff will not be able to recover for such amounts.

c. The immunities issue

Authorizing a jury to allocate fault to immune nonparties that are not represented at and do not appear at the trial raises the questions of whether the jury should be told why the immune parties are not present, what the effect of immunity is, and how that immunity will affect the plaintiff's ability to collect a judgment.

One can certainly argue that a jury should be informed of the effect of the immunity provided by the Worker's Compensation Act and/or the Governmental Claims Act. To do otherwise is to leave the jury in the dark, blindfolded to "the consequences of its determination."[106] Conversely, one can argue that immunity is not a consequence of the jury's allocation of fault; rather, it is a consequence of a legislative decision to afford immunity to some groups of actors. Accordingly, one can argue that the jury should not be "tainted" with the knowledge that certain actors are immune because with such knowledge, the jury may allocate more liability to those parties that are not immune.

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105. Liability shall not exceed $250,000 for any claimant for any number of claims arising out of a single transaction or occurrence, or $500,000 for all claims of all claimants arising out of a single transaction or occurrence. WYO. STAT. § 1-39-118(a) (Supp. 1995).

106. *See* WYO. STAT. § 1-1-109(c)(i)(B) (Supp. 1995) (The court "shall . . . inform the jury of the consequences of its determination of the percentage of fault."). *See also*, Burton v. Fisher Controls Co., 723 P.2d 1214, 1222 n.6 (Wyo. 1986).

C. *Necessity for Procedural Safeguards*

The defendants that are joined as parties have an obvious incentive to blame nonparty actors; the more fault that the jury allocates to nonparties, the less there is to allocate to parties. Accordingly, nonparty actors present the plaintiff with a heightened burden. In addition to proving liability by those actors subject to suit, the plaintiff must be prepared to disprove the liability of nonparty actors. That additional burden presents significant due process issues.

Wyoming is one of a handful of states that allow a fact finder to allocate fault or negligence to nonparties.[107] Most of those states have enacted one or both of the following procedural safeguards: (1) a defendant that intends to argue that a nonparty was at least partially at fault must give the plaintiff notice of that intention; and (2) the burden of proving a nonparty was at fault is on the defendant alleging the defense.

In Colorado and Arizona, for example, the fact finder may allocate fault to a nonparty if the claimant settled with the nonparty or if the defending party gives notice within a specified time after initiation of the lawsuit that a nonparty was wholly or partially at fault.[108] This levels the playing field a bit by preventing the plaintiff from being sandbagged at trial.

The Indiana statute requires notice and shifts the burden of proof. A defendant may affirmatively plead a "nonparty defense" that the damages of the plaintiff were caused in full or in part by a nonparty. The burden of proof of a nonparty defense is on that defendant.[109]

Wyoming's new statute (and its old statute), by contrast, has no

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107. The other states are: Arizona (ARIZ. REV. STAT. ANN. § 12-2506(B) (1994 & Supp. 1995)); California (Scott v. County of Los Angeles, 32 Cal. Rptr. 2d 643, 658 (Cal. Ct. App. 1994) (citation omitted)); Colorado (COLO. REV. STAT. ANN. § 13-21-111.5(3)(b) (West Supp. 1995)); Indiana (IND. CODE ANN. §§ 34-4-33-5(a)(1), -10(a) (Burns Supp. 1995)); Montana (MONT. CODE ANN. § 27-1-703(4) (1987) (The Montana Supreme Court held the provision unconstitutional in Newville v. Department of Family Servs., 883 P.2d 793 (1994). The Montana Legislature subsequently enacted procedural protections to remedy the constitutional deficiencies. 1995 Mont. Laws ch. 330.)); New Mexico (N.M. STAT. ANN. § 41-3A-1(B) (1989)); New York (N.Y. CIV. PRAC. L & R § 1601 (McKinney Supp. 1996)); North Dakota (N.D. CENT. CODE § 32-03.2-02 (Supp. 1995)); Oklahoma (OKLA. STAT. ANN. tit. 23, § 13 (West 1987)); Tennessee (TENN. CODE ANN. § 20-1-119(e) (1994)); and Utah (UTAH CODE ANN. § 78-27-38(4) (Supp. 1995) (jury may allocate fault to persons immune from suit)).

The Uniform Act allows fault to be allocated to each claimant, defendant, third-party defendant, and any person who has been released from liability. UNIF. COMPARATIVE FAULT ACT § 2(a)(2), 12 U.L.A. 50-51 (Supp. 1995).

108. COLO. REV. STAT. ANN. § 13-21-11.5(3)(b) (West Supp. 1995); ARIZ. REV. STAT. ANN. § 12-2506(B) (1994 & Supp. 1995).

109. IND. CODE ANN. § 34-4-33-10(b) (Burns Supp. 1995).

procedural safeguards to protect a claimant from having to battle the ghost of a nonparty actor whose existence was unknown to the claimant until trial. The lack of any such procedural safeguards led the Montana Supreme Court to find a similar provision of the Montana comparative negligence statute to be unconstitutional.

In *Newville v. Department of Family Services*,[110] the Montana Supreme Court found the inclusion of nonparties in the allocation of fault in the absence of procedural safeguards for the plaintiff violated plaintiffs' substantive due process rights. The *Newville* case is instructive for three reasons. First, the inclusion of nonparty actors in the allocation of fault under the new Wyoming statute is similar in effect to the provision of the Montana statute that was stricken as unconstitutional. Second, the due process clauses of the Montana and Wyoming constitutions are identical, and both are substantially similar to the Due Process Clause of the United States Constitution. Finally, the substantive due process analysis used by the Montana Supreme Court is similar to that adopted by the Wyoming Supreme Court in other contexts.

In 1987 the Montana Legislature enacted a series of tort reform measures, including amendments to the comparative negligence statute. Those amendments were intended to "match liability for damages to fault of each of the parties involved in a tort action."[111] The express aim of the changes was to "protect 'deep pocket' defendants . . . when they were faced with minimal percentages of negligence."[112] To assist in achieving that goal, the amended Montana comparative negligence statute included language allowing the jury to allocate fault to nonparties:

> For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons . . . .[113]

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110. 883 P.2d 793, 803 (Mont. 1994).

111. *Id.* at 799.

112. *Id.*

113. MONT. CODE ANN. § 27-1-703(4) (1987). The Montana statute was amended in 1995 to remedy the constitutional deficiencies found by the *Newville* court. *See infra* note 126.

The Montana comparative negligence statute was challenged as violating the constitutional guarantees of procedural due process, substantive due process and equal protection.[114] The Montana Supreme Court found the statute to violate substantive due process rights, and did not, therefore, address the other constitutional challenges.[115]

The Due Process Clause of the Fourteenth Amendment to the United States Constitution says that: "No state shall . . . deprive any person of life, liberty or property, without due process of law . . . ."[116] The Montana Constitution contains an identical guarantee: "No person shall be deprived of life, liberty or property without due process of law."[117] The Wyoming Constitution contains language identical to Montana's.[118]

The Montana Supreme Court began by discussing the theoretical basis for incorporating a substantive due process component in the due process clause. Substantive due process, said the court, exists to preclude "arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action."[119] Substantive due process review applies, therefore, when a legislative enactment affects individual constitutional rights. Accordingly, courts may review a statute's "inherent procedural fairness."[120] A statute that limits a person's rights or remedies must be "reasonably related to a permissible legislative objective."[121]

The appellants in *Newville* argued that allowing a jury to allocate fault to nonparties was unconstitutional because of alleged procedural unfairness. There was, according to the appellants, no reasonable basis for requiring a plaintiff to prepare and present a defense "at the last minute" to a nonparty that a defendant seeks to blame for the plaintiff's injury, and there was "no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties."[122] The court agreed.

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114. *Newville*, 883 P.2d at 799.

115. *Id.* The court did not indicate whether it was deciding the case under the Montana Constitution or the United States Constitution. Given the similarity of the two, the analysis would, presumably, be identical.

116. U.S. CONST. amend. XIV, § 1.

117. MONT. CONST. art. II, § 17.

118. WYO. CONST. art. I, § 6.

119. *Newville*, 883 P.2d at 799-800.

120. *Id.* at 800.

121. *Id.*

122. *Id.* at 802. The "last minute" issue arose because the Montana statute did not require a defendant to disclose the intention to rely at trial on the defense that the plaintiff's injury was the fault of some nonparty.

Permitting the allocation of negligence to nonparties in the absence of procedural safeguards forces the plaintiff to "anticipate defendants' attempts to apportion blame . . . [and] is clearly unreasonable as to plaintiffs."[123] Therefore, the court concluded that the Montana comparative negligence statute violated substantive due process by including "persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant."[124]

The Montana Supreme Court compared the Montana comparative negligence statute with other states' statutes. It noted that while statutes in other states allow the allocation of fault to certain nonparties, those statutes contain procedural safeguards to protect the plaintiff.[125] The court referred to the Colorado and Indiana statutes, in particular.[126]

The Wyoming comparative fault statute is vulnerable, as was the Montana statute, to a substantive due process challenge. It is also on shaky equal protection ground.

The Wyoming Supreme Court has recognized that due process, under the United States and/or Wyoming Constitutions, includes procedural and substantive components.[127] As in Montana, substantive due process protects an individual's life, liberty and property interests from illegitimate governmental intrusion.[128] Those interests are infringed when a statute is arbitrary and fails to promote a legitimate state objective through reasonable means.[129]

The degree of judicial protection under substantive due process varies, depending on the nature of the individual's interest.[130] Governmental actions affecting fundamental interests receive strict judicial scrutiny. Actions affecting other interests, such as economic or property rights, do not. If the interest is not fundamental, the court merely examines the law at issue to deter-

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123. *Id.*

124. *Id.* at 803. Because the statute had a severability clause, the court did not find the remainder of the statute unconstitutional.

125. *Id.* at 802.

126. *Id.* In response to the *Newville* decision, the Montana Legislature amended the comparative negligence statute to incorporate safeguards for the plaintiff. 1995 Mont. Laws ch. 330. In particular, a defendant that wishes to assert a "nonparty defense" bears the burden of proof on that issue, and the defendant must affirmatively plead the defense in the answer (or, if discovered after the answer is filed, with "reasonable promptness."). *Id.* § 1 (codified at MONT. CODE ANN. § 27-1-703(6)(c), (d) (1995)).

127. Mills v. Reynolds, 807 P.2d 383, 395 (Wyo. 1991) (citation omitted), *rev'd on other grounds*, 837 P.2d 48 (Wyo. 1992).

128. ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION 39 (1993).

129. Mills v. Reynolds, 807 P.2d at 395 (citation omitted).

130. KEITER & NEWCOMB, *supra* note 128, at 39.

mine whether it promotes a legitimate state objective by reasonable means.[131] The classification of the interest is, therefore, critical to the analysis.

Because of the differing levels of judicial scrutiny under substantive due process review, the first question is whether the inclusion of nonparty actors in the allocation of fault involves a fundamental right. It may.

The Wyoming Supreme Court has suggested that one source of fundamental rights is the Wyoming Constitution; provisions such as Article I, section 8, which guarantees equal access to the courts, enumerate fundamental rights.[132] Whether rights not enumerated in the constitution are fundamental can be determined by balancing the inherent rights of individuals against the police power of the state.[133] The argument that the allocation of fault to nonparties involves a fundamental right has its genesis in both the concepts of enumerated constitutional rights and the inherent rights of citizens of the state.

The Wyoming Constitution guarantees equal access to the courts:

> All courts shall be open and every person for an injury done to a person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law decree.[134]

Access to the courts, therefore, should be limited "only in exceptional circumstances."[135]

Although the equal access to the courts provision does not prohibit the legislature from imposing reasonable regulations, the court has used the equal access provision as a basis to carefully scrutinize legislation that imposes any restrictions on access to the courts.[136] This provides a basis for arguing that the allocation of fault to nonparties involves a fundamental right, meaning that the statute should be subjected to strict scrutiny under a substantive due process analysis.

In addition to constitutional infirmity under a strict scrutiny, substantive due process challenge, the comparative fault statute may be constitutionally defective under the equal protection and equal access to the courts provisions of the Wyoming Constitution.

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131. *Id.*
132. *Id.*
133. *Id.*
134. WYO. CONST. art. I, § 8.
135. Williams v. Stafford, 589 P.2d 322, 325 (Wyo. 1979).
136. *See, e.g.*, Hoem v. State, 756 P.2d 780, 784 (Wyo. 1988).

In *Hoem v. State*,[137] the Wyoming Supreme Court cited the equal access provision of the Wyoming Constitution in striking down the legislation which created the Wyoming Medical Review Panel. The court's analysis in *Hoem* suggests that the comparative fault statute may also be constitutionally defective.

Justice Macy, writing for the majority in *Hoem*, laid out the standards for considering an equal protection and/or equal access to the courts constitutional challenge to a statute.[138] First, the party challenging a legislative classification bears the burden of showing that the classification is not reasonable. Second, the court will sustain a classification if there is any set of supporting facts that can be reasonably conceived. Third, while the court gives great deference to legislative actions, "*it is equally imperative that [the court] declare them invalid when they transgress the Wyoming Constitution.*"[139]

Applying these standards, the court first analyzed the state interests that the Medical Review Panel Act was intended to further: reducing the filing of questionable medical malpractice claims, and equitably compensating persons with "well-founded" claims, thereby addressing the "perceived medical malpractice insurance 'crisis.'"[140] The court agreed that protecting the public health and the economic and social stability of the state were legitimate state interests. The question then became whether the creation of the Medical Review Panel was a "reasonable and effective means" of addressing those interests. It was not.

Requiring persons who desired to bring medical malpractice actions to appear before a Medical Review Panel before filing a claim in court created two classes of potential plaintiffs: (1) those seeking compensation for injuries allegedly caused by medical malpractice; and (2) those seeking compensation for injuries allegedly caused by any other tortious conduct. Those in the former class were subjected to an additional burden not borne by those in the latter, review by a Medical Review Panel. Additionally, health care practitioners were singled out for protections not available to any other defendants. That scheme did not pass constitutional muster.

In invalidating the Medical Review Act, the court held that conferring special benefits on the medical profession and imposing additional

137. 756 P.2d at 784.

138. *Id.* at 782.

139. *Id.* (quoting Brenner v. City of Casper, 723 P.2d 558, 560 (Wyo. 1986) (emphasis in original)).

140. *Hoem*, 756 P.2d at 782-83.

burdens on the victims of medical malpractice bore no reasonable relationship to the protection of public health or economic and social stability.[141] Furthermore, the court emphasized the principle that "constitutional safeguards are not suspended in time of even the most legitimate crisis."[142] Using language that bodes ill for the comparative fault statute, the court concluded: "We cannot condone the legislature's use of the law to protect one class of people from financial difficulties while it dilutes the rights under the constitution of another class of people."[143]

Under *Hoem*, the first step in analyzing the constitutionality of the comparative fault statute under an equal access analysis is to determine the state interest that the comparative fault statute purports to further. Although there is no legislative history, it is probably safe to assume that the state's interest is to protect defendants from having to pay more than their share of a claimant's injuries. That is probably a legitimate state interest. The question then becomes whether allocating fault to nonparty actors, in the absence of due process protections for claimants, is a reasonable and effective means of addressing that interest. It is not.

The comparative fault statute, as the Medical Review Act, creates two classes of persons: claimants seeking recovery in a lawsuit where all the actors that caused the injury are known and joined as defendants; and claimants seeking recovery in a lawsuit where one or more actors cannot be joined as a defendant because an actor is unknown, immune or not susceptible to service. That classification imposes additional burdens on the second group of claimants, and confers benefits on defendants in lawsuits where there are nonparty actors. While it is true that persons in those classifications cannot be identified in advance of an injury, the burdens and benefits resulting from the classification are no less real—and no more defensible.

The result of the classification is that a claimant in an action that cannot join one or more actors is placed at a significant disadvantage. And those defendants that are joined receive a significant advantage. The advantage to the defendants that are joined is obvious. They can blame the missing actor(s); to the extent they are successful, the jury will allocate fault to missing actors, thereby reducing, or even eliminating, the defendants' liability and the plaintiff's recovery. The disadvantage to the claimant is simply the reverse of the benefit to the joined defendants. In

141. *Id.* at 783. In a concurring opinion, Justice Thomas, joined by Justice Urbigkit, noted that the act was clearly unconstitutional under "the 'heightened scrutiny' test," and failed even under a rational basis test. *Id.* at 785.

142. *Id.* at 783 (quoting Waggoner v. Gibson, 647 F. Supp. 1102, 1107 (N.D. Tex. 1986)).

143. *Hoem*, 756 P.2d at 784.

addition to proving the defendant(s) liable, the claimant must disprove, or at least minimize, the fault attributable to nonparty actors.

Should a claimant refuse to pick up and carry the standard of nonparty actors, the claimant may well suffer a significantly diminished recovery if the defendants succeed in convincing the jury of the fault of nonparty actors. Under the analysis set forth in *Hoem*, the benefit to the party defendants, which is simultaneously an additional burden to the claimant, suggests that allocating liability to nonparty actors is unconstitutional, in the absence of procedural protections for plaintiffs, under the equal access guarantee of the Wyoming Constitution.

IV. GUIDELINES FOR INTERPRETING AND APPLYING THE STATUTE

Perhaps the biggest issue in interpreting and applying the statute is how to instruct juries on the meaning of "fault." In particular, the meaning of "proximate cause" will present a challenge to courts. Read literally, juries will be expected to engage in a two-step process. First, they will be asked to determine whether the acts or omissions of specified actors were a proximate cause of the claimant's injuries. Then they will be asked whether any of those actors who were found to be a proximate cause were in any manner negligent, subject to liability for strict liability, strict products liability, including breach of warranty, assumption of risk and misuse or alteration of a product. The problem with such an instruction is that a jury may become hopelessly confused. The current pattern jury instructions on comparative negligence say: A person is at fault when that person is negligent and that person's negligence is a cause of the injury or damages for which the claim is made.[144] That instruction will have to be substantially modified. Proposed jury instructions follow.

> 10.01 Comparative Fault - Theory and Effect
> (Single Plaintiff and Single Defendant)
>
> Liability in this case must be determined by comparing the fault, if any, of the claimant (also called the "plaintiff") and the defendant. Therefore, in deciding this case you will need to know what "fault" means.
>
> When the word "fault" is used in these instructions to refer to the claimant's behavior, it means that the acts or omissions of the claimant:

144. W.C.P.J.I. Nos. 10.01, 10.03 (1994).

(1) Were [negligent, involved assumption of risk or negligent misuse or alteration of a product];[145] and
(2) Were a substantial factor in causing the claimant's harm.

When the word "fault" is used in these instructions to refer to the defendant's behavior, it means that the acts or omissions of the defendant:

(1) Were [negligent or would lead to the imposition of strict liability, strict products liability or breach of warranty];[146] and
(2) Were a substantial factor in causing the claimant's harm

It will be necessary for you to determine the percentage of fault, if any, of the claimant and the defendant. It will also be necessary for you to determine the amount of damages, if any, suffered by the claimant.

Your findings about fault will affect the claimant's recovery. It is my duty to explain how that may occur.

The defendant's liability for damages is limited to the percentage of fault, if any, that you find is attributable to the defendant.

The claimant's recovery will be reduced by the percentage of fault, if any, that you find is attributable to the claimant.

Should you find that the claimant's fault is more than fifty percent, the claimant will not be entitled to recover any damages.

In explaining the consequences of your verdict, I have not meant to imply that either the claimant or defendant is at fault. That is for you to decide.

Other instructions may be necessary, including instructions on "assumption of risk" or "misuse or alteration of a product."

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145. Whether to include the terms "negligence," "assumption of risk," or "misuse or alteration of a product" will depend on the evidence. If, for example, there is evidence to support an instruction on negligence, that term should be included. If there is not, it should not be. Similarly, if there is evidence to support an instruction on negligent misuse or alteration of a product, that instruction should be given. And since it is extremely unlikely that the claimant's actions or inactions could subject the claimant to strict liability, strict products liability or breach of warranty, including those terms in the instructions seems guaranteed to do nothing but confuse the jury.

146. The "fault" of the defendant will be limited to the claim or claims asserted by the claimant. If there is no claim that the defendant is strictly liable, for example, that language should not be included because the defendant could not be "subject to strict liability."

Comparative Fault - Assumption of Risk[147]

The defendant claims that the claimant was at fault because the claimant assumed the risk presented by the defendant's activity. "Assumed the risk" means that [the claimant knew about the danger presented by the activity in which the defendant was engaged, and voluntarily decided to proceed in spite of that danger] [the claimant knew of a defect in the product and voluntarily decided to use the product in spite of the danger].[148] The claimant is not at fault if he or she simply failed to discover the danger presented by [the defendant's dangerous activity] [the dangerous product].[149]

Comparative Fault - Misuse or Alteration of a Product

The defendant claims that the claimant was at fault because the claimant misused or altered the product which caused the claimant's injury. A product is misused or altered if the claimant used it in a way that was: (1) negligent; (2) not reasonably foreseeable; and either (3) unintended or (4) obviously dangerous to the claimant.

If the case involves multiple defendants, pattern jury instruction 10.03 (Comparative Fault - Theory and Effect; Single Plaintiff and Multiple Defendant) should be similarly amended. The more difficult issue will be the instruction for cases involving nonparty actors. Pattern instruction 10.05 should be amended as follows.

10.05 Comparative Fault - Where a Nonparty Defense is Raised

In this case, the defendant claims that _____, who is not a party to this lawsuit, was at fault for causing the claimant's injuries, at least in part. A nonparty who may be responsible for helping to cause the injuries of the claimant is called an "actor."

147. If the defendant in a negligence case has asserted primary assumption of risk as a defense, the jury should be instructed on that defense separately. The instruction should be separate, and should be entitled "primary assumption of risk," because if the jury finds primary assumption of risk by the plaintiff, the defendant owed no duty to the plaintiff and the case is over. There is no fault to compare. *See supra* notes 42 through 51 and accompanying text.

148. The first clause should be used if the claim involves strict liability based on an abnormally dangerous activity. The second should be used if the claim involves strict products liability.

149. The first clause should be used if the claim involves strict liability based on an abnormally dangerous activity. The second should be used if the claim involves strict products liability.

> Even though _____ has not appeared at this trial or offered evidence, you must determine whether _____ was at fault. If so, you must determine the percentage of fault attributable to _____.
>
> When the word "fault" is used in these instructions to describe the behavior of a nonparty actor, it means that the acts or omissions of that actor:
>
> (1) Were [negligent, would subject the actor to strict liability, strict products liability or breach of warranty];[150] and
> (2) Were a substantial factor in causing the claimant's harm.

The instructions proposed above do not use the term "proximate cause," even though that language is part of the definition of fault. There are three reasons for that omission. First, under any circumstances, "proximate cause" is an ambiguous and ill-defined term that will likely only confuse a jury. Second, the term is even more confusing when taken out of its historical context of tying together tortious conduct and injuries and used, instead, as a threshold criterion for determining fault. Third, the "substantial factor" language, which has been adopted by the Restatement and used by the Wyoming Supreme Court, allows a jury to make the common sense factual determination of whether the acts or omissions were a "substantial factor" in causing the harm.[151]

Courts will also face the issue of informing a jury of "the consequences of its determination of fault." Under the old statute, courts apparently informed the jury of at least four consequences of its allocation of fault: (1) the plaintiff's recovery would be reduced by the percentage of fault allocated to him or her; (2) the plaintiff could not recover if the allocation of fault to the plaintiff exceeded fifty percent; (3) each defendant would be liable only for the percentage of fault allocated to that defendant; and (4) which actors had "available pockets" and which were on the verdict form only for allocation of responsibility purposes.[152] There are additional consequences under both the old and new statutes.

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150. Which term or terms to include will depend on whether there is evidence to support such an instruction. It makes no sense, for example, to include "strict products liability" in the definition of fault unless the actor in question was involved in distributing a product. Further, it is hard to envisage circumstances in which the acts or omissions of a nonparty actor could subject that actor to assumption of risk or misuse or alteration of a product.

151. The second half of the Restatement's definition of "legal cause" is whether "there is no rule of law relieving the actor from liability." RESTATEMENT (SECOND) OF TORTS § 431 (1965). If there is such a rule, the case should never go to the jury.

152. W.C.P.J.I. Nos. 10.01, 10.03, 10.05 (1994); *see also* Burton v. Fisher Controls Co., 723 P.2d 1214, 1222 n.6 (Wyo. 1986).

The parties may wish to consider asking the court to inform the jury of additional consequences. For example, the plaintiff may wish to have the jury informed that there will be no recovery from immune actors.[153] Such actors do not have "available pockets," and the language of the act and the *Burton* decision can be read to support such a request.

Finally, jury instructions cannot address the issue of the potential prejudice to a claimant that does not know that a defendant intends to use a nonparty actor defense. To avoid the surprise of having to defend against the claim that nonparty actor(s) unknown to the claimant were really at fault, the claimant should attempt to discover the identity of any such nonparty actors. The mechanism available to do so is interrogatories. It is a foolish claimant who does not ask the defendant to identify all nonparty actors that the defendant believes to be partially at fault. Since interrogatories are continuing in nature,[154] a defendant that fails to disclose a nonparty actor before trial should be precluded from offering the "fault" of that unidentified nonparty actor as a defense at trial.[155]

Although surprise can be virtually eliminated through discovery, the additional burden of having to effectively disprove a nonparty actor defense will remain. Short of an amendment to the statute, a claimant will have to be prepared to prove the liability of the defendants, and disprove the liability of nonparty actors.

V. SUGGESTED CHANGES

There are at least three serious flaws in the statute. First, the definition of "fault" is confusing and overbroad. Second, the lack of procedural safeguards to protect claimants from the nonparty actor defense is likely unconstitutional (and extremely unfair to claimants, even if not unconstitutional). And finally, the statute should not even arguably apply to non-tort claims, intentional torts or torts based on reckless disregard or willful and wanton conduct by a defendant. All three defects should be remedied.[156]

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153. For a complete discussion of informing the jury of the consequences of its decision see *supra* part II.C.2.

154. *See* WYO. R. CIV. P. 26(e).

155. If the defendant only discovers the existence of another potentially liable actor on the eve of trial, it seems that, at a minimum, the court should grant a continuance to allow the plaintiff the opportunity to prepare a counter-attack to the defendant's newly discovered defense.

156. The proposed statute, reflecting the changes discussed below, appears in Appendix C.

A. Redefine "Fault"

The definition of "fault" is confusing and overbroad in several ways. First, having "proximate cause" serve as the prerequisite to a finding of "fault" makes no sense. Second, failing to separate out conduct of a claimant from that of other actors is unnecessarily confusing. And finally, allowing certain non-negligent conduct of a claimant or other actor to be a defense to a defendant's negligent conduct creates conceptual and implementation problems.

Eliminating the "proximate cause" language would simplify the definition without expanding it. The reason is that conduct that is "negligent" or that would subject an actor to strict liability, strict products liability or breach of warranty is, by definition, conduct that was a proximate cause of the claimant's injury. The "proximate cause" language adds nothing but confusion.

Separating out the language that describes the "fault" of claimants from that which describes the "fault" of other actors would greatly clarify the applicability of the statute. The admixture of "conduct that could subject an actor to strict liability, strict tort liability or breach of warranty" and "assumption of risk or misuse or alteration of a product" has resulted in a hodgepodge that will require sorting out in each case where the statute is applied.

Finally, allowing the comparison of negligent and non-negligent conduct, which will, in some cases, hold the claimant and/or nonparty actors to a higher standard than the defendant, lacks a coherent philosophical basis and will be difficult to implement. The statute should restrict any comparison to like kinds of conduct, thereby treating all actors more fairly.

The pendulum has swung too far in the direction of defendants, at the expense of plaintiffs. To correct the distortion, the definition of fault should be amended.[157] The suggested changes would eliminate the

157. *See* Appendix C, § 1-1-109(a)(iv) for the proposed changes to the definition of fault. The following examples illustrate how the new definition would affect recovery when claims for both negligence and strict products liability are brought and fault is allocated differently for each claim.

Assume a claimant sues a defendant for negligence and strict products liability. The defendant asserts the defense of comparative negligence to the former claim, and assumption of risk to the latter. The jury allocates fault on the negligence issue 50% (defendant) and 50% (claimant), and on the strict products liability issue 60% (defendant) and 40% (claimant). The plaintiff should be allowed to recover 60% under the strict products liability claim since comparative negligence is not a defense to strict products liability. Appendix C, § 1-1-109(a)(iv)(C)(1).

Assume a claimant sues a defendant for negligence and strict products liability. The defendant asserts the defense of comparative negligence to the former claim, and assumption of risk to the

problems with trying to define and implement "proximate cause," clarify the applicability of the statute to claimants and other actors, and prevent the comparison of negligent and non-negligent conduct, all without undermining the Legislature's clear intent to overrule *Phillips v. Duro-Last* by allowing a comparison of fault in strict liability and breach of warranty cases. In the end, a claimant's awards would be reduced or eliminated based on "fault" that is truly comparable to the defendant's, and defendants would be liable only for their proportionate share of fault. Defendants would not benefit, as they do under the new statute, from a comparison of their negligent conduct and the non-negligent conduct of others, including the claimant.

Since the definition of "fault" eliminates the use of and necessity for the "proximate cause" language, the term "proximate cause" should also be eliminated from the definition of "actor."

B. Provide Procedural Protections for Claimants

The statute should provide procedural safeguards to protect claimants in cases involving the potential allocation of fault to nonparty actors. Two important safeguards should be created: notice to claimants of a nonparty defense, and making explicit that the burden of proving that defense rests with the defendant that asserts it.

As previously discussed, the lack of procedural protections for claimants subject to a nonparty actor defense may well render the statute unconstitutional. Even if the statute is constitutional, the lack of protections is unfair to claimants. The balance between allowing defendants the defense that a nonparty actor was at fault and treating claimants fairly is easily restored.

The Indiana statute allows a defendant to argue that a nonparty was a cause of a plaintiff's injuries, but "[t]he burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense."[158] This accomplishes two objectives. First, the plaintiff does not have to assume the additional burden of proving the non-liability of nonparty actors. Second, the plaintiff will be put on notice of a defendant's intention to argue a nonparty defense. The revised Montana statute contains similar requirements.[159]

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latter. The jury allocates fault on the negligence issue 60% (defendant) and 40% (claimant), and on the strict products liability issue 50% (defendant) and 50% (claimant). The plaintiff should be allowed to recover only the lesser amount (40%) since the claimant's assumption of risk involves more culpability than mere contributory negligence. It is, in essence, a defense to the negligence claim. Appendix C, § 1-1-109(a)(iv)(C)(2).

158. IND. CODE ANN. § 34-4-33-10(b) (Burns Supp. 1995).

159. MONT. CODE ANN. § 27-1-703(6)(c), (d) (1995).

The Wyoming statute should be amended to include a new subdivision which provides for a nonparty defense, requires that the defense be affirmatively pled in the defendant's answer, and shifts the burden of a nonparty defense to the defendant who raised it. Such a change would level the playing field, which has shifted in favor of defendants. Claimants would be put on notice of a defendant's intention of using a nonparty defense,[160] and the defendant would have the burden of proving that defense—just as the defendant has the burden of proving any other defense. The underlying objective of preventing a defendant from having to pay more than his or her share would be preserved.

C. *Clarify That the Statute Does Not Apply to Non-tort Claims or Intentional Torts*

The legitimacy of any comparison is comparability. Allowing a claimant's non-negligent or negligent conduct to be a defense to a non-tort claim, such as breach of contract, is not appropriate because the parties' actions do not involve comparable conduct.[161] Similarly, a comparison between a defendant's intentional and/or reckless conduct and a claimant's negligent conduct is inherently suspect. Although the statute should be construed to prevent such comparisons, it should be amended to eliminate any argument that comparative fault can be a defense in such actions by adding a new sentence at the end of (b): "The defense of contributory fault shall not be available with respect to any non-tort claim made by a claimant, or any claim in which an element of the claim is that the defendant acted intentionally, recklessly, or willfully and/or wantonly."

VI. CONCLUSION

Whatever the intent behind the new act, it represents a significant victory for defendants, and a significant loss for plaintiffs. There is no empirical evidence to justify such a radical change to Wyoming's tort law.[162]

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160. If a defendant discovers a nonparty defense after filing an answer, that answer may be amended; leave to amend is to "be freely given when justice so requires." WYO. R. CIV. P. 15(a).

161. Comparative negligence is not a defense to a breach of contract claim. *See, e.g.*, Becker v. BancOhio Nat'l Bank, 478 N.E.2d 776, 781 (Ohio 1985).

162. The available evidence is to the contrary. *See, e.g.*, Brian C. Shuck & Susan Martin, Comment, *Wyoming Tort Reform and the Medical Malpractice Insurance Crisis: A Second Opinion*, 28 LAND & WATER L. REV. 593, 625 (1993) (concluding that there was not a medical malpractice litigation crisis during the 1970s and 1980s, despite media reports to the contrary).

Comparative negligence was designed to "ameliorate the harsh effects of the contributory negligence rule."[163] Now, the pendulum has swung so far that in some situations, claimants are worse off than they were under the "harsh" contributory negligence rule. The result distorts the tort system to unfairly favor defendants. A system that unfairly favors one side over the other is not in the best interests of anyone but insurance companies, for they are the only entities that are invariably defendants.

When the pendulum appeared to swing too far to favor plaintiffs, the Legislature responded with a series of tort reform measures to adjust the balance.[164] In the absence of any evidence to show that such reforms have been insufficient, it is now time for some tort reform that benefits plaintiffs, and thereby begins to restore fairness to all parties.

163. Danculovich v. Brown, 593 P.2d 187, 194 (Wyo. 1979)

164. For example, the Legislature abolished joint and several liability. 1986 Wyo. Sess. Laws ch. 24, § 1.

APPENDIX A: THE OLD STATUTE

§ 1-1-109. COMPARATIVE NEGLIGENCE.

(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence of the said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

(i) If a jury trial:

(A) Direct the jury to find separate special verdicts determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party; and

(B) Inform the jury of the consequences of its determination of the percentage of fault.

(ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party.

(c) The court shall reduce the amount of damages determined under subsection (b) of this section in proportion to the amount of fault attributed to the person recovering and enter judgment against each defendant in the amount determined under subsection (d) of this section.

(d) Each defendant is liable only for that proportion of the total dollar amount determined as damages under paragraph (b)(i) or (ii) of this section in the percentage of the amount of fault attributed to him under paragraph (b)(i) or (ii) of this section.

APPENDIX B: THE NEW STATUTE

§ 1-1-109. COMPARATIVE FAULT.

(a) As used in this section:

(i) "Actor" means a person or other entity, including the claimant, whose fault is determined to be a proximate cause of the death, injury or damage, whether or not the actor is a party to the litigation;

(ii) "Claimant" means a natural person, including the personal representative of a deceased person, or any legal entity, including corporations, limited liability companies, partnerships or unincorporated associations, and includes a third party plaintiff and a counterclaiming defendant;

(iii) "Defendant" means a party to the litigation against whom a claim for damages is asserted, and includes third party defendants. Where there is a counterclaim, the claimant against whom the counterclaim is asserted is also a defendant;

(iv) "Fault" includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product;

(v) "Injury to person or property," in addition to bodily injury, includes, without limitation, loss of enjoyment of life, emotional distress, pain and suffering, disfigurement, physical or mental disability, loss of earnings or income, damage to reputation, loss of consortium, loss of profits and all other such claims and causes of action arising out of the fault of an actor;

(vi) "Wrongful death" means that cause of action authorized by Wyoming statute to recover money damages when the death of a person is caused by the fault of an actor such as would have entitled the party injured to maintain an action to recover damages if death had not ensued.

(b) Contributory fault shall not bar a recovery in an action by any claimant or the claimant's legal representative to recover damages for wrongful death or injury to person or property, if the contributory fault of the claimant is not more than fifty percent (50%) of the total fault of all actors. Any damages allowed shall be diminished in proportion to the amount of fault attributed to the claimant.

(c) Whether or not the claimant is free of fault, the court shall:

(i) If a jury trial:

(A) Direct the jury to determine the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor; and

(B) Inform the jury of the consequences of its determination of the percentage of fault.

(ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor.

(d) The court shall reduce the amount of damages determined under subsection (c) of this section in proportion to the percentage of fault attributed to the claimant and enter judgment against each defendant in the amount determined under subsection (e) of this section.

(e) Each defendant is liable only to the extent of that defendant's proportion of the total fault determined under paragraph (c)(i) or (ii) of this section.

APPENDIX C: THE PROPOSED STATUTE

§ 1-1-109. COMPARATIVE FAULT.

(a) As used in this section:

(i) "Actor" means a person or other entity, including the claimant, whose fault is ~~determined to be a proximate~~ a cause of the claimant's death, injury or damage, whether or not the actor is a party to the litigation;

(ii) "Claimant" means a natural person, including the personal representative of a deceased person, or any legal entity, including corporations, limited liability companies, partnerships or unincorporated associations, and includes a third party plaintiff and a counterclaiming defendant;

(iii) "Defendant" means a party to the litigation against whom a claim for damages is asserted, and includes third party defendants. Where there is a counterclaim, the claimant against whom the counterclaim is asserted is also a defendant;

(iv) "Fault" has the following meaning: ~~includes actors or omissions determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product.~~

(A) In an action where the claimant seeks recovery based on the negligence of the defendant(s), "fault" means an act or omission by any actor, including the claimant, that is negligent.

(B) In an action where the claimant seeks recovery based on strict liability, strict products liability or breach of warranty, "fault" means:

(1) With respect to an actor other than the claimant, any acts or omissions that would subject the actor to strict liability, strict products liability or breach of warranty; and

(2) With respect to a claimant, negligent misuse or alteration of a product, or the use of a product in an obviously dangerous way.

(C) In an action where the claimant seeks recovery based on negligence and strict liability, strict products liability or breach of warranty, "fault" shall be determined separately for each claim, using the definitions in (A) and (B).

(1) If the fact finder allocates more fault to the claimant with respect to the claimant's negligence claim than with respect to the claimant's other claims, the claimant may recover based on the allocation of fault on the claim(s) for strict liability, strict products liability or breach of warranty.

(2) If the fact finder allocates more fault to the claimant with respect to the claimant's claim(s) for strict liability, strict products liability or breach of warranty than with respect to the claim for negligence, the claimant shall recover the lesser amount

(v) "Injury to person or property," in addition to bodily injury, includes, without limitation, loss of enjoyment of life, emotional distress, pain and suffering, disfigurement, physical or mental disability, loss of earnings or income, damage to reputation, loss of consortium, loss of profits and all other such claims and causes of action arising out of the fault of an actor;

(vi) "Wrongful death" means that cause of action authorized by Wyoming statute to recover money damages when the death of a person is caused by the fault of an actor such as would have entitled the party injured to maintain an action to recover damages if death had not ensued.

(b) Contributory fault shall not bar a recovery in an action by any claimant or the claimant's legal representative to recover damages for wrongful death or injury to person or property, if the contributory fault of the claimant is not more than fifty percent (50%) of the total fault of all actors. Any damages allowed shall be diminished in proportion to the amount of fault attributed to the claimant. The defense of contributory fault shall not be available with respect to any non-tort claim made by a claimant, or any claim in which an element of the claim is that the defendant acted intentionally, recklessly, or willfully and/or wantonly.

(c) Whether or not the claimant is free of fault, the court shall:

(i) If a jury trial:

(A) Direct the jury to determine the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor; and

(B) Inform the jury of the consequences of its determination of the percentage of fault.

(ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor.

(d) Nonparty defense.

(i) In an action under this statute, a defendant may assert as a defense that the damages of the claimant were caused in full or part by a nonparty. Such a defense is referred to as a nonparty defense and must be affirmatively pled in the defendant's answer.

(ii) The burden of proof of a nonparty defense is on the defendant who raised it.

(iii) Nothing in this subsection relieves the claimant of the burden of proving that fault on the part of the defendant(s) caused, in whole or in part, the damages of the claimant.

(e) The court shall reduce the amount of damages determined under subsection (c) of this section in proportion to the percentage of fault attributed to the claimant and enter judgment against each defendant in the amount determined under subsection (e) of this section.

(f) Each defendant is liable only to the extent of that defendant's proportion of the total fault determined under paragraph (c)(i) or (ii) of this section.