April 15, 2011

The Honorable Robert M. Bell,
Chief Judge
The Honorable Glenn T. Harrell, Jr.
The Honorable Lynne A. Battaglia
The Honorable Clayton Greene, Jr.
The Honorable Joseph F. Murphy, Jr.
The Honorable Sally D. Adkins
The Honorable Mary Ellen Barbera,
Judges
The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

Your Honors:

The Rules Committee submits this, its One Hundred Seventieth Report. This is a special report in response to the Court's request for information and advice regarding the doctrine of comparative fault and various legal principles that may be associated with it. There are no changes to existing Maryland Rules recommended at this time.

Respectfully submitted,

Alan M. Wilner
Chair

Linda M. Schuett
Vice Chair

AMW:cdc

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
SPECIAL REPORT TO COURT OF APPEALS
ON ASPECTS OF CONTRIBUTORY NEGLIGENCE
AND COMPARATIVE FAULT

I. INTRODUCTION

A. Court's Request to Rules Committee

By Memorandum of November 8, 2010 from Chief Judge Robert M. Bell, the Court requested the Rules Committee to undertake a comprehensive and objective study of how other States and Federal jurisdictions currently treat the doctrines of contributory negligence and comparative fault, as well as legal principles associated with or affected by those doctrines, and to report to the Court the results of that study. The Court asked that, as part of its Report, the Committee advise:

(1) To the extent that other States or Federal jurisdictions have replaced contributory negligence with a form of comparative fault:

(a) how the change was effected;

(b) the form, aspects, and structure of comparative fault they chose as the alternative; and

(c) any significant judicial and economic consequences that resulted from the replacement; and

(2) If the Court were to consider replacing the doctrine of contributory negligence with some form of comparative fault:

(a) whether, in the Committee's view, the Court could effect that change by

Rule, as opposed to judicial decision;

(b) if the Court were to consider the adoption of such a Rule, what the form and content of the Rule should be; and

(c) what related legal principles would need to be considered concurrently.

The Court directed that, in conducting its study, the Committee consider the views of individuals and groups that have exhibited an interest in the matter, including, in particular, the Maryland Defense Counsel, the Maryland Association for Justice, and the Maryland State Bar Association.

The Court did not solicit the Committee's views as to whether the Court *should* abrogate the current common law doctrine of contributory negligence in favor of some form of comparative fault, either by Rule or by judicial decision, and the Committee therefore considers that issue to be beyond its charge.

B. The Two Doctrines

Contributory Negligence (Fault)

The contributory negligence doctrine holds that "a plaintiff who fails to observe ordinary care for his [or her] own safety is contributorily negligent and is barred from all recovery, regardless of the quantum of a defendant's primary negligence." *Harrison v. Mont. Co. Bd. of Educ.*, 295 Md. 442, 451 (1983); *County Commissioners v. Bell Atlantic*, 346 Md. 160, 180 (1997). It is regarded as a clear, fixed, all-or-nothing proposition, although, because of certain associated doctrines such as "last clear chance," that is not always the case.

Comparative Fault

The comparative fault doctrine comes in several forms.

The "pure" comparative fault doctrine does not absolutely bar a contributorily negligent claimant from any recovery but instead measures the extent of the claimant's contributory fault against the fault of the other alleged tortfeasors and reduces the claimant's recovery in the proportion that his or her contributory fault bears to the total fault causing or contributing to the injury. In whole numbers, the reduction could be from 1% to 99%.

A "modified" comparative fault doctrine bars any recovery, and thus acts in the manner of the contributory negligence doctrine, if the claimant's contributory fault reaches a certain proportionate level. In some jurisdictions, the level is 50%; in others, it is anything *over* 50%. If the contributory fault is below that threshold, the doctrine will permit recovery but will reduce the amount of recovery in the manner of "pure" comparative fault.

C. Rules Committee Proceedings

Upon receipt of the Court's request, the Committee Chair appointed a special subcommittee to undertake the study and prepare a draft report for consideration by the full Committee. The subcommittee commenced its work by consulting recent studies relevant to the matters included in Item (1) of the Court's request and by collecting the statutes in each State that has replaced contributory negligence with a form of comparative fault by statute, the opinions of the State Supreme Courts that have made the

change by judicial decision, relevant Federal statutes, and statutes and court decisions from the District of Columbia and the Federal Territories (Puerto Rico, the American Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands). Much of the basic research was done by Ms. Georgene Kaleina, Esq., acting as a special reporter to the subcommittee. The principal national studies considered by the Committee are:

(1) a 2004 Report by the Maryland Department of Legislative Services, *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability* (hereafter MDLS *Negligence Systems*);

(2) the 2003 version of the proposed Uniform Apportionment of Tort Responsibility Act (UATRA), with Prefatory Note and Comments prepared by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commissioners);

(3) a State-by-State analysis in 2 *Comparative Negligence Manual* 3rd ed. (2010 supp.) published by Clark Boardman Callaghan; and

(4) a 2009 *State by State Summary of Comparative/Contributory Negligence and Joint and Several Liability* prepared by the Commercial Transportation Litigation Committee of the American Bar Association.

Copies of the MDLS study and UATRA are attached as Appendices A and B, respectively. The two-volume Clark Boardman Callaghan work is available at the State Law Library.

From the inception, the Committee has solicited the views and participation of all individuals and groups who have indicated an interest, including the three organizations mentioned in Chief Judge Bell's Memorandum. Many of those individuals and groups have responded by attending meetings of the special subcommittee and Rules Committee and making oral presentations. Several of them submitted written comments.

II. THE NATIONAL LANDSCAPE

A. Historical Perspective

In *Harrison v. Mont. Co. Bd.. Of Educ.*, *supra,* 295 Md. 442, the Court laid out the historical background of the contributory negligence and comparative fault doctrines applicable in tort cases and the eventual replacement of the former by the latter in most of the States. There is no need to repeat what the Court said in that Opinion, but, for context, it is worth noting certain salient points. The defense of contributory negligence had its apparent origin in the 1809 English case of *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926. Commencing with an 1824 Massachusetts case, the doctrine gained acceptance in the American courts and was first adopted in Maryland in 1847. *See Irwin v. Spriggs*, 6 Gill 200 (1847). The *Harrison* Court noted that the roots of comparative fault could be traced to Roman law but that its earliest application in England was in admiralty cases.

The ascendancy of contributory negligence in the United States lasted just over a century. Congress opted for a comparative fault approach with the enactment in 1908 of

the Federal Employer's Liability Act, 35 Stat. 65, 45 U.S.C. §§ 51-60. By 1913, Mississippi, Georgia, and Nebraska had adopted a comparative fault approach, followed during the 1930s, 1940s, and 1950s by Wisconsin, South Dakota, and Arkansas. Five more States joined the ranks in the 1960s.

The major shift occurred during the 1970s and 1980s, encouraged, perhaps, by the drafting of the Uniform Comparative Fault Act (UCFA) by the Uniform Law Commissioners in 1977 and various tort reform efforts that gained currency during that period. The last two States to adopt comparative fault – South Carolina and Tennessee – did so in the early 1990s. Although it appears that at least two States that initially adopted a "pure" form of comparative fault later replaced it with a modified form, no State that replaced contributory negligence with any form of comparative fault has reversed that decision and re-adopted contributory negligence.

B. Current Status – In General

Currently, 46 States, the Federal Government, Puerto Rico, the American Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands have adopted either a pure or modified comparative fault approach. Only Maryland, Virginia, North Carolina, Alabama, and the District of Columbia retain contributory negligence. There does not appear to be any significant movement in those jurisdictions to change their law.[1] The template 1977 UCFA has been replaced by the

[1] In 2010, the North Carolina Legislature created a Commission to study the matter and directed that it report to the Legislature in 2011. No members of that Commission have ever been appointed, however.

UATRA, approved by the Uniform Law Commissioners in 2002 and amended in 2003. The Maryland Court of Appeals has adhered to contributory negligence as an absolute defense to actions based on negligence since its adoption in 1847. *See Harrison*; also *Franklin v. Morrison*, 350 Md. 144, 167 (1998).

C. Method of Change by the States

In 33 States, the change from contributory negligence to a form of comparative fault was effected by statute.[2] In 12 States, the change was effected by judicial decision of the State Supreme Court[3], although in one, a statute was enacted following the court decision.[4] One State effected the change through a judicial synthesis of two statutes.[5] No State has adopted comparative fault by Court Rule. The adoption of comparative fault by the Federal Government was entirely by statute.

D. Pure or Modified Comparative Fault

Twelve States and three of the American territories have adopted the "pure" form

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[2] Those States are Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[3] Those States are Alaska, California, Florida, Illinois, Iowa, Kentucky, Michigan, Missouri, New Mexico, South Carolina, Tennessee, and West Virginia.

[4] In Iowa, the initial change was effected by judicial decision, which adopted "pure" comparative fault; two years later, a statute adopting a modified form of comparative fault was enacted.

[5] In 1913, the Georgia Supreme Court used two 19th Century statutes to evolve a general comparative fault approach.

of comparative fault.[6] Twelve States have adopted the form of comparative fault under which a claimant may recover only if his or her proportionate contributory negligence is *less* than 50 percent.[7] Under the approach adopted in 21 States, a claimant may recover only if his or her proportionate contributory negligence does not *exceed* 50 percent.[8] In South Dakota, the claimant may recover if his or her contributory negligence was "slight in comparison with the negligence of the defendant." [9]

In exercising admiralty jurisdiction, the Federal courts, from an early time, adopted the English practice of applying the "pure" form of comparative fault, and, by both statute and statutory construction, that approach continues.[10] As noted, Congress extended that approach when enacting the Federal Employers' Liability Act.[11] Because, in Federal Tort

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[6] Those States and Territories are Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, Washington, Puerto Rico, American Samoa, and the Northern Mariana Islands.

[7] Those States are Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, and West Virginia.

[8] Those States are Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming; also the American Virgin Islands.

[9] *See* S. Dakota Codified Laws, § 20-9-2.

[10] *See* the Death on the High Seas Act, 46 U.S.C. 30304 and cases construing the Jones Act, 46 U.S.C. § 30104, *e.g., Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939).

[11] *See* 45 U.S.C. §§ 53 ("the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee") and 54 (eliminating the defense of assumption of risk).

Claims Act cases, the Federal courts apply the law of the State in which the injury occurred[12], comparative fault also governs the great majority of the cases in which the claimant bears some contributory fault.

III. TREATMENT OF ASSOCIATED DOCTRINES

A. In General

In *Harrison*, the Court recognized that replacement of contributory negligence as an absolute defense with a form of comparative fault would require consideration of "other fundamental areas of negligence law," such as last clear chance, assumption of risk, joint and several liability, contribution, setoffs and counterclaims, and other fault systems such as strict liability. *Harrison*, 295 Md. at 455. The manner in which the States have dealt with those and other allied issues, some of which are inter-related, is an aspect of the general National Landscape otherwise dealt with in Part I, but also impacts on Item (2)(b) of the Court's request – the form and content of any Rule the Court might consider adopting. For organizational convenience, those associated doctrines are treated separately in this Part III, and may be broken down into two general categories:

(1) Application of comparative fault to other fault systems; and

(2) Allocation of fault among multiple tortfeasors

B. Application to Other Fault Systems

[12] *See* 28 U.S.C. §§2671-2680.

As a preface, under current Maryland law, the defense of contributory negligence does not apply when (1) the law of another jurisdiction that provides for comparative fault is applicable;[13] (2) the action is based on strict liability rather than negligence;[14] or (3) the action is based on intentional, rather than negligent, conduct by the defendant.[15]

A fourth instance in which the plaintiff's negligence does not bar recovery is in a case in which the "last clear chance" doctrine is applicable. Under this doctrine, which is an aspect of the more general principle of supervening negligence, if the plaintiff establishes "something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence"[16] – the contributory negligence doctrine *applies.* The plaintiff's negligence is an element in a "last clear chance" analysis, but it is, in effect, overcome by the defendant's sequential negligence and therefore does not bar recovery.

All four of those exceptions would have relevance in any decision to adopt a form

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[13] *See Collins v. National Railroad*, 417 Md. 217, 233, n.13 (2010); *Farrell Lines v. Devlin*, 211 Md. 404, 415 (1956) ("when federal maritime law controls, contributory negligence is not an absolute bar"); *Erie v. Heffernan*, 399 Md. 598, 629 (2007) (when, under *lex loci deliciti* doctrine, Delaware law applied, comparative fault analysis was required; there was no strong public policy in enforcing Maryland contributory negligence doctrine sufficient to override application of *lex loci delicti*).

[14] *See Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 597 (1985) (contributory negligence is not a defense to an action of strict liability in tort).

[15] *See Tucker v. State*, 89 Md. 471 (1899); *State Farm v. Hill*, 139 Md. App. 308, 316-17 (2001).

[16] *See Liscombe v. Potomac Edison Co.,* 303 Md. 619, 638 (1985); *Wooldridge v. Price,* 184 Md.App. 451, 462-63 (2009).

of comparative fault.

Application of Law of Another Jurisdiction

If Maryland were to adopt a form of comparative fault but, in a particular case, Federal law or the law of another State is applicable, either directly or under a conflict of laws analysis, the Court would need to apply the law as adopted by that jurisdiction. It may be contributory negligence or a different form of comparative fault. In that setting, the law likely would be no different under a Maryland comparative fault approach than it is now under contributory negligence.

Other Fault Doctrines

Negligence is regarded as a narrower concept than "fault" and thus does not ordinarily embrace within it actions based on other fault concepts such as strict liability, intentional conduct, breach of warranty, or assumption of risk. In adopting a comparative fault system, however, whether those other fault concepts are to be included for purposes of allocating liability will depend on how "fault" is defined. Negligence does, however, embody the element of causation – proximate cause – and, as noted, is overcome when "last clear chance" is established. The manner in which that or other emanations of proximate cause, as an element of negligence, would be applied in a comparative fault system also likely would depend on how "fault" is defined. Those matters were explored by the Uniform Law Commissioners in their comments to both the 1977 UCFA and the 2002 and 2003 versions of UATRA.

The 1977 UCFA proposed a pure form of comparative fault. Its scope was broad

in some respects and narrow in others. Last clear chance was dealt with in the core substantive provision, § 1(a), which provided:

> " In an action based on fault seeking to recover damages for *injury or death to person or harm to property*, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, *such as last clear chance*."

(Emphasis added).

In their Comment to that section, the Uniform Law Commissioners noted that the Act was confined to physical harm to person or property, and, although it extended to consequential damages deriving from the physical harm, it did not apply to economic loss resulting from such torts as negligent misrepresentation, interference with contractual relations, injurious falsehood, or harm to reputation resulting from defamation. They added that the exclusion of those torts from the purview of the Act was not intended to preclude recovery for those torts under common law principles.

The other fault doctrines were dealt with in the definition of "Fault," UCFA § 1(b):

> "'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault."

In their Comment, the Uniform Law Commissioners explained that:

(1) The definition covered all negligent conduct, whether or not it was within the traditional negligence action – including negligence as a matter of law or arising from a court decision or statute.

(2) Whether "reckless" conduct was broad enough to include wanton or willful conduct was for each State to determine. If the State wanted such conduct included**,** it would need to determine whether the proposed language should be amended.

(3) Although strict liability sometimes was characterized as liability without fault, it nevertheless was included. The Commissioners explained:

> "Strict liability for both abnormally dangerous activities and for products bears a strong similarity to negligence as a matter of law (negligence per se) and the fact finder should have no real difficulty in setting percentages of fault. Putting out a product that is dangerous to the user or the public or engaging in an activity that is dangerous to those in the vicinity involves a measure of fault that can be weighed and compared, even though it is not characterized as negligence."

(4) With respect to breach of warranty, the Commissioners noted that such actions sometimes sound in tort and sometimes in contract, and that there was no intent to include under the Act actions that were "fully contractual in their gravamen" and in which the plaintiff was suing solely because he did not recover what he contracted to receive. Those claims were excluded as not involving physical harm to persons or property.

(5) The Act was not intended to include intentional torts, but it did not purport to preclude a court from applying comparative fault principles to such torts as a matter of common law.

(6) The term "contributory fault chargeable to the claimant," as used in UCFA § 1(a), was intended to be broad and to cover legally imputed fault, as in the case of principal and agent, and to diminish recovery whether or not it was a bar to recovery under a contributory negligence approach, such as in an action based on strict liability or reckless conduct.

(7) Finally, in this regard, the Commissioners commented on torts or conduct that straddled the statutory boundaries. They noted that, with respect to some torts, such as nuisance, the defendant's conduct may be negligent, intentional, or subject to strict liability, and, in those cases, the Act would exclude only conduct in which the defendant intentionally inflicted the injury. In the same vein, they observed that the concept of assumption of risk could cover a variety of conduct. They declared that contributory fault included only an unreasonable assumption of risk that was voluntary and undertaken with knowledge of the danger, which would encompass the current Maryland concept of assumption of risk.[17] Similarly, misuse of a product could have several meanings. UCFA was intended to cover, as contributory fault, only misuse "giving rise to a danger that could have been reasonably anticipated and guarded against."[18]

Those issues were not definitively resolved by the States in the manner suggested by UCFA, or in any other manner, and were reconsidered by the Uniform Law

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[17] *See American Powerlifting v. Cotillo*, 401 Md. 658, 668 (2007).

[18] *See* UCFA Commissioners' Comment to § 1.

Commissioners in the 2003 version of the UATRA, which proposed a modified form of comparative fault. Recognizing that the chance of "achieving any degree of uniformity" with respect to those issues was "very problematic, given the different approaches that exist today among the jurisdictions adopting comparative fault," the Commissioners decided not to try to define "fault."[19] This eliminated their need to address whether strict liability or intentional conduct constituted fault that could be shared. The definition and scope of fault generally was left to the adopting States to determine as they wished. The 2004 study by the Department of Legislative Services reported that 35 of the States that had adopted a form of comparative fault applied the doctrine to strict liability cases, 10 did not, and in one State it was an open issue.[20]

In their 2003 analysis, the Uniform Law Commissioners found that there was a greater consensus regarding the type of fault that should be attributed to the claimant. In an effort to support that consensus, § 2(1) of UATRA defined "contributory fault" as including contributory negligence, misuse of a product, unreasonable failure to avoid or mitigate harm, and assumption of risk "unless the risk is expressly assumed in a legally enforceable release or similar agreement." The Commissioners made clear, however, that the definition articulated in § 2(1) was not exclusive and that the adopting jurisdictions were free to decide, among other things, whether a claimant should be barred when

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[19] *See* UATRA Commissioners' Comment to § 2.

[20] *See* MDLS *Negligence Systems* Appendix A: State Negligence Systems, 37-41.

engaged in intentional wrongdoing.[21]

Short of reading carefully the statutes and appellate case law of the 46 States that have adopted a form of comparative fault, which the Rules Committee does not have the resources to do, it is impossible to determine how each of those States, individually, has resolved each of these several issues. A brief review of some of the State statutes reveals that some of them deal with some of those issues, while others do not, and the statutes that do deal with them do so in different ways.[22] The Committee accepts the conclusion reached by the Uniform Law Commissioners that, as of 2003, there was no real consensus on those issues but that a State adopting a form of comparative fault, at some point and in some manner, must resolve them in determining the scope and operation of their tort law.

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[21] The Commissioners noted that the comparative fault States were not uniform with respect to whether a claimant's fault should bar all or part of a claim based on strict liability, and that three different approaches had gained some currency. In the *Restatement Third of Torts*, the American Law Institute concluded that most jurisdictions in some manner compare the claimant's fault in a strict liability action and that all forms of fault should fall within a comparative fault rule rather than limiting the comparison to situations involving an unreasonable encounter of a known danger. The Uniform Law Commissioners followed the lead of the ALI and adopted that position in the 2002 draft of UATRA. In light of objections from the American Bar Association to an attempt to achieve uniformity in that area, however, the Uniform Law Commissioners retreated and, in the 2003 version, opted not to address the matter but leave it to the various States to resolve for themselves. *See* UATRA, Comment to § 3.

[22] Compare, for example, the Arizona statute, A.R.S. §§ 12-2505 and 12-2509, which provides for contribution among all tortfeasors whose liability is based on negligence, strict liability in tort, or any product liability action, recognizes the continued viability of assumption of risk as a defense, excludes any recovery if the claimant intentionally, willfully, or wantonly contributed to the injury, and says nothing about last clear chance, with the Connecticut statute (Conn. Gen. Stat. § 52-572h), which expressly abolishes last clear chance and assumption of risk and precludes an apportionment of liability or damages between persons liable for negligence and persons liable on any basis other than negligence, including reckless misconduct and strict liability.

C. Allocation of Fault Among Other Tortfeasors

In General

A number of factors need to be considered in determining how fault, liability, and damages are to be apportioned among two or more defendant tortfeasors. That is true under a contributory negligence system (assuming no contributory negligence on the part of the claimant) as well as under a comparative fault system, although, at least in some respects, the analysis is different. The law must resolve:

(1) what other tortfeasors are in the pool – in a comparative fault system, against which other tortfeasors' fault is the claimant's fault measured;

(2) in what manner and to what extent can the claimant recover from each of the tortfeasors; and

(3) in what manner and to what extent can the other tortfeasors recover from each other for what they have paid to the claimant.

Each of those issues depends, in turn, on how the jurisdiction resolves a number of subsidiary issues.

Determining The Pool Of Tortfeasors

The first issue, of who is in the pool, will depend, in large part, on how "fault" is defined, *see* Part III B, but also on how uncharged parties (nonparties) and tortfeasors who have been released are treated. The Uniform Law Commissioners wrestled with the nonparty and released party issues. At one point, they proposed to take account of the conduct of a "nonparty at fault" but abandoned the effort because of the difficulties it

presented, including that of even defining the term. Would it include a person with immunity, or over whom the court lacks jurisdiction? Does the person have to be identifiable? Their ultimate conclusion, with one exception, was to compare fault only among those who are actual parties to the litigation but not to preclude any defendant from pursuing a nonparty.[23] A few States that initially adopted that approach later amended their law to require apportionment of fault to nonparties.[24]

The one exception under UATRA concerned released tortfeasors. UATRA defines a released person as one who would be liable for damages to a claimant if the person had not been discharged from liability.[25] Under § 4 of UATRA, the proportionate responsibility of released persons must be determined by the fact-finder in the case and, with certain exceptions, counted in the apportionment mix. The Uniform Law Commissioners concluded that that approach -- of not counting nonparties other than released parties -- found support in what actually had taken place in practice. The MDLS study concluded that jurisdictions were "split on whether they include, with the named defendants, other identifiable tortfeasors who are not parties in the case for the purpose of comparing the plaintiff's fault."[26]

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[23] *See* UATRA Commissioners' Preface APPORTIONING TORT RESPONSIBILITY IN THIS ACT.

[24] *See Special Feature: Comparative Negligence Under NRS 41:141*,18 Nevada Lawyer 6 (2010)

[25] *See* UATRA, § 2(3).

[26] *See* MDLS *Negligence Systems* at 12. *Compare*, for example, the Florida statute (Fla. Stat. § 768.81(3)(a)) allowing an allocation of fault to nonparties provided the

Joint and Several Liability and Contribution

Current Maryland Approach

Under the current Maryland contributory negligence system, the second and third factors noted above – the extent to which the claimant can recover against multiple defendants and the extent to which the defendants may recover from each other – are largely controlled by the Maryland Uniform Contribution Among Joint Tortfeasors Act (Maryland Code, Courts Article, §§ 3-1401 through 3-1409). Under that statute, as judicially construed:

(1) Persons who are liable in tort for the same injury to the claimant's person or property are deemed to be joint tortfeasors and, as such, are jointly and severally liable to the claimant. The claimant may recover judgment against them all. To the extent of available assets, the claimant may collect on the judgment from any or all of them, without regard to their respective shares of the fault (which are rarely, if ever, determined, because they are not relevant). *See* §§ 3-1401 and 3-1403. The claimant's aggregate recovery is, of course, limited to the amount of the judgment.

(2) To the extent that a joint tortfeasor discharges in whole the common liability or pays to the claimant more than a pro rata share of the common liability, that tortfeasor may recover a judgment for contribution against the other joint tortfeasors. A joint tortfeasor who settles with the claimant, however, is not entitled to contribution from

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claimant identifies and affirmatively pleads the fault of the nonparty, the Illinois statute (735 ILCS 5/2-1116) defining "tortfeasor" as including a nonparty, and the New Jersey statute (N.J. Stat. § 2A:15-5.1) including, for apportionment purposes, "persons against whom recovery is sought."-

another joint tortfeasor whose liability to the claimant is not discharged by the settlement. *See* § 3-1402.

(3) A release given by the claimant to one joint tortfeasor does not discharge other tortfeasors unless the release so provides, but it does reduce the claim against the other tortfeasors by the consideration paid for the release or, if greater, by any amount or proportion stated in the release. *See* § 3-1404. A release given to one joint tortfeasor does not relieve that tortfeasor from liability to make contribution to another joint tortfeasor unless (i) the release is given before the other tortfeasor acquires a right of contribution, and (ii) the release provides for a reduction to the extent of the released tortfeasor's pro rata share of the of the claimant's damages recoverable from all other joint tortfeasors.

Relevant Factors In a Comparative Fault System – In General

In a comparative fault system, additional and different factors may be applicable. The most obvious one is that, in a pure comparative fault system or where a modified system is in place and the claimant's fault does not reach a disqualifying threshold, the claimant's proportionate fault needs to be determined, quantified, and apportioned. This determination, quantification, and apportionment impacts not only how the pie is to be sliced, but also, in at least three States that have adopted comparative fault, what other tortfeasors are in the pool.

According to the 2004 study conducted by the Department of Legislative Services, most of the States that had adopted a form of comparative fault measured the claimant's

fault against the aggregate fault of all of the other tortfeasors combined (some States, as noted, exclude nonparties; others include them). Three States that adopted a modified form – Idaho, Minnesota, and Wisconsin – measure the claimant's fault against that of each individual defendant separately and permit recovery against that defendant only if the contributory fault was not greater than that of that defendant.[27] Thus, if the total negligence was apportioned 20 percent to the Claimant, 40 percent to Defendant A, 30 percent to Defendant B, and 10 percent to Defendant C, in the majority of comparative fault States, the claimant could recover from each of those defendants in those proportions. In the three individual-comparison States, however, the claimant could not recover against Defendant C. That is obviously an issue that Maryland would need to consider and resolve if it were to switch to a modified form of comparative fault.

A second major difference between the current Maryland law and a comparative fault approach is that, under comparative fault, apportionment of liability and damages is based on judicially-determined shares of fault, rather than on pro rata or, in the case of a release, a negotiated amount or percentage of the total. The method of apportionment is affected by (1) how "fault" is defined, as to both the claimant and the other tortfeasors, (2) how the jurisdiction chooses to treat certain relationships between or among the various tortfeasors, and (3) what, if any, relevance the jurisdiction wishes to give to the

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[27] *See* MDLS *Negligence Systems* Appendix 1, State Negligence Systems 37-41. The MDLS study listed Tennessee and Wyoming as being in that category as well, but that appears to be a mistake. With respect to Idaho, Minnesota, and Wisconsin, *see* Idaho Code, § 6-801; Minn. Stat. § 604.01; and Wis. Stat. § 895.045(1).

uncollectibility of damages apportioned to one or more tortfeasors.[28] As with other aspects of comparative fault, there is no uniformity among the States with regard to those matters.

Joint and Several Liability

As noted, joint and several liability on the part of defendant tortfeasors is an integral part of the current Maryland contributory negligence system. That clearly is not the case in jurisdictions that have adopted a form of comparative fault. The great majority of those jurisdictions have either abolished or, in one way or another, limited joint and several liability. The MDLS study reported that, of the 46 States that had adopted a form of comparative fault, 38 had either abolished or limited the doctrine of joint and several liability; only eight had retained the doctrine in its entirety.[29] Only 10 of the 38 States abolished the doctrine entirely. The other 28 have retained it in specified circumstances, but there is no clear consensus regarding some of those circumstances.

In their Preface to UATRA, the Uniform Law Commissioners noted that, as a general rule, joint and several liability has been retained with respect to defendants who acted in concert and that some States have retained the doctrine where multiple defendants engaged in conduct resulting in environmental harm. They observed further that some jurisdictions permit joint and several liability for economic loss**,** but not for

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[28] As to that, *see* Part IV E.

[29] The eight States retaining the doctrine were Arkansas, Delaware, Illinois, Maine, Massachusetts, Rhode Island, South Carolina, and South Dakota. MDLS *Negligence Systems* at 17.

non-economic loss. Others will not hold a tortfeasor whose proportionate fault is below a certain threshold jointly and severally liable with tortfeasors whose proportionate fault is above that threshold.[30] According to the MDLS study, five comparative fault States retained joint and several liability among defendants where there is no contributory fault on the part of the claimant.[31] There is a smorgasbord from which to choose.

UATRA provides for several judgments except in four instances, in which joint and several liability is required: (1) if two or more of the tortfeasors acted in concert or with intent to cause personal injury or harm to property; (2) where one party intentionally caused personal injury or harm to property and another's liability is for failing to prevent that conduct; (3) where the liability of one defendant is based on the act or omission of another one; and (4) if another statute requires that the judgment impose joint and several liability.[32]

Contribution And Indemnity

The right of defendants to seek contribution from one another emanates from, and remains closely associated with, the doctrine of joint and several liability. It is not surprising, therefore, that to the extent a State adopts a form of comparative fault and abolishes or significantly limits joint and several liability, the State also is likely to limit rights of contribution. Except in those circumstances where joint and several liability is

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[30] *See* UATRA Commissioners Preface DEVELOPMENTS SINCE THE UNIFORM COMPARATIVE FAULT ACT (1977).

[31] *Id*. Those States are Georgia, Missouri, Oklahoma, Vermont, and Washington.

[32] *See* UATRA § 6(a).

retained, judgments are entered individually against each defendant found liable in the amount that reflects that defendant's proportionate share of fault. No defendant is required to pay more than the amount of that individual judgment, interest on that judgment, and a share of the costs. Thus, no defendant has a basis for seeking contribution from any other defendant.

UATRA reflects that basic principle. Section 6(a) states the general comparative fault rule requiring the entry of individual several judgments in the respective amounts for which the defendants found liable are responsible and the four circumstances in which joint and several judgments are required. Contribution and indemnity are dealt with in § 7. Section 7(a) provides for a right of contribution, available solely in those situations in which joint and several liability is imposed.[33] Sections 7(c) and (d) permit a defendant to seek indemnity from a nonparty under certain circumstances, either by joining the non-party in the litigation or in a separate action.

Effect on Workers' Compensation

An issue mentioned but not dealt with in UCFA, not mentioned at all in the MDLS

[33] Section 7(a) states:

Except as otherwise provided in subsection (b), a party that is jointly and severally liable with one or more other parties under this [act] has a right of contribution from another party jointly liable for any amount the party pays in excess of the several amount for which the party is responsible. A party against which contribution is sought is not liable for more than the monetary amount of the party's several share of responsibility determined pursuant to Section 5." The exception for subsection (b) deals with the situation in which a defendant (Defendant A) is jointly and severally liable for failing to prevent another defendant (Defendant B) from intentionally causing personal injury or harm to property. In that situation, Defendant A has a right of indemnification from Defendant B.

study, but clearly presented in the UATRA is how to deal with a subrogation claim by a workers' compensation employer/insurer.

Under the Maryland Workers' Compensation Law (Code, Labor & Empl. Art, § 9-902), if workers' compensation benefits are awarded or paid, the payor may sue a third party that is liable for the injuries to the employee. If there is a recovery, the payor is entitled to the amount of compensation paid; after certain deductions, any excess goes to the employee. If the payor does not file such an action, the employee may do so. Out of any recovery, subject to certain deductions, the employee must reimburse the compensation payor for the amount of compensation paid and then is entitled to the balance. In any such third-party action, contributory negligence on the part of the *employee* will defeat a recovery if, under the circumstances, the defense applies. In this scheme, any fault on the part of the *employer* that contributed to the injury is disregarded; to the extent there is a recovery, the compensation payor is entitled to be reimbursed for the entire amount of compensation paid.

A comparative fault system entails at least one and possibly two modifications to that approach. In the third-party action, the employee's fault would be determined, quantified, and apportioned; unless it reached a disqualifying threshold, it would not bar recovery but only reduce the amount. That is a normal aspect of a comparative fault system.

The new "wrinkle" concerns fault that may properly be attributed to the *employer*. In UCFA, the Uniform Law Commissioners noted that the then-common rule precluding

a right of contribution from the employer who was also at fault was unfair, as it cast the entire fault on a third-party defendant who may have been only partially at fault. Several solutions were suggested.

In the 2003 version of UATRA, the Commissioners settled on one approach, which does not *increase* the amount required to be paid by the employer but may reduce the amount of its subrogation claim. In § 9, UATRA treats the payment of compensation benefits as a form of settlement, implemented as if the employer received a release, and requires that the employer's share of fault, if any, be determined in the same manner as a tortfeasor who had been released. The employer's subrogation lien would then be reduced by the monetary amount of the employer's percentage of responsibility. The Uniform Law Commissioners noted that such provisions could be included in amendments to the State workers' compensation law rather than in a comparative fault statute.

In their Comments to § 9 of UATRA, the Uniform Law Commissioners illustrate how that provision would work. They present the hypothetical situation of an employee who, while driving the employer's truck, is injured in an automobile accident with X. The employee receives $30,000 in workers' compensation benefits and then sues X. The jury finds the total damages to be $100,000 and apportions fault as follows: employee 10 percent; X 70 percent; and the employer 20 percent for failure to maintain the brakes on the truck. In that circumstance, the recovery from X would be $70,000, of which the employer would recoup $10,000, and the employee would get the balance of $60,000.

The aggregate amount to the employee would thus be $90,000 ($30,000 workers' compensation plus $60,000 from X), thus reducing the employee's recovery by the proportionate amount of his/her 10 percent fault. The employer would have paid a net amount of $20,000, commensurate with its 20 percent share of the fault.

This approach was not published until 2002, long after the 46 comparative fault States made the switch from contributory negligence, and, without reviewing the workers' compensation laws in those States, the Rules Committee is unable to determine how many States currently follow the UATRA model.

Impact on Other Categories of Claims

Although not discussed in the MDLS study or the Uniform Law Commissioners comments to UCFA or UATRA, adoption of a comparative fault system may impact other categories of claims as well, including:

(1) the effect of a claimant's fault on a loss of consortium claim,

(2) the effect of a claimant's fault on an uninsured or under insured motorist claim against the claimant's insurer,

(3) how comparative fault would apply in a professional malpractice case,

(4) how comparative fault would apply in a crash-worthiness case, and

(5) whether punitive damages, where permissible, are subject to apportionment among defendant tortfeasors.

It appears that most courts that have dealt with those or similar specific issues have

done so through case law.[34]

Reallocation of Uncollectible Share

As noted earlier, where judgments against joint tortfeasors create joint and several liability, the claimant may collect from any of them up to the amount of the total judgment and, to the extent one tortfeasor discharges more than its pro rata share of the total, that tortfeasor may pursue a claim for contribution against other tortfeasors who have not discharged their pro rata share. That is the sole basis and method for any *actual* apportionment of liability, and the extent to which a defendant may succeed in getting contribution ordinarily is of no concern to the claimant.

Also as noted, in a comparative fault system, the court (judge or jury) apportions the percentage of fault and the amount of damages, and individual judgments reflecting that apportionment are entered against the respective defendants. Except in those limited situations in which joint and several liability is expressly permitted, each defendant is liable for no more than the amount of the judgment entered against that defendant. If a defendant is "judgment-proof," that is of no concern to the other defendants. The existence of one or more judgment-proof defendants impacts only the claimant. The claimant bears the entire amount of the loss that had been apportioned to the judgment-proof defendant.

In the UCFA, the Uniform Law Commissioners regarded that outcome as inconsistent with the underlying premise of a comparative fault system that responsibility

[34] *See* 1 *Comparative Negligence Manual* 3rd ed. §§ 1.23 through 1.41 (1995).

should be shared equitably according to fault. In § 2(d), UCFA therefore provided that, on motion filed within one year after judgment was entered, the court must determine whether all or part of a judgment reflecting a party's equitable share of the obligation is uncollectible. The court must then reallocate any uncollectible amount among all of the other parties, including the claimant, according to their respective percentages of fault. The party whose liability is reallocated is subject to contribution and any continuing liability to the claimant on the judgment. The Commissioners noted in a comment to that section that reallocation avoided the unfairness not only of the common law rule of joint and several liability, which casts the total risk of uncollectibility on the solvent defendants**,** but also of the abolition of joint and several liability, which casts the total risk of uncollectibility on the claimant.

The 1977 UCFA did not address, either in its text or in the Uniform Law Commissioners' comments, many of the details required to implement a reallocation procedure. The 2003 version of UATRA addressed a few of those details but left most of them for the States to resolve as they chose – such things as:

(1) how long after entry of judgments a claimant should have to seek reallocation,

(2) what standard(s) should be used to determine whether an allocated share is not reasonably collectible,

(3) whether a separate declaratory judgment action would be permissible to determine whether a liability insurance carrier is obligated to pay the judgment (and, presumably, who could bring such an action),

(4) how reallocation would work when the judgment at issue is a joint and several one, or when one or more of the judgments against a defendant whose share would be increased by the reallocation is joint and several, and

(5) what the result would be if the reallocation causes the claimant's share of fault to exceed the threshold precluding any recovery.

It appears that nine of the comparative fault States have a statutory procedure for reallocation of shares upon a finding of uncollectibility.[35] The others do not.

None of the comparative fault statutes appear to speak directly to whether, following return of a jury's verdict, the court may (1) create the need for a judicial reallocation by granting a judgment NOV as to one or more defendant tortfeasors, or (2) reduce the amount apportioned by granting a remittitur as to the aggregate damage award.

D. Conclusion

What emerges from this analysis is that, although 46 States have rejected the common law doctrine of contributory negligence as an absolute bar to recovery (except in those circumstances noted) in favor of a form of comparative fault, there appears to be no significant consensus among them as to how the comparative fault system is to be implemented in all of its details.

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[35] Those States are Arizona (A.R.S. § 12-2508); Arkansas (Ark. Code Ann, § 16-55-2-3); Connecticut (Conn. Gen. Stat. § 57-572h(g)); Michigan (Mich. Comp. Laws Serv. § 600.6304(6)(b), applicable only in medical malpractice cases where the claimant was party at fault); Minnesota (Minn. Stat. Ann. § 604.2); Missouri (Mo. Ann. Stat. § 85-5-7); Montana (Mont. Code Ann. § 12-1-703); New Hampshire (N.H. Stat. Ann. § 507:7e); and Oregon (Oregon Rev. Stat. § 31.610(3)).

IV. IMPACT OF ADOPTION OF COMPARATIVE FAULT IN OTHER STATES

The material presented in Parts II and III of this Report is factual and documented. In the vernacular, "it is what it is," and there seems to be no substantial disagreement about it. There is no consensus regarding the impact of switching from contributory negligence to a form of comparative fault. Some studies have been done. Some of them have been *predictive* in nature – trying to assess what *might* or, in the view of the author(s) of the study, *would* occur if the State in question made the change. A few others have attempted to assess what *actually* occurred after a State made the change. Most of the studies have been roundly criticized for being academically sloppy or incomplete. Those that were commissioned and paid for by a group having an economic or political interest in the issue and which reached the conclusions desired by that group are particularly suspect.

Through its own research, the Rules Committee discovered a number of papers on the subject. We asked all of the groups that attended the subcommittee's organizational meeting to advise us of any of which they were aware. Only one of the groups responded and presented us with two studies which we already had. At the Committee's request, Steven Anderson, Director of the State Law Library, surveyed his counterparts in other States, which produced some additional material. Except for some of the predictive studies done in States still clinging to contributory negligence, few of the studies are of recent vintage, which is not surprising, given that the major shift occurred more than 25 years ago.

In its 2004 Report, the Department of Legislative Reference reviewed a number of the studies that had been made, including the ones presented to the Rules Committee, and drew this general conclusion:

> "Relatively few studies have attempted to address this subject. Some have found no or a small overall impact, while others have concluded that a switch from contributory to comparative leads to substantially higher costs. Regardless of result, those studies have been criticized for lack of academic rigor and/or for not having taken into account other factors that could have contributed to increased costs, in studies that reached this conclusion. *In the absence of any comprehensive study, it is impossible to state with any certainty the direct and indirect consequences of changing to a comparative negligence system*."

(Emphasis added).[36]

The Rules Committee's review of those studies leads it to the same conclusion. The basis of the MDLS conclusion is set forth in greater detail in Chapter 4 of its Report, and the Committee respectfully directs the Court's attention to that analysis. The one salient factor, as to which there is no dispute, is that none of the 46 States that adopted a form of comparative fault have switched back to the common law contributory negligence approach, whatever the impact may have been from the initial change.

V. ADOPTION OF COMPARATIVE FAULT BY RULE

The Court has asked the Committee to advise whether, if the Court were to consider replacing the doctrine of contributory negligence with a form of comparative

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[36] MDLS *Negligence Systems*, Ch. 4 at 21.

fault, it could effect that change by Rule. This is obviously a delicate question for the Committee, as the Court itself is the ultimate determiner of the scope of its rule-making authority; the best the Committee can do is to give its own honest opinion.

The Court's general rule-making authority stems from Art. IV, § 18(a) of the Maryland Constitution, which provides, in relevant part:

> "The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law."

As the Court confirmed in *Hudson v. Housing Authority*, 402 Md. 18, 30, n.10 (2007), the basis for that rule-making authority "is the recognition that in order to provide for the orderly administration of justice reasonable and specific rules of procedure are necessary."[37]

The Constitutional authority embodied in Art. IV, § 18(a) is supplemented by a number of statutes, spread throughout the Code, that independently authorize or implicitly recognize the Court's authority to adopt Rules. The broadest of those statutes is Code,

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[37] We characterize Art. IV § 18(a) as the source of the Court's *general* rule-making authority because there are other provisions in the Maryland Constitution that authorize the Court to adopt rules in more specific contexts. *See*, for example, Art. IV, §§ 4B(a)(5), directing the Court to prescribe by rule the means to implement and enforce the powers of the Judicial Disabilities Commission and practice and procedure before the Commission; Art. IV, § 10(a)(2), providing that the office and business of the clerks of the circuit courts shall be subject to and governed in accordance with rules adopted by the Court of Appeals; and Art. IV, § 22, providing that the procedure for appeals to en banc panels in the circuit courts shall be as provided in the Maryland Rules. The Court also has inherent power to regulate, and by Rule has regulated, the admission, conduct, and disciplining of lawyers.

Courts Article, § 1-201, which provides:

> "The power of the Court of Appeals to make rules and regulations to govern the practice and procedure and judicial administration in that court and in the other courts of the State shall be liberally construed. Without intending to limit the comprehensive application of the term 'practice and procedure,' the term includes the forms of process; writs; pleadings; motions; parties; depositions; discovery; trials; judgments; new trials; provisional and final remedies; appeals; unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both; and regulation of the form and method of taking and the admissibility of evidence in all cases, including criminal cases."

This general rule-making authority is limited to Rules governing or concerning practice and procedure in the Maryland courts and judicial administration, but, *within that sphere*, the power has been regarded as plenary. The Court's Rules are legislative in nature, have the force of law, and may supersede existing inconsistent statutes. *See Application of Kimmer*, 392 Md. 251, 270-71, n.22 (2006); *County Fed. S.& L. v. Equitable S.& L.*, 261 Md. 246, 252-53 (1971). Rules may be, and have been, adopted that change the common law or which affect or establish public policy that otherwise may be determined by the General Assembly.[38]

The only separation-of-powers constraint on the Court's general rule-making

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[38] *See*, for example, the Rules of Evidence (Title 5 of the Maryland Rules) which, in a number of respects, altered existing common law and "legislated" in an area in which the General Assembly has also legislated. *See* also Rules 16-1001 through 16-1011, dealing with access to court records; Rules 16-813 and 16-814, establishing enforceable ethical codes for judges and judicial appointees; and Rule 4-217, dealing with bail bonds. Access to public records, ethical codes for public employees, and the regulation of bail bonds are all areas in which the General Assembly has also legislated.

power is that the scope of that power is limited to matters affecting practice, procedure, and judicial administration. Respectfully, the Committee believes that the doctrines of contributory negligence, comparative fault, and at least some of the various associated doctrines and legal principles associated with those doctrines are matters of substantive law that do not fall within the ambit of practice, procedure, or judicial administration**.** To the extent they are common law doctrines, they can be changed by judicial decision, as they have in several other States, but not, in the Committee's view, by Rule. A particular impediment would be an attempt, by Rule, to alter the provisions of the Uniform Contribution Among Joint Tortfeasors Act or the third-party action provision of the Workers' Compensation Act.

Despite some language used in *Consolidated Construction v. Simpson*, 372 Md. 434 (2002), the Court's actual conduct and jurisprudence indicate that the limit on the Court's rule-making power is not whether the matter involves substantive law but whether it falls within the ambit of practice, procedure, or judicial administration. The matter before the Court in *Simpson* involved a Rule that purported to permit the garnishment of property constituting a *contingent* debt owed by the garnishee to the judgment debtor, whereas the statute providing for the garnishment of property, in the Court's view, did not allow garnishment of a contingent debt. Accordingly, the Court held that the inconsistent Rule was invalid.[39]

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[39] The Court's actual holding, 372 Md. at 451-52 was that:

> "As we have indicated, attachment and garnishment proceedings are creatures of statute. As such the substance of the statute, so long as constitutional issues are not present, is

The Court, on occasion, has created or modified substantive law by Rule. A recent example are the provisions in Rule 16-110 conferring immunity from liability on court security personnel who, under the authority of the Rule, confiscate cell phones or other electronic devices that are being used in court facilities in contravention of the Rule or a court order. Those provisions, however, while matters of substantive law, are intimately connected with practice, procedure, and judicial administration. That kind of nexus was lacking in the Rule at issue in *Simpson* and, in the Committee's view, it is lacking with respect to the matters at issue here.

VI. FORM AND CONTENT OF A RULE

The Court asked the Rules Committee to advise what the form and content of a Rule should be in the event the Court were inclined to adopt a form of comparative fault by Rule. The problem facing the Committee is that the structure and content of such a Rule would necessarily depend on:

(1) which form of comparative fault the Court chose to adopt;

(2) the extent to which the Court desired to deal with the various associated issues in the Rule; and

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> the province of the Legislature and not the courts. The statute only permits the garnishment of matured and unmatured property or credits belonging to the garnishor's debtor. When we added contingent property or credits by rule, we added a substantive element to a statutory cause of action. In so doing we exceeded our rule making authority."

See also Dissent of Judge John C. Eldridge from the adoption by the Court of Maryland Rule 15-207 (e). Vol. 1 Maryland Rules at 45 (2011).

(3) how it wished to resolve those issues.

If the Court chooses to proceed by Rule, the Committee respectfully suggests that the Court first examine and make a determination with respect to the form of comparative fault it desires to adopt and such of the issues set forth in Part III that it wishes to deal with in the Rule. One or more Rules could then be drafted to implement the Court's decisions.