COMPARATIVE NEGLIGENCE WITH JOINT & SEVERAL LIABILITY:

THE BEST OF BOTH WORLDS

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When the Court of Appeals of Maryland issued a writ of certiorari in *Coleman v. Howard County Soccer Association*[3] it agreed to hear a case that could profoundly advance our state's tort law. Now that *Coleman* has been briefed and argued, it is apparent that the doctrine of contributory negligence may finally become a vestige of the past, replaced by a standard that better serves the interests that shape contemporary tort law. In doing so the state's highest court would bring the state's common law into the mainstream of twenty-first century jurisprudence.

Our goal in writing this piece is to set forth a new standard that would properly consider the theoretical underpinnings of the body of law that defines negligence and its potential defenses. Applying these principles to the practical chore of constructing a workable defense, we examine how "comparative negligence" is generally applied. In light of what has proven to work elsewhere, we analyze what will work best here—given that Maryland, by statute, embraces the laudable doctrine of joint and several liability among joint tortfeasors.

The best solution is one that affords victims a meaningful remedy by reducing the amount of their recovery in proportion to their role in causing their own injuries, yet preserves joint and several liability among joint tortfeasors for the remaining defendant liability. In this way it promotes fairness and gives all parties involved optimal incentives to keep accidents from happening.

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I. HISTORY OF CONTRIBUTORY NEGLIGENCE IN MARYLAND

In 1847, Maryland's highest court adopted the doctrine of contributory negligence.[4] This common law doctrine, though a vast improvement over a regime that recognized no defenses, bars a remedy to victims guilty of even the slightest breach of duty, no matter how egregious the negligence of the wrongdoers who harmed them. Due to the all-or-nothing nature of the defense, countless contributorily negligent Marylanders have borne one hundred percent of their losses and damages, even though they were not one hundred percent responsible. Similarly, innumerable defendants have completely walked away from the consequences of their actions because the plaintiff was slightly negligent. Also, many potential defendants calculated that blaming the victim was cheaper than taking reasonable safety precautions.

Not only has our contributory system frustrated the interests of justice as to the litigants, but legions of jurors have had to pit their oath to follow the court's jury instructions against a conscience that told them there is something wrong with a system that allows those who have done most of the harm get away scot-free—leaving the victims to bear the entirety of their losses.

Since 1847, the United States has fought a Civil War, abolished slavery, won two World Wars, survived a Great Depression, witnessed a Civil Rights Movement, and evolved from a largely agrarian society into a post-industrial, twenty-first century superpower. As we have evolved economically, politically, and socially so have our beliefs about the interests promoted by negligence law. These shifting ideas have resulted in the abandonment of contributory negligence in 46 states.[5] Not only has almost every state made the switch to comparative negligence, but not one jurisdiction that switched to comparative negligence has switched back to contributory negligence. [6]

4. Irwin v. Sprigg, 6 Gill 200, 205 (1847) ("The established doctrine now is, that although the defendant's misconduct may have been the primary cause of the injury complained of, yet the plaintiff cannot recover in an action of this kind, if the proximate and immediate cause of the damage can be traced to a want of ordinary care and caution on his part.").

5. *See* JOSEPH W. LITTLE, LARISSA BARNETT LIDSKY & ROBERT H. LANDE, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACT 429 (3rd ed. 2009).

6. STANDING COMM. ON RULES OF PRACTICE & PROC., SPECIAL REPORT TO COURT OF APPEALS ON ASPECTS OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE FAULT 7 (Apr. 15, 2011) [hereinafter SPECIAL REPORT], *available at* http://www.courts.state.md.us/rules/reports/170thReport.pdf.

Maryland's Court of Appeals last seriously pondered a shift to comparative negligence a generation ago in *Harrison v. Montgomery County Board of Education*.[7] The *Harrison* majority concluded: "All things considered, we are unable to say that the circumstances of modern life have so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland."[8] Moreover, the *Harrison* majority believed that "whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature."[9]

The *Harrison* court got it wrong on both counts.

First, its abdication of the judiciary's power to alter the common law, in favor of the General Assembly, ignores the fact that it was the Court of Appeals that had adopted the doctrine of contributory negligence. During the century and a half that contributory negligence has been the law of this land, the General Assembly has rejected bills to abandon contributory negligence and a bill to legislatively codify contributory negligence.[10] In the absence of legislative action, one way or the other, there is no sound reasoning for delegating to the legislature the decision to alter judicially-adopted contributory negligence, which governs the outcomes of trials in the judiciary's courthouses.

Second, the *Harrison* Court's belief that circumstances of modern life do not render contributory negligence a "vestige of the past"

7. Harrison v. Montgomery Cnty. Bd. of Educ., 295 Md. 442, 456 A.2d 894 (1983). *Harrison*'s twentieth century jurists offer the following reasons why contributory negligence seemed sensible to their early-nineteenth century counterparts:

> 1. A nineteenth century fear that juries, believed to be invariably "plaintiff-minded," would enter awards that would stifle "newly developing industry."
> 2. The unwritten policy of the "common law at the time" that "courts should not assist a wrongdoer who suffered an injury as a result of his own wrongdoing."
> 3. A "passion for a simple issue that could be categorically answered yes or no, or at least reduced to finding a single, dominant, 'proximate' cause of every injury."
> 4. Punishment of the plaintiff.
> 5. "Encouragement to comply with the community's standard of care."
> 6. The "alleged inability of juries to measure the amount of damage attributable to the plaintiff's own negligence."

Id. at 450, 456 A.2d at 898.

8. *Id.* at 463, 456 A.2d at 905.

9. *Id.*

10. *See e.g.*, H.B. 1129, 2011 Gen. Assem., Reg. Sess. (Md. 2011) *available at* http://mgaleg. maryland.gov/2011rs/bills/ hb/hb1129f.pdf.

overlooks contemporary notions of the interests advanced by the body of law defining the duties owed by victimizers and victims. For reasons the next section will explain, William Prosser, perhaps the greatest tort scholar of the twentieth century, cogently summarizes contributory negligence's incompatibility with modern negligence jurisprudence: "No one ever has succeeded in justifying [contributory negligence] as a policy, and no one ever will."[11]

II. THEORETICAL UNDERPINNINGS

There are four principle reasons why Maryland should adopt a comparative negligence regime: (1) fairness; (2) optimal compensation of victims; (3) optimal deterrence of accidents; and (4) enhanced respect for the rule of law in the minds of the citizenry. We will address these issues in turn.

1. Fairness. If both the plaintiff and the defendant caused an accident, it is only fair that they both pay in proportion to their respective percentages of fault. If the plaintiff is 10% responsible, it would be fair for the plaintiff to absorb or pay 10% of the damages, and it would be unfair for the plaintiff to absorb or pay 100% of the damages. But under the current contributory negligence standard, that plaintiff-victim cannot recover at all, thereby necessarily absorbing or paying 100% of the damages.

Put differently, it is unfair for a plaintiff that is only slightly responsible for an accident for which the defendant is largely responsible to collect nothing. It is equally unfair for a defendant that is mostly responsible for the accident to pay nothing. A defendant who is 80% responsible for the damages should pay 80% of the damages. The "all or nothing" system, disconnected from a party's degree of fault, is unfair and counterintuitive. Under comparative negligence, tort law would more precisely link degree of liability to degree of fault.

2. Optimal Compensation of Victims. Those wronged by others are deserving of compensation; they should be made whole by those who injured them. This is a basic building block of tort jurisprudence, and the contributory negligence doctrine is an aberration—an unfortunate exception to this fundamental basis of tort law.

11. William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953); *see also* WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65 at 453 (5th ed. 1984) [hereinafter PROSSER AND KEETON] ("The history of the doctrine [of contributory negligence] has been that of a chronic invalid who will not die.").

In today's society, the contributorily negligent do not suffer alone. Health insurers, Medicare, and Medicaid often pay the medical bills caused by tortious injury. Most of these secondary payers have a right to be reimbursed by the plaintiff whose bills they have paid, if and when the plaintiff makes a recovery from the defendant.[12] When the plaintiff loses, so do the payers, resulting in increases in premiums and higher costs to the public.[13] Similarly, emergency rooms that treat impoverished accident victims do not simply write off the bills; the costs of uncompensated care are passed on to the rest of us in the form of higher health care costs.

The question, "who should pay" begs the answer. Shouldn't the one who caused the damages be required to pay something, as long as the plaintiff is not 100% at fault for causing his or her own injury? Just as it would be unfair for a defendant to pay all of the damages, is it not equally unjust that a defendant pays zero percent when the jury believes they are at fault? The current Maryland situation is especially concerning because victims denied a remedy are almost always Marylanders, while defendants whose negligence injures those victims often are not. In other words, our citizens are paying the price, while out-of-state wrongdoers are reaping the rewards.

3. Optimal Deterrence of Accidents. One of tort law's most important goals is accident deterrence. Many respected judges and scholars, including Judge Posner, believe that tort law's highest priority should be to prevent every accident that can be prevented at a reasonable cost.[14] These same people believe in placing the burden of preventing accidents on those who can best undertake this prevention, and in structuring tort law to give these parties an incentive to do so.[15] Comparative negligence, which holds everyone accountable according to their degree of fault, best accomplishes these goals.

A system of negligence with neither contributory negligence nor comparative negligence burdens only defendants with the obligation to take precautions. This is not desirable because sometimes plaintiffs can best look out for their own safety. At the other

12. The secondary payers, either by contract or by statute, have a right of subrogation, the right to pursue the tortfeasor whose negligence who cause the plaintiff's covered losses. *See, e.g.*, MD. LAB. & EMPL. ART. § 9-902 (workers' compensation subrogation).

13. *See* Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 55–56 (1996).

14. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 167–214 (2003).

15. *Id.*

extreme, the contributory negligence system burdens only plaintiffs with the obligation to take precautions. This is undesirable because oftentimes the defendant will be best able to prevent the accident. This is especially true in those situations where the defendant is mostly at fault.

In situations of mixed plaintiff-defendant fault, a mixture of responsibility is the best way to prevent most accidents. In this way both parties have some duty to try to prevent accidents. If both parties are not exposed to the risk of paying at least some of the damages, the individual freed of responsibility has no incentive to abate a hazard. This intuition is supported by rigorous analysis in the academic literature.[16] Under the conditions most likely to arise in the real world, noted torts scholars Robert D. Cooter and Thomas Ulen have shown that "comparative negligence is the best rule from the economic standpoint because, under such circumstances, it is more efficient and more equitable than its alternatives, and is preferred ex ante by everyone."[17]

4. Enhanced Respect for the Rule of Law in the Minds of the Citizenry. Many believe that too frequently contributory negligence juries ignore the judge's instructions so that plaintiffs who should have lost are afforded a remedy. Perhaps, if the jury believes a victim was slightly at fault it will return a verdict for that plaintiff, with a slight deduction for what it surmises was the degree of contributory negligence. This jury nullification, ignoring instructions to do what their heart tells them is just, undermines the respect of the citizenry for the judicial system and the law in general. Alabama Supreme Court Justice Jones said it best: "Jurors tend to find themselves caught between the judge's instruction on contributory negligence and their own common concepts of the logical link between fault and liability."[18]

III. PRACTICAL APPLICATION

Any serious candidate to replace the contributory negligence doctrine[19] must be a workable standard that fact finders can readily understand and apply. If juries lack the capacity to assess percentages of fault, or if there should develop empirical proof of "buyer's remorse" in jurisdictions that switched to comparative

16. *See generally* Robert D. Cooter & Thomas S. Ulen, *An Economic Case For Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986).

17. *Id.* at 1100.

18. Golden v. McCurry, 392 So. 2d 815, 821 (Ala. 1980) (Jones, J., dissenting).

19. PROSSER AND KEETON, *supra* note 11, at 453 (explaining that "contributory fault" would be a better name for contributory negligence).

negligence, it would make little sense to abandon the flawed contributory standard in favor of a problematic comparative rubric. These issues will be discussed in turn.

A. Capacity – Juries Are Capable

Are juries capable of making the types of findings required in comparative negligence adjudication? Without a doubt.

Juries decide complex questions on a regular basis. In the realm of personal injury cases, one has only to examine the special verdict sheets handed to juries pre-deliberation, then handed back by them post-deliberation, for proof juries can, and do, decide these issues quite capably. These jurors are required to make and express economic and non-economic judgment calls. Regarding the former, fact finders, having heard expert medical testimony, frequently decide whether a plaintiff was treated unnecessarily by a doctor, whether medical bills were excessive, or whether a plaintiff missed too much time from work.

In addition to deciding these tangible economic issues, juries also can award non-economic damages for "pain, suffering, pre-impact fright, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury."[20] In some cases juries are trusted to decide punitive damages issues, with only the general guidelines that they decide upon a dollar figure that will deter, but not bankrupt.[21] Perhaps the greatest example of a jury's unique ability to assign a dollar value to a seemingly immeasurable loss is when we ask them to calculate the value of loss of consortium, not to mention the priceless loss of love and affection due to the wrongful death of a parent or loved one.

Jurors are routinely trusted to render verdicts that translate the intangible (pain and suffering, loss of consortium, the death of a loved one) into the tangible (a dollar amount for non-economic damages). The judicial respect and deference for these verdicts speaks volumes about the trust we place in their findings. Maryland appellate courts are extremely reluctant to second-guess whether a

20. MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13 (West 2012).

21. The Maryland Civil Pattern Jury Instructions offer the following to guide juries with regard to punitive damages: "An award for punitive damages should be: (1) In an amount that will deter the defendant and others from similar conduct. (2) Proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay. (3) But not designed to bankrupt or financially destroy a defendant." *Id.*

jury verdict is too high or too low.[22] And trial judges cannot set aside a verdict because they are unhappy with the sums awarded unless the amount is so disproportionate to the evidence that it shocks the judge's conscience.[23]

If a jury can be trusted to determine the value of the loss of a child killed by negligence, it stands to reason it can apportion fault.

The empirical proof that juries are up to the task is fact that the juries in all but four states apply comparative negligence, daily. These thousands of trials are, in effect, laboratories where the efficacy of comparative negligence is tested on a daily basis. If the switch to comparative negligence had been problematic, we would expect many of these jurisdictions to return to a contributory negligence regime. Yet, comparative negligence has never failed the test.[24] In the judicial laboratories of every jurisdiction that has experimented with comparative negligence, the results have been 100% positive, and 0% negative.

This one-way progression from contributory to comparative is proof positive that juries can and do apportion negligence satisfactorily. At the very least this evidence proves that whatever small imperfections might be associated with apportioning fault, 46 states have concluded that working with these shortcomings is better than the contributory negligence's all-or-nothing outcomes.

B. Comparing Negligence – One Defendant vs. One Plaintiff

In its purest, most logical, and most straightforward form comparative negligence first requires the finder of fact to determine whether the plaintiff has met his or her burden of proving that the defendant has been negligent. Then the defendant must prove that the plaintiff has been negligent. The jury is then instructed to compare the negligence of these parties. That is, the jury is charged with assuming that the "total amount of the negligence is 100%," and the jury is to assign "the . . . percentage of negligence attributed to each party with respect to the happening of the accident."[25] These

22. Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 57–58 (1992). ("'[W]e know of no case where this Court has ever disturbed the exercise of the lower court's discretion in denying a motion for a new trial because of the inadequacy or excessiveness of damages.'" (quoting Kirkpatrick v. Zimmerman, 257 Md. 215, 218, 262 A.2d 531 (1970))).

23. Leizear v. Butler, 226 Md. 171, 179–180 (1961).

24. SPECIAL REPORT, *supra* note 6, at 7.

25. This was the instruction proposed by the Petitioner in *Coleman*. Petition for Writ of Certiorari at Exhibit 3, Coleman v. Soccer Ass'n of Columbia (CSA No. 2011-2048), *cert. granted*, 425 Md. 396, 41 A.3d 570 (2012). .

percentages result in adjustment of the damages awarded to reflect the percentages assigned. For example, if a defendant were responsible for 90% of the negligence and the plaintiff for 10%, this would result in a 10% reduction in the damages awarded from the defendant to the plaintiff. Conversely, should a jury return a verdict that apportions liability only 10% on the defendant and 90% on the plaintiff, the victims would recover only 10% of their damages.

Over the years various hybrid forms of comparative negligence have emerged. Some deny recovery to a plaintiff whose proportionate share is less than some fixed percentage, such as 50%, while others bar the claims of all plaintiffs except those whose negligence is deemed "slight."[26] Akin to contributory negligence, these modified systems establish an arbitrary threshold and then, for cases that fail to meet that threshold, impose 100% of the economic consequences of a loss upon a party the jury has just determined is not 100% at fault. Not only do these hybrid systems fail at optimal compensation in cases that fail to reach these arbitrary thresholds, so too do they fail to deter optimally in these cases.

In short, only a "pure" system protects all the deserving injured, is fair to defendants, optimally deters negligent behavior, and fosters the greatest sense of justice, fairness, and respect for the law on the part of juries.

C. Multiple Parties

While a "pure" comparative standard equitably apportions fault optimally between one plaintiff and one defendant, a complication arises when the negligence of multiple defendants injures a plaintiff.

1. Joint & Several Liability is Optimal

Under Maryland's Uniform Contribution Among Joint Tort-Feasors Act,[27] multiple defendants are all jointly and severally liable for an indivisible injury they cause to another.[28] In other words, each defendant owes the plaintiff a duty to make the victim whole for all of the plaintiff's losses. To mitigate the harshness that would arise if only one defendant paid the entire judgment, a defendant who pays

26. These multiple comparative systems are explained in detail in SPECIAL REPORT, *supra* note 6, at 7–10.

27. MD. CODE ANN., CTS. & JUD. PROC. § 3-1401 to -1409 (West 2012).

28. Consumer Prot. Div. v. Morgan, 387 Md. 125, 183, 874 A.2d 919, 953 (2005) (internal citations omitted).

more than his or her pro-rata share can obtain contribution from the other joint-tortfeasors.[29]

The importance of joint and several liability cannot be understated. To the injured it offers the best opportunity for complete compensation from a party that is negligent. By contrast, a system that requires defendants to pay only according to their apportioned share would re-victimize the victims in those cases when some defendants cannot pay. Similarly, a system that puts the burden on the injured to prove which defendant is responsible for which fraction of the damages would lead to the "'absurd result' . . . that would follow from burdening plaintiffs with apportioning damages in cases of an invisible injury."[30]

In addition to helping victims acquire a meaningful remedy, joint and several liability "incentivizes" safety. Someone with little or no assets lacks the resources and the incentive to take precautions. To the "judgment proof" defendant, whose inability to pay means he or she will pay nothing, empty pockets are a complete defense. But to potential defendants with "deep pockets," joint and several liability is a powerful motivator for them to ensure that everyone with whom they deal, the pool of potential joint tortfeasors, takes precautions. At the very least financially healthy potential tortfeasors are more likely to require that everyone with whom they deal—the pool of potential joint tortfeasors—is sufficiently insured.[31]

Thus, from both a compensation and a behavior modification perspective, joint and several liability is the preferred system. Those with the most at stake are motivated to use their resources to keep people safe. If or when someone is injured, the doctrine helps victims have at least one defendant with either the resources to pay or the sufficient insurance coverage to compensate them.

2. "Pure" Comparative Negligence with Joint & Several Liability

A comparative negligence system's proportionate liability findings might at first not appear to mesh well with joint and several liability's notion that each wrongdoer owes a duty to make the victim whole.[32] The solution, however, is to retain joint and several liability while offering a mechanism by which a plaintiff's recovery would be reduced by the percentage of his or her negligence.

29. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1402, -1403, -1404 (West 2012).

30. *Consumer Prot. Div.*, 387 Md. at 183, 874 A2d at 953.

31. Potential "deep pocket" tortfeasors, given the risk of having to pay the entirety of a loss, can protect themselves by ensuring that parties with whom they deal have sufficient insurance to pay compensation in the event of a negligent act.

32. *See* Franklin v. Morrison, 350 Md. 144, 168, 711 A.2d 177, 189 (1998).

Key to understanding the building blocks to such a defense is an appreciation of the difference between duties breached by negligent defendants and negligent plaintiffs. Professors Prosser and Keeton point out that tortfeasors breach a duty that "creates an undue risk of harm to others."[33] Contributory negligence, by contrast, "involves an undue risk of harm to the actor himself."[34] As such, the contributory negligent cannot be said to breach the same duty as the negligence of a tortfeasor, "unless we are to be so ingenious as to say that the plaintiff is under an obligation to protect the defendant against liability for the consequences of the plaintiff's own negligence."[35] Rather, the plaintiff breaches the duty to exercise due care for his or her own safety, nothing more.

Furthermore, treating a plaintiff as a joint tortfeasor supposes that he or she is in the same position as those who caused the injury. What sets the victim apart from the victimizers is that the former was harmed, while the latter harmed others. Suffering injury, as opposed to inflicting it, justifies treating a plaintiff's breach of duty differently than a defendant's breach of duty.[36]

Comparative negligence should be adopted in Maryland in a manner that preserves joint and several liability among joint tortfeasors, and also allows a plaintiff who is not solely at fault to make a proportionate recovery. We propose Maryland adopt logic suggested by Professors Prosser and Keeton, which treats the victim's role in causing his or her own injury as in effect a partial disability.[37] In other words, the percentage to which the plaintiff's breach of duty caused the injury complained of "disables" the plaintiff from recovery of damages in the amount of that "contributory" percentage. Thus, the dollar amount of the damages award would be reduced by the percentage to which the jury believed the victim's injuries stemmed from the victim's failure to take precautions for his or her own safety. All joint tortfeasors—every defendant found to be negligent—would then be jointly and severally liable for this reduced amount. After all, this would be the percentage by which their collective breaches of duty caused the injury. In practice, a standard using comparative negligence and joint and several liability would involve a three-step process, only the last

33. PROSSER AND KEETON, *supra* note 11, §65 at 453.

34. *Id.*

35. *Id.*

36. Also worthy of note is that treating a plaintiff as a joint-tortfeasor implicitly assumes, absurdly, that the plaintiff would have a claim against herself.

37. PROSSER AND KEETON, *supra* note 11, §65 at 452–53..

step of which would require a change in Maryland's current approach:

> Step 1: Try the defendants' negligence. Anyone deemed negligent is a joint tortfeasor.
> Step 2: Calculate the total amount of damages owed. Make this the damages award.
> (These first two steps are consistent with the current negligence system in Maryland.)
> Step 3: Determine if the plaintiff breached her duty to take reasonable precautions for her own safety and, if so, what percentage of the harm the plaintiff's breach of duty caused.

Using a special verdict, the court would reduce the damage award by the plaintiff's percentage of fault; all joint tortfeasors would be jointly and severally liable for this amount.

D. Hypothetical Illustration

Imagine, for a moment, that a general contractor and a subcontractor are both working on a manhole pursuant to a contract with the City. They leave the manhole uncovered, and a pedestrian comes along and stumbles into the manhole. The pedestrian sues the City, the general contractor, and the subcontractor. At the end of the trial the jury would engage in the previous three-step process:

> Step 1: Try the defendants' negligence. Anyone found negligent is a joint tortfeasor.
> (Assume that the City and the subcontractor were found to be negligent, but the general contactor was not.)
> Step 2: Calculate the total amount of damages owed. Make this the damages award.
> (Assume that this total is $100,000.)
> Step 3: Determine if the plaintiff breached her duty to take reasonable precautions for her own safety and, if so, what percentage of the harm the plaintiff's breach of duty caused.
> (Assume the jury finds that the plaintiff breached her duty and was 60% at fault.)

In this hypothetical the total defendant liability should be reduced by 60%, from $100,000 down to $40,000. Both the City and the subcontractor would be jointly and severally liable for $40,000.[38]

38. The exonerated general contractor pays nothing, unless deemed liable under a contractual indemnity claim.

IV. CONCLUSION

Contributory negligence is a fixture of Maryland common law that has far too long outlived the century in which it was adopted. Because the Court of Appeals gave us contributory negligence and the General Assembly has not spoken on the subject, the judiciary should be free to act, and should adopt comparative negligence. To do anything less would continue to punish injured Marylanders while rewarding wrongdoers lucky enough to injure a victim that is even slightly blameworthy. Often those who could prevent accidents best instead will continue to allow the accidents to happen, in the hope that they can blame the injured. And another generation of jurors will be forced to choose between their conscience and their oath to follow instructions.

In place of contributory negligence, we humbly and respectfully suggest a system that combines comparative negligence with joint and several liability. This standard would preserve joint and several liability's many virtues while properly deducting from a plaintiff's recovery a percentage commensurate with his or her breach of the duty to look out for his or her own safety.