

INS AND OUTS OF AMENDED SECTION 2-1117

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Effective June 3, 2003, the General Assembly amended Section 2-1117 of the Code of Civil Procedure, (735 ILCS 5/2-1117). In its present form it provides:

Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party *except the plaintiff's employer*, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff's employer, shall be jointly and severally liable for all other damages. (Italics supplied).

In order to understand the impact of the amendment it is necessary to trace the evolution of fault apportionment in Illinois.

A. Rule of indivisibility

Prior to March, 1977, the rule in Illinois was one of indivisible recovery. That is to say, a plaintiff recovered "all" from a defendant or "nothing". Liability was thus full or nonexistent. Defenses were either wholly insubstantial or sufficient to bar recovery in its entirety. The same principles applied downstream between defendants *inter se*, and in third-party actions between defendants and parties who might be liable to them for full indemnity. Indemnification presupposed: (1) a duty owed by both the putative indemnitor and indemnitee to the plaintiff, *Chicago and Illinois Midland Ry. Co. v. Evans Constr. Co.*, 32 Ill.2d 600, 604-605, 208 N.E.2d 573 (1965); (2) a pretort relationship between them, *Muhlbauer v. Kruzel*, 39 Ill.2d 226, 230, 234 N.E.2d 790 (1968), and a "qualitative" distinction between the liability-producing factors applicable to each. *Harris v. Algonquin Ready Mix, Inc.*, 59 Ill.2d 445, 449, 322 N.E.2d 58 (1974). With respect to the latter, any negligence or misconduct on the part of the party seeking indemnification which "actively" contributed to the plaintiff's injury or which was a "major" factor in bringing it about was sufficient to bar recovery, without regard to the magnitude of the indemnitee's offense. The unfortunate effect of this unitary rule was to require one tortfeasor to "bite the bullet" while others emerged unscathed. Underlying the Draconian impact of the implied indemnity rule was the philosophic assumption that liability was indivisible and

therefore incapable of apportionment. *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill.2d 1, 12-15, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977).

B. Contribution

The bastion of unitary fault and *ergo* unitary damage was finally breached in the setting of joint tortfeasors, each of whom was guilty of misconduct proximately causing injury to the plaintiff. *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill.2d 1, 12-15, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977), *Stevens v. Silver Mfg. Co.*, 70 Ill.2d 41, 374 N.E.2d 455, 15 Ill.Dec. 847 (1977) and *Robinson v. International Harvester Co.*, 70 Ill.2d 47, 374 N.E.2d 457, 15 Ill.Dec. 850 (1977). In each of those cases the manufacturer of a product sought relief from the ultimate user which was also the plaintiff's employer. In each, the application of an "all" or "nothing" rule would, as a matter of law, preclude indemnification or relief of any sort. *Griffiths & Son Co. v. National Fireproofing Co.*, 310 Ill. 331, 141 N.E. 739 (1923), *Chicago and Illinois Midland Ry. Co. v. Evans Constr. Co.*, *supra*, and *Burke v. Sky Climber, Inc.*, 57 Ill.2d 542, 546-47, 316 N.E.2d 516 (1974). The court in recognizing the rule against apportionment and its implications also considered the inequities which existed in instance where one tortfeasor was required to shoulder the burden of another's misconduct as well as his own. This latter consideration was found to be sufficient reason to abrogate the doctrine and to substitute in its place the concept of contribution which requires "that ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them". *Skinner, supra*, at 14. In so holding, Illinois broke away from the ancient "all or nothing" rule of liability and divided the theretofore "indivisible" tort into as many sections as were required to allocate damages among the various defendants. With the division of damages among defendants and third-party defendants commensurate with causative fault, the path was paved for the short journey which would include plaintiffs in the "comparative" analysis.

C. Plaintiff in the comparative fault equation.

1. Rationale for joint liability.

As discussed previously, the contributory negligence rule served for more than 120 years to bar a plaintiff's recovery where he was also at fault, however, slight, in causing his own injury. The rule was one which was admirable in its simplicity. A wrongdoer ought not recover. However, a plaintiff who was free from fault ought not recover. However, a plaintiff who was free from fault ought not have his collection rights impaired, thus bringing about the concept of joint, as well as several, liability. *Laubach v. Morgan*, 588 P.2d 1071, 1074 (Okla. 1978). While the rule was simplistic, it worked injustices upon both plaintiff and defendant.

2. *Alvis v. Ribar*

In *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981) the court took the step contemplated *supra* and held that a plaintiff was entitled to recover such damage as were not the proximate result of his own misconduct. With *Alvis*, the apportionment process became

complete and, logically, a party, plaintiff or defendant, would be held responsible to the extent of his misconduct.

3. *Coney v. JLG Industries*

Coney v. JLG Industries, 97 Ill.2d 104, 119-24 (1983) was a Rule 308 appeal in which the Supreme Court accepted jurisdiction to resolve two questions. The first, and that for which it is best known, was the issue of whether comparative fault principles apply in product liability cases. The second considered the impact of *Alvis v. Ribar, supra*, upon joint liability. Simply stated, the court was asked to decide whether proportionate fault principles vitiated the theoretical underpinnings of joint liability. In other words, if a plaintiff's claim is not barred by his own contributory negligence, is there any reason why a defendant should pay more than his aliquot share of a judgment? (See *Laubach v. Morgan, supra*).

The court responded to the latter question by deciding that the comparative fault doctrine had no effect upon joint liability. Thus, the opinion states:

We find nothing in *Alvis* which mandates either a shift in who shall bear the risk of the insolvent defendants or the elimination of joint and several liability. Defendant has not cited nor have we found persuasive judicial authority for the proposition that comparative negligence compels the abolition of joint and several liability. On the contrary, most jurisdictions which have adopted comparative negligence have retained the doctrine. Therefore, we hold that our adoption of comparative negligence in *Alvis* does not change the long-standing doctrine of joint and several liability.

D. Tort Reform Amendments of 1986.

Coney produced a groundswell of legislative interest in tort reform. That movement culminated in the so-called Tort Reform Amendments of 1986. In response to what was then identified as a "crisis" the General Assembly enacted Section 2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) making Illinois a modified comparative fault state and recognizing the plaintiff's "fault" as a defense in both negligence and product liability cases. At the same time Section 2-1117 was passed limiting joint liability for non-economic damages to defendants whose proportionate share of the culpability of those included in the equation was 25% or more. As otherwise expressed, if a defendant's percentage of the total fault under consideration was less than one-fourth that defendant's liability was several. As it bears upon an understanding of the 2003 amendment, the original language of Section 2-1117 follows:

Joint Liability. Except as provided in section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any

third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages.

Following the adoption of Section 2-1117 it was not uncommon to have the assertion of several liability as an affirmative defense at the same time that fault apportionment was sought under the contribution statute. The interrelationship of the two statutes was particularly vexing in cases which involved a plaintiff's employer. First it was determined in *Doyle v. Rhodes*, 101 Ill.2d 1 (1984) that an employer could be viewed as liable to the plaintiff, despite the immunities of Sections 5 and 11 of the Workers' Compensation Act (820 ILCS 305/5(a) and (11)) because those immunities had to be asserted as affirmative defenses. (See also *Braye v. Archer-Daniels-Midland Co.*, 175 Ill.2d 201 (1997) and *Geise v. Phoenix Co.*, 159 Ill.2d 507 (1994). The question then became whether the same reasoning applied to the language of Section 2-1117. In *Lily v. Marcal Rope & Rigging*, 289 Ill.App.3d 1105 (1997) the Fifth District held that the two statutes were to be construed differently and therefore employers did not fall within the comparative fault equation for several liability purposes.

E. *Best v. Taylor Machine Works*

While the impact of *Lily v. Marcal Rope* was still being argued, the social and political winds changed direction. In 1995 the General Assembly adopted a comprehensive Tort Reform Act. Among the changes was the elimination of joint liability without regard to percentage of fault and without consideration of the damages awarded. The only exception to several liability "across the board" was carved out in the area of medical malpractice. The statute specifically provided that if for any reason the statutory "caps" on non-economic damages were overturned then joint liability would exist *vis a vis* doctors, hospitals, and pharmaceutical companies. As is evident from the statute in its original form, the same type of reservation was made to encourage plaintiffs to collect from corporate defendants before pursuing the uninsured assets of individual doctors.

The Supreme Court threw out the entire Tort Reform Act. *Best v. Taylor Machine Works*, 179 Ill.2d 367, 423 (1997). In finding the amendment to Section 2-1117 unconstitutional, the court *inter alia*, held that the cap related exception for medical malpractice cases amounted to "special legislation" in favor of one class of litigants. That set the stage for arguments that the original statute was similarly flawed, as Section 2-1118 contained an exception for medical malpractice cases.

F. *Unzicker v. Kraft Food Ingredients*

In February, 2003 the Supreme Court decided both the constitutional challenge to Section 2-1117 and whether a plaintiff's employer could be included in the fault apportionment mix. *Unzicker v. Kraft Food Ingredients*, 203 Ill.2d 64 (2003). It did so in the setting of singularly egregious facts which can serve as a template in evaluating the impact of the current amendment.

The jury in *Unzicker* returned a non-economic verdict in favor of the plaintiff for \$788,000. It apportioned the fault of the defendant, Kraft Food, and the plaintiff's employer, Nogle & Black Mechanical, Inc., for the purposes of contribution and joint liability. In that regard it found that Kraft's share of the total fault was 1% with Nogle having the 99% balance. As a consequence the liability of Kraft from non-economic damages was \$7,880 which was offset in its entirety by the employer's workers' compensation exposure, even assuming a *Kotecki* "cap".

Before the Supreme Court the plaintiff argued that the medical malpractice exception rendered the statute unconstitutional *and*, in any event, that *Lily v. Marcal* was correct and therefore Nogle should not have been considered in the joint liability equation. The court disagreed in both respects. It held that the statutory reservation for medical malpractice cases was in response to a properly perceived "crisis in health care" and therefore was not "special legislation." Addressing the *Lily v. Marcal* argument, the court found the Fifth District's reasoning inapt and inequitable stating at 78-79:

The clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards. The legislature set the line of minimal responsibility at less than 25%. In order to apportion responsibility, the legislature looked to those people in the suit: the plaintiff, the defendants sued by the plaintiff, and any third-party defendants who could have been sued by the plaintiff. In our opinion, the broad wording in the statute merely shows that the legislature intended the division of responsibility to include those people in the suit who might have been responsible for the plaintiff's injuries. Here, ignoring the party found to be 99% responsible for the plaintiff's injuries and requiring the party found 1% responsible to pay all of the nonmedical damages would not be in accord with the clear legislative intent that minimally responsible defendants should not be liable for entire judgments. The appellate court did not err in holding that Nogle was properly considered in the division of fault.

G. The current amendment

Within four months of *Unzicker* the plaintiff's bar had its way with the General Assembly. The fault equation was altered by specifically excluding "employers" from those whose culpability might affect a plaintiff's ability to collect non-economic damages in a multi-party case. As the following examples demonstrate, it is difficult to perceive a justification for the change other than fattening the plaintiff's purse.

EXAMPLE 1

This example sets forth the outcome in *Unzicker* under the amendment.

Non-economic Verdict	\$788,000
Percentages of fault	
Kraft 1%	\$ 7,880
Plaintiff's employer (Nogle) 99%	\$ 0.00

Plaintiff's recovery from Kraft \$788,000

Nogle's 99% contribution exposure would be substantially mitigated by the *Kotecki* "cap", leaving Kraft to bear the disproportionate load.

In the preceding example, as in *Unzicker*, the plaintiff's comparative fault was not an issue. However, where the plaintiff is contributorily negligent, Section 11-2117 remains viable *if, but only if*, the ratio of the plaintiff's fault to that of the remaining defendant exceeds three to one. Only then will the defendant's share be less than 25%. That fundamental fact is evident in the following examples:

EXAMPLE 2		EXAMPLE 3	
<u>Plaintiff 5%</u>		<u>Plaintiff 3%</u>	
Non-economic Verdict	\$788,000	Non-economic Verdict	\$788,000
Percentages of fault		Percentages of fault	
Plaintiff percentage -	5%	Plaintiff percentage -	5%
Nogle percentage -	94%	Nogle percentage -	94%
Kraft percentage -	1%	Kraft percentage -	1%
Kraft vs. Plaintiff 5:1 = Kraft	16.67%	Kraft vs. Plaintiff 3:1 = Kraft	25%
Plaintiff	83.33%	Plaintiff	75%
Kraft pays	\$131,359.60	Kraft pays	\$764,360
		(\$780,000 - \$23,640 (P's 3%) = \$764,360	

As is evident from Example 3 the plaintiff's comparative fault exceeds that of Kraft by a factor of 3:1 and yet the plaintiff recovers 97% of his damages from the nominally exposed defendant.¹ The *Unzicker* court considered the legislative intent and public policy concerns which led to the 1986 statute with its exception for medical malpractice litigation. In doing so it reviewed at length the legislative debate in both houses of the General Assembly where those concerns were voiced and affirmed. Unfortunately, like deliberations did not motivate the current amendment. As the attached excerpts from the legislative record show the employer exception was engrafted on the statute for no purpose other than to enhance a plaintiff's right to collect at the expense of a minimally exposed defendant. The author submits that this exercise in thinly veiled duplicity affirms the adage that: "One should be spared the knowledge of how sausage and laws are made."

II. Coping with the legislation (trying to make lemonade out of lemons).

A. Considerations for defense counsel

If the plaintiff's employer cannot be considered in the Section 2-1117 equation the threshold question is whether or not to file a contribution claim. Where the percentages of fault preponderate substantially against the employer, as in *Unzicker*, allowing the jury to apportion fault *via* contribution creates the possibility for the type of inequitable result which that case demonstrates. In exchange for a *Kotecki* capped contribution judgment a defendant in the position of Kraft created the medium for joint liability. Thus, the first, and most difficult

¹ Absent compelling lip service to some perceived socioeconomic principle, the preceding examples reflect "special legislation of the most odiferous variety." Paraphrasing Orwell, "All litigants are equal but some litigants are more equal than others."

question, is whether a defendant's exposure is so nominal that a sole proximate cause argument might work. (See IPI 12.04.)

Other considerations which go into the decision involve the sufficiency of the employer's workers' compensation lien as an offset to any potential judgment and whether the *Kotecki* cap has been waived. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill.2d 201 (1997) and *Liccardi v. Stolt Terminals, Inc.*, 178 Ill.2d 540 (1997).

B. Proceeding with a claim against the employer

If the decision is made to proceed with a contribution claim against the employer, defense counsel should anticipate, particularly in "thin" liability cases, that the attorney for the plaintiff will make a joint liability "pitch". In doing so he will recognize that 1% is as good as 99% and argue the equation accordingly. The jury has no understanding of either *Kotecki* or the principles of joint liability. Consequently, it assumes that 1% means 1% of the total damages with the employer to pay the balance. To prevent that type of misguided result a candor instruction would be appropriate, as is the case with a plaintiff's contributory negligence. Thus, the jury should be instructed on the fault apportionment forms of verdict to the effect:

The percentage of fault which you have attributed to each party on this verdict form, if applied to the plaintiff's recoverable damages, does not necessarily represent the amount which will be paid by that party to the plaintiff. Rather, the court will use those findings in determining the liability of each. (Non I.P.I.)

This type of "candor" instruction is proposed as an ideal. While it accurately states the law, it has not been approved by the Supreme Court and therefore probably would not be given. (Supreme Court Rule 239.)

C. Additional parties

A case which involves only the plaintiff, a single defendant and the plaintiff's employer is not appropriate for the assertion of Section 2-1117. Absent the employer, the plaintiff's claim would be barred well before the single defendant's percentage could fall below 25%. Where there are multiple defendants several liability should be considered in the context of the relative culpability of the plaintiff, the defendants and any third party defendants other than the employer. Assuming that contribution claims are brought against the employer and therefore the jury attributes a percentage of fault to the employer, the trial judge must reallocate the shares of each of the guilty parties after dropping the employer out. Potentially, this can lead to the following absurd result:

Non-economic Verdict	\$1,000,000
Plaintiff percentage 1%	
Defendant #1 percentage 1%	
Defendant #2 percentage 1%	
Defendant #3 percentage 1%	

Employer percentage 96%

In this example each of the defendants is jointly liable to the plaintiff for \$990,000.

D. Lemonade

One of the truths of fault apportionment is that the more parties whose conduct is considered the more likely it is that the percentage of each will be less. The preceding truth cuts both ways. Where a plaintiff is guilty of significant claim barring contributory negligence, he will want to join as many additional parties as possible. He may also want to point the finger at non-parties, including his employer, where the latter's "fault" proximately contributed to his injury. (735 ILCS 5/2-1116). Likewise, defendants want to mitigate their exposure under Section 2-1117 by the inclusion of as many joint tortfeasors as possible. While the original joint liability statute refers to "defendant sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff,"² since the advent of comparative fault, the involvement of non-parties has been essential to the fault apportionment process. *Bofman v. Material Service Corp.*, 125 Ill.App.3d 1053, 1061-62 (1984). See also *Smith v. Central Illinois Public Service Co.*, 176 Ill.App.3d 482, 495 (1989) in which the defendant in a Structural Work Act case was permitted to interject the fault of the plaintiff's employer as the sole proximate cause of the plaintiff's injuries.

The amended statute drops employers from the fault comparison process solely for the purpose of assessing joint and several liability. It has no effect upon the Contribution Act, of which Section 3 provides *inter alia*:

The pro rata share of *each tortfeasor* shall be determined in accordance with his relative culpability. . . (Emphasis supplied).

Nor is the term "tortfeasor" defined or qualified, other than in the context of "relative culpability." Therefore, in cases where the employer is joined as a third party defendant, the verdict forms will contain a line for the assessment of its aliquot portion of the "common liability." In the context of Section 2-1117 in its current form, this means that the court will have to adjust the percentages after deleting the employer for the purposes of determining whether a defendant's share is less than 25%.

It has long been the rule of construction that a statute will be interpreted as it is written. *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 504 (2000). Absent an ambiguity courts will neither add to nor detract from the language of the General Assembly. *In re D.D.*, 196 Ill.2d 405, 418 (2001). Applying those principles to the current joint liability statute, it is evident that the only tortfeasor or at fault party who is excluded from the apportionment process is the "plaintiff's employer." There is no like exception or exclusion for individuals whose culpable acts and omissions may have caused or substantially contributed to cause the injury. That silence is significant in its omission of the plaintiff's co-workers, fellow servants, and supervisors. In most instances a direct nexus exists between the accident for which

² The amendment to Section 2-1117 deletes the phrase "who could have been sued by the plaintiff" in addition to excepting the "plaintiff's employer" from its application.

recovery is sought and the acts and omissions, including instructions and directions, of the plaintiff's co-employees. In its current form Section 2-1117 includes those individuals within the ambit of persons whose conduct may be considered in assessing the proportionate fault of the parties for joint and several liability purposes. The only caveat is the requirement that they either be sued by the plaintiff or be joined by one of the defendants as a "third party defendant." However, that requirement imposes two conceptual hurdles.

Section 5(a) of the Workers' Compensation Act immunizes employers and co-employees from direct action liability to the injured plaintiff. (820 ILCS 305/5(a), *Fregeau v. Gillespie*, 96 Ill.2d 479, 484 (1983) and *Rylander v. Chicago Short Line Ry. Co.*, 17 Ill.2d 618, 628 (1959). However, as determined by the Supreme Court in *Doyle v. Rhodes*, 101 Ill.2d 1 (1984) that immunity is an affirmative defense which must be asserted. In other words, a worker is not precluded from suing his employer and can obtain a judgment if the latter fails to claim its immunity. As a consequence, the *Doyle* court held that the plaintiff's employer is not immune from claims under the contribution statute.

The same reasoning would appear to apply to the plaintiff's co-employees. However, as a matter of public policy, the Supreme Court has recognized a second level of immunity which insulates fellow workers from contribution liability. In *Ramsey v. Morrison*, 175 Ill.2d 218, 231 (1997) the court held that, for Contribution Act purposes, any liability for the "fault" of a fellow servant ". . . must be paid by the employer, not by the co-employee." However, as was the case in *Doyle*, the Court also held that the second level immunity is a defense which must be asserted in order to be effective, stating:

In sum, we hold that the immunity granted to co-employees under section 5(a) of the Workers' Compensation Act (820 ILCS 305/5(a) (West 1992)) may be raised as a bar in both direct actions and third-party contribution actions.

As the preceding analysis demonstrates, co-workers can be made third party defendants in contribution cases, even though they are entitled to an immunity defense. The issue therefore becomes whether the joinder and subsequent dismissal of fellow workers disqualifies them from consideration under Section 2-1117 because they are not third party defendants *at the time of trial*. This is the same vexing, but unresolved problem which exists in the context of parties which have been previously dismissed as a consequence of settlement or the successful assertion of immunities. The authorities go both ways on the question. *Lannom v. Kosco*, 158 Ill.2d 535, 543 (1994) and *Alvarez v. Fred Hintze Construction Co.*, 247 Ill.App.3d 811 (1993) imply that the dismissal of an otherwise liable party does not impair fault apportionment under the statute. *Banovitz v. Rantanen*, 271 Ill.App.3d 910, 921 (1995) concurs strongly in that interpretation. However, *Blake v. Hy Ho Restaurants*, 273 Ill.App.3d 372, 374-75 (1995) and *Freislinger v. Emro Propane Co.*, 99 F.3d 1412 (7 Cir.) are antipodal. Most recently, the issue is pregnant in *Ozik v. Gramins*, 799 N.E.2d 871 (2003) in which the opinion was withdrawn following rehearing.

The issue of the immune or settling third party defendant who is no longer in the case remains unresolved, leaving the field open for creative "lawyering." In this regard, and on the

side of fellow servant inclusion in the apportionment process, it must be noted that legislative deletion of the phrase "who could have been sued by the plaintiff" leaves open the implication that employers *qua* employers are the only excluded category of culpable parties.

CONCLUSION

If the proper objective of fault apportionment is direct correlation between culpability and exposure then any measure which removes a significant participant from the equation skews the result and debases the process. There is no doubt that the recent amendment to Section 2-1117 was intended to and did have that effect. However, it avails naught to simply complain of political injustice or rail against the darkness imposed by small minds.

Given the total absence of a "rational basis" or manifest need for change the statute is susceptible of the same "special legislation" and "separation of powers" challenges which motivated the decision in *Best v. Taylor Machine Works*, 179 Ill.2d 367 (1997). Coping with the act in its present form requires reliance upon the public policy which drove adoption of the Tort Reform Amendments of 1986, as expressed in *Unzicker v. Kraft Food Ingredients*, 203 Ill.2d 64 (2003). Appropriate instructions should be tendered to inform the jury that its percentages are not directly converted to dollars. This is the identical "candor" which plaintiffs require in describing the effect of predominant contributory negligence. Also, use the exact language of the statute to limit *only* "employers" from consideration, thereby including the plaintiff's co-workers as potential third party defendants *for the sole purpose of several liability*.