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Mary A. Laudick

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# STATUS AND TRENDS IN STATE PRODUCT LIABILITY LAW: JOINT AND SEVERAL LIABILITY

## INTRODUCTION

The doctrine of joint and several liability originated from the concept that "the act of one is the act of all."[1] This principle has come to mean that all participants in a joint enterprise may be joined as defendants in one action. Liability is joint in that all defendants may be joined together. It is several in that each defendant is liable for the entire amount of the damages. It is joint and several in that no defendant's liability is relieved until the plaintiff's judgment is fully satisfied.[2]

Until recently, joint and several liability had been adopted by nearly all states. In response to the recent insurance crisis, however, several states have elected to abolish or modify their joint and several liability laws.[3] This section will examine those changes and the policy decisions behind them. The section also will explore the policy choices that have led many states to return to the doctrine. Finally, it will suggest a list of factors that legislators should consider before deciding to alter their state's approach to joint and several liability.

## WHY JOINT AND SEVERAL LIABILITY HAS BEEN ABROGATED OR CHANGED

During the 1960s, the widespread adoption of comparative negligence forced legislators and judges to consider whether joint and several liability could logically or practically coexist in the same jurisdiction as comparative negligence. Several states found that it could not, reasoning that a defendant should not be forced to bear the entire risk of a judgment when a joint tortfeasor is insolvent, unknown or is simply not a named party in the action.[4] In addition, these states were convinced that a wrong is divisible,[5] and that a defendant's liability should be apportioned to the degree of fault.[6] These states thus abrogated their joint and several liability laws.

1. Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (1613).
2. J. Little, Comparative Negligence Law and Practice § 13.30 (2) (1985).
3. *See infra* notes 26-34 and accompanying text.
4. *See* Paul v. N.L. Industries, 624 P.2d 68 (Okla. 1980) (it is not fair to those tortfeasors whom the plaintiff decides to name in the action); Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983) (Uhlenhopp, J., dissenting) (it is questionable why any defendant should be responsible for more than his share of the blame); Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. App. 1982) (questioning the basis on which risk shifts if the defendant is insolvent).
5. *See, e.g.*, Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. App. 1982) (the concept of an indivisible wrong is obsolete).
6. *See, e.g.*, Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978) ("The legislature intended to equate recovery and duty to pay to degree of fault. . . . There is not compelling social policy which requires the co-defendant to pay more than his fair share of the loss.").

**Conflicts With Comparative Negligence**

Some states adopted comparative negligence and elected to retain joint and several liability.[7] This created a new set of problems as the two doctrines enmeshed. As a result, some of these states began to modify or abrogate the doctrine of joint and several liability.

One problem was a shift in liability for a judgment. Unlike contributory negligence states, in a comparative negligence jurisdiction, a defendant barely at fault can be forced to assume the entire burden of a judgment against him and other defendants if joint and several liability exists and other defendants remain judgment-proof.[8] Conceivably, a defendant who is only one percent negligent may be forced to pay 100% of a judgment—which may include punitive damages.[9] This has led to another problem: often plaintiffs name defendants not because their liability is great, but because plaintiffs perceive them as having a lot of money. Common deep-pocket defendants include insurance companies and businesses.[10]

Another problem in these states is that plaintiffs are neither required to, nor have the incentive to join all defendants.[11] Non-joinder increases the likelihood that one defendant or a few defendants will be forced to bear all costs associated with a trial or settlement. The impact of non-

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7. Several states interpreted the adoption of the Uniform Contribution Among Tortfeasors Act as prima facie evidence of legislative intent to retain joint and several liability. *See* Alaska Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979); Coney v. J.L.G. Industries, 454 N.E.2d 197 (Ill. 1983); Lincenberg v. Issen, 318 So.2d (Fla. 1975). *But see* Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. App. 1982).

   Other states retained comparative negligence based on fairness to the plaintiff. *See, e.g.*, American Motorcycle Association v. Superior Court, 578 P.2d 899 (Cal. 1978); Weeks v. Feltner, 297 N.W.2d 678 (Ct. App. Mich. 1980).

   *Cf.* Matthews v. Mills, 178 N.W.2d 841 (Minn. 1970) (injury is divisible); Tucker v. Union Oil Co., 603 P.2d 156 (Idaho 1979) (legislature intended to retain joint and several liability); Gazway v. Nicholson, 9 S.E.2d 154 (Ga. 1940) (although unfairness to defendants may arise in some cases, joint and several liability must be retained); RESTATEMENT (SECOND) OF TORTS § 433A (1965) (takes position that joint and several liability should be retained); UNIFORM COMPARATIVE FAULT ACT § 2 (1987) (joint and several liability is retained); AM. BAR ASS'N, REPORT OF THE ABA ACTION COMM'N TO IMPROVE THE TORT LIABILITY SYSTEM 24 (1987) [hereinafter cited as REPORT] (plaintiff always should be entitled to full recovery).

8. *See, e.g.*, O'Connor v. City of New York, 460 N.Y.2d 485, 447 N.E.2d 33 (Ct. App. N.Y. 1983) (city found only four percent negligent by jury for the explosion of a gas main was forced to pay millions of dollars in damages because its co-defendants were unable to pay their portion of the judgment); Sills v. City of Los Angeles, C-33504 (1985) (San Fernando Sup. Ct.) (although city was found to be only 22% negligent, the city paid nearly all of a $2.16 million award, since the other defendant proved to be judgment-proof).

9. Several states have apportioned punitive damages. *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979); Fredeen v. Stride, 269 Or. 369, 525 P.2d 166 (1974). *But cf.* SPECIAL TASK FORCE ON PROPERTY & CASUALTY INSURANCE, FINAL REPORT 17 (1986) [hereinafter cited as *Task Force on Insurance*] (dissenting comment notes that no evidence was ever presented that a court case in Wisconsin had ever imposed punitive damages upon a defendant based on joint and several liability).

10. *See Task Force on Insurance, supra* note 9, at 17.

11. A plaintiff may obtain the entire amount of a judgment from one defendant; the defendant may then seek contribution from other joint tortfeasors.

joinder is mitigated in states with contributory negligence because even the plaintiff's slight negligence will eliminate the cause of action and relieve the defendant of all liability.

Finally, these states found that retention of joint and several liability with comparative negligence encouraged large settlement awards. In cases where litigation may have been more appropriate, defendants have settled in order to avoid the deleterious effect of a judgment-proof co-defendant. Under these circumstances, a defendant may settle for a higher amount than is justifiable, fearing an even greater judgment against him or her would result at trial.

**Pressure from the Insurance Lobby**

Insurance companies assert that the legal problems associated with joint and several liability are key factors in rising insurance premiums. Because the insurance industry cannot predict when an insured defendant will be forced to pay entire judgments or when the insured will be forced to settle, insurance companies have been forced to increase premiums significantly to cover their risk.[12] Insurance companies further contend that their involvement in litigation has increased because of the retention of joint and several liability. The companies assert that they are often the targets of lawsuits[13] simply because they guarantee a plaintiff complete relief. This leads to increased expenditures for legal fees and, thus, increased premiums.[14]

The amount spent for legal fees is further aggravated because once the insurance company has been joined in the lawsuit, it is forced to litigate the issue more vigorously than those defendants who do not possess adequate resources. They claim that they must provide the resources to defend all the joint tortfeasors in a suit in order to reduce the chance of a high damage award.[15]

Finally, insurance companies assert that because joint and several liability has been retained in comparative negligence jurisdictions, they

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12. The percentage of cases in which insurance companies are required to assume the full amount of a judgment where co-defendants remain judgment-proof is unclear. Neither the insurance industry nor proponents of abolishing joint and several liability have provided this data. *See, e.g.*, REPORT, *supra* note 7; STAFF OF THE FLA. S. COMM. ON COMMERCE, A REVIEW OF HISTORICAL ANALYSIS—CURRENT PERSPECTIVES OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY AND A REVIEW OF TORT REFORM 51, 61 (Mar. 1986) (on file with the Committee) [hereinafter cited as TORT REFORM REVIEW].
13. Because a plaintiff can successfully collect the entire amount of a judgment from one defendant where co-defendants remain judgment-proof, fewer defendants are joined in the action, and insurance companies are usually among those joined.
14. Whether the percentage of product liability cases has increased remains questionable. *See* Bancroft, *Which Pocket Will Be the Deepest?*, 75 CAL. ST. B.J. 257 (League of California Cities claims that costs have risen because even ludicrous claims must be defended); *but see* TORT REFORM REVIEW, *supra* note 12, at 166 (the number of product liability cases that went to trial in Florida from 1983 to 1985 decreased).
15. A judgment-proof co-defendant has nothing to lose, so he or she is often unwilling to spend money on legal fees.

are now unable to insure certain entities. In some cases, an award, if paid solely by their insured due to judgment-proof co-defendants, will be so high that the risk of insuring them is economically unsound.

## WHY STATES HAVE RETAINED JOINT AND SEVERAL LIABILITY

Comparative negligence states that retained joint and several liability after the adoption of comparative negligence or have considered the advisability of retaining joint and several liability in light of the recent insurance crisis offer several rationales for retaining the doctrine. They believe comparative negligence can logically coexist with joint and several liability, because an injury is divisible for purposes of joint and several liability.[16] These states also contend that if joint and several liability were abrogated, a plaintiff often would not be able to obtain full compensation for his or her injuries.[17] Finally, without joint and several liability, a non-negligent plaintiff would bear some of the loss if one of the other defendants proved insolvent.[18]

These states also have considered the problems that changes in joint and several liability might create. Although modification of the doctrine might be feasible, abrogation would increase the number of parties in each case because plaintiffs would attempt to sue all possible defendants.[19] In addition, defendants probably would fight amongst themselves, making the plaintiff's case much easier.[20]

Modifying joint and several liability also would affect the principle of proximate cause. Defendants often argue that the plaintiff's negligence was the sole proximate cause of the event causing the injury, so the defendant is not liable. If joint and several liability were abrogated, this argument would no longer be useful.[21]

The likelihood of settlement might be affected also. Although it might encourage the defendant to settle a case more readily,[22] several liability

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16. *See, e.g.*, Coney v. J.L.G. Industries, 454 N.E.2d 197 (Ill. 1983).
17. *See, e.g.*, Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983) (suggests that a plaintiff may not be able to obtain full compensation when a defendant is unknown or insolvent and the remaining defendants may not be sued for the remaining amount).
18. *See, e.g.*, *id.* (the burden of the insolvent defendant would fall entirely on the plaintiff, and the plaintiff's damages would be reduced beyond the percentage of the negligence attributable to the plaintiff).
19. If the plaintiff neglects to join all possible defendants, the named defendants enjoy tactical advantages. For example, the named defendants could attempt to show that either absent or unknown parties are liable to a greater degree. *See generally* Benson, *New Role for Non-parties in Tort Actions—The Empty Chair*, 75 COLO. LAW. 1652 (1986) (discussing the impact of absent and unknown parties); J. DIMENTO & J. HARRISON, JOINT AND SEVERAL LIABILITY: A STUDY OF THE FISCAL AND SOCIAL IMPACT OF A CHANGE IN THE DOCTRINE 27 (1985).
20. *See* TASK FORCE ON INSURANCE, *supra* note 9, at 57.
21. *See id.*
22. Under a several liability system, a plaintiff might want to settle earlier in the litigation if he or she risks being held liable for the full amount of damages.

might increase the risk of settlement for plaintiffs,[23] thereby crowding the docket. Finally, because the plaintiff would not be able to receive full compensation for his or her injuries[24] from private insurance companies, the burden to provide such compensation might rest ultimately with state-funded programs.[25]

## ATTEMPTS TO CHANGE JOINT AND SEVERAL LIABILITY

States have addressed these policy considerations in various ways. Colorado acknowledged the unfairness of requiring a minimally negligent defendant to pay all of a judgment and statutorily eliminated joint and several liability.[26] California voters specifically addressed insurance company complaints and abolished the doctrine by approving the Proposition 51 initiative.[27]

Other state legislatures have addressed the joint and several liability issue by allowing the doctrine only where the defendant's culpability is of a specified percentage.[28] Illinois hopes to reduce the recurrence of cases in which a defendant is held entirely liable for a judgment when he or she is only minimally negligent and a co-defendant remains judgment-proof.[29]

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23. *See* J. DIMENTO & J. HARRISON, *supra* note 19, at 27 ("a plaintiff may not be able to determine with certainty what they [sic] are giving up vis-a-vis the potential liability of the settling defendant").
24. "Assume, for example, a case in which a plaintiff incurs $1 million in injury, and each defendant is found 25% liable. Assume also that Defendant 1 (D1) and Defendant 2 (D2) possess $25,000 of insurance coverage. D3 and D4 each own $1 million of insurance coverage. Under joint and several liability, D1 and D2 could settle for $25,000 each, and D3 and D4 would remain liable for the remaining $950,000. Under a several liability theory, however, D2 and D3 would be liable for only $250,000 each. Plaintiff is thus compensated only for $550,000 of his total damages." *Id.* at 14.
25. For example, Medicare or Medicaid.
26. *See* COLO. REV. STAT. § 13-21-111.5 (1986) (changes the common law rule on the role of non-parties under the Colorado Comparative Negligence Act); Benson, *supra* note 19, at 1652.
27. CAL. CIV. CODE § 1431 (West 1987) (in personal injury, property damage or wrongful death actions, liability for each defendant is several for non-economic damages).
28. *See* ILL. REV. STAT. ch. 110, para. 2-1107.1, 2-1116 (1987) (in negligence and strict liability cases, the plaintiff cannot recover if he or she is more than 50% at fault. If the plaintiff is less than 50% at fault, damages will be reduced in proportion to the fault of the plaintiff); Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws 695 (the plaintiff may recover economic damages only from defendants whose fault is equal to or greater than that of the plaintiff; exempt from this rule until 1990 are cases with total damages of less than $25,000, pollution cases, intentional torts and RICO actions, anti-trust, land sales and securities fraud chapters; N.Y. CIV. PRAC. L. & R. §§ 1600-1603 (Consol. 1987) (limits the joint liability of a tortfeasor with 50% or less relative culpability for non-economic loss to the defendant's equitable share of the judgment in accord with culpability; exceptions include product liablity actions where jurisdicition over the manufacturer could not be obtained with due diligence by the plaintiff); MINN. STAT. ANN. § 604.02 (1) (West 1987) (if the state or municipality is jointly liable, and its fault is less than 35%, the state or municipality is jointly and severally liable for an amount no greater than twice the amount of its fault).
29. *See* N.Y. CIV. PRAC. L. & R. §§ 1600-1603 (Consol. 1987) (a defendant's liability for non-economic losses in an action covered by this statute involving two or more tortfeasors is limited to the defendant's equitable share of the total fault); Tort Reform and Insurance Act of 1986, ch. 86-0160, 1986 Fla. Laws 695 (joint and several liability law applies where the defendant's fault is equal to or greater than that of the plaintiff, subject to several exceptions. Proportional liability, not joint and several liability, applies to non-economic damages).

Still other states allow joint and several liability only for economic damages.[30] These reforms limit the liability of each joint tortfeasor to the percentage of his or her culpability. Legislators, and the California voters who passed Proposition 51,[31] believe that limiting joint and several liability to economic damages will reduce insurance premiums by encouraging plaintiffs to carefully consider potential defendants. They maintain that plaintiffs will be less likely to automatically include the defendants who have the deepest pockets but are only minimally at fault. Plaintiffs will be more likely to bring an action against those defendants who have acted the most negligently and, thus, are liable for a greater amount of the damages.[32] In states where joint and several liability is additionally limited to those situations where the defendant's culpability is less than or equal to the plaintiff's, insurance companies will also incur less risk.

Legislatures in such states as Illinois have invoked measures to hold defendants jointly and severally liable only if they have engaged in certain activities.[33] These measures allow the insurance industry to pinpoint areas where liability probably will be found and reduce the insurance company's risk that an insured will be forced to pay the full amount of a judgment. Legislators predict that these reforms will reduce the cost of insurance premiums. Finally, an Ohio law will protect defendants from being forced to assume a co-defendant's liability when the co-defendant is unable to pay his or her share of a judgment.[34] This measure will help reduce insurance company costs by encouraging additional means for collecting a judgment.

## CONCLUSION

Although it is impossible to predict which, if any, of these recent reforms will ease the insurance crisis, states should consider several factors before enacting such measures. First, proponents of the abolition of joint and several liability have yet to present conclusive data indicating that an insurance crisis exists. Assuming that the liability insurance crisis is real, neither side has indicated conclusively whether joint and several liability

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30. *See, e.g., supra* note 27 and accompanying text.
31. *See supra* note 27 and accompanying text.
32. Presumably, plaintiffs will not want to waste time and money in an action against defendants who are only minimally at fault. In some cases, a plaintiff may even forgo bringing a cause of action against a defendant who is clearly only minimally at fault.
33. Illinois law provides that in product liability suits based on strict liability, defendants shall be jointly and severally liable for medical and related damages. A defendant 25% or less liable for the total negligence of all parties shall be severally liable for all other damages. But a defendant more than 25% liable for the total negligence of all parties shall be jointly and severally liable for all other damages. ILL. ANN. STAT. ch. 110, para. 2-1117, 2-1118 (Smith-Hurd 1986) (provisions do not apply to environmental and medical malpractice cases).
34. 1986 Ohio Laws 2315.19 (D)(1) (provides that if a defendant is judgment-proof, the court will reallocate among the other defendants and the plaintiff his or her portion of the judgment according to a specified formula and subject to a specified vicarious liability restriction. This will limit the amount of damages that a defendant will be required to pay).

has contributed significantly to higher insurance premiums. No evidence has been offered by either side that the insurance crisis is greater or the same in those states that abrogated joint and several liability many years ago.

Assuming that the insurance crisis is less significant in those states that abolished joint and several liability during the 1970s, states must still consider the effect of modifications or abrogation of the doctrine. Some preliminary findings indicate that a change or abolition of joint and several liability will produce effects far worse than the current insurance problem.[35] Each state must also examine the unique set of circumstances existing in that state and should research the particular effect of changing the joint and several liability doctrine in that jurisdiction.[36] Until each state considers these issues, a change in the age-old joint and several liability doctrine would be premature.

*Mary A. Laudick**

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35. *See supra* notes 17-22 and accompanying text.
36. A state that already has instituted a program of caps on damages, for example, might not find it beneficial to also abrogate joint and several liability, because caps may improve the liability crisis without further action.

* B.A., Denison University, 1985; J.D. Candidate, Notre Dame Law School, 1988.