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JOINT AND SEVERAL LIABILITY AND ENVIRONMENTAL HARM IN THE 1990'S

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INTRODUCTION

While contemporary hazardous waste issues are mediated principally through the application of permitting and clean-up response statutes, there exists a backdrop of tort law that, at least for now, operates in relative freedom from the gravitational pull of such state and federal statutory obligations.

Where not expressly pre-empted by federal statute, or impliedly pre-empted by the Water Pollution Control Act¹ and Clean Air Act² settings, where the comprehensive nature of federal activity is interpreted as leaving no room for either interstitial development of federal common law or application of state law private or public nuisance claims,³ state tort law remedies continue to play a vital role. A central dynamic in application of tort law remedies to injury or damage associated with waste products is the apportionment of responsibility among multiple tortfeasors.⁴ Apportionment issues, particularly in the products liability context, often involve a measurement of the plaintiff's contribution to the harm and a set-off of that fractional responsibility against plaintiff's total recovery.⁵ In the environmental context, however, the prevalent paradigm is that of the innocent

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1. 33 U.S.C. §§ 1251-1387 (1994).

2. 42 U.S.C. §§ 7401-7642 (1994).

3. *See, e.g.*, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (FWCPA); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (FWPCA); *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir. 1981) (CAA). *See* GERALD W. BOSTON & M. STUART MADDEN, *THE LAW OF ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS AND PROBLEMS* 216 (1994).

4. This essay, a fuller version of the author's presentation at the Environmental Law Journal's Symposium, develops and refines aspects of a lengthier treatment of joint liability and other issues that appeared in 32 GA. L. REV. 1019 (1998).

5. *See* GUIDO CALABRESI, *THE COST OF ACCIDENTS* 279 n.4 (1970).

plaintiff, i.e., a public or private entity that has not contributed to the harm, seeking a remedy, most often for property damage or lost value, but sometimes for personal physical injury, against two or more culpable polluters.⁶

In this brief essay, I wish to first describe the operation of common law joint and several liability, together with the effect upon its application occasioned by the nearly universal modern subscription to comparative fault principles. I will then sketch the leading arguments for reform or abolition of joint liability, followed by counter-arguments that it be retained, or if reformed, that such reform not be drastic. I will follow with a summary of modern joint liability reform efforts at the federal and state levels and will conclude by identifying the approach adopted in several states that I believe best serves established tort principles, including but not limited to those of corrective justice and economic efficiency.

I. JOINT AND SEVERAL LIABILITY GENERALLY

In general terms, under joint and several liability, a tort victim injured by two or more tortfeasors "may recover his total damages from any one of the tortfeasors, regardless of the portion of fault attributable to that tortfeasor."⁷ This venerable and concededly plaintiff-favorable doctrine operated over the years to relieve the plaintiff of the obligation of suing all concurrent tortfeasors (an alleviation of at least a proportion of what Guido Calabresi would term tertiary accident costs).⁸ Pure joint and several liability also meant that should a tortfeasor be insolvent or absent, the remaining joint tortfeasor or tortfeasors, and not the plaintiff,

6. See generally Nancy Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 *CORNELL L. REV.* 628, 635 (1988) (explaining the operation and effect of joint and several liability of joint tortfeasors).

7. *Id.* See also MICHAEL HOENIG, *PRODUCTS LIABILITY: SUBSTANTIVE, PROCEDURAL AND POLICY ISSUES* 191 (1992) ("At common law, the joint and several liability imposed upon joint tortfeasors was indivisible. Thus, any one of the joint tortfeasors was liable to the injured party for the entire damage." (citing *Musco v. Conte*, 254 N.Y.S.2d 589, 593 (App. Div. 1954)).

8. See CALABRESI, *supra* note 5, at 28-29.

would be liable for the so-called "orphan" share of the overall proved damages.⁹

Aaron Twerski has described the conventional joint and several liability approach as "accentuat[ing] and exacerbat[ing] all the imperfections that exist in the present tort compensation system."¹⁰ The principal argument against retention of joint and several liability is that the doctrine provides an incentive for plaintiffs to collect their award from the party with the deepest pocket, rather than the party whose causal contribution to the harm may have been the greatest.¹¹

II. STATE AND FEDERAL REFORM INITIATIVES — AN OVERVIEW

A. *Profile of Contemporary Treatment of Joint Liability and Comparative Fault*

The common law of joint liability has sustained overwhelming change within the past decade or more. Over thirty-three states have either abandoned or modified it, ordinarily replacing it with comparative fault or comparative causation principles on the rationale that the changes establish a fairer liability standard for multiple tortfeasors.¹²

9. See Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1127 (1989).

10. *Id.* at 1143, discussed in Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 703 n.173 (1997). The doctrine's distortion of realistic settlement negotiations is described in HOENIG, *supra* note 7, in these words:

The more significant policy of encouraging reasonable settlements is undermined because realistic evaluations of true culpability need not impact upon the settlement demands. An artificially high range of settlement evaluations ensues. The tendency is to look at overall exposure, i.e. "how many millions will this jury possibly award to this plaintiff?," rather than "how much of the potential award is really attributable to this defendant's fault."

11. See Larry Presler & Kevin V. Scheiffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651, 652 (1988). See also Manzer, *supra* note 6, at 644, 651.

12. See Paul Bargren, Comment, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453 (1994).

At both the state and federal levels, reformers have sometimes wielded the meat axe and sometimes the surgeon's scalpel. A meat axe approach was taken in the 1991 proposed Joint and Several Liability Reform Act,¹³ which provided that in any personal injury, property damage, or wrongful death action, liability against multiple tortfeasors should be several only, and the determination of such several liability should properly take into account the proportion of responsibility attributable to absent or impecunious actors — leaving the claimant, rather than the remaining defendant(s), to bear the burden of any orphan share.

The most recent federal initiative touching upon joint liability, the Product Liability Reform Act of 1997,¹⁴ takes a moderate, intermediate approach of suggesting that joint liability be preserved for economic harm, but that liability be several for noneconomic damages only.¹⁵

On a state level, here follows a sampling of three tacks taken or proposed:

When a party is insolvent, under "Modified Joint and Several Liability," the comparatively responsible plaintiff "can initially recover the full amount of his reduced claim from any available and solvent tortfeasor, who then bears the expense of locating the other tortfeasors, preparing and proving contribution claims against them, and collecting on those claims"¹⁶

Under "Modified Proportionate Several Liability," in turn, "the plaintiff must bear the expense of locating each tortfeasor, preparing and proving liability claims against each of them, collecting each tortfeasor's initial proportionate several liability share, and then coming back to each (hopefully still) available and solvent tortfeasor to collect her share of any uncollectible shares."¹⁷

13. 137 CONG. REC. S579-01, 897 (1991).

14. Product Liability Reform Act of 1997 § 110, S. Rep. No. 105-32 at 20 (105th Cong., 1st Sess. 1997).

15. The position taken in the Product Liability Reform Act § 110 is a so-called "fair share" of responsibility for noneconomic loss approach. *Id.* at 55.

16. Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. L. REV. 45, 79 (1992).

17. *Id.* at 79.

Regarding allocation of the "Orphan Share Burden," still another approach would place the burden or equitable obligation of insolvent or absent tortfeasor's share upon all parties, including the plaintiff.¹⁸ Thus, with a nonresponsible plaintiff, an 80% responsible tortfeasor, and a 20% tortfeasor who is insolvent, the remaining defendant would be responsible for 80% of the orphan 20% in damages, and the plaintiff's award would be reduced by 20% of the 20% share of the absent tortfeasor. This is the position taken in the American Law Institute *Reporter's Study: Enterprise Responsibility for Personal Injury*.¹⁹

B. *Contemporary Joint Liability Reform Flaws From the Standpoint of Corrective Justice and Economic Efficiency*

1. Corrective Justice

Those opposing limitations upon pure joint and several liability for noneconomic damages might endorse the comments of former California Chief Justice Bird, who once stated in dissent:

Pain and suffering are afflictions shared by all human beings, regardless of economic status. For poor plaintiffs, noneconomic damages can provide the principal source of compensation for reduced lifespan or loss of physical capacity [T]hese plaintiffs may be unable to prove substantial loss of future earnings or other economic damages.²⁰

Along similar lines, criticizing the several liability provision of an earlier reform proposal, Andrew F. Popper wrote:

The mere fact that pain and suffering are difficult to quantify should not mean that plaintiffs are somehow not entitled to joint and several liability By making joint and several liability unavailable for noneconomic damages, those plaintiffs with the most devastating injuries would end up undercompensated, even though they have proved the liability of the

18. John Scott Hickman, Note, *Efficiency, Fairness and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions that Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 745 (1995).

19. 2 REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 127-57 (A.L.I. 1991).

20. *Fein v. Permanente Med. Group*, 695 P.2d 665, 689 (Cal. 1985) (Bird, C.J., dissenting), discussed in Andrew F. Popper, *A Federal Tort Law is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PROD. & TOXICS LIAB. 105, 124-25 (1994) (alteration in original).

defendant.²¹

In addition, Popper argues that tertiary accident costs are elevated by any several liability reform proposal, in that "[s]uch victims would be forced to pursue [in separate litigation] each party who had been in any way responsible for the victim's injury."²²

The Reporters of the *Restatement (Third) of the Law of Torts: Apportionment*²³ retain as one option for Institute evaluation a rule that would confine joint liability to economic harm and providing several liability under applicable comparative fault principles for noneconomic harm.²⁴ The *Apportionment Restatement* Reporters suggest that a rationale for preserving joint liability only for economic harm is that other compensation schemes, such as workers' compensation, do so.²⁵ This position fails to take into account that a strict compensation scheme for liability for economic harm or workers' compensation has always been visualized as a bargained-for-exchange in which those suffering workplace injuries could recover economic loss for them, without being subjected to the uncertainty and expense of bringing a tort suit for all of their provable harm. The tort system remained available for recovery of their other losses against responsible parties other than the employer. The other participant in this bargained-for-exchange was, of course, the employer, who for a finite and relatively predictable assessment in workers' compensation insurance coverage could be relieved of defending tort claims for greater amounts.²⁶

Thus, the workers' compensation logic and justice has remained intact for decades, with workers and employers having relinquished something of value in order to achieve benefits. To now introduce several liability for economic harm as a "reform," relying in part upon the logic of workers' compensation, sounds tinny. Unlike the respective sacrifices made by workers and employers, at least conceptually, when workers' compensation was

21. Andrew F. Popper, *A Federal Tort Law is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PROD. & TOXICS LIAB. 105, 125 (1994).

22. *Id.*

23. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT §27E (Council Draft No. 2 1997).

24. *Id.* at § 27E & cmt. c.

25. *See id.*

26. *See id.*

created, the potential *Apportionment Restatement* provision brings nothing to the bargaining table. Rather than enjoying a filial bond with other economic-harm strict-liability social insurance schemes, the latter approach is parasitic, as it would take away potential claims and offer nothing in return.

As regards the more drastic approach of total abolition of joint and several liability, able criticism of such potential "reform" is raised by Richard W. Wright, who uses the example of coffee poisoning where an intentional poisoner and a negligent poisoner each lace decedent's coffee with a lethal dose.²⁷ Let us change the facts of the well-known New York environmental tort decision of *State v. Schenectady Chemicals Corp.*,²⁸ involving dumping done by an independent contractor hired by Schenectady Chemical to dispose of waste. Imagine that the independent contractor, Dewy Loeffel, intentionally dumped 80% of the damaging waste, and that another entity negligently disposed of 20% of similar waste, thinking erroneously both that the site was lawful, and further that the containers, in which the material was disposed of, were sufficient to contain the waste. Imagine further that either quantity of waste, be it 80% or 20%, would suffice to totally degrade the property and the underlying aquifer.

Should joint tort liability be totally abolished, and if Mr. Loeffel were insolvent, neither New York's claim in public nuisance, nor a "special harm" individual's claim in public nuisance, nor an individual's claim in private nuisance, could recover more than 20% of its proved harm against the severally liable remaining defendant.²⁹ Further to the assessment that such "reform" of joint liability stymies the corrective justice goals of tort remedies, an important part of Wright's argument against "reform" of joint and several liability is its claim that the jointly liable party's successful or unsuccessful contribution or indemnity claim against another tortfeasor "is secondary to the plaintiff's prior and independent corrective justice claim against each tortfeasor."³⁰

27. See Wright, *supra* note 16, at 60-62.

28. 459 N.Y.S.2d 971 (NY Sup. Ct. 1983), *aff'd as modified*, 479 N.Y.S.2d 1010 (1984).

29. See Wright, *supra* note 16, at 59.

30. *Id.* at 61, *discussed in* Lilly v. Marcal Rope & Rigging, 682 N.E.2d 481, 488 (Ill. Ct. App. 1997). See also JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 228 (1996):

[Where] all of the joint tortfeasors, by definition, acted tortiously and actually and proximately caused the plaintiff's in-

There are, nevertheless, material limitations to Wright's argument. In the context of the poisoned coffee example, Wright's point is seemingly confined by its premise that each poisoner "put enough poison in plaintiff's coffee to kill her."³¹ This scenario does not address the joint and several liability example that proponents of several liability love to hate, i.e., when a defendant's substandard conduct contributes only minimally to plaintiff's harm, but imposition of joint and several liability burdens that defendant with the totality of plaintiff's proved damages.

Emblematic of this predicament in logic and fairness is the notorious plaintiff's verdict in *Walt Disney World Co. v. Wood*,³² which involved an amusement park bumper car accident, where plaintiff's judgement-proof fiancée was adjudged 85% responsible, plaintiff 14% responsible, and Walt Disney World 1% responsible. Upon appeal, Disney was left with liability for not only its participation in the injury, but also for the lion's share of the insolvent tortfeasor's liability, leaving Disney responsible for 86% of the damages in a suit in which its causal contribution was but 1%.³³

The irrationality of a *Disney* result, however, will often be ameliorated in the environmental tort context. In *Disney*, plaintiff was responsible for a material portion of the harm done, a percentage greater than that attributable to Disney. However, in most environmental torts, the injured party is innocent of contribution to his or her harm, and the tortfeasors, be they all before the court or even should only a subset be before the court, will by definition have each contributed more to plaintiff's harm than did plaintiff.

Even if the plaintiff is responsible for a proportion of the environmental harm, Calabresi suggests that absent a coherent appli-

jury[,] [i]n most cases, under usual 'but for' causation analysis, the injury would have been totally avoided if any of the defendants had acted nonculpably. In this sense, the percentage allocation determined by the fact-finder is only a comparative measure of the ideal apportionment among wrongdoers, each of whom, it can be argued, should be fully liable to the plaintiff for all of the plaintiff's losses because any of them could have, by acting non-negligently, protected the plaintiff from injury.

31. *Marcal*, 682 N.E.2d at 487.

32. 515 So. 2d 198 (Fla. 1987).

33. See *id.* at 202. See also 2 REPORTERS' STUDY, *supra* note 19, at 151 n.28.

cation of comparative fault to joint and several liability circumstances, the fairness or unfairness of retaining joint and several liability cannot be gauged.³⁴ Assume, Calabresi proposes, a 60% responsible defendant, a 10% responsible defendant, and a 30% responsible plaintiff.³⁵ Assume further that the 60% responsible defendant is unavailable or bankrupt. The jury places 70% of responsibility on the 10% responsible defendant, and 30% responsibility upon plaintiff. If the jury intended that the plaintiff, even though three times more responsible than the remaining defendant, recover 70% of the total harm from him, the result, Calabresi writes, "seems both unfair and contrary to what the jury found."³⁶ If, on the other hand, the jury meant that the defendants together were 70% responsible, and that the 10%/60% allocation between them "was no more than an equitable split as to them, a split that did not concern their individual responsibility to plaintiff at all," then, Calabresi concludes, retention of joint and several liability in a comparative responsibility context "might be as fair as the previous hypothetical made it seem unfair."³⁷ Calabresi writes that until courts appreciate "the full consequences of the shift from an all or nothing rule to a splitting rule[,] . . . efforts at reform are bound to be haphazard and nonsensical."³⁸

2. Economic Efficiency

An efficiency argument favoring *some form* of several liability reform (although not necessarily that contained in the *Reporter's Study*) is found in Calabresi's least cost avoider approach.³⁹ Landes and Posner agree, harmoniously, that as to risk remediation, we do not want all joint tortfeasors to participate, but rather only the tortfeasor who can take action most efficiently.⁴⁰

34. See Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 880-81 (1996).

35. See *id.* at 880.

36. *Id.*

37. *Id.* at 881.

38. *Id.*

39. See Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 797-98 (1997).

40. See *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 575 (Wyo. 1992).

In the ordinary course, whether the defendant is an automobile manufacturer or an environmental polluter, the tortfeasor whose contribution to a plaintiff's harm is the greatest will be the tortfeasor who can most readily and efficiently detect and remedy the risk.⁴¹

Following this line of reasoning, the greatest incentives for efficient and societally acceptable conduct should ordinarily rest with the party that can foresee or remedy that wasteful or harmful conduct, while proportionately lesser incentives would be apparent to tortfeasors whose likely causal contribution would be less. To conclude otherwise would, in Judge Higgenbotham's reasoning in *Louisiana ex rel. Guste v. M/V Testbank*,⁴² make potential liability so great in relation to wrongdoing as to disassociate conduct from consequences.⁴³

Efficiency principles seemingly support retention of joint liability in some form for noneconomic loss. Extrapolating from an example provided by Robin Paul Malloy,⁴⁴ imagine a suburban water district and a residential water wholesaler together selling filtered well water to local residents. The water of six particular homes is uniquely affected by minerals in such quantities as to make the water responsible for intestinal illness in those who drink it. Suppose further that the personal injury value is \$100 per home, for a total of \$600. Two options exist for remedying the problem. First, a water filtering device can be installed at the district distribution point at a cost of \$300. Alternatively, each resident can be provided with a home water purifier at a cost of \$75 per home, at a total cost of \$450. Installing the filter at the distribution point eliminates total damages of \$600 at a cost of \$300, and represents the efficient economic solution to the externality problem by avoiding having to spend \$75 per residence for a total \$450.

Under "reform" that provides several liability only for noneconomic harm, a resident enduring pain and suffering loss

41. *See id.* at 575.

42. 752 F.2d 1019 (5th Cir. 1985).

43. *See id.* at 1029.

44. ROBIN PAUL MALLOY, *LAW AND ECONOMICS* 35-38 (1990). (Malloy acknowledges the similarity of his example to that found in A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 11-14 (1983)).

due to intestinal illness caused by the contaminated water would be unable to recover any fraction of proven noneconomic harm should one of the two arguable tortfeasors (the water district or the residential water wholesaler) be insolvent. In addition to the hardship imposed upon residents by this illness, such an approach invites several inefficiencies, not the least of which is that a several liability for noneconomic harm approach undermines the economic efficiency of the least cost avoider approach. Absent a rule of joint liability that would obligate each of two or more joint tortfeasors to at least conceptually acknowledge that their capacity to recognize and remediate the risk was superior to that of plaintiffs, the tortfeasors and the victims alike are encouraged to undertake inefficient measures.

The remaining tortfeasor that will be left answerable in damages knows at the very least that his or her liability will be for less than the entirety of plaintiff's loss, and thus has less incentive to remedy the risk than it would under conventional joint liability. The victims, in turn, recognize that should illness occur, they will potentially be able to gain reparation for only a fraction of their noneconomic harm. Consequently, they may be prompted to take measures in their own hands by, for example, adopting the inefficient course of installing filters in their individual homes.

Proceeding to a higher level of generality, the question might be put as one of whether unfettered joint and several liability can be considered wasteful. The least cost avoider approach, with the premium placed upon imposing the burden of liability upon the actor who can remedy a risk least expensively, permits the conclusion that it is wasteful to require all tortfeasors, even those minimally at fault, to comport themselves as though they may bear responsibility for the totality of a harm.⁴⁵

CONCLUSION

Both corrective justice and efficiency tenets would be better served by a solution such as that adopted in many states, and which provides for alleviation of joint and several liability when

45. See *Louisiana ex rel. Guste v. m/v Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985).

defendant's contribution to the harm is less than a defined amount, such as 50%.⁴⁶ Least cost avoider and discouragement of *post hoc* coerced transfer objectives would remain intact under such a modified approach. At the same time, the plaintiff's paramount right to compensation for proved tortious harm would not be stemmed arbitrarily at the line separating economic versus noneconomic harm, but rather at a more commonsense threshold based upon a defendant's actual contribution to the harm. The deterrence objectives of both corrective justice and efficiency would, in fact, be best served by such a modified approach, as actors anticipating conduct (including omission to act) routinely gauge planned action not upon considerations of potential liability for economic harm as opposed to noneconomic harm, but rather upon evaluation of the level at which their behavior is likely to be deemed a legal cause of plaintiff's overall harm.

Lastly, total abolition of joint liability for noneconomic harm is a more drastic remedy than is necessary to lessen the likelihood of bizarre results such as that reached in *Walt Disney Co. v. Wood*.⁴⁷ A confinement of joint liability to situations where defendant's contribution to the harm exceeds, for example, 50%, would, without more, preclude the facially unjust imposition of a liability judgment bearing no relation whatsoever to a defendant's participation in the wrongdoing.

46. See, e.g., Ark. Code Ann. § 16-64-122(C).

47. 515 So. 2d 198 (Fla. 1987).