The Reform of Joint and Several Liability Theory: A Survey of State Approaches

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I. INTRODUCTION

APPORTIONMENT OF DAMAGES between multiple tortfeasors has been the subject of much legal thought and, more significantly, recent legislative action. The most current popular movement in jurisprudence to sweep across the nation is commonly known as "tort reform."¹ Virtually each state's version of tort reform includes changes in apportioning or comparing joint tortfeasor responsibility.² This article attempts to characterize the various approaches, focusing on the responses affecting litigation involving the theory of joint and several liability. Moreover, this article includes recommendations for a model joint and several liability statute and concludes with discussions of alternatives to the current tort system.

¹ The primary purpose of this comment is not to present a discussion of the merits of tort reform or the evils of the insurance industry. This article includes numerous references to the scholarly thought on these important issues. See, e.g., infra notes 33-50 and accompanying text.

² See infra notes 63-175 for a discussion of state tort reform legislation; see also Talmadge and Petersen, In Search of a Proper Balance, 22 GONZ. L. REV. 259, 260 (1986) ("It will be no surprise when the 1986 tort reform legislation does not remedy the insurance crisis . . . . The only certainty surrounding this issue is that it emanates from multiple factors.")
II. BACKGROUND

A. The History of Damage Apportionment

The principle of fault originally governed tort and accident law. In an ordinary negligence situation, the plaintiff shouldered the burden of proof. The court required him to show that the defendant owed a duty, that the defendant breached the duty, and that the plaintiff’s injuries were the proximate result of the defendant’s breach. Beginning in the late nineteenth century, two absolute bars to plaintiff recovery in this type of scenario arose: contributory negligence and assumption of the risk.

1. Contributory Negligence

Contributory negligence became the ordinary defense to negligence cases. England first recognized contributory negligence in 1809 in Butterfield v. Forrester as a total bar to plaintiff’s recovery. By 1824, the theory had reached the United States where in various forms it be-

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4 These elements comprise the basic tort of negligence. See, e.g., Himmler v. United States, 474 F. Supp. 914 (E.D. Pa. 1979) (general rules of duty and standards in tort apply to air crashes); Oban v. Bossard, 201 Neb. 243, 267 N.W.2d 507 (1978) (action remanded when connection between defendant-pilot’s negligence and airplane crash not established as a matter of law).

5 Concurrently, and not coincidentally, the industrial revolution was occurring. Many courts may have been acting in an effort to protect growing industry. See Prosser, Comparative Negligence, 41 CALIF. L. REV. 1, 4 (1953).

6 James, Contributory Negligence, 62 YALE L.J. 691 (1953). Professor James stated that “[i]n an action based on negligence, the contributory negligence of the plaintiff is a complete defense.” Id.

7 Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). In the course of repairing his house, the defendant had left a pole obstructing the highway. The plaintiff did not see the pole in the dusk, and his horse threw and injured him. Id.


came the law in most states until the 1960's.\textsuperscript{10} The early application of contributory negligence focused on the person bringing suit. If the plaintiff was negligent in any manner, his conduct totally barred recovery.\textsuperscript{11} To determine contributory negligence, courts used the objective standard of a "reasonable person of ordinary prudence in the same or similar circumstances."\textsuperscript{12} The burden of proof belonged to the defendant.\textsuperscript{13}

The theory did not apply, however, in all situations. If the conduct involved an intentional tort, a violation of statutory law, or conduct involving a "last clear chance," the plaintiff's actions did not preclude his recovery.\textsuperscript{14} Many legal scholars, however, believed the contributory negligence rule promoted more injustice than benefit.\textsuperscript{15} Prosser stated that "[n]o one has ever succeeded in justifying [contributory negligence] as a policy, and no one ever will."\textsuperscript{16} According to Prosser, courts in the late nineteenth century used the doctrine to protect industry.\textsuperscript{17}

\textsuperscript{11} \textit{PROSSER \\& KEETON}, \textsuperscript{12} supra note 9, at § 65.
\textsuperscript{12} \textit{Vargo}, \textsuperscript{13} supra note 8, at 830.
\textsuperscript{13} \textit{PROSSER \\& KEETON}, \textsuperscript{14} supra note 9, at § 65.
\textsuperscript{14} \textit{Prosser}, \textit{Comparative Negligence}, 51 MICH. L. REV. 465, 470-71 (1953); see, e.g., Pegram v. Pinehurst Airlines, Inc., 79 N.C. App. 738, 340 S.E.2d 763 (1986) (all elements of last clear chance established by the plaintiff, including the failure of airline employees to use reasonable care).
\textsuperscript{15} See, e.g., Lambert, \textit{The Common Law is Never Finished (Comparative Negligence on the March)}, 32 AM. TRIAL LAW. J. 741 (1968) (advocates an apportionment of damages rule to ensure adequate compensation); Leffler, \textit{The Declining Defense of Contributory Negligence}, 1 ARK. L. REV. 1 (1946) (the comparative negligence doctrine is destroying contributory negligence); Lowndes, \textit{Contributory Negligence}, 22 GEO. L.J. 674 (1934). This final author states:

Unless one is willing to scrap not only the received conceptual apparatus of causation, but a basic policy beneath it, it cannot reasonably be said that the contributory negligence of the plaintiff, at least where this is foreseeable, severs the causal tie between the defendant's misconduct and the plaintiff's injury . . . . The doctrine of contributory negligence is not just.

\textit{Id.} at 678, 708.
\textsuperscript{16} \textit{Prosser}, \textit{supra} note 14, at 469.
\textsuperscript{17} Prosser stated:

Probably the true explanation lies merely in the highly individualistic attitude of the common law of the early nineteenth century. The
2. Comparative Negligence

The adoption of "comparative negligence"\textsuperscript{18} modified the harsh effects of this all or nothing rule. Under comparative negligence, the trier of fact determined the relative percentages of fault of the plaintiff and defendant, diminishing plaintiff's recovery accordingly. Thus, if the plaintiff caused twenty percent of the damages, recovery would be reduced twenty percent,\textsuperscript{19} resulting in a more precise determination of each tortfeasor's culpability.\textsuperscript{20} Some commentators, however, questioned the jury's ability to effectively apportion damages.\textsuperscript{21} Others hailed the

\textsuperscript{18} See Vargo, supra note 8, at 838. See generally Goldberg, Judicial Adoption of Comparative Fault in New Mexico: The Time is at Hand, 10 N.M.L. REV. 3 (1979) (advocating comparative fault following New Mexico Supreme Court's retention of contributory negligence); Wade, Comparative Fault in Tennessee Tort Actions: Past, Present and Future, 41 TENN. L. REV. 423 (1974) (recommending the switch to comparative fault in Tennessee).

\textsuperscript{19} Vargo, supra note 8, at 838. This is "pure" comparative fault. Another variety is called "modified," wherein the plaintiff may recover only when his percentage is less than some arbitrary statutory limit. Proponents of the latter believe it inequitable that recovery may be awarded to a plaintiff found more culpable than a defendant.

Additionally, causation may play a role in the comparative scheme. See, e.g., Dare v. Sobule, 674 P.2d 960, 962-63 (Colo. 1984) ("Comparative negligence takes into account the negligence which caused the injury and reduces damages proportionately.")

\textsuperscript{20} One court stated:

[Comparative negligence] is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent . . . . When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.


\textsuperscript{21} Professor Prosser stated:

The question is whether, upon the facts, it is possible to say that each defendant is responsible for a separate portion of the loss sustained. The distinction is one between injuries which are capable of
movement as a deterrent promoting equity and justice. A complete comparative fault scheme often included a statutory right to contribution and indemnity for defendants. Contribution allows a jointly and severally liable defendant to seek compensation from his fellow tortfeasors in an effort to redress possible overpayment. Toward this end, the defendant's liability percentage is considered the contribution limit. A contribution statute benefits the defendant and more equitably apportions responsibility among joint tortfeasors. Likewise, the concept of indemnity allows a defendant to shift the entire burden onto a companion tortfeasor. However, contribution and indemnity remain distinct concepts.

3. No-fault

During the 1960's new loss spreading concepts surfaced in American tort law, giving momentum to no-fault based systems. The common philosophy of these loss spreading concepts was that defendants, not injured parties, should absorb the loss caused by injury. Socialization of being divided, and injuries which are not . . . . Entire liability is imposed only where there is no reasonable alternative.

Prosser, Joint Torts and Several Liability, 25 CALIF. L. REV. 413, 442-43 (1937) (example omitted); see also Yancey v. Farmer, 472 So. 2d 990 (Ala. 1985) (under Alabama law damages are not apportioned; joint and several liability for the entire award).

James, supra note 6, states that "[t]he logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule [of contributory negligence]." Id. at 704.


Id.


See generally Bohlen, Contribution and Indemnity Between Tortfeasors, 21 CORNELL L.Q. 552 (1936).

Id.


See, e.g., Duncan, 665 S.W.2d at 429 (discussing policy matters in Texas).
risk was the policy force behind the development of no-fault liability. With this scheme, the court could hold the defendant liable without proof of causation. As a result the no-fault concept increased the availability of recovery for the plaintiff. Legislatures and courts used the development of no-fault liability to justify a restriction on joint and several liability twenty years later.

The crises in insurance availability and affordability motivated the movement to reform the civil justice system throughout the United States. Certainly the issue is controversial. On the one hand a coalition of insurance companies and large corporations allegedly formed a powerful political coalition promoting reform of the tort system to control escalating costs. The Reagan Administration led the fight for reform as well. In 1986 the Department of Justice Tort Policy Working Group published a report listing four problem areas which, in the

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30 Id.
31 See generally Prosser & Keeton, supra note 9, at § 98.
32 See infra notes 51-175 and accompanying text for a discussion of the treatment of joint and several liability in tort reform.
34 Compare Schreoter and Rutzick, "Tort Reform" — Being An Insurance Company Means Never Having to Say You're Sorry, 22 GonZ. L. Rev. 31, 33 (1986) ("Instead of punishing the perpetrators, who are rich and powerful, the Legislature decided it was time to punish the victims instead") with Herman, The Case for Comprehensive Federal Tort Reform, 34 Fed. B. News & J. 125 (1987) ("[The American people] are convinced that our civil justice system has broken down—and they are correct. The hard evidence backs up these instinctual reactions.")
35 Badley, Why Tort Reform Was Needed in Washington, 22 GonZ. L. Rev. 3, 5 (1986). He states that:

The coalition included corporations, government agencies, health care providers, commercial insurance companies, self-insured corporations and associations, health care provider-owner insurance companies, trust funds, small businesses, professionals, and many others. Uniting the coalition was the shared belief that expanded civil liability doctrines were hurting the public, directly by increasing insurance costs and reducing insurance availability, and indirectly by undermining the availability of goods and services.

Id. at 5.
37 Dep't of Justice, Report of the Tort Policy Working Group on the
Administration's view, have contributed significantly to the insurance dilemma.\textsuperscript{38} In addition, the report contained eight basic recommendations to "restore a sense of balance to our tort law."\textsuperscript{39} Among these were the elimination of joint and several liability in cases where the tortfeasors did not act in concert.\textsuperscript{40} The chairman of the Tort Policy Working Group himself stated that "the administration's tort reform proposals . . . have been successful in changing the terms of debate over the past year,"\textsuperscript{41} including an effort "to bring to the attention of the courts the consequences of unwieldy judgments and rulings."\textsuperscript{42}

Consumer advocates,\textsuperscript{43} on the other hand, believe that the increase in insurance rates comes not from the justice

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\item[(1)] the movement toward no-fault liability;
\item[(2)] the decline of causation leading to the deep pocket;
\item[(3)] the large damage awards, especially non-economic;
\item[(4)] the high transaction costs in the civil justice system.
\end{itemize}

\begin{itemize}
\item[(1)] return to a fault-based standard for liability;
\item[(2)] base causation findings on credible scientific evidence or opinions;
\item[(3)] limit non-economic damages, such as exemplary damages;
\item[(4)] provide for periodic damage payments;
\item[(5)] reduce awards under the collateral source rule;
\item[(6)] limit contingency fees to reduce transaction costs; and
\item[(7)] encourage the usage of alternate dispute resolution techniques.
\end{itemize}

This commentator, formerly Administrator of the National Highway Safety Administration, takes the insurance and litigation crisis head on. Her arguments against tort reform are based on five points concerning our present system:

1. It compensates injured victims.
2. It deters misconduct that may cause injury and punishes wrongdoers who inflict injury.
3. It prevents injury by removing dangerous products and practices from the marketplace.
4. It forces public disclosure of information on dangerous practices and defective products otherwise kept secret.
5. It expands public health and safety rights in a world of expanding technology.

She concludes by saying "people don't sue for damages if they aren't injured."
system, but from an insurance cycle. The lower interest rates which have prevailed in the 1980's purportedly resulted in less investment income for insurance companies. When investment income drops, the argument goes, insurance companies sharply raise premiums, or drop coverage of risky enterprises, to recoup the disparity. Competition for insurance customers increases when investment income is higher, thus premiums are lowered to attract business. The cost of insurance rises when the insurance company's capital and income are adversely impacted. Advocates of the current system believe that the unpredictability of insurance costs and tort liability helps prevent injury by creating a deterrent effect. Ralph Nader, a well known consumer advocate, stated that tort reform "is a degradation of the just norms of the common law that have elevated care, redress, deterrence, and knowledge of perils into our nation's consciousness."

A more thorough discussion of tort reform and other changes in the civil justice system is beyond the scope of this comment. Arguments for or against tort reform aside, the treatment of joint and several liability reveals an important effect of the reform movement. This comment now explores the various approaches states have taken to the reform of joint and several liability.


Id. Such an economic downturn, according to Mr. Nader, also occurred in the mid-1970's.

Id.

Id. supra note 35, at 13.

Id. supra note 36, at 13.

Id. Badley noted that insurance companies and corporate America believe that a broadening of tort liability would have a much longer lasting effect on the insurance industry than a phase of the "cycle." Id. at 14.

See Nader, supra note 44, at 21.

Id. at 29.
III. STATE LEGISLATION AND JOINT AND SEVERAL LIABILITY

A. Joint and Several Liability Defined

Joint and several liability originated as distinct theories. The first to develop was joint liability: action in concert or in conspiracy, proximately resulting in injury, making the defendants liable together for the plaintiff's damages. Over time, however, the rules of engagement became more modern, and the procedural practice of joinder caused confusion with "joint liability." When the second theory of common several liability emerged, joint liability evolved to become the joint and several liability common in present jurisprudence. Defendants classified as jointly and severally liable became liable for any portion of the total judgement. Thus the plaintiff may elect from which defendants to seek compensation — the defendants face liability together or individually. Occasionally known as the "deep pocket theory," joint and several liability may entice claimants to seek payment on a judgment from the wealthiest among the defendants.

Thus, under the theory of joint and several liability, when only one of the defendants actually causes injury and the defendant who caused the injury cannot be identified, each defendant who breached a duty of care owing to the plaintiff must prove that he or she did not proximately cause the plaintiff's injuries or face joint and several liability with his or her codefendants. Typically the defendants

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51 Prosser, supra note 21, at 414.
52 Id.
53 Id. at 420-422.
54 See Prosser & Keeton, supra note 9, at § 52. "The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes." Id.
act independently. In a well known "alternative liability" case, *Summers v. Tice*, two hunters negligently aimed and shot in the direction of the plaintiff. During trial the plaintiff could not positively identify which of the two hunters proximately caused the injury. The court held both defendants liable and did not burden the plaintiff with proving the particular guilty defendant. Even though the plaintiff could not prove which tortfeasor caused the injury, public policy dictated that the plaintiff should not be without remedy. The Restatement Second of Torts adopted this rule.

### B. Joint and Several Liability and Tort Reform Legislation

1. **States which have not acted or which have generally retained traditional joint and several liability**

For various reasons, some jurisdictions have elected not to adopt any reforms in civil justice or adopted reforms not affecting joint and several liability. Arkansas, for example, does not have a statute specifically concerning joint and several liability. Instead, a law exists in which joint tortfeasors are not released when the plaintiff seeks payment from only one. More importantly, the Arkansas Supreme Court held that defendants are jointly and sever-

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57 Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).
58 Id., 199 P.2d at 2.
59 Id.
60 Id., at 5.
61 Id., at 4.
62 Restatement (Second) of Torts § 433(B)(3) (1965). The language states: Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one of them has caused it, the burden is upon each such actor to prove that he has not caused the harm.
63 Ark. Code Ann. § 16-61-203 (Michie 1987). "Nothing in [the Contribution Act] shall be construed to effect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury . . . ." Id.
ally liable in personal injury cases. The holdings of the Arkansas courts reflect an adoption of traditional joint and several liability theory. Delaware statutes imply joint tortfeasor liability. Idaho similarly implies liability. The Idaho Supreme Court held that the legislature intended to retain the common law rule of joint and several liability. The court also did not limit liability based on proportionate fault.

Georgia has a contributory negligence statute asserting that defendants may be held either jointly or individually responsible. The Georgia Supreme Court outlined Georgia's common law notions of joint and several liability, for example, in a products liability case. As yet, the

64 See, e.g., Bill C. Harris Constr. Co., Inc. v. Powers, 262 Ark. 96, 554 S.W.2d 332 (1977). The court stated in part:

[When the negligent acts of two parties combine to produce harm they are jointly and severally liable . . . and either one may be held responsible for all . . . [Moreover,] damages for the entire injury may be recovered from all or any one of the joint tortfeasors . . . . [The injured party] may sue each separately or join them as parties defendant.

Id., 554 S.W.2d at 337 (citations omitted).
65 See, e.g., id.
68 Tucker v. Union Oil Co., 100 Idaho 590, 603 P.2d 156 (1979). The court stated "[a]t this time . . . the adoption of our comparative negligence act . . . does not require . . . [that] we find a legislative intent to so abolish joint and several liability." Id., 603 P.2d at 164.
69 Id., 603 P.2d at 164.
70 Ga. Code Ann. § 105-603 (1984). That section states "[i]f the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." Id.
71 Colt Ind. Operating Corp. v. Coleman, 246 Ga. 559, 272 S.E.2d 251 (1980). The language used by the court included:

If the separate and independent acts of negligence of two or more persons or corporations combine naturally and directly to produce a single, indivisible injury other than a nuisance, and if a rational basis does not exist for an apportionment of the resulting damages among
Georgia legislature has not entered the tort reform arena with restrictions on joint and several liability.

In Kentucky, the statute purporting to extend a right of joint and several liability originally applied only to trespass cases. Soon after its adoption, however, the Kentucky Supreme Court extended the language to include personal injuries. This is an example of the legislature and courts acting together to adapt to the needs of both the injured and the insured. For example, West Virginia follows the traditional common law doctrine of joint and several liability. West Virginia courts have likewise recognized joint and several liability through the state contribution statute.

Maine expressly retained joint and several liability through its comparative negligence statute. The Maine Supreme Court, in explaining why it held a personal injury defendant jointly and severally liable, stated "[it was] entirely clear under the law in this state" that joint and several liability applied. Massachusetts, Missis-

the various causes, then the actors are joint tortfeasors, jointly and severally liable for the full amount of plaintiff's damages.


72 KY. REV. STAT. ANN. § 454.040 (Michie/Bobbs-Merrill 1985), entitled "Trespass, joint or several damages for." This statute leaves the determination expressly to the jury. Id.


74 See, e.g., Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). The court stated that "[n]either our comparative negligence rule nor [prior case law] is designed to alter our basic law which provides for joint and several liability among joint tortfeasors after judgment." Id. at 886. The case also presents a good discussion of contribution and comparative negligence in West Virginia.

76 ME. REV. STAT. ANN. tit. 14, § 156 (1980). This statute also provides a pure comparative negligence system. Id. Moreover, each defendant has the right to request the jury, through use of special interrogatories, to separately determine percentages of fault. Id.; see also Herrick v. Theberge, 474 A.2d 870 (Me. 1984) (plaintiff's comparative fault bars recovery only if fault is at least equal to the defendant's).

77 Atherton v. Cramblemire, 140 Me. 28, 33 A.2d 303 (1943) (automobile accident case). The court stated more fully "that each wrongdoer is liable for the
sippi, Tennessee, and Wisconsin chose the same manner of definition as Maine. In 1980 the Wisconsin Supreme Court ruled that the common law theory of joint and several liability would not be abandoned. The background of the Wisconsin joint and several liability rule reveals several attempts to modify or repeal its effect. Without novel reasons, the Wisconsin Supreme Court seems unlikely to overturn precedent.

The Missouri state court system interpreted a contribution/release statute as giving plaintiffs a right to jointly and severally liable defendants. Also, the Federal District Court for the Eastern District of Missouri, in a wrongful death diversity case, found the air traffic controllers, the crew, and the airline manufacturer of a DC-9 jointly and severally liable by utilizing the contribution statute to introduce the doctrine. Maryland also recognizes joint and several liability, not by any one specific statute but rather by implication through a number of

whole amount of damage resulting from separate negligent acts which operate together to cause damage to another . . . ." Id., 33 A.2d at 303.

79 Mass. Ann. Laws ch. 231, § 85 (Law. Co-op. 1986). The statute states in part: "In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought." Id.

The Massachusetts Supreme Judicial Court has also stated that "[if] two or more are liable to an action, they are liable jointly and severally . . . ." Eckstein v. Scoffi, 299 Mass. 573, 13 N.E.2d 436, 438 (1938).

77 Miss. Code Ann. § 85-5-5 (1972) (contribution between joint tortfeasors); see, e.g., Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985) (joint tortfeasors are jointly and severally liable to the plaintiff).


80 See supra note 76 and accompanying text for a discussion of the Maine law in this area.


82 Id., 291 N.W.2d at 833-34.

83 Id., at 834-35.


This array of statutes makes the existence of joint and several liability less obvious than, for example, Michigan's legislation entitled "Pro rata shares of tortfeasors." Michigan's law states that the right of the injured person to a joint and several judgment shall not be affected from a determination of pro rata responsibilities. Moreover, Michigan courts have held that joint and several liability survived adoption of comparative negligence. Pennsylvania still recognizes the common law joint and several liability law through its Contribution Among Joint Tortfeasors Act. Pennsylvania case law supports joint and several liability as well. However, a superior court held that liability and damages are to be apportioned when acts of the original wrongdoer and negligent defendants are separate from each other.

Several states operate under the notion that a plaintiff has the right to a joint and several judgment when the plaintiff's percentage of responsibility is less than all defendants. In Oklahoma, for example, joint and several liability exists as in common law except for comparative negligence cases. Thus, the Oklahoma legislature and supreme court have not completely abolished the doctrine. An earlier version of the Oklahoma statute allowed the court to hold that multiple tortfeasors may be only severally liable if a jury can apportion fault among several

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88 See Md. Ann. Code art. 50, §§ 16-21 (1979) (statutes dealing with contribution, indemnity, and releases). The definitional section explains joint tortfeasor to mean "two or more persons jointly and severally liable . . . ." Id.
90 § 600.2925b.
defendants.97

Other states, in a similar vein, have adopted joint and several liability only when the plaintiff’s responsibility, as determined by the fact finder, is zero percent.98 These statutes reflect a modification of the traditional common law rule that the plaintiff recover nothing when he or she has contributed to the injury.99 Joint and several liability applies in basically the common law form in Minnesota.100 However, an exception exists for a municipality, which is considered jointly and severally liable only for a percentage of the whole award not exceeding twice the dollar amount of its fault.101 The legislature passed the municipality provision as an amendment to the apportionment statute in 1986.102 No other significant changes to joint and several liability passed the legislature.103 Shortly before passage of the 1986 amendments, the Minnesota Supreme Court reaffirmed the state’s support of the doctrine in an asbestosis case.104 The court noted that the comparative fault scheme retains joint and several liability.105 The public policy in Minnesota reflects a choice between placing the burden of loss “on an innocent plaintiff or on defendants who are clearly proved to have been at fault.”106 Minnesota chose the defendants.107

98 See, e.g., NEB. REV. STAT. § 25-21,185 (1985) (contributory negligence is no defense unless plaintiff’s causation is not slight).
99 See supra notes 3-27 and accompanying text for a discussion of common law rules of apportionment.
100 MINN. STAT. ANN. § 604.02 (West Supp. 1988). “When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.” Id.
101 § 604.02(1). Additional exceptions were also added by the 1988 amendments. Id.
102 See MINN. STAT. ANN. § 604.02 note (West Supp. 1988).
103 Id. § 604.02.
104 Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986). “It is a well-established rule in Minnesota that parties whose negligence concurs to cause an injury are jointly and severally liable.” Id. at 292.
105 Id. at 292.
107 Id., at 273.
2. States which enacted legislation affecting the doctrine of joint and several liability

In 1986 and 1987, the "insurance crisis" or "litigation explosion" prompted state legislatures to reform the civil justice system. The reasons and motivations for each reaction were as varied as the resulting laws. In 1986, a total of thirty five states enacted some type of tort reform. Of these, only fourteen modified or abolished the theory of joint and several liability. Three states considered but did not adopt tort reform in 1986. The following year saw additional legislative efforts, with nine more states joining the tort reform movement, all altering joint and several liability doctrines.

Most jurisdictions did not completely abandon the common law concept of joint and several liability. Instead, many lawmakers merely limited the application of joint and several liability to specific factual situations, such as litigation involving hazardous wastes or toxic tort injuries. Other states retained the doctrine for defendants acting in concert. The Arizona bill states that it abolishes joint and several liability except that (1) a defendant is responsible for the fault of another if he acted in concert; and (2) toxic torts or solid waste disposal litigation may have joint and several liability imposed.

108 See supra notes 33-50 and accompanying text for a discussion of the origins of the tort reform movement.
110 Id. at 52.
111 Id. at 52-54. This group of states was Alabama, Idaho, and Mississippi. Minnesota also made a minor change. See supra notes 101-103 and accompanying text for a discussion of this change.
112 The states making changes in 1987 were, in alphabetical order: Arizona, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, and Texas.
113 See, e.g., ARIZ. REV. STAT. ANN. § 12-2506 (Supp. 1987); HAW. REV. STAT. § 663-10.9 (Supp. 1987); ILL. ANN. STAT. ch. 110, 2-1117, 2-1118 (Smith-Hurd Supp. 1988).
114 See ARIZ. REV. STAT. ANN. § 12-2506 (Supp. 1987); N.D. CENT. CODE § 32-03.2-02 (Supp. 1987).
ant found jointly and severally liable retains a right to contribution in Arizona.\textsuperscript{116} Likewise, Hawaii abolished joint and several liability for litigation not meeting certain enumerated exceptions,\textsuperscript{117} including an exception for torts relating to aircraft accidents.\textsuperscript{118} The distinction between economic and non-economic damages prevails in Hawaii.\textsuperscript{119}

Interestingly, Florida enacted significant tort legislation in its 1986 session,\textsuperscript{120} but Florida trial lawyers and the insurance industry successfully litigated the matter to the Florida Supreme Court.\textsuperscript{121} The fate of joint and several liability was challenged on denial of access, due process, and equal protection grounds.\textsuperscript{122} The Florida Supreme Court held the joint and several liability provisions of the tort reform legislation did not violate the U.S. or Florida Constitutions.\textsuperscript{123} The court also noted the legislative policy for joint and several liability reforms reflected the belief that "the underlying basis for the doctrine no longer exists."\textsuperscript{124} The court upheld most of the remainder of the legislation, but it did rule that a $450,000 limit for non-economic damages violated the plaintiff's right to access in the courts.\textsuperscript{125}

Illinois automatically imposes joint and several liability for defendants whose fault is twenty-five percent or more

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\textsuperscript{116} ARIZ. REV. STAT. ANN. § 12-2506(E).
\textsuperscript{117} HAW. REV. STAT. § 663-10.9. The exceptions are economic damages involving personal injury or death, economic and non-economic damages involving (1) intentional torts; (2) torts relating to pollution, toxicity, and asbestos; (3) aircraft accidents; (4) strict and products liability; or (5) certain automobile accidents. Id. § 663-10.9(2)(D).
\textsuperscript{118} Id. § 663-10.9.
\textsuperscript{119} FLA. STAT. ANN. § 768.81 (West Supp. 1988).
\textsuperscript{120} Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987). This litigation presented a broadly-based challenge to the new Florida tort reform legislation. Id. at 1083.
\textsuperscript{121} Id. at 1090.
\textsuperscript{122} Id. at 1091.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 1088-89.
\end{verbatim}
of the total fault attributable to the plaintiff. A companion provision includes exceptions to this law, namely pollution torts and medical malpractice actions. The former section applies to any personal or property damage case based on negligence, strict liability, or products liability. Commentary following the statute states that the legislature passed these new rules in response to "the insurance crisis." The effect makes defendants no longer jointly and severally liable to the plaintiff for all damages. North Dakota adopted a similar law in its 1987 tort reform legislation. Defendants face only several liability unless they acted in concert or adopted actions for their own benefit. However, the coverage of this statute does not extend to products liability or other strict liability cases. The policy in North Dakota prior to this new law favored the injured party by giving him the option of waivability.

Other jurisdictions also adopted joint and several liability for tortfeasors when the liability percentages are at certain levels. The state of Alaska, in a 1986 tort reform

127 Ch. 110, § 2-1118.
128 Ch. 110, § 2-1117.
129 See ILL. ANN. STAT. ch. 110 (Smith-Hurd Supp. 1988) (Historical and Practice Notes).
130 Id. Illinois courts had followed joint and several liability for some time. See, e.g., Storen v. City of Chicago, 373 Ill. 530, 27 N.E.2d 53 (1940). Joint and several liability arose "even though there is no common duty, common design or concerted action." Id., 27 N.E.2d at 55.
131 N.D. CENT. CODE § 32-03.2-02 (Supp. 1987).
132 Id.
133 Under the statute "fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, and failure to avoid injury." Id.
134 See Bartles v. City of Williston, 276 N.W.2d 113, 122 (N.D. 1979).
135 See ALASKA STAT. § 09.17.080 (Supp. 1987) (retains joint and several liability unless defendant is less than 50% liable—then only jointly liable for up to twice his percentage in dollar terms); ILL. ANN. STAT. ch. 110, § 2-1117 (Smith-Hurd Supp. 1988) (defendant jointly and severally liable when his percentage of fault is greater than 25% for all expenses other than medical); IOWA CODE ANN. § 668.4 (West 1987) (abolishes joint and several liability when a defendant is less than 50% responsible); MINN. STAT. ANN. § 604.02 (West 1988) (joint and several liability with special rules for municipalities based on percentage of fault); TEX. CIV.
bill, requires a defendant to have liability of fifty percent or more to be jointly and severally liable. Other tortfeasors have limited joint liability. Illinois operates with a percentage for the defendant equal to twenty-five percent of the plaintiff’s fault. In Iowa, the common law rule of joint and several liability does not apply to defendants found to be less than fifty percent responsible. Prior to passage of this reform, Iowa recognized the common law rule, including comparative negligence cases.

Also common is a more strict type of several liability which holds defendants responsible only for their proportional share of causation. Colorado provides a defend-

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136 ALASKA STAT. § 09.17.080(d) (Supp. 1987).
137 Id. The statute states in part “that a party who is allocated less than 50 percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.” Id.
138 ILL. ANN. STAT. ch. 110, § 2-1117 (Smith-Hurd Supp. 1988). “Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to 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.” Id. However, defendants in actions involving medical malpractice or “the discharge into the environment of any pollutant” may still be held jointly and severally liable. Id.
139 IOWA CODE ANN. § 668.4 (West 1987). The effective date of this provision was July 1, 1984. The Iowa Supreme Court upheld this new joint and several liability law in Johnson v. Junkman, 395 N.W.2d 862 (Iowa 1986).
140 See, e.g., Kopsas v. Iowa Great Lakes Sanitary Dist. of Dickinson County, 407 N.W.2d 339 (Iowa 1987) (notes retention of joint and several liability prior to new statute); Glidden v. German, 360 N.W.2d 716, 720 (Iowa 1984) (“the plaintiff is allowed to collect the fair amount of a verdict from all tortfeasors”).
ant is only liable for the percentage of fault attributable to the particular defendant.\textsuperscript{142} Traditional joint and several liability was thus repealed in Colorado by the tort reform measure adopted in 1986.\textsuperscript{143} Nevada takes a similar approach. The Nevada legislature amended the comparative negligence statute\textsuperscript{144} in 1987 to abolish joint and several liability in all cases which do not fit into one of five particular categories.\textsuperscript{145} New Mexico abolished joint and several liability\textsuperscript{146} except for intentional torts, vicarious liability, strict products liability, and "to situations not covered by any of the foregoing and having a sound basis in public policy."\textsuperscript{147} Before the adoption of the New Mexico statute, a New Mexico Court of Appeals favored abolition of the doctrine due to inconsistency with the policies of comparative negligence.\textsuperscript{148} New York tort reform, on the other hand, provides several liability in two scenarios.\textsuperscript{149} If a defendant is fifty percent liable or less, that defendant is liable for his proportionate share, but only regarding non-economic losses.\textsuperscript{150} Presumably, a defendant remains jointly and severally liable for economic losses re-


\textsuperscript{143} Joint and several liability had been retained in Colorado even after a comparative negligence statute was adopted. \textit{See} Martinez v. Stefanich, 577 P.2d 1099 (Colo. 1978) (contains a brief view of the law in other jurisdictions).

\textsuperscript{144} \textit{Id.} § 41-141 (1987).

\textsuperscript{145} § 41.141(4)-(5). The language reads in part "except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him." \textit{Id.} § 41.141(4). The five categories where joint and several liability applies are in actions based on (1) strict liability; (2) intentional torts; (3) toxic or hazardous substance torts; (4) concerted actions; and (5) intrastate product liability. \textit{Id.} § 41.141(5). The effective date for these new laws was July 1, 1987.


\textsuperscript{147} \textit{Id.} § 41-3A-1(C).


\textsuperscript{149} \textit{N.Y. Civil Law} § 1601 (McKinney Supp. 1988). The two scenarios are when the defendants are jointly liable or in a claim against the state. \textit{Id.}
Regardless of any percentage of fault.151

Occasionally following verdict, a judgment will be uncollectible. Connecticut152 and Minnesota153 will both allow a reallocation according to the original percentages within a specified time in an uncollectible situation. Thus if a defendant was originally twenty percent at fault, he or she will be forced to pay twenty percent of the amount which a codefendant cannot pay. This conceivably benefits the plaintiff faced with a potentially uncollectible damage award.

The 117th General Assembly of Ohio passed a broadly-based tort reform bill in October 1987.154 A significant portion of the bill abolished joint and several liability for non-economic losses.155 Defendants remain subject to joint and several liability for economic losses.156 The new reforms apply, however, only if contributory negligence or implied assumption of the risk has been successfully asserted against the claimant.157 In 1986, the state of Washington also passed sweeping tort reform.158 In fault actions, defendants face several liability unless the trier of
fact determines the plaintiff has no fault. Defendants are jointly and severally liable in this situation. Oregon and New Jersey also enacted reforms in 1987. Oregon provides several liability for non-economic damages and for other occasions when the defendant's percentage of fault is less than fifteen percent or less than the plaintiff's. The Senate Judiciary Committee Statement explains the New Jersey changes.

In California, the state known for its innovations, voters approved a referendum commonly known as Proposition 51 on June 3, 1986, reflecting popular desire to modify tort law in that state. Proposition 51 abolishes joint and several liability, but only for non-economic damages. California courts have been busy interpreting the

160 Id. However the statute also states "[a] party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party." § 4.22.070(1)(a).
163 § 18.485(2).
164 § 18.485(3), (4).

This bill modifies "joint and several liability" so that only a defendant determined to be 60% or more responsible for damages would be liable for the total amount of the award. A defendant found to be more than 20% but less than 60% responsible for the damages would be responsible for the total amount of any economic loss but only that percentage of the noneconomic loss directly attributable to his negligence. A defendant found to be 20% or less responsible for the damages would be liable only for the percentage of the award directly attributable to his negligence. This modification would not be applicable to cases involving environmental torts where a plaintiff could still recover the full award from any defendant found liable.

Id.

166 Cal. Civ. Code § 1431.2 (West Supp. 1988). This statute was "added by § 4 of Initiative Measure, approved by the People, June 3, 1986." Id.
168 Kelley, supra note 109, at 52. Moreover, the new California statute states in part:

In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of
provisions of Proposition 51, including its retroactive effects. California law had been the bellwether for the retention of joint and several liability following adoption of comparative negligence.

The Texas tort reform legislation, passed in a Special Legislative Session, is one of the most complex and all-encompassing of any activity to date. This bill addressed frivolous pleadings and claims, comparative responsibility (including amount of recovery, joint liability, etc.), contribution, exemplary damages, liability of drug manufacturers and sellers, governmental liability, and prejudgment interest. As part of the comparative responsibility legislation, the legislature amended the rules of joint and several liability so that a defendant is liable only for his percentage of responsibility unless found specifically jointly and severally liable. The statute continues by expressly enumerating the areas where joint and several liability is retained. These areas include (1) where the claimant is zero percent liable and the defendant is more than ten percent liable; or (2) where the percentage of responsibility of the defendant is greater than twenty percent, and in a negligence action, the defendant is more responsible than the claimant; or (3) a defendant is also jointly and severally liable if the injuries or death are

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American Motorcycle Assn. v. Superior Court of Los Angeles, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978) (diminish amount the defendants pay by the plaintiff's own percentage only; joint and several liability is compatible).

See 1987 Tex Gen. Laws ch. 2 (First Called Session).

Id.


§ 33.013(a)-(c).
caused by a toxic tort.\textsuperscript{175}

3. The consequences of eliminating joint and several liability

Ralph Nader and several legal commentators\textsuperscript{176} state that abolition of joint and several liability harms the injured person because if a responsible defendant cannot pay, plaintiff's recovery is reduced.\textsuperscript{177} He notes also that common law "has long recognized that it is fairer [sic] to allow an innocent victim to fully and promptly recover for injuries suffered, and let the wrongdoers decide among themselves, after the victim is compensated, how to apportion the liability."\textsuperscript{178} Some commentators believe that insurance rates and transaction costs will actually increase with elimination of joint and several liability.\textsuperscript{179}

However, other commentators point out that predictability is an absolute must if insurance costs are to ever be controlled.\textsuperscript{180} When potential liability can be assessed with foresight, risks can be minimized with effective use of insurance.\textsuperscript{181} The curtailment of joint and several liability is widely recognized as an effective way to bring back a measure of predictability and reliability to tort lawsuits.\textsuperscript{182} Public sector defendants in particular have a significant concern for decreasing their liability. Public entities are often required to pay entire judgments, even though their respective liability may only be minor.\textsuperscript{183} This deep

\textsuperscript{175} Id.
\textsuperscript{176} See, e.g., Phillips, Future Implications of the National Tort Reform Movement, 22 Gonz. L. Rev. 277, 284-285 (1986). This commentator calls the idea regressive because she believes it will trench substantially on vital consumer interests without conferring apparent corresponding social benefits.
\textsuperscript{177} Nader, supra note 44, at 16.
\textsuperscript{178} Id. at n.8.
\textsuperscript{179} Id.; see also Talmadge and Petersen, supra note 2, at 264-65 (will require unnecessary impleading of parties and cause more proceedings and longer delays).
\textsuperscript{180} Badley, supra note 35, at 12.
\textsuperscript{181} Id. at 11-12.
\textsuperscript{182} See Willard, supra note 36, at 118. The Reagan Administration’s Tort Policy Working Committee recommended the elimination of joint and several liability (in all situations except where tortfeasors have acted in concert) as part of its comprehensive reforms. Id.
\textsuperscript{183} See Granelli, The Attack on Joint and Several Liability, 71 A.B.A. J. 61 (July,
pocket recovery affects all people through increased taxes and/or decreased public services.

Thus, the justifications for modification of joint and several liability theory mirror those for the basic tort reform movement. Of particular concern will be the effect on large tort litigation. For example, in the toxic tort area, joint and several liability rules may still be in effect. In ordinary negligence suits, such as car or airline accidents, the new rules might apply. For those states which have not submitted to the political pressures of the tort reform movement, or for those which have submitted but desire to make "technical corrections," which combination is the most effective for modification of the joint and several liability theory?

IV. A Model Statute for Effective Utilization of Joint and Several Liability Theory

A. Characteristic of the Model Statute

As stated earlier, the theory of joint and several liability can be defined simply as a doctrine which allows a claimant, or judgment creditor, to seek collection of a judgment from his choice of the defendants, or judgment debtors. Such an all or-nothing rule cannot, however, exist in modern society without limitation. The "best" or "model" statute therefore starts with the common law notions of joint and several liability as defined and simply restricts its applicability. It is in the nature of these re-

1985). However, President Habush of the Association of Trial Lawyers states: "Isn't it unfair that a defendant who is one percent liable has to pick up the tab for an entire award, because the other defendants are broke? I say to that: Yes, that would be unfair. But show me a case — show me one case — where that has happened." Habush, The Tort System Under Fire: Don't Fix What Ain't Broke, 34 Fed. B. News & J. 119, 123 (1987).

See supra notes 33-50 and accompanying text.

See Harris, supra note 158, for a discussion of the ramifications of eliminating joint and several liability as seen through the mind of a Washington state lawyer.

See supra notes 51-62 and accompanying text.
strictions where the tough legislative decisions need to be made.

Concerted or conspiratorial action by defendants should be first enumerated for application of joint and several liability. If acting in concert, tortfeasors should be held jointly to pay the judgment, or if the claimant wishes, held severally to pay on demand. The underlying policy basis, of course, is fairness. The burden of injury should fall on those responsible, not on those injured in a concerted action.

A second application of joint and several liability arises when the plaintiff is not at fault, in other words, the claimant's percentage of responsibility is zero.\textsuperscript{187} In practical terms, there would be a distinction between a defendant merely being liable for his own percentage of responsibility and a defendant being liable jointly for the entire amount when the plaintiff is not at fault.\textsuperscript{188} The "fairness" rationale has greater justification where the fact finder has determined the plaintiff did not contribute to his own injuries. When the claimant does not in any manner contribute to his own injuries, he should be free to seek payment of his adjudicated damages from any liable "deep pocket".

Third, the model statute would apply joint and several liability for defendants guilty of intentional torts.\textsuperscript{189} Because of the prerequisite state of mind of the guilty defendant, culpability commands and supports application of the joint and several liability theory. Such an application cannot easily be enumerated as against policy. Indeed, usage of the theory in an intentional tort situation


\textsuperscript{188} This distinction is a policy driven desire to provide an injured nonliable party in such circumstances a damage award at the expense of a defendant forced to pay more than his or her own percentage.

\textsuperscript{189} Intentional torts can be defined as acts by a defendant having a state of mind which includes the consequences of the acts or omissions. See generally Prosser & Keeton, supra note 9, at § 8.
may balance the goals of compensation of the injured and reaffirmation of society's standards regarding intentional torts.

Finally, in the model statute joint and several liability should be applied in toxic torts or those tortious acts involving hazardous substances. Hawaii, for example, has such an exception.\(^{190}\) Toxic torts will clearly be a major player in litigation throughout the remainder of the twentieth century.\(^{191}\) Due to the nature and extent of hazardous waste ramifications, a greater degree of liability is warranted. A plaintiff suffering injuries in this manner should have the opportunity to seek payment from his choice of culpable defendants.\(^{192}\)

**B. A Model Joint and Several Liability Statute**

(1) Title

Rules for Determining Comparative Responsibility

(2) Introductory Statement

In an effort to address the concerns of the public as to the availability and cost of insurance, to address the concerns of public and private entities concerning unpredictable and increasing liability risks, to continue meaningful redress to individuals who become victims of injuries, and to restore faith in this State's civil justice system, we the [Nth Legislature] of the [State of ] do enact the following:

(3) Definitions

a. "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervenor, seeking recovery of damages. In an action in

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192 However, some limits such as a minimum percentage of responsibility would be an appropriate step to prevent a defendant three percent responsible from having to pay the entire amount. This limitation is reconcilable with the strong policy arguments outlined in the text by considering a balancing of the conflicting interests involved.
which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.\footnote{Definition borrowed from \textit{TEX. CIV. PRAC. \\& REM. CODE ANN.} § 9.001(1) (Vernon Supp. 1988).}

b. "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.\footnote{\textsection 9.001(2).}

c. "Percentage of responsibility" means that percentage attributed by the trier of fact to each claimant, each defendant, or each settling person with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.\footnote{\textsection 33.011(4).}

(4) Determination of Percentage of Responsibility

1. The trier of fact, as to each claim being asserted, shall determine the percentage of responsibility of each of the following entities or persons:
   (a) each claimant;
   (b) each defendant; and
   (c) each settling person.\footnote{Four issues exist in partial settlement cases: 1. Whether the non-settling defendant should receive a credit that will reduce the claimant's award against him. If he does, the type of credit he will receive; 2. Whether the settling defendant is discharged from all future liability for contribution; 3. Whether the settling defendant's right to seek contribution from a non-settling defendant survives the settlement. If it survives, the manner of determining the gross amount that the later contribution action will apportion; 4. Whether either the settling defendant or non-settling defendant retains the right to assert a vicarious liability claim, or other type indemnity claim, against the other. Harris, \textit{supra} note 158, at 69. Settlement should be addressed by statutory law}
2. If the claimant is not otherwise barred from recovery, the court shall reduce the amount of damages to be awarded to the claimant, with respect to each claim, by the percentage of the claimant's responsibility as determined in part 1 for that claim.

3. If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be awarded to the claimant, with respect to each claim, by the sum of the dollar amounts of all settlements.

4. A defendant is liable only for the percentage of the damages found by the trier of fact equal that defendant's percentage of responsibility. However, each defendant is jointly and severally liable if:
   (a) the percentage of responsibility attributed to the claimant by the trier of fact is zero percent;
   (b) the claimant's personal injury, property damage, or death is caused by any hazardous or harmful substance known as a "toxic tort." This includes, but is not limited to, depositing, discharging, or releasing hazardous chemicals, hazardous wastes, hazardous hydrocarbons, hazardous radiation substances, or any similarly harmful substance;
   (c) the defendant is guilty of an "intentional tort;" or
   (d) the defendants and/or settling parties acted in concert or in a conspiracy.

separately from joint and several liability. Settlement is beyond the scope of this comment.

197 Having a percentage of responsibility determined by the trier of fact exceeding the state's contributory or comparative negligence statute (typically 50% or greater than all the defendants) may bar the claimant.

198 This section is the reason for requiring the trier of fact to determine the percentages of each settling party.


200 Thus where the claimant is not found to be at fault in any degree the defendants are jointly and severally liable for the entire amount. See Phillips, supra note 176, at 290.

201 See supra notes 190-192 for a discussion of toxic torts.

202 For a definition of "intentional tort", see supra note 189 and accompanying text.

203 See also Phillips, supra note 176, at 290.
5. This section does not create a claim or cause of action.

V. Conclusions

“No tort system can completely harmonize the three principal systemic goals of promoting full recovery by claimants, encouraging settlements, and enforcing a proportionate sharing of losses among all responsible parties.”204 The commentator who espoused this rather pessimistic view may in fact be correct. Following examination of the state laws on joint and several liability, the policy reasons behind each nuance of the laws, and the political and economic ramifications which follow, this comment proposes a model statute to meet each goal as closely as possible. Nevertheless, such a task is clearly formidable.205

Because no state or federal legislative body has been able to design an efficient, goal-meeting solution, one then asks if the problems, widely discussed and acknowledged, are being treated with inadequate solutions. Could the “crisis” or “explosion” be caused by something other than the insurance industry and plaintiff’s bar? Could there perhaps be problems with the tort system itself which go beyond any mention of joint and several liability?

Systemic alternatives to the tort system are certainly nothing novel. For example, arbitration systems are common, even mandatory, in some situations.206 The policy behind this type of alternative dispute resolution is typically to reduce caseloads and court costs, enhancing the

204 Harris, supra note 158, at 72.
205 See generally Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986) (a discussion of the current status of caseloads, costs, and benefits of litigation today). This commentator states in part: “we should take America’s variform and changing patterns of litigation as a challenge to explore the central and distinctive features of this society.” Id. at 39.
speed of injured party redress. The Washington state scheme, for example, "has proven to be an equitable, less expensive, and faster means to resolve civil disputes while reducing court congestion, court costs in case processing, and litigants' cost." Obviously some classes of cases will not lend themselves to adequate resolution through arbitration. Additionally, courts, through local rules, may require settlement, discovery, or pre-trial, conferences, usually mandated in an effort to promote settlement. Settlement, of course, is said to promote justice by decreasing transaction costs and time. However, if one joint tortfeasor settles, how is the remaining joint tortfeasor's liability effected? The central question resurfaces as a systemic problem with the tort method. Is the real cause for alarm among tort reform advocates, such as insurance companies and business enterprises who seek to limit the proportioning of liability, the structure and goals of tort jurisprudence?

A systematic review of the tort institutional structure in an effort to equitably and efficiently apportion losses should begin immediately. On the one hand, a full-blown joint and several liability rule ensures the claimant will be fully compensated for any injuries suffered, although at the possible unfair expense of a defendant. On the other hand, a half-hearted, somewhat compromise attempt may not adequately compensate the plaintiff and still cause in-

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207 See Talmadge and Petersen, supra note 2, at 269.
208 Id.
209 See, e.g., FED. R. CIV. P. 16 (Pre-trial conferences and orders). The Federal Rules, of course, have been the model for numerous state procedural systems.
equity to the defendant. Thus, one influential commentator states:

The systemic critics believe that the social welfare goals of enterprise liability can best be achieved by scrapping the tort system in favor of one or more alternative institutions such as contract, no-fault liability (on the workers' compensation model), private first-party loss insurance, or government social insurance programs. Others would radically modify the private law tort system through measures to simplify and reduce litigation, or expand use of class action procedures, to transform private tort law into a fundamentally different "public law" system.\footnote{Stewart, Crisis in Tort Law? The Institutional Perspective, 54 U. CHI. L. REV. 184, 185 (1987). Mr. Stewart is the Byrne Professor of Administrative Law at Harvard University School of Law. During 1986-87, Professor Stewart served on the faculty of the University of Chicago School of Law, widely known for its espousal of the market driven approach to social justice.}

Because many courts have recently adopted enterprise liability\footnote{Enterprise liability is considered a risk device. Business enterprises, when faced with increasing liability and insurance costs, will pass along these costs to the consumer through higher prices. Likewise, the higher costs will reduce consumer demand, thus decreasing the number of injuries and corresponding costs to society. \textit{Id.} at 186.} in lieu of the fault approach,\footnote{\"[T]ort law has become a system of compulsory insurance that converts the risk of a large loss to a few individuals into a small surcharge borne by each consumer of the goods and services that the enterprise produces. This system asserts the costs of risk bearing and in so doing increases social welfare.\" \textit{Id.} at 187.} the tort system in its traditional role cannot adequately address the needs of the public and insurance societies. The resulting overreaching creates increased transaction costs,\footnote{Transaction and administrative costs increase in large measure due to the shift to third-party insurance. The underlying incorrect assumption here is that enterprises are better insurers. \textit{Id.} at 188.} making insurance rates prohibitive for business, particularly small businesses and closely held corporations.\footnote{The vast awards of punitive damages and other non-economic awards has caused consumers to purchase more insurance than they would probably voluntarily choose, thus enhancing administrative costs. \textit{Id.}} Thus the deterrence effect becomes significantly overblown, rendering an equitable apportionment of losses impracticable and unnecessary. Ironically, judicial expansions of tort lia-
bility has not realistically promoted the sociological goals behind its purpose.

The tort system contains important strengths as a social and economic policy institution. A major drawback to the system, however, is the lack of adequate measures to effectively (1) apportion losses among joint tortfeasors, and (2) allocate the costs of deterrence in society. The proper solution, therefore, must include the positive features of the current institution but also effective mechanisms to apportion and deter. It is in this manner that the "crisis" in tort and accident law, and thus in joint and several liability, must be ultimately addressed. The proposed model statute coupled with explorations into revolutionary private tort law systems should be the first step towards a long-term solution.
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