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Understanding Joint and Several Liability

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UNDERSTANDING JOINT AND SEVERAL LIABILITY

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The common law doctrine of joint and several liability applies when more than one defendant tortiously contributed to the plaintiff's injury. The doctrine allows the plaintiff to recover the full amount of the damages arising from the injury (reduced by his comparative responsibility for the injury if he was negligent) from any one or any combination of the defendants who tortiously caused the injury, but he cannot recover in the aggregate more than the full amount of damages.¹

One of the primary goals of defendants' lobbying groups during the insurance crisis of the mid-1980s was the legislative repeal of the common law doctrine of joint and several liability and its replacement by so-called "several" (proportionate) liability.² Under proportionate several liability, each tortfeasor is liable only for a portion of the plaintiff's damages. The portion corresponds to the tortfeasor's percentage of comparative responsibility, which is calculated by comparing the tortfeasor's causal negligence or other tortious conduct with the tortious conduct of the other contributing tortfeasors and the contributory negligence, if any, of the plaintiff.³

Tremendous political pressure was exerted against state legislatures in the attempt to replace joint and several liability with proportionate several liability. The results have been extremely varied and have introduced (along with other liability-limiting "tort reform" measures) a major amount of nonuniformity into what was previously a fairly uniform tort law throughout the United States.

As of 1988, eight states had replaced joint and several liability with proportionate several liability in almost all tort actions. At the other end of the spectrum, 15 states and the District of Columbia had made no changes in the doctrine. The rest of the states had adopted a wide variety of intermediate positions. A few states shift to proportionate several liability only for actions against certain types of defendants. Other states use proportionate several

liability only if the plaintiff was contributorily negligent, or only for a plaintiff whose contributory negligence was less than the tortfeasor's, or only for a tortfeasor whose comparative responsibility was less than a certain percentage. Some states apply proportionate several liability only to noneconomic damages. Some states put a cap or limit on the tortfeasor's joint and several liability. Other states reallocate any uncollectible shares attributable to unreachable or insolvent tortfeasors among all the responsible parties, including the plaintiff if the plaintiff was negligent. Some states combine these various approaches. Most states which replaced, limited, or modified the doctrine of joint and several liability made exceptions for certain types of actions. Some of the statutes are riddled with exceptions.⁴

I have argued elsewhere that the recent widespread, but highly divergent, legislative action on joint and several liability is attributable to two factors: (1) the general lack of understanding of the doctrine of joint and several liability on the part of state legislators (including many of its defenders as well as its critics); and (2) the perceived need to do something, whether or not it was justified, to relieve the tremendous political pressure generated by defendants' lobbying organizations during the insurance crisis.⁵

Illinois is no exception. These two factors clearly underlaid the Illinois legislature's modification of the doctrine of joint and several liability in 1986. Now that the political pressure has significantly declined, it may be an appropriate time to evaluate the Illinois statute with a better understanding of the history, rationale, and consequences of the joint and several liability doctrine.

The Illinois Statute

Section 2-1117 of the Illinois Code of Civil Procedure, enacted in 1986 as part of the Illinois legislature's omnibus act related to the insurance crisis, provides that, in most tort

actions, any tortfeasor whose percentage of comparative responsibility is less than 25 percent will be only proportionately liable for the nonmedical expenses arising from the plaintiff's injury:

[I]n actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose [comparative] fault . . . is less than 25% . . . shall be severally liable for all other damages. Any defendant whose [comparative] fault . . . is 25% or greater . . . shall be jointly and severally liable for all other damages.⁶

Section 2-1117 preserves joint and several liability, regardless of the tortfeasor's percentage of comparative responsibility, not only explicitly for all medical expenses, but also implicitly for all intentional tort actions, all traditional strict liability actions (e.g., for nuisances and ultrahazardous activities), and all negligence actions not based on physical injury to person or property. In addition, section 2-1118 explicitly preserves joint and several liability, regardless of the tortfeasor's percentage of comparative responsibility, in any medical malpractice action based on negligence, and for all damages caused by a discharge into the environment of any pollutant (broadly defined).⁷

The Arguments Against Joint And Several Liability

The major arguments raised against the joint and several liability doctrine have been that: (1) it requires a tortfeasor to pay for more damages than she tortiously caused or for which she was responsible and therefore makes her responsible for others' actions in addition to her own; (2) it is applied to "deep pocket" defendants who "have done nothing wrong" and who thus are required to provide "social insurance" for others' wrongful behavior; (3) it is a recent and unjustified judicial departure from the common law, which imposed full liability for the injury on each tortfeasor only when the tortfeasors acted in concert; and (4) it is inconsistent with modern regimes of comparative responsibility.⁸

1. Liability in Excess of Responsibility?

The most powerful, and hence most frequently asserted, argument against the joint and several liability doctrine is that the doctrine results in a tortfeasor being held liable for more damages than she tortiously caused or for which she was responsible and therefore makes her responsible for others' actions in

addition to her own.⁹ In Illinois, as in other states, this was the oft-repeated core argument raised against the doctrine by its critics.

For example, in the Senate debate on S.B. 2263 (a predecessor to the bill, S.B. 1200, that was eventually enacted), Senator Rupp argued:

[I] have been adjudged to be . . . six percent at fault and yet . . . I could be called on to pay not only what I have been adjudged responsible for but the main one, the highest percentage.¹⁰

Senator Barkhausen queried:

[S]hould a defendant have an obligation to pay proportionately more than that defendant is found to be at fault and is . . . obligated to pay by a judge or jury. As a matter of simple justice, the answer to that proposition would seem to be no. If I am injured, yes, I may be looking for someone against whom I might recover but, indeed, should I be able to recover against . . . an individual or an organization who is not at fault; again, I say the answer should be no.¹¹

Senator Watson noted "the injustice [that occurs when] someone can be one percent liable and . . . end up being a hundred percent responsible for the award."¹² Senator Schuneman objected that S.B. 1200 would only protect defendants from joint and several liability who were "less than 25 percent liable."¹³

Similarly, in the House debate on S.B. 1200, Representative Regan argued:

[T]ort law simply means if you do damage to someone . . . , you must pay for that and I totally agree with that. . . . Hey, [but] only if you are at fault. . . . [Under this provision,] [m]edical bills have to be paid 100 percent by the person that's not at fault or that maybe he's five percent at fault. . . . [W]hy should an innocent party pay for an injury that they didn't have much to do with?¹⁴

[P]art of [the judge's or jury's decision] assesses fault and part of it assesses a total amount of damages. . . . So why should we be willing to just push aside one section of that decision and say that you have to . . . because you have the money pay for my share of the loss that I cannot cover?¹⁵

Moreover, as in almost every other state where the issue was debated, the defenders of joint and several liability for the most part seemed to assume that the critics' account of joint and several liability was correct. For example, Representative Greiman, the sponsor of S.B. 1200, defended it against attempts to enact more extensive inroads on the joint and several liability doctrine as follows:

[J]oint and several liability . . . means that if you are one percent negligent, you must pay the entire judgment. . . . We have changed that. We have heard from . . . people all across the state that we are concerned that we are minimally liable, five, 10 percent liable, 15 percent liable, and we're stuck for the whole thing. So we have said that there should be a threshold. If you are 25 percent liable, you are so much involved with causing that accident . . . that you should respond in damages for the entire amount. But if you are less than 25 percent, then you should pay only your share. . . . The minimally liable are no longer liable for any more than their share. Those people only who have a significant part of the liability will remain [jointly and severally] liable.¹⁶

Similarly, Representative Homer argued:

There is a substantial modification of current law by establishing a 25 percent threshold to say that any defendant less [than] 25 percent responsible and less than one-fourth of the responsibility will be afforded substantial protection with regard to nonmedical losses.¹⁷

Senator Berman, the principal defender of the joint and several liability doctrine in the Senate, defended a proposal to extend proportionate several liability only to tortfeasors whose comparative responsibility was less than the plaintiff's as follows:

[I]t has been the social policy decision of the courts . . . that when a person who has been injured is entitled to compensation that they should go away with all of their compensation, and the people that contributed to some extent to that injury shall bear the cost of that injury. . . . [I]t is better that the people that were at fault should pay the plaintiff rather than the plaintiff should go home with less than [he is] entitled to. That's the whole theory behind joint and several liability. Now this amendment says that in weighing those types of policy decisions we're going to modify it somewhat. . . . [T]he person who is liable less than the plaintiff won't have to pay more than what he is responsible for.¹⁸

If, as is assumed in all of these statements, joint and several liability actually resulted in a tortfeasor's being held liable for more than she tortiously caused or for which she was responsible, or held her liable for the actions of others rather than her own actions, it indeed would be unjust.

However, the premise is false. Joint and several liability only applies to injuries for which the tortfeasor herself is fully responsible. She is responsible for the entirety of some injury only if her tortious behavior was an actual and proximate cause of the entire injury. She is not liable for injuries, including separable portions of injuries, to which she did not contribute. She is not liable unless the tortious

aspect of her conduct was an actual cause of the injury. Moreover, even then, she is not liable if, for reasons of policy or principle, her connection to the injury is considered too remote or minimal to be "proximate."¹⁹

A tortfeasor's full responsibility for an injury is not diminished if some other person's tortious behavior also was an actual and proximate cause of the entire injury; rather the second tortfeasor also is fully responsible for the entire injury. Neither tortfeasor is merely "50 percent negligent" or "50 percent responsible" (assuming equal fault). Such statements make as much sense as saying that someone is "50 percent pregnant." Rather, each tortfeasor, having tortiously caused the entire injury, is 100 percent negligent and 100 percent responsible.

If one of the tortfeasors pays all the damages, she has an equitable restitutionary claim against the other tortfeasor for contribution (reimbursement for 50 percent of the damages), based on the other's comparative responsibility. If she cannot obtain contribution from him because he is insolvent or otherwise unreachable, this does not mean that she is being held liable for more than she tortiously caused, for more than she is responsible, for the other's tortious actions, or for his portion of the damages. Whether or not she can obtain contribution, she is liable to the plaintiff for the full amount of the damages that she tortiously caused. Her paying all the damages fulfills her own responsibility to the plaintiff; it is not a shifting to her of the insolvent tortfeasor's responsibility.

Her bearing all the damages indeed is unfair, but only in the context of her equitable restitutionary claim against the other tortfeasor for contribution, which is secondary to the plaintiff's independent corrective-justice claim against each tortfeasor for full compensation for the injury that each of them tortiously caused. This remains true even if there were 99 other tortfeasors, each equally culpable yet insolvent. Although her comparative responsibility would be "minimal" (one percent), she continues to be *fully* (100 percent) responsible to the plaintiff. Otherwise, victims would be subject to a perverse "tortfest," in which the more tortfeasors there were, the less the victim could recover from any particular tortfeasor, even though each tortfeasor was a tortious cause of the victim's entire injury.

Each tortfeasor's independent full responsibility for the injury is most obvious when her tortious behavior was either necessary or independently sufficient for the occurrence of the injury. If it was necessary for the occurrence of the injury, then the plaintiff would not have suffered the injury at all if not for the tortfeasor's tortious behavior. If it was independently sufficient for the occurrence of the injury, then the tortfeasor's tortious behavior was sufficient to produce the plaintiff's injury regardless of the other tortfeasors' involvement. In either case, as the courts consistently have held, the tortfeasor clearly was a tortious cause of the plaintiff's entire injury and therefore is responsible for the entire injury.²⁰

The courts have had more difficulty with those cases, typically pollution cases, in which the defendant's tortious behavior was neither necessary nor independently sufficient for the plaintiff's injury, but nevertheless clearly contributed to the injury. Consider a hypothetical in which three units of pollution are sufficient for the occurrence of the injury, and each of four tortfeasors simultaneously contributed one unit of pollution. Each tortfeasor's unit of pollution was a cause of (contributed to) the entire injury.²¹ If there had been only three polluters, each of them would have been fully responsible as a necessary cause of the injury. There is no apparent reason why this full responsibility should be reduced to responsibility for only a fraction of the injury merely because a duplicative unit of pollution has been added by a fourth tortfeasor.

Yet some courts have been reluctant to impose liability for the entire injury upon a single polluter in these circumstances. They have treated the injury as being theoretically separable, even when it is not, to justify a shift to proportionate several liability. Other courts, recognizing the single, indivisible nature of the injury, have adhered to joint and several liability.²²

It has been suggested that the reluctance of the first group of courts was due to the then-existing rule which did not allow a tortfeasor who paid for the injury to obtain contribution from the other tortfeasors.²³ When the tortfeasor was neither a necessary nor an independently sufficient cause of the injury, the unfairness of imposing liability for the entire injury upon her, with no ability to seek contribution from the other tortfeasors, seems most

pronounced. Yet, as noted above, this is an unfairness in terms of the equitable restitutionary claims among the tortfeasors themselves, an unfairness for which the injured plaintiff is not responsible, and an unfairness secondary to the injured plaintiff's corrective-justice claim against each defendant who tortiously caused his injury.

In any event, if the no-contribution rule was the source of some courts' reluctance to impose joint and several liability in the pollution cases, that reluctance should be substantially diminished when, as is true in most jurisdictions (including Illinois) today, contribution is permitted based on the tortfeasors' comparative responsibility. This appears to be the case. Indeed, in an ironic reversal of prior doctrine, two of the most frequent exceptions in the statutes eliminating, limiting, or modifying joint and several liability have been the exceptions for cases involving environmental pollution or toxic substances.²⁴

As noted above, the Illinois statute contains such an exception.²⁵ In this context, at least, the Illinois legislators recognized the perverse "tortfest" that could occur if each tortfeasor's liability could be lowered simply by adding additional duplicative tortfeasors. As Representative Greiman, the sponsor of the Illinois statute, explained: "For environmental cases, because so often there are hundreds of defendants that may, in fact, cause an environmental danger, joint and several liability remains."²⁶

With only one exception, the defenders of the joint and several liability doctrine in the Illinois legislature failed to counter the critics' argument that the doctrine results in tortfeasors' being held liable in excess of their respective responsibility for the injury. Instead, there were only a few oblique, vague references to the fact that each defendant who is held jointly and severally liable was a tortious, proximate cause of the injury.²⁷

Senator Berman at one point argued that, in a hypothetical involving two negligently driven automobiles that collided and caused injury to a pedestrian, the driver who was "twenty-five percent at fault" should be fully liable because "[i]f that car hadn't been in the intersection . . . , [the pedestrian] would not have been injured."²⁸ But he apparently failed to grasp the full import of this argument, since he immediately proceeded to return to his

principal argument based on loss spreading rather than responsibility:

You're only debating here as to whether somebody who is responsible should pay more than their share. . . . [Should] the person who was hurt and [has] not contributed to his injury . . . bear the loss or should the person that contributed to the injury pay more than their loss? And there's arguments on both sides. I suggest to you the more socially acceptable policy, the more humane policy, the policy that spreads the risks and saves . . . the taxpayers an awful lot of money because . . . if the plaintiff is not made whole, it winds up on public aid and other types of taxpayer funded programs [is that the] person that has contributed to that injury should be the one that pays along with others that have contributed to that injury.²⁹

Given the fact that the defenders of joint and several liability in the Senate were themselves confused about, or at least failed to clearly articulate, the full responsibility of each tortfeasor given her tortious causation of the plaintiff's entire injury, it is not surprising that the critics failed to grasp this point, and that the Senate voted at one point to completely eliminate joint and several liability.³⁰ Senator Rupp responded to the few oblique references to the proximate causation argument as follows:

. . . I think we heard mentioned here proximate cause and . . . the inference was that . . . those who have the higher percentage of fault basically bear the proximate cause label too. . . . I also believe that if I were just a one or two percent fault [defendant], I am also part of the proximate cause. So, the argument about proximate cause, I think, does not carry too much weight.³¹

The only legislator who explicitly and unambiguously countered the partial responsibility argument of the critics was Representative McPike. At the very close of the debate on S.B. 1200 in the House of Representatives, he discussed a few of the cases or hypotheticals that had figured prominently in the statewide debate on the issue. One involved a speeding driver whose car hit an uncovered manhole, broke its axle, crossed the street, and injured a pedestrian. Representative McPike explained:

Now, when you go to court you have to prove that the proximate cause of this pedestrian being crippled . . . was the driver who was speeding and the city who was negligent enough to leave the cover off a manhole. The jury doesn't say that one or the other is partially guilty, the jury says, "You're innocent," or it says, "You're guilty." And in this case the city is obviously guilty. If the manhole cover hadn't been left off, the speeding driver wouldn't have crashed into it and

broke his axle and crippled a pedestrian. . . . [A]nd what do [the critics of joint and several liability] say? "But don't worry if she can collect, worry about the city. Worry about their tax bills." Joint and several liability is a fair system.³²

Yet even Representative McPike faltered on another commonly used example: one in which a drunk driver runs a stop sign that is partially concealed by untrimmed foliage, or is twisted or tilted so that it is less likely to be seen, and the drunk driver runs into another car or a pedestrian.³³ Representative McPike stated:

The park districts, the cities, they're concerned because they're really not liable. . . . [They say], "We're a passive tortfeasor. We were drug into the case by the tip of our tail. We really didn't do anything wrong. And the truth of the matter is, but for us, this accident would have happened anyway, and now we're stuck with the bill." So we said, "Well, you're right. Somehow, the civil justice system has become distorted, so we will correct that." Five percent, six percent, eight percent, 10 percent. No, we said 25 percent. We went overboard. The truth is that many Members on this side said we went too far. And we did that to try to answer this legitimate problem.³⁴

Representative McPike seems to assume that the city was not negligent, or that its negligence did not contribute to the plaintiff's injury. But in that event, the city is not liable at all, so the issue of joint and several liability does not even arise. There thus is no need to limit or modify the joint and several liability doctrine to avoid "excessive" liability in this type of situation.

Perhaps the assumption is that "deep pocket" defendants, although innocent, are improperly found negligent, or, although not a cause, are improperly found to have been a cause, by juries in these situations in order to provide compensation to the plaintiff. This charge was common in the "tort reform" debates across the country. Yet there is no data which indicates that this is a pervasive or even significant problem. To the contrary, the data indicates that juries conscientiously attempt to assign responsibility only where it is supported by the evidence. In particular, both surveys and investigation of anecdotes have failed to establish that "deep pocket" defendants are being held liable in the absence of plausible evidence of tortious conduct or causation.³⁵

If, in a few cases, juries have found deep-pocket defendants liable in the absence of sufficient evidence of tortious behavior or causation, the obvious and usual remedy is policing

of the juries' findings by trial and appellate judges, rather than the elimination of joint and several liability. In such cases the real problem is not joint and several liability, but rather *any* liability. Why sacrifice injured plaintiffs in every case involving multiple tortfeasors (by eliminating or limiting joint and several liability) to correct problems that arise, at most, in a very few cases and that can and should be handled by proper judicial supervision of juries?

If, on the other hand, the city was negligent and that negligence was an actual and proximate cause of the plaintiff's injury, the stop sign example is not distinguishable from the uncovered manhole example. The city would be negligent if the sign was so obstructed, twisted, or tilted that it was significantly more difficult to see. A clearly visible stop sign is especially important given the foreseeability of drunken as well as sober drivers.³⁶

The critical issue ordinarily would be the causal one. Did the drunk driver fail to see the sign because it was obstructed, twisted, or tilted (even if a sober driver would have seen it regardless), and would she have obeyed the sign if she had seen it? The answers to these questions would depend, among other things, on whether, as is often the case, the drunk was trying her best to get home safely rather than speeding along intentionally ignoring all dangers and warnings. If the causal issue is answered affirmatively, the city's failure to properly maintain the stop sign was a tortious cause of the entire injury and the city is fully responsible for the injury.

If the city, although "minimally at fault" in comparison with the drunk driver, ends up paying for all or almost all of the damages, there indeed is a problem of unfairness. But, once again, the unfairness exists solely in the failure to fully implement the equitable restitutionary claims among the tortfeasors themselves. This is an unfairness for which the injured plaintiff is not responsible, and it is independent from and secondary to the injured plaintiff's corrective-justice claim for full compensation against each defendant who tortiously caused his injury. The city is "minimally at fault" or "minimally responsible" only in terms of its *comparative* responsibility vis-à-vis the drunk driver. The city, as well as the driver, is *fully* responsible for the plaintiff's

entire injury, since its negligence was an actual and proximate cause of the entire injury.

2. Deep Pockets as Social Insurers?

The second argument against the joint and several liability doctrine is parasitic on the partial responsibility argument that was discussed—and rejected—in the previous section. The second argument is that the doctrine requires "deep pocket" defendants who "have done nothing wrong" to provide "social insurance" for harms caused by the wrongful behavior of others.³⁷ This social insurance or loss-spreading objection depends upon the erroneous assumption that the joint and several liability doctrine results in a tortfeasor being held liable for more damages than she tortiously caused or for which she was responsible, and therefore makes her responsible for others' actions in addition to her own.

With perhaps two exceptions,³⁸ the Illinois legislators did not assert that innocent defendants were being held liable. Rather, the dominant concern was that the doctrine supposedly results in "minimally at fault" tortfeasors being held liable in excess of their responsibility.³⁹ Yet, as was discussed in the previous section, all tortfeasors subject to joint and several liability, including so-called "minimally at fault" tortfeasors, were tortious, actual, and proximate causes of the plaintiff's entire injury and, as such, are independently fully responsible for the plaintiff's total damages attributable to that injury.

Unfortunately, in many states, even the defenders of joint and several liability have erroneously assumed that a tortfeasor who is held liable for a share of the damages which exceeds her percentage of comparative responsibility is being held liable for damages which are attributable to other defendants' tortious conduct but not to hers.⁴⁰ As we have seen, this error was made by many of the defenders of joint and several liability in the Illinois legislature. Thus, like similarly confused defenders of the doctrine in other states,⁴¹ they were forced to rest their defense of the doctrine on the plaintiff's need for compensation—a social insurance or loss spreading rationale—rather than on principles of just responsibility.⁴² But this social insurance rationale is easily rebutted: why should the defendant, rather than society at large, provide this social insurance?⁴³

In sum, in Illinois as elsewhere, both the "fairness to the defendants" and the "fairness to the plaintiff" arguments were fundamentally misconceived and were weighted heavily toward the defendants. When the arguments are correctly perceived, there is no place for weighing or balancing. The "fairness to the defendants" argument is a "fairness among the defendants" argument which applies only to the restitutionary contribution claims among the defendants and which is secondary to the plaintiff's corrective-justice claim against each defendant for full compensation for the injury that the defendant tortiously caused.

3. Judicial Perversion of the Common Law?

The third argument commonly raised against the joint and several liability doctrine, which was reiterated by Senator Kustra during the debate in the Illinois Senate,⁴⁴ is that the doctrine as it currently exists in the United States is a recent and unjustified judicial departure from the common law, which supposedly imposed full liability for the injury on each tortfeasor only when the tortfeasors acted in concert.⁴⁵ This argument is based on a confusion between the substantive and procedural aspects of joint and several liability.

Originally under the common law, the term "several liability" referred to the independent substantive liability of each tortfeasor for the entirety of the damages that she tortiously caused, whereas the terms "joint liability" and "joint tortfeasors" referred to the procedural permissibility of a plaintiff's joining multiple tortfeasors together for suit in the same action. Initially in the United States, and still in England, only tortfeasors acting in concert could be procedurally joined together for suit in the same action. Independently acting tortfeasors who tortiously contributed to the same injury, who in England are called "concurrent tortfeasors" rather than "joint tortfeasors," could not be joined in the same action.⁴⁶

Nevertheless, substantively, each concurrent tortfeasor was severally (independently) liable for the entirety of the injury, in England as well as in the United States. The only change has been that, in the United States, procedural joinder of such independently acting tortfeasors is now allowed, and it therefore is customary in the United States to refer to

such independently acting tortfeasors, as well as tortfeasors acting in concert, as "joint tortfeasors." But contrary to the assertions of the critics, this procedural change in the United States did not result in any change in substantive liability. Both before and after the change, in England as well as the United States, concurrent tortfeasors, whether acting in concert or independently, were each substantively liable for the entirety of the plaintiff's injury.⁴⁷

4. Inconsistency with Comparative Responsibility?

The final argument against the joint and several liability doctrine is that it is inconsistent with modern regimes of comparative responsibility, which replace the former all-or-nothing rules of the common law with rules that apportion liability between the plaintiff and the defendants, and also among the defendants according to their comparative responsibility for the injury.⁴⁸

This argument, like most of the other arguments, is based on the erroneous assumption that a tortfeasor who is held liable for a share of the damages which exceeds her percentage of comparative responsibility is being held liable for damages which are attributable to other defendants' tortious conduct but not to hers.⁴⁹ It is based on a confusion between a tortfeasor's degree of comparative responsibility in relation to other responsible parties and her independent full responsibility for the entirety of the damages that were actually and proximately caused by her tortious conduct.

When the plaintiff was innocent—not contributorily negligent—he is not himself responsible for his injury. The only responsible parties are the tortfeasors. The principle of comparative responsibility therefore applies only to the legal and equitable relationships among the tortfeasors themselves.⁵⁰ Those relationships consist of their positions as tortfeasors, each of whom tortiously, actually, and proximately caused the plaintiff's injury and, thus, each of whom is fully liable to the plaintiff for the entirety of the damages attributable to that injury. When one tortfeasor fulfills her responsibility to the plaintiff by paying for all of the plaintiff's damages, she has an equitable restitutionary (unjust enrichment) claim for contribution against the other tortfeasors, each of whom also was fully liable for the plaintiff's

injury. The extent of this equitable claim is based on the tortfeasors' comparative responsibility.

Nevertheless, as has been mentioned several times before, this equitable claim for contribution among the tortfeasors themselves is independent from and subsidiary to the plaintiff's corrective-justice claim for full compensation against each tortfeasor. If some or all of the tortfeasors are insolvent or otherwise unavailable, an unfair apportionment of liability among the tortfeasors results, but the unfairness is solely a matter among the tortfeasors. The plaintiff is not a part of and is not responsible for that unfairness, whereas each tortfeasor is responsible for the plaintiff's injury.

In sum, when the plaintiff is innocent, there is no principled justification for shifting from joint and several liability to proportionate several liability. Doing so erroneously converts the tortfeasors' equitable restitutionary claims against one another into unjustified limitations on the innocent plaintiff's independent corrective-justice claims against each tortfeasor for full compensation.

The situation is less clear when the plaintiff was contributorily negligent. Having negligently contributed to the injury, the plaintiff, like each tortfeasor, is a responsible cause of the entire injury. What effect should the plaintiff's own responsibility for his injury have on his corrective-justice claim against each tortfeasor?

The initial issue is whether the plaintiff's own responsibility for his injury should completely negate his corrective-justice claim against each tortfeasor, or rather should only reduce his claim in proportion to his percentage of comparative responsibility. When the plaintiff's comparative responsibility is not too great, it seems unnecessarily harsh to deny his claim completely rather than merely reducing it.

Under the common law, the plaintiff's contributory negligence theoretically was a complete bar to his recovery of any damages. In practice, however, a rough form of comparative negligence existed. The contributory negligence issue almost always went to the jury (indeed, in some states the constitution forbids taking the issue away from the jury), and the jury often found a lack of contributory negligence even when such contributory negligence

actually existed, but reduced the plaintiff's damages to reflect the plaintiff's comparative responsibility for his injury.⁵¹

In recent years, all but a few states have rendered this subterfuge unnecessary by explicitly adopting comparative negligence principles of liability, which allow a contributorily negligent plaintiff to recover but reduce his corrective-justice claim for compensation by his percentage of comparative responsibility. Some states have adopted pure comparative negligence, which allows a plaintiff to recover no matter how high his percentage of comparative responsibility, while others, including Illinois, have adopted a modified form of comparative negligence, which completely bars the plaintiff's corrective-justice claim if his percentage of comparative responsibility is greater than 50 percent.⁵²

We come now to the most difficult issue. Should the contributorily negligent plaintiff's own responsibility for his injury not only be used to reduce his corrective-justice claim against each tortfeasor, but also be treated as equivalent to each tortfeasor's responsibility for the injury, so that the equitable contribution claims among the tortfeasors can now be extended to include the responsible plaintiff as well? Stated more practically, should the contributorily negligent plaintiff share with the solvent tortfeasors the portion of the damages that equitably should have been shouldered by insolvent or otherwise unreachable tortfeasors under the principles of comparative responsibility?

The courts have almost universally answered this question negatively. They note, correctly, that the negligent plaintiff's responsibility for his injury is analytically and qualitatively different from the tortfeasors' responsibility. Each tortfeasor's responsibility for the injury is based on her tortious causation of injury to another (the plaintiff), which gives the plaintiff a corrective-justice claim against each tortfeasor for compensation for the injury. The plaintiff, on the other hand, cannot be a tortfeasor in relation to his own injury. The plaintiff's responsibility for his injury is not based on any tortious causation of injury to another, but rather on his having negligently exposed himself to injury.⁵³

Thus, it can be argued, any restitutionary claim for contribution among the tortfeasors,

based on one of them having fulfilled the others' corrective-justice obligation to the plaintiff as well as her own, cannot extend to the plaintiff himself. The tortfeasors have no corrective-justice claim against the plaintiff to offset or match against the plaintiff's corrective-justice claim against each of them. Rather, they only have the argument that the plaintiff's corrective-justice claim against each of them for the entire injury should be reduced (or, under the modified approach, sometimes barred) in the light of the plaintiff's own responsibility for his injury. But the reduction is precisely that—only a reduction. Each tortfeasor remains jointly and severally liable for the full amount of the reduced claim.

I myself have supported this argument previously,⁵⁴ and I still think it has some force. Indeed, it reflects the position that has been adopted by countries around the world and by almost all the courts in the United States which have addressed the issue.⁵⁵

However, I now think that, regardless of the analytic and qualitative distinctions between the negligent plaintiff's responsibility and the tortfeasors' responsibility, the fact remains that the plaintiff, as well as each tortfeasor, bears responsibility for the entirety of the injury. The plaintiff has behaved negligently, and his negligent conduct, as well as each defendant's tortious conduct, was an actual and proximate cause of the entire injury. As such, it seems fair that the negligent plaintiff should share with the solvent tortfeasors the portion of the damages that equitably should have been shouldered by insolvent or otherwise unreachable tortfeasors under the principles of comparative responsibility.⁵⁶

There is no justification, however, for treating the contributorily negligent plaintiff worse than the tortfeasors who injured him. This is the result reached under pure proportionate several liability, under which the portion of the damages that equitably should have been shouldered by insolvent or otherwise unreachable tortfeasors is placed entirely on the plaintiff, rather than being shared among the plaintiff and the solvent tortfeasors.

The only argument that would support pure proportionate several liability is the argument that holding a tortfeasor liable for a share of the damages which exceeds her percentage of comparative responsibility results in her being

held liable for more damages than she tortiously caused or for which she was responsible, and thus makes her responsible for others' actions rather than her own. Even if valid, why is this argument also not applicable to the plaintiff, who under pure proportionate several liability is required to bear a share of the damages that exceeds his percentage of comparative responsibility if there are insolvent or otherwise unreachable tortfeasors.

More fundamentally, as we have noted many times above, this argument is invalid. Each tortfeasor was a tortious, actual, and proximate cause of the entire injury and thus is responsible for the entire injury. The contributorily negligent plaintiff is also responsible for the entire injury. The contributorily negligent plaintiff should at least be on an equal footing with the tortfeasors who injured her. Pure proportionate several liability fails to accomplish this result.

The final issue is whether the sharing of liability among the contributorily negligent plaintiff and the solvent tortfeasors should be accomplished under a rule of modified joint and several liability or a rule of modified proportionate several liability.

Under modified joint and several liability, the plaintiff can initially recover the full amount of his reduced claim from any solvent tortfeasor, who then bears the expense of locating and obtaining contribution from the other tortfeasors, as well as the expense and risk of trying to obtain proportionate reimbursement from the plaintiff for any uncollectible shares of these other tortfeasors.

Conversely, under modified proportionate several liability, the plaintiff initially can recover only the comparative fault share from each solvent tortfeasor, and must bear the expense of locating each tortfeasor and obtaining her initial share, plus the additional expense and risk of coming back to each (hopefully still) solvent tortfeasor to collect her share of any uncollectible shares.

Since the injured plaintiff can least afford the expense and delay involved in locating all the tortfeasors, collecting initial comparative responsibility shares from all the solvent tortfeasors, and then retracing the same route to obtain contribution towards the uncollectible shares, the modified joint and several liability rule seems preferable. It also has the advantage of being able to be applied across the

board, in situations involving innocent as well as contributorily negligent plaintiffs, whereas the modified proportionate several liability rule is unjustified in situations involving innocent plaintiffs. No doubt for these sorts of reasons, the modified joint and several liability rule is the rule that is proposed in the Uniform Comparative Fault Act.⁵⁷

However, the modified joint and several liability rule subjects the solvent tortfeasor who initially pays the plaintiff to the risk of not being able to obtain reimbursement later from the plaintiff for the plaintiff's share of any uncollectible shares. Rather than shifting to the modified proportionate several liability rule, which seriously disadvantages the injured plaintiff, this risk could be dealt with, in appropriate cases, by requiring the plaintiff to provide some financial guarantee or by allowing the solvent tortfeasor to pay a portion of the damages into the court until the risk is resolved.

Conclusion

Even for tort lawyers, the joint and several liability doctrine is not a simple concept. For nonlawyers and even many non-tort lawyers, the doctrine often seems to be a mystery. As Representative Greiman remarked in initiating the debate on S.B. 1200 in the Illinois House of Representatives, "I suppose that four months ago in this General Assembly, a discussion of joint and several liability would be

[about] the penalty imposed for a violation of the marijuana statute."⁵⁸ Members of the Illinois legislature, like other legislators across the country forced to confront the issue, exhibited, and sometimes admitted, confusion regarding the history, rationale, and consequences of the joint and several liability doctrine.

At the same time, tremendous pressure was being exerted on the Illinois legislature, as well as other legislatures across the country, to enact some form of "tort reform."⁵⁹ The principal object of this pressure was the joint and several liability doctrine.⁶⁰ As Senator Berman noted in explaining his support of a limited modification of the joint and several liability doctrine, despite his belief that the facts failed to justify any modification of the doctrine, "I don't like to try to hold the ocean back, this is a compromise amendment."⁶¹

Given these two factors, the remarkable fact is that complete elimination of joint and several liability occurred in only a few states. In comparison to other states, Illinois' modification of the doctrine is relatively modest. Yet, as I have attempted to demonstrate in this article, Illinois' modification cannot be justified. Bills to completely eliminate the doctrine continue to surface in the Illinois legislature. In these calmer times, perhaps these bills can be used as vehicles to enact a more principled modification along the lines discussed above.

ENDNOTES

1. See Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141-42 & n.1 (1988). This article is based in part on the articles cited in this note and in note 4, *infra*.
2. E.g., U.S. Atty Gen., Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 33-34, 64-65 (Feb. 1986) [hereinafter Reagan Report]; U.S. Atty Gen., An Update on the Liability Crisis 76-78 (Mar. 1987) [hereinafter Reagan Report Update]; The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations 2, 23-25, 70 (May 1986) [hereinafter Industry Report]; Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A.J. 61 (July 1985).
3. Wright, *supra* note 1, at 1144-46.
4. For descriptions of each state's rules on joint and several liability, see *id.* at 1165-68 & nn.74 & 76-93; Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. Davis L. Rev. 1147 n.2 (1989).
5. Wright, *supra* note 1, at 1147-68, 1179-93; Wright, *supra* note 4.
6. Ill. Ann. Stat. ch. 110, par. 2-1117 (Smith-Hurd Supp. 1990). According to traditional legal usage, "several liability" would mean full rather than proportional liability. See text at notes 46 & 47 *infra*. However, the legislative history makes it clear that "several liability" is meant to be proportional liability. This erroneous usage of the term has become quite common.
7. Ill. Ann. Stat. ch. 110, par. 2-1118 (Smith-Hurd Supp. 1990).

8. See Wright, *supra* note 1, at 1148-49 & nn.19 & 26, 1152-53 & nn.37 & 40-42; Wright, *supra* note 4, at 1148 & n.3.
9. For examples of this argument in states other than Illinois, see Wright, *supra* note 1, at 1152-53 & nn.37 & 40, 188 n.161; Wright, *supra* note 4, at 1150-51 & n.15, 1154-56.
10. Ill. 84th Gen. Assembly, Reg. Sess., Sen. Debates, May 21, 1986, at 84.
11. *Id.* at 90; see *id.* at 119 (Sen. Barkhausen): "[I] did not mean to say that . . . joint liability potentially imposes liability on one who is not to any degree at fault. I said or meant to say that it imposes liability in greater proportion and to a greater extent that a party is found to be at fault and then posed the basic question as to whether that was fair."
12. *Id.* at 89.
13. *Id.*, June 30, 1986, at 84.
14. Ill. 84th Gen. Assembly, House of Rep. Transcription Debate, June 30, 1986, at 67.
15. *Id.* at 92.
16. *Id.* at 8-9.
17. *Id.* at 59.
18. Senate Debates, May 21, 1986, at 85.
19. 3 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts*, §10.1, at 3-7, 11, 17-18; *id.*, vol. 4, §20.3, at 114-15, 120, 122-24 (2d ed. 1986); W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, §47, at 328-29, §52, at 345-46, 347-49 (5th ed. 1984).
20. See Harper, James & Gray, *supra* note 19, §10.1, at 18-19, 23-25; *id.*, vol. 4, §20.3, at 114-15, 121; Prosser and Keeton, *supra* note 19, §52, at 347-48.
21. Wright, *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1789-93 (1985).
22. 3 Harper, James & Gray, *supra* note 19, §10.1, at 25-29; *id.*, vol. 4, §20.3, at 120-21, 125-26 & nn.28-30; Prosser & Keeton, *supra* note 19, §52, at 345-46, 349, 351, 354-55. When it is difficult to distinguish separately caused injuries from jointly caused injuries, the modern trend is to place the burden of proof on the tortfeasors. 3 Harper, James & Gray, *supra*, §10.2, at 26-29; *id.*, vol. 4, §20.3, at 117-18, 124 n.27, 127-29 & n.32; Prosser & Keeton, *supra*, §52, at 345-46, 348-53. This seems appropriate as long as the resulting liability for any particular tortfeasor is not clearly in excess of what could reasonably have been caused by her tortious behavior. *Unlimited* joint and several liability applied to small contributors to hazardous and solid waste disposal sites may well raise such a problem.
23. Prosser & Keeton, *supra* note 19, at 349.
24. See Wright, *supra* note 1, at 1165-68; Wright, *supra* note 4, at 1147 n.2.
25. See *supra* text at note 7.
26. House Debates, June 30, 1986, at 9.
27. *Id.* at 64 (Rep. Greiman); Senate Debates, May 21, 1986, at 93-94 (Sen. Rock).
28. Senate Debates, May 21, 1986, at 109-10.
29. *Id.* at 111.
30. *Id.* at 123 (amendment 5 to S.B. 2263).
31. *Id.* at 108.
32. House Debate, June 30, 1986, at 76.
33. See Senate Debates, May 21, 1986, at 111 (Sen. Schuneman); Wright, *supra* note 1, at 1161-62.
34. House Debate, June 30, 1986, at 75.
35. *Id.* at 65 (Rep. Greiman); *Product Liability: Hearings on H.R. 2238 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 463 (statement of Gene Kimmelman); *id.* at 479, 500-01 (remarks of Gene Kimmelman and Rep. Florio); Wisconsin Comm'r of Ins., Final Report of the Special Task Force on Property and Casualty Insurance 18 (Aug. 1986); Beyler, *Is There a Problem?*, 75 Ill. B.J. 162 (1986) (answers to questions 6 and 7 on jury fairness); Strasser, *Tort Tales: Old Stories Never Die*, Nat'l L.J., Feb. 16, 1987, at 39; *The Facts Behind the Horror Stories*, ATLA Advoc., Feb. 1986, at 1; cf. Strasser, *Have 'Anecdotes,' Not Facts, Fueled Tort Crisis?*, Nat'l L.J., Feb. 24, 1986, at 15.
36. "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460, 461 (1855).
37. See sources discussed in Wright, *supra* note 1, at 1149-52; Wright, *supra* note 4, at 1156-58.
38. House Debate, June 30, 1986, at 66-67 (Rep. Regan); see text at note 34 *supra* (Rep. McPike).

39. House Debate, June 30, 1986, at 9 (Rep. Greiman); *id.* at 19 (Rep. O'Connell); *id.* at 39 (Rep. Davis); *id.* at 59 (Rep. Homer); *id.* at 65-67 (Rep. Regan); see note 11 *supra* (Sen. Barkhausen).
40. See sources discussed in Wright, *supra* note 4, at 1154-56.
41. *Id.*
42. See, e.g., Senator Berman's argument, quoted in text at notes 18 & 29 *supra*. Similarly, the exception of medical expenses from proportionate several liability was explained as furthering a policy of ensuring that no tortiously injured plaintiff would suffer "medical indigency." House Debate, June 30, 1986, at 9 (Rep. Greiman); *id.* at 19-20 (Rep. O'Connell).
43. See text at note 11 *supra* (Sen. Barkhausen's response to Sen. Berman).
44. Senate Debate, May 21, 1986, at 91-92.
45. See sources discussed in Wright, *supra* note 1, at 1148-49; Wright, *supra* note 4, at 1148 n.3.
46. *Id.*
47. *Id.*
48. See sources and arguments discussed in Wright, *supra* note 1, at 1153-64, 1185-93.
49. See *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 608-09, 578 P.2d 899, 918-19 (1978) (Clark, J., dissenting); sources discussed in Wright, *supra* note 4, at 1154-56.
50. See *American Motorcycle Ass'n*, 20 Cal. 3d at 614 n.4, 578 P.2d at 922 n.4.
51. See Wright, *supra* note 1, at 1156-60.
52. Ill. Ann. Stat. ch. 110, par. 2-1116 (Smith-Hurd Supp. 1990).
53. See, e.g., *American Motorcycle Ass'n*, 20 Cal. 3d at 589-90, 578 P.2d at 906 (1978); *Coney v. J.L.G. Indus.*, 97 Ill. 2d 104, 122-23, 454 N.E.2d 197, 205 (1983). Although, in some cases, the negligent plaintiff's conduct may put others at risk as well as himself, that risk to others is not relevant in assessing the plaintiff's contributory negligence in causing his own injury, which is analyzed solely in terms of the risk that he created to himself. See Prosser and Keeton, *supra* note 19, section 65, at 451, 453; Wright, *supra* note 4, at 1149 n.9.
54. Wright, *supra* note 1, at 1191-93.
55. See sources cited *id.* nn.146 & 150.
56. See *American Motorcycle Ass'n*, 20 Cal. 3d at 613-15, 578 P.2d at 922-23.
57. Unif. Comp. Fault Act, section 2, 12 U.L.A. 43 (Supp. 1988).
58. House Debate, June 30, 1986, at 8.
59. See, e.g., Senate Debate, May 21, 1986, at 121 (Sen. Rupp).
60. *Id.* at 89 (Sen. Barkhausen); House Debate, June 30, 1986, at 59 (Rep. Homer).
61. Senate Debate, May 21, 1986, at 86; see *id.* at 93 (Sen. Rock); House Debate, June 30, 1986, at 59 (Rep. Homer).