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Allocating Liability Among Multiple Responsible Causes: Principles, Rhetoric and Power - Chapter 2

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2

Allocating Liability Among Multiple Responsible Causes: Principles, Rhetoric and Power

Richard W Wright*

I Introduction

When more than one person, possibly including the plaintiff, wrongfully or negligently contributed to an indivisible injury to the plaintiff, the issue arises as to how liability for the injury should be allocated among the multiple responsible contributors.¹ The standard method preferred by almost all courts allocates liability as follows: the plaintiff's claim for compensation is reduced by her percentage of comparative responsibility if she was contributorily negligent, those who wrongfully contributed to the plaintiff's injury are each held fully liable for the plaintiff's possibly reduced claim (but the plaintiff cannot recover in the aggregate more than the full amount of her possibly reduced claim), and the wrongdoers who pay the plaintiff are able to maintain contribution actions against the other wrongdoers based on their comparative responsibility.²

The full liability of each wrongdoer for the plaintiff's possibly reduced claim is variously referred to as 'joint and several liability', 'concurrent liability' or 'solidary liability'.³ For ease of reference and to avoid issues arising from differing historical interpretations of 'joint', 'several' and 'concurrent' in the United States and other common law countries,⁴ I will generally refer to 'solidary' liability. Also for ease of reference, I will employ 'liability' to describe not only a defendant's liability to the plaintiff or to another defendant (in an indemnity or contribution action)

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¹ I focus in this chapter on situations in which it can be proven that the defendant's wrongful conduct was a cause of the plaintiff's indivisible injury. I do not discuss situations in which the defendant may have been a wrongful cause but it is inherently impossible to prove or disprove causation. In those situations, I believe liability should not be full but instead should be proportionate to the probability of causation, unless it is a situation in which the defendant is a possible wrongful cause and has the ability to determine who or what actually caused the injury. See R Wright, 'Proving Causation: Probability versus Belief' in R Goldberg (ed), *Perspectives on Causation* (Oxford, Hart Publishing, 2011) 195, 212–20.

² D Dobbs, *The Law of Torts* (St Paul, West Group, 2000) s 201 at 503–04, ss 385–387 at 1077–81; J Fleming, *The Law of Torts* 8th edn (Sydney, LawBook Co, 1992) 275–76; A Honoré, 'Causation and Remoteness of Damage' in A Tunc (ed), *International Encyclopedia of Comparative Law, XI, Torts, Pt. 1* (Leiden, Brill, 1983) ss 7-141, 7-189(2), 7-193; C von Bar, *The Common European Law of Torts* (Oxford, OUP, 1998) Vol 1, 334–38; T Weir, 'Complex Liabilities' in A Tunc (ed), *International Encyclopedia of Comparative Law, XI, Torts, Pt. 2* (Leiden, Brill, 1983) ss 12-79 to -86, 12-105 to -109, 12-131 to -133.

³ Fleming (n 2) 257–58; W Prosser, 'Joint Torts and Several Liability' (1937) 25 *California LR* 413, 414–15, 418–19, 424, 439; K Barker and J Steele, 'Drifting Towards Proportionate Liability: Ethics and Pragmatics' (2015) 74 *Cambridge LJ* 49, 49.

⁴ See Part III A below.

but also the assignment of some or all of the plaintiff's damages to the plaintiff, even though plaintiffs are not technically liable to anyone, including themselves.

A substantial majority of states in the United States depart from the standard method by completely barring recovery by a contributorily negligent plaintiff if the plaintiff's comparative responsibility is, depending on the state, either equal to or greater than the defendants' aggregate comparative responsibility. A majority of states in the United States and (for injuries other than injuries to the plaintiff's person) all the Australian states have replaced the solidary liability of wrongful contributors to a plaintiff's injury, in some or almost all situations and in a large variety of ways, with proportionate liability, according to which each wrongdoer is only liable, initially and ultimately, for a portion of the injury that he wrongfully caused equal to his percentage of comparative responsibility. Both of these deviations from the standard method have almost always been made by the state legislatures, at the behest of defense interests.⁵

In Part II below, I evaluate the standard method and various deviations from it from the perspective of the basic principles of justice. I focus first in Part II A on situations in which the victim was innocent, before turning in Part II B to the more complicated issues that arise when the victim was contributorily negligent. I argue that both the standard method and a modified version of it, which would allow wrongdoers who pay the plaintiff to have a contributorily negligent plaintiff share in bearing the portion of damages that are uncollectible from other wrongdoers, can be justified, with the latter being fairer, but that the proportionate liability rules adopted in the United States and Australia are neither justifiable nor fair.

In Part III, I explain and criticize the rhetorical arguments used by the defense advocates in the United States (and Australia?) to attempt to convince judges (unsuccessfully) and legislators (successfully) that replacing solidary liability with proportionate liability is necessary to be consistent with the common law and allocation of liability consistent with each person's responsibility.

In Part IV, I describe (i) the primary role played by recurrent cycles of 'soft' and 'hard' liability insurance markets, made possible by lack of proper regulation of the insurance industry, in creating recurrent liability insurance crises, (ii) the successful effort of the insurance industry and other defense interests to portray tort liability rather than the flaws in the liability insurance market as the cause of the recurrent liability insurance crises in order to promote 'tort reform' while avoiding needed regulation of the insurance industry, and (iii) the recurrent failure of the enacted 'tort reforms' to provide the promised reduction or moderation in liability insurance premiums.

Although I occasionally refer to legal rules and debates outside the United States, I generally focus on the rules and debates in the United States, for two reasons. First, my limited familiarity with the rules and debates outside the United States. Second, because Kit Barker and Jenny Steele have recently comprehensively discussed the rules and debates outside (as well as within) the United States.⁶

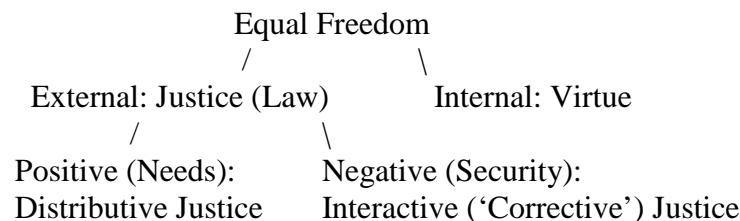
⁵ See *Restatement Third of Torts: Apportionment of Liability* (St Paul, American Law Institute, 2000) s 17 comment a and s B18 comment a, reporters' note at 170–71; Barker and Steele (n 3).

⁶ Barker and Steele (n 3).

II Principles⁷

A Substantive Justice

Since at least Aristotle's time, it generally has been assumed that the purpose of law is or should be the implementation of justice:⁸ the creation and maintenance of those conditions that are properly specifiable by law for the promotion of each person's equal external freedom as a free and equal rational being seeking to fully develop her humanity.⁹ The external exercise of freedom depends on sufficient access to instrumental goods and sufficient security against interferences by others with one's person and whatever instrumental goods one happens to possess. Distributive justice defines the scope of persons' positive freedom—their access to a fair share of the societal stock of instrumental goods (housing, food, clothing, health care, education, political power, etc) needed to go about their lives, and is evaluated and implemented by their respective ranking compared to all others in society under the proper distributive criterion, which is primarily based on need but also takes into account merit and effort.¹⁰ Interactive justice, which is usually misleadingly referred to as 'corrective' justice,¹¹ defines the scope of persons' negative freedom—the security of their persons and of their existing stocks of resources in interactions with others. It requires that one's conduct that might affect others' person or property be consistent with those others' equal external freedom.¹² A person's practical exercise of her freedom in the external world must be consistent with the equal external freedom of every other person. As Kant put it in his supreme principle of Right: '[S]o act *externally* that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law'.¹³



⁷ For discussion of efficiency theorists' inability to identify efficient allocation rules or to justify and explain existing allocation rules, see R Wright, 'Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure' (1988) 21 *UC Davis LR* 1141, 1169–79 (hereafter 'Allocating Liability'); R Wright, 'Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski' (1989) *UC Davis LR* 1147, 1151 fn 20, 1152 fn 21 (hereafter 'Reply').

⁸ See, eg, Aristotle, **Error! Main Document Only.** *Politics* (B Jowett trans) in J Barnes (ed), *The Complete Works of Aristotle* (Princeton, Princeton University Press, 1984), Vol 2, bk 3 ch 6 at 1279a 17–19 ('governments which have a regard for the common interest are constituted in accordance with strict principles of justice'); I Kant, *The Metaphysics of Morals* (M Gregor trans, Cambridge, Cambridge University Press, 1991) *318 ('By the well-being of a state is understood . . . that condition in which its constitution conforms most fully to principles of Right [justice]'); J Madison, *The Federalist No 51* (Benjamin Fletcher Wright ed, 1961) 358 ('Justice is the end of government. It is the end of civil society').

⁹ See R Wright, 'The Principles of Justice' (2000) 75 *Notre Dame LR* 1859, 1864–65, 1871.

¹⁰ *ibid* 1886, 1887, 1888.

¹¹ The usual phrase, 'corrective justice', erroneously implies (and has misled many into assuming) that this type of justice is only concerned with correcting or rectifying wrongs after they have occurred, and not with preventing them beforehand or with defining the nature of the wrong being corrected. See *ibid* 1883 and fn 113.

¹² *ibid* 1887–90.

¹³ Kant (n 8) *231 (emphasis added).

B Innocent (Non-Negligent) Plaintiff

If a defendant wrongfully (by acting inconsistently with others' right to equal external freedom), actually and 'proximately'¹⁴ caused a legally cognizable injury to an innocent plaintiff's legally protected interests, he is as a matter of interactive justice required to rectify the wrongful injury by fully compensating the plaintiff.¹⁵ If the injury is ongoing or imminent and sufficiently serious and it is practically possible to prevent the injury, the defendant can be enjoined from acting wrongfully.

If more than one person wrongfully and 'proximately' caused an indivisible (theoretically and practically non-separable) injury to the plaintiff, interactive justice requires that she receive full compensation from the wrongdoers. The solidary liability rule assures this by making each wrongdoer fully liable for the injury, while limiting the plaintiff's aggregate recovery to the full amount of her losses. The full liability of each wrongful contributor is clearly justifiable when his wrongful conduct was either necessary or independently sufficient for the occurrence of the injury.¹⁶ If it was necessary for the occurrence of the injury, then the plaintiff would not have suffered the injury at all if not for his wrongful conduct. If it was independently sufficient,¹⁷ then his wrongful conduct was sufficient to produce the plaintiff's injury regardless of any other person's wrongful involvement.

Courts have had more difficulty with those cases, typically pollution cases, in which the defendant's wrongful behavior was neither necessary nor independently sufficient for the plaintiff's injury, but yet clearly was a cause of the injury. Consider a situation in which three drops of some poison are sufficient to kill a person, each of four persons independently wrongfully put one drop of the poison in the plaintiff's cup, and the plaintiff drank the contents of the cup and died from the poisoning. Each wrongdoer's drop of poison was a cause of the plaintiff's indivisible death.¹⁸ If not, who or what caused the death? If there had been only three wrongdoers, each of them would clearly have been fully responsible as a necessary cause of the injury. There is no

¹⁴ So-called 'proximate' causation exists if the defendant was an actual cause of the plaintiff's injury and there are no applicable limitations on the scope of the defendant's legal responsibility. The ambiguous and misleading nature of this phrase has led to its abandonment in the *Restatement Third*. See *Restatement Third of Torts, Liability for Physical and Emotional Harm* (St Paul, American Law Institute, 2010) s 26 comment a, ch 6 'Special Note on Proximate Cause', s 29 comment b.

¹⁵ If the injury would have occurred anyway in the absence of any wrongful conduct by the defendant or others, as a result of non-responsible conditions such as acts of God or the plaintiff's own negligence, the interactive justice claim fails. See R Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 40 *San Diego LR* 1425, 1434–67.

¹⁶ See WP Keeton, D Dobbs, R Keeton and D Owen, *Prosser and Keeton on the Law of Torts*, 5th edn (St Paul, West Publishing, 1984) s 52 at 345–46.

¹⁷ No condition by itself is sufficient for any result. The complete cause of any result consists of all the actual conditions that participate in the complete instantiation of a set of abstract conditions that are minimally sufficient, when instantiated, for the occurrence of the result. Each actual condition that participates in that complete instantiation is a cause of (contributed to) the entirety of the indivisible result, rather than, illogically, only some part of the indivisible result. An 'independently sufficient' condition is a condition that is sufficient by itself to instantiate one of the necessary conditions in an otherwise fully instantiated minimally sufficient set. See R Wright and I Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic' (2016) 91 *Chicago-Kent LR* 461, 466–67, 482–84, 486–87.

¹⁸ *ibid* 484, 486–87; *Restatement Third: Physical and Emotional Harm* (n 14) s 27 comment f.

apparent reason why this full responsibility should be reduced to responsibility for only a fourth of the injury merely because another drop was wrongfully put in the cup by a fourth wrongdoer. If adding more wrongdoers enables each wrongdoer to reduce his share of damages to successively smaller fractions, there would be a substantial incentive for wrongdoers to engage in perverse ‘tortfests’ involving as many wrongdoers as possible.

Yet some courts have been reluctant to impose liability for the entire indivisible injury upon each wrongdoer in these circumstances. They have treated the injury as being divisible, even though it was not, to justify a shift to proportionate liability. Other courts, recognizing the single, indivisible nature of the injury, have adhered to solidary liability.¹⁹ It has been suggested that the reluctance of some courts to impose full liability on each wrongdoer was due to the then existing rule preventing a wrongdoer who compensated the plaintiff from seeking contribution (reimbursement) from the other wrongdoers.²⁰ When a defendant was neither a necessary nor an independently sufficient cause of the plaintiff’s injury, it may seem unfair to impose full liability when he is not allowed to seek reimbursement for a portion of the damages from the other wrongful contributors to the injury. However, the unfairness exists only among the wrongdoers, rather than there being any unfairness or injustice with respect to the plaintiff’s interactive justice claim for full compensation by any person who wrongfully contributed to her indivisible injury. If a person’s contribution was neither necessary nor independently sufficient and *de minimis* when compared with the other wrongful contributions considered separately, rather than in the aggregate, he generally will be absolved from liability due to a lack of ‘proximate’ causation.²¹

Initially, in both common law and civil law jurisdictions, any defendant who compensated the plaintiff for an injury was not allowed to seek contribution (reimbursement) from any other wrongful contributor to the injury.²² This rule might be explained by a strict view of justice: while the plaintiff has an interactive justice claim against each person who was a wrongful cause of her injury, no wrongful contributor has a similar claim against any of the other wrongful contributors, each of whom wrongfully invaded the plaintiff’s rights but not each other’s rights. This is true even if he fully compensates the plaintiff and thus extinguishes the plaintiff’s claim against the other wrongful contributors, since the plaintiff is not entitled to more than full compensation. He has not paid any compensation on behalf of them, but merely, as required, discharged his own responsibility to the plaintiff.

Nevertheless, there is a strong equity claim by a defendant who paid the plaintiff for a sharing of the damages that he paid to the plaintiff by all those persons who were wrongful contributors to the plaintiff’s injury and thus were also fully responsible for the injury as a matter of interactive

¹⁹ See Keeton et al (n 16) s 52 at 345–46, 349, 351, 354–55. Compare *Restatement Second of Torts* (St Paul, American Law Institute, 1965) s 433A illustration 5 (harm caused by multiple discharges of oil into stream: ‘divisible’ and apportionable) with, *ibid*, illustrations 14 and 15 (same: not divisible so solidary liability). The *Restatement Third* properly treats injuries as being divisible only if there are separable injuries or losses that can be attributed to different persons based on causation. *Restatement Third: Physical and Emotional Harm* (n 14) s 26.

²⁰ Keeton et al (n 16) s 52 at 349.

²¹ See *Restatement Third: Physical and Emotional Harm* (n 14) s 36. A basis for less than full liability of a defendant to each person whom he wronged may also exist when he has similarly wronged many persons, in order to enable a fair allocation of the defendant’s available funds among his many victims. See T Keren-Paz and R Wright, ‘Liability for Mass Sexual Abuse’ (2019) 56(1) *American Criminal LR* (forthcoming) pt III.C.3.

²² See Keeton et al (n 16) s 50 at 336.

justice. This claim should not, as some have argued,²³ be viewed as a ‘localized’ distributive justice claim, simply because of the rhetorical circumstance that what is being sought is a ‘distribution’ of ultimate liability among several persons. The claim being made is not, as required for a valid distributive justice claim, that the defendant does not have his fair share of society’s instrumental goods and that the other persons who are also responsible for the plaintiff’s injury have more than their fair share of society’s instrumental goods. Even if both of these conditions were true, it still would not be a valid distributive justice claim. Such one-to-one distributive justice claims are fundamentally flawed, since persons other than the plaintiff usually will have even less of their proper distributive justice share of society’s instrumental goods, and persons other than the other responsible causes of the plaintiff’s injury will usually have even more of their proper distributive justice share. Valid distributive justice claims can only be made with respect to scarce material resources based on a society-wide comparison of resources and needs.²⁴

The contribution claim by a defendant who paid the plaintiff is rather an equity claim based on interactive justice: all those who are responsible for the plaintiff’s injury as a matter of interactive justice should equitably share the compensation paid to the plaintiff. As with the similar claim for a sharing of liability between a defendant and a contributorily negligent plaintiff, which is discussed below,²⁵ courts and legislatures in common law jurisdictions, especially the various states (but not the federal government) in the United States, resisted this claim for a long time.²⁶ Several reasons have been suggested for their resistance: (1) the ‘unclean hands’ of the other responsible contributors; (2) an inability to conceive of liability other than in all-or-nothing terms; (3) a desire to avoid the practical complications introduced by sharing of liability; and (4) an inability to formulate a specific method or yardstick for measuring comparative responsibility.²⁷

A major impediment to a shift to comparative responsibility rules in both contexts seems to have been the inability to formulate a specific method or yardstick for measuring comparative responsibility. In an 1869 decision discussing the bar against recovery by a contributorily negligent plaintiff, the California Supreme Court stated:

²³ See J Finnis, *Natural Law and Natural Rights* (Oxford, OUP, 1980) 179 (treating ‘apportionment of damages where there is contributory negligence or [apportionment] of the costs of litigation’, or any other act of adjudication, as a ‘matter of/for distributive justice’); Barker and Steele (n 3) 65, 68; J Gardner, ‘What is Tort Law For? Part 2. The Place of Distributive Justice’, in J Oberdiek (ed), *Philosophical Foundations of Tort Law* (Oxford, OUP, 2014) 335; S Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa LR* 449, 512 (stating that corrective justice is a ‘localized distributive justice inquiry, as constrained by outcome responsibility’).

²⁴ See Wright, ‘Principles’ (n 9) 1884–87, 1890–91.

²⁵ See text at nn 36–40 below.

²⁶ See *Norfolk & Western Railway Co v Ayers* (2003) 538 US 135 (Federal Employers Liability Act); Keeton et al (n 16) s 50 at 337–38 and fn 17, 341 fn 44, s 51 at 344–45 and fns 30–31, s 67 at 476–77; H Drion, ‘Contributory Negligence in Europe’ (1963) 12 *Cleveland-Marshall LR* 437, 438–39.

²⁷ See Keeton et al (n 16) s 50 at 336–37, s 65 at 452–53, s 67 at 470–71. Instead of allowing contribution claims, many states adopted indemnity rules, which permit a paying wrongdoer to shift his entire liability to another wrongdoer. Indemnity generally was (and remains) limited to situations in which the indemnitee has a responsibility for the injury that is clearly secondary to the indemnitor’s primary responsibility, as with the vicarious liability of employers for the injuries negligently caused by their employees within the scope of employment. Some courts formulated distinctions similar to those used under the contributory negligence allocation rules discussed in Part II.C below, eg, between ‘active’ and ‘passive’ or ‘slight’ and ‘gross’ negligence, to permit indemnity in a broader set of circumstances. *ibid* s 51 at 341–44 and fns 26 and 31.

The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible, if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded.²⁸

In both contexts, especially the contribution-among-defendants context, the initial shifts away from the all-or-nothing allocation rules employed per capita rather than comparative responsibility allocation rules: liability was split equally among the responsible parties based on the number of responsible parties. However, these rules often resulted in liabilities that varied substantially from the parties' comparative responsibility and eventually were replaced by comparative responsibility allocation rules as courts became more comfortable with rough evaluations of comparative responsibility.²⁹

The wrongdoers' equitable contribution claims against each other based on their comparative responsibility are subordinate to the innocent plaintiff's interactive justice claim against each of them for full compensation of her injury. If a wrongdoer who provides compensation to the plaintiff cannot obtain contribution from one or more of the other wrongdoers, this does not, contrary to the defense advocates' arguments,³⁰ result in his being held liable for more than he wrongfully caused or for the other wrongdoers' wrongful conduct. Whether or not he can obtain contribution, he is liable to the plaintiff for the full amount of the damages that he wrongly caused. His paying all of the damages fulfills his own responsibility to the plaintiff; it is not a shifting to him of the other wrongdoers' responsibilities. His bearing all of the damages is unfair only in the context of his equitable contribution claim against the other wrongdoers, which is secondary to the plaintiff's interactive justice claim against each person who wrongfully contributed to his injury.

Practical considerations reinforce the arguments as a matter of principle in support of solidary liability. In an ideal world of costless litigation and available, solvent wrongdoers, there would be no practical differences between solidary liability with contribution and proportionate liability, each based on comparative responsibility. Each wrongdoer would ultimately pay its equitable share of the plaintiff's damages. However, in the real world of costly litigation and insolvent or otherwise unavailable wrongdoers, there are major practical differences between the two allocation methods.

Under proportionate liability, the plaintiff can obtain full compensation for her injury only if she is able to successfully locate, sue and collect from every person who wrongfully contributed to her

²⁸ *Needham v SF & SJR Co* (1869) 37 Cal 409, 419.

²⁹ See, eg, *United States v Carroll Towing Co* (2d Cir 1947) 159 F2d 169 (liability split one-third each among two defendants and the contributorily negligent plaintiff); Dobbs (n 2) s 387 at 1080–81; Keeton et al (n 16) s 50 at 340–41, s 51 at 344, s 67 at 471.

³⁰ See Part III B below.

injury. The plaintiff therefore bears a substantial risk of receiving less than full compensation if any wrongful contributor is insolvent or otherwise unavailable. In addition, the plaintiff bears the expense and delay of the multiple actions that are required to obtain theoretically full compensation, which will substantially delay and diminish her ultimate net compensation even if she can successfully sue and collect from each wrongful contributor. This delay problem will be compounded by each wrongdoer's reduced incentive to settle the plaintiff's claim, since from the beginning each wrongdoer's liability is limited to his percentage of comparative responsibility. Conversely, under solidary liability with contribution the risk of insolvent or otherwise unavailable wrongdoers and the expense of multiple actions is placed on the solvent wrongdoer(s) from whom the plaintiff initially obtains compensation. The plaintiff can obtain full compensation in the initial suit, and the wrongdoer(s) who pay the plaintiff must seek contribution from the other wrongdoers.

When the plaintiff was not negligent, it should be especially clear that those who wrongfully injured her, rather than she, should bear the expense, risk and delay involved in attempting to recover from the multiple wrongdoers. She bears no responsibility for her injury. As the injured party, she is often urgently in need of compensation and can least afford the expense and delay. Each wrongdoer, on the other hand, was a wrongful, actual and 'proximate' cause of the plaintiff's entire injury and thus bears independent full responsibility for the injury.

C Negligent Plaintiff

An argument has been made, similar to the argument discussed above for barring contribution claims among defendants who wrongfully contributed to the same injury,³¹ that a plaintiff's negligent contribution to her injury should not bar or reduce her claim against any person who wrongfully caused her injury. The plaintiff has an interactive justice claim against each person who wrongfully caused her injury, but none of the wrongdoers has a similar claim against her with respect to her injury. Indeed, if the plaintiff put only herself at risk, it would be improper to describe the plaintiff as having been negligent in the sense of a breach of a legal duty, since the plaintiff owes no legal duty to herself.³²

Nevertheless, if the plaintiff unreasonably put herself at risk and thus failed to properly respect and promote her humanity, she as well as the defendant is morally responsible for her injury, and her responsibility as well as the defendant's moral and legal responsibility should be taken into account on a comparative responsibility basis when assessing the defendant's liability under her interactive justice claim against him.³³ If her relevant conduct also unreasonably put the defendant

³¹ See text following n 22 above.

³² See, eg, J Fleming, 'Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with *American Motorcycle Association v Superior Court*' (1979) 30 *Hastings LJ* 1464, 1483; R Stevens, 'Should Contributory Negligence Be Analogue of Digital?' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing, 2015) 253–54; G Schwartz, 'Contributory and Comparative Negligence: A Reappraisal' (1978) 87 *Yale LJ* 697, 701–02 and fns 31 and 33, 722–23 and fns 117 and 118.

³³ See Schwartz (n 32) 724–25; R Wright, 'The Standards of Care in Negligence Law' in D Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press, 1995) 249, 257, 259, 269–71; R Wright, 'Hand, Posner, and the Myth of the "Hand Formula"' (2003) 4 *Theoretical Inquiries in Law* 145, 223–35.

or others at risk, that also should be taken into account in an assessment of her comparative responsibility vis-a-vis the defendant.³⁴

The traditional common law viewed her negligent contribution to her injury much more seriously. It did not weigh her responsibility in comparison to the defendant's responsibility in order to apportion liability between her and the defendant. Instead, although she, unlike the defendant, committed no legal wrong,³⁵ while the defendant did, she was completely barred from recovering from the defendant, no matter how slight her negligence was compared to the defendant's.³⁶

Several rationales, including those offered to support the bar against contribution among defendants, were offered for this harsh result, most of which do not stand up to even minimal scrutiny.³⁷ The 'unclean hands', distrust of juries, and industry subsidization rationales were undermined by: (a) the existence of various formal rules that allowed plaintiffs to recover, on an all-or-nothing basis, if the defendant had the 'last clear chance' or his negligence was active or gross while the plaintiff's was passive or slight; (b) the informal practice according to which the contributory negligence issue rarely was taken away from juries, which sometimes or often allowed negligent plaintiffs to recover some or all of their damages through juries' employment of an unauthorized, hidden and unguided form of de facto comparative responsibility; and (c) the tendency of judges and juries to assess plaintiffs' conduct more leniently while assessing defendants' strictly.³⁸

The most plausible explanation for the prolonged failure by many states in the United States to replace the clearly unjust and inequitable complete bar against recovery by a contributorily negligent plaintiff with a comparative responsibility recovery rule is a combination of four factors: (1) the inability to formulate a specific method or yardstick for measuring comparative responsibility;³⁹ (2) strong opposition by defense interests; (3) failures by most legislatures to act given the financial and related political power of the defense interests; and (4) reluctance by state courts to remedy the legislative inaction due to institutional deference and the same political concerns. I believe the second element was the critical one.

Eventually, the state courts gave up on waiting for action by the state legislatures and, despite opposition by the defense interests, exercised their judicial power regarding the common law to replace the complete bar to recovery by a contributorily negligent plaintiff with a recovery regime based on comparative responsibility. The reasons for doing so were stated succinctly by one of the first courts to do so, the California Supreme Court, in *Li v Yellow Cab Co*⁴⁰:

³⁴ See R Wright, 'Negligence in the Courts: Introduction and Commentary' (2002) 77 *Chicago-Kent LR* 425, 469, 472-73 and fn 187.

³⁵ If her negligent conduct resulted in harm to another (including the defendant in her lawsuit) in addition to herself, that other person would be the plaintiff in a distinct lawsuit in which she would be the defendant

³⁶ Keeton et al (n 16) s 65 at 451-52, 461.

³⁷ *ibid* s 65 at 452-53, s 67 at 470-71.

³⁸ *ibid* s 66 at 462-63, s 67 at 469-70; **Error! Main Document Only.** G Schwartz, 'Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation' (1981) 90 *Yale LJ* 1717, 1759, 1761-63; G Schwartz, 'The Character of Early American Tort Law' (1989) 36 *UCLA LR* 641, 661-66; T Weir, 'All or Nothing' (2004) 78 *Tulane LR* 511, 549.

³⁹ See text at n 28 above.

⁴⁰ *Li v Yellow Cab Co* (1975) 532 P2d 1226.

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the ‘all-or-nothing’ approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.

Furthermore, practical experience with the application by juries of the doctrine of contributory negligence has added its weight to analyses of its inherent shortcomings: ‘Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff’s fault. But the process is at best a haphazard and most unsatisfactory one.’ It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis.⁴¹

The state courts’ move toward adoption of comparative responsibility rules for allocating liability between negligent defendants and plaintiffs spurred state legislatures to act, both to iron out details and to limit the effect of the shift to comparative responsibility. While state courts generally have preferred the ‘pure’ form of comparative responsibility that governs in all civil law jurisdictions and (almost all?) common law jurisdictions outside the United States, which allows a plaintiff to recover damages reduced by her percentage of comparative responsibility no matter how high that percentage might be, the state legislatures in the United States, at the behest of the defense interests, have generally adopted a ‘modified’ form that continues to bar any recovery by the plaintiff if the plaintiff’s percentage of comparative responsibility is, depending on the jurisdiction, either equal to or greater than that of the defendants in the aggregate.⁴²

When the courts adopted comparative responsibility rules to govern the relationship between a negligent defendant and a negligent plaintiff, they did not disturb the previously long established rule applying solidary liability to multiple wrongful contributors to a plaintiff’s injury.⁴³ Defense advocates, quoting statements by the *Li* court and other courts that legal responsibility should be distributed ‘in proportion to fault’⁴⁴ and treating percentages of comparative responsibility as stating defendants’ actual individual responsibility, attempted to convince the courts and legislatures to adopt instead a proportionate liability rule, which limits each wrongdoer’s liability, initially and ultimately, for the injury that it wrongfully caused to a portion of the injury equal to

⁴¹ *ibid* 1227–28 (citations omitted).

⁴² Dobbs (n 2) s 201 at 505–06; Keeton et al (n 16) s 67 at 470–73.

⁴³ *Rozevink v Faris* (Iowa 1983) 342 NW2d 845, 849 (‘of the thirty-eight other states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability, five have retained the doctrine in a modified form, and only three have done away with it (two by statute, one by court decision)’); *Restatement Third: Apportionment* (n 5) s A18 comment a reporters’ note at 163 (citation omitted); Keeton et al (n 16) s 67 at 475.

⁴⁴ See text at n 41 above.

its percentage of comparative responsibility.⁴⁵ Their argument was correctly rejected as being invalid by almost all the courts that considered it, which instead retained solidary liability.⁴⁶ However, a few courts⁴⁷ and many state legislatures accepted or at least were confused by this argument, along with other invalid arguments, and adopted a wide and inconsistent variety of proportionate liability rules applicable in some or almost all situations.⁴⁸

The defense advocates unashamedly insisted upon employing ‘pure’ proportionate liability for wrongdoers while at the same time inconsistently insisting upon a ‘modified’ rather than ‘pure’ rule for determining a contributorily negligent plaintiff’s portion of damages, which under the ‘modified’ rule results in the negligent plaintiff’s bearing all of her damages, rather than a percentage equal to her comparative fault, if her percentage of comparative responsibility is equal to or more than 50 per cent.

The proportionate liability rule results in innocent as well as negligent plaintiffs’ bearing a portion of their damages that is much greater than their percentages of comparative responsibility if, as often will be the case, one or more of the wrongdoers is unavailable or insolvent, and it will delay and reduce their ultimate recovery due to litigation expenses even if all of them are available and

⁴⁵ See Part III B below.

⁴⁶ See, eg, *Norfolk & Western Railway Co v Ayers* (2003) 538 US 135, 160–64; *Arctic Structures, Inc v Wedmore* (Alaska 1979) 605 P2d 426; *Walton v Tull* (Ark 1962) 356 SW2d 20, 26; *American Motorcycle Ass’n v Superior Court* (Cal 1978) 578 P2d 899; *Tucker v Union Oil Co of California* (Idaho 1979) 603 P2d 156, 163–69; *Coney v JLG Indus* (Ill 1983) 454 NE2d 197; *Best v Taylor Machine Works* (Ill 1997) 689 NE2d 1057, 1084–89; *Rozevink v Faris* (Iowa 1983) 342 NW2d 845; *Maday v Yellow Taxi Co* (Minn 1981) 311 NW2d 849; *Duncan v Cessna Aircraft Co* (Tex 1984) 665 SW2d 414, 429; *Seattle First Nat’l Bank v Shoreline Concrete Co* (Wash 1978) 588 P2d 1308, 1311–14; *Sitzes v Anchor Motor Freight* (W Va 1982) 289 SE2d 679, 684–85; *Wisconsin Natural Gas Co v. Ford, Bacon & Davis Constr Corp* (Wisc 1980) 291 NW2d 825, 833–35; *Kirby Bldg Systems v Mineral Explorations* (Wyo 1985) 704 P2d 1266.

⁴⁷ The three state courts that on their own replaced solidary liability with proportionate liability each uncritically accepted the defense advocates’ argument that solidary liability results in a defendant’s being held liable for more than it caused or for which it was responsible. See *Bartlett v New Mexico Welding Supply* (NM App 1982) 646 P2d 579, 582 (assuming the doctrine ‘hold[s] a person liable for an amount greater than the extent that person caused injury’), cert denied, (NM 1982) 648 P2d 784; *Laubach v Morgan* (Okla 1978) 588 P2d 1071, 1074 (‘By doing away with joint liability plaintiff will collect his damages from the defendant who is responsible for them.’), limited by *Boyles v Oklahoma Natural Gas Co* (Okla 1980) 619 P2d 613 (retaining solidary liability for innocent plaintiffs); *McIntyre v Balentine* (Tenn 1992) 833 SW2d 52, 58 (assuming that adoption of proportionate liability was necessary to ensure that ‘a particular defendant will henceforth be liable only for the percentage of a plaintiff’s damages occasioned by that defendant’s negligence’). See also *Brown v Keill* (Kansas 1978) 580 P2d 867, 871–74 (construing statute as eliminating joint and several liability and stating that ‘[t]here is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss’); *Smith v Department of Ins* (Fla 1987) 507 So 2d 1080, 1091 (upholding against constitutional challenge a legislated shift to proportionate liability in certain types of cases because the right of access to the courts under the state constitution ‘does not include the right to recover for injuries beyond those caused by the particular defendant’); *Prudential Life Ins Co v Moody* (Ky 1985) 696 SW2d 503, 505 (Vance J concurring) (‘[it is unfair] for a defendant who is only 50% responsible for an injury to be saddled with 100% of the liability’); *Walt Disney World v Wood* (Fla 1987) 515 So 2d 198, 202 (McDonald CJ dissenting) (‘the law of joint and several liability should be repudiated and each defendant held accountable for only the percentage of damages found by the trier of fact to have been caused by his conduct’).

⁴⁸ For lengthy but incomplete listings that nevertheless demonstrate the large variation in approaches in the United States, see *Restatement Third: Apportionment* (n 5) s 17 comment a; Wright, ‘Allocating Liability’ (n 7) 1165–68 and fns 74 and 76–93; Wright, ‘Reply’ (n 7) 1147 fn 2.

solvent.⁴⁹ Contrary to the defense advocates' constant refrain,⁵⁰ it is the proportionate liability rule, rather than traditional solidary liability with contribution allowed, that departs from principled allocation of liability based on the various contributors' distinct individual and comparative responsibilities. As the *Restatement Third* explains,

[S]everal [proportionate] liability shifts the burden of insolvency from defendants to plaintiffs and creates a symmetrical unfairness to that existing with pure joint and several liability when a plaintiff is also comparatively responsible for damages. Indeed, several liability is especially unfair in universally imposing the risk of insolvency on plaintiffs, even though some [being non-negligent] are not comparatively responsible for their damages.⁵¹

As the *Restatement* notes, under the solidary liability rule with allowed contribution the available, solvent wrongdoers will end up having to bear the share of damages that equitably should have been borne by unavailable or insolvent wrongdoers. However, contrary to the defense advocates' repeated arguments, this does not result in their being made liable for injuries and losses for which others, rather than they, are responsible.⁵² They have only been made to pay for injuries and losses that they wrongly caused and for which they thus are responsible. Their inability to obtain contribution from the unavailable and insolvent wrongdoers who also were fully responsible results in an unfairness among the wrongdoers, but in no way makes their having to fully rectify their wrong to the plaintiff unfair or unjust.

Nevertheless, would it be fairer to require negligent plaintiffs to share with the available and solvent wrongdoers the portion of the damages that equitably should have been borne by unavailable or insolvent wrongdoers? Those who answer 'no' to this question emphasize the significant differences in the bases for the wrongdoers' and the negligent plaintiff's responsibility for the plaintiff's injury. As was explained above, the plaintiff has an interactive justice claim against each wrongdoer for the entirety of the indivisible injury that was wrongfully caused by

⁴⁹ See the last three paragraphs in Part II B above.

⁵⁰ See, eg, US Attorney General Tort Policy Working Group, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (Feb 1986) 31–35, 64–65 (hereafter *Reagan Report*); US Attorney General Tort Policy Working Group, *An Update on the Liability Crisis* (Mar 1987) 54, 76–78 (hereafter *Reagan Report Update*); 'The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations' (1987) 10 *Hamline LR* 345, 349, 359–61, 384 (originally published as a monograph in May 1986) (hereafter 'Industry Report'); C Mutter, 'Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee' (1990) 57 *Tennessee LR* 199, 204, 306–07, 312–13, 318–19; R Pearson, 'Apportionment of Losses Under Comparative Fault Law—An Analysis of the Alternatives' (1980) 40 *Louisiana LR* 343, 361–63. For discussion of the many problems with this argument, see R Wright, 'The Logic and Fairness of Joint and Several Liability' (1992) 23 *Memphis St Univ LR* 45, 71–81 (hereafter 'Logic and Fairness').

⁵¹ *Restatement Third: Apportionment* s 11 comment a at 109; see *ibid* s C21 comment a, reporters' note at 214–15 (citation omitted):

[E]ven with the plaintiff sharing some fault, each defendant (as well as the plaintiff) is still a legal cause of all of the plaintiff's damages. Shifting the entire risk of insolvency to the plaintiff 'merely transform[s] the inequity of imposing that risk entirely on solvent defendants into the equal and opposite inequity of imposing the risk entirely on the plaintiff.'

See *ibid* s 17 comment a at 149 ('imposing the risk of insolvency on an innocent plaintiff is unwarranted'); *ibid* s A19 comment e, reporters' note at 167 (same); *ibid* s B18 comment a (same); *ibid* s B19 comment d (describing effects of proportionate liability on plaintiffs as 'harsh').

⁵² See Part III B below.

each of them, while no wrongdoer has an interactive justice claim against the plaintiff, but rather only a claim that, when assessing liability for his wrongful causation of the plaintiff's injury, the plaintiff's own moral responsibility for the injury should be taken into account. A wrongdoer's equitable claim for contribution by the other wrongdoers is based on the fact that his completely or partially fulfilling his interactive justice responsibility to the plaintiff by fully or partially compensating her extinguished the plaintiff's interactive justice claims against the other wrongdoers by the amount of his payment. His compensation of the plaintiff did not extinguish any liability or responsibility that the plaintiff had to anyone. Indeed, if the plaintiff was contributorily negligent, the wrongdoers have instead already had the benefit of having the plaintiff's interactive justice claims against each of them reduced in accord with the plaintiff's comparative responsibility.⁵³

I have previously endorsed this argument,⁵⁴ and I still think it has considerable force. It justifies and explains the position that has been adopted by almost all countries around the world and by almost all the courts in the United States that have addressed the issue.⁵⁵ However, I now think that, regardless of the significant differences in the bases of the wrongdoers' responsibilities for the plaintiff's injury and her own responsibility if she negligently contributed to the injury, the fact remains that the plaintiff, as well as each wrongdoer, is responsible for the entirety of the injury. The plaintiff has behaved negligently and her negligent conduct, as well as each wrongdoer's wrongful conduct, was an actual and 'proximate' cause of the entire injury. As such, it seems fair that the negligent plaintiff should share with the available and solvent tortfeasors the portion of the damages that equitably should have been borne by unavailable or insolvent wrongdoers, based on their comparative responsibility. This would avoid situations such as the 1987 Florida case in which a defendant with 1 per cent comparative responsibility was held liable for 86 per cent of the plaintiff's damages after subtraction of her 14 per cent comparative responsibility, with little likelihood of obtaining contribution from the other defendant, plaintiff's husband, who had 85 per cent comparative responsibility.⁵⁶

For reasons discussed above,⁵⁷ the negligent plaintiff's sharing with those who wronged her of the share of damages that should have been borne by unavailable or insolvent wrongdoers should occur under a modified solidary liability rule rather than a modified proportionate liability rule. The plaintiff's claim against each wrongdoer for full compensation (reduced by plaintiff's percentage of comparative responsibility if the plaintiff was negligent) has priority over any wrongdoer's equitable claim for sharing of liability. Moreover, the injured plaintiff can least afford the expense and delay involved in locating all the wrongdoers, successfully suing and collecting initial comparative responsibility shares from the available and solvent wrongdoers, and then repeating these steps to obtain from (hopefully still) available and solvent wrongdoers the shares that should have been borne by unavailable or insolvent wrongdoers.⁵⁸

⁵³ See, eg, *American Motorcycle Ass'n v Superior Court* (Cal 1978) 578 P2d 899, 906; *Coney v JLG Indus* (Ill 1983) 454 NE2d 197, 205; *Weir* (n 2) s 12–86.

⁵⁴ Wright, 'Allocating Liability' (n 7) 1191–93.

⁵⁵ See sources cited in nn 2 and 46 above.

⁵⁶ *Walt Disney World v Wood* (Fla 1987) 515 So 2d 198.

⁵⁷ See last three paragraphs in Part II B above.

⁵⁸ To eliminate the risk of a wrongdoer's being unable to collect from a negligent plaintiff the plaintiff's proper share of damages that end up not being collectible from unavailable or insolvent wrongdoers, the court could require the

The modified solidary liability rule also has the advantage of being able to be applied across the board, in situations involving innocent as well as contributorily negligent plaintiffs, while the modified proportionate liability rule is clearly unjustified in situations involving innocent plaintiffs. The modified solidary liable rule was adopted in the Uniform Comparative Fault Act⁵⁹ and has been endorsed as the fairest approach in the *Restatement Third*⁶⁰ and by prominent tort scholars.⁶¹

III Rhetoric

The defense advocates have repeatedly confused and misused legal terms in attempts to portray solidary liability, as well as other aspects of traditional tort doctrine, as deviations from or obsolete elements of the traditional principles of tort liability. In this part, I will focus on two primary examples.

A ‘Joint’ and ‘Several’ Liability

The defense advocates have repeatedly asserted that ‘joint and several’ (solidary) liability initially applied only to defendants acting in concert, that application of this rule to other situations is a recent innovation which leads to highly inequitable treatment of defendants, and hence that the rule should be eliminated except for defendants who acted in concert.⁶² As the US Supreme Court stated recently in rejecting this argument, as well as the argument that solidary liability is inconsistent with allocation regimes based on comparative responsibility, the defense advocates failed to heed warnings in the sources that they cited of the need to distinguish the historical uses of the words ‘joint’ and ‘several’.⁶³

The terms ‘joint tort’, ‘joint liability’ and ‘joint tortfeasors’ initially were primarily procedural terms that were applied to situations in which defendants could be joined in the same lawsuit,

plaintiff to provide a financial guarantee or put the appropriate portion of the wrongdoer’s payment into an escrow account until ultimate liability shares are resolved.

⁵⁹ Uniform Comparative Fault Act s 2, 12 ULA 39 (West Supp 1990). Due to opposition to the ‘pure’ form of comparative responsibility between plaintiffs and defendants, it was adopted by only a few states and was replaced in 2002 by the Uniform Apportionment of Tort Responsibility Act, which replaced pure comparative responsibility between plaintiffs and defendants with modified comparative responsibility and replaced modified solidary liability for defendants with modified proportionate liability (reallocation of proportionate shares).

⁶⁰ *Restatement Third: Apportionment* (n 5) s C21 comment a; see *ibid* s 17 comment a, 148.

⁶¹ Fleming (n 34) 1483–84, 1491–93; J Wade, ‘An Evaluation of the “Insurance Crisis” and Existing Tort Law’ (1987) 24 *Houston LR* 81, 87–88.

⁶² Eg, *Reagan Report* (n 50) 33–34 and fns 29–30, 64–65; *Reagan Report Update* (n 50) 76–78; ‘Industry Report’ (n 50) 360; V Schwartz, *Comparative Negligence*, 2nd edn (Charlottesville, Lexis Law Pub, 1986) s 16.3 at 257, s 16.5 at 261 fn 74; L Pressler and K Schieffer, ‘Joint and Several Liability: A Case for Reform’ (1988) 64 *Denver Univ LR* 651, 660–62 and fn 49; Illinois 84th Gen Assembly, Reg Sess, Senate Debates, May 21, 1986, 91–92 (Senator Kustra); Petitioner’s Brief, *Norfolk & Western Railway Co v Ayers* (2003) 538 US 135, at 12–13, 32 and fn 26, 34–36, 39–40, 49.

⁶³ *Norfolk & Western Railway Co v Ayers* (2003) 538 US 135, 163–65; see, eg, Prosser (n 3) 413 (‘the separate problems of joinder of parties in the same action, as a matter of procedure, and the substantive liability of two or more parties for the same result, require separate consideration, and have very little in common’).

which under the traditional common law was allowed only in situations involving concerted action, in which each tortfeasor could be held liable for the consequences of each other's acts as well as their own acts, or in other situations involving vicarious liability (primarily that of employers for the injuries caused by their employees within the scope of employment). Independently acting tortfeasors who tortiously contributed to the same injury, who in England are still called 'concurrent tortfeasors' rather than 'joint tortfeasors', could not be joined in the same action. However, as the defense advocates have failed to acknowledge, each was 'severally' (separately) fully liable for the injury.⁶⁴ As the *Restatement Third* explains,

[B]efore the advent of comparative responsibility [rather, 'tort reform'], 'several liability' was employed to describe a defendant who was responsible for all of the plaintiff's damages but who could not be joined in a suit with any other defendant who may also have been responsible.⁶⁵

Procedural joinder of independently acting tortfeasors is now allowed, indeed encouraged, 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'.⁶⁶ Both before and after this procedural change, each tortfeasor, whether acting in concert or independently, was 'severally' (fully) liable for the entirety of any injury that was caused by his tortious conduct, regardless of whether other tortfeasors or natural events also contributed to the same injury.⁶⁷ Hence, as the *Restatement Third* explains, 'Many courts, even before the 20th century, [allowed procedural joinder and thus] imposed *joint* and *several* liability on independent tortfeasors when their acts caused truly indivisible harm.'⁶⁸ It traces such joint and several liability for independent tortfeasors at least as far back as 1771.⁶⁹

During the recent period of 'tort reform', the term 'several liability' has come to mean fractional or partial liability, rather than full liability, for the harm to which one contributed. As the *Restatement Third* notes, this use of the term 'several liability' is 'imprecise and potentially confusing' and historically inaccurate, for the reasons discussed above.⁷⁰ However, deferring to the now prevalent usage, the *Restatement Third* uses the term 'several liability' in its current sense of fractional or partial rather than full liability for a harm to which one wrongfully contributed.⁷¹

⁶⁴ C Baker, *Tort*, 4th edn (1986) 142–43; Fleming (n 2) 255, 257–58; Keeton et al (n 16) s 46 at 322–23, s 47 at 324–25 and fn 3, 328–29; Prosser (n 3) at 413–15, 418–19, 424, 430, 439.

⁶⁵ *Restatement Third: Apportionment* (n 5) s 11 comment a, reporters' note at 109–110 (citation omitted). Defendants who caused distinct separate injuries to the same plaintiff were similarly held 'severally' (fully) liable 'for the portion of the plaintiff's injury caused by that defendant' (ibid).

⁶⁶ Keeton et al (n 16) s 47 at 325–26.

⁶⁷ See, eg, *Miller v Union Pacific R Co* (1933) 290 US 227, 236 ('The rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone') (citing a number of US Supreme Court and Federal Circuit Court cases from the 19th and early 20th centuries); *Restatement Third: Apportionment* (n 5) s 10 comment b, reporters' note at 104; C Baker, *Tort* (n 64) 142–43; Keeton et al (n 16) s 46 at 322, s 47 at 328–29.

⁶⁸ *Restatement Third: Apportionment* (n 5) s A18 comment a reporters' note at 163 (emphasis added) (citations omitted).

⁶⁹ ibid.

⁷⁰ ibid s 11 comment a, reporters' note at 109–10.

⁷¹ ibid.

A more precise and less confusing term for such fractional or partial liability for injuries and losses, which is used in this chapter, is 'proportionate liability'.⁷²

B Individual Full versus Relative Comparative Responsibility

The most powerful (and hence most frequently asserted) argument against the solidary liability rule is that it unjustly and unfairly holds a defendant who caused or was responsible for only a portion of the plaintiff's injury liable for the entire injury or, to the same effect, for injuries for which others but not he was a cause.⁷³ The arguments made by the defense advocates in Illinois are typical of those made throughout the country.⁷⁴ Senator Rupp argued:

⁷² See *Best v Taylor Machine Works* 689 NE2d 1057 (Illinois 1997) 1084–89 ('proportionate several liability').

⁷³ Eg 'Industry Report' (n 50) 360 ('courts have expanded the doctrine to require any defendant who is responsible for any portion of the plaintiff's injury to be jointly liable for all of the damages'); *ibid* 361 ('It is manifestly unfair that [a defendant] who is held to be only five percent liable (if that) for the economic loss may be forced to pay 100% of the damage'); *Reagan Report* (n 50) 64 ('Joint and several liability . . . is now in many cases applied to all defendants, regardless of their connection to the injury'); *Reagan Report Update* (n 50) **Error! Main Document Only**.⁷⁶ ('a 1% finding of liability will guarantee plaintiff a 100% recovery'); *ibid* 77 ('it is unfair for a defendant to bear the cost of another person's responsibility'); *ibid* 78 ('A person [should be liable] only for those damages directly attributable to the person's pro-rata share of fault or responsibility for the injury'); D Ball, 'A Reexamination of Joint and Several Liability Under a Comparative Negligence System' (1987) 18 *St Mary's LJ* 891, 891 (joint and several liability 'can result in a defendant, who is minimally at fault in comparison to other parties, paying not only the damage he caused but also the damage caused by others'); Pearson (n 50) 362 (assuming that the only loss 'attributable to' a party's negligence is the fraction of the injury corresponding to the party's percentage of comparative responsibility); *ibid* 366 (assuming that a person with 13% comparative responsibility is 'only 13 percent negligent' and thus essentially indistinguishable from a totally innocent plaintiff); Petitioner's Brief (n 62) 1–2, 31–33 and fn 26, 40 and fn 35, 43 fn 38, 46–47.

⁷⁴ I make this assertion based on its being true for every legislative debate that I have read or read about, including review of materials generously provided to me by Aaron Twerski, as well as its being included in the reports prepared at the national level for the defense interests, which are quoted in n 73 above. See, eg, *Texas House/Senate Joint Committee on Liability Insurance and Tort Law and Procedure, Majority Report* 182 (filed with the 70th Leg, Jan 1987) ('[a] defendant who is found jointly liable for the injuries of a plaintiff is liable for the *entirety* of the damages awarded in favor of the plaintiff even if he is only *partly* responsible for the injuries.') (emphasis in original); *Wisconsin Comm'r of Insurance, Final Report of the Special Task Force on Property and Casualty Insurance* (Aug 1986) 19:

[A]bolishing joint and several liability for [noneconomic] damages would require defendants responsible for causing noneconomic injuries to pay the noneconomic damages. This should alleviate some concerns that wealthy defendants too often get saddled with paying . . . noneconomic damages when [they] did not cause the noneconomic injuries. The task force felt that joint and several liability should remain for economic damages to assure the victim of full compensation for economic injuries.

See also B Clark, 'Joint and Several Liability: The Battle in California Moves to the Courts' (1986) 16 *Lincoln LR* 121, 121–36, 145–49 (describing the debate in California); J Montford and W Barber, '1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System' (pt. 2, 1988) 25 *Houston LR* 245, 281–91 and fn 180 (describing the debate in Texas); R Wright, 'Understanding Joint and Several Liability' (1991) 2 *Shepard's Ill Tort Rep* 278, 279–83 (describing the debate in Illinois); Wright, 'Reply' (n 7) 1150–51 (describing the debate in Maine); Wright, 'Logic and Fairness' (n 50) 52–53 fn 21 (quoting numerous statements by Professor Carol Mutter, who was a consultant to the special committee of the Tennessee Senate that considered the solidary liability issue, in which she referred to the 'glaring' injustice of a defendant only 'X percent at fault' or 'X percent responsible' being held liable for more than X percent of the damages).

[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.⁷⁵

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.⁷⁶

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.’⁷⁷ Senator Schuneman objected that the proposed legislation would only protect defendants from joint and several liability who were ‘less than 25 percent liable.’⁷⁸ 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[?]⁷⁹

Unfortunately, as in almost every other state where the issue was debated, the defenders of solidary liability in Illinois for the most part seemed to accept, or at least failed to clearly rebut, the defense advocates’ criticisms of solidary liability. For example, Representative Greiman stated:

[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 [fully] liable.⁸⁰

If solidary liability resulted in a defendant's being held liable for what he did not cause or for the actions of others rather than his own actions, it indeed would be unjust. However, as was noted above,⁸¹ almost all courts in the United States that have considered this argument have correctly held that it is patently false. For example, the US Court of Appeals for the Ninth Circuit stated in 1941:

⁷⁵ Illinois Senate Debates (n 62) 84.

⁷⁶ *ibid* 90.

⁷⁷ *ibid* 89.

⁷⁸ *ibid*, June 30, 1986, 84.

⁷⁹ Illinois 84th Gen. Assembly, House of Rep Transcription Debate, June 30, 1986, 67.

⁸⁰ *ibid* 8–9; see *ibid* 59 (similar statement by Representative Homer).

⁸¹ See n 46 above.

Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held liable for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury.⁸²

In its opinion rejecting the defense advocates' arguments, the Supreme Court of Illinois stated:

We note that the proposition which defendants offer as the primary explanation for abolishing the doctrine of joint and several liability, *i.e.*, the assertion that the doctrine requires tortfeasors to pay for more damages than they caused, is at odds with this court's explanation of joint and several liability in [*Coney v JLG Indus*, (1983) 454 NE2d 197] . . . [T]he *Coney* court stated: 'The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. *A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage.* *** The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another *does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.*'⁸³

As the Court went on to explain,⁸⁴ solidary liability applies only to injuries for which the defendant himself is fully responsible. He is responsible for an injury only if the tortious aspect of his behavior was an actual cause of the injury.⁸⁵ He is not liable for injuries, including separable portions of injuries, to which he did not contribute. He is not liable if, for reasons of policy or principle, his connection to the injury is considered too remote or minimal to be 'proximate'.⁸⁶

The Court emphasized the fundamental difference between each tortfeasor's *individual full responsibility* for an injury that he tortiously caused and the *comparative responsibility percentages* that are obtained by comparing the tortfeasors' individual full responsibilities for the injury (and the plaintiff's if the plaintiff was contributorily negligent).⁸⁷ For example, if two defendants were each negligent, actual and 'proximate' causes of a plaintiff's injury, neither is merely '50 per cent negligent', a cause of only 50 per cent of the injury, or only '50 per cent responsible'. Such statements make as much sense as saying that someone is 50 per cent pregnant or caused 50 per cent of a death or a broken leg. Rather, each defendant was 100 per cent negligent, and each defendant's negligence was an actual and 'proximate' cause of 100 per cent of the injury. Each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50 per cent of the total *comparative* responsibility for the injury.

⁸² *Husky Refining Co v Barnes* (1941) 119 F2d 715, 716 (citations omitted).

⁸³ *Best v Taylor Machine Works* (1997) 689 NE2d 1057, 1086 (emphasis added by the court).

⁸⁴ *ibid.*

⁸⁵ R Wright, 'Causation in Tort Law' (1985) 73 *California LR* 1735, 1759, 1766–71.

⁸⁶ Keeton et al (n 16) s 47 at 328–29, s 52 at 345–46, 347–49; see text at n 21 above.

⁸⁷ *Best v Taylor Machine Works* (n 60) 1086–87.

Similar rebuttals were rare in the state legislative debates.⁸⁸ Instead, plaintiffs' advocates often played into the hands of the defense advocates by relying solely on an 'innocent plaintiff needs compensation' argument,⁸⁹ which is weak even with respect to innocent plaintiffs as a matter of interactive or distributive justice and obviously is of no help to negligent plaintiffs.

For example, Senator Berman, the principal defender of the solidary liability doctrine in the Illinois Senate, stated:

[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.⁹⁰

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.'⁹¹ But he apparently failed to grasp the full import of this argument, since he immediately proceeded to return to an argument based on the plaintiff's need for compensation rather than each wrongdoer's full responsibility for the injury that he wrongfully caused:

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.⁹²

⁸⁸ The only strong rebuttal at the state level that I have read was a statement by Mack Kidd on behalf of the Texas Trial Lawyers Association during the legislative debates in Texas. See Wright, 'Logic and Fairness' (n 50) 53 fn 22. A sustained challenge to the defense advocate's argument in a Congressional hearing made the defense advocate quite uncomfortable. See *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 (1987) 488–90 (colloquy between Rep Florio and Alfred W Cortese Jr).

⁸⁹ See, eg, Nevada Trial Lawyers Association, 1987 Press Packet, *Statement on Joint and Several Liability*, which states:

The law presently does not lose sight of who the victim is in a case. The company is a 'wrongdoer', it has broken the law and caused the damage. Although it may not be fair for the one company to have to pay, it is more just than to let the victims become losers once again.

⁹⁰ Illinois Senate Debates (n 62) 85.

⁹¹ *ibid* 109–10.

⁹² *ibid* 111.

Similarly, Representative McPike at one point argued for solidary liability based on the defendant's being an actual and 'proximate' cause of the plaintiff's injury in an actual/hypothetical case in which the defendant municipality failed to replace a manhole cover,⁹³ but failed to make the same point for an actual case in which the defendant municipality allowed foliage to eliminate or seriously obscure viewing of a stop sign:

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.⁹⁴

In Maine, the Commission to Examine Problems of Tort Litigation and Liability Insurance based its majority recommendation that no change be made in the solidary liability doctrine on the 'innocent plaintiff needs compensation' rationale:

Maine law, in most instances, permits a liable defendant to bear responsibility for only that portion of the plaintiff's damages attributable to his fault. . . . [W]hile in a few cases a defendant may pay more than his portion of a plaintiff's damages because another defendant at fault has no assets, this result is the fairest option. A more unfair option is to have an innocent or less blameworthy plaintiff absorb the loss.⁹⁵

The same arguments were reiterated in the debates in the Maine legislature. Supporters of solidary liability explicitly noted their confusion over the doctrine.⁹⁶ Those on both sides of the debate erroneously assumed that a defendant held liable for more than her percentage of comparative responsibility was being held liable for damages for which she was not responsible. However, the majority thought that the balance weighed in favor of 'fairness to the innocent plaintiff' based on the plaintiff's need for full compensation, especially given the lack of any evidence that elimination or modification of joint and several liability would improve insurance availability or affordability.⁹⁷

The principal academic spokesperson for the defense advocates, Professor Aaron Twerski, who testified on their behalf before several legislative committees, has argued that legislators were not confused by the defense advocates' arguments. He asserts that legislators were well aware of the

⁹³ Illinois House Debate (n 79) 76.

⁹⁴ *ibid* 75.

⁹⁵ Maine State Legislature, *Draft Report of the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine* (Oct 1 1987) 95–96.

⁹⁶ Eg, *Maine Legislative Record* (March 16, 1988) H-288 (remarks of Rep Paradis).

⁹⁷ *ibid* H-288 (remarks by Representative Paradis defending joint and several liability); *ibid* H-290 (remarks of Representative MacBride defending joint and several liability); *ibid* H-289 (remarks of Representative Hanley opposing joint and several liability); *ibid* S-309–11 (March 17, 1988) (remarks of Senators Brannigan and Black favoring joint and several liability); *ibid* (remarks of Senators Collins, Whitmore and Dillenback opposing joint and several liability). The attempt to modify the solidary liability rule failed by an overwhelming vote in the House and by a single vote in the Senate. *ibid* H-291 (101 to 30 vote), S-311 (15 to 14 vote, with two paired votes).

best arguments for both sides and weighed them against each other to reach various compromise solutions based on liability concerns not related to the basic justice and fairness of solidary liability, but which are exacerbated by solidary liability.⁹⁸

Contrary to Twerski's assertions, the defense advocates, including Twerski himself,⁹⁹ consistently hammered away on the argument that solidary liability unfairly requires a defendant to pay for more damage than he wrongfully caused or for which he was responsible, and thus makes him responsible for others' tortious actions in addition to his own, and that argument was usually accepted and repeated by legislators. As Twerski himself framed the issue regarding insolvent defendants,¹⁰⁰ the 'fairness to plaintiffs' argument was consistently stated as an 'innocent plaintiff needs compensation' argument for making wrongdoers liable for harm for which they allegedly were not responsible, rather than as an individual full responsibility argument based on the each wrongdoer's actual and 'proximate' causation of the plaintiff's indivisible injury.¹⁰¹ Any 'compromise' allocation rule, such as reallocating the uncollectible shares among the solvent responsible parties or retaining joint and several liability for economic damages only, allegedly would be unjust since a solvent defendant would be made to pay 'more than his portion of damages'¹⁰² and would be based on the plaintiff's need for compensation rather than on any principle of responsibility:

If we are to achieve a true fault based system of responsibility, pure several [proportionate] liability is essential. The various modified systems are only a partial solution to the injustice inherent in joint and several liability. . . . The advantage of these methods is that the plaintiff is guaranteed [sic] full recovery. To achieve this, however, defendants must act as insurers for the actions of others, over whom they exercise no control.¹⁰³

IV Power

The major push in the United States for full or partial replacement of wrongdoers' solidary liability by proportionate liability occurred in the mid-1980s,¹⁰⁴ when two critical factors coincided: a

⁹⁸ A Twerski, 'The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics' (1989) 22 *UC Davis LR* 1125, 1127, 1129–33, 1144–45.

⁹⁹ *ibid* 1128 ('industry advocates contend that joint and several liability is unfair because a defendant is held responsible to pay more than the proportional share of harm *which she caused*') (emphasis added); *ibid* 1139 ('ten percent liability . . . effectively means 100%').

¹⁰⁰ *ibid* 1127, 1129–30 and fn 19.

¹⁰¹ See, eg, Wisconsin Commissioner of Insurance, *Final Report of the Special Task Force on Property and Casualty Insurance* (Aug 1986) 19:

[A]bolishing joint and several liability for [noneconomic] damages would require defendants responsible for causing noneconomic injuries to pay the noneconomic damages. This should alleviate some concerns that wealthy defendants too often get saddled with paying . . . noneconomic damages when [they] did not cause the noneconomic injuries. The task force felt that joint and several liability should remain for economic damages to assure the victim of full compensation for economic injuries.

¹⁰² Maine Liability Crisis Alliance **Error! Main Document Only.**, *Response to Draft of the Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine, Appendix A: Joint and Several Liability* (Oct 1987) A–5.

¹⁰³ *ibid* A-6; see *ibid* A-4 (same).

¹⁰⁴ See sources cited in n 50 above; J Granelli, 'The Attack on Joint and Several Liability' (1985) 71 *ABAJ* 61.

‘liability insurance crisis’ generated by ‘the most infamous hard market in the United States’ with resulting ‘dramatic increases in commercial liability insurance premiums and reductions in coverage availability’¹⁰⁵ and Ronald Reagan’s landslide Presidential election victory, which swept in on his coattails pro-business Republican Party legislators at both the national and state levels across the country.

Due to substantial delays (‘float’ time) between receipt of premium income and pay out on claims, significant changes in financial markets, difficulties in forecasting future casualty losses, and lack of transparency or regulation, the liability insurance market goes through repeated ‘soft’ and ‘hard’ cycles:

Simply described, the [‘soft’ and ‘hard’] economic cycle occurs because insurers make most of their money from investment income. During years of a strong stock market, high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to *invest* for maximum return. This results in competitive *underpricing* of policies [based on expected claims], when rates rise less than inflation. This is called the ‘soft market’. . . . However, when investment income decreases because the stock market plummets (or as in past cycles, interest rates drop) and/or cumulative price cuts make profits unbearably low, the industry responds by sharply increasing premiums and reducing coverage, creating a ‘hard market.’ For policyholders, a ‘liability insurance crisis’ is the result.¹⁰⁶

During soft markets, to gain market share insurers take on riskier insureds as well as lowering premiums and sometimes understate expected claims or draw on built-up excess reserves to show profitability to justify the lower premiums to state insurance agencies, which puts pressure on competing firms to also lower premiums. Such behavior is facilitated by limited liability, risk-insensitive guaranty programs and insurers’ ability to use reinsurance to conceal low prices and excessive growth. When investment returns decrease due to declining interest rates or stock market returns or financial crises such as the 2008 real estate financing crisis in the United States and/or a sharp increase in claim costs due to catastrophic natural events or alleged major increases in tort liability costs, reserves and surpluses built up during prior hard markets may be depleted; if so, a new hard market occurs, the severity of which is exacerbated by aberrant (especially risky) behavior during the soft market. A few insurers may default, but most will adjust by dropping clients and/or coverages as well as raising premiums, often overstating expected claims to justify higher premiums and build up surpluses.¹⁰⁷

In the United States, the McCarran-Ferguson Act exempts the insurance industry from antitrust regulation unless boycott, coercion or intimidation is involved and prohibits federal regulation.¹⁰⁸

¹⁰⁵ S Harrington, ‘Tort Liability, Insurance Rates, and the Insurance Cycle’ (2004) *Brookings-Wharton Papers on Financial Services* 1.

¹⁰⁶ J R Hunter and J Doroshow, *Premium Deceit 2016: The Failure of ‘Tort Reform’ To Cut Insurance Prices* (New York, Americans for Insurance Reform, Nov 2016) 4; see Harrington (n 105) 1, 18; see Federal Insurance Office, *Annual Report on the Insurance Industry* (June 2013) 22–29.

¹⁰⁷ See Harrington (n 105) 1–2, 19 and fns 12 and 13, 23; J R Hunter and J Doroshow, *Repeat Offenders: How the Insurance Industry Manufactures Crises and Harms America* (New York, Americans for Insurance Reform, Dec 2011) 2–6, 10, 18–24.

¹⁰⁸ 15 USC ss 1011–1015. The US Supreme Court has held that insurance companies may not boycott their insureds by agreeing to deny them coverage entirely. *St Paul Fire & Marine Inc Co v Barry* (1978) 438 US 531 (1978).

The industry created and controls a for-profit company, the Insurance Services Office Inc, which insurers use to share data among themselves and state insurance departments for rate-making purposes. Insurers are subject to regulation by state insurance departments, but few state insurance offices have the authority or funding to collect relevant data, validate it, and use it to exercise proper control over insurance rates. Neither the federal government nor states regulate the rates or terms of coverage set by reinsurers, which insurers use to shift and spread some of their claim risks. Some state insurance departments are authorized to collect data from domestic insurers, but rarely do. They are supposed to assure insurers' solvency, but they only have authority to require foreign reinsurers, such as Lloyd's of London, to post security for their reinsurance obligations.¹⁰⁹

From 1978 to 1984 the liability insurance market in the United States was soft. Premium growth grew dramatically, with indications of aberrant insurer behavior, while insurer profits and surplus declined. However, interest rates fell sharply between 1984 and 1986. Operating margins were 'substantially negative during 1982–1985 with particularly large losses during 1983–1984'.¹¹⁰ As interest rates began to fall sharply in 1984, insurers began to discuss among themselves the need to quit competing for premium income and instead collectively institute a significant raise in premiums. Initially, no mention was made of tort liability costs.¹¹¹ Indeed, St Paul, then the nation's largest medical malpractice insurer, told the *National Underwriter* magazine in December 1984 that 'there is not a malpractice crisis around the corner' and that any problem in the medical malpractice insurance field 'can be dealt with through rate adequacy, improved risk management, more intensive underwriting practices, and improved claims handling ability and strategy.'¹¹²

However, plans were already underway to follow the same path that was taken during the earlier 1974–1977 hard market, which primarily affected medical malpractice and product liability insurance.¹¹³ The industry's Insurance Information Institute informed insurers at a meeting in 1984 that it would be launching a massive advertising and public relations effort 'to market the idea that there is something wrong with the civil justice system in the United States.'¹¹⁴ The industry took advantage of its exemption from antitrust laws or any other significant regulation and the lack of governmental or public access to relevant information regarding its past and projected expenses and income to collude on eliminating or reducing coverages and sharply raising premiums. Insurers were pressured by other insurers and reinsurers to avoid premium competition and to instead raise premiums well above rates necessary along with investment income to cover expected claims costs in order to restore and enhance reserves and surplus as quickly as possible and to put pressure on legislators and voters to enact 'tort reforms'.¹¹⁵

The hard market began in 1985, with sharp premium increases and related increases in reported profits and surpluses.¹¹⁶ Operating margins following the premium increases were 'large and positive . . . peaking at about 35 percent in 1987'.¹¹⁷ The resulting liability insurance crisis affected

¹⁰⁹ *Repeat Offenders* (n 107) 7–8.

¹¹⁰ Harrington (n 105) 7.

¹¹¹ *Repeat Offenders* (n 107) 10–11.

¹¹² *National Underwriter*, December 14, 1984, 40.

¹¹³ See *Repeat Offenders* (n 107) 8–9.

¹¹⁴ *National Underwriter*, December 21, 1984, 1, 2, 46; see *Repeat Offenders* 13–14.

¹¹⁵ See *Repeat Offenders* (n 107) 15–18.

¹¹⁶ Harrington (n 105) 4–5, 11, 18.

¹¹⁷ *ibid* 7.

most lines of coverage. The insurers instituted a nationwide campaign to blame the crisis on alleged sharp increases in tort liability claim costs and to push for ‘tort reform’.¹¹⁸ They had eager allies among business interests and in the pro-business Reagan Administration, which published the first of its two reports on the crisis and the alleged need for tort reform in February 1986.¹¹⁹ Tremendous pressure was exerted on legislators across the country to enact ‘tort reform’.¹²⁰ A principal object of this pressure was replacement of the solidary liability rule by proportionate liability.¹²¹ As Senator Berman in Illinois noted in explaining his support of a limited modification of the solidary liability rule, despite his belief that modification of the rule was unjustified, ‘I don’t like to try to hold the ocean back, this is a compromise amendment’.¹²²

When asked for data to back up their claims, the insurance industry could not or would not supply it.¹²³ After conducting its own independent investigation, the Ad Hoc Insurance Committee of the National Association of Attorneys General concluded:

The facts do not bear out the allegations of an ‘explosion’ in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation ‘explosion.’ Instead, the available data indicate that the causes of, and therefore solutions to, the current crisis lie with the insurance industry itself.¹²⁴

Business Week magazine similarly reported:

Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry’s financial difficulties.¹²⁵

Even industry insiders occasionally acknowledged the true source of the recurrent liability insurance crises. Maurice R Greenberg, then President and Chief Executive Officer of American International Group Inc, one of the largest insurers, told an insurance audience in Boston in 1986 that the industry’s problems were due to price cuts taken ‘to the point of absurdity’ in the early

¹¹⁸ *Repeat Offenders* (n 107) 11–19.

¹¹⁹ *Reagan Report* (n 50).

¹²⁰ See Granelli (n 104); Illinois Senate Debates (n 62) 121 (Senator Rupp).

¹²¹ Illinois Senate Debates (n 62) 89 (Senator Barkhausen); Illinois House Debates (n 79) 59 (Representative Homer).

¹²² Illinois Senate Debates (n 62) 86; see *ibid* 93 (Senator Rock); Illinois House Debates (n 79) 59 (Representative Homer).

¹²³ See *Repeat Offenders* (n 107) 14.

¹²⁴ F Bellotti et al, *Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (Boston, Ad Hoc Insurance Committee of the National Association of Attorneys General, May 1986). Several state commissions reached similar conclusions. See, eg, New Mexico State Legislature, *Report of the Interim Legislative Workmen’s Compensation Committee On Liability Insurance and Tort Reform* (Nov 12, 1986); Michigan House of Representatives, *Study of the Profitability of Commercial Liability Insurance* (Nov 10, 1986); Insurance Committee. Pennsylvania House of Representatives, *Liability Insurance Crisis in Pennsylvania* (Sep 29, 1986).

¹²⁵ ‘What Insurance Crisis?’ *Business Week*, Jan 12, 1987; accord, Stanoch, ‘Insurance Crisis or Tort Crisis? Explaining the Myths and Examining the Facts’ (1987) 10 *Hamline LR* 443, 460.

1980s. Had it not been for these cuts, Greenberg said, there would not be ‘all this hullabaloo’ about the tort system.¹²⁶

Nevertheless, the insurers were successful, as they had been during the 1974–1977 hard market, in using the liability insurance crisis generated by their unregulated market behavior to convince numerous state legislatures to enact (additional) tort reforms, including replacement of solidary liability for wrongdoers wholly or partly with proportionate liability. They were successful again, using the same strategy, during the subsequent 2002–2006 hard market, which primarily affected property and medical malpractice liability insurance.¹²⁷ During each of the three hard markets, legislators, regulators and the public were told that ‘tort reform’ would ease the liability insurance crisis and result in lower insurance premiums.¹²⁸ Not surprisingly, since the variations in premium rates were primarily due to the cyclical soft and hard liability insurance markets rather than tort liability, this did not happen. States with little or no ‘tort reforms’ experienced approximately the same changes in insurance rates as those states that enacted severe restrictions on tort liability. Indeed, some states that had enacted tort reforms based on promises of rate reductions instead had rates increase substantially after the reforms were enacted or had reductions less than states with no or more limited reforms.¹²⁹

V Conclusion

Contrary to the assertions of the defense advocates, the standard method for allocating liability among the multiple responsible causes of an indivisible injury—which reduces a plaintiff’s recovery for her injury by her percentage of comparative responsibility, holds those who wrongly contributed to her injury solidarily liable for the (reduced) damages, and allows contribution among the wrongdoers based on their comparative responsibility—is consistent with the basic principles of justice and proper allocation of liability in accord with each person’s legal and/or moral responsibility. Not surprisingly, it is the method favored by almost all courts and is employed by almost all governments, including the federal government in the United States. The proportional liability method urged by the defense advocates in the United States and Australia clearly is neither just nor consistent with allocation of liability in accord with persons’ respective legal and/or moral responsibility.

The defense advocates in the United States have tried to argue otherwise by employing misleading rhetorical arguments that (i) ignore and confuse the distinct historical meanings of the words ‘joint’ and ‘several’ and (ii) treat a person’s percentage of *comparative* responsibility for an indivisible injury for which he was a wrongful, actual and ‘proximate’ cause as stating (illogically) that he caused and therefore is responsible for only that per cent of the indivisible injury. They have taken advantage of liability insurance crises generated by unregulated cycles of soft and hard liability

¹²⁶ M Greenwald, ‘Insurers Must Share Blame: AIG Head’ *Business Insurance*, Mar 31, 1986, 3.

¹²⁷ *Repeat Offenders* (n 107) 20–24; see T Baker, *The Medical Malpractice Myth* (Chicago, Univ of Chicago Press, 2007). The insurers’ attempt to create a hard market after Hurricanes Irene and Sandy in 2011 and 2012 failed. *Repeat Offenders* (n 107) i–ii, 5, 28–36.

¹²⁸ *Repeat Offenders* (n 107) 14–15, 18. During soft markets, on the other hand, advocates of ‘tort reform’ claim that they never said or would say that ‘tort reform’ would lower insurance premiums. *ibid* 20.

¹²⁹ *ibid* 19–22, 24, 25; *Premium Deceit* (n 106) 5–6, 11–15, 19–20, 22–23.

insurance markets, rather than tort liability, to employ their misleading rhetorical arguments for ‘tort reform’.

In a recent article, Kit Barker and Jenny Steele make very similar points regarding the recent replacement of solidary liability with various inconsistent versions of proportionate liability in all the Australian states for injuries other than to one’s person. They describe the unprincipled nature of proportionate liability, the misleading rhetorical arguments by the defense advocates that confuse the grounds for reducing a plaintiff’s recovery by her comparative responsibility with the quite distinct issue of each wrongdoer’s full responsibility for the wrongful injury that he caused, and the use by the defense advocates of the shock caused to the financial and insurance markets by the collapse of Enron and a major Australian indemnity insurance company in 2001, both clearly due to internal fraud and mismanagement rather than tort liability issues, as a springboard for ‘tort reform’.¹³⁰ Hopefully, this chapter will add to their warning to other countries to watch out for these moves and tactics by the defense advocates and maybe even serve, along with their article, as encouragement of and support for restoration of the standard method for allocating liability in the United States and Australia.

¹³⁰ Barker and Steele (n 3) 49–54, 59, 61–63, 67–69.