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JOINT AND SEVERAL LIABILITY: A CASE FOR REFORM

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INDEX TO ARTICLE

		Page
I.	Introduction	652
II.	Background	654
III.	The Developing Law Affecting Joint Tortfeasors	660
	A. Procedural Joinder	660
	B. Definition of Joint Tort	661
	C. Contribution	662
	D. Contributory Negligence	663
	E. Comparative Fault	664
	F. Jury Apportionment of Damages	665
	G. Alternative Liability	666
	H. Burdens of Proof	667
	I. Release	668
IV.	Doctrinal Justifications	669
	A. Moral Fault	669
	B. Compensating the Innocent Plaintiff	669
	C. Loss Distribution	669
	D. Ability to Pay	669
V.	Concurrent Torts	670
VI.	False Labels and Confused Applications	671
	A. Tortious Conduct	672
	B. Causation	673
	C. Indivisibility	676
VII.	Related Problems: Release Offsets and the "Empty Chair"	677
	A. Release Offsets	678
	B. "Empty Chair"	679
VIII.	Suggested Reform	680
	A. Operative Language	680

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B. Burdens of Proof 682
C. "Empty Chair" Problems 682
D. Offsetting Adjustments for Release 682
E. Policy Considerations 682
IX. Conclusion 684

I. INTRODUCTION

One of the great strengths of the common law is its ability to adapt to a changing legal environment. Its flexibility allows courts to weave from ancient doctrines new rules to resolve problems as they arise in an increasingly complex society. Occasionally the courts' handiwork becomes so entangled in confused definitions and internal inconsistencies, and travels so far from a doctrine's original rationale, that it cries out for reform. Such is the case with joint and several liability.

The doctrine of joint and several liability works to hold any one of multiple tortfeasors liable to a plaintiff for the entire harm caused by their combined acts.[1] This doctrine applies even when the trier of fact determines that an individual tortfeasor's proportionate share of fault is slight.[2] Thus, theoretically a party found one percent at fault can be held liable for the entire amount of damages awarded.

As a result of this shortcoming, plaintiffs often target persons they perceive to have the greatest resources from which to pay claims. Commonly known as "deep-pocket" defendants, they are especially likely to be brought into a suit when it appears that the party most responsible for the harm is judgment-proof.[3]

Some argue that the deep pocket abuse is curtailed effectively through the common law rule requiring that a party be determined to have been a "legal cause"[4] of the harm in order for liability to attach.[5]

1. *See* RESTATEMENT (SECOND) OF TORTS § 875 (1977); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1937); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 404 (1939); Recent Developments, *Torts—Joint Tortfeasors—Liability and Contribution for Indivisible Injury*, 45 TENN. L. REV. 129 (1977) (citing Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976)); W. PROSSER & W. P. KEETON, PROSSER AND KEETON ON TORTS § 47, at 328 (5th ed. 1984) [hereinafter PROSSER & KEETON].

2. 86 C.J.S. *Torts* § 34 (1956 & Cum. Supp. 1985); *see also* Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983) (defendant adjudicated to be seventeen percent negligent was jointly liable for entire amount of damages); Gannon Personnel Agency, Inc. v. City of New York, 103 Misc. 2d 60, 425 N.Y.S. 2d 446 (N.Y. Sup. Ct. 1979), 81 A.D.2d 755, 438 N.Y.S.2d 661 (N.Y. App. Div. 1981), *rev'd on other grounds*, O'Connor v. City of New York, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (N.Y. 1983) (defendant adjudicated to be four percent at fault was required to pay entire judgment for personal injuries).

3. It has been argued that "[d]efendants are brought into a lawsuit not so much because [they are] responsible in a practical sense. They are brought in because of their deep pockets." *Executive Session No. 20 of the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. (June 12, 1986) (Statement of Senator Pressler).

4. "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion" than the issue of "proximate cause" or "legal cause." PROSSER & KEETON, *supra* note 1, § 41, at 263. Generally speaking, once it has been established that an act or omission is a "cause in fact" of a harm, an additional legal test must be met before liability attaches. That test requires "that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Id.* It "is merely the limitation which the

However, this rule has proved ineffective because typically it has required little more than an indirect contributory role.[6] Because the chain of causation becomes tenuous at best in these cases,[7] this approach has been criticized.[8]

The thesis of this article is that the doctrine of joint and several liability should be refined to accommodate the current law on joint torts and to reflect the original policy goals underlying its common law origins. The purpose of this article is to assist the reformer in identifying the various issues which should be addressed in any reform proposal, to discuss and develop the theoretical and policy rationale for reform, and to recommend specific reforms. This article will critically examine the

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courts have placed upon the actor's responsibility for the consequences of the actor's conduct." *Id.* at 264. Historically, this has been termed as "proximate cause," although Prosser prefers the "more appropriate term" of "legal cause." *Id.* at 273. Despite concerns over semantic purity, the two terms are used synonymously. *Id.* at 263.

5. *See* PROSSER & KEETON, *supra* note 1, § 41, at 264.

6. *See infra* note 135 and accompanying text.

7. *See, e.g.*, Sills v. City of Los Angeles, C-333504 (San Fernando Super. Ct. Mar. 14, 1985). In *Sills*, a driver high on drugs collided with another automobile as he ran a stop sign. The city was found to have jointly caused the accident because it failed to trim the hedges near the intersection. The driver was insolvent and the city was required to pay almost all of the $2.16 million judgment.

Duggan v. City of San Diego, No. 484152 (San Diego Super. Ct. Mar. 1, 1984). In *Duggan*, a drunk driver smashed into a car with three passengers as he crossed the center line on a curve. The City of San Diego was joined as a defendant based on a claim that the accident was "caused" by a faulty road design. The drunk driver settled for $25,000. After initial court proceedings, the city settled for $1.6 million.

Laurenti v. Tiffenbauch, No. A-6247-82 (N.J. Super. Ct. App. Div. Aug. 2, 1984) (on appeal from N.J. Super. Ct. Law Div.). In *Laurenti*, a "chopped" motorcycle collided with a full-size automobile when it was unable to stop in time to avoid the oncoming automobile making a left-hand turn in front of it. A passenger on the motorcycle was wearing a large metal belt buckle. Upon impact the passenger came forward and forced the belt buckle into the driver's back, resulting in a serious injury. Among others, the driver named Rayco of Trenton, Inc. as a defendant, alleging that Rayco, who had reupholstered the seat, had stretched the material too tight making the seat "excessively slippery." The plaintiff alleged that this act had "caused" the injury and the lower court agreed. Before trial, the driver of the automobile settled for her insurance policy limit of $25,000. Other defendants named had little or no assets and thus Rayco became liable for the balance of the $2.5 million verdict plus $900,000 in interest. After an appeal was filed and briefed, the case was settled for $1.1 million. For an extensive narrative of this case, see *Availability and Cost of Liability Insurance: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. 67-68 (1986) (statement of Mr. Bradford W. Mitchell) [hereinafter *1986 Insurance Hearings*].

Cini v. Vaughn, No. A893-81T1 (N.J. Super. Ct. App. Div. Feb. 4, 1983) (on appeal from N.J. Super. Ct. Law Div., Atlantic County, No. L-17175-78). In *Cini*, the plaintiff was injured when defendant Vaughn fell asleep behind the wheel on the expressway, allowing his car to veer off the road and collide with a tow truck that was parked on the shoulder of the road to assist a disabled vehicle. The plaintiff alleged that the tow truck, parked approximately ten feet behind the disabled vehicle with its lights flashing, was "improper[ly] locat[ed]." The tow truck owner was named one of the numerous defendants. The sleeping driver settled for his insurance policy limit of $30,000. After an initial summary judgment for the defendant tow truck owner was reversed, the owner settled for $242,500. *See* Claim No. A50-11 22 06-R, Harleysville Insurance Companies, Harleysville, Pennsylvania (settlement figures relating to the tow truck owner). Two other named defendants — The Atlantic City Expressway Authority and the architect of the expressway — also settled after the reversal of the summary judgment.

8. *See generally Product Liability Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. (1986) [hereinafter *1986 Product Liability Hearings*].

theories and justifications underlying the ancient common law doctrine of joint torts. It will apply them to today's legal setting by focusing on relatively recent common law developments such as the advent of comparative fault[9] and alternative liability,[10] and illustrate the need for change. Finally, the article will discuss how joint and several liability reform can (1) lead to more equitable results in the majority of cases; (2) punish the true wrongdoers; and (3) eliminate a great deal of uncertainty in the law of joint torts.

II. Background

The current insurance "crisis"[11] has given joint and several liability reformers new impetus. Joint and several liability has been named by the insurance industry and other deep-pocket defendants as one of the leading culprits in causing skyrocketing liability insurance premiums.[12] Local governments have cited it as a reason for increasing taxes and eliminating public facilities and services.[13] Because of their deep pockets, public entities, particularly municipalities, are often brought into suits for their passive roles in "causing" accidents. For example, cities have been held responsible for virtually the entire damages in million-

9. For a discussion of comparative fault, see *infra* notes 68-76 and accompanying text.

10. For a discussion of alternative liability, see *infra* notes 80-83 and accompanying text.

11. Although there has been a substantial amount of discussion as to whether recent developments within the insurance industry constitute a "crisis," the present problems in obtaining affordable insurance coverage have been often referred to as such. *See generally Availability and Affordability Problems in Liability Insurance: Hearing Before the Subcomm. on Business, Trade, and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Insurance Hearings*]; *1986 Insurance Hearings, supra* note 7; *The Cost and Availability of Liability Insurance for Small Business Hearings Before the Senate Comm. on Small Business*, 99th Cong., 1st & 2d Sess. (1985, 1986) [hereinafter *Small Business Insurance Hearings*].

12. *Report of the Committee on Municipal Tort Liability of the National Institute of Municipal Law Officers*, pp. 38-42, Annual Conference, Fort Worth, Texas (Oct. 1984) [hereinafter *Report on Municipal Liability*]; American Insurance Association Memorandum from Dennis R. Connolly, Vice President for Liability, to all Regional Vice Presidents (Nov. 12, 1985) [hereinafter AIA Memorandum] ("The elimination of joint liability . . . is perhaps the most single [sic] important across-the-board tort reform"); Letter from Leslie Cheek, Vice President of Federal Affairs, Crum & Forster Insurance Companies to Senator Larry Pressler (March 10, 1986) (abrogation of joint and several liability "would remove the single most serious common law impediment to the underwriting and pricing of product liability insurance"). *See generally 1986 Product Liability Hearings, supra* note 8; *1986 Insurance Hearings, supra* note 7 (these records are replete with evidence of the problems caused by the joint and several liability doctrine).

It should be noted that opponents of tort reform strongly disagree as to the causes of insurance premium increases, citing reasons such as poor industry underwriting practices, the cyclical nature of the insurance industry, and an insurance industry conspiracy to dramatically raise prices in an attempt to gain long-coveted tort reform. *1986 Insurance Hearings, supra* note 7. There is insufficient evidence to unequivocally support any of these competing theories. It is the writers' opinion that the insurance problem is a result of a combination of the factors referred to above. And, although it is doubtful the insurance industry is engaged in a conscious conspiracy to raise prices in an effort to prompt tort reform, at the very least it appears that the industry is taking advantage of the "crisis" in its push for reform and using it to deflect criticisms of its own contributions to the problem.

13. *See Report on Municipal Liability, supra* note 12, at 35-38.

dollar awards because they have failed to trim hedges on private property, "causing" a vehicle whose driver was high on drugs to collide at an intersection equipped with stop signs;[14] because they have located a street light too close to the curb, "causing" injury upon impact when a driver veered off the road and ran into a light pole;[15] because their traffic lanes were too narrow, "causing" a collision between negligent drivers;[16] because they failed to place warning signs along a beachfront during the off-season, "causing" injury to a man who ran into the surf and dove into shallow water, hitting his head on a sandbar and leaving him a quadraplegic.[17]

As long as the plaintiff can convince the trier of fact that the deep-pocket defendant was a contributing factor in bringing about the injury, and thereby a legal cause,[18] the doctrine of joint and several liability potentially exposes it to entire liability. Although juries commonly find that the deep pocket's responsibility for the harm caused is very slight, often only a few percentage points,[19] this is sufficient to establish liability for the entire judgment. Although deep-pocket defendants have a right of contribution against the remaining defendants, those parties are often insolvent or otherwise judgment-proof.[20]

The issue of joint and several liability has received extensive debate

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14. Sills v. City of Los Angeles, C-333504 (San Fernando Super. Ct. Mar. 14, 1985). The plaintiff argued that the city should have installed signs to warn of the upcoming stop signs. The jury returned a verdict of $2.16 million. The negligent driver had no money and three other co-defendants settled for their insurance policy limits, a total of $200,000, leaving the city to pay the balance.

15. Isom v. City of Antioch, No. 225117 (San Fernando Super. Ct. Jan. 25, 1984). The plaintiff argued that the light should have been mounted on a break-away pole. The city pointed out that break-away poles also have created municipal liability for the damage caused when they fall. However, because of the joint and several liability law, the City of Antioch settled the case in 1984 for $400,000.

16. Anderson v. City of Signal Hill, No. SOC-60893 (Los Angeles County Super. Ct. Oct. 15, 1984). The jury returned a verdict of $1.5 million against the city and two negligent drivers also involved in the case. The two drivers' policy limits totalled $115,000, leaving the city responsible for the balance of $1.385 million. The city later settled the case for $400,000 and monthly payments of $4,000 over the next 10 years, plus additional payments to related parties in excess of $10,000 per month for varying time periods. The city was held liable because it had restriped the traffic lanes six years earlier making them 10 feet wide — a width accepted as safe in the state highway authority's CALTRANS traffic manual.

17. Taylor v. City of Newport Beach, No. 354623 (Orange County Super. Ct. October 29, 1984). The city was ordered to pay $6 million. Shortly after the verdict, the city's insurance coverage was cancelled.

18. For a discussion of legal cause, see *supra* note 4; *see also infra* note 135 and accompanying text.

19. *See, e.g.*, Gannon Personnel Agency, Inc. v. City of New York, 103 Misc. 2d 60, 425 N.Y.S.2d 446 (N.Y. Sup. Ct. 1979), 81 A.D.2d 755, 438 N.Y.S.2d 661 (N.Y. App. Div. 1981), *rev'd on other grounds*, O'Connor v. City of New York, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (N.Y. 1983) (city adjudicated only four percent at fault but held liable for the entire judgment); *see also Report on Municipal Liability*, *supra* note 12, at 30-38.

20. Indeed, it is often argued that the primary reason a public entity is brought into the suit in the first place is because the defendants most responsible are judgment-proof. *See, e.g.*, SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, PRODUCT LIABILITY REFORM ACT, S. REP. NO. 422, 99th Cong., 2d Sess. 70-71 (1986) (majority views); *1985 Insurance Hearings*, *supra* note 11, at 155-57 (statement of Mr. Quinn, vice president of the Maryland Municipal League, urging repeal of the doctrine of joint and several liability).

at the federal level for the first time since uniform product liability legislation was introduced seven years ago.[21] Efforts are now being made by federal legislators to limit the doctrine.[22] The Reagan Administration has urged complete repeal except in cases involving "concerted action".[23] The most recent product liability bill reported by the Senate Commerce Committee contains an amendment abrogating joint and several liability for noneconomic damages.[24]

Also, many states have begun to focus on the issue of joint and several liability. Twelve years ago, joint and several liability was universally applied in every state.[25] Since then, however, at least thirty-three states[26] have either abolished[27] or substantially limited[28] joint and sev-

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21. *See* H.R. 1061, 96th Cong., 1st Sess. (1979); H.R. 1676, 96th Cong., 1st Sess. (1979). Early product liability legislation did not focus on the issue of joint and several liability. *Cf. infra* notes 22-24. But with the convergence of the general liability insurance/tort reform and product liability issues, joint and several liability became a major element in the product liability hearings during the 99th Congress. *See, e.g.*, *1986 Product Liability Hearings*, *supra* note 8 (joint and several liability amendment proposal discussed February 27 at p. 6 and identified as the "one tort reform that would do the most to improve the availability and affordability of liability insurance," February 27, at p. 14. Specific joint and several liability amendment filed March 11, at p. 210).

22. The early federal product liability and tort reform legislation, although generally including some type of contribution provision, did not attempt to abrogate or substantially limit joint and several liability. *See, e.g.*, H.R. 1061, 96th Cong., 1st Sess. (1979); H.R. 7000, 96th Cong., 2d Sess. (1980); S. 2631, 97th Cong., 2d Sess. (1982); S. 44, 98th Cong., 1st Sess. (1983); S. 100, 99th Cong., 1st Sess. (1985); S. 1999, 99th Cong., 1st Sess. (1985); *see also* S. 2046, 99th Cong., 2d Sess. (1986) (would abolish joint and several liability for noneconomic damages); Pressler Amendment to S. 1999, *1986 Product Liability Hearings*, *supra* note 8, at 210 (would abolish joint and several liability in all product liability actions except for cases involving concerted action; the amendment was debated, but no vote was taken); Pressler Amendment to Committee Working Draft, *Executive Session No. 20 of the Senate Committee on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. (June 12, 1986) (would limit joint and several liability to economic damages in product liability actions); *see generally Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, Depts. of Justice and Commerce, at 64 (February 1986) [hereinafter *Administration Report*] (Recommendation No. 3 urges abolition of joint and several liability except for cases involving concerted action).

23. *Administration Report*, *supra* note 22. Concerted action is discussed *infra* notes 43-44 and accompanying text.

24. S. 2760, 99th Cong., 2d Sess. § 308 (1986) (Section 308 was added to the original Committee bill as an amendment. Section 308(c) defines noneconomic damages as

> subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation; the term does not include objectively verifiable monetary losses including, but not limited to, medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, rehabilitation and training expenses, loss of employment or loss of business or employment opportunities.)

25. Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 61, 62 (July 1985).

26. *See infra* notes 27 (three states abrogated prior to 1986), 28 (nine states modified prior to 1986), 29 (fifteen states abrogated or modified in 1986), 30 (one state modified by 1986 referendum) and 31 (ten states abrogated or modified in 1987). The reader will note that of the thirty-eight states referred to in this footnote, five states — Minnesota, Missouri, Nevada, New Mexico and Texas — enacted joint and several liability legislation or decided joint and several liability court cases in successive years. Therefore, a total of thirty-three states have either abrogated or substantially modified joint and several liability laws in recent years.

27. In 1986, Colorado, Utah and Wyoming abrogated joint and several liability. *See*

eral liability. In 1986 alone, fifteen state legislatures enacted joint and several liability reform laws.[29] Additionally during 1986, voters in Cali-

infra note 29. North Dakota followed in 1987. *See infra* note 31. Additionally, Kansas, Ohio and New Mexico abrogated joint and several liability prior to 1986.

Brown v. Keill, 580 P.2d 867 (Kan. 1978) (abolished joint and several liability through interpretation of a 1976 comparative negligence statute, KAN. STAT. ANN. §§ 60-258a, 60-258b (1983)); *see also* Ebeling v. General Motors Corp., No. 57,700 (Kan. Feb. 21, 1986).

OHIO REV. CODE ANN. § 2315.19(A)(2) (Anderson 1981) (abolished the rule in favor of several liability); Stearns v. Johns-Manville Sales Corp., 770 F.2d 599 (6th Cir. 1985); Bailey v. V & O Press Co., 770 F.2d 601 (6th Cir. 1985); Wilfong v. Batdorf, 451 N.E.2d 1185 (Ohio 1983); *see also* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.4, at 258-59 (2d ed. 1986).

Bartlett v. New Mexico Welding Supply Inc., 646 P.2d 579 (N.M. 1982) (abolished the rule in favor of several liability through interpretation of a state supreme court decision, Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981), which earlier adopted comparative negligence). *But see* N.M. STAT. ANN. § 43-3-1 at *infra* note 31. It remains to be seen how the New Mexico courts will interpret the "public policy" exception of the 1987 statute in light of *Bartlett.*

It should be noted that in addition to the statutes and decision just mentioned, a 1981 New Hampshire comparative negligence statute, N.H. REV. STAT. ANN. § 507:7-a (1983), appeared to have completely abrogated joint and several liability. The statutory language appears to have abolished the rule in favor of several liability, but thus far the courts have not decided the issue. However, given the 1986 New Hampshire modified joint and several liability statute cited *infra* note 29, this now seems an unlikely result.

Finally, while some thought that Vermont's comparative negligence statute, VT. STAT. ANN. tit. 12, § 1036 (1981), abolished the rule in favor of several liability, *see* Granelli, *supra* note 25, at 62, which suggests the Vermont courts seem to have held otherwise. English v. Meyers, 142 Vt. 144, 454 A.2d 251 (1982); *see also* V. SCHWARTZ, *supra* § 16.4, at 259.

28. As discussed *infra* notes 29-30, Alaska, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Hampshire, New York, Washington, West Virginia and California substantially modified joint and several liability in 1986. Nine others followed in 1987 — Arizona, Georgia, Idaho, Missouri, Montana, Nevada, New Mexico, South Dakota and Texas. In addition to these twenty-two states, nine others — Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Oregon, Pennsylvania and Texas — substantially modified joint and several liability prior to 1986.

Nevada, Texas, Indiana, Louisiana, Oregon and Pennsylvania all limited the rule so that it applies only when plaintiff's negligence is less than defendants'. Several liability applies when plaintiff's negligence is greater than defendants'. NEV. REV. STAT. § 41.141(3) (1986); TEX. REV. CIV. STAT. ANN. art. 2212(a) (Vernon Supp. 1987); IND. CODE ANN. § 34-4-33-5 (Burns 1986); LA. CIV. CODE ANN. art. 2324 (West 1972); OR. REV. STAT. § 18.485 (1985); 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1982); General State Auth. v. Sutter Corp., 452 A.2d 75 (N.Y. 1982) (reform via court decision rather than through legislation).

Iowa limited the rule so it would not apply to defendants found to bear less than fifty percent of total fault assigned to all parties, leaving them liable for their several amount. IOWA CODE ANN. §§ 668.1-668.3, 619.17 (West Supp. 1987).

Minnesota limited the rule only insofar as the share of an uncollectable defendant's damages would be reallocated among all others, including a partially negligent plaintiff. MINN. STAT. ANN. § 604.01(1) (West Supp. 1987).

Oklahoma limited the rule to cases where damages cannot be apportioned or where plaintiff is not at fault. Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

29. Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Michigan, Minnesota, Missouri, New Hampshire, New York, Utah, Washington, West Virginia, and Wyoming all enacted legislation during the 1986 session to abrogate or substantially modify the doctrine of joint and several liability.

Of the fifteen states, three enacted an outright abrogation: COLO. REV. STAT. § 13-21-111.5 (Cum. Supp. 1986) ("[N]o defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant."); UTAH CODE ANN. § 78 27-38 (Supp. 1986) ("[N]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant."); WYO. STAT. § 1-1-109(d) (Cum. Supp. 1986) ("Each defendant is liable

fornia approved an initiative measure abolishing the doctrine as it per-

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only for that portion of the total dollar amount [correlating to] the percentage of fault attributable to him as determined by the jury.").

The remaining twelve states enacted substantial modifications: ALASKA STAT. § 09.17.080 (Cum. Supp. 1986) ("[A] party who is allocated less than 50 percent of the total fault allocated to all parties [including plaintiff] may not be jointly liable for more than twice the percentage of fault allocated to that party." § 09.17.080 (d)); CONN. GEN. STAT. § 52-572h (Cum. Supp. 1987) ("[E]ach person against whom recovery is allowed shall be liable to the claimant only for his proportionate share of the recoverable . . . damages . . . except [that when] damages [are] uncollectable [the court] shall reallocate such uncollectable amount among the other parties according to their respective percentages."); FLA. STAT. § 768.81 (Cum. Supp. 1987) (Liability of each party is determined "on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability [except for] economic damages [in cases where the defendant's] fault equals or exceeds that of [the] claimant."); HAW. REV. STAT. § 663-10.9 (Supp. 1986) ("Joint and several liability for joint tortfeasors [whose 'degree of negligence is less than twenty-five percent'] . . . is abolished" for noneconomic damages except in actions involving environmental pollution, asbestos-related and toxic torts, intentional torts, strict and products liability, and aircraft and certain motor vehicle accidents.); ILL. REV. STAT. ch. 110, paras. 2-1117, 2-1118 (Cum. Supp. 1987) ("Any defendant whose fault . . . is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all . . . damages" other than medically related expenses. § 2-1117. However, joint and several liability is retained in medical malpractice and environmental cases. § 2-1118.); MICH. COMP. LAWS ANN. § 600.6304 (West 1987) ("In a personal injury action involving fault of more than 1 party . . . a person shall not be required to pay damages in an amount greater than his or her percentage of fault." § 600.6304(1) & (5). However, if the court determines that "all or part of a party's share of the obligation is uncollectible," it "shall reallocate any uncollectible amount among the other parties according to their respective percentages of fault" not to exceed "that party's percentage of fault." § 600.6304(6). In addition, joint and several liability is retained in "a products liability action," § 600.6304(4), and in cases where "a plaintiff is not at fault," § 600.6304(3)). MINN. STAT. § 604.02 (Cum. Supp. 1987) ("[T]he state or a municipality [whose] fault is less than 35 percent . . . is jointly and severally liable for an amount no greater than twice the amount of fault.") (*See also* MINN. STAT. § 604.01 (West Supp. 1987), *supra* note 28.); MO. REV. STAT. § 538.230(2) (Vernon Cum. Supp. 1987) ("defendant ['health care provider'] . . . jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant"); N.H. REV. STAT. ANN. § 507-B:9 (Cum. Supp. 1986) ("[G]overnmental units or public employees shall be liable only to the extent that their acts or omissions contributed to the causation" of harm "arising from a pollutant incident" if that fault is less than fifty percent of the total.); N.Y. CIV. PRAC. L & R 1601, 1602 (McKinney Cum. Supp. 1987) ("[I]n an action involving two or more tortfeasors . . . or in a claim against the state [where] the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant . . . for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss." § 1601. But § 1601 does not apply to intentional torts, actions taken in concert, workers' compensation cases, or administrative proceedings. § 1602.); WASH. REV. CODE § 4.22.070 (Cum. Supp. 1987) ("The liability of each defendant shall be several only and shall not be joint" if the action involves fault of more than one party — except in cases involving concerted action, hazardous waste sites, business torts, and manufacturers of fungible products.); W. VA. CODE § 55-7B-9 (Cum. Supp. 1987) (eliminates joint and several liability "against and among all defendants which bear less than twenty-five percent of the negligence attributable to all defendants" in medical professional liability actions) (Section 29-12A-7(d) similarly modifies joint and several liability in actions against a political subdivision or its employees.).

Joint and several liability reform measures were introduced in at least twenty-seven states during the 1986 legislative session. *See Liability Alert*, Capitol Impact Publications, Vol. I, No. 1 (Feb. 28, 1986). Other states are considering joint and several liability reforms which still may be enacted in 1987. For example, one bi-monthly publication which tracks state tort reform efforts has identified at least twenty jurisdictions in which bills to abolish or modify joint and several liability have been introduced. *See Liability Alert*, Capi-

tains to non-economic damages.[30] And already in 1987, at least ten states have enacted legislation reforming joint and several liability.[31]

tol Impact Publications, Vol. I, Nos. 22-24, Vol. II, Nos. 1-9 (Jan. 15-June 30, 1987). Arizona, District of Columbia, Georgia, Idaho, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee and Texas have all had legislation introduced which would abolish joint and several liability. *See also infra* note 31 in which it is noted that in at least ten of these states, legislation has been signed into law during 1987.

30. California Proposition 51, entitled the "Fair Responsibility Act of 1986," was approved with a sixty-two percent majority in the June 3, 1986 primary and became effective immediately. CAL. CIV. CODE §§ 1431.1-.5 (West Cum. Supp. 1987).

31. North Dakota enacted outright abrogation. Nine others enacted substantial modifications. N.D. CENT. CODE § 32-03.2-02 (Supp. 1987) ("[w]hen two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party" except in cases involving concerted action); Act of Feb. 12, 1987, ch. 1, § 2, 1987 ARIZ. LEGIS. SERV. 1 (West) (to be codified at ARIZ. REV. STAT. ANN. § 12-2506) ("[T]he liability of each defendant for damages is several only and is not joint" except in cases involving concerted action, hazardous wastes, or where "a person was acting as an agent or servant of the party."); GA. CODE ANN. § 51-12-33 (Cum. Supp. 1987) ("Where . . . the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact . . . may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party. . . . Damages . . . shall be the liability of each person against whom they are awarded [and] shall not be a joint liability."); IDAHO CODE § 6-803(3)-(7) (Cum. Supp. 1987) ("The common law doctrine of joint and several liability is hereby limited to causes of action . . . where [persons] were acting in concert or when a person was acting as an agent or servant of another party. . . relating to hazardous or toxic waste or substances or solid waste disposal sites . . . [or] arising from the manufacture of any medical devices or pharmaceutical products."); Act of Apr. 14, 1987, § B, 1987 MO. LEGIS. SERV. 49 (to be codified at MO. REV. STAT. § 509.050.41) (Joint and several liability is retained except where plaintiff is contributorily negligent. If any defendant's equitable share is determined to be "uncollectible," it is reallocated to the remaining parties; but "[n]o amount shall be reallocated to any party whose assessed percentage of fault is less than the plaintiff's so as to increase that party's liability by more than a factor of two."); MONT. CODE ANN. § 27-1-703(2)-(3) (1987) ("Any party whose negligence is determined to be 50% or less of the combined negligence of all persons . . . is severally liable only and is responsible only for the amount of negligence attributable to him, except . . . if [they] acted in concert . . . or if one party acted as an agent of the other."); Nevada S. 511 (to be codified at NEV. REV. STAT. §§ 41.141(4)-(5)) (signed by governor June 22, 1987) ("a defendant whose negligence is less that that of the plaintiff or his decedent is not jointly liable and except [for cases involving strict liability, intentional torts, toxic or hazardous substances, concerted action, and product liability] each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him"); Act of Apr. 7, 1987, ch. 141, § 1, 1987 N.M. STAT. ANN. ADV. LEGIS. SERV. 852 (to be codified at N.M. STAT. ANN. § 41-3-1) [hereinafter N.M. STAT. ANN. § 43-3-1] ("joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished" except in cases involving intentional torts, vicarious liability, product liability, and in "situations . . . having a sound basis in public policy"); S.D. CODIFIED LAWS ANN. § 15-8-15.1 (Supp. 1987) ("any party who is allocated less than fifty percent of the total fault allocated to all parties may not be jointly liable for more than twice the percentage of fault allocated to that party"); Act of June 16, 1987, ch. 2, § 2.09, 1987 TEX. SESS. LAW SERV. 81 (Vernon) (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a)-(c)) ("[A] liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed . . . [unless] the percentage of responsibility attributed to the defendant is greater that 20 percent; and . . . [in comparative responsibility cases, where] the percentage of responsibility attributed to the defendant is greater than the percentage of responsibility attributed to the claimant . . . [or in cases where] no percentage of responsibility is attributed to the claimant and the percentage of responsibility attributed to the defendant is

III. THE DEVELOPING LAW AFFECTING JOINT TORTFEASORS

The doctrine of joint and several liability, holding any of several tortfeasors responsible[32] for the acts of all, has its origin in the common law.[33] Originally, its application was limited to joint tortfeasors[34] acting in concert,[35] and was subject to strict procedural limitations. Rules relating to joint tortfeasors, procedural joinder, and tortfeasors acting in concert, as well as other rules governing application of the doctrine of joint and several liability have changed gradually over the centuries. However, the doctrine of joint and several liability itself has not been modified in conjunction with these developments; rather, it has remained stubbornly entrenched in the common law. A brief survey and discussion of the developing law regarding other rules applicable to multiple tortfeasors is necessary to provide an understanding of the problems caused by the curious stagnation of joint and several liability and to demonstrate why reform is necessary.

A. *Procedural Joinder*

At common law, the concepts of procedural joinder and joint and several liability were indistinguishable because there could be no joinder of parties unless it was alleged that they were jointly responsible for acts done in concert.[36] Because procedural joinder was limited to cases involving concerted action,[37] the American courts began equating "joinder" with "joint liability." With the advent, in the mid-19th century, of

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greater than 10% . . . [or in cases where] claimant's . . . injury . . . resulted from a 'toxic tort'.").

32. The term "responsible" is used here even though in American courts today "liable" or "entirely liable" may be preferable in a technical sense. But, as will be discussed below, a central theme of this article is that any reform effort should focus on returning "responsibility" as the primary touchstone for liability. At its inception, joint and several liability was based on vicarious liability, which is an indirect legal responsibility for the acts of another. PROSSER & KEETON, *supra* note 1, § 46, at 322.

33. PROSSER & KEETON, *supra* note 1, § 46 at 323; 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 10.1 (2d ed. 1986) [hereinafter HARPER, JAMES & GRAY].

34. The terms "joint tortfeasor" and "joint tort" have been the subject of a great deal of confusion and have been the source of many of the problems in this area as is discussed *infra* notes 42-48 and accompanying text. *See* Prosser, *supra* note 1, at 413 (the terms mean "radically different things to different courts"); Jackson, *supra* note 1, at 403 ("['joint tort'] . . . is often used in different senses by the same court"); PROSSER & KEETON, *supra* note 1, § 46, at 322.

35. *See, e.g.*, PROSSER & KEETON, *supra* note 1, § 46, at 322; HARPER, JAMES & GRAY, *supra* note 33; 1 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 3.6, at 392-93 (1983) [hereinafter SPEISER, KRAUSE & GANS]. It is illustrative of the confusion that has grown out of the law of joint torts to note that the phrase "joint tortfeasors acting in concert" would have been redundant at common law. Today it is a necessary distinction as tortfeasors no longer need to "act in concert" before they are considered join tortfeasors.

36. Prosser, *supra* note 1, at 414-15; HARPER, JAMES & GRAY, *supra* note 33, § 10.1, at 7-8.

37. HARPER, JAMES & GRAY, *supra* note 33, § 10.1, at 8 n.24; *see also* PROSSER & KEETON *citing* FIELD CODE OF PROCEDURE OF NEW YORK (1948) as statute authorizing settlement of questions connected with one transaction to be joined in a single suit.

codes of procedure allowing joinder,[38] the American courts gradually began to liberalize the rules. Today procedural joinder no longer requires an assertion of entire liability.[39] Confusion results because the courts have continued to equate "joinder" with "joint liability" even though the rules for joinder have become more liberal.[40] This has had the illogical and unfortunate effect of allowing the substantive law of joint and several liability to sometimes turn on the procedural issue of joinder.[41]

At common law, because courts required joint and several liability as a prerequisite for procedural joinder, pure several liability would have been difficult if not impossible to administer. However, under modern codes allowing for permissive joinder, a rule of pure several liability has become feasible and would be much easier to administer and enforce than was the case at common law. Procedural joinder gives the trier of fact a perspective of totality of evidence relating to all persons involved in the suit, thus facilitating the allocation of responsibility on a proportionate basis.

B. *Definition of Joint Tort*

Generally speaking, a joint tort can be defined as an act causing harm for which two or more persons can be held liable.[42] At common law, a joint tort required a concert of action, a common plan, or later in time, the breach of a joint duty.[43] Originally, it required a true joint enterprise so that "all coming to do an unlawful act, and of one party, the act of one is the act of all. . . ."[44] Today the definition has been expanded to include additional categories so that, generally, a joint tort has been found by courts in cases involving (1) concert of action;[45] (2) common duty;[46] (3) vicarious liability;[47] and (4) concurrent torts.[48]

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38. *See* Harris, *Joinder of Causes and Parties*, 36 W. VA. L.Q. 192 (1929-30) (summary of the development of joint and several liability).

39. PROSSER & KEETON, *supra* note 1, § 47, at 325-26.

40. Prosser, *supra* note 1, at 416-18.

41. This is one of the confused results of later courts' interpretations of the early common law. They doggedly equated "joinder" with "joint liability" even though there was no indication that the common law courts intended to do so. A second area of confusion, involving the definition of a joint tort, is discussed *infra* notes 42-52 and accompanying text. These sources of confusion, and the law which grew up around them, are important to an understanding of where the law is today with respect to joint and several liability, and to understanding the theoretical arguments urging reform in the wake of comparative fault, alternative liability theories, and other recent developments in the law.

42. *See* PROSSER & KEETON, *supra* note 1, § 46, at 322-23. But Prosser points out that the definition of a joint tort has "meant very different things to different courts, and often to the same court. . . ." *Id.* at 322.

43. HARPER, JAMES & GRAY, *supra* note 33, § 10.1, at 2.

44. Sir John Heydon's Case, 77 Eng. Rep. 1150 (1613); *see also* PROSSER & KEETON, *supra* note 1, § 46, at 322-23.

45. Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, 7 F.2d 583, 584 (9th Cir. 1925), *cert. denied* 269 U.S. 581 (1926); Bobich v. Dackow, 229 Ky. 830, 18 S.W. 2d 280, 281 (1929); Wrabek v. Suchomel, 145 Minn. 468, 177 N.W. 764, 766 (1920); Oliver v. Miles, 144 Miss. 852, 110 So. 666, 667 (1926); Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302 (1948); *see also* PROSSER & KEETON, *supra* note 1, § 52, at 346.

46. Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891); Klauder v. McGrath, 35

As late as post-World War I, joint and several liability was largely restricted to its common law origins.[49] But during the last half-century there has been a substantial expansion of joint and several liability, due in large part to the expansion of the definition of "joint tort." The law has been expanded so that persons acting independently of each other can be held liable as joint tortfeasors.[50] Joint and several liability also has been expanded from intentional torts to negligence and strict liability.[51] Thus, while "joint tort" classifications have increased in number and complexity, the central consequence flowing therefrom has remained unchanged: entire liability attaches. This is true even though there are clear distinctions in the degree of participation and culpability as between the different types of "joint torts."[52]

C. *Contribution*

Under contribution principles, a tortfeasor against whom a judgment is rendered is entitled to recover on a proportionate basis from other joint tortfeasors who also were liable to the plaintiff for contributing to the injury.[53] While contribution actions were prohibited at common law,[54] today they are allowed in the overwhelming majority of states.[55] Abolition of the rule against contribution was a response "to the injustice of one defendant shouldering the responsibility of others,"[56] particularly when he was acting independently and the harm

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Pa. 128 (1860); Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744, 746 (1897); *see also* PROSSER & KEETON, *supra* note 1, § 52, at 346.

47. Mayberry v. Northern Pacific Ry. Co., 100 Minn. 79, 110 N.W. 356 (1907); Verlinda v. Stone & Webster Engineering Corp., 44 Mont. 223, 119 P. 573 (1911); Allen v. Trester, 112 Neb. 515, 199 N.W. 841, 844 (1924); Schumpert v. Southern Ry. Co., 65 S.C. 332, 43 S.E. 813 (1903); *see also* PROSSER & KEETON, *supra* note 1, § 52, at 346.

48. Way v. Waterloo, Cedar Falls & Northern R.R., 239 Iowa 244, 29 N.W.2d 867 (1947); Arnst v. Estes, 136 Me. 272, 8 A.2d 201 (1939); Nees v. Minneapolis St. Ry. Co., 218 Minn. 532, 16 N.W.2d 758 (1944); Schools v. Walker, 187 Va. 619, 47 S.E.2d 418 (1948); *see also* PROSSER & KEETON, *supra* note 1, § 52, at 347-48.

49. *See generally* Wigmore, *Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923). In this short article, Wigmore laid out a thoughtful and persuasive case for broadening the scope of joint liability. Other commentators, and gradually the courts, built upon and followed this lead; this persuasive logic has been cited by many famous and not-so-famous authors on the subject. *See, e.g.*, Prosser, *supra* note 1, at 438 n.161; Jackson, *supra* note 1, at 420-21 & nn.92-93.

50. *See, e.g.*, Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976). In this action for indemnification brought by a chemical company against other manufacturers, the court found that contribution was the appropriate remedy. Where tortious acts of two or more wrongdoers cannot be apportioned, wrongdoers may be held jointly and severally liable for the entire damages and the plaintiff may choose whether to proceed against all or one in one single suit.

51. SPEISER, KRAUSE & GANS *supra* note 35, § 3.6.

52. *See generally*, Prosser, *supra* note 1 (discussion of intentional concerted action v. independent negligence).

53. Dawson v. Contractors Transp. Corp., 467 F.2d 727 (D.C. Cir. 1972).

54. Merryweather v. Nixan, 101 Eng. Rep. 1337 (1799); Greer v. Intercole Automation, Inc., 553 F. Supp. 375 (D. Colo. 1982); *see* HARPER, JAMES & GRAY, *supra* note 33, § 10.2, at 39; Prosser, *supra* note 1, at 425-29.

55. V. SCHWARTZ, *supra* note 27, § 16.7, at 273.

56. *Recent Developments in Joint and Several Liability*, 24 SYRACUSE L. REV. 1319, 1334 (1973) (citing rationale for New York Legislature's enactment of N.Y. CIV. PRAC. L. & R. 1401 (McKinney Cum. Supp. 1987)).

was unintentional.[57] The primary reason for allowing contribution rather than simply abrogating joint and several liability was the desire to compensate the innocent plaintiff.[58] Clearly it was not based on the degree of the defendant's moral fault.[59]

In this sense, the right of contribution was a substitute for pure several liability. The problem in justifying this substitute today is that the plaintiff often is no longer "innocent" as a result of changes in the contributory negligence laws.[60]

D. *Contributory Negligence*

Contributory negligence is negligent conduct by a plaintiff which is a contributing cause to his own harm.[61] Historically, contributory negligence was asserted as a complete defense, and if proven, barred the plaintiff from recovery.[62] When recovery was barred due to contributory negligence, the right of contribution was theoretically a more justifiable alternative to eliminating joint and several liability than is the case today. This is true because the original justification for allowing contribution as an alternative to pure several liability was that as between two parties, the one most responsible ought to shoulder the burden for harm caused by a judgment-proof third party.[63]

As the law has continued to evolve, however, in a majority of states the concept of contributory negligence as a defense barring recovery has been replaced with the concept of comparative fault.[64] However, comparative fault, because it does not prohibit recovery does not necessarily mean that the plaintiff is totally innocent. Indeed, often he may be more at fault than the defendant against whom he is collecting damages.[65] Thus, the rationale behind the original justification disappears, and it

57. *See, e.g.*, Nickerson v. Wheeler, 118 Mass. 295 (1875) (contribution action permissible); *see also* Prosser, *supra* note 1, at 426-27.

58. *See, e.g.*, Wigmore, *Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923).

59. "Moral fault on the part of the defendant" as a justification for imposing joint and several liability is discussed *infra* note 103 and accompanying text.

60. The plaintiff lacks innocence in the sense that, like culpable defendants, his conduct is below the standard to which he is legally required to conform for his own protection. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (comparative negligence approved); *see also* discussion of contributory negligence *infra* notes 61-67 and accompanying text.

61. Li v. Yellow Cab Co., 13 Cal. 3d 804, 809, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975); RESTATEMENT (SECOND) OF TORTS § 463 (1977).

62. PROSSER & KEETON, *supra* note 1, § 65, at 451-52.

63. *See* HARPER, JAMES & GRAY, *supra* note 33, § 10.2, at 44-45.

64. *See* discussion of comparative fault, *infra* notes 68-76 and accompanying text; *see also* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1963).

65. *See, e.g.*, Ambriz v. Kress, 148 Cal. App. 3d 963, 196 Cal. Rptr. 417 (1983). In *Ambriz*, plaintiff was found to be twenty percent negligent, defendant Kress was found to be seventy percent negligent and defendant McDowell was found to be ten percent negligent. For all practical purposes Kress was judgment-proof, leaving McDowell liable for the entire amount of defendants' liability under the doctrine of joint and several liability. The result was that defendant McDowell *could have ended up paying an award in excess of $300,000 to a plaintiff who was found to be twice as much at fault.* The court relieved the inequity by granting defendant McDowell's motion for contribution against Ambriz.

logically follows that the liability of defendants less responsible than the plaintiff for the total harm caused ought to be several. This much is required to effect the policy considerations preferring contribution as an alternative to the abrogation of joint and several liability.[66] Whether application of pure several liability is feasible as a practical matter is another question, to be addressed later in this article.[67]

E. *Comparative Fault*

The concept of comparative fault provides a basis for reducing damages awarded to a plaintiff in proportion to the determined percentage of his fault.[68] Perhaps the most significant development in the area of multiple torts is the almost universal acceptance of comparative fault.[69] Today, at least forty-four states have adopted comparative fault as an alternative to contributory negligence.[70] Comparative fault statutes already have played a key role in abolishing or substantially limiting joint and several liability in some states.[71] But in most states in which the question has been decided, the courts generally have retained joint and several liability absent specific statutory language to the contrary.[72]

Aside from the policy justifications for imposing joint and several liability,[73] a powerful and often-cited practical argument in favor of the rule has been the inability to apportion damages among joint

66. *See supra* text accompanying note 58.

67. *See infra* notes 73-76 and accompanying text. One alternative in dealing with this problem is to retain joint and several liability where the plaintiff is completely innocent, but apply pure several liability when the plaintiff is contributorily negligent. At least one state, Oklahoma, has adopted this approach (discussed in V. SCHWARTZ, *supra* note 27, § 16.4, at 259). Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983) (joint and several liability imposed when plaintiff found not negligent); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978) (liability apportioned where plaintiff was found contributorily negligent). Another approach is to retain joint and several liability as to individual defendants whose percentage of fault is greater than that of the plaintiff, even though plaintiff was partially at fault, but to apply pure several liability to those defendants whose percentage of fault is less than that of plaintiff's. Oregon uses this approach. OR. REV. STAT. § 18.485 (1985). Either of these options would work to avoid the inequitable result described in *supra* note 65.

68. *See* PROSSER & KEETON, *supra* note 1, § 67, at 471-72.

69. There are two types of comparative negligence statutes that predominate: (1) pure comparative negligence statutes, which allow a plaintiff to recover damages regardless of his degree of fault; and (2) mixed comparative negligence statutes, which preclude a plaintiff from recovering damages when his negligence exceeds a statutorily specified percentage in comparison to the defendants. For a summary of these types of comparative negligence statutes, see Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883 (Colo. 1983).

The term "comparative fault" is used interchangeably with "comparative negligence," but the authors prefer the term comparative negligence when discussing cases that do not involve traditional fault-based liability.

70. *See* V. SCHWARTZ, *supra* note 27, § 1.1, at 3. The six states that have not adopted comparative fault, either through legislation or judicial decisions, are Alabama, Maryland, North Carolina, South Carolina, Tennessee and Virginia.

71. *See supra* notes 27-28.

72. *See* V. SCHWARTZ, *supra* note 27, § 16.4, at 258-61.

73. *See* Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 964-67 (1959) ("moral" fault cannot be practically determined, and apportioning recovery based on moral fault would impair the benefits of distributing the risk to the widest possible segment of society).

tortfeasors.[74] But the adoption of comparative fault negates any procedural relevance this argument may have had in the past. In addition, the acceptance of common sense approximations in apportionment of damages[75] addresses the argument as it relates to practical problems in determining exact percentages in apportionment.[76] Therefore, the advent of comparative fault has seriously undermined one of the most powerful theoretical underpinnings of joint and several liability.

F. *Jury Apportionment of Damages*

At common law, juries were prohibited from apportioning damages among the parties.[77] As a practical matter, this rule made it impossible to impose anything less than entire liability. Thus, at common law there was no basis for pure several liability. Today, through modern comparative negligence statutes, juries not only are allowed but usually directed to apportion fault.[78] But the ability to apportion fault has yet to lead to its logical conclusion of equating responsibility[79] with liability. Instead, application of responsibility principles has been limited primarily to contribution actions and comparative fault.

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74. *See, e.g.*, PROSSER & KEETON, *supra* note 1, § 67, at 470; Jackson, *supra* note 1, at 408; HARPER, JAMES & GRAY, *supra* note 33, § 10.1, at 5; SPEISER, KRAUSE & GANS, *supra* note 35, § 3.7.

75. It never has been required and indeed is impossible to reduce damage apportionments to exact percentages. It has been left to the trier of fact to estimate approximate percentages based on all the evidence presented. *See, e.g.*, Jackson, *supra* note 1, at 402 n.9 ("[T]he approved practice is to leave [the computation of damages] to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances.") (quoting Mark v. Hudson R. Bridge Co., 103 N.Y. 28, 8 N.E. 243 (1886)); Recent Developments, *supra* note 1, at 135 ("juries should not be held to great . . . accuracy of judgment in ascertaining the damages to be assessed against each of the tortfeasors and the court should be slow to interfere with such verdicts") (quoting Swain v. Tennessee Copper Co., 78 S.W. 93 (Tenn. 1903)); PROSSER & KEETON, *supra* note 1, § 52, at 345 (apportionment will be made "[w]here a factual basis can be found for some rough practical apportionment").

76. Exact apportionment of damages can never be achieved in an absolute sense. This determination is necessarily dependent upon the trier of fact's subjective determinations as to legal cause and cause in fact. *See* discussion of causation *infra* notes 129-50 and accompanying text.

77. *See* PROSSER & KEETON, *supra* note 1, § 46 at 323 n.5 and accompanying text; Prosser, *supra* note 1, at 414; *Recent Developments in Joint and Several Liability*, 24 SYRACUSE L. REV. 1319, 1333 (1973); 46 A.L.R.3D 830 (1972); 74 AM.JUR.2D *Torts* § 76, at 684 (1974). It is interesting to note that notwithstanding the courts' instructions to the contrary, many juries made ingenious attempts to circumvent the harsh result of joint and several liability. However, these efforts to deliver an equitable damage apportionment were met with rather hostile treatment by the courts. *See, e.g.*, Detroit City Gas Co. v. Syme, 109 F.2d 366, 369 (6th Cir. 1940) (jury returned two separate verdicts, forcing court to order new trial); Dauenhauer v. Sullivan, 215 Cal. App. 2d 231, 30 Cal. Rptr. 71 (1963) (court disregarded jury apportionment of $37,000 judgment among four defendants and held the defendants jointly and severally liable for the entire damage award); Weddle v. Loges, 52 Cal. App. 2d 115, 125 P.2d 914 (1942) (The jury returned a single $5,000 judgment for plaintiff, apportioning damages between two defendants at $4,250 and $750, respectively. The court disregarded the jury's apportionment and held defendants jointly and severally liable for the full $5,000).

78. *See* V. SCHWARTZ, *supra* note 27, § 2.3, at 41.

79. "Responsibility" is used here in lieu of "fault" or "negligence" to avoid semantic problems in cases of strict liability. *See supra* note 32.

G. *Alternative Liability*

Where one of several alternative parties is responsible for the harm caused, but it is difficult or impossible for the plaintiff to prove which party caused the harm, courts will shift the burden of proof as to who caused the harm from the plaintiff to the defendants.[80] However, if defendants are identifiable, some factual basis for a rough apportionment of responsibility exists. Even in those cases where there is insufficient evidence to make a studied comparison of relative degrees of responsibility, juries can, and often do, resort to an equal or approximate division of damages.[81] The real problem exists where it is impossible for the plaintiff to identify which of several wrongdoers caused or contributed to the harm in question. To address this problem, courts have developed theories of alternative liability,[82] which subsequently have been incorporated into the Restatement.[83]

However, it must be remembered that the central issue in these cases is really one of causation rather than apportionment. It is important that this distinction remains clear. If the inquiry is "which of these negligent actors caused harm," and it is impossible for the plaintiff to prove who caused the harm, then a theory of alternative liability can shift to the defendants the burden of proof as to causation. If the defendants cannot meet that burden, they should be held severally liable for the harm caused. However, where the inquiry is "how responsible is each contributing wrongdoer for the harm caused," it should remain for the trier of fact to make the best estimate as to the proper apportionment of responsibility.

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80. RESTATEMENT (SECOND) OF TORTS § 433B and Comments (1977) (citing Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948)); Cummings v. Kendall, 41 Cal. App. 2d 549, 107 P.2d 282 (1940).

81. *See, e.g.*, HARPER, JAMES & GRAY, *supra* note 33, § 10.2; *see also* sources cited *supra* note 75.

82. *See, e.g.*, Borel v. Fireboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973) (worker exposed to asbestos manufactured by at least eleven different companies was unable to ascertain which manufacturer's product actually caused asbestosis); Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944) (patient having appendix removed awoke with injured shoulder — impossible to identify which of numerous hospital personnel caused the injury); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (third hunter struck when two companions simultaneously fired guns in his direction — impossible to identify which companion fired the shot that accidentally hit plaintiff).

83. (1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
>
> (3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

RESTATEMENT (SECOND) OF TORTS § 433B (1977).

H. *Burdens of Proof*

One issue to be resolved in a pure several liability reform measure is the allocation of the burden of proof for correct apportionment of damages. Early cases on the issue placed the burden on the plaintiff,[84] but the modern approach has been to place it on the defendants.[85] The burden requirement evidently came about as a result of confusion between the "*fact* of damage," which has to do with causation, and the "*amount* of damages," which involves apportionment.

In arguing against the practice of placing the burden of apportionment on the plaintiff, one distinguished writer concluded that a plaintiff "should not be denied any recovery simply because the *amount* of damages, as distinguished from the *fact* of damage, is impossible of exact ascertainment."[86] This argument is wholly logical and well grounded in fairness and equity. But it does not logically follow that the burden should be placed on the defendants in these cases. To do so would mean that failure to prove an exact apportionment formula, which is often inevitable, would lead to entire liability. It is neither fair nor necessary to require a defendant to prove he was only one percent responsible for the harm caused and, if he fails, to hold him one hundred percent liable.

There is no need to impose a requirement that any particular party bear the burden with respect to apportionment. At least one of the recent joint and several liability reform bills provides some support for this position.[87] This legislation provides that all parties should have the opportunity to present evidence to the trier of fact, and the trier of fact should determine apportionment without requiring that either party prove which apportionment formula should be used.[88]

Generally, the burden of proof as to causation should be on the plaintiff, as is the case today. For those problem areas where that burden is impossible to meet, the theories of alternative liability usually suffice to prevent injustice to the innocent plaintiff. However, to require any party to prove the "correct" apportionment is unfair and, in many cases, impossible.

There are sufficient incentives for both plaintiffs and defendants to

84. *See, e.g.*, Jackson, *supra* note 1, at 400-01; Recent Developments, *supra* note 1, at 134; Wigmore, *supra* note 58.

85. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1977); SPEISER, KRAUSE & GANS, *supra* note 35, § 3.7; HARPER, JAMES & GRAY, *supra* note 33; Mitchell v. Volkswagenwerk, A.G., 669 F.2d 1199, 1208 (8th Cir. 1982); *Borel*, 493 F.2d at 1095.

86. Jackson, *supra* note 1, at 402 (emphasis added).

87. "[This bill] does not specify who has the burden of proof as to apportionment of non-economic loss. Based on the evidence presented, the trier of fact should apportion responsibility among all parties. All the parties will have an opportunity to present their case to the trier of fact as to the appropriate apportionment of responsibility, so that liability can be assigned based on that apportionment. The trier of fact shall make a determination as to apportionment without a requirement that any particular party 'prove' which apportionment formula should be applied." SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, THE PRODUCT LIABILITY REFORM ACT, S. REP. No. 422, 99th Cong., 2d Sess. 69-70 (1986) (majority views).

88. *Id.*

argue vigorously their respective perceptions as to the degree of responsibility attributable to each wrongdoer. All parties should come to court, make their case, and leave to the trier of fact the task of extrapolating from the evidence a logical, common sense apportionment. The imposition of burdens confuses the issue and makes impossible any chance of reform.

I. *Release*

A release is the "abandonment of a claim to the party against whom it exists. . . ."[89] However, it does not necessarily mean that in giving a release the plaintiff has received full satisfaction of a claim.[90] At common law, the release of one of several tortfeasors released all.[91] But for independent multiple tortfeasors this is no longer the law.[92] If full satisfaction is not received, claims against defendants other than the ones released are not discharged.[93] When a release is conditioned on settlement, an offsetting credit is usually allowed to diminish the amount of damages recoverable against the remaining defendants.[94] Such a rule is justified as an encouragement for the plaintiff to settle.[95]

However justified, the development of this rule is a clear example of the dual standards that exist in the law of multiple tortfeasors. For purposes of release, mere concurrent torts, which are concurrent wrongful acts or omissions of two or more persons acting independently,[96] are correctly considered independent and separate claims. Release of one concurrent tortfeasor does not release all.[97] But in cases involving concerted action, the acts of several joint tortfeasors give rise to but one cause of action,[98] and release of a single joint tortfeasor releases all.[99] A clear distinction is drawn here between concerted actions and independent but concurrent torts, with great emphasis placed on the independence of each cause of action against concurrent tortfeasors.[100]

For purposes of invoking ultimate liability, however, the distinction disappears and tortfeasors are treated as one, regardless of whether they act independently or in concert.[101] The distinction recognized between different types of multiple torts for purposes of release should be carried over to the doctrines of liability.

89. HARPER, JAMES & GRAY, *supra* note 33.
90. *Id.*; *see also* Prosser, *supra* note 1, at 423.
91. Prosser, *supra* note 1, at 423.
92. PROSSER & KEETON, *supra* note 1, § 49, at 333-34.
93. *Id.* at 335.
94. *Id.*; *see also* Schmelzer v. Farrar, 48 Ohio App. 2d 210, 356 N.E.2d 751 (1976).
95. PROSSER & KEETON, *supra* note 1, § 49, at 333.
96. Concurrent torts are discussed *infra* notes 111-20 and accompanying text.
97. HARPER, JAMES & GRAY, *supra* note 33.
98. PROSSER & KEETON, *supra* note 1, § 49, at 432.
99. *Id.*; *see also* Prosser, *supra* note 1, at 422-23.
100. Prosser, *supra* note 1, at 245.
101. *See supra* note 1 and accompanying text.

IV. DOCTRINAL JUSTIFICATIONS

In tracing the policy development of the doctrine, it is interesting to note the changes in justifications for imposing joint and several liability as the doctrine has continued to expand in scope. There are four fundamental and sometimes conflicting policy justifications for joint and several liability: (1) moral fault; (2) compensating the innocent plaintiff; (3) loss distribution; and (4) ability to pay.[102]

A. *Moral Fault*

The need to punish moral fault or culpability was considered adequate justification for the common law cases involving concerted action.[103] As the doctrine of joint and several liability was expanded to apply to non-intentional, independent torts, moral fault alone obviously would not justify the imposition of joint and several liability.

B. *Compensating the Innocent Plaintiff*

When moral fault proved to be an insufficient justification, the policy considerations began to focus on the need to compensate the innocent victim.[104] In the wake of comparative negligence, as discussed earlier in this article, compensation of innocent victims should not justify imposition of joint and several liability in cases where the plaintiff is not wholly innocent.[105]

C. *Loss Distribution*

Loss distribution is another justification for joint and several liability. It favors distributing the loss throughout society by way of insurance companies, large self-insurers, or some type of social insurance program.[106] Perhaps the biggest problem with this policy is that it works too well. The resulting increase in insurance rates and product costs is a painful illustration of its success.[107] In addition, local governments attribute recent tax increases and service cutbacks directly to their deep-pocket exposures.[108]

D. *Ability to Pay*

More recently, greater emphasis has been placed on shifting the loss to the party best able to pay[109] — the deep pocket. Ultimately,

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102. *See* Note, *supra* note 73; Recent Developments, *supra* note 1, at 141.

103. *See* Note, *supra* note 73, at 964 n.1.

104. *See supra* note 64 and accompanying text.

105. *See supra* notes 64-66 and accompanying text.

106. *See* Note, *supra* note 73, at 966-67; HARPER, JAMES & GRAY, *supra* note 33, § 13.

107. *See* sources cited *infra* note 110.

108. *See, e.g.*, *1985 Insurance Hearings*, *supra* note 11, at 155-57; *Report on Municipality Liability*, *supra* note 12, at 731-36.

109. Recent Developments, *supra* note 1, at 141 (citing authority which recognizes that, in addition to the traditional justifications such as responsibility for harm, it is appropriate for courts to consider who is best able to bear the loss in determining liability of the parties).

however, the deep-pocket defendant has the ability to pass the cost on to society as a whole. Higher prices, increased taxes and reduced services are examples of how this cost is passed through to society. Thus, in these cases, the ultimate burden does not fall on the defendant who is best able to bear the loss. More accurately stated, the initial burden falls on the defendant who is best able to *distribute* the loss among those who ultimately bear the burden — consumers and taxpayers.[110]

In this sense, the civil justice system is being used as a national social insurance program. If that is the desired result, it could be administered much more efficiently through means other than the legal system. The policy of equating liability with responsibility would avoid the unfair result of imposing the ultimate burden on those who are completely innocent and wholly unassociated with the case.

Before turning to specific reform proposals, it is necessary to put some remaining problematic issues into perspective.

V. Concurrent Torts

A concurrent tort occurs when the harm is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently.[111] It is important to understand that the classification of "concurrent torts" is a broad heading which can be subdivided into many different categories. Clear theoretical distinctions can be made between these categories and the circumstances which accompany them. As to the defendants' position, there are three general categories worthy of note.

First, the defendants' acts individually may not be sufficient to cause any harm by themselves, but combine to result in actionable harm to the plaintiff.[112] Second, each defendant's act alone would cause some of the harm, but all acts combine to result in the total harm.[113] Third, each defendant's act is sufficient in itself to cause the entire harm, but combines with some redundant force which, although a legal cause of the harm, is unnecessary in bringing about the result.[114]

It is also important to consider the position of the plaintiff when concurrent torts are involved.[115] First, the plaintiff may be completely

110. *See Report on Municipal Liability*, *supra* note 12, at 35-36; *see also* Senate Comm. on Commerce, Science, and Transportation, The Product Liability Reform Act, S. Rep. No. 422, 99th Cong., 2d Sess. 66-71 (1986) ("Unlike private companies, local governments do not always have the flexibility of withdrawing a service because it entails high risks. . . . Payment has been guaranteed because in most cases, cities are required by law to pay their liability obligations and are able to spread the liability among many people in the form of taxes or other levies. In this way municipalities act as ad hoc insurance companies providing compensation to the injured."); *see generally Small Business Insurance Hearings*, *supra* note 11, at 614 (discussion of the disproportionate cost of insurance).

111. *See* Jackson, *supra* note 1, at 405 n.24.

112. *Id.* at 407.

113. *Id.* at 415.

114. *Id.* at 413.

115. The effect of plaintiffs' responsibility vis-a-vis defendants generally has not been considered by commentators in discussing the type of liability that should attach to multiple tortfeasors. It has been said that the plaintiffs' conduct is not "tortious" and therefore

innocent, harmed by the acts of the defendants through no fault of his own. Second, the plaintiff may come to the case bearing some comparative responsibility for causing the harm. Finally, there may be multiple plaintiffs, with some of them sharing in the responsibility for causing the harm, and some of them completely innocent.

Theoretically, there are strong justifications for treating these distinct classifications differently for purposes of joint and several liability. For example, the strongest case for imposing joint and several liability might involve a defendant whose act alone is sufficient to cause the entire harm and a plaintiff who is wholly innocent. The strongest case for pure several liability might involve a defendant whose conduct alone is not sufficient to cause the entire harm and a plaintiff who is contributorily negligent.

However, these distinct classifications often disappear in practical application because the trier of fact can eliminate them arbitrarily through subjective causation determinations.[116] When contributory negligence was the majority rule, this was often the case. Juries tended to ignore what appeared to be partial negligence on the part of the plaintiff in order to avoid the harsh result of barring any recovery.[117]

To further complicate the matter, there are many situations involving harm for which non-parties are responsible, where it is impossible to bring those parties into the case. Examples include cases involving immunity,[118] lack of jurisdiction,[119] and acts of God.[120] Because of the problems in formulating criteria to distinguish between these theoretical categories, and because of the endless number of circumstances in which they can arise, the authors urge that a single rule should be formulated for all multiple tortfeasors acting independently of each other.

VI. False Labels and Confused Applications

The general rule of joint and several liability is that "[e]ach of two or more persons whose *tortious* conduct is a *legal cause* of a single and *indivisible* harm to the injured party is subject to liability to the injured party for the entire harm."[121] Applying this principle, all concurrent tortfeasors discussed in the preceding section are jointly and severally

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should not affect the joint liability of the tortfeasors. *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 589-90, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978).

116. For a discussion of causation see *infra* notes 129-50 and accompanying text.

117. An example of this is the famous case of Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948). In *Summers*, the plaintiff, who was in the same hunting party as the two defendants, acted outside accepted hunting norms when he forged ahead of his two companions rather than staying abreast of them. Yet this fact was conveniently ignored by the trier of fact.

118. *See, e.g.*, Beck v. Wessel, 90 S.D. 107, 237 N.W.2d 905 (1976).

119. *See, e.g.*, Flexner v. Farson, 248 U.S. 289 (1919); Sauver v. New Mexico Peterbilt, Inc., 101 N.M. 84, 678 P.2d 712 (N.M. Ct. App. 1984).

120. *See, e.g.*, Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N.W. 830 (1938) (severe windstorm asserted as an act of God).

121. RESTATEMENT (SECOND) OF TORTS § 875 (1977) (emphasis added).

liable for the entire harm caused. This should not be the result. Thus, the problematic aspects of the general rule stated above are highlighted and discussed in the following paragraphs and then some recommendations for changes are proposed.

A. *Tortious Conduct*

The argument advanced for retaining the doctrine of joint and several liability in the wake of comparative negligence is that application of the doctrine is limited to defendants.[122] It has been said that the plaintiff's conduct only creates a risk of self-injury, and therefore cannot be tortious.[123] Since tortious conduct is a requirement for imposition of joint and several liability, the doctrine is limited to defendants.[124]

Joint liability, however, should not turn on whether conduct technically is considered "tortious." A plaintiff's acts may not be "tortious" in the sense that no legal duty exists to exercise due care for one's own safety. However, failure to exercise that care most certainly harms others in that it can result in others ultimately becoming exposed to unlimited liability for the consequences of a plaintiff's negligence.

American Motorcycle Association v. Superior Court,[125] a landmark case that limited the imposition of joint and several liability to defendants because of the tortious conduct requirement, somewhat inconsistently based liability on the principle that "a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches . . . not because he is responsible for the acts of other[s] . . . but because he is responsible for all damage of which his own negligence was a proximate cause."[126] However, the plaintiff's "proximate cause" is conveniently ignored. The plaintiff is treated differently because his conduct is not considered "tortious." And this is so even though the plaintiff's actions clearly harmed the remaining parties by increasing, indeed often *creating*, their liability exposure. Without the artificial distinction between "tor-

122. *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

123. *Id.* at 589-90, 578 P.2d at 906, 146 Cal. Rptr. at 189.

124. *Id.*

125. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). The plaintiff sought damages from motorcycle organizations which sponsored a cross-country race in which he was seriously injured. He claimed that the defendants had negligently designed, managed, supervised, and administered the race. The defenses raised included a claim that the injured party's own negligence was a proximate cause of his injuries, and that the injured party's parents were negligent in failing to exercise their power of supervision over their minor child. Defendants argued that their liability should be limited to the percentage of damages allocated to them under the recently adopted rule of comparative negligence. In essence, defendants argued that California's comparative negligence rule abrogated the rule of joint and several liability.

126. *Id.* at 587, 578 P.2d at 904, 146 Cal. Rptr. at 187; *see also* 86 C.J.S. *Torts* § 35, at 951-52 (1955). Note the different bases for imposing joint and several liability on concurrent tortfeasors. At common law, joint and several liability was based on vicarious liability because it was limited to true "joint torts." *See supra* note 44 and accompanying text.

More recently in concurrent torts, vicarious liability is specifically rejected as a basis, and is replaced by the proximate cause basis discussed in the text accompanying this note. *Cf.* discussion of doctrinal justifications, *supra* notes 102-10 and accompanying text.

tious" and "negligent," combined with the *American Motorcycle Association* court's refusal to apply the proximate cause test to the plaintiff, this inconsistency cannot be reconciled. Further, it hardly can be considered fair to the defendants.

The artificial, theoretical distinction between "tortious" and "negligent" conduct, as applied to joint and several liability, is perhaps the strongest illustration of the inadequacy of the joint and several liability doctrine in the face of comparative fault.[127] Plaintiffs and defendants, who can be equally at fault, are treated differently in sharing the responsibility of third parties. If joint and several liability is to be retained, the authors maintain that it should be applied to all persons whose *negligent*, as opposed to *tortious*, conduct is the legal cause of the harm.[128] The obvious problem with such an approach is that it would lead to the same type of inequitable results as did the contributory negligence rule where a partially negligent plaintiff was barred from any recovery.

B. *Causation*

In addition to tortious conduct, a second prerequisite to the imposition of joint and several liability is a showing of proximate or legal cause.[129] Proximate cause is a limitation imposed by the courts requiring that a sufficient causal connection — between the actor's conduct and the harm caused — be proved as a prerequisite to the imposition of liability.[130] It serves to exculpate one whose act, although a cause in fact of the harm, is extremely remote or has resulted in unforeseeable consequences.[131] However, the problem of determining whether the proximate cause requirement has been met has created a great deal of confusion and disagreement in the law.[132]

To further complicate matters, "proximate" or "legal" cause seems to be more broadly defined in the law of joint tortfeasors,[133] which exacerbates the problem of determining whether the proximate cause requirement has been met in cases involving multiple tortfeasors. First, in the context of multiple tortfeasors, it is not clear whether the proximate cause test is to be applied to the act of each tortfeasor,[134] or to an event

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127. It has been pointed out that "where one of the injurers is also the victim [as in] contributory negligence . . . it is analytically the same as the joint tortfeasor case." Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 518 (1980).

128. *Id.*

129. *See, e.g.*, Guille v. Swan, 19 Johns. 381 (N.Y. 1822); RESTATEMENT (SECOND) OF TORTS § 875 (1977); PROSSER & KEETON, *supra* note 1, § 47; 74 AM.JUR.2D *Torts* § 62 (1974); 65 C.J.S. *Negligence* § 102 (1955).

130. PROSSER & KEETON, *supra* note 1, § 41.

131. *Id.* at § 43; *see also* North v. Johnson, 58 Minn. 242, 59 N.W. 1012 (1894).

132. PROSSER & KEETON, *supra* note 1, § 41.

133. Conduct that otherwise would be considered innocent becomes a legal cause and therefore tortious when several parties are involved. *See* cases cited *supra* note 7; *see also infra* notes 136-37 and accompanying text.

134. *See* RESTATEMENT (SECOND) OF TORTS § 875 (1977) (liability is joint and several when each person's conduct is a legal cause).

toward which each tortfeasor's act contributes.[135] It appears that either will suffice.

Generally, an act is tortious only when a harm is proximately caused by the breach of an existing duty,[136] except that in strict liability cases it is not necessary that a duty be breached.[137] In cases involving joint torts, the elements of harm or proximate cause, or both, often would be absent if a single tortfeasor's actions were isolated. For example, conduct which alone would be considered innocent has been found to be tortious when the proximate cause test is applied by combining such conduct with the conduct of other parties to determine ultimately that the combined event caused the harm.[138]

The authors do not suggest that a tortfeasor whose act, by itself, is not sufficient to cause the harm should escape all liability under such circumstances. But it is urged that an independent tortfeasor's liability should be limited to what the trier of fact considers to be his share of responsibility for causing the ultimate harm. It is unreasonable to hold any one of a number of independent tortfeasors completely responsible for the acts of the others because his act is *a* cause of the harm, as is the case in jurisdictions continuing to follow the doctrine of joint and several liability. The authors suggest that complete liability should be invoked only for those damages for which a tortfeasor's act is *the* cause of the harm.[139] If one were to follow the logic of the *American Motorcycle Association* court, making "proximate cause" the touchstone for joint and several liability, there would be no recovery for the plaintiff where his act constitutes *a* proximate cause because he too would be subject to joint and several liability. As was ably pointed out in the dissenting opinion, the majority's proximate cause argument "proves too

135. *See* 74 AM.JUR.2D *Torts* § 62 (1974) (joint and several liability applicable when "two or more persons [acts] are, in combination, the direct and proximate cause"); 65 C.J.S. *Negligence* § 102 (1955) (joint and several liability applicable when "the concurrent negligence of two or more persons combined results in an injury").

136. *See* W. PROSSER, J. WADE & V. SCHWARTZ, *Cases and Materials on Torts*, at 144 (7th ed. 1982).

137. *Id.* at 705.

138. *See, e.g.*, Sills v. City of Los Angeles, No. C-333504 (San Fernando Super. Ct. Mar. 14, 1985) (the failure of the city to trim the hedges would not have been considered tortious had the driver high on drugs been alert enough to stop for the sign, as other drivers apparently were able to do); Duggan v. City of San Diego, No. 484152 (San Diego Super. Ct. Mar. 1, 1984) (the road curve design would not have been considered tortious had the drunk driver not been over the center line); Laurenti v. Tiffenbach, No. A-6247-82 (N.J. Super. Ct. App. Div. Aug. 2, 1984) (the act of stretching the material too tight would not have been considered tortious had the automobile driver not turned in front of the motorcycle, or had the driver of the motorcycle been able to stop); Cini v. Vaughn, No. A893-81T1 (N.J. Super. Ct. App. Div. Feb. 4, 1983) (the act of parking the tow truck on the shoulder of the road would not have been considered tortious had the driver of the automobile not fallen asleep and veered off the expressway).

139. As Justice Clark pointed out in his dissenting opinion in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 611, 578 P.2d 899, 920, 146 Cal. Rptr. 182, 203 (1978) (Clark, J., dissenting), to say otherwise "proves too much." If joint and several liability were to attach anytime one's act constituted *a* cause of the harm, contributorily negligent plaintiffs theoretically should be denied any recovery (notwithstanding the artificial distinction between "tortious" and "negligent" conduct discussed *supra* notes 122-28 and accompanying text).

much."[140] And the artificial distinction between "tortious" and "negligent" conduct does not undermine the logic of the proximate cause analysis.[141]

The second major problem with causation in the area of joint torts is its inherent subjectivity.[142] Findings of proximate cause sometime seem to be more the result of the jury's desire to compensate the plaintiff than a dispassionate assessment of the wrongdoer's actual responsibility. These result-oriented determinations are most obvious in cases where the true wrongdoer is judgment-proof.[143]

Causation determinations often involve a mixture of fact and policy.[144] Even in determining cause in fact, as opposed to legal cause, a great deal of discretion is left to the trier of fact in judgment, evaluation, interpretation, and policy considerations.[145] For policymakers, the subjectivity problem raises an issue of equity; for insurers and insurance consumers it raises an issue of uncertainty.

It seems contrary to our sense of retributive justice to allow the negligent, drunk, and drugged drivers and other wrongdoers to go virtually scot-free.[146] Yet it is also unfair to require the victim, wholly innocent or only partially at fault, to go entirely uncompensated. Confined to the parameters of tort law, the policymaker is faced with a Hobson's choice in attempting to resolve the dilemma of compensating an innocent plaintiff when the wrongdoer is truly judgment-proof. However, the "judgment-proof" wrongdoer under today's legal system is not necessarily unable to pay,[147] and the policymaker's imprisonment within the

140. *Id.*

141. For discussion of tortious conduct see *supra* notes 122-28 and accompanying text; *see also* Landes & Posner, *supra* note 127.

142. *See generally* Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956) (determination of cause in fact is influenced by policy evaluation as well as factual considerations).

143. *See, e.g.*, cases cited *supra* note 7.

144. *See* Malone, *supra* note 142.

145. *Id.*

146. It seems inherently unjust and inequitable to require someone who reupholstered a motorcycle seat to be liable for a $3.4 million claim because a car turned in front of a motorcycle that could not stop soon enough to avoid the collision. *See* Laurenti v. Tiffenbach, No. A-6247-82 (N.J. Super. Ct. App. Div. Aug. 2, 1984). It is also unfair to require taxpayers to absorb a $1.6 million settlement because a drunk driver went over the center line when he was unable to negotiate a curve. Duggan v. City of San Diego, No. 484152 (San Diego Super. Ct. Mar. 1, 1984). Likewise it is unfair to require taxpayers to pay $2.16 million because a driver high on drugs ran a stop sign. Sills v. City of Los Angeles, No. C-333504 (San Fernando Super. Ct. Mar. 14, 1985).

147. In pointing out how the majority's opinion in *American Motorcycle Ass'n* frustrated the doctrine of comparative responsibility, Justice Clark's dissent indirectly alludes to three instances in which a person might be considered judgment-proof: he may be unavailable; he may be insolvent; or he may have settled. 20 Cal. 3d 578, 611, 578 P.2d 899, 920, 146 Cal. Rptr. 182, 203 (1978). (Clark, J., dissenting). In each of these situations policy-makers could find ways to reduce drastically the number of "judgment-proof" persons if there was sufficient impetus to do so. Briefly those instances considered are:

Responsible actor unavailable. The actor may be unavailable in a number of ways. For example, (1) he could be outside the reach of the court's jurisdiction; (2) he could be able to escape service of process; (3) he may be unidentifiable; (4) the plaintiff may be unable to locate him; (5) he may have died; (6) he may be immune; or (7) the act may have been an act of God. (These are examples of the empty chair problems discussed *infra* notes 165-67

confines of tort law is self-imposed.[148]

The remaining issue raised by the problem of subjectivity in causation determinations is one of uncertainty. There are virtually no guidelines by which a particular defendant or potential defendant can estimate with any degree of certainty what his liability will be in any given case. Identical facts can mean very different things to different juries. One jury may consider a particular person's role to be too insignificant to impose liability, whereas another jury may find partial responsibility sufficient to hold that person liable for the entire amount of damages awarded. This all or nothing game makes risk assessment virtually impossible,[149] leading to higher insurance costs and decreased availability of coverage at any cost.[150] Because of the inherent problems of subjectivity in causation determinations, the only reform option which the authors believe could return a degree of certainty or predictability to individual risk assessment is the abrogation of joint and several liability.

C. *Indivisibility*

One final problem with regard to causation is the unwarranted focus on the indivisibility of the harm caused by concurrent tortfeasors. In determining whether a single independent tortfeasor should be held jointly and severally liable for the acts of all, it has been said that "the true distinction to be made is between injuries which are divisible and those [which] are indivisible."[151] For harm which is "indivisible," the

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under the heading of "Release"). In the first two examples, much more could be done both domestically and internationally to bring elusive parties to justice. In the third example, courts already have gone far in developing theories of alternative liability. These theories could be expanded. Assistance could be provided in the fourth example, but it would be an admittedly expensive proposition with uncertain results. As to the last two examples, little or nothing can be done to prevent the actor from being unavailable.

Responsible actor insolvent. For those instances in which a person is truly without money or assets, nothing can be done. But there are numerous cases where bankruptcy laws, corporate veils, and property owner protection laws render a person with some or all of the necessary assets "judgment-proof" for purposes of enforcing a judgment. For "non-deep-pocket" individuals, personal insurance policy limits often represent the extent of their effective liability exposure.

Responsible actor settled. This area is perhaps the ripest for reform, and is discussed *supra* notes 89-101 and accompanying text under the heading of "Release."

This article does not advocate all of these changes. Indeed, the authors would consider some of them to be inadvisable. The policy arguments against them may be so strong as to outweigh those in favor of the uncompensated victim. The purpose of this note is simply to point out that there are many instances where the "judgment-proof" defendant is *able* to pay, even though the legal system is presently powerless to *make* him pay.

148. There are means other than tort law through which injured parties may be compensated. *See* discussion of suggested reform *infra* notes 168-75 and accompanying text.

149. *See, e.g.*, *U.S. Reinsurance Market Reaction to the U.S. Civil Justice System*, White Paper by the Reinsurance Association of America, at 48 (March, 1986); AIA Memorandum, *supra* note 12, at Discussion Paper, p. 4 ("Individual insureds must be measured on their individual capabilities and risk potential. It is only under a system of several liability . . . that this can be accomplished").

150. *See* sources cited *supra* note 149; *see also 1985 Insurance Hearings*, *supra* note 11; *1986 Insurance Hearings*, *supra* note 7.

151. Jackson, *supra* note 1, at 406; *see also* Prosser, *supra* note 1, at 442.

liability will be joint and several.[152] This rule is based on the reasoning that harm which is indivisible leaves no logical basis for apportionment.[153] Such tortured analysis has survived unchallenged far too long.

It does not follow that simply because the *harm* is indivisible there is no basis for apportionment. It is the *responsibility* for causing the harm which should be the focus of the inquiry.[154] The distinction between "harm" and "responsibility for causing that harm" is in some cases completely lost and hopelessly confused.[155] Indeed, it is something of a contradiction in terms to speak of a harm which is divisible. If injury is capable of division, then in reality there are two separate injuries.

It has been said that there are two basic categories of indivisible injuries. The first is injury incapable of theoretical division; the second, although theoretically divisible, is injury incapable of apportionment.[156] A discussion of a classic example of the distinction may prove helpful. Two negligent defendants, acting independently with separate guns, shoot the plaintiff, wounding her in two different places.[157] If she dies, the harm is said to be indivisible because there is no logical basis for dividing death.[158] If she lives, however, the harm is said to be divisible,[159] even though certain elements of the damages, such as pain and suffering, are difficult to apportion.[160]

In both of these examples there exists a logical basis for apportionment. That basis is the *responsibility* of the defendant for bringing about the result. Lack of ability to apportion damages, based on the indivisibility of *harm*, is not a sound argument for retaining joint and several liability. It is the ability to allocate *responsibility* for that harm which is the key. Where that allocation is impossible, alternative liability theories still provide a mechanism for resolving the case.

VII. Related Problems: Release Offsets and the "Empty Chair"

Another major problem in addressing the law related to joint

152. *See* Prosser & Keeton, *supra* note 1, § 52, at 347; Recent Developments, *supra* note 1, at 157; Speiser, Krause & Gans, *supra* note 35, § 3.7, at 400; Harper, James & Gray, *supra* note 33.

153. *See, e.g.*, Prosser & Keeton, *supra* note 1, § 52, at 347.

154. This is the approach taken by the Product Liability bill which recently passed the Senate Committee on Commerce, Science, and Transportation. Senate Comm. on Commerce, Science, and Transportation, The Product Liability Reform Act, S. Rep. No. 422, 99th Cong., 2d Sess. 69 (1986) (majority views).

155. *See, e.g.*, 1 Shearman & Redfield, Negligence § 122, at 318 (6th ed. 1913); *Recent Developments in Joint and Several Liability*, 24 Syracuse L. Rev. 1319, 1321 (1973). Similar problems are noted in this excerpt from a discussion on concurrent torts: "recovery was allowed because the plaintiff suffered an 'indivisible *injury*' [i.e., harm] for which there was no logical basis for apportionment. Each actor was responsible for part of the damage but it was impossible to tell how much."

156. Recent Developments, *supra* note 1, at 132.

157. Prosser & Keeton, *supra* note 1, § 52, at 345.

158. *Id.*

159. *Id.*

160. *Id.* But note that regardless of Prosser's seeming preference for a contrary result, the defendants contributing to the non-fatal wounding could still be held jointly and severally liable in jurisdictions where the doctrine is still applied.

tortfeasors is the fact that many times one of the responsible actors never makes it to court. This is an issue that must be addressed in any comprehensive reform.

A. *Release Offsets*

Although an offsetting credit is appropriately allowed in cases where a defendant or potential defendant is released by the plaintiff following a settlement,[161] the manner in which the offset is calculated can result in inequitable treatment of the remaining defendants. In many jurisdictions, the offset is calculated by simply deducting the amount of the settlement from the final award.[162] When a release is given for a reason other than settlement, such as a gratuitous release based on a plaintiff's relationship with a potential defendant, there is no offset even though the person released is responsible for a substantial percentage of the harm. This result is inequitable. Whenever the plaintiff releases one of several potential tortfeasors for any reason, the ultimate judgment should be reduced and the correct offset calculation should be based on the settler's percentage of *responsibility* in causing the harm.

Two arguments against this approach are readily apparent: (1) it would be difficult for the trier of fact properly to assign the correct percentage of responsibility to a person not a party to the case; and (2) it would discourage settlements. With respect to the former, sufficient incentive exists for the remaining parties to argue vigorously the relative responsibility of the person released. The trier of fact should determine the settler's responsibility for the limited purpose of allocating responsibility. The settling party could be called as a witness or be asked to produce evidence even though liability could no longer attach due to the release. As long as the evidence can be presented to the trier of fact, and the incentive for fully developing that evidence remains intact, allocating responsibility to a "nonparty" should not present a substantial problem.

The second argument is a matter of policy. Out-of-court settlements are clearly preferred to the costly, time-consuming, and uncertain process of litigation. From the government's perspective, settlements relieve the congested judicial system of time-consuming cases. From the plaintiff's perspective, a settlement provides a sum certain now, without the time, expense, and uncertainty involved in litigation. From the defendant's perspective, settlement limits an otherwise uncertain liability. These legitimate policy goals would not be affected by adopting the "percentage of responsibility" offset approach recommended in this article. Although it is conceded that some settlement agreements made at the expense of parties not privy to the negotiations may indeed be dis-

161. *See supra* notes 94-95 and accompanying text.

162. *See, e.g.*, Arkansas Kraft Corp. v. Johnson, 257 Ark. 629, 519 S.W.2d 74 (1975); Greier v. Wikel, 4 Kan. App. 2d 188, 603 P.2d 1028 (1979); Deal v. Madison, 576 S.W.2d 409 (Tex. Civ. App. 1978); Johnson v. Heintz, 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

couraged, the authors argue that this would produce a more equitable result in those cases.

A settlement is a trade-off. In exchange for swift and certain compensation, the plaintiff waives his right to attempt to extract, through litigation, a potentially larger but less certain judgment. The basic concept of settlement would remain unchanged under the "percentage of responsibility" offset approach outlined above.

When multiple defendants are involved, the plaintiff sometimes enjoys a settlement "windfall" of sorts when the "amount of settlement" offset approach is employed.[163] The plaintiff can receive a sum certain portion of compensation now, without waiving his right to pursue the larger judgment he initially sought. Thus, in cases involving multiple tortfeasors, the plaintiff has an additional incentive to settle with at least one of the tortfeasors since he loses nothing. Settling with only one of them, however, does not further any policy objective. The case lives on. The judicial system is still bogged down; the plaintiff essentially gives up nothing, and the remaining defendants are subject to liability not only for their own actions, but for those of the settling parties. Contribution actions often are not available to correct this inequity even when the settling party is solvent.[164]

Settlement between any one of several potential defendants and the plaintiff should be driven on its own merits, the same as in cases involving a single tortfeasor. Under the "percentage of responsibility" offset approach suggested here, there would be no additional disincentives in cases involving multiple tortfeasors.

B. *The "Empty Chair"*

When a person responsible for a portion of the harm caused cannot be brought into the suit, many courts do not recognize the absent party which is commonly referred to as the "empty chair."[165] As a general rule, only parties to the transaction should be considered in apportioning responsibility. If a person who is responsible for a portion of the harm is not brought into a suit, the litigant in the best position to join such person in the lawsuit but who fails to do so, should assume the unnamed but partially liable person's percentage of responsibility. This

163. *See* V. SCHWARTZ, *supra* note 27, § 16.5, at 264.

164. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2504 (Supp. 1978) ("release . . . given . . . to one of two or more persons . . . does not discharge any of the other tortfeasors [and i]t discharges the tortfeasor to whom it is given from all liability for contribution"); IOWA CODE § 668.7 (1979) ("release . . . discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim"); N.H. REV. STAT. ANN. 507:7h (1974) ("release . . . discharges that person . . . from all liability for contribution, but it does not discharge any other person liable upon the same claim"); and WYO. STAT. § 1-1-113 (1977) ("release . . . does not discharge any of the other tortfeasors . . . and [i]t discharges the tortfeasor to whom it is given from all liability for contribution"). *But cf.* IDAHO CODE § 6-806 (1979) (release . . . *does not relieve* him from liability to make contribution . . . unless . . . [it] provides for a reduction, to the extent of the pro rata share of the released tortfeasor") (emphasis added); and UTAH CODE ANN. § 78-27-43 (1977) (similar to Idaho).

165. *See, e.g.*, V. SCHWARTZ, *supra* note 27, § 16.5, at 263.

would help insure either that all responsible parties are brought into the suit, or that the percentage of responsibility allocable to any unnamed responsible persons is taken into account. If a person is not brought in because of plaintiff's release, then the plaintiff should accept responsibility for the released person's percentage of responsibility.

However, if the defendant fails to bring in a potentially liable person through available impleader practices or other procedures, he has no one to blame but himself. When the "empty chair" is the result of the defendant's failure to bring in a responsible person, that person's percentage of fault should not be considered by the trier of fact. The defendant is often in the best position to know who the other responsible actors are, and thus it is reasonable that he bear the burden of joining other potential tortfeasors.

There remains to be considered the "empty chair" problem which develops when, regardless of the best efforts of either plaintiff or defendant, the "person"[166] responsible cannot be brought before the court.[167] Analytically, the empty chair problem presents the same dilemma presented in the case of a truly insolvent defendant. The responsible person is judgment-proof, and we are left to decide who is to shoulder his burden. It is unjustifiable to require the remaining defendants to shoulder the burden of the insolvent tortfeasor. They should not be required to pay for harm they are able to prove has been caused by another person who, through no fault of the remaining defendants, cannot be brought before the court. As discussed below, options other than the tort system are available to compensate the plaintiff when this type of "empty chair" problem exists.

VIII. Suggested Reform

To summarize the basic provisions which should be included in joint and several liability reform legislation,[168] some of the issues set forth above are revisited in the following discussion.

A. *Operative language*

The operative language abrogating joint and several liability should consist of a simple across-the-board abrogation, with the exception of cases involving concerted action. It is important to include a clear statutory definition of "concerted action" in order to give the courts and parties proper guidance. Such a definition should require that the actors consciously work together, intending to do the wrongful act which

166. For convenience of discussion, the term "person" as used in this context also would be applicable to acts of God.

167. For examples of empty chair problems see *supra* note 147, which also discusses ways to deal with the problem outside of the joint and several liability context.

168. For an example of a specific joint and several liability reform legislation incorporating the provisions urged in this article, see Amendment No. 2844 to S. 2760, 99th Cong. 2d Sess., 132 Cong. Rec., S12852 (Sept. 17, 1986) (amendment proposed by Senator Pressler); *see also* S. 217, 100th Cong., 1st Sess. (1987) (The Joint and Several Liability Tort Reform Act of 1987 as introduced by Sen. Pressler Jan. 8, 1987).

causes the harm. For example, liability for two negligent component manufacturers normally would be several if they acted independently. However, if they agreed to "cut corners" to come up with a cheaper product, they would have acted in concert and should be jointly liable.

For all multiple torts independently committed, liability should be several, not joint. Liability should be equated with apportioned responsibility. There are numerous other options the reform-minded legislator might consider, but all are similarly plagued with either theoretical problems of justification, or practical problems in implementation, or both.[169]

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169. Some examples of alternative reform approaches and a short discussion of each follows:

Limited to noneconomic damages. This approach retains joint and several liability for economic damages such as pain and suffering. *See, e.g.*, California Proposition 51; S. 2760, 99th Cong., 2d Sess. § 308 (1986). The object of this alternative is to make plaintiff whole in an economic sense, while limiting other defendants' joint liability to objectively determined damages. Although there exists a clear policy rationale for the distinction, there is scant theoretical justification for differentiating liability based on the type of damage involved. This approach represents a political compromise.

Threshold percentage requirement. This approach allows for the abrogation of joint and several liability, contingent upon the defendant falling below some threshold percentage requirement after which joint and several liability would be invoked. For example, if the threshold were set at twenty-five percent, a defendant whose responsibility was less than twenty-five percent would be severally liable. Those whose responsibility is in excess of twenty-five percent would be jointly and severally liable. *See, e.g.*, *supra* note 29 (New Hampshire fifty percent threshold). The idea behind this approach is to prevent the most egregious applications of joint and several liability involving deep-pocket defendants whose contribution in causing the harm is slight. The problem with such an approach is that the threshold percentage figure is purely arbitrary. Also, juries might tend to simply assign a higher percentage to the deep pocket than would otherwise be the case in an attempt to compensate the plaintiff.

Defendant's responsibility compared to plaintiff's. This approach involves a comparison of the responsibility of the plaintiff to each defendant. If the defendant's responsibility is greater than the plaintiff's, he is jointly and severally liable. If the defendant's responsibility is less than that of the plaintiff's, he is severally liable. *See, e.g.*, NEV. REV. STAT. § 41.141(3) (1986). While theoretically justifiable, the jury again might be led toward result-oriented determinations regarding the allocation of responsibility.

Plaintiff's conduct. This approach retains joint and several liability when the plaintiff is completely innocent. In cases involving contributory negligence on the part of the plaintiff, however, the liability of the defendants will be several. *See, e.g.*, Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980). Thus, the application of joint liability is contingent upon the conduct of the plaintiff. Although a rational approach, it involves exactly the same problems found in the old contributory negligence rule in that plaintiffs clearly contibutorily negligent were found to be completely innocent in order to avoid barring any recovery. *See supra* note 117 and accompanying text.

Other defendants' conduct. This approach compares each individual defendant's percentage of responsibility with that of the other tortfeasors. A defendant is jointly liable only with those defendants whose apportioned responsibility is less than his. *See, e.g.*, MO. REV. STAT. § 538.230(2) (Cum. Supp. 1987).

Judgment-proof defendants. This approach is directed at the allocation of a judgment-proof defendant's liability. Joint and several liability is retained, but the plaintiff has an obligation to use his best efforts to collect individually each defendant's apportioned share of liability, rather than allowing him to collect the lump sum from any of the defendants, leaving them to initiate contribution actions against the remaining defendants. If, after using best efforts, the plaintiff is unable to collect from a judgment-proof defendant, that defendant's share is reallocated among all responsible parties, including the plaintiff, based on their apportioned responsibility. *See, e.g.*, UNIFORM COMPARATIVE FAULT ACT

B. *Burdens of Proof*

There should be no burden of proof as to apportionment of responsibility. It should be left to the trier of fact to make its best estimate based on the evidence presented. Apportionment need not be reducible to an exact mathematical computation.[170]

C. *"Empty Chair" Problems*

As a general rule, only parties to the case should be considered in apportioning responsibility. This policy is to ensure that the trier of fact has the benefit of the best evidence available. However, in those cases where the plaintiff chooses to release persons who are potentially liable, or where it is impossible for a defendant to implead a responsible party, those parties should be considered in allocating responsibility.

D. *Offsetting Adjustments for Release*

When the plaintiff releases a defendant or potential defendant, the final award accordingly should be offset by the percentage of responsibility, as opposed to settlement dollar amount, attributable to that defendant or potential defendant.

E. *Policy Considerations*

Anyone attempting to articulate specific reform proposals immediately confronts an insoluble policy dilemma. Some substantially innocent parties will suffer. The reason for this sad state of affairs is that the doctrine of joint and several liability makes a difference only when a true wrongdoer is judgment-proof. If all responsible parties had money, the difference between right of contribution (the present alternative to several liability) and pure several liability (the approach advocated here) would be one largely of administrative convenience and efficiency.[171]

The limitations of any reform effort must be realized with frustrating clarity. The goals of the reform effort then come into sharper focus, as we realize that we can never reasonably expect to bring complete justice to this area of the law. The best that can be hoped for is to minimize the injustice to both plaintiffs and defendants. The issue, then, boils down to two fundamental questions. First, upon whom do we place the burden of responsibility for the wrongful act of a judgment-proof third party? Second, what is the most efficient means of accomplishing this task? There is no "right" answer to the first question. The policy decisions which flow from this analysis are necessarily laden with strong

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§ 2(d), 12 U.L.A. 38 (Cum. Supp. 1987). This relatively mild reform is an improvement, but it fails to address the crux of the issue.

"Crisis sensitive" reform. This approach limits reform efforts to specific classifications of defendants, such as municipalities or public entities generally, or to specific types of actions, like product liability or medical malpractice. *See, e.g.*, S. 2760, 99th Cong., 2d Sess. § 308 (1986) (reform limited to product liability actions).

170. *See* discussion of burdens of proof, *supra* notes 84-88 and accompanying text.

171. *See, e.g.*, LANDES & POSNER, *supra* note 127, at 529.

philosophical prejudices, and the resolution of both questions is uniquely political.

As has been illustrated previously, it is no longer possible categorically to answer the first question based on the "innocence" of the plaintiff. At first blush, it might seem that if the plaintiff — who may or may not be at fault — is to shoulder the burden of the missing third person's responsibility, liability should be several. If it is to fall on the shoulders of independent defendants who already have paid for their apportioned share of responsibility, liability should be joint and several. Still, the inquiry must go deeper. Regardless of how the first question is answered, the second question regarding efficiency inevitably should lead to a pure several liability approach.

Under today's system of joint and several liability, the liability of the missing third person is generally borne by some deep-pocket defendant who then distributes the loss throughout society. The cumbersome and costly legal process necessary for this system to work is expensive in terms of both time and money, making it grossly inefficient.[172] Add to that the artificial market distortions caused by deep-pocket defendants passing costs on to consumers, and the system quickly becomes difficult to defend — at least if one accepts the proposition that deep-pocket defendants, such as manufacturers, insurance companies, municipalities, and large corporations, are capable of passing the costs on to unrelated third persons such as consumers and taxpayers.

Even if the answer to the first question involves a conscious policy decision to compensate the plaintiff, that goal could be met much more efficiently through the adoption of several liability supplemented by some type of compensation system other than tort litigation. Examples include a national insurance plan or a "tort trust fund" approach.[173] These could be administered much more cheaply and efficiently than the present system and would ensure that the plaintiff is fully compensated.

The several liability approach places greater emphasis on individual responsibility,[174]times. Logically, it also would lead to greater efforts toward punishing the true wrongdoer.[175]

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172. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, THE UNIFORM PRODUCT LIABILITY ACT, S. REP. No. 918, 98th Cong., 2d. Sess. 7 (1984) (majority views); ("for every $59 that is paid to claimants in product liability cases, $99 is paid for legal services," not including court and other administrative costs); *see also* LANDES & POSNER, *supra* note 127, at 529 (discussing the relative inefficiency of contribution actions).

173. This approach is not necessarily urged here. The point is that there are much more efficient means other than the tort system to compensate an injured party when the wrongdoer is found to be judgment-proof. Detailed discussions of alternatives may prove to be fertile ground for future articles.

174. It should be remembered that this does not leave the plaintiff unable to protect himself. First, the remaining tortfeasors are liable severally for the portion of the harm for which they are responsible. In addition, the harsh results of this rule inevitably would lead to greater reliance upon individual liability insurance, which should be considerably easier to afford.

175. Pure several liability would place greater emphasis on holding the true wrongdoers responsible. Under the present system, deep-pocket defendants become proxies for the "judgment-proof" wrongdoers, often as a matter of convenience rather than necessity. "Judgment-proof" can mean many things. The party may be immune; the court may not

IX. Conclusion

The theoretical underpinnings of the doctrine of joint and several liability, as applied to concurrent torts, have been eroded gradually by parallel developments in the law. Except for cases involving concerted action, the doctrine should be abrogated. In its stead should be instituted a system of pure several liability, based on the common sense apportionment of each wrongdoer's responsibility.

This system would not be perfect. Apportionments are not reducible to exact mathematical computations. Undoubtedly, there would be cases where justice may be better served under the present system. There is no "right" answer. The issue involves a fundamental policy question of who should shoulder the burden of actions for which a third party is responsible. Faced with that question, the result will never lead to perfect justice. The goal of the reform urged herein is to minimize the injustice. At one point in our legal history, joint and several liability may have served that purpose better than the approach suggested in this article. But in the wake of developments such as comparative fault, alternative liability and jury apportionment of damages, that no longer is the case.

Originally joint and several liability was applied to punish the wrongdoer and protect the innocent plaintiff. Today, the true wrongdoer often escapes all liability because the focus is on the deep pocket; the compensated plaintiff no longer is always innocent; and the substantially innocent third parties, or more likely consumers and taxpayers who are completely innocent and totally unrelated to the case, ultimately pay the bill for all of them. "This all goes to show that a rule of law applied without regard to its reason may become a rule of injustice."[176]

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have proper jurisdiction; a proper defendant may be "insolvent;" he may be uninsured; his insurance company may be "bankrupt;" or, as a practical matter, his assets may not be worth pursuing because they are too difficult to liquidate. All of these factors make it much simpler for the court or plaintiff or defendant seeking contribution to focus on the deep pocket with ready cash. Indeed, one judgment *required* that "'recovery of contribution be limited to recovery from [third-party defendant's] insurer to the extent of . . . coverage . . . and *that no contribution be recoverable from [third-party defendant] individually*.'" *Ambriz v. Kress*, 148 Cal. App. 3d 963, 970 n.5, 196 Cal. Rptr. 417, 421 n.5 (1983) (quoting the judgment) (emphasis added).

More emphasis needs to be placed on punishing the wrongdoer rather than limiting liability to insurance coverage. Pure several liability would force parties, courts, and legislatures to go beyond the insurance companies and paper corporations, and collect for the heretofore "uncollectables" as an alternative to not compensating the plaintiff.

176. WIGMORE, *supra* note 58, at 460.