

**MEMORANDUM**

**TO:** Drafting Committee, Uniform Apportionment of Tort Responsibility Act

**FROM:** Victor E. Schwartz

**DATE:** February 4, 2002

**RE:** **COMMENTS ON THE SIXTH TENTATIVE DRAFT OF THE APPORTIONMENT OF TORT RESPONSIBILITY ACT**

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The following comments are offered in response to the Sixth Draft of the Uniform Apportionment of Tort Responsibility Act ("Act"), which is currently under consideration by Drafting Committee of the National Conference of Commissioners on Uniform State Laws ("Committee"). The final product of the Committee's efforts is expected to replace both the Uniform Contribution Among Joint Tortfeasors Act (which was drafted in 1955) and the Uniform Comparative Fault Act (which was drafted in 1977). The Committee has done a necessary and helpful job in drafting a uniform bill regarding the apportionment of liability. As you may be aware, I served as an advisor on the Uniform Comparative Fault Act, and have written a book on the issue of comparative negligence. In addition, I served on the Advisory Committee of the American Law Institute's RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY. Based on that experience, the following comments are offered in response to several of the issues raised in the Reporter's Notes of the Sixth Tentative Draft of the Act.

**SECTION 3****Adoption of Modified Comparative Fault System**

The current draft of the Act provides for a modified comparative fault system. My understanding is that in earlier drafts, the Committee had debated whether to adopt a pure comparative fault system or a modified comparative fault system. The Committee's adoption of the modified comparative fault system is the best approach from a practical standpoint. When Dean Wade, fellow advisors, and I drafted the Uniform Comparative Fault Act, we supported a pure comparative fault approach. At that time from an academic standpoint, pure comparative fault seemed correct. My experience as a practicing attorney over the past two decades, however, has shown that a modified comparative fault system is a superior system because it encourages settlement between the parties. This is particularly true in the bulk of cases in which comparative fault is at issue, which are cases involving automobile accidents. In a pure comparative fault system, some plaintiffs' lawyers may be more likely to "take their chances" in front of a jury because there is always a possibility that the plaintiff will recover, even if the jury finds that the defendant's share of fault was very small. In contrast, in a modified comparative fault system, if a jury finds that the plaintiff's percentage of fault was greater than or, in some states, equal to the combined fault of the defendants, the plaintiff will recover nothing. When plaintiffs' lawyers are faced with the possibility of not recovering any damages, they are less

likely to want to take their chances in front of a jury, so a modified comparative fault system will encourage settlement in many cases. *See* VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 454 (3rd ed. 1994).

As a related matter, it would seem that plaintiffs should only be precluded from recovering in cases where the plaintiff's fault is greater than the combined fault of other responsible parties. In other words, if the jury determines that the plaintiff is equally at fault with the defendants, the plaintiff should be permitted to recover. Although it might seem that the difference between a "greater than" threshold and an "equal to" threshold would only make a difference in a small number of cases, as a practical matter, juries faced with complex or difficult cases often return verdicts finding the plaintiff and the defendant equally at fault. *See* VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 82 (3rd ed. 1994). Under an "equal to" threshold, the jury may unintentionally deny recovery to plaintiffs by dividing the fault equally between the plaintiff and the defendants. This problem is ameliorated somewhat by proposed Section 3(C), which states that the trial court shall instruct the jury regarding the effects of its findings on the claimant's right to recover damages. Presumably, if the jury is properly instructed it will understand that under an "equal to" system, it is denying that plaintiff the right to recover by returning a verdict that the plaintiff and the defendant were each 50% at fault. The Committee should nonetheless adopt a "greater than" system because, as one court has recognized, a plaintiff who is no more at fault than the defendant for the harm that he or she has suffered should not be required to bear the cost of the harm alone. *See Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565, 573 (S.C. 1998).

## SECTIONS 4 & 5

### Elimination of Reference to Nonparties At Fault

Professor Henderson's memorandum of November 19, 2001, indicates that references to nonparties at fault have been eliminated from Sections 4 and 5 of the Sixth Draft of the Act. You should reconsider this deletion, and allow the trier of fact to assign a portion of fault to nonparties. This is why. If the fault of nonparty defendants is not considered, this may be prejudicial to the defendants who are present, because the defendant or defendants who are present may be assigned a greater percentage of fault than that for which they are actually responsible. *See* VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 313-15 (3rd ed. 1994); *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY* §B19 Reporter's Note cmt. d.

Under a joint liability system, each defendant is potentially responsible for the entire amount of the award to the plaintiffs. Thus, in a joint liability system, defendants would not necessarily be prejudiced by the failure to consider that fault of nonparties because each defendant is always potentially responsible for the entire judgment. If, however, damages were assigned according to the California Rule (which is described in greater detail below) the defendants would be jointly liable for the economic damages but severally liable for the noneconomic damages. Under the California Rule, whether the fault of a nonparty defendant is considered could substantially affect the amount of noneconomic damages that the remaining defendants are required to pay. Suppose that a plaintiff (A) suffers an accident as a result of the actions of two defendants (B and C). Suppose further that A is 10% at fault, B is 20% and C is 70%, but C is not subject to the jurisdiction of the court in which the case is brought. Under the California Rule, if the jury is permitted to consider the fault of C, the plaintiff would recover all

of her economic damages, as B would be responsible, under joint liability, for the entire amount of economic damages. With respect to noneconomic damages, however, B would only be responsible for the 20% of the plaintiff's award. If nonparties at fault are not considered, however, B's percentage of fault would be compared only against A. In this situation, B would likely be assigned 66% of the damages (since B's fault is twice that of A). Thus B would have to bear 66% of the plaintiffs noneconomic damages rather than 20% of the plaintiffs noneconomic damages. As this hypothetical but very practical situation shows, failure to consider nonparties at fault could have a substantial effect on the imposition of damages if the California Rule is adopted.

## SECTIONS 5 & 6

### Several Liability and Reapportionment of Damages

Sections 5 creates a system in which several liability is the general rule, subject to a limited number of exceptions. Section 6 provides that if one party's share of the damages are "not reasonably collectable," that party's share may be reapportioned to the other parties. Although the Reporter's Notes provide several rationales in support of this rule, you should instead adopt the system set forth in Section 5(6), which makes defendants jointly liable for economic losses, and severally liable for noneconomic losses. This approach, commonly called the "California Rule," has been in place there since 1986. It has several advantages over the system of several liability and reallocation in the current draft of the Act.

From the plaintiff's perspective, the California Rule is preferable to the current approach because it allows plaintiffs to receive compensation for their economic injuries without enduring the potentially long and complex reallocation process. As the Reporter's Notes to Section 6 indicate, the burden of proving that a defendant is not able to satisfy the judgment is placed on the plaintiff. As a practical matter, this means that after a plaintiff has taken his or her claim to trial and received a judgement in his or her favor, the plaintiff may be effectively required to go back to the discovery stage in order to prove that the defendant is insolvent.

The California Rule, in contrast, would ensure that plaintiffs are compensated for their economic damages. This rule reflects the view that one of the primary goals of tort law is compensating individuals for economic losses. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §E18 cmt. d (2000). The rationale for imposing joint liability for economic losses is that when neither the plaintiff nor the defendant is responsible for a percentage of the harm suffered by the plaintiff, the defendant should bear the risk of economic loss attributable to an absent or bankrupt co-defendant. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §E18 cmt. d (2000).

From a defense perspective, the California Rule is preferable because it would not hold defendants responsible for the "pain and suffering" caused by others. Under the reallocation process described in Section 6 of the current draft of the Act, any damages caused by defendants who are unable to satisfy the judgment may be reallocated to the plaintiff and the defendants who are able to satisfy the judgment. This means that the noneconomic damages of both absent defendants (whose fault is not considered by the fact finder) and co-defendants who are insolvent or otherwise unable to satisfy the judgment (whose fault may be reapportioned by the court) would become the responsibility of the defendants that are present and financially stable. In contrast, the California Rule ensures that plaintiffs are compensated for their economic losses,

but does not place the noneconomic losses of absent or insolvent defendants on the shoulders of the present and financially stable defendant. In this sense, the California Rule is similar to no-fault compensation systems, such as workers compensation and no-fault automobile systems, in which primary emphasis is placed upon compensating the claimant for what he or she actually lost. In no-fault systems, claimants are compensated for economic losses, but a no-fault system does not allow amorphous damages for “pain and suffering.” The California Rule allows plaintiffs to recover more damages than a no-fault systems because the California Rule permits plaintiffs to recover pain and suffering damages against each defendant according to that defendant’s share of liability.

#### Joint and Several Liability for Defendants Who Fail To Prevent Intentional Acts By Third Parties

Section 5(2) of the Act, which provides for joint and several liability if a party is found liable for failing to prevent the intentional act of a third party, is unsound public policy, especially in the current situation where acts of terrorism have occurred and may occur in the future. In light of our country’s current crisis situation, the Committee should consider revising this Section of the Act so that joint liability only extends to economic damages. As discussed above, joint liability for economic damages would achieve one of the primary goals of tort law, which is compensating plaintiffs for their damages. In addition, joint liability for economic damages would also address the concern stated in the Reporter’s Notes to Section 5 by providing a significant incentive for landowners and occupiers of land not to breach their duties to invitees and others.

The risk of potential future terrorist attacks illustrates the inequitable and unsound results that would follow from holding a negligent defendant liable for failing to prevent the intentional acts of a third party. As the events of September 11th demonstrated, international terrorist groups that are beyond the jurisdiction of American courts are capable of causing vast and horrific damage in ways that we might not have contemplated prior to September 11. While future terrorist acts may, as a practical matter, still not be foreseeable, it is possible that in the event of future terrorist attacks, businesses or landowners could be found to have acted carelessly. But these judgments are likely to be honeycombed with hindsight. The only clearly wrongful acts are those of the of terrorists or other intentional wrongdoers. While it would be stretching the grasp of tort law to hold parties who neither helped nor assisted intentional wrongdoers liable, it would be extraordinarily unsound tort policy to hold a defendant, even if found negligent, responsible for pain and suffering that a jury allocated to a terrorist.

In that regard, traditionally, intentional and criminal acts were considered superseding causes and a defendant whose negligence may have created the opportunity for the intentional act was not held liable for the intentional act of another. *See* DAN B. DOBBS, *THE LAW OF TORTS*, §190 (2000). More recently, some courts have held that if a person’s acts of negligence create the opportunity for the intentional act, the negligent defendant may be subject to liability. *See* DAN B. DOBBS, *THE LAW OF TORTS*, §190 (2000). Courts that have held a negligent defendant liable for the intentional acts of another have premised that liability on the existence of a “special relationship” either between the negligent defendant and the injured party, or between the negligent defendant and the intentional actor. *See* DAN B. DOBBS, *THE LAW OF TORTS*, §317 (2000). The various states are not in agreement, however, as to when a “special relationship” that would impose liability on a negligent defendant exists. (*See* DAN B. DOBBS, *THE LAW OF TORTS*, §317 (2000) (contrasting a Michigan case in which “companions on a social venture” were found to have a “special relationship” and an Iowa decision in which the court found that

“companions on a social venture” had not formed a “special relationship.”) Because it is not clear when negligent defendants will be found liable for the acts of others the Committee should not to adopt a rule that would hold negligent defendants jointly liable for the intentional acts of another.

As the Reporter’s Notes to Section 5 state, the law should provide incentives for a defendant who has a duty to protect another from the intentional acts of a third party not to breach that duty. Nevertheless, tort law should not hold a careless defendant responsible for harm that was intentionally caused by another. Adoption of the California Rule would address both of these concerns. Joint liability for economic damages would provide an incentive for parties to not breach any duties they owe to protect others from third parties. Several liability for noneconomic damages would avoid holding merely careless defendants liable for the pain and suffering caused by an intentional actor.

In closing, I urge the Committee to consider adopting the California approach to apportioning liability among defendants for several reasons. First, the California Rule assures that plaintiffs are compensated for economic harm, while not holding defendants responsible for pain and suffering caused by others. Second, the California Rule allows damages to be apportioned when judgment is entered, thus avoiding the need for plaintiffs and defendants to go through a reallocation process if a portion of the judgment cannot be collected from one of the defendants. Finally, the California Rule could apply in all cases covered by the Act. The universal applicability of the rule would avoid the need for litigation regarding whether, under Section 5 of the Act, a court should apply the general rule of several liability, or one of the exceptions that provide for joint and several liability.

If you would like to further discuss any of my comments and suggestions regarding the Act, please contact me at (202) 662-4886 or vschwartz@shb.com.