

July 3, 2000

MEMORANDUM

TO: Gene LeBrun, Chair, Drafting Committee on Apportionment of Tort Liability

FROM: Roger Henderson, Reporter

RE: Uniform Apportionment of Tort Liability Act

INTRODUCTION

Apportionment of tort responsibility, the subject that our drafting committee has been charged to address, is a familiar one to the National Conference of Commissioners on Uniform State Laws. In fact, the Conference has promulgated three acts dealing with this subject. The first, denominated the Uniform Contribution Among Joint Tortfeasors Act, was completed in 1939. That Act was superseded by a revised version bearing the same name in 1955. A third version--the Uniform Comparative Fault Act--was promulgated in 1977, but, unlike the 1955 version, it did not supersede its predecessor. Because approximately one-third of the states in the 1970s had not adopted comparative fault, it was decided to leave the Uniform Contribution Among Joint Tortfeasors Act (1955) for possible use by those jurisdictions. However, it was recommended that the other jurisdictions embracing comparative fault adopt the newly promulgated Uniform Comparative Fault Act. Given the state of the law today, it is contemplated that the work product of our Committee will replace both the Uniform Contribution Among Joint

Tortfeasors Act (1955) and the Uniform Comparative Fault Act.

THE EARLY COMMON LAW AND SUBSEQUENT DEVELOPMENTS

The Conference's work in this area reflects the somewhat disparate approaches that have brought us to this juncture. At early common law, there was no occasion to apportion tort responsibility for two reasons. First, contributory negligence of the plaintiff was a complete bar and apportionment of responsibility between a plaintiff and defendant was not part of the process. The plaintiff either recovered all of his or her damages or recovered nothing. Secondly, at the same time, the rules of procedure would not permit the joinder in most tort cases involving multiple tortfeasors unless the defendants had acted in concert. Each tortfeasor had to be sued separately. Moreover, the common law dictated that a claimant prove how much damages each tortfeasor had caused, unless, again, the defendants had acted in concert, the latter situation being the only situation giving rise to joint and several liability. The combination of the early rules of procedure and the common law resulted in a situation where a claimant was rarely able to recover against multiple tortfeasors, at least where there were independent acts resulting in indivisible harm. This, of course, has changed in many respects.

Initially, courts broadened the scope of procedural joinder from those situations where multiple defendants had acted in concert to include situations where the defendants were alleged to have a common duty, although, strictly speaking, not acting in concert. As early as the 1920s, and certainly by World War II, some courts had begun to allow joinder of multiple tortfeasors even though they had engaged in independent acts that did not involve a common duty or had not

acted in concert. This move was reflected in and encouraged through the newly adopted Federal Rules of Civil Procedure which took place in 1938. Once joinder was more freely permitted, the issue of joint and several liability was bound to be brought into greater relief.

Once joinder was more readily permitted, it did not take long for the courts to recognize the injustice of the common law rule that required a claimant to prove which defendant caused what damages in those cases where independent acts resulted in indivisible harm. The result of such recognition was to subject multiple tortfeasors to the rule of joint and several liability, not only in concerted action and common duty cases, but in all cases where the conduct of multiple defendants results in indivisible harm. Once joint and several liability was more generally recognized, it was only a short time before the courts were petitioned to permit contribution among this newly defined group of joint tortfeasors, something that also had not been allowed earlier when joint and several liability was so restricted.¹ It was largely the refusal of the courts to accede to this request that led to the need for legislation to rectify what many perceived to be the “obvious lack of sense and justice in a rule that permitted the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff’s whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.”² The legislation, however, that ensued varied in many respects.

¹Although the “no right of contribution” rule originated in early English cases involving defendants acting in concert to commit intentional torts, ultimately it was applied more generally in the United States to include all cases of joint and several liability, even where independent, although concurrent, negligence had contributed to a single result. William L. Prosser, *Law of Torts*, 273-74 (3rd ed. 1964).

²*Id.* at 275.

THE LEGISLATIVE RESPONSE AND UNIFORM ACTS

As the developments described above unfolded, the Uniform Laws Conference responded by drafting a uniform law dealing with contribution among joint tortfeasors. This act, which as previously stated was promulgated in 1939, did not attempt to determine when multiple tortfeasors would be held jointly and severally liable. Rather, it took the position, once multiple tortfeasors were determined to be jointly and severally liable, that certain rights of contribution existed and addressed how those rights were effected. The Act also attempted to resolve related issues such as the effect of settlements among those tortfeasors who were subjected to joint and several liability. Although this Act was enacted by a number of states, it was so extensively amended that the goal of uniformity was not achieved. Part of the problem was that the 1939 Act contained elaborate provisions addressing the procedures for joinder. In addition, it came under criticism with regard to the provisions dealing with the legal effect of a settlement by one joint tortfeasor upon the rights of the plaintiff and the rights of the nonsettling tortfeasors. In the meantime, many states independently passed other legislation that also proved to be problematic. This unsatisfactory situation caused the Conference to take up the subject again in the 1950s.

The Uniform Contribution Among Joint Tortfeasors Act was revised, and ultimately adopted by the Conference in 1955, to bring it into line with what was considered to be more just and equitable solutions to the legal problems arising out of a rule of joint and several liability. However, the rule at that time with regard to contributory negligence acting as a complete bar was still the predominate rule in the overwhelming majority of jurisdictions in the United States. Beginning in the 1960s, and clearly by the 1970s, most American jurisdictions had abandoned

contributory negligence as a complete bar and were proceeding to adopt some type of comparative fault system. At first, the focus was on comparing plaintiff's fault with that of defendant's, but it was only a matter of time before the courts and legislatures began to address the problem of comparing fault among all the parties in situations involving two or more defendants. Since the 1955 Act called for contribution to be based upon a *pro rata* determination, this, among other issues associated with the comparative fault movement, again led to the Conference to review the legal situation with regard to contribution among joint tortfeasors. This review led to the bifurcated approach contained in our current Acts on the subject.

In 1977 the Conference promulgated the Uniform Comparative Fault Act which gave the states a choice. If all the parties to the litigation were to be evaluated in terms of fault and that fault compared in determining responsibility for damages, the 1977 act provided a complete replacement for the Uniform Contribution Among Joint Tortfeasors Act (1955). On the other hand, it was decided not to amend the Uniform Contribution Act, but to leave that act for possible use by states that did not adopt the principle of comparative fault.

Suffice it say at this point, the Uniform Comparative Fault Act did not alter the basic rule of joint and several liability where joint tortfeasors acted in concert, breached a common duty, or otherwise were legally responsible for indivisible harm. Although fault was to be compared among all the parties responsible for the harm and assessed accordingly on a percentage basis, joint and several liability was retained. Contribution, however, was to be based upon the percentages assessed among the defendants, not on a *pro rata* basis as was the case under the Uniform Contribution Among Joint Tortfeasors Act (1955). Among other features not contained in the 1955 Act, the Comparative Fault Act provided for reallocation of responsibility in cases

where one or more joint tortfeasors were unable to satisfy the damage award assessed and attempted to deal with the set off problem in cases involving counter claims under the pure comparative fault system. Although the 1977 effort by the Conference, which was chaired by John Wade, provided a state-of-the-art product at that time much has changed in the interim, particularly with regard to apportionment of tort responsibility. In the main, what are these changes?

DEVELOPMENTS SINCE THE UNIFORM COMPARATIVE FAULT ACT

In 1977 approximately two-thirds of the states had adopted comparative fault. Today, all but five jurisdictions³ in the United States have adopted some type of comparative fault system. Of the 46 states that have adopted some form of comparative responsibility, ten have been by judicial decision and 36 by legislation. Although seven of the ten states in which comparative responsibility has been *judicially* adopted have opted for a pure scheme (in which a plaintiff who is far more negligent than the defendant may still recover), only six of the 36 states in which comparative responsibility has been *legislatively* adopted have chosen the pure system. A majority of the states that have adopted a comparative responsibility scheme, i.e., 33 out of 46 have chosen a modified scheme. Two-thirds of these--22 out of 33--have chosen a 51 percent threshold, while the other 11 have adopted a 50 percent threshold. Three states have replaced their original pure schemes with modified schemes, and none has gone the other way. Thus, the

³The five jurisdictions that have not adopted a comparative responsibility system are the states of Alabama, Maryland, North Carolina, and Virginia and the District of Columbia.

clear trend as been toward the modified approach, which is in contrast to the Uniform Comparative Fault Act which employs a pure comparative fault scheme. Moreover, only two states have adopted the Uniform Act, and one of these recently repealed it in favor of a modified system.

If this were the end of the story, perhaps there would be no need for our Committee, but the story does not end here. Once the great majority of jurisdictions adopted some type of comparative fault system that compared the fault not only of plaintiffs with defendants, but also compared the fault among defendants in a multiple tortfeasors situation, inevitably another question arose. In particular, defendants began to question the justice of joint and several liability when it has been determined that each defendant in a multiple tortfeasor situation is only responsible for causing a certain percentage of the harm to the claimant. The question became even more acute when defendants pointed out that in many of these cases the claimant had also been assigned a certain percentage of responsibility for the harm that had resulted. Thus, it was not long before legislatures, and even courts, were persuaded to revisit the issue of allocating responsibility among joint tortfeasors. In doing so, further changes have occurred since 1977.

Many jurisdictions employing comparative fault today have been persuaded to severely limit joint and several liability. In some ways, one might observe that we have come full circle, as it were, and have returned in large part to the early common law position. As a general rule, where defendants have acted in concert, joint and several liability has been retained. In addition, some jurisdictions have retained joint and several liability where multiple defendants have engaged in conduct which results in environmental harm. Beyond these two situations, however, many jurisdictions today in some manner have abolished joint and several liability and, thereby, any

necessity to recognize rights of contributions among joint tortfeasors. How has this trend manifested itself?

In those jurisdictions that have not completely abolished joint and several liability outside of the two areas mentioned above (acting in concert and environmental harms), a number of different approaches have been taken to limit joint and several liability. For example, some jurisdictions still permit joint and several liability for economic losses, but do not permit such for non-economic losses. Other jurisdictions do not allow a tortfeasor that is determined to be less than a certain percentage at fault, say 20 percentage, to be held jointly and severally liable with other tortfeasors whose individual responsibility is determined to be in excess of that figure. Still another variation is seen in those jurisdictions that, although initially prohibiting joint and several liability, permit claimants to show that a judgment entered severally against multiple defendants is not capable of being satisfied on that basis. Upon such as showing, a court may be permitted to reallocate the non-paying judgment debtor's obligation to others adjudged responsible for a portion of the harm suffered.⁴

The reallocation process may take one of several forms. For example, it may just reallocate the non-paying judgment debtor's portion among the remaining judgment debtors. Or, it may take into account any contributory fault on the part of the plaintiff so that the allocation of responsibility itself is revised to take into account the greater responsibility of the claimant once the responsibility of one of the tortfeasors, the non-paying judgment debtor, is eliminated from the

⁴This does not relieve the non-paying judgment debtor from liability to the claimant for the amount not paid, nor does it alter any rights of contribution that the paying judgment debtors might have against the non-paying debtor. However, the claimant may not collect more than the sum assessed for the damages awarded, nor is the non-paying judgment debtor ultimately liable for more than the amount originally assessed as his or her share.

equation.

In addition to the above, other issues have become more acute. For example, the issue of comparing intentional conduct with lesser forms of culpability has received much more attention since the Uniform Comparative Fault Act was promulgated. This includes the possibility of comparing any negligence on the part of a claimant with intentionally cause harm by a defendant as well as comparing the intentional conduct of one tortfeasor with the negligent conduct of other joint tortfeasors. The occasion for these issues to be raised has increased as the courts have expanded tort liability in areas involving an actor's obligation to protect a tort victim from the intentional tortious acts of a third party.⁵ Present legislation dealing with apportionment of tort responsibility does not always address these issues and, where that is the case, court decisions have been anything but unanimous in resolving the problems. In any event, the apportionment area is much more problematic than it was 25 years ago when the Conference last addressed the subject.

CURRENT ISSUES TO BE ADDRESSED

The above historical summary and outline of the legal developments since the Conference last addressed in 1977 the subjects of joint and several liability, contribution among joint tortfeasors, and comparative fault provides an agenda of some of the issues confronting the

⁵For example, it has become common for owner's and occupiers of commercial office buildings, shopping centers, transportation sites, hotels, motels and similar facilities, be they private or public in nature, to be held liable for failing to protect invitees and others from intentional torts committed by others frequenting the areas.

Drafting Committee. These and some of the related issues may be listed as follows:

1. The Uniform Comparative Fault Act (UCFA) embraces a pure system of comparative fault. Most states have adopted some form of modified comparative fault. Which system should we adopt?
2. The UCFA retains joint and several liability despite the fact that responsibility is apportioned among the responsible parties on a percentage basis. Should we retain joint and several liability and, if so, to what extent?
3. What should be done about non-parties at fault? Should the fault of a person whose is not subject to the jurisdiction of the court or who otherwise is not made a party to the litigation be taken into account?
4. Assuming that joint and several liability is limited in some manner, to what extent should reallocation be allowed where a judgment debtor is unable to satisfy all or part of an assessed award of damages?
5. Assuming that joint and several liability is retained to some extent, what rights of contribution and/or indemnity should be recognized?
6. To what type of actions should the statute apply? All tort actions? All

personal injury actions? Only actions seeking compensation for bodily injury, including death, and physical harm to property?

7. In comparing fault, how should “fault” be defined? Should it include intentional wrongdoing and, if so, in what situations?

8. Depending on the answers to one or more of the above questions, what should be the legal effect of a settlement one or more joint tortfeasors on the rights of the parties or other affected persons.

Although this list certainly does not exhaust the list of issues that our Committee will need to resolve, it does provide a point from which we can begin our work. To put the issues into a more specific framework, I have also attempted a first draft of a statute for the Committee’s consideration.

There are many other issues that will need to be resolved during the next two years, including those that I either have chosen at this point to defer raising or of whose existence I am not aware. In short, what follows is nothing more than an initial and surely flawed effort to assist the Committee to come to grips with some of the main issues in revisiting the subject with which the Conference has charged us. I am sure various members of the Committee and others will want to point out other matters that we need to address and I welcome that input. I have no preconceived view on how they should be resolved so comments and suggestions are invited.

