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BY E-MAIL

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RE: Comments on current draft of Uniform Apportionment of Tort Responsibility Act

Dear Gene & Roger:

These are my comments on the current draft of UATRA. Copies of this letter have also been e-mailed to the members of the Drafting Committee. I am very much interested in the act since the District of Columbia is one of those jurisdictions that has no comparative fault. My comments are based on my practical experience litigating cases involving torts. I have represented the District of Columbia and its officers and employees in hundreds of such cases over the last 28 years. They are based on what I learned as a member of the Member's Consultative Group of the ALI for the Restatement (Third) of Torts (Apportionment of Liability) during a period of three years.

In my view the act should have a simple, straightforward, and equitable approach to the problems of apportionment. As Roger points out in his introduction, fairness seems to dictate that, when defendants give up the complete defense of contributory negligence, and become subject to liability despite the plaintiff's negligence, as a general rule, a defendant should be responsibility only for his or her own liability. Any exceptions to this basic rule must be justified by other important policies.

In general, I think that the act should do the following and no more: (1) abolish the common-law defenses of contributory negligence and implied assumption of risk; (2) apply to all torts, whether negligent, intentional, or under strict liability; (3) make a defendant severally liable for his or her percentage of responsibility measured against the total responsibility of all persons, whether parties or not, that caused indivisible injury or harm to property; and (4) limit any exceptions to the general rule of several liability to those cases in which the defendants acted in concert or for other specialized situations where a several liability would normally be unfair. My comments to specific sections follow.

1. Section 2(4) (definition of "responsibility"). Minor point of clarification. The phrase "act or omission that imposes liability for, or creates a defense in whole or part, to" should be changed to "act or omission that is the basis for the imposition of liability, or the creation of a defense in whole or part to,". An act or omission does not impose liability or create a defense.

2. Section 3(a). The phrase ". . . in an action seeking damages for person injury or harm to property based on negligence or strict liability" excludes from the scope of the act actions in which an intentional tort is alleged. This seems at odds with the approach of the

Restatement (Third), which includes intentional torts, as well as other parts of the draft, which assume that the act applies to intentional torts, if only to make it clear that the liability is joint and several. See, *e.g.*, Sec. 5(1). You should delete the phrase "based on negligence or strict liability".

3. Section 3(b) [Alternative B]. Under this section, a claimant who was found only 33-1/3% responsible (if the "equal to" option is chosen, or, otherwise, 34% responsible) would recover *nothing* because the claimant's responsibility would be "greater than 50% of the total responsibility of all other persons whose responsibility is determined to have caused personal injury . . ." The "total responsibility" of the "other persons" would be 66-2/3%, and 33-1/3% is "equal to" 50% of 66-2/3%. This seems especially unfair to the claimant. You should delete Alternative B.

4. Section 4(a). One of the most serious flaws in the draft is that it does not adequately deal with the situation in which a nonparty who is responsible in part for an indivisible injury is not sued, or is sued but successfully asserts a defense of immunity. Section 4(a)(2) requires a finding of "the percentage of the total responsibility of all the *parties*, including any released person . . ." What if an indivisible injury to Plaintiff P was caused by Defendant D and Nonparty N, each of whom had an equal role in causing the injury. It seems inherently unfair for D to bear the *entire* responsibility for P's damages, unless D and N were acting in concert. I agree with your inclusion of the responsibility of a released person, which is required by fairness. However, there are other situations that should be treated the same. I give three examples in which P is blameless and D and N had an equal role in P's indivisible injuries:

   A. *P voluntarily chooses not to sue N.* It would be unfair for P to recover 100% of P's damages from D under those circumstances; P should only recover 50%. P's decision not to sue N may have been based on P's family, social, or business relations with N. Or it may been based on P's belief that N is judgment proof or, at least, so lacking in financial resources that, in P's judgment, the cost of bringing N into the action would not justify the potential recovery from N. Or it may have been based on P's belief that N had, and that N would raise, a defense of immunity. Or it may have been part of a strategy to avoid including N, who is well-respected or popular in the community as a defendant. It is not feasible to distinguish, in a statute, between the many different reasons P may have for voluntarily choosing not to sue N. As a matter of fairness, P should not be able to shift N's share of responsibility to D in such situations.

   B. *P failed to serve N.* It would be equally unfair for P to recover 100% from D in this case. Although plaintiff's failure to sue N is not voluntary, it is still P's responsibility to serve N if N was known to have a role in causing P's injuries. P may not have exercised reasonable diligence in finding P. Although D, in some cases, may be able to bring N in as a third party, P's failure to serve N during the sometimes lengthy period between the injury and the complaint may have prejudiced D's ability to do this. In some cases, P may have skipped town. Again, I don't think it is feasible to distinguish between the various reasons that P did not serve N. The bottom line is that it is P's responsibility to serve all persons that caused P's injury. A defendant should not be penalized for a plaintiff's failure to serve such persons. Even if N's identity is not known–*e.g.*, the "phantom driver" in an automobile accident who immediately leaves the scene–it seems unfair to burden D (who did not leave the scene) with N's share or responsibility.[1]

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[1]I have a case right now where there was a phantom driver, in which the jury was asked to make a finding as to whether the unknown driver was negligent. The jury found that the driver

C. *N successfully asserts a defense of immunity.*[2] In this case P sued N but N moved to dismiss or for summary judgment based on immunity and gets out of the case for reasons other than lack of responsibility. A good example is diplomatic immunity based on treaties and federal law. Although the equities are not as clearly one-sided in favor of D as in the previous two examples, they are still in D's favor. N's entitlement to and assertion of an immunity defense is mere happenstance. Why should D bear the entire cost of N's responsibility?

In sum, I recommend that Section 4(a)(2) be rewritten by inserting the underscored phrase:

> (2) as to each claim, the percentage of the total responsibility of all the parties, including any released person, and of all nonparties that caused the injury or harm, allocated to each claimant, defendant, and released person that caused the injury or harm.

4. Section 4(b). While I see the equity in making the degree of responsibility depend, in part, on the "extent of the causal relation between the conduct and the damages claimed," I fear that this question will be confused with the threshold question of whether the defendant's conduct was foreseeable, which is an all or nothing proposition since foreseeability is an essential element of tort liability, even strict tort liability. You should make it clear that this provision does not vitiate this basic rule by permitting an extension of liability to remote conduct simply by reducing the percentage of responsibility. This becomes particularly important in cases in which a defendant with a low percentage of responsibility may be jointly or severally liable with another defendant with high percentage, such as Section 5(2). Therefore, I recommend adding the following sentence:

> However, this subsection does not diminish the claimant's burden of proving that the injury or harm was foreseeable.

5. Section 4 Comments. I think the inclusion of comments suggesting language for a "pure" negligence statute is a mistake. It is a back-door way of retaining this option despite an overwhelming vote for a modified system. It invites nonuniformity on a question of central importance to this act.

6. Section 5(1). Minor point of clarification. You should change "the parties" to "those parties" to preclude the argument that another defendant, one other than the parties acting in concert or intentionally, should be liable jointly or severally.

7. Section 5(2). This exception to the general rule of several liability "for failing to prevent a third party from intentionally causing personal injury or harm to property" is far too broad. It may seem equitable in the example of a landlord who fails to fix the lock to an apartment in a high crime neighborhood thereby allowing a burglar or rapist to enter, who is never identified or, if so, judgment proof. However, I don't think this provision works in other cases. For example, what about the referee in a wrestling match who negligently fails to stop one fighter from intentionally injuring another fighter? The fact that the intentional tortfeasor would normally be assigned a much higher percentage of liability than the negligent tortfeasor compounds the unfairness in making the later responsible for the former's conduct. I would narrowly draw this exception it to address the negligent

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was not.

[2]Legal immunity, in contrast to biological immunity, is not a status but a defense–an affirmative defense that must be raised or forgone and which sometimes is waived, such as in the case of diplomatic immunity, which is often waived by embassies in cases arising from traffic accidents for reasons of reciprocity.

landlord situation and any other specific situations where the equities or social policy is compelling.

8. Section 5(3). Either delete this as superfluous or convert it into a bracketed paragraph with instructions to insert a specific statute.

9. Section 5(4). This bracketed paragraph would undercut the basic premise of the act to apportion responsibility among tortfeasors. The fact that the plaintiff is not liable does not justify making each defendant entirely liable for the other defendants' conduct. The strongest argument in favor of this act is the inherent equitableness of making a defendant liable for that defendant's conduct. Stronger justifications are required than the mere fact that the plaintiff is not found responsible. The paragraph should be deleted.

10. Section 5(5). This bracketed paragraph would make *every* defendant jointly and severable because, under the modified comparative responsibility scheme, only those defendants whose percentage of responsibility is greater than [or equal to] the claimants would be liable in the first place. It should be deleted.

11. Section 5(6). This bracketed paragraph treats "economic loss" differently from noneconomic loss. I assume that economic loss includes such things as property damage, medical expenses, and lost wages, whereas noneconomic loss includes such things as pain and suffering and permanent physical injury. Not only does this create practical problems in instructing the jury, whose task is complicated enough, but it seems inherently unfair to differentiate between these types of damages. Why should lost wages be given more favorable treatment than a lost leg? It should be deleted.

12. Section 5(7). This bracketed paragraph, which makes all defendants whose individual responsibility exceeds 20% jointly and severally liable is arbitrary since it depends upon the happenstance of the number of defendants and discriminates against defendants that are similarly situated. If plaintiff is 40% negligent and there are three or more defendants, each of whom are 20 % liable, then the liability is several. If Defendant A is 21% liable, B, 20%, and C, 19%, then A will be jointly and severally liable, but B and C will not be. This just doesn't seems to accord with common sense. It should be deleted.

13. Section 6(b). Reallocation creates horrendous practical problems, perpetuates litigation, and comes at a high social costs. The comments seem to assume that, in a significant number of cases, a defendant whose allocation has been retroactively increased may seek contribution from the deadbeat defendant. This is not my the typical case. In almost all cases, the deadbeat defendant has either declared bankruptcy, if he has any assets to protect, or has disappeared in to the woodwork. The appellate process severely aggravates the problem. I have had many cases in which liability of one party is not resolved for more than a decade after the injury. Going back in time that far creates all sorts of problems of proof, service, and equity. Retaining this section will severely hurt the prospects of getting this act enacted. During the ALI member's consultative group, many trial attorneys raised this problem. The ALI reporters ignored them. We can afford to do the same thing.

14. Section 6(c). Reserving my general objections against reallocation, the final, bracketed sentence, is essential and not superfluous. Without that sentence, it is not at all clear that a released party would not have to bear an additional share of damages after reallocation.

15. Section 7. This section is unnecessary. The normal rules of civil procedure should apply. It would be and unwise to include them in this act since it would invite the argument that it interferes with established rules. The section should be deleted.

16. Section 10(a). I have no problem to the concept of including the negligent employer's share of responsibility as part of the "total responsibility" in Section 4(a)(2). However, my suggested revision of that provision would do this without the need for a special

provision. I do object to the phrase "the lien or subrogation right is reduced by the monetary amount of the employer's percentage of responsibility, if any, in the employee's action against the third party." As the comments note, most states could not enact such a provision outside their workmen's compensation statutes. Moreover, I don't think we know enough about these statutes, and interpretive decisions, to say with any degree of certainty that the same result would not ensue in any case. The comments might alert states to the potential problem. But I think it would be a mistake to include anything in th in Section 10(a) act. The subsection should be deleted.

17. Section 10(b). I do not think that the situation contemplated in this subsection would every arise in reality. Under the due process clause, an employer (or any other person) cannot be adjudged responsible for a portion of the employee's injury without having been sued in the action brought by the employee. Since the employer, therefore, will always be a party, there would be no need to require the employee to give the employer notice or for the employer to intervene. The subsection should be deleted.

Good luck at your meeting. If any one has a question, please feel free to e-mail me or call me on (202) 724-5690.

Sincerely,

Jim

James C. McKay, Jr.

cc: Members of the Drafting Committee