## Notes

# TORT "REFORM" IN ARIZONA: AN ANALYSIS OF THE DEMISE OF JOINT AND SEVERAL LIABILITY

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## INTRODUCTION

As of January 1, 1988, Section 12–2506 of Arizona's Uniform Contribution Among Tortfeasors Act [hereinafter UCATA] abolished joint and several liability[1] in most cases.[2] This action represents the State Legislature's attempt to correct the unfair results caused by insolvent tortfeasors in a joint and several liability system.[3] Under the previous system, solvent defendants, however minimally at fault, were required to pay for the liability of their insolvent co-tortfeasors.[4] However, the legislature's answer has created comparably unjust allocative results. Now it is the plaintiff who bears the burden of a defendant's

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1. Section 12–2506(A) of the Arizona Revised Statutes Annotated provides:

> A. In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

ARIZ. REV. STAT. ANN. § 12–2506(A) (Supp. 1992).

2. The only exceptions providing for joint and several liability are acting in concert, acting as an agent or servant, and actions relating to hazardous substances:

> D. The liability of each defendant is several only and is not joint, except that:
> 1. A party is responsible for the fault of another person, or for payment of the proportionate share of another party, if both parties were acting in concert or if a person was acting as the agent or servant of the party.
> 2. Nothing in this section prohibits the imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.

ARIZ. REV. STAT. ANN. § 12–2506(D) (Supp. 1992).

3. *See* H.R. 2078, 38th Leg., 1st Sess. (1987); *infra* note 44.

4. "[Under joint and several liability,] one tortfeasor may be liable for the entire judgment amount regardless of the solvency of the other tortfeasors. The risk of an impecunious defendant lies with the other wrongdoers and not with the plaintiffs." Gehres v. City of Phoenix, 156 Ariz. 484, 487, 753 P.2d 174, 177 (Ct. App. 1987).

insolvency.[5] This result clearly conflicts with basic principles of tort law, particularly the injured plaintiff's right to full compensation.[6]

This Note considers the legal and policy implications of the abolition of joint and several liability in Arizona. First, this Note examines the history of joint and several liability in Arizona, including its policy bases and its abrogation as of January 1, 1988. Second, this Note addresses the inequitable results produced by Arizona's practical abolition of joint and several liability. More specifically, this Note compares the effectiveness of the joint and several liability system with the several liability system in dealing with the distribution of fault among negligent parties, the reallocation of an insolvent tortfeasor's liability, the naming of immune employers and insurance carriers as nonparties at fault, and indivisible injury. Finally, this Note recommends alternatives to the current inequities created by Arizona's several liability system.

## I. JOINT AND SEVERAL LIABILITY AT COMMON LAW

### *A. Application of the Indivisible Injury Rule*

Prior to its practical abolition in 1988, Arizona had long recognized joint and several liability[7] under common law principles. Originally, Arizona limited joint and several liability to instances where two parties acted in concert to commit a common tort.[8] Joint and several liability was ultimately extended to situations of indivisible injury in 1966, with the case of *Holtz v. Holder*.[9] Thereafter under certain circumstances, when judge or jury was unable to apportion a plaintiff's damages among two or more defendants, the indivisible injury

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5. Bisaillon v. Casares, 165 Ariz. 359, 798 P.2d 1368 (Ct. App. 1990).

6. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137, at 560–61 (1935). "Commentators often suggest that the primary function of tort damages is to compensate victims for injuries. Damages, according to this view, are intended to restore the plaintiff to the position he occupied prior to the tortious act of the defendant." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 775 (1985).

7. Joint and several liability enables a plaintiff to receive full compensation from a solvent defendant whose joint tortfeasor is insolvent. Lewis A. Kornhauser & Richard L. Revesz, *Apportioning Damages Among Potentially Insolvent Actors*, 19 J. LEGAL STUD. 617, 621 (1990). *See* David K. DeWolf, *Several Liability and the Effect of Settlement on Claim Reduction: Further Thoughts*, 23 GONZ. L. REV. 37, 42 (1987–1988).

8. Sparks v. Republic Nat'l Life Ins. Co., 132 Ariz. 529, 540, 647 P.2d 1127, 1138 (1982), *cert. denied*, 459 U.S. 1070 (1982); Siebrand v. Gossnell, 234 F.2d 81, 92 (9th Cir. 1956); Salt River Valley Water Users' Ass'n v. Cornum, 49 Ariz. 1, 8, 63 P.2d 639, 643 (1937).

Arizona has laid down its own rule as to what constitutes joint tortfeasors. White v. Arizona Eastern R. Co., 26 Ariz. 590, 229 P. 101 (1924), follows the original meaning of "joint tort" and requires concert of action in its historical sense: "There must exist some community of purpose or wrong or fault to give rise to joint liability. This we think is the settled rule." *Id.* at 593, 229 P.2d at 102.

9. 101 Ariz. 247, 418 P.2d 584 (1966).

> The rule [of indivisible injury, applied in any case involving a collision between two vessels,] is largely one of expediency, adopted by the courts because of the great difficulty the injured party has in proving which of the colliding machines, where both are not at fault, is the innocent one; the effort always being when the question is on trial for each to shift the responsibility to the other.

*White*, 29 Ariz. at 595, 229 P. at 102; *see* Michael A. Beale, *Torts — Liability — Independent Tortfeasors Jointly and Severally Liable for Separate Acts of Negligence Where Harm is Indivisible* Holtz v. Holder (Ariz. 1966), 9 ARIZ. L. REV. 129 (1967).

rule permitted the plaintiff's cause of action.[10] Rather than deny recovery to an innocent plaintiff, it was more logical as a matter of policy to burden the wrongdoers with apportioning their fault once the plaintiff had established their negligence.[11]

However, joint and several liability applied only under limited circumstances.[12] It also was restricted by the no-contribution rule and the doctrine of contributory negligence. These doctrines had negative consequences for both plaintiffs and defendants.[13]

### *B. Distribution and Reallocation of Fault*

Arizona common law disallowed contribution between joint tortfeasors.[14] A plaintiff could sue one or all potentially liable parties and collect her judgment from one or all of the defendants found liable.[15] However, a defendant with sufficient funds to pay the entire judgment had no right to reimbursement from others who had also contributed to the plaintiff's injury.[16] Hence, a defendant with a low degree of fault could easily end up shouldering the full burden of a judgment.[17] Courts reasoned that, between a totally innocent plaintiff and guilty defendants, the wrongdoers should bear the burden of an insolvent defendant.[18]

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10. Kovrig v. Vasquez, 10 Ariz. App. 101, 104, 456 P.2d 947, 950 (1969); *Holtz*, 101 Ariz. at 251, 418 P.2d at 588.

> Where joint liability is appropriate, once plaintiff has made a prima facie showing that the injury was a proximate result of the conduct of one or more of the wrongdoers, the defendants then have the burden of denying all liability or proving that the injury is divisible and that the damages should be apportioned among the defendants.

1 J. D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 19.03, at 653–54 (1988 rev. ed.).

11. In his article on joint and several liability where harm is indivisible, Michael Beale states:

> The Arizona court, in the instant case, has joined a number of other jurisdictions in applying this liberal rule to situations where two or more persons are guilty of successive acts of negligence which, though independent, are closely related in time and space, and result in an indivisible injury to the plaintiff. ...
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> The rationale for such an exception to the strict, common law view is its application to situations where it would seem more desirable, as a matter of policy, for the innocent plaintiff to recover his entire damage from several defendants, even though one may have to pay more than his share, than to leave the plaintiff without a remedy and absolve the defendants entirely.

Beale, *supra* note 9, at 132.

12. *See supra* notes 8–9 and accompanying text.

13. *See infra* notes 14–21 and accompanying text.

14. DePinto v. Landoe, 411 F.2d 297, 300 (9th Cir. 1969); United States v. State, 214 F.2d 389, 392 (9th Cir. 1954); Chrysler Corp. v. McCarthy, 14 Ariz. App. 536, 538, 484 P.2d 1065, 1067 (1971); Essex Wire Corp. v. Salt River Project Agric. Improvement & Power Dist., 9 Ariz. App. 295, 303, 451 P.2d 653, 661 (1969); Thornton v. Marsico, 5 Ariz. App. 299, 302, 425 P.2d 869, 872 (1967).

15. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 47, at 327 (5th ed. 1984). "When joinder is permitted, it is not compelled, and each tortfeasor may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it." *Id. See also* Blakely Oil v. Crowder, 80 Ariz. 72, 75, 292 P.2d 842, 844 (1956); *Chrysler Corp.*, 14 Ariz. App. at 538, 484 P.2d at 1067.

16. *Blakely Oil*, 80 Ariz. at 75, 292 P.2d at 844; *Chrysler Corp.*, 14 Ariz. App. at 538, 484 P.2d at 1067.

17. It was the plaintiff's option to select the most solvent defendant from whom to seek recovery. KEETON ET AL., *supra* note 15, § 50, at 338–39.

18. Gehres v. City of Phoenix, 156 Ariz. 484, 487, 753 P.2d 174, 177 (Ct. App. 1987).

By contrast, if the plaintiff committed any wrongdoing which was a proximate cause of her injuries, the incentive to place the burden of insolvency on the defendants was negated.[19] Instead, the plaintiff recovered nothing under the doctrine of contributory negligence.[20] Recovery could be barred by the finder of fact even if the plaintiff was only one percent responsible for her injuries.[21] Because of the rule's harshness, courts often recognized exceptions, including the last clear chance doctrine[22] and willful and wanton acts committed by defendants.[23]

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19. Prosser and Keeton have the following to say about the contributory negligence defense:

> [The contributory negligence] defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, although the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law, both parties are at fault ....

KEETON ET AL., *supra* note 15, § 65, at 451–52.

20. Quadrone v. Pasco Petroleum Co., 156 Ariz. 415, 417, 752 P.2d 504, 505 (Ct. App. 1987) ("Prior to August 31, 1984, Arizona followed the common law rule that a plaintiff's contributory negligence, however slight, constituted a complete defense and barred the plaintiff from any recovery."); Cheney v. State Super. Ct., 144 Ariz. 446, 698 P.2d 691 (1985); Campbell v. English, 56 Ariz. 549, 110 P.2d 219 (1941); Benton v. Regeser, 20 Ariz. 273, 179 P. 966 (1919); Young v. Campbell, 20 Ariz. 71, 177 P. 19, (1918); Rhind v. Kearney, 21 Ariz. App. 570, 521 P.2d 1148 (1974). "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." KEETON ET AL., *supra* note 15, § 65, at 451. Traditionally, the plaintiff has been denied recovery when he could have avoided injury by exercising "proper care for the protection of his own interests." *Id.* § 65, at 458.

21. *Quadrone*, 156 Ariz. at 418, 752 P.2d at 507 (stating that contributory negligence "as would deprive [a] plaintiff of the right of recovery" is a question for the jury); *Cheney*, 144 Ariz. at 448, 698 P.2d at 693; McDowell v. Davis, 104 Ariz. 69, 72, 448 P.2d 869, 872 (1969).

> [After *Heimke v. Munoz*,] [t]he court must still instruct the jury on the law of contributory negligence, the only modification from the common law being that the jury is sole arbiter [in deciding, first, whether the plaintiff is contributorily negligent and, second, whether to deny the plaintiff recovery because of his negligence]. Thus, Arizona adheres to a definition of the law which bars a negligent plaintiff's recovery.

*Contributory Negligence — Confusion Out of Compromise*, *supra* note 19, at 561; *see* Heimke v. Munoz, 106 Ariz. 26, 29, 470 P.2d 107, 110 (1970). *Cf.* State v. Cress, 22 Ariz. App. 490, 528 P.2d 876 (1974) (describing contributory negligence as a bastardized form of comparative negligence); Kovrig v. Vasquez, 10 Ariz. App. 101, 456 P.2d 947 (1969) (explaining that it is the defendant's burden to prove contributory negligence).

> In this state by Art. 18, Sec. 5 Arizona Constitution, A.R.S., we are committed to the doctrine of contributory negligence. And the doctrines of contributory negligence and comparative negligence are not compatible. ... "[H]ere there can be no recovery by a plaintiff who is guilty of contributory negligence. ..." In Arizona Contributory negligence of the slightest degree if it is a proximate cause of the accident "may" or "should" defeat recovery by a plaintiff and we have recently reaffirmed the Arizona rule on contributory negligence in Layton v. Rocha, 90 Ariz. 369, 368 P.2d 444; Lutz v. Faith, 95 Ariz. 40, 386 P.2d 85.

Boies v. Cole, 99 Ariz. 198, 205, 407 P.2d 917, 921 (1965).

22. Casey v. Marshall, 64 Ariz. 232, 236–37, 168 P.2d 240, 243–44 (1946); Minyard v. Hildebrand, 24 Ariz. App. 465, 467, 539 P.2d 939, 941 (1975); Wilson v. Sereno, 11 Ariz. App. 35, 36, 461 P.2d 514, 515 (1969). "If the last clear chance rule is applied, the plaintiff recovers in spite of his negligence, which produces an all-or-nothing situation as under the doctrine of contributory negligence, except that the entire burden is shifted from one party to the other." 1 LEE & LINDAHL, *supra* note 10, § 12.02, at 346.

23. S. Pac. Transp. Co. v. Lueck, 111 Ariz. 560, 562, 535 P.2d 599, 601 (1975), *cert. denied*, 425 U.S. 913 (1976); Evans v. Pickett, 102 Ariz. 393, 395–96, 430 P.2d 413, 415–16

## II. THE EFFECT OF THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

### *A. Distribution of Fault*

Despite the exceptions to contributory negligence, minimally guilty plaintiffs were still barred from recovery.[24] Likewise, a defendant often shouldered the entire burden of liability, while other potentially liable, solvent persons escaped unscathed under the no-contribution rule.[25] As a result of the inequities that this liability system produced for both sides, the Arizona Legislature adopted the UCATA in 1984.[26] While retaining the doctrine of joint and several liability, the UCATA abandoned the no-contribution rule[27] and replaced contributory negligence with pure comparative negligence.[28] The purpose behind the UCATA was to make the tort liability system more fair to plaintiffs and defendants. Defendants benefited from the right of contribution's more equitable distribution of liability.[29] Further, Arizona's pure comparative

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(1967); Bryan v. S. Pac. Co., 79 Ariz. 253, 256, 286 P.2d 761, 762 (1955); Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 107–08, 166 P.2d 816, 819–20 (1946).

24. *Supra* note 21 and accompanying text.

25. *See supra* notes 16–17 and accompanying text.

26. With few changes, Arizona has adopted the 1955 Revised Version of the UCATA. The Act became effective as of August 31, 1984, Sections 12–2501 through 12–2509 of the Arizona Revised Statutes Annotated. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, *Table of Jurisdictions Wherein Act has Been Adopted,* 12 U.L.A. 81 (Supp. 1993).

As of 1993, 19 states have adopted some form of the UCATA: Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Tennessee. *Id.* Arizona has adopted the 1955 Revised UCATA, but has added to the original act Sections 12–2505, 12–2506, 12–2507, 12–2508, and 12–2509. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, General Statutory Note, 12 U.L.A. 81–82 (Supp. 1993). For a brief description of Arizona's adoption of the UCATA, see *1984 Arizona Legislation,* ARIZ. BAR J., Aug.–Sept. 1984, at 18–20. For an analysis of the UCATA as adopted in 1984 and its legislative history, see Scot Butler, III and G. David Gage, *Comparative Negligence and Uniform Contribution New Arizona Law,* ARIZ. BAR J., June–July 1984, at 16.

27. Section 12–2501(A) of the Arizona Revised Statutes Annotated provides:

> A. Except as otherwise provided in this article, if two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against any or all of them.

ARIZ. REV. STAT. ANN. § 12–2501(A) (Supp. 1992).

28. Section 12–2505 of the Arizona Revised Statutes Annotated states:

> A. The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury. If the jury applies either defense, the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of injury or death, if any. There is no right to comparative negligence in favor of any claimant who has intentionally, wilfully or wantonly caused or contributed to the injury or wrongful death.
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> B. In this section "claimant's fault" includes the fault imputed or attributed to a claimant by operation of law, if any.

ARIZ. REV. STAT. ANN. § 12–2505 (Supp. 1992).

29. The 1955 Revised UCATA directs:

> This uniform act establishes the right of a person liable for damages for an unintentional wrong to compel others, who are liable with him for the same damages, to share in discharging the common liability. Under the existing law an injured person may select whom he wishes to sue from among those jointly liable to him for an injury. He need not sue at all. He may settle out of court or

negligence system allows plaintiffs to recover even if they are ninety-nine percent negligent.[30]

### *B. Reallocation of Fault*

The shift from barring the plaintiff's recovery under contributory negligence to reducing the plaintiff's recovery in proportion to the plaintiff's degree of fault produces more just results for plaintiffs.[31] Likewise, allowing a joint tortfeasor who pays a judgment to seek contribution from the other defendants results, in theory, in a more equitable distribution of responsibility for the plaintiff's injury.[32]

However, contribution does not always achieve this goal. For example, a solvent defendant under joint and several liability bears the entire burden of a judgment if the other tortfeasors are either insolvent[33] or immune[34] from a suit for contribution. Further, under pure comparative negligence, a plaintiff no longer needs to be innocent in order to recover.[35] This clouds joint and several

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> he may sue all and collect the full amount of the judgment from one. Under the prevailing law rule there is no recourse by one who voluntarily pays or who is forced to pay common liability, against the others who are equally liable to the injured party but who have escaped payment. This act would distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law.

UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note, 12 U.L.A. 59.

> As to the 1955 [Uniform Contribution Among Tortfeasors] Act, the Massachusetts Supreme Judicial Court has stated: "It is plain that the evil to be remedied was the unfairness of allowing a disproportionate share of the plaintiff's recovery to be borne by one of several joint tortfeasors, and the object to be accomplished was a more equitable distribution of that burden among those liable in tort for the same injury."

1 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 3:20, at 453–54 (1983).

30. "Under pure comparative negligence, contributory negligence in any percentage does not bar recovery. A plaintiff 99% at fault can still recover 1% of his damage. The only escape from the rule is a finding of no negligence." 1 LEE & LINDAHL, *supra* note 10, § 12.06, at 354.

While Arizona applies pure comparative fault, other jurisdictions apply modified comparative fault. Under this system, the plaintiff can recover as long as his contributory negligence is either not equal to the defendant's fault or not greater than the defendant's fault, depending on the type of modified system used. KEETON ET AL., *supra* note 15, § 67, at 473. Another variation of comparative fault is the slight-gross theory. Under this theory, the plaintiff can recover as long as his negligence is found to be slight and the defendant's gross. *Id.* at 474.

31. Under the contributory negligence doctrine, recovery could be barred by the finder of fact even if the plaintiff was only one percent responsible for her injuries. Sources cited *supra* note 21.

By contrast, Arizona's pure comparative negligence system allows plaintiffs to recover even if they are ninety-nine percent negligent. ARIZ. REV. STAT. ANN. § 12–2505(A). For the text of Section 12–2505(A), see *supra* note 28.

32. 1 LEE & LINDAHL, *supra* note 10, § 20.17, at 698.

The right of contribution normally does not affect the plaintiff's recovery. *See* Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L. J. 831, 842 (1989); Kornhauser & Revesz, *supra* note 7, at 620–23.

33. *See* 1 LEE & LINDAHL, *supra* note 10, § 20.31, at 720; Kornhauser & Revesz, *supra* note 32, at 842.

34. *See* KEETON ET AL., *supra* note 15, § 50, at 339–40; 1 LEE & LINDAHL, *supra* note 10, § 20.20, at 707.

35. 1 LEE & LINDAHL, *supra* note 10, § 12.06, at 354.

liability's original justification for placing the burden of insolvency on the guilty parties, the solvent defendants, to make the innocent plaintiff whole.[36]

*Gehres v. City of Phoenix*[37] demonstrates the problems which arise under a system of pure comparative fault with joint and several liability. Violet Gehres was killed in a traffic accident involving an insolvent drunk driver.[38] Mrs. Gehres' survivors sued the driver's estate, the night club from which the driver left intoxicated, and the City of Phoenix for alleged negligence by the police in a high-speed chase after the drunk driver.[39] The jury awarded the decedent's survivors $527,600 and $50,000 respectively.[40] The jury allocated ninety-five percent of the fault to the drunk driver, three percent of the fault to the night club, and two percent of the fault to the City of Phoenix.[41]

Pursuant to Arizona's comparative fault system under the UCATA, the defendants were jointly and severally liable under the indivisible injury rule.[42] As the only solvent defendants, the City of Phoenix and the night club were held responsible for the full amount of the plaintiff's damages, although their total fault amounted to only five percent.[43]

As a result of cases like *Gehres*, powerful defendants, such as insurance companies and municipal entities, lobbied to abrogate joint and several liability.[44] In 1984, the Arizona Legislature responded, effectively abolishing joint and several liability through Section 12–2506 of the Arizona Revised Statutes Annotated.[45] Under the new several liability system, each defendant pays no more than the value of the percentage of liability allocated to him by the fact-finder. There is no need for a right of contribution because a defendant never pays for more than his percentage of fault.

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36. *Supra* note 11. *See* KEETON ET AL., *supra* note 15, § 67 at 469, 475.
37. 156 Ariz. 484, 753 P.2d 174 (Ct. App. 1987).
38. *Gehres*, 156 Ariz. at 485, 753 P.2d at 175.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Gehres*, 156 Ariz. at 487, 753 P.2d at 177.

> On motion made not later than one year after a judgment imposing joint and several liability and determining contribution rights is entered, the court shall determine whether all or part of a tortfeasor's contribution share under § 12–2502 is uncollectible from that tortfeasor. If a contribution share is totally or partially uncollectible, the court shall redetermine the contribution shares of the other tortfeasors so that the uncollectible contribution amount is paid, based on the ratio of the percentages of the contribution shares of the other tortfeasors. The court's order redetermining the contribution shares shall include a judgment for the uncollectible amount against the tortfeasor whose share is totally or partially uncollectible and in favor of the other tortfeasors.

ARIZ. REV. STAT. ANN. § 12–2508 (Supp. 1992).

44. Proponents for the bill abolishing joint and several liability included the Arizona Railroad Association/Samaritan Health Services, the National Federation of Independent Businesses, Mountain Bell/Tucson Electric, the American Insurance Association, the Arizona Chamber of Commerce, the League of Arizona Cities and Towns, and the Arizona Hospital Association. H.R. 2078, 38th Leg., 1st Sess. (1987).

The spokesman for the Arizona Railroad Association and Samaritan Health Services "stressed [to the House] that it is not fair to have someone who is nominally involved pay 100 percent of the damages." *Id.*

45. ARIZ. REV. STAT. ANN. § 12–2506(A) (Supp. 1992). For the text of Section 12–2506(A), see *supra* note 1.

## III. INTRODUCTION OF THE PROBLEMS CAUSED BY SECTION 12–2506

The abolition of joint and several liability guarantees that a defendant will not be held liable for more than his degree of fault in causing the plaintiff's injury. Yet this system of several liability has far-reaching consequences for plaintiffs that are contrary to the basic tort principle of full recovery for victims.[46]

First, under the new tort liability system, the plaintiff alone bears the burden of an insolvent or immune defendant.[47] Second, Section 12–2506(B) of the Arizona Revised Statutes Annotated requires the inclusion of all nonparties at fault in apportioning damages.[48] As interpreted by case law,[49] the rule does not make exception for workers' compensation employers and insurance carriers, who are statutorily immune from tort liability[50] and receive statutory liens on

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46. Ingber, *supra* note 6, at 775. Although the constitutionality of the statute abolishing joint and several liability has been questioned in previous Notes, the court of appeals in Church v. Rawson Drug & Sundry Co., 173 Ariz. 342, 842 P.2d 1355 (Ct. App. 1992) held that Section 12–2506 of the Arizona Revised Statutes Annotated is constitutional. The issues addressed by the court were whether Section 12–2506 "violates the nonabrogation of damages provision found in article 18, § 6 ... violates the nonlimitation of damages provision found in article 2, § 31 ... violates the guarantee of equal privileges and immunities found in article 2, § 13 ... violates due process of law guaranteed by article 2, § 4 ... [and] violates the separation of powers guaranteed by article 3 ..." *Church*, 173 Ariz. __, 842 P.2d at 1358.

47. *See* Bisaillon v. Casares, 165 Ariz. 359, 798 P.2d 1368 (Ct. App. 1990). *Church* demonstrates the rationale which motivated the legislature to abrogate joint and several liability in most cases:

> "Plaintiffs now take the parties as they find them. ... Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute."

*Church*, 173 Ariz. __, 798 P.2d at 1364 (quoting Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978)). The fault of this rationale is that, as noted in *Gehres*, the comparative negligence statute, the UCATA, was not meant to affect joint and several liability: "The UCATA was not intended to change the common law rules of joint and several liability." *Gehres*, 156 Ariz. at 487, 753 P.2d at 177. By comparing *Gehres* and *Church*, one can see that it was the Arizona Legislature, not the judiciary, that had difficulty uniting comparative fault with joint and several liability.

48. Section 12–2506(B) of the Arizona Revised Statutes Annotated instructs:

> In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.

ARIZ. REV. STAT. ANN. § 12–2506(B) (Supp. 1992).

49. Dietz v. General Electric Co., 169 Ariz. 505, 821 P.2d 166 (1991); Aitken v. Indus. Comm'n of Arizona, 173 Ariz. 300, 842 P.2d 1313 (Ct. App. 1992).

50. Section 23–906(A) of the Arizona Revised Statutes Annotated states:

> Employers who comply with the provisions of § 23–961 or 23–962 as to securing compensation, and the employers' workers' compensation insurance carriers or administrative service representatives, shall not be liable for damages at common law or by statute, except as provided in this section, for injury or

employee-plaintiffs' recoveries against third parties.[51] This can give workers' compensation employers and insurance carriers a windfall, and ignore the plaintiff's right to full recovery for his damages. Third, Section 12–2506 of the Arizona Revised Statutes Annotated does not include indivisible injury in its exceptions to several liability.[52] Because there is no commonly accepted rule that statutory abrogation of joint and several liability excludes indivisible injury and because recent case law indicates that indivisible injury was included in the legislature's abolition of joint and several liability,[53] courts now face the problem of how to apportion cases of indivisible injury.

## IV. SECTION 12–2506: CAUSING THE PLAINTIFF TO BEAR THE BURDEN OF INSOLVENCY

While the inequities created by the combination of comparative negligence and joint and several liability motivated the Arizona Legislature to abrogate joint and several liability, the legislature's response now causes the plaintiff to bear the entire burden of an insolvent or immune defendant.[54] Thus, the new tort liability system is equally as unfair as the previous system, which often caused a solvent defendant to pay for the proportion of damages allocated to an insolvent co-defendant.

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death of an employee wherever occurring, but it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employers as provided by law.

ARIZ. REV. STAT. ANN. § 23–906(A) (Supp. 1992).

51. Section 23–1023(C) of the Arizona Revised Statutes Annotated states:

> If [the employee] proceeds against [the third party], compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or [self-insured employer] liable to pay the claim shall have a lien on the amount actually collectable from such [third party] to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or [self-insured employer] shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

ARIZ. REV. STAT. ANN. § 23–1023(C) (1983).

52. ARIZ. REV. STAT. ANN. § 12–2506(D) (Supp. 1992). For the text of Section 12–2506(D), see *supra* note 2.

53. *Church* shows the stark difference between the application of Section 12–2506(D) of the Arizona Revised Statutes Annotated to cases before January 1, 1988 and the statute's effect on cases after this date:

> Arizona Revised Statutes Annotated § 12–2506 was adopted in 1987 and applies to causes of action filed after January 1, 1988. Before that date, damages in actions for personal injury, property damage and wrongful death were indivisible, and each defendant was liable for the entire judgment, regardless of a particular defendant's degree of fault. Since 1988, each defendant is liable "only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault." A.R.S. § 12–2506(A).

*Church*, 173 Ariz. __, 842 P.2d at 1358.

54. *See* Bisaillon v. Casares, 165 Ariz. 359, 798 P.2d 1368 (Ct. App. 1990).

*Bisaillon v. Casares*[55] dramatically illustrates the effect of the abolition of joint and several liability on plaintiffs. In *Bisaillon*, the plaintiff filed a personal injury suit against defendants Sergio and Chris Casares on September 17, 1987. Because the suit was filed prior to the implementation of the statutory amendment abolishing joint and several liability,[56] the Casares brothers were jointly and severally liable. On January 1, 1988, the statute abrogating joint and several liability went into effect.[57] Then, on February 9, 1988, the plaintiff amended his complaint, adding Polly Nash and her parents as defendants and alleging that they were joint tortfeasors.[58] At trial, the jury allocated forty percent of the fault to plaintiff Bisaillon, forty percent to Sergio Casares, ten percent to Chris Casares, and ten percent to Polly Nash.[59] The plaintiff claimed that his amended complaint related back to the original complaint.[60] If the amended complaint related back to the original, defendant Nash would be held jointly liable for sixty percent of the plaintiff's damages, rather than simply her own ten percent.[61] Because the court found that the amended complaint did not relate back,[62] defendant Nash was held severally liable for her ten percent fault only,[63] and plaintiff Bisaillon shouldered the burden of the Casares brothers' potential insolvency.

As *Bisaillon* demonstrates, under current Arizona law, the plaintiff's right to recover fully for his injuries is unprotected, and the solvent defendant is safeguarded at the plaintiff's expense.[64]

## V. THE UNIFORM COMPARATIVE FAULT ACT: A PROPOSED ALTERNATIVE TO THE PLAINTIFF BEARING INSOLVENCY ALONE

While it is unfair to cause a solvent defendant like Nash to pay sixty percent of the damages when she was only ten percent at fault, it is likewise unjust to require a plaintiff such as Bisaillon to suffer without fifty percent of his awarded damages. Often, the injured plaintiff is the party least likely to be able to bear such a loss.[65] Furthermore, such a result is not consistent with the traditional tort policy of full compensation for the injured plaintiff.[66]

An alternative to both unfortunate situations is the one proposed by the Uniform Comparative Fault Act [hereinafter UCFA].[67] The UCFA recommends

55. *Id.*
56. *Id.* at 360, 798 P.2d at 1369.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* "Bisaillon argues that his right to hold all tortfeasors jointly and severally liable vested at the time he was injured. We disagree." *Id.*
61. *Id.* at 361, 798 P.2d at 1370.
62. The court found that plaintiff Bisaillon did not fulfill the mistake of identity requirement of Rule 15(c) of the Arizona Rules of Civil Procedure. *Id.* at 361–62, 798 P.2d at 1370–71.
63. *Bisaillon*, 165 Ariz. at 362, 798 P.2d at 1371.
64. *See* Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1142–43 (1987–1988).
65. KEETON ET AL., *supra* note 15, § 67, at 469.
66. MCCORMICK, *supra* note 6, § 137, at 560–61.
67. UNIF. CAMPARATIVE FAULT ACT, 12 U.L.A. 43 (Supp. 1993). This act was enacted in 1977 and, as of 1993, it has been adopted by Iowa and Washington. *Id.*

that, in apportioning damages, courts and juries apply pure comparative fault.[68] Then, if one wrongdoer's allocated liability is not collectible, that amount is reallocated to each remaining guilty party in proportion to the parties' respective percentages of fault. This formula includes the plaintiff.[69] Reallocation results in verdicts which are fairer to both plaintiffs and defendants.[70] The Arizona judiciary has conceded that there may be better, more just methods of reallocation other than the method provided by our current tort liability system.[71] However, the judiciary is constrained by the separation of powers doctrine and respect for legislative authority.[72]

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68. Section 1(a) of the UCFA states:

> In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

§ 1(a), 12 U.L.A. 45.

69. Section 2(d) of the UCFA states:

> Upon motion made not later than [one year] after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

§ 2(d), 12 U.L.A. 50.

70. Section 2 of the UCFA describes the reallocation of fault in this way:

> Reallocation of the equitable share of the obligation of a party takes place when his share is uncollectible.
>
> Reallocation takes place among all parties at fault. This includes a claimant who is contributorily at fault. It avoids the unfairness both of the common law rule of joint-and-several liability, which would cast the total risk of uncollectibility upon the solvent defendants, and of a rule abolishing joint-and-several liability, which would cast the total risk of uncollectibility upon the claimant.

§ 2, comment, 12 U.L.A. 51; *see* Nancy Thofner, *The Modification of Joint and Several Liability: Consideration of the Uniform Comparative Fault Act*, 36 U. FLA. L. REV. 288, 299–303 (1984); Gary B. Brewer, *Where is the Principle of Fairness in Joint and Several Liability — Missouri Stops Short of a Comprehensive Comparative Fault System ?*, 50 MO. L. REV. 601, 621–23 (1985).

71. *Church*, 173Ariz__, 842 P.2d at 1363.

> The plaintiff urges that if apportioning liability according to fault is a legitimate end, the only rational means of achieving that end would be to adopt the approach of the Uniform Comparative Fault Act. *See* 12 U.L.A. § 2, comment (Supp. 1992). Under the Uniform Act, joint and several liability is retained, but if one of several judgment debtors is insolvent, the remaining judgment debtors pay the insolvent debtor's share according to their respective percentages of fault.
>
> We recognize the competing values the plaintiff advances. *There may be other, and perhaps better, ways of achieving the goal of fairness in this area.*

*Id.* (emphasis added).

72. *Church*, 173 Ariz.__, 842 P.2d at 1363–64.

> However true [it] may be [that there may be other, and perhaps better ways of achieving fairness besides several liability], it does not mean that the method the legislature selected is irrational. *Even if the classification results in some inequality*, it is not unconstitutional if it rests on some reasonable basis.

*Id.* (emphasis added).

The method of reallocation proposed by the UCFA creates a more fair result compared to Arizona's current and previous tort liability systems. The UCFA is also more consistent with the concept of pure comparative fault. For these reasons, the Arizona Legislature's adoption of the UCFA would greatly improve the fairness of our tort liability system.

## VI. SECTION 12–2506: NAMING WORKERS' COMPENSATION EMPLOYERS AS NONPARTIES AT FAULT

### *A. Why Workers' Compensation Employers and Carriers Should not be Considered Nonparties at Fault*

The second problem caused by the statute abolishing joint and several liability is its refusal to exempt self-insured employers and insurance carriers from Section 12–2506(B) of the Arizona Revised Statutes Annotated.[73] This subsection requires that the fault of all persons who contributed to the plaintiff's injury be considered by the trier of fact, regardless of whether these persons were, or could have been, named as parties to the suit.[74] This can have extremely negative effects on a plaintiff's recovery. Not only are workers' compensation employers and carriers statutorily immune from suit,[75] they are also statutorily granted a lien on any recovery gained by the employee-plaintiff against third parties.[76] This situation can result in the injured employee recovering only enough to pay his actual medical costs, while the insured employer or insurance carrier receives a windfall by usurping what should have been the plaintiff's recovery for non-pecuniary damages.[77]

*Dietz v. General Electric Co.*[78] provides a practical example of the unfairness which results from naming a self-insured employer or insurance carrier as a nonparty at fault.[79] In *Dietz*, the plaintiff was injured in the course of his employment at a Magma Copper Company mine on June 8, 1987.[80] Plaintiff Dietz subsequently filed a workers' compensation claim and received benefits pursuant to Section 23–1061 of the Arizona Revised Statutes Annotated.[81] Then, in June of 1989, Dietz filed a negligence action against General Electric and S &

73. ARIZ. REV. STAT. ANN. § 12–2506(B) (Supp. 1992). For the text of Section 12–2506(B), see *supra* note 48.

74. *Id.*

75. ARIZ. REV. STAT. ANN. § 23–906(A) (Supp. 1992). For the text of Section 23–906(A), see *supra* note 50.

76. ARIZ. REV. STAT. ANN. § 23–1023(C) (1983). For the text of Section 23–1023(C), see *supra* note 51. *But see* Lou Grubb Chevrolet, Inc. v. Indus. Comm'n, 174 Ariz. 23, 846 P.2d 836 (Ct. App. 1992) (stating that a carrier receives no lien rights under Section 23–1023 of the Arizona Revised Statutes Annotated when the accident for which the employee-plaintiff is suing is non-industrial). For other Arizona cases demonstrating the scope and application of a self-insured employer's or insurance carrier's lien, see Ruth v. Indus. Comm'n, 107 Ariz. 572, 490 P.2d 828 (1971); Martinez v. Indus. Comm'n of Arizona, 168 Ariz. 307, 812 P.2d 1125 (Ct. App. 1991); Martinez v. State Workmen's Compensation Ins. Fund, 163 Ariz. 380, 788 P.2d 113 (Ct. App. 1989); State Compensation Fund v. Nelson, 153 Ariz. 450, 737 P.2d 1088 (1987).

77. Pulliam, *infra* note 90, at 84–85.

78. 169 Ariz. 505, 821 P.2d 166 (1991).

79. *Id.*

80. *Id.* at 506, 821 P.2d at 167.

81. *Id.* Section 23–1061 provides for the workers' compensation employee's notice of an accident, the form of that notice, the employee's claim for compensation, any reopening of a claim, and the payment of compensation. ARIZ. REV. STAT. ANN. § 23–1061 (Supp. 1992).

C Electric, alleging that these defendants had caused his injuries through their negligent manufacture and distribution of appliances at Dietz's place of work.[82] Pursuant to Section 12–2506 of the Arizona Revised Statutes Annotated, the defendants named Magma as a nonparty at fault.[83] Designating Magma as a nonparty at fault allowed the defendants to offer evidence of Magma's negligence at the trial, but it did not subject Magma to liability.[84] This arrangement created four serious dilemmas.

First, pursuant to Section 23–906(A) of the Arizona Revised Statutes Annotated,[85] Magma, as Dietz's self-insured employer, had complied with the workers' compensation statute. Therefore, Magma could not be joined as a defendant.[86] Second, if the jury found Magma liable, it would reduce the other defendants' percentages of liability.[87] Third, following Section 23–906(A) of the Arizona Revised Statutes Annotated,[88] plaintiff Dietz could not sue Magma in a separate suit to recover for allocated fault.[89] Finally, under Section 23–1023(C) of the Arizona Revised Statutes Annotated,[90] plaintiff Dietz was required to repay Magma for workers' compensation benefits received from his recovery against defendants General Electric Company and S & C Electric Company.[91] This resulted in a potential windfall for Magma (or its insurer) and significant loss for the injured plaintiff Dietz. Magma was not subject to liability for up to one hundred percent of its allocated fault. Further, Magma could recover damages received by the plaintiff from negligent third parties, including damages for non-pecuniary loss, without regard to the amount of Magma's allocated fault.[92]

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82. *Dietz*, 169 Ariz. at 506, 821 P.2d at 167.
83. *Id.*
84. *Id.* at 507, 821 P.2d at 168.
85. ARIZ. REV. STAT. ANN. § 23–906(A) (Supp. 1992). For the text of Section 23–906(A), see *supra* note 50.
86. *Dietz*, 169 Ariz. at 507, 821 P.2d at 168.
87. *Id.*
88. ARIZ. REV. STAT. ANN. § 23–906(A) (Supp. 1992). For the text of Section 23–906(A), see *supra* note 50.
89. *Dietz*, 169 Ariz. at 507, 821 P.2d at 168.
90. ARIZ. REV. STAT. ANN. § 23–1023(C) (1983). For the text of Section 23–1023(C), see *supra* note 51.
91. *Dietz*, 169 Ariz. at 511, 821 P.2d at 172. "If we were free to decide on a common law basis, Dietz' argument might compel us *to recognize legal or equitable principles that would prohibit assessing fault against nonparties that, while immune from plaintiff's action, have a lien on his recovery.*" *Id.* at 509, 821 P.2d at 170 (emphasis added).

Mark Pulliam also addresses the ironic effect that the worker's compensation lien has on the parties involved:

> Perversely, after the ... third party has paid all of the worker's compensable common law tort damages, including non-pecuniary losses not covered by the industrial reparations system, the employer is entitled to a refund of all the benefits he paid to the employee. This feature, the "compensation lien," operates without regard to the extent of the *employer's* negligence. ... The immune employer, even though negligent, is not a "tortfeasor," courts myopically intone, and contribution can be obtained only from a joint tortfeasor."

Mark S. Pulliam, *Comparative Loss Allocation and the Rights and Liabilities of Third Parties Against an Immune Employer: A Modest Proposal*, 31 FED'N INS. COUNS. Q. 80, 84–85 (1980–1981).

92. Say, for example, that Dietz has accumulated $100,000 in medical bills, all of which Magma has paid under worker's compensation. Plaintiff Dietz then sues General Electric Company and S & C Electric Company. The defendants name Magma as a nonparty at

The *Dietz* Court left open the issue of whether a self-insured employer or insurance carrier should be reimbursed from the money recovered by a plaintiff only to the extent that the insurer had paid more than its proportionate share of the plaintiff's damages.[93] Had the judiciary ultimately decided to consider the workers' compensation employer's allocated fault in reimbursing under Section 23–1023(C) of the Arizona Revised Statutes Annotated,[94] the result would have been much more equitable than the current effect. The plaintiff would at least have been assured of recovering all of his awarded damages, provided none of the other tortfeasors were insolvent or immune.

Unfortunately, the court in *Aitken v. Industrial Commission of Arizona*[95] held that the employer's fault could not be considered under Section 23–1023(C) of the Arizona Revised Statutes Annotated.[96] In *Aitken*, the plaintiff was hurt at her place of work when she fell in an area where the sidewalk had been removed by a construction company.[97] The plaintiff filed for and received workers' compensation benefits in the amount of $28,929.70.[98] Subsequently, the plaintiff and her husband sued the construction company.[99] Pursuant to Section 12–2506(B) of the Arizona Revised Statutes Annotated,[100] the construction company named the plaintiff's employer as a nonparty at fault.[101] The jury awarded the plaintiffs $319,292, of which $207,350 was actually collectible and thus subject to the workers' compensation lien.[102] Sixty-five percent of the fault was apportioned to the construction company, twenty-five percent to the employer, and ten percent to the plaintiff.[103]

Although theoretically the employer should have been liable for $79,823, or twenty-five percent of the defendants' liability, the employer's insurance carrier received back the $28,929.70 it had previously paid the plaintiff, as well as $74,466.54.[104] The latter amount was a credit against the plaintiff's husband's future recovery for loss of consortium.[105] Thus, the plaintiff actually collected $103,953.76, and the carrier received fifty percent of the plaintiff's collectible award.[106]

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fault. At trial, the jury allocates ninety percent of the fault to Magma and ten percent of the fault to the defendant electric companies, and orders the defendants to each pay $50,000.

This means that ten percent of the plaintiff's damages total $100,000, while the plaintiff's full compensation would amount to $1,000,000 if Magma were subject to liability. Also, through its lien on the plaintiff's recovery, Magma receives the $100,000 collected by Dietz from the defendants. Thus Magma loses nothing and Dietz is reimbursed only for his medical bills, or ten percent of his full recovery.

93. *Dietz*, 169 Ariz. at 511, 821 P.2d at 172.

94. ARIZ. REV. STAT. ANN. § 23–1023(C) (1983). For the text of Section 23–1023(C), see *supra* note 51.

95. 173 Ariz. 300, 842 P.2d 1313 (Ct. App. 1992).

96. *Id.* at 302, 842 P.2d at 1315.

97. *Id.* at 301, 842 P.2d at 1314.

98. *Id.*

99. *Id.*

100. ARIZ. REV. STAT. ANN. § 12–2506(B) (Supp. 1992). For the text of Section 12–2506(B), see *supra* note 48.

101. *Aitken*, 173 Ariz. __, 842 P.2d at 1314.

102. *Id.*

103. *Id.*

104. *Id.*

105. 173 Ariz. __, 842 P.2d at 1314, 1316.

106. *Id.*

To justify this clearly inequitable result, the court relied on the traditional basis of workers' compensation liability.[107] Workers' compensation is based on a no-fault system, designed to place the burden of the employee's loss onto the industry in which the employee was injured, quickly provide for the injured employee's needs, and limit the employer's liability.[108] Therefore, the court reasoned, reducing the carrier's lien by the amount of the employer's allocated fault would insert fault into a no-fault system.[109] Ironically, the court recognized the questionable equity of this outcome, stating that the legislature could not have intended to cause this result when it enacted the workers' compensation law.[110] Yet the court felt bound by what it termed the clear and unequivocal meaning of the statutory language.[111]

### *B. Proposed Alternatives to the Problems Caused by Naming Workers' Compensation Employers as Nonparties at Fault*

One possible way to avoid this clearly inequitable result is to exempt immune employers from the nonparties at fault rule.[112] Thus, the remaining guilty parties would absorb the insured employer's liability. However, one difficulty with this proposal is that it is inconsistent with the concept of comparative fault, which requires all guilty persons to be considered when apportioning damages.[113]

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107. 173 Ariz. __, 842 P.2d at 1315.

108. *See* 2A ARTHUR LARSON, LARSON'S WORKMEN'S COMPENSATION LAW, § 71.10, at 14–2 (1991); WEX S. MALONE & MARCUS L. PLANT, WORKMEN'S COMPENSATION, CASES AND MATERIALS 64 (1963).

109. *Aitken*, 173 Ariz. __, 842 P.2d at 1315.

110. *Id.* "While we cannot help but question the equity of this outcome—that the employee, whose damages have already been reduced by 25%, reflecting Amphitheater's proportionate share of fault, must nevertheless reimburse Amphitheater's carrier for 100% of the benefits received—we are bound by the rules of statutory construction ..." 173 Ariz. , 842 P.2d at 1315.

111. 173 Ariz. __, 842 P.2d at 1315–16.

112. *See* John G. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated With* American Motorcycle Association v. Superior Court, 30 HASTINGS L. J. 1464, 1502–03 (1979). John Fleming addresses the problem of employer immunity under a comparative fault with joint and several liability system. His analysis demonstrates the unjust results caused by naming an immune party as a nonparty at fault:

> Another alternative for [the *Li* rationale of] limiting the third-party's liability to his own share of fault would be to abandon the "joint and several" liability rule and reduce the employee's tort recovery from the third party by his employer's share of negligence. ... [T]his formula would ... [promote the *Li* rationale] at the cost of the employee. ... [An] analogy is that of a co-tortfeasor's insolvency, the risk of which is and should remain ... with the solvent tortfeasor(s), at any rate where the plaintiff is free from fault himself. Why should a tortfeasor be better off because someone else contributed to the injury than if he had been solely responsible?

*Id.*

113. *Cf.* Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 271–73 (1989–1990) (discussing the problems associated with allocating fault to unidentified nonparties, unreachable tortfeasors, and immune wrongdoers).

> Since the cornerstone of comparative negligence is an assessment of the fault of all persons who contributed to the harm, consideration of the fault of tortfeasors who are not named parties is a legitimate undertaking. ...
>
> Allocation of fault to an immune tortfeasor stands on a somewhat different footing. The immunities of ... employers subject to workers'

Another possible alternative would be to consider the immune employer's fault when reimbursing pursuant to Section 23–1023(C) of the Arizona Revised Statutes Annotated.[114] Self-insured employers and carriers would then be reimbursed for those workers' compensation benefits received by the plaintiff which exceeded the employer's allocated fault.[115] The workers' compensation principle of limiting employer liability should not be taken to the extreme of giving the insurer a windfall and seriously diminishing the injured plaintiff's recovery.

Possibly the best method of correcting this inequity would be to adopt the UCFA. The UCFA does not consider nonparties in its apportionment of damages.[116] Only parties to the suit are considered in apportioning the fault, providing excellent incentive for parties to join others who also could be held liable.[117] However, the adoption of the UCFA would mean returning to a system of joint and several liability.[118] Doubtless, none of the economically and politically powerful entities which lobbied for the abolition of joint and several liability in 1987 are going to willingly give up their comfortable tort liability position to adopt a system which is more fair but less biased in their favor. Regardless of the method chosen, the Arizona Legislature should take action to correct the unfair burden borne by plaintiffs under Arizona's current tort liability system.

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compensation are based on conscious public policy choices by the state legislatures. These immunities inevitably create inequities for injured parties.

*Id.* at 271–72.

114. ARIZ. REV. STAT. ANN. § 23–1023(C) (1983). For the text of this section, see *supra* note 51.

115. Taylor v. Delgarno Transp., Inc. 667 P.2d 445, 448–50 (N.M. 1983) (Payne, C.J., and Sosa, J., dissenting).

116. UNIF. COMPARATIVE FAULT ACT, § 2, comment, 12 U.L.A. 43 (Supp. 1993).

117. Section 2 of the UCFA states:

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

§ 2, comment, 12 U.L.A. 50–51.

118. Section 2(c) of the UCFA states:

> The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under Section 6, and enter judgment against each party liable on the basis of rules of joint-and-several liability. For purposes of contribution under Sections 4 and 5, the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

§ 2(c), 12 U.L.A. 50.

## VII. SECTION 12–2506: COPING WITH ARIZONA'S ABROGATION OF THE INDIVISIBLE INJURY RULE

The third and final problem caused by the statute abolishing joint and several liability is its abrogation of the indivisible injury rule.[119] Although the statute's effect on indivisible injury was not clear prior to 1988[120] when the statute took effect, case law subsequent to January 1, 1988 clearly indicates that indivisible injury is no longer the rule in Arizona.[121] The debate between the plaintiff and the court in *Church v. Rawson Drug & Sundry Co.*[122] reveals the fundamental difference between comparative fault under several liability and comparative fault under joint and several liability. The former system is based on a view that it is the act, not the injury, which creates the liability.[123] The latter system is based on the view that it is the final result, not the separate acts, which forms the basis of liability.[124]

The difficulty with failing to make an exception for the indivisible injury rule is that the mere adoption of a new liability system, several liability, does not automatically result in an ability to apportion what was previously indivisible.[125] In order to reach an equitable outcome, certain situations, for example the facts of *Parker v. Vanell*[126] and *Czarnecki v. Volkswagen of America*,[127] require the indivisible injury rule.

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119. ARIZ. REV. STAT. ANN. § 12–2506(D) (Supp. 1992). For the text of Section 12–2506(D), see *supra* note 2. The indivisible injury rule was adopted by Arizona in 1966, in Holtz v. Holder, 101 Ariz. 247, 418 P.2d 584 (1966). Beale, *supra* note 9, at 132.

> [Some] courts reason that a tortfeasor should be liable only for that particular injury proximately caused by his negligence, and that the burden of proving the injury caused by each tortfeasor should remain with the plaintiff. Such reasoning is based on the premise that "[i]t is the wrongful act, and not the injury, that creates liability."
>
> This approach has been criticized ... on the ground that ... such an unyielding rule stifles the compensatory function of tort law. ...
>
> Foremost in the recent trend to ameliorate the strict doctrine ... is the ... "single indivisible injury" rule. The Arizona court ... appl[ies] this liberal rule to situations where two or more persons are guilty of successive acts of negligence which, though independent, are closely related in time and space, and result in an indivisible injury to the plaintiff. The gravamen of this rule lies in the singleness of the injury — one incapable of any *logical* division — where it is impossible to say that each tortfeasor is responsible for a separate portion of the entire injury.

Beale, *supra* note 9, at 131–32.

120. "We express no opinion as to the effect of the 1987 amendment limiting a defendant's liability to the percentage of fault determination arrived at by the trier of fact. *See* 1987 Ariz.Sess.Laws, Ch. 1, effective Jan. 1, 1988." Gehres v. City of Phoenix, 156 Ariz. 484, 487 n. 2, 753 P.2d 174, 177 n.2 (1987).

121. Church v. Rawson Drug & Sundry Co.,173 Ariz. 342, 345, 842 P.2d 1355, 1358 (Ct. App. 1992).

122. *Id.*

123. Beale, *supra* note 9, at 131.

124. Thus, under the single indivisible injury rule, "'[t]he duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made.'" Mississippi v. Edgeworth, 214 So.2d 579, 588 (Miss. 1968) (quoting PROSSER, THE LAW OF TORTS § 42, at 250–51 (3d ed. 1964)).

125. Mike Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 TORT & INS. L. J. 482, 483 (1987–1988 ).

126. 170 Ariz. 350, 824 P.2d 746 (1992).

127. 172 Ariz. 408, 837 P.2d 1143 (Ct. App. 1991).

In *Parker*, Defendant 1, Mr. Vanell, and Defendant 2, Mr. Parker, were driving in the same direction when Mr. Vanell signaled to make a left turn. As Mr. Vanell began to turn, Mr. Parker attempted to pass him on the left. A collision resulted in which the plaintiff, Mrs. Vanell, was seriously injured.[128] Mrs. Vanell sued the two defendants,[129] who were found jointly and severally liable for Mrs. Vanell's indivisible injury in the amount of $165,000.[130] Pursuant to the UCATA, the trial court found Mr. Vanell thirty-five percent at fault and Mr. Parker sixty-five percent at fault.[131] Multiplying these percentages by the defendants' total liability, $165,000, Mr. Vanell was charged with paying $57,750, while Mr. Parker's pro rata share was $107,250.[132] Under the single indivisible injury rule, if Mr. Parker ended up being insolvent, Mr. Vanell would be liable for the entire $165,000. Conversely, under several liability, Mr. Vanell could not be held responsible for more than $57,750. The problem with the latter result is that the original motivation behind apportioning fault between two or more defendants in a multiple collision, indivisible injury case was solely to increase fairness for injured plaintiffs with indivisible damages.[133] In order to permit contribution among joint tortfeasors, the fact-finder must make some allocation of fault.[134]

Given the nature of Mrs. Vanell's injury, it was *impossible* to know which defendant caused what amount of her harm. Thus, instead of penalizing the innocent plaintiff for her inability to separate her damage, it makes much more sense, as a matter of policy, to place the burden of insolvency on the wrongdoers.[135]

When faced with a situation similar to the one in *Parker*, the court of appeals in *Czarnecki v. Volkswagen of America*[136] applied the single indivisible injury rule. In *Czarnecki*, the plaintiff suffered paraplegia in an automobile

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128. 170 Ariz. at 350–51, 824 P.2d at 746–47.
129. *Id.* at 351, 824 P.2d at 747.
130. *Id.* at 353, 824 P.2d at 749.
131. *Id.* at 351, 824 P.2d at 747.
132. *Id.*
133. Holtz v. Holder, 101 Ariz. 247, 251, 418 P.2d 584, 588 (1966).

> [I]t is more desirable, as a matter of policy, for an injured and innocent plaintiff to recover his entire damages jointly and severally from independent tortfeasors, one of whom may have to pay more than his just share, than it is to let two or more wrongdoers escape liability altogether, simply because the plaintiff cannot carry the impossible burden of proving their respective shares of causation ... we adopt the "single injury" rule as the correct one to be applied in multiple collision, indivisible injury cases.

*Id.*

134. *See* ARIZ. REV. STAT. ANN. § 12–2505(A) (Supp. 1992). For the text of Section 12–2505(A), see *supra* note 28.

135. In reference to the doctrine of indivisible injury, Michael Beale echoes the *Holtz* Court:

> The rationale for such an exception to the strict, common law view is its application to situations where it would seem more desirable, as a matter of policy, for the innocent plaintiff to recover his entire damage from several defendants, even though one may have to pay more than his share, than to leave the plaintiff without a remedy and absolve the defendants entirely.

Beale, *supra* note 9, at 132.

Although, under comparative fault, the plaintiff is now at least assured of recovering for each solvent defendant's allocated fault, the problem still remains that the allocation of fault in indivisible injury situations is inherently arbitrary. If two defendants each contribute in some manner to the same injury, it is unfair to penalize the plaintiff because she was not "lucky" enough to be harmed by all solvent actors.

136. 172 Ariz. 408, 837 P.2d 1143 (Ct. App. 1991).

collision while riding in the back seat of a car with his seat belt fastened.[137] The plaintiff subsequently sued Volkswagen of America,[138] alleging that the company had defectively designed the vehicle's rear seat back, causing the plaintiff's paraplegia on the second impact.[139] The court found that when a plaintiff is suing a manufacturer for "enhanced injuries," the single indivisible injury rule applies.[140] Therefore, once the plaintiff proves that the defective design caused him to incur worse injuries than he would have otherwise received, the burden shifts to the defendant to show that the damages arising from the enhanced injury are apportionable.[141]

When a plaintiff has received a single injury caused by multiple defendants, it is difficult to see why any of the defendants should be held liable for only a portion of that single injury. By analogy, under the "thin skull" doctrine of tort law,[142] a defendant is held liable for the plaintiff's entire harm, whether or not the defendant intended the injury to become so great.[143] Many courts extend a principle similar to the "thin skull" doctrine to cases of general negligence. These courts hold that, once a defendant's negligence has been established, the foreseeability of the actual consequences of the defendant's actions is irrelevant in determining liability.[144] Following this logic, it is irrational to reduce a defendant's liability for the plaintiff's total injury simply because another insolvent actor also contributed to the plaintiff's injury.[145] Similar to the case where a plaintiff is exceptionally susceptible to injury but unable to avoid it, a plaintiff who suffers a single indivisible injury is unable to apportion it. In both instances, it should be the wrongdoers' burden to shoulder any unforeseeable liability.

If joint and several liability is not provided for situations similar to the above cases, as well as for other scenarios,[146] the fact-finder's necessarily

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137. *Id.* at 409–10, 837 P.2d at 1144–45.
138. *Id.*
139. *Id.* at 410, 837 P.2d at 1145.
140. *Id.* at 413, 837 P.2d at 1148. The single indivisible injury rule means that, "where two or more persons act independently and commit consecutive negligent acts closely related in time and where it is not reasonably possible to apportion the damages between the separate negligent acts, the tortfeasors must be treated as jointly and severally liable." *Id.* at 412–13, 837 P.2d at 1147–48 (paraphrasing Mathews v. Mills, 178 N.W.2d 841, 844 (Minn. 1970)).
141. *Id.* at 413, 837 P.2d at 1148.
142. Ingber, *supra* note 6, at 802.
143. *Id.*
144. KEETON ET AL., *supra* note 15, § 43, at 290–91.
145. *Cf.* Fleming, *supra* note 112, at 1492 (recommending that the "solvent parties, plaintiff as well as defendant(s), [accept the insolvent wrongdoer's liability] in the proportion of their respective shares of fault").
146. Other scenarios include the following:

First, consider a situation like the one presented in Summers v. Tice, 199 P.2d 1 (Cal. 1948). There, two defendants were equally negligent in shooting, but only one defendant's bullet struck the plaintiff. *Id.* at 2. Unable to apportion the plaintiff's injury, the court held both defendants jointly and severally liable. *Id.*

A situation similar to *Summers* is one in which a patient becomes paralyzed during a routine surgery and the medical staff present at the time refuse to reveal what occurred in the operating room. Assuming that one or more of the physicians and nurses were negligent, it is unjust to refuse the plaintiff's cause of action because he cannot prove which of the potential wrongdoers was at fault. In this case, the indivisible injury rule should be applied, placing the burden of proving divisibility on each defendant.

Of relatively new concern is a scenario presented by Richard Carl Schoenstein in *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 HOF. L. REV. 37, 57 (1989–1990).

arbitrary apportionment of the plaintiff's damages in cases involving indivisible injury and insolvent defendants will result in serious, inequitable results. The failure of Section 12–2506 of the Arizona Revised Statutes Annotated to recognize the indivisible injury rule is a grave barrier to the plaintiff's right to full compensation. It is hoped that cases like *Parker* and *Czarnecki* will cause the legislature to reexamine its treatment of the indivisible injury rule.[147]

## CONCLUSION

This Note has addressed the evolution of Arizona's tort liability system and three formidable problems created by Section 12–2506 of the Arizona Revised Statutes Annotated: first, the injured plaintiff's sole responsibility of bearing a tortfeasor's insolvency; second, the inequities resulting from naming immune employers and insurance carriers as nonparties at fault; and finally, the difficulty of apportioning liability for a single, indivisible injury. Further, this Note has proposed a number of solutions to correct the current inequities produced under our several liability system.

Whether or not the Arizona Legislature accepts the proposals made by this Note, the legislature should, at the very least, reconsider the motives behind and the effects of its practical abolition of joint and several liability in 1988.

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Schoenstein considers the determination of proximate cause when an AIDS victim has contracted the virus through multiple exposures:

> AIDS may be contracted through multiple exposures. ... [I]t may be possible that sexual contact with one of the defendants would not have been sufficient to cause the infection. ... If it is possible that all of the defendants may have shared in causing the injury, it is rational to hold them jointly and severally liable.
>
> [One] option in the multiple exposure situation would be utilization of the "single indivisible result" rule.

*Id.* at 70–71.

Second, consider the situation presented by Anderson v. Minneapolis, ST. P. & S. S. M. RY. Co., 179 N.W. 45 (Minn. 1920). In *Anderson*, sparks from the defendant's train engine set a fire which subsequently merged with some fires of unknown origin. These fires destroyed a portion of the plaintiff's land. *Id.* at 46. The court held that if two defendants, or one defendant and an "Act of God," combined to destroy a plaintiff's property, joint and several liability applied even though either fire would have been sufficient in itself to destroy the plaintiff's property. *Id.* at 49.

If either defendant in a case like *Anderson* was insolvent or immune, the plaintiff's recovery would differ drastically, depending on whether several liability or joint and several liability was applied. Under both systems, each defendant would be apportioned fifty percent of the fault. However, under several liability, if one defendant was insolvent, the other defendant would receive a windfall and the plaintiff would be compensated for only fifty percent of her damages. On the contrary, under joint and several liability, the solvent defendant would be required to pay the full amount of the plaintiff's damages. This is the more fair result because each defendant's act was sufficient in itself to have caused the plaintiff's injury.

147. *But See* Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws — An Analysis of the Alternatives*, 40 LA. L. REV. 343, 362, 366 (1980) (advocating joint and several liability only when the plaintiff is innocent).

> One [other] alternative ... would be to limit proportionate several liability to those tortfeasors who are in fact less negligent than the plaintiff when compared. This would ... eliminate visiting the several liability consequence upon plaintiffs who are almost innocent. Slightly negligent plaintiffs would have the benefit of joint and several liability except as to even more slightly negligent defendants.

William J. McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence—Is Products Liability Next?*, 35 OK. L. REV. 193, 229 (1982).