TORT REFORM: ENSURING THE MOST EQUITABLE RESULTS FOR PLAINTIFFS AND DEFENDANTS?

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In 1987, the Arizona legislature enacted a statute[1] that put Arizona among a growing number of states which have discarded the doctrine of joint and several liability. Under this doctrine, victims injured by multiple defendants can recover fully for their injuries from any one of the defendants.[2] Thus, the victim is fully compensated even if one tortfeasor is insolvent, judgment proof, or unwilling to pay. Joint tortfeasors are then free to seek contribution from one another without further involving the victim.[3] The new statute, Arizona Revised Statutes section 12-2506, abolishes the doctrine of joint and several liability in most situations, allowing the defendant in multiple tortfeasor personal injury actions to pay only the percentage of damages for which he was at fault.[4] While the defendant is protected from paying for injuries which were caused partially by others, the chance that innocent victims will go uncompensated for their injuries is increased.[5]

Although section 12-2506 acts as a virtually complete bar to the doc-

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1. ARIZ. REV. STAT. ANN. § 12-2506 (1987) states:

> 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.

Other states which have enacted similar statutes include: Alaska, ALASKA STAT. § 9.17.080(d) (Supp. 1988); California, CAL. CIV. CODE § 1431.2 (Supp.1988); Colorado, COLO. REV. STAT. § 13-21-111 (1986); Florida, FLA. STAT. ANN. § 768.81(3-5) (West 1988); Illinois, ILL. REV. STAT. ch. 110, paras. 2-1117, -1118 (1988); Indiana, IND. CODE ANN. §§ 34-4-33-1 to -33-14 (West 1986); Iowa, IOWA CODE ANN. § 668.4 (West 1987); Kansas, KAN. STAT. ANN. § 60-258(a)(d) (Supp. 1987); Kentucky, KY. REV. STAT. ANN. § 454-040 (1985); Louisiana, LA. CIV. CODE ANN. art. 2324 (West 1979); Minnesota, MINN. STAT. ANN. § 604.02 subd. 1 (West 1986); Missouri, MO. REV. STAT. § 9(2) (1986); New Hampshire, N.H. REV. STAT. ANN. § 507-B:9 (Supp. 1987); Oregon, OR. REV. STAT. § 18.485 (1987); Utah, 1986 UTAH LAWS 199, § 2; Vermont, VT. STAT. ANN. tit. 12, § 1036 (1973 & Supp. 1988); and Washington, WASH. REV. CODE § 4.22 (1988).

2. PROSSER AND KEETON ON THE LAW OF TORTS § 47, at 328 (W. P. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON].

3. *Id.* at 327.

4. *See supra* note 1. The Arizona statute has retained joint and several liability where the negligent parties were acting in concert as well as in actions dealing with hazardous waste and solid waste disposal sites. ARIZ. REV. STAT. ANN. § 12-2506(D)(1) & (D)(2) (1987).

5. *See infra* notes 16-20 and accompanying text.

trine of joint and several liability,[6] other states have enacted a variety of statutes with the same objectives, but with less drastic results. For example, some states permit the plaintiff to collect under the doctrine of joint and several liability only when they are entirely without contributory fault.[7] Other states have retained joint and several liability to the extent that the plaintiff may recover her own monetary losses, such as medical expenses, while at the same time allowing liability to be apportioned for pain and suffering.[8] Still others have abolished joint and several liability only where the defendant is found to be less negligent than the plaintiff.[9] In that instance the plaintiff is able to recover fully when found to be less negligent than the defendant.

This Note examines the development of the judicial treatment of joint torts in the United States. The emphasis is on courts' efforts to develop a system of laws which both achieves the most equitable results for all those involved in a tort claim, and yet does not lose sight of the necessity that the claimant secure a full recovery for his injuries.[10] The Note then focuses specifically on the property/casualty insurance industry's role in prompting the courts to shift away from ensuring compensation for the injured tort victim. Finally, the ramifications of a provision in the Arizona Constitution which guarantees that the tort victim's right to recover damages shall not be abrogated[11] is scrutinized in light of section 12-2506.

THE TREND TOWARDS ENSURING FULL COMPENSATION TO THE VICTIM—A HISTORICAL OVERVIEW

The function of tort law in the twentieth century is threefold: to compensate those harmed by others,[12] to prevent future harms,[13] and to spread the costs of injuries throughout society[14] by forcing potential wrongdoers to

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6. *See supra* note 1.

7. Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980).

8. *See* CAL. CIV. CODE § 1431.2 (1988); ILL. REV. STAT. ch. 110, para. 2-1117 (1988).

9. OR. REV. STAT. § 18.485 (1987); FLA. STAT. ANN. § 768.81(3) (West 1988).

10. Contribution is an example of an effort to ensure equitable results for all defendants involved in a tort claim. Contribution allows a negligent party tortfeasor to seek financial assistance from other negligent tortfeasors once the victim has been compensated. PROSSER & KEETON, *supra* note 2, § 50, at 336.

Comparative negligence enables the claimant to recover for his injuries by apportioning damages between *all* parties who are at fault and then diminishing the recovery by the portion of the claimant's comparative fault, rather than denying the plaintiff any recovery when he is found partially at fault. Comparative negligence is another example of the courts' efforts to ensure that the defendant in a tort action receives equitable treatment, while protecting the victim's right to recover for his injuries. *Id.* § 67, at 470.

11. ARIZ. CONST. art. XVIII, § 6.

12. G.E. WHITE, TORT LAW IN AMERICA, AN INTELLECTUAL HISTORY 153 (1980). Originally, tort law was primarily a means of punishing blameworthy public behavior, while actual recovery was simply a secondary result of a successful tort action. *Id.* at 62. It was not until the twentieth century that tort law came to be viewed as a compensatory system. *Id.* at 147-55. *See also* M.J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1866, at 85 (1977) (stating that at the beginning of the nineteenth century there was a general presumption in favor of compensation).

13. There is a strong incentive on the part of potential tortfeasors to prevent harm once they are aware of the court's holding. PROSSER & KEETON, *supra* note 2, § 4, at 25. The realization that they too may be held liable for their behavior is seen as having a strong prophylactic effect. *Id.*

14. The public policy, cost spreading function of tort law was established by the 1950s. Green,

purchase liability insurance. In an effort to further the first and second of these goals, liability at common law for joint tortfeasors was joint and several.[15]

Joint and Several Liability

Originally, a joint tort referred only to the situation where all persons acted in concert and in pursuance of a single unlawful act.[16] Under these circumstances each wrongdoer was individually liable for 100% of the damages inflicted.[17] It has been suggested that this rule was developed in an effort to relieve the plaintiff of the intolerable burden of proving what share of his injury should be allocated to each of two or more wrongdoers.[18] However, it soon became apparent that the plaintiff's burden was intolerable not only when the multiple tortfeasors were acting in concert, but also when they were acting wholly independent of one another.[19] Thus, courts dropped the requirement of concert of action.[20]

Another common law development in joint tort actions was the courts' refusal to allow contribution among joint tortfeasors.[21] Thus, once the plaintiff had recovered from one defendant, the defendant had no recourse to seek partial reimbursement from other negligent tortfeasors who were also at fault.[22]

Tort Law Public Law in Disguise, 38 TEX. L. REV. 1 (1960). "Interests outside and beyond the interests of the immediate parties to the litigation" were "parties to every law suit." *Id.* at 257. The public policies served by tort law were far more important than its doctrines. *Id.* at 269.

15. PROSSER & KEETON, *supra* note 2, § 46, at 323. *Sir John Heydon's Case* is a good example of this doctrine. 77 Eng. Rep. 1150, 11 Coke Rep. 5 (1613).

> Suppose three rascals A, B and C assault and knock down M; A kicks and breaks a rib, B crushes a hand, C gouges an eye. When M recovers consciousness and sues them he can prove the initial assault by A, B and C, but he cannot prove which harm was done by which assailant. Does he lose his case? By no means. The law sensibly relieves him from any loss through mere inability to prove the specific share of harm done by each. It makes *each assailant liable for all* the harm, leaving them to settle their shares between them.

PROSSER & KEETON, *supra* note 2, § 46, at 323.

16. PROSSER & KEETON, *supra* note 2, § 46, at 323.

17. *Id.*

18. Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress,* 17 ILL. L. REV. 458 (1923).

19. *Id.* at 459.

Wigmore suggests:

> the rule should be: *whenever two or more persons by culpable acts,* whether concerted or not, *cause a single general harm not obviously assignable in part to the respective wrongdoers,* the *injured party may recover from each for the whole.* In short, wherever there is any doubt at all as to how much each caused, take the burden of proof off the innocent sufferer, make any one of them pay him for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each.

Id. (emphasis added).

20. PROSSER & KEETON, *supra* note 2, § 47, at 327.

21. Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. PA. L. REV. 130, 139 (1933). *See also* PROSSER & KEETON, *supra* note 2, § 50, at 336.

22. PROSSER & KEETON, *supra* note 2, § 50, at 338. Although the rule prohibiting contribution was originally followed only where the wrongdoers were acting in concert and with willful misconduct, not where the tort was committed by negligence or mistake, the American courts eventually lost sight of this limitation and applied the rule freely to all types of negligence cases. *Id.* § 47, at 325. A change in procedural rules can explain why the American courts no longer enforced this limitation. At common law two or more persons could not be joined in a single lawsuit unless there was concert of action, where a mutual agency might be found. *Id.* Attitudes towards joinder were altered by the Field Code of Procedure in New York in 1848, allowing complete settlement of all

Many states have changed the rule prohibiting contribution, and now allow it among joint tortfeasors.[23] This has been accomplished through the adoption of various versions of the Uniform Contribution Among Tortfeasors Act.[24] The original 1939 version of the Act created a right of contribution among joint tortfeasors based upon an equal division of liability among all those who the victim could hold jointly and severally liable for his injuries.[25] In 1955, a new version of the Act was promulgated.[26] The primary difference between the two versions is that fault under the 1955 version is divided equally among defendants, whereas under an optional provision of the 1939 Act it is assessed proportionately.[27] Although the contribution statutes of each state vary slightly, they have all achieved a similar result by allowing the wrongdoers to equitably settle their financial disputes with the court's aid, without jeopardizing the victim's right to be fully compensated for his injuries.

Contributory Negligence

While the eventual abolition of the rule prohibiting contribution provided an opportunity for tortfeasors to obtain more equitable treatment, tort claimants were still faced with the doctrine of contributory negligence, a barricade making recovery virtually impossible. Contributory negligence is behavior on the part of the plaintiff that is a contributing legal cause to the harm which is suffered.[28] Although the defendant has been negligent and would otherwise be held liable, because of the plaintiff's conduct, the plaintiff is denied recovery in any amount.[29]

There are a number of theories as to why such a harsh rule originated at common law. One theory is that contributory negligence served as a punitive

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questions connected with a transaction in a single suit. It has been suggested that there are legitimate social policy reasons for allowing contribution in all causes of action where the liability is joint and several. Where it is known that the entire burden of fulfilling any claims must be discharged by whomever the victim chooses to pursue (while the other escapes responsibility altogether) it appears likely that a corrupt influence, perhaps even bribery, would be attempted in undercover dealings involving joint tortfeasors. Leflar, *supra* note 21, at 137.

23. PROSSER & KEETON, *supra* note 2, § 50, at 338.

24. Uniform Contriution Among Tortfeasors Act § 4, 12 U.L.A. 57 (1955). When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares.

25. *Id.* at 87, § 2, 12 U.L.A. at 87.

26. *Id.* The policy at common law had been to deny tortfeasors any assistance in achieving an equal distribution of the common burden because, as wrongdoers, they were not deserving of the aid of the courts. With the promulgation of the Uniform Contribution Among Tortfeasors Act, the injustices often resulting under the common law are avoided. Leflar, *supra* note 21, at 141.

The Commissioner's prefatory note of the 1939 Act states:

> As an original proposition all might agree that courts should not lend their aid to rascals in adjusting differences among them. But all tortfeasors are not rascals, in spite of the literal translation of the term as wrongdoers. Most joint and several tort liability results from inadvertently caused damage, although it is almost impossible to draw a practical line between torts of inadvertence and others.

Uniform Contriution Among Tortfeasors Act § 4, 12 U.L.A. 57 (1955).

27. Twenty-two states have adopted one of the versions of the Uniform Act. H. WOODS, COMPARATIVE FAULT § 13:7, at 251 (2d ed. 1987). For further examination of how individual states have utilized the Act, see *infra* note 36 and accompanying text.

28. RESTATEMENT (SECOND) OF TORTS § 463 (1965).

29. PROSSER & KEETON, *supra* note 2, § 65, at 452.

measure, denying the plaintiff recovery due to his own misconduct.[30] Another theory is that the plaintiff's negligence is an intervening cause that releases the defendant from any responsibility.[31] Essentially, the view of the common law was that each individual was responsible for his own care and prudence.[32]

Nevertheless, by the turn of the century societal views had shifted towards a desire to compensate victims for their injuries.[33] With the widespread use of the automobile, tort claimants became a much broader group of the population.[34] The common law rule of contributory negligence became inappropriate since it no longer met the needs of an expanding and technologically advancing society.[35]

Comparative Negligence

In an effort to lessen the harsh results of the common law doctrine of contributory negligence, comparative negligence has now replaced contributory negligence in the majority of states.[36] Under a comparative negligence system, damages are divided among the parties who are at fault.[37] The doctrine of comparative negligence ensures that the tort victim does not go uncompensated, even if contributorily negligent.[38] This doctrine, while ensuring that the victim has an opportunity to recover all compensable damages, neglected to address the unfairness which results where one of several negligent tortfeasors is required to pay the entire damage award under the doctrine of joint and several liability.

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30. *Id.* at 452 n.4 (citing Wakelin v. London & S.W.R.R. Co., 12 A.C. 41, 45 (1886) (Lord Halsbury, L.C.)).

31. *Id.* at 452 (citing Thomas v. Quartermaine, 18 Q.B.D. 685, 697 (1897) (Bowen, L.J.)).

32. Schofield, Davies v. Mann: *Theory of Contributory Negligence,* 3 HARV. L. REV. 263, 270 (1890).

33. G.E. WHITE, *supra* note 12, at 165.

34. *Id.* at 16.

35. *Id. See also* M.J. HOROWITZ, *supra* note 12, at 88; G.E. WHITE, *supra* note 12, at 164-65.

> An admonitory view of the function of tort law assumed that there was nothing unjust about costs of injuries being borne by injured parties themselves unless the injurers had done something blameworthy. The injustice of no compensation for tort victims lay in the fact that blameworthy injurers were not admonished rather than that injured people were not being compensated. Once the situations where a blameworthy (contributorily negligent) person was deprived of compensation for his injuries came to be regarded as "unjust," a new *primary purpose* for tort law could be assumed. "Injustice" could now be equated with the absence of compensation for injuries rather than with the failure to admonish blameworthy conduct.

Id. (emphasis added).

36. The following is a comprehensive list of all states which have comparative negligence statutes: ARK. STAT. ANN. § 16-64-122 (1987); GA. CODE ANN. § 105-603 (1968); HAW. REV. STAT. § 663-731 (1985); IDAHO CODE § 6-801 (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980); MASS. GEN. L., ch. 231, § 85 (1986); MINN. STAT. ANN. § 604.01 (West 1988); MISS. CODE ANN. § 11-7-15 (1972); NEB. REV. STAT. § 25-1151 (1956); NEV. REV. STAT. § 41.141 (1986); N.H. REV. STAT. ANN. § 507:7(a) (1983); N.D. CENT. CODE § 9-10-07 (1987); OKLA. STAT. ANN. tit. 23, § 13 (West 1987); OR. REV. STAT. § 18.470 (1987); R.I. GEN. LAWS § 9-20-4 (1985); S.D. CODIFIED LAWS ANN. § 20-9-2 (1987); UTAH CODE ANN. § 78-27-38 (1987); VT. STAT. ANN. tit. 12, § 1036 (1973); WIS. STAT. ANN. § 895.045 (West 1983); WYO. STAT. ANN. § 1-1-09 (1988).

37. PROSSER & KEETON, *supra* note 2, § 67, at 470.

38. *Id.*

The Incompatibility Between Comparative Negligence and Joint and Several Liability

Left unanswered by the courts and state legislatures is whether the rules of comparative negligence apply to situations in which there are multiple tortfeasors, rather than a single tortfeasor and a contributorily negligent plaintiff. Simply stated, the question is, between the plaintiff and defendant, who should bear the risk of insolvent or judgment proof defendants? This issue has caused considerable controversy between the plaintiff and defense bars. The defense bar and insurance industry argue for the abolition of joint and several liability, claiming that joint and several liability and comparative negligence are simply not compatible doctrines since once the all-or-nothing rule of contributory negligence has been repudiated the fundamental rationale of joint and several liability is undermined.[39] These commentators assert that the sole reason for imposing joint and several liability on each defendant is that no basis exists for dividing the damages award.[40] Since comparative negligence allows for a division of damages, some argue it is logically inconsistent to retain joint and several liability in states where comparative negligence has been adopted.[41] Despite these contentions, in most jurisdictions joint and several liability statutes remain unchanged by comparative negligence.[42] Because the judgment has already taken into account the proportion of fault attributable to the plaintiff, a tortfeasor is liable to the tort victim for the entire amount of the judgment.[43] In fact, some comparative negligence statutes reaffirm the rule of joint and several liability,[44] while other states have by judicial fiat reaffirmed the doctrine in situations where comparative negligence is an issue.[45]

A leading case discussing the retention of joint and several liability in light of comparative negligence is *American Motorcycle Association v. Superior Court of California.*[46] In that case, the California Supreme Court held that comparative negligence would have no effect on the doctrine of joint and several liability and also recognized that the inherently inequitable consequences of the doctrine of contributory negligence had been ameliorated by California's adoption of comparative negligence.[47] The court disagreed with the contention that joint and several liability logically conflicts with a comparative negligence system which diminishes an injured party's recovery

39. *See infra* note 47 and accompanying text.

40. American Motorcycle Ass'n v. Superior Court of Cal., 20 Cal. 3d 578, 584, 578 P.2d 899, 905, 146 Cal. Rptr. 182, 188 (1978).

41. *Id.*

42. H. WOODS, *supra* note 27, § 13:4, at 242.

43. *Id.* at 243.

44. Margain v. Maize and Blue Properties, Inc., 753 F.2d 47 (6th Cir. 1985); IDAHO CODE § 6-803(4) (1979); ME. REV. STAT. ANN. tit. 14, § 156 (1980).

45. *See* Gustafson v. Benda, 661 S.W.2d 11, 16 (Mo. 1983); Wisconsin Natural Gas Co. v. Ford, Bacon and Davis Constr. Corp., 96 Wis. 2d 314, 291 N.W.2d 825 (1980); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). All three cases reaffirm joint and several liability in light of the comparative negligence statutes.

46. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). *See also* Walt Disney World Co. v. Wood, 489 So. 2d 61 (Fla. Dist. Ct. App. 1986).

47. California adopted comparative negligence in 1975 in Nga Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *Nga Li*, however, involved but a single plaintiff and a single defendant. Therefore, the court concluded that a decision addressing the problems of compar-

on the basis of his comparative fault.[48] Three reasons were given by the court for the retention of the doctrine of joint and several liability. First, the court found that apportioning fault by using comparative negligence principles does not make an indivisible injury divisible or indicate that any defendant's negligence is not a proximate cause of the entire injury[49]—in certain situations it is simply impossible to determine what amount each tortfeasor contributes to an injury.[50] Second, the court observed that even where the plaintiff is contributorily negligent, the plaintiff's conduct involves a lack of due care in protecting himself, whereas the defendant's negligence relates to the lack of appropriate care in the protection of others.[51] Lack of due care to oneself does not allow others to behave negligently.[52] Finally, the court discussed the fact that joint and several liability must be retained to allow injured plaintiffs to receive adequate compensation in the event that one defendant is insolvent.[53]

The Alaska Supreme Court's decision in *Arctic Structures, Inc. v. Wedmore*[54] is another example of a state's determination to retain joint and several liability in the face of comparative negligence. The court reasoned that its primary concern in replacing the common law rule of contributory negligence with comparative fault was to remedy the inequitable situation

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ative negligence where multiple parties were involved should be left until a case specifically on point was before the court. *Id.* at 828, 532 P.2d at 1241, 119 Cal. Rptr. at 882.

In *American Motorcycle Ass'n*, 20 Cal. 3d at 584, 578 P.2d at 905, 146 Cal. Rptr. at 188, the court stated:

> As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of the injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis-a-vis an injured plaintiff to be relieved of liablity for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm. In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisiible injury.

48. *American Motorcycle Ass'n*, 20 Cal. 3d at 584, 578 P.2d at 905, 146 Cal. Rptr. at 188. In support of this argument *American Motorcycle Ass'n* cited the following segment from Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950).

> Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole. . . . The reason for imposing liability on each for the entire consequences is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.

49. *American Motorcycle Ass'n.*, 20 Cal. 3d at 584, 578 P.2d at 905, 146 Cal. Rptr. at 188.

50. *Id.*

51. *Id.*

52. PROSSER & KEETON, *supra* note 2, § 65, at 453-54.

53. *American Motorcycle Ass'n*, 20 Cal. 3d at 585, 578 P.2d at 906, 146 Cal. Rptr. at 189.

54. 605 P.2d 426 (Alaska 1979). Some of the rules relating to the liability of joint tortfeasors under prior Alaska law are helpful when considering the holding in this case. Alaska adopted the Uniform Contribution Among Tortfeasors Act, requiring pro rata distribution of liability for damages among tortfeasors found jointly and severally liable for the same injury to person or property. ALASKA STAT. §§ 09.16.010-.060 (1970).

The legislature made a deliberate decision not to take degree of fault into account when handling contribution cases. *See* ALASKA STAT. § 9.16.020(1) ("The exclusion of intentional, willful and wanton actors from the right to contribution eliminates the better arguments for a relative degree of fault rule."). Moreover, the Alaska Act was adopted at a time when contributory negligence was the law in Alaska. In 1975, Alaska adopted comparative fault in Kaatz v. State, 540 P.2d 1037 (Alaska 1975).

which occurred where an injured tort claimant was forced to bear the entire burden of damages simply because he was not completely free of negligence.[55] The defendants in *Wedmore* suggested that the comparative negligence rule should be applied to divide damages among multiple defendants proportionate to their individual degree of fault.[56] The court rejected this suggestion, relying in part on the fact that the National Conference of Commissioners on Uniform State Laws did not abolish joint and several liability in the Uniform Comparative Fault Act,[57] and also on the basis of the holdings of two other states with similar judicial histories[58] concerning comparative negligence and contribution.[59]

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55. *Wedmore,* 605 P.2d 426.

56. *Id.*

57. *Id.* at 432. The court noted that "[t]he common law rule of joint and several liability of joint tortfeasors continues to apply under this Act. . . ." Uniform Comparative Fault Act § 2 (U.L.A.) (Supp. 1979).

58. *See supra* notes 46-50 and accompanying text. The Florida court adopted comparative negligence in the case of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) and subsequently enacted the Uniform Contribution Among Tortfeasors Act, including the plaintiff's pro rata apportionment of damages among joint tortfeasors provision. FLA. STAT. § 768.31 (1975).

In Lincenberg v. Issen, 318 So. 2d 386 (Fla. 1975), the court reconciled the doctrine of comparative negligence with the doctrine of joint and several liability and Florida's Uniform Contribution Among Tortfeasors Act. "The Act retains the full joint and several liability of joint tortfeasors to the plaintiff and provides for contribution among them on a pro rata basis." *Id.* at 392.

59. *See also* Weeks v. Feltner, 99 Mich. App. 392, 297 N.W.2d 678 (1980) (holding that the doctrine of comparative negligence did not mandate the abrogation of joint and several liability). The Michigan Court of Appeals stated:

> [T]he [Michigan] comparative negligence doctrine . . . seeks to assure fair and adequate compensation for injured plaintiffs. Unlike the concept of contributory negligence, it avoids unduly penalizing a plaintiff for his own fault. While some unfairness exists when one defendant is held liable for the fault of his codefendants, this is equally true of cases where the plaintiff is not at fault.

Id. at 394, 279 N.W.2d at 680.

But see Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978) (demanding the abrogation of joint and several liability in light of the Kansas comparative negligence statute—KAN. STAT. ANN. §§ 60-214(a), -258(a), -2413(b)(1974). Kansas, like most other states that have enacted comparative negligence statutes, did so in an effort to lessen the harsh results of the common law doctrine of contributory negligence. *Brown,* 224 Kan. at 198, 580 P.2d at 874. In light of the foregoing, in 1974, the Kansas legislature passed House Bill No. 1784. 1974 Kan. Session Laws 239 (codified at KAN. STAT. ANN. § 60-258a (1974)). Two purposes were expressed in passing this statute. The first was the abolition of contributory negligence as a bar to recovery. *Brown,* 224 Kan. at 198, 580 P.2d at 870. The second was to provide for the award of damages based on comparative negligence. *Id.* at 198, 580 P.2d at 870. The concept of joint and several liability was not specifically mentioned in the Kansas law, thus raising the question of whether the doctrine should be retained or abolished. *Brown,* 224 Kan. at 195, 580 P.2d at 872.

In *Brown,* the Kansas Supreme Court answered this question. There, an automobile owner's vehicle was involved in an accident while being driven by her son. The owner sued the driver of the other vehicle to recover damages. The court found the defendant 10% negligent and entered judgment against her for only 10% of the damages awarded, holding that the concept of joint and several liability did not apply in comparative negligence actions. The court determined that by adopting comparative negligence, "[t]he legislature intended to equate recovery and duty to pay to degree of fault. . . . Any other interpretation . . . [would destroy] the fundamental conceptual basis for the abandonment of the contributory negligence rule . . . ." *Brown,* 224 Kan. at 201-02, 580 P.2d at 873-74.

New Mexico has also come to a result contrary to *Wedmore.* Prior to 1981, New Mexico followed the old common law theory of contributory negligence. But in *Scott v. Rizzo,* the New Mexico Supreme Court affirmed the New Mexico Court of Appeals opinion in *Claymore v. City of Albuquerque,* which adopted the theory of comparative negligence. 96 N.M. 628, 634 P.2d 1234 (1981). Also, no right of contribution previously existed among joint tortfeasors. *Id.* In 1947, New Mexico eliminated this situation by enacting the 1939 version of the Uniform Contribution Among Tortfeasors Act, which does *not* change the common law rule of joint and several liability. N. M.

In reaching these decisions both the California and Alaska courts recognized the continued importance of allowing the injured parties their right of redress in light of the comparative negligence doctrine. In so holding, these courts retained tort law's balance: a balance which allows the defendant tortfeasor to seek contribution from non-party tortfeasors while protecting the victim's right to recover damages with the abolition of contributory negligence.[60]

Under pressure from current tort reform,[61] changes are being made in many states which had previously retained joint and several liability when adopting comparative negligence.[62] Throughout the country, legislators that were previously content to rely on various versions of the Uniform Contribution Among Tortfeasors Act to address the problems of joint tortfeasors are changing their minds. For example, despite the California Supreme Court's efforts in *American Motorcycle Association*, the California legislature subsequently adopted Proposition 51, a proposition which limits the application of the joint and several liability rule to economic losses in personal injury, property damage, and wrongful death cases.[63] After the lengthy and comprehensive explanation by the California court as to why the doctrine of joint and several liability must be retained in their comparative negligence system, it is curious that the legislature would make such a decision. One explanation is the pressure exerted by the property/casualty insurance industry[64] as evidenced by an examination of the "Findings and Declaration of Purpose" section of California's new statute.[65] It appears from this declara-

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STAT. ANN. § 41-3-2 (1947). After *Scott*, the New Mexico Court of Appeals, in *Bartlett v. New Mexico Welding Supply, Inc.*, chose to follow the law of the state of Kansas, where several liability is mandated by the language of the comparative negligence statute (KAN. STAT. ANN. § 60-258a(d) (1974)). 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982). In so deciding, the New Mexico court discussed the prevailing rules in Florida, Michigan, Alaska, and California before deciding to follow Kansas.

In *Wilson v. Gault*, the New Mexico court recognized that its decision to abolish joint and several liability was contrary to its own version of the Uniform Contribution Among Tortfeasors Act. 100 N.M. 227, 688 P.2d 1104 (Ct. App. 1983).

> Since joint and several liability provides the foundation under the Uniform Act for the pro rata allocation of burden among tortfeasors, *Bartlett* effectively eliminates any basis for contribution among concurrent tortfeasors. . . . Thus, the Uniform Contribution Among Tortfeasors Act no longer has force in this state with respect to contribution among concurrent tortfeasors.

Id. at 231, 668 P.2d at1108.

60. The California court recognized specifically, in *Summers v. Tice*, the importance of allowing injured parties their right to redress, while leaving open the courthouse door for wrongdoers to settle among themselves any apportionment disputes. 33 Cal. 2d 80, 88, 199 P.2d 1, 5 (1948).

61. Nader, *The Corporate Drive to Restrict Their Victims' Possessive Rights*, 22 GONZ. L. REV. 15, 18 (1987).

62. See *supra* note 1 for a list of states which have statutorily changed their joint and several liability laws.

63. CAL. CIV. CODE § 1431.2(a) (1987) reads:

> In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

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

65. CAL. CIV. CODE § 1431.1 (1987) states:

> [t]he People of the State of California find and declare as follows:

tion that the California legislature was convinced that disastrous economic consequences would befall their state without immediate reform.[66]

ARGUMENTS FOR AND AGAINST THE ABOLITION OF JOINT AND SEVERAL LIABILITY

Our tort system has evolved as the needs of society have changed.[67] Because of the expanding tort system we lead safer lives, for each lawsuit which results in a safer product has a great and far-reaching impact on society as a whole.[68] Though the tort system now plays an essential role in protecting consumers, the question remains why legislatures across the country are abolishing the doctrine of joint and several liability. One explanation is the increasing cost of liability insurance.[69] Abolishing joint and several liability may lower insurance rates and make liability insurance more readily available.[70] Moreover, proponents of tort reform contend there is a lawsuit

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(a) The legal doctrine of joint and several liability, also known as the "deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher prices to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and thus have been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums. Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable. The People of the State of California further declare that reforms in the liabilty laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

66. *Id.*

67. "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory." PROSSER & KEETON, *supra* note 2, § 2, at 15. *See also supra* notes 12-37 and accompanying text.

68. Ralph Nader, a consumer advocate as well as an attorney, recently wrote an article for a special issue of *Gonzaga Law Review* dealing exclusively with tort reform.

> The most effective incentive for ultrahazardous and toxic industries to operate safely is often the risk of financial liability in the event of an industrial accident. As long as corporate managers know a company's financial responsibility for unsafe or reckless operation is lessened by other legally culpable wrongdoers' involvement, the deterrent effect of potential litigation is substantially reduced.

Nader, *supra* note 61, at 16 n.8.

He later stated,

> Our tort system is the means of protection for tens of millions of Americans who are less likely to be injured because of the impact of lawsuits brought by victims. The prospect of tort liability deters culpable manufacturers, builders, doctors, or other tortfeasors from repeating their negligence and gives them a proper incentive to "clean up their act" and to become more safe.

Id. at 21. *See also* PROSSER & KEETON, *supra* note 2, § 2, at 25.

69. *The Manufactured Crisis,* 51 CONSUMER REP. 544 (Aug. 1986).

70. Although the state of Arizona provides no legislative history discussing why joint and several liability has been abrogated, a look at California's tort reform statute (CAL. CIV. CODE § 1431 (1987)) shows this is precisely why California chose to abolish the doctrine. See *supra* note 65 for the text of the California statute.

crisis stemming from enormous jury verdicts being awarded to plaintiffs[71] and legislatures have concluded that immediate tort reform is the answer.[72]

Many insurance companies claim they are on the verge of going bankrupt due to the increasing number of lawsuits and large jury awards.[73] According to them, this is why premiums have skyrocketed,[74] making insurance unavailable to many. Other groups do not believe the insurance industry is suffering at all and maintain the industry simply wishes to save money by abolishing joint and several liablity.[75] Some concede that the industry is indeed experiencing a financial crisis, but place the blame on the industry itself.[76] In light of the vast differences of opinion concerning the current status of the insurance industry, the contentions of the industry are worthy of a more detailed examination.

The Litigation Crisis

First, the data does not support the conclusion that tort litigation is on the increase in the United States.[77] From 1980 to 1985, tort cases in federal court increased at an annual rate of 4.6%, while other civil litigation grew at an annual rate of 11.7%.[78] Supporters of tort reform, such as the United

71. In May, 1986, a report was prepared by the National Association of Attorneys General Ad Hoc Insurance Committee, which examined the four factual contentions advanced by the Insurance industry to justify tort reform. These include:

1. The insurance companies claimed that their industry was in terrible financial trouble.
2. The insurance companies asserted that there has been a drastic increase in the number and size of present and future liability claims.
3. The insurance industry asserted that these increased claims are the cause of the current problems in the availability and affordability of liability insurance.
4. Finally, the insurance companies asserted that the best way to resolve the present crisis is to change the tort system in order to limit the number and size of liability claims.

National Association of Attorneys General, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance (NAAG Ad Hoc Insurance Committee, May 1986) [hereinafter Analysis].

72. *Id.*

73. *Id.*

74. *Id.*

75. According to some sources, the industry itself claims little or no profits, but the United States General Accounting Office has calculated that the property/casualty insurers industry's net gains between 1976 and 1985 were $75 billion. *See, e.g.*, Schroeter & Rutzick, *"Tort Reform"—Being an Insurance Company Means Never Having to Say You're Sorry*, 22 GONZ. L. REV. 31, 36-37 (1987).

76. *See infra* notes 90-95 and accompanying text.

77. The raw data for 1980 shows that there were 32,529 tort cases and 136,250 other civil cases. For 1985, there were 41,593 tort cases and 232,007 other civil cases. Administrative Office, United States Courts, Annual Report of the Director A-16 (1980).

78. *Id.* The May, 1986 report by the Ad Hoc Insurance Committee of the NAAG concluded that

> the majority assumption and conclusions underlying the Justice Department Report . . . are substantially unsupported by the facts. The facts do not bear out the allegations of an "explosion" in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation "explosion". Instead, the available data indicates that the cause of, and therefore the solutions to, the current crisis lie with the insurance industry itself.

Analysis, *supra* note 71.

Also, Robert T. Roper, Director of the Court Statistics and Information Management Project of the National Center for the State Courts testified before the Economic Stabilization Subcommittee of the Committee on Banking, Finance and Urban Affairs on August 6, 1986:

> There is not one shred of evidence to indicate that there is a litigation explosion in the state

States Department of Justice, rely on figures released by a legal publishing firm, Jury Verdict Research, Inc. (JVR), to support their position that the United States legal system is experiencing a litigation explosion.[79] However, it has been argued these figures have been misused and substantially discredited.[80] One significant study has shown that the state courts, where approximately ninety-five percent of tort claims are filed, are not experiencing a litigation explosion at all.[81]

There is also a disagreement over whether tort litigation simply costs too much.[82] One study indicates the median amount awarded in federal cases was $15,000 and was only $4,500 at the state level.[83] It has been sug-

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court system. . . . I do not know where [they] would gather that information, but we do not have it at the National Center for State Courts, and we are the clearing house for all the information.

Id.

79. Nader, *supra* note 61, at 24-25.

80. *See supra* note 78. To date, the most extensive report concerning the volume of litigation in our society is the Civil Litigation Research Project (CLRP). This report was funded by the United States Department of Justice, the National Institute for Justice, and the University of Wisconsin Law and Graduate Schools.

The results of this report are set forth in D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT (1982). The report consists of three volumes, entitled: *Studying the Civil Litigation Process: The CLRP Experience; Civil Litigation as the Investment of Lawyer Time;* and *Other Studies of Civil Litigation and Dispute Processing.* For an in-depth analysis of this report, see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigous Society,* 31 UCLA L. REV. 4 (1983) and Sarat, Feltstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation,* 31 UCLA L. REV. 72 (1983) [hereinafter *The Costs*].

81. Nader, *supra* note 61, at 24 n.29 (citing Kakalik & Pace, *Cost and Compensation Paid in Tort Litigation: Testimony Before the Joint Economic Committee of the U.S. Congress,* 99th Cong., 2d Sess. (1986)). *See also* Schroeter & Rutzick, *supra* note 75, at 24 n.31 (citing National Center for State Courts, A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981 and 1984 (Apr. 1986)). This report found that the increase in tort claim filings between 1978 and 1981 was two percent, while the population of the states analyzed grew four percent. Between 1981 and 1984, the population grew another four percent and tort claims increased seven percent. For the entire period, tort claims increased nine percent; the population grew eight percent.

See also Galanter, *supra* note 80, at 61-71, which indicated that the theory that Americans are more prone than others to utilize the courts for dispute resolution is unfounded once a careful analysis of available data has been completed. "The 'litigation explosion' and the 'litigious society' are not objective 'facts' that exist independently, but interpretations based on the perceptions and judgments of the observer." *Id.* at 64-65.

And see The Costs, supra note 80, where the authors came to a similar conclusion.

> 71.8 percent of individuals with grievances complained to the offending party . . . a dispute arose in 63 percent of these situations. Of these disputes, 11.2 percent resulted in a court filing . . . . [L]awsuits are filed in just over 10 percent of the disputes involving individuals where 1,000.00 dollars or more is at issue. Approximately 90 percent of the cases were settled or abandoned without a court filing. When one realizes that in many lawsuits little or nothing occurs except filing the complaint, an 11.2 percent litigation rate does not seem particularly high . . . .

82. One project studied 1,649 cases from five state and federal courts. The results of this study indicate that only 12% of the cases studied involved verdicts of over $50,000; 56% involved verdicts of $10,000 or less. *The Costs, supra* note 80, at 89.

Also, a report released by the United States General Accounting Office on February 28, 1988 attributes the disputed "litigation explosion" to an increase in asbestos case filings. The General Accounting Office reports that from 1974 to 1986 asbestos cases account for a full 50% of the total growth in federal filings. The Dalkon Shield and Bendectin suits are responsible for 12% and five percent, respectively. Excluding the filings in these three areas, the General Accounting Office concludes that federal filings increased "just under eight percent" from one year to the next. 16 Prod. Safety & Liab. Rep. (BNA) 231 (1988).

83. 16 Prod. Safety & Liab. Rep. (BNA) 231 (1988).

gested that the familiar horror stories which predominate the media are the exception rather than the rule.[84] Advocates of joint and several liability suggest that these stories, many times grossly exaggerated, are only a part of the massive advertising campaign created by the insurance industry to sell the lawsuit crisis to legislatures across the country.[85] One source describes this as an orchestrated campaign begun in 1985 by the insurance industry as a way out of a crisis for which they themselves are responsible.[86]

Moreover, it has been suggested that many of the statistics upon which proponents of tort reform rely are distorted.[87] For example, a comparison of the average jury award with average jury awards from previous years is an inappropriate means of demonstrating that jury verdicts have risen substantially in recent years.[88] Use of the median as a method of analyzing the jury award data would result in a more accurate picture of what the jury system is actually awarding.[89]

Assuming, for the sake of argument, that the contentions of the insurance industry are correct and there has been both a litigation explosion and mammoth verdicts in recent years, the question remains whether these factors are really responsible for the current condition of the insurance industry. Those opposed to abolishing joint and several liability contend that the tort system is not to blame for the insurance industry's financial woes. Instead they maintain that the industry's problems are self-inflicted and cyclical in nature.[90] The same situation now facing the insurance industry also

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84. *Id.*

85. *See* Galanter, *supra* note 80, at 10-11. Examples cited in Galanter's article include a half-million dollar suit filed against community officials for not allowing a woman to breast-feed her child at a public pool and a child suing his parents for malparenting.

The *Journal of Commerce* reported that the insurance industry has spent $6.5 million on an advertising campaign to convince the public that a "lawsuit crisis" is responsible for the lack of affordable insurance for many individuals and businesses. J. COM., Mar. 19, 1986, at 1.

86. *The Manufactured Crisis,* 51 CONSUMER REP., 544 (Aug. 1986).

Members of the Association of Trial Lawyers of America were advised at their annual meeting held July 10-17, 1987 to be concerned about taking marginal tort cases given the "controversy" surrounding the current environment. At one informal session outgoing ATLA President Robert Habush stated that potential jurors are being "bombarded by propoganda" from insurance companies about the so-called "liability insurance crisis" and the "need for tort reform." 15 Prod. Safety & Liab. Rep. (BNA) 559 (1987).

87. Nader, *supra* note 61, at 23.

88. For example, *USA Today* reported that the average jury verdict in a products liability case in 1978 was $1.7 million, up from $400,000 the year before and $800,000 the year after. When questioned by Ralph Nader, the newspaper responded that the jump was due to a single $127 million verdict in a Ford Pinto case. Nader, *supra* note 61, at 25 n.34. Also, it was not mentioned that the judgment was later reduced to $3.5 million on appeal. JVR, the firm used by the Justice Department to produce these statistics, does not take into account reversals, dismissals, or remitturs when compiling its figures. *Id.*

89. The term "average" is defined as the numerical sum of two or more figures, divided by that number of figures. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 61 (7th ed. 1976). One extremely large figure among many smaller ones can result in a noticeable and misleading increase in the final average. For example, consider 99 hypothetical awards for one dollar each and one award of $100,000. The "average" award would be $10,009; this is not a representative indication of what the actual trend was. Use of the median would involve examination of the middle figure in a group of figures as the indicator of what the trend was for that group. *Id.* at 256. For example, in the group of numbers one, three, five, seven and nine, the median is five. In the example considering the 99 hypothetical awards of one dollar each the median would be one.

90. Nader, *supra* note 61, at 18-19.

occurred in the 1970s.[91] The cycle begins when interest rates are high, as they were several years ago.[92] The insurance industry cuts prices and insures poor risks in order to obtain more cash to invest while the rates are high.[93] When the interest rates drop, the industry must increase premiums and reduce the availability of coverage to maintain their profit margin.[94] Furthermore, even during those years when the insurance industry is at the bottom of a cycle, it is still very profitable and in no danger of going bankrupt.[95]

Moreover, it is unlikely that the current status of the insurance industry was caused by any one single factor.[96] More likely, a combination of social and economic factors, such as past low pricing of insurance premiums to take advantage of high interest rates and negligent drafting of policies,[97] contributed to the recent rate increases and low availability of liability insurance.[98] Although a desired effect of tort reform statutes such as Arizona Revised Statutes section 12-2506 is relief from the current condition of the insurance industry, it is unclear whether abolishing joint and several liability will solve this problem. One survey of states which have passed tort reform statutes abolishing joint and several liability indicates that neither insurance availability nor affordability was altered after the statutes were passed.[99] Even if one were to accept the proposition that tort law is the culprit, it is unclear how abolishing joint and several liability will affect insurance availability and rates.[100] Therefore, tort reform statutes, such as the one recently enacted in Arizona,[101] should be analyzed on their own merits, without speculation as to their potential benefit to the insurance industry.

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91. *Id.* at18 n.12 (citing *Availability and Affordability Problems in Liability Insurance: Hearings Before the Subcomm. on Business, Trade, and Tourism of the Senate Comm. on Commerce, Science, and Transportation,* 99th Cong., 1st Sess. 47-48 (1985) (statement of J. Robert Hunter, Federal Insurance Administrator under Presidents Ford and Carter, and now President of the National Insurance Consumer Organization) ("1984 was a typical 'bottom-of-the-cycle' year. The last time it happened was in the mid-1970s when I served as Federal Insurance Administrator in the Ford Administration. At that time, the country observed the precise phenomena we see today.").

92. Nader, *supra* note 61, at 18.

93. *Id.*

94. *Id.* at 18-19.

95. For example, between 1975-1984, the insurance industry experienced net gains of $72.5 billion. *See* Statement of John C. Finch, Senior Associate Director, General Government Division, *Profitability of the Property/Casualty Insurance Industry Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 99th Cong., 1st Sess. (1986). The National Insurance Consumer Organization Report on First Quarter Property/Casualty Insurance Industry Profitability (1986) found that profits rose $2.11 billion, and the insurance industry itself has released figures stating that net profits for the first half of 1986 were $5.7 billion, as compared with $930 million in 1985. Slater, *Property and Liability Insurers Report Strong Profits, Signaling Easing of Crisis,* Wall St. J., Aug. 28, 1986, at A1, col. 2.

96. "The cause—or causes—for the crisis have never been clearly identified . . . . The only certainty surrounding this issue is that it emanates from multiple factors." Talmadge & Petersen, *In Search of A Proper Balance,* 22 GONZ. L. REV. 259, 260 (1987).

97. *Id.* at 267.

98. *Id.* at 276.

99. *Id.*; *see also* DiMento, Harrison & Besky, Joint and Several Liability: A Study of the Fiscal and Social Impact of a Change in the Doctrine 3 (Dec. 1985) (unpublished manuscript)(available from the University of Florida College of Law) (finding no conclusive evidence that states which had abolished joint and several liability were any less affected by the insurance "crisis").

100. *Id.*; *see also* Talmadge & Petersen, *supra* note 96, at 259 n.4, 266 n.27.

101. ARIZ. REV. STAT. ANN. § 12-2506 (1987).

ARIZONA REVISED STATUTES SECTION 12-2506

In 1986, the Arizona legislature considered measures which would have abolished the doctrine of joint and several liability for a defendant who was less than fifty percent at fault.[102] Then Governor Bruce Babbitt criticized the bill as one that generally would operate to the detriment of the innocent victims of tortfeasors and permit wrongdoers and their insurers to avoid paying full compensation for the consequences of their actions.[103] Nonetheless, on February 12, 1987, now impeached Governor Evan Mecham signed into law the current statute,[104] which acts virtually as a complete bar to joint and several liability.[105] Under Arizona's new statute, joint and several liability remains in only three situations: respondeat superior, parties acting in concert, and tortfeasors involved in hazardous waste or substance or solid waste disposal sites.[106]

Arizona's tort law history is not unlike that of many other states.[107] Originally, there was no contribution among joint tortfeasors in Arizona. Also, plaintiffs who were contributorily negligent were barred from recovery.[108] In one group of comprehensive statutes the Arizona legislature, in 1984, incorporated the Uniform Contribution Among Tortfeasors Act, resulting in a comparative fault system, remedying the unfair burden previously placed upon both plaintiffs and defendants.[109] Now, the enactment of Arizona Revised Statutes section 12-2506 forces the tort victim to shoulder the burden of negligent defendants, even when the plaintiff is completely free of contributory fault.[110]

Under Arizona's new statute, the ill fortune of being injured by an immune or judgment proof person now falls upon the plaintiff rather than upon the other defendants. The abolition of joint and several liability makes it necessary for plaintiffs to assign a precise percentage of fault for an indivisible injury to each of the several wrongdoers involved.[111] Many times this is

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102. 4 Miller and Pitt Newsletter No. 2 (1986) (on file with the Arizona Law Review).

103. *Id.* A comprehensive 55 item survey on 14 major policy areas, including tort reform, was recently mailed to 13 presidential contenders. Bruce Babbitt, former Governor of Arizona, was the only Democratic candidate surveyed to respond to the tort reform questions. He articulated his belief that the liability crisis is an insurance crisis, and not a jury crisis, stating "[t]he law should not protect wrongdoers from the consequences of their negligence." 16 Prod. Safety & Liab. Rep. (BNA) 159 (1988).

104. See *supra* note 1 for text of ARIZ. REV. STAT. ANN. § 12-2506 (1987).

105. ARIZ. REV. STAT. ANN. § 12-2506(D)(1)(2) (1987) states

> 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 an 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.

106. *Id.*

107. *See generally* H. WOODS, *supra* note 27.

108. Arizona adopted a system of contribution and comparative fault, effective August 31, 1984. ARIZ. REV. STAT. ANN. §§ 12-2501 to 2509 (1987).

109. *Id.*

110. *See supra* note 1 and accompanying text.

111. ARIZ. REV. STAT. ANN. § 12-2506(C) (1987) states: "The relative degree of fault of the claimant, and the relative degrees of fault of all the defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact."

not feasible.[112]

For example, assume A is driving through an intersection when hit by two cars, driven by B and C. B runs into the passanger side of A's vehicle and C collides with the driver's side. A is severely injured and requires extended hospitalization. A was exercising due care in driving; B and C were negligent. Under such circumstances it is virtually impossible to accurately determine whether B or C's negligence alone would have caused the identical injury. Moreover, the difficulty in determining the percentage of fault serves to considerably lessen the incentive to act reasonably. For example, where a company knows financial responsibility for a dangerous operation is lessened by any other legally responsible wrongdoers involved, any deterrence which might have occurred because of a possible lawsuit is greatly decreased.[113]

THE ARIZONA CONSTITUTION

Arizona Revised Statutes section12-2506 has substantially affected tort victims' rights to fully recover for their injuries.[114] Whether these changes are constitutionally sound is not yet clear.[115] The Arizona Constitution contains several provisions which protect an individual's right to fully recover damages for personal injury. One provision guarantees that the right to recover damages shall never be abrogated[116] and that the amount of these damages will not be subject to any statutory limitations.[117] The Arizona Constitution also prohibits the enactment of any laws limiting damages for causing the death or injury of any individual.[118] A survey of the history of these provisions provides convincing evidence of early lawmakers' concern that tort victims be adequately compensated for their injuries.[119] Both con-

112. *See supra* note 47.

113. *Id.*

114. *See supra* note 1.

115. State constitutions serve as a check on legislative abuses of individual rights. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds,* 63 TEX. L. REV. 1025, 1046 (1985).

116. Kenyon v. Hammer, 142 Ariz. 69, 81, 688 P.2d 961, 973 (1984).

117. ARIZ. CONST. art. XVIII, § 6. Moreover, the Arizona Constitution provides in article 18, section 3:

> It shall be unlawful for any person, company, association, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, association, or corporation shall be released or discharged from liability or responsibility on account of personal injuries which may be received by such servants or employees while in the service or employment of such person, company, association, or corporation, by reason of the negligence of such person, company, association or corporation, or the agents or employees thereref; and any such contract or agreement if made, shall be null and void.

ARIZ. CONST. art. XVIII, § 3.

118. Arizona Constitution article II, section 31 states: "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."

119. In *Holtz v. Holder*, the court held:

> [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 the respective shares of causation or because the tortfeasors have not committed a joint tort.

101 Ariz. 247, 251, 418 P.2d 548, 552 (1966).

stitutional provisions are drawn from a proposition which was introduced at the 1910 Arizona Constitutional Convention.[120] The original proposition was aimed at protecting employees from contracts in which they were forced to waive their right to recover damages from their employer in the event of death or bodily injury.[121] But when introduced at the convention, the clear intent of the delegates was to extend the guarantee to cover all persons.[122] Thus, the provision was amended to reflect this desire and then adopted.[123]

More than seventy years after the adoption of this provision Arizona courts are still aware of the necessity for tort victims to be adequately compensated for their injuries. In *Kenyon v. Hammer*[124] the Arizona Supreme Court determined that the right to recover damages for bodily injuries guaranteed by the Arizona Constitution is a fundamental right. Therefore, section 12-2506 must be subjected to the strict scrutiny test.[125] Under this method of analysis a statute may be upheld only if it serves a compelling state interest and the regulation is necessary to achieve the legislative objective.[126] The statute under consideration forces innocent plaintiffs to bear the entire burden of damages attributable to non-party insolvent tortfeasors, while insulating negligent defendants from bearing any share of the burden.[127] It is difficult to find a compelling state interest that would be fur-

120. *Kenyon,* 142 Ariz. at 80 n.9, 688 P.2d at 972 n.9. Introduced by delegate Parsons, the original proposition stated:

> That no law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person. Any contract or agreement [made by] any employee [to] waive any right to recover damages for causing the death or injury of any employee shall be void.

Id.

121. *Id.* When introduced at the 1910 convention, delegate Franklin (Dem. Maricopa, lawyer and later state supreme court chief justice) stated, "I think that this measure should be made not only to include employees but other persons, as in the case of a railroad accident. Should not other persons as well as employees be protected?" *Kenyon,* 142 Ariz. at 80 n.9, 688 P.2d at 972 n.9. Delegate Baker, former justice of the Territorial Supreme Court and later justice of the state supreme court, stated,

> I would like to know why everyone, whether an employee or not, should not be protected in the matter of an accident, death or injury? I would not only favor the measure as a protection to employees but I would make it cover all persons who may be included in an accident,—where such persons were subjected to accident, death or injury, as in a railroad accident.

Id.

122. *Id.*

123. *Id.* Delegate Cunniff moved to amend the proposition on December 5, 1910, to include language protecting the right to recover damages by requiring that the right never be abrogated. The motion prevailed. *Id.*

124. 142 Ariz. 69, 688 P.2d 961 (1984).

125. *Id.* at 83, 688 P.2d at 975.

126. There are three levels of scrutiny which may be used in Arizona to determine the constitutionality of a statute under equal protection analysis. *Id.* at 78, 688 P.2d at 970. The highest level of scrutiny, strict scrutiny, is applied where there is a fundamental right at stake. ARIZ. CONST. art. II, § 13. Under this method of analysis, a discriminatory statute may be upheld only where there is a compelling state interest to be served and the regulation is necessary to achieve the legislative objective. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Arizona Downs v. Arizona Horsemen's Found., 130 Ariz. 550, 555, 637 P.2d 1053,1058 (1981).

127. ARIZ. REV. STAT. ANN. § 12-2506 (1987) discriminates against the rights of certain tort victims by immunizing negligent tortfeasors from bearing the burden of the proportionate damages caused by nonparty or immune tortfeasors. It also grants immunity to negligent tortfeasors.

Because liability is several and not joint under this statute, these wrongdoers are protected from bearing the burden of the percentage of damages caused by judgment proof or insolvent tortfeasors. Injured plaintiffs must shoulder the entire burden of damages caused by nonparty or otherwise im-

thered by this result. According to the Arizona Supreme Court there is no compelling or legitimate interest in providing economic relief to one segment of society at the expense of another.[128] Therefore, the argument that the legislature's goal was to reduce the economic hardship from which the insurance industry allegedly suffers is without merit.[129]

Even accepting the argument that relieving the insurance industry from economic hardship is a compelling state interest, it is unclear whether abolishing joint and several liability will alleviate the industry's financial woes.[130] There is considerable debate as to whether the tort system is to blame for the current condition of the industry in the first place.[131] Given the absence of concrete information concerning what the legislature's actual purpose was in enacting section 12-2506, as well as the lack of data supporting the contention that abolishing the doctine of joint and several liability was a necessary, or even the least restrictive method[132] of achieving the compelling state interest hypothesized above,[133] section 12-2506 is unconstitutional.[134]

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mune wrongdoers. Thus, the statute imposes a burden on a specific and limited group of tort claimants—those who have been injured by nonparty tortfeasors. This special treatment accorded certain tortfeasors and tort victims is subject to equal protection analysis under the Arizona Constitution.

128. In reference to a system which would favor one segment of society at the expense of another, the Arizona Supreme Court has stated that "under such a system our constitutional guarantees would be gradually eroded until this state became no more than a playground for the privileged and influential. We believe this is exactly what those guarantees were designed to prevent. Special privileges and immunities are not favored by Arizona law." *Kenyon,* 142 Ariz. at 84, 688 P.2d at 76.

129. Because Arizona has no legislative history on the statute in question, it can only be assumed that the Arizona legislature had similar goals as other states, such as California, which have enacted similar statutes.

130. Section 101(D) of the Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,716 (Oct. 31, 1979) confirms the point: "[P]roduct liability insurance rates are set on the basis of countrywide, rather than individual state, experience." cited in Berry v. Beech Aircraft Corp., 717 P.2d 670, 682 (Utah 1985).

131. *See* Talmadge & Peterson, *supra* note 96, at 260-67.

> It will be no surprise when the 1986 tort reform legislation does not remedy the insurance crisis . . . . Members of the coalition of reform advocates and insurance industry maintained that restrictions on the victims' rights to secure recovery from wrongdoers—"tort reform"—would substantially solve the problem of increasing rates and unavailability of insurance. . . . On the other hand, many consumer groups and trial lawyers blamed insurers for high rates and scarce coverage, . . . rates were high because the industry was rebounding from a savage industry-wide price cutting war.

Id. at 260.

132. *Bernal v. Fainter* establishes the necessity test to be that the statute furthers the compelling interest "by the least restrictive means practically available." 467 U.S. 216 (1984).

133. *See supra* notes 126-28 and accompanying text.

134. It should also be noted that the Arizona Constitution guarantees the right to a trial by jury. ARIZ. CONST. art. II, § 23. Indeed, the plaintiff's right to have the jury award damages is inviolate. In order to fully realize this right the jury's award must be fully recognized, and not altered in any way. The Arizona Supreme Court is without authority to adopt a rule abridging, enlarging, or modifying the right to a jury trial. United States Fidelity and Guar. Co. v. State, 65 Ariz. 212, 177 P.2d 823 (1947). Article II, section 23 of the Arizona Constitution guarantees preservation of the right to a jury trial but does not actually grant that right; however, the Arizona Supreme Court has determined that a party is entitled to a jury trial as a matter of absolute right under this section. Mounce v. Wrightman, 30 Ariz. 45, 243 P. 916 (1926). Section 12-2506 requires that certain judgments be altered. *See supra* note 1. Situations previously covered by the doctrine of joint and several liablity which now fall under section 12-2506 will in some instances leave the tort victim with only a partial award. *See supra* note 1. The victim's right of a fully recognized jury award is no longer attainable under section 12-2506, and consequently, the statute appears to be unconstitutional in this context as well.

CONCLUSION

In the process of developing tort law, courts consider both the need for equitable results for all those involved in a tort claim and the necessity that the claimant be ensured compensation for his injuries. Although contributory negligence originally barred recovery for a plantiff in a negligence action, the adoption of comparative negligence has enabled the plaintiff to recover regardless of whether he or she is partially at fault. Joint and several liability allowed the plaintiff to recover from any defendant against whom a judgment was received.

Although defendants sometimes paid more than their share, with the passage of the Uniform Contribution Among Tortfeasors Act, defendants were able to seek contribution from other negligent defendants. Throughout history, the trend has been to ensure adequate compensation for the victims, while also providing a fair method of allocation of responsibility among the defendants. However, that trend is now being reversed through legislation abolishing the longstanding doctrine of joint and several liability.

Arizona's new statute will have a considerable effect on the doctrine of joint and several liablity. In time, the ramifications of Arizona Revised Statutes section 12-2506 and other similar statutes on the availability and affordability of liability insurance will become self-evident. Whatever is the true cause of the so-called insurance crisis, it is clear that the rule abolishing joint and several liability in Arizona is simply an attempt by the insurance companies to protect themselves from having to pay the entire judgment where one defendant is insolvent. By abolishing the doctrine of joint and several liability, the tort system, a system essential in protecting people in many aspects of their lives, is being eroded. In light of the blatant constitutional defects of Arizona's newest tort reform, this statute must be abolished.