ambulance service. The Court in Edwards rejected these arguments and stated that the test for establishing a proprietary function "cannot be whether the same thing is done by private entities" or whether a fee is charged. Rather the test applied by the Court in Edwards was "whether, in providing such services, the governmental entity is exercising the powers and duties of government conferred by law for the general benefit and well-being of its citizens."

In light of the holding in Edwards, the Administrator's argument that the Commission was engaged in a proprietary function cannot be sustained simply on the basis that the Commission charged a fee and provided a service which was not available to every citizen in the county and was also available from private sources.

Edwards is also instructive because of another similarity it shares with the instant case. In Edwards, former Code §32.1-156 required the City to make a finding that the ambulance services were necessary to preserve, protect, and promote public health, safety, and general welfare prior to authorizing the ambulance service. In making that finding and authorization, the City, according to Edwards, exercised its police powers and "the governmental aspect of the undertaking [was] controlling."

As in Edwards, prior to creating the Commission, Chesterfield County was required to find that there was a public need for the Commission and that the nursing services were necessary to protect the public health and welfare. Code §15.2-5202. The County's resolution stated that a public need existed for the establishment of the Commission, that the public health and welfare required the operation of public hospital facilities, "particularly nursing homes," and that the Commission was to operate the nursing home, hospital, or health center facility. While these declarations are not dispositive, they are more significant than the statutory declarations justifying expenditure of public funds cited in Hampton Redevelopment. As in Edwards, by enacting the resolution creating the Commission, the local government exercised its police power. Furthermore, the provision of nursing home services at issue here is of the same nature as the provision of emergency ambulance services in Edwards . . . and unlike the safe maintenance and operation of a housing project at issue in Hampton Redevelopment.

Considering our prior cases and the record here, we conclude that the provision of nursing services by the Commission was not a ministerial act of a proprietary nature, but an exercise of the County's police power for the common good and, thus, was governmental in nature. . . .

For the reasons stated, we conclude that the trial court did not err in holding that the Commission was entitled to immunity from tort liability in this case because the operation of a nursing home was a governmental function. Accordingly, the judgment of the trial court will be affirmed.

NOTES TO CARTER v. CHESTERFIELD COUNTY HEALTH COMMISSION

1. ***Difficulty in Applying the Governmental/Proprietary Distinction.*** The *Carter* court stated that much difficulty has been associated with using the governmental/proprietary distinction. In Harrell v. City of Norfolk, 578 S.E.2d 756 (Va. 2003), the plaintiff alleged that an unsafe material had been used by the city to mark a pedestrian crosswalk, and that its slipperiness had caused the plaintiff to fall. The Virginia Supreme Court noted that its cases apply immunity to negligent selection and

maintenance of traffic signals and that its cases have allowed liability for negligent maintenance of roadways. The court applied immunity, reasoning that the markings that delineate a crosswalk are more like a street's traffic signal than its pavement.

2. *Alternative Approaches for Municipal Tort Liability.* Restatement (Second) of Torts §895C(2) provides that local government entities are immune from tort liability only for their acts or omissions "constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an administrative function involving the determination of fundamental governmental policy."

Supporting this position, a justice of the Vermont Supreme Court wrote: "The goal should be to place municipalities on an equal footing with private corporate entities with respect to responsibility for injuries caused by the common torts of their employees, but to shield them from liability for acts and omissions that are policy-based or that are adjudicative, legislative, or regulatory in nature." Hillerby v. Town of Colchester, 706 A.2d 446, 458 (Vt. 1997) (dissenting opinion).

B. Intrafamilial Immunity

Common law rules traditionally prevented suits by one family member against another. This bar was meant to preserve family harmony, to protect insurance companies from false claims, and to avoid using judicial resources just to transfer wealth from one family member to another. Protecting parental discretion, authority, and control has been another concern. Modern perspectives on these issues have changed, and the common law immunities have been widely modified.

Jurisdictions have made a wide variety of changes in these doctrines. Boone v. Boone considers reasons underlying the nearly total abolition of interspousal immunity while Broadwell v. Holmes compares various approaches states take to parent-child immunity.

BOONE v. BOONE

546 S.E.2d 191 (S.C. 2001)

BURNETT, J.

The question presented by this appeal is whether interspousal immunity from personal injury actions violates the public policy of South Carolina. We conclude it does.

Appellant Juanita Boone (Wife) was injured in a car accident in Georgia. At the time of the accident, Wife was a passenger in a vehicle driven by her husband Respondent Freddie Boone (Husband). Wife and Husband reside in South Carolina.

Wife brought this tort action against Husband in South Carolina. Concluding Georgia law which provides interspousal immunity in personal injury actions was applicable, the trial judge granted Husband's motion to dismiss. Wife appeals. We reverse.

Issue. Does Georgia law providing interspousal immunity in personal injury actions violate the public policy of South Carolina? Interspousal immunity is a common law doctrine based on the legal fiction that husband and wife share the same identity in law,

namely that of the husband. 92 A.L.R.3d 901 (1979). Accordingly, at common law, it was "both morally and conceptually objectionable to permit a tort suit between two spouses."

With the passage of Married Women's Property Acts in the mid-nineteenth century, married women were given a legal estate in their own property and the capacity to sue and be sued. Under this legislation, a married woman could maintain an action against her husband for any tort against her property interest such as trespass to land or conversion. Since the legislation destroyed the "unity of persons," a husband could also maintain an action against his wife for torts to his property. See 1 Dan B. Dobbs, The Law of Torts §279 (2001).

For a long time, however, the majority of courts held Married Women's Property Acts did not destroy interspousal immunity for personal torts. Courts adopted two inconsistent arguments in favor of continued immunity. First, they theorized suits between spouses would be fictitious and fraudulent, particularly against insurance companies. Second, they claimed interspousal suits would destroy domestic harmony.

In the twentieth century, most courts either abrogated or provided exceptions to interspousal immunity. South Carolina has abolished the doctrine of interspousal immunity from tort liability for personal injury. S.C. Code Ann. §15-5-170 (1976) ("[a] married woman may sue and be sued as if she were unmarried.")

Very few jurisdictions now recognize interspousal tort immunity.

Georgia continues to recognize the common law doctrine of interspousal immunity. Under Georgia law, interspousal tort immunity bars personal injury actions between spouses, except where the traditional policy reasons for applying the doctrine are absent, i.e., where there is no marital harmony to be preserved and where there exists no possibility of collusion between the spouses.

Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti,* the law of the state in which the injury occurred. However,

> foreign law may not be given effect in this State if 'it is against good morals or natural justice . . . ' . . .

Although South Carolina had abolished the doctrine of interspousal immunity from tort liability for personal injury thirty years before, this Court held it would apply the law of the foreign state even if it recognized interspousal immunity. Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964). If a spouse had no right of action against her spouse where the tort occurred, the action would not be enforced in South Carolina.

In Algie v. Algie, 261 S.C. 103, 198 S.E.2d 529 (1973), the Court expressly declined to overrule Oshiek v. Oshiek, supra. In *Algie,* the parties lived in Florida. The wife was injured in an airplane accident in South Carolina. Her husband had piloted the airplane. The husband urged the Court to apply Florida law which, at that time, recognized interspousal immunity. The Court declined, noting "[w]e are not persuaded that this result would be in furtherance of justice." Id., 261 S.C. at 106, 198 S.E.2d at 530.

It is the public policy of our State to provide married persons with the same legal rights and remedies possessed by unmarried persons. Had the parties to this action not been married to each other, Wife could have maintained a personal injury action against Husband. We find it contrary to "natural justice," see Rauton v. Pullman Co., supra, to hold that because of their marital status, Wife is precluded from

maintaining this action against Husband. Accordingly, we conclude application of the doctrine of interspousal immunity violates the public policy of South Carolina.

Moreover, the reasons given in support of interspousal immunity are simply not justified in the twenty-first century. There is no reason to presume married couples are more likely than others to engage in a collusive action. Whether or not parties are married, if fraudulent conduct is suspected, insurers can examine and investigate the claim and, at trial, cross-examine the parties as to their financial stakes in the outcome of the suit. Fraudulent claims would be subject to the trial court's contempt powers and to criminal prosecution for perjury and other crimes. It is unjustified to prohibit all personal injury tort suits between spouses simply because some suits may be fraudulent.

Additionally, we do not agree that precluding spouses from maintaining a personal injury action against each other fosters domestic harmony. Instead, we find marital harmony is promoted by allowing the negligent spouse, who has most likely purchased liability insurance, to provide for his injured spouse.

Furthermore, in Georgia, spouses may maintain an action against each other for torts committed against their property. If suits encompassing one type of tort are permitted between spouses, we fail to see how suits encompassing a different tort should be prohibited under the guise of protecting domestic tranquility. In our opinion, marital disharmony will not increase because married persons are permitted to maintain a personal injury action against each other. . . .

Because interspousal immunity violates the public policy of South Carolina, we will no longer apply the *lex loci delicti* when the law of the foreign state recognizes the doctrine. Oshiek v. Oshiek, supra, is overruled.

Reversed.

BROADWELL v. HOLMES

871 S.W.2d 471 (Tenn. 1994)

REID, J.

This case presents for review the judgment of the Court of Appeals dismissing a suit on behalf of two unemancipated minor children against their mother for personal injuries to one child and for the wrongful death of the other child. The children were injured while riding as passengers in an automobile operated by the mother. The trial court found that the complaint did not state a cause of action, and the Court of Appeals affirmed.

This Court granted permission to appeal in order to re-examine the parental immunity doctrine, first adopted in this state in McKelvey v. McKelvey, 77 S.W. 664 (1903), and most recently reaffirmed in Barranco v. Jackson, 690 S.W.2d 221 (Tenn. 1985), a case in which the dissent advocated that parental immunity be abolished in "automobile tort" cases.

In the case before the Court, Mindy Elaine Broadwell, age 8, and Justin L. Broadwell, age 6, were passengers in a pickup truck driven by their mother, the defendant, when the vehicle was involved in an accident. The complaint alleges that the defendant negligently lost control of the vehicle and that her negligence proximately caused the death of Mindy and serious bodily injuries to Justin. The suit was brought on behalf of the children by their father as next friend. At the time of the accident, the parents were divorced, and the mother had custody of the children.

The majority in *Barranco* declined to discuss the substantive issue of whether the parental immunity doctrine should be modified, observing only that the doctrine "has continuing vitality and should be adhered to unless modified or changed by action of the General Assembly." Id. at 222. Therefore, the first matter for consideration is whether the court will persist in the view expressed by the majority in *Barranco,* that it has no role in the development of the law in this area. . . .

The dissent in *Barranco* reviewed the development of parental immunity beginning with the doctrine's initial adoption by the Mississippi Supreme Court in Hewellette v. George, 9 So. 885 (Miss. 1891), and noted that the doctrine had been subjected to criticism and modification in recent decisions. The dissent concluded:

> [T]he sole policy consideration which justifies its application [is] a parent's right to discipline and use discretion in the care and rearing of children.

Since the decision in *Barranco,* the trend to modify the parental immunity doctrine has continued. Although state courts have continued to modify parental immunity, the decisions have established no uniform standard for imposing parental liability. However, the cases uniformly exempt from liability, expressly or implicitly, conduct, whether acts or omissions, incident to the exercise of parental authority and supervision.

In the first case in which the parent-child immunity doctrine was modified, the Supreme Court of Wisconsin expressed the concern that total abrogation of the doctrine would unduly interfere with parental authority and discipline. Goller v. White, 122 N.W.2d 193 (1963). In an effort to prevent such interference, the court abrogated immunity in all cases except those involving the exercise of parental authority over the child and/or the exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care. Id. 122 N.W.2d at 198. This approach reflects a recognition that the parent-child relationship is unique and that traditional negligence concepts cannot be applied in situations where the relationship is involved.

Several courts have adopted the *Goller* approach with minor variations of the standard. In Sandoval v. Sandoval, 623 P.2d 800, 803 (Ariz. 1981), the court stated that the immunity applies only if "the parent breached a duty owed to a child within the family sphere" rather than to the world at large. In Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971), the court further varied the *Goller* standard. Instead of listing specific activities as to which a parent is immune in the use of ordinary parental discretion, the court narrowed the applicability of the immunity to parental acts of ordinary discretion used "with respect to provisions for the care and necessities of the child." Id. at 923. The Supreme Court of Michigan adopted the *Goller* approach but varied it by substituting the term "reasonable" for "ordinary." Plumley v. Klein, 199 N.W.2d 169, 173 (1972). In Cates v. Cates, the Illinois Supreme Court modified the *Goller* approach by limiting immunity to "conduct inherent to the parent-child relationship." Cates v. Cates, 189 Ill. Dec. at 28, 619 N.E.2d at 729.

Other courts have created their own standards regarding the immunity applicable in parent-child tort actions. In Gibson v. Gibson, 3 Cal. 3d 914, 92 Cal. Rptr. 288, 293, 479 P.2d 648, 653 (1971), the California Supreme Court held that the proper test of a parent's conduct is: "What would an ordinary, reasonable and prudent *parent* have done in similar circumstances?" One of the states originally following the *Goller* approach has rejected it in favor of the reasonable parent standard. In Anderson v.

Stream, 295 N.W.2d 595 (Minn. 1980), the Minnesota Supreme Court rejected the *Goller* approach it had adopted earlier in Silesky v. Kelman, 161 N.W.2d 631 (1968). In *Anderson*, the court reasoned that the *Goller* standard was not very helpful because it still required a case-by-case analysis to determine whether the conduct at issue was within one of the exemptions. The court also was concerned that the standard added "to the potential for arbitrary decision-making in the area." 295 N.W.2d at 598. The determinative consideration for the court's holding was "that the areas of parental authority and discretion, for which the *Silesky* exceptions were designed to provide safeguards, can be effectively protected by use of a 'reasonable parent standard.'" Id.

Another approach to modifying the parental immunity doctrine was articulated by the New York Court of Appeals in Holodook v. Spencer, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 338 (1974), in which it was alleged that the minor child's mother had negligently supervised her child when, as a result of being left untended, the child wandered into the street where she was struck by a passing automobile. Though noting the parents' obligations to support, guide, protect, and supervise their children, the court held that negligent supervision was not a tort actionable by the child, reasoning that there are very few accidental injuries to children that could not have been prevented by more intense parental supervision. Id. 364 N.Y.S.2d at 865-67, at 342-43. That court stated that imposing a parental duty of "constant surveillance and instruction" would place an overwhelming burden on parents since it is virtually impossible to supervise a child 24 hours a day. Nevertheless, the *Holodook* court went on to say that when there is a breach of a recognized duty ordinarily owed apart from the family relationship, the law will not withhold liability merely because the parties are parent and child. Id. at 870-71, 324 N.E.2d at 346. The *Holodook* court criticized the reasonable parent standard for its attempt to apply a uniform standard of parental conduct across the spectrum of different economic, educational, cultural, ethnic, and religious backgrounds. The court stated that to apply the reasonable parent standard "would be to circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence." Id. at 871, 324 N.E.2d at 346.

The exemption from liability recognized in these cases is not based on the absence of a duty of care. Obviously, parents owe a high duty of care to their children. However, the rights, responsibilities, and privileges of parents in relation to their children are so unique that the ordinary standards of care which regulate conduct between others are not applicable to conduct incident to the particular relationship of parent and child. That relationship includes responsibilities not owed by parents to any persons other than their children; these responsibilities are inseparable from the privileges that parents have in rearing their children which are not recognized in any other relationship.

> Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand. . . . Consequently, [a]llowing a cause of action for negligent supervision would enable others, ignorant of a case's peculiar familial distinctions and bereft of any standards, to second-guess a parent's management of family affairs. . . .

Paige v. Bing Construction Co., 61 Mich. App. 480, 233 N.W.2d 46, 49 (1975). Even though the courts routinely and successfully intervene in order to protect a child when the parent's conduct towards the child is criminal or where the child's physical or mental health is seriously endangered, the court system is not an appropriate or

effective forum for resolving controversies between parent and child, when such controversies necessarily involve ethical, religious, moral, or cultural values.

The parental right to govern the rearing of a child has been afforded protection under both the federal and state constitutions. This Court has stated, "Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases convince us that parental rights constitute a fundamental liberty interest under Article I, Section 8 of the Tennessee Constitution." Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1973).

Courts have expressed a concern that without the imposition of parent-child immunity, juries would feel free to express their disapproval of what they consider to be unusual or inappropriate child rearing practices by awarding damages to children whose parents' conduct was only unconventional. Courts also properly have found that parents whose "[p]hysical, mental or financial weakness [causes them] to provide what many a reasonable man would consider substandard maintenance, guidance, education and recreation for their children, and in many instances to provide a family home which is not reasonably safe as a place of abode," should not be liable to the child for these "unintended injuries." Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771, 774 (1964) (*en banc*), overruled by Heino v. Harper, 306 Or. 347, 759 P.2d 253 (1988) (abolishing interspousal immunity). Such imposition of liability could effectively curtail the exercise of constitutionally guaranteed parental discretion in matters of child rearing. Consequently, it reasonably can be argued that parental immunity that relates to the right and duty to rear children implements a constitutional right.

However, the relationship between parents and their children is not exclusively that of parent-child. A parent's conduct that injures a child may be outside the scope of their relationship as parent-child, and a child may be injured by a parent's conduct that is not in the exercise of parental authority, supervision, care, or custody. Consequently, the scope of the exemption from liability should be limited or defined by the purpose for granting the immunity, and the definition of the duty alleged to have been breached will disclose whether there is immunity. See Cates v. Cates, 619 N.E.2d at 729.

The Court's essential task is to craft an objective standard, recognized in the above cases, that defines the conduct that should be protected by a parental immunity. The principle is perhaps most precisely stated in Cates v. Cates. In *Cates,* as in the case before the Court, the plaintiff was injured while riding in an automobile operated by her parent. The court declined to limit the modification of parental immunity to automobile negligence cases, finding that "there is no fundamental distinction between automobile negligence situations and other negligence scenarios." 619 N.E.2d at 720. The Illinois court, instead, limited immunity to "conduct [that] concerns parental discretion in discipline, supervision and care of the child." 619 N.E.2d at 729. The court stated:

> [I]mmunity should afford protection to conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child. These limited areas of conduct require the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective, background, experience, and culture which only a parent and his or her child can bring to the situation; our legal system is ill-equipped to decide the reasonableness of such matters.

Parental immunity in Tennessee is limited to conduct that constitutes the exercise of parental authority, the performance of parental supervision, and the provision of parental care and custody. The operation of an automobile under the circumstances alleged in this case is not protected conduct under this standard.

This decision applies to all cases tried or retried after the date of this opinion and all cases on appeal on the date of this opinion in which a claim challenging the parental immunity doctrine was asserted in the trial court and preserved for appeal. Those cases in conflict with this decision, including McKelvey v. McKelvey and Barranco v. Jackson, are overruled.

The judgments of the trial court and the Court of Appeals are reversed, and the case is remanded for further proceedings consistent with this opinion.

NOTES TO BOONE v. BOONE AND BROADWELL v. HOLMES

1. ***Policy Approaches to Intrafamilial Immunity.*** Interspousal immunity was totally abolished in South Carolina, but parental immunity was retained in a limited form in Tennessee. How are the policy arguments in favor of and opposed to interspousal immunity different from those in favor of and opposed to parental immunity?

2. ***Alternative Approaches to Parent-Child Suits.*** Currently, a small number of states have no parent-child immunity doctrine, either because they have abrogated it completely or because they had never adopted it. Some other states have abolished the doctrine only with respect to particular activities, such as automobile accidents.

Jurisdictions partially abrogating the immunity have adopted different approaches to accommodating a child's right to sue with parental rights to discipline and use discretion in child care. The California approach in Gibson v. Gibson and the New York approach in Holodook v. Spencer, both discussed in *Broadwell,* and the Tennessee rule adopted in *Broadwell* represent the range of variations. For the following activities, which of the three approaches would provide parents with immunity from a suit brought by a child?

A. Child passenger injured when automobile negligently driven by her parent hits a tree while going to the grocery store.

B. Child burned when his parent lets campfire get out of control and burn 100 acres of national forest during vacation trip.

C. Child injured when her parent punishes child by hitting repeatedly with a baseball bat.

D. Child's hand mangled when using snowblower as negligently instructed by his father.

VI. Statutes of Limitation and Repose

Tort law imposes two types of limits on the length of time that may elapse between an injury and the filing of a lawsuit about the injury. A *statute of limitations* relates to the time a plaintiff should reasonably have known that he or she had a legal claim and bars a claim unless it is filed within a certain period after that time. A *statute of repose* relates to the time when a defendant committed the act or omission that is the basis for a plaintiff's claim and bars a claim unless it is filed within a certain period after that time,

even if the statute of limitations would not bar the claim. These statutes are designed to ensure that cases are tried when memories are fresh and evidence is relatively easy to obtain. Some suggest that the court system should be relieved of the burden of trying "stale" claims where a plaintiff has "slept on" his or her rights.

Hanley v. Citizens Bank of Massachusetts presents the *discovery rule*, which governs when the time period for a statute of limitations begins — that is, when the time "begins to run." Kern v. St. Joseph's Hospital demonstrates the effect of a defendant's *fraudulent concealment* that keeps a plaintiff from knowing that he or she had a legal claim. Fraudulent concealment *tolls* a statute of limitations, stopping the clock during the concealment period. Sedar v. Knowlton Construction Company involves a statute of repose applicable to construction and real property.

HANLEY v. CITIZENS BANK OF MASSACHUSETTS

2001 WL 717106 (Mass. Super.)

BURNES, J.

This case arises out of a negligence claim filed by Plaintiff, James M. Hanley ("Hanley") against Defendant, Citizens Bank of Massachusetts ("Citizens"). Hanley alleges that as a result of Citizens' negligence, he sustained personal injuries during a bank robbery. Hanley has asserted only one count for negligence (Count I) as to the bank. Citizens now moves to dismiss Hanley's complaint on the grounds that . . . Hanley's complaint is barred by the statute of limitations . . .

On or about February 10, 1990, Hanley was employed as a security guard by Metropolitan Security Service ("Metropolitan"). Metropolitan assigned Hanley to a branch of the Somerset Savings Bank ("Somerset") [which later merged into Citizens Bank], located at 40 Union Square, Somerville, Massachusetts ("Union Branch").

On the night of February 9, 1990, an alarm sounded at the Union Branch and the police responded by arriving on the scene at the bank. However, the police did not enter the bank since no one from the bank was present to allow the police to gain entry into the building.

On the morning of February 10, 1990, Hanley entered the Union Branch and robbers "disarmed him, kicked him repeatedly, held a gun to his head and threatened to execute him." The robbery was committed by the "Hole-in-the-Roof Gang." This gang has been known to rob numerous greater Boston banks by cutting a hole in the roof of the target bank at night, entering the bank and waiting for bank employees to arrive in the morning. In the morning, the gang forces the bank employees to open the vault at gun point.

On or about March 17, 1997, the first jury trial of the "Hole-in-the-Roof Gang" began in federal court. Hanley first discovered that the Somerville police responded to an alarm at the Union Branch on February 9, 1990, and could not enter the bank to inspect the interior because nobody from the bank responded to the alarm to enable the police to gain entry.

Specifically, Hanley alleges that the bank was negligent in hiring, training, and supervising the bank personnel in charge of the security of the Union Branch on February 9, 1990 and February 10, 1990. In addition, Hanley asserts that the bank was negligent in failing to investigate and failing to allow the Somerville Police to enter the Union Branch on February 9, 1990.

General Laws chapter 260, §2A provides, "Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries and actions of replevin, shall be commenced only within three years next after the cause of action accrues." This incident occurred on February 10, 1990 and this suit was commenced on March 14, 2000. Therefore, Citizens argues that the three-year statute of limitations has expired.

Hanley argues that his claim is not barred by the statute of limitations since the discovery rule is applicable to this case. The discovery rule provides that "the statute of limitations does not run against a claim until 'an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.'" Bernier v. Upjohn Co., 144 F.3d 178, 180 (1st Cir. 1998), citing Bowen v. Eli Lilly & Co., 408 Mass. 204 (1990).

In *Bernier*, the First Circuit also stated that "[p]ut another way, the statute runs from the point at which a reasonably prudent person in the plaintiff's position, 'reacting to any suspicious circumstances of which he might have been aware,' would have discovered that another party might be liable for her injury." Bernier v. Upjohn Co., 144 F.3d 178, 180 (1st Cir. 1998), citing Malapanis v. Shirazi, 21 Mass. App. Ct. 378 (1986).

In this case, it is clear that Hanley failed to take steps to ascertain that he might have been injured by the bank's negligence. It is obvious that Hanley knew of the robbers' presence in the bank at the time he arrived and acting in a reasonably prudent manner, he could have investigated the lack of response by the bank to the alarm, and thus discovered whether he had a cause of action against the bank. Instead, Hanley argues that he only discovered the lack of response by the bank at the criminal trial in federal court. Hanley's failure to investigate facts that could have been known to him immediately after the robbery bars this claim under the discovery rule and ultimately under the statue of limitations. See Bowen v. Eli Lilly & Co., 409 Mass. 204, 211 (1990) (holding that "reasonable notice that a particular product or a particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations"). Accordingly, Citizens' Motion to Dismiss is allowed.

KERN v. ST. JOSEPH'S HOSPITAL

697 P.2d 135 (N.M. 1985)

FEDERICI, C.J. . . .

Petitioner's decedent, Dale Kern, received external beam radiation therapy for cancer of the bladder at St. Joseph Hospital in Albuquerque, New Mexico. The treatments were administered by defendant-respondent Dr. Simmons, an employee of defendant-respondent, X-Ray Associates, from August 16, 1977, through September 22, 1977. Kern and his wife were told by Dr. Simmons that Kern's therapy would consist of 30 treatments of radiation. After Kern had received 25 treatments, however, the therapy was discontinued without explanation. When Kern and his wife asked Dr. Simmons the reason for the early termination of the therapy, Dr. Simmons did not respond and appeared to stare off in the other direction. After the radiation treatments, Kern experienced problems with frequency of urination and the passing of blood in his bowel movements and urine. Kern died on August 30, 1982. The cause of death listed on the death certificate was sepsis-urinary tract infection due to or as a consequence of irradiation cystitis and proctitis and/or urinary bladder cancer.

Both Kern and his wife believed that the problems Kern experienced after the radiation therapy were acceptable complications of the treatments. They were never informed that Kern had received an excessive amount of radiation. However, after reading a newspaper article in 1981 regarding excessive radiation having allegedly been administered at St. Joseph Hospital, they began to suspect the propriety of Kern's treatment. Kern and his wife employed a lawyer to investigate whether Kern's radiation therapy had been administered properly.

This lawsuit was filed on March 21, 1983, by Kern's widow in her capacity as personal representative of her husband's estate. She alleged that her husband's death was due to the negligent administration and calculation of external beam radiation therapy. Dr. Simmons and X-Ray Associates filed a motion for summary judgment contending that petitioner's lawsuit was barred by [New Mexico Statutes §41-5-13 (Repl. Pamp. 1982):

> No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act [ch. 41, art. 5 N.M. Stat. Ann. 1978] may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This subsection [section] applies to all persons regardless of minority or other legal disability.]

The trial court and the Court of Appeals agreed. . . .

We recognize that this statute may be harsh when applied to latent injury cases. Although the "wrongful act rule," as our type of statute has become known, was once the general rule, it is now generally disfavored and many states have enacted some form of discovery provision which typically provides for the cause of action not to accrue until the patient discovers or should have discovered the injury. Any changes to our statute, however, should be made by the Legislature and not by the courts.

In the present case, petitioner's lawsuit was filed more than three years after Kern's last radiation treatment and is barred by Section 41-5-13 unless the statute was tolled by the doctrine of fraudulent concealment. New Mexico recognizes the doctrine of fraudulent concealment in medical malpractice actions. The doctrine is based not upon a construction of the statute, but rather upon the principle of equitable estoppel. The theory is premised on the notion that the one who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of limitations as a defense.

In *Hardin*, the court recognized the estoppel nature of fraudulent concealment and stated:

> We therefore conclude that where a party against whom a cause of action accrues prevents the one entitled to bring the cause from obtaining knowledge thereof by fraudulent concealment, or where the cause is known to the injuring party, but is of such character as to conceal itself from the injured party, the statutory limitation on the time for bringing the action will not begin to run until the right of action is discovered, or, by the exercise of ordinary diligence, could have been discovered.

Hardin v. Farris, 87 N.M. at 146, 530 P.2d at 410 (citations omitted). Silence may sometimes constitute fraudulent concealment where a physician breaches his fiduciary duty to disclose material information concerning a patient's treatment. Hardin v. Farris. The statute of limitations, however, is not tolled if the patient knew, or through

the exercise of reasonable diligence should have known, of his cause of action within the statutory period. If tolled by fraudulent concealment, the statute commences to run again when the patient discovers, or through the exercise of reasonable diligence should have discovered, the malpractice.

To toll the statute of limitations under the doctrine of fraudulent concealment, a patient has the burden, therefore, of showing (1) that the physician knew of the alleged wrongful act and concealed it from the patient or had material information pertinent to its discovery which he failed to disclose, and (2) that the patient did not know, or could not have known through the exercise of reasonable diligence, of his cause of action within the statutory period. . . .

When we consider the record, we find that petitioner did present sufficient evidence to raise an issue of material fact regarding Dr. Simmons' knowledge of excessive radiation having been administered to Kern. The record reveals that in opposition to respondent's motion for summary judgment, petitioner presented the affidavit of a doctor knowledgeable in the field of therapeutic radiology who stated that although the intended treatment plan for Kern conformed with the customary standards at that time, the dose levels given did not follow the plan and were greatly excessive and that such dose levels "will cause unacceptable complications such as those recorded in the medical records as being suffered by Dale Kern, deceased." In addition, the affidavit of a radiation physicist stated, "Whoever calculated the treatment times needed to implement this treatment plan performed a *gross calculation error.*" (Emphasis added.) Petitioner also presented her own affidavit which contained the facts set forth at the beginning of this opinion.

In support of his motion for summary judgment, Dr. Simmons filed an affidavit denying knowledge of any malpractice and denying concealment of any material facts. Resolving, however, all doubts in favor of petitioner, we find the evidence sufficient to create a fact issue. The early termination of the treatments without explanation, Dr. Simmons' failure to answer the Kerns' question concerning the early termination, and the statements in the affidavits filed by petitioner lend possible support to petitioner's claims of excessive radiation having been given to Kern, and of "a gross calculation error" having been made in implementing Kern's treatment plan.

Summary judgment was improperly granted. The trial court and the Court of Appeals are reversed. The case is remanded to the trial court for proceedings consistent with this opinion.

SEDAR v. KNOWLTON CONSTRUCTION COMPANY

551 N.E.2d 938 (Ohio 1990)

Syllabus by the Court. . . .

Appellant, Michael R. Sedar, was a nineteen-year-old student at Kent State University when, on September 11, 1985, he was severely injured by passing his right hand and arm through a panel of wire-reinforced glass in one of the doors of his dormitory, Clark Hall. Clark Hall had been designed between 1961 and 1963 by appellee Larson & Nassau, architectural engineers (formerly known as Fulton, DelaMotte, Larson & Nassau). Appellee Knowlton Construction Company (now known as Arga Company) of Bellefontaine, Ohio, was the general contractor throughout the construction of Clark Hall, which construction was completed by December 31, 1966.

On April 8, 1987, appellant filed this action, alleging that appellees had been negligent and careless in the design and/or construction of Clark Hall including the door containing the glass panel on which he was injured. Appellees moved for summary judgment on the basis that appellant's claim was barred by the ten-year statute of repose provided in R.C. 2305.131. On November 18, 1987, the trial court granted summary judgment in favor of appellees.

The court of appeals affirmed. . . .

HOLMES, J.

We are asked in this case to decide whether R.C. 2305.131 may constitutionally prevent the accrual of actions sounding in tort against architects, construction contractors and others who perform services related to the design and construction of improvements to real property, where such action arises more than ten years following the completion of such services. For the reasons which follow, and as applied to bar the claims of appellant herein, we answer such query in the affirmative.

R.C. 2305.131 provides:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought against any person performing services for or furnishing the design, planning, supervision of construction, or construction of such improvement to real property, more than ten years after the performance or furnishing of such services and construction. This limitation does not apply to actions against any person in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

This ten-year statute of repose applies to architects, construction contractors and others who supply services in the design, planning, supervision of construction or construction of buildings and other improvements to real property. Unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statute of repose, such as R.C. 2305.131, potentially bars a plaintiff's suit *before* the cause of action arises. . . .

All legislative enactments enjoy a presumption of constitutionality. . . .

The legislature's choice of ten years to achieve its valid goal of limiting liability here was neither unreasonable nor arbitrary. An oft-quoted study presented to a committee of the United States House of Representatives studying a similar statute of repose for the District of Columbia revealed that 89.7 percent of all claims against architects were brought within five years of completion of the building, *99.6 percent* of all such claims were brought within ten years, and 100 percent of all such claims were brought within fourteen years. See Comment, Limitation of Action Statutes for Architects and Builders, supra, at 367. Indeed, a substantial majority of states have found no due process violations in similar statutes, some of which afford periods as brief as four years.

We realize that faded memories, lost evidence, unavailable witnesses and intervening negligence hinders plaintiffs, who bear the burden of proving negligence, as well as defendants. We also recognize that R.C. 2305.131 bars *all* claims after ten years, whether meritorious or frivolous. However, we do not sit in judgment of the wisdom of legislative enactments. ". . . [A] court has nothing to do with the policy or wisdom of a

statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power." State, ex rel. Bishop, v. Bd. of Edn. (1942), 40 N.E.2d 913, 919. We agree that "[t]he Legislature could reasonably conclude that the statistical improbability of meritorious claims after a certain length of time, . . . and the inability of the courts to adjudicate stale claims weigh more heavily than allowing the adjudication of a few meritorious claims. . . ." *Klein* [v. Catalano, 437 N.E.2d 514, 521, fn. 11 (Mass. 1982)] Thus, we hold that R.C. 2305.131 does not violate the due course of law provision of Section 16, Article I of the Ohio Constitution.

. . . [T]he differences in work conditions provide a rational basis for limiting the liability of architects and builders, but not materialmen:

> . . . Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involv[e] individual expertise not susceptible of the quality control standards of the factory. . . . Burmaster v. Gravity Drainage Dist. No. 2 (La. 1978), 366 So. 2d 1381, 1386.

Moreover, some courts have upheld these distinctions as "necessary to encourage . . . [architects and builders] to experiment with new designs and materials. . . ." *Klein*, supra]. ". . . Design creativity might be stifled if architects and engineers labored under the fear that every untried configuration might have unsuspected flaws that could lead to liability decades later." O'Brien v. Hazelet & Erdal (1980), 299 N.W.2d 336, 342. . . .

We hold that R.C. 2305.131 does not violate the equal protection guarantees of the Ohio and United States Constitutions by limiting the liability of architects and builders without corresponding limits on the liability of occupiers of improvements to real property and materialmen supplying materials used in the construction of such improvements. Because we also have held that the statute does not violate either the due process or right-to-a-remedy provisions of Section 16, Article I of the Ohio Constitution, we thus affirm the court of appeals.

NOTES TO HANLEY v. CITIZENS BANK OF MASSACHUSETTS, KERN v. ST. JOSEPH'S HOSPITAL, AND SEDAR v. KNOWLTON CONSTRUCTION COMPANY

1. ***Differences Between Statutes of Repose and Limitation.*** Statutes of limitation generally begin to run from the time a person could have discovered that he or she had a legal claim, as discussed in *Hanley*. Statutes of repose generally begin to run from the time of the tortious conduct, as in *Kern* and *Sedar*. What social policies support the differences in these two types of statutes? Why should some claims be accepted even if they are brought long after the time of the defendant's conduct, so long as they are brought fairly soon after the plaintiff discovers the conduct? If this scenario is acceptable for some kinds of claims, why should statutes of repose identify particular types of harmful conduct and give it a different type of protection?

2. *Fraudulent Concealment.* A defendant's fraudulent concealment of information that would enable an individual to suspect the defendant's tortious conduct will toll any type of statute of limitations. This doctrine was particularly significant for the plaintiff in *Kern,* because the statute in that case would have continued to protect the defendant if the plaintiff's only basis for avoiding the statute had been a showing that the plaintiff could not have known through the exercise of reasonable diligence about the cause of action within the statutory period.

Statute: EFFECT OF DISABILITY

Tex. Civ. Prac. & Rem. Code §16.001 (2002)

(a) For the purposes of this subchapter, a person is under a legal disability if the person is:

(1) younger than 18 years of age, regardless of whether the person is married; or

(2) of unsound mind.

(b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.

(c) A person may not tack one legal disability to another to extend a limitations period.

(d) A disability that arises after a limitations period starts does not suspend the running of the period.

Statute: CLAIM BY MINOR AGAINST PROVIDER OF HEALTH CARE; LIMITATIONS

Mass. Gen. Laws ch. 231 §60D (2000)

Notwithstanding the provisions of section seven of chapter two hundred and sixty, any claim by a minor against a health care provider stemming from professional services or health care rendered, whether in contract or tort, based on an alleged act, omission or neglect shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

Statute: TEN YEARS; DEVELOPER, CONTRACTOR, ARCHITECT, ETC.

Cal. Civ. Proc. Code §337.15 (2002)

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or

construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

Statute: LIMITATION OF ACTIONS

Tenn. Stat. §29-28-103 (2002)

(a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by [statutes of limitations in other sections] but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

Statute: ATTORNEYS

Ill. Comp. Stat. ch. 735 5/13-214.3(b), (c) (2002)

(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced with 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

(c) An action described in Subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

NOTES TO STATUTES

1. ***Tolling of Statutes of Limitation for Children and Certain Disabled People.*** Another circumstance suspends the running of the statute of limitations to protect children and others who are not able to care for their own property or protect their own rights. A disability exception ensures that those individuals' rights to bring suit will not be precluded by the running of the statute of limitations. An example of a statutory provision that tolls the statute until a child reaches the age of majority appears in §16.001(b) of the Texas Civil Practice and Remedies Code.

2. ***Combining Statutes of Repose and Limitation.*** A lawyer must be alert to the combined effect of statutes of limitation and statutes of repose. Statutes of repose may limit the application of the discovery rule and bar recovery even though the plaintiff

had insufficient time to discover that he or she had a claim. States differ about whether fraudulent concealment tolls statutes of repose. Statutes of repose may also reduce the effect of the disability exception, as the Massachusetts statute does. Even though the disability exception to the statute of limitations may generally toll the statute of limitations until a child reaches his or her majority, the statute of repose for health care providers in Massachusetts creates a maximum time from the occurrence of the tortious act.

3. *Other Contexts for Statutes of Repose.* In addition to activity related to "improvements to land," illustrated in *Sedar,* statutes of repose are important in medical and legal malpractice and products liability cases. Note how limitation periods and repose periods are combined in the California, Tennessee, and Illinois statutes.

CHAPTER 8

APPORTIONMENT OF DAMAGES

I. Introduction

When tortious actions by multiple individuals are legal causes of a plaintiff's injury, tort law allocates responsibility for damages among those individuals. This apportionment used to be accomplished with a few clear rules that were based on an "all or nothing" approach to responsibility for injuries. They allocated all of the responsibility to either the plaintiff or the defendants. In contrast, modern tort law increasingly recognizes proportional and shared responsibility among plaintiffs and defendants.

The Defenses chapter examined multiple-cause cases in which one of the causes was the plaintiff's own negligence. As that chapter shows, when a plaintiff's injury is caused by a combination of negligent conduct by the plaintiff and one or more defendants, a small minority of jurisdictions allocate *all* of the responsibility to the *plaintiff*. Most jurisdictions now use doctrines that spread the responsibility among the *plaintiff* and the *defendant* or *defendants* in many of these cases. Contributory negligence and comparative negligence doctrines answer the question, "When the plaintiff's conduct is one of the legal causes of the plaintiff's injury, does tort law allocate entire responsibility to the plaintiff, or will the plaintiff be entitled to receive some damages?"

This chapter deals with multiple-cause cases in which a jurisdiction does allow a plaintiff to recover damages. In some of these cases the plaintiff's own negligent conduct was a cause, but the jurisdiction's rules still allow the plaintiff some recovery. In other cases, the multiple causes are all negligent conduct by defendants, and the plaintiff's conduct was not tortious. For all of these cases, the primary question is "How much should each defendant pay?" If there are two or more defendants, tort law must determine the share of the damages for which each defendant is liable.

II. Apportioning Damages Among Liable Defendants

When more than one defendant's conduct is a legal cause of a plaintiff's injury and the plaintiff is entitled to recover damages, there are two solutions to the question of how

much each defendant should pay. Common law recognized a system known as *joint and several liability,* with related doctrines of *contribution* and *indemnity.* Modern comparative fault systems sometimes apply joint and several liability and sometimes apply another doctrine, *several liability.*

At common law, when all plaintiffs who were entitled to damages were free from negligent conduct, there was a strong emphasis on maximizing the likelihood that the plaintiff would be able to collect the full amount of his or her judgment. Under the common law doctrine of joint and several liability, a plaintiff was entitled to enforce his or her entire judgment against each one of the defendants. This meant that the plaintiff could collect the entire sum from one of them or could collect part from one and part from another. However, the plaintiff was not allowed to collect a total amount greater than the judgment.

Because joint and several liability can lead to a situation in which a single defendant has paid all or most of a judgment, the common law developed procedures for redistributing that burden. One defendant may sue a second defendant for contribution if the first defendant pays more than his or her proper share. States have adopted a variety of rules for determining each defendant's proper share.

Several liability is a system in which each defendant is assigned an individual obligation to the plaintiff. The plaintiff may collect only that amount from each defendant. There are no procedures to redistribute the costs of the judgment among the defendants, because no defendant can have paid an amount in excess of his or her assigned share.

A. Joint and Several Liability

Joint and several liability treats each defendant as responsible for the entire judgment awarded to the plaintiff. When this doctrine developed under the contributory negligence system, cases did not involve findings about percentages of any parties' responsibility for injuries. Successful plaintiffs were always free from blame and liable defendants were always involved in *tortious* conduct. The adoption of comparative fault systems has led jurisdictions to question whether joint and several liability should be continued. Should each defendant be potentially responsible for paying the entire damages to which the plaintiff is entitled?

Lacy v. CSX Transportation, Inc. demonstrates the practical significance of the joint and several liability doctrine. Sitzes v. Anchor Motor Freight, Inc. reviews the common law development of joint and several liability and its related doctrine of contribution.

LACY v. CSX TRANSPORTATION, INC.

520 S.E.2d 418 (W. Va. 1999)

McGraw, J. . . .

Shortly after 11:00 p.m. on January 11, 1995, a car driven by Cacoe Sullivan left the Kroger parking lot in St. Albans, heading west on Third Avenue. Sullivan's fiancee, Richard Brooks, was riding in the front passenger's seat, while her mother, Tanya Lacy, was in the back seat with Sullivan's and Brooks's infant son. CSX's railroad tracks,

comprised of two main-line and two side tracks, run parallel to Third Avenue immediately to the south.

While traveling on Third Avenue, Sullivan's car encountered a stop sign from where the occupants could see that the flashing lights and gates of the still-distant Fifth Street crossing were activated. Sullivan's vehicle proceeded to the intersection of Third Avenue and Fifth Street (adjacent to the crossing), slowed but did not stop at a stop sign, made a left turn onto Fifth Street, went around one of the lowered gate arms onto the tracks, and was struck broadside by a westbound train traveling at 50 miles per hour. Brooks was apparently rendered paraplegic by the accident. . . .

The central issue at trial with respect to CSX was whether it was negligent in permitting both fast- and slow-moving locomotives to approach the Fifth Street crossing simultaneously on its main-line tracks. The crossing had an active warning system consisting of flashing-light signals and automatic gates. Plaintiffs asserted at trial that the ability of the crossing warning system to provide a "positive warning" of an approaching train was effectively neutralized by CSX's practice of allowing slow-moving switching locomotives to use the main-line tracks. . . .

After hearing the evidence, the jury . . . rendered a special verdict regarding liability, finding CSX and Sullivan, as well as plaintiffs Tanya Lacy and Richard Brooks, negligent, but determining that Sullivan's negligence was the sole proximate cause of the accident. The jury ascribed one percent negligence each to CSX, Lacy and Brooks, and ninety-seven percent to defendant Sullivan. The circuit court entered judgment in favor of CSX based upon the jury's special verdict. Plaintiffs' subsequent Motion for a New Trial and Judgment Notwithstanding the Verdict was denied by the trial court.

Plaintiffs first contend that the trial court erred in permitting counsel for CSX to argue the potential post-judgment effects of joint and several liability to the jury.[8] We reverse on this issue, finding that the trial court abused its discretion by permitting counsel for CSX to speculate and otherwise mislead the jury regarding whether the railroad would ultimately be charged with paying the entire judgment if both CSX and defendant Sullivan were found at fault.

Prior to trial, plaintiffs filed a motion in limine "to exclude any questions, suggestions, comments, allegations, testimony or argument by the defendant, [CSX], as to the effect that West Virginia's joint and several liability law may have upon [CSX]." . . .

The trial court . . . ruled that CSX could argue joint and several liability and "point out the intrigue." . . .

Counsel for CSX stated the following during closing argument:

> Let's just stop for a minute and let's talk about what this case is really about, what has been going on here for two weeks in this trial. Tanya Lacy, Richard Brooks, and Cacoe Sullivan are family. This is not a case where we have two plaintiffs suing two defendants. This is a case in which the family is trying to get money from the railroad. Tanya Lacy doesn't want anything from her daughter.

[8] Under the doctrine of joint and several liability, "[a] plaintiff may elect to sue any and all of those responsible for his [or her] injuries and collect his [or her] damages from whomever is able to pay, irrespective of their percentage of fault." Syl. pt. 2, in part, Sitzes v. Anchor Motor Freight, Inc., 169 W. Va. 698, 289 S.E.2d 679 (1982).

> They spent two weeks trying to convince you that CSX was at fault. They didn't spend two weeks trying to convince you that Cacoe Sullivan was at fault. Why not? I'll tell why not. If you go back into that jury room and return this verdict of shared responsibility that [plaintiffs' counsel] wants, if you go back into that jury room and return a verdict that says . . . 99 percent Cacoe Sullivan's fault, 1 percent CSX's fault, guess what? Tanya Lacy and Richard Brooks can collect the entire judgment from CSX. They can also collect it from Cacoe Sullivan, if they wanted, but what are the odds a mother is going to actually ask her daughter.
>
> So when you go back into that jury room and fill out this verdict form, any finding on the part of CSX, 1 percent, 10 percent, 50 percent, 100 percent, it's the same thing. One percent is, in essence, telling CSX, you are completely and totally responsible for this accident. . . .

Counsel for Cacoe Sullivan objected to this argument at the time it was delivered, but was overruled by the trial court. . . .

There are divergent views concerning the appropriateness of informing the jury of the effects of joint and several liability. Some jurisdictions, employing the same rationale used to permit instruction and argument on the workings of modified comparative negligence, sanction informing juries about joint and several liability because, in their estimation, juries are likely to respond to such information by being more conscientious about assigning responsibility to defendants. For example, in Luna [v. Shockey Sheet Metal & Welding Co., 113 Idaho 193, 195-197, 743 P.2d 61, 64 (1987)], the Idaho Supreme Court stated that the doctrine of joint and several liability, under which a defendant assessed a mere 1% negligence may be required to pay 100% of plaintiff's damages if, for some reason, the joint tortfeasor is unreachable through the judicial process, "poses a trap for the uninformed jury." An informed jury will be much more likely to carefully examine the facts prior to reaching a verdict holding a defendant even 1% at fault, no matter how cosmetically appealing a partial allocation of fault might be.

Other courts stress that consideration of joint and several liability is not relevant to determining any issue of fact. The Court of Appeals of South Carolina recently took this approach, where it held that it was not error for a trial court to refuse an instruction on joint and several liability "because the doctrine has no bearing on the jury's ultimate fact-finding role in determining the relative negligence of joint tortfeasors." Fernanders v. Marks Constr. of S.C., Inc., 330 S.C. 470, 475, 499 S.E.2d 509, 510-11 (S.C. Ct. App. 1998).

Courts on both sides of the debate take credible positions; however, we perceive that resolution of this issue turns on practical considerations that have only been lightly touched upon.

. . . Any conclusion about how joint and several liability will ultimately affect a particular defendant is largely speculative. As the Superior Court of Pennsylvania pointed out in holding that it was proper for a trial court to refuse a jury instruction on joint and several liability, "neither the court nor the jury can say with assurance how much of the verdict rendered, if any, any one tortfeasor will in fact pay." Dranzo [v. Winterhalter, 395 Pa. Super. 578, 592, 577 A.2d 1349, 1356 (1990)]. . . .

The line of argument pursued by CSX in the present case demonstrates how any consideration of the potential post-judgment effects of joint and several liability is likely to degenerate into conjecture about whether a particular defendant will ultimately bear a greater portion of the plaintiff's loss than is attributable to its fault.

Counsel for CSX speculated that plaintiffs would be unwilling to collect any judgment against Cacoe Sullivan, and would instead resort to forcing CSX to pay the entire judgment. While such an outcome is perhaps a plausible inference given the unique familial relationship of these parties, there was nothing in evidence that otherwise directly supported such a contention.

CSX's argument was, in any event, misleading to the extent that it implied that plaintiffs could ultimately control who would pay. This obviously ignores the fact that CSX would, if it were called upon by plaintiffs to satisfy the entire judgment, have a right of comparative contribution against Sullivan. . . .

We are not inclined to sanction forays into matters that invite speculation and conjecture on the part of the jury, and which do not suggest an easy stopping point with respect to the disclosures necessary to avoid misleading the trier of fact. Nor in the case of joint and several liability do we discern, as we did in [a prior decision authorizing instructions about the effects of comparative negligence] that juries are likely to harbor or otherwise act upon misconceptions regarding this doctrine. Accordingly, we hold that in a civil trial it is generally an abuse of discretion for the trial court to instruct the jury or permit argument by counsel regarding the operation of the doctrine of joint and several liability, where the purpose thereof is to communicate to the jury the potential post-judgment effect of their assignment of fault.

. . . If, as we have repeatedly declared, "this jurisdiction is committed to the concept of joint and several liability among tortfeasors," a defendant cannot be permitted to argue against a finding of fault based upon misleading speculation about the possible ramifications of the doctrine's application. . . .

For the reasons stated, the judgment of the Circuit Court of Kanawha County is hereby reversed and remanded for a new trial consistent with this opinion.

[Dissenting opinion omitted.]

NOTES TO LACY v. CSX TRANSPORTATION, INC.

1. ***The Plaintiff's Options Under Joint and Several Liability.*** Under the doctrine of joint and several liability, the plaintiff may collect the entire amount of damages from any defendant whose negligence was a proximate cause of her harms. Cacoe Sullivan negligently drove around the lowered gates. The railroad was negligent for permitting both fast- and slow-moving trains to approach the crossing simultaneously. The other plaintiffs were apparently also negligent, in some way that is not clear from the case, but that negligence was not a proximate cause of the harm, so their contributions were ignored. If Cacoe Sullivan's conduct and CSX's conduct were both proximate causes of the accident and Richard Brooks's damages were $100,000, how much would he be entitled to collect from each defendant? How did the jury's special verdict affect that plaintiff's option?

2. ***Plaintiff's Choice Among Defendants.*** In *Lacy*, one defendant, Cacoe Sullivan, was relatively poor and the other, CSX, was relatively wealthy. How might this affect Richard Brooks's choice of how to collect his damages in a joint and several liability jurisdiction? How would the family relationship affect the choice? What supports the court's conclusion that the amount any one tortfeasor will pay is "conjecture"?

3. ***Jury Comprehension of Legal Doctrines.*** The *Lacy* court notes that jurisdictions are split on the issue of informing the jury about the joint and several liability

doctrine. On a related question, informing the jury about the operation of the general system of comparative negligence, almost all states approve letting the jury know the consequences of various allocations of fault. The *Lacy* court distinguishes that body of law, saying that while juries might harbor misconceptions about comparative fault, they are not likely to have similar misconceptions about joint and several liability. Do differences between those two rules support the court's supposition about juries?

SITZES v. ANCHOR MOTOR FREIGHT, INC.

289 S.E.2d 679 (W. Va. 1982)

MILLER, J.

We have accepted certain certified questions from the United States District Court for the Southern District of West Virginia . . . Generally, we are asked to state . . . what effect our adoption of comparative negligence as announced in Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979), has upon the rules of contribution among joint tortfeasors . . .

The facts of the case have been presented to us as follows:

> Plaintiffs in this action, Arnold L. Sitzes and Edward L. Rucks, are administrators of the estate of Patricia Ann Roberson. Mrs. Roberson was killed in an automobile accident on January 19, 1977. At the time, she was a passenger in a pick-up truck driven by her husband, James R. Roberson, which collided with a motor truck driven by Oswald R. Carter, an agent and employee of the defendant Anchor Motor Freight, Inc. Mrs. Roberson is survived by her husband and her son, Joseph Eugene Roberson.
>
> Plaintiffs commenced this action against the defendant on November 23, 1977. With leave of court, defendant filed a third-party complaint for contribution against Mr. Roberson on February 12, 1980. This court, perceiving a potential conflict between West Virginia's normal rules of contribution (which would apportion damages equally among joint tortfeasors) and the state's newly-adopted rule of comparative negligence (which requires a jury to "assign the proportion or degree of this total negligence among the various parties," Bradley v. Appalachian Power, 163 W. Va. 332, 256 S.E. 2d 879, 885 (1979), and which denies recovery to a plaintiff whose negligence equals or exceeds 50% of the combined negligence of the parties to the accident), instructed the jury to assign percentages of fault to the third-party plaintiff [Anchor Motor Freight] and third-party defendant [James R. Roberson] if it found that both had been negligent. Plaintiffs' decedent was not negligent, and was therefore excluded from the apportioning.
>
> On March 31, 1981, the jury returned a verdict for the plaintiffs and against the defendants and assessed plaintiffs' damages in the amount of $100,000. . . .

In the present case, the trial court permitted the jury to apportion the degree of primary negligence (as opposed to contributory negligence) between the two joint tortfeasors. The jury concluded that the defendant, Anchor Motor Freight, Inc., [hereinafter Anchor], was 70% at fault while the third-party defendant, Mr. Roberson, was found to be 30% at fault. The certified question inherently demands consideration of whether we recognized that primary fault or negligence should be apportioned among joint tortfeasors in accordance with their degrees of fault.

The basic purpose of the joint and several liability rule is to permit the injured plaintiff to select and collect the full amount of his damages against one or more

joint tortfeasors. This rule however need not preclude a right of comparative contribution between the joint tortfeasors inter se. The purpose of this latter rule is to require the joint tortfeasors to share in contribution based upon the degree of fault that each has contributed to the accident. There is a definite trend in the field of tort law toward allocation of judgmental liability between the joint tortfeasors inter se. It is thought to be fairer to require them to respond in damages based on their degrees of fault.

Historically, at common law, there was no right of contribution between joint tortfeasors on the theory that the law should not aid wrongdoers. The historic development of this point is contained in Northwest Airlines, Inc. v. Transport Workers Union of American, AFL-CIO, et al., 451 U.S. 77, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981), where Justice Stevens states in note 17:

> Thirty-nine States and the District of Columbia recognize to some extent a right to contribution among joint tortfeasors. In 10 jurisdictions, the common-law rule was initially changed by judicial action.

The right of contribution developed because it was thought unfair to have one of several joint tortfeasors pay the entire judgment and not be able to obtain contribution from any of his fellow wrongdoers. It would seem proper social policy that a wrongdoer should not escape his liability on the fortuitous event that another paid the entire joint judgment. . . .

In this State since 1872, by virtue of W. Va. Code, 55-7-13, we have permitted a right of contribution between joint tortfeasors after judgment . . . Thus, our cases in both contract and tort have utilized the phrases "joint and several liability" and the "right of contribution" if the judgment debtor pays more than his pro tanto share of the liability. The traditional method of assigning pro tanto liability was to divide the judgment by the number of debtors who were liable on the judgment.

Once a right of contribution was recognized between joint tortfeasors, courts and commentators began to realize that a more equitable method of handling the right of contribution inter se would be to allocate it according to the degrees of fault attributable to each tortfeasor. This concept arose from the fact that in many cases involving joint tortfeasors, the tortfeasors were vastly unequal in their degrees of fault or negligence.

One of the catalysts for adopting a system of comparative contribution was the relaxation of the common law rule that a plaintiff's contributory negligence completely barred his recovery. With the adoption of comparative negligence statutes and case decisions allowing allocation of negligence between plaintiffs and defendants, the allocation of fault among joint tortfeasors seemed the next logical step.

Comparative contribution makes the right of contribution equitable to the degree of fault between each tortfeasor. This is in keeping with the trend toward reducing substantial artificiality or unfairness in tort law. A number of states by statute now base contribution on relative fault. Several courts have independent of any legislation adopted a form of comparative contribution.

Over the last twenty years there has been a noticeable trend in our tort decisions to ameliorate the rigidity of many common law rules. In the earlier portions of this opinion, we cited our cases which have lifted the bar of various common law immunity doctrines. In *Bradley* we alleviated the harshness of the doctrine of contributory negligence. . . .

. . . *Bradley* did [not] discuss the question of whether the primary fault of the defendant joint tortfeasors should be allocated in accordance with their respective degrees of fault. However, the fundamental concepts of . . . *Bradley* lead ineluctably to this conclusion as they are . . . premised on making a more equitable adjustment of tort liability based on a party's degree of fault. . . . We, therefore, conclude that as between joint tortfeasors a right of comparative contribution exists inter se based upon their relative degrees of primary fault or negligence. By moderating the bar of contributory negligence for the plaintiff and permitting comparative contribution between joint tortfeasors, we have provided a reasonable balance of fairness for both plaintiffs and defendants. . . .

The certified [question] having been answered, this case is dismissed from the docket.

NOTES TO SITZES v. ANCHOR MOTOR FREIGHT, INC.

1. ***Terminology: Third-Party Plaintiffs and Defendants.*** *Sitzes* involved a tort claim and a contribution claim. The administrators of the estate of Patricia Ann Roberson sued the defendant, Anchor Motor Freight, for damages due to her death in a motor vehicle accident. In the contribution claim, Anchor Motor Freight, described as a "third party plaintiff," sued James R. Roberson, the plaintiff's husband, who became the "third party defendant." Anchor Motor Freight alleged that James Roberson's negligence also contributed to the death of the original plaintiff and that he should therefore contribute to the damages. Factual issues arising from both claims—most significantly, the defendants' relative degrees of fault—were decided in the same trial.

2. ***Contribution Under Joint and Several Liability.*** After adopting modified comparative negligence, West Virginia retained its joint and several liability rule but modified its contribution rule. Under joint and several liability, how much of the $100,000 damages could the estate collect from either Anchor Motor Freight or James R. Roberson?

Sitzes substituted contribution based on degree of fault for contribution based on an equal division of liability. After the plaintiff's estate had recovered from one or the other of the defendants (or perhaps some part of the total from each), any defendant who has paid more than its share is entitled to collect the overage from the other defendant. Imagine that the plaintiff's estate collected the $100,000 from Anchor Motor Freight. How much would Anchor Motor Freight collect from James R. Roberson under the equal division rule or under the degree of fault rule?

B. Several Liability

In recent years, many state legislatures have eliminated or modified the joint and several liability doctrine. Several liability is often the general rule, with joint and several liability retained as an exception for specifically identified types of cases. Piner v. Superior Court illustrates how several liability works when multiple defendants have contributed to a single "indivisible" injury. The statutes following *Piner* show various ways of defining circumstances in which joint and several liability

will apply. Roderick v. Lake examines apportionment where the liability of multiple defendants arises for reasons other than a plaintiff's having suffered an indivisible harm.

PINER v. SUPERIOR CT.

962 P.2d 909 (Ariz. 1998)

FELDMAN, J.

On his way to work on Friday, October 12, 1990, William Piner stopped his truck to let a pedestrian cross the street. While he was stopped, a car driven by Billy Jones hit Piner's truck from behind. Police were called to investigate the incident. Piner waited for the police to finish their investigation before calling his physician to complain of pain in his neck, upper back, left arm, and head. The doctor's staff told Piner that the doctor was unavailable but would call him back later that day. Piner then fixed the broken tail lights on his truck and went to work.

Later that day, Piner was driving to lunch when the car ahead of him stopped to let some pedestrians cross the street. Piner stopped and was again hit from the rear, this time by a vehicle driven by Cynthia Richardson. Feeling similar pain symptoms after this accident, Piner called his doctor's office and was again told that the doctor was occupied and would contact him later.

Piner was unable to see his physician until Monday. After examination, the doctor concluded that Piner suffered a number of injuries as a result of the collisions. Due to the nature of the injuries, however, neither she nor any other physician has been able to attribute any particular part of Piner's total injuries to one accident or the other.

Piner filed an action against Jones and Richardson (together "Defendants") alleging indivisible injuries resulting from the successive impacts. Neither defendant has asserted that he or she could apportion the particular physical harm Piner suffered between the separate accidents. Apparently, all parties agree that both collisions contributed to Piner's total physical injuries.

Piner moved for partial summary judgment, arguing that because his injuries are indivisible, defendants should be held jointly and severally liable. According to Piner, in a successive accident, indivisible injury case, defendants have the burden of proving apportionment; if neither defendant can demonstrate what portion of the total damage he or she caused, they should be held jointly and severally liable for the entire amount.

Richardson responded that A.R.S. §12-2506 abolished the system of joint and several liability, leaving only two exceptions in which the doctrine can still be invoked. Richardson concluded that because neither exception applied to Piner's claim, "the trier of fact must be directed to either apportion, or deny damages in this case." After hearing oral argument on the motion, the trial judge, in a June 4, 1996 order, denied Piner's motion for "the reasons stated [by] Defendant Richardson. . . ."

. . . We granted review to determine which rule of liability applies to cases in which successive acts of negligence combine to produce separate but indivisible injuries. . . .

The Arizona Legislature enacted its first version of [the Uniform Contribution Among Tortfeasors Act] (UCATA) in 1984. . . . Under this new regime, the factfinder allocated a percentage of fault to each culpable actor. Even though the culpable

defendants were still jointly and severally liable for all damages, the legislature established a right of contribution that allowed a defendant held liable for more than his share of fault to recover from the other tortfeasors in proportion to their several contributions of fault. This change was intended to bring about a system in which each tortfeasor would eventually contribute only a portion of damage equal to the percentage of fault attributed to that tortfeasor by the factfinder. But Arizona's negligence law still produced harsh results when one defendant was insolvent, thus leaving the others unable to obtain contribution. See, e.g., Gehres [v. City of Phoenix, 753 P.2d 174 (Ariz. App. 1987)] (defendants assigned five percent of fault held jointly and severally liable for one hundred percent of damages).

In response, the Arizona Legislature amended UCATA, abolishing joint liability and replacing it with a system that requires the court to allocate responsibility among all parties who caused the injury, whether or not they are present in the action. §12-2506. Under the present version of UCATA, "the liability of each defendant is several only and not joint." §12-2506(D). Taken in isolation, this wording tends to support Defendants' argument, but several factors militate against such an interpretation. First, the legislative intent was to cure the Gehres "deep pocket" problem of a defendant only minimally at fault yet liable for the full amount of damages.

A second factor is that the old rule conditioned the plaintiff's recovery on the impossible: if unable to divide the indivisible, the plaintiff was denied relief and the culpable parties were relieved of all responsibility. The injustice inherent in this policy has been repeatedly recognized by our courts. We do not believe that when the legislature attempted to eliminate the injustice it perceived in the deep pocket problem, it also intended to reestablish an unfair regime under which an innocent victim is denied any relief because the damages caused by independent wrongdoers result in an indivisible, unapportionable injury.

Most important, the clear text of UCATA does not require that a defendant's liability be limited by apportioning damages, but only by apportioning fault:

> 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. . . . Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault. . . . [T]he 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. . . .
>
> B. In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury. . . .
>
> F. (2) "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, . . .

§12-2506(A), (B), & (F)(2).

Thus, while UCATA requires the plaintiff to prove that a defendant's conduct was a cause of injury, it does not instruct us to limit liability by apportioning damages. Instead, each tortfeasor whose conduct caused injury is severally liable only for a percentage of the total damages recoverable by the plaintiff, the percentage based on each actor's allocated share of fault.

We conclude, therefore, that the present version of UCATA has left intact the rule of indivisible injury, relieving the plaintiff of apportioning damage according to causal

contribution. When the tortious conduct of more than one defendant contributes to one indivisible injury, the entire amount of damage resulting from all contributing causes is the total amount "of damages recoverable by the plaintiff," as that term is used in §12-2506(A). . . . Contrary to the common law and cases such as *Gehres*, the fault of all actors is compared and each defendant is severally liable for damages allocated "in direct proportion to that defendant's percentage of fault." §12-2506(A). To determine each defendant's liability "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." Id.

Thus in an indivisible injury case, the factfinder is to compute the total amount of damage sustained by the plaintiff and the percentage of fault of each tortfeasor. Multiplying the first figure by the second gives the maximum recoverable against each tortfeasor. This result conforms not only with the intent of the legislature and the text of the statute but also with common sense. When damages cannot be apportioned between multiple tortfeasors, there is no reason why those whose conduct produced successive but indivisible injuries should be treated differently from those whose independent conduct caused injury in a single accident. . . . [W]e see no reason to employ a different rule if the injuries occur at once, five minutes apart or, as in the present case, several hours apart. The operative fact is simply that the conduct of each defendant was a cause and the result is indivisible damage. . . .

In the present case, the trial judge erred in placing the burden of proof on apportionment on Piner. Assuming Piner proves that the conduct of both Jones and Richardson contributed to the final result, the burden of proof on apportionment is on them. If the judge concludes there is no evidence that would permit apportionment, then the case should be treated as one involving indivisible injuries. If the judge further concludes there is no evidence on which to base a jury finding of inability to apportion, then the jurors must be instructed to apportion. If the evidence on the question of apportionment is conflicting, the jurors should be instructed that if they are able to apportion damages, they should do so, allocating fault and damages for each accident separately. They should also be instructed that if they are unable to apportion damages, then they are to determine Piner's total damages resulting from both accidents. In such case, the indivisible injury rule will apply. In all cases in which the indivisible injury rule applies as either a matter of law or on a jury finding of inability to apportion, the plaintiff's recovery will be the total damage sustained. But in all such indivisible injury cases, the jurors must be instructed to allocate fault in accordance with §12-2506. The judge is then to multiply each tortfeasor's percentage of fault by the amount recoverable by the plaintiff. Each tortfeasor in an indivisible injury case is then severally liable for the product of that calculation. . . .

The trial court's June 4, 1996 order denying Piner's motion for partial summary judgement and July 31, 1996 ruling regarding jury instruction content are vacated. The trial court may proceed in accordance with this opinion.

NOTES TO PINER v. SUPERIOR COURT

1. ***Divisible and Indivisible Injuries.*** Multi-actor cases can involve divisible or indivisible injuries. When injuries are divisible, it is possible to establish which actor caused which harm. For divisible injuries, the but-for test for causation could assign responsibility for each injury to the particular defendant without whose act the

injury would not have occurred. So if Defendant One acted negligently in a way that broke a plaintiff's arm and Defendant Two acted negligently in a way that broke that plaintiff's leg, the but-for test would treat Defendant One as a cause-in-fact of the broken arm and would treat Defendant Two as a cause-in-fact of the broken leg. Each actor would pay for the injury that he or she caused.

If the victim who suffered a broken arm and a broken leg suffered a further problem that could have been caused by either the broken leg or broken arm, such as an allergic reaction to materials used to make casts for the broken limbs, that allergic reaction would be called an indivisible injury. There would be no way to identify whether it had been caused by the defendant who broke the victim's arm or the defendant who broke the victim's leg. Death can also be an indivisible injury. If death occurs after a victim has suffered a number of separate injuries, there will often be no way to determine whether any single injury was a but-for cause of the death.

The lack of precise information about whose conduct caused what part of an indivisible injury requires a decision about who should suffer due to the lack of information: the plaintiff or the defendants. Where injuries are divisible, the plaintiff must establish which defendant caused which harm or recover nothing. Where injuries are indivisible, the traditional rule is that defendants must establish which defendant caused which harm or share the liability between them. The Restatement (Second) of Torts §433B comment d provides the rationale for this rule, stating that it would be unjust to allow "a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned."

The defendants in *Piner* claimed that abolishing joint and several liability meant that defendants' joint responsibility for indivisible harms was also abolished. How does the court reconcile the abolition of joint and several liability with requiring defendants who cause indivisible harm to share the liability?

2. *Practical and Conceptual Indivisibility.* If the plaintiff in *Piner* had been examined by doctors after each of the two vehicular accidents, perhaps the effects of each one might have been identifiable. The lack of such an examination presents a practical reason why the plaintiff's injuries came to be treated as indivisible. In some cases, there is no possibility that more information could assign particular harms to particular actors. For example, in Lacy v. CSX Transportation, Inc., the negligence of the car driver putting the plaintiff on the railroad tracks in front of a train combined with the negligence of the railroad to produce a single impact with indivisible consequences. Because there was just one impact, conceptualizing separate causal contributions is impossible as a matter of logic. Tort doctrines treat apportionment the same way in cases involving practically indivisible and conceptually indivisible harms.

3. *Problem: Effect of Applying Several Liability.* In Glomb v. Glomb, 530 A.2d 1362 (Pa. Super. Ct. 1986), the child-plaintiff's parents were negligent in their hiring and supervision of the child's babysitter, Sherry Ginosky. Even after noticing that the child was often bruised after being left with the sitter, the parents continued to employ Ms. Ginosky. Eventually, the child suffered severe injuries while under the babysitter's care, due to the babysitter's tortious conduct. A guardian for the child sued the parents, who joined the babysitter in the suit as a co-defendant. The parents argued that the

court should apportion damages between the parents and the babysitter. Is this a proper case for shifting the burden of proof with respect to apportionment from the plaintiff to the defendants? If the babysitter has no money to satisfy a judgment, how will the child's recovery be affected by following the rule of several liability in *Piner* as opposed to the rule of joint and several liability in *Lacy*?

Statute: RECOVERY OF DAMAGES; APPORTIONMENT AMONG RESPONSIBLE PARTIES

N.J. Stat. §2A:15-5.3 (2006)

Except as provided in subsection d. of this section [covering environmental tort actions], the party so recovering may recover as follows:

a. The full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages. . . .

c. Only that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60% responsible for the total damages.

Statute: LIMITATION OF JOINT AND SEVERAL LIABILITY

Miss. Stat. Ann. §85-5-7 (2000)

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent.

(2) Except as may be otherwise provided in Subsection (6) of this section, in any civil action based on fault, the liability for damages caused by two (2) or more persons shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.

Statute: ABOLITION OF JOINT AND SEVERAL LIABILITY; EXCEPTIONS

Haw. Rev. Stat. Ann. §663-10.9 (2006)

Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

(1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons;

(2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:

(A) Intentional torts;

(B) Torts relating to environmental pollution;

(C) Toxic and asbestos-related torts;

(D) Torts relating to aircraft accidents;
(E) Strict and products liability torts; . . .

NOTES TO STATUTES

1. ***Fault Threshold and Damage Threshold Several Liability.*** The New Jersey and Mississippi statutes offer alternative ways of serving two competing goals: providing full compensation to plaintiffs and apportioning liability according to fault. Each statute retains joint liability to some extent. Imagine a case with defendants *A*, *B*, and *C* whose shares of fault are 65 percent, 20 percent, and 10 percent, respectively, and a plaintiff with a 5 percent share of fault whose damages total $100,000. Under each statute what is the maximum the plaintiff would be entitled to collect from each defendant?

2. ***Harm-Based Retention of Joint and Several Liability.*** The Hawaii statute illustrates a third approach taken by state legislatures when switching from joint to several liability.

RODERICK v. LAKE

778 P.2d 443 (N.M. Ct. App. 1989)

BIVINS, C.J.

Plaintiff sued to recover damages for personal injuries sustained when the car he was driving struck two thoroughbred horses on Christmas Eve 1985. Following a bench trial, the court found no negligence on the part of defendant Robert W. Lake, the owner of the fenced property on which the horses were kept, and dismissed plaintiff's complaint against him with prejudice. Plaintiff does not appeal that dismissal. The trial court found the remaining defendants, Edgar L. Lake and Roland Hohenberg, the owners of the two horses, . . . jointly and severally liable to plaintiff for the damages awarded. It predicated liability on the doctrine of *res ipsa loquitur* as well as negligent violation of applicable statutes and San Juan County, N.M., Ordinance 10 (July 20, 1982) [which provides that "Any person owning or having charge, custody, care or control of any animal shall keep such animal on his premises."]. The trial court assessed no negligence against plaintiff. From a judgment on the findings, Edgar and Roland appeal. . . .

Summarizing the trial court's findings of fact, plaintiff was traveling west on County Road 6700 in San Juan County at approximately 6:00 p.m. on December 24, 1985, in a safe and lawful manner, when two horses darted onto the highway in front of him. "It was dark at the time . . . and the horses were dark colored." Plaintiff did not have time to brake and recalled no details of the accident. He suffered serious injuries.

Robert owned the land adjacent to the county road. His brother, Edgar, kept several of his horses there, including one of the horses involved in the accident. Roland, an associate and trainer for Edgar, owned the other horse and also kept it on Robert's property.

Edgar had brought the two horses from the racetrack around 3:30 p.m. the day of the accident and fed them at 5:00 p.m., after which Edgar left. Roland remained there. Since Roland did not testify, we are not told if he left subsequent to Edgar and before the accident or remained there until the accident occurred.

There was testimony that the horses could not escape except through the gate. After the accident the gate was found "sprung open." The latch on the gate confining the horses had been left open.

[The court affirmed the trial court's finding that defendants' conduct constituted negligence for which they were liable.]

Except to the extent modified by statute, NMSA 1978, Section 41-3A-1 (Cum. Supp. 1988), which the parties agree does not apply to this case, joint and several liability among concurrent tortfeasors no longer exists in New Mexico. Each concurrent tortfeasor is liable only for his apportioned fault or negligence. . . .

We agree that the trial court must apportion fault in this case, and remand for that purpose. Because of the rather unusual circumstances, we offer guidance to the trial court.

The question presented is, How does the trier of fact apportion fault or negligence when there is no direct evidence as to which concurrent tortfeasor caused the harm? Ancillary to that question is the further question of which party bears the burden of proving apportionment under these circumstances.

Normally, of course, the plaintiff bears the burden of proving that a defendant's negligence caused his injury. In cases such as this, however, we hold that, where defendants are independent but concurrent tortfeasors and thus each liable for the damage caused by him alone, but the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of redress. Rather, the wrongdoers should be left to work out between themselves any apportionment. Under the circumstances present in this case, the burden shifts to each defendant to absolve himself, if he can, thereby relieving the wronged party of the duty of apportioning fault as between defendants. . . .

We adopt this rule in New Mexico as the fairest and most logical way to determine the amount of fault of two or more tortfeasors in the unusual circumstances of cases such as this one, where plaintiff can prove defendants were negligent, but cannot prove which defendant's negligence caused the injury, or which defendant was more at fault.

On remand the trial court should consider apportionment between defendants, based upon this burden which rests with them, not plaintiff. While this task is difficult, we do not believe it impossible. As we have previously discussed, there is evidence from which the court could infer that Edgar was the last one to leave the gate before the horses escaped, and that Roland remained on the property but was somewhere else at the time Edgar left. If the trial court infers that Roland did not leave before the accident, then his negligence would be for not observing the improperly secured gate or the fact that the horses had escaped. We express no opinion as to how such apportionment should be made based on these and other relevant facts before the court. . . .

NOTES TO RODERICK v. LAKE

1. ***Alternative Liability: Apportionment of Liability.*** Under joint and several liability, both horse owners would have been liable to the car driver for the full amount of damages. A New Mexico statute had, however, replaced joint and several liability with several liability. Because this was a bench trial, the judge was obliged to determine the defendants' relative degrees of fault. The appellate court acknowledged the difficulty in apportioning fault in alternative liability cases where the plaintiff cannot show which of two concurrent tortfeasors caused the harm, but it required the trial court to examine each defendant's conduct.

Each party's degree of negligence depends on the trial court's factual findings. Perhaps one defendant came through the gate last and left if open. Would the shares be 50/50 in this alternative liability situation? Or perhaps Edgar's negligence consisted of being the last one to leave the gate open before the horses escaped and Roland's negligence was a later failure to observe that the gate was improperly secured or that the horses had escaped. In that situation, would the case involve alternative liability or concurrent tortfeasors creating an indivisible harm? What would the shares of liability be?

2. ***Concerted Action and Apportionment of Liability.*** Courts and legislatures have taken different positions on whether defendants who act in concert will be held jointly and severally liable or only severally liable. Concerted action cases are those in which an actor

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

See Restatement (Second) of Torts §876.

In Woods v. Cole, 675 N.E.2d 132, 133 (Ill. App. 1996), the court considered whether the state statute abolishing joint and several liability for some defendants applied to defendants acting in concert. The majority of the court said that it did not. Referring to each of the three types of concerted action, Justice McCullough stated:

> In our view, each of these scenarios depicts a single and indivisible course of tortious conduct for which each is an equal participant and equally liable. The conduct of one actor cannot be compared to the conduct of another for purposes of apportioning liability because each agreed to cooperate in the tortious conduct or tortious result and each is liable for the entirety of the damages as if there were but one actor.

The dissent disagreed, in part because the judge thought that it was up to the legislature to create exceptions to legislatively created statutes and in part because he thought the conduct of the actors could be compared and one's fault might be found to be greater than others.

Other states have dealt with this problem by statute. See, e.g., Colo. Rev. Stat. §13-21-111.5:

> (1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss, except as provided in subsection (4) of this section. . . .
>
> (4) Joint liability shall be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act. Any person held jointly liable under this subsection (4) shall have a right of contribution from his fellow defendants acting in concert. A defendant shall be held responsible under this subsection (4) only for the degree or percentage of fault assessed to those persons who are held jointly liable pursuant to this subsection (4).

3. ***Problem: Apportionment of Liability for Concerted Acts.*** The claim in Woods v. Cole, 675 N.E.2d 132, 133 (Ill. App. Ct. 1996), was based on the shooting of Eric Woods by Jason Hill, who was convicted of involuntary manslaughter. Jason Hill, Laurencio Carrera, and Todd Cole were alleged to have acted in concert. These

three had embarked on a shooting expedition with Eric Woods at a farm belonging to Todd Cole's grandfather:

> When decedent [Eric Woods] fell asleep during the drive to the farm, defendant [Todd Cole] hatched a plan to scare him. At the farm, the group woke decedent as planned by simultaneously firing their weapons into the ground. Defendant and Carrera then pointed their weapons at decedent, said "it's time to die," and pulled their triggers on an empty chamber, producing a click. Hill then pulled the trigger of his revolver and it discharged, killing decedent.
>
> Under which type of concerted action would this conduct fall? Assume that the damages for Eric Woods' death are $100,000. How much would the estate of Woods be entitled to recover from each defendant under a rule of joint and several liability? Under a rule of several liability apportioned according to fault without thresholds?

Perspective: Fairness and Several Liability

In Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 Val. U. L. Rev. 859 (1996), the authors suggest that one explanation for judicial and legislative adoption of restrictions on joint and several liability is the comfort courts and legislatures have experienced in assigning percentages of responsibility to the conduct of individuals.

> One powerful aspect of today's so-called tort reform movement comes from not understanding the effect that moving from all-or-nothing rules to splitting rules has had on joint and several liability. The notion of joint and several liability is as old as tort law. It has always been the case that if one defendant is ten percent negligent, and another defendant is ninety percent negligent, and together they combine to injure Marshall, they are both liable to him. Marshall can recover a hundred percent of his damages from either one. How they might choose to apportion the damages between themselves later is of no interest to Marshall. . . .
>
> Comparative negligence introduced important new wrinkles into these situations. Suppose now that one defendant is sixty percent responsible — not negligent, but responsible, because that is what we compare under comparative negligence — and another defendant is ten percent responsible, while the plaintiff is thirty percent responsible. Suppose also that the sixty percent responsible defendant is judgment-proof and cannot pay. Is it appropriate to put seventy percent of the loss on the ten percent responsible defendant and thirty percent of the loss on the thirty percent responsible plaintiff?
>
> Fairness now depends on what the jury intended to do when it assessed responsibility. Did the jury mean, in allocating responsibility, that the plaintiff was three times as responsible as the ten percent responsible defendant? If so, requiring the ten percent responsible defendant to bear seventy percent of the loss seems both unfair and contrary to what the jury found. Or did the jury mean, instead, that the defendants as a whole were to be held seventy percent responsible — that the ten percent/sixty percent division between the defendants was no more than an equitable split as to them, a split that did not concern their individual responsibility to the plaintiff at all? Did the jury intend, in other words, that the plaintiff, in fact, deserved to recover seventy percent of his or her damages, regardless of who would ultimately pay? If this is the case, then the old rule, perhaps slightly modified, might be as fair as the previous hypothetical made it seem unfair.

C. Allocating Responsibility to Absent or Immune Actors

When injuries are caused by more than one actor, sometimes all of the actors can be identified and sued. Sometimes, however, it is impossible to impose liability on an actor, either because that actor's identity is unknown or because that actor is immune from liability. This leads to the question of how to treat the missing actor's conduct in allocating responsibility for the plaintiff's injury.

At common law, with joint and several liability, any defendant could be liable to pay the entire damages awarded to the plaintiff. If another tortfeasor was immune or unknown, the defendant who paid the damages would never be able to be reimbursed through a contribution action. This is a pro-plaintiff result that is supported by a variety of rationales, including the fact that under the contributory negligence system the only plaintiffs who were ever entitled to recover were plaintiffs who were entirely free from blame. That factor may have supported the choice of a system that maximized the chance for the plaintiff to be fully compensated.

Some states now allow the conduct of an absent or immune tortfeasor to be evaluated, even though that actor will never pay any damages. Examples would be harms caused by: (1) a criminal and a landowner who failed to provide adequate security; (2) the employer of an injured worker and the manufacturer of a machine that hurt the worker; or (3) a child's parent and someone else who harmed a poorly supervised child. In these cases, the criminal's identity might be unknown, the employer might be immune under state workers' compensation law, and the parent might be protected by a parental immunity rule. If the jury assigns a share of responsibility to conduct by the unknown or immune actor, this will place the cost of that actor's conduct on the plaintiff, in contrast to the common law's choice of placing it on any solvent defendant.

Sullivan v. Scoular Grain Company of Utah explores one state's statutory approach to this issue, in the context of an injury allegedly caused both by an employer, a grain company that was immune under the state's workers' compensation law, and others who were not immune.

SULLIVAN v. SCOULAR GRAIN COMPANY OF UTAH

853 P.2d 877 (Utah 1993)

DURHAM, Justice.

This case comes to us pursuant to rule 41 of the Utah Rules of Appellate Procedure as a question certified from the United States District Court for the District of Utah[:]

> 1. Under the Utah Comparative Fault Act, can a jury apportion the fault of the plaintiff's employers that caused or contributed to the accident although said employers are immune from suit under Utah Workers' Compensation Act . . .

The following facts are taken from the federal district court's certification order. In October 1986, plaintiff Kenneth Sullivan lost his left arm and left leg in an accident on the railroad tracks at the Freeport Center in Clearfield, Utah. At the time of his injury, Sullivan was assigned to unload grain from rail cars into warehouses. He was employed by Scoular Grain Company, Freeport Center Associates, and Scoular Grain Company of Utah ("the Scoular parties").

Sullivan filed this action against the Scoular parties, Union Pacific Railroad Company, Denver & Rio Grande Western Railroad Company, Oregon Short Line Railroad Company, Utah Power & Light Company, Trackmobile, Inc., and G.W. Van Keppel Company. In 1989, the federal district court found the Scoular parties immune from plaintiff's claim under the exclusive remedy provision of Utah's Workers' Compensation Law and dismissed them from the action. That court also found that defendant Denver & Rio Grande Western Railroad had no legal duty to Sullivan and dismissed it from the lawsuit. The remaining defendants in the case are Utah Power & Light, Trackmobile, G.W. Van Keppel, Union Pacific Railroad, and Oregon Short Line Railroad. A motion to dismiss Utah Power & Light for lack of jurisdiction is pending at this time.

Defendant Trackmobile moved to have the jury apportion and compare the fault of all the originally named defendants, whether dismissed or present at trial. Plaintiff opposed this motion, claiming that only the fault of parties who are defendants at trial may be compared.

The court's principal duty in interpreting statutes is to determine legislative intent, and the best evidence of legislative intent is the plain language of the statute.

Plaintiff argues that his former employers must be excluded from the apportionment process because they are not "defendants" under the Liability Reform Act's definition. Section 68-3-11 of the Utah Code states that "words and phrases . . . [which] are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition." Under section 78-27-39 of the Liability Reform Act, a jury may be instructed "to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant." Section 78-27-37(1) defines "defendant" as "any person *not immune from suit* who is claimed to be liable because of fault to any person seeking recovery." (Emphasis added.) Therefore, plaintiff argues, because the district court found the Scoular parties to be "immune from suit" under the exclusive remedy provision of Utah Workers' Compensation Act, Utah Code Ann. §35-1-60, they are not defendants and are excluded from apportionment under the plain language of the Act.

Excluding plaintiff's employers from the apportionment process, however, would directly conflict with the language of other sections of the Act which require that no defendant be held liable for damages in excess of its proportion of fault. The relevant portions of sections 78-27-38 and -40 read as follows:

> **78-27-38. Comparative negligence.** The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, *no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.*
>
> **78-27-40. Amount of liability limited to proportion of fault — No contribution.** Subject to Section 78-27-38, *the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.* No defendant is entitled to contribution from any other person.

(Emphasis added.) If the Scoular parties, who allegedly contributed to the accident, are not included on the special verdict form, the remaining defendants will be potentially liable to plaintiff for an amount in excess of their proportion of fault. For example, if

the Scoular parties were 90% at fault and the defendants remaining in the action were 10% at fault, the remaining defendants would be apportioned 100% of any damages awarded even though they were only 10% at fault. Such a result would violate the plain language of sections 78-27-38 and -40.

Thus, we are faced with two arguably contradictory statutes within the same article. Section 78-27-37 defines "defendant" in a way that appears to preclude the inclusion of an employer from apportionment. But excluding employers from apportionment would violate the mandate of section 78-27-40 that no defendant be held liable for damages greater than its proportion of fault. This conflict creates an ambiguity that requires the court to make a policy inference as to the overall purpose and intent of the Act.

"When interpreting an ambiguous statute, we first try to discover the underlying intent of the legislature, guided by the purpose of the statute as a whole and the legislative history." Hansen v. Salt Lake County, 794 P.2d 838, 841 (Utah 1990) (citations omitted). We then try to harmonize ambiguous provisions accordingly.

In the 1986 session of the Utah Legislature, Substitute Senate Bill No. 64 proposed that a jury may determine the "total amount of damages sustained and a percentage or proportion of fault attributable to each person seeking recovery, to each defendant, *and to each other person whose fault contributed to the injury or damages.*" (Emphasis added.) Before being enacted, the bill was amended by deleting the part emphasized above and inserting the word "and" before "to each defendant." The result is codified at Utah Code Ann. §78-27-39:

> The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery and to each defendant.

Sullivan argues that this amendment shows that the legislature did not intend to include nonparties in the apportionment process.

Trackmobile counters that the *reason* for the amendment is not clear and argues that, by contrast, the intent of the comparative negligence statute to limit a defendant's liability to his or her proportion of fault *is* clear. That purpose is to ensure that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant." Utah Code Ann. §78-27-38.

"The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve." Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991) (footnote omitted). Thus, failing to include immune employers in the apportionment violates the main purpose of the Act by improperly subjecting the remaining defendants to liability in excess of their proportion of fault.

Other portions of the Act's history support this conclusion. First, during a floor debate prior to the adoption of the bill, one senator observed that "it is the basic fairness concept we're driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages." Floor Debate, Utah Senate, 46th Leg. 1986, General Sess., Senate Day 31, Records No. 63 (Feb. 12, 1986). Second, each preliminary draft of Senate Bill 64 states in the title that the purpose of the Act was, among other things, "abolishing joint and several liability." If the jury is prevented in this case from considering the relative fault of the Scoular parties in the apportionment process, Trackmobile and the other

defendants will be held liable in the event of a verdict for plaintiff, not only for their own proportionate share of fault, but also for the proportionate share of fault attributable to the Scoular parties. Thus, one of the major evils of joint and several liability would result, and the stated purpose of the legislature in abolishing it would be frustrated. . . .

Any judicial or legislative decision concerning tort liability requires a balancing of competing interests and a policy decision as to which party should bear the risks of an immune or insolvent tort-feasor. Prior to 1986, under joint and several liability, a tort-feasor bore the risk of paying not only his or her share of the plaintiff's damages, but also the shares of other tort-feasors who were impecunious or immune from suit. The 1986 Utah Liability Reform Act shifted the risks caused by impecunious or immune tort-feasors to the plaintiffs by abolishing joint and several liability and contribution among tort-feasors.

Plaintiff correctly asserts that if his employer's actions are included in apportionment, his recovery may be significantly reduced. Plaintiff's recovery from nonemployer defendants would be reduced directly in proportion to the percentage of fault, if any, the jury attributes to the employer.

On the other hand, in Trackmobile's view, fairness to the defendants requires that each defendant pay only its proportionate share of the plaintiff's damages. If the Scoular parties are not included in apportionment, Trackmobile and the other defendants would be liable for damages in excess of their proportion of fault. "There is nothing inherently fair about a defendant who is[, for example,] 10% at fault paying 100% of the loss. . . ." Brown v. Keill, 580 P.2d 867, 874 (Kansas 1978).

General comparative negligence theory also supports the inclusion of nonparty employers in apportionment. For example, according to Heft and Heft:

> It is accepted practice to include all tortfeasors in the apportionment question. This includes nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent but not liable in damages to the injured party such as in the third party cases arising in the workmen's compensation area. . . .
>
> The reason for such rules is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.

Carroll R. Heft & C. James Heft, *Comparative Negligence Manual,* §8.100, at 14 (John J. Palmer & Stephen M. Flanagan eds., rev. ed. 1992) (footnote omitted). Thus, it is accepted practice for the jury to apportion the comparative fault of all tort-feasors when comparative negligence is at issue. . . .

Based on the foregoing analysis, [we answer the question] certified from the federal court [ ] as follows:

> 1. A jury may apportion the fault of employers under Utah Code Ann. §78-27-38 to -43 notwithstanding their immunity under Utah Code Ann. §35-1-60. . . .

NOTES TO SULLIVAN v. SCOULAR GRAIN COMPANY OF UTAH

1. ***Apportionment to Immune Parties.*** Both the plaintiff and defendant in *Sullivan* cited statutory language supporting conflicting interpretations of whether the liability of non-immune defendants should be reduced to reflect the contributory fault of immune parties. How did the court resolve the conflict in statutory language?

2. *Apportionment to Non-Tortious Defendants.* One of the defendants in *Sullivan* argued that liability of each defendant should be reduced to reflect the causal contribution of defendants who were found to be non-negligent. The defendant relied on two statutory definitions in Utah Code Ann. §§78-27-37(1), (2) (1986):

> (1) "Defendant" means any person not immune from suit who is claimed to be liable *because of fault* to any person seeking recovery.
>
> (2) "Fault" means any *actionable* breach of legal duty, act, or omission proximately causing or contributing to injury or damages. . . .

(Emphasis added.)

The defendant argued that non-negligent defendants are not immune from suit under the definition of "Defendant" in (1) and they are claimed to be liable because of an "actionable breach" of duty under (2). The defendant argued that "actionable" means only that there are grounds to sue the defendant, not that the plaintiff will necessarily win. Given the statutory language discussed in *Sullivan*, should the contribution of non-negligent defendants be included in the apportionment?

3. *Diversity of State Approaches to Apportionment to Immune Parties.* In an appendix to *Sullivan*, the court categorized the approaches states in its region had taken to this problem. In five states the legislature had adopted a similar practice by statute: Arizona, Colorado, Kansas, New Mexico, and Washington; in five states courts have interpreted general comparative negligence statutes to require apportionment of nonparty fault: California, Hawaii, Idaho, Oklahoma, and Wyoming; two states retain joint and several liability but allow the consideration of nonparty negligence for the limited purpose of determining whether all or none of the total fault can be attributed to the nonparty: Alaska and Montana; and two states refuse to allow a jury to consider the fault of nonparties in apportionment: Nevada and Oregon.

4. *Problem: Apportionment to Absent Parties.* In Field v. The Boyer Co., 952 P.2d 1078 (Utah 1998), the same court that decided *Sullivan* considered whether the fault of an unidentified criminal assailant should be considered in an apportionment of fault that would reduce the liability of owners and operators who negligently failed to provide security at a shopping mall. The criminal was not sued. Under the Utah statutory definition of "defendant" discussed in *Sullivan*, would the criminal be a defendant for the purpose of apportionment? If so, the plaintiff's damage recovery from the mall owners would be reduced and thus would be unrecoverable, because the criminal is unidentified. The court referred to Utah Code §78-27-38(4), which stated, "the court may allocate fault to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury." Does this language help the plaintiff recover more damages from the owner?

5. *Procedural Note: Joinder of Missing Defendants.* A plaintiff may chose not to sue all of the potential defendants. The traditional rule is that plaintiffs are not required to join all potential defendants in a single action; the plaintiffs may bring successive suits against defendants. Some states, however, do require that all responsible parties be combined in a single claim on the ground that it is easier to resolve issues of causation and to apportion liability among the parties if all parties are included in the case. Eliminating successive suits with different factfinders eliminates inconsistent verdicts. A plaintiff may *join* a previously omitted defendant with whom a defendant

seeks to share liability. A defendant may also move to join that omitted defendant for the purposes of apportionment in the hope of spreading the liability more widely. See Federal Rules of Civil Procedure 14(a) and Restatement (Third) of Torts, Apportionment of Liability §B19, comment g and Reporter's notes to comment c. p.177. In Field v. The Boyer Co., discussed in the problem above, the court justified its conclusion that apportionment between an unknown and unsued criminal was inappropriate because the mall owners could have joined the criminal in the trial but failed to do so.

D. Intentional Conduct in a Comparative Setting

In some cases, a plaintiff's harm is caused by one actor's negligence and another actor's intentional tort. For example, a retailer might negligently fail to provide security in a store's parking lot, and an intentional tortfeasor might harm a customer there. Under traditional contributory negligence doctrines, even though a plaintiff's contributory negligence was a complete defense to a negligence action, it was ignored if the defendant had committed an intentional tort. Some comparative negligence jurisdictions continue this practice of ignoring a plaintiff's negligent conduct if the defendant was an intentional tortfeasor. Others permit a comparison of negligent and intentional tortious conduct. Slack v. Farmers Insurance Exchange considers these issues where a plaintiff's harm was caused by a negligent insurance company and an intentionally tortious chiropractor.

SLACK v. FARMERS INSURANCE EXCHANGE

5 P.3d 280 (Colo. 2000)

KOURLIS, J.

The question in this case is whether section 13-21-111.5, 5 C.R.S. (1999) requires the pro rata distribution of civil liability among intentional and negligent tortfeasors who jointly cause indivisible injuries. Section 13-21-111.5 states that a tortfeasor shall only be liable for damages to the extent of her negligence or fault. . . .

On September 8, 1992, Juliette Diane Slack suffered injuries in an automobile accident. Slack, driving a minivan, was stopped at a stoplight waiting to make a right turn. When she began to make the turn, a young man in a small, green car ran the stoplight and forced Slack to slam on the brakes. The abrupt stop caused Slack to strike her chin on the steering wheel and then to hit the back of her head on the headrest.

The following day, Slack visited her chiropractor, Dr. Steven Lee Schuster, for treatment of her neck and back pain caused by the accident. Dr. Schuster submitted all charges for treatment to Slack's insurer, Farmers Insurance. . . . Farmers Insurance elected to obtain a second opinion regarding the nature of Slack's injuries from an independent medical examiner (an IME).

Farmers Insurance scheduled an appointment for Slack with Dr. Lloyd Lachow, a chiropractor. At that time, another one of Farmers' insureds, Jodi Lynn Harvey, had claimed that Lachow sexually assaulted her during an examination. Slack testified that during her exam, Lachow touched her clothed breast and pushed his pelvis into her

back. In addition, she testified that he pulled hard on her neck and shook her head violently from side-to-side, putting her in additional pain. . . .

Following an investigation, the Colorado Department of Regulatory Agencies (the Agency) suspended Lachow's license effective March 31, 1993. Lachow admitted in a Stipulation and Final Agency Order that the State Board of Chiropractic Examiners, a Board contained within the Agency, would be able to establish a prima facie case of unprofessional conduct during the examinations of Slack and Harvey.

Slack filed suit against Lachow claiming assault, battery, negligence, extreme and outrageous conduct/intentional infliction of emotional distress, negligent infliction of emotional distress, and malpractice. In the same suit, she claimed negligence, breach of contract, bad faith breach of contract, and outrageous conduct against Farmers Insurance. Slack claimed that Farmers Insurance acted improperly by sending her to a chiropractor it knew or should have known would injure her. Brett Slack, her husband, brought a loss of consortium claim.

Before trial, the Slacks settled their claims with Lachow. Farmers Insurance, however, designated Lachow a nonparty [whose fault should be considered in apportioning liability] pursuant to section 13-21-111.5(3), 5 C.R.S. (1999). Following a trial, the jury returned a verdict in favor of the Slacks and against Farmers Insurance on the negligence claim, bad faith breach of contract claim, and on Brett's loss of consortium claim. The jury also found that Farmers Insurance acted [recklessly]. The jury awarded Slack $40,000 for her injuries and $16,000 in exemplary damages. It awarded Brett $6000 for his loss and $2400 in exemplary damages. The jury apportioned sixty percent of the fault for Slack's injuries to Lachow and forty percent to Farmers Insurance. In accordance with section 13-21-111.5(1), the trial court reduced Slack's award to $16,000 in compensatory damages and $16,000 in exemplary damages. The trial court did not reduce the compensatory portion of Brett's damage award.

Slack appealed the reduction of her award to the court of appeals. Farmers Insurance cross-appealed the trial court's refusal to apportion the damages awarded to Brett. The court of appeals held in favor of Farmers Insurance on both issues. This appeal followed. . . .

We move . . . to the question of whether the jury could properly apportion Slack's damages between Lachow and Farmers Insurance. As part of the tort reform movement in Colorado, the General Assembly eliminated joint and several liability wherein one tortfeasor might be liable in damages for the acts of another tortfeasor, and adopted a several liability scheme, wherein a tortfeasor is responsible only for the portion of the damages that he or she caused. Section 13-21-111.5 states

> In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss. . . .

The General Assembly also provided that the negligence or fault of a nonparty who settled with the plaintiff could be considered in the apportionment of damages.

We are called upon to determine whether the General Assembly intended that liability may be apportioned only between negligent tortfeasors, or also between a negligent and an intentional tortfeasor. In other words, may a jury apportion fault among tortfeasors who were merely negligent and others who intended to do wrong?

. . . For analytical purposes, the statute can be separated into two parts. The first explains that the statute applies to "an action brought as a result of a death or an injury to person or property." §13-21-111.5(1). The language of this part clearly applies to a wide variety of situations, and includes intentional torts. Undoubtedly, a sexual assault can result in an action for an injury to a person. Therefore, on its face, the language would cover the intentional torts of assault and battery.

The second part of the statute states "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the *negligence or fault* attributable to such defendant that produced the claimed injury, death, damage, or loss." §13-21-111.5(1) (emphasis added). The critical portion of this section is the phrase "negligence or fault." If this second part of the statute does not limit the first part, then intentional torts must fall within its reach. . . .

Black's Law Dictionary defines fault as "[a]n error or defect of judgment or of conduct; any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement." Black's Law Dictionary 623 (7th ed. 1999). . . .

. . . Black's offers this definition of negligence:

> The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights. . . .

These definitions suggest that the General Assembly used the word "fault" purposefully in section 13-21-111.5(1) and that the common understanding of that term controls our interpretation. Fault contemplates more than mere negligence, and includes intentional acts. . . .

In short, we can find nothing in the statutes or in our cases interpreting the statutes to suggest that the General Assembly intended to expose a negligent tortfeasor to greater liability when his conduct was coupled with that of an intentional tortfeasor, than when his conduct combined with that of another negligent tortfeasor. Accordingly, we conclude that section 13-21-111.5(1) applies even when one of several tortfeasors commits an intentional tort that contributes to an indivisible injury.

The General Assembly abolished joint and several liability in Colorado "to reduce unfair burdens placed on defendants." General Elec. Co. v. Niemet, 866 P.2d 1361, 1364 (Colo. 1994). "The adoption of [the pro rata division of liability based on degree of fault] was intended to cure the perceived inequity under the common law concept of joint and several liability whereby wrongdoers could be held fully responsible for a plaintiff's entire loss, despite the fact that another wrongdoer, who was not held accountable, contributed to the result." Barton v. Adams Rental, Inc., 938 P.2d 532, 535 (Colo. 1997). In our view, neither the reasoning nor the result differ when an intentional wrongdoer contributes to the loss.

Other courts facing this issue have adopted a similar construction. In Bhinder v. Sun Co., 246 Conn. 223, 717 A.2d 202 (1998), the Supreme Court of Connecticut held that the apportionment statute did not apply to situations where one defendant committed an intentional act and another committed a negligent act, because unlike Colorado's law, the Connecticut statute was limited to "negligence actions." However, the court extended the statute to such situations as a matter of common law. The court noted that failure to apportion "would have the incongruous effect of rendering a

negligent party solely responsible for the conduct of an intentional actor, whose deviation from the standard of reasonable care is clearly greater." Id. at 210; see also Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. Ct. App. 1998) (interpreting an apportionment statute covering tort actions involving "fault" to allow apportionment between a church operated school that negligently hired and retained an employee that sexually abused a student and the intentional tortfeasor).

Slack acknowledges that the pro-rata liability statute would apply were Lachow a mere negligent actor, and that Farmers Insurance would bear only their portion of the liability. She argues, however, that since Lachow was an intentional actor, Farmers Insurance (not Lachow) should bear a greater proportion of the loss. In our estimation, the public policy rationale for apportioning the loss commensurate with wrongdoing is even more compelling when an intentional tortfeasor contributes to the injury. Under the terms of the statute, a negligent actor is only responsible for his contribution to an injury, irrespective of whether the other tortfeasor accidentally or purposefully injured the victim. To hold otherwise would lead to the anomaly that a negligent tortfeasor would bear the full risk of the injury if the other tortfeasor purposefully injured the victim, but only his portion of the risk if the other actor were negligent. If any disproportionate responsibility were to be assessed, it would more logically fall upon the intentional tortfeasor—not the negligent one. Nonetheless, section 13-21-111.5 demonstrates the General Assembly's intent that a tortfeasor should pay only for the portion of the injury he caused. . . .

The Colorado several liability statute does not differentiate between intentional acts and negligent acts in its mandate to apportion liability among tortfeasors. Accordingly, the trial court properly apportioned liability in this case based upon the jury's decision as to relative fault between Farmers Insurance and Lachow for Slack's injuries, but erred in failing to apportion liability for Brett's loss of consortium. Therefore, we affirm the court of appeals, and remand the case with directions to return it to the district court with instructions to reduce Brett's award of compensatory damages to $2400 in accordance with this opinion and otherwise to reinstate the trial court judgment.

RICE, J., dissenting.

. . . Other jurisdictions that have addressed this issue have . . . concluded that a negligent tortfeasor should not be permitted to reduce his liability by comparing his negligence to the actions of an intentional tortfeasor. As I find the reasoning and rationale underlying these cases persuasive on the issue before us, I proceed to review them here.

In a negligence suit brought by a customer of a convenience store against the store owner for personal injuries he sustained when he was robbed by an unknown assailant while leaving the store, the Washington Supreme Court interpreted the term "fault," as defined in their state's liability statutes, as not including intentional conduct. See Welch v. Southland Corp., 134 Wash. 2d 629, 952 P.2d 162, 163-165 (1998). The court first noted that the applicable statute "makes clear that . . . several liability is now intended to be the general rule and that the statute now evidences legislative intent that fault be apportioned and that generally an entity be required to pay that entity's proportionate share of damages only." Id. at 164 (internal quotation marks omitted). The court then noted that the statute defines "fault" as:

> acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person

> to strict tort liability or liability on a product liability claim. . . . Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Id. (quoting Wash. Rev. Code §4.22.015) (internal quotation marks omitted).

From this broad definition of fault, and despite its recognition that the legislature intended that liability should be apportioned only to the extent of each defendant's fault, the *Welch* court held that the intentional conduct of a tortfeasor could not reduce the liability of a negligent tortfeasor.

The Tennessee Supreme Court addressed this issue in Turner v. Jordan and held that the conduct of a negligent defendant could not be compared with the intentional conduct of another in determining comparative fault where the intentional conduct is the foreseeable risk created by the negligent tortfeasor. See 957 S.W.2d 815, 823 (Tenn. 1997). In *Turner*, a hospital nurse brought a medical malpractice action against a patient's treating psychiatrist after she was assaulted by the mentally ill patient. The nurse offered evidence at trial in the form of expert testimony that the defendant psychiatrist's failure to medicate, restrain, seclude, or transfer the patient fell below the standard of care and that, as a result of this negligence, she was assaulted by the patient. The trial court instructed the jury that it could allocate the liability for the nurse's injuries between the negligent doctor and the patient's intentional conduct. The jury returned a verdict for the nurse and allocated 100% of the liability for her injuries to the negligent psychiatrist.

On appeal, the Tennessee Supreme Court determined first that the psychiatrist owed a duty of care to the nurse and breached this duty because the psychiatrist was aware of the patient's violent tendencies, including a previous assault on another hospital staff member, and took no reasonable steps to avoid this type of assault from occurring again. The court then held that it was error for the trial court to allow the jury to apportion liability between the psychiatrist and the mental patient, but concluded that this error was harmless in this case because the jury allocated 100% of the liability to the psychiatrist. In reaching its holding, the court first noted that "comparison presents practical difficulties in allocating fault between negligent and intentional acts, because negligent and intentional torts are different in degree, in kind, and in society's view of the relative culpability of such act." Id. The court then observed that this type of comparison "reduces the negligent person's incentive to comply with the applicable duty of care." Id. Finally, the court addressed the policy rationale for the holding and noted that the principle of " 'holding the tortfeasor liable for only his own percentage of fault is *not* abrogated by nonapportionment when the nature of the tortfeasor's breach is that *he created the risk of the second tortfeasor's [intentional] act.*' " Id. (brackets in original) (emphasis added).

I find the Tennessee Supreme Court's rationale underlying its holding particularly persuasive on this issue with respect to the facts of the case before us. As the *Turner* court noted, a tortfeasor should not be allowed to reduce his liability by shifting some or all of the blame to an intentional tortfeasor whose actions constitute the precise risk for which the negligent tortfeasor has been found liable for not preventing. In *Turner*, the psychiatrist breached the duty by not taking steps to prevent the assault. In the instant case, Farmers not only did not take steps to remove Dr. Lachow from its list of approved independent medical examiners after learning of the earlier sexual assault, but they instructed Mrs. Slack that she must be examined by Dr. Lachow before they

would process her claim. As such, the rationale expressed by the *Turner* court applies with even greater force to the facts of the instant case. . . .

In my view, precluding a negligent tortfeasor from reducing his liability by pointing to the actions of an intentional tortfeasor in no way undermines the General Assembly's goal of reducing the unfair burdens placed on defendants. This case is an ideal example of a "burden" that should not be considered "unfair," and a result that was likely not contemplated by the General Assembly when it passed the statute. Under my construction of the statute, Farmers would not be allowed to reduce its liability by pointing to Dr. Lachow's conduct. Farmers' negligence in referring Mrs. Slack to Dr. Lachow, when it knew he had just recently sexually assaulted another insured, created the exact risk of harm that occurred. Precluding Farmers from reducing its liability in this manner does not impose any unfair burden on Farmers in contravention of the General Assembly's purpose. Accordingly, I believe that this interpretation of the statute is consistent with the General Assembly's purpose in enacting section 13-21-111.5. . . .

NOTES TO SLACK v. FARMERS INSURANCE EXCHANGE

1. ***Apportionment Between Negligent and Intentional Defendants.*** The majority and dissenting opinions in *Slack* relied on their perceptions of fairness in deciding whether liability should be apportioned among negligent and intentional defendants. How did the different perceptions of fairness result in different outcomes? Under the dissenting justice's view, should there never be apportionment between such defendants or should apportionment be denied only in certain cases?

2. ***Apportioning Compensatory and Exemplary Damages.*** In a portion of the opinion not included here, the *Slack* court discussed apportionment of punitive damages. The defendant insurance company had been reckless in referring Juliet Slack to Dr. Lachow, about whom prior complaints of unprofessional conduct had been made. Both Juliet Slack and her husband were awarded *exemplary or punitive damages* in addition to compensatory damages. Exemplary or punitive damages are added to compensatory damages to punish the defendant. According to the court in *Slack*, most states do not allow the apportionment of exemplary damages. Instead, courts require juries to determine separate amounts of appropriate exemplary damages for each defendant and make each defendant liable for the full amount of its own exemplary damages. A logical reason for this treatment is that compensatory damages are designed to make up for indivisible harm caused by several defendants, while exemplary or punitive damages are designed to punish a particular defendant's reprehensible conduct.

Perspective: Restatement (Third) and Responsibility for Intentional Actors' Wrongdoing

In a symposium on the Restatement (Third) of Torts, one of the Reporters for Apportionment of Liability section of that project explained its position on assigning financial responsibility when one defendant is negligent and another

has committed an intentional tort. See comments by Dean Michael Green in *Third Annual Judges and Lawyers Symposium: The Restatement (Third) of Torts and the Future of Tort Law: Overview by the ALI Reporters: Apportionment of Liability*, 10 Kan. J.L. & Pub. Poly. 30 (2000):

> Finally, let me just close out with what I think is the most cutting edge, least law to support it, [provision in the Restatement (Third) on Apportionment of Liability]. . . . [T]his was actually the *Howard Johnson* case, and it involved Connie Francis. It was when Connie Francis was sexually assaulted in a *Howard Johnson's* motel and sued Howard Johnson's, not the assaulter, for inadequate security. Well, with several liability, and this is where it becomes particularly a problem, if we are going to include intentional tortfeasors, all of a sudden we are apportioning comparative responsibility to an intentional tortfeasor and to Howard Johnson's. As a factfinder compares their culpability, surely the intentional tortfeasor ends up with a whole bunch, and Howard Johnson's may end up with some, but it is going to be relatively minimal. Yet, if we are going to hold Howard Johnson's liable for negligent security in that situation, if there is a tort duty that was breached we intended that Howard Johnson's protect the plaintiff from the intentional tortfeasor. Section Fourteen says, no matter what form of joint and several or several liability adopted in the jurisdiction, a negligent tortfeasor who fails to protect the plaintiff, who breaches a duty to protect a plaintiff from an intentional tort, is liable not only for its share of comparative responsibility, but also for any share assigned to the intentional tortfeasor. The negligent tortfeasor, of course, would have a contribution claim against the intentional tortfeasor, but I leave it to you to try to figure out how the negligent defendant is going to collect on that contribution judgment.

E. Allocating the Risk of Insolvency

Under joint and several liability, the plaintiff may collect his or her damages from any subset of the jointly and severally liable defendants because each is liable for the entire amount. Under several liability, however, each defendant is only liable for a share of the damages. Without some special rules relating to insolvent defendants, if one defendant is insolvent, the plaintiff will be unable to collect that share. Some courts refer to these uncollectible shares as *orphan shares*. See Martignetti v. Haigh-Farr, Inc., 680 N.E.2d 1131, 1145 and n.39 (Mass. 1997) (defining "orphan share" as "the amount for which a liable party should be responsible under an equitable allocation procedure, but which cannot be collected because the party is insolvent, unidentifiable, or otherwise unreachable.")

To prevent the risk of insolvency from resting on plaintiffs, a few states use reallocation rules that spread the insolvent defendant's share either among the solvent defendants or among the plaintiff and any solvent defendants. The following Connecticut and Minnesota statutes illustrate these approaches.

Statute: LIABILITY OF MULTIPLE TORTFEASORS FOR DAMAGES

Conn. Gen. Stat. Ann. §52-572h(g)(3) (2001)

The court shall order that the portion of such uncollectible amount which represents recoverable economic damages be reallocated among the other defendants. The court shall reallocate to any such other defendant an amount equal to such uncollectible amount of . . . economic damages multiplied by a fraction in which the numerator is such defendant's percentage of negligence and the denominator is the total of the percentages of negligence of all defendants, excluding any defendant whose liability is being reallocated.

Statute: APPORTIONMENT OF DAMAGES

Minn. Stat. Ann. §604.02 (2001)

Subd. 2. 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. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

NOTE TO STATUTES

Suppose that a plaintiff has suffered economic damages of $70,000 arising from the sale of a negligently manufactured power saw. The plaintiff was negligent for failing to wear protective eyewear. The manufacturer was negligent for failing to secure the saw's safety guard during manufacture. A retailer was negligent for failing to provide written or oral safety instructions to the plaintiff. A jury allocated the following shares of responsibility for the plaintiff's injuries:

Plaintiff	30% responsible
Defendant Manufacturer	60% responsible
Defendant Retailer	10% responsible

In a jurisdiction that applies comparative fault principles and several liability, the plaintiff would receive a judgment for $42,000 against the manufacturer and a judgment for $7,000 against the retailer. If the manufacturer was insolvent, how would the Connecticut and Minnesota statutes treat the $42,000 judgment that the manufacturer would otherwise have paid? If the retailer was insolvent, how would these statutes treat the $7,000 the retailer would otherwise have paid? Which statute is more favorable to plaintiffs?

III. Vicarious Liability

A special variety of joint liability is the doctrine known as *vicarious liability*. Under this doctrine, an actor is liable for someone else's tortious conduct. The primary instance of vicarious liability is an employer's obligation to pay for an employee's tortious conduct, known as the doctrine of *respondeat superior*. Even if an employer has been totally free from negligence, tort law subjects the employer to liability for negligent acts by an employee committed within the scope of employment. Vicarious liability is also applied to vehicle owners, allowing people injured by the negligent use of an automobile or other vehicle to recover from the owner even if the owner was not negligent in any way.

A. Respondeat Superior

Trahan-Laroche v. Lockheed Sanders, Inc. introduces the basic elements of the *respondeat superior* doctrine. It shows that a plaintiff injured by an employee may seek damages from the employer with two separate causes of action. One cause of action is based on vicarious liability *for the employee's tortious act*. The other is based on a claim that the employer is responsible for some other negligent act, such as negligent supervision or negligent hiring.

Holding an employer responsible for an employee's torts raises the question of whether the negligent person was acting as an employee at the time of the tortious conduct. *McDonald's Restaurants of California* analyzes whether a person who was admittedly an employee was acting within the scope of that employment when his car collided with the plaintiff's motorcycle. In Santiago v. Phoenix Newspapers, Inc., a newspaper company denied that a driver was an employee and argued that the court should classify the driver as an *independent contractor* for whose conduct the newspaper would be free from vicarious liability.

TRAHAN-LAROCHE v. LOCKHEED SANDERS, INC.

657 A.2d 417 (N.H. 1995)

HORTON, J.

The plaintiffs, Rita Trahan-Laroche and Lucien Laroche, appeal a decision of the Superior Court granting the motion of the defendant, Lockheed Sanders, Inc., for

summary judgment on their *respondeat superior* and negligent supervision claims. We reverse and remand.

On October 24, 1990, a flatbed trailer separated from the pickup truck towing it and collided with the plaintiffs' vehicle. Patrick J. Maimone, employed by the defendant as a maintenance mechanic, was the driver as well as the owner of both the truck and the trailer. One of his tasks was to hay the fields at the defendant's facilities in Hudson and Litchfield. Maimone provided most of the haying equipment, most of which he towed to the defendant's premises with his truck and trailer. The defendant did not compensate Maimone for the use of the equipment or the time spent transporting it, but did pay him his normal wages while haying the fields and permitted him to keep any hay he removed. Prior to the day of the accident, Maimone had completed haying the fields at the defendant's Litchfield facility, but had not removed his trailer or all of the farming equipment. After work on October 24, 1990, but before leaving the defendant's premises, Maimone hitched his trailer to his truck for use in transporting hay from his farm to the Agway store to sell that evening. He planned to return the trailer to remove the remaining farm machinery. The trailer separated from the truck during the drive from the defendant's Litchfield facility to Maimone's farm.

The plaintiffs sued the defendant under theories of *respondeat superior* and negligent supervision. They argued that Maimone was acting within the scope of his employment at the time of the accident. Alternatively, they argued that while on the defendant's property and under the defendant's supervision and control, Maimone negligently attached his trailer and used inadequate safety chains in violation of the common law and RSA 266:63 (1993). The defendants moved for summary judgment, arguing that no disputed issues of material fact existed and that the plaintiffs failed to state a claim upon which relief may be granted because Maimone was not acting within the scope of his employment. . . .

The trial court ruled as a matter of law that Maimone acted outside the scope of his employment. Treating the defendant's motion as a motion to dismiss, the court concluded that "even taking the facts and reasonable inferences drawn therefrom in the light most favorable to them, the plaintiffs have failed to state a claim that would permit them to recover." . . . The plaintiffs appealed. . . .

Under the doctrine of *respondeat superior*, an employer may be held vicariously responsible for the tortious acts of an employee committed incidental to or during the scope of employment. Here, the plaintiff has alleged that the movement of Maimone's trailer for temporary personal use was understood to be part of the agreement between Maimone and the defendant regarding Maimone's provision of the farming equipment and removal of the hay, and therefore incidental to Maimone's employment. This allegation could lead to a finding that would support recovery based on the doctrine of *respondeat superior* if found to be true by a jury.

An employer may be directly liable for damages resulting from the negligent supervision of its employee's activities. The employer's duty to exercise reasonable care to control its employee may extend to activities performed outside the scope of employment. The plaintiffs alleged that although Maimone was involved in several accidents involving vehicles and equipment while in the defendant's employ, his activities were not closely supervised, and his equipment and vehicles were not regularly inspected. This allegation and the reasonable inferences therefrom raise a jury issue as to whether the defendant negligently supervised Maimone. We therefore hold that it was error to dismiss the plaintiffs' claims.