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The Risk of Financial Irresponsibility Under New York C.P.L.R. 1602(6)

A CALL FOR REFORM*

I. INTRODUCTION

New York State automobile insurance rates have increased dramatically in recent years.¹ In 2001, New York's average automobile insurance premiums were the second highest in the nation and trailed New Jersey, the most expensive state, by only 1.8 percent.² Overall in 2001, automobile insurance rates increased by 8.1 percent, and more importantly, rates for compulsory automobile liability insurance increased by a staggering 17.2 percent.³ Despite

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¹ See ANNUAL REPORT OF THE SUPERINTENDENT OF INSURANCE TO THE NEW YORK LEGISLATURE, CALENDAR YEAR 2001, at 73 (2001) [hereinafter *NY ANNUAL INSURANCE REPORT*].

² See Bankrate.com, *Best and Worst States for Auto Insurance Premiums*, at <http://aol1.bankrate.com/AOL/news/auto/20030910b1.asp?header=pf> (last visited Mar. 1, 2004).

In 1994, New York State had the fifth highest annual automobile insurance premiums in the nation. See GEORGE E. REJDA, *PRINCIPLES OF RISK MANAGEMENT AND INSURANCE* 204 (Denise Clinton ed., 1998). Average annual premiums in 1994 for New Yorkers were \$1,029.09, only approximately 7% lower than New Jersey, the most expensive state in the United States. *Id.* By 1998, New York State automobile insurance rates had risen to become the second highest in the nation. *New York Insurance Rates Among Costliest*, N.Y. TIMES, May 8, 1998, at B5. Within New York State, rates in Brooklyn were the highest, averaging \$3,304.00 per year. *Id.*

³ *NY ANNUAL INSURANCE REPORT*, *supra* note 1, at 73. The percentage increase in insurance rates occurred in insurance companies that represented 77% of the entire New York automobile insurance market. *Id.* The 2001 rate increases are quite remarkable when compared to the modest 1.6% increase in the consumer price index. See U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index – All Urban Consumers, at http://www.bls.gov/schedule/archives/cpi_nr.htm (last visited Mar. 1, 2004).

those increases, rates rose by 8.4 percent in 2002 and are expected to rise an additional nine percent in 2003.⁴ One factor driving up automobile liability insurance rates is increased jury awards in automobile accident cases.⁵ Higher jury awards result in larger claim payments, which naturally lead to higher insurance premiums.⁶

In order to limit claim payments, and thereby decrease automobile liability insurance rates, this Note suggests abolishing joint and several liability in automobile accident cases.⁷ In New York, section 1601 of the Civil Practice Law and Rules (C.P.L.R.) partially abolishes the ancient joint and several liability doctrine.⁸ However, C.P.L.R. section 1602(6) specifically exempts automobile accident cases from section 1601's partial abolition.⁹ This Note argues that C.P.L.R. section 1602(6) should be repealed because it is both unnecessary and unjustified.¹⁰

When liability is joint and several, the plaintiff has the freedom to seek recovery against all of the tortfeasors, against only one, or against a few select members of a group.¹¹ Thus, under joint and several liability, a defendant who is only partly responsible for the plaintiff's injuries may be held fully liable.¹²

⁴ See Insurance Information Institute, *Facts and Statistics: The Rising Cost of Auto Insurance*, at <http://www.iii.org/media/facts/statsbyissue/auto> (last visited Mar. 1, 2004).

⁵ See *id.* Other factors contributing to increases in automobile insurance premiums include an upward trend in medical care costs, automobile repair costs, fraud, and theft of air bags. See *id.* From 1994 to 2000, the average jury award in automobile liability cases rose 44% from \$187,000 to \$269,000. See Dr. Robert P. Hartwig, *What's Behind the Rising Cost of Auto and Homeowners Insurance?*, at <http://www.iii.org/media/hottopics/hot/20022003outlook/> (last visited June 24, 2003).

⁶ See REJDA, *supra* note 2, at 103, 527.

⁷ See Jonathan Cardi, *Apportioning Responsibility To Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1302 (1997) (recognizing that large companies and local governments cited joint and several liability as a cause for skyrocketing insurance premiums). "Critics of the doctrine have also pointed out that joint and several liability may hinder insurers' ability to predict risks and set aside narrow risk pools for specialized insurance plans. These interferences with risk assessment and customized plans likely drive up insurance premiums." *Id.*

⁸ See N.Y. C.P.L.R. 1601 (McKinney 2003).

⁹ See N.Y. C.P.L.R. 1602(6) (McKinney 2003).

¹⁰ See *infra* text accompanying notes 116-48 (unnecessary) and 92-115 (unjustified).

¹¹ See BLACK'S LAW DICTIONARY 837 (6th ed. 1994).

¹² As a result, joint and several liability "often has the effect of turning a lawsuit into a search for a peripherally involved party whose pockets are deep enough to pay a sizable award." New Yorkers for Civil Justice Reform, *Reform Priorities*, at <http://www.nycjr.org/reforms.html> (last visited Mar. 1, 2004).

Preserving joint and several liability in automobile accident cases increases the potential liability of all motorists involved in accidents, which in turn increases the claim payments of liability insurance companies. The increased claim payments are ultimately passed on to all responsible motorists in the form of higher liability insurance premiums.¹³

This Note asserts two reasons why section 1602(6)'s automobile exception should be repealed. First, the current New York statutory scheme unjustifiably shifts the risk of an insolvent co-defendant from the plaintiff to the financially responsible defendant. Second, section 1602(6)'s protections are redundant and thus unnecessary. Irrespective of section 1602(6), plaintiffs who fall within the class of persons defined as an "insured" in the Personal Auto Policy¹⁴ (PAP-insured plaintiffs) are protected from financially irresponsible defendants¹⁵ because New York law requires all motorists to purchase uninsured motorist coverage.¹⁶ Additionally, plaintiffs who are not considered PAP-insured (non-PAP-insured plaintiffs) are also protected from financially irresponsible defendants, again irrespective of section 1602(6), by the Motor Vehicle Accident Indemnity Corporation.¹⁷

This rest of this Note proceeds in three parts. Part II illustrates the practical effects of the current New York statutory scheme establishing joint and several liability, contribution, and comparative fault in automobile accident cases.¹⁸ It then demonstrates how joint and several liability, in conjunction with a claim for contribution, shifts the risk of a financially irresponsible defendant from the plaintiff to a financially responsible defendant.

Part III explains the impact of automobile insurance on the tort process by focusing on the Personal Auto Policy (PAP) and its four major coverages: liability coverage, medical

¹³ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 591 (5th ed. 1984).

¹⁴ The PAP is a widely-used standard personal automobile insurance policy. See *infra* text accompanying notes 57-66.

¹⁵ A "financially irresponsible defendant" is a term of art. As used herein, a financially irresponsible defendant shall be defined as a motorist who has not purchased automobile liability insurance and who is also financially unable to satisfy an injured person's damage award. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 413-14 (West Group 1988).

¹⁶ N.Y. VEH. & TRAF. LAW §§ 310-321 (McKinney 2003).

¹⁷ See *infra* text accompanying notes 132-48.

¹⁸ See *infra* text accompanying notes 21-50.

payments coverage, uninsured motorist coverage, and coverage for damage to the insured automobile.¹⁹ This Part then illustrates how joint and several liability and contribution claims are processed once there is applicable automobile insurance.

Part IV posits the reasons for repealing section 1602(6).²⁰ Part IV.A examines the policy concerns normally present when the law shifts the risk of an insolvent co-defendant from the plaintiff to another defendant, and then demonstrates how those policy concerns are lacking in the automobile accident context. Part IV.B demonstrates that plaintiffs do not need section 1602(6)'s protections because both compulsory uninsured motorist coverage as well as the Motor Vehicle Accident Corporation adequately protect them from financially irresponsible defendants. Ultimately, the analysis reveals that joint and several liability unjustifiably and unnecessarily drives up the cost of automobile liability insurance in New York.

II. JOINT AND SEVERAL LIABILITY, CONTRIBUTION, AND COMPARATIVE FAULT IN NEW YORK

The common law doctrine of joint and several liability gives a plaintiff the ability to choose from whom among several tortfeasors to pursue for the full amount of her damages.²¹ A plaintiff can elect to pursue a full recovery against one, some, or all of the at-fault parties.²² Under New York law,²³ joint and several liability applies when two or more people either act in

¹⁹ See REJDA, *supra* note 2, at 171.

²⁰ See *infra* text accompanying notes 78-148.

²¹ *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983); see also BLACK'S LAW DICTIONARY, POCKET EDITION 377 (5th ed. 2000) (defining joint and several liability as liability that may be apportioned at the plaintiff's discretion either among two or more parties, or to only one or a few select members of the group).

²² VICTOR E. SCHWARTZ ET AL., TORTS 358 (10th ed. 2000). See generally William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937).

Joint and several liability originated in the English report of Sir John Heydon's Case, resting on the theory of concerted action. 77 Eng. Rep. 1150 (K.B. 1613); see also Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565 (2000). The rationale for joint and several liability "grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages since there was but one wrong." *Bartlett v. N.M. Welding Supply, Inc.*, 646 P.2d 579, 584 (N.M. Ct. App. 1982).

²³ See LEE S. KREINDLER ET AL., NEW YORK LAW OF TORTS (WEST'S NEW YORK PRACTICE SERIES) § 10.2 (2002).

concert to commit an injury,²⁴ breach a common duty owed to the plaintiff,²⁵ or commit separate individual acts that cause an indivisible injury to the plaintiff.²⁶ For example, in an automobile accident case, joint and several liability attaches when two motorists negligently strike each other and injure a third party. In such a case, the injured third party can recover all of her damages from any one or all of the potentially liable motorists.

Joint and several liability can lead to inequitable results by holding a partly responsible defendant fully liable for the plaintiff's injuries. To ameliorate the harshness of joint and several liability, many jurisdictions, including New York, allow a joint tortfeasor who has paid more than his apportioned share of damages to seek recovery from the other tortfeasors by asserting a claim for contribution.²⁷

In 1972, the New York Court of Appeals first recognized a claim for contribution in the seminal case of *Dole v. Dow Chemical Co.*,²⁸ holding that:

where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant

²⁴ See, e.g., *De Carvalho v. Brunner*, 223 N.Y. 284, 119 N.E. 563 (1918) (holding that when two or more people are negligently racing horses on a street and one injures a pedestrian, they are both joint and severally liable); see also *Bierczynski v. Rogers*, 239 A.2d 218, 221 (Del. 1968) (finding that all parties engaging in a motor vehicle race on a street are wrongdoers acting in concert).

²⁵ See, e.g., *Wold v. Grozalsky*, 277 N.Y. 364, 365, 14 N.E.2d 437, 438 (1938) (holding that a common duty was breached when a flower pot fell from a common party wall between two buildings and injured plaintiff); see also *SCHWARTZ ET AL.*, *supra* note 22, at 359 (citing *Marcon v. Kmart Corp.*, 573 N.W.2d 728 (Minn. Ct. App. 1998) (holding Kmart fully liable to customer injured because manufacturer of a sled failed to properly warn of its risks)).

²⁶ See, e.g., *Hawkes v. Goll*, 281 N.Y. 808, 24 N.E.2d 484 (1939) (finding indivisible injury from two separate acts when pedestrian on a highway was struck by an automobile and thrown to the other side of the road, where he was then struck by another automobile); see also *Coney*, 454 N.E.2d at 207 (holding that the doctrine of comparative fault, in lieu of contributory negligence, does not eliminate joint and several liability).

²⁷ See Paul F. Kirgis, *Apportioning Tort Damage in New York: A Method to the Madness*, 75 ST. JOHN'S L. REV. 427 (2001).

²⁸ 30 N.Y.2d 143, 282 N.E.2d 288 (1972). In *Dole*, the plaintiff's husband died by inhaling methyl bromide, a fumigant, used by his employer and manufactured by Dow. Plaintiff sued Dow, alleging it failed to adequately warn users of the fumigant's dangers. *Id.* at 146. Dow pleaded the decedent's employer for indemnification, alleging that the decedent's death, if caused by negligence, was caused by the "active and primary negligence" of the employer while Dow's negligence was "merely passive and secondary." *Id.* The Court abandoned the active-passive indemnification concept and recognized a claim for contribution. *Id.* at 148.

against the third party . . . [by] an apportionment of responsibility in negligence between those parties.²⁹

In 1974, the legislature codified *Dole* in section 1401 of the C.P.L.R.³⁰ Thus, although a defendant who is jointly and severally liable will still be responsible in full to the plaintiff, that defendant may seek reimbursement by asserting a claim for contribution against the other at-fault parties. Accordingly, in theory, a defendant's net liability should never exceed his apportioned percentage of fault.³¹

Although contribution claims seem to link each party's ultimate liability to his or her apportioned percentage of fault, "[t]he right to contribution . . . is cold comfort when the other culpable persons are insolvent"³² Therefore, contribution only partially addresses the harshness and inequity of joint and several liability. Although it provides a means for equitable reimbursement, the initial defendant must still bear the risk that the other tortfeasors are identifiable, subject to the jurisdiction of the court,³³ and solvent.³⁴ Additionally, even if the other defendants meet those criteria, the first defendant initially held liable may incur opportunity costs as he waits for his contribution claims to bear fruit.

Joint defendants were not the only parties suffering under the harsh pre-*Dole* tort laws.³⁵ Plaintiffs also faced the inequitable contributory negligence defense. The defense completely barred recovery if the plaintiff was at all responsible for their injury.³⁶ Thus, a plaintiff found to be even

²⁹ *Id.* at 148-49.

³⁰ Section 1401 provides in pertinent part that, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." N.Y. C.P.L.R. 1401 (McKinney 2003). Section 1401 also provides that contribution is to be determined based on equitable shares of fault. *See also* Kirgis, *supra* note 27, at 430.

³¹ *See* N.Y. C.P.L.R. 1401 (McKinney 2003).

³² Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 1601, C1601:1 (McKinney 1997 Main Volume).

³³ Obtaining personal jurisdiction over non-resident defendants in automobile accident cases is not problematic because section 253 of the Vehicle and Traffic Law appoints the secretary of state as an agent for service of process for such defendants. *See* N.Y. VEH. & TRAF. LAW 253(a) (McKinney 2003).

³⁴ *See generally* SCHWARTZ ET AL., *supra* note 22, at 364.

³⁵ *See* Kirgis, *supra* note 27, at 431-32.

³⁶ *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 1033 (defining contributory negligence). Three main factors led to the development of contributory negligence: first and foremost the courts distrusted the pro-plaintiff juries in the early nineteenth

one percent at fault would be denied any recovery. Despite the harshness of the doctrine, the New York Court of Appeals in *Codling v. Paglia*³⁷ refused to adopt the more equitable comparative negligence standard, which, instead of completely denying an at-fault plaintiff any recovery, would reduce the award by the percentage of the plaintiff's fault.³⁸

However, in 1975 the legislature responded by enacting a pure comparative fault standard in C.P.L.R. section 1411.³⁹ Under the new standard, "a plaintiff's contributory negligence does not operate to bar his recovery altogether, but does serve to reduce his damages in proportion to his fault."⁴⁰ For example, if a plaintiff proves one hundred thousand dollars in damages, but is found to be twenty percent at fault, the plaintiff's recovery will be decreased to eighty thousand dollars.⁴¹ Adopting comparative negligence and contribution links the parties' ultimate liability to their apportioned fault and thereby increases the "fairness" of the tort process.

Nonetheless, those reforms did not perfect the scheme. In 1986, the state legislature recognized additional schematic shortcomings and partially abolished joint and several

century; the courts sought to limit the liabilities of the growing industry; and the courts were also unable to apportion damages in cases in which both plaintiff and defendant were at fault. KEETON ET AL., *supra* note 13, at 452.

³⁷ 32 N.Y.2d 330, 345, 298 N.E.2d 622, 630 (1973) (holding that the legislature, and not the courts, should address the harshness of contributory negligence).

³⁸ See Kirgis, *supra* note 27, at 430.

³⁹ *Id.* at 432. Section 1411 provides in pertinent part:

[i]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

N.Y. C.P.L.R. 1411 (McKinney 2003); see also Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 1411, C1411:1 (McKinney 1997 Main Volume).

⁴⁰ KEETON ET AL., *supra* note 13, at 471-72. "The move from contributory negligence to comparative fault in tort law has been swift and pervasive, with only four states and the District of Columbia retaining pure contributory negligence schemes." Cardi, *supra* note 7, at 1294.

⁴¹ Under a pure comparative fault analysis a plaintiff's recovery can be calculated by applying the formula: Recovery = Damages x (1 - % of plaintiff's attributed fault). See *Alternative Rules for Determining Tort Liability: Comparative Negligence*, COKE'S INSTITUTES OF THE LAW (No. 2) (Amanda J. Owens & Charles K. Rowley eds.), available at <http://www.thelockeinstitute.org/journals/tortliability9.html> (last visited Mar. 1, 2004).

liability.⁴² Under section 1601,⁴³ the legislature retained joint and several liability with respect to economic loss, but not with respect to non-economic loss when a defendant's fault is fifty percent or less.⁴⁴ Accordingly, a tortfeasor apportioned less than fifty percent of the fault will not pay in excess of his culpability for the plaintiff's non-economic loss.⁴⁵ Thus, section 1601 shifts the risk of a co-defendant's insolvency, at least in some circumstances, from a financially responsible defendant back to the plaintiff.⁴⁶

Despite the legislature's recognition of the inequities of joint and several liability, it nonetheless exempted certain actions from section 1601's limitations.⁴⁷ Most notably, section 1602(6) states that section 1601 does "not apply to any person

⁴² See N.Y. C.P.L.R. 1601 (McKinney 2003). New York's limitations on joint and several liability were consistent with trends elsewhere. By 1997, "only fourteen states and the District of Columbia retain[ed] virtually pure joint and several liability. Of the remaining thirty-six states, sixteen states have abolished, or nearly abolished, joint and several liability, and twenty [states] have adopted a hybrid of the two systems." Cardi, *supra* note 7, at 1302-04.

⁴³ N.Y. C.P.L.R. 1601 provides in pertinent part:
when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss.

N.Y. C.P.L.R. 1601 (McKinney 2003).

⁴⁴ Economic losses are out-of-pocket expenses which include, but are not limited to, medical expenses and lost earnings. Non-economic losses are defined in N.Y. C.P.L.R. section 1600 as including, but not limited to, pain and suffering, mental anguish, and loss of consortium. In addition to New York, other states that also limit the application of joint and several liability depending on whether the damages are economic or non-economic include Florida, Ohio, California, and Nebraska. See Vandall, *supra* note 22, at 589 n.147.

⁴⁵ See Kirgis, *supra* note 27, at 434. For example, assume the plaintiff suffers \$20,000 in economic damages, \$80,000 in non-economic damages, and the jury finds defendant A 70% at fault and defendant B 30% at fault. Without section 1601, defendant B could be forced to pay the full \$100,000 in damages. However, under section 1601, the most defendant B could be required to pay would be \$44,000, the full economic damage plus 30% of the non-economic damages. See *id.*

⁴⁶ Vincent C. Alexander, Practice Commentaries, N.Y. C.P.L.R. 1601, C1601:1 (McKinney 1997 Main Volume).

⁴⁷ See N.Y. C.P.L.R. 1602 (McKinney 2003). Some of the exceptions include: actions for intentional torts; cases where the defendant has acted with reckless disregard for the safety of others; or cases involving administrative proceedings. See generally N.Y. C.P.L.R. 1602(1)-(12) (McKinney 2003). There is a presumption that section 1601 governs and a party wishing to rely upon a section 1602 exception must carry the burden of proving its applicability. See N.Y. C.P.L.R. 1603 (McKinney 2003); see also *Tortfeasor Jointly, Severally Liable; Valet Parking is Deemed Use of Car*, N.Y.L.J., Oct. 25, 1996, at 25.

held liable by reason of his use, operation, or ownership of a motor vehicle or motorcycle”⁴⁸ As a result, “the reduced-liability benefits of [section 1601] are unavailable to most of the tortfeasors in the most common tort case of all: the motor vehicle accident.”⁴⁹ The combination of section 1602(6)’s preservation of joint and several liability for automobile accident claims and section 1401’s recognition of a right to contribution creates an inefficient⁵⁰ and complex risk transfer mechanism. In theory, a defendant should never pay more than his fair share because any excess payments made to the plaintiff can be recovered by asserting a contribution claim. However, in practice, there is always the risk that a co-defendant will be insolvent. As a result, the scheme transfers the risk of financial irresponsibility from the plaintiff to the defendant. A defendant’s risk decreases when section 1601 applies, but 1602(6)’s motor vehicle exception leaves many tort defendants fully exposed to potentially large liabilities for injuries for which they may be only partly responsible.

⁴⁸ N.Y. C.P.L.R. 1602(6) (McKinney 2003). Section 125 of the New York Vehicle and Traffic Law defines a motor vehicle as:

every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (b) vehicles which run only upon rails or tracks, (c) snowmobiles as defined in article forty-seven of this chapter, and (d) all terrain vehicles as defined in article forty-eight-B of this chapter. For the purposes of title four, the term motor vehicle shall exclude fire and police vehicles other than ambulances.

N.Y. VEH. & TRAF. LAW § 125 (McKinney 2003). Section 311 further provides:

the term “motor vehicle” shall be defined as in section one hundred twenty-five of this chapter, except that it shall also include trailers, semi-trailers and tractors other than tractors used exclusively for agricultural purposes, and shall exclude fire and police vehicles, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, tractors used exclusively for agricultural purposes, or for snow plowing other than for hire, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

N.Y. VEH. & TRAF. LAW § 311 (McKinney 2003).

Besides New York, Hawaii is the only other state that specifically retains joint and several liability for automobile cases. See Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 318 (1990).

⁴⁹ Vincent C. Alexander, N.Y. C.P.L.R. 1602, Practice Commentaries, subdivision 6 (McKinney 1997 Main Volume).

⁵⁰ In the absence of joint and several liability, plaintiffs would join all responsible parties, streamlining the litigation and obviating the need for contribution claims. See *Cardi*, *supra* note 7, at 1302.

III. THE IMPACT OF AUTOMOBILE INSURANCE ON THE TORT PROCESS

Each year there are approximately thirty-four million motor vehicle accidents.⁵¹ Assuming an equal distribution, an accident occurs approximately every second of every day. The economic costs are staggering. In 1994, automobile accidents resulted in an estimated economic loss of almost \$111 billion dollars.⁵² Since the potential liabilities can reach such enormous levels, individuals often transfer the risk of loss to automobile insurance companies by purchasing a Personal Auto Policy.⁵³

Automobile liability insurance is part of almost all actions involving automobile accidents because automobile liability insurance is mandatory in forty-seven states and the District of Columbia.⁵⁴ New York's compulsory insurance law requires that motorists carry a minimum of twenty-five thousand dollars in liability insurance for bodily injury to one person, fifty thousand dollars for bodily injury to all persons, and ten thousand dollars for property damage in any one accident.⁵⁵ Motorists typically select higher limits because "the

⁵¹ BEN G. BALDWIN, *THE LAWYER'S GUIDE TO INSURANCE, PERSONAL INSURANCE COVERAGE FOR PROFESSIONALS AND THEIR CLIENTS* 111 (1999). In 2000, 41,821 people in the United States were killed in automobile accidents, 1,458 of whom were killed within New York State. See Car-Accidents.com, *Motor Vehicle Crash Fatalities by State*, at http://www.car-accidents.com/pages/stats/2000_by_state.html (last visited Mar. 1, 2004).

⁵² See REJDA, *supra* note 2, at 169.

⁵³ *Id.*

⁵⁴ See Insurance Information Institute, *Hot Topics & Insurance Issues: Compulsory Auto Insurance* [hereinafter *Compulsory Auto Insurance*], at <http://www.iii.org/media/hottopics/insurance/compulsory/> (last visited Mar. 1, 2004).

The only states that do not have compulsory automobile insurance liability laws are New Hampshire, Tennessee and Wisconsin. *Id.* Connecticut was the first state to enact a financial responsibility law. See KEETON & WIDISS, *supra* note 15, at 413-14. Under the Connecticut law, motorists involved in an accident causing damages in excess of \$100 were required to prove their ability to satisfy a claim up to \$10,000. *Id.* (citing Connecticut Public Acts Ch. 183 (1925)). The Connecticut approach was ineffective because it required drivers to furnish proof of financial responsibility only after they got into an accident. *Id.* at 601 (emphasis added). In 1956, New York adopted a compulsory insurance law that required *advance* proof of financial responsibility by all drivers. *Id.* (emphasis added); see also N.Y. VEH. & TRAF. LAW §§ 310-321 (McKinney 2003). For a chart listing the compulsory automobile insurance requirements of all states, see *Compulsory Auto Insurance, supra*.

⁵⁵ See New York State Department of Insurance, *Consumer Frequently Asked Questions*, at <http://www.ins.state.ny.us/faqs1.htm> (last visited Mar. 1, 2004). Other compulsory insurance coverages are no-fault coverage of \$50,000 and uninsured motorists coverage (for bodily injury) of \$50,000. See *id.* Additionally, an insurer must offer supplemental uninsured motorist limits of \$250,000 per person per accident and \$500,000 per accident if a person has bodily injury liability limits of that amount or higher. See *id.*

losses which result from motor vehicle accidents are frequently far in excess of the amount of liability insurance mandated by the financial responsibility laws, even in those states with the highest minimum levels for liability insurance.”⁵⁶ Nevertheless, the compulsory insurance requirements attempt to ensure that injured plaintiffs receive, if not all, at least partial indemnification for their damages from an at-fault party.

The most widely-used automobile insurance policy throughout the United States is the Personal Auto Policy (PAP).⁵⁷ The PAP is a standard policy, drafted by the Insurance Services Office,⁵⁸ typically containing four main types of protections: liability coverage; medical payments coverage; uninsured motorist coverage; and coverage for damage to the insured automobile.⁵⁹ The liability coverage section is the most noteworthy section because it protects the insured against claims from third parties that arise out of the negligent operation of the insured automobile.⁶⁰ The insurance company agrees to “pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto[mobile] accident.”⁶¹ In addition, the insurer agrees to “defend, as [it] considers appropriate, any claim or suit asking for these damages . . . [and] pay all defense costs [it] incurs.”⁶² Thus, if an insured maintains a PAP with adequate liability limits, she can rest assured that the insurer will both defend

⁵⁶ See KEETON & WIDISS *supra*, note 15, at 403, 602-03 (explaining that minimum liability amounts are “grossly inadequate”).

⁵⁷ See REJDA, *supra* note 2, at 169. The PAP was first introduced in 1977 and has undergone several revisions since then. *Id.* The discussion herein is based upon the current 1994 edition of the PAP.

⁵⁸ The Insurance Services Office (ISO) provides insurers, reinsurers and insurance regulators actuarial, underwriting, and policy language support for a broad spectrum of commercial and personal lines of insurance. See Insurance Services Office, Inc., *About ISO*, available at http://www.iso.com/about_iso/index.html (last visited Mar. 1, 2004).

⁵⁹ For a sample of the 1994 Personal Auto Policy, see REJDA, *supra* note 2, app. B; see also INSURANCE SERVICES OFFICE, INC., THE INSURANCE PROFESSIONALS’ POLICY KIT 2-12 (1997).

⁶⁰ See REJDA, *supra* note 2, at 171.

⁶¹ Insurance Service Office, 1994 Personal Auto Policy, Part A - Liability Coverage, Insuring Agreement A, reprinted in REJDA, *supra* note 2, app. B.

⁶² *Id.* For a recent court of appeals case reviewing an insurers duty to defend, see *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 779 N.E.2d 167 (2002). An insurer’s “duty to defend is broader than the duty to indemnify.” See *id.* at 443 (citing *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 64-65, 575 N.E.2d 90, 91-92 (1991)). “An insurer’s duty to defend arises whenever the allegations in a complaint state a cause of action that gives rise to a reasonable possibility of recovery under the policy.” *Fitzpatrick*, 78 N.Y.2d at 64-65.

and, if necessary, pay for any covered claim arising from an accident.⁶³

The PAP's remaining three types of coverage are first-party coverages that, unlike third party liability coverage, pay the insured in the event of loss. The medical payments coverage will pay all medical and funeral expenses incurred by an insured up to the specified limit.⁶⁴ The uninsured motorist coverage will pay the insured for bodily injury damages caused by a hit-and-run driver or an uninsured motorist.⁶⁵ Last, coverage for damage to your auto provides coverage for physical damage or theft to the insured automobile.⁶⁶

However, it is important to keep in mind that the presence or absence of insurance does not affect the underlying liabilities of the parties.⁶⁷ Insurance merely provides a means for funding a judgment *after* the insured is found legally liable.⁶⁸ In fact, evidence of insurance coverage is generally not admissible to prove fault, and if a jury is told that a defendant is insured a mistrial may result.⁶⁹ Therefore, the same legal rules apply in determining liability regardless of whether the defendant is insured.⁷⁰

Under a PAP, once an insurer has paid a claim on behalf of the insured to an injured third party, the insured's right to assert any contribution claims are "subrogated" to the

⁶³ See generally KEETON & WIDISS, *supra* note 15, at 12. "Even in the absence of a loss, however, the insured has still enjoyed the certainty that if the insured event had occurred, insurance benefits would have been available as an offset." *Id.*

⁶⁴ See REJDA, *supra* note 2, at 175.

⁶⁵ See *id.* at 176.

⁶⁶ See *id.* at 179.

⁶⁷ See KEETON ET AL., *supra* note 13, at 593-94.

⁶⁸ See *id.* at 594.

⁶⁹ See Joanne B. Haelen, *If the Jury Hears That a Defendant Is Covered by Liability Insurance, A Mistrial is Not a Certainty*, N.Y. ST. B. ASS'N J., Oct. 2002, at 35 (explaining that because "[t]he touchstone for a mistrial is prejudice," disclosing to the jury that the defendant is protected by liability insurance may not necessarily result in a mistrial) (quoting *Simpson v. Foundation Co.*, 201 N.Y. 479, 490, 95 N.E. 10, 22 (1911) ("Evidence that the defendant . . . was insured . . . is so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it.")). See also FED. R. EVID. 411 (2003) ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.").

⁷⁰ There have been a few isolated cases where the presence of insurance was a factor in deciding the merits of a case. See generally KEETON ET AL., *supra* note 13, at 594. This was especially true in *Ryan v. New York Central Railroad Co.*, 35 N.Y. 210 (1866), where the presence of fire insurance among urban property owners supported a narrow interpretation of proximate cause in cases where fire spread to adjacent properties.

insurer.⁷¹ Subrogation transfers the insured's right to receive contribution from the other joint tortfeasors to the insurer.⁷² Specifically, the PAP provides that "[i]f we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another[,] we shall be subrogated to that right."⁷³ Therefore, "[a]n insurer asserting a subrogation right is usually viewed as 'standing in the shoes' of the insured so that the insurer's rights are equal to, but no greater than, those of the insured."⁷⁴

For example, assume an insured vehicle and another vehicle negligently collide into each other and injure a pedestrian. Both drivers would be jointly and severally liable to the pedestrian because both drivers committed separate individual negligent acts that caused an indivisible injury to the plaintiff.⁷⁵ If the pedestrian decides to file suit against only the insured vehicle, the insurer would be liable, in full, for the plaintiff's damages. However, the insurer can now assert a contribution claim against the other driver because the insured's right to receive contribution is subrogated to the insurer.⁷⁶ Insurers, like any other defendant, still bear the risk that a joint tortfeasor will be unidentifiable or insolvent, but on the whole, subrogation allows insurers to somewhat limit their ultimate liability to the apportioned fault of their underlying policyholders. As a result, aggregate claim payments diminish, which in turn lowers liability insurance premiums.⁷⁷

⁷¹ See generally Insurance Service Office, 1994 Personal Auto Policy, Part F - General Provisions, Our Right to Recover Payment, para. A, reprinted in REJDA, *supra*, note 2, app. B. However, there is no right of subrogation for an insurer against either a named insured or any other party covered as an additional insured. KEETON & WIDISS, *supra* note 15, at 221; see also S.S.D.W. Co. v. Brisk Waterproofing Co., 76 N.Y.2d 228, 235, 556 N.E.2d 1097, 1101 (1990) (recognizing that the insurer has no right to subrogation against its own insured). For subrogation generally, see KEETON & WIDISS, *supra* note 15, § 3.10(a).

⁷² See KEETON & WIDISS, *supra* note 15, at 219.

⁷³ Insurance Service Office, 1994 Personal Auto Policy, Part F - General Provisions, Our Right to Recover Payment, para. A, reprinted in REJDA, *supra* note 2, app. B.

⁷⁴ KEETON & WIDISS, *supra* note 15, § 3.10(a).

⁷⁵ See N.Y. C.P.L.R. 1602(6) (McKinney 2003); see also KREINDLER ET AL., *supra* note 23.

⁷⁶ See Insurance Service Office, 1994 Personal Auto Policy, Part F - General Provisions, Our Right to Recover Payment, para. A, reprinted in REJDA, *supra* note 2, app. B.

⁷⁷ See REJDA, *supra* note 2, at 63. Subrogation has three basic purposes: first, it prevents the insured from collecting twice for the same loss; second, subrogation holds the guilty person responsible for the loss; and third, subrogation holds down insurance rates. *Id.*

IV. REJECTION OF NEW YORK C.P.L.R. 1602(6)

This Note questions whether automobile accident cases should be exempted from section 1601's limitations on joint and several liability; it does not challenge joint and several liability as a whole. The issue of joint and several liability has been debated extensively and continues to divide leading tort scholars.⁷⁸ New York's joint and several liability scheme, as enacted in section 1601, resolves the debate by compromise and "partially" abolishes joint and several liability.⁷⁹ Admittedly, section 1602's exceptions to section 1601 undermine the extent of the abolition,⁸⁰ but given the substantial disagreement among contemporary tort scholars,⁸¹ section 1601's compromise is not wholly unreasonable.⁸² Proponents of joint and several liability often argue that as between two negligent defendants and an innocent plaintiff, the at-fault defendants should bear the risk of a co-defendant's financial irresponsibility. Be that as it may, this Note does not challenge the familiar argument. Instead, this Note posits a different question, namely: what is it about automobile accidents that justifies distinguishing motorist-defendants from non-motorist-defendants in order to deprive the former of section 1601's limitations on joint and several liability?

In 1996, total liability costs in New York were twenty-eight percent above the national average and totaled over fourteen billion dollars.⁸³ From 1988 to 1996, the aggregate number of tort filings in New York increased by fifty-eight percent, "[r]unning counter to the trend elsewhere in the nation."⁸⁴ Most notably, despite a sharp drop in the number of traffic accidents, huge increases in the value of motor vehicle-related claims continue to drive up New Yorkers' automobile insurance costs.⁸⁵

⁷⁸ See, e.g., Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125 (1989); see also Richard W. Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. DAVIS L. REV. 1147 (1989); but see Aaron D. Twerski, *The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright*, 22 U.C. DAVIS L. REV. 1161 (1989).

⁷⁹ See *supra* text accompanying notes 42-45.

⁸⁰ See N.Y. C.P.L.R. 1602(1)-(12) (McKinney 2003).

⁸¹ See *supra* note 78.

⁸² See N.Y. C.P.L.R. 1601 (McKinney 2003).

⁸³ See Public Policy Institute, *An Accident and a Dream*, available at <http://www.bcnys.org/ppi/accintro.htm> (last visited Aug. 15, 2003).

⁸⁴ See *id.*

⁸⁵ See *id.*

Joint and several liability's continued application to automobile cases certainly drives up the cost of automobile insurance⁸⁶ by forcing a financially responsible defendant's automobile insurance carrier to bear the risk of an insolvent joint tortfeasor. Even though insurance companies receive their policyholders' right to contribution, there are many instances in which that right will be worthless.⁸⁷ If a joint tortfeasor is unidentifiable, insolvent, or uninsured, the insurance company is left paying all of the plaintiff's damages when their underlying policyholder may have been only minimally at fault. Moreover, since approximately fourteen percent of U.S. drivers are uninsured motorists⁸⁸ who typically have few assets to satisfy a judgment, the risk of a financially irresponsible joint tortfeasor is significant.⁸⁹

It almost goes without saying that insurance companies, as for-profit entities, must strive to maximize profit.⁹⁰ In order to do so, they must shift the costs of unsatisfied contribution claims to their policyholders by increasing automobile liability insurance premiums.⁹¹ Ultimately, all financially responsible New York motorists bear the cost of increased claim payments due to unsatisfied contribution claims. This Part argues that financially responsible motorists need not bear that increased cost because the state's joint and several liability scheme is both unjustified and, as a practical matter, unnecessary.

A. *The Lack of Justification for Shifting the Risk of Financial Irresponsibility in the Automobile Accident Context*

This subpart, by examining a claim for indemnity, catalogues some of the other instances where the law shifts the risk of financial irresponsibility to a defendant, and explores the underlying policy concerns that justify doing so. This survey reveals that the justifications that support risk shifting

⁸⁶ See generally *Cardi*, *supra* note 7, at 1302.

⁸⁷ Even if the joint tortfeasor is solvent and identifiable, the transaction costs involved in pursuing a contribution claim will reduce the net recovery and, in certain cases, discourage an insurer from pursuing contribution altogether. *Id.*

⁸⁸ *Compulsory Auto Insurance*, *supra* note 54.

⁸⁹ See generally *BALDWIN*, *supra* note 51, at 116.

⁹⁰ See *REJDA*, *supra* note 2, at 527; see also *KEETON & WIDISS*, *supra* note 15, at 12.

⁹¹ See *OSCAR G. CHASE & ROBERT A. BARKER, CIVIL LITIGATION IN NEW YORK* 38 (4th ed. 2002) (espousing the same principle, albeit in a different context).

in those other instances simply do not exist in the automobile accident context.

A claim for indemnity is one case where solid underlying policy considerations justify shifting the risk of financial irresponsibility. Claims for indemnity and contribution are similar because in both cases a defendant seeks reimbursement for damages he already has paid.⁹² There is, however, an important substantive difference.⁹³ A claim for contribution distributes losses among tortfeasors by requiring each to pay his respective proportionate share to another tortfeasor who has been held fully liable for their respective joint liability.⁹⁴ A claim for indemnity, however, differs in that it "shift[s] the entire cost of the judgment . . . from a [defendant] whose liability to the plaintiff was not based on its own wrongful conduct, but imposed on it by law because of its relationship with the tortfeasor whose wrongful conduct caused the injury."⁹⁵ Thus, while a contribution claim ensures liability is shared equitably amongst tortfeasors, an indemnity claim shifts the *entire* liability from the defendant initially held liable to the tortfeasor who actually caused the plaintiff's injuries.⁹⁶ Since the defendant's initial liability to the injured party arises because of someone else's wrongful conduct, the defendant can later seek reimbursement from the actual wrongdoer. However, even in the indemnity context, the original defendant still bears the risk of financial irresponsibility because the wrongdoer may be insolvent and unable to satisfy the indemnity claim.

It is difficult to precisely state a rule as to when a claim for indemnity will be allowed.⁹⁷ However, indemnity claims are

⁹² See KEETON ET AL., *supra* note 13, at 341.

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ SCHWARTZ ET AL., *supra* note 22, at 387.

⁹⁶ *Id.*

⁹⁷ KEETON ET AL., *supra* note 13, at 343. According to the Restatement (Third) of Torts: Apportionment of Liability:

When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:

- (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
- (2) the indemnitee (i) was not liable except vicariously for the tort of the indemnitor, or (ii) was not liable except as a seller of a

commonly permitted when: an employer is held vicariously liable for the tort of an employee;⁹⁸ the owner of an automobile is held vicariously liable for the conduct of a driver;⁹⁹ or when a retailer is held liable for a manufacturer's defect that injured a consumer.¹⁰⁰

In the absence of a general rule, indemnification has been permitted when the underlying policy motives demanded that the risk of a financially irresponsible wrongdoer should not be borne by the injured party.¹⁰¹ In the employer-employee context, it is fair to shift the risk of the employee's financial irresponsibility to the employer because the employer can take steps to safeguard itself from liability. For example, before hiring an employee, an employer has the chance to screen and evaluate the applicant. Accordingly, the employer can simply not hire someone whom they believe may act in a risky manner. Also, if an employee causes an injury, fairness requires the employer to indemnify the injured party because the employer was the agent that set forth the injury-causing employee in motion. In any event, an employer can offset the costs incurred from bearing the risk of an employee's financial irresponsibility by increasing the price of the goods sold or

product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.

RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 22(a) (2000).

⁹⁸ See generally 23 N.Y. JUR. 2D *Contribution, Indemnity, and Subrogation* § 91 (2002). An employer held vicariously liable for the tort of an employee can thereafter assert an indemnity claim against the employee-tortfeasor. See generally *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 565 n.2, 300 N.E.2d 403, 410 n.2 (1973).

⁹⁹ 23 N.Y. JUR. 2D *Contribution, Indemnity, and Subrogation* § 91 (2002); see also *Traub v. Dinzler* 309 N.Y. 395, 131 N.E.2d 564 (1955) (entitling the owner to recover from the negligent driver where liability is predicated on the ownership of a motor vehicle). Under N.Y. VEH. & TRAF. LAW § 388 (McKinney 2003), an owner of an automobile is vicariously liable for the negligence of a permissive driver. Thus, an automobile owner held vicariously liable under § 388, can assert an indemnity claim against the permissive driver.

¹⁰⁰ 23 N.Y. JUR. 2D *Contribution, Indemnity, and Subrogation* § 91 (2002); see, e.g., *Coleman v. Chesebro-Whitman Co.*, 678 N.Y.S.2d 246, 247, 177 Misc. 2d 566, 567 (N.Y. Sup. Ct. 1998) (entitling retailer to indemnity against manufacturer of an allegedly defective ladder). Indemnity is also allowed when "one is employed or directed by another to do an act in his behalf, not manifestly wrong." *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 563, 236 N.E.2d 634, 637 (1968). See generally KEETON ET AL., *supra* note 13, at 343 (identifying the instances in which indemnity is allowed). A claim for indemnity can also arise by agreement, commonly known as a "hold-harmless" agreement. SCHWARTZ ET AL., *supra* note 22, at 387.

¹⁰¹ See KEETON ET AL., *supra* note 13, at 593. Holding defendants vicariously liable for the wrongful acts of another "represent[s] an obvious effort to find a financially responsible defendant who can be charged with the liability of another who, in general, cannot be relied on to pay a judgment." *Id.*

services rendered.¹⁰² Thus, fairness requires the employer to bear the risk that his employees may be financially irresponsible.

Similarly, in the automobile owner-permissive driver context, shifting the risk of a permissive driver's financial irresponsibility to the automobile's owner is also justified. As in the employer-employee context, the automobile owner also has an opportunity to screen and evaluate the potential driver before incurring any liability. Again, since the automobile owner can refuse permission and insulate himself from the risk, policy concerns support shifting the risk of a permissive driver's financial irresponsibility to the automobile owner.

Likewise, when a defective product injures a consumer, policy rationales support shifting the risk of the manufacturer's financial irresponsibility to the retailer. Before selling the manufacturer's defective product, the retailer has an opportunity to screen and evaluate the manufacturers they purchased from. If a particular manufacturer appears financially unstable or on the brink of insolvency, the retailer can either refuse to purchase from the manufacturer altogether or purchase the goods at a discount to offset the risk incurred. Furthermore, the costs of incurring such a risk can, as in the employer-employee context, be passed on to consumers in the form of higher prices.¹⁰³

As the prior examples illustrate, the risk of a financially irresponsible wrongdoer will be shifted only when policy motives demand that such a risk should not be borne by the injured party.¹⁰⁴ In each of the aforementioned cases, the risk of financial irresponsibility shifts when the indemnitee either has an opportunity to screen and evaluate the indemnitor, or when the indemnitee has a readily available mechanism to pass on the costs of the risk to a third party. In either case, the risk of a financially irresponsible wrongdoer is transferred only when the underlying policy motives justify doing so.

¹⁰² Such a price increase would not harm a firm's relative competitive position because all firms within a given industry should incur similar costs. Firms will commonly purchase similarly priced liability insurance to re-transfer this risk to an insurer. See Insurance Service Office, 1996 Commercial General Liability Policy, Coverage A, reprinted in REJDA, *supra* note 2, at 246-47; see also generally REJDA, *supra* note 2, at 243-47 (reviewing an employers major general liability loss exposures and the corresponding coverages provided by the commercial general liability policy).

¹⁰³ See *supra* note 102

¹⁰⁴ KEETON ET AL., *supra* note 13, at 593.

In the automobile accident context, the policy rationales for shifting the risk of a financially irresponsible co-defendant are much weaker. Under section 1602(6), if car A and car B (uninsured and insolvent) collide and injure a pedestrian, the risk of B's financial irresponsibility transfers to A. But, unlike the examples above, A neither has an opportunity to select and evaluate with whom he would collide, nor has a mechanism through which the costs of the risk could be passed on or transferred to a third party. Therefore, policy concerns do not seem to justify shifting the risk of financial irresponsibility.

One might argue that the cost of the risk easily transfers to A's insurance carrier, which then spreads it and passes it on to other consumers. However, A himself still ultimately bears the cost, merely disguised in the form of higher premiums.¹⁰⁵ Crucially, in addition to those costs, if the plaintiff's damages exceed A's liability insurance limits, A could be forced to personally fund a portion of the judgment.¹⁰⁶ Thus, financially responsible motorists like A cannot fully pass on the increased premiums and must ultimately bear at least some of the costs themselves. Since automobile liability insurance is mandatory in New York,¹⁰⁷ motorists confront a Hobson's choice:¹⁰⁸ either pay the increased automobile liability insurance premiums or stop driving altogether, an unacceptable alternative for rural and suburban motorists without access to public transportation.

Nonetheless, despite its costs, section 1602(6) does provide a policy benefit.¹⁰⁹ Section 1602(6) attempts to

¹⁰⁵ See generally *supra* text accompanying notes 90-91.

¹⁰⁶ See N.Y. C.P.L.R. 1602(6) (McKinney 2003).

¹⁰⁷ See New York State Department of Insurance, *supra* note 55.

¹⁰⁸ A "Hobson's choice" is a choice that offers no real alternative. AMERICAN HERITAGE COLLEGE DICTIONARY 646 (3d ed. 1997). The term derives from Thomas Hobson, an "English keeper of a livery stable, from his requirement that customers take the horse nearest the stable door or none." *Id.*

¹⁰⁹ In Governor Mario Cuomo's approval memorandum of the bill containing C.P.L.R. 1602(6) he noted that:

indemnify automobile accident victims for their injuries by holding any single defendant fully liable.¹¹⁰ However, as more fully explained in the following subsections, that benefit is greatly reduced in light of the existing protections provided by mandatory uninsured motorist coverage for PAP-insured plaintiffs,¹¹¹ and by the Motor Vehicle Accident Indemnity Corporation (MVAIC) for non-PAP-insured plaintiffs.¹¹²

Moreover, repealing section 1602(6) would not necessarily eliminate joint and several liability in *all* automobile accident cases. Alternatively, plaintiffs may be able to rely upon section 1602(7), which provides that the limitations on joint and several liability in section 1601 do “not apply to any person held liable for causing claimant’s injury by having acted with reckless disregard for the safety of others.”¹¹³ Therefore, even if section 1602(6) is repealed, joint and several liability could still be applied in cases where a plaintiff is injured by a “reckless” motorist.¹¹⁴ While the aforementioned economic arguments against joint and several liability apply equally to a “reckless” driver, as a matter of fairness, the increase in culpability arguably overrides those otherwise persuasive policy arguments, justifying the shift in cost. In any case, despite repealing section 1602(6), joint and several liability could still be applied in some of the most deserving automobile accident cases.

The bill also contains a number of exceptions [i.e. section 1602(6)] to this modification of the rule of joint and several liability, including instances in which the defendant acts in reckless disregard for the safety of others or instances in which the defendant’s acts upon which liability is based are willfully performed or intentionally performed in concert with others The crafting of these exceptions and savings provisions reflects careful deliberations over the appropriate situations for a modified joint and several liability rule and demonstrates the benefits of addressing this important reform through the legislative process.

Mario Cuomo, *Governor’s Approval Memorandum Regarding Toxic Torts/Discovery Statute of Limitations*, in NEW YORK STATE LEGISLATIVE ANNUAL-1986, at 288-89 (Pamela Sibener ed., 1986).

New York State Senator Ronald B. Stafford also commented on the bill. In a memorandum outlining the purposes of the bill, he noted that “the doctrine of joint and several liability as it applies to non-economic damages in certain personal injury actions would be modified to provide a more just apportionment of risk and entitlement.” Ronald B. Stafford, *Memorandum of Senator Ronald B. Stafford Regarding Toxic Torts/Discovery Statute of Limitations*, in NEW YORK STATE LEGISLATIVE ANNUAL-1986, at 288 (Pamela Sibener ed., 1986).

¹¹⁰ See N.Y. C.P.L.R. 1602(6) (McKinney 2003).

¹¹¹ See generally *infra* text accompanying note 116-31.

¹¹² See generally *infra* text accompanying note 132-48.

¹¹³ N.Y. C.P.L.R. 1602(7) (McKinney 2003).

¹¹⁴ *Id.*

In sum, the reasons that normally support risk shifting do not exist in the cases of negligent automobile accidents because joint tortfeasors cannot control the conduct of other drivers, and because they cannot fully transfer the cost of that risk. Moreover, the substantially similar protections afforded injured plaintiffs by mandatory uninsured motorist coverage and the MVAIC greatly diminish the benefit that the current liability scheme provides.¹¹⁵ Since the policy benefits of section 1602(6) do not outweigh its costs, section 1602(6) is unjustified and should be repealed.

B. The Redundancy of Section 1602(6)'s Protections

1. Compulsory Uninsured Motorist Coverage Already Protects PAP-Insured Plaintiffs from Financially Irresponsible Defendants

Plaintiffs injured by automobiles divide into two broad classes: PAP-insured plaintiffs or non-PAP-insured plaintiffs. Neither class of plaintiffs needs section 1602(6)'s protection from financially irresponsible defendants because they already are protected. PAP-insured plaintiffs are protected from financially irresponsible defendants, irrespective of section 1602(6), by the uninsured motorist coverage provided by their PAP,¹¹⁶ while non-PAP-insured plaintiffs are protected by the MVAIC.¹¹⁷

Uninsured motorist coverage is a fault-based, first-party coverage that pays an insured¹¹⁸ for bodily injury caused by an uninsured motorist or hit-and-run driver.¹¹⁹ An insured receives uninsured motorist benefits only if the uninsured motorist is found legally liable for the insured's injury.¹²⁰ The PAP provides that the insurer "will pay compensatory damages which an

¹¹⁵ See generally *supra* text accompanying note 59 and *infra* text accompanying notes 116-48.

¹¹⁶ See generally Insurance Service Office 1994 Personal Auto Policy, Part C - Uninsured Motorist Coverage, reprinted in REJDA, *supra* note 2, app. B.

¹¹⁷ See generally *infra* text accompanying notes 132-48.

¹¹⁸ An "insured" under the Uninsured Motorist coverage is broadly defined to include the named policyholder, relatives, and any other passenger occupying the insured automobile. See generally Insurance Service Office 1994 Personal Auto Policy, Part C - Uninsured Motorist Coverage, reprinted in REJDA, *supra* note 2, app. B.

¹¹⁹ See REJDA, *supra* note 2, at 176. Uninsured motorist coverage was developed in response to increasing pressure in 1955 for adoption of compulsory liability insurance in New York. KEETON AND WIDISS, *supra* note 15, at 399 n.3.

¹²⁰ See REJDA, *supra* note 2, at 176.

insured is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of bodily injury.¹²¹ Most states mandate uninsured motorist coverage,¹²² and in New York all motorists must carry at least fifty thousand dollars of coverage.¹²³ Thus, the compulsory uninsured motorist coverage protects PAP-insured plaintiffs from financially irresponsible defendants, irrespective of section 1602(6). The uninsured motorist coverage transfers the risk of a financially irresponsible defendant from the plaintiff to his or her insurer. Since PAP-insured plaintiffs are protected by their uninsured motorist coverage, the protection of section 1602(6) is unnecessary.

Although the plaintiff's insurer will initially fund an uninsured defendant's damages, the plaintiff's insurer can recover its payments from any other defendant jointly or severally liable with the uninsured defendant.¹²⁴ As a result, under section 1602(6), a responsible defendant's insurer ultimately bears the risk of a financially irresponsible joint-tortfeasor.¹²⁵ A defendant's insurer can seek contribution from the other tortfeasors for the liability claim paid in excess of their underlying policyholder's apportioned fault, but such claims are difficult to satisfy. This increased exposure drives up claim payments, which naturally leads to higher automobile liability insurance premiums.¹²⁶ Since automobile liability insurance is compulsory, financially responsible motorists ultimately must fund the unpaid claims of financially irresponsible motorists.

Eliminating section 1602(6) could limit a defendant's liability for the plaintiff's non-economic damages to his apportioned percentage of fault, and thereby reduce automobile liability rates.¹²⁷ Plaintiffs would lose the benefit of joint and

¹²¹ Insurance Service Office, 1994 Personal Auto Policy, Part C - Uninsured Motorists Coverage, Insurance Agreement A, *reprinted in* REJDA, *supra* note 2, app. B.

¹²² See PAUL W. PRETZEL, UNINSURED MOTORISTS 2002-03, app. A (1972).

¹²³ See *Compulsory Auto Insurance*, *supra* note 54; see also N.Y. INS. LAW § 3420(f)(1) (McKinney 2003).

¹²⁴ PRETZEL, *supra* note 122, at 45 ("For example, when an insured car and an uninsured car collide in circumstances where both would be liable for resulting injury to persons in a third car, the insurer of the third car has been held to have the right to reduce its uninsured motorist coverage payments by the amount paid by the liability insurance company covering the insured vehicle.").

¹²⁵ See *id.*

¹²⁶ See KEETON ET AL., *supra* note 13, at 591.

¹²⁷ See *id.* (explaining that an increase in plaintiff's recoveries also increases liability insurance rates).

several liability and would have to bear some risk that a joint tortfeasor is insolvent or unidentifiable. However, plaintiffs already benefit from the mandatory minimum uninsured motorist coverage, and can purchase additional supplemental uninsured motorist (SUM) coverage.¹²⁸ In fact, insurers are required to offer SUM limits of \$250,000 per person per accident and \$500,000 per accident if a person has bodily injury liability limits of that amount or higher.¹²⁹ The decrease in liability insurance rates realized by eliminating section 1602(6) can then be used by policyholders to purchase additional SUM coverage if they feel the mandatory fifty thousand dollar limit is inadequate.¹³⁰ A policyholder electing to increase the uninsured motorist coverage can double the coverage to one hundred thousand dollars for only approximately forty dollars per year.¹³¹ In either case, eliminating section 1602(6) would lower automobile liability insurance rates and give motorists the freedom to decide for themselves how to manage the risk of a financially irresponsible defendant. Thus, section 1602(6) is redundant and unnecessary because uninsured motorist coverage can provide PAP-insured plaintiffs with substantially similar protection in a more equitable fashion.

2. The Motor Vehicle Accident Indemnification Corporation Already Protects Non-PAP-Insured Plaintiffs from Financially Irresponsible Defendants

Although compulsory uninsured motorist coverage can provide PAP-insured plaintiffs the same protections as section 1602(6), uninsured motorist coverage only protects an "insured" as defined in the PAP.¹³² An "insured" under the uninsured motorist coverage section of the PAP includes the policyholder,

¹²⁸ See New York State Department of Insurance, *supra* note 55.

¹²⁹ See *id.* "Increasing the [uninsured coverage] reimbursement to \$300,000/\$500,000 will cause an insignificant increase in premium relative to the increased protection provided." BALDWIN, *supra* note 51, at 111.

¹³⁰ Given the competitive nature of the insurance industry and generally accepted neo-classical economic principles, it is reasonable to assume that the reduction in claim payments realized by abolishing section 1602(6) will result in lower liability premiums.

¹³¹ See "How Much Policy Do You Need?" *Uninsured or Underinsured Motorist*, at <http://www.smartmoney.com/insurance/auto/> (last visited Mar. 1, 2004).

¹³² See Insurance Service Office, 1994 Personal Auto Policy, Part C - Uninsured Motorist Coverage, Insuring Agreement A, reprinted in REJDA, *supra* note 2, app. B (explaining that the PAP will pay compensatory damages that are sustained by an "insured").

any family member, and anyone else occupying the vehicle.¹³³ The coverage also protects the policyholder and her family members from uninsured defendants for injuries sustained as pedestrians.¹³⁴ Although “insured” is defined broadly, the term is not all encompassing. Individuals who are not PAP policyholders, family members of PAP policyholders, or passengers in a covered automobile, are not within the definition and lack coverage.

For example, assume motorists A and B negligently collide into each other and skid onto the sidewalk injuring a pedestrian (P). P, under section 1602(6), can elect to sue either A, B, or A and B because both drivers are jointly and severally liable. Assuming B is insolvent and uninsured, P will elect to sue A. P will be able to recover all of her damages from A, despite the fact that A may only be partly responsible. If section 1602(6) is repealed, as this Note suggests, A would be liable to P for all of P’s economic losses, but A’s liability for P’s non-economic losses would be limited to A’s apportioned percentage of culpability.¹³⁵ The remaining non-economic losses apportioned to B would be left unsatisfied. The previous section explained that if P has a PAP or is a family member of a PAP policyholder, she would then be protected by her own compulsory uninsured motorist coverage for the remaining unpaid damages. However, if P is not an insured, the uninsured motorist coverage will not protect her from the financially irresponsible co-defendant.¹³⁶

However, the MVAIC protects non-PAP-insured plaintiffs, like P, from financially irresponsible defendants.¹³⁷ “The MVAIC is a non-profit corporation consisting of all insurers authorized in New York State that write motor vehicle

¹³³ See Insurance Service Office, 1994 Personal Auto Policy, Part C - Uninsured Motorist Coverage, Insuring Agreement B, *reprinted in* REJDA, *supra* note 2, app. B.

¹³⁴ See generally BALDWIN, *supra* note 51, at 111.

¹³⁵ This assumes A is apportioned no more than 50% of the fault. See N.Y. C.P.L.R. 1601 (McKinney 2003).

¹³⁶ See Insurance Service Office, 1994 Personal Auto Policy, Part C - Uninsured Motorist Coverage, Insuring Agreement B, *reprinted in* REJDA, *supra* note 2, app. B (defining “insured” as including the named insured, family members, and anyone else occupying the automobile).

¹³⁷ See Michael Pilarz, *Uninsured Motorists Coverage*, available at http://www.pilarz.com/motorists_coverage.html (last visited Mar. 1, 2004).

liability insurance.”¹³⁸ “Every insurer authorized to write motor vehicle liability insurance in the State of New York, as a condition precedent thereto, is required to be a member of the [MVAIC].”¹³⁹ The MVAIC provides compensation for injury or death to “qualified persons” who are involved in accidents caused by an uninsured motorist within New York State.¹⁴⁰

“Qualified persons” eligible to receive benefits from the MVAIC are defined in Insurance Law section 5202(b) as New York residents who are not the following: an insured under an automobile policy; the owner of an uninsured motor vehicle; or the uninsured motor vehicle owner’s spouse while a passenger in the uninsured vehicle.¹⁴¹ Thus, if an uninsured motorist injures a “qualified person,” that person can recover her damages from the MVAIC.¹⁴² The MVAIC provides qualified persons with benefits for basic economic losses,¹⁴³ and non-

¹³⁸ VERONICA DUNCAN-BLACK, REPORT ON EXAMINATION OF THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION AS OF DECEMBER 31, 1999 (June 18, 2001), at <http://www.ins.state.ny.us/acrobat/mvaic99.pdf>.

¹³⁹ *Id.* at 4.

¹⁴⁰ *See id.* The MVAIC provides compensation for injuries caused by: uninsured motor vehicles; unidentified motor vehicles which leave the scene of the accident; stolen motor vehicles; motor vehicles operated without the permission of the owner; insured motor vehicles where the insurer disclaims liability or denies coverage; and unregistered motor vehicles. *See id.*

¹⁴¹ *See* Pilarz, *supra* note 137.

¹⁴² *See id.* The protection provided by the MVAIC is not absolute. “Insurance Law 5210(a)(1) . . . provides that the maximum judgment payable by the MVAIC ‘on account of injury to one person in any one accident’ caused by a ‘financially irresponsible motorist,’ shall not exceed \$10,000.” Norman H. Dachs & Jonathan A. Dachs, *How UM and UIM Are Linked With other Areas of Law*, N.Y.L.J., May 11, 1993, at 3. *See, e.g.*, *Massey v. City of New York*, 589 N.Y.S.2d 145, 146 Misc. 580, 582 (Sup. Ct. Kings Co. 1992) (rewarding plaintiff injured by an automobile ten thousand dollars from the MVAIC).

Although the damages payable by the MVAIC are limited to \$10,000, there will not be many cases in which the plaintiff will have to rely on the MVAIC because the uninsured motorist coverage protects all PAP policy holders and their family members. In the unlikely event that the plaintiff is not an “insured” under the PAP, the only case in which a plaintiff who suffers a serious injury will be left with unsatisfied damages is if the financially irresponsible defendant’s apportioned percentage of non-economic damages exceeds \$10,000. In such a case, the plaintiff will be able to recover all of her economic damages from the insured defendant (assuming the defendant was found more than 50% at fault and the plaintiff suffered a “serious injury”), but with respect to non-economic damages the plaintiff will only collect the amount that is apportioned to the insured defendant. The remaining non-economic damages apportioned to the financially irresponsible defendant will be paid by the MVAIC, subject to the \$10,000 limit, if the plaintiff suffers a serious injury. Thus, although the MVAIC’s protection is not absolute, it is substantial.

¹⁴³ “Basic economic loss” is defined in NY Insurance Law section 5102(a) as:
 [a]ll necessary expenses incurred for: (i) medical, hospital, . . . surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services;
 (ii) psychiatric, physical and occupational therapy and rehabilitation . . . and

economic losses if the qualified person suffers a serious injury.¹⁴⁴

Consequently, both the MVAIC and section 1602(6) operate to protect non-PAP-insured plaintiffs, albeit to different degrees, from financially irresponsible defendants.¹⁴⁵ However, the MVAIC provides the protection in a more cost-effective and equitable manner. Unlike section 1602(6), which can subject individual defendants to unlimited liability, exceeding their apportioned degree of fault, the MVAIC limits its payments to ten thousand dollars and allocates the costs of its payments proportionally, across the entire New York automobile insurance market.¹⁴⁶

At bottom, the legislature is faced with the difficult task of dealing with the risk of financially irresponsible motorists in a manner that will accommodate the competing policy concerns of battling the rising cost of automobile insurance and ensuring plaintiff indemnification. While abolishing section 1602(6) would decrease insurance premiums to the detriment of plaintiff indemnification, the MVAIC would step in to ameliorate the effect. After abolishing section 1602(6), the MVAIC's payments, as a whole, would increase, in turn increasing each insurer's mandatory MVAIC contribution. Those increases would tend to result in premium increases, but

(iv) any other professional health services . . . [as well as] loss of earnings from work which the person would have performed had he not been injured.

N.Y. INS. LAW § 5102(a) (McKinney 2003).

¹⁴⁴ See Pilarz, *supra* note 137. "Serious injury" is defined in NY Insurance Law section 5102(d) as:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

N.Y. INS. LAW § 5102(d) (McKinney 2003).

¹⁴⁵ Thus, if C.P.L.R. section 1602(6) is repealed, P, the pedestrian in the prior example, would be entitled to recover for the injuries caused by B (the uninsured defendant) from the MVAIC. In order for a qualified person to recover from the MVAIC they must file an affidavit within 180 days from the accident stating, *inter alia*: (i) that the person has a cause of action for damages arising out of an accident; (ii) the facts in support of the claim; and (iii) that the claim lies against either the owner or operator of a designated uninsured motor vehicle; against a person whose identity is unascertainable, such as a hit-and-run driver; or against a person whose insurer has disclaimed liability. See Pilarz, *supra* note 137, pt. B.2.

¹⁴⁶ See Duncan-Black, *supra* note 138.

for two reasons would be offset by even greater savings realized by abolishing 1602(6). First and foremost, each claim would be limited to ten thousand dollars.¹⁴⁷ Second, under the law of large numbers, pooling claims generated by financially irresponsible motorists would decrease the influence of actuarial abnormalities on the total amount of claims.¹⁴⁸ In sum, abolishing 1602(6) and shifting the claims of non-PAP-insured plaintiffs generated by financially irresponsible drivers to the MVAIC would strike a fair balance between two otherwise competing policy concerns.

V. CONCLUSION

New York automobile liability insurance rates have risen to unacceptable levels and section 1602(6)'s preservation of joint and several liability continues to fuel the rate hikes.¹⁴⁹ "New Yorkers overwhelmingly believe that the cost of lawsuit awards is too high, and that the current liability system needs major reform."¹⁵⁰ Repealing section 1602(6) would be a good start. It lacks the solid policy rationale that normally justifies shifting the risk of financial irresponsibility from the plaintiff to the defendant. Moreover, uninsured motorist coverage and the MVAIC provide substantially similar protection in a more equitable fashion, making the provision redundant and costly. Repealing section 1602(6) would limit a defendant's liability to his apportioned degree of fault and lower New York's costly automobile insurance rates. Commentators have referred to section 1602(6) as having "little rhyme or reason"¹⁵¹ and "lack[ing] intellectual rigor."¹⁵² It has also been characterized as "enigmatic"¹⁵³ and "truly the product of political give-and-

¹⁴⁷ See N.Y. INS. LAW § 5210(a)(1) (McKinney 2003).

¹⁴⁸ BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 316 (5th ed. 1988). The law of large numbers is a "statistical concept that holds the greater the number of units in a projection, the less important each unit becomes. Group insurance, which gets cheaper as the group gets larger, is an example of the principle." *Id.* See also Cardi, *supra* note 7 at 1302 (recognizing that actuarial abnormalities that interfere with risk assessment tend to drive up insurance premiums).

¹⁴⁹ See *Erny v. Russo*, 754 A.2d 606, 615 (N.J. Super. Ct. App. Div. 2000) (recognizing that "[t]he enhanced liability exposure by New York's joint and several liability law is a factor in the calculation of automobile insurance rates in that state").

¹⁵⁰ New Yorkers for Civil Justice Reform, *Public Opinion: Zogby Poll Finds Support for Reform*, at <http://www.nycjr.org/opinion.html> (last visited Mar. 1, 2004).

¹⁵¹ Mutter, *supra* note 48, at 318.

¹⁵² *Id.*

¹⁵³ Cardi, *supra* note 7, at 1304 n.61.

take.”¹⁵⁴ Therefore, it is not surprising that there is only one other state besides New York that recognizes such a needless exception.¹⁵⁵

Joseph D. Zavaglia[†]

¹⁵⁴ Mutter, *supra* note 48, at 318.

¹⁵⁵ *See id.*; *see also* HAW. REV. STAT. § 663-10.9 (2003).

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