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## COLLOQUY

# The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics

Aaron D. Twerski\*

The legislative tort reform movement has been successful beyond the hopes of its most ardent advocates.<sup>1</sup> Academia was caught napping. The legislative coup was so quick and ferocious that commentators did not have time to react.<sup>2</sup> Some early scholarly discussion focused on proposed federal product liability legislation.<sup>3</sup> However, oblivious to the

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<sup>1</sup> From January 1986 to August 1988 some 35 states enacted significant tort reform legislation. This figure does not include states that passed legislation dealing with insurance reform. It also does not include states whose tort reform legislation antedated January 1986. For compilations of many of the tort reform statutes, see INSURANCE INFO. INST., DATA BASE REPORTS (1986, 1987); V. SCHWARTZ, P. LEE, F. SOUK & M. MULLEN, PRODUCT LIABILITY: CASES AND TRENDS (1989); Products Liability Rep. (CCH); see also T. WILSON, J. ELSE, H. MOSKOWITZ, M. EDELMAN & H. DICKER, PUNITIVE DAMAGES REVIEW — 1988 (1988); T. WILSON, J. ELSE, H. MOSKOWITZ, M. EDELMAN & H. DICKER, U.S. TORT REFORM — 1988 (1988).

<sup>2</sup> Many law review symposia have dealt with the general subject of tort law reform. See, e.g., *Symposium: Issues in Tort Reform*, 48 OHIO ST. L.J. 317 (1987); *Symposium on Developments in Tort Law and Tort Law Reform*, 18 ST. MARY'S L.J. 669 (1987); *Symposium on Tort Reform*, 10 HAMLINE L. REV. 345 (1987); *Symposium, Tort Reform: Will It Advance Justice in the Civil System?*, 32 VILL. L. REV. 1211 (1987); *Tort Reform Symposium*, 24 SAN DIEGO L. REV. 795 (1987). With some notable exceptions much of the literature is descriptive, not analytical. More important, the literature is reactive. It is fair to say that no one foresaw in advance that state legislatures would act so swiftly and so decisively on such a broad range of tort reform issues.

<sup>3</sup> See, e.g., Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625 (1978); Johnson, *Products*

debate in the nation's capital, state legislatures created their own individualized "reform packages."<sup>4</sup> Each piece of legislation, itself, is not earth shattering, but, in toto, the changes have substantially altered the law of torts.<sup>5</sup>

Academic commentary has now begun to surface. It is not surprising that those who believe systemic reform is necessary are unhappy with what they perceive as patchwork being performed on the existing system.<sup>6</sup> Criticism has, however, come from those who believe that the legislative solutions are both unfair and unwise.<sup>7</sup> In last year's *U.C.*

*Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677 (1978); Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575 (1985) [hereafter Twerski, *Product Liability Bill*]; Twerski, *National Product Liability Legislation: In Search of the Best of All Possible Worlds*, 18 IDAHO L. REV. 411 (1982); Twerski & Weinstein, *A Critique of the Uniform Product Liability Law — A Rush to Judgment*, 28 DRAKE L. REV. 221 (1978-1979).

<sup>4</sup> Several states passed product liability legislation in the period 1978-1981. *See, e.g.*, IDAHO CODE § 6-1401 to -1410 (Supp. 1987); IND. CODE ANN. § 33-1-1.5-1 to -8 (West 1983 & Supp. 1988); KAN. STAT. ANN. § 60-3301 to -3306 (1981); KY. REV. STAT. ANN. § 411.200-.470 (Michie/Bobbs-Merrill Supp. 1988). This legislation preceded most of the federal tort reform activity. These statutes were, however, directed toward product liability. They did not encompass the kinds of sweeping reform that characterized legislative efforts in 1986-1988.

<sup>5</sup> The following subjects have been covered in recent tort reform legislation: (1) production defect, (2) design defect, (3) failure to warn, (4) express warranty, (5) product misuse, (6) product alteration, (7) contributory fault, (8) assumption of risk, (9) unavoidably dangerous products, (10) inherently dangerous products, (11) compliance with governmental standards, (12) compliance with industry standards, (13) obvious dangers, (14) technological feasibility — state of art defenses, (15) liability of wholesalers and retailers, (16) joint and several liability, (17) statutes of limitations, (18) statutes of repose, (19) worker compensation, (20) punitive damages, (21) subsequent remedial measures as evidence of defect, (22) economic loss arising from product liability claims, (23) mitigation of damages for failure to wear a seat belt, (24) collateral source recovery, (25) caps on recovery for pain and suffering, (26) periodic payment of damages, (27) attorney contingency fee limitations, (28) prosecution of frivolous suits.

<sup>6</sup> *See, e.g.*, P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469 (1987); O'Connell, *Balanced Proposal for Product Liability Reform*, 48 OHIO ST. L.J. 317 (1987); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987) [hereafter Priest, *Puzzles*]; Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795 (1987); Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987).

<sup>7</sup> *See* Habush, *Adapted from the Statement of the Association of the Trial Lawyers of America Before the Judiciary Committee of the United States Senate*, 10 HAMLIN

*Davis Law Review*, Professor Richard Wright wrote about one of the major targets of "tort reform" — joint and several tort liability — and pronounced that the work of the state legislatures in this area was the product of misunderstanding and outright confusion.<sup>8</sup>

Professor Wright's critique of the movement to abolish or modify the common-law joint and several doctrine raises perceptive and troubling questions about the fairness of the proposed legislative solutions. His conclusion that state legislatures have acted out of ignorance and confusion is, however, simply insupportable. Professor Wright apparently believes that no rational legislature that fully appreciated the underlying issues would have enacted statutory reform. Wright is wrong. The legislators understood very well the policy choices before them and made some difficult and painful decisions. One may differ with their policy preference but it is unfair to conclude that they acted as know-nothings who were the captives of industry lobbyists. They dealt with a problem of legitimate legislative concern and for the most part responded with considerable moderation. This Essay's purpose is to voice the concerns that triggered a massive revision of the hallowed common-law joint tortfeasor doctrine. To provide for analysis, it is first necessary to restate Professor Wright's views. Only by understanding why the legislatures rejected the position he advocates can we understand what fueled the fires that led to such extraordinary legislative action.

### I. ATTACKING THE REFORMERS

Professor Wright's attack on the joint tortfeasor reform movement proceeds from some common-sense assumptions. As between two negligent defendants and an innocent plaintiff, fairness dictates that the defendant who is at fault should bear the cost of the plaintiff's loss when one of the defendants is insolvent or otherwise immune from liability.<sup>9</sup>

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L. REV. 491 (1987); Kindregan & Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 ST. MARY'S L.J. 673 (1987).

<sup>8</sup> See Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141 (1988).

<sup>9</sup> *Id.* at 1161-65. For a plaintiff who is contributorily negligent, Wright recognizes that the claim for reallocating fault to all parties including the plaintiff is stronger. *Id.* at 1188-92. Nonetheless, Wright concludes that the reallocation formula of the Uniform Comparative Fault Act violates corrective justice norms. He argues that the negligence of plaintiffs is different from that of defendants. Plaintiffs have merely exposed themselves to injury; the defendant tortfeasors thus have no corrective justice claim against them to offset or to match plaintiffs' corrective justice claim against each

Any revision of the joint tortfeasor doctrine shifts the loss arising from a defendant's insolvency to the plaintiff. Wright contends that legislatures have been hoodwinked by industry lobbyists into limiting liability to a defendant's proportional share of fault. These lobbyists, he adds, have managed to create a "smokescreen" by propounding several false and deceptive arguments.

First, industry advocates contend that joint and several liability is unfair because a defendant is held responsible to pay more than the proportional share of harm which she caused. Wright argues that in joint or concurrent tort liability a defendant is only liable if she is the "but-for" cause of the harm.<sup>10</sup> Cause is indivisible, and each defendant should be held liable for the entire harm because the plaintiff would have escaped injury absent the fault of each tortfeasor. Wright claims that legislatures have failed to understand the crucial distinction between fault apportionment (which is divisible) and causal responsibility (which is not divisible). As a result, he contends, lawmakers have avoided facing the hard question about why, between defendants who are causally responsible for harm and a plaintiff (who is not), the burden of a defendant's insolvency should be carried by the plaintiff.

Second, defense lobbyists argue that tort liability was traditionally based on moral fault. In a true "fault" system, they say, it was appropriate to impose joint and several liability. Modern tort law has weakened or obliterated the fault-based limitation on tort liability. Under common-law joint tortfeasor doctrine, defendants who "have done nothing wrong" are now called on to provide "social insurance" for harms caused by others.<sup>11</sup> Wright argues that tort liability was never based on moral fault but rather on moral responsibility for conduct that has exposed others "to a significant, objectively foreseeable, and unaccepted risk of injury."<sup>12</sup> Thus, modern extensions of liability (such as strict products liability) are consistent with traditional notions of tortious fault. Even if juries, in the absence of sufficient evidence of tortious behavior, act improperly and impose liability on "deep pocket" defend-

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defendant.

The distinction between negligence that is self-regarding and negligence that threatens others is interesting but does not comport with contributory and primary negligence. For the most part, conduct that constitutes contributory negligence not only exposes the plaintiff to harm but also exposes others to harm. Unless Wright is prepared to distinguish between solely self-regarding contributory fault and contributory fault that can serve as a predicate for primary negligence, his distinction fails.

<sup>10</sup> *Id.* at 1152-53.

<sup>11</sup> *See id.* at 1149 n.26.

<sup>12</sup> *Id.* at 1150.

ants, the solution is to police jury behavior rather than to strike out against the joint tortfeasor doctrine.

Third, evidence exists that tort judgments against deep pocket defendants are higher than those against other defendants for similar types of injuries.<sup>13</sup> Modification of the joint and several doctrine is thus necessary to somewhat curtail excessive jury awards. Wright argues that judges have the power to remit excessive damages. It is improper to eliminate the joint tortfeasor doctrine to resolve the problem of excessive damages.<sup>14</sup>

Professor Wright concludes that the only unfairness existing under the common-law joint tortfeasor doctrine is that solvent defendants often bear a disproportionate burden because their contribution actions are ineffective against insolvent defendants.<sup>15</sup> However, it is far less equitable to ask the innocent plaintiff to bear the loss. Other common-law countries such as England retain joint and several liability and do so even though they have adopted rules of comparative responsibility. Wright expresses the hope that after the "tort reform" frenzy has dissipated, legislatures will restore joint and several liability to its rightful place.<sup>16</sup>

## II. CAUSATION AND FAULT — WERE THE LEGISLATURES CONFUSED?

Professor Wright's thesis is engaging but incorrect. State legislatures were not confused between fault and causation. The issue of who should bear the loss caused by an insolvent defendant — an innocent plaintiff or a faulty defendant — was not ignored or confused. It was

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<sup>13</sup> See Kelley & Beyler, *Large Damage Awards and the Insurance Crisis: Causes, Effects and Cures*, 75 ILL. B.J. 140, 146-54 (1986). A recent study of insurance files by ISO Data, Inc., contains figures that are relevant to the issue under discussion. See ISO DATA, INC., CLAIMS FILE DATA ANALYSIS: TECHNICAL ANALYSIS OF STUDY RESULTS (1988). In Part I of its study ISO investigated claims of \$25,000 or more — whether open or closed — arising from policies written during 1983. The study found that in multi-defendant cases the insurance mechanism paid 2.4 times the amount paid in single defendant cases. *Id.* at 8, 30. In Part II of the study ISO investigated claims that closed in the first week of August 1987 regardless of amount. In this category, the amount paid in multi-defendant cases was 3.7 times that paid in single defendant cases. *Id.* The authors of the report are careful to demonstrate that multi-defendant cases often involve more serious injuries than single defendant cases. *Id.* at 30. Nonetheless, the disparities are so significant that the results in multi-defendant cases are likely affected by the defendant's status.

<sup>14</sup> See Wright, *supra* note 8, at 1152.

<sup>15</sup> See *id.* at 1162.

<sup>16</sup> See *id.* at 1193.

not simply *one* issue among many which legislatures discussed. It is fair to say that it was the *only* subject that weighed on the legislators' minds. Having testified before several legislative committees to modify the common-law doctrine, I can unequivocally say that the issue of "fairness" to plaintiffs was constantly and unremittingly questioned.<sup>17</sup> Professor Wright believes that industry lobbyists' argument that liability should not exceed proportional fault successfully diverted attention from causation. That statement does not accurately describe the debate.

Industry lobbyists did argue that it was unfair to subject a defendant to liability exceeding the defendant's proportional fault share.<sup>18</sup> This argument was countered by consumer advocates and members of the trial bar who propounded the "fairness" argument. They argued that a defendant who was causally responsible, rather than the innocent plaintiff, should bear the loss.<sup>19</sup> Proof that legislatures understood this

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<sup>17</sup> See, e.g., *Product Liability (Part I), Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 361 (1987) [hereafter *House Energy Committee Hearings*]; *id.* at 368-74 (statement of Professor David Randolph Smith); *id.* at 385-87 (article of John W. Wade); *id.* at 396-97 (article of Jerry J. Phillips); *id.* at 427, 433 (colloquy with Professor Smith); *id.* at 459-60, 463-64 (statement of Gene Kimmelman); *id.* at 469-73 (colloquy of Congressman Dingell with members of panel); *id.* at 474-75 (colloquy between Congressman Florio and Professor Twerski); *id.* at 484, 496-501 (colloquy between congressmen and panel); *id.* at 398 (article of David Randolph Smith & John W. Wade).

<sup>18</sup> *Id.* at 456-59 (statement of Alfred W. Cortese, Jr.); see COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE, DRAFT REPORT 96-97 (October 1, 1987) (expressing minority view); MAINE LIABILITY CRISIS ALLIANCE, RESPONSE TO DRAFT OF COMM. TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE app. B (1987) ("Joint and Several Liability") (copy on file with *U.C. Davis Law Review*); see also SPECIAL TASK FORCE ON PROPERTY AND CASUALTY INSURANCE, OFFICE OF WISCONSIN COMM. OF INSURANCE, FINAL REPORT 17-19 (August 1986) (copy on file with *U.C. Davis Law Review*).

<sup>19</sup> *House Energy Committee Hearings*, supra note 17; see MAINE TRIAL LAWYERS ASS'N, MAINE HAS AN INSURANCE PROBLEM — NOT A JURY PROBLEM 38-43 (1988) (copy on file with *U.C. Davis Law Review*); *Protecting the Innocent Victim: Joint and Several Liability, Hearings Before the Comm. on Economic Dev. of Texas State Senate* (Mar. 2, 1987) (statement of Professor Thomas O. McGarity, University of Texas, Austin, School of Law) (copy on file with *U.C. Davis Law Review*); *id.* at 1-4 (statement by law firm of Kidd, Whitehurst, Harkness and Watson) (copy on file with *U.C. Davis Law Review*); *id.* at 6-8 (Mar. 5, 1987) (statement of Joan Claybrook) (copy on file with *U.C. Davis Law Review*); Nevada Trial Lawyers Ass'n, 1987 Press Packet, Statement on Joint and Several Liability 3 (1987); see also NATIONAL CAMPAIGN AGAINST TOXIC HAZARDS AND THE TEXAS CENTER FOR RURAL STUDIES, THE ROLE OF JOINT AND SEVERAL LIABILITY IN TOXICS COMPENSATION AND PREVEN-

point is that most did not abolish outright the common-law doctrine.<sup>20</sup> Instead, legislatures enacted a wide variety of legislative solutions that balanced the equities in differing ways.<sup>21</sup> The lawmakers understood

TION (Feb. 6, 1987).

It is difficult if not impossible to gather the hundreds of statements various interest groups made to state legislative bodies. These materials are not systematically published or gathered. The materials set forth *supra* notes 17-19, however, illustrate that in the legislative debate to modify the joint tortfeasor doctrine, the argument for fairness to innocent plaintiffs was made with considerable force and vigor.

<sup>20</sup> Of 34 states that have somewhat modified the common-law joint tortfeasor doctrine, only nine have abolished joint tortfeasor liability for both economic and noneconomic losses. See ARIZ. REV. STAT. ANN. § 12-2506 (1987); COLO. REV. STAT. § 13-21-111.5 (1987); IDAHO CODE § 6-803(3) (Supp. 1987); IND. CODE ANN. § 34-4-33-4 (West Supp. 1988); KAN. CIV. PROC. CODE ANN. § 60-258a(d) (Supp. 1987); N.D. CENT. CODE §§ 32-03.2-02-03 (Supp. 1987); UTAH CODE ANN. § 78-27-40 (1987); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1988); WYO. STAT. § 1-1-109 (1987). Two total abolition states allow joint liability if the fault of the tortfeasor exceeds 50%. See IOWA CODE ANN. § 668.4 (West 1987); MONT. CODE ANN. § 27-1-703(2) (1988). Two other states provide that if the fault of any defendant is less than 50%, that defendant cannot be liable for more than twice the fault allocated to her. ALASKA STAT. § 09.17.080(d) (1987); 1987 S.D. CODIFIED LAWS ANN. §§ 15-8-15.1-.2 (Supp. 1987). For a comprehensive review of the statutes enacted as of the date of this Article, see Pressler & Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DEN. U.L. REV. 651, 656-59 (1987).

<sup>21</sup> A good number of states have only eliminated the joint tortfeasor doctrine for noneconomic loss (*i.e.*, pain and suffering). See, *e.g.*, CAL. CIV. CODE § 1431 to 1431.5 (West Supp. 1988) (added by Proposition 51, approved by electorate on June 3, 1986); FLA. STAT. ANN. § 768.81(3) (West 1987); ILL. REV. STAT. ch. 2, para. 117 (1989) (defendant over 25% at fault is jointly and severally liable); N.Y. CIV. PRAC. L. & R. 1600 (McKinney 1986) (defendant over 50% at fault is jointly and severally liable); OHIO REV. CODE ANN. § 2515.19 (Anderson 1987) (applies only when plaintiff is at fault).

A recently enacted New Jersey statute sets forth an interesting compromise. The statute states:

Except as provided in subsection d. of this section, 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 total damages.
- b. The full amount of economic damages plus the percentage of non-economic damages directly attributable to that party's negligence from any party determined by the trier of fact to be more than 20% but less than 60% responsible for the total damages.
- c. Only that percentage of the damages directly attributable to that party's negligence from any party determined by the trier of fact to be 20% or less responsible for the total damages.
- d. With regard to environmental tort actions, the party so recovering may recover the full amount of the damage award from any party determined to be liable.



the underlying tensions and sought to resolve them to comport with their sense of justice and with their sense of appropriate balance in a tort compensation system.

One then questions why the legislatures, who (according to my analysis) fully understood the issue, modified the joint tortfeasor doctrine? Why were they not convinced by the simplicity and strength of the "fairness" argument?

I am convinced that legislatures were driven by at least two considerations. First, they believed that the joint tortfeasor doctrine operated to overlay tort doctrine that was itself unfair. *Joint tortfeasor liability exponentially multiplies the unfairness.* On finding themselves unable to address many of the underlying problems because political resolution of fundamental liability issues was not feasible, they determined to reduce the unfairness fostered by existing doctrine to manageable proportions. Second, legislatures understood that the problem was more serious than merely reallocating losses from occasional insolvent defendants who were unable to pay their fair share of judgments.

The true problem is "institutionally immune" defendants. These defendants have been granted a broad license to act, bearing limited financial responsibility for their conduct. It is not surprising for legislatures to conclude that it is unfair to saddle solvent defendants with the full brunt of damages substantially caused by conduct which society

- e. Any party who is compelled to pay more than his percentage share, may seek contribution from the other joint tortfeasors. . . .

N.J. STAT. ANN. § 2A:15-5.3 (amended 1987).

Several states have followed the Uniform Comparative Fault Act and have enacted reallocation statutes which reallocate uncollectible shares among all the responsible parties, including the plaintiff if the plaintiff were negligent. *See, e.g.,* MINN. STAT. ANN. § 604.02 (West Supp. 1988); MO. ANN. STAT. §§ 537.067, 538.230, 538.300 (Vernon 1988). Michigan applies its reallocation statute only if the plaintiff was contributorily negligent. *See* MICH. COMP. LAWS ANN. § 600.6304 (West 1987).

Professor Wright attributes the "confused results" of the legislative activity to "the confused and distorted nature of the debate which the defense advocates have fostered." Wright, *supra* note 8, at 1168. He could not be more wrong. The varying legislative results reflect the very real tensions legislators correctly perceive to be operating. Sophisticated and thoughtful commentators who have supported legislative compromise have been troubled by these same tensions. *See, e.g.,* Mooney, *The Liability Crisis — A Perspective*, 32 VILL. L. REV. 1235, 1260-61 (1987); Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 40-41 (1988); Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929, 959-60 (1987); Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628 (1988).

immunized. The decision against joint tortfeasor liability essentially states society's belief that the limited compensation available from recovery-immune defendants reflects the appropriate level of compensation for the immune conduct. For example, motorists who are permitted by law to drive with woefully inadequate liability insurance limits are not simply insolvent tortfeasors. Instead, they are recovery-immune defendants, legally sanctioned to drive with full knowledge that they will only be able to pay a small fraction of the costs of the harm they cause. To shift losses to the solvent joint tortfeasor is to treat him as a "whipping boy" and to require him to bear full responsibility for broad-based immunities that cut a very large swath through traditional tort liability.

### III. JOINT TORTFEASOR LIABILITY AND FAULT BASED LIABILITY

#### A. *Doctrinal Developments*

Professor Wright has sharply criticized reformers for arguing that joint and several tort liability operates unfairly in the context of the modern extensions of tort liability. He says that moral responsibility, not moral fault, is the criterion for imposing tort liability.<sup>22</sup> The elaborate expansion of liability over the last two decades does not reflect the imposition of "social insurance" on innocent parties but rather is the consequence of applying the "moral responsibility" principle to new societal problems.

Professor Wright is entitled to his view. It is not shared by a substantial body of scholars who view the expansive developments in products liability and medical malpractice as a radical departure from traditional tort fault principles.<sup>23</sup> Legislatures that sought to put their finger in the dike found the task extraordinarily complex. Not only was it difficult to forge political compromise on doctrinal issues, but they also found legislative drafting on these issues to be most troublesome. For every word or phrase chosen to resolve a given problem one could develop a hypothetical for which the proposed legislative resolution might well be inappropriate. The common law of torts is not easily compressed into tight legislative language. Legislatures perceived themselves caught in a trap created by the courts. The doctrinal structure of the liability system was marvelously resistant to serious legislative

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<sup>22</sup> Wright, *supra* note 8, at 1150.

<sup>23</sup> Several leading scholars have taken the position that the tort revolution over the past three decades reflects serious departures from traditional tort principles. See, e.g., R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* (1980); P. HUBER, *supra* note 6; Epstein, *supra* note 6, at 469; Priest, *Puzzles*, *supra* note 6, at 1534-39.

invasion.

Proponents premise the belief that expansive tort liability has taken on an "insurance" like character on the confluence of multiple factors. It is not based, as Wright suggests, on the simple failure to understand the difference between "moral fault" and "moral responsibility." First, liability rules have taken on a hue that raises real questions about whether a defendant bears "moral responsibility" for injury. Second, a host of satellite rules that traditionally limited tort liability have been almost abolished. Third, the very nature of complex technological litigation has raised serious questions about the judiciary's ability to fairly adjudicate issues brought before them.

As to the formal structure of the liability rules, one reasonably discerns a move from "moral responsibility" toward pure "insurance." In products liability the imposition in several important jurisdictions of liability for scientifically unknowable risks or for designs that conform to the existing state-of-art at the time of product distribution<sup>24</sup> is hardly consistent with any common-sense notion of "moral responsibility." A test that imposes liability for failing to account for risk information which was not knowable or technology which was not feasible ten or twenty years earlier when the product was marketed strikes many as radically different from traditional strict liability.<sup>25</sup> In many jurisdic-

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<sup>24</sup> The leading case imposing liability for scientifically unknowable risks is *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). *Beshada* was substantially modified by *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984). Although *Feldman* establishes an *ex ante* negligence test for liability, it shifts the burden of proof to the defendant on the issue of scientific liability. In many instances, this is the functional equivalent of a true strict liability test. Recent legislation in New Jersey, which enacted a "state-of-art" defense, appears to apply to only design defect cases. See N.J. STAT. ANN. § 2A-58C-1.3(a)(1) (West 1987). A subsequent section of the bill which deals with failure to warn does not limit liability to dangers which were foreseeable at the time the product was distributed. *Id.* § 2A-58C-1.4. The court in *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), shifts the burden of proof on the risk/utility issue to the defendant. It is not totally clear whether it imposes a true hindsight test for scientifically unknowable risks, although it appears to do so. There is substantial judicial support for true strict liability in which defendant's foreseeable knowledge is not a mitigating factor. See, e.g., *Dart v. Wiebe Mfg.*, 147 Ariz. 242, 709 P.2d 876 (1985); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Hayes v. Ariens Co.*, 391 Mass. 407, 462 N.E.2d 273 (1984); *Carreter v. Colson Equip. Co.*, 346 Pa. Super. 95, 499 A.2d 326 (1985).

<sup>25</sup> See, e.g., *Henderson, Coping With the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 952-68 (1981); *Schwartz, Products Liability, Corporate Structure and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689 (1985); *Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983).

tions the judicial test for "defect" has become so open-ended that little more than insurance seems to be the criterion for imposing liability. For example, adopting an unlimited "consumer expectation" test<sup>26</sup> or "the manufacturer is the guarantor of the product safety"<sup>27</sup> rule appears to impose liability even though the manufacturer has met risk-utility norms. Furthermore, the total merger of assumption of the risk

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<sup>26</sup> A fair number of courts have couched their tests for defect in whole or in part in terms of "consumer expectations." See, e.g., *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979), *aff'd in part, rev'd in part*, 624 P.2d 790 (Alaska 1981); *Vineyard v. Empire Mach. Co.*, 119 Ariz. 502, 581 P.2d 1152 (Ct. App. 1978); *Barker*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225; *Aller v. Rodgers Mach. Mfg.*, 268 N.W.2d 830 (Iowa 1978); *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Voss v. Black & Decker Mfg.*, 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Menard v. Newhall*, 135 Vt. 53, 373 A.2d 505 (1977); *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 542 P.2d 774 (1975); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

Although the consumer expectation test has its academic supporters, see, e.g., Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113 (1974), it has been heavily criticized by other commentators. See, e.g., Keeton, *Products Liability — Design Hazards and the Meaning of Defect*, 10 CUMB. L. REV. 293, 310 (1979); Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435, 476 n.241 (1979); Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861, 916-18 (1983). For a rather shocking example of open-ended liability utilizing the consumer expectation test, see *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982). This Author's critique of the case is found in Twerski, *Product Liability Bill*, *supra* note 3, at 580-86. One should be careful to distinguish recent legislation that exempts manufacturers from liability for common products that meet consumer expectations. These bills serve to extinguish liability for commonly used products that have inherent dangers. They do not serve as vehicles for open-ended liability. See, e.g., CALIF. CIV. CODE § 1714.45(a)(1) (West Supp. 1989); N.J. STAT. ANN. § 2A:58C-1.3(a)(2) (1987).

<sup>27</sup> See *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978). *Azzarello* has been treated harshly by most commentators. See Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 636-39 (1980); Henderson, *Products Liability: Controversial New Decision on Design Defects*, 2 CORP. L. REV. 246, 248 (1979); Comment, *Returning the "Balance" to Design Defect Litigation in Pennsylvania: A Critique of Azzarello v. Black Brothers Company*, 89 DICK. L. REV. 149 (1984); Note, *Products Liability — Restatement (Second) of Torts — Section 402A — Uncertain Standards of Responsibility in Design Defect Cases — After Azzarello, Will Manufacturers Be Absolutely Liable in Pennsylvania?*, 24 VILL. L. REV. 1035, 1050 (1979).

into the doctrine of comparative fault has imposed substantial liability on defendants for risk-taking conduct which was once perceived to be the plaintiff's "moral responsibility."<sup>28</sup> Finally, annihilating almost all of the limited-duty rules has removed structural certainty from the law of torts.<sup>29</sup> Clear structural guidelines played an important role in assigning "moral responsibility" among various actors. In a world in which everyone is responsible, it is excruciatingly difficult to pinpoint moral responsibility.

The formal changes in liability rules do not tell half the tale. Significant changes have taken place in administering other elements of the tort cause of action. The amount of evidence necessary to establish cause-in-fact has substantially been diminished.<sup>30</sup> Cases go to juries with evidence that is very thin, and courts are hard pressed to overturn verdicts based on the weight of the evidence. Some jurisdictions have even shifted the burden of proof on causation-related issues to the de-

<sup>28</sup> See *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959). This case was the first to abolish implied assumption of risk as an independent defense. The widespread adoption of comparative fault has hastened the process considerably. See W. PROSSER & P. KEETON, *THE LAW OF TORTS* 495-96 (5th ed. 1984); V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 9.4, at 165-72 (2d ed. 1986); H. WOODS, *COMPARATIVE FAULT* § 6, at 131-64 (2d ed. 1987) (listing 35 states that have merged assumption of risk into comparative fault).

<sup>29</sup> A host of limited-duty rules have been either abolished or sharply curtailed. (1) Landowner liability rules. See *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). See generally W. PROSSER & P. KEETON, *supra* note 28, § 62. (2) Recovery for negligent infliction of mental distress without physical injury. See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 438 (Me. 1982). (3) Bystander recovery for mental distress due to injury caused to a third person. See *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). (4) Patent danger rule in products liability. See *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). (5) Product misuse defense. See *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 546 (Iowa 1980).

<sup>30</sup> See *McNabb v. Green Real Estate Co.*, 62 Mich. App. 500, 519, 233 N.W.2d 811, 820 (1975); Henderson, *The Role of the Judge in Tort Law: Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845, 852 (1983) (citing the tendency of courts "to play fast and loose with the [causation] requirement"); Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 713 n.89 (1986) ("As a practical matter, by allowing jurors to infer causation from the facts, a court may tacitly shift the burden to the defendant to 'disprove' causation."); see also *The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations*, 10 HAMLINE L. REV. 345, 363 (1987).

defendant so that it is increasingly difficult for the defendant to prevail.<sup>31</sup> Furthermore, courts have been so lax in administering doctrines of proximate cause,<sup>32</sup> intervening cause,<sup>33</sup> and shifting duty,<sup>34</sup> that they provide little of the traditional protection that existed in the regime of "moral responsibility" liability.

Finally, respected scholars have argued that complex technological design-defect litigation involves the courts in decision making that seriously strains their abilities to fairly adjudicate issues.<sup>35</sup> The highly

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<sup>31</sup> In product liability "failure to warn" cases, courts have created a rebuttable presumption that a warning, if given, would have been heeded. The cause-in-fact issue is rarely resolved in favor of defendant. *See, e.g.,* *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *Graham v. Wyeth Laboratories*, 666 F. Supp. 1483 (D. Kan. 1987); *Hamilton v. Hardy*, 370 Colo. 375, 549 P.2d 1099 (1976); *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541 (1979); *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984); *Seley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 423 N.E.2d 831 (1981); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377 (Okla. 1974); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602 (Tex. 1972) *But see* *Plummer v. Lederle Laboratories*, 819 F.2d 349 (2d Cir.), *cert. denied*, 108 S. Ct. 232 (1987) (finding no evidence that physician would have warned patient of risk of contracting polio from vaccine — thus no proximate cause as a matter of law); *Bloxom v. Bloxom*, 512 So. 2d 839 (La. 1987) (finding that failure to adequately warn in driver manual about intense heat emanating from catalytic converter was not cause of fire because owner said he never read the manual — presumption of causation rebutted).

A similar phenomenon has arisen in second collision crashworthiness cases. A majority of courts have shifted the burden of proof to the auto manufacturer to establish the extent of the second collision damages. If they fail to do so, they are treated as joint tortfeasors with the primary wrongdoers and held fully liable for all damages to the plaintiff. *See* *Mitchell v. Volkswagenwerk, A.G.*, 669 F.2d 1199 (8th Cir. 1982); *Fox v. Ford Motor Co.* 575 F.2d 774 (10th Cir. 1978); *Fouche v. Chrysler Motors Corp.*, 107 Idaho 701, 692 P.2d 345 (1984).

<sup>32</sup> *See, e.g.,* *Bigbee v. Pacific Tel. & Tel.*, 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983); *Wierum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

<sup>33</sup> *See, e.g.,* *O'Toole v. Carlsbad Shell Serv. Station*, 202 Cal. App. 3d 151, 247 Cal. Rptr. 663 (1988); *Moran v. Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975).

<sup>34</sup> *See, e.g.,* *Bilota v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984); *Lopez v. Precision Papers, Inc.*, 107 A.D.2d 667, 484 N.Y.S.2d 585 (1985), *aff'd*, 67 N.Y.2d 871, 492 N.E.2d 1214, 501 N.Y.S.2d 798 (1986).

<sup>35</sup> An early critic of open-ended design defect litigation noted that the polycentric nature of this genre of product liability claim was substantially different from traditional tort litigation. *See* *Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). Professor Henderson continues to believe that justiciability concerns place significant limitations on tort doctrine. *See* *Henderson, Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982). This Author has also expressed deep concern about the unstructured nature of design litigation. *Twerski, Seizing the Middle Ground Between Rules and*

polycentric and interwoven issues that courts must balance and compromise to determine whether a design is defective may render them non-justiciable. Failure to warn litigation also presents serious justiciability problems.<sup>36</sup> It takes little to conjure up after the fact a specific warning that might have been useful. If courts relax causation norms as well, this form of litigation may result in liability that nearly transforms manufacturers into insurers.

When all of the above factors are combined, ample grounds exist to conclude that we have moved rather far away from the "moral responsibility" which once governed our tort system. What does this have to do with joint tortfeasor liability? If the critics are (or are even partially) correct and defendants are in fact "insurers," then good reason exists to balk at their being full insurers when their involvement in the injury event has been shared with others. If they are liable for being actors rather than truly at fault in the traditional sense (as they were when joint tortfeasor liability was first adopted), then why should they carry the full weight of liability? They bristle at any liability and are rightfully incensed when asked to carry the entire cost of the accident.

Wright's argument to this is to reform the offensive doctrines rather than attack joint tortfeasor liability.<sup>37</sup> He is of course quite correct. However, as noted earlier, the law of torts is remarkably resistant to comprehensive doctrinal change.<sup>38</sup> The problems I catalogued are so complex and their effects so serious, that legislative reform to reduce the perceived unfairness was compelling. Legislatures thus sought to limit the unfairness by restricting the plaintiff's right to recover to the percentage of fault attributed to the defendant. If the substantive harms could not easily be undone, they could at least be reduced by instituting procedural rules that kept them in check. Equitable apportionment according to party fault (especially when applied to noneconomic loss) is

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*Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

<sup>36</sup> See, e.g., *Hon v. Stroh Brewery Co.*, 835 F.2d 510 (3d Cir. 1987) (vacating summary judgment for defendant when claim was that brewery failed to warn about possible danger of contracting pancreatitis because of habitual beer drinking); *Fraust v. Swift & Co.*, 610 F. Supp. 711 (W.D. Pa. 1985) (denying defendant's motion for summary judgment in case in which mother of a 16-month-old infant might not have known of risk of feeding him peanut butter sandwich; child choked on the peanut butter and suffered severe brain damage; a jury might find that the manufacturer breached its duty to warn of hidden dangers).

<sup>37</sup> Wright, *supra* note 8, at 1151.

<sup>38</sup> Rabin, *supra* note 21, at 39, has also observed that substantive law reform is an unlikely prospect. Tort reformers have thus focused on damage-related issues to curb excesses in the tort compensation system.

a sensible and moderate legislative response to an otherwise intractable problem.

### *B. The Jury and the Ten Percent Solution*

Improvident doctrine and complex process concerns are just some of the problems faced by institutional defendants. The problem of jury control for cases in which the jury must evaluate expert testimony and balance the risk-utility factors to determine liability is at very best daunting. Given a constitutional right to jury trial and severe limitations on the judge's right to direct a verdict when legitimate fact questions need to be decided, institutional defendants believe that the mechanisms to thwart improper jury verdicts are simply not operative.<sup>39</sup>

For example, they argue with considerable justification that a ten percent finding of fault in a multi-defendant case is not particularly difficult to obtain. Juries, they say, parcel out small portions of liability without significant evidence to support the verdict, and appellate courts are close to impotent if they wish to reverse. The evidence may be just enough to squeak by, and once the plaintiff passes the most minimal of thresholds, the defendant under common-law doctrine is liable for full damages. Municipalities, corporations, and major institutions stand as the defendant of last resort.<sup>40</sup>

The implication of this for settlement is rather obvious. An institutional defendant that believes it has a fully defensible case must think long and hard whether it can take the chance of litigating its innocence. The spectre of ten percent liability is enough to thwart defendants with strong and legitimate defenses from engaging in litigation. For no liability may turn out to be ten percent liability, and ten percent effectively means 100% under the common-law joint tortfeasor doctrine. It is also not certain that the desperate search for the deep pocket will force a quick and easy (if extortionate) settlement. Claimants presented with the opportunity to "shoot for the moon" on the basis of a defendant's minuscule fault may resist sensible settlement. Thus, litigation may be

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<sup>39</sup> In a leading case, *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), the court exhaustively reviewed the evidence of design defect in a crashworthiness setting. Given the complexity of balancing the risk/utility factors, the court indicated that its hands were tied. The seventh amendment barred appellate review of facts found by a jury in actions at common law. A jury reversal could not be sustained unless the record was "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief . . ." *Id.* at 959.

<sup>40</sup> See J. HENDERSON & A. TWERSKI, *PRODUCTS LIABILITY, PROBLEMS AND PROCESS* 331-33 (1987).



increased and the controversy extended over time. In short, uncertainty and lack of predictability are added to a litigation system which already suffers from a lack of stability.

Professor Wright is once again partially correct when he states that the real problem is not joint liability but any liability.<sup>41</sup> Courts should really police juries, but their ability to do so is seriously circumscribed. It is also psychologically very difficult for a court to proclaim that ten percent liability does not exist. One rather easily understands why proposals to impose joint and several liability only after reaching minimum thresholds have met with such wide approval.<sup>42</sup> These proposals are the only realistic protection against disastrous and unfair liability. More important, they insure that a defendant's right to mount a credible defense is more than a mere formality.

### *C. Damages — Compounding the Problem: Unregulated Damages and Deep Pocket Defendants*

In addition to liability-related issues, the common-law joint tortfeasor doctrine compounds unfairness when it assesses unprincipled damages. The problem again is that a defendant who is assessed a moderate percentage of fault finds itself carrying the full weight of exceedingly high noneconomic loss damages. For the third time I find myself agreeing with Professor Wright that rational control of damages is a good in and of itself.<sup>43</sup> Joint tortfeasor doctrine should not be the vehicle for dealing with this problem.

The difficulties are twofold. First, no objective criteria exist for assessing or reviewing awards of noneconomic damages.<sup>44</sup> Judicial control of this highly volatile category of damages is consequently erratic. Second, institutional defendants tend to be the object of jury scorn.<sup>45</sup> Wright argues that courts have the power of remittitur and in fact exercise it.<sup>46</sup> There is thus no need to curb joint tortfeasor liability to overcome jury overzealousness. Once again, however, Professor Wright has not heeded the structural weaknesses which permit overinflated damages to exist as a permanent feature of our tort compensation system.

The history of appellate review of damages is not shrouded in mys-

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<sup>41</sup> Wright, *supra* note 8, at 1151.

<sup>42</sup> See statutes cited *supra* note 21.

<sup>43</sup> Wright, *supra* note 8, at 1152.

<sup>44</sup> See *infra* text accompanying notes 48-61.

<sup>45</sup> See *supra* note 13.

<sup>46</sup> Wright, *supra* note 8, at 1152.

tery. In an unbroken chain of cases beginning in 1812 with the famous opinion of Chancellor Kent in *Coleman v. Southwick*,<sup>47</sup> courts have acknowledged that they have no standards by which to measure or to evaluate excess damages. The language of Chancellor Kent so often quoted throughout almost two centuries is remarkable for its lucidity and its honesty. He stated:

The law has not laid down what shall be the measure of damages in actions of *tort*. The measure is vague and uncertain depending upon a vast variety of causes, facts and circumstances . . . . The court cannot interfere, unless the damages are apparent, so that they can properly judge the degree of the injury. Generally, in such cases, they cannot say whether 500 pounds was too much, or 50 pounds would have been too little. The damages therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; *for they have no standard by which to ascertain the excess.*<sup>48</sup>

Over the years courts have utilized different verbalizations to support findings of excessive damages. Some courts have cited jury "partiality or prejudice,"<sup>49</sup> others have cited "caprice,"<sup>50</sup> and some courts have characterized excessive verdicts as "outrageous,"<sup>51</sup> and "perverse."<sup>52</sup> However, authorities almost unanimously agree that these verbalizations are the defendant's only protection against an inflated verdict. As the court in *Atlantic Coast Line Railroad v. Withers*<sup>53</sup> noted:

The settled rule is that *as there is no legal measure of damages in cases involving personal injuries*, the verdict of the jury in such cases cannot be set aside as excessive unless it is made to appear that the jury has been actuated by prejudice, partiality or corruption, or that they have been misled by some mistaken view of the merits of the case. . . .<sup>54</sup>

A paucity of scholarly literature exists dealing with suitable criteria for measuring damages in noneconomic loss cases. However, the leading scholars who have written on the subject are astonished that a topic of such enormous practical significance has no discernable standards or

<sup>47</sup> 9 Johns. 45 (N.Y. 1812).

<sup>48</sup> *Id.* at 52 (emphasis added).

<sup>49</sup> *Lake Erie & W. R.R. v. Howarth*, 73 Ind. App. 454, 124 N.E. 687 (1919).

<sup>50</sup> *Ferry Cos. v. White*, 99 Tenn. 256, 41 S.W. 583 (1897).

<sup>51</sup> *Colorado Springs & Interurban R.R. v. Kelley*, 65 Colo. 246, 176 P. 307 (1918).

<sup>52</sup> *Olson v. Brown*, 186 Wis. 179, 202 N.W. 167 (1925).

<sup>53</sup> 192 Va. 493, 65 S.E.2d 654 (1951).

<sup>54</sup> *Id.* at 510, 65 S.E.2d at 663 (emphasis added).

guidelines.<sup>55</sup> In 1935 McCormick noted: "Translating pain and anguish into dollars can, at best be only an arbitrary allowance, and not a process of measurement and consequently the judge can, in his instructions, give the jury no standard to go by."<sup>56</sup> Another scholar who studied pain and suffering damages commented that recovery "leads to unpredictable and seemingly arbitrary awards. . . . [There is] no rhyme or reason underlying the amounts recovered by or denied to plaintiffs."<sup>57</sup>

Our tort compensation system transfers billions of dollars every year based on legal standards which would not be respected in any other area of the law.<sup>58</sup> Professor Wright notes that other common-law countries continue to impose joint and several tort liability,<sup>59</sup> but he fails to indicate that pain and suffering awards are minuscule compared to American standards.<sup>60</sup> Their joint and several rules are, in truth, comparable to the law of those jurisdictions which allow joint and several

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<sup>55</sup> See, e.g., Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953) ("Judges consign [damages for pain and suffering] uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases."); Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 205 ("The complete lack of any such standard [for measuring damages attributable to pain and suffering] has been freely admitted by scholars and courts for many years.").

<sup>56</sup> C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 318 (1935).

<sup>57</sup> Zelermyer, *Damages For Pain and Suffering*, 6 SYRACUSE L. REV. 27, 28 (1954).

<sup>58</sup> The Author is reminded of Justice Jackson's famous dissent in *Williams v. North Carolina*, 317 U.S. 287, 311 (1942) (Jackson, J., dissenting). In commenting on the court's decision recognizing the domicile of one spouse as sufficient to assert jurisdiction over the marriage res without asserting in personam jurisdiction over the absent spouse, Justice Jackson said: "In other words, settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." *Id.* at 316. The total absence of standards to assess damages for noneconomic loss would, I believe, not be countenanced in any other field of substantive law. Billions of dollars are transferred every year under guidelines that would be considered woefully inadequate if the issue were the collection of a grocery bill.

<sup>59</sup> Wright, *supra* note 8, at 1183-85.

<sup>60</sup> Pain and suffering damages in Canada, for example, are limited to \$100,000 (inflation-indexed). For a discussion of the impact of this judicially imposed ceiling, see Trebilcock, *The Social Insurance Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929, 979-81 (1987). Although England has no formal ceilings on pain and suffering, the amounts awarded are minuscule by American standards. See J. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* 125-29 (1985); D. HARRIS, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* 85-91 (1984); W.Y.H. ROGERS, WINFIELD AND JOLOWICZ ON TORTS 628-30 (1984).

liability for economic losses and several liability only for noneconomic losses.<sup>61</sup> When one adds the inherent prejudice toward corporate defendants to a damage award policy which is almost totally without standards, defendants can justifiably believe that they are not being fairly dealt with.

The common-law joint and several tortfeasor doctrine accentuates and exacerbates all the imperfections that exist in the present tort compensation system. Comprehensive and thoroughgoing reform of tort doctrine and all its accompanying procedural rules is not practically feasible. One can reasonably believe that only sharply focused and well-defined legislation can establish the kind of change that courts can effectively implement. That state legislatures sought to remove the harshness of full joint liability is fully understandable. The compromise legislative solutions are eloquent testimony that the lawmakers seriously grappled with the problem.

#### IV. JOINT TORTFEASOR LIABILITY AND THE INSTITUTIONALLY IMMUNE DEFENDANT

The language of the joint and several debate is studded with references to the insolvent defendant. Although this defendant may exist in theory, it is not the culprit that has caused all the difficulty.

Consider the following examples:<sup>62</sup>

- (1) A reckless driver loses control of her car and crosses the median strip hitting the plaintiff's car head on. Following the accident, plaintiff seeks to establish that the brakes of the defendant's car were defective and that had they been sound, the accident could have been avoided. The defendant driver carries 10,000/20,000 automobile liability insurance.
- (2) An employee working on a plastic molding machine injures her hand when a platen accidentally closes. Plaintiff alleges that the plastic molding machine should have been equipped with a safety device. The evidence demonstrates that the safety device which came with the machine was removed for repairs six months ago. It was never replaced because the employer believed that the machine would operate more quickly (and provide for greater productivity) without the safety device. The employer is not liable in tort because its liability is limited to worker's compensation.
- (3) An aircraft manufacturer is sued following an accident for failing to design a redundancy system into the aircraft. Evidence indicates that the cause of the crash was negligent repair of the aircraft by a local aircraft repair outfit. The repairer carries no insurance and has no

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<sup>61</sup> See statutes cited *supra* note 21.

<sup>62</sup> See *House Energy Committee Hearings*, *supra* note 17, at 442-43.

significant assets.

In all of the foregoing examples the primary defendants are effectively immune from tort liability. The legislature was fully aware that drivers with substantial assets carry high limits to protect their wealth. Minimum liability limits are, in fact, maximum recovery amounts. Worker's compensation similarly immunizes employers and holds them liable only to the limits of this specialized compensation system. In addition, when states permit high risk repairers to operate with thin capitalization and no insurance, they effectively immunize these defendants from liability. These are the "insolvent" defendants who purvey harm in joint tortfeasor situations.

Legislatures are now considering whether they wish to fully transfer the cost of these broad-based immunities to the joint tortfeasor who appeared on the scene and who contributed in some small measure to the accident. The alternative is to spread the broad-based legislative immunity to society as a whole. That they have opted for wider sharing is not irrational. Which sharing formula is more just is a matter of legitimate difference of opinion. This issue is classic grist for the legislative mill. However, the legislative decision to remove the immune conduct from the tort compensation system is evidence that the cost of broad-based immunity should not be fully borne by the joint tortfeasor. The reformers have decided that the wide societal implications of the immunities cannot be set aside by mouthing a simple but-for argument against the solvent defendant. She, too, is an intended beneficiary of the sweeping immunities. I would add only the following observations. To shift the full cost of injury to third-party defendants may prevent careful re-examination of the immunities. The present situation which shifts losses from immune parties to third-party defendants does not properly internalize costs.<sup>63</sup> As long as third-party recovery serves as an escape valve allowing recovery from marginally guilty defendants, there will be less pressure to examine the scope of the immunities and their sensible limits. Furthermore, third-party liability cases have created a body of case law that is at best strained and at worst completely irrational.<sup>64</sup> The immunities have thus placed unconscionable pressure on

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<sup>63</sup> Parties who are either wholly or partially immune simply do not have the proper incentives to modify their behavior.

<sup>64</sup> See Gallub, *Limiting the Manufacturer's Duty for Subsequent Product Alteration: Three Steps to a Rational Approach*, 16 HOFSTRA L. REV. 361 (1988) (collecting and analyzing a large number of third-party manufacturer product liability cases). That these cases present a significant strain on the system has long been recognized. See MODEL UNIFORM PRODUCT LIABILITY ACT § 112, 44 Fed. Reg. 62713 (1979).

substantive law doctrines which govern third-party litigation. Society should honestly confront the tort immunities and reasonably decide their scope. Joint tortfeasor liability cannot in the long run carry the load of the tort immunity doctrine.

#### CONCLUSION

Professor Wright has honed the issues of the joint and several tortfeasor liability debate. The formal structure of his arguments cannot be assailed. However, logic does not fully address the underlying problems. Years of bitter experience with an imperfect liability system have taught the players that the common-law joint tortfeasor doctrine operates with considerable unfairness. The various legislative schemes address that unfairness. My own sense is that the more moderate statutes are not half-bad.

