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The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright

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The reader will have to choose. Wright claims that over thirty state legislatures acted to modify the common-law joint tortfeasor doctrine because they were flummoxed by defense lobbyists. The poor, benighted souls who wrote the laws could not understand that the common law only held a defendant liable whose fault percentage was minuscule as compared to other defendants, if but only if, that defendant was the but-for cause of harm. Although Wright acknowledges that plaintiffs groups consistently thus argued, he insists that this rather simple straightforward argument was never fully understood. So be it. Wright espouses the "confusion theory."

Since it is likely that neither Wright nor I will canvass several thousand state legislators to discover what they were thinking when they voted on the issue, we shall never know with any degree of certainty whether he is correct. My reasons for disagreeing with him are, I believe, well-founded. The problem with the "confusion theory" is that it does not explain why state legislatures overwhelmingly rejected total abolition of the joint-tortfeasor doctrine. Why instead did they establish percentage thresholds? Why did they limit the abolition of the doctrine to pain and suffering damages? If the legislators were so confused, why did they retain the joint tortfeasor doctrine but carefully limit its application?

My contention is that they looked at the baby (joint-tortfeasor liability) and the bathwater (the structural weaknesses in tort doctrine) and carefully sought to craft rules which would prevent the bathwater from choking the baby. The legislation took dead aim at several very real ills. First, the questionable integrity of low-fault-percentage jury verdicts is a problem recognized by every trial lawyer who has tried a multi-defendant case. The thresholds address this problem in a sensible

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fashion. They allow full joint-tortfeasor recovery only if there is some substantial guarantee that the verdict meets a minimum validation level. Second, that we have no jurisprudence of tort damages is more than an embarrassment. The argument that the lack of standards for damages has due process implications has recently been voiced by two justices of the United States Supreme Court.[1] The limitation of joint tortfeasor liability for the most ill-defined area of damages — pain and suffering — by capping liability to the fault percentage is again a modest and sensible response to a long-festering problem. In short, my thesis explains events. Wright's "confusion theory" explains nothing. A theory that does not explain is not much of a theory. The glorious confusion which Wright describes should have resulted in chaos. States admittedly differed in how they structured their solutions, but chaotic they were not.

More important, however, is Professor Wright's unwillingness to confront the problems I discussed. For whether he or I am right about why legislators acted, the reality is that the common-law joint tortfeasor rule does, in fact, aggravate weaknesses in the present system, and the reform legislation substantially reduces the tensions. As to the integrity of low-fault-percentage jury verdicts and unprincipled damages, Wright states that "[t]he lack of controls on judges' or juries' discretion is not due to a lack of promising approaches, but rather to a lack of interest by tort 'reformers,' who are interested in laws that will reduce defendants' liability rather than in true tort reform."[2] I am mildly amused. Just what are these wonderful solutions? Even modest substantive law changes have been successfully fought by the trial bar. The more radical proposals advocated by the seminal thinkers in tort law do not have a prayer at enactment. It is simply not true that there were legislatively viable alternatives readily available for dealing with excesses in jury discretion and with unprincipled damages. That legislators faced the joint tortfeasor problem in a hard-headed pragmatic fashion is no vice. The options were not good at all.

Finally, Wright has difficulty with my argument that by enacting joint tortfeasor reform the legislatures were taking a careful look at the immunities they enacted over the years and asked who should bear the costs of these immunities? Wright says that he finds no hint of this rationale in the legislative materials. There was, however, much discus-

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[1] Banker's Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1656 (1988) (Justices O'Connor and Scalia concurring).

[2] Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. DAVIS L. REV. 1147, 1158 (1989).

sion of the problem of insolvent tortfeasors who could not be reached either as primary or contribution defendants. It was not a closely kept secret who the so-called insolvent defendants really were. Manufacturers and municipalities made it clear that they were being inundated by third-party claims based on minor fault percentages and were paying the full bill.

The legislators were thus forced to face the question of whether they wished to place the full cost of every immunized accident to marginal defendants. Tens of millions of drivers are permitted to drive with 10/20 liability coverage. Wright asks, "[W]hy are those defendants with substantial insurance . . . , who engage in the same activities as the supposedly 'immune' underinsured defendants, not also immunized."[3] He misses the point. By permitting driving with low liability limits, legislatures have seen fit to "immunize" the driving of the poor. Under common law, subsidy for that immunity is almost entirely paid by peripheral defendants. The legislatures thought that to be unfair. So do I.

The solution was not, as Wright proclaims, to shift that loss entirely to the victim. States have mostly limited a defendant's liability for noneconomic loss to its fault percentage, and often have combined this with a proviso that if the fault of the defendant exceeds a given threshold, full joint liability will be reinstated. The American Bar Association endorsed this solution as fair. It does not shift all costs to plaintiffs. It partially shifts costs of the most ill-defined category of damages for cases in which the finding of fault has the least integrity to the plaintiff and to the society that has consciously chosen to expose her to insolvents. Its only vice is that it smacks of common sense. Once again — that is not half-bad.

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[3] *Id.* at 1159.