26. Multiple Tortfeasors

"Some day, they'll go down together
They'll bury them side by side
To a few, it'll be grief
To the law, a relief
But it's death for Bonnie and Clyde."

– *Bonnie and Clyde*, 1967

Introduction

We live in a complicated world. That fact is easy to lose track of in a torts course where you get used to thinking in terms of abstract, simplified hypotheticals – a stick-figure world where one solitary defendant walks up and does something tortious to a single plaintiff. But reality is messier. It is seldom the case that there is only one person who bears tortious responsibility for an injury. It's often said that no person is an island. Certainly few tortfeasors are.

This chapter explores various doctrines relating to the existence of multiple tortfeasors within the scope of a single lawsuit. Here's a preview: Doctrines of **vicarious liability** allow plaintiffs to sue parties who stand in the shoes of the primary tortfeasor. Particularly important among them is **respondeat superior**, which allows plaintiffs to sue employers for the torts committed by their employees. Where the actions of more than one tortfeasor combine to injure the plaintiff – such as with a negligent driver operating a defective car – the doctrine of **joint and several liability** allows plaintiffs to satisfy their full claim against any single defendant. The doctrine of **contribution** allows defendants saddled with outsized judgments to get partially reimbursed by fellow blameworthy parties, and the related doctrine of **indemnification** provides a way for defendants to shift their liability burdens on to other parties. Many of these doctrines have been the subject of defendant-friendly modifications passed as part of tort-reform efforts.

Vicarious Liability

In general, tort law requires that persons be blameworthy before their actions are considered tortious. The defendant's intent may make the defendant blameworthy, as can the defendant's carelessness. One glaring exception to this idea, as we have seen, is strict liability. Vicarious liability is another. Through the application of vicarious liability, one entity is regarded by the law as if it had performed the tortious actions of another – even when it didn't.

Respondeat Superior

The most important form of vicarious liability is respondeat superior, which causes an employer to be automatically liable for torts committed by employees acting within the scope of their employment. In fact, companies would rarely be liable otherwise. No company can act except through the actions of actual human beings. And because of respondeat superior, when a company is acting through its employees, it is capable of committing torts.

The historical roots of respondeat superior go back at least to Ancient Rome. Even today, some of the terminology in the cases seems antiquated, particularly in its references to "masters" and "servants." Masters are said to be responsible for the torts of their servants. This terminology is potentially confusing. When you think of "masters" and "servants, " you are probably more likely to picture a scene from *Downton Abbey* than a regular Tuesday at ExxonMobil. But the basic doctrine is the same whenever people are employed to carry out actions on behalf of others – whether they are carrying soup tureens or steering supertankers.

The flow of liability under respondeat superior works only in one direction: Up. Masters are liable for the torts of their servants. Servants are not liable for the torts of their masters. Because of this, respondeat superior works only to expand, not contract, liability. Where a truck driver negligently causes a collision, the fact that the truck driver was employed by a trucking company only causes the trucking company to become liable, it does not relieve the employee trucker of liability. If the plaintiff decides to sue both the employer

and the employee and is successful in the suit, then both will be on the hook – which is to say they have joint and several liability.

This means that an employer stuck with a judgment premised on respondeat superior would be theoretically able to sue the employee more directly at fault for indemnification. For many reasons – e.g., damage to employee morale, bad trial dynamics, and all-around pointlessness – this is a capability rarely invoked.

Acting in Concert

Another important occasion for vicarious liability is persons acting in concert. Acting in concert is the same as acting in "conspiracy," to borrow a criminal law word. When two or more people work together in the commission of a tort, each is liable for the other's tortious action. If two burglars break into a house and one negligently causes a fire, the other is liable as well.

It is important to understand that there is no need for an elaborately drawn up joint venture agreement in order for tortfeasors to be considered acting in concert. If one aids or encourages another to commit a tort, then that person will be liable along with the primary tortfeasor.

Other Situations and Relevant Statutes

It seems intuitive to many people that parents should be vicariously liable for the torts of their minor children. The traditional common-law, however, has no such doctrine. If parents themselves are negligent in supervising their children, they may have first-party liability for negligence. There is, however, no general common-law rule by which parents are liable for torts committed by their children.

In the absence of common-law doctrine, most states have added some form of parental vicarious liability by way of statute. In many jurisdictions, however, this liability is quite limited.

Some states exclude negligence and have hard monetary caps. Alabama, for instance, makes parents liable for up to $1,000 worth of a child's willful, wanton, or intentional property damage. Ala. Code § 6-5-380. Montana's law is similar, but the cap is $2,500. Mont. Stat. § 40-6-237.

Other states are more generous to plaintiffs. Hawaii's statute provides for joint and several liability for all tortious actions committed by minor children, with no cap. One interesting exception – and a reminder that you never know what you will find in a statute until you look – the Hawaii law excludes vicarious liability for minor children who are married. Haw. Rev. Stat. § 577-3.

There are statutes that provide for vicarious liability outside the parent/child context as well. Some jurisdictions make owners of motor vehicles vicariously liable for persons who use their car with their express or implied permission. Before you let someone borrow your ride in California, you should know that the owner is liable for compensatory damages of up to $15,000 per person injured or killed, subject to a $30,000 maximum, plus up to $5,000 for property damage. Cal. Vehicle Code § 17150-17151.

And some states provide for vicarious liability where parenting and driving meet. In Nevada, the adult signing the child's driver's license application takes on unlimited joint and several liability for the minor's torts behind the wheel. Nev. Rev. Stat. § 483.300.

Joint and Several Liability – The Traditional Approach

When there are two or more defendants whose tortious actions caused the plaintiff's injury, how is the responsibility for paying a damages award divided among them? The answer, under the traditional common law, is that it is entirely up to the plaintiff.

Under the doctrine of **joint and several liability**, the plaintiff can collect all of the judgment from one defendant, 50% from each, or according to any arbitrary division the plaintiff desires. The plaintiff cannot, however, double collect: Once the plaintiff has collected the full amount of the judgment, the plaintiff is done.

Joint and several liability applies where multiple tortfeasors are all liable to the same plaintiff for the same harm. Remember that an injury can have any number of actual causes, as one injury is often the final point along a line of unfortunate events. It may take a negligently engineered machine that is negligently operated by a person in a negligently secured area to bring about just one injury.

Joint and several liability means that the injured plaintiff can go after any one tortfeasor or any combination of the tortfeasors whose negligence was a but-for cause of injury.

The argument for joint and several liability is that as between the plaintiff and the defendants, it is more important to make sure the plaintiff gets compensated than to worry about equity among defendants. If a tort case gets to the point where there is a judgment for the plaintiff, that necessarily means the plaintiff has been injured, and it means that, in the eyes of the law, all defendants against whom judgment is entered are responsible for that injury.

Suppose there are four parties whose negligence caused the plaintiff to suffer a $1 million injury, and suppose the four parties are equally a fault, so that it would be fair to have each pay 25%. Assuming all four are defendants in the lawsuit and that each can pay a quarter of the judgment, then no harm is done to the plaintiff by requiring the plaintiff to collect no more than 25% of the judgment from each. But suppose three defendants lack the assets to pay the judgment: a bankrupt gas station, an unemployed and uninsured motorist, and a floral shop operated as a sole proprietorship. And suppose the fourth defendant is one of the world's largest oil companies. In the view of joint and several liability, it's fair for the oil company to pay the entire judgment. After all, but for the oil company's negligence, the plaintiff would not have suffered an injury. And without the oil company being on the hook, the plaintiff will not be made whole.

Yet even the most ardent defenders of joint and several liability would be hard pressed not to admit that it creates some strange results. An excellent example is the case of *Walt Disney World Co. v. Wood*, 515 So.2d 198 (Fla. 1987). The accident at issue happened on the Grand Prix Raceway attraction in Walt Disney World, where diminutive race cars (essentially go-karts with cosmetic enhancements) were driven by park goers on a winding roadway circuit, with the cars being kept from deviating more than several inches to the left or right by a metal guiderail running down the middle of the road. (Today the same attraction, somewhat refurbished, is the Tommorowland Speedway. Its sister attraction in California is Disneyland's Autopia.) Back in 1971, Plaintiff Aloysia

Wood was in one car, while Daniel Wood – her then-fiancé and later husband – was riding in the car behind. Daniel rammed Aloysia's car, and she suffered personal injuries as a result. Aloysia sued Disney, and Disney brought Daniel into the suit as a means of seeking contribution. In a special verdict, the jury assessed total damages at $75,000 and found Daniel 85% at fault, Aloysia 14% at fault, and Disney 1% at fault. Thanks to joint and several liability, the court entered judgment against Disney for all damages save Aloysia's portion. Thus, Disney was liable for $64,500. The judgment was upheld on appeal.

The Realities of Shallow-Pocketed Defendants

The doctrine of joint and several liability is of much more help to plaintiffs than merely simplifying the collection of a judgment or preserving marital harmony between a plaintiff-bride and tortfeasor-groom.

There are important practical reasons why recovery is not sought from certain defendants.

First, as mentioned, it may be that one or more co-defendants lack the resources to pay the judgment. Many commentators speak in a short-hand way of joint and several liability being useful where one or more defendants is "insolvent." This can be confusing, however, because a defendant does not need to be insolvent to lack the resources to pay the judgment. In fact, for a decent-sized personal injury case, it may well be that most individuals in the United States are not worth suing on account of lacking adequate assets. Take, for example, an automobile collision that puts the plaintiff in the hospital for a week or two and requires a couple of surgeries. The medical bill might be $250,000. Your run-of-the-mill middle class individual certainly doesn't have cash on hand to pay this. But, you might think, can't the plaintiff seize the defendant's house to satisfy the judgment? The answer is probably not, because state judgment-debtor laws shield certain property from confiscation to satisfy judgments. In our hypothetical, what's called a *homestead exemption* may well place the property off-limits.

Debtor exemption laws vary wildly from one state to the next, and homestead exemptions are a good example. Rhode Island, for instance, has an exemption to protect the debtor's primary residence up to $300,000. In Florida, the homestead exemption is unlimited as to value – subject instead to an acreage limitation of half an acre in urban areas and 160 acres in rural areas. But watch out Wyoming homeowners – the exemption limit there is just $20,000.

Other exemptions apply to retirement accounts, family jewelry, vehicles, and more. There are also state-law limitations on collection methods such as wage garnishments.

That is not the end of the story, however. Even if the judgment creditor would be satisfied with whatever nonexempt assets a normal middle-class individual would have, when the judgment creditor goes to collect, the debtor may be able to declare bankruptcy. Bankruptcy is possible where all of the debtor's current obligations put together – including those of the plaintiff creditor and everyone else – exceeds the ability of the debtor to pay. Once a debtor declares bankruptcy, federal law prohibits all attempts to collect on the debt. This will force the victorious personal-injury plaintiff to go to the bankruptcy court and get in line with all of the debtor's other creditors. At that point, the plaintiff may be lucky to get pennies on the dollar.

None of this is to say that bankruptcy is a pleasant option for the defendant debtor. But the fact that bankruptcy is out there as a contingency means that a wide array of tort plaintiffs are discouraged from ever knocking at the door with a summons.

In other words, a tortfeasor does not need to be "insolvent" to be effectively judgment proof.

Other Practical and Strategic Reasons Some Co-Tortfeasors Don't Become Defendants

The lack of depth of a tortfeasor's pockets isn't the only reason a plaintiff may be disinclined to sue.

Some tortfeasors may simply be outside of the court's jurisdiction. With products manufactured overseas, this can be a common occurrence. In such a case, the defendant may be unreachable.

In other cases, personal jurisdiction can be had, but the defendant's distance still presents a barrier for the plaintiff. If an important part of that defendant's operations are located overseas, then it may prove practically impossible to take full discovery of that defendant. Suppose the defendant has most of its operations in Japan. Japanese courts do not compel expansive American-style discovery. The Japanese company might stipulate to discovery to avoid sanctions in an American court, but Japanese law forbids American attorneys from taking depositions on Japanese soil or even entering the country for the purpose of taking a deposition. Pursuant to a treaty, an attorney can obtain a special deposition visa to enter Japan so as to take a deposition of a Japanese national at the U.S. embassy or a U.S. consulate in that country. The waiting list for private parties to use these consular facilities, however, can be many months long.

Thus, in a products liability case, the anticipation of such difficulties may discourage a plaintiff from even trying to sue a distant defendant.

There are also strategic reasons to leave defendants off a complaint – even if they are readily reachable and have unexempt assets that could satisfy the judgment. This is particularly the case where the potential defendants are individuals. Consider that the individual will likely be a witness at trial. A witness whose name is on the other side of the "v" in a lawsuit is likely to be much less cooperative and forthcoming on the stand. Moreover, the fact that an individual is on the complaint might engender sympathies with the jury that a faceless corporation could never muster. Also, multiple defendants in a litigation will often save money on their defense by cooperating – taking turns writing briefs that all defendants sign and pooling discovery efforts. The more defendants there are to share the costs of the defense, the less likely they will be to settle. All of these are considerations for the plaintiff in deciding whom to sue.

Joint and Several Liability – Modifications

Today, the doctrine of joint and several liability is on the decline. Or, at least, it is losing its purity. Fewer than 10 states still follow the doctrine in its original, unmodified form. The trend is toward

allocating liability on the front end, so that, at least in some situations, a plaintiff cannot collect from defendants out of proportion to their relative fault.

Several states have moved by statute to a system of **pure several liability**, where any given defendant can only be held liable for the share of the total damages that is proportional to that defendant's fault. Many states that use this system have exceptions for certain kinds of cases, such as hazardous waste or medical-device liability.

Many states have a **hybrid system**, such that where there is a judgment-proof tortfeasor, that tortfeasor's share will be reallocated to other parties in accordance with their share of comparative responsibility. In some states, the reallocation is only to the other defendants; in other states, it is to the plaintiff as well. Some states have a hybrid system that allows joint and several liability for tortfeasors whose share of comparative responsibility exceeds a certain threshold, but several liability for those whose share falls below the threshold. Still other states draw distinctions on the type of damages, such as having joint and several liability for pecuniary (or "economic") damages, but several liability only for nonpecuniary (or "noneconomic") damages.

Among all these modified approaches, the states also differ as to whether fault can be assigned to a non-party tortfeasor, such as a would-be defendant that is outside the court's jurisdiction.

Suffice it to say that these variations, even if seemingly slight as an abstract matter, can easily make or break a particular case.

Contribution – Letting the Defendants Fight It Out

The doctrine of contribution helps to ameliorate the seeming injustice of joint and several liability. Losing defendants who feel they have been made to overpay can seek **contribution** from co-defendants or other blameworthy parties.

The most important thing to understand about contribution is that it is irrelevant to the plaintiff. Traditional joint and several liability does its job for the plaintiff by making it easy for the plaintiff to recover.

Given that, sorting out who ought to reimburse whom on the defendants' side isn't the plaintiff's concern.

How contribution works as a procedural matter is subject to considerable variation among jurisdictions. Contribution might be brought into the trial proceedings – where the defendants begin to resolve the problems amongst themselves even as they are battling the plaintiff – or contribution might be sought in a separate litigation that begins after the plaintiff's trial has concluded.

The substance of contribution also varies greatly. Some approaches call for defendants to split the burden *pro rata,* with each defendant being ultimately liable for an equal share. Other approaches call for responsibility to be apportioned by relative fault.

Indemnification – Shifting the Loss

Indemnification allows one entity to shift the entire burden of loss on to another. There are two kinds of indemnification – one is a doctrine applied by the courts; the other is an obligation arising out of contract.

The doctrine version of indemnification allows a cause of action by a relatively innocent party against a more blameworthy party. Recall that there are many situations in which a relatively blameless party might find itself liable – strict liability and vicarious liability being two leading examples. Assuming the losing defendant can find a party who is "really to blame" for the plaintiff's injury, then the defendant can become an indemnification plaintiff, suing the more blameworthy party to get reimbursed for the judgment. The ability of a defendant to seek indemnification does a great deal of work in making doctrines such as strict liability more intuitively fair. For instance, when it comes to strict products liability, the tort system seems to say: *First, let's make sure the plaintiff gets paid. If you sell a defective product in your store, then you are going to have to stand by to make whole any plaintiff who gets injured. Afterward, of course, you can get reimbursed by the manufacturer who is actually responsible for introducing the defect.*

Some courts characterize the doctrine of indemnification as an equitable doctrine, others describe it as a legal doctrine or common-

law doctrine. As a result, this doctrinal indemnification often goes by the name "equitable indemnification" or "common-law indemnification." Either way, it is important to distinguish it from the other kind of indemnification – that which arises by contract.

Contractual indemnification is created by a promise made binding under contract law. It has nothing to do with fairness or blame. One party in a business deal may agree to indemnify the other as part of the overall bargain of money, services, goods, and promises that are exchanged between the two parties. Insurance, in fact, is a particularized and highly regulated form of indemnity, wherein the insurance company agrees to make payments to a policyholder to offset certain contingent losses. When a hurricane destroys a house, it's not the insurance company's fault, of course. They indemnify the homeowner simply because they agreed to do so. The indemnification was part of a mutually beneficial bargain made between the parties.

Sometimes, however, an indemnification clause is not really about a sensible bargain reached between parties, it is just a matter of one party having much more bargaining power than the other. In fact, you might be shocked to know how many times you have agreed to indemnify another party in seemingly innocuous agreements you've signed, or clicked-through online.

There is one aspect of contractual indemnification that it is crucial for you to understand for torts purposes: No defendant can escape liability to a plaintiff by way of an indemnification provision with a third party. Many people misapprehend this, so it is important to think through it carefully. If A agrees to indemnify B, that does nothing to stop C from suing B and collecting from B. The agreement between A and B does not and cannot affect C's rights. All the indemnification agreement means is that B can go after A to get reimbursed after B pays C. This makes sense if you think about it in its most abstract terms: Should a contract between two people be able to deprive a person not a party to the contract of her or his rights? Of course not.

This concept is so important, and so frequently misunderstood, it is worth emphasizing with an example.

> *Example: The Whirler* – Suppose that General Amusement Industries wants to sell a ride called The Whirler to a small, family-owned theme park, Wonder Cove. Wonder Cove is worried that operator error could lead to injuries on The Whirler. So, to close the deal, General Amusement Industries agrees to indemnify and hold harmless Wonder Cove for any and all injuries sustained in connection with The Whirler. Plaintiff Gene Gbaj is injured on The Whirler because of operator negligence. Can Gbaj successfully sue Wonder Cove? You bet. The indemnification agreement does not affect Gbaj's rights. What Wonder Cove can do is demand General Amusement Industries indemnify Gbaj, and if they refuse, Wonder Cove can sue General Amusement Industries for breach of contract.

Settlements in Circumstances Involving Contribution

The law encourages settlements. Whenever parties can resolve their dispute in a mutually agreeable way without needing a judge and jury to decide the matter, so much the better. Unfortunately for the courts, settlements, when combined with questions of contribution, can themselves create thorny issues that courts may be called upon to resolve.

Suppose there are four defendants who have all tortuously contributed to the plaintiff's injury. What happens if one settles? Suppose they are equally to blame, and one settles before trial for $10,000. Then, the jury returns a verdict against the remaining three defendants for $10 million. Can the losing defendants go after the defendant who ducked out for contribution on the difference between $2.5 million and $10,000?

Or consider the opposite sort of situation: One defendant in the case settles for $10 million – an amount that fully compensates the plaintiff. The other three successfully evaded service of process and therefore were not part of the trial. Can the settling defendant get

contribution for the other three provided they can be tracked down – even though they had no chance to defend against the suit?

How courts treat situations such as these vary greatly from state to state. If you are planning to practice litigation when you graduate, you would be well served to leave a note for your future self to check the laws of the jurisdiction you land in. The finer points of law in this area can have important effects on litigation strategy. It also matters to how a settlement agreement is drafted, since the language can affect settling defendants' rights vis-à-vis their co-tortfeasors.

Case: *Great Lakes Dredge Dock Company v. Tanker Robert Watt Miller*

This case explains different approaches to the problem of partial settlements and contribution. Because this case uses admiralty law – a common-law form of federal law for maritime claims – it provides insightful comparisons among the various approaches used in state tort law of various jurisdictions.

Great Lakes Dredge Dock Company v. Tanker Robert Watt Miller

United States Court of Appeals for the Eleventh Circuit
April 16, 1992

957 F. 2d 1575. GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff-Appellant, v. TANKER ROBERT WATT MILLER, Defendant-Appellee. Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability, Plaintiff. GREAT LAKES DREDGE & DOCK CO., a corporation, Plaintiff-Appellant, v. CHEVRON SHIPPING COMPANY and Italia Societe Per Az Di Nav., Defendants-Appellees. No. 90-3466.Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

COX, CIRCUIT JUDGE:

Great Lakes Dredge & Dock Co. ("Great Lakes") appeals the district court's grant of summary judgment in favor of Chevron

Transport Corp. and Chevron Shipping Corp. (collectively referred to as "Chevron"). For the reasons discussed below, we reverse and remand.

I. Facts and Procedural Background

~In February 1975, the *Robert Watt Miller,* a tanker owned by Chevron Transport Corp. and operated by Chevron Shipping Corp., collided with the *Alaska,* a dredge owned by Great Lakes, in the St. Johns River near Jacksonville, Florida. As a result of the collision, eight crewmen of the *Alaska* were injured and two lost their lives.

The injured crewmen and the estates of the deceased filed separate suits against Great Lakes under the Jones Act and general maritime law. Great Lakes in turn filed third-party complaints against Chevron for contribution, indemnity, and damage to the *Alaska.* Meanwhile, Chevron settled with the injured crewmen and the estates of the deceased crewmen for a total of $707,800.

The district court severed the third-party claims against Chevron and tried before a jury the cases against Great Lakes. After a verdict was returned in favor of Great Lakes, the crewmen and estates appealed to this court. They argued that the district court erred in framing special interrogatories submitted to the jury. Those interrogatories asked the jury to determine the comparative degrees of fault of Great Lakes and Chevron, which was not a party to the suit. We reversed and remanded for a new trial, saying:

> Since the plaintiff is entitled to recover, as stated by the Court, against either of several tortfeasors, without regard to the percentage of fault, it was error for the trial court to distract the juror's attention by requiring it to allocate the degree of fault between the defendant and a non-party. If the jury had found the causation in the negligence which it found against Great Lakes, and Great Lakes considered that the total amount of damages for the injuries received by these plaintiffs was disproportionate for it to

> bear, it could have obtained contributions against Chevron, as it had already undertaken to do, in a different proceeding. That issue was to be tried at a different time and between two live opponents, and not as part of the suit by the injured workman and representative of a deceased workman against their employer~.

After that decision, Great Lakes settled with all the claimants except the estate of Danny Self for a total of $943,199. The Self claim, brought by his widow Vivian Self, was then heard in conjunction with Great Lakes's claims against Chevron. The district court concluded that Great Lakes was 30% responsible and Chevron was 70% responsible. It also found Self's total damages to be $661,354. Because Self had already settled with Chevron (which was 70% responsible), the district court limited Self's recovery against Great Lakes to 30% of her damages or $198,406.

On appeal, this court rejected the district court's limitation of Self's recovery to the percentage of Great Lakes's fault. We held the district court's~ limitation~ was inconsistent with the principles of joint and several liability subsequently discussed by the Supreme Court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). We held that Self was entitled to recover her entire damages from Great Lakes, regardless of its percentage of fault, with a credit for the dollar amount ($315,000) of the settlement paid by Chevron, not a credit based upon Chevron's percentage of fault. We also concluded that the district court underestimated the amount of Self's damages through faulty assumptions about her husband's pain and suffering and his future earnings potential. As a result, Self was likely to recover far more than the $198,406 judgment entered by the district court.

Great Lakes subsequently settled with the Self estate for $2,050,000. The sole remaining issue was Great Lakes's claims for contribution from Chevron. Great Lakes maintained that it was forced to pay far more than its proportionate share of all of the personal injury and wrongful death claims. The district court granted Chevron's motion for summary judgment on the

contribution claims under the so-called "settlement bar" rule. The settlement bar rule prohibits one joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party. The district court also held that Great Lakes's claims for contribution were barred because Great Lakes itself had settled with the personal injury and death claimants. Great Lakes appeals.

II. Issues on Appeal

Great Lakes contends that the district court erred in granting Chevron summary judgment on Great Lakes's contribution claims. Resolving this issue requires that we answer two questions:

> 1) Whether a settlement bar rule precludes a joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party?
>
> 2) Whether, under what may be called a "settler barred" rule, a joint tortfeasor who has settled with the injured party may seek contribution from another joint tortfeasor?

~Discussion

Historical Background

Before addressing the settlement bar question directly, it is necessary to briefly review the historical evolution of the law regarding distribution of liability among joint tortfeasors in maritime actions. At common law, contribution among joint tortfeasors was not recognized. In admiralty, however, a limited right to contribution has been recognized for more than 135 years. *See, e.g., The Schooner Catharine v. Dickinson,* 58 U.S. (17 How.) 170 (1855). Under the admiralty "divided damages" rule, if two vessels were both at fault for a collision, each was held responsible for one-half of the total damage. Although damages for the collision were shared among the joint tortfeasors, liability was not based on the parties' relative degrees of fault.

In 1974, the Supreme Court established the modern right to contribution among joint tortfeasors in maritime personal injury

cases. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106 (1974). A year later, the Court abandoned the divided damages rule in collision cases and adopted a comparative negligence approach. *United States v. Reliable Transfer Co.,* 421 U.S. 397, (1975). The Court held that liability should be distributed among the parties according to each party's comparative degree of fault. The same proportionate fault rule applies in personal injury cases.

A difficult problem arises in the personal injury context when one of the joint tortfeasors settles with the victim. What effect should that settlement have on the liability of the remaining joint tortfeasors? It is generally agreed that non-settling joint tortfeasors are entitled to have a judgment against them reduced by the amount of any settlement. Otherwise, the injured party would receive a double recovery. There is a split of authority, however, over how to calculate the settlement credit. Some courts use a *pro rata* approach under which the non-settling joint tortfeasor receives a credit based upon the percentage of the settling party's fault. Other courts apply a *pro tanto* approach and give a credit for the actual dollar amount of the settlement. A simple hypothetical will demonstrate the effect of these two methods.

Assume, for example, that the negligence of A and B combine to injure C, who then files a lawsuit against A and B. On the morning of trial A settles with C for $50,000. The jury subsequently finds that A was 75% responsible and B was 25% responsible for the accident and that C's damages totaled $100,000. If neither party had settled, judgment would be entered against A for $75,000 and B for $25,000. But given A's settlement for $50,000, how much should B pay? Under a *pro rata* approach, B would receive a credit for 75% of C's damages ($75,000) because A, the settling joint tortfeasor, was 75% responsible for the accident. Thus, B would owe $25,000 ($100,000-$75,000) to C. Under the *pro tanto* approach, B would only receive a credit for the dollar value of A's settlement ($50,000). Therefore, B would owe $50,000 ($100,000-$50,000) to C. Clearly, the manner in which the settlement credit is calculated has a significant effect.~

In *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979)*,* a longshoreman was injured in an accident for which the jury determined he was 10% at fault, his employer (via another employee's negligence) was 70% at fault, and the shipowner was 20% at fault. The longshoreman collected benefits from his employer under the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), which provides statutory benefits in exchange for the loss of the right to sue the employer for negligence. The longshoreman filed suit against the shipowner. The jury found the longshoreman's total damages to be $100,000. The district court entered judgment against the shipowner for $90,000, which represented the $100,000 of damages less a 10% credit ($10,000) for the longshoreman's contributory negligence.

The shipowner argued that it should only be liable for $20,000, which is that portion of the damages attributable to its 20% fault. The Supreme Court, however, held that the Longshoremen's Act did not modify the pre-existing admiralty rule that a longshoreman may recover the full measure of his damages from a shipowner who is partially responsible for an accident. *Id.* at 266. Unfortunately for the shipowner, it was also barred by the exclusive remedy provision of the LHWCA from seeking contribution from the employer who was 70% responsible. The Court sympathized with the shipowner's argument that it was being forced to bear more than its fair share, concluding that "[s]ome inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect."

Citing *Edmonds* by analogy, this court [adopted] to the *pro tanto* method. *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1540, 1548 (11th Cir.1987).~ The court candidly admitted that the *pro tanto* method may cause a joint tortfeasor to pay more damages than were actually caused by its proportionate share of fault. Nevertheless, "[t]he philosophy governing *Edmonds* is clear: any inequity which results from the implementation of a seaman's damage award should be borne by the tortfeasors rather than

the seaman himself." This court concluded that the *Edmond*'s philosophy requires the non-settling joint tortfeasor to bear a disproportionate burden even when the "inequity" was caused by the seaman's own imprudent settlement with another joint tortfeasor for less than its fair share of the damages.

With this background in mind, we now turn to the central issue on this appeal: Whether, given the *pro tanto* method adopted in *Self,* a joint tortfeasor who is forced to bear more than its fair share of an injured party's damages is prohibited by a settlement bar rule from seeking contribution from a settling joint tortfeasor.

The Settlement Bar Rule

The Ninth Circuit accurately summarized the confusion surrounding the maritime settlement bar rule in *Miller v. Christopher,* 887 F.2d 902 (9th Cir.1989). "We sympathize with the district court's difficulties in finding guidance from controlling authority on the settlement bar issue. There is none." *Id.* at 903. The court noted that there are three possible solutions to the question:

> (1) allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim;
>
> (2) imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith"; and
>
> (3) reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

Id. at 905 (citing Restatement (Second) of Torts § 886A cmt. m (1977)). Other circuits have failed to reach a consensus on this issue. *See, e.g., Associated Electric Co-op.,* 931 F.2d at 1266 (8th Cir.1991) (adopting third approach); *In re Oil Spill by the Amoco Cadiz,* 954 F.2d 1279 (7th Cir.1992) (rejecting third approach

but not deciding between first and second); *Miller v. Christopher,* 887 F.2d 902 (9th Cir.1989) (rejecting first approach but not deciding between the second and third). Of course, this same issue arises in tort law generally. The Restatement (Second) of Torts refuses to take a position on the issue. Restatement (Second) of Torts § 886A Caveat. The Restatement notes that each approach has drawbacks and that no one is satisfactory. *Id.* § 886A cmt. m.~

Self~ rejected the proportionate distribution of liability. Accordingly, the third approach described above is not available. This court, therefore, must choose between the first and second approaches – permitting an action for contribution or adopting some kind of settlement bar rule. Permitting contribution ensures that liability will be shared by all joint tortfeasors in proportion to their respective degrees of fault. Critics, however, argue that it may discourage settlements because the settling tortfeasor still faces litigation and potential liability to non-settling joint tortfeasors. Adopting a settlement bar rule, on the other hand, generally encourages at least partial settlements. Non-settling tortfeasors, however, may be forced to pay far more than their proportionate share of damages. Given the necessity of deciding between these two approaches, we select the former and reject the adoption of a settlement bar rule.

Permitting contribution is clearly supported by the Supreme Court's decision in *Reliable Transfer*[, which] held that liability among joint tortfeasors in maritime actions should be distributed according to their comparative degree of fault. The public policy underlying this quest for a "just and equitable" allocation of damages is not eroded by the fact that the party from whom contribution is sought has settled with the victim. Requiring each party to bear that portion of the damages caused by its own negligence guarantees an efficient level of deterrence against future negligence. If a negligent party was forced to pay more or less than its fair share, future negligence would be either over- or under-deterred. *See, e.g., Smith & Kelly Co. v. The S/S Concordia Tadj,* 718 F.2d 1022, 1029-30 (11th Cir. 1983) (stating that "[t]he clear trend in maritime cases is to reject all-or-nothing or other arbitrary allotments of liability in favor of a

system that divides damages on the basis of the relative degrees of fault" and that such a system "matches the power of its incentives to the ability of each party to prevent injury"); *Reliable Transfer,* 421 U.S. at 405 n. 11, 95 S.Ct. at 1713 (noting that comparative fault "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others"). Allowing an action for contribution is also consistent with *Edmonds.* The injured party is assured of full compensation for his damages (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution.

Chevron argues that allowing contribution will discourage settlements because the settling party may still face liability to the non-settling joint tortfeasors for contribution. The deterrent effect on settlements, however, is far from clearly established. Furthermore, the potential negative side effects of the settlement bar rule outweigh its purported advantage.

The *pro tanto* approach may encourage irresponsible settlements by plaintiffs. If we then apply a settlement bar rule, we force non-settling defendants to bear a disproportionate share of liability. When a single tortfeasor causes an injury and the parties settle, both the plaintiff and the defendant accept the certainty of a fixed result in exchange for forgoing the chance of a more favorable outcome at trial. The balancing of risk by both sides of the bargaining table ensures that the result is equitable. This, however, is not the case with multiple tortfeasors under the *pro tanto* approach. The plaintiff is free to accept the certainty of a settlement *without* losing the chance of obtaining more at trial. If it turns out that the plaintiff settled for too little from one defendant, he automatically recovers the shortfall from the non-settling defendants. The normal balancing of risks by both sides is disrupted. The party who makes the decision relative to settlement is not the party who bears the responsibility for that decision. If we apply a settlement bar rule in this situation, the defendants will be unable to equitably divide liability among themselves. It will be the non-settling defendants, not the plaintiff or the settling defendant, who bear the risk that the plaintiff settled for too little.

Assuming, *arguendo,* that rejecting the settlement bar rule has a slight disincentive effect upon settlements, we nevertheless authorize an action for contribution. The Supreme Court came to a similar conclusion when it adopted the doctrine of comparative fault in *Reliable Transfer*. "[The argument against comparative fault] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation." *Reliable Transfer,* 421 U.S. at 408.

For the reasons discussed above, therefore, we reject the settlement bar rule in admiralty. We hold that an action for contribution against a settling tortfeasor may be maintained by a non-settling joint tortfeasor that has paid more than its share of the plaintiff's damages based upon the respective degrees of fault.

The "Settler Barred" Rule

~Chevron~ argues that Great Lakes's claims for contribution are prohibited by Great Lakes's own settlement with the injured crewmen and estates under what may be called a "settler barred" rule.

Great Lakes,~ might well have been forced to pay far more than its proportionate share of damages. Accordingly, notwithstanding the fact that Great Lakes itself settled with the claimants, Great Lakes may be entitled to contribution from Chevron.

In *Wisconsin Barge Line, Inc. v. The Barge Chem 300,* 546 F.2d 1125 (5th Cir. 1977), a seaman sued his employer for injuries subsequently determined to have been caused by a third party. The employer requested that the third party defend the lawsuit, but the third party never responded. The employer then entered into a court approved settlement with the injured seaman for $32,419. In a separate action for indemnity from the third party, the third party claimed that the employer was not entitled to indemnification for its settlement.

The court rejected the third-party's argument that, absent a judgment, the employer was not required to pay the employee's

damages. "[I]n the facts of the instant case, appellant's payment to the claimant could hardly be said to be 'voluntary' in the sense of there being no legal liability, with the result of foreclosing indemnification." The court held that the employer was entitled to indemnity for its settlement payment if the settlement amount was reasonable. We recently reiterated this principle in *Weissman v. Boating Magazine,* 946 F.2d 811 (11th Cir.1991).

> [A] settling indemnitee can recover from an indemnitor upon proof of the indemnitee's potential liability if the settlement terms are reasonable and if the indemnitor has notice of the suit, and has failed to object to those terms even though he has had a reasonable opportunity to approve or disapprove the settlement.

Id. at 813 (quoting *Burke v. Ripp,* 619 F.2d 354, 360 (5th Cir.1980)).~

As discussed above, liability in maritime actions should be distributed according to the parties' comparative degrees of fault. If Great Lakes paid more than its proportionate share, it might well be entitled to contribution from Chevron. We hold that Great Lakes's claims for contribution from Chevron are not barred by the fact that Great Lakes itself settled with the injured crewmen and estates.~

Conclusion

For the reasons discussed above, we reject both the settlement bar and "settler barred" rules in maritime actions for contribution under the *Self pro tanto* approach. The district court's grant of summary judgment in favor of Chevron on Great Lakes's claims for contribution is reversed.~

REVERSED and REMANDED.

Problem: A Lucky Break for Bad Brakes?

Omar was driving on a divided mountain highway consisting of two lanes of traffic in each direction separated by the familiar 42-inch-high concrete wall that is known "K-rail" or "Jersey wall." On a

downhill section, Omar's brakes failed, and, after travelling for one mile, he finally careened off the road to avoid a jackknifed tractor-trailer. Omar's car somersaulted down the mountainside.

At the resulting trial, the jury calculated total damages at $1 million and, using a special verdict form, assigned fault as follows: 60% of the responsibility to the brake manufacturer; 20% to the operator of the tractor-trailer; 5% to the civil engineering firm that decided no guardrail was need on the right shoulder; and 15% to Omar, for failing to slow down with lower gears or the hand brake and for choosing to steer the car into the void rather than nudge it into the K-rail.

Omar would like to collect $850,000 from the civil engineering firm. What might be some reasons he would want to do this? And will he be permitted under the law? How could doctrinal differences among jurisdictions affect Omar's ability to collect?