June 2019

A Small Step Forward: An Analysis of West Virginia's Attempt at Joint and Several Liability Reform

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A SMALL STEP FORWARD: AN ANALYSIS OF WEST VIRGINIA’S ATTEMPT AT JOINT AND SEVERAL LIABILITY REFORM

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I. INTRODUCTION

Beginning in the 1980s, many defense advocates and pro-business organizations began to push for a comprehensive reform of the American tort system, which they viewed as being unfair to defendants, especially those who are perceived to have “deep pockets” from which to pay substantial damage awards.¹ The efforts of these organizations did not go unrewarded as thirty-five states enacted tort reform legislation during a twenty month period in the mid 1980s.² One of the principal targets of this tort reform movement, which is still ongoing today, has been the rule of joint and several liability.³ The rule of joint and several liability, in its pure form, allows a plaintiff to sue multiple tortfeasors in the same action and enforce the judgment against any one of the tortfeasors who are found to be a proximate cause of the plaintiff’s injuries.⁴ Thus, where a plaintiff’s injuries have been caused by the tortious actions of multiple tortfeasors, any single defendant may be forced to pay the entire judgment regardless of the amount of fault the jury has attributed to his actions.⁵ Some defense and business advocates believe that this leads to unfair results for defendants, especially those with “deep pockets,” because a defendant who is determined by a jury to be minimally at fault may end up paying the entire judgment when one or more of his co-defendants are insolvent, immune or otherwise un-

² See Twerski, supra note 1, at 1125 n.1.
⁴ See Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679, 684 (W. Va. 1982); Dobbs, supra note 1, at 413; Steenson, supra note 1, at 482.
⁵ “A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault.” Sitzes, 289 S.E.2d at 684. See also Dobbs, supra note 1, at 413; Steenson, supra note 1, at 482; James J. Scheske, The Reform of Joint and Several Liability Theory: A Survey of State Approaches, 54 J. Air L. & Com. 627, 635 (1988); Att’y Gen. Report, supra note 3; Att’y Gen. Report Update, supra note 3; ATRA, Joint and Several Liability, supra note 3.
available. Accordingly, many organizations have pushed for the abolition or modification of joint and several liability. The result of their efforts has been that approximately forty-three states have adopted some sort of joint and several liability reform.

Like many other states, West Virginia has not been able to escape criticism of its civil justice system. One factor that had spawned much of this criticism had been the State’s longtime devotion to the doctrine of joint and several liability. In fact, as of the year 2000, when the Restatement (Third) of Torts was published, it listed West Virginia as one of only nine comparative negli-

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7 See id.; Wright, Allocating Liability, supra note 3, at 1142; Twerski, supra note 1, at 1127.


10 For example, the West Virginia Chamber of Commerce ranked civil justice reform as the top “key issue” for West Virginia businesses in 2005. The Chamber listed joint and several liability reform as a key component to civil justice reform in West Virginia. See generally ATRA, JUDICIAL HELLHOLES 2005, supra note 9.
gence jurisdictions to employ a pure joint and several liability regime. But on April 9, 2005, the West Virginia legislature passed West Virginia Code section 55-7-24, which modifies the doctrine of joint and several liability as to any action filed after July 1, 2005. Although it does not completely abolish the doctrine of joint and several liability in West Virginia, the statute does substantially modify it by adopting a hybrid scheme of apportioning damages modeled after several provisions espoused by the American Law Institute’s Restatement (Third) of Torts. This Note will argue that West Virginia Code section 55-7-24 is step in the right direction towards eliminating the problems attendant to joint and several liability. But the Note will also argue that the statute did not go far enough in mitigating joint and several liability’s adverse consequences.

Part II of this Note will provide a background of joint and several liability both generally and in the State of West Virginia particularly. Part III of this Note will argue that the doctrine of joint and several liability leads to injustice and unfairness for defendants in a variety of ways. It will also be argued in Part III that pure joint and several liability is wholly inconsistent with the principles of comparative negligence. Part IV of this Note will discuss the various provisions of West Virginia Code section 55-7-24. Part V of this note will provide an analysis and argue that this statute is a step in the right direction which will mitigate some of the injustice and inconsistencies attendant to joint and several liability. However, it will also be argued in Part V that the West Virginia Legislature did not go far enough in mitigating the adverse consequences of the doctrine. Finally, Part VI of this Note will provide a proposed model statute which this author thinks the Legislature should consider the next time it takes up this issue.

II. BACKGROUND

A. General History of Joint and Several Liability

Courts began to apply the concept of joint and several liability well before the twentieth century. In fact, joint and several liability was applied as early as 1771 in the English case of Hill v. Goodchild. In that case, Lord Mansfield held that the jury could not assess several damages against two defendants where they had been found guilty of a joint trespass. This method of

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13 See id.; Restatement §§ 17-E21.
16 Id. at 466. The general idea behind the joint and several liability doctrine is that damages are incapable of being apportioned among the parties. This is the same idea that is behind the
assessing damages was generally limited, in the early cases, to instances where the defendants had acted in concert to bring about harm to the plaintiff.17 However, the common law soon developed another concept which held that a defendant, in the absence of a concert of action, could still be liable for the entire loss of the plaintiff, notwithstanding the fact that he was only a partial cause of it.18 This is the rule that we know today as joint and several liability.

Like their English counterparts, American courts began to frequently apply the rule of joint and several liability to multiple tortfeasors who, acting independently of each other, combined to bring about an indivisible harm to the plaintiff.19 Although some early American Courts resisted the application of joint and several liability in the absence of concerted action20, the doctrine nonetheless became the favored rule in many American jurisdictions.21 Most commentators of this time lent their support to the doctrine of joint and several liability as well.22

The 1980s represented a change in attitude toward the doctrine of joint and several liability. It was during this time that many organizations began to call for tort reform in America.23 Among the reforms pushed by these organizations was a call to either abolish or substantially modify the doctrine of joint and several liability.24 This effort has been very successful.25 Most states have reformed the doctrine of joint and several liability since the 1980s by either modi-


17 See William Prosser, Joint Torts and Several Liability, 25 CAL. L. REV. 413, 418 (1937). "The rule grew out of the common law concept of the unity of the cause of action; the jury could not be permitted to apportion the damages, since there was but one wrong." Id.

18 Id.

19 See Restatement (Third) of Torts: Apportionment of Liab. § A18 reporters’ note cmt. a (2000).

20 See Sun Oil Co. v. Robicheaux, 23 S.W.2d 713, 715 (Tex. Comm’r’s App. 1930), overruled by Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731 (Tex. 1952); Restatement § A18 reporters’ note cmt. a.

21 Restatement § A18 reporters’ note cmt. a.

22 See, e.g., Roy D. Jackson, Jr., Joint Torts and Several Liability, 17 TEX. L. REV. 399, 403 (1939); Diversities De La Ley, Joint Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress, 17 ILL. L. REV. 458, 459 (1923); Restatement § A18 reporters’ note cmt. a.


24 See Steenson, supra note 1; Twerski, supra note 1, at 1126-1127; Wright, Allocating Liability, supra note 3, at 1147-1148; ATRA, Joint and Several Liability, supra note 3; Att’y Gen. Report, supra note 3, at 33-34; U.S. Att’y Gen. Report Update, supra note 3, at 76-77.

25 In 1986 and 1987 alone, at least half of the states enacted legislation that either modified or abolished joint and several liability. See Steenson, supra note 1, at 482.
fying the doctrine or eliminating it all together.26 These reforms have taken
different forms in different jurisdictions.27 But these different approaches to
joint and several liability reform can be grouped into four general categories: (1) states that have abolished joint and several liability with limited exceptions; (2) states that have abolished joint and several liability but allow for a reallocation amongst the parties of uncollectible damages; (3) states that have abolished joint and several liability for Defendants whose fault is determined to be below a designated threshold; and (4) states that have eliminated joint and several liability for certain types of damages.28

B. History of Joint and Several Liability in West Virginia

As early as 1906, the West Virginia Supreme Court began to apply joint
and several liability in cases where multiple defendants acted independently to
bring about a single indivisible injury to the plaintiff.29 In at least one subse-
quent case, however, the West Virginia Supreme Court briefly retreated from
the application of joint and several liability where the defendants had acted
independently to cause the plaintiff’s injury.30 In that case, the Court held that
there could be neither joint liability nor liability for the entirety of the plaintiff’s
damages where the defendants had acted "without concert, collusion, or com-
mon design, and [where] the injury to the plaintiff [was] consequential only . . .
as [opposed to] direct and immediate."31 But this retreat from the doctrine of
joint and several liability was short lived and, by 1956, the West Virginia Su-
preme Court had clearly recognized that pure joint and several liability was the
applicable rule in all cases where multiple tortfeasors combined to cause a sin-
gle injury to the plaintiff.32

26 See DOBS, supra note 1, at 1087; RESTATEMENT § 17 reporters’ note cmt. a; Richard W.
[hereinafter Wright, Logic and Fairness]; Richard W. Wright, Throwing Out the Baby with the
Bathwater: A Reply to Professor Twerski, 22 U.C. DAVIS L. REV. 1147 (1989) [hereinafter Wright,
Throwing Out the Baby].
27 See DOBS, supra note 1, at 1087; Steenson, supra note 1, at 485; Scheske, supra note 5, at
642-650.
28 See DOBS, supra note 1, at 1087; RESTATEMENT § 17; Steenson, supra note 1, at 485.
31 Id. at 267.
who was injured as a result of the negligence of an ambulance driver, with whom she was riding
as a guest passenger, and the negligence of the operator of an oncoming vehicle, which collided
into the ambulance. Id. at 728. Although the ambulance driver and the driver of the oncom-
ing vehicle had obviously not acted in concert, the West Virginia Supreme Court nevertheless applied
the rule of joint and several liability, making it clear that "[i]n [West Virginia,] the liability of
tortfeasors is both joint and several." Id. at 731 (citing Day, 53 S.E. 776). The Court further so-
lidified the concept of joint and several liability in West Virginia by proclaiming that "where a
person is injured as the result of the concurrent wrongdoing of several joint tortfeasors, the injured
In 1979, the West Virginia Supreme Court abolished the doctrine of contributory negligence and adopted a modified regime of comparative negligence.\textsuperscript{33} This could have put the doctrine of joint and several liability on shaky footing in West Virginia as a few its sister jurisdictions had abolished or modified the doctrine of joint and several liability upon their adoption of comparative negligence.\textsuperscript{34} But in spite of its adoption of comparative negligence, the West Virginia Supreme Court solidified its devotion to the doctrine of joint and several liability in \textit{Bradley v. Appalachian Power Co.}, holding that the doctrine of comparative negligence had no effect on joint and several liability in West Virginia.\textsuperscript{35} West Virginia would continue to be committed to the doctrine of joint and several liability into the twenty-first century.\textsuperscript{36} But in 2005, the West Virginia Legislature passed West Virginia Code section 55-7-24\textsuperscript{37} which limits the role of joint and several liability in the State of West Virginia.

\section*{III. Pure Joint and Several Liability}

Joint and several liability has two important principles. First, a plaintiff may collect all of his damages from any one of several tortfeasors who are found to be a proximate cause of his injuries.\textsuperscript{38} Second, the risk that one or more co-defendants will be insolvent, immune or otherwise unavailable falls completely on solvent defendants.\textsuperscript{39} These principles lead to undesirable results in two ways. First, they result in unfairness to defendants, particularly those who

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See, \textit{e.g.}, Brown v. Keill, 580 P.2d 867, 874 (Kan. 1978) (holding that the adoption of comparative negligence by the Kansas Legislature barred the application of joint and several liability.); McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992) (holding that the adoption of comparative negligence renders joint and several liability obsolete.); Wyo. Stat. Ann. \textsection\ 1-1-109 (1986); \textit{see also} 65 C.J.S. \textit{Negligence.} \textsection\ 155 (2005); Wright, \textit{Logic and Fairness}, supra note 26, at 46.
\end{quote}

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256 S.E.2d at 886.
\end{quote}

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"[T]his jurisdiction is committed to the concept of joint and several liability among joint tortfeasors. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whom ever is able to pay, irrespective of their percentage of fault." \textit{Strahin v. Cleavenger}, 603 S.E.2d 197, 211 (W. Va. 2004) (citing Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679 (W. Va. 1982)).
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"A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault." Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679, 684 (W. Va. 1982). \textit{See also} \textit{Restatement (Third) of Torts: Apportionment of Liab.} \textsection\ A18 cmt. a (2000); \textit{Dobbs, supra note 1, at 413; Steenerson, supra note 1, at 482; James J. Scheske, supra note 5, at 635 (1988); Att'y Gen. Report, supra note 3; Att'y Gen. Report Update, supra note 3; ATRA, Joint and Several Liability, supra note 3.
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\textit{See Restatement} § A18 cmt. a.
are thought of as “deep pocket” defendants. Second, the principles of joint and several liability do not fall in line with the equitable principles of comparative negligence.

A. Pure Joint and Several Liability is Unfair to Solvent Defendants Where One or More Co-Defendants Are Insolvent, Immune or Otherwise Unavailable

In cases where all parties who are responsible for the plaintiff’s injuries are solvent, available, and amenable to suit, the consequences of joint and several liability are of no importance. In this variety of cases the rules of contribution, one recovery, and liberal joinder typically combine to ensure that defendants pay no more than their fair share of damages. However, if one or more co-defendants are insolvent, immune, or otherwise unavailable, the doctrine of joint and several liability exposes the remaining solvent defendants to a variety of injustices, including requiring minimally responsible defendants to pay more than their fair share of the plaintiff’s damages, violating the principle of corrective justice when it requires “deep pocket” defendants to stand in as social insurers against the plaintiff’s losses, exposing “deep pocket” defendants to abusive litigation practices such as “shotgun pleading”, and requiring defendants to bear the entire costs of risk creating activities that society has chosen to immunize.

40 See ATT’Y GEN. REPORT, supra note 3, at 64; ATT’Y GEN. REPORT UPDATE, supra note 3, at 76; DOBBS, supra note 1, at 1085; Nancy L. Manzer, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628, 635-636 (1988). “Deep pocket” defendants are generally identified as those with enough wealth or liability insurance with which to pay large damage awards. General examples of “deep pocket” defendants include municipalities, corporations, and professionals. See Twerski, supra note 1, at 1139.

41 See sources cited supra note 40.

42 See Manzer, supra note 40, at 635.

43 Early common law rules prevented defendants, against whom a joint and several liability judgment was enforced, from seeking contribution from other responsible parties. See W.E. Shipley, Uniform Contribution Among Joint Tortfeasors Act, 34 A.L.R. 2d 1107, § 1 (1954); DOBBS, supra note 1, at 1078; Manzer, supra note 40, at 635 n.44. However, most jurisdictions now allow a defendant against whom a joint and several liability judgment has been enforced to sue other responsible parties for contribution to recoup sums paid out in excess of that defendant’s comparative responsibility for the plaintiff’s injury. See DOBBS, supra note 1, at 1078; Manzer, supra note 40, at 635 n.44.

44 “Where the concurrent negligence of two or more persons combined together results in an injury to a third person, recovery may be had as to either or all of such wrongdoers: each of such joint tort feasors is liable for the entire damages . . . though only one recovery may be had.” Edwards v. Lynch, 175 S.E.2d 632, 635-636 (W. Va. 1970); see also DOBBS, supra note 1, at 413; Manzer, supra note 40, at 635 n.43.


46 Manzer, supra note 40, at 635.
1. Joint and Several Liability Often Requires Minimally Responsible Defendants to Pay More Than Their Fair Share

When one or more co-defendants are insolvent, immune or otherwise unavailable, the remaining solvent defendants often end up paying much more than their share of the damages.\(^{47}\) Several cases provide good illustrations of how joint and several liability works to the detriment of defendants by requiring them to pay the entire damage award even though they may be minimally responsible under the principles of comparative negligence.

In *Walt Disney World Co. v. Wood*\(^{48}\), the plaintiff was injured while riding a bumper car attraction at Walt Disney World when she was bumped by another car driven by her fiancé.\(^{49}\) At the conclusion of the resulting lawsuit, the jury returned a verdict that assigned 14% of the fault to the plaintiff, 85% of the fault to the fiancé, and only 1% of the fault to Walt Disney World.\(^{50}\) However, pursuant to the doctrine of joint and several liability, the judge entered judgment against Walt Disney World for 86% of the damages.\(^{51}\) Thus Walt Disney World, a deep pocket defendant, was responsible for paying the entire damage award minus only the percentage of that award representing the Plaintiff’s percentage of fault.\(^{52}\) Florida’s intermediate appellate court affirmed the circuit court’s entry of judgment\(^{53}\) and refused to judicially abolish joint and several liability.\(^{54}\) That Court did, however, recognize that joint and several liability can often lead to harsh results for solvent defendants when their co-defendants are insolvent, immune, or otherwise unavailable.\(^{55}\)

Municipalities can also become targeted “deep pockets” in a system of pure joint and several liability.\(^{56}\) For instance, the city of Honolulu, Hawaii was

\(^{47}\) *See* sources cited *supra* note 40; Sanders & Joyce, *supra* note 45, at 256.

\(^{48}\) 489 So.2d 61 (Fla. Dist. Ct. App. 1986).

\(^{49}\) *Id.* at 61-62.

\(^{50}\) *Id.* at 62.

\(^{51}\) *Id.*

\(^{52}\) Apparently, the fiancé was judgment proof. *See id.*

\(^{53}\) *See* *id.* at 63.

\(^{54}\) *See* *id.* at 62.

\(^{55}\) “If the codefendant is judgment proof, then under existing law the solvent Defendant must pay it all.” *Id.* at 62.

\(^{56}\) In fact some political subdivisions in West Virginia were experiencing difficulty in financing some governmental services due to their ever expanding tort liability. The West Virginia Governmental Tort Claims and Insurance Reform Act set forth the West Virginia Legislature’s findings regarding that very subject. West Virginia Code section 29-12A-2 provides:

The Legislature finds and declares that the political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost in defending such claims, the risk of liability beyond the affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it
a targeted "deep pocket" in Kaeo v. Davis.\textsuperscript{57} That case involved a speeding, intoxicated driver who failed to successfully negotiate a double curved section of highway and slammed into a utility pole.\textsuperscript{58} The plaintiff in that case was a passenger who was thrown into the windshield and suffered disabling head injuries.\textsuperscript{59} In the lawsuit that followed, her guardians sued a number of defendants, including the driver of the car, the manufacturer of the car, the owner of the pole, the owner of the drinking establishment where the driver had been drinking, and the city who was responsible for maintaining the road on which the accident occurred.\textsuperscript{60} Although the road was apparently well signed with warnings of the curvy and dangerous conditions ahead,\textsuperscript{61} the jury still assessed one percent of the fault to the city of Honolulu.\textsuperscript{62} Because Hawaii observed the rule of pure joint and several liability at the time this case was litigated,\textsuperscript{63} the city of Honolulu ended up being responsible for paying the entire damage award of well over a half million dollars, despite the fact that the jury had found that it was only 1\% responsible for the plaintiff's injuries.\textsuperscript{64}

The two preceding cases provide good illustrations of how the principles of joint and several liability often work to the detriment of defendants by requiring them to pay more in damages than that which the jury has attributed to

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  \item is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary and needed governmental services to its citizens within the limits of their available revenues.
  \end{itemize}
\end{center}

W.Va. Code § 29-12A-2 (2006). The plight experienced by West Virginia's political subdivisions is not at all uncommon. In fact during the 1980s many insurers of political subdivisions, partly in response to the risk of liability created by the doctrine of joint and several liability, either raised premiums by as much as three-hundred to four-hundred and fifty percent or stopped writing liability policies for political subdivisions all together. See James Granelli, The Attack on Joint and Several Liability, 71 A.B.A. J. 60, 61 (1985).

\textsuperscript{57} 719 P.2d 387 (Haw. 1986).

\textsuperscript{58} The driver of the car admitted that he was traveling at least five miles per hour in excess of the speed limit and twice the suggested safe speed before he applied the brakes. \textit{Id.} at 389. Moreover, a passenger in the car testified in her deposition that the driver had consumed several alcoholic beverages and was "feeling good" when they left the drinking establishment. \textit{Id.}

\textsuperscript{59} \textit{See id.} at 389.

\textsuperscript{60} \textit{Id.} at 390. This also illustrates the shotgun pleading technique discussed later, often utilized by plaintiff's attorneys to ensure full recovery for his client. \textit{See supra} Part II A.

\textsuperscript{61} "The sharp bends in the road there are marked by several road signs, including one indicating the presence of a curve and another advising a driving speed of 15 miles per hour . . . ." \textit{Id.} at 389.

\textsuperscript{62} \textit{Id.} at 390.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} Only the driver and the city remained as defendants at the time of trial and the driver could not be located at the time of the trial. \textit{Id.} The jury returned a verdict for $725,000 reduced by sums of $99,316 and $5,000 previously paid in settlement by Hawaiian Electric Company and Ford Motor Company. \textit{Id.}
their negligence. In fact, minimally responsible defendants often end up bearing the entire burden for the plaintiff’s injuries simply because they are capable of paying a large damage award and their co-defendants are not.⁶⁵ In a case where there is but one plaintiff and one defendant, the plaintiff bears the risk of an insolvent defendant and thus, the possibility that he may have to carry the entire burden of his losses.⁶⁶ Where another defendant is added, who happens to be solvent, there is no logical reason to shift the risk of the insolvent defendant and the burden of all of the plaintiffs losses to the solvent defendant.⁶⁷ Where joint and several liability results in this arbitrary shifting of risks and burdens, the doctrine in unfair.

2. Joint and Several Liability Often Requires “Deep Pocket” Defendants to Stand in as Social Insurers Against the Losses Suffered by the Plaintiff

Joint and several liability often results in situations where minimally responsible “deep pocket” defendants become highly sought after targets whom the plaintiff can use as social insurers from which to collect substantial sums of money, regardless of the percentage of fault that has been attributed to their actions.⁶⁸ This is so because a jury’s finding of a small percentage of negligence on behalf of a defendant can effectively mean a finding of one hundred percent under the principles of joint and several liability.⁶⁹ Moreover, some suggest that it is quite easy to get a jury to “parcel out small portions of liability without significant evidence to support the verdict” simply to insure that a plaintiff is able to collect the entire damage award.⁷⁰ This may be, as some studies suggest, because wealthy defendants such as corporations, municipalities, and professionals often tend to be the object of “jury scorn.”⁷¹ Thus, the principles of joint and several liability, when combined with the jury’s natural scorn for “deep pocket” defendants, allow plaintiffs attorneys to use minimally responsible “deep pocket” defendants as a form of social insurance or social safety net to

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⁶⁷ Id. at 350-351; Bartlett v. N.M. Welding Supply, Inc., 646 P.2d 579, 585-586 (N.M. 1982).

⁶⁸ See Twerski, supra note 1, at 1139; ATT’Y GEN. REPORT, supra note 3, at 76; ATT’Y GEN. REPORT UPDATE, supra note 3, at 64.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ See Twerski, supra note 1, at 1139. See Sanders & Joyce, supra note 45, at 256; ATT’Y GEN. REPORT UPDATE, supra note 3, at 76 (suggesting that defendants are often hit with liability even though their responsibility for the injury is not readily apparent).

⁷² See Twerski, supra note 1, at 1140.
compensate plaintiffs who were injured, for the most part, by the negligence of another person or entity.72

Even joint and several liability supporters implicitly admit that "deep pocket" defendants are being used as social insurers when they attempt to justify the doctrine by arguing that it is preferable to make the "deep pocket" pay instead of the plaintiff because the "deep pocket" can afford to pay.73 The rationale of this argument is obviously unsound. American tort law attempts to work corrective justice between the individual parties in any particular dispute.74 In other words, claims are individualistic75 and tort law seeks to right wrongs between the individual plaintiffs who are injured and the individual defendants who are responsible for the injury.76 Thus, if A invades the rights of B, then an adjustment must be made in favor of B for the loss for which A was responsible.77 Stated another way, A must restore what he has taken from B. Comparative negligence provides a way to determine what A must restore based on percentages of fault.78 Thus, because joint and several liability often requires defendants to step in as social insurers and pay the entire judgment in order to achieve some broad social goal of guaranteeing most Plaintiffs a full recovery,

72 See Twerski, supra note 1, at 1139 ("Municipalities, corporations, and major institutions stand as the defendant of last resort"); Peter H. Schuck, The New Judicial Ideology of Tort Law, in THE ACADEMY OF POLITICAL SCIENCE, NEW DIRECTIONS IN LIABILITY LAW 4, 12-14 (Walter Olson ed., Capital City Press 1988) (suggesting that liability expanding tort doctrines, such as joint and several liability, seek to serve broad social goals such as wealth spreading); Law Firm of Sidley and Austin, The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations, 10 HAMLIN L. REV. 345, 384 (1987) (suggesting that the tort system, including joint and several liability, has imposed a kind of social insurance upon "deep pocket" defendants).


74 See Manzer, supra note 40, at 640; Schuck, supra note 72, at 12; Kenneth S. Abraham, What Is a Tort Claim? An Interpretation of Contemporary Tort Reform, 51 MD. L. REV. 172, 173 (1992) ("At the core of our traditional conception of a tort claim are two notions: the right to individualized determination of the defendant's liability, and the right to custom-tailored compensation for the actual loss suffered by the claimant."); DOBBS, supra note 1, at 14 ("The most traditional elements of tort law do not in fact aim at a redistribution of goods but are concerned with corrective justice instead."); Wright, Allocating Liability, supra note 3, at 1179 ("Even those who favor . . . social welfare views acknowledge the historical dominance of the corrective justice view of tort law.").

75 "Every claim is unique because it is about individual human beings, or at least individual corporations acting in particular circumstances." DOBBS, supra note 1, at 13.


77 See Wells, supra note 76, at 2350.

78 See Pearson, supra note 65, at 344. Under contributory negligence, there was no basis for apportioning liability among the defendants. Thus, it followed that if all the Defendants caused the harm, then they all ought to be liable for all of it. Id; see also Bartlett v. N.M. Welding Supply, Inc., 646 P.2d 579, 585-86 (N.M. 1982).
the doctrine is violative of corrective justice upon which much of tort law is based.\textsuperscript{79}

3. Joint and Several Liability Exposes “Deep Pocket” Defendants to Abusive Litigation Practices Such As “Shotgun Pleading”

Moreover, the doctrine of joint and several liability is unfair to defendants, especially those with “deep pockets,” because it often subjects them to abusive litigation practices employed by plaintiffs’ attorneys in order to guarantee that their client receives the largest award possible and that some entity is joined in the lawsuit who can pay that judgment.\textsuperscript{80} One of the more popular abusive litigation practices employed by many plaintiffs’ attorneys is that known as “shotgun” pleading.\textsuperscript{81} The practice of “shotgun” pleading involves the joinder of minimally responsible entities in lawsuits where they probably wouldn’t otherwise be joined, in the absence of joint and several liability, due to their mere tangential involvement in the events in question.\textsuperscript{82} Plaintiffs’ attorneys engage in “shotgun” pleading because they know that if they join enough “deep pockets,” they are likely to be able to convince the jury to assign at least 1% responsibility to one of them,\textsuperscript{83} assuring that, because of the principles of joint and several liability, at least one party will be available to pay the entirety of a potentially high damage award.\textsuperscript{84} Therefore, joint and several liability results in the perpetuation of this abusive litigation practice, which leads to injus-

\textsuperscript{79} See Manzer, supra note 40, at 639-41. “The most traditional elements of tort law do not in fact aim at a redistribution of goods but are concerned with corrective justice instead.” Dobbs, supra note 1, at 14.

\textsuperscript{80} See ATT’Y GEN. REPORT, supra note 3, at 64; ATT’Y GEN. REPORT UPDATE, supra note 3, at 76; Steenson, supra note 1, at 485.

\textsuperscript{81} Id. The phrase shotgun pleading comes from the analogy to the firing of a shotgun where hundreds of pellets are sprayed from the shotgun shell cartridge in the hopes that it will hit something.

\textsuperscript{82} These minimally responsible entities are joined in order to take advantage of the greater financial resources of these entities as compared to the other defendants in the litigation. See Steenson, supra note 1, at 485. This concern is greater in cases involving municipalities and other governmental entities. See id. For example, in the case of Kaeo v. Davis, an intoxicated driver failed to successfully negotiate a double curved section of a highway and slammed into a utility pole, seriously injuring one of his passengers. 719 P.2d 387, 388 (Haw. 1986). In the lawsuit that followed, the Plaintiff joined a “host of identified and unidentified defendants,” including the manufacturer of the car, the owner of the pole, the owner of the drinking establishment where the driver had been drinking, and the city who was responsible for maintaining the road on which the accident occurred. Id. at 390; see also ATT’Y GEN. REPORT, supra note 3, at 64; ATT’Y GEN. REPORT UPDATE, supra note 3, at 76.

\textsuperscript{83} See supra note 64 and accompanying text.

\textsuperscript{84} See ATT’Y GEN. REPORT, supra note 3, at 64; ATT’Y GEN. REPORT UPDATE, supra note 3, at 76; Sanders & Joyce, supra note 45, at 256; Twerski, supra note 1, at 1139.
tice for defendants, particularly those who are perceived to have “deep pockets.”

4. Joint and Several Liability Forces Defendants to Bear the Entire Costs of Risk Creating Activities Which Society Has Immunized

Where there is but one solvent defendant amenable to suit amongst multiple possible tortfeasors, joint and several liability often forces that defendant to bear the cost of many legislatively immunized activities. Many opponents of joint and several liability point to the insolvency of many defendants as the reason why their solvent co-defendants are often required to pay more than their fair share of damages. Professor Alan Twerski, on the other hand, suggests that the real culprit may actually be the actual or implied immunities enjoyed by some classes of defendants. There are numerous examples of these sorts of immunities. For example, employers are generally immunized from liability for workplace injuries under worker’s compensation statutes. Governmental entities often enjoy many statutory immunities as well.

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85 See id.
86 See Sanders & Joyce, supra note 45, at 1143-45.
87 See id. at 1143; see e.g., Manzer, supra note 40, at 644.
88 Twerski, supra note 1, at 1143. “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.” Id.
89 For example, W. VA. CODE § 23-2-6 provides, in part, that

[any employer subject to this chapter who subscribes and pays into the workers’ compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter. Continuation in the service of the employer shall be considered a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have . . . .”

90 For example, Article VI, Section 35 of the West Virginia Constitution states, in pertinent part, that “[t]he State of West Virginia shall never be made defendant in any court of law or equity . . . .” W. VA. CONST. art. VI, § 35. However, the State of West Virginia’s immunity has been limited by judicial decision. For instance, Pittsburgh Elevator Co. v. West Virginia Board of Regents held that where the state has procured liability insurance, the insurance company is prohibited from asserting the State’s immunity for liability up to and under the policy’s limits. 310 S.E.2d 675, 688 (W. Va. 1983). The political subdivisions of a state often enjoy certain immunities as well. For example, in West Virginia, the Governmental Tort Claims and Insurance Reform Act “limit[s] liability of political subdivisions and provide[s] immunity to political subdivisions in
In addition to the explicit statutory immunities that exist in most jurisdictions, some classes of defendants also enjoy immunities that are implied by legislative enactments.\textsuperscript{91} For instance, minimum liability insurance limits effectively immunize drivers, who have only the meager minimum limits,\textsuperscript{92} from any liability above and beyond those limits.\textsuperscript{93} Similarly, "when states permit high risk repairers to operate with thin capitalization and no insurance, they effectively immunize these defendants from liability."\textsuperscript{94}

Where a co-defendant enjoys one of these express or implied immunities, joint and several liability would transfer the entire costs of these immunities to third parties (solvent and available co-defendants) who may be only minimally at fault.\textsuperscript{95} However, the more equitable method would be to spread certain instances . . . ." W. VA. CODE § 29-12A-1 (2006). Finally, the Federal Government is also immunized from liability in certain instances. For example, The Federal Tort Claims Act provides that the jurisdiction granted to hear tort claims against the Federal Government shall not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.


\textsuperscript{91} See Twerski, supra note 1, at 1143-45.

\textsuperscript{92} The State of West Virginia only requires that motor vehicle owners be able to provide [p]roof of ability to respond in damages for liability, on account of accident . . . arising out of the ownership, operation, maintenance or use of a motor vehicle . . . in the amount of twenty thousand dollars because of bodily injury to or death of one person in any one accident, and . . . in the amount of forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of ten thousand dollars because of injury to or destruction of property of others in any one accident.


\textsuperscript{93} "Minimum liability limits are, in fact, maximum recovery amounts." Twerski, supra note 1, at 1144.

\textsuperscript{94} Twerski, supra note 1, at 1144. Professor Twerski offers the following example to illustrate this concept:

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 significant assets.

Twerski, supra note 1, at 1143-44.

\textsuperscript{95} See id. at 1144. A good illustration of this concept can be found in Miller v. Monongahela Power Co., 403 S.E.2d 406 (W. Va. 1991), overruled on other grounds by Mallet v. Pickens, 522 S.E.2d 436 (W. Va. 1999). There, the Court opined that in a case where the plaintiff was 10% at fault, the third-party tortfeasor 1% at fault, and the employer exempted by statutory immunity, the 10% liable plaintiff would collect the entire judgment from the 1% liable third-party. See id. at 414.
these costs among the general public. The former alternative of wholly transferring the costs of the immunized activity to the third-party tortfeasor does not properly deter harmful activity or internalize costs because, under such a system, "[p]arties who are either wholly or partially immune simply do not have the proper incentive to modify their behavior." Thus, it is neither logical nor fair to ask third-party tortfeasors, who are minimally at fault, to bear the entire burden of damages resulting from activity which society has chosen to immunize or activity for which society has effectively set the appropriate amount of compensation as reflected by, for example, minimum liability insurance policy limits or worker's compensation benefits.

5. The Unfairness of Joint and Several Liability Cannot Be Justified

As pointed out in the preceding discussion, the doctrine of joint and several liability can often result in a substantial amount of unfairness and injustice for solvent defendants in cases where his co-defendants are insolvent, immune, or otherwise unavailable. Many joint and several liability supporters attempt to justify these injustices by arguing that it is better that an at-fault defendant pay the entire damage award, regardless of his percentage of fault, rather than leaving an innocent plaintiff without compensation. This argument may have been valid in the days of contributory negligence because, in the days of contributory negligence, a recovering plaintiff was always innocent. But most American jurisdictions have long since moved to a system of comparative negligence. Under a comparative negligence scheme, a plaintiff may recover even if he was negligent in some way. Thus, because it is possible

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96 See Twerski, supra note 1, at 1144.
97 See id. at n.63.
98 See id. at 1132-33; Aaron D. Twerski, The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright, 22 U.C. DAVIS L. REV. 1161, 1163 (1989).
99 See discussion supra Part III.A.1-4.
100 See Wright, Throwing Out the Baby, supra note 26, at 1154.
101 Under contributory negligence, even the slightest negligence on behalf of the Plaintiff was a complete and total bar to his recovery. See, e.g., Morton v. Baber, 190 S.E. 767, 771-72 (W. Va. 1937); Crum v. Ward, 122 S.E.2d 18, 28 (W. Va. 1961); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 882 (W. Va. 1979); see also Dobbs, supra note 1, at 494; Wright, Logic and Fairness, supra note 26, at 45 n.3.
102 See Dobbs, supra note 1, at 503-04; Wright, supra note 3, at 45; Pearson, supra note 65, at 343; Thomas R. Trenkner, Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally, 78 A.L.R.3d 339, § 2(a) (Westlaw 2006); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 reporters’ note, cmt. a, tbl. (2000) (Pure Joint and Several Liability Jurisdictions); Mutter, supra note 16, at 199-200; McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992).
103 See Bradley, 256 S.E.2d at 885; McIntyre, 833 S.W.2d at 57; Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Dobbs, supra note 1, at 503-04.
that today's plaintiff can recover damages even though he may not be completely innocent, this argument loses its rationale.\textsuperscript{104} Professor Professor Wright has attempted to justify joint and several liability in a slightly different way. Although his argument is essentially the same "innocent plaintiff" argument, he attempts to strengthen this ill-fated argument by tying it to principles of causation.\textsuperscript{105} He has argued that it is not unfair to ask a minimally responsible defendant to pay an entire damage award because that defendant was an actual and proximate cause of the plaintiff's entire injury.\textsuperscript{106} Thus, Wright argues, because a defendant must be an actual but-for and proximate cause of the plaintiff's injury, the plaintiff would not have been injured if the defendant had not behaved tortiously.\textsuperscript{107} The simple fact that someone else's behavior was also an actual and proximate cause of the injury does not diminish the defendant's responsibility, according to Professor Wright.\textsuperscript{108}

The above referenced argument put forth by Professor Wright seems logical and sound if one were to assume that the plaintiff is always innocent. But because most jurisdictions have moved to comparative negligence, plaintiffs who are "comparatively" negligent are often allowed to recover at least a partial damage award. Where this is the case, the plaintiff has been found to be negligent in bringing about the injury in just the same way as the various defendants have.\textsuperscript{109} Thus, the same principles of causation that apply to the negligent defendant also apply to the contributorily negligent plaintiff.\textsuperscript{110} Therefore, where it is determined that the plaintiff was comparatively negligent, he too was a necessary and proximate cause of his injury.\textsuperscript{111} Because the plaintiff and all of the

\begin{footnotesize}
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\item \textsuperscript{104} See ATT'Y GEN. REPORT UPDATE, supra note 3, at 76.
\item \textsuperscript{105} See Wright, Allocating Liability, supra note 3, at 1186.
\item \textsuperscript{106} See Wright, Logic and Fairness, supra note 26, at 54; Wright, Allocating Liability, supra note 3, at 1179-93.
\item \textsuperscript{107} See Wright, Logic and Fairness, supra note 93, at 54-55; Wright, Allocating Liability, supra note 3, at 1179-93.
\item \textsuperscript{108} See id.
\item \textsuperscript{109} See DOBBS, supra note 1, at 495; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 cmt. b (Proposed Final Draft No. 1, 2005).
\item \textsuperscript{110} See Divita v. Atl. Trucking Co., 40 S.E.2d 324, 333 (W. Va. 1946); W. Constr. Co. v. Atl. Coast Line R.R. Co., 113 S.E. 672, 673 (N.C. 1922); Hughes v. Atlanta Steel Co., 71 S.E. 728, 728-29 (Ga. 1911); Craig v. Greenbelt Consumer Servs., Inc., 222 A.2d 836, 836 (Md. 1966); DOBBS, supra note 1, at 496-97; RESTATEMENT § 3 cmt. b.
\item \textsuperscript{111} The West Virginia Supreme Court expressed this maxim as follows:
\begin{quote}
If it appears that plaintiff was guilty of acts of negligence which 'proximately contributed' to the damage complained of, plaintiff is barred of recovery. The term proximate cause has been defined as that cause 'without which the accident would not have occurred.' It necessarily follows that the term proximately contributed is of similar import. Therefore, we are called upon to ascertain if plaintiff...[was] guilty of negligent acts 'without which the accident would not have occurred.'
\end{quote}
\end{itemize}
\end{footnotesize}
defendants are necessary and proximate causes of the plaintiff's injury, all of the parties are on the same causal footing, in that the injury producing accident would not have occurred but for the negligence of each liable party. This includes the partially at fault plaintiff. When this is the case, it is no fairer to ask the solvent defendant to pay the entire judgment than it is to ask the plaintiff to bear the risk that all or part of his damage award will be uncollectible.\(^{112}\) Wright tries to solve this defect in his reasoning by distinguishing the nature of the plaintiff's responsibility from that of the defendant's responsibility.\(^{113}\) Wright argues that the comparatively negligent plaintiff should be treated differently than the negligent defendant because the plaintiff has exposed only himself to risk and the defendant has exposed others to risk.\(^{114}\) However, the fact remains that a finding of contributory negligence reflects the jury's finding that the injury producing accident would not have occurred absent the plaintiff's negligence, just as it would not have occurred absent the defendant's negligence.\(^{115}\) Because the plaintiff was also responsible for the entirety of the injuries, there is no reason to entirely insulate him from the risk of insolvent or unavailable tortfeasors, while shifting the entirety of that burden to the remaining solvent defendants.\(^{116}\) Therefore, at least where the plaintiff has been compara-

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\(^{112}\) See Manzer, supra note 40, at 645-46; Scheske, supra note 5, at 653.

\(^{113}\) See Wright, Logic and Fairness, supra note 26, at 76-77.

\(^{114}\) See id. Others have also attempted to make this distinction. See, e.g., DOBBS, supra note 1, at 497; RESTATEMENT § 3 cmt. b.

\(^{115}\) See Divita, 40 S.E.2d at 330; W. Constr. Co., 113 S.E. at 673; Hughes, 71 S.E. at 728-29; Craig, 222 A.2d at 836; DOBBS, supra note 1, at 496-97; RESTATEMENT § 3 cmt. b; Gary T. Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 YALE L.J. 697, 724 (1978).

\(^{116}\) Although the distinction made between the moral implications of the plaintiff's negligence and the defendant's negligence may be warranted, it does not justify shifting the entire cost of insolvent or unavailable co-defendants to the solvent defendants. Although the plaintiff's conduct may initially exposed only himself to risk, it eventually results in risk to others. While commenting on the rule of contributory negligence, one commentator has made this same point in the following way:

> [t]he plaintiff's original act of contributory negligence may not have been morally improper, since it created a risk only to the plaintiff himself. When that risk eventuates in an injury to the plaintiff, however, and when the plaintiff then seeks to collect in tort for that injury against a negligent defendant, at the time of this lawsuit the harm involved in the plaintiff's original conduct "reaches" the defendant, another person. . . . Nevertheless, that accident would never have occurred had the plaintiff himself not behaved in a foolish way. In these circumstances, it would be basically unfair for the law to ignore entirely the plaintiff's conduct by imposing full liability on the negligent defendant.
tively negligent, Professor Wright fails to sufficiently justify the unfairness that often results from joint and several liability.

In summation, joint and several liability often results in unfairness and injustice to solvent defendants, especially those who are perceived to have "deep pockets." For instance, joint and several liability often requires a solvent defendant to pay far more than his fair share of damages. Moreover, the doctrine of joint and several liability often requires minimally responsible solvent defendants to stand in as social insurance against all losses suffered by the plaintiff regardless of his minimal fault. Further, the doctrine often subjects defendants to abusive litigation practices such as "shotgun" pleading, where minimally responsible defendants are joined in order to take advantage of their substantial wealth compared to that of the other defendants in the case. Additionally, the doctrine is unfair because it asks solvent defendants to bear the entire burden of damages resulting from activities which society has either explicitly or implicitly immunized or activities for which society has essentially set maximum liability limits. Finally, the most common arguments that supporters use to justify the injustice of joint and several liability cannot, in fact, justify those injustices, especially where the plaintiff has been comparatively negligent.

B. Pure Joint and Several Liability is Inconsistent With the Principles of Comparative Negligence

The traditional rule at common law was that a plaintiff’s negligence, no matter how slight, was a complete bar to his recovery. The rule was adopted in many American jurisdictions and became the rule in most of those jurisdictions prior to the 1960s and 1970s. However, due in large part to its harsh results, the rule was frequently attacked by many commentators. Most

Schwartz, supra note 115, at 724-25. Likewise, in the joint and several liability context, it would be unfair for the law to ignore the Plaintiff’s conduct by imposing all of the risk of the insolvent or unavailable co-defendant on the remaining solvent defendants.


118 See, e.g., Brown v. Kendall, 60 Mass. 292, 296 (1850). See also Schwartz, supra note 115, at 697; DOBBS, supra note 1, at 504.

119 See DOBBS, supra note 1, at 494, 503-04; Schwartz, supra note 115, at 697; Scheske, supra note 5, at 628-29; Fleming James, Jr., CONTRIBUTORY NEGLIGENCE, 62 YALE L.J. 691, 691 (1953); William L. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 466 (1953).

120 See Ray J. Aiken, Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulaion, 53 Marq. L. Rev. 293 (1970); George & Walkowiak, supra note 117; Haugh, supra note 117; James, supra note 119; Schwartz, supra note 115; Robert A. Leflar, The Declining Defense of Contributory Negligence, 1 Ark. L. Rev. 1 (1947); Frank E. Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U. Fla. L. Rev. 135 (1958);
thought the rule to be extreme because it completely barred a plaintiff’s recovery if he was even slightly negligent, despite the fact that the defendant’s negligence might have been quite severe.\textsuperscript{121} The criticisms of the harsh all or nothing rule of joint and several liability eventually led a majority of jurisdictions to abandon contributory negligence and move to a system of comparative negligence.\textsuperscript{122} Although comparative negligence exists in two basic forms—“pure” and “modified”—the gist of the doctrine is that plaintiffs are now allowed to recover even if they have been negligent themselves.\textsuperscript{124} Two of the main themes that seem to run through the concept of comparative negligence are a preference for proportional allocation of liability\textsuperscript{125} and fairness.\textsuperscript{126}

\textit{see also} Bradley v. Appalachian Power Co., 256 S.E.2d 879, 882 (W. Va. 1979). Although the dominance of contributory negligence during it reign as the majority rule is unquestionable, it seems that many courts began to realize that the rule often lead to harsh results, leading them to create various exceptions under which the plaintiff could still recover despite the fact that he was contributorily negligent. \textit{See Bradley}, 256 S.E.2d at 882-83; DOBBS, supra note 1, at 498-503; Scheske, \textit{supra} note 5, at 629. For instance, many courts refused to apply the doctrine of contributory negligence where the defendant had the last clear chance to avoid the accident. \textit{See, e.g.,} Barr v. Curry, 71 S.E.2d 313, 318 (W. Va. 1952); \textit{see also} Bradley, 256 S.E.2d at 882; DOBBS, \textit{supra} note 1, at 499; Scheske, \textit{supra} note 5, at 629; Robert T. Donley, \textit{Observations on Last Clear Chance in West Virginia}, 37 W. VA. L. Q. 362 (1931). Courts also allowed a plaintiff to recover, despite his contributory negligence, where the defendant had acted in a intentional, wanton, or reckless manner. \textit{See, e.g.,} Stone v. Rudolph, 32 S.E.2d 742, 749 (W. Va. 1944); \textit{see also} DOBBS, \textit{supra} note 1, at 498. Finally, many courts held that the rule of contributory negligence was not available to the defendant where he was under a statutory duty to protect the plaintiff. \textit{See, e.g.,} Pitzer v. M. D. Tomkies & Sons, 67 S.E.2d 437, 442 (W. Va. 1951); \textit{see also} DOBBS, \textit{supra} note 1, at 500; Scheske, \textit{supra} note 5, at 629.

\textsuperscript{121} \textit{See} DOBBS, \textit{supra} note 1, at 494.

\textsuperscript{122} \textit{See} RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 reporters’ note, cmt. a (2000); DOBBS, \textit{supra} note 1, at 504; Pearson, \textit{supra} note 65, at 343 n.2; Scheske, \textit{supra} note 5, at 630; Wright, \textit{Logic and Fairness}, \textit{supra} note 26, at 45. In fact, as of 2000, only five jurisdictions continued to adhere to the rule of contributory negligence. \textit{See} RESTATEMENT § 7 cmt. a.

\textsuperscript{123} \textit{See} RESTATEMENT § 7 reporters’ note, cmt. a.; DOBBS, \textit{supra} note 1, at 505; Pearson, \textit{supra} note 65, at 344. The “pure” system of comparative negligence allows a plaintiff to recover regardless of his percentage of comparative negligence. \textit{See} RESTATEMENT § 7 cmt. a; DOBBS, \textit{supra} note 1, at 505. However, the plaintiff’s recovery is reduced by his percentage of comparative negligence. \textit{See} DOBBS, \textit{supra} note 1, at 505. Similarly, the “modified” system of comparative negligence also reduces the plaintiff’s recovery by his percentage of comparative negligence. \textit{Id.} However, under the “modified” system, the plaintiff is barred from recovery if his comparative negligence reaches a particular threshold (typically either 50% or 51%). \textit{Id.}

\textsuperscript{124} \textit{See} RESTATEMENT § 7 reporters’ note, cmt. a (2000); DOBBS, \textit{supra} note 1, at 505; Pearson, \textit{supra} note 65, at 344.

\textsuperscript{125} \textit{See} discussion \textit{infra} Part III.B.1.

\textsuperscript{126} \textit{See} discussion \textit{infra} Part III.B.2.
1. Joint and Several Liability Is Inconsistent With the Preference of Proportionate Liability Allocation Embodied In Comparative Negligence

Both contributory negligence and joint and several liability were based on the notion that a jury could not compare or apportion fault among and between the parties.\textsuperscript{127} Comparative negligence, on the other hand, provides a basis for apportioning losses between negligent plaintiffs and negligent defendants based on the principle that liability should be proportionate to negligence.\textsuperscript{128} In other words, comparative negligence recognizes that it is preferable to apportion liability among various negligent parties (plaintiffs and defendants alike) and it provides a method with which to do it.\textsuperscript{129} Conversely, joint and several liability requires a defendant to pay damages out of proportion to his percentage of negligence, even requiring some defendants to pay the entire judgment despite the fact that he may only be responsible for only a portion of it.\textsuperscript{130} Because comparative negligence recognizes that losses can be apportioned and provides a manner by which to accomplish that task, it cannot be denied that the concept of comparative negligence represents a preference to allocate losses proportionately. Taking this into consideration, one can see that joint and several liability is inconsistent with the proportionate loss apportionment ideas of comparative negligence.\textsuperscript{131}

2. Joint and Several Liability Is Inconsistent With The Notions of Fairness Behind Comparative Negligence

The rejection of contributory negligence in favor of comparative negligence was based primarily on notions of fairness.\textsuperscript{132} For instance, one of the primary arguments for moving toward a system of comparative negligence was that it was unfair for a Plaintiff who was only minimally responsible for his own injury to be barred completely from recovery and bear the total financial burden

\textsuperscript{127} See Mutter, supra note 16, at 204.
\textsuperscript{128} See Pearson, supra note 65, at 344. Under contributory negligence, there was no basis for apportioning liability among the defendants. Thus, it followed that if all the defendants caused the harm, then they all ought to be liable for all of it. Id.; see also Bartlett v. N.M. Welding Supply, Inc., 646 P.2d 579, 585-86 (N.M. 1982).
\textsuperscript{129} See Pearson, supra note 65, at 362; Krumlauf, supra note 66, at 348; John Scott Hickman, Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability, 48 VAND. L. REV. 739, 746 (1995); Damon Ball, A Reexamination of Joint and Several Liability Under a Comparative Negligence System, 18 ST. MARY'S L.J. 891, 898 (1987).
\textsuperscript{130} Pearson, supra note 65, at 362.
\textsuperscript{131} See id. 362; Krumlauf, supra note 66, at 348; Hickman, supra note 129, at 746; Ball, supra note 129, at 898; Walt Disney World Co. v. Wood, 515 So. 2d 198, 202 (Fla. 1987).
\textsuperscript{132} See Krumlauf, supra note 66, at 348.
of all of his losses. The recognition that this was overly harsh on plaintiffs led many jurisdictions to abandon contributory negligence and move to a system of comparative negligence, which did not require a plaintiff to bear the entire burden of his injury where he was only minimally at fault. Thus, the move to comparative negligence represented the recognition that tort law should strive to eliminate blatant unfairness such as that attendant in forcing minimally responsible parties to bear the entire burden of losses for which they were only minimally responsible.

Just as it is unfair to require that a minimally responsible plaintiff to bear the entire burden of his injuries, it is also unfair to require a minimally responsible defendant to bear the total financial burden for those injuries. Because joint and several liability often leads to just this kind of result, it is inconsistent with the notions of fairness that, in large part, provide the underpinning for comparative negligence regimes. With this in mind, one can see the inconsistency that exists when a particular jurisdiction chooses to side with fairness to plaintiffs by adopting comparative negligence, while ignoring the unfairness that defendants must bear as a result of joint and several liability.

IV. West Virginia Code Section 55-7-24

On April 9, 2005, the West Virginia Legislature passed West Virginia Code section 55-7-24, which removes West Virginia from the dwindling handful of jurisdictions that recognize a system of pure joint and several liability for apportioning damages in lawsuits that involve multiple tortfeasors who cause a

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133 See Id.

134 See Id. at 348-49; see Restatement (Third) of Torts: Apportionment of Liab. § 7 reporters' note, cmt. a (2000); Dobbs, supra note 1, at 504; Pearson, supra note 65, at 343 n.2; Scheske, supra note 5, at 630; Wright, Logic and Fairness, supra note 26, at 45.

135 See Krumlau, supra note 66, at 348-49; Restatement § 7 reporters' note, cmt. a; Dobbs, supra note 1, at 505; Pearson, supra note 65, at 344.

136 See Krumlau, supra note 66, at 348.

137 See discussion supra Part III.

138 Some courts have recognized this fact. For example, the Tennessee Supreme Court has stated that comparative negligence:

[r]enders the doctrine of joint and several liability obsolete. Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent Plaintiff, notwithstanding that the Plaintiff's fault was minor in comparison to Defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

McIntyre v. Ballentine, 833 S.W.2d 52, 58 (Tenn. 1992); see also Wright, Logic and Fairness, supra note 26, at 46.
single indivisible injury.\textsuperscript{139} Although West Virginia Code section 55-7-24 does not completely abandon joint and several liability, it does represent a significant modification of the doctrine.\textsuperscript{140} The statute’s major substantive provisions in-

\textsuperscript{139} See W. Va. Code § 55-7-24 (2000). The trend over the last several decades has been to move away from pure joint and several liability. See Restatement (Third) of Torts: Apportionment of Liab. § 17 reporters’ note cmt. a (2005). In fact, at the turn of the century, only fifteen jurisdictions still retained a system of pure joint and several liability. Id.

\textsuperscript{140} West Virginia Code section 55-7-24 provides, in pertinent part:

(a) In any cause of action involving the tortious conduct of more than one defendant, the trial court shall:

(1) Instruct the jury to determine, or, if there is no jury, find, the total amount of damages sustained by the claimant and the proportionate fault of each of the parties in the litigation at the time the verdict is rendered; and

(2) Enter judgment against each defendant found to be liable on the basis of the rules of joint and several liability, except that if any defendant is thirty percent or less at fault, then that defendant’s liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.

(b) Notwithstanding subdivision (2), subsection (a) of this section, the rules of joint and several liability shall apply to:

(1) Any party who acted with the intention of inflicting injury or damage;

(2) Any party who acted in concert with another person as part of a common plan or design resulting in harm;

(3) Any party who negligently or willfully caused the unlawful emission, disposal or spillage of a toxic or hazardous substance; or

(4) Any party strictly liable for the manufacture and sale of a defective product.

(c) Notwithstanding subdivision (2), subsection (a) of this section, if a claimant through good faith efforts is unable to collect from a liable defendant, the claimant may, not later than six months after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties in the litigation at the time the verdict is rendered.

(1) Upon the filing of such a motion, the court shall determine whether all or part of a defendant’s proportionate share of the verdict is uncollectible from that defendant and shall reallocate such uncollectible amount among the other parties in the litigation at the time the verdict is rendered, including a claimant at fault according to their percentages of fault: Provided, That the court shall not reallocate to any defendant an uncollectible amount greater than that defendant’s percentage of fault multiplied by such uncollectible amount.

(2) If such a motion is filed, the parties may conduct discovery on the issue of collectability prior to a hearing on such motion.

(3) Any order regarding such motion shall be entered within one hundred twenty days after the date of filing such a motion.

(4) A defendant’s share of the obligation to a claimant may not be increased by reason of reallocation under this subsection if:

(A) The percentage of fault of that defendant is equal to or less than the claimant’s percentage of fault; or
clude a minimum threshold of liability for joint and several liability application,141 a reallocation of uncollectible portions of damage awards amongst the parties,142 and exceptions which exempt certain actions from the statute.143

A. Minimum Liability Thresholds

West Virginia Code section 55-7-24 provides that, in any action involving multiple tortfeasors, the jury or judge must first determine the total amount of damages suffered by the plaintiff and then determine the proportionate fault of each of the parties.144 Next, the judge must enter judgment against each defendant according to the rules of joint and several liability.145 If any defendant’s fault is equal to or less than thirty percent, however, then that defendant is no longer jointly and severally liable for the plaintiff’s entire damage award under the statute.146 Thus, where a defendant is less than thirty percent at fault the plaintiff can only enforce the judgment against that defendant for his proportionate share of the damages, subject to certain subsequent provisions in the statute.147 The statute does, however, allow a court to reallocate any uncollectible damages amongst all parties to the litigation, including the plaintiff, according to their respective percentages of comparative fault.148 On the other hand, the Act limits the reallocation to those defendants who are determined by the jury to be more than ten percent at fault.149

(B) The percentage of fault of that defendant is less than ten percent.

(5) A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

(6) If any defendant’s share of the obligation to a claimant is not increased by reason of the application of subdivision (4) of this subsection, the amount of that defendant’s share of the reallocation shall be considered uncollectible and shall be reallocated among all other parties who are not subject to subdivision four of this subsection, including the claimant, in the same manner as otherwise provided this subsection.


141 See § 55-7-24 (a)(2), (c)(4)(B).
142 See § 55-7-24 (c)(1)-(6).
143 See § 55-7-24 (b)(1)-(4).
144 See § 55-7-24 (a)(1).
145 See § 55-7-24 (a)(2).
146 Id.
147 Section 55-7-24 (c) subjects defendants who are ten percent or more at fault to a reallocation of the uncollectible portions of the judgment according to the parties’ percentages of comparative fault. W. VA. CODE § 55-7-24 (c)(1)-(4)(b).
148 See § 55-7-24 (b).
149 See § 55-7-24 (c)(4)(B).
B. Reallocation of Uncollectible Shares

In the event that the plaintiff is not able to collect from any particular defendant due to insolvency, immunity or any other particular reason, the plaintiff is not without redress under section 55-7-24. In those cases, the plaintiff may move the court to reallocate among the parties, including the claimant, any portion of the damages which the plaintiff, in good faith, was unable to collect. However, the statute does not allow the court to reallocate, to any particular defendant, an amount of the uncollectible damages greater than that defendant's comparative fault multiplied by the uncollectible amount. Moreover, defendants who the jury determines to be ten percent or less at fault are not subject to any reallocation whatsoever. Additionally, defendants are not subject to reallocation of uncollectible amounts of the damage award if their fault is equal to or less than the fault of the plaintiff. If a defendant falls within the reallocation exceptions stated in the statute, then his share of the reallocation is deemed to be uncollectible and is once again reallocated amongst the remaining parties. Finally, any defendant who has had his share of the damages reallocated to the other parties is still subject to contribution actions brought by his co-defendants and any continuing liability to the plaintiff.

C. Exceptions

The final major substantive provision of section 55-7-24 is that which excepts certain types of parties from the statute's provisions. These exceptions are based on the type of civil wrong for which a party is liable. For instance, the statute does not apply to parties who have been found liable for injuries resulting from an intentional tort. Likewise, the statute does not apply to parties who have been found liable for injuries which resulted from their actions while acting in concert with another person. Similarly, parties who are found liable for a toxic tort are excepted from the statute. Finally, where a party is

150 See § 55-7-24 (c).
151 Id.
152 See § 55-7-24 (c)(4)(B).
153 See § 55-7-24 (c)(4)(A).
154 See § 55-7-24 (c)(6).
155 See § 55-7-24 (c)(5).
156 See § 55-7-24 (b)(1)-(4).
157 Id.
158 See § 55-7-24 (b)(1).
159 See § 55-7-24 (b)(2).
160 See § 55-7-24 (b)(3).
strictly liable for manufacturing or selling a defective product, the provisions of the statute do not apply to him.\textsuperscript{161}

V. ANALYSIS

It is quite clear that pure joint and several liability can often result in injustice and unfairness for solvent "deep pocket" defendants, especially those with "deep pockets."\textsuperscript{162} Moreover, joint and several liability offends the principles of comparative negligence because it does not comport with that doctrine's notions of fairness and because it ignores the principle of allocating liability based on the jury's determination of fault, upon which comparative negligence is based.\textsuperscript{163} Addressing these problems, some jurisdictions that once used pure joint and several liability have moved to a system of pure several liability.\textsuperscript{164} Some jurisdictions, however, have avoided both of these doctrines and have adopted hybrid systems of damages apportionment which contain features of both doctrines.\textsuperscript{165} These hybrid systems are undoubtedly attempts at compromise between plaintiffs and defendants which mitigate some of the unfairness to defendants that often results in a system of pure joint and several liability. Section 55-7-24 of the West Virginia Code is a combination of two typical hybrid systems.\textsuperscript{166} As such, section 55-7-24 is a step in the right direction for the State of West Virginia because it addresses many of the problems associated with the State's prior regime of pure joint and several liability.

For instance, the statute provides that defendants who are thirty percent or less at fault are only severally liable for the plaintiff's damages.\textsuperscript{167} Thus, notwithstanding the statute's subsequent reallocation provisions,\textsuperscript{168} a defendant who is below this thirty percent threshold will not be required to pay more than his fair share of damages. Although a defendant who is thirty percent or less at fault may ultimately end up paying more than their fair share if damages are

\textsuperscript{161} See id.

\textsuperscript{162} See discussion supra Part III.A.

\textsuperscript{163} See discussion supra Part III.B.

\textsuperscript{164} See, e.g., ALASKA STAT. § 09.17.080 (d) (1989); WYO. STAT. ANN. § 1-1-109 (1986); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 17 reporters' note cmt. a (2000).

\textsuperscript{165} See RESTATEMENT § 17 cmt. a. The RESTATEMENT sets out five alternative systems of damage apportionment. Id. Three of these alternatives represent typical hybrid systems which contain vestiges of both joint and several liability and several liability. Id. The three typical hybrid systems include joint and several liability or several liability with a reallocation of uncollectible shares of the damages, joint and several liability only for defendants whose fault exceeds a specified threshold and making defendants severally liable or jointly and severally liable for certain kinds of damages (i.e. economic or noneconomic). See id. at §§ 17-E18.

\textsuperscript{166} West Virginia Code section 55-7-24 is a combination of a threshold system and a system of joint and several liability with reallocation. See § 55-7-24; RESTATEMENT §§ C18, D18.

\textsuperscript{167} See § 55-7-24 (a)(2).

\textsuperscript{168} See § 55-7-24 (c)(1)-(6).
uncollectible and reallocated, the fact remains that these defendants do not have to bear the full burden of insolvency or immunity as they had often been required to do under the previous regime of pure joint and several liability.\textsuperscript{169}

Moreover, under this statute, the most minimally responsible defendants will never pay more than their fair share of damages because they are only severally liable and thus exempt from any reallocation of uncollectible shares.\textsuperscript{170} Additionally, if a defendant is less at fault than the plaintiff, he will also not pay more than his fair share of the judgment.\textsuperscript{171} These threshold provisions mitigate the problem of a minimally responsible defendant paying the entire judgment when one or more of his co-defendants are insolvent, immune or otherwise unavailable.\textsuperscript{172} Essentially, these provisions do not allow a one percent finding of fault to morph into one-hundred percent liability. This will, in turn, reduce the incentive for plaintiffs’ attorneys to use abusive litigation practices such as “shotgun pleading”.\textsuperscript{173} Finally, minimally responsible “deep pocket” defendants will be forced to act as social insurance or to bear the cost of activities which society has immunized far less often under this statute than under pure joint and several liability.

Although a defendant may be required to pay more than his fair share of damages through the statute’s reallocation provisions,\textsuperscript{174} this procedure is still fairer and more consistent with comparative negligence than pure joint and several liability. Whereas the burden of insolvency, immunity and unavailability was borne entirely by the remaining solvent defendants under joint and several liability, this statute spreads that burden amongst all of the parties, including the plaintiff, who were proximate causes of the injuries.\textsuperscript{175} Moreover, because this statute reallocates uncollectible damages based on the parties’ relative percentages of fault,\textsuperscript{176} the statute is more in line with the apportionment principles of comparative negligence than is pure joint and several liability. In other words, the plaintiff will no longer have the convenience of collecting all of his damages off of the defendant of his choice, usually the “deepest pocket”, leaving that defendant with the burden of collecting whatever amount of contribution that he can from his less wealthy co-defendants. Now any damages that are reallocated due to a co-defendant’s insolvency or immunity are done so proportionately so that the plaintiff must collect each defendant’s share of reallocated damages, based on the percentages of fault assigned by the jury.

\textsuperscript{169} Under this statute uncollectible damages are reallocated amongst all of the parties. \textit{See id.}

\textsuperscript{170} \S\ 55-7-24 (a)(2), (b)(4)(B).

\textsuperscript{171} \textit{See} \S\ 55-7-24 (b)(4)(A).

\textsuperscript{172} \textit{See} discussion \textit{supra} Part III.A.1.

\textsuperscript{173} \textit{See} discussion \textit{supra} Part III.A.3.

\textsuperscript{174} \S\ 55-7-24 (c)(1)-(6).

\textsuperscript{175} \textit{See} \textit{id.}

\textsuperscript{176} Under this statute, the uncollectible portions of the plaintiff’s damages are reallocated by multiplying such uncollectible damages by the parties’ original percentage of comparative fault. \textit{See} \S\ 55-7-24 (c)(1)-(6).
Although this statute is a step forward for West Virginia toward a more equitable system of damage apportionment which is also more consistent with the principles of comparative negligence, it does not go far enough. For instance, a defendant who is just thirty one percent at fault is still subject to the rules of joint and several liability under this statute.\footnote{See § 55-7-24 (a)(2).} Thus, these defendants still may end up paying the entire judgment despite the fact that they are less than fifty percent responsible for the plaintiff’s injuries. This still disregards the idea, inherent in comparative negligence, that damages should be apportioned based on the percentage of fault which the jury assigns to each party.\footnote{See discussion supra Part III.B.1.} Moreover, it leaves much of the unfairness of joint and several liability in that a defendant who is thirty percent or more at fault could still end up paying out much more money than he otherwise would have if he was only responsible for paying his proportionate share of the damages. Moreover, because defendants who are subject to the reallocation provisions must actually pay more than their fair share of damages simply for the sake of compensating the plaintiff for his injuries, this statute still requires defendants to stand in as social insurer’s for the plaintiff’s injuries, although to a lesser extent than under joint and several liability.

In addition, West Virginia Code section 55-7-24 inexplicably excepts toxic tort and strict products liability actions from its provisions.\footnote{See § 55-7-24 (b)(3)-(4).} Unlike the instances where a defendant has acted in concert with the other tortfeasors or has committed an intentional tort, there is no logical reason for distinguishing toxic torts and strict products liability. In the case of concerted action, it is logical to hold the tortfeasors jointly and severally liable. In fact, the earliest applications of joint and several liability were to cases where the defendants acted in concert.\footnote{See Restatement (Third) of Torts: Apportionment of Liability § 15 reporters’ note cmt. a (2000).} The rationale behind retaining joint and several liability for tortfeasors who act in concert is that a finding of concerted action establishes a legal relationship between the actors so that “the act of one is the act of all.”\footnote{See, e.g., Woods v. Cole, 693 N.E.2d 333, 337 (Ill. 1998); Restatement § 15 reporters’ note cmt. a. (2000); Jerry J. Phillips, McIntyre v. Balentine and the Activist Tennessee Supreme Court, 23 MEM. ST. U. L. REV. 33, 39 (1992).} This legal relationship precludes any apportionment of damages.\footnote{See Woods, 693 N.E.2d at 337; Restatement § 15 reporters’ note cmt. a.} Moreover, it is thought that tortfeasors who act in concert have a higher degree of culpability that those who do not, thus making it fairer to hold them jointly and severally liable.\footnote{See Restatement § 15 reporters’ note cmt. a.} Thus, most commentators agree that it is preferable to retain pure joint

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177 See § 55-7-24 (a)(2).

178 See discussion supra Part III.B.1.

179 See § 55-7-24 (b)(3)-(4).


182 See Woods, 693 N.E.2d at 337; Restatement § 15 reporters’ note cmt. a.

183 See Restatement § 15 reporters’ note cmt. a.
and several liability for those tortfeasors who act in concert. Like tortfeasors who act in concert, intentional tortfeasors have likewise been subject to joint and several liability since the earliest cases. Moreover, the intentional tortfeasor’s state of mind supports the application of joint and several liability because, like tortfeasors who act in concert, it connotes a higher degree of culpability. Essentially, where a tortfeasor intentionally harms another person, he should not be heard to complain when he is held responsible for the entirety of that person’s injuries.

Conversely, there is no similar logical justification for retaining pure joint and several liability for toxic torts or strict products liability. In the case of toxic torts, one may argue that there is a higher degree of culpability there as well. However, where one negligently emits a hazardous substance into the environment there is no special state of mind or legal relationship which suggests a higher degree of culpability. One may also argue, in the case of toxic torts, that the apportionment of damages is not as easily apportioned as in other actions. However, although not an exact science, comparative negligence provides a method for apportioning fault. Because we use this method for other “indivisible” injuries, there is no logical reason why it should not be used for toxic tort actions.

Likewise, there is no logical reason to retain pure joint and several liability for those defendants who are found liable for strict products liability. Liability has been dramatically expanded in products liability cases over the last

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184 See Wright, Logic and Fairness, supra note 26, at 47 n.7; Scheske, supra note 5, at 652; Phillips, supra note 174, at 39; RESTATEMENT § 15 reporter’s note cmt. a (2000). Many other state legislatures have also retained pure joint and several liability for concerted action torts even if they have abolished or limited it for other actions. See e.g., MISS. CODE ANN. § 85-5-7(6) (1997); WIS. STAT. § 895.045 (2005); ARIZ. REV. STAT. ANN. § 12-2506(D)(1) (2006); RESTATEMENT § 15 reporters’ note cmt. a.


186 See Scheske, supra note 5, at 652-653. The RESTATEMENT (THIRD) OF TORTS supports imposition of pure joint and several liability on intentional tortfeasors. See RESTATEMENT § 12. Moreover, many commentators also support joint and several liability in this instance. See e.g., William E. Westerbeke, Survey of Kansas Law: Torts, 33 U. KAN. L. REV. 1, 33 (1984); Scheske, supra note 5, at 652-653; RESTATEMENT (THIRD) OF TORTS § 12 reporters’ note cmt. b. Many state legislatures agree with this reasoning and have retained joint and several liability for intentional tortfeasors despite abolishing or modifying it for other tortfeasors. See e.g., FLA. STAT. ANN. § 768.81(4)(b) (2006); HAW. REV. STAT. § 663-10.9(2)(A) (2006); MISS. CODE ANN. § 85-5-7(4) (2004); NEV. REV. STAT. ANN. § 41.141(5)(b) (2006); N.M. STAT. ANN. § 41-3A-11(C)(1) (2006); N.Y. C.P.L.R. 1601-02(5) (McKinley 2005); see also RESTATEMENT § 12 reporters’ note cmt. b.

187 At least one commentator has espoused this view. See Scheske, supra note 5, at 653.

188 For example professor Wright gives the example of poison in a cup of coffee. Wright says that if four Defendants each drop one drop of poison into a coffee cup, each sufficient to kill the drinker, it would be silly to say that each Defendant is twenty five percent responsible for the death of the drinker. See Wright, Logic and Fairness, supra note 26, at 56. One may be tempted to use this example to justify imposition of joint and several liability for toxic torts.
several decades. Furthermore, judicial tests for a “defect” have become increasingly open ended, allowing liability in suspect circumstances. Additionally, liability for defective products is not based on negligence but rather strict liability. In other words, if a product happens to be defective it does not matter how it came to be that way and a product manufacturer may be found liable despite the fact that he exercised the utmost care in manufacturing the product. For the foregoing reasons, the problem of one percent liability based on scant justifications turning into one hundred percent liability is perhaps at its greatest in strict products liability cases. Therefore there are very good reasons why strict products liability is the one situation where the argument against joint and several liability is at its strongest. Taking this into account, the exception of strict products liability actions from the provisions of section 55-7-24 is not warranted.

In summary, West Virginia Code section 55-7-24 is a step in the right direction for West Virginia toward eliminating the injustices of joint and several liability and making its damage apportionment scheme more consistent with the principles of comparative negligence. The threshold provisions in the statute assure that the most minimally responsible defendants are generally not going to be held liable for all of the plaintiff’s damages. This should relieve these defendants, in most instances, from being subjected to abusive litigation practices, asked to provide social insurance for the plaintiff’s injuries, or asked to bear the burden for activities which society has immunized. Moreover, even though a defendant may be asked to pay more than his fair share of damages through reallocation of uncollectible amounts, this is done in a way that is fairer and more consistent with comparative negligence because the uncollectible amounts are reallocated amongst all of the parties to the litigation based on their comparative fault. Because all of the parties, including the plaintiff, are included in the reallocation, solvent defendants will no longer bear the entire risk of insolvent or immune co-defendants. That risk will now be distributed amongst the parties according to their percentages of fault.

Although the statute is a step in the right direction, it does not go far enough in remedying the unfairness of joint and several liability or its inconsistency with comparative negligence. Defendants are still asked to pay more than their fair share of damages when one or more of their co-defendants are insolvent, immune or otherwise unavailable even if the plaintiff has also been negligent. Moreover, plaintiffs may still collect all of their damage award from any

189 See Twerski, supra note 1, at 1133.
190 See Aaron D. Twerski, From Defect To Cause To Comparative Fault—Rethinking Some Products Liability Concepts, 60 MARQ. L. REV. 297, 299 (1977); 72A C.J.S. Products Liability § 11; RESTATEMENT § 2 cmt. a.
191 See Twerski, supra note 190, at 299; 72A C.J.S. Products Liability § 11; RESTATEMENT § 2 cmt. a.
192 See Twerski, supra note 190, at 299; RESTATEMENT § 2 cmt. a.; 72A C.J.S. Products Liability § 11.
defendant who is more than thirty percent at fault. Finally, the statute does not apply to certain actions even though there is no logical way to distinguish them from other actions. This author believes that the West Virginia Legislature should have further limited the application of joint and several liability. Therefore, the next part of this Note will suggest a model statute which the legislature ought to consider if they choose to reexamine this issue in the future.

VI. PROPOSED MODEL STATUTE

Joint and Several Liability Abolished; Exceptions 193

(a) In any cause of action involving the tortious conduct of more than one party, the trial court shall:

(1) Instruct the jury to determine, or, if there is no jury, find, the total amount of damages sustained by the claimant and the proportionate fault of each of the parties in the litigation at the time the verdict is rendered; and

(2) Enter judgment against each liable party on the basis of several liability only, except that if any liable party is fifty-one percent or more at fault, he shall be jointly and severally liable for the claimant’s injuries.

(b) Notwithstanding subdivision (2), subsection (a) of this section, if a claimant is determined to be free of fault and through good faith efforts is unable to collect from a liable party, the claimant may, not later than six months after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties in the litigation.

(1) Upon the filing of such a motion, the court shall determine whether all or part of a liable party’s proportionate share of the verdict is uncollectible from that defendant and shall reallocate such uncollectible amount among the other parties in the litigation at the time the verdict is rendered, according to their percentages of fault: Provided, That the court shall not reallocate to any party an uncollectible amount greater than that party’s percentage of fault multiplied by such uncollectible amount.

193 This model statute is based, in large part, on West Virginia Code section 55-7-24. Thus, the model statute parallels the West Virginia Statute in many respects. See W. VA. CODE § 55-7-24 (2005).
(2) If such a motion is filed, the parties may conduct discovery on the issue of collectability prior to a hearing on such motion.

(3) Any order regarding such motion shall be entered within one hundred twenty days after the date of filing such a motion.

(4) A party’s share of the obligation to a claimant may not be increased by reason of reallocation under this subsection if the jury determines that party’s percentage of fault to be less than ten percent.

(6) If any party's share of the obligation to any claimant is not increased by reason of the application of subdivision (4) of this subsection, the amount of that defendant’s share of the reallocation shall be considered uncollectible and shall be reallocated among all other parties who are not subject to subdivision (4) of this subsection, including the claimant, in the same manner as otherwise provided in this subsection.

(c) Notwithstanding subdivision (2), of subsection (a) of this section, the rules of joint and several liability shall apply to:

(1) Any party who acted with the intention of inflicting injury or damage; or

(2) Any party who acted in concert with another person as part of a common plan or design resulting in harm.

(d) If a judgment is entered against a party based on subdivision (2), of subsection (a) or subdivision(1) or (2) of subsection (c) of this section, nothing in this section shall be construed to effect his right of contribution against any of the other parties for their proportionate share of the claimant’s damages or impair or to abrogate any other right of indemnity or contribution arising out of any contract or agreement or any right of indemnity otherwise provided by law.

(e) Nothing in this section creates or recognizes, either explicitly or impliedly, any new or different cause of action not otherwise recognized by law.

(f) Nothing in this section may be construed to affect, impair or abrogate the provisions of section seven, article twelve-a, chap-
ter twenty-nine of this code or section nine, article seven-b of this chapter.\textsuperscript{194}

Although this model statute parallels West Virginia Code section 55-7-24 a great deal, there are several substantive differences. For instance, the model statute is divided up into situations where either the plaintiff is or is not at fault. Where the plaintiff is at fault, judgment is to be entered against each defendant on the basis of several liability only. Judgment is entered in this way because several liability cures the ill effects of pure joint and several liability in relation to defendants.\textsuperscript{195} Under this model statute, the plaintiff would be responsible for the collection of each defendant’s proportionate share of the damages, and no defendant, except those who are more than fifty percent at fault, will be required to pay more than their fair share of the judgment. Furthermore, several liability is completely consistent with the liability apportionment principles of comparative negligence in that each party is required to pay an amount that corresponds to his percentage of fault, as determined by the jury.\textsuperscript{196} The model statute is also consistent with fair play and corrective justice in that each defendant who is less than half at fault pays only his fair share of the plaintiff’s damages, such that justice is done between each of those defendants and the plaintiff.

Even where the plaintiff has been determined to be partially at fault, the model statute retains pure joint and several liability for those defendants who are at least fifty-one percent at fault. This is, in effect, a threshold provision. The Restatement (Third) of Torts suggests that thresholds, especially those over fifty percent, are not an effective way to ameliorate the problems inherent in joint and several liability.\textsuperscript{197} This author would beg to differ, especially if the effectiveness of thresholds is viewed in the context of this jurisdiction’s comparative negligence regime.

The threshold in the model statute (fifty-one percent) is considerably higher than that found in section 55-7-24 (thirty percent) for two reasons. First, the purpose of a threshold is to eliminate the problem of minimally responsible defendants being on the hook for an entire judgment. In other words, the only instance in which any defendant should be responsible for all of a plaintiff’s damages under a proper threshold regime is when that defendant crosses a certain threshold of fault, at which point it cannot be fairly argued that he is minimally at fault. Section 55-7-24’s thirty percent threshold is too low to effectively accomplish the purpose of a threshold provision. Under a thirty percent
threshold, a defendant who shoulders less that one third of the fault could still be on the hook for the entire judgment. A fifty-one percent threshold, such as the one in the model statute, is the most logical point at which the threshold should be set because, at that point, it could no longer be argued that the defendant is minimally at fault because he, in fact, shoulders a majority of the blame.

Second, the threshold provision in the model statute is more consistent with the proportionate loss allocation principles espoused by this jurisdiction’s comparative negligence regime. For instance, West Virginia’s comparative negligence regime apportions losses proportionately until a plaintiff’s fault equals or exceeds the combined fault of the other parties, at which time it requires the plaintiff to bear the full costs of his losses.\(^{198}\) Section 55-7-24, on the other hand, would require a defendant to bear the full burden for the plaintiff’s losses when he is only thirty percent at fault. Like West Virginia’s comparative negligence regime, this model statute’s threshold provision allocates losses proportionately until a particular defendant’s fault exceeds the combined fault of the other parties, at which time that defendant could be responsible for the entirety of the plaintiff’s losses.

Finally, the threshold provision in this model statute is consistent with the notions of fairness embodied in this jurisdiction’s comparative negligence regime. While defendants who are more than fifty-one percent at fault may still be forced to pay the entire judgment, this is not necessarily inconsistent with principles of fairness in West Virginia’s comparative negligence regime. For instance, once a defendant is found to be fifty-one percent or more at fault, he is necessarily more at fault than all of the other parties involved in the litigation, combined. In this author’s opinion, it would not be completely unfair to ask such a defendant to bear the entire burden of the plaintiff’s losses. Moreover, the comparative negligence regime adopted in this jurisdiction takes a very similar approach, as it requires a plaintiff to bear the entire burden of his losses if his fault is determined to equal or exceed the combined fault of all of the other parties in the litigation.\(^{199}\) Thus, the threshold provision in this model statute is completely consistent with the level of fairness that this jurisdictions attempts to achieve in its comparative negligence regime.

Where the plaintiff is free of fault, the model statute still provides for several liability for the above stated reasons. But in these instances, the model statute would allow any uncollectible portions to be reallocated among all of the defendants in relation to their comparative fault. Where a plaintiff is, in fact, free of fault he stands on a higher moral footing than the at-fault defendants because, while they have been determined to be a necessary cause of the injury producing accident, he has not.\(^{200}\) Thus, it is fairer in these situations to ask a defendant, who is a cause in fact of the plaintiff’s injuries, to pay more than his

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[199] See id.
original fair share than it would be to let the *innocent* plaintiff go grossly under-compensated. The reallocation of uncollectible shares should work to provide innocent plaintiffs with substantial compensation in most instances. Moreover, the reallocation is somewhat consistent with the proportionate loss allocation embodied in comparative negligence, as the uncollectible shares would be reallocated based on the defendants' percentage of comparative negligence.

The model statute, like West Virginia Code section 55-7-24, does not apply the reallocation provisions to defendants whose percentage of fault is less than ten percent. This will ensure that the most minimally responsible defendants pay no more than their fair share of the plaintiff's damages, as determined by the jury. In turn, plaintiffs will have less incentive to engage in abusive tactics such as "shotgun pleading" to ensure they receive substantial compensation. It is not lost on this author that this may lead to situations where the plaintiff may not be able to find a solvent defendant and may go undercompensated. But it is not possible for the law to guarantee the plaintiff a solvent defendant in all circumstances.\(^{201}\) For example, if there is only one defendant and that defendant happens to be insolvent, the law does not shift the loss to another person but, instead, leaves it where it falls.\(^{202}\) Because the law does not and could not guarantee the plaintiff a solvent defendant in *every* instance, this model statute does not attempt to do so either.

Finally, the statute retains pure joint and several liability only for intentional tortfeasors and those tortfeasors who act in concert. This is because of the state of mind, legal relationship, and higher degree of culpability that these situations entail.\(^{203}\) It should be noted that full joint and several liability is not retained for toxic torts or strict products liability. There is no logical way to distinguish these actions from those to which the model statute applies.\(^{204}\) Moreover, strict products liability may actually be the one cause of action where joint and several liability is most problematic.\(^{205}\) Because of the foregoing reasons, these actions receive no special treatment under the model statute.

**VII. CONCLUSION**

In conclusion, pure joint and several liability often results in injustices and unfairness to solvent defendants, especially those who are perceived as having "deep pockets". These defendants are often required to pay more than their fair share of a plaintiff's damages where one or more co-defendants are insolvent, immune, or otherwise unavailable. As a result, "deep pocket" defendants

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\(^{201}\) See Manzer, *supra* note 40, at 645; Pearson, *supra* note 65, at 363.

\(^{202}\) *Id.*

\(^{203}\) See discussion *supra* Part V.

\(^{204}\) *Id.*

\(^{205}\) *Id.*
are often exposed to further injustices such as being required to act as social insurers, being subjected to abusive litigation practices such as “shotgun” pleading, and requiring some defendants to bear the entire burden for risk creating activity which society has chosen to immunize. Additionally, joint and several liability is wholly inconsistent with the principles of comparative negligence because it ignores that doctrine’s preference for fairness and proportional loss allocation.

West Virginia Code section 55-7-24 is a step in the right direction in addressing the problems attendant to joint and several liability and attempting to mitigate the injustices and inconsistencies associated with that doctrine. Although West Virginia Code section 55-7-24 represents a step forward in addressing the problems created by joint and several liability, the West Virginia Legislature did not go far enough in doing so, leaving much of the injustice and inconsistencies in place. This author feels that the model statute put forward in this Note should be a more equitable way to apportion damages in West Virginia. The author also feels that the model statute is more in line with the principles of comparative negligence than West Virginia Code 55-7-24. Therefore, the author believes that the model statute should be considered by the West Virginia Legislature the next time it takes up this issue.

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