The Application of Comparative Responsibility to Intentional Tortfeasors and Immune Parties

William Westerbeke

MARK DAVIDSON: Jonathan Cardi was scheduled to speak next about the comparative responsibility of immune tortfeasors. However, as we speak his wife is having a baby and Mr. Cardi cannot be here. William Westerbeke will speak next on the application of comparative responsibility to intentional torts, and he has also agreed to add a few comments on Mr. Cardi’s topic about immune tortfeasors.

PROFESSOR WILLIAM WESTERBEKE: Thank you, Mr. Davidson. During the past few decades in which concepts of comparative fault were in their formative years, courts and commentators tended to pay little attention to intentional torts. Generally, they concluded that comparative fault did not apply to intentional torts. The new Restatement adopts a few tentative changes. Permit me to provide a brief overview. First, the Restatement takes no formal position on whether contributory negligence should reduce a plaintiff's recovery from an intentional tortfeasor. ¹ Second, and of greater interest, are the rules governing cases involving multiple defendants. Defendants who are intentional tortfeasors shall remain jointly and severally liable regardless of the state's method of allocating loss among negligent defendants.² In cases where a defendant was negligent for failing to protect the plaintiff from another defendant's intentional tort, the negligent defendant and the intentional defendant shall be jointly and severally liable for the indivisible harms caused by their tortious acts.³ However, at this juncture, principles of comparative responsibility effect some departure from earlier rules. Either defendant can now recover comparative fault contribution from the other.⁴ Comparative fault contribution in favor of the negligent defendant in such cases effectively abolishes any active-passive indemnity that might have once applied to such cases. And, comparative contribution in favor of the intentional tortfeasor is a new development. Third, contracts allocating the parties' potential losses by prior agreement may be valid even when one or more of the parties is an intentional tortfeasor.⁵

Now let me return briefly to comparative responsibility between plaintiff and defendant. Under the traditional “all or nothing” system, a fundamental principle was that a plaintiff's lesser fault should not be a complete defense to a defendant's greater fault. Thus, ordinary contributory negligence was not a defense to a defendant's intentional tort or reckless conduct.⁶ On the other hand, when plaintiff and defendant were equally at fault, plaintiff was completely barred from any recovery. Negligence constituted a major problem because it encompassed an extraordinary sweep of human conduct ranging from the relatively innocuous to the highly culpable. Yet with the exception of last clear chance, negligent acts were generally presumed to be essentially equal in culpability. Thus quite expectedly, the early decades of comparative fault focused heavily on allocation of loss between negligent plaintiffs and negligent defendants.

William Westerbeke, Professor of Law, University of Kansas School of Law.
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During this period, courts and legislatures largely ignored intentional torts. Comparative responsibility statutes referred only to negligence or "fault," and the statutes never defined "fault" to include intentional misconduct. When the statutory language provided no simple answer and the comparative responsibility system was judicially created, courts held comparative fault inapplicable to intentional torts based on an "apples and oranges" rationale that intentional misconduct is "different in kind" and cannot be compared with either negligence or other intentional torts. These explanations have not been entirely persuasive.

In my opinion, the better explanation is found in equitable and institutional considerations. Comparative responsibility is an equitable departure from the harshness of the former "all or nothing" system. In most cases the equitable benefit flows to plaintiffs by eliminating the complete defense of contributory fault. Occasionally the equitable benefit may also flow to defendants by abolishing the last clear chance doctrine or reducing a contributorily negligent plaintiff's damages from a reckless defendant. Yet an equitable adjustment in favor of an intentional tortfeasor is perhaps inappropriate because intentional misconduct is so highly culpable. Reduction of my obligation to pay damages in proportion to your contributory negligence may be appropriate if I am merely negligent in running my car into your car. The reduction is far less appropriate if I intentionally crash into your car. Moreover, the judiciary as an institution benefits little from revising broad areas of law to improve only minimally a small number of cases. Because contributory negligence rarely arises as a serious defense to an intentional tort, comparative fault reductions would probably be infrequent and small, and the potential for confusion would be considerable. As the saying goes, "if it ain't broke, don't fix it."

However, as the Reporters have correctly recognized,7 not all intentional torts fit the "high culpability" stereotype. For example, one may lose a privilege because of a reasonable but incorrect belief in the need to use force for some protected purpose, such as the property owner who physically detains another whom the owner incorrectly believes to have stolen some chattel. A privilege may also be lost because of an honest but unreasonable belief in the need to use force, such as the individual who resorts to force to defend himself in response to an unreasonable, but not malicious or reckless, belief in the need for such force. Similarly, the acts of children, insane persons and others may meet the technical definition of intentional despite a virtual lack of any moral culpability. The child who intentionally enters my yard in the course of an innocent game of "hide and seek" has committed a trespass to land, but certainly does not possess the culpability normally associated with intentional torts. The same is true of the insane person who strikes another in a fit of uncontrolled mental delusion,8 or the hunter who shoots the neighbor's dog in the entirely reasonable belief that it was a coyote.9 These cases all seem more the vestigial remains of the old strict liability system than examples of highly culpable conduct. Denying such intentional tortfeasors the equitable benefits of comparative fault reduction makes little sense.

Judicial economy and a desire to avoid administrative confusion may also support the application of comparative responsibility to intentional tort cases. Most states extend comparative responsibility to reckless tortfeasors. Some intentional torts have an expanded intent element that also encompasses some reckless conduct in addition to intent. Thus, intent or recklessness is an element of an action for intentional infliction of emotional distress.10 Knowledge of falsity or reckless disregard of whether a statement is true or false is a required element in certain defamation cases,11 and a similar hybrid element is required for fraud.12 Little if any public policy gains will result from burdening courts and attorneys with the need to try these tort actions under both "all or nothing" and
comparative responsibility principles until the trier of fact decides whether defendant's conduct was intentional or merely reckless.

With regard to plaintiff/defendant comparative responsibility, the Reporters have done exactly what the ALI and its various constituencies should expect them to do. By taking no position, they have not interfered with the majority rule that contributory negligence does not reduce damages recoverable from an intentional tortfeasor. At the same time, they provide in the comments the analytical guidance to encourage a process of positive change.

The multiple defendant cases pose more difficult questions. The Restatement imposes joint and several liability on multiple intentional tortfeasors regardless of whatever other approach the state might adopt in cases of multiple negligent defendants. The rule is a proper "restatement" of the law because this is the rule adopted all over the country. I am not aware of a single state that applies proportionate or several liability to multiple intentional tortfeasors. Again, the Reporters provide, in the comments, sufficient commentary to enable the state courts to reconsider this rule. The lack of substantial culpability and the burden of administering these cases might suggest a different rule for some, if not all, cases involving multiple intentional tortfeasors.

Far more perplexing are the hybrid cases in which the conduct of a negligent tortfeasor combines with the conduct of an intentional tortfeasor to produce a single indivisible injury to the plaintiff. The Kansas experience illustrates the problem. Despite adopting several or proportionate liability for loss allocation among multiple negligent defendants, Kansas has retained joint and several liability in all hybrid cases involving both negligent and intentional defendants. These cases use the "apples and oranges" rationale that negligent and intentional misconduct cannot be compared. The Restatement narrows that rule slightly, imposing joint and several liability on the negligent as well as the intentional defendants only in those cases in which the negligent defendant breached a specific duty to protect plaintiff against the intentional tort.

Two examples illustrate the difference between the Restatement and Kansas approaches. Consider the hotel that negligently fails to provide an adequate lock on a guest's room, thereby allowing a wrongdoer to enter the room to assault the plaintiff or to steal his or her property. In such a case, the hotel breached a specific duty to protect the guest from intentional torts and would be jointly and severally liable, along with the intentional tortfeasor, for plaintiff's damages. Compare that situation with that of the innocent plaintiff whose car is intentionally rammed by another driver suffering road rage and who suffers greater injury because the manufacturer's negligence caused plaintiff's air bag not to deploy. The airbag exists to protect plaintiff in any kind of accident, not specifically against accidents intentionally caused by road rage. In such a case, the Restatement would apply the rule generally applicable to apportionment between negligent defendants to determine the share of damages allocated to the negligent defendant, while Kansas would treat the defendants jointly and severally liable simply because one committed negligence and the other an intentional tort.

Comparative responsibility rarely affords absolute fairness to all parties. In these hybrid cases, I suspect the Reporters recognized that these rules fall somewhere between a principle and a mere result and that the same conflict could arise in various cases involving two negligent defendants. For example, consider a negligent entrustment case in which the owner-defendant entrusts a car or a rifle to another defendant who is visibly intoxicated and whose subsequent act of negligence in using the car or rifle injures an innocent plaintiff. In Kansas, negligent entrustment is viewed as actual negligence, not imputed fault, and thus is governed by our general rule of several liability. Yet the
owner of the dangerous instrumentality has a specific duty to protect others from the
conduct of one who is incompetent to safely use that instrumentality. The Reporters
apparently recognize that this duty is quite analogous to the duty of the hotel owner to
protect its patrons from intentional torts. Again, they have restated the rule that in fact
exists in the vast majority of states, but they also provide commentary to assist courts in
moving toward a more rational and balanced rule.

Finally, the Restatement allows a party to enter into a contractual agreement to
relieve itself of liability for intentional misconduct, subject only to the traditional
limitations that the agreement be strictly construed against the drafter and that the
agreement not contravene public policy.26 I expect that only in rare cases will a party
successfully disclaim liability for intentional torts. The agreement would have to spell out
clearly and unequivocally that the party is relieved of liability even when the harms results
from intentional misconduct, and courts would not tolerate any ambiguity or surprise to
operate against the other party to such an agreement. Moreover, the Restatement does not
take the position that disclaimers of intentional misconduct comports with public policy;
it only holds that such disclaimers are not categorically against sound public policy. Thus,
each disclaimer will simply require an ad hoc determination of the public policy issue.

I see that my time has nearly expired. Permit me just a few minutes to comment
briefly on Mr. Cardi’s topic about treatment of immune tortfeasors. At the outset,
"immunity" is not a singular, one-dimensional concept. It covers a wide variety of
situations, and each immunity rests upon a different combination of interests and policies.
The classic immunities provided protection from lawsuits based upon a party’s particular
status: governmental immunity, family immunity, and charitable immunity. In addition,
release of a settling tortfeasor renders that person "immune" from any further obligation
to pay damages or contribution. Immunity may also be defined by the forum for dispute
resolution. For example, both bankruptcy and workers compensation immunize certain
parties from traditional litigation in order that their legal situations may be resolved in a
different forum with a different method of payment, and a lack of jurisdiction might
render a tortfeasor "immune" to litigation in a particular state or federal court. Moreover,
the liability of some parties may be capped at a certain damage amount, rendering them
"immune" with respect to any damages in excess of the statutory cap. Other parties may
be "immune" from ordinary negligence claims, but not from claims based on more
aggravated fault, such as the "immunity" from ordinary negligence claims afforded a host
driver by an automobile guest statute or afforded a governmental entity for its
maintenance of a park, playground or recreation area. Finally, expiration of the statute
of limitations provides an "immunity" based solely on the delay in commencing litigation.

Under the "all or nothing" system, the fault of immune parties played little role in
the cases. Generally, procedural rules did not permit the joinder of an immune tortfeasor
and thus no occasion arose to consider that tortfeasor’s fault. Courts did not permit
contribution against an immune tortfeasor because contribution required that the
tortfeasors share a common liability to the plaintiff.

The widespread adoption of comparative fault created opportunities for states to
experiment with new approaches to loss allocation among multiple tortfeasors, including
immune tortfeasors. Courts and legislatures recognized that "immunities" impose costs
or burdens on other parties. Regardless of the loss allocation system, the burden of the
immune party’s comparative fault share of the damages is shifted to some other party or
parties either by reducing the plaintiff’s recovery, by adding to the damages paid other
defendants, or by a combination of the two. The states produced a great variety of
approaches to multi-tortfeasor loss allocation. The Restatement has grouped these diverse
approaches into five separate "tracks" of rules.

Tracks A and B set forth the two opposite poles in loss allocation thinking under comparative fault. First, Track A addresses states that retain joint and several liability, but allocate the loss between tortfeasors on the basis of comparative fault contribution rather than by equal share contribution.\(^{21}\) A settlement with and release of one tortfeasor reduces the judgment against the remaining defendant(s) by the amount of the settling tortfeasor's comparative fault share of the damages.\(^{22}\) The trier of fact does not determine the comparative fault of any other immune tortfeasor, and thus that fault is spread among the non-immune parties to the litigation.

By contrast, Track B addresses states that have abolished joint and several liability in favor a system of several liability, i.e., limiting the fault of any defendant to its own comparative fault share of the damages.\(^{23}\) Under this approach, the burden of any immune tortfeasor's comparative fault share of the damages is shifted to the plaintiff without regard to the nature of or rationale for the immunity.\(^{24}\)

The difference between tracks A and B is demonstrated by the situations set forth in Figures 1 and 2:

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In both situations, assume that Y is immune for some reason other than settlement and release. Under Track A, the trier of fact would not determine Y's share of fault. In Figure 1, X is the other party at fault and would bear the entire $100,000 loss. In Figure 2, the trier of fact would ignore Y and allocate 100 percent of the fault between P and X, perhaps in the same 2-to-3 ratio for a 40 percent-60 percent allocation. However, under Track B the trier of fact would in each case determine Y's share of fault even though Y is immune and cannot be required to pay damages. Thus, in Figure 1 P would lose the $60,000 attributable to Y's fault and recover only $40,000 from X, and in Figure 2 P would lose the $20,000 attributable to his own fault plus the $50,000 attributable to Y's fault and would recover only $30,000 from X. However, if Y's immunity arose from a settlement with and release by P, then even under Track A, P's settlement with Y would be treated as a settlement of Y's 60 percent share of the damages in Figure 1 and of Y's 50 percent share of the damages in Figure 2. P would recover only $40,000 from X in Figure 1 and only $30,000 from X in Figure 2.

Track C modifies traditional joint and several liability systems by adding a reallocation mechanism to deal with the problem of the insolvent defendant.\(^{25}\) For example, in Figure 2 assume that both X and Y are non-immune defendants held jointly and severally liable to P, that X has paid the entire $80,000 judgment in favor of P, but that Y is insolvent and unable to pay $50,000 contribution to X. The uncollectible $50,000 would be allocated on a comparative fault basis among all parties, including the plaintiff, whose fault legally contributed to the injury. The $50,000 would be reallocated $30,000 to X and $20,000 to P. The final allocation would thus be $60,000 paid by X and $40,000 borne by P.
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Track C also treats as an insolvency two partial immunities in which a tortfeasor may be liable, but only for an amount less than his comparative fault share of the damages. The reallocation provision applies to any portion of one party's damages that cannot be collected because they exceed a damages cap. Thus, assume that the damages in figure 2 were $1,000,000 and Y's share of the damages were capped at $100,000. The uncollectible $400,000 of damages attributable to Y would then be reallocated on a comparative fault basis $160,000 to P and $240,000 to X.

The reallocation provision may also apply in some cases involving fault by the plaintiff's employer. Historically, the exclusive remedy provision in workers' compensation statutes barred any common law tort action against the employer brought directly by the employee or indirectly in the form of a claim for contribution or indemnity by an independent tortfeasor held liable to the employee-plaintiff. Since the advent of comparative fault some states allow an independent tortfeasor to reduce a judgment to the employee-plaintiff or alternatively to recover partial contribution or indemnity from the employer in an amount not to exceed the amount of the workers' compensation benefits paid by the employer to the employee. The same approach applies in states allowing an employer's workers' compensation payment to reduce an independent tortfeasor's liability either directly as a credit against the judgment or secondarily by partial contribution. These payments by an employer are limited to the amount of the workers' compensation benefits paid by the employer. When the employer's common law share of the damages exceeds the amount of benefits paid, Track C treats the remainder of the employer's share the same as a party's uncollectible share of damages in excess of a damages cap. However, in states that do not require any employer participation in a common law action, the trier of fact will not determine the employer's share of the fault and the reallocation provision has no application.

Finally, Tracks D and E address states that have developed hybrid systems of joint and several liability for some parties and several liability for others. Track D addresses states that excuse from a general system of joint and several liability any defendant whose fault falls below a certain threshold. For example, a state could provide that defendants are jointly and severally liable except that any defendant less than 20 percent at fault is liable only for his own comparative fault share of the damages. Track E addresses those states that hold defendants jointly and severally liable for economic losses, but only severally liable for noneconomic losses.

Both tracks employ a similar approach to immune tortfeasors. If several liability plays no role because no party's fault falls below the threshold amount under Track D or no claim for noneconomic damages is made under Track E, the trier of fact will not determine the fault of immune tortfeasors. If the prerequisite for several liability is present under either track, however, the trier of fact is to determine the fault of every immune tortfeasor.

In my opinion, routinely determining the comparative fault of immune tortfeasors in several liability systems, but not in joint and several liability systems, is not particularly sound. Courts and commentators have never fully developed a rationale for several liability. They assume that several liability is the natural offspring of comparative fault. Yet comparative fault does not provide an affirmative rationale for several liability; it only negates the traditional rationale for joint and several liability in cases where the plaintiff is also at fault. In essence, the absence of a clear affirmative rationale for several liability leaves in doubt the propriety of the assumption that a several liability system of loss allocation requires shifting to the plaintiff the entire burden of any immune tortfeasor's comparative fault share of the damages.
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The treatment of immune tortfeasors should depend on the nature of the immunity, not simply on the choice between several liability and joint and several liability. For example, assume that in Figure 1 Y settled with P for $20,000. Prior to comparative fault, X would be liable jointly and severally for the entire $100,000 damages, reduced to $80,000 by a pro tanto credit for the amount of the settlement. Under comparative fault most courts and the new Restatement reduce X's judgment by Y's comparative fault share of the damages, or $60,000. Because the settlement was negotiated by P and Y and resulted in an economic benefit to P, it is fair to treat the settlement amount as a legal substitute for Y's comparative fault share of the damages.

The same reasoning should apply equally to employers rendered "immune" to common law liability by the exclusive remedy provision of workers' compensation. The employer provides workers compensation benefits to an injured employee and in return is rendered immune from common law liability. Although the benefits are not individually negotiated, they flow from the employer-employee relationship and provide the employee with an economic benefit. Thus, in a joint and several liability system, it would not be unfair to reduce the judgment against an independent defendant by the employer's comparative fault share of the damages. The workers' compensation benefits, like a settlement amount, would be a legal substitute for the party's comparative fault share of the damages. In each case, plaintiff can be fairly viewed as accepting the economic benefit as a substitute for the immune tortfeasor's comparative fault share of the damages.

By contrast, governmental immunity should be viewed differently. In theory, the benefits and protections that are inherent in the government-citizen relationship and that give rise to the immunity are afforded equally to all citizens. Assume, for example, that in Figure 2 Y is a governmental entity immune from all liability. The benefits Y makes available to P would be in theory the same benefits that Y makes available to any other citizen, including X. Government's neutrality between parties would logically justify an allocation of Y's share of the damages between P and X. There seems to be no logical basis for shifting the full burden of Y's immunity from Y to P.

In summary, neither joint and several liability nor several liability provides any logical basis for a uniform treatment of all immune parties. Each immunity should undergo separate evaluation to resolve which other party or parties should bear all or part of the burden of that immunity. When the immunity is based on a beneficial economic relationship between the plaintiff and the immune party, as is the case with the tortfeasor who negotiated a settlement and the employer who provides workers' compensation benefits, the plaintiff may be fairly asked to bear that burden. But not when the basis for the immunity is neutral toward the remaining parties, as with the immune governmental entity.

By way of conclusion, let me add a brief comment about the Reporters. I have heard criticism of their work product by speakers who would have preferred different rules. The impact of these loss-allocation rules on plaintiffs or defendants is often very substantial, and feelings may run high on occasion. I am not persuaded that the criticism is fair. The Reporters have drafted rules that reflect the predominant trends in the case law. More importantly, they have limited to the Comments and Reporters Notes following the rules their "legislative impulses" to suggest improvements upon the rules. Suggestions concerning possible changes and improvements in rules is certainly an appropriate part of the Reporters' function. I have criticized some of the rules concerning immune parties, but my criticism is directed at judicial and legislative decisions, not at the Reporters who merely restated rules based on those decisions. In my opinion, the
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Reporters have done an admirable job in dealing with a difficult subject matter.

Notes

1. Restatement (Third) of Torts: Apportionment of Liability § 1, Comment c (2000) (hereafter "Restatement (Third)").
2. Id. § 12.
3. Id. § 14.
4. Id. § 22, Comment e.
5. Id. § 2, Comment g.
6. Restatement (Second) §§ 481, 482 (1977) (hereafter "Restatement (Second)").
10. Restatement (Second) § 46 & Comment i (1965).
13. Restatement (Third) § 12.
14. Id. § 12, Comment b.
17. Id. § 14, Illustration 1. Kansas would reach the same result under the "apples and oranges" rationale.
18. Id. § 14, illustration 3.
22. Id. § 16.
23. Id. §§ B18-B19.
24. Id. § B19.
25. Id. §§ C18-C21.
26. Id. § C19, Comment f.
27. Id. § C20(a).
28. Id. § C20(b).
29. Id. §§ D18-D19.
30. Id. §§ E18-E19.
31. Id. § 16.