

# **PDI**

**Pennsylvania Defense Institute Position Paper**

**Joint and Several Reform**

## **Joint & Several Liability Reform**

### **(a) Overview**

Joint and several liability is a theory of recovery that permits the plaintiff to recover damages from multiple defendants collectively, or from each defendant individually. Joint and several liability controls how damages are to be paid where liability is apportioned among multiple defendants. Under joint and several liability if a plaintiff is awarded damages against two or more defendants each defendant is liable not only for its own share but for the entire amount of the damage Award. Thus, a 1% finding of liability may require that defendant to pay 100% of the judgment. Such a system encourages frivolous joinder of "deep pocket" defendants in civil litigation. Under this system, if only one defendant has the ability to pay, then that defendant must shoulder the burden of the entire verdict and seek contribution, which is often worthless, from the other defendants. Forty states have abolished or modified the rule of joint and several liability. In so doing, these states have abrogated joint liability. These reforms seek to implement fair recovery based on an assessment of fault. The following is an overview of the various state reforms.

### **(b) Reforms Barring Joint and Several Liability**

The following states have enacted legislation to bar joint and several liability. The asterisk denotes statutory exceptions:

Alaska  
Arizona  
California  
Colorado  
\*Connecticut<sup>1</sup>  
Florida  
Georgia  
Idaho  
Illinois  
Indiana  
Kansas  
Kentucky  
Louisiana  
Michigan  
Mississippi  
Nebraska

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<sup>1</sup> The Connecticut statute, Conn. Gen. Stat Ann. § 52-572h, bars application of the rule of joint and several liability in the recovery of all damages except where the liable party's share of the judgment is uncollectible.

Nevada  
New Mexico  
North Dakota  
\*Oregon<sup>2</sup>  
Rhode Island  
Tennessee  
Utah  
Vermont  
Virginia  
Washington  
Wyoming.

Thus, many jurisdictions have directly addressed the problem.

**(c) Reforms Imposing Threshold for Imposition of Joint and Several Liability**

The following states have enacted reform efforts which contain a threshold of liability which a defendant must meet prior to the imposition of joint and several liability.

<u>State</u>	<u>Threshold Level</u>
Iowa	50%
Missouri	51%
Montana	50%
New York	50% <sup>3</sup>
Ohio	50%
Oklahoma	50%
South Carolina	50%
South Dakota	50%
Texas	50%
Wisconsin	51%
Hawaii	25%
West Virginia	30%

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<sup>2</sup> Oregon statute Or. Rev. Stat § 18.485 bars application of the rule of joint and several liability and the recovery of all damages except where the defendant is determined to be insolvent within a year of the final judgment.

<sup>3</sup> No application to actions involving motor vehicle cases, toxic cases, intentional torts, contract cases and product liability cases

The remaining states have retained joint and several liability.

**(d) Pennsylvania System**

**(1) Generally**

The Pennsylvania Comparative Negligence Act, 42 Pa.C.S.A. § 7102 establishes a framework for the recovery of damages in civil litigation. Recovery is premised upon a determination of fault or responsibility. In this regard, in Pennsylvania, a civil litigant may recover damages provided his negligence is not greater than the negligence of the defendants. With respect to the liability of defendants, the Act mandates joint and several liability. Under the theory of joint and several liability, a plaintiff is allowed to recover damages from multiple defendants collectively or from each defendant individually. Presently, in lawsuits involving more than one defendant, each defendant found to be at least 1% negligent is responsible for the *entire* verdict. The application of joint and several liability results in an inequitable result; a minimally liable defendant, even a defendant determined to be 1% at fault, may be obligated to pay 100% of the verdict. These inequities impair how lawsuits are defended, tried and settled.

Presently Bills to eliminate joint and several liability are pending in both chambers of the General Assembly of Pennsylvania (House Bill No. 1 of 2011 and Senate Bill No. 2 of 2011 (“The Fair Share Act”). The Fair Share Act seeks to replace joint and several liability with proportional liability. Under the Fair Share Act , a plaintiff will be permitted to recover from a defendant the proportionate share of the verdict any judge or jury determined was the result of that defendant’s negligent conduct.. Nothing more; nothing less. In certain limited public policy based exception, the Fair Share Act retains joint and several liability<sup>4</sup> The Fair Share Act seeks to restore fairness. The Pennsylvania Defense Institute recommends the enactment of House Bill No. 1 of 2011 and Senate Bill No. 2 of 2011.

**(2) Current Statute**

**(i) Statutory Provisions**

The current Pennsylvania Comparative Negligence Act, 42 Pa.C.S.A. § 7102, permits the plaintiff to recover damages as long as the negligence of the plaintiff is not greater than the causal negligence of the defendant(s). In this regard, the Pennsylvania Comparative Negligence Act provides, in pertinent part:

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<sup>4</sup> As set forth, *infra.*, the Fair Share Act retains joint and several liability in where a defendant is determined to be at least 60% liable, claims arising from intentional conduct, and release of a hazardous substance or a dram shop action.

- (a) In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

42 Pa.C.S.A. § 7102 (a). Thus, Pennsylvania employs a 51% rule. If the plaintiff is 51% negligent, there is no recovery. The law recognizes that not every injury will be compensated.

In Pennsylvania, joint and several principles apply with respect to the payment of damages. Under the Comparative Negligence Act, each defendant found to be at least 1% negligent, is responsible for the entire verdict. Specifically, in litigation with multiple defendants, the plaintiff is entitled to recover the full amount of the award against any liable defendant regardless of the determination by the judge or jury of that defendant's fault or responsibility. Defendants who pay more than their proportionate share are entitled to contribution from the remaining liable defendants. In this regard, the Comparative Negligence Act, provides, in pertinent part:

- (b) Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

42 Pa.C.S.A. § 7102 (b). Thus, a defendant with minimal liability and sufficient assets may be named in a lawsuit in an attempt to essentially extort settlement proceeds under the 1% rule. The right of recovery against the co-defendant is often worthless. Nonetheless, the perceived "deep pocket" defendants must shoulder the burden of payment of full amount of the allowed recovery without respect to that defendant's level of fault. Additionally, by operation of the 1% rule, a minimally liable defendant may incur litigation costs or make a payment to settle the claim and

increased amount. The results of joint and several are inequitable.

**(ii) Application**

Under the theory of joint and several liability multiple defendants share apportioned liability both severally and jointly without respect to fault. Joint and several liability, without respect to fault, results in inequities.

**Scenario 1:** Claim arising from a two vehicle motor vehicle accident. Plaintiff sues Defendant A (driver of host vehicle) and Defendant B (other driver). Jury finds Defendant A 75% and Defendant B 25% negligent.

**Joint and Several:** Defendant A and Defendant B would each be responsible for its share of the verdict (several liability). Thus, Defendant A would pay 75% of the verdict and Defendant B would pay 25% of the verdict.

However, if Defendant A is unable to pay its share of the verdict, Defendant B becomes responsible for the entire verdict (joint liability). This would be true even if Defendant B was determined to be 1% at fault for the accident. Under joint and several liability, Defendant B although determined to be 1% at fault could be responsible for 100% of the verdict.

Additionally, in light of the potential for joint liability, a Defendant who is only 1%, or perhaps 10% at fault, may be required to incur additional litigation costs or increased settlement costs to avoid on-going litigation. This is inequitable. Reform is needed.

**Fair Share Act:** Each defendant pays only his proportionate share of the verdict (several liability). Each defendant pays the portion of the verdict for which the individual defendant was determined by a judge or jury to be responsible. Defendant A pays 75 % and Defendant B pays 25%.

If Defendant A is unable to pay Defendant B, who

was determined to be 25% at fault would not be obligated to pay the entire verdict. However, in the event Defendant B is unable to pay, Defendant A, who was determined to be 75% at fault would be obligated to pay the entire verdict because he was assessed liability in excess of 60%.

**Scenario 2:**

Claim arising from two vehicle motor vehicle accident involving a passenger car and a delivery truck for a small business. Plaintiff sues Defendant A (driver of host vehicle) and Defendant B (delivery driver). Jury finds Defendant A 85% and Defendant B 15% negligent.

**Joint and Several:**

Defendant A and Defendant B would each be responsible for its share of the verdict (several liability). Thus, Defendant A would pay 85% of the verdict and Defendant B would pay 15% of the verdict.

However, if Defendant A is unable to pay its share of the verdict, Defendant B becomes responsible for the entire verdict (joint liability).

Additionally, in light of the potential for joint liability, a Defendant who is only 15%, may be required to incur additional litigation costs or increased settlement costs to avoid on-going litigation. This is inequitable. Reform is needed.

**Fair Share Act:**

Each defendant pays only his proportionate share of the verdict (several liability). Each defendant pays the portion of the verdict for which the individual defendant was determined by a judge or jury to be responsible. Defendant A pays 85 % and Defendant B pays 15%.

In this case, the if Defendant A is unable to pay Defendant B, who was determined to be 15% at fault would not be obligated to pay the entire verdict. However, in the event Defendant B is unable to pay, Defendant A, who was determined to be 75% at fault

would be obligated to pay the entire verdict because he was assessed liability in excess of 60%.

**Scenario 3:**

Claim arising from a slip and fall. Plaintiff sues Defendant A (commercial property owner), Defendant B (tenant) and Defendant C (contractor-snow removal). Jury finds the plaintiff to be 40% negligent and Defendants A,B and C to be 20% liable each.

**Joint and Several:**

Defendants A, B and C would each be responsible for its share of the verdict (several liability). Thus, Defendants, A, B, and C would pay 20% of the verdict each.

However, if any of the Defendants were unable to pay, the other Defendants would become responsible for the entire verdict (joint liability). Accordingly, any Defendant although determined to be 20% at fault could be responsible for 100% of the verdict.

Additionally, in light of the potential for joint liability, a Defendant who is only 20% at fault, may be required to incur additional litigation costs or increased settlement costs to avoid on-going litigation.

**Fair Share Act:**

Each Defendant pays only his proportionate share of the verdict (several liability). Each Defendant pays 20% of the verdict, the portion of the verdict for which the individual defendant was determined by a judge or jury to be responsible.

**(d) Pending Bills (House Bill No. 1 and Senate Bill No. 2)**

Bills to amend the Comparative Negligence Statute are pending within both chambers of the General Assembly of Pennsylvania, House Bill No. 1 of 2011 and Senate Bill No. 2 of 2011. Both Bills seek to eliminate the inequities of joint and several liability. Specifically, both Bills eliminate joint and several liabilities with certain limited exceptions. In this regard, both Bills provide:

- (b) Recovery against joint defendant; contribution—
- (1) Where recovery is allowed against more than one person including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons whom liability is apportioned under subsection (c)<sup>5</sup>.
  - (2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.
  - (3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:
    - (i) Intentional Misrepresentation;
    - (ii) Intentional Tort;
    - (iii) Where a defendant has been held liable for not less than 60% of the total liability apportioned to all parties;
    - (iv) a release or threatened release of a hazardous substance

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<sup>5</sup> Subsection (c) allows the trier of fact to determine the proportionate liability of any defendant or nonparty who has entered into a release with the plaintiff. On this, the statute states:

(c) Apportionment of responsibility among certain non-parties and effect. -- For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. A person whose liability may be determined pursuant to this section does not include an employer to the extent that the employer is granted immunity from liability or suit pursuant to the act of June 2, 1915 (P.L. 736, No. 338), know as the Workers' Compensation Act. An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose. Nothing in this section shall affect the admissibility or nonadmissibility of evidence regarding releases, settlements, offers to compromise or compromises as set forth in the Pennsylvania Rules of Evidence. Nothing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure.

under section 702 of the act of October 18, 1988(P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act;

- (v) a civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L. 90, No. 211) known as the Liquor Code.

The pending bills eliminate the unfair and impractical ramifications of joint and several liability. The pending bills provide for several liability except in certain limited circumstances, grounded in public policy. Joint liability, therefore, becomes the exception (where the circumstances warrant imposition of joint liability) instead of the rule. The pending bills seek to implement fair recovery based on fault. The Pennsylvania Defense Institute recommends passage of the pending bills.

**(e) Prior Reform Efforts**

Prior efforts to eliminate joint and several liability and replace it with proportional liability have been undertaken. In 2002, the Pennsylvania General Assembly passed and then Governor Schweiker signed into law SB 1089, the “Fair Share Act”. The Fair Share Act, much like HB 1 and SB 2, left in place the general framework of comparative negligence, but limited the applicability of joint and several liability. The Fair Share Act provided:

- (1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (b.2).
- (2) Except as set forth in paragraph (3), a defendant’s liability shall be several and not joint; and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

42 Pa.C.S.A. § 7102 (b.1)(1), (b.1)(2)(amended June 18, 2002). This statutory enactment sought to remedy the inequities arising from

requiring a minimally liable defendant with "deep pockets" from shouldering the responsibility of the full award.

Undaunted by its overwhelming passage of both the Senate and the House<sup>6</sup>, a legal challenge to the passage was mounted. In this regard, the prior amendments to the joint and several liability were inappropriately added to a bill on an unrelated subject matter (DNA testing). Article III, Section 3 of the Pennsylvania Constitution requires, in pertinent part:

“no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.

Ultimately, the law was declared unconstitutional in that it violated the single subject rule in DeWeese v. Weaver 880 A.2d 54 (2005).

Subsequently, in 2006, the General Assembly again addressed the repeal of joint and several liability. Once again legislation eliminating joint and several liability was passed by the General Assembly. The legislation was, however, vetoed by then Governor Rendell.

**(f) New Jersey System**

The abrogation of pure joint liability in the Commonwealth of Pennsylvania would be consistent with the statutory provisions of the majority of the United States. In this regard, forty states have abolished or modified the rule of joint and several liability. New Jersey has enacted substantially similar legislation. In this regard, N.J.S.A. 2A:15-5.3 provides in pertinent part:

Recovery of damages based on party's responsibility; exception for environmental torts; definitions.

Except as provided in subsection d. of this section, the party so recovering may recover as follows:

- a. The full amount of damages from any party determined by the trier of fact to be 60% or more responsible for total damages.

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<sup>6</sup> In 2002, the Fair Share Act "Fair Share Act," SB 1089, passed the Senate 40-9 and the House 153-43

- b. (Deleted by amendment, P.L. 1995, c. 140.)
- c. Only that percentage of damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60% responsible for the total damages.

2A:15-5.3. The New Jersey statute implements a fault based recovery system. Similar legislation should be enacted in Pennsylvania to remedy the inequities of joint and several liability. Such reform would level the playing field.

**(g) Recommendation**

The current Pennsylvania system of joint and several liability is out of step with the majority of jurisdictions in Pennsylvania. The "1% Rule" of the current Pennsylvania system promotes frivolous claims and encourages spurious litigation. It is neither consumer friendly nor business oriented. The current system merely results in unnecessary claims and litigation, thereby discouraging business initiatives in the Commonwealth while increasing insurance costs for the consumer. Reform of the current system is necessary.