



WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

Fairly Allotting Liability Among Defendants

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I. What is Joint and Several Liability?

Black's Law Dictionary defines "joint and several liability" as:

Liability that may be apportioned either among two or more parties or only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.

II. Different Types of Joint and Several Liability Laws

States have varying forms of joint and several liability laws. Such laws fall roughly within three different categories: joint and several liability, modified joint and several liability, and several liability.

A. Pure Joint and Several Liability

Joint and several liability holds that each defendant in a suit is responsible for the entire amount of damages being pursued by the plaintiff, regardless of the individual share of damages actually caused by each defendant. Under joint and several liability laws, a defendant as little as 1% at fault can be held responsible for 100% of the damages if the other defendants are judgment proof.

For example, three co-defendants (A, B, and C) are involved in a car accident. Assume the plaintiff is zero percent at fault, and Defendant A is 60% at fault, Defendant B 35% at fault, and Defendant C 5% at fault. Defendant C (5%) could be required to pay 100% of the damages if the other two co-defendants are insolvent.

B. Modified Joint and Several Liability

Many states have "**modified**" joint and several liability laws, where a co-defendant could be fully liable for all damages if he or she is a certain percentage at fault. For example, under Wisconsin's "modified" joint and several liability law, a co-defendant can only be liable for 100% of the damages if he or she is 51% or more at fault. Any co-defendant less than 51% is only responsible for his or her proportionate share of fault.

C. Several (or Proportionate) Liability

Last, in states that have *several (or proportionate) liability* laws co-defendants are liable for their proportionate share of fault. Thus, if a co-defendant is 70% at fault he or she is responsible for 70% of the damages. The same occurs if the co-defendant is only 1% at fault – he or she is only responsible for 1% of the damages.

III. Other Related Liability Terms:

Acting in Concert: If an individual intentionally aids or encourages another to commit a tort, that person is equally as liable as the person that committed the actual tort.

Vicarious Liability: Vicarious liability automatically imposes responsibility on a party due to their relationship with the tortfeasor. The most common example occurs when employers are held responsible for the actions of their employees within the scope of their employment.

IV. What is the Practical Effect of Pure Joint and Several Liability Laws?

As noted above, states with so-called **pure joint and several liability** laws permit a plaintiff to sue and recover 100% of damages from a co-defendant who is as little as 1% percent at fault. If the other co-defendants are judgment proof (typically insolvent), the lone co-defendant who is minimally at fault is responsible for all of the damages.

This provides an incentive for plaintiffs' lawyers to sue "deep pockets," such as corporations and businesses. Instead of going through a lengthy and expensive trial, most defendants settle the case out fear of being responsible for all of the damages. This can lead to a co-defendant as little as 1% at fault having to pay for the majority of the damages in the case or forcing the co-defendant to settle for significant amounts of money even though they are minimally at fault.

V. History of Liability Apportionment in Wisconsin

Many states have moved away from the harsh pure joint and several liability law and enacted statutes adopting either modified joint and several liability or several (or proportionate) liability. This section provides a brief history of Wisconsin's law as an example of how states typically have moved away from the harsh consequences produced by pure joint and several liability. Because laws vary from state to state, this section is for illustrative purposes only.

A. Common Law

Joint and several liability was part of Wisconsin's early common law. The common law rule in Wisconsin provided that any contributory negligence of a plaintiff was a complete bar to recovery.¹ This meant that if the plaintiff's actions contributed to the accident, even if just one percent, the plaintiff could not recover any of his or her damages from the other tortfeasor(s).

Also at common law, joint and several liability was the rule. Therefore, when multiple tortfeasors caused injury to a plaintiff who was not contributorily negligent, the plaintiff could recover his or her entire damages from any tortfeasor.²

B. Statutory Comparative Negligence

In 1931, the legislature established statutory comparative negligence.³ This new law allowed a plaintiff who was contributorily negligent to recover damages if his or her negligence was *less*

¹ *Brewster v. Ludtke*, 211 Wis. 344, 346, 247 N.W. 449 (1933).

² *Group Health Coop. of Eau Claire v. Hartland Cicero Mut. Ins. Co.*, 164 Wis. 2d 632, 634-35, 476 N.W.2d 302 (Ct. App. 1991).

³ Wis. Stat. § 331.045 (1931); ch. 242, Laws of 1931.

than the negligence of the person from whom recovery was sought. The new law did not affect the common law of joint and several liability.

Therefore, in suits involving multiple tortfeasors, a comparison of the negligence of the plaintiff with that of any tortfeasor was made and the full amount of damages could be recovered from any tortfeasor who was more negligent than the plaintiff, even though a second tortfeasor may have been more negligent than the tortfeasor from whom recovery was sought.⁴

In 1971, the Legislature once again amended the law. The new law still allowed a plaintiff who was less negligent than the tortfeasor to recover damages; however, the plaintiff's damages were to be reduced by the amount of the plaintiff's negligence.⁵ This was the law until 1995.

C. Statutory Modified Joint and Several Liability

In 1995, the Wisconsin Legislature amended the comparative negligence statute and significantly changed the law of joint and several liability.⁶

The new law provides that only when a tortfeasor is at least 51 percent causally negligent will the tortfeasor be jointly and severally liable for all damages attributed to all tortfeasors. If the tortfeasor's fault is less than 51 percent, he or she is only liable for his or her proportionate share of fault. Thus, in many cases involving multiple tortfeasors and a contributorily negligent plaintiff, there no longer is joint and several liability. This remains the law today in Wisconsin.

VI. Example of Joint and Several Liability Case in Wisconsin (pre-1995 law)

To illustrate how lop-sided the joint and several liability law was in Wisconsin prior to the 1995 Act adopting modified joint and several liability, below is a discussion of an actual case in Wisconsin. The case highlights how easy it was for plaintiffs' attorneys to use the system to sue "deep pockets" and extract money from those parties who were minimally at fault.

Thomas Bus Company Case

In 1991, a driver carrying his wife and family struck a school bus in an intersection after failing to notice rumble strips in the pavement and a stop sign. The school bus had the right of way and was lawfully in the intersection. One of the passengers in the car (the driver's wife) was severally injured in the accident.

The driver of the car was insured for \$100,000, which his insurance company paid. However, beyond the insurance policy the driver had few if any assets. The passenger's attorneys sued the bus company and its insurer for roughly \$11 million, even though the bus driver's negligence was minimal.

During negotiations, the plaintiff's attorney warned the bus company that a jury verdict could well exceed the \$2 million insurance coverage. The plaintiff's attorney boasted in a newspaper article after the case was settled that all he had to do was convince the jury that the bus driver was 1% at fault and that the bus company would be 100% responsible for the damages. Because Wisconsin had a pure joint and several liability statute at the time, the bus company and its insurer settled the case for \$1.9 million. This is a classic example of legal extortion.

⁴ *Richards v. Badger Mutual Ins. Co.*, 309 Wis. 2d 541, 555, 749 N.W.2d 581 (2008).

⁵ Wis. Stat. § 895.045 (1971); ch. 47, Laws of 1971.

⁶ Wis. Stat. § 895.045; 1995 Wis. Act 17.

VII. Arguments in Favor of Proportionate Liability (or Modified Joint and Several Liability) Laws

A. Proportionate Liability (or Modified Joint and Several Liability) is Fair

Plaintiffs' attorneys argue that moving away from pure joint and several liability is unfair to victims. To counter this argument, it should be noted that the rule of joint and several liability is itself unfair and irrational because it fails to equitably distribute liability. The plaintiffs' bar claims that joint and several liability protects their clients by ensuring that they're fully compensated. However, this fails to address the extreme hardship imposed by the rule and the fact that it often creates a second class of victims – those forced to pay damages well beyond their proportionate share of fault.

In short, proportionate liability is fair because it requires the tortfeasor to pay the amount of damages that person contributed to the plaintiff's injuries.

B. Proportionate Liability Laws Help a State's Business Climate

In many states, the political momentum has shifted and pro-civil liability reforms are being passed throughout the country. If states have not done already, the time is ripe to amend their joint and several liability laws.

Implementing a fair system, such as modified joint and several liability or proportionate liability, will enhance a state's business climate. Businesses deciding whether to relocate or expand operations will look to the particular state's litigation climate before deciding to invest capital and locate to that state. A 2008 study by the Institute for Legal Reform found that 67 percent of business respondents said that the litigation environment in a state is likely to impact important business decisions at their company, such as where to locate or do business.

As demonstrated above, the purpose of joint and several liability is for plaintiffs' attorneys to sue "deep pockets" in cases where such defendants are minimally at fault. Aside from being unfair, such laws will have a negative impact on a state's economy.

Making it easier for plaintiffs' attorneys to sue businesses hurts a state's business climate. One of the best ways to prevent plaintiffs' attorneys from going after "deep pockets" that are minimally at fault is to amend a state's joint and several liability law.

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