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MULTIPLE CAUSES AND APPORTIONMENT OF DAMAGES

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Judge Doyle discusses and analyzes the problems arising when several persons' individual conduct, which is neither concerted nor coincidental in time, causes indivisible harm to another. The courts' refusal to hold the defendants jointly responsible is considered to be unsatisfactory, and the American Law Institute's proposed solution is considered in some detail. Judge Doyle approvingly discusses the ALI's apportionment of liability by shifting the burden of proof to the defendant and concludes that "experience has shown that the probabilities favor a just result where joint liability is imposed."

"Ignorance of history sometimes builds up a rule of thumb, which when applied by mere logic, does cruel wrong."[1]

IN THE above statement Professor Wigmore was referring to that rule of law which held defendants liable jointly who acted contemporaneously or in concert to produce an indivisible harm. He went on to point out that in such circumstances the law wisely held each of the wrongdoers liable for the entire harm inflicted. But as "joint" is interpreted to mean concert of action, the case of the indivisible harm resulting from conduct of several persons which do not coincide time-wise or which is not concerted was, anomalously, outside the rule. Wigmore insisted that the reason for joint liability existed and had existed historically regardless of whether there was true concert of action. His prime example of "cruel wrong" was the case of *Farley v. Crystal Coal & Coke Co.*,[2] wherein six coal mining companies ruined the plaintiff's farm by contributing to the pollution of a stream which ran adjacent to the farm. The West Virginia court refused to hold the defendants jointly responsible.

Both before and after the Wigmore note there has been widespread concern about the seemingly simple but actually complex problem of concurrent factual causes and joint liability, particularly when it arose in the *Farley* type of pollution cases. Little has been done to remedy the difficulty, however. The present discussion considers the recent valiant effort by the American Law Institute to prescribe a fair approach and solution to such non-concert of action

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[1] Wigmore, *Jointfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress*, 17 ILL. L. REV. 458 (1923).

[2] 85 W. Va. 595, 102 S.E. 265 (1920).

cases. Two companion sections[3] have been added in its new publication, *The Restatement of the Law of Torts, Second.* These sections are called to the attention of the bar primarily in respect to the pollution problem because this is the extreme and exaggerated application of the old rule. These sections also apply, however, to every kind of case in which several persons contribute to an injury. The guidelines there outlined are applicable regardless of whether the causes are concurrent in time or whether there is concert of action in the real sense.

The typical difficult case is that of the riparian farmer or rancher whose land or cattle suffer injury from upstream pollution resulting from independent acts on the part of several industries. Must he pursue each of the alleged violators individually? If he has suffered a single cumulative injury he faces difficult and sometimes impossible problems of proof. Ordinarily the injury is, as a practical matter, indivisible in that the contribution of any single one of the miscreants can not readily be identified and isolated. The damage problem is similarly complex. Indeed, it may result that no single one of the offenders has been a substantial factor in the production of the harm suffered. It is likely that the plaintiff will be unable to generate proof, even in terms of rough percentages, of the extent of each defendant's contribution. Thus, after expensive discovery and litigation, the hapless farmer may well discover that he has no cognizable claim. These complexities and difficulties have often led lawyers and litigants to abandon the action at the outset. The result is that the downstream owner is placed in the position of bearing the cost of acts of pollution for which he is not in the least responsible. The injustice of this result has been noted from time to time in the literature.[4]

This particular cause problem is described by Prosser[5] as one of apportionment of damages. The basic assumption is that the defendant's conduct has been the cause of some damage suffered by the plaintiff. Prosser further states that it is not primarily a question of causation but rather one of the feasibility and convenience of splitting up the total harm into separate parts attributable to two or more causes. The learned author concludes that where there is some feasible basis for an apportionment it should be made but if not, the practical course is to hold the defendant liable for the entire loss.

To describe this problem as merely a question of apportion-

[3] RESTATEMENT (SECOND), TORTS 433A-B (1965).

[4] Jackson, *Joint Torts and Several Liability,* 17 TEXAS L. REV. 399 (1939); Prosser, *Joint Torts and Several Liability,* 25 CALIF. L. REV. 413 (1937); Wigmore, *supra* note 1.

[5] PROSSER, TORTS 247 (3d ed. 1964).

ment of damages seems at first to be oversimplification. Courts typically consider it a problem of adequacy of evidence to prove injury and to establish a factual link in the chain of causation, and frequently tend to ask whether the causes are concurrent, concerted or independent. Courts also on occasion stumble over a procedural obstacle, that of misjoinder. The *Restatement* sections eliminate most of these questions and follow the Prosser analysis.

Considering the complexity often involved, it is not surprising that the trend of decisions has been to refuse to hold a defendant liable on a joint basis where the plaintiff has been unable to show the extent of the individual defendant's impact. Thus, where the plaintiff has not been able to adduce proof of the amount of damages attributable to each defendant he has lost his case.

I. RESTATEMENT VIEWPOINT

The injustice of this result led the American Law Institute to adopt companion sections 433A and 433B.[6]

Section 433A concerns itself with the case in which the injuries are distinct and the damages can be apportioned. It provides:

> §433A. Apportionment of Harm to Causes
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> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
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> (2) Damages for any other harm cannot be apportioned among two or more causes.[7]

Comment *a* to this section emphasizes that it applies whenever two or more causes have combined to bring about harm to the plaintiff and each has been a substantial factor in producing the harm. Undoubtedly, the section contemplates that the conduct of each participant has an independent origin, for it notes that it is immaterial whether or not all of the participants are joined. The section has in mind successive injuries, distinct harms, divisible harm, and innocent causes associated with tortious ones.

The comment on subsection (2) calls attention to the fact that certain harms are by their nature incapable of any logical, reasonable, or practical division. "Death is that kind of harm, since it is impossible, except upon a purely arbitrary basis for the purpose of accomplishing the result, to say that one man has caused half of it and another the rest."[8] This comment continues:

> Where two or more causes combine to produce such a single result,

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[6] RESTATEMENT (SECOND), TORTS (1965).

[7] RESTATEMENT (SECOND), TORTS § 433A (1965).

[8] *Id.* § 433A, comment i at 439.

> incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm. The typical case is that of two negligently driven vehicles which collide and kill a bystander. The two drivers have not acted in concert, and the duties which they owe are separate and distinct, and may not be identical in character or scope; but the entire liability of each rests upon the obvious fact that each has caused the single result, and that no rational basis for division can be found.[9]

Thus there is a recognition of the view accepted by the cases where a combination of causes produces harm. The comment points out that the section is not limited to simultaneous causes — that it also applies where one defendant has produced a condition and a subsequent defendant acts later to cause the harm.

The device which has been adopted to solve the problem under consideration, that is, apportionment of cause and damage in the multiple cause case, is ingenious. It uses a method which has become increasingly popular — the shifting of the burden of proof. Section 433B, here the center of interest, recognizes that in the ordinary case "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff."[10] It goes on to point out the exceptional cases in subsections (2) and (3). Subsection (2) provides:

> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.[11]

A similar technique is prescribed in subsection (3) for solving the case of two or more persons who acted and the conduct of only one has caused the harm to the plaintiff but it is not possible to ascertain with certainty which one is responsible. Like subsection (2) it declares that "the burden is upon each such actor to prove that he has not caused the harm."[12] The familiar example of this is the case in which two hunters shoot at the same time in the direction of the plaintiff who is struck by a single shot which could have come from either gun. The shooters can be sued jointly and in the action each has the burden of proving that the shot did not come from his gun. If he fails to do so he is subject to liability. Conceivably, both defendants could fail to bring forward necessary proof; this would render both of them liable.[13]

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[9] *Id.* at 440.

[10] *Id.* § 433B(1), at 441.

[11] *Ibid.*

[12] *Id.* at 442.

[13] Reyher v. Mayne, 90 Colo. 586, 10 P.2d 1109 (1932).

It is subsection (2) which introduces the new and revolutionary approach which is most interesting. According to the comment it applies where there are distinct independent harms capable of apportionment. It contemplates, however, the ultimate presentation of evidence to establish the extent of the contribution of each. In such a case the obscurity must be cleared away by the *defendant*, the party who is in the best position to know the extent of his impact. The rationale of the subsection is succinctly set forth in the comment:

> d. The reason for the exceptional rule placing the burden of proof as to apportionment upon the defendant or defendants is the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned. In such a case the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing the full responsibility. As between the proved tort feasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.[14]

II. PRIOR CASE HISTORY

The somewhat drastic nature of the proposed change is apparent from a study of some of the early cases which expound the rule of nonliability. A good example of this orthodox majority rule is *Farley v. Crystal Coal & Coke Co.*[15] *Farley* overruled an earlier decision of the West Virginia court, that of *Day v. Louisville Coal & Coke Co.*[16] *Day* had held several stream polluters jointly and severally liable on the simple basis that there was direct causation. In *Farley* the action was against six coal mining corporations located along tributaries of the Bluestone River. Plaintiff complained that the several companies had caused damage to his farm. Although he recovered in the trial court, this judgment was reversed on appeal, the court saying: "There is no allegation that the defendants acted in concert, collusion, or in pursuit of a common design in the performance of the acts which are alleged to have injured and defiled the stream and damaged plaintiff's land."[17] The court further held that the principle of concurrent causation could not be applied in pollution cases because of the consequential nature of the injury and, therefore, the remoteness of the result. It said: "The injury to the plaintiff is consequential only, or remotely resulting, as con-

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[14] RESTATEMENT (SECOND), TORTS at § 433B at 444 (1965).

[15] 85 W. Va. 595, 102 S.E. 265 (1920).

[16] 60 W. Va. 27, 53 S.E. 776 (1906).

[17] Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 597, 102 S.E. 265, 266 (1920).

tradistinguished from direct and immediate."[18] The court did not fail to recognize the obvious fact that "viewed from a merely practical standpoint, this distinction may not be important;"[19] that the injury is equally serious regardless of whether the impact is direct or consequential or results from joint, coincident, or contemporaneous action of the wrongdoers. Apparently, however, the court felt it was helpless to grant relief. The underlying basis for the court's decision is found in the policy statement which declares:

> In this state the development of natural resources and location of mills and factories along its numerous streams has only fairly commenced; wherefore it is highly important that the rights of riparian owners and persons conducting diverse kinds of business along the water courses and their remedies for wrongful acts respecting them and the adjacent lands be correctly defined.[20]

The opinion notes that the overwhelming weight of authorities stands against the court's former opinion in *Day,* holding, as it does, that several defendants may be joined in one action under circumstances such as those presented in the case and that liability may be imposed upon one of several individuals for the entire damage.

Thus, the West Virginia court was concerned with a number of problems, including the propriety of joinder, concurrent action, and joint liability in a case in which each of the defendants had acted independently. The court was also apprehensive about whether each of the defendants had inflicted a substantial injury on plaintiff whereby there was a cognizable harm inflicted. Thus *Farley* is a classic example of the orthodox viewpoint. Although it unquestionably had and continues to have the support of the vast majority of decided cases,[21] the injustice of the result was recognized even at the time.[22]

Since 1920 a few states have refused to follow the majority rule and have reached the contrary result by simply concluding that there was concurrent causation.[23] However, one decision stands out as a fully reasoned opinion and a leading case for the minority view. It is the decision of the Supreme Court of Texas in *Landers v. East Texas Salt Water Disposal Co.*[24] Two separate companies per-

[18] *Id.* at 598, 102 S.E. at 267.

[19] *Id.* at 600, 102 S.E. at 267.

[20] *Id.* at 602, 102 S.E. at 268.

[21] Annot., 91 A.L.R. 759 (1934); Annot., 35 A.L.R. 409 (1925); Annot., 9 A.L.R. 939 (1920).

[22] 18 MICH. L. REV. 708 (1920); 29 YALE L.J. 935 (1920).

[23] See McDaniel v. City of Cherryvale, 91 Kan. 40, 136 Pac. 899 (1913); Prairie Oil & Gas Co. v. Laskey, 173 Okla. 48, 46 P.2d 484 (1935); Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P.2d 389 (1931).

[24] 151 Tex. 251, 248 S.W.2d 731 (1952).

mitted their pipelines to break at about the same time, resulting in the escape of salt water and oil into the plaintiff's lake which killed his fish and polluted the water. The court held the defendants liable on a joint and several basis, adopting the rule that

> "Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages * * *."[25]

The court explained the reason for the holding as being the impossibility of plaintiff's satisfying the burden of proving the portion of injury attributable to each defendant. Several earlier Texas decisions are cited to illustrate the difficulties which the plaintiff faces in proving liability. These, of course, were overruled by *Landers*.

In this 1952 decision, the opinion of the Texas court, by Mr. Justice Calvert, noted the existence of criticism of the rule refusing to recognize joint liability where the torts have had independent origin but have produced a single injury to the land of another:

> Much has been written on the need for re-examination of the rule approved in the Robicheaux case. See Wigmore in 17 Illinois Law Review 458; 27 Columbia Law Review 754; Gendel in 19 California Law Review 630; Prosser in 25 California Law Review 413; Jackson in 17 Texas Law Review 399; Robinson in 27 Texas Law Review 732. Thus far, however, but little has been achieved toward inducing the courts to re-examine the rule. Wigmore has suggested that the rule of joint and several liability in the field of torts had its inception in the need of the law, bent on justice, to relieve a plaintiff of the intolerable burden of proving what share each of two or more wrongdoers contributed to the plaintiff's injuries, and that the burden is just as intolerable and the need for relief therefrom is just as great when the independent tortious acts of multiple defendants contribute to a plaintiff's indivisible injuries as when the acts are done in concert and of common design. Jackson in 17 Illinois Law Review 459.[26]

The most significant comments leading to the adoption of the *Restatement* sections are those of Wigmore which have been referred to above and which influenced the decision of the Texas court. In commenting on *Farley* and other similar cases, Wigmore said:

> Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meanness of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law. It does not take much reflection to see the reason of the original rule, i.e., making each joint tortfeasor liable for the whole of the harm done, and to perceive that the reason of that rule carries beyond the narrow limits of its orthodox application. The rule should be: *Wherever*

[25] *Id.* at 256, 248 S.W.2d at 734.

[26] *Id.* at 255, 248 S.W.2d at 733.

> *two or more persons by culpable acts,* whether concerted or not, *cause a single general harm, not obviously assignable in parts to the respective wrongdoers,* the *injured party may recover from each for the whole.* In short, wherever there is any doubt at all as to how much each caused, take the burden of proof off the innocent sufferer; make any one of them pay him for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each.[27]

Wigmore made this final observation: "This all goes to show that a rule of law applied without regard to its reason may become a rule of injustice."[28]

In view of Wigmore's recommendation that in cases of doubt as to how much injury each defendant caused, the emphasis should be in the area of burden of proof — that the burden should be taken off of the innocent sufferer — it would appear that Wigmore's arguments were at long last vindicated by the adoption of section 433B (2), the burden of proof approach.

One other case, illustrative of the minority or joint liability doctrine, is *Phillips Petroleum Co. v. Hardee.*[29] This was an action brought by certain farmers against four oil companies for damages sustained from pollution. At the trial the defendants obtained a verdict based on their theory that they could be held liable only if the evidence established that a particular defendant had independently produced the plaintiffs' injuries. Plaintiffs had asked the trial judge to instruct the jury to render a verdict in their favor if it appeared that the defendants had jointly produced the injuries complained of. The Court of Appeals for the Fifth Circuit, applying the law of Louisiana, concluded that there was joint liability. It remanded the case stating:

> If, therefore, on a new trail, plaintiffs can adduce evidence sufficient to show that the defendants, or any of them, were negligent and, though acting separately, their negligence combined to produce the pollution damage, plaintiffs may recover for the whole damage against one or all of those contributing. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings.[30]

In the course of the opinion the court of appeals mentioned the requirement that the conduct of each wrongdoer must appear to have been a substantial factor in producing the harm to the plaintiff.

III. The Law in Colorado

Although the law in Colorado in pollution cases is somewhat obscure, there has been a tendency at least toward the rule of joint

[27] Wigmore, *supra* note 1, at 459.
[28] *Id.* at 460.
[29] 189 F.2d 205 (5th Cir. 1951).
[30] *Id.* at 212.

liability. In *Larimer & Weld Irr. Co. v. Walker*,[31] a flooding case, joint liability was recognized. Two water companies, each with knowledge of the other's act, conveyed water down a natural stream (dry creek) on the same day. The volume was such that it raised the stream of the channel above its capacity, resulting in an overflow which damaged plaintiff's property. The court noted that the testimony established that the defendant companies were operating together, and thus the acts of the one were in effect the acts of the other. On the matter of joint liability it was said:

> A further contention is that the evidence fails to establish a joint tort. In order to render parties jointly liable for tort it must clearly appear that the wrong complained of flowed from their joint action or non-action. Mead v. Zang Brewing Co., 43 Colo. 1, 95 Pac. 284. To make them jointly liable the injury must be the result of concerted action. Stratton's Independence v. Sterrett, 51 Colo. 26, 117 Pac. 351. In 36 Cyc. 483, the principle is thus stated:
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> 'Where different persons owe the same duty and their acts naturally tend to the same breach of their duty, the wrong may be regarded as joint and both may be held liable.'
>
> In this case the injury complained of was plainly the result of the joint acts of the defendants in attempting to convey an excessive amount of water through Dry Creek. The commingling of their respective allowances of water in the stream produced the injury, and under the rule announced they are each liable for the damage done, and are therefore jointly liable. The case was tried upon a correct theory and the instructions given properly stated the law governing the issues involved.[32]

The emphasis is on actual concert of action as between these defendants. Hence Colorado cannot be classified as a joint liability jurisdiction.

Wilmore v. Chain O'Mines, Inc. [33] is a pollution case which declares that defendants operating independently, each contributing to the pollution of the stream, are responsible individually for the entire damage. The court said that one introducing extraneous matter into a stream is under a duty to prevent damage as the result thereof either from his act alone or his act in conjunction with acts of others. This, however, was an injunction suit; the courts in this type of case have been less restrictive about the cause factor.

One other interesting Colorado case is that of *Reyher v. Mayne*.[34] Here two defendants were engaged in hunting. One of them shot the plaintiff. The trial court entered judgment against both the shooter and his companion. The Colorado Supreme Court held that this judgment was not in error, in that the defendants were acting in

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[31] 65 Colo. 320, 176 Pac. 282 (1918).

[32] *Id.* at 323, 176 Pac. at 283-84.

[33] 96 Colo. 319, 44 P.2d 1024 (1934).

[34] 90 Colo. 586, 10 P.2d 1109 (1932).

concert. Both were violating the law in that they were trespassers. The court described the action of the two defendants as "a thing integral and indivisible. Each defendant here is properly answerable for the sum or aggregate of the damage inflicted by both wrongdoers."[35]

The decision in *Ryan Gulch Reservoir Co. v. Swartz*,[36] contains some consolation as well as some argument material for those advocating the individual liability principle. In that case the Colorado Supreme Court held that there was an improper joinder of parties inasmuch as the several sources of the flooding were independent. It made the following comments:

> The difficulty that the plaintiff must necessarily encounter, if he brings a separate action against either defendant, in showing what its contribution was to the single injury, is no reason why this court in a joint action against them, where the evidence does not show a joint liability, should hold either defendant liable for the entire injury to which he is only one separate contributor, nor is it any reason why we should permit a joint action to be maintained against both when there was no concurrence, either in time or place, of their distinct and separate acts.[37]

Joinder is, of course, no longer a problem but the substantive questions remain. Perhaps the question is now an open one in Colorado.

The reader might conclude from what has been said that sections 433A and B are plaintiff principles. It is suggested that they strike a middle ground between the old rule of individual non-liability and that of strict joint liability exemplified by *Landers* and *Phillips Petroleum Co.* For example, it is open under the *Restatement* view to the defendant to whom the burden of proof has shifted to show nonliability by establishing that his part in the injury or damage to the plaintiff was legally insubstantial or insignificant. It should be borne in mind that this section does not, directly at least, seek to change the substantive law; it is limited to a shifting of the burden of proof and thus requires the defendants to prove their innocence or to establish the extent of their respective contributions to the indivisible result. This may prove in practice to be a difficult burden. Again, however, it must be emphasized that in general these are cases in which the defendants have acted independently and in which the impact brought about by each defendant is presumably susceptible to apportionment. The philosophy of section 433B(2) is that there is a probability of fault inferable from the happening similar to that in *res ipsa loquitur* cases. The several defendants are

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[35] *Id.* at 590, 10 P.2d at 1110.

[36] 77 Colo. 60, 234 Pac. 1059 (1925).

[37] *Id.* at 69, 234 Pac. 1062.

deemed to be in a superior position to produce evidence as to actual contribution or participation.

One possible result of this rule is that in practice it could, with the modern attitude toward expert witnesses, transform a wide variety of cases which are now regarded as joint tortfeasor in character into individual liability cases. Defendants could conceivably put this procedure to work for them.

One final observation: It should be kept in mind that the entire concept of joint liability is and has been a fiction which has come to us under the guise of concert of action. It was derived from intentional tort cases. Obviously there is no true concert of action in a case in which two automobiles coming from different directions negligently collide with the car of the plaintiffs. The culprits are held jointly liable notwithstanding that they were not in a conspiracy. The result is an expedient one; the plaintiff cannot prove the contribution of each defendant and is relieved from the burden in the interests of achieving a just result. We take this type of case for granted.

Sections 433A and B would open the door to a holding of joint or several liability in the other multiple cause-indivisible injury cases, thus extending what might be called a fiction on a consistent basis. It eliminates the old, meaningless catch phrases such as concurrent causes and recognizes that joint liability in all of the non-intentional tort cases is not a matter of concert of action or joint enterprise but is a question of whether damages can be feasibly and conveniently apportioned. Experience has shown that the probabilities favor a just result where joint liability is imposed. It thus appears hypocritical to draw the line in the hard case and to rationalize the unjust result by these catch phrase tests. Professor Wigmore must have had this in mind when he said that "ignorance of history * * * does cruel wrong."