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Pro Rata Tort Contribution Is

Outdated In Our Era

of Comparative Negligence

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This article addresses the apportionment of liability among tortfeasors under the Massachusetts Contribution Statute and concludes that Massachusetts' rule of pro rata contribution is inequitable and out of step with current Massachusetts tort law.

Contribution is the right of one joint tortfeasor to collect payment from another tortfeasor where the first tortfeasor paid more than his share of the joint liability. In Massachusetts, such contribution is made on a pro rata basis without regard to the comparative fault of the tortfeasors. If there are two joint tortfeasors, each must contribute half the liability, and if there are three joint tortfeasors, each pays one-third without regard to their relative degrees of fault. Pro rata contribution should be replaced with comparative fault contribution whereby each tortfeasor contributes an amount proportional to his relative degree of fault. Making this change in the law will remedy the arbitrariness of pro rata contribution and can be done without altering the balance in Massachusetts tort law between the interests of plaintiffs and defendants, without affecting joint and several liability, and indeed without cost to any interest or principle in the law.

CONCEPT OF JOINT TORTFEASORS

Before exploring the Massachusetts regime on contribution, it is useful to address briefly the principle of joint liability, as only with joint liability is there a need for contribution. Joint liability arises when two or more actors each negligently cause or contribute to a single indivisible injury. *Feneff v. Boston & Maine R.R.*, 196 Mass. 575, 581 (1907). In such case, each tortfeasor is held to have caused plaintiff's injury and each is liable for the entire resulting damage. In such case, a plaintiff may collect the entire amount of her injury from either tortfeasor (although plaintiff cannot obtain double compensation). Thus, a first person who negligently spills gasoline and a second person who negligently drops a lit match thereon might each be charged with having caused the ensuing fire and each would be jointly liable for the entire damage; plaintiff could recover in full from either. Contribution is the right of the one joint tortfeasor who pays the entire damage award to seek recovery of part of that amount from the other joint tortfeasor.

CONTRIBUTION BEFORE 1962

In Massachusetts, prior to 1962, there was no right to contribution among tortfeasors. An aggrieved plaintiff who had been injured by one or more tortfeasors could sue and collect from any tortfeasor. A tortfeasor who paid an entire liability could not seek partial payment or contribution from another tortfeasor who escaped payment either by not having been named in the suit by plaintiff or because plaintiff chose to execute the judgment against the first tortfeasor and not against him. As the Supreme Judicial Court explained upholding the no-contribution rule, "[t]here can be no contribution enforced in the courts between joint wrongdoers in the ordinary case. Each is left by the law where his wrongful act leaves him." *Geo. W. Gale Lumber v. Bush*, 227 Mass. 203, 205 (1917).

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ADOPTION OF THE CONTRIBUTION STATUTE

In 1962, the Massachusetts Legislature abolished the no-contribution rule and adopted as Massachusetts law the Uniform Contribution Among Tortfeasors Act ("Uniform Contribution Act"). The Uniform Contribution Act was originally promulgated in 1939, revised in 1955, and approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association the same year. The notes to the Uniform Contribution Act explain the Act's purpose is to "distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law." Prefatory Note, Uniform Contribution Among Tortfeasors Act (1955), 12 U.L.A. 187 (Master ed. 1996).

The Massachusetts contribution statute as enacted in 1962 (St. 1962, c. 730, §§ 1-4, effective Jan. 1, 1963), is codified at Mass. Gen. Laws c. 231B, §§ 1-4, and remains essentially unchanged today. The relevant provision provides that where "two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them." Mass. Gen. Laws c. 231B, § 1(a). The statute further provides that contribution is to be made on a pro rata basis (*id.* at §§ 1(b), 2) arrived at by dividing the common liability equally by the number of tortfeasors. Thus, if there are two joint tortfeasors, each pays one-half of the damage award and if there are three tortfeasors, each pays one-third.

Under the Massachusetts contribution regime, if the plaintiff has named all joint tortfeasors in the original action then one defendant may seek contribution from another joint tortfeasor-defendant in that action. If, however, the plaintiff has not named a second tortfeasor in the original action, a named tortfeasor may implead the second tortfeasor into the original action for contribution under the Massachusetts impleader rule (Mass. R. Civ. P. 14) or, in the alternative, the tortfeasor seeking contribution may wait until the original action is over and the judgment is paid and then bring an independent action for contribution. Mass. Gen. Laws c. 231B, § 3.

The adoption of contribution in 1962 in Massachusetts was indeed a step forward from the pre-1962 no-contribution rule whereby one joint tortfeasor had to shoulder the entire damage award based on whom the plaintiff chose to sue and/or collect judgment from. Further, once contribution was adopted, setting contribution on a pro rata basis (as opposed to any other method of allocation) made sense conceptually and equitably. Under the existing traditional view of proximate cause, each of the negligent joint tortfeasors was regarded as being a legal cause of the entire damage and each was liable for the entire amount. W. Page Keeton, ed., *Prosser and Keeton on the Law of Torts*, § 41 at 268 (5th ed. 1984); Restatement (Second) Torts § 875 (1977). Thus splitting the bill equally made sense and comported with the principle that "equality is equity." *Prosser and Keeton*, *supra*, § 50 at 340.

ADOPTION OF COMPARATIVE NEGLIGENCE

In understanding why the Massachusetts contribution regime is out of step with Massachusetts law, it is necessary to explore briefly the advent of comparative negligence. At common law in England, it used to be that the contributory negligence of a plaintiff served as a complete bar to recovery; if the plaintiff's negligence was a substantial contributing cause of her injury, there could be no recovery. In 1824, Massachusetts became the first American state to follow England's lead and adopt the rule of contributory negligence as a total bar to plaintiff's recovery. Philip W. Bouchard, *Apportionment of Damages Under Comparative Negligence*, 55 Mass. L. Q. 125, 126 (1970). As a leading text notes, one reason for this all-or-nothing rule was the "inability of the courts . . . to conceive of a satisfactory method by which the damages for a single, indivisible injury could be apportioned between the parties." *Prosser and Keeton*, *supra*, § 65 at 452-53.

In 1971, the Massachusetts Legislature statutorily abolished contributory negligence as a

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total bar and in its place adopted comparative negligence whereby a plaintiff's negligence is no longer a total bar to recovery but rather serves to reduce her recovery by the percentage of her fault. St. 1969, c. 761, § 1 (effective Jan. 1, 1971), codified at Mass. Gen. Laws c. 231 § 85. As initially enacted, the plaintiff remained completely barred from recovering in cases where her negligence was equal to or greater than that of the defendant. In 1973, the Legislature rewrote the statute so that a plaintiff is only barred from recovery if her negligence is greater than that of defendant. St. 1973, c. 1123, § 1 (effective Jan. 1, 1974). Thus, if plaintiff and defendant were each 50% at fault, plaintiff may recover for 50% of her injuries, but if plaintiff is 51% at fault, she recovers nothing.

The abolition of contributory negligence as a total bar and the corresponding adoption of comparative negligence signaled a seismic shift in Massachusetts tort law. For the first time, cause of and liability for what was previously viewed as a plaintiff's indivisible injury could be divided according to percentages of fault. The notion that causation and responsibility for injury could somehow be divided was conceptually new — although some suggest juries had been applying comparative fault principles for years. *See, e.g.*, Bouchard, *supra*, 55 Mass. L. Q. at 127. Under traditional tort law, an actor either legally caused the injury or he did not. If he did cause the injury, he was liable for the entire harm. But with the advent of comparative negligence, a single indivisible injury to plaintiff could now be divided according to "percentages of fault." Regardless of the conceptual soundness of comparative negligence, it represents a significant shift in the way practitioners think about causation of and liability for injuries where there are multiple actors contributing to the injury. Indeed, today, for many, the notion that negligence-based tort damages can be apportioned according to percentage of fault seems perfectly commonplace.

PRO RATA CONTRIBUTION CONFLICTS WITH COMPARATIVE NEGLIGENCE PRINCIPLES

This same shift, however, causes conceptual problems for the Massachusetts contribution scheme. When contribution was adopted in Massachusetts in 1962, there was no comparative negligence and tort causation could not be divided according to relative degrees fault. Fault and liability were thought of on an all-or-nothing basis. Accordingly, pro rata contribution made good sense; if two defendants each caused the whole damage, each bearing half the cost was both conceptually sound and equitable. However, with the adoption of comparative negligence some eight years later, tort causation and liability, at least as between a negligent plaintiff and defendant, are no longer done on an all-or-nothing basis; instead, fault and liability are assessed on a percentage basis with the fault of the various negligent actors adding up to 100%.

However, these same comparative negligence principles are ignored in the contribution setting. Contribution remains allocated on a pro rata basis without consideration of the relative degrees of fault of the joint tortfeasors, even where one joint tortfeasor was significantly more or less at fault than the other(s). Thus, we have the anomalous situation in which comparative fault is the method for assessing liability as between negligent plaintiffs and defendants, but, as between defendants themselves, there is no such proportional assessment of liability. This situation is both conceptually unsound and inequitable. Except in cases where the comparative fault between two joint tortfeasors happens to be equal, contribution will always be unfair to one and provide a windfall to the other.

For example, imagine a case where three drivers collide. One is seriously injured and she brings suit against the other two. The jury must assess whether the plaintiff was at fault, and if so, by what percentage. If the jury finds that plaintiff was 20% at fault, then her recovery is reduced by her 20% of fault, for an 80% recovery. The two defendants, however, share the liability without regard to their relative degrees of fault. Thus, they each pay half of the 80%

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verdict, or 40% each even if one was only 1% at fault and the other 79% at fault.

WHY COMPARATIVE FAULT SHOULD AND CAN BE ADOPTED IN MASSACHUSETTS

Simply put, pro rata contribution is out of step with Massachusetts tort law. The advent of comparative negligence should naturally have included the adoption of comparative contribution. Indeed, when Massachusetts adopted comparative negligence, one commentator reviewing the new law noted "[t]he adoption of the Comparative Negligence Statute should eventually cause reconsideration of the pro rata concept in the contribution statute." James W. Smith, *Comparative Negligence in Massachusetts*, 54 Mass. L. Q. 140, 148 (1969). Similarly the commissioners of the Uniform Comparative Fault Act note that pro rata contribution is "inappropriate" in a jurisdiction adopting comparative negligence, such as Massachusetts, and that comparative fault contribution should be adopted in any such jurisdiction. Prefatory Note, Uniform Comparative Fault Act (1977), 12 U.L.A. 125 (Master ed. 1996).

Additionally, while the adoption of comparative negligence not only opened the door conceptually to comparative contribution it also provided the "procedural machinery" for comparative contribution. Bouchard, *supra*, 55 Mass. L. Q. at 143. Indeed, the jury must, at least in cases where the plaintiff's fault is alleged, allocate fault in exact percentage terms between plaintiff and defendant. Where there is evidence of comparative negligence, juries are routinely instructed that "the combined total of the negligence of the plaintiff and all the defendants must equal 100 percent" and asked to return special verdicts dividing up the total fault in percentage terms among the plaintiff and defendant. *See Massachusetts Superior Court Civil Practice Jury Instructions*, § 2.1.11 and Exhibit 2A (MCLE 2001 Supp.). The jury is thus easily positioned to allocate fault as between defendants as well.

While the legislature should have amended the 1962 contribution statue when it adopted comparative negligence in 1969 (effective 1971) and rewrote the section a few years later, it did not. In 1985, in *Zeller v. Cantu*, 395 Mass. 76 (1985), an attempt was made to cause the judicial adoption of comparative fault contribution. In the case, plaintiff was injured when a scalpel blade snapped during a medical operation and became permanently lodged in her back. Plaintiff sued, and obtained judgment from both the blade manufacturer and the surgeon. The blade manufacturer paid the entire judgment and sought contribution from the surgeon for half the amount. The surgeon asserted that his share of the contribution should be less than half as he maintained he was less at fault than the blade manufacturer. He argued that contribution should be made on a comparative basis on the ground that the Massachusetts comparative negligence statute impliedly amended the contribution statute. The trial court disagreed and entered judgment against the surgeon for contribution on a pro rata basis for half the underlying judgment without regard to his comparative fault. The Supreme Judicial Court ("SJC") affirmed noting that although "it is more equitable to apportion [contribution] liability on the basis of comparative fault" and that "strong policy considerations favor appointment of the basis of comparative fault," the Massachusetts contribution statute clearly provides that contribution shall be allocated on a pro rata basis and that "'relative degrees of fault shall not be considered.'" *Id.* at 81, 82, 86 (*quoting* Mass. Gen. Laws c. 231B, § 2(a)). The SJC concluded that even though comparative contribution would be more equitable, because the statute is clear in its mandate and was not amended when comparative negligence was adopted (and not because no constitutional issues were implicated), "it is the Legislature's prerogative to make such a change in our law, not ours." *Id.* at 81.

Thus, the SJC made clear that if comparative fault contribution is ever to be adopted, it must be done by the Legislature. While it has been some thirty years since the adoption of comparative negligence and fifteen years since *Zeller v. Cantu*, the Legislature has not changed the law.

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But it should. Pro rata contribution is out of step with Massachusetts law; it is a hold-over from a different era of tort law. Further, there seems little if any policy reasons not to make the change.

Whenever issues of tort reform arises, attention must be given to whether the proposed change alters the delicate structural balance between tort plaintiffs and defendants. Adopting comparative contribution, however, does not implicate or threaten the existing balance. Indeed, plaintiffs and the plaintiffs' bar should be indifferent to how joint tortfeasors share a judgment among themselves so long as the plaintiff's ability to obtain full recovery under the doctrine of joint and several liability is not undermined. Comparative contribution would not affect joint liability. Indeed, the Uniform Comparative Fault Act, which advocates pure comparative negligence and contribution, notes "[j]oint-and-several liability under the common law means that each defendant contributing to the same harm is liable to him for the whole amount of the recoverable damages. This is unchanged by the Act." Comment, Uniform Comparative Fault Act (1977), 12 U.L.A. 143 (Master ed. 1996).

Defendants likewise have no reason to oppose the adoption of comparative contribution. Certainly in individual cases, a particular defendant may prefer comparative contribution or pro rata contribution depending on how his percentage of fault compares to that of other defendants. But, from the perspective of incentives to minimize damage and liability, defendants should either be indifferent to or support the adoption of comparative contribution.

From the perspective of the system as a whole, replacing pro rata contribution with comparative fault contribution should be viewed as a progressive and sensible move. In our era of comparative negligence, pro rata contribution is conceptually unsound and its method of apportionment is inequitable and arbitrary. Further, retention of pro rata contribution often skews otherwise rational decision-making. A thoughtful law review note on the exact issue concludes that retention of pro rata contribution in the comparative fault era often encourages parties to make decisions that are advantageous to them but otherwise irrational and undesirable from a systemic viewpoint. Todd B. Denenberg, *The Massachusetts Contribution Statute: A Medieval Law in Modern Times*, 22 New Eng. L. Rev. 373, 410-11 (1987-88).

There is no sound reason to retain pro rata contribution. The Massachusetts judiciary, while acknowledging the deficiencies of pro rata contribution, views itself as unable to effect the change. Therefore, the job is left to the Massachusetts Legislature, which, this author hopes, will some day soon bring Massachusetts contribution law into the modern era. ■