Cleaning Up After Multiple Tortfeasors

PART TWO:
The Nature of the Common Liability

by Ron Kilgard

As we saw last month, if there is a single, indivisible injury, then the liability is "common." But what is the nature of the common liability? In Arizona the great dividing line is 1988, when several-only liability was adopted in most cases and joint and several liability was greatly restricted. However, to understand the law, even now, we need to take a look at those long-ago days before 1988.

The Halcyon Days of Joint and Several Liability

Before *Holtz v. Holder*, 101 Ariz. 247 (1966), tortfeasors were jointly and severally liable only if they acted in concert. As we saw last month, this was a harsh doctrine. It was almost as though the tort was being treated as a crime, and the defendant's procedural protections were seen as more important than the plaintiff's interest in being compensated. *Holtz*, as we saw, addressed this harshness by imposing joint and several liability whenever the injury was indivisible, regardless of whether the tortfeasors had acted in concert, or simultaneously, or in any other particular fashion. In such a case, each tortfeasor was liable for the plaintiff's entire damage, and the plaintiff could execute against any tortfeasor at his option.[1]

Now the balance was shifted somewhat in favor of the plaintiff. In such a case he would usually be able to recover his damages from someone, but there might be some unfairness in the party from whom he collected them. In Arizona the parade example of this was *Gehres v. City of Phoenix*, 156 Ariz. 484 (App. 1987), in which the party 95 percent at fault was judgment proof, leaving the others to foot the entire $500,000+ bill.

The common law responded to this unfairness in a variety of ways. The indemnity doctrines and contribution, which are discussed in next month's article, sometimes shifted the expense from one tortfeasor to another. Likewise, contributory negligence, assumption of risk and similar doctrines, to be discussed in the last article in this series, sometimes precluded the plaintiff's recovery altogether. To ameliorate the harshness of *these* doctrines, the law developed still *other* doctrines, such as the last clear chance or the "gross or wanton" negligence of the defendant. This back-and-forth adjustment could have gone on forever, but the legislature put a stop to it in 1987.

Several-Only Liability

The statute, now codified at A.R.S. § 12-2506, stripped of all its ancillary definitions and qualifications, provides as follows:

> In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint...
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> [T]he liability of the person who caused the injury shall be allocated to each person in proportion to that person's percentage fault... Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to the defendant's percentage of fault, and...judgment shall be entered against the defendant for that amount...
>
> In assessing percentages of fault the trier of fact shall consider the fault of all persons that contributed to the alleged injury, death, or damaged the property, regardless of whether the person was, or could have been, named as a party to the suit.

At first blush, one would think this restored the status quo before *Holtz*, but it did not. The regime before *Holtz* was not several-only liability, but what we have called individual liability. Fault was not *allocated* among the various parties commonly

liable. Even if the injury was indivisible, the plaintiff had to make out an *individual* claim against each party.[2] As we have seen, the vice of such a system was that the plaintiff would often not be able to meet his burden with any particular defendant, thus failing altogether.

Several-only liability does not suffer from this vice, but it does suffer from another. The plaintiff will often not be made whole because some of the parties who are at fault will be judgment proof, immune from suit, or otherwise unreachable. Its virtue, however, is that no defendant will pay more than his percentage of the fault. Whatever its vices and virtues, for the last 10 years virtually all multiple tortfeasor cases in Arizona have been several-only cases. Several- only liability raises a host of issues in litigation, but space permits a discussion of only three of them here: The type of fault to which several-only liability applies, the type of injury to which it applies and the role of non-parties in several-only cases.

Type of Fault

In a several-only case, the fact- finder allocates the liability to each tortfeasor in direct proportion to that person's "fault." The meaning of fault is therefore crucial to the scope of the several-only scheme. The statutory definition, A.R.S. § 12-2506(F)(2), is broad:

> "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of expressed or implied warranty of a product, products liability and misuse, modification or abuse of a product.

Broad is hardly the word for it. Is anything excluded? Breaching a contract, for example, is surely "an actionable breach of legal duty"; so is defaulting on a promissory note, failing to honor a guaranty or violating a statute. In all of these cases, there can easily be multiple obligors who have in the past been jointly and severally liable for the breach.[3] Did the legislature really mean to require several-only allocation in such cases? It seems unlikely, but no case, as far as I am aware, has addressed the issue.[4]

At least within the world of torts the statute is comprehensive. The Arizona courts have repeatedly rejected suggestions that the statute only applies to negligence or that the faults being allocated must be comparable in seriousness. Thus, in a crashworthiness case, the fault of the drunk driver who hit the plaintiff's car is compared to that of the manufacturer *(Zuern v. Ford Motor Co.*, 188 Ariz. 486 (App. 1996)), and in a death case, the fault of a murderer is compared to that of a negligent 911 operator. *(Hutcherson v. City of Phoenix*, 192 Ariz. 51 (1998)).[5]

These decisions seem inescapable given the language of the statute, but there is something disconcerting about them. The manufacturer of an automobile is liable on a crashworthiness theory precisely because automobiles often end up in crashes. A 911 operator is in business precisely because there are murderers. To reduce their fault because of the conduct of the people who are their whole *raison d'être* is a bit odd.

The court of appeals and the supreme court thrashed it all out in *Hutcherson*. There the plaintiffs' decedents—a young woman and her friend—were murdered by the woman's ex-boyfriend, who then killed himself. The plaintiffs sued the City of Phoenix, alleging that the 911 operator negligently responded to the emergency call. Predictably, the City named the murderer as a non-party at fault. However, the jury concluded that the City, not the murderer, bore the bulk of the responsibility and allocated 75 percent of the fault to it. The court of appeals found this puzzling: How can a negligent, but well- meaning, 911 operator possibly be more at fault than a man who breaks into an apartment in the middle of the night and murders its occupants? It reversed, with Judge Grant dissenting.

The supreme court took up the whole vexing issue. It vacated the court of appeals opinion and reinstated the jury verdict, based in part on Judge Grant's distinction between "culpability" and "responsibility." The murderer's culpability was profound; that of the City's agent, the 911 operator, was trivial by comparison. However, the court reasoned, the jury could have properly found that the City, by virtue of operating a 911 system and encouraging people to rely on it, was more *responsible* than the murderer for the tragedy. Indeed, it appeared that, but for the 911 operator's negligent reassurance, the victims might have fled and escaped.

The court's opinion is in my view correct, but it is difficult to formulate precisely the rationale for the conclusion that a negligent tortfeasor can be more at fault than an intentional one. I cannot help but feel that the murderer's suicide also was a relevant consideration. If the victims had been killed by a tornado, the City would have born all the fault for the negligence of its 911 operator; we don't allocate fault to natural causes. The murderer here was not a tornado, but a crazed, distraught, irrational ex-boyfriend who had not slept all night and who killed himself immediately after killing his victims. In a certain sense, he *was* a tornado.

Perhaps equally important, if a jury is not permitted to allocate the bulk of the fault to the negligent actor in a situation like *Hutcherson*, the consequence would be virtually to immunize certain defendants from liability. Even under *Hutcherson*, the City escaped liability for much of the damage its negligence caused because part of the fault was allocated to the murderer. The true

ground of decision here, I think, is that in allocating fault it is permissible for juries to consider, along with all the other facts and circumstances, whether the duty of the defendant is precisely to protect the plaintiff from someone else.

Type of Injury

When multiple tortfeasors are on the loose, they generally cause personal injury or death. All of the cases we have discussed thus far deal with those types of injuries. However, at common law there was in principle no such limitation, and our statute expressly recognizes that common liability can also occur in an action for "property damage." Once again, the statutory definition, A.R.S. § 12-2501(G), added in 1993, is exceedingly broad:

> "Property damage" means both physical damage to tangible property and economic loss proximately caused by a breach of duty.

Thus, several-only liability is the rule in commercial disputes as well as personal injury and death cases. For example, in *Gemstar Limited v. Ernst & Young*, 185 Ariz. 493 (1996), several- only principles applied to a commercial dispute involving claims of breach of contract, negligence and breach of fiduciary duty. Although the court did not have occasion to address the issue in *Gemstar*, situations such as this would seem to present difficult problems of allocation. Would liability on the breach of contract theory still be joint and several? If so, in a complex commercial dispute with claims of ordinary negligence, professional negligence, breach of contract, etc., the verdict form could end up being quite a puzzle. Or would all liability be several-only if any were? As things stand now, we just don't know.[6]

Non-Parties at Fault

Central to the several-only liability scheme is the allocation of fault to non-parties. In order to ensure that no tortfeasor is liable for more than the damage he alone causes, fault must also be allocated to persons who are for one reason or another not parties to the action. Thus, if the plaintiff is a worker hurt on the job, fault is allocated to the employer, even though it is immune from suit under the workers' compensation laws. *Dietz v. General Electric Co.*, 169 Ariz. 505 (1991). It is not even essential that the non-party be identified by name. In *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431 (App. 1996), the jury allocated fault to the unnamed hooligans who had assaulted the plaintiff at a nightclub. Likewise, in *Smith v. Johnson*, 183 Ariz. 38 (App. 1995), the jury could allocate fault to a non-party identified only as "the driver of a red Mercedes."[7]

Of course, the defendants must introduce *evidence* that the non-party is at fault. Mere assertion will not suffice. This principle, obvious though it seems, is often overlooked by defendants, especially when the non-party is a former co-defendant who has settled out. Having relied on the plaintiff to prosecute the claim, the defendant may be ill prepared to present a case against his former confederate. *See, e.g., Barton v. Adams Rental, Inc.*, 938 P.2d 532 (Colo. 1997) (under Colorado's several-only statutes, defendant claiming a non-party is at fault "has the burden of presenting admissible evidence in support of the claim").

Joint and Several Liability After 1988

As adopted in 1987, the statute preserved joint and several liability in only three circumstances: Master and servant, concerted action and hazardous waste cases. Let us consider each in turn.

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As I mentioned, the type of fault, the type of injury and the role of non-parties are only three issues implicated by several-only liability. Much more could be said about the litigation consequences of this new doctrine. (See the note for some tantalizing tidbits.[8]) Even these three issues, however, illustrate how different tort law looks in a several-only setting. And this is underscored when we see how little now remains of its venerable rival, joint and several liability.

Master and Servant

Liability remains joint and several between a party and another person "if the other person was acting as agent or servant of the party." A.R.S. § 12-2506(D). Thus, when a truck driver acting in the course and scope of his employment backs over a pedestrian, the trucking company and the driver are jointly and severally liable. In such a case, however, the plaintiff is usually indifferent to whether the driver is liable. He is generally concerned only that the employer is liable for driver's negligence. Often the plaintiff won't even name the employee who actually did the damage.[9]

However, even in this case several-only liability may make certain inroads. In such cases there is often a claim that the employer is not only vicariously liable for the employee's negligence, but is also directly liable for its own negligence in, say, failing to train the driver properly. In such a case it would seem that fault on the vicarious liability claim would be joint and several and on the direct negligent claim several-only. Explaining all this to the jury will, to put it mildly, be a bit confusing.

Two other examples of master/servant liability may raise interesting questions in the several-only setting. Arizona has long been a jurisdiction which adheres to the quaintly named "Family Car Doctrine," so evocative of Ozzie and Harriet suburban life. Put briefly, the doctrine holds that Mom and Pop are vicariously liable for all the damage Junior does when behind the wheel of the family Packard. *Jacobson v. Superior Court*, 154 Ariz. 430 (App. 1987). The doctrine is supposedly based on agency principles, but in truth the "agency is a fiction, defensible only because of its social usefulness." *Id.* In order to preserve this usefulness, the courts will, presumably, have to hold that the fictional agency of the family car doctrine is sufficient to preserve joint and several liability in these cases. Or the court might use this change in the law as an opportunity to repudiate the family car doctrine (it is the law in about only a quarter of the states). We shall see.

Still another unusual example of what will now probably be pigeonholed as agency liability is the liability of parents for the torts of their children. A.R.S. § 12-661 provides that parents are "jointly and severally" liable for the torts of their misbehaving offspring in certain circumstances, subject to a limit of $10,000. It seems unlikely that the courts would hold that this highly specific statute was overruled by the several- only statute, especially since it has been amended since several only liability was adopted. However, as an analytical matter, the two statutes do not mesh. Under traditional agency principles a 17-year-old would not be his mom's agent when he blows up the neighbor's gazebo. To reconcile the two statutory schemes, the courts would presumably have to treat parenthood as a kind of implied agency. For those of us with high-spirited children, it's a disturbing thought.[10]

Acting in Concert

"Acting in concert," essentially a dead letter after *Holtz*, was revived when the legislature adopted several-only liability. It preserved joint and several liability whenever the two persons were "acting in concert."

When the statute was originally adopted, the legislature defined "acting in concert" in the same vague open-ended way in which the court had used in *White*: acting in concert meant "pursuing a common plan or design to commit a tortious act and actively taking part in it." *Cf. Restatement (Second) of Torts* § 876 (1979) (traditional definition of "acting in concert"). Presumably this would leave the door open to cases such as the colliding boats, which we considered last month, in which the two crews were found to have acted in concert even though there was no conscious agreement to cause the accident. However, apparently frustrated by the ambiguity inherent such a definition, in 1993 the legislature defined acting in concert in a way that would have been unrecognizable to the common law:

> Acting in concert means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person's conduct which provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

A.R.S. § 12-2506(F)(1)

Given this definition, cases of joint and several liability for acting in concert will be rare. Except in criminal enterprises, people seldom enter into "a conscious agreement" to commit an "intentional tort." *See, e.g., Bishop v. Pecanic,* 275 Ariz. Adv. Rep. 7 (App. 1998) (group of young men acted in concert in brutally beating the plaintiff). As a practical matter this exception to several-only liability has been all but repealed.

Hazardous Wastes

As originally adopted, the statute also provided for joint and several liability "in a cause of action relating to hazardous wastes or substances or solid waste disposal sites." While the legislature obviated joint and several liability for acting in concert indirectly, for hazardous wastes it took the more direct approach: it simply repealed the statute. (1997 Ariz. Legis. Serv. ch. 259.) Issues will remain as to the prospective or retrospective application of the repeal—*see Yslava v. Hughes Aircraft Co.*, 188 Ariz. 380 (1997)—but on a going-forward basis this exception is gone. In a case governed by state law, several-only liability is the rule even in environmental cases.

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This, then, is all that remains of the once-imposing doctrine of joint and several liability. With joint and several liability for environmental torts repealed for all cases explicitly, and for acting in concert repealed for most cases implicitly, all that really remains is joint and several liability for the torts of master and servant. And this, as we have seen, is usually of little importance as long as the master is vicariously liable. Thus, in the space of only ten years we have gone from a jurisdiction in which multiple tortfeasors were almost *always* jointly and severally liable to one in which they are almost *never* jointly and severally liable. It's no surprise that the courts and practitioners have yet to fully assimilate the change, as we'll see next month when we tackle the liability of multiple tortfeasors to each other.

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ENDNOTES:

1. *See generally* Lankford & Blaze, "The Law of Negligence in Arizona" § 6.2(1) (1997) (collecting and discussing the older cases); *Restatement (Third) of Torts: Apportionment of Liability § 20* (Proposed Final Draft 1998) (defining the traditional joint and several liability).
2. *Accord: Restatement (Third) of Torts: Apportionment of Liability § 21* (Proposed Final Draft 1998) (a several-only defendant is liable not for the damages he causes, but for the "comparative responsibility share" of the total damages).
3. *E.g., American Home v. Vaughn*, 21 Ariz. App. 190 (1974)(two insurers liable for same loss); A.R.S. § 24-1026 (liability of partners for partnership obligations); A.R.S. § 44-141 (negotiable paper); A.R.S. § 47-3116 (negotiable instruments); A.R.S. § 10-204 (liability for non-corporate transactions); A.R.S. § 10-1631 (false statements to creditors or shareholders).
4. *See generally Restatement (Third) of Torts: Apportionment of Liability § 1* (Proposed Final Draft 1998) (discussing the application of apportionment principles to all types of torts).
5. *See also Thomas v. First Interstate Bank*, 187 Ariz. 488 (App. 1996) (negligence compared with murder); *Natseway v. City of Tempe*, 184 Ariz. 374 (App. 1995) (fault of police compared with that of fleeing criminal in a high-speed chase).
6. At least one type of commercial case has its own several-only system. A.R.S. § 44-2003 deals with civil liability for securities fraud and sales of unregistered securities. The statute in its present form was adopted in 1996, well after several-only was the rule generally. Without reference to the earlier several-only statute, § 44-2003 lays out a complicated system of joint and several liability for some defendants, several-only for others, and a mechanism to reallocate shares in the event of insolvency.
7. The allocation of fault to non-parties necessarily requires a procedural mechanism to identify the non-parties so that the plaintiff may, if he wishes, include them in the case. Ariz. R. Civ. P. 26(b)(5) provides that non-parties must be disclosed 150 days after the filing of the answer. Each defendant must name its own non-parties at fault. It may not rely on other parties' listing. *LyphoMed v. Superior Court*, 172 Ariz. 423 (App. 1992). (However, when a co-defendant settles a claim, and thus becomes a non-party at fault, the remaining defendants need not formally name the settling party as a non-party at fault. *Id.*) This procedural mechanism is so intricately connected to the substantive law on several-only liability that the same procedure is followed even in federal court. *Webster v. Crown Controls Corp.*, 974 F. Supp. 1284 (D. Ariz. 1996).
8. Others include several-only liability and workers' compensation cases, *see Aitken v. Industrial Commission*, 183 Ariz. 387 (1995); several-only liability in products cases, *see Jimenez v. Sears*, 183 Ariz. 399 (1995) (defenses), and *Owens v. Truckstops of America*, 915 S.W.2d 420 (Tenn. 1996) (chain of distribution); several-only liability and punitive damages, *see Bishop v. Pecanic*, 275 Ariz. Adv. Rep. 7 (App. 1998); several-only liability and settlements, *see Neil v. Kavena*, 176 Ariz. 93 (App. 1993), *Roland v. Bernstein*, 171 Ariz. 96 (App. 1991), and *Gemstar Limited v. Ernst & Young*, 185 Ariz. 493 (1996); waiver of joint and several liability, *see Herstam v. Deloitte & Touche*, 186 Ariz. 110 (App. 1996); and liability for costs and attorney fees in several-only cases, *see Hales v. Humana*, 186 Ariz. 375 (App. 1996) (costs).
9. *See also Restatement (Third) of Torts: Apportionment of Liability § 23* (Proposed Final Draft 1998) (vicariously liable defendant liable for all plaintiff's damages, even in a several-only system).
10. *See also* A.R.S. § 5-350(c) (vicarious liability for certain boating accidents; relation to several-only liability uncertain).