

Cleaning Up After Multiple Tortfeasors

The Prerequisites for Common Liability

by Ron Kilgard

What a mess! Whatever the physical, personal, economic and emotional damage a single tortfeasor does, the doctrinal damage is usually not great. The law governing the liability of an individual tortfeasor to an individual plaintiff is generally pretty straightforward: There is a legal theory of liability, there is a factual dispute over causation, and there are damages. True, these may each be complex and may require years of litigation to hash out, but the general conceptual framework is seldom a puzzle.

With multiple tortfeasors, however, the situation is very different. In addition to the usual tort-law doctrines, the lawyers and the judge must wrestle with all the doctrinal clutter that the multiple tortfeasors drag into the case. In this article and three follow-up articles, I will try to clean up after these tortfeasors. I'll try to figure out which doctrines are now junk and can be hauled out to the alley, and which are a little weathered, but still good for a few more years of use. And, for the brand-new doctrines, I'll try to find the instructions that came with them (so often they get thrown out with the packing materials) and review them with you. Our goal will be to understand the law of multiple tortfeasors as it exists in Arizona now.

This is rough duty. These doctrines arose, after all, one at a time, in particular cases and statutes, informed by specific facts and legislative concerns—not all at once in a coherent conceptual framework. They overlap with each other, and they are not all consistent. As we will see, it will be useful at some points in the discussion to consider the doctrines historically, and some of the law we will discuss is now obsolete. But, before we stuff these battered doctrines into the Dumpster, we need to understand them, at least in part, to understand the law that replaced them.

In short, the law in this area is tricky, but it's not *too* tricky. When we're done cleaning up after multiple tortfeasors, we'll find that the law governing most multiple tortfeasor cases is, after all, fairly clear. Our discussion is in four parts: the prerequisites for common liability, which follows; the nature of common liability, which will appear in next month's issue; the liability of multiple tortfeasors to each other, which will appear in the following issue; and the role of the plaintiff's own fault, which will appear three months hence. In the last article I'll also try to highlight some of the areas in which the law is *not* so clear, pointing out some of the debris I couldn't clean up, and at least warning you not to trip over it.

A chart summarizing all four articles is on page 29.

Individual Liability and Common Liability

Let's start our cleanup effort by trying on a couple of distinctions. As we will see, a threshold distinction in the law of multiple tortfeasors in Arizona is between what we will call "individual liability" and what, for want of a better term, we will call "common liability," although "group liability" or "shared liability" would serve just as well. Until recently, the only type of common liability was the familiar joint and several liability. Since 1988 in Arizona, we have another: several only liability. We are so used to thinking about the differences between the two that we overlook the similarity. They are both systems in which a group of defendants *share* the liability for the plaintiff's injury. In the first case, each is liable for the whole injury; in the second, each is liable only for an allocable share. But in both cases the liability is "common."

Contrast this with "individual liability." If two cars drive over a plaintiff snoozing in a crosswalk, one of which neatly breaks his arm, and that only, and the other neatly breaks his leg, and that only, the liability of the tortfeasors would not be joint and several, and it would not be several only either. It would not be

“common” liability at all. It would be “individual” liability: two wholly separate claims arising from two wholly separate injuries. Under our liberal joinder rules the plaintiff could probably bring the two claims in the same lawsuit, but duty, breach, causation and damages would all be separate. The further apart in time and the more different in quality the injuries are, the more obvious it is that we have a case of individual liability, not common liability. The more similar the injuries are and the closer in time, the more likely it is that the defendants are liable in common or not at all. As always, the difficult cases are in between.

Let’s pursue the distinction a bit further. When the law changes quickly, we often find ourselves confused not only by the substance of new doctrines, but also by the language used to describe them. Thus, those of us who learned about a broad doctrine of the effect of prior litigation, called “res judicata,” had to adjust to the new doctrines of claim preclusion and issue preclusion, in which the phrase “res judicata” was used, if at all, only in a much narrower sense. Still older lawyers, who analyzed the personal jurisdiction of a corporation in terms of its “presence,” had to get used to the “minimum contacts” of *International Shoe*, in which the concept and word “presence” had little role. In the same way, in this area of the law, we will need to be wary of older cases—and they’re not very old—that refer casually to “joint” liability, when the liability would now not be joint (*i.e.*, joint and several), but would be common (*i.e.*, several only). The case may be good law for some point about common liability as opposed to individual liability, but lousy law for a point about joint and several liability as opposed to several only liability.

We will see more of this as we work our way through these doctrines. The point to keep in mind for present purposes, is simply that we will probably find it useful to distinguish individual liability from common liability, and within common liability, joint and several liability from several only liability. Now let’s get to work.

Common Liability: Train Hits Truck

Time out of mind, in Arizona and elsewhere, there was, as we have said, only one kind of common liability: joint and several liability. Tortfeasors were jointly and severally liable only if the plaintiff suffered a “single injury” which the tortfeasors caused by acting “in concert.” *White v. Arizona Eastern Railroad Co.*, 26 Ariz. 590 (1924). If either factor was missing, they were not commonly liable. *Id.*

White spells out what these requirements were. Bill White drove a “gasoline truck” for various employers who operated a “freight stage line.” On July 27, 1922, he was killed “between Globe and Miami at what is known as Kaiser Crossing” when the truck he was driving was hit by a locomotive operated by the Arizona Eastern Railroad Company. The first requirement for “common liability”—a single injury—was easily met: Bill White died only once. But the court held that the second requirement was not. The negligence of his employers, which had allowed him to drive exhausted and in a vehicle with faulty brakes, was “separate, distinct, and independent” from the negligence of the railroad, which failed to clear its right of way or adequately warn of the train’s approach.

Because the defendants did not act in concert, they were not jointly and severally liable; in fact, they could not even be sued in the same action.¹ White’s widow should have filed two lawsuits, one against the railroad and the other against the stage line. Of course, in each lawsuit, the primary defense would have been that it was the negligence of the other defendant that caused the death. Because the plaintiff had the burden of proof, she could easily lose both cases.² A harsh result.

Common Liability:

Boat Hits Boat

Though touted as the “settled rule,” the holding of *White* that “there must exist some community of purpose...to give rise to joint liability,” was not destined to survive. I’m not sure it even survived that case. Even in *White*, the court recognized that acting “in concert” might sometimes occur even when the two defendants had no previous connection with one another. This is an odd sort of concert. For example, in an old case, *Cuddy v. Horn*, 10 N.W. 32 (Mich. 1881), the plaintiff’s decedent was drowned in the Detroit River while a passenger on a boat named “Mamie,” which collided with one named “Garland.” The Michigan court held, and the *White* court agreed, that the owners of the boats were jointly and severally liable for the death. Although the two crews were not acting in concert, “yet by their simultaneous wrongful acts [they] put in motion the agencies which together caused a single injury.” 26 Ariz. at 594.

Thus, the rule of *White* was a bit more flexible than we originally thought: tortfeasors were jointly and severally liable for an indivisible injury only when they acted in concert *or* when their conduct somehow simultaneously caused the injury.³ Alas, even as modified, this doctrine barred Mrs. White’s claim. Still a harsh result.

Common Liability:

Car Hits Car

White remained the law in Arizona for over 40 years. The supreme court reaffirmed the two requirements for common liability, indivisible injury and “community of purpose” in *Salt River Valley Water Users’ Ass’n v. Cornum*, 49 Ariz. 1 (1937). Without specifically mentioning *White*, the Ninth Circuit, applying Arizona law, apparently did the same in *Sweet Milk Co. v. Stanfield*, 353 F.2d 811 (9th Cir. 1965). Finally, in *Holtz v. Holder*, 101 Ariz. 247 (1966), the supreme court re-examined the issue.

On February 6, 1960, Cynthia Holtz was driving her car north through the intersection of 24th Street and Thomas in Phoenix, when James Holder’s car slammed into her. The collision knocked Holtz’s car across the center line of 24th Street where it was hit a second time by a pick-up truck. This apparently knocked her back

into the northbound lane but facing the wrong direction. "Some five or 10 minutes later a milk truck owned by defendant Carnation Company" hit her still a third time. She sued Holtz and Carnation for her injuries.

White recognized that it was possible, as in the case of the colliding boats, for two tortfeasors to be jointly and severally liable for a single injury, even though they did not technically act in concert, but the tenor of *White*, confirmed in *Cornum* and *Sweet Milk*, was that such cases would be rare. In *Holtz* the court mapped out a different approach altogether: the "single injury" rule. The court explained the rule as follows:

The "single injury" rule is based on the proposition that it is more desirable, as a matter of policy, for an injured and innocent plaintiff to recover his entire damages jointly and severally from independent tortfeasors, one of whom may have to pay more than his just share, than it is to let two or more wrongdoers escape liability altogether, simply because the plaintiff cannot carry the impossible burden of proving the respective shares causation or because the tortfeasors have not committed a joint tort. *Id.* at 251.

Thus, the exception recognized in *White* became the rule in *Holtz*. Not only injuries from colliding boats, but from colliding automobiles, and any other mischief multiple tortfeasors could devise, would result in joint and several liability whenever the plaintiff suffered a single, indivisible injury. After *Holtz* it was no longer necessary for a plaintiff to prove that the defendants acted "in concert," or "simultaneously," or that their wrongs coincided in "time and place and character." All the plaintiff needed to prove common liability was an indivisible injury and the tortfeasors who contributed to it.

The Requirement of a Single Injury

Holtz overrules *White* in that acting in concert, however the phrase is understood, is no longer required for common liability.⁴ However, *Holtz* reaffirms *White*'s first requirement for common liability: a single injury. Thus, both cases recognize the distinction between a single indivisible injury and a series of injuries, however close in time. Though not explicitly discussed in the cases, the distinction is fundamental to them, and it is a distinction that is with us still, even with all the intervening change in the law.

In fact, the distinction is now part of the statutory framework of the law of multiple tortfeasors. In the Arizona statutes which created contribution among joint tortfeasors (in 1984) and then abolished joint and several liability in most cases (in 1988), the legislature required a "common liability" for the "same injury" as a predicate for joint and several liability, for contribution and indemnity, and even for the allocation of fault among the various parties and non-parties in a several only case. A.R.S. § 12-2501.

This brings us to the central, difficult issue: What is a single, indivisible injury that gives rise to common liability? *White* itself suggests that "the rule is largely one of expediency, adopted by the courts because of the great difficulty the injured party has in proving" who is at fault. 26 Ariz. at 595. *Holtz* makes the same point, but justifies the distinction not in terms of expediency, but policy: "It is more desirable, as a matter of policy, for an injured and innocent plaintiff to recover his entire damages jointly and severally from independent tort-feasors, one of whom may have to pay more than his just share, than it is to let two or more wrongdoers escape liability altogether..." 101 Ariz. at 251.

Both cases, however, make clear that the inquiry is not merely one into the nature of the injury itself, but the nature of the injury *within the context of litigation*. The *Restatement (Second) of Torts* puts the matter this way: Damages are apportioned only if there are "distinct harms." *Restatement (Second) of Torts* § 433A (1965). Harms are "distinct" only if there is a "reasonable basis for determining the contribution of each cause to a single harm." *Id.* If there is no such "reasonable basis," then the liability is common liability, which at the time the *Restatement (Second)* was prepared, was joint and several liability. That was the case in *Holtz*. On the other hand, if there is a "reasonable basis" for apportionment, then the liability is not common, but individual.

In the new *Restatement (Third) of Torts: Apportionment of Liability* (Proposed Final Draft 1998), the matter is dealt with in considerably more detail. Nevertheless the new *Restatement*, like the old, focuses primarily on whether there is a "reasonable basis" to divide liability based on "causation." *Id.* § 50. The new *Restatement* emphasizes, however, that *division by causation* is different from *apportionment of responsibility*. Division by causation is the process by which one reduces a group of injuries to their constituent "indivisible injuries." Only when that is done is the time ripe to apportion responsibility for each indivisible injury.

Sometimes, determining whether the injury is indivisible is a complex factual, legal and procedural task. Sometimes, it is so easy we skip over it without thinking about it. But the point for our purposes is that *this* is the initial inquiry. The *Restatement (Third)* says that courts often "muddle through" the issue. *Id.* at 392. Let's see how our courts have handled it in two recent cases, *Potts v. Litt*, 171 Ariz. 98 (App. 1991), and *Piner v. Superior Court*, 274 Ariz. Adv. Rep. 11 (1998). I think we'll be pleasantly surprised.

Like Cynthia Holtz, Daisy Potts had the misfortune to be injured in two automobile collisions. However, while the two collisions in *Holtz* were five to 10 minutes apart, those in *Potts* were 13 days apart. In fact, Potts was treated by a chiropractor five times between the first accident and the second. The court concluded that "even though it might have been difficult to apportion Potts's damages, it was not impossible." 171 Ariz. at 100. In the language of the *Restatement (Third)*, it was possible to divide the damages by causation and therefore it was unnecessary to apportion the responsibility. The case therefore should have been litigated as essentially two separate claims against two separate tortfeasors for two separate injuries. There was no common liability.

In *Potts* the court of appeals addressed indivisible injury in the context of joint and several liability (the accident occurred in 1987 and was therefore governed by joint and several principles). In *Piner* the supreme court faced the issue after the adoption of several only liability. Bill Piner was hurt in a rear-end auto accident on a Friday morning. He called his doctor, complaining of pain in the neck, left arm, upper back and head.

The doctor's staff told him to call back in the afternoon. But in the afternoon, he was rear-ended again. He called the doctor again and complained of, well, *more* pain in the neck, left arm, upper back and head. He finally got into see the doctor on Monday. Everyone agreed that both collisions contributed to his injuries.

This set of facts is perfect for illustrating how the indivisible injury rule works. Piner had argued that because there was an indivisible injury, the liability of the two rear-enders was joint and several, relying on *Holtz*. The trial judge correctly rejected this argument, but she erroneously thought that because *Holtz* did not apply, she was obliged to turn the clock back to *White*. Since Piner could not prove how much of his injury came from the morning versus the evening collision, he couldn't recover at all. He was in the same fix Bill White's widow was in.

The supreme court, however, recognized that the indivisible injury rule survived several only liability. Several only liability, as we have said, is only a form of common liability. Thus, when faced with an arguably composite injury, the jury (or the court if there is no reasonable dispute about the facts or the inferences to be drawn from them) must first determine if the injury is indivisible or not. In making this determination "the plaintiff has the burden of proving that the conduct of each defendant was a cause of the injury, but when a defendant seeks to limit his liability on the ground that the harm is capable of apportionment...the burden of proof as to the apportionment is upon each such actor." 274 Ariz. Adv. Rep. at 15 (quoting the *Restatement (Second) of Torts*).

Thus, once Bill Piner established that each Friday rear-ender had contributed to his injury, it was up to one of them to establish who caused what part of the injury. Given the description of the facts in the opinion, it seems unlikely that either would be able to do so.⁵ The key point is that the apportionment of damages to determine whether the injury is indivisible is different from, and antecedent to, the apportionment of fault in a several only system. Again, in the language of the *Restatement (Third)*, the first inquiry is division by causation, the second is the apportionment of responsibility.

If the injury is indivisible, then the jury must apportion not damages, but fault, and it must do so for each accident. For example, the plaintiff might bear much of the fault in the first accident, but none in the second. The supreme court explains how this would work in a table. If, as in *Piner*, there were two accidents, and if the injury were indivisible, then the allocation of several only fault for the indivisible injury would be calculated for each accident, totaled, and divided by the number of accidents. (See chart for court's example.)

When the dust has settled, the plaintiff in the example recovers a total of \$5,750 from Defendants X, Y, and Z. The balance of his \$10,000 in damages is allocated to non-parties (\$2,500) and himself (\$1,750). It is a bit complicated, but when X, Y and Z are real people the jury has seen, and the two accidents have each been described with their own blow-ups, complete with the nifty magnetic model cars the lawyers love to push around on the evidence board, the jury can presumably work its way through a grid like this just like any other set of special interrogatories. What will be complicated, however, is a trial in which there is a genuine factual dispute over whether the injury is indivisible. In that case, the jury will first wrestle with the division of damages, then with the apportionment of fault. However well drafted the instructions are, there is sure to be some confusion, for much of the evidence on the two issues will be the same. Some jurors will no doubt find it odd to conclude, for example, that there is no way to apportion *damages* from two successive accidents and then turn the page of verdict form and find that they must nevertheless apportion *fault* for the two accidents. But the law of multiple tortfeasors, both here and in many other areas, strives to accommodate varying goals and values, and it cannot always be simple.

I have spent so much time on what must have seemed at the onset to be a simple distinction, between a single injury and a multiple injury, both because it isn't all that simple, as *Potts* and *Piner* illustrate, and because it underlies all the remaining doctrines bearing on multiple tortfeasors. Only if there is such a single, indivisible injury do we reach the difficult issues addressed in the next three articles: the nature of the common liability, the relationship of the multiple tortfeasors to each other, and the role of the plaintiff's fault.

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ENDNOTES:

1. The trial court dismissed the complaint for "misjoinder," and the supreme court affirmed. 26 Ariz. at 592. More precisely, the supreme court permitted the plaintiff on remand "to amend her complaint and proceed against one of the defendants, if she be so advised." *Id.* at 596. It puzzles me that the supreme court states that the plaintiff could amend to litigate against only one of the defendants. I suspect that what happened was that by the time of the supreme court opinion the statute of limitations prevented a new lawsuit being filed. Because the defendants were not jointly liable, they could not be sued in the same lawsuit. Therefore, the plaintiff was apparently forced to decide which claim was better and drop one of the defendants from the case.
2. On the other hand, I don't think she could *win* both cases. If the first case resulted in a judgment, she might be barred from even continuing the second. Restatement (Second) of Judgments § 18 (1982) (judgment in favor of plaintiff bars further litigation on that "claim"). At the very least, her recovery in the second action would be reduced by the amount of the recovery in the first. See generally Restatement (Second) of Torts § 920A (1979) (any payment by one who is "subject to the same tort liability" is credited against the tort liability of other tortfeasors).
3. *White* even suggested that by their "simultaneous wrongful acts" the drivers in an ordinary multiple vehicle automobile accident might be jointly and severally liable. Drifting far away from the principle early in the opinion that the key inquiry for joint liability is whether the tortfeasors' negligent acts were "concurrent," "contemporaneous," "simultaneous," or in some other way connected, by the end of the opinion the court frankly admits that at least in some cases, "the rule is largely one of expediency, adopted by the courts because of the great difficulty the injured party has in proving which of the colliding machines, where both are not at fault, is the innocent one..." *Id.* at 595. Why didn't this rule of "expediency" apply to the facts at hand? It seems that Mrs. White was *worse* off with both the railroad and the freight stage contributing to her husband's death than she would have been if one had been innocent, but she didn't know which. This makes no sense as a matter of logic, and less as a matter of policy.
4. The court says that it is merely "modifying" *White*, 101 Ariz. at 251, but there is no mistaking that the "in concert" requirement of *White* has been repudiated.
5. Cf. *Lovely v. Allstate Ins. Co.*, 658 A.2d 1091 (Me. 1995) (on facts presented, two accidents one month apart caused a single, indivisible injury; tortfeasor liable for entire injury).