Additional Handout on Joint & Several Liability and Contribution—Review

Joint and Several Liability

If tortfeasors are held jointly and severally liable for a π's harm, this means that each one of them alone is liable for the entire injury and π can collect all her damages from just one of the tortfeasors. Thus, if a π's damages are $100,000 for an indivisible harm, and there are 2 people that could be liable in negligence for that harm, ***X*** and ***Y***, a π can either (1a) sue ***X*** and ***Y*** in the same suit but choose to enforce and collect the entire judgment from ***X*** only; or (1b) sue ***X*** only and leave ***Y*** out of the lawsuit and just collect the entire judgment from ***X***.[1] In other words:

(1a) π ———v.——— ***X*** + ***Y*** [π gets a judgment for $100,000, which π chooses for strategic reasons to enforce and collect against ***X*** only]

OR

(1b) π ———v.——— ***X*** [π gets a judgment for $100,000, which π can only enforce and collect from ***X*** b/c there is no one else in the suit]

Contribution

If either of the above-described scenarios happens, and ***X*** believes she has paid more than her fair share of the $100,000, then in some circumstances the law will allow ***X*** to recoup from ***Y*** some of the money ***X*** paid to the π. This is called a claim for contribution. A contribution claim can be brought, depending on the jurisdiction you are in, in several ways. The two most common are:

(2a) in the same lawsuit against π, ***X*** can raise a third-party contribution claim against ***Y***

```
π ———v.——— X [+ Y, if also named as a ∂]
           |
           v.
           |
           Y
```

OR

(2b) after losing to the π, ***X*** can file a separate lawsuit against ***Y*** seeking contribution

X———v.——— ***Y*** [***X*** seeks, e.g., $60,000 from ***Y***]

I'll use scenario (2b) as an example for how these sorts of things play out in practice. I will first discuss the scenario where π sues both ***X*** and ***Y*** and then the scenario where π only sues ***X***.

[1] It is not uncommon for a π to sue only ***X*** and not sue ***Y*** despite the fact ***Y*** also was involved. The reasons for this vary, but one that immediately comes to mind is that the particular court chosen by the π may not be able to exercise personal jurisdiction over ***Y***.

(1a) π ———v.——— ***X*** + ***Y***

π sues ***X*** and ***Y*** for negligence. The jury must determine whether both ∂s are liable for negligence [i.e., duty, breach, harm, and causation] and how much to award in damages. On its verdict form the jury will answer: (1) is ***X*** liable for negligence and (2) is ***Y*** liable for negligence? Another line will ask: (3) If you answered "Yes," to 1 and/or 2, state the amount of damages to which π is entitled. Let's assume the jury finds both ***X*** and ***Y*** liable and that π was damaged in the amount of $100,000. The judge will enter a judgment in favor of the π for $100,000. Now assume π decides to enforce the judgment against ***X*** only, perhaps because ***Y*** appears to be judgment proof or because ***Y*** is a close friend or family member which π would rather not seek money from if they do not have to, despite ***Y***'s negligence. So ***X*** ends up having to pay the entire $100,000.[2]

X sues ***Y*** to recover some of the $100,000 ***X*** paid out. To state a claim for contribution, ***X*** must plead and prove: (1) that ***Y*** is liable in tort to the original π and (2) that ***X*** paid a judgment to π that was more than his proportionate share of the $100,000 liability. Demonstrating the first element is not difficult because a jury already made that determination in the first trial; ***X*** can use the original judgment against ***Y***. Think of this as a form of offensive collateral estoppel (i.e., issue preclusion), and issue you will later learn about in civil procedure. Proof of the second element will likely require further reexamination of the relevant actions of ***X*** and ***Y*** that led to π's harm, which will then lead the trier of fact to apportion fault—perhaps finding that ***X*** and ***Y*** were each 50% responsible. ***Y*** would then have to pay ***X*** $50,000. Later in this class, we will talk about the guidance court's provide juries in helping the jurors apportion fault, i.e., how to assign a percentage amount of fault (hint: not much).

(1b) π ———v.——— ***X***

Let's assume now that π sues ***X*** only because, for example, the court cannot exercise personal jurisdiction over ***Y***. The jury will determine whether ***X*** is liable for negligence [i.e., duty, breach, harm, and causation] and how much to award in damages. On its verdict form the jury will answer: (1) is ***X*** liable for negligence? Another line will ask: (2) If you answered "Yes," state the amount of damages to which π is entitled. Assume the jury says "Yes" and writes in $100,000. The judge will enter a judgment for $100,000 against ***X*** alone.[3]

---

[2] If this claim had been decided in a proportionate share regime, in addition to determining negligence and damages as above, the jury *would also have to apportion fault or responsibility*. In proportionate share cases, each ∂ is only liable to a π for their fair share of the fault. There would thus be two more lines on the verdict form: (4) Please state the percentage of fault of ***X*** and (5) Please state the percentage of fault of ***Y***. If they said ***X*** 40% and ***Y*** 60%, then the judge will enter a judgment ordering ***X*** to pay $40,000 and ***Y*** $60,000. Neither defendant would be responsible for paying the money owed by the other.

[3] If this claim had been decided in a proportionate share regime, the jury would, in addition to determining negligence and damages as above, still have to *apportion fault*. This can be difficult in a case such as ours where one of the key defendants, ***Y***, is not even named in the case. There are two general approaches to this problem:

(1) Some jurisdictions permit the named defendant to designate "non-parties at fault" at the beginning of the case. Thus, ***X*** would have been permitted to "add" ***Y*** to the case, not as a defendant per se but as a "non-party" whose actions would be considered and whose fault/responsibility would be determined. ***Y*** would thus be judged in absentia so to speak. As before, there would be two more lines on the verdict form asking the jury to state the percentages of fault of ***X*** <u>and</u> ***Y***. If the jury said ***X*** 40% and ***Y*** 60%, in a case involving a total of $100,000, then the judge would enter a judgment ordering ***X*** to pay $40,000. Obviously, no judgment could be entered against ***Y*** given that ***Y*** was not a defendant in the lawsuit.

Now let's look at the contribution claim. ***X*** wants to sue ***Y*** to recover some of the $100,000 that ***X*** paid out. This remains a separate cause of action for which ***X*** must again plead and prove: (1) that ***Y*** is liable in tort to the original π and (2) that ***X*** paid a judgment to π that was more than his proportionate share of the $100,000 liability. Unlike before, demonstrating the first element will be more difficult. This is because we do not have a prior judgment against ***Y***. Ordinarily, then, ***X*** could not use offensive collateral estoppel (i.e., issue preclusion) against ***Y*** in the contribution action, since ***Y*** was not a party to the original judgment.[4] The liability issues will thus have to be tried all over again, with ***X*** carrying the burden of proving that ***Y*** was also liable for negligence. Fault/responsibility will also have to be apportioned.

TGA

---

(2) In jurisdictions that do not utilize designations of non-parties at fault, ***X*** will be judged severally liable for π's damages without any consideration of ***Y***'s responsibility. This means ***X*** would be liable for the entirety of π's $100,000 injury once again. Recognizing that this is unfair, these jurisdictions also allow ***X*** to sue ***Y*** for contribution despite the fact that contribution claims ordinarily only arise following cases of joint and several liability (rather than proportionate share liability).

[4] That having been said, courts sometimes hold that it is fair to bind a person who was not officially a defendant in a prior action if that person, under the circumstances of the prior litigation, sufficiently participated such that he had a genuine opportunity to make a case against personal liability. I was working on a toxic tort case in California many years ago in which we wanted to make such an argument, but the circumstances under which it would have been possible were extremely narrow (as I am sure you can imagine). In any event, the limits of collateral estoppel (i.e., issue preclusion) is a topic for your Civil Procedure class, so don't worry about it.