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JOINT LIABILITY & SEVERAL LIABILITY

SHOW ME THE PRINCIPLE  
BUT HOLD THE METAPHYSICS

DAVID CHEIFETZ

BENNETT BEST BURN LLP  
TORONTO CANADA

dcheifetz@bbburn.com  
416-362-3400

**JOINT LIABILITY & SEVERAL LIABILITY:  
SHOW ME THE PRINCIPLE,  
BUT HOLD THE METAPHYSICS\*<sup>1</sup>**

**Introduction**

I will summarize this lecture in a few words. It is about joint liability and several liability.<sup>2</sup> Joint liability is a very simple concept. It means two or more wrongdoers are liable for the same injury.<sup>3</sup> Joint liability occurs in two ways. (1) The conduct or deemed conduct of each of the wrongdoers is a legal cause of the injured person's damages. (2) A person is vicariously liable for damages resulting from the actionable conduct of some other wrongdoer. The two categories may overlap. The person who is vicariously liable might also have acted wrongly in a way that is also a cause of the damages. Several liability is a bit more complex. It means proportional liability. Where it exists, it means that in situations involving two or more wrongdoers who have caused the same injury, the limit of liability of each wrongdoer is some percentage of that injury which represents that wrongdoer's share (however share is defined) of the injury.<sup>4</sup> The rest of this lecture is just detail.<sup>5</sup>

Liability by itself is meaningless. There has to be liability for something. What is that something? It is the something that has brought at least some of you here, today. Damages. Compensation. Money. Money for your clients. Money for you. Ultimately that's the detail that underlies this lecture. It is the detail that underlies this conference.

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\* David Cheifetz; Bennett Best Burn LLP; Toronto Canada. **This paper was first presented in April 2006 at the Canadian Bar Association conference mentioned on the title page. Citations to cases will have been updated where required. Some text has been added. It will usually be in bold.**

<sup>1</sup> This is just in case there any judges in the audience. Many judges prefer not listen to whatever it is that the judge thinks is "metaphysics"; even more so if the judge think it is "academic" metaphysics as opposed to merely lawyer's metaphysics. A litigant is on the way to victory if the judge believes the opposing theory of law is "scholastic" or "metaphysical". See, for example, *CCR Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814 at p. 823, 69 D.L.R. (4th) 112; *Snell v. Farrell*, [1990] 2 S.C.R. 311 at p. 328, 72 D.L.R. (4th) 289; *School Division of Assiniboine South No. 3 v. Hoffer*, [1971] 4 W.W.R. 746, 21 D.L.R. (3d) 608 at para. 19, leave to appeal to S.C.C. refused 40 D.L.R. (3d) 480n; and, *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd. (The Wagon Mound) (No 1)*, [1961] A.C. 388 at 419 (H.L.).

<sup>2</sup> It isn't true that I've been writing about aspects of this subject for more than 30 years. It just feels that way to me and, I suspect, to too many others. The truth is that I wrote about it for about 6 years (1975-80); ignored it for more than 20 years (1981-2001); and I'd hazard that there are judges in this province who'd prefer that I had kept ignoring it for the past 5 (2002-06).

<sup>3</sup> This does not mean they each have to be liable for all of the injury – just that they are liable for the same portion of the injury. A limit on the total amount recoverable does not necessarily affect what goes on below the limit.

<sup>4</sup> Proportional liability is not the same as a mere limit on liability. There could be, for example, statutory limits on liability that are greater than a particular wrongdoer's share of those limits.

<sup>5</sup> I have contributed a few pages to the body of scholarship on joint liability, several liability, and their consequences. See, for example, *Apportionment of Fault in Tort* (Canada Law Book, 1981), "Allocating Financial Responsibility Among Solvent Concurrent Wrongdoers" (2004), 28 Adv. Q. 137 and its postscripts in volumes 28 and 29 of the *Advocates' Quarterly*. The seminal analyses of the subject are G. Williams, *Joint Obligations* (London, Butterworths, 1949) and G. Williams, *Joint Torts and Contributory Negligence* (London, Stevens & Sons Ltd., 1951).

There is one sure reason why joint liability should matter to most of you here. I'm assuming most of you are in private practice, so I'm also assuming you're here because you think you'll hear something financially useful.<sup>6</sup> I hope you will. On the other hand, if you're here for education, then I suggest you go next door to the lecture that's running concurrently with mine. I admit that I'd be there, too, if I could have found a way to be in both places simultaneously. Unfortunately, Einstein stated that that isn't possible and that's one of his postulates that Quantum Theory has yet to disprove.

Joint liability tends to increase the chance your client will get paid. That should increase the chance you'll get paid, too; perhaps what you believe you're worth. The need to be aware of the difference between joint liability and several liability is more important than it used to be, even outside of British Columbia (and maybe Nova Scotia). Once upon a time, potential several liability situations were rare; most commonly encountered in actions governed by workers' compensation legislation or as the result of settlements. There are now more instances of several liability as a result of statute. I discuss this later in the lecture.

There are some historical, technical, meanings for the terms joint liability, joint and several liability, and several liability. I will explain them and I will tell you to remember, but then ignore, the technical meanings because they won't usually matter to your daily practices.

Some of you act primarily for plaintiffs; others primarily for defendants; some swing from both sides. Regardless, it's important to remember that, more often than not, the difference between joint and several liability does not (or should not) matter to plaintiffs' counsel. It matters only (1) where injury has been caused (in an actionable legal sense) by more than one wrongdoer, or the compensable damages that result from that injury might be collected from more than one person even if there is only one wrongdoer who committed the act(s) which are a legal cause of the injury, *or* (2) where the value of the compensable claims exceeds the assets of any one of the target defendants.

Either the target defendant(s) – and by this I mean the persons the injured person is legally able to succeed against – each have enough money to pay what the injured person's case is actually worth, or collectively they do, or they don't.<sup>7</sup> If they do, collectively or individually, plaintiffs' counsel doesn't care how the defendants divide the amount to be paid amongst themselves, whether their liability to the plaintiff is joint or several. If any one of the target defendants has enough money, the plaintiff and plaintiff's counsel will collect from the easiest defendant to collect from. If individually the target defendants don't have enough money but collectively they do, plaintiff and counsel still don't care: they'll collect from each until the total they've recovered is the full amount of the settlement or the judgment, subject to the prohibition against double satisfaction if there are separate judgments against the concurrent wrongdoers. The prohibition against

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<sup>6</sup> Since CLE isn't mandatory in Ontario, except for those with specialist certificates who want to maintain them.

<sup>7</sup> In other words, "show me the money"; the catchphrase paraphrased for part of the title of this lecture.

double satisfaction is well-known and straight-forward. The awards in the multiple judgments against different persons for the same injury are not cumulative in the sense that the injured person is able to collect twice for the same injury. So, if P has a judgment against X for \$10,000 and Y for \$20,000 for the same injury, the most P can recover is \$20,000 in total.<sup>8</sup> For example, if P collects \$10,000 from X, the most P can collect from Y is \$10,000. If P collects \$7,500 for X, then P can collect up to \$12,500 from Y.

If any of you are involved in a situation where what we now call several liability limits the amount you can collect from any of the settling wrongdoers or the defendants who have been held liable,<sup>9</sup> you'll collect the balance from one or more of the others. That's all plaintiffs' counsel generally needs to know about joint liability and several liability.

Defendants' counsel need to know a bit more about the concepts because they have to worry about having their clients paying more than their clients' share, and their clients' rights to recover that excess. I discuss those issues, briefly, under the heading "Reimbursement Rights".<sup>10</sup>

I will try to keep this lecture as jargon-free as possible. There are three reasons. First, it will make this lecture easier to follow. That's also why there are pictures. I might not refer them, but there will be pictures. Second, decreasing the amount of jargon should increase the likelihood no one in the audience will fall asleep and start snoring. Pictures might help there, too. Third, there might be a judge or two in the audience.<sup>11</sup>

### **Joint Liability & Several Liability – Importance**

In this part of this paper, I deal primarily with issues between the injured person and the alleged wrongdoers, although aspects of the discussion are relevant to reimbursement rights among the wrongdoers.

Joint liability and several liability are concepts that are relevant only in cases where there may be more than one person liable for the same injury. The only reason an injured person cares about joint liability is a concern that the value of the compensable injury exceeds the financial assets of any one of the wrongdoers who may be successfully sued. That is, if you are certain that you have a "can't lose" case against one wrongdoer who has a deep enough pocket, you don't care whether there are others, except to the extent that having more than one paying wrongdoer might increase the likelihood of a

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<sup>8</sup> See *Treaty Group Inc. v. Drake International Inc.*, 2005 CanLII 45406 at para. 6-9 (Ont. S.C.J.) affd 2007 ONCA 450 (C.A.) and *Olsen v. Poirier* (1978), 21 O.R. (2d) 642 (H.C.J.), affirmed (1980) 28 O.R. (2d) 744 (C.A.); *Cuttell v. Bentz*, [1985] 6 W.W.R. 193, 65 B.C.L.R. 273 (B.C.C.A.); *Reaney v. National Trust Co.*, [1964] 1 O.R. 461, 42 D.L.R. (2d) 703 (H.C.J.)

<sup>9</sup> Where there are limits due to some pre or post incident agreement or, for cases subject to British Columbia or Nova Scotia law, where the injured person is all at fault.

<sup>10</sup> Reimbursement rights because that's what contribution or indemnity are about – obtaining reimbursement of some or all of an amount paid to another.

<sup>11</sup> This is not necessarily connected to the second reason.

speedier settlement: precisely because there are more paying pockets, so each pocket pays less.

The concepts are relevant to those from whom compensation is or may be sought by the injured person: wrongdoers and those vicariously liable for injury caused by wrongdoers. The target defendants or wrongdoers will not want to have to bear the entire compensable cost of the injury. To the extent permitted by law, they will want to force others who the injured person might have successfully claimed from, but did not, to also pay for the injury. They will, sometimes, be able to obtain reimbursement. Sometimes, though, they will not.

Where there is joint liability, the target wrongdoers or defendants cannot force the injured person to sue any person that the injured person has not sued, absent some sort of enforceable agreement that provides otherwise. In *Parkland (County) No. 31 v. Stetar*, Dickson J. stated:

It is fundamental, however, to tort law that a plaintiff can proceed against any one of a number of joint or several tort-feasors; there is no duty upon him to sue all those whom he believes contributed to his hurt. He may elect to recover the full amount of his damage from a tort-feasor only partly to blame ... however, even in those cases in which for some reason the right to contribution does not exist, the victim retains the right of full recovery from the tort-feasor whom he has sued.<sup>12</sup>

So, it is a consequence of what we now call joint liability to the injured person that it is not a defence that someone else may also be, or might also have been, liable for the injury. Similarly, absent an enforceable agreement that provides otherwise, it is not a defence that the injury was also caused by somebody who the injured person cannot sue or chooses not to sue; whether the immunity is because of statute,<sup>13</sup> or agreement between injured person and “immune” wrongdoer;<sup>14</sup> or because the wrongdoer is bankrupt; or even if it is simply a case where, for whatever reason the injured person has chosen not to sue some of the persons who might be sued and held liable. Whether the incident(s) occurred inside or outside of Canada and even if a Canadian court has jurisdiction over at least one of the potential defendants, there may be others not subject to the jurisdiction of a Canadian court unless they attorn. And they may not.

Issues involving joint liability and several liability may exist no matter the legal basis of the relationship said to create the liability. Joint liability and several liability may exist in all of the areas of law that may support claims for compensation for injury: tort, contract, fiduciary and trust, and, to the extent it is still a separate area, equity. In all

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<sup>12</sup> [1975] 2 S.C.R. 884 at p. 899.

<sup>13</sup> *Parkland (County) No. 31 v. Stetar*, [1975] 2 S.C.R. 884 (W2 who was at fault and would have been held also liable was sued by P after expiration of limitation period, P’s action against W2 dismissed); *Horvath v. Thring*, 2005 BCCA 127 (CanLII) (W2 at fault but immune by statute; no provisions similar to those in workers’ compensation statutes precluding recovery of W2’s “share” from W1).

<sup>14</sup> *PDC 3 Limited Partnership v. Bregman + Hamann Architects* (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (QL) (C.A.), reversing 49 O.R. (3d) 722 (S.C.J.). (W2 liability limited under pre-incident contract with injured person).

categories, the starting common law premise is what we now call joint liability. Persons subject to the same common law (I include equity when I use “common law” without qualification) obligation in respect of the same injury have always been jointly liable to the injured person unless there was a valid agreement to the contrary. Absent a valid agreement to the contrary, people party to the same contractual obligation or subject to the same trust or fiduciary obligation are jointly liable where the breach results in the same injury.<sup>15</sup> In most respects, that is also true, and has always been true, in tort. Persons subject to liability in tort for the same injury have always had the type of liability we now describe as joint liability. Those of you who have a background in maritime law know why this is. Much of English tort law has its roots in historical maritime law. There, liability for injury caused by more than one person was always “joint and several”, as we know use this phrase, absent a valid agreement to the contrary.

### Some History, Some Terminology

First, I generally use “wrong” in this paper rather than “tort”. The reason for this is that joint liability and several liability concepts extend beyond tort. I use “wrong” to mean conduct that law will redress by means of an award of monetary damages.<sup>16</sup> However, for the most part when I use “wrong” I am using it to mean conduct that is at least actionable in tort, even if it might also be actionable as some other category of civil wrong.

Second, the term “concurrent wrongdoer” refers to the situation where there is more than person whose actionable conduct has caused the same injury.<sup>17</sup> There is a limited temporal aspect to law’s use of the term “concurrent” in the context of causation. It does not mean “contemporaneous” or “simultaneous”. It means only that the conduct occurred *before* the occurrence of the injury sought to be attributed to the conduct.<sup>18</sup> How can there be causative conduct for some injury which conduct occurs after the injury has already occurred? There can’t, of course, in the understanding of reality and time upon which Canadian jurisprudence is based. This understanding is, ultimately, the principled foundation for the manner in which we assess damages in claims arising out of successive, overlapping, injury to the same person or object. The point is that what has already been caused, and still exists, cannot be caused again.

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<sup>15</sup> And, equally liable as between themselves unless there is something about the circumstances that entitles one of the co-obligees to receive a higher amount of contribution, or to pay a lower amount of contribution. See, for example, G. H.L. Fridman, *Restitution* (2d) (Toronto, Carswell, 1992) at pp. 230-243 and G. Williams, *Joint Obligations*.

<sup>16</sup> I am paraphrasing the classic textbook definition of tort: “A tort is a civil wrong, other than a breach of contract, which the law will redress by an award of damages.” See, Klar, *Tort Law* (3d) at p. 1.

<sup>17</sup> Williams, *Joint Torts*, pp. 1, 16; Reeves v. Arsenault (1995), 136 Nfld. & P.E.I.R. 91 at para. 15, 423 A.P.R. 91, 423 A.P.R. 91 (P.E.I. S.C.).

<sup>18</sup> See, Williams, *Joint Torts* at p. 2, cited and approved in *Economy Foods & Hardware Ltd. v. Klassen*, 2001 MBCA 16 at para. 16, (2001) 196 D.L.R. (4th) 413, [2001] M.J. No. 47 (QL), 2001 CarswellMan 36 (C.A.) affirming [1999] 11 W.W.R. 433 (Man. Q.B.). The point made by Williams, and approved in *Economy Foods*, was merely that the multiple tortious causative events may be successive, they do not have to be contemporaneous, so long as the events precede the injury. Williams and *Economy Foods* were not addressing the principled basis for global assessment.

The meaning of “joint liability” now differs from what the term once meant. When we discuss how much an injured person may recover from concurrent wrongdoers, “joint liability” now means the same as “joint and several liability”. Where there is still any difference at all in the meaning of the terms, it is only in certain consequences of settling with or suing fewer than all of the concurrent wrongdoers.<sup>19</sup> What joint liability now describes is the injured person’s legal entitlement to collect the person’s recoverable damages from any of the concurrent wrongdoers, until the total collected is the full amount of the judgment. The injured person does not have to sue all of the wrongdoers to recover all of the recoverable damages. The injured person needs to sue only the wrongdoer(s) who have sufficient assets. That the injured person might need to sue more than one of the wrongdoers to collect the full amount, because none of the wrongdoers individually have sufficient insurance or other assets does not alter the consequences of joint liability. This “extent of liability” meaning is not the (original) common law meaning. The common law terms for what we now call joint liability are liability *in solidum* or solidary liability.<sup>20</sup>

“Joint liability” and “joint and several liability” now have meanings different from their original meanings. In most common law jurisdictions, the terms now refer only to the extent of a wrongdoer’s liability. The original meanings were procedural. The terms described two categories of concurrent wrongdoer who had caused the same injury: those wrongdoers who could be sued in one action and those who could not but had to be sued separately. Wrongdoers who could be sued in one action were wrongdoers who had joint liability; or, because they could be sued in one action, they had joint liability. It is a chicken and egg dilemma which no longer matters except to those writing about legal history. Wrongdoers who had to be sued in separate actions were wrongdoers who had several liability. However, neither of joint liability nor several liability defined the extent of the concurrent wrongdoers’ liability. Each of the concurrent wrongdoers, whether they were suable jointly (that is, in one action) or had to be sued in separate actions (severally), was liable for all of the injury that the wrongdoer had caused, even if another of the wrongdoers was also liable for that injury. This is what was called liability *in solidum* and is what we now call both “joint liability” and “joint and several liability”. There were some other procedural differences relating to the consequences of judgments against or settlements with fewer than all or the tortfeasors.<sup>21</sup>

In [historical] common law, the *only* differences between joint liability, joint and several liability, and several liability were: (1) defendants [persons] who were subject to

<sup>19</sup> There is no difference in Ontario and some of the other provinces. It may be that some have not abolished all of the settlement or judgment related consequences.

<sup>20</sup> See, for example, Ontario Law Reform Commission, *Report on Contribution between Wrongdoers and Contributory Negligence* (1988), c. 3, at p. 31-33. The key portions are quoted in my Postscript 2: The Retreat Continues (2005), 29 Adv. Q. 276 at 291-92, which is probably easier to find than the OLRC Report. OLRC at p. 31: “Since each concurrent wrong doer is liable for the entire injury, each is said to be liable in solidum.” “An alternative name for concurrent wrongdoers is the civilian term, ‘solidary’ wrongdoers, indicating that each is liable in full for the damage collectively done”: Williams, *Joint Torts*, at p. 1.

<sup>21</sup> Don’t just take my word for it: see the OLRC Report at p. 32. Most of the procedural consequences have been abolished in most of the Canadian common law jurisdictions. However, since that is not true across the board, a careful lawyer will check.

joint liability or joint and several liability could be sued in one action; (2) defendants who were subject to several liability, only, had to be sued in separate actions; (3) where there was only joint liability, the mere fact of a judgment against or a settlement with any of the concurrent wrongdoers (regardless of collection) released all of the rest, even those who were not sued or were not part of the settlement; (4) where there was also several liability (with or without joint liability) then the mere fact of judgment against or settlement with some did not release the others. Legislation has eliminated those draconian consequences of joint liability in most but not all of the provinces and territories. The Ontario example is the *Courts of Justice Act*,<sup>22</sup> s. 139(1): “Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding.”<sup>23</sup>

In any event, now in common law Canada, except for certain procedural consequences after judgment or settlement in some jurisdictions, joint liability means the same as joint and several liability and both terms mean the same as liability *in solidum*. Both “joint liability” and “joint and several liability” mean that any wrongdoer who may be held liable to a plaintiff for the same injury may be sued for the whole amount of the plaintiff’s injury, regardless of whether other wrongdoers may also be liable.

Alternate liability is neither joint liability nor several liability. Alternate liability means that one of X or Y, but not both, may be held liable for the injury. Where the liability is alternate, the injured person has to elect against whom the injured person wants judgment before taking judgment.<sup>24</sup> I am not going to say anything more about alternate liability.

So, in the phrase “joint and several liability,” “and several” adds nothing. And, just to add to the fun, in the phrase “joint and several liability” “several liability” does *not* mean what “several liability” means when used by itself. “Several liability”, when used by itself, means “proportionate liability”. From this point on, I will use only “joint liability” to mean both “joint liability” and “joint and several liability”. Those with older ears who wish to hear “joint and several liability” may, in Captain Jean-Luc Picard’s words “make it so”.

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<sup>22</sup> R.S.O. 1990, c. C.43.

<sup>23</sup> See *Treaty Group Inc. v. Drake International Inc.*, 2005 CanLII 45406 at para. 3-11 (Ont. S.C.J) for a recent case reviewing Ontario (and common) law applicable to the right of the injured person to sue and succeed against concurrent wrongdoers separately. *Treaty* emphasizes that what the injured person cannot have is double recovery (satisfaction.). *Treaty* is also interesting for the attempt by the defendant in the later action to stand both common law and the *Courts of Justice Act* on their heads by arguing that the effect of s. 139 was to permit the successive actions *only* where the concurrent wrongdoers were *joint wrongdoers*. That argument was correctly rejected.

<sup>24</sup> Williston and Rolls, *The Law of Civil Procedure* (Toronto, Butterworths, 1970) at pp. 248-49. Citations to case law, as needed, are easily found in the texts dealing with civil procedure for the appropriate province or territory. The citations are usually collected at the discussion of the repeal or amendment of the common law rules dealing with the affect of settlement or judgment on the liability of joint wrongdoers. For Ontario, see any text dealing with s. 139 of the *Courts of Justice Act*.

































































