ISSUE FOCUS

Abolishing or Modifying Joint and Several Liability Would Not Likely Increase Florida Government Budget and Taxes

Tort reform is the most hotly debated and highly publicized issue facing the 1986 Florida Legislature. It is likely that the way in which tort (personal injury) liability cases are handled in Florida's courts will be changed in some way as our lawmakers look for a remedy to the liability insurance "crisis." Liability insurance rates for business and government are going through the roof as both become increasingly likely to be sued for big bucks. Florida now ranks third in the nation (behind more populous California and New York) in million dollar plus jury awards.

One issue at the center of the tort reform debate is the legal doctrine of "joint and several liability." This doctrine holds that all parties judged at fault in a tort case are fully responsible for any monetary damage judgement. Even a defendant who is determined only 1% liable could end up paying the entire award if the other parties 99% at fault are unable to pay.

Originally applied to wrongdoers acting in concert, joint and several liability is now commonly invoked against defendants acting independently and who may be only tangentially involved. Many contend that the existence of joint and several liability in Florida and most other states has been a primary contributing factor to skyrocketing jury awards because it encourages plaintiffs and their attorneys to go after "deep pocket" defendants (those typically carrying large insurance policies such as large corporations and municipalities). Opponents argue for abolition or modification of the doctrine to retain the principle, but limit the amount a party who is only a small percentage liable would pay.

Those who favor the concept of joint and several liability claim that without it, people who are injured because of some negligence on the part of others may not be justly compensated by those responsible for their injury. A **secondary contention is that if a significant number of injured parties are unable to get just compensation from our court system, these individuals will fall back on state welfare and public assistance programs - causing social service budgets and, thus, taxes to rise.** (continued on page 2).

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A fundamental tenet of both common law and our federal Constitution is that people injured by the malicious or negligent acts of others have the right to sue to redress perceived wrongdoing in the courts. **It is questionable whether abolition or modification of joint and several liability would interfere with this right and nothing more than speculation to forecast increased taxes as a consequence.**

In order for the removal of joint and several liability to have a significant fiscal impact on state government, a substantially increased number of personal injury cases would have to meet a hierarchy of six independent conditions (see page 6). While no data exist on the number of cases which meet these conditions, it is statistically improbable that such an unlikely scenario would be carried out enough times for the cost of (limited) state benefits available to rise enough to necessitate a tax increase.

What is Joint and Several Liability and From Whence Did it Come?

The debate over joint and several liability may be recent, but the doctrine itself is certainly nothing new. The concept has evolved over the centuries through English common law and the American judicial system. The principle behind joint and several liability is that when a person is injured by the acts of several people, liability is indivisible. That is, all of the negligent acts of the parties involved directly contributed to and resulted in the plaintiff's injury - therefore all are co-equally responsible.

There was little concern over joint and several liability until a "new generation" of lawsuits cropped up in the 1960's and 1970's. As the legal doctrine of "contributory" negligence began to be replaced by the concept of "comparative" negligence, the potential impact of the application of joint and several liability became much greater. Under contributory negligence, injured parties who were partly responsible for their own injury had a much more difficult time gaining judgements against plaintiffs. However, compa-

rative negligence largely ignores the responsibility of the plaintiff, allowing proportions of fault to be assessed against numerous defendants.

The original application of joint and several liability (under contributory negligence) was primarily against defendants who acted in concert. Now, with comparative negligence, defendants who did not contribute directly to the injury can be sued more easily.

For example, a drunk driver runs off the road and slams into a light pole, injuring the passenger in his car. If the passenger sues, he can attempt to have some portion of the damages assessed against the city which installed the light pole. Even if the city is adjudicated to be only 1% at fault, it is responsible for the entire award if the other party has insufficient resources. Some degree of comparative negligence can be assigned, even though the city did not directly contribute to the accident.

With the ascendency of comparative negligence as a legal doctrine, plaintiffs and their attorneys have been able to greatly expand the potential applications of joint and several liability. They often look for a "deep pocket" defendant - one who may have had little to do with the actual injury - hoping a big insurance policy can assure that a big award can be paid.

Recently, 14 states have sought to put a halt to such practices by either abolishing or modifying the joint and several liability doctrine. Most reforms cap the percentage of damages that can be paid by one party. For example, some states limit the amount one party must pay to all damages except what the plaintiff is determined responsible for. Others cut off damages at two times the percent any one party is found at fault. Federal legislation limiting the application of joint and several liability is also being proposed.

THE LIABILITY CRISIS: Pricing Government and Business Out of the Insurance Market

Liability insurance costs are skyrocketing. Premiums paid in 1985 topped $9 billion nationwide - up 60% over 1983. At the same time, unexpected cancellations proliferate and insurance for those seeking new policies is becoming increasingly hard to get. Liability insurance - essential for both business and government - has for many become a crippling cost. Recently, the City of Hartford, Connecticut - the insurance capital of the world - saw its municipal liability coverage cut from $31 million to $4 million while premiums rose over 20%. One insurance brokerage firm's professional liability premium rose an unbelievable 860% in one year! These are but two illustrative examples of the liability "crisis" gripping the country.

Explanations of the origins of our insurance woes are numerous and vary widely, depending on who is doing the explaining. Certainly, one cause is more and bigger jury awards in liability cases. There is evidence that our society is becoming more and more litigious. This is particularly true in a fast growing, urbanizing state like Florida - where many residents are new or have not yet established "roots" and a more informed means of resolving lesser disputes.

Over the past decade, the number of product liability lawsuits has jumped 680% nationwide. The average award in such cases now tops $1 million, up from $350,000 just four years ago. Medical malpractice lawsuits also commonly result in million dollar plus judgements.

To help stem this tide, every state has either passed or is currently considering some type of liability reform legislation. Joint and several liability is but one of many issues being addressed. Caps on punitive ("pain and suffering") damage, limiting attorneys' contingency fees and sanctions against frivolous lawsuits are among the approaches to reform. Whatever route is taken, the problem begs a solution - or at least a partial remedy - to prevent much of Florida and the nation from being priced out of the insurance market.

Joint and Several Liability Still Applied in Most States — 14 Have Modified or Abolished it, 22 States Considering Action

States	Common Law	Modified	Abolished
Alabama	X		
Alaska*	X		
Arizona*	X		
Arkansas	X		
California*	X		
Colorado*	X		
Connecticut	X		
Delaware	X		
Florida*	X		
Georgia*	X		
Hawaii	X		
Idaho*	X		
Illinois*	X		
Indiana		X	
Iowa*		X	
Kansas			X
Kentucky	X		
Louisiana		X	
Maine	X		
Maryland	X		
Massachusetts	X		
Michigan*	X		
Minnesota		X	
Mississippi	X		
Missouri	X		
Montana	X		
Nebraska*	X		
Nevada		X	
New Hampshire			X
New Jersey*	X		
New Mexico			X
New York*	X		
North Carolina*	X		
North Dakota*	X		
Ohio			X
Oklahoma		X	
Oregon*		X	
Pennsylvania		X	
Rhode Island*	X		
South Carolina*	X		
South Dakota*	X		
Tennessee	X		
Texas*		X	
Utah	X		
Vermont			X
Virginia	X		
Washington*	X		
West Virginia	X		
Wisconsin	X		
Wyoming*	X		

*Considering legislation to modify or abolish.

Source: National Conference of State Legislatures and Florida **TaxWatch,** Inc., May 1986.

Facts Negate Claims That Abolishing Joint and Several Liability Will Hike the Cost of Government and Raise Taxes

PROPOSITION: Some proponents of joint and several liability claim that taxes could rise in Florida if the doctrine is repealed because a number of injured persons who would otherwise be compensated through the courts will not receive adequate jury awards. They assert that this will result in "injured parties" requiring state social services for support, thus hiking social service agency budgets and taxes.

For this to happen, a large number of tort cases in Florida would have to meet **each and every one** of the following conditions:

- **More than one defendant liable;**
- **Gross difference in liability among defendants;**
- **Party found most at fault is unable to pay own share of damages;**
- **Defendant least at fault is "deep pocket";**
- **Plaintiff is injured badly enough that he is unable to work and/or care for himself and family; and**
- **Plaintiff's income or resources are within the state's welfare and social service eligibility guidelines, which are some of the most stringent in the nation.**

If any one of these conditions is not met in a case, the repeal of joint and several liability would have no effect on whether the injured party would need to fall back on government assistance.

State Welfare and Social Service Benefits That an Injured Person and His/Her Family Might Receive

Benefit/Service*	Eligibility	Approximate Number of Clients In Florida	Total Budget FY 1986	Average Annual Cost per Client
Aging/ Adult Services	Disabled; unable to care for self; usually on Social Security	220,000	$104 million	$473
Economic Services, Including AFDC	Assets under $1,000 for family of four	275,000	$457 million	$1,662
Medicaid	Assets under $2,550 for couple	515,000	$1.2 billion	$2,330
Vocational Rehabilitation	Disabled; needs vocational retraining	55,000	$51 million	$927

*Individuals eligible for these programs will also likely receive (entirely federally funded) Supplemental Security Income and Food Stamps.

Source: Florida Department of Health and Rehabilitative Services and Florida **TaxWatch,** Inc., May 1986.

Statistics Show Scant Probability of Fiscal Impact

In order to raise the combined budgets of the programs described here by 1% in FY 1987, over 3,300 liability cases meeting all of the conditions on page six would have to be adjudicated this year. And the injured party would have to get each benefit and service.

Approximately 25,000 negligence cases are disposed of in Florida annually. Having all six of the conditions set forth occur in 3,300 (13%) of these is highly unlikely. How unlikely? In any given case, assuming each condition has a 50/50 chance of occurring (actually, for most conditions there are more possibilities) there is only a 1.5% probability that all six will occur. While the 1.5% probability of occurrence would be the same for all cases - the chances of this 1.5% probability occurring 3,300 times are very slim.

With the right to sue to recover damages comes some risk of assuming unrecoverable damages — however small. Neither legal doctrine nor legislation can remove that risk. We do not live in a risk free society.

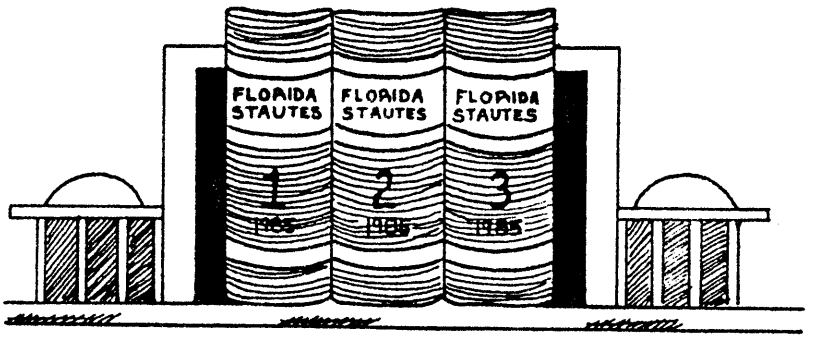
Case Histories

A Long Arm Reaches Into "Deep Pockets"

No one keeps statistics on the number of Florida cases in which the doctrine of joint and several liability applies. However, it appears relatively small when compared to the total tort caseload of over 25,000 per year. It is not the sheer number of joint and several liability cases that strikes fear in the hearts of chief executive officers, city and county managers, school district administrators and insurance company executives, but the knowledge that they - as "deep pockets" - can potentially be drawn into a big buck lawsuit as a co-defendant at any time, and with seemingly little justification, to be liable for the entire award.

As one attorney put it, the system of joint and several liability is like a roulette wheel - the "damages arrow" can stop anywhere - and not necessarily to the benefit of the plaintiff. It is that uncertainty which constitutes the crux of the issue. According to those seeking to abolish or modify the doctrine, the unknown degree of risk contributes to the high insurance rates and difficulty in getting coverage for business and government. Some examples follow of how the doctrine of joint and several liability has been stretched to its limits in Florida to gain settlements against parties whose contribution to the injury of the plaintiff was questionable.

• A car crashed into the side of a Seaboard Coastline train in Leon County. Passengers injured in the accident sued the driver, the Florida Department of Transportation and the railroad. The jury found the driver 75% at fault, DOT 20% and the railroad 5%. The verdict resulted in assignment of monetary damages in reverse proportion to fault. The railroad paid $700,000, DOT $100,000 (the state's liability cap under Florida's modified sovereign immunity law) and the driver only



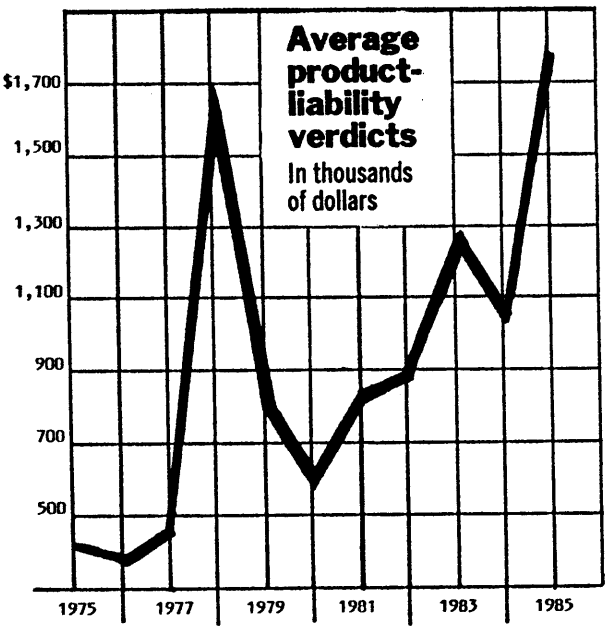
$16,000 (the extent of his insurance). Despite being only 2% liable - and even that is questionable because the train followed proper procedures - the railroad was forced to make up the remainder of the award over and above the capped damages that could be assigned to DOT and the driver.

• In perhaps the strangest case of all, a woman was injured at Disney World when her husband (then fiance) bumped her car on the Disney "Grand Prix" track. She promptly sued Disney for $1.5 million. The jury awarded only $75,000 in damages. It concluded that the fiance was 85% at fault, the injured wife 14%, and Disney 1% (reason unspecified). Because spouses cannot sue each other in Florida, Disney was held liable for the husband's 85% share as well as its own 1%. The case is still under appeal.

• In the City of Daytona Beach, an intoxicated motorist hit a parked front-end loader vehicle which, because of its size, protruded a short distance into a traffic lane. The area was well lit and a Daytona Beach policeman observed the parked vehicle and decided it constituted no hazard to traffic - no more in fact than a parked car or a construction site marker. The City was advised by counsel that it should expect to be found 2% liable, with the remainder split between the owner of the front-end loader (18%) and the driver (80%). Notwithstanding that the drunk driver was mostly at fault, the City faced a potential claim for $200,000 from the driver's family. The City later settled out of court with the family for a lesser amount.

• In the City of Tamarac in Broward County a driver, who according to court testimony had been drinking, ran off the road and hit a boulder placed in a highway median for beautification. The boulder had been put there by the developers of the subdivision the highway ran through. The driver, paralyzed in the accident, sued not only the developer but Broward County and the City of Tamarac. Even though the county or city had nothing to do with either causing the man to wreck or putting the boulder in the median, both ended up paying large damage awards.

Liability Awards on the Rise
U.S.



Source: Jury Verdict Research, Inc. and Florida **Taxwatch**, Inc., May 1986.

Conclusion

Could Absence or Modification of Joint and Several Liability Result in More Taxes?

HIGHLY UNLIKELY

The doctrine of joint and several liability has several important and far-reaching implications, most of which are vigorously being debated not only in the Florida Legislature, but throughout the nation. Does joint and several liability cause or contribute to the current insurance crisis facing government and business? Is joint and several liability fundamentally fair and just to the defendant and plaintiff? Has the application of joint and several liability been stretched beyond its traditional role? Supporting evidence exists on both sides of these questions. It is up to our elected lawmakers to evaluate the arguments and data and decide what the policy of the State of Florida regarding tort litigation should be.

Evaluating these larger issues is beyond the scope of this report, though they are introduced because they are central to a sound understanding of the joint and several liability doctrine. One important question that has arisen, however, is answered here. **Will welfare and social service agency budgets, and thus taxes, be forced upward by people (who would otherwise be compensated through the court system) falling back on state benefits and services in the absence of "deep pockets" from joint and several? At best, it is highly improbable.**

The six independent conditions which must all be present in a tort case for joint and several liability to have any potential fiscal consequence have a combined likelihood of occurrence of only 1.5%. If that probability happens, 375 plaintiffs who are injured in negligence cases could require social services to compensate for court-awarded damages they would otherwise receive. This would constitute a 1/10 of 1 per cent impact on the budget of the services these individuals would likely receive - a statistically insignificant impact.

Also, if joint and several liability is merely modified to cap the amount any one party must pay, injured plaintiffs would be virtually ensured some damage award if they prevail in their case. Under such circumstances, is is hard to imagine individuals who would need welfare benefits or social services because their award was smaller than it would have otherwise been.

Of course, we should all be concerned with even one person who cannot receive adequate compensation when injured by the negligence of others. However, our laws guarantee only the right to sue, not an assurance that damages will be awarded. A person who is suing one party for damages, with no access to a "deep pocket", has no guarantee that the defendant will be able to pay. Hopefully, no injured parties will go uncompensated in Florida. Of those who do, it is highly unlikely that the cause would be the absence of joint and several liability and even more improbable that such individuals would then become wards of the state.

What you can do about your taxes...

Budget crunches. Revenue shortfalls. Tax increases. Shifting of costly programs from the federal level to state and local governments. Population growth and increased costs for providing public services. Since many compounding factors are prompting officials of Florida's state and local governments to raise taxes for increased revenue, taxes are a direct concern to you and your business.

The next few years will be crucial for Florida. Sound, prudent fiscal and budgetary policies which will foster a sustained and diversified economic base need to be developed and vigilantly pursued.

Florida is at a crossroads.

You can sit on the sidelines—a spectator watching others decide the future of how your tax dollars are spent and what your Florida becomes. Or you can join Florida **TaxWatch**, Inc. and have an informed basis to get involved in determining the outcome.

TaxWatch is dedicated to:

- prompting cost saving improvements in Florida government
- providing timely information and meaningful citizen input in the complex budgetary process
- maintaining and enhancing credibility with responsible public officials, the news media and Florida citizens through careful, objective and well documented research publications.

You can share in **TaxWatch's** constructive work and in the resultant savings and improved government through your investment in a tax deductible membership. Remember, collecting and spending tax dollars is your business.

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