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Joint and several liability needs our protection – again

Public entities seek to avoid liability

By Jacqueline Serna

Here we go again! Despite enjoying a host of immunities and protections, public entities are blaming the tort system for their financial woes. In the 1980s, the result was Proposition 51, which eliminated joint and several liability for non-economic damages, and a huge tort compromise called "The Napkin Deal."

Just like in the 1980s, many factors are contributing to budgetary difficulties across the state. Inflation, the high cost of housing, insurance and just about everything else has impacted most consumers. However, big insurance companies and tort reform enthusiasts cry out against "deep pocket" jury awards and lambast trial lawyer organizations across the state as the cause for every problem. Now, certain public entities are following suit.

Rather than blaming victims of negligence and other bad conduct, public entities need to look inward to the cause of increased payouts on tort claims. What could they do differently? Could they finally fix the infamous intersection that results in dozens of reported deadly accidents? Could they fire the known harasser they employ in their department with a notorious track record for repeated offenses? Could their insurers settle reasonable demands within policy limits?

The answer is yes. So, why don't they? Instead, some government bodies are increasingly seeking to shift this liability, particularly when it comes to who pays and who gets punished. We have heard these cries before.

Explaining a sometimes difficult concept

In the months leading up to the June 1986 California primary election, we saw similar messaging pushing to reform the then-existing joint and several liability system. In cases where government entities try to avoid responsibility, the financial fallout often lands in the lap of taxpayers.

If public entities can avoid liability through legal loopholes, there's less incentive for them to improve policies or maintain infrastructure. The result? We may be left dealing with even worse potholes, crumbling bridges, or poorly planned development projects. Instead of tackling these important issues responsibly, they are looking to attack decades-old consumer protections and eliminate joint and several liability in public entity cases.

Joint and several liability is among the hardest concepts to understand in tort law, but one that is vital to the proper operation of the tort system. Put simply, without joint and several liability, entities who hurt or kill a California resident will not pay for the harm they cause. If paying for the harm you cause is a central tenant of personal and corporate responsibility, then it demands preserving our existing law.

When two (or more) entities are at fault for causing an injury, joint and several liability ensures both entities are liable for the harm they caused. The theory behind this long-standing policy is that the victim should not have to pay the cost of the injury – the entities who are at fault for causing the injury should pay the full cost. This is the "joint" in joint and several.

To be clear, fault is not apportioned. Just like you cannot be 10% pregnant, no one is 10% "at fault" either. Under our tort law, every entity must be found to be the 100% "but for" cause of an injury before they are found "at fault." If an entity is not at fault for the injury, then they don't owe the plaintiff anything. If a single entity is found to be at fault, there is no apportionment – they pay 100% of the damages.

When two or more entities are found to be 100% at fault in causing harm or death, the jury is then allowed to apportion liability between the at-fault parties. Joint and several liability becomes critical when one (or more) party cannot pay for the damages that are apportioned to them. For example, say Company A has $3 and Company B has $1. Both are found to be 100% at fault for causing $4 in harm. The jury has no idea who has the money to pay for the harm, so they apportion those four dollars evenly between the two companies.

Joint and several liability is like a co-signed loan. If not for both parties, the injury (loan) would not exist. Both parties are responsible for the injury and the costs associated. "But for" any one defendant, the injury (loan) would not have occurred.

Eliminating joint and several means that any defendant could walk away from paying for part of the injury. They cause the injury but won't have to pay for it. That is the opposite of personal responsibility – instead, it incentivizes dangerous and reckless actions, because the perpetrator knows they can point the finger and avoid accountability.

Just like we did in the 1980s, CAOC is leading the fight to defend our current joint and several liability system. But we need your help.

As governments tighten their grip on control, it's important for citizens to stay informed, advocate for transparency, and push for systems that prioritize both accountability and fairness. Because when the balance between public and private responsibility gets out of whack, it's often the public who pays the price.


Serna

So, the next time you see a pothole or experience a public service failure, remember: the stakes are high – and the battle for responsibility is ongoing. Keep your eyes open, because it's more than just about fixing that pothole; it's about protecting the civil justice system.

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