One Percent Liability: How Much of it is Fiction?

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Note: Updated and redacted version of "1% Liability: Fact or Fiction of Apportionment in Tort Law," [2005] *A.Q.* 104

What does 1% liability look like? It is a regular problem for litigation lawyers who must advise clients in cases involving remote liability but substantial damages. In multiparty tort litigation, counsel acting for institutional defendants or defendants with liability insurance worry over a principle of tort law all law students learn in their first year: All it takes is a finding of 1% liability for the defendant to be found 100% liable to the plaintiff. Perhaps, to a "deep pocket" defendant, there is a cruel injustice to the rule. To a plaintiff, it may hold out a 99% chance of success in a civil action. But are these views well-founded?

It is not easy to attribute fault to anyone who could be only "1% at fault," especially if the consequence leads to pay potentially up to 100% of the damages award. Modern legal adjudication shrinks from turning the courtroom into a theatre of cruelty. The number "1" is simply too close to zero and too far from 100 that it appears fairer to dismiss a claim for damages than to grant it. But one is not equal to zero, and any logic which makes it so is arbitrary. In *Rushton v. Turner Bros. Asbestos Co. Ltd.*,[1] a judgment of the Manchester Assizes Court, Mr. Justice Ashworth equated *five* and zero in the following words:

> "I am not prepared to give the plaintiff something, for example, as little as 5 per cent for damages which he could recover. I do not decide it on the ground that 5 per cent is the same as nought because others might have a different view. I take the view that in this case, looked at fairly, the plaintiff is the sole author of his own misfortune."[2]

What is not clear from this judgment is the extent to which it relied on a decision of the English Court of Appeal, *Johnson v. Tennant Bros. Ltd.*,[3] cited immediately prior to the above passage. According to text writers, that decision stands for the proposition that small percentages of apportionment ought not to be made, and contribution of less than 10% is to be disregarded.[4]

The 10% rule attributed to *Johnson* should now be considered incorrect.[5] The apportionment exercise occurs only once it is found that there are two or more parties at fault for the damage.[6] Apportionment is not part of the initial determination of fault and to impose a quantitative threshold would be a misreading of the statute. It is also hard to agree with the court in *Rushton* that 5% is *de minimis* in cases involving larger claims such as catastrophic personal injuries. In a case worth $5 million, for example, there is nothing *de minimis* about an award of $250,000 plus costs, especially compared to dismissal with costs in favour of the defendant.

At the other end of the spectrum, some courts have attempted to superimpose a minimum apportionment based on moral disapproval of the tortfeasor's conduct. Mr. Justice Hughes, in *Conrad v. Crawford*,[7] stated:

> "As a practical matter it is difficult to see how in any case of contributory negligence in a situation like this a higher apportionment than 50% against the plaintiff could possibly be made in the face of a finding of gross negligence on the part of the defendant."

Perhaps unfairly, this statement has been cited and followed for the proposition that a finding of gross negligence requires that a person be held at least 50% at fault.[8] Had legislatures intended to insert this gloss into the

apportionment statutes such as the *Negligence Act*,[9] they would have done so. Mr. Justice Hughes' judgment certainly expressed a visceral and common-sense appreciation of the facts that were before him, but no more than that.

Apportionment legislation reformed the common law rule that there could be no contribution among tortfeasors and abolished contributory negligence as a full defence to a plaintiff's claim. As Mr. Justice Major wrote in *Athey v. Leonati et al.*,[10] concerning apportionment between defendants:

> "Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The apportionment legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury."

In tort law, negligence is determined by a breach of a duty of care. The degree of opprobrium which the tortfeasor's conduct attracts, while a factor in punitive damage awards, is irrelevant to the principle of compensation.

The "minimum 50% liability for gross negligence" rule not only defies principles of reasonable statutory interpretation but also crumbles under the lightest degree of logical scrutiny: What if more than two persons are found grossly negligent? In *Athey*, the Supreme Court of Canada presented the issue of apportionment in terms of causation and contribution to the loss or injury, not in terms of the degree of carelessness. It follows that a grossly negligent party may be found less responsible for the plaintiff's injuries than a simply negligent one. For example, a "joyrider" or heavily impaired driver may be found guilty of gross negligence, but an accident reconstruction might show that his automobile figured less in the *cause* of an plaintiff's injury than that of another motorist at the scene, say, who was guilty only of an unauthorized left turn. In the House of Lords judgment in *Reeves v. Comrs. of Police of the Metropolis*,[11] Lord Hoffman wrote, at para. 20:

> "[W]hat section 1 requires the court to apportion is not merely degrees of carelessness but 'responsibility' and that an assessment of responsibility must take into account the policy of the rule, such as the *Factories Acts*, by which liability is imposed. A person may be responsible although he has not been careless at all, as in the case of breach of an absolute statutory duty. And he may have been careless without being responsible, as in the case of 'acts of inattention' by workmen."

Lord Hoffman shines a light on the need to uphold harmony in the law of negligence between the common-law determination of fault and the statutory exercise of apportionment, for without this harmony it is easy to foresee injustices in the civil process. Apportionment is a finding of fact, not law.[12] The statute does not fetter the trier of fact. In theory, therefore, there is no rule that a party cannot be held 1% at fault. But how about 0.5%?

In Canada, an apportionment of 1% either by a judge or a jury based on contested facts is either rare or unreported. A finding of 5%, however, can be made more readily.[13] If one surveys Canadian court decisions, the reports in which the 1% apportionment is mentioned fall into two categories. In the first, the percentage is mentioned as part of the court's restatement of the law that where two defendants' apportionments are found to be 99% and 1% respectively, they both are liable 100% to the plaintiff. However, no such actual apportionment is made in the judgment.[14] In the second, the parties agreed in advance that one group of defendants is 99% at fault and the other 1%. This pre-trial agreement on the facts amounts to a legal fiction, likely to allow a finding of liability to the plaintiff without resulting in a meaningful cross-claim between co-defendants.[15] None of these decisions in the Canadian jurisprudence are of help in illustrating what type of facts are required for a finding of fault where a party is nevertheless apportioned only a 1% contribution among guilty defendants.

In the United States, a review of appellate cases reveals that apportionment findings of 1% can be made on the evidence, although the case law is certainly not abundant.[16] In those cases, the courts tend to use the language of

proximate cause to express the principle of apportionment. Proximity is not viewed in terms of closeness to events, the "chain of causation" or any notion of "last clear chance." Rather, apportionment is based on responsibility for having created the peril. In cases where parties are found 1% at fault, the minimally guilty parties are the final or incidental agents in *almost* inevitable accidents caused by the other tortfeasors' more dominant negligence.

Minimal apportionment of liability, however, is not a denial of a real fault, which is also a precondition to apportionment in American tort law. This conclusion is seen in judgments reviewing jury verdicts in which 1% apportionments were made. In *Burton v. R. J. Reynolds Tobacco Co. et al.*,[17] the facts offered a mathematically elegant illustration of the nexus between apportionment and causation that also provokes one to think of more complex permutations. (It may be fitting that such a case comes from tobacco litigation, where, unlike cases involving car crashes or mechanical failures, causation has historically taken on Scopes Monkey Trial proportions.)

The plaintiff Burton alleged that he would never have taken up smoking had he been warned of the risks of addiction and peripheral vascular disease, and brought suit against R.J. Reynolds Tobacco Company, Inc., the manufacturer of "Camel" brand cigarettes, and American Tobacco Company, Inc., the manufacturer of the "Lucky Strike" brand. He obtained a jury verdict for damages against the two tobacco manufacturers. The jury then concluded that R.J. Reynolds was 99% at fault and that American was 1% at fault. The evidence at trial was that the plaintiff smoked Lucky Strike cigarettes only when Camel cigarettes were not available. There were stretches of years when he did not smoke Lucky Strike cigarettes at all. In the logic of the verdict, the plaintiff must have smoked one Lucky Strike to every 99 Camel cigarettes.

What if the 1% of all cigarettes consumed were at the beginning of the story? (If the smoker switched preference from one brand to another before he became addicted.) Should there be a finding of liability to the plaintiff, in such a case? Was the switching of brands indicative of addiction before he switched? (Which could support an apportionment of 99% against American and 1% against R.J. Reynolds, if addition was the dominant cause.) If the plaintiff had smoked cigarettes manufactured by more than 100 manufacturers, could we not conceive of apportionment of less than 1% to any one? For counsel, each one of these questions, however playful they may appear, may be a legitimate and serious line of inquiry in an appropriate civil action.

The court in *Burton*, mindful not to supplant the role of the jury, could only determine whether the jury's apportionment could be supported in the evidence and in the law. In upholding the verdict, the court employed a "substantial factor" test in the U.S. Restatement of Torts, which test

> "denote[s] the fact that defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there lurks the idea of responsibility, rather than the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening [the injury] would not have occurred."[18]

1% is therefore not *de minimis* at all, but in fact "substantial." This approach is consistent with the principle that before even a 1% apportionment can be made, there must be liability, in the absolute and not in the relative sense. In mathematical terms, liability to the plaintiff is binary, not a percentage: the answer is one or it is zero: a defendant is liable to the plaintiff or he is not.

Whose Roll of the Dice is It, Anyway?

Apportionment in tort arises from a very practical problem in civil litigation: the existence of two or more parties at fault for the plaintiff's injury or loss, including the plaintiff. (In practice, a plaintiff's own 1% contributory negligence would usually have little effect on the outcome.) It is important to reflect upon this

commonly employed by lawyers and judges as a rhetorical device in the law, and to test its limits. The infrequency by which 1% apportionments are reported in the case law must tell us that the operative principles of apportionment must be rough-hewn. Rarely do facts arise that require one to express a party's contribution to the loss down to a single percentage point. We must always remember that there is no such thing as 1% liability to the plaintiff, unless the plaintiff is found 99% the author of his own misfortune. The percentage is not synonymous with the risk faced by a target or deep-pocket defendant against whom the case is particularly weak in terms of evidence. Such a defendant may face a more substantial apportionment, if negligence is proved at trial.

But litigants rightly want to predict the outcome where the party is so almost *not* guilty of contributing to the plaintiff's damages that he may be apportioned 1% in relation to other tortfeasors. Describing the continuum in terms of breach of duty and causation may be of help. Usually it is difficult to draw a line between a weak case of substantial contribution to damages and a strong case of minimal contribution. But in cases involving grave consequences to the parties at trial, this is the burden that counsel must bear.

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[1] [1960]1 W.L.R. 96.
[2] *Ibid,* at p. 102.
[3] Unreported, dated November 19, 1954 (Eng. C.A.).
[4] Levinson, *Contributory Negligence* (U.K., Emis Prof. Publishing, 2002), p. 18; Cheifetz, *Apportionment of Fault in Tort* (Toronto: Canada Law Book, 1981), p. 105, referring to an edition of *Salmond on Torts.*
[5] *Salmond* has more recently stated that there is no 10% rule, "although in practice minute percentages are rare": *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996), p. 492.
[6] *Pitts v. Hunt,* [1991] 1 Q.B. 24 (Eng. C.A.), [1990] E.W.J. No. 576 at para. 43.
[7] [1972] 1 O.R. 134 (H.C.J.), at 146.
[8] *Cheifetz, supra,* p. 105; *Priestley v. Gilbert; State Farm Mutual Automobile Insurance Co., Third Party,* [1972] 3 O.R. 501 (H.C.J.), at 505; *Tomlinson v. Harrison et al.,* [1972] 1 O.R. 670 (H.C.J.), at 679-80.
[9] R.S.O. 1990, Chap. N.1.
[10] (1996), 140 D.L.R. (4th) 235 (S.C.C.), at 240-41; despite more recent commentary from this court relating to causation, this statement relating to apportionment remains current. See: *Resurfice Corp. v. Hanke,* [2007] 1 S.C.R. 333, at paras. 21-22.
[11] [1999] 3 W.L.R. 363, [1999] H.L.J. No. 33; followed by the English Court of Appeal in *Toole v. Bolton Metropolitan Borough Council,* [2002] E.W.J. No. 1790, at para. 15.
[12] *Negligence Act,* R.S.O. 1990, Chap. N.1, s. 6; Fridman, *The Law of Torts in Canada, Vol. 1* (Toronto: Carswell, 1990), p. 383.
[13] *Sherritt v. Thorold Concrete Block Co. et al.,* [1954] O.W.N. 535 (C.A.).
[14] *Mason v. Canada,* [1973] F.C.J. No. 200 (T.D.), at para. 8; *Slaunwhite v. Little,* [1998] N.S.J. NO. 176 (S.C.), at para. 4; *Fink v. McMaster* (1987), 58 O.R. (2d) 401 (C.A.), at 403.
[15] *Brennan v. Singh,* [2000] B.C.J. No. 1026 (B.C.C.A.), at para. 31.
[16] *Clay Rural Water System Inc. v. One Call Systems, Inc.*, 30 Fed. Appx. 675 (8th Cir. 2002); *Purnell v. Norned Shipping B.V.*, 801 F.2d 152 (3d Cir. 1986); *Tokio Marine & Fire Ins. Co. v. M/V Flora*, [1998] U.S. Dist. Lexis 13254.
[17] 208 F. Supp. 2d 1187 (Dist. Kansas, 2002), affirmed on this issue, reversed in other respects, 2005 U.S. App. Lexis 2049 (10th Cir. 2005).
[18] *Ibid,* at p. 1213.