Joint and Several Liability Under Texas Tort Law

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This article points out some recent changes in the basic requirements to establish a defendant’s joint and several tort liability, and to show how jury questions may need to be restructured, depending on when the cause of action accrued and when the lawsuit was filed.

A 1995 change in Texas law prompted an unprecedented volume of new lawsuit filings before September 1, 1996, as reported by the Texas Lawyer.1 Newspaper accounts of the “mad dash” to the courthouse on August 30 and 31 may be an over-dramatization, but there is little question about the radical change in the rules affecting joint and several liability. This article discusses those changes and provides some examples and illustrations of the new thinking prompted by changes in the law.

I. Joint and Several Liability under the 1987 rules.

A major step in Texas tort reform occurred in 1987 when the Legislature adopted a new contribution scheme based upon comparative responsibility.2 The Civil Practice and Remedies Code (the “Code”) was amended at that time with respect to negligence actions, strict liability actions, products liability actions, and breach of warranty actions brought under Chapter 2 of the Business and Commerce Code. Claims based on intentional torts, claims for exemplary damages included in an action to which the Chapter otherwise applied, workers’ compensation claims, DTPA claims, and claims under Chapter 21 of the Insurance Code were not included.3

Under the 1987 revisions to the Code, any action based on negligence, or action for products liability grounded in negligence, allowed the claimant to recover only if his percentage of liability was less than or equal to 50%.4 Also, in an action where at least one defendant was liable on a basis of strict tort liability, products liability, or breach of warranty brought under Chapter 2 of the Business and Commerce Code, the claimant was allowed recovery only if his percentage of liability was less than 60%.

The general rule in Texas has long been that there is no joint and several liability. After the 1987 amendments, the statute showed that “a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant’s percentage of responsibility.”5 However, that general rule was subject to three very significant statutory exceptions: (1) the over 20% exception, (2) the over 10% exception, and (3) the hazardous substance/toxic tort exception. These exceptions applied as follow:

(1) The “over 20%” exception.
In a pure negligence case, a defendant was formerly jointly and severally liable if his percentage of responsibility was (1) greater than 20%; and (2) greater than the claimant’s percentage of responsibility.6

For example, under the 1987 scheme, if P sued D₁ and D₂ in a pure negligence case and the jury found P 30% responsible, D₁ 40% responsible and D₂ 30% responsible. P could recover because P was less than 51% responsible.7 However, P’s gross recovery was first reduced by 30% due to P’s relative culpability/responsibility, to establish a net recovery. D₁, at 40% was more than 20% responsible as well as more responsible than P. D₁ was therefore jointly and severally liable to P for all of P’s recoverable damages. Because D₂ was found to be over 20% responsible, but D₂ had less percentage responsibility than P, D₂ was not jointly and severally liable to P for all of P’s recoverable damages. This was because D₂ failed to meet the dual criteria of the “over 20%” exception applicable to a pure negligence case.

Under the 1987 scheme, there was a significant difference to the “over 20%” exception when the lawsuit involves something other than a pure negligence claim.

In a strict liability, breach of warranty, DTPA or in mixed cases, a defendant needed only be more than 20% responsible to be held jointly and severally liable to a plaintiff for the damages awarded by the finder of fact.8 The defendant’s percentage of responsibility did not need to be greater than the plaintiff’s percentage of responsibility. Therefore, there was only one criterion in non-negligence cases.

For example, if P sued D₁ and D₂ and the jury found both defendants liable under a breach of warranty theory with P 20% responsible, D₁ 30% responsible and D₂ 50% responsible, P was not barred from recovery because he was less than 60% responsible. P’s recovery was reduced by P’s 20% responsibility, but because both D₁ and D₂ were both greater than 20% responsible, both D₁ and D₂ were jointly and severally liable for all of P’s recoverable damages.

(2) The “over 10%” exception.

The over 10% exception applied to all types of cases (including cases covered under the “over 20%” exception. Under the 10% exception, a defendant was jointly and severally liable if (1) the defendant was greater than 10% responsible and (2) the plaintiff was 0% responsible.9 Therefore, if no percentage of liability is placed on the plaintiff, the “over 10%” exception automatically applied, regardless of the basis of liability, unless it was a “toxic tort” claim.

For example, if P sued D₁ and D₂ and the jury found both defendants liable under a pure negligence theory and the jury also found that P was 0% responsible, D₁ was 80% responsible and D₂ is 20% responsible, P was not barred from recovery, nor was P’s recovery reduced. Because D₁ was more than 20% responsible and was also more responsible than the
plaintiff. D₁ was jointly and severally liable to P as a result of the “over 20%” exception as well as the “over 10%” exception. D₂ was not jointly and severally liable under the “over 20%” exception because D₂’s percentage of responsibility was not greater than the 20% required by that exception. However, D₂ was jointly and severally liable to P under the “over 10%” exception because D₂ was more than 10% responsible and P was 0% responsible.

(3) Exceptions for hazardous substance/toxic tort.

A defendant was always jointly and severally liable if the jury’s finding of liability for personal injury, death or property damage was based on the deposit, discharge or release of any hazardous or harmful substances or was the result of a toxic tort.¹⁰ There was no minimum percentage of responsibility required for a defendant to be jointly and severally liable under the 1987 toxic tort exception. A finding of only 1% by any defendant triggered full joint and several liability in all cases.

Punitive damages under 1987 tort reform.

There was no joint and several liability as to exemplary damages under the 1987 scheme.¹¹

The 1995 Amendments to Chapter 33 of the Texas Civil Practice and Remedies Code and their effect on Joint and Several Liability.

The 1995 amendments are effective in all causes of action that accrue after August 31, 1995, and for which a lawsuit is filed after August 31, 1996.¹²

The new 1995 scheme applies to “any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought,” excepting certain intentional tort claims,-workers’ compensation claims and claims for exemplary damages included in an action to which the chapter otherwise applies.¹³

The 1995 amendments to the Civil Practice and Remedies Code still do not allow a claimant to recover damages if the claimant’s percentage of responsibility is greater than 50%.¹⁵ However, unlike the 1987 rules there is no distinction between negligence causes of action and all other causes.

Just as under the 1987 rules, the general rule under Chapter 33 of the Code is still that there is no joint and several liability.¹⁶ However, there are now only two important exceptions to the general rule:

(1) The “over 50%” exception.

The 1995 statute causes each liable defendant, in addition to his liability for his own percentage of responsibility, to be jointly and severally liable for all damages recoverable by a claimant if the percentage of responsibility assigned to the defendant is greater than 50%.¹⁷
There is obviously no longer a need to consider the percentage of responsibility attributed to the plaintiff so long as one defendant is more than 50% responsible. Of course, if the plaintiff’s percentage of responsibility is greater than 50%, no recovery is allowed.

(2) The hazardous substance/toxic tort exception.

A defendant, in addition to liability for the percentage of his/her/its comparative fault, is jointly and severally liable to plaintiff if (1) the percentage of responsibility attributed to the individual defendant is equal to or greater than 15% and (2) the claim is based on the deposit, discharge or release of any hazardous or harmful substances or is the result of a toxic tort. Consequently, under the 1995 amendments, there is now a 15% responsibility threshold before joint and several liability attaches to a tortfeasor in a hazardous substance/toxic tort case.

Punitive damages under the 1995 scheme.

The Texas Civil Practice and Remedies still provides that joint and several liability does not apply to exemplary damages. The Code now also provides that “in an action where there are two or more defendants, an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.”


Under the 1987 version of Chapter 33 of the Civil Practice and Remedies Code, the finder of fact determined the percentage of responsibility for: (1) each claimant; (2) each defendant; and (3) each settling person for purposes of determining percentages of responsibility to the plaintiff. The plaintiff controlled who was a claimant, a defendant or a settling person, and therefore controlled the names of persons submitted in the jury issue for determination of percentage of responsibility for plaintiff’s injury, if any.

A “settling person” was one who, at the time of submission of the case to the jury, paid or promised to pay value to a claimant in consideration of potential liability. The definition did not require that a settling defendant remain a party to the suit and, therefore, did not exclude settling defendants who were dismissed or non-suited. There are no reported cases under the old rules where a party was allowed to submit a jury issue for the percentage of responsibility to the plaintiff of a non-party, non-settling person.

Additionally, no party was a “claimant” other than the one seeking damages. Therefore, any contribution or indemnity claimants were excluded because the plaintiff/claimant controlled who was included in this category. This definition of “claimant” included derivative claimants such as a husband seeking damages for his wife’s injury or death or a parent seeking damages for a child’s injury or death.

A “defendant” was a party, however procedurally postured, from whom a claimant sought damages pursuant to section 33.001 of the Code. As previously stated, this provision
precluded any party from whom only contribution, indemnity, or other nonmonetary relief was sought from being a “defendant” within the meaning of section 33.003 of the Code.\textsuperscript{27} It was only when a plaintiff sued an entity or person that any question of that defendant’s responsibility was submitted to the jury for determining that entity or person’s percentage of responsibility to the plaintiff. Similarly, only when the plaintiff decided to settle with a defendant prior to jury submission was a defendant considered a settling person. Therefore, the plaintiff had absolute control over which parties and non-parties could be presented to the jury for a determination of their respective percentage of responsibility to the plaintiff.

Although a defendant may have had a contribution claim against someone who was never sued by the plaintiff, that extraneous person’s percentage of responsibility was never calculated when determining percentages of responsibility for the plaintiff’s injuries. Instead, the trier of fact determined as a separate issue the percentage of responsibility with respect to each “contribution defendant.”\textsuperscript{28} A contribution defendant was “any defendant, counter-defendant, or third party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission.”\textsuperscript{29}

For example, consider the situation where P sued D\textsubscript{1} and D\textsubscript{2} for negligence and D\textsubscript{1} was more culpable than D\textsubscript{2}, but D\textsubscript{1} only had minimal auto insurance coverage but D\textsubscript{2} had rather sizable insurance policy limits. If P settled with D\textsubscript{1} for his $20,000 in policy limits and dismissed D\textsubscript{1} from the suit, D\textsubscript{1} thus became a “settling person” and a question as to his percentage of responsibility would be submitted to the jury. If the jury then found P 0% responsible, D\textsubscript{1} 75% responsible, D\textsubscript{2} 25% responsible, with $100,000 in aggregate damages, D\textsubscript{1} would not pay any of the damages found by the jury because of D\textsubscript{1}’s status as a “settling person.” Judgment against D\textsubscript{2} for $25,000 as the 25 percent responsibility, would result in P’s total recovery of only $45,000 ($20,000 plus $25,000).

In contrast, if P sued only D\textsubscript{2} and D\textsubscript{2} then asserted its third-party claim against D\textsubscript{1} and P did not assert an independent claim against D\textsubscript{1}, D\textsubscript{1} remained only a contribution defendant. The jury was not asked to find D\textsubscript{1}’s percentage of responsibility to P. If the jury then assessed responsibility between P and D\textsubscript{2} at 20% and 80%, respectively, with damages of $100,000, D\textsubscript{2} would owe $80,000 to P as P’s total recovery. Therefore, by strategically non-suiting the Defendant with shallow pockets, the plaintiff increased his total recovery by $35,000. (Of course, D\textsubscript{2} could still pursue its contribution claim against D\textsubscript{1}.)

Under the 1995 changes, effective to all causes of action accruing after August 31, 1995 or those which accrue before that date but suit is not filed until after August 31, 1996, the law is revised to allow the defendant to maintain some degree of control over persons for whom the jury will determine percentage responsibility. The changes now allow defendants to
join “responsible third parties” in the lawsuit and to have the jury determine those parties’ percentage responsibility to a plaintiff, along with the percentage the responsibility of the claimant, each defendant and all settling persons. A responsible third party is any person to whom all of the following apply:

(i) the court in which the action is filed could exercise jurisdiction over the person;
(ii) the person could have been, but was not, sued by the claimant; and
(iii) the person is or may be liable to the claimant for all or a part of the damages claimed against the named defendant or defendants.

The Code has a new section which authorizes a defendant to join a responsible third party who was not sued by a claimant. Subsection (a) of Section 33.004 provides that a defendant has until limitations expire to join a responsible third party. The defendant must join the responsible party into the lawsuit in order to submit a question to the jury about that party’s percentage of responsibility. This provision requires a defendant to be aware of the plaintiff’s cutoff date for limitations in order to have relief. However subsection (d) provides that a third party claim by a defendant may be filed, regardless of a bar by statute of limitations, if the third party claim is filed on or before 30 days after the defendant’s answer is required to be filed, another trap for the unwary, or for those who are unable to identify third parties quickly. Subsection (e) provides for joinder, notwithstanding the statute of limitations, if the claimant wishes to join the responsible third party not later than 60 days after a third party claim is filed by a defendant under subsection (d).

Subsection (b) of Code Section 33.004 provides that the section shall not affect the normal third party practice, including laws of contribution and indemnity and cross claims and counterclaims as recognized under Texas law. What does change significantly is the plaintiff’s ability to control the persons for whom the jury can place responsibility in a comparative responsibility lawsuit. Where it was previously possible for only claimants, defendants and settling persons to be submitted to the jury for purposes of determining percentage of responsibility to the plaintiff, new possibilities are opened up under the 1995 scheme.

Those who prefer solutions to problems in graphic form, the authors provide the following diagram to compare the new and old joint and several liability rules.


7 Tex. Civ. Prac. & Rem. Code § 33.001(a) and (c).


10 Tex. Civ. Prac. & Rem. Code § 33.013(c)(2) and (3).


13 One should not overlook the joint and several liability potential of a defendant under Code Section 33.002, whereby damages are proximately caused by a laundry list of specific Penal Code offenses (12 items), plus conduct punishable as a felony of the third degree or higher. In these instances, however, there must be a finding of specific intent or conspiracy.

14 Tex. Civ. Prac. & Rem. Code § 33.002(a), (b) and (c) (Vernon Supp. 1996).


18 Tex. Civ. Prac. & Rem. Code § 33.013(c)(1) and (2).


Section 33.011 specifically excludes the following from “responsible third party”: 1) the claimant’s employer if the employer was a worker’s compensation subscriber, and 2) a debtor in bankruptcy proceedings or a party against whom the claimant claims has been discharged in bankruptcy except to the extent that third party funding might be available to pay such claims (insurance proceeds).